

LIABILITY FOR BREAKING OFF CONTRACTUAL NEGOTIATIONS?*

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In the negotiation phase of a contract opposing parties make representations to each other in the process of attempting to reach agreement. Assuming there has been wasted expenditure on one side in anticipation of the contract, can a party recover its losses should negotiations fail? There is a dearth of South African case law in this area, but foreign jurisprudence demonstrates the prevalence of this problem. Can benefits conferred on the other party during negotiations be recouped? Alternatively, does an action lie for reliance losses? What would be the basis of such claims? And what measure of compensation would a court award? This article will interrogate issues surrounding the recoverability of potential enrichment and the possibility of a delictual action for breaking off negotiations if sufficient progress has been made in those negotiations and there has been reasonable reliance on a representation by the recalcitrant party.

I INTRODUCTION

The issue at hand is how to compensate a party ('A') for pre-contractual reliance when negotiations are broken off by the opposing party ('B'). Where no contract ultimately results between A and B due to B's conduct, can A claim damages? This problem is a much discussed one in foreign jurisdictions.¹ Consider the following hypothetical example: A is negotiating a contract with B. Negotiations are expressly subject to contract, but B puts pressure on A to begin preparations for performance in advance. A is anxious

* This paper benefited from discussions with Professor Dale Hutchison, Professor Robin Evans-Jones, Professor Helen Scott and Mr Graham Bradfield.

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¹ A short synopsis of some of the leading texts could be as follows: Generally — John Cartwright & Martijn Hesselink *Pre-Contractual Liability in European Private Law* (2008); USA — E Allan Farnsworth 'Precontractual liability and preliminary agreements: Fair dealing and failed negotiations' (1987) 87 *Columbia LR* 217, Friedrich Kessler & Edith Fine 'Culpa in contrahendo, bargaining in good faith, and freedom of contract: A comparative study' (1963–1964) 77 *Harvard LR* 401 (this is a comparative study focusing on German law and hence providing an element of civilian context); England — Ewan McKendrick 'Work done in anticipation of a contract which does not materialise' in W R Cornish, Richard Nolan, J O'Sullivan & G Virgo *Restitution — Past Present and Future* (1998), Michael Furmston & G J Tolhurst *Contract Formation* (2010), Paula Giliker *Precontractual Liability in English and French Law* (2002), Andrew Burrows *The Law of Restitution* 3 ed (2011) 371–80; Scotland — William W McBryde *The Law of Contract in Scotland* (2001), Hector L MacQueen & Joe Thomson *Contract Law in Scotland* (2000); Australia — J W Carter & M P Furmston 'Good faith and fairness in the negotiation of contracts (parts 1 & 2)' (1994) 8 *Journal of Contract Law* 1 and (1995) 8 *Journal of Contract Law* 93; Germany & the Netherlands — Basil Markesinis, Hannes Unberath & Angus Johnston *The German Law of Contract* (2006) 92, John M Zieff 'Culpa in contrahendo — A prescription for the ills of the South African law of contract' (1989) 52 *THRHR* 348, Werner Lorenz 'Germany' & Jan M van Dunné 'Netherlands' in Ewoud H Hondius (ed) *Precontractual Liability — Reports to the XIIIth Congress, International Academy of Comparative Law* (1990) 159 and 223.

to get the contract in writing before spending money, but B reassures A that the contract will definitely go ahead. A spends money in preparation for the contract. Subsequently negotiations are broken off by B.

Is there any way in which A can recover his losses from B, given that the expenditure was premised on B's reassurances? What if B gave those reassurances with the deliberate intention of keeping A in the picture just to induce a better offer from C? What if B was merely negligent in making those representations, since he ought reasonably to have foreseen that he might not go through with the contract, yet reassured A anyway? In short, can A recover his reliance expenses from B in delict and to do this would it be necessary to demonstrate fraud on B's part, or would negligence suffice?

As a separate question one may inquire what would be the position if A's pre-contractual performance had conferred a benefit on B? What if some structure had been erected on B's land? Alternatively, what if A's professional services in preparing to perform the contract have benefited B? Could the value of such a benefit be reclaimed with an enrichment action?

In South African law there seems to be little debate about this type of question. If you have a contract, then there is liability for both parties, but until then no liability exists. The problem does not appear to be discussed in enrichment textbooks, perhaps because there is no relevant case law in this country, and in delict there is only one case where damages for pre-contractual losses consequent upon a failed contract have been sought. In this case, *Murray v McLean NO*,² the plaintiff was unsuccessful due to a finding that no liability existed in this context.³ This begs the question whether South African courts have drawn the line as to liability correctly, particularly given the fact that overseas courts have viewed the matter differently?⁴

For present purposes, assume such liability were to be permitted. In which branch of the law of obligations would such a suit lie? If one analyses this problem from the frame of reference of the law of contract, some sort of binding contractual promise would be required to give rise to an action. This takes the argument into the realm of agreements to agree and the extent to which these are binding, a question considered in a separate article by the present author.⁵ This aspect of the problem will not be reconsidered in this article; thus the analysis will focus on possible actions outside of the law of contract.⁶ In analysing the various interests at stake, it seems appropriate to

² 1970 (1) SA 133 (R).

³ See the discussion in part III below.

⁴ The position in several foreign jurisdictions will be set out below, see by way of introduction the readings listed in note 1.

⁵ Andrew Hutchison 'Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?' (2011) 128 *SALJ* 273.

⁶ It is submitted also that the Consumer Protection Act 68 of 2008 is not relevant to the topic as defined. Section 5(1)(b) of that Act does state that it applies to the 'promotion of any goods or services' and 'promote' is defined as extending to representations that 'could reasonably be inferred as expressing a willingness to supply any goods or services for consideration'; however the tenor of the Act as a whole seems to

invoke the seminal paper of Fuller & Purdue.⁷ Fuller & Purdue identify different interests which an award of damages might seek to compensate: the restitution, reliance and expectation interests.⁸ Since the contractual aspect of this problem has been specifically excluded, this paper does not consider damages measured according to a party's expectation interest, which would seek to place a party in the position he would have been in had the contract been fulfilled. It should be noted at the outset, however, that a contractual remedy is available in certain jurisdictions, even in the pre-contractual sphere. The position in some of these jurisdictions will be considered below. When it comes to demonstrable benefits conferred on the opposing party, these would fall under the restitution interest and are best claimed with an enrichment action. This possibility will be discussed in part II. Losses, as a broader category which may or may not include benefits conferred on the other party, are compensated as part of the reliance interest. The measure of this interest is potentially far larger than the restitution interest and its recovery is more debatable. The reliance interest will be considered in part III.

II CLAIMING THE RESTITUTION INTEREST

The narrowest claim for compensation consequent on failed negotiations between party A and party B must rest on any possible enrichment of B at A's expense.⁹ In this section the availability of an enrichment claim to compensate A for benefits conferred upon B will be considered.

According to the South African law of unjustified enrichment, a plaintiff must identify which of the specific enrichment actions best suits his claim.¹⁰ Having identified the appropriate cause of action, of which there is a closed list originating in the traditional Roman remedies for unjustified enrichment, a plaintiff must satisfy the requirements of that particular remedy.¹¹ If no action can be found to fit the circumstances of the plaintiff's case, either one of the traditional causes of action must be expanded or there can be no claim.¹² A third possibility is to bring the claim under a so-called 'general' enrichment action, but while the availability of this mechanism has been

refer to consumer contracts and marketing to consumers, rather than pre-contractual negotiations aimed at concluding a contract.

⁷ L L Fuller & William R Purdue 'The reliance interest in contract damages (part 1)' (1936) 46 *Yale LJ* 52. For discussion of the same principles in South Africa see: Gerhard Lubbe 'The assessment of loss upon cancellation for breach of contract' (1984) 101 *SALJ* 616; Dale Hutchison 'Back to basics: Reliance damages for breach of contract revisited' (2004) 121 *SALJ* 51.

⁸ Fuller & Purdue op cit note 7 at 53-7.

⁹ Ibid at 56.

¹⁰ J G Lotz & F D J Brand 'Enrichment' in W A Joubert (ed) *LAWSA Vol 9 2 ed* (2005) para 208.

¹¹ Ibid.

¹² Ibid.

suggested in the case law to be a future possibility, no such action has yet been recognised.¹³

The problem of reclaiming benefits conferred under failed contractual negotiations needs to be analysed according to the nature of the potential benefit involved. If the benefit consists of money or property handed over in ownership by A to B, then this should be able to be recovered using one of the traditional *condictiones*. A more problematic issue is how to compensate for services conferred on party B, absent a contractual basis for those services. Accordingly in what follows the position with regard to services will be analysed separately from that relating to property.

With regard to the transfer of property, one must ask on what basis the transfer was made. If the transfer occurred prior to the conclusion of any sort of binding contract, which is the position assumed in this paper, then clearly any analysis based on the failure of a contract is inappropriate. This is not a situation of breach of contract, supervening impossibility of performance, or a voidable contract; it is merely a transfer in the expectation that a contract will eventuate.¹⁴ Hence, while the enrichment concerned seems to lie at the border between enrichment and contract, it does not fit the typical instances in which the *condictiones* based on failed contracts would lie. Rather, the property was transferred in the hope of creating a future obligation. The appropriate remedy must thus lie outside of reversing contractual transfers and in the realm of reversing transfers consequent upon a failed (possibly common) assumption that a contract would eventuate. In other words, the most appropriate remedy would appear to be the *condictio causa data causa non secuta*.¹⁵

Immediately at this point an obstacle is struck, however. Lotz & Brand identify the *condictio causa data causa non secuta* as lying to recover expenditure consequent upon a failed *modus* or performance made under a contract which has been rendered void due to the failure of a common assumption which was the basis of a contract to materialise.¹⁶ Property given in anticipation of a contract is not a recognised ground for recovery (although the similarity of this situation is apparent). Although there is no specific case law recognising this possibility, there are not many cases in point and the general description of this *condictio* seems to suit most eminently the purpose at hand. Visser describes the *condictio causa data causa non secuta* as

¹³ *Nortje v Pool* NO 1966 (3) SA 96 (A), *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 960 (SCA), Lotz & Brand op cit note 10 para 208, Daniel Visser *Unjustified Enrichment* (2008) 46–54.

¹⁴ The three instances defined above traditionally demarcate the border between enrichment and contract. See Visser op cit note 13 at 90–113; Sally Hutton ‘Restitution after breach of contract: Rethinking the conventional jurisprudence’ 1997 *Acta Juridica* 201; Saul Miller ‘Unjustified enrichment and failed contracts’ in Reinhard Zimmermann, Daniel Visser & Kenneth Reid *Mixed Legal Systems in Comparative Perspective* (2004) 437.

¹⁵ See Lotz & Brand op cit note 10 paras 217–18; Visser op cit note 13 in ch 8.

¹⁶ Lotz & Brand op cit note 10 para 217.

payment or transfer 'not in order to fulfil an obligation but to induce a specific outcome'.¹⁷ A common example would be performance under a void contract in order to obtain a counter-performance which does not materialise because the contract is unenforceable.¹⁸ The analogy between this common example and the situation where the contract is not void, but fails to materialise, is strong.

One might argue that perhaps a line has been drawn here on the grounds of the proper allocation of risks in the pre-contractual bargaining sphere. This type of risk analysis would perhaps be better suited to services conferred in anticipation of a contract rather than property conferred, however. Services might be conferred freely on a party in the hope that a contract might result. Here the risk may be said to lie with the service provider, since the goal is to obtain a contract and there is (as of yet) no binding agreement between the parties. Thus a line needs to be taken here on the proper allocation of the risk that no contract may result. The service provider should perhaps not be compensated under the law of unjustified enrichment if there is no clear evidence of actual benefit to the defendant. A conferral of property falls more clearly on the other side of the risk line, since such a disposition is less likely to be considered to be gratuitous. In such a case, the property should be reclaimable and the most appropriate *condictio* appears to be the *condictio causa data causa non secuta*.¹⁹ While Visser's definition of this *condictio* cited above is broad enough to cover both services and property given in anticipation of a contract, policy considerations may dictate against compensating the service provider, unless he can prove actual enrichment of the defendant.

What is the appropriate response then to a claim for enrichment by services? Here the traditional South African action is the action for work done and services rendered.²⁰ If one analyses work done by party A for the benefit of party B as the work of an independent contractor, then A should be entitled to reasonable compensation, either in enrichment or in contract, provided he can show benefit to B.²¹ The problem in the present context is

¹⁷ Visser op cit note 13 at 455.

¹⁸ Ibid at 455, 459–74.

¹⁹ Evans-Jones notes that the *condictio causa data causa non secuta* is the appropriate vehicle for recovery in this context in Scots law. Since the Scots law of enrichment is based on the traditional Roman law in the same way that South Africa is, this provides persuasive support for the above argument. See Robin Evans-Jones *Unjustified Enrichment* vol I (2003) 199. On the *condictio causa data causa non secuta* in Scots law see further: Johann Andreas Dieckmann & Robin Evans-Jones 'The dark side of *Connelly v. Simpson*' 1995 *Juridical Review* 90; Robin Evans-Jones 'The claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)' 1997 *Acta Juridica* 139.

²⁰ Visser op cit note 13 at 552–4; Lotz & Brand op cit note 10 paras 243–44; Wouter de Vos *Verrykingsaanspreklikeid in die Suid-Afrikaanse Reg* 3 ed (1987) 274–94.

²¹ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A). For discussion of this case see the sources quoted in note 20.

that the services are rendered in the absence of a contract, hence excluding an analysis based on compensation for an independent contractor. To argue, furthermore, that such services constituted *negotiorum gestio* would be stretching the definitions of this concept.²² Thus an action for services rendered in the pre-contractual sphere presents problems to the South African litigant.²³ In English law, however, compensation for services under the law of restitution has the stamp of approval of the House of Lords.²⁴

Consider the leading English case in this area, *Cobbe v Yeoman's Row Management Ltd*.²⁵ Here the House of Lords was faced with the latest in what has been a number of cases involving a plaintiff property developer and a defendant property owner.²⁶ Mr Cobbe, an experienced property developer, contracted with the defendant company which owned a number of flats. The terms of the preliminary agreement, which was never formalised into a binding contract, were that Cobbe would spend money on obtaining planning permission for a new housing development on the site of an existing block of flats. If this was successfully obtained, the defendant company would sell the property to Cobbe for £12 million, on the understanding that should the profits on the subsequent housing development reach £24 million, it would be entitled to 50 per cent of the gross profits over this amount. Cobbe expended considerable amounts of time and energy on this project and was ultimately successful in obtaining the necessary permission. Of course this involved a risk by Cobbe, since the money expended in obtaining planning permission would have been wasted if permission had been denied and in addition he had no binding contract with the defendant. He proceeded, however, on the encouragements of the sole director of the defendant company, Mrs Lisle-Mainwaring. Once planning permission had been obtained, the defendant refused to sell the property to Cobbe for less than £20 million, with the defendant to receive 40 per cent of the amount by which profits exceeded £40 million. Cobbe insisted on sticking to the initial agreement, however, and the defendant company withdrew from negotiations.

²² For example, *Lotz & Brand* op cit note 10 paras 222–24.

²³ *De Vos* op cit note 20 deals comprehensively with the position of an independent contractor whose services have enriched the defendant. He states (at 283–85) based on *BK Tooling* that an action for compensation will lie in contract if the performance is accepted and in enrichment if the performance is rejected. *De Vos* is clear though (at 287–94) that the defendant must not make use of the rejected performance if he wishes to escape enrichment liability. Enrichment for services outside of the context of *locatio conductio operis* or *locatio conductio operarum* is not dealt with by this writer, however.

²⁴ *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.

²⁵ *Supra* note 24.

²⁶ See further: *Way v Latilla* [1937] 3 All ER 759, *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932, *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 and *Countrywide Communications Ltd v ICL Pathway* [2000] CLC 324. In the similar case of *Regalian Properties Ltd v London Docklands Development Corporation* [1995] 1 WLR 212, restitution was denied.

The House of Lords denied a claim based on proprietary estoppel, which sought to bind the defendant company to the sale.²⁷ Lord Scott held that this was impossible since even if the defendant was estopped from denying the terms of the initial agreement, Cobbe still would not have a contract on which to base his claim.²⁸ The acquisition of planning rights for the property had enriched the defendant, however, and this was unjustifiably at the expense of Cobbe's services.²⁹ He was awarded a fee appropriate for the services of an experienced property developer,³⁰ which the House of Lords described as a quantum meruit.³¹

There is thus authority for an enrichment action to recover the value of services rendered in this context in the English law jurisdiction.³² This position also pertains in Australia. In *Sabemo (Pty) Ltd v North Sydney Municipal Council*³³ the earlier English case of *William Lacey*³⁴ was followed, lending further common law support to this type of action. (In *William Lacey*, the leading case prior to *Cobbe*, the court awarded a quantum meruit to a firm of builders who had expended time and money in anticipation of a building contract for which their tender had been accepted.³⁵ The ultimate contract had not yet been formalised, however, when the defendants broke off negotiations.) In *Sabemo* Sheppard J held:

'[W]here two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, . . . which he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party.'³⁶

At this point it seems apt to add the very real caution to litigious plaintiffs that even if it is established that this type of enrichment is unjustified, it is not always easy to prove the actual enrichment of the defendant. An illustrative case is *Regalian Properties Ltd v London Docklands Development Corporation*.³⁷ Here the plaintiff company submitted a tender to develop a tract of land owned by the defendant. The understanding was that the construction work would be done as and when vacant possession of the land was obtained. The

²⁷ *Cobbe* supra note 24 para 28.

²⁸ *Ibid.*

²⁹ *Ibid* paras 40–1.

³⁰ *Ibid* paras 41–2.

³¹ *Ibid* para 42.

³² See cases listed in note 26.

³³ [1977] 2 NSWLR 880. It should be noted that this case was not followed in *Regalian Properties* supra note 26 at 227.

³⁴ *Supra* note 26.

³⁵ *Ibid* at 940.

³⁶ *Supra* note 33 at 902–3.

³⁷ *Supra* note 26.

plaintiff proceeded on the basis that it would receive the mandate to develop the land, although negotiations were always expressly subject to the conclusion of an ultimate contract. In the process the plaintiff managed to rack up expenses totalling almost £3 million, consisting of payments to professional firms, particularly architects. Obtaining vacant possession proved difficult, however, and as the months dragged on there was a downward shift in the property market. Approximately two years after the initial tender had been accepted the defendant tried to increase the contract price and the plaintiff decided to abandon the project. The land in question had still not been developed seven years later at the time of trial. The plaintiff claimed for its wasted expenditure.

Rattee J in the Chancery Division noted at the outset that there was no potential contractual action available to Regalian, due to the 'subject to' clause.³⁸ When it came to enrichment, however, Rattee J held that the case before him was distinguishable from the *William Lacey* case, since the subject matter of the claim was outside the ambit of the intended contract.³⁹ The amounts claimed for represented preparatory work for which the defendant would not have had to pay had a contract ultimately been concluded.⁴⁰ Indeed there was no evidence to demonstrate that the preparatory work even benefited the defendant (particularly given the fact that no development ultimately took place).⁴¹ Regalian's claim for restitution thus failed.⁴²

Of what use is this English and Australian law precedent in our own jurisdiction? The above series of cases provide a model for refunding a plaintiff for services rendered in anticipation of a contract where no contract ultimately results. These cases represent a deliberate stretching of the concept of enrichment by the English and Australian courts in an attempt to award at least some relief to plaintiffs who have a suitable case. Arguably this is a development which owes much to the absence of a potential tortious action in this field, which has necessitated the development of another arm of the law of obligations. There does not appear to be any precedent for an enrichment action along these lines in South Africa, but the possibility of awarding (at very least) a measure of restitution to a plaintiff should not be ignored.

The measure of recovery under such an action in South African and English law needs to be mentioned. The quantum meruit measure favoured by the House of Lords in *Cobbe's* case, has been discussed in South African law too, although in a different context. The leading Appellate Division case on quantum meruit recovery in South Africa, *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*,⁴³ dealt with a claim in the different context

³⁸ Ibid at 221.

³⁹ Ibid at 227.

⁴⁰ Ibid at 230.

⁴¹ Ibid at 229.

⁴² Ibid at 231.

⁴³ Supra note 21.

of a claim for specific performance. In a very thorough judgment the Appellate Division awarded a reduced contract price to the plaintiffs to remunerate them to the extent that they had successfully rendered performance under a breached contract.⁴⁴ The measure of this reduced contract price — which the Appellate Division deliberately chose not to term a quantum meruit — was the original contract price less the cost of remedying the defects.⁴⁵

As noted above, however, the very real difference between *BK Tooling* and the present context is the fact that in the latter the services are not undertaken in terms of a contract. It does not follow, however, that the services conferred on the defendant in the pre-contractual phase will automatically be of no value to him. Consider the facts of the *Cobbe* case: there the services of the professional planner unlocked the potential of real property, greatly enhancing the value of the land.⁴⁶ At the same time, however, that potential had always inhered in the land, hence the award merely of remuneration for services rendered.⁴⁷ This type of factual scenario harks back to the South African case of *Nortje v Pool NO*.⁴⁸ There the plaintiff prospector discovered kaolin on the defendant property owner's land. The prospector had agreed to a share of the profits if kaolin was discovered, but the basis of this claim was removed when the contract between the parties was declared void for want of necessary formalities. An enrichment claim brought by the prospector failed on the basis that the value of the land had not been tangibly enhanced by his services. No claim lay for his expenses and effort.⁴⁹

Nortje v Pool NO is the case most commentators see as most strongly calling for intervention in the form of some sort of generalised enrichment liability in South African law.⁵⁰ In more recent times, a general enrichment action has been strongly foreshadowed in the case law, particularly the obiter dictum of Schutz JA in *McCarthy Retail Ltd v Shortdistance Carriers CC*.⁵¹ Lotz & Brand state the general requirements for enrichment as being that the defendant must be enriched; the plaintiff must be impoverished; the defendant's enrichment must be at the expense of the plaintiff and the enrichment must be without legal cause (*sine causa*).⁵² If services conferred outside of a

⁴⁴ Ibid at 439.

⁴⁵ Ibid at 438–9.

⁴⁶ Compare the analogy given by Lord Scott at para 41 of *Cobbe* supra note 24.

⁴⁷ Ibid.

⁴⁸ Supra note 10.

⁴⁹ Ibid at 137–40.

⁵⁰ For example De Vos op cit note 20 at ch 6; Daniel Visser & Andrew Purchase 'The general enrichment action cometh' (2002) 119 *SALJ* 260 at 264; Robin Evans-Jones 'Seeking imposed enrichment in improvements — Classifications and general enrichment actions in mixed systems: Scotland and South Africa' (2008) 16 *Restitution LR* 18.

⁵¹ Supra note 13 paras 8–10. See also *Kommissaris v Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) and the opposing authority in *Nortje v Pool NO* supra note 13. For an excellent comparative analysis see Visser & Purchase op cit note 50.

⁵² Lotz & Brand op cit note 10 para 209.

contractual setting have conferred some sort of benefit on a defendant, perhaps even just to unlock the potential of his existing property, it is arguable that a general enrichment action should lie to compensate the plaintiff. In this manner the defendant could be rewarded for his time and effort according to the appropriate tariffs for professional services, in a similar vein to the English approach.

A final comparative note at this point with regard to the English cases discussed above is to highlight the analysis of Birks, who brings civilian learning to bear on the body of English case law in this context.⁵³ Birks cites particularly the *William Lacey*⁵⁴ case as an example of enrichment for which there is an absence of basis (other than the hopes of securing a contract). The traditional English classification of this class of cases is under ‘failure of consideration’,⁵⁵ but Birks’s own analysis does not make use of this terminology. Birks chooses the language of ‘payment made on the basis of a liability to be met in the future’, which may or may not materialise.⁵⁶ Where the basis ultimately proves absent recovery may lie. Birks cites the *condictio causa data causa non secuta* as the Roman equivalent of this action.⁵⁷ Perhaps then if South Africa were to follow the approach of Birks, the *condictio causa data causa non secuta* could be used in respect of property as well as services, avoiding the need for a general enrichment action. Admittedly, however, this would be breaking new ground with regard to the South African use of this *condictio*.

The Birksian approach set out above must be read in the context of the majority of English cases in this field (several of which have been discussed above). Typically these cases deal with a conferral of services, rather than property and hence the necessity of adapting the *condictio causa data causa non secuta* to this context. It is submitted that when dealing with an enrichment claim for compensation for services rendered, the plaintiff should first be tasked with demonstrating the actual enrichment of the plaintiff. Only if this hurdle can be crossed should an action lie in enrichment — in which case Birks’s analysis is most apt and is perhaps preferable to creating a general enrichment action, since it fits within the traditional Roman-Dutch status quo. If services have resulted in losses for the plaintiff, without enrichment of the defendant, the plaintiff should then be tasked with demonstrating reasonable reliance on a representation by the defendant and be required to establish his action in the law of delict, as will be set out below.

What should be clear from this brief excursus on enrichment is first that enrichment in the pre-contractual sphere is often very difficult to prove. Generally it is not property or money which is conferred on the defendant, which would clearly demonstrate enrichment, but rather something more

⁵³ Peter Birks *Unjust Enrichment* 2 ed (2005) 142–54.

⁵⁴ *Supra* note 26.

⁵⁵ Compare Burrows *op cit* note 1 at 371–80.

⁵⁶ Birks *op cit* note 53 at 153.

⁵⁷ *Ibid.*

intangible such as services or wasted expenditure, which does not directly benefit the defendant and for which the use of an enrichment action becomes more tenuous. Faced with this dilemma a court could stretch the meaning of the enrichment requirement as in English law to include an action for services rendered in the pre-contractual sphere, in terms of a generalised enrichment liability. Alternatively, the *condictio causa data causa non secuta* could be put to this purpose as per Birks's argument set out above.

If the plaintiff can establish reliance, however, and services rendered in reliance upon the belief that a contract would eventuate have caused him loss, perhaps an action should lie in delict. As we shall presently see, the enrichment-based English solution is a response to the lack of an action in tort for negligently caused pure economic loss. Since South Africa recognises this form of claim, it would better fit with our existing distinction between recouping enrichment and recouping other losses for the action for losses to lie in delict, unless enrichment of the defendant can be clearly demonstrated. Thus it is to the possibility of an action based on reliance to which this article now turns.

III CLAIMING THE RELIANCE INTEREST

Continuing to follow the analysis of Fuller & Purdue, the reliance interest aims to put the plaintiff in as good a position as he was before the promise was made.⁵⁸ Following Cockrell, one relies on another when you alter your position in the belief that the other's word 'can be depended upon'.⁵⁹ As Cockrell notes, reliance does play a role in South African private law, even in the law of delict, particularly in areas such as liability for pure economic loss, where an ongoing relationship between the parties may exist.⁶⁰ The increasing role played by reliance in the law is ascribed (inter alia) by Atiyah to a growing recognition of the importance of community values, which limit individualism by reference to standards such as 'reasonableness', and which are community based.⁶¹ It is this type of argument for social justice which underpins much of what is to follow.

Transposing Fuller & Purdue to this context, the reliance interest here must encompass all out-of-pocket losses consequent upon reliance on the representation that a contract would be concluded.⁶² This measure should include wasted expenditure, opportunities forgone and consequential losses (which are not too remote) and should aim to put the plaintiff (party A) in the position he would have been in had the representation never been made to

⁵⁸ Fuller & Purdue op cit note 7 at 54.

⁵⁹ Alfred Cockrell 'Reliance and private law' (1993) 4 *Stell LR* 41 at 41.

⁶⁰ *Ibid* at 49–53.

⁶¹ Patrick Atiyah 'The binding nature of contractual obligations' in Donald Harris & Denis Tallon (eds) *Contract Law Today* (1989) 21 at 28. See also Cockrell op cit note 59 at 56–61.

⁶² Fuller & Purdue op cit note 7 at 54; Dale Hutchison op cit note 7 at 56.

him.⁶³ By definition the reliance measure would include the restitution interest,⁶⁴ since such benefits conferred upon the defendant also constitute out-of-pocket losses spent in anticipation of an ultimate contract and hence augment the global reliance position. If the losses of the plaintiff can be demonstrated to have been incurred in reliance on a representation of the defendant that a contract would be concluded, it will not be necessary to demonstrate a benefit to the defendant in order to establish the alternative enrichment action and hence prove the plaintiff's case. This will lighten the burden of proof and an alternative cause of action — such as delict — would allow for a fuller measure of damages.

Of course the reliance measure of damages can be claimed following a breach of contract,⁶⁵ but since this article presumes that the existence of a contract cannot be demonstrated, the action must lie in another area of the law. Two main possibilities present themselves in the comparative literature: promissory estoppel and delict.⁶⁶ A third possibility is to extend contractual liability into the pre-contractual sphere, either by means of an actionable doctrine of good faith⁶⁷ or by the German doctrine of culpa in contrahendo.⁶⁸

(a) *Promissory estoppel*

Promissory estoppel is a doctrine originating in English law, which prevents the maker of a promise, intended to be legally binding, from denying that he or she is bound by that promise.⁶⁹ This mechanism stems back to the decision of Denning J (as he then was) in *Central London Property Trust Ltd v High Trees House Ltd*,⁷⁰ where it was developed to provide a defence where no contract could be relied on due to a lack of consideration given for the promise.⁷¹ Promissory estoppel has since then been exported to many common law countries, including Australia and the USA.⁷² In South Africa this doctrine has never taken root for the simple reason that in our law consideration is not a requirement for a promise to be contractually binding.⁷³ Any serious and

⁶³ Dale Hutchison op cit note 7 at 58; Fuller & Purdue op cit note 7 at 75–80.

⁶⁴ Compare Dale Hutchison op cit note 7 at 58.

⁶⁵ See the sources listed in note 7.

⁶⁶ See particularly the analyses of McKendrick op cit note 1, Carter & Farnsworth op cit note 1 & Farnsworth op cit note 1.

⁶⁷ This is the approach followed in the Netherlands: see Van Dunné op cit note 1 and the discussion in the text below.

⁶⁸ See the German sources cited in note 1 and the discussion in the text below.

⁶⁹ Piers Feltham, Daniel Hochberg & Tom Leech *Spencer Bower Estoppel by Representation* (2004) at 441 (paraphrased).

⁷⁰ [1947] KB 130.

⁷¹ Feltham, Hochberg & Leech op cit note 69 at 443–4.

⁷² Ibid. See especially 513–22. An interesting take on promissory estoppel in the USA is to be found in Grant Gilmore *The Death of Contract* (1974). Gilmore felt that this qualification of the bargain theory of contract would lead to a collapsing of traditional contract law into tort law.

⁷³ *Conradie v Rossouw* 1919 AD 279.

deliberate promise freely given with the intention to contract is binding in South Africa and hence there is no need for promissory estoppel. To give a fuller comparative account, however, this legal mechanism warrants brief consideration.

The leading US case, *Hoffman v Red Owl Stores*,⁷⁴ heard in Wisconsin in 1965, was decided on the basis of promissory estoppel. Here the plaintiff was the owner of a bakery at the outset. He entered into negotiations with the Red Owl chain with the intention of establishing a grocery store under this franchise in a different town. Hoffman stated that he only had \$18 000 to invest and the Red Owl representative assured him that this would be sufficient. Thereafter, acting on the advice of Red Owl's representatives, Hoffman sold his bakery and bought a small grocery store in a different town to gain experience in this market. After three months this store was operating at a profit, but Hoffman was again advised to sell, which he did. He moved again to the town where the new Red Owl franchise was to be established. At this point Red Owl moved the goal posts, requiring an increased capital contribution by Hoffman (\$26 000) on terms he could not meet. Negotiations broke down and Hoffman instituted a claim against Red Owl for damages.

The decision in *Hoffman* was based on section 90 of the *Restatement, First, Contracts* which created a promissory estoppel defence, although not under that name.⁷⁵ The Wisconsin Supreme Court endorsed and adopted this rule in the *Hoffman* case⁷⁶ and concluded that injustice would result if the plaintiff was not awarded some relief based on this principle.⁷⁷ The plaintiff was awarded damages to compensate him for his detrimental reliance on Red Owl's representations to the extent that he was able to prove an actual loss.⁷⁸

It has been suggested by some writers that Hoffman was fortunate in the outcome of his case and that this might not be the typical position of US law.⁷⁹ Furthermore, the authors of *Spencer Bower on Estoppel* point out that *Hoffman v Red Owl Stores* would have been decided differently in English law, since one of the requirements for promissory estoppel in that jurisdiction is a pre-existing legal relationship between the parties.⁸⁰ This requirement never took hold in US law.⁸¹ These authors also note many of the principal cases under section 90 were based on anticipated contracts which did not

⁷⁴ 133 NW 2d 267 (Wisconsin 1965). See in particular Robert E Scott 'Hoffman v Red Owl Stores and the myth of precontractual reliance' (2007) 68 *Ohio State LJ* 71.

⁷⁵ See *Hoffman* supra note 74 at 273. The *Restatement, Second, Contracts* (1981) preserves this rule at section 90 with the facts of *Hoffman's* case forming the basis of illustration 10.

⁷⁶ *Hoffman* supra note 74 at 274.

⁷⁷ *Ibid* at 275.

⁷⁸ *Ibid* at 275–7.

⁷⁹ Scott op cit note 74; Farnsworth op cit note 1 at 237; Furmston & Tolhurst op cit note 1 at 390.

⁸⁰ Feltham, Hochberg & Leech op cit note 69 at 516.

⁸¹ *Ibid*.

materialise, which has not been the case in the English law of promissory estoppel.⁸² Another difference between promissory estoppel in the UK and that found in the US and Australia is that the English rule which holds that estoppel is a shield and not a sword is not enforced in these latter jurisdictions.⁸³ Hence promissory estoppel may serve as a self-standing cause of action in certain jurisdictions, as was famously held in the landmark Australian case of *Walton Stores (Interstate) Ltd v Maher*.⁸⁴ This step represents a considerable watering down of the consideration requirement in these legal systems. Rather than promissory estoppel providing a defence to a claim based on other grounds, this makes a mere promise, unsupported by consideration, actionable. This undermines the bargain theory of contract and represents a step in the direction of countries (like South Africa) which have no consideration requirement.

In conclusion on this topic, it should by now be apparent that reliance expenditure on failed negotiations may be recovered in Australia or the USA by means of a form of promissory estoppel. This action has little relevance in South Africa, however, since a promise given in this country is enforceable and hence a plaintiff in this type of scenario would be thrust into the realm of contract law, or at the least, agreements to agree, which are beyond the scope of this paper.

(b) *Culpa in contrahendo*

In Germany a negotiating party can rely on the doctrine of culpa in contrahendo, which is neither precisely delictual nor contractual, but rather a hybrid of the two actions.⁸⁵ The father of this approach is recognised to be Von Jhering, who published an essay on this topic in 1861.⁸⁶ Markesinis et al state that while the freedom not to contract is recognised, in very exceptional circumstances the law indeed imposes an obligation to contract and a party who nevertheless breaks off negotiations under these circumstances will be liable in damages to the opposing party, provided fault is present.⁸⁷ Thus

⁸² Ibid. Hence no doubt the fact that English courts tend to focus on the restitution interest as set out above in part II. For an argument that the English law of promissory estoppel should be available to plaintiffs as a cause of action see Ben McFarlane 'The protection of pre-contractual reliance: A way forward?' (2010) 10 *Oxford University Commonwealth LJ* 95; Giliker op cit note 1 at ch 5.

⁸³ USA: *Hoffman v Red Owl Stores* supra note 74, Carter & Furmston op cit note 1 at 103. Australia: *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; McKendrick op cit note 1 at 188 – 189; Burrows op cit note 1 at 379–80; Michael Spence 'Australian estoppel and the protection of reliance' (1997) 11 *Journal of Contract Law* 203 at 211.

⁸⁴ Supra note 83.

⁸⁵ See generally sources on German law mentioned in note 1.

⁸⁶ Rudolf von Jhering 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen' (1861) cited in Lorenz op cit note 1 at 161.

⁸⁷ Markesinis, Unberath & Johnston op cit note 1 at 100. See also Lorenz op cit note 1 at 165.

'special care' is required of parties conducting negotiations.⁸⁸ These authors add with reference to case law that a party may be liable for the reliance expenditure of his or her counterpart if that party breaks off negotiations or withholds final acceptance after the conclusion of a final contract seemed certain.⁸⁹

(c) *Good faith*

In the Netherlands there is case authority from the Hoge Raad that reliance damages can be awarded for breach of a duty of good faith in one's dealings with an opposing party to negotiations.⁹⁰ If one is obliged to negotiate in good faith, this seems to extend contractual liability into the pre-contractual sphere, rather like the German position. Indeed the debt to Von Jhering for the origins of the modern Dutch approach is recognised by scholars such as Van Dunné.⁹¹ This author states that prior to the *Plas v Valburg*⁹² case in 1982, however, the predominant view was that pre-contractual liability lay within the sphere of delict.⁹³ Van Dunné states that the issue as to under which branch of law the action lies is largely academic, since the focus in modern Dutch law is on remedies rather than specific ('dogmatic') causes of action.⁹⁴ Good faith nevertheless stands as an independent ground of action in Dutch law and is used in this context to recover losses consequent upon failed contractual negotiations.⁹⁵

The *Plas v Valburg* case represents a landmark in the area of pre-contractual reliance and identifies the Netherlands as having the most liberal rules in this context in Europe.⁹⁶ There the Hoge Raad made a very useful distinction between three stages in contracting. First there is an initial stage where parties are free to break off negotiations. Secondly, there is a continuing stage when a party may break off negotiations, but must compensate the reliance expenditure of his or her counterpart. Thirdly, there is the final stage; here breaking off negotiations would be contrary to good faith and may ground a claim for reliance damages and even, in exceptional circumstances, expecta-

⁸⁸ Markesinis, Unberath & Johnston op cit note 1 at 100; Lorenz op cit note 1 at 165.

⁸⁹ Markesinis, Unberath & Johnston op cit note 1 at 100. The cases cited are BGH WM 1969, 595; NJW 1975, 1774, case no 29; and NJW-RR 1989, 627.

⁹⁰ Van Dunné op cit note 1 at 227 cites the case of *Plas v Municipality of Valburg* 18 June 1982, NJ 1983, 723 as the source of this rule. See also Arthur S Hartkamp 'Judicial discretion under the New Civil Code of the Netherlands' (1992) 40 *American Journal of Comparative Law* 551 at 557.

⁹¹ Van Dunné op cit note 1 at 225.

⁹² Supra note 90.

⁹³ Van Dunné op cit note 1 at 227.

⁹⁴ Ibid.

⁹⁵ Ibid. See *Plas v Valburg* supra note 90.

⁹⁶ John Cartwright & Martijn Hesselink 'Conclusions' in Cartwright & Hesselink op cit note 1 at 468-70.

tion damages.⁹⁷ The stage reached in negotiations will depend on the facts and reasonable assumptions of both parties in the circumstances.⁹⁸

The *Plas v Valburg* analysis provides a useful tool in determining the availability of damages in this context. Even if awarding the expectation interest were to be regarded as going a step too far, it is useful to consider the circumstances of the parties and their reasonable assumptions based on those circumstances, particularly with regard to the progress of negotiations, in determining whether (at least reliance) losses should be recoverable.

In Scotland, a narrow form of pre-contractual liability, referred to as ‘Melville Monument’ liability, exists. The name is based on the subject matter of the case where it was first established, *Walker v Milne*.⁹⁹ The modern status of this doctrine was neatly encapsulated in the leading case of *Dawson International plc v Coats Patons plc*.¹⁰⁰ Here Lord Cullen held in the Outer House that this type of liability was available to a plaintiff who had relied on the implied assurance by the defendant that there was a binding contract between them, when in fact there was a mere agreement which fell short of being a binding contract.¹⁰¹ This type of claim was held to be an equitable one and was not based in contract, delict or enrichment.¹⁰² Good faith in the Scottish law of contract has been given a fresh impetus by the House of Lords decision in *Smith v Bank of Scotland*.¹⁰³ There it was held that there was a duty on a bank to disclose potential difficulties to a would-be surety (cautioner) before concluding a contract of suretyship.¹⁰⁴ The basis of this duty in Scots law was held to be good faith.¹⁰⁵

In a discussion of good faith in the context of pre-contractual liability, MacQueen argues that good faith should be used as a basis for the development of new rules to deal with the problems of this area. He does, however, note that at present the existing tools of Melville Monument liability and the law on misrepresentation provide only a very narrowly circumscribed response to this problem.¹⁰⁶ As can be seen from the limits set on Melville Monument liability by Lord Cullen, this mechanism hardly presents a generalised solution to the problem of pre-contractual reliance. This may well be ascribed to the lack of a well-developed principle of good

⁹⁷ Van Dunné op cit note 1 at 230.

⁹⁸ Ibid.

⁹⁹ (1823) 2 S 379. See further McBryde op cit note 1 at 5.60–5.70; MacQueen & Thomson op cit note 1 at 2.91–2.96; Hector L MacQueen ‘Good faith in the Scots law of contract: An undisclosed principle?’ in A D M Forte (ed) *Good Faith in Contract and Property* (1999) 5 at 22–37; Martin Hogg & Hector MacQueen ‘Notes on the Scottish jurisdiction’ in Cartwright & Hesselink op cit note 1.

¹⁰⁰ 1988 SLT 854.

¹⁰¹ Ibid at 866.

¹⁰² Ibid at 865.

¹⁰³ 1997 SC (HL) 111. See Fritz Brand & Douglas Brodie ‘Good faith in contract law’ in Zimmermann, Visser & Reid (eds) op cit note 14 at 94.

¹⁰⁴ *Smith* supra note 103 at 120–1.

¹⁰⁵ Ibid.

¹⁰⁶ MacQueen op cit note 99 at 33–7.

faith and perhaps in time the law in this area will develop along the lines suggested by MacQueen under the influence of the *Smith* decision. Any development is likely to proceed gradually, however, because, as Brand & Brodie note, a narrower (and in their view preferable) interpretation of *Smith* is that it represents a modification of the law in the area of suretyship, rather than a 'new fundamental principle'.¹⁰⁷ This view underlies their conclusion that Scottish law continues not to recognise an independent principle of good faith.¹⁰⁸ Be that as it may, Melville Monument liability is still one step closer to recognising a form of pre-contractual liability than the present South African position.

(d) *Delict*

What the foregoing discussion should illustrate is that the choice of remedy which a legal system offers for the recovery of pre-contractual reliance will depend on the intricacies of that system. South African law is different from most civil law jurisdictions in that we do not recognise a duty of good faith in contractual negotiation which is actionable independent of supervening legal doctrines,¹⁰⁹ and is different from most common law systems in that we do not recognise the doctrine of consideration.¹¹⁰ Thus a solution to this problem that is suitable for our own legal system needs to be found. The remainder of this section will consider the solutions which have been proffered on the basis of delict and then will attempt to formulate an action for reliance-based damages suitable to our own climate.

Since the major focus so far has been on English law, the question will need to be answered why English law chooses enrichment as the basis for decisions dealing with pre-contractual reliance, given the inherent limitations of this branch of the law of obligations. Perhaps the discussion should begin with often quoted denial by the House of Lords of any duty to negotiate in good faith in English contract law:

[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that

¹⁰⁷ Brand & Brodie op cit note 103 at 103.

¹⁰⁸ Ibid at 116. The similarities of this approach and that favoured by the South African Supreme Court of Appeal in *Brisley v Drotosky* 2002 (4) SA 1 (SCA) are mentioned by the authors. Whether this statement is still true of South African law following *Barkhuizen v Napier* 2007 (5) SA 323 (CC) is open to interpretation, however.

¹⁰⁹ See particularly *Brisley v Drotosky* supra note 108; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* supra note 108; Reinhard Zimmermann 'Good faith and equity' in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217; Dale Hutchison 'Good faith in the South African law of contract' in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 213.

¹¹⁰ *Conradie v Rossouw* supra note 73; R H Christie *The Law of Contract in South Africa* (2006) 10; Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract — General Principles* (2007) 195–6.

interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.¹¹¹

This negates, as in South African law, any potential pre-contractual liability based on good faith. The possibility of redress following a misrepresentation is mentioned in the above quote. This introduces the possibility of an action based in tort. It is trite law that fraud will not be tolerated, even in a pre-contractual setting, and to this end the tort of deceit is available for redress in situations where fraud by one party is clearly demonstrable.¹¹² This action necessitates that a plaintiff show deliberate intention to deceive, or at the very least recklessness as to whether a representation was true or not, on the part of the defendant.¹¹³ This is a difficult evidentiary burden to meet, making the tort of negligence far more attractive to a potential litigant.

The English courts are reluctant, however, to recognise liability in tort for negligently caused pure economic loss.¹¹⁴ This was the starting point in English law, based it would seem on a floodgates type of argument.¹¹⁵ Then, in 1964, a landmark judgment of the House of Lords recognised an action for pure economic loss caused by a negligent misstatement. Following this decision in *Hedley Byrne & Co v Heller & Partners Ltd*,¹¹⁶ there followed a brief period of expansion with decisions like *Esso Petroleum Co Ltd v Mardon*¹¹⁷ and *Anns v Merton Burrough Council*,¹¹⁸ which reached a high point in *Junior Books Ltd v Veitchi Co Ltd*.¹¹⁹ In *Junior Books* the plaintiff factory owner employed a builder to build a new factory. A sub-contractor was employed to do the flooring, but the floors turned out to be defective and needed to be replaced. Instead of suing the main building contractor, the plaintiff sued the sub-contractor, with whom it had no contractual nexus. The House of Lords found for the plaintiff.

In *Murphy v Brentwood District Council*,¹²⁰ however, the House of Lords overruled the *Anns* case, putting a halt to *Junior Books* type of actions which sought to circumvent contractual privity via tort. The tendency not to allow claims for negligently caused economic loss continued in the subsequent

¹¹¹ *Walford v Miles* [1992] 2 AC 128 at 138.

¹¹² Giliker op cit note 1 at 106.

¹¹³ Ibid.

¹¹⁴ See generally Dale Hutchison 'Murphy's law: The recovery of pure economic loss in the tort of negligence' (1995) 6 *Stell LR* 3; Giliker op cit note 1 at ch 4; David Howarth 'Economic loss in England: The search for coherence' in Efstathios K Banakas (ed) *Civil Liability for Pure Economic Loss* (1996) 27; A M Dugdale 'Negligence' in Anthony M Dugdale & Michael A Jones *Clerk & Lindsell on Torts* 19 ed (2006).

¹¹⁵ Dugdale op cit note 113 at 443, Giliker op cit note 1 at 107–9.

¹¹⁶ [1964] AC 465.

¹¹⁷ [1976] QB 801.

¹¹⁸ [1978] 1 AC 728.

¹¹⁹ [1983] 1 AC 520. See Giliker op cit note 1 at 109.

¹²⁰ [1991] 1 AC 398.

decisions of the House of Lords.¹²¹ The *Hedley Byrne* principle remains part of English law, however, as it was too entrenched to overrule.¹²² In *Hedley Byrne* the plaintiff company was an advertising agency, which placed advertisements for clients on terms whereby the agency would be liable should the client default. In order to protect themselves the advertisers sought a reference from the client's bankers. This was returned with positive feedback, but the client went insolvent soon afterwards. The advertisers successfully sued the bankers for losses suffered in consequence of their negligent representation. The House of Lords was careful in that case to emphasise the need for a special relationship between the parties in order for an action to lie and the need for the loss to be foreseeable.¹²³ The requirement of reasonable reliance was also stressed by certain of the Lords.¹²⁴ The extent to which a special relationship exists is largely determined by how close the parties are to a relationship akin to contract.¹²⁵

Howarth argues with reference to the subsequent case law that there is a strong presumption against expanding the categories in which damages for negligently caused pure economic loss are recoverable.¹²⁶ Thus extending the action for economic loss to pre-contractual negotiations would be difficult.¹²⁷ McKendrick has argued that no duty of care exists under these circumstances.¹²⁸ This conclusion seems to be supported by Giliker¹²⁹ and by the absence of a body of contrary case law.

The lack of an action for negligently caused pure economic loss extends also to American law.¹³⁰ This would seem to explain why tort is also not the avenue of redress chosen in that country, with the focus being on estoppel under section 90 of the *Restatement, Second, Contracts*.¹³¹ Common law countries thus provide little assistance with their laws of tort. When one looks to the French law of delict, however, clear authority exists for an action for pre-contractual reliance. The basic starting point is articles 1382 and 1383

¹²¹ *Spring v Guardian Assurance Plc* [1995] 2 AC 296; *Henderson v Merret Syndicates Ltd* [1995] 2 AC 145; *White v Jones* [1995] 2 AC 207.

¹²² Giliker op cit note 1 at 109.

¹²³ *Hedley Byrne* supra note 116 at 502, 528, 534. See Giliker op cit note 1 at 109.

¹²⁴ *Hedley Byrne* supra note 116 at 480. See Hutchison op cit note 114 at 29; Cockrell op cit note 59 at 50.

¹²⁵ Dugdale op cit note 114 at 449. See further *Commissioners of Customs and Excise v Barclays Bank Plc* [2004] EWCA Civ 1555.

¹²⁶ Howarth op cit note 114 at 32.

¹²⁷ Giliker op cit note 1 cites (at 110–11) the High Court decision in *Box v Midland Bank* [1979] 2 Lloyd's Rep 391 as the only example of an English case where this has been done. In *Esso Petroleum Co Ltd v Mardon* supra note 117 damages were awarded for a negligent misrepresentation inducing a contract, although this is slightly different from the present context, since a contract was actually concluded in that case.

¹²⁸ McKendrick op cit note 1 at 190.

¹²⁹ Giliker op cit note 1 at 118–19.

¹³⁰ Gary T Schwartz 'The economic loss doctrine in American tort law: Assessing the recent experience' in Efstathios K Banakas (ed) op cit note 114 at 103, Dan B Dobbs *The Law of Torts* (2000) § 452.

¹³¹ See above on promissory estoppel.

of the French Civil Code.¹³² Article 1382 reads as follows: 'Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.'¹³³ Article 1383 reads: 'Each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence.'¹³⁴

These two articles contain the essence of the French law of delict, which is clearly based on a broad principle of liability, which recognises all losses caused deliberately or negligently.¹³⁵ It should be apparent from the text of the articles quoted above that there is no express wrongfulness element in the French law of delict. Giliker notes that French courts have no problem in awarding damages for pure economic loss.¹³⁶ Her analysis of the leading French cases reveals that whether or not reliance damages are available depends on the circumstances of a particular case.¹³⁷ Courts will look particularly at the stage of negotiations which the parties have reached, the presence or absence of bad faith or negligence and the suddenness with which negotiations are broken off.¹³⁸ Deshayes & Maitre give the following typical examples of bad faith: entering negotiations with no real intention to contract; wrongful behaviour by one of the parties, such as disclosing confidential information furnished to him or her and finally, breaking off negotiations suddenly when the other party had good reason to believe a contract would be concluded.¹³⁹ The action is for reliance damages, never expectation damages or specific performance.¹⁴⁰

French law thus seems to protect the legitimate expectations of a contracting party, even in the pre-contractual sphere.¹⁴¹ Once negotiations have reached a particular point (which will have to be assessed on the facts) it becomes possible to impose liability on a party who breaks off dealings, provided fault is present.

As a final comparative indicator to set the scene for a discussion of the South African law of delict in this context, it should be noted that the Court of Justice of the European Communities chose to frame an action based on

¹³² For an account of the French law in this context see Giliker op cit note 1 and the notes on French law prepared by Olivier Deshayes & Gregory Maitre in Cartwright & Hesselink (eds) op cit note 1.

¹³³ Translation taken from John H Crabb *The French Civil Code* (1995) at 252.

¹³⁴ Ibid.

¹³⁵ Compare Giliker op cit note 1 at 120.

¹³⁶ Ibid.

¹³⁷ Ibid at 123.

¹³⁸ Giliker cites Cass com 20.3.1972 JCP 1973 II 17543 note J Schmidt (Cour de cassation) & Riom 10.6.1992 RJDA 1992 No 893 (Court of Appeal of Riom) as the leading authority for this description of the law.

¹³⁹ Deshayes & Maitre op cit note 132 at 29.

¹⁴⁰ Ibid at 31 (paraphrased).

¹⁴¹ Compare the conclusion of Giliker op cit note 1 at 132.

pre-contractual reliance as a tort/delict in the fairly recent *Tacconi* case.¹⁴² This conclusion was reached after surveying the laws of several leading European jurisdictions as well as art 2.1.15 of the Unidroit Principles of International Commercial Contracts.¹⁴³ The question arose in the context of jurisdictional dispute between two international parties, a German company and an Italian company. If the pre-contractual wrong complained of was held to be actionable in contract, the courts of the country of performance would have jurisdiction under the relevant Brussels Convention. If the wrong was actionable in delict, the place where the harmful event occurred would hear the matter. The Advocate General proposed a pre-contractual regime not dissimilar to that of the Netherlands, with legitimate expectations of the relying party being protected differently depending on how far negotiations had progressed.¹⁴⁴ The court held since no obligation had been freely assumed by the defendant toward the plaintiff (in the absence of a binding contract) the action must lie in delict.¹⁴⁵

What should be clear by now is that there is some support internationally for the idea of an action for reliance damages based in delict. In South African law the action for pure economic loss is well established.¹⁴⁶ Fraud in the pre-contractual phase is actionable, even if a contract does not ultimately materialise.¹⁴⁷ Negligence is a more difficult issue. A negligent misrepresentation is actionable if a contract results from negotiations,¹⁴⁸ but what if no contract comes into being? For pre-contractual loss caused negligently to be actionable in this context, it would be necessary to extend liability for negligent misrepresentation to recognise that such a representation is also actionable where it forms the basis of pre-contractual reliance where the

¹⁴² *Fonderie Officine Meccaniche Tacconi Spa v Heinrich Wagner Sinto Maschinenfabrik GmbH* in para 27 of the judgment. This case is available at www.unilex.info, last accessed on 7 February 2011.

¹⁴³ Article 2.1.15 'Negotiations in bad faith' reads as follows:

- '(1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
- (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.'

¹⁴⁴ *Tacconi* supra note 142 paras 55–66 of the opinion of the Advocate General.

¹⁴⁵ *ibid* paras 19–27 of the judgment of the court.

¹⁴⁶ *Hefer v Van Greuning* 1979 (4) SA 952 (A); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA); J Neethling, J M Potgieter & J C Knobel *Law of Delict* (2010) at 10 and 290; Max Loubser & Rob Midgley (eds) *The Law of Delict in South Africa* (2009) 224–9.

¹⁴⁷ *Meskin NO v Anglo American Corporation of SA Ltd* 1968 (4) SA 793 (W) at 802–4.

¹⁴⁸ *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).

anticipated contract fails to materialise. In other words, the finding in *Murray v McLean NO*¹⁴⁹ needs to be reconsidered.

Murray v McLean NO is a case which was reported in 1970 from what was then Rhodesia. There the plaintiff case argued that a representative of the Rhodesian Minister of Health had represented to him that 52 prefabricated houses were required by the ministry and that funds were available to purchase such houses. (Murray carried on business as a manufacturer of prefabricated houses.) The representative also informed Murray that sites had been prepared for these houses and that these were awaited by the ministry. The representative knew the cost of the housing and that Murray's business was expending time and materials preparing these houses. He also knew that funds were not guaranteed. Ultimately funds were not forthcoming from the ministry and no contract eventuated. Murray brought a delictual action to recover his reliance expenditure. The Rhodesian court held that the claim was not actionable in the law of delict of Rhodesia or South Africa.¹⁵⁰ The essence of Lewis J's objection to the plaintiff's case appears to be that he viewed the plaintiff's reliance on the defendant's representations as unreasonable.¹⁵¹ This view in turn seems to rely on the position which prevailed in South African law at the time that negligently caused pure economic loss was not actionable.¹⁵² Lewis J was strengthened in his finding by the opinion that the fact that the defendant was a representative of the Rhodesian government and hence his undertaking was subject to considerations of what was in the public interest.¹⁵³

In present day law, a discussion on extending delictual liability into the pre-contractual sphere to recover losses consequent upon a failed contract should begin with the trite observation that in order for such an action to succeed in South Africa all elements thereof need to be proved. Thus there

¹⁴⁹ 1970 (1) SA 133 (R). For discussion of this case see P Q R Boberg 1970 *Annual Survey of South African Law* 159–60; W H B Dean 'Put not your trust in princes, nor in the son of man, in whom there is no help — Psalm 146, Verse 3' (1970) 87 *SALJ* 149; Hutchison in Brownsword, Hird & Howells (eds) op cit note 109 at 236–42.

¹⁵⁰ *Murray* supra note 149 at 138H–140G.

¹⁵¹ *Ibid.*

¹⁵² Lewis J cited the South African cases of *Herschel v Mrupe* 1954 (3) SA 464 (A) and *Hamman v Moolman* 1968 (4) SA 340 (A) in support of this view.

¹⁵³ *Ibid* at 140F–142A. Since the defendant in this case was the state, one might today argue (if this were a South African case) that Murray had a legitimate expectation of concluding the contract. A legitimate expectation, as distinct from a right, is protected in South African administrative law to the extent that where such an expectation exists, the affected party has a right to a hearing before a decision regarding his or her position is taken. See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A); Cora Hoexter *Administrative Law in South Africa* (2007) 376–92. Whether the protection of legitimate expectations extends to substantive relief is debatable, however. See Hoexter op cit; Geo Quinot 'The developing doctrine of substantive protection of legitimate expectations in South African administrative law' (2004) 19 *SA Public Law* 543. What this means for cases like Murray's is that while the plaintiff may have a right to a hearing if he can show he had a legitimate expectation of contracting, it is unlikely a court would force the government to contract on this basis.

must be conduct, harm, fault on the part of the defendant, the wrongfulness of the conduct must be recognised by South African law and the conduct must be the factual and legal cause of the harm complained of.¹⁵⁴ The harm suffered will be the losses of the plaintiff expended in reliance on the contract. The conduct is a bit trickier — is it the act of breaking off negotiations or the actual representation on which the plaintiff relied? It may be that both aspects need to be considered, since while the breaking off of negotiations might be the most obvious cause of the harm, it is the representation that a contract would eventuate which caused the reliance by the plaintiff. It will be assumed here that the conduct complained of caused the reliance damages claimed and that these are not too remote.¹⁵⁵ This leaves the troublesome issues of wrongfulness and fault to consider.

In the recent decision of *Trustees, Two Oceans Aquarium v Kantey & Templer (Pty) Ltd*,¹⁵⁶ a unanimous Supreme Court of Appeal held that what was meant by wrongfulness in the context of pure economic loss was whether ‘public or legal considerations require that such conduct, if negligent, is actionable’.¹⁵⁷ The question is thus not so much about whether fault is present, but whether liability should be imposed for that kind of culpable conduct. This limits the floodgates potential of liability for pure economic loss. In the context of pre-contractual reliance fault is easier to establish than wrongfulness. If the conduct complained of is the breaking off of negotiations, then this will almost certainly have been done intentionally. Indeed a key element of hard bargaining is the ability to break off negotiations — or to threaten to do so — and according to principles of freedom of contract a party is entitled to do this. Thus establishing fault here is easy: the question is whether this conduct is wrongful.

What about the making of representations prior to breaking off negotiations? It is this conduct which has probably caused the reliance of the plaintiff. A deliberate intention to induce pre-contractual reliance by a defendant without intending to ultimately conclude a contract¹⁵⁸ would probably constitute fraud in the pre-contractual sphere. In support of this view one could quote the dictum of Jansen J (as he then was) in *Meskin NO v Anglo American Corporation of SA Ltd*¹⁵⁹ that bad faith conduct constituted a fraud, which extended even into the pre-contractual stage of a contract.¹⁶⁰

¹⁵⁴ Compare (for example) Loubser & Midgley op cit note 146 at 21–2.

¹⁵⁵ Causation could, however, be an important means of controlling liability in this type of action, such as where the contract does not materialise due a reason unrelated to the representation or conduct of the defendant. Compare Dean op cit note 149 at 155. Giliker op cit note 1 argues (at 106) the contrary position that in practice causation of loss is generally not an issue.

¹⁵⁶ Supra note 146.

¹⁵⁷ Ibid at para 12.

¹⁵⁸ Compare Unidroit PICC art 2.1.15(3) reproduced above at note 143.

¹⁵⁹ Supra note 147.

¹⁶⁰ Ibid at 802–4. Compare the statement in *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) at 198A–B.

This finding was based on the notion that good faith in negotiating a contract may require disclosure of facts known to one party where there is involuntary reliance by the other.¹⁶¹ Non-disclosure would then constitute bad faith conduct. Jansen J's argument was that based on the similarity between the 'legal convictions of the community' test used in establishing wrongfulness in delict and the requirement of good faith in negotiating a contract, bad faith could be said to constitute fraud.¹⁶² Jansen J added that a delictual action was available in respect of this type of conduct.¹⁶³

In *Meskin's* case bad faith in *contrahendo* was alleged, in the form of a non-disclosure. Here the plaintiff was the liquidator of a company called Titanium, which held shares in a second company, Umgababa, which was controlled by the defendant, Anglo American. Unbeknown to Titanium, Umgababa had entered into a losing contract, which would eventually lead to its downfall. Nevertheless Titanium was offered 50 000 shares in Umgababa subsequent to the conclusion of this losing contract. Anglo American at this point offered to buy the entire share-holding of Titanium, which given the inside knowledge of the defendant, induced a belief in Titanium that its shares in Umgababa were valuable. Titanium then subscribed for the further shares on offer. Soon after, Umgababa was placed in liquidation and Titanium ultimately went the same way. Meskin, the liquidator of Titanium, then sued Anglo American for inducing the further subscription of shares. The measure of damages alleged was the price offered by Anglo American for the full shareholding of Titanium, prior to the subscription in question. The defendant successfully excepted that the facts alleged disclosed no cause of action.

Jansen J held that the action alleged relied on a finding that there had been bad faith on the part of the defendant and the appropriate vehicle for such an action was not contract, but delict.¹⁶⁴ He found, however, that there was no fiduciary duty owed by the defendant to Titanium and hence Anglo American's exception should succeed.¹⁶⁵ The dictum of Jansen J that pre-contractual fraud is actionable thus provides authority for the argument advanced here that reliance damages should be claimable where a fraudulent misrepresentation has been made in the pre-contractual sphere.

The wrongfulness question becomes more difficult, however, when one considers the possibility of extending this type of action to negligently caused losses. As noted above, negligent misstatements and negligent misrepresentations which ultimately cause a contract are actionable. The action for recovery is delictual and the reliance measure of damages is claimed.¹⁶⁶ Does it make a difference if no contract ultimately results? The argument advanced

¹⁶¹ Ibid at 804.

¹⁶² Ibid.

¹⁶³ Meskin supra note 147 at 798F.

¹⁶⁴ Ibid at 807.

¹⁶⁵ Ibid.

¹⁶⁶ See cases cited in note 148.

here is that the conduct complained of consists in failing to contract after making a representation that one would, in circumstances where the plaintiff's reliance on the representation was reasonable. In effect this is a type of prior conduct followed by an omission, however the wrongfulness must be judged with reference to the representation made, since it is herein that the fault lies.

The facts of *Murray*'s case are in point. Should Murray have had an action? The line this article will adopt is that Murray should have had an action. While the representations of the government official in *Murray* did not necessarily constitute bad faith negotiation, this official negligently failed to ensure that his representations were accurate in his negotiations with the plaintiff.¹⁶⁷

In *Murray v McLean* NO Lewis J held that on the facts the plaintiff had not made out his cause of action.¹⁶⁸ This finding was based largely on the South African cases of *Herschel v Mrupe*¹⁶⁹ and *Hamman v Moolman*.¹⁷⁰ Both cases involved negligent representations and demonstrated the reluctance of the Appellate Division to grant an action for pure economic loss in this area.¹⁷¹ Following the decision in *Administrateur, Natal v Trust Bank van Afrika*¹⁷² that a negligent misrepresentation causing economic loss was actionable, the *Herschel* and *Hamman* precedents have been overtaken by subsequent legal developments.¹⁷³ Much attention was also focused by Lewis J on the English case of *Hedley Byrne*,¹⁷⁴ which established liability for negligent misstatement in that jurisdiction, but concluded that the circumstances of that case were different to Murray's.

A further aspect of the judgment of Lewis J which bears attention was the statement, made with reference to the dictum of Van den Heever JA in *Herschel*'s case that the plaintiff in a case of this type should use 'ordinary care and prudence in avoiding injury to himself'.¹⁷⁵ Lewis J explained by the analogy of a woman trying on shoes in a shoe store, who causes the shopkeeper to miss out on other potential sales because of the devotion of his attention to her, only to have her announce at the last moment that she had

¹⁶⁷ The concept of a 'duty to negotiate with care' is borrowed from Hugh Collins *The Law of Contract* 4 ed (2003) 216–20, who advocates such a duty which is neither precisely tortious nor contractual, so that English courts could develop the possibilities of awarding damages in this context. For a Canadian argument in favour of recognising an action in tort for this purpose see Geoffrey F Cauchi 'The protection of the reliance interest and anticipated contracts which fail to materialize' (1981) 19 *University of Western Ontario LR* 237.

¹⁶⁸ *Murray* supra note 149 at 142.

¹⁶⁹ Supra note 152.

¹⁷⁰ Supra note 152.

¹⁷¹ Compare Dean op cit note 149 and Dale Hutchison 'Aquilian liability II (Twentieth century)' in Zimmermann & Visser (eds) op cit note 109 at 619, 629.

¹⁷² Supra note 148.

¹⁷³ *Bayer* supra note 148 at 569H.

¹⁷⁴ Supra note 116.

¹⁷⁵ *Murray* supra note 149 at 136.

just realised that she had no money.¹⁷⁶ The shopkeeper has no action against her for opportunities foregone, argues the learned judge.¹⁷⁷ While this may be true, the analysis of Dean seems (with respect) to be apt when he points out that the example given of an everyday transaction with a customer is different from the negotiations between the parties to a serious commercial contract.¹⁷⁸

Even if both parties are aware of the risks inherent in contractual negotiation because they are serious commercial negotiators, rather than fickle shoe shoppers, perhaps they should not be free to dash legitimate expectations where these have been created by their conduct. While a large retailer may squeeze its suppliers through legitimate hard bargaining and the mere promise of a potential contract induces all kinds of expenditure in an effort to tender for the contract, if negotiations have progressed to a certain point and are then broken off in bad faith by the retailer, perhaps it may indeed be liable to pay damages. Of course each case would have to be assessed on its facts and the conventional manner in which that type of retailer does business, as well as the business acumen of its counterpart in negotiations, will have to be assessed.

Thus it seems that the foundations on which the *Murray* decision is built are completely out of date. Following the recognition of delictual actions for negligent misstatement and misrepresentation, as well as the development of a jurisprudence surrounding good faith (or public policy),¹⁷⁹ it makes sense to extend these actions to cases where no contract results. Boberg's claim that the correctness of this decision 'cannot be doubted'¹⁸⁰ seems, with respect, to have been overtaken by the passage of time. Boberg bases his argument on the notion that 'all's fair' during pre-contractual negotiations and that the other party has no right to rely on such representations. With respect, the rise of consumer protection and the modern view that public policy requires fairness in contracting mean that this statement should no longer be supported. Admittedly this involves a shifting of the risk in contractual relations, and the implementation thereof will have to be closely monitored by the courts, but with a shift in emphasis towards good faith in contracting perhaps it is time that liability in the pre-contractual phase is recognised.

Seen in this light, breaking off negotiations will be wrongful where a legitimate expectation has been induced in one's opposing party due to a prior fraudulent or negligent representation. McFarlane, arguing for reliance to be the basis of pre-contractual liability in the English context, identifies two pre-conditions for this type of liability. These are: first, that sufficient progress has been made in negotiations to say that an 'agreement in principle'

¹⁷⁶ Ibid at 138.

¹⁷⁷ Ibid.

¹⁷⁸ Dean op cit note 149 at 154.

¹⁷⁹ See particularly *Barkhuizen v Napier* supra note 108.

¹⁸⁰ Boberg op cit note 149 at 160.

has been reached and secondly, party B has led party A reasonably to believe that A's reliance will be protected.¹⁸¹

The present type of delictual action would be a novel one, thus requiring an exercise of judicial discretion to determine its wrongfulness.¹⁸² The Supreme Court of Appeal has been explicit that caution is necessary for extending liability for pure economic loss and this will only be done where public or legal policy requires this.¹⁸³ The shift in public policy towards fairness and reasonableness in contracting referred to above is most clearly demonstrated in the Constitutional Court case of *Barkhuizen v Napier*.¹⁸⁴ The best way to extend this duty of good faith into the pre-contractual sphere is to impose delictual liability along the lines set out at the beginning of this paragraph. While an enrichment remedy may exist as set out in part II, the potential scope of such liability is fairly narrow, necessitating a delictual action to recover reliance losses.

IV CONCLUSION

The view that a party may negotiate a contract with impunity, secure in the knowledge that should no binding agreement result, he or she would be free from any liability, is outdated. Hard bargaining may legitimately use threats of breaking off negotiations to force a better agreement — this follows from freedom of contract. It should be possible, however, to reach a point in negotiations when reliance expenditure will have to be compensated should negotiations be broken off in bad faith. Whether or not reliance damages are available will be a question of fact and will necessitate the establishment of a legitimate expectation on the part of the innocent party that a contract would eventuate. Furthermore there must be fault present in conduct of the recalcitrant party in the making of pre-contractual representations. This fault element will be satisfied if fraud can be proved, but should also be available in appropriate circumstances for negligence. When establishing liability based on a negligent representation the legitimacy of the plaintiff's expectations of a

¹⁸¹ McFarlane op cit note 82 at 104. McFarlane suggests that reliance can be protected in English law by reforming promissory estoppel along the lines of US and Australian law. Thus the requirement of an 'agreement in principle' should not be viewed as entailing contractual liability, but rather something less than that, since the 'agreement' would not be supported by consideration. Only with an adjustment of the English rules relating to promissory estoppel could this type of 'agreement' become binding. In South African law consideration is not a requirement for contractual validity, but not every representation would qualify as an 'agreement in principle' and whether or not even an 'agreement in principle' would be binding is open to debate. Hence McFarlane's argument could be interpreted for the South African context (in line with the present author's argument) as requiring that negotiations have reached a sufficient stage that a legitimate expectation could be said to exist on the part of the defendant.

¹⁸² Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90 at 94.

¹⁸³ *Trustees, Tivo Oceans Aquarium* supra note 146 para 12.

¹⁸⁴ *Supra* note 106.

contract will have to be carefully interrogated to avoid an opening of the floodgates of litigation. This would entail an expansion of the recognised grounds on which pure economic loss is actionable, but is a natural progression for our law to make and is supported (at least in concept, if not in precise doctrinal foundation) by leading foreign precedent. The reliance interest should thus be claimable by a disappointed party to contractual negotiations which are ultimately unsuccessful and in South Africa the most appropriate cause of action toward this end is the law of delict.

A separate question from the recoverability of reliance based losses is the issue of reversing enrichment. A plaintiff should definitely have a claim to reverse an unjustified transfer, provided he or she can prove actual enrichment. This will generally be different from the question as to whether services can be compensated outside of a contractual setting. Although English law sometimes awards a quantum meruit in these situations, this should be seen as a solution tailored to the quirks of their own legal system, particularly the absence of a claim in tort for negligently caused pure economic loss. Since it is foreseeable that the South African law of delict could be expanded to allow for a claim for pre-contractual reliance, this presents a more plausible solution to the problem of wasted services.

In sum, liability for breaking off negotiations can exist in South African law. The theoretical development of delictual and enrichment principles has reached the point where a small expansion of the law into a new area is all that is required to establish such an action.