A STUDY OF THE LEGAL ASPECTS OF
ABORTIVE CONTRACT NEGOTIATIONS

by

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I ABSTRACT

The problems which are to be dealt with in this paper have attracted relatively little attention in the literature. One of the reasons for this is undoubtedly the paucity of reported cases in which aggrieved negotiators have sought to recover for expenditures incurred during abortive negotiations. Nevertheless, the question of the rights of negotiating parties is becoming increasingly important in present day conditions, in view of the fact that much of the contracting of businessmen is now preceded by a period of protracted negotiation. The difficulty arises when one of the prospective contractors has incurred substantial expenditure in the course of negotiations; and the other unilaterally decides to resile, refusing to enter into a contract.

As will be seen, there are a variety of reasons why the defendant may no longer wish to contract, and it is possible that these should, to some extent, be determinative of his liability to make recompense to the plaintiff. Not every refusal to conclude an agreement should culminate in a liability to recoup the other party for his expenses. This aspect will be pursued further at a later stage.

For the most part, we will be confining ourselves to a discussion of the question when, if ever, an aggrieved negotiator has recourse against his co-negotiator for these various losses and expenditures. The somewhat similar problem of the case where parties have reached an agreement which makes payment conditional upon the occurrence of a future fact which the defendant prevents from materialising will be considered insofar as relevant to the negotiation cases.¹

¹ See, for example, Luxor (Eastbourne) Ltd and Others v Cooper, [1941] 1 ALL ER 33; Planche v Colburn, (1831) 8 BING 14; Prickett v Badger (1856) 1 CBNS 290; Inchbald v Western Coffee Co (1864) 17 CBNS 733; Trollope (George) and Sons v Martyn Bros, [1934] 2 KB 436; Crooks v Gerard [1951] 4 DLR 473; Black, Gavin and Co v Chalmers (1966) 56 WWR 203.
In both cases the plaintiff seeks to recover what is essentially remuneration for wasted time and expenses, the defendant having put it out of his power to recompense him for those in the mode originally contemplated, viz, under an expected contract in the one case, and on the fulfilment of a stipulated condition in the other.

The picture will become clearer if some illustrations are given. Suppose two parties (say, a building contractor and a developer) enter into negotiations with a view to entering into a contract for the construction of a shopping centre. After initial discussion, it is apparent to each party that he has found the "right man". The contractor is then instructed to carry out geological surveys of the proposed site, is advised that he should also prepare plans of the proposed buildings (which invariably involves the services of an independent architect), is requested to prepare quantities, to submit and resubmit tenders, and so forth. The cost of these various services runs into thousands of dollars, and the contractor devotes many months of his time to the project. He has bypassed the opportunity of entering into other contracts elsewhere. All along, the developer holds himself out as being ready and willing to contract. The contractor is sure the "deal is on", the only apparent question between the parties being when it will be consummated. The contractor's expectations of obtaining the contract are so strong that he may even go to extra expense without being specifically requested by the other party. So clear is the understanding that a contract is just about to be entered into.²

² See, for example, *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; *Brewer v Chrysler Canada Ltd* [1977] 3 WWR 69
After having done this preparatory work for several months, and just when it appeared that a contract was about to be consummated, the developer announces that he no longer wishes to proceed with the proposed transaction, and he lets the project to another contractor or abandons it altogether. He does not even offer a reason for this sudden change of mind. What has happened has had severe financial implications for the contractor. If he is a "small" contractor, it may even have threatened the financial substratum of his entire business. The question now being asked, and which we shall attempt to answer in this paper, is whether the law affords the contractor any protection in such a case.

An illustration of abortive negotiations resulting in considerable loss to a prospective contractor may be given in a different setting. X is approached by Y, who is the managing director of a large company. Y indicates that the board is desirous of having X join the company, and invites X to enter into negotiations with a view to securing that end. A course of protracted negotiations ensues between X and other company representatives with the object of settling the terms of his employment, his role in the management and internal affairs of the company, and so forth. Again there emerges a belief, apparently common to both parties, that X will be joining the company in due course. X sells his existing business at a loss. He also sells his house and moves with his family to the locality where the company's offices are situated, all at the urging or with the knowledge of company officials, and in reliance on the assurances which were given as to him being acceptable to the company. Were it not for the fact that X understood the position in the company to be his, it being, in his view, a matter of "ratification rather
than a matter of selection," he would not have changed his position thus, even if encouraged to by company officials. No contract is in fact concluded, the defendants having changed their minds about engaging the plaintiff.4

Should the law give X a measure of protection in such a situation? On elementary principles of justice the answer must clearly be in the affirmative; a party should not be permitted with impunity to generate expectations in another party, and lead or direct him to act to his detriment when his expectations are thus raised, if the first party should now change his mind and withhold the contract.5 Fortunately, however, as will be seen shortly, many legal systems will, if certain conditions are satisfied, permit the plaintiff to recover his "reliance" expenditures in such a case.

An attempt will be made in the following pages to analyse the English and Canadian pre-contract case law, and a comparison will be drawn with the relevant authority in Scotland and in the United States.

3 This phrase was used by H J MacDonald J in Brewer v Chrysler (supra) at p 76.

4 These facts bear a similarity to those in the American case of Hoffman v Red Owl Stores Inc (1965) 133 NW (2d) 267 (S CT WIS). Hoffman, involving an extended use of the doctrine of promissory estoppel in contract negotiations, will be examined in a later section.

5 "It was contemplated that the plaintiff would go to trouble and expense and in the normal course of events he would be eventually recompensed. There were assurances held out to the plaintiff as to his eventual position, upon which it was intended he would act and in effect upon which he did act." per H J MacDonald J in Brewer v Chrysler (supra) at p 78. This strong expectation of contract enabled the court to give the plaintiff restitutionary relief for expenses and outlays incurred in anticipation of getting a proposed dealership.
TABLE OF CONTENTS

I  Abstract ................................................................. (ii)
II  The Legal Setting .................................................. 1
  1  Restitution and Unjust Enrichment  ................. 1
     (a) The Meaning of Benefit in Restitution .......... 4
     (b) A Brief Comment on the American Position .... 9
     (c) The "Risk-Assumption" Factor in Contract Negotiations .. 12
     (d) Some Specific Case Illustrations ................. 17
     (e) Analysis of the Anglo-Canadian Pre-Contract Authorities:  
         The "Fault-Risk" Hypothesis  ......................... 22
     (f) The Mutual Breakdown of Negotiations .......... 51
     (g) Restitutionary Relief and the Plaintiff Who Refuses To  
         Go On .................................................. 61
     (h) A Brief Comparison with the Legal Position of an Estate-Agent  
         .................................................... 70
     (i) A Final Comment on the Meaning of Benefit .... 78
     (j) Conclusion .................................................. 86

2  Promissory Estoppel and Abortive Contract Negotiations in  
    the United States ............................................. 90
   (a) Background .................................................. 90
   (b) A Functional Analysis of Promissory Estoppel Theory in  
        Abortive Negotiation Situations ...................... 105
   (c) Conclusion .................................................. 112

3  The Implied-In-Fact Contract and Abortive Contract  
    Negotiations .................................................. 113
   (a) The Case Law Examined .................................. 113
   (b) Conclusion .................................................. 125
III Initiating Negotiations Without Serious Intent to Contract 127
   (a) A Look at the Case-Law ...................................... 127
   (b) Conclusion ..................................................... 132
IV The Aggrieved Contract Negotiator in Scots Law ............. 134
   (a) A Look at the Scottish Cases allowing Recovery on the basis of the "fault-risk" formula .............................. 135
   (b) A Look at the Scottish cases basing Recovery on the defender's "Wrongdoing" ........................................... 140
V Summary and Conclusion ........................................... 145
Bibliography ............................................................. 148
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1. THE LEGAL SETTING AND APPLICABLE PRINCIPLES:

1. RESTITUTION AND UNJUST ENRICHMENT

When a breakdown in contract negotiations causes heavy losses to one of the parties to the proposed transaction we have, in essence, a situation in which a party is seeking recompanse for losses and expenditures incurred on the advice or instructions of the other, which expenditures will rarely be conformable with any monetary advantage acquired by that party. Before going on to discuss in detail the applicability of restitutionary remedies to the pre-contract situation, however, it is necessary that we first make some observations concerning general restitutionary theory in present day Anglo-Canadian law. An attempt will then be made to show that the pre-contract cases giving the desired relief fall four square within this general restitutionary framework.

The Deglman case, a 1954 Canadian Supreme Court decision, is now widely accepted to have based Canada's law of restitution upon the doctrine of unjust enrichment. A few months earlier the same

6 It is prima facie "easier" to recover in restitution in a case where it can be shown that the defendant has obtained a financial gain from the abortive negotiations, eg. See Maclver v American Motors (Canada) Ltd, (1976) 63 DLR (3d) 154, affirmed [1976] 5 WWR 217 (Manitoba Court of Appeal). Such cases are uncommon, however, and if aggrieved negotiators are to be adequately protected, then restitutionary recovery must be permitted regardless of such gain. As will be seen, the authorities indicate that the trend is in this direction.

7 Deglman v Guaranty Trust Co of Canada and Constantineau, [1954] 3 DLR 785.

8 For example, see McCamus, "Restitutionary Remedies", Law Society of Upper Canada, Special Lectures, (1975) 255; Angus, "Restitution in Canada since the Deglman case", (1964) 42 Can. B Rev 529; Shelton, "Unjust Enrichment and the Deglman case", 1 Alta L Rev 30 (1955); Schiff, "The Deglman case and Canada's Law of Unjust Enrichment," (1955) 13 U. Toronto Fac L Rev 30
conclusion had been arrived at by the Manitoba Court of Appeal in *Morrison v Canadian Surety Company*.

There are numerous post 1954 Supreme Court decisions which apply *Deglman* and quote with approval Lord Wright's well-known dictum in the *Fibrosa* case that:

"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."

There is certainly no room left in Canada now for application of the implied-in-law contract fiction which dominated thinking in the English law of restitution for such a long time.

As Cartwright J put it in the *Deglman* case.

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9 Viz., that the backbone of the law of restitution was to be found in the doctrine of unjust enrichment.

10 [1954] 4 DLR 736, 12 WWR 57

11 To name but a few, *Shortoaks R M v Mobil Oil Canada Ltd*, [1975] 4 WWR 591 at 604 per Martland J; *County of Carleton v City of Ottawa*, [1966] 52 DLR (2d) 220 per Hall J at 225; *Peter Kiewit Sons Company of Canada Ltd v Eakins Construction Ltd* [1960] SCR 361, 22 DLR (2d) 465 per Cartwright J, as he then was, (dissenting on a different point) at 474.


13 For example, see *Sinclair v Brougham* [1914] AC 398. Traces of the implied-in-law contract theory are still to be found in the decisions of some English Courts, e.g. *Re Diplock* [1947] Ch 716.

14 At pp 794-795, with the concurrence of Estey, Locke and Fauteaux J.J.
"[The plaintiff's] right appears to me to be based, not on contract, but on an obligation imposed by law. [In Scott v Pattison, 1923 2 KB 723] it was held that [the plaintiff] could sue in assumpsit on an implied contract to pay him according to his deserts ...... I do not think it is accurate to say that there was an implied promise. In my view it was correctly decided in Britain v Rossiter, (1879) 11 QBD 123, that where there is an express contract between the parties which turns out to be unenforceable by reason of the Statute of Frauds no other contract between the parties can be implied from the doing of acts in performance of the express contract.

The Supreme Court has never departed from the principle expounded in Deglman of allowing "restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. per Rand J, with the concurrence of Rinfret C J C and Taschereau J, at P 778.

Central to the doctrine of unjust enrichment is the notion of benefit conferred upon the defendant. Thus, the success or failure of a restitutionary claim will depend, inter alia, upon whether a benefit has been conferred in law on the defendant.

15 Where performance is referable to an existing, albeit unenforceable, agreement, finding an implied contract for payment of reasonable remuneration, it is said, would be "to draw an inference contrary to the facts."

16 per Lord Wright in Luxor (Eastbourne) Ltd and others v Cooper, ([1941] 1 ALL ER 33 at 55). The validity of the above proposition, however, depends on the meaning of benefit in restitution.
a) The Meaning of Benefit in Restitution

There have been very few cases before the Canadian Courts in which the question of whether or not the defendant received a benefit has been squarely in issue. Estok v Heguy, however, a decision of the British Columbia Supreme Court, was such a case. The fact that in this case there was an objective increase in the value of the defendant's land, as a result of a load of manure dumped there by the plaintiff, was held to be controlling. A benefit had been conferred, and the defendant's argument that he did not want the manure, and that he had now proceeded to subdivide his land for purposes other than farming, could not displace this finding. There are also indications that it is not essential to show that a defendant has made a financial gain, even in an objective sense, in order to support a finding of benefit.

Thus, in McCarthy Milling Co Ltd v Elder Packing Co Ltd the Ontario High Court found that a benefit had been conferred upon the defendant buyer when the plaintiff seller's goods were found to be no longer eligible for a particular subsidy. The plaintiff had


19 Although the decision in Estok may be wrong in allowing the plaintiff recovery (the defendant had not requested the manure, and did not even know it was being dumped on his land), it can be supported on the issue of "benefit". As will be seen shortly, there is plenty of support to be found in the United States for an expanded definition of benefit.

20 See, for example, Planché v Colburn, Prickett v Badger, William Lacey, all supra.

21 (1973), 33 DLR (3d) 52.
sold substantial quantities of his product to the defendant over an extended period of time. The selling price was computed on the basis that the above subsidy was payable on all the plaintiff's sales, and was therefore lower than it would have been had there been no question of entitlement to subsidy.

The plaintiff successfully argued that, as he would have demanded a higher selling price had he been aware of his non-entitlement to subsidy at the time of entering into business with the defendant buyer, the latter had been unjustly enriched by the amount of the price difference.

There was no evidence before the court showing that the defendant had profited in any way from the misapprehension. It is most likely that the defendant (a manufacturer of pet food) had passed the advantages of the allegedly lower selling price on to consumers and retailers. Osler J, however, was content to hold that:

"the defendant was unjustly enriched by the amount demanded by the Feed Board and paid to it by the plaintiff as repayment of ineligible subsidy received."

Again, in William Lacey (Hounslow) Ltd v Davis,22 a case where no evidence was led to show that the defendant had made a pecuniary gain, Barry J said that the defendant had received "the benefit of all [the plaintiff's] services." The plaintiff's preparation of various plans and estimates in that case, and their submission to the defendant for his opinion on their suitability, constituted a benefit in the hands of the defendant. It was not material that it was not turned to financial advantage.

In the same way, the plaintiff in the case of Planche v Colburn23

22 [1957] 1 WLR 932. Incidentally, this case is vitally important to the pre-contract analysis conducted in this paper.

23 (1831) 8 Bing. 14.
was held entitled to recover on a quantum meruit for his services, "because he ought not to lose the fruit of his labour." The defendant had repudiated an "entire" contract under which the plaintiff obliged himself to write a manuscript. Repudiation occurred before the work was completed. The defendant did not even see the unfinished manuscript, so clearly there could have been no financial gain on his part.

The above cases illustrate that it is not necessary for there to be any financial gain on the defendant's part for a benefit to have been conferred on him in law.

The similar point also arises of whether, in a case where some gain has resulted from the plaintiff's efforts, that gain or the reasonable cost of the services to him is recoverable. An action on a quantum meruit always gives the latter;

"the respondent is entitled to recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent."
These factors make it possible for one to analyse the pre-contract cases in the context of a general restitutionary framework. The case law suggests that a rationalisation along the following lines may be correct. If one requests that another perform services and that other does indeed perform services, then the benefit to the person requesting consists in the actual performance by that other; the benefit presumed to have been conferred is the cost to the plaintiff of these services, and, conceptually, it is this which the law forces the recipient to disgorge, it being immaterial what advantage, if any, the services have been to him in an economic sense, if he should now break off his relationship with the other party.

If we adopt this wider meaning of benefit, then it becomes possible to eliminate any associations which that term has with pecuniary gain, and a rationalisation of the pre-contract and Planche - Prickett type cases can be made in the context of an unjust enrichment theory. The measure of the plaintiff's recovery will be the reasonable cost of the services to him. This figure is presumed to be the benefit

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28 See, for example, cases cited at note (26)

29 It is most interesting to note that this is the approach taken in the American Restatement of Restitution (1937); "A person confers a benefit upon another if he........performs services beneficial to or at the request of the other" (S(1), Comm (b)). The theory is that "the defendant must have attributed "value" to the services if he requested them, even if they resulted in no increment in his estate." Dobbs, The Law of Remedies, (1973) at p 956.

30 cf., Goff and Jones (supra), at chapter 23, which is devoted to "Anticipated Contracts Which Do Not Materialise." However, given the desirability of such a rationalisation in that it opens the way to a conceptual unification of the law of restitution, occasional dissenters are still to be found. Thus, in the most recent Australian case arising from abortive negotiations, Sheppard J., in the New South Wales Supreme Court, said that in the case before him the defendant had obtained no "benefit", and that it therefore was not a case of unjust enrichment. (Sabemo P/L v North Sydney M C, [1972] 2 NSWLR 880)
acquired by the defendant.  

The mere conferment of a benefit is, of course, not per se enough to permit the plaintiff recovery in the situations about to be discussed, and much of this paper will be devoted to a study of these various limitations. The distinction between the question of whether there has been a benefit conferred upon a party, on the one hand, and the question of whether that benefit is recoverable, on the other, must always be kept in mind. Otherwise, any analysis of the issues relevant to recoverability is in danger of becoming clouded.

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31 See, for example, William Lacey (supra); Brewer Street Investments (supra); Brewer v Chrysler Canada Ltd, [1977] 3 WWR 69; Planché v Colburn, (1831) 8 Bing. 14; Prickett v Badger, (1855) 1 CBNS 296; Hill v Kitching, (1846) 3 CB 299; Lockwood v Levick, (1860) 8 CBNS 603; Inchbald v Western Coffee Co., (1864) 17 CBNS 733; cf. Sinclair v Logan, 1961 SLT (Sh Ct) 10 (Scotland).

32 See, for example, Construction Design & Management Ltd v New Brunswick Housing Corp. et al., [1973] 36 DLR (3d) 458; Jennings and Chapman Ltd v Woodman Matthews & Co, [1952] 2 TLR 409; Italian Village Restaurant Ltd v Van Ostrand et al, [1970] 9 DLR (3d) 512; cf. Von Laun & Co v Neilson Reid & Co, (1904) 64 644 (Scotland); Microwave Systems (Scotland) Ltd v Electro-Physiological Instruments Ltd, 1971 SLT (NOTES) 38 (Scotland); Site Preparations Ltd v Secretary of State for Scotland, 1975 SLT (NOTES) 41.
(b) The attenuation of the notion of "benefit" in the American Law of Restitution: A brief comment.

Finally, before going on to discuss the pre-contract cases in detail, it is instructive to compare what has been said in the previous section re the expansive and often attenuated meaning given the notion of benefit in the Anglo-Canadian law of restitution with the parallel American position. Many cases can be found in the American law reports to vouch for the proposition that a "benefit" may be conferred upon a defendant, regardless of whether the plaintiff's performance results in an objective gain to him, or proves to be of any value to him.

In Minsky's Follies of Florida v Sennes, parties entered into an oral, and therefore unenforceable, agreement for the lease of certain premises. The prospective tenant instructed the owner to employ a watchman and obtain a liquor license for the premises. The prospective tenant, relying on the Statute of Frauds, refused to go ahead with the agreement. The landlord successfully raised an action to recover his wasted expenditures. The defendant had never even

35 As, for example, in Estok, (supra): "Any inquiry into the definition of benefit must account for those cases ostensibly decided on quasi-contractual grounds that permit recovery without requiring a finding of gain" - Sullivan, "The Concept of Benefit in the Law of Quasi-Contract," (1975) 64 Georgetown Law Journal, 1 at p 12.
36 206 F. 2d 1, (5th Cir. 1953).
entered upon the premises, and the plaintiff's performance of these various requested acts cannot, therefore, be said to have monetarily benefited him. The court remarked that:

"The lease is unenforceable because of the Statute of Frauds, but that fact does not relieve the defendant of the implied obligation cast upon him by law, independently of the lease, to reimburse the plaintiff for moneys expended at defendant's request [and for his benefit]."

In the same vein is Kearns v Andree, where parties had entered into an oral agreement for the sale of land. The defendant requested the plaintiff-vendor to make certain alterations to the property. These were duly executed. The defendant refused to proceed with the purchase. The plaintiff recovered in restitution for the expenditures incurred in complying with the defendant's requests.

Benefit, for the purposes of the law of restitution, can thus be divorced from the question of financial gain. Thus, services rendered to a defendant upon request can be treated as a legal benefit, whether or not these ultimately prove to be of any personal value to

37 id at p 4
38 Emphasis mine
39 107 Conn. 181, 139 A 695 (1928)
40 Cf, Jeanblanc, (1950) 26 Ind. LJ 1
These, and other numerous American authorities yielding similar results, provide unequivocal support for the view that present day restitutionary theory in the United States favours the adoption of an expansive concept of benefit.

41 Cf. Fuller and Perdue's classic article on contract damages: "The Reliance Interest in Contract Damages," (1936) 46 Yale LJ 52. The writers, noticing that the reliance interest in contract had long been protected in the guise of restitutionary awards, remark that the plaintiff's "recovery is measured not by the defendant's enrichment, but by his own detriment. If the purpose of restitution is indeed ......... to compel the defendant "to return to the plaintiff the value of any performance that he has received," it seems odd that this value should be measured at the point of departure instead of at the point of arrival" (at p 394). As will be seen, this observation is appropriate also to restitutionary awards emerging from abortive contract negotiations.
(c) The "Risk-Assumption" Factor In Contract-Negotiations.

It is clear that not every plaintiff who has incurred expenditure in anticipation of a contract being entered into at some later date should be able to recover these expenses from his co-negotiator if, at the end of the day, no contract is in fact entered into. Much of the time the aggrieved negotiator will be taking one of the "risks of the game", thus standing to lose the expenditure made if the negotiations should fail.

A few practical illustrations might clarify the picture. X, the owner of a television set, approaches an electrical engineer with a view to finding out what is the matter with the set, and how much it would cost to repair the defect. X considers the price quoted to be too high. He takes the television set to another engineer, a competitor of the first one, or just dumps it, thinking it not to be worth repairing. The engineer's wasted time and trouble in this case represents one of the business risks inherent in his trade.

Essentially similar considerations obtain when one takes his car to a garage, contemplating getting repairs done to it. The vehicle owner has a change of mind, the faults located in the car being considered either too trivial or too major to be worth repairing, or because the estimate quoted is thought to be excessive. Again, the garage has taken the risk of what has happened. A wasted afternoon of one of its employees' time is entered as one of the overheads involved in running the business.

42 As will be seen, however, the position would in all likelihood be different if it could be shown that the owner of the vehicle did not "seriously contemplate" getting the repairs done when he took the car to the garage. See page 127 post.
Or one may go to a car dealer to inquire about some rare continental model. You are told that none are in stock in the meantime. The dealer, in anticipation of business, says that he will make a phone call to the manufacturers in Italy, instructing them to send a model to Vancouver as soon as possible. The model arrives in due course, but, owing to the fact that it does not match your idiosyncratic tastes, you decide not to purchase it. Or you decide not to purchase it for "no good reason at all". Recovery for the money and time expended in getting the model to Vancouver would again appear to be excluded on the basis that the dealer "was taking a chance". 43

The archetypal example of pre-contract risk-taking must be the initial negotiating and tendering stages of construction and engineering contracts. There is, for example, no merit in the argument that a builder tendering for certain works, along with several other builders, should be able to recover the costs of preparing his tender from the employer, if he should be one of the unsuccessful bidders. In the nature of things, only one of them could have obtained the eventual contract, and each tenderer is fully aware of this. Saddling the employer with multiple liabilities in such a case would discourage competitive contract negotiation, might foster "unnegotiated" contracts, or weaken the "utility of contract as an instrument of self-government." 44

The builder, in preparing his bid, takes the "risk" of future employment, and of his expenditures going uncompensated.

43 Cf. Saleilles, (1907), 6 Revue Trimestrielle De Droit Civil, 697: "De la responsabilité précontractuelle."

44 This phrase was used by Kessler and Fine, "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study," (1964) 77 Harv. L. Rev. 401 at 412.
He does not expect to be remunerated for the work done, and the employer is aware of this. As Barry J. puts it in the William Lacey case:

"If a builder is invited to tender for certain work, either in competition or otherwise, these is no implication that he will be paid for the work - sometimes the very considerable amount of work - involved in arriving at his price: he undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made as a result of tenders which prove to be successful."

A builder in this situation may, in restitutionary language, be regarded as a "volunteer", not in the sense that the work done by him was unrequested, but in the sense that the risk-factor associated with the work done negates any expectation that payment is to be made if he should be an unsuccessful tenderer.

45 [1957] 1 WLR 932

46 id at p 934. Much the same was said in an early Ontario case: "It would be a startling proposition that a builder, who, at the request of one who contemplates building a house, makes a sketch of the building and an estimate of the cost, with a view to his getting the contract to build it, is entitled, if he does not succeed in getting the contract, to be paid for the work which he had to do in order to submit his sketch and estimate," per Meredith, CJO in Yates v Wright & Co., (1920), 18 OWN 305 at 306.

47 Similarly, with the television engineer and the car dealer instanced above. The protracted course of negotiation, and the confident anticipation of eventual agreement, present in cases like William Lacey (discussed in detail at p 37 et seq., post), is absent. The plaintiffs in those illustrations probably encounter such customers many times a day or week.
However, when all other competitors have been eliminated, and parties begin negotiations on a one-to-one basis, there comes a time when the party doing the work should no longer take the risk of the other arbitrarily breaking off their relationship. Indeed, the available case law does establish that the defendant's freedom of action becomes curtailed when negotiations reach an advanced stage. 48

As was said in a recent Canadian case:

"the services were rendered in the expectation of both parties that the plaintiff would be compensated by being granted a dealership. This did not come about but that fact does not "wipe out" the circumstance that the plaintiff was to be compensated. If it was not to be done by awarding him a contract, it must surely be done otherwise..........." 49

It is difficult to say when, in a particular case, the plaintiff is no longer carrying out the work at his own risk. Much appears to depend upon the strength of the plaintiff's expectation that a contract will eventually be entered into, and that compensation for his efforts will come out of the profits made thereunder. 50

In other words, if it is found that the plaintiff did not have an "unqualified understanding" that the defendant would contract with him, then, and for so long as this is the case, it is more likely that

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48 For example, see, Brewer v Chrysler Canada Ltd [1977] 3 WWR 69 of Site Preparations Ltd v Secretary of State for Scotland 1975 SLT (NOTES) 41 (SCOTLAND). A detailed analysis of the Anglo-Canadian pre-contract authorities is found in section (e).

49 per H J MacDonald J in Brewer (supra) at p 79. See also William Lacev (Hounslow) Ltd v Davis, [1957] 1 WLR 932, and Sabemo P/L v North Sydney M C [1977] 2 NSWLR 880.

50 See, for example, William Lacev (supra): Brewer v Chrysler Canada (supra): Sabemo P/L (supra.)
he was taking the risk of his efforts going uncompensated. An analysis along these lines would distinguish the tender cases, and cases where the work done is merely preliminary of preparatory, from the Brewer v. Chrysler and William Lacey type situation.

51 See, for example, Construction Design and Management Ltd v New Brunswick Housing Corporation et al, [1973] 36 DLR (3d) 458 (NBSC); City of Moncton v Stephen, (1956), 5 DLR (2d) 722 (NBSC); Morton Construction Co Ltd v City of Hamilton, (1962), 31 DLR (2d) 323, [1962] OR 194 (Ont CA).

52 As in Yates v Wright & Co (supra).


54 [1957] 1 WLR 932. A detailed discussion of this and the other important pre-contract authorities comes at p 22 et seq, post.

55 Cf. The Construction Design and Management Ltd case (discussed at p 61 et seq, post) which distinguished William Lacey on this ground.
(d) Some Specific Case Illustrations of the Risk-Factor Defeating Restitutionary Recovery.

Some recent Canadian cases throw some light on the nature of risk-taking in contract negotiations.\textsuperscript{56} Having devoted the previous section to a discussion of this concept, what follows here will tend to be only illustrative of points already made.

Consider the New Brunswick Court of Appeal decision in City of Moncton v Stephen.\textsuperscript{57} A paving contractor had resurfaced certain streets under a contract with the City of Moncton. The new surface on some of the streets began to flake away. The contractor, without specific request by the City, proceeded to repair these streets, thinking that this extra work would ensure that further paving contracts, proposed to be let by the City during the following year, would go to him. When these contracts were awarded to other contractors, Stephen asked to be paid for the repairs carried out by him. The City refused to pay. Stephen's restitutionary claim was unsuccessful.

Stephen had done the repair work voluntarily.\textsuperscript{58} He did it because he thought it would maximise his chances of obtaining contracts proposed to be let by the City at a future date, and the circumstances did not give rise to the inference that it was to be paid for if these


\textsuperscript{57} (1956) 5 DLR (2d) 722 (NBCA).

\textsuperscript{58} There was even evidence before the Court to the effect that the City had told Stephen that it did not want the streets to be repaired. See further, Angus, "Restitution in Canada since the Deglman case", (1964) 42 Can B Rev 529.
contracts should not be awarded to him.\textsuperscript{59} Ritchie J quoted with approval from the American Restatement of The Law of Restitution at Section (57), which deals with "Gifts Made In Anticipation Of Gratuities Or Contracts." That section reads:

"A person who has conferred a benefit upon another, manifesting that he does not expect compensation therefor, is not entitled to restitution merely because his expectation that the other will make a gift to him or enter into a contract with him is not realized."

The "expectation of receiving something later ......... because of the favourable impression created"\textsuperscript{60} by the rendering of services will not, per se, suffice to found restitutionary liability.

The illustration given in the comment to Section (57) of the Restatement may be compared with the situation in the Moncton case:

"A, an insurance broker, effects a fire insurance policy for B and is paid by B for his services. A fire occurs and A performs services in connection with the loss, \textsuperscript{60}

\textsuperscript{59} However, had the City requested Stephen to do the work, the restitutionary claim might well have succeeded. Stephen might then have been able to argue that the request deprived the work of its voluntary character and if it was not to be compensated for by the award of the said proposed contracts, it would have "to be done otherwise, namely, by an award for his services." cf. Morton Construction Company Ltd. v City of Hamilton (1962) 31 DLR (2d) 323 [1962] OR 1\textsuperscript{94}. For seemingly sound criticism of this case, see Angus (supra) at pp 542-545, where the author suggests that the Ontario court may have erred in its reasoning.

\textsuperscript{60} Restatement; section (57), Comm. (a) at p 224.
expecting that B will employ him to obtain the insurance to be written upon the building replacing the one destroyed. B, however, employs another broker for this purpose. A is not entitled to compensation for his services.  

Another way of looking at the Moncton case might be to say that the work done there was not work of a kind which was necessary to put the parties into a position to contract, and is in this sense unlike the ordinary pre-contract case. This being so, there is not the same "unqualified understanding" between the parties that a contract is to be entered into in the future, so that the plaintiff is taken to have "run the risk", both of future employment and of getting no return for his expenditures.

The plaintiff in the Moncton case was therefore like a common tenderer; both act as volunteers.

The case of Italian Village Restaurant Ltd v Van Ostrand et al. provides a further illustration of an aggrieved negotiator being unable to recover his expenditures on the dissolution of negotiations because the objection that he was taking the risk was sustained.

In this case the plaintiff lessee entered into negotiations with the defendant lessors for an extension of the current lease. The current lease still had some time to run. During the negotiations the plaintiff renovated the demised premises which were being used as a restaurant. These improvements left the plaintiff 7,000 dollars out of pocket.

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61 Comm. (b); illustration (2), p 225.
62 Discussed in section (e), post.
The parties were unable to agree on certain of the terms of the proposed lease, and the defendant sold the premises. The Supreme Court of Alberta found that:

"the renovations effected by the plaintiff were not effected as a result of any representations, encouragement or inducement extended to the plaintiff by the defendants, but were effected after the plaintiff had been advised that a sale of the subject premises was contemplated at the risk of the plaintiff."^{64}

In these circumstances, therefore, the plaintiff could have no firm expectation that the extension lease would be granted. It knowingly and rather unwisely "jumped the contractual gun", having full awareness of the contemplated sale. In other words, it commenced the alterations at "its own risk".

The above cases are plainly distinguishable from the line of cases represented by authorities such as *William Lacey* and *Brewer v Chrysler*, which do permit restitutionary recovery for expenses incurred during abortive negotiations. The strong expectation of obtaining the desired contract is absent; the defendant does not hold himself out as being ready and willing to contract, and the negotiations have not acquired the degree of "seriousness" where it can be said that the awarding of the contract to the plaintiff was a "matter of ratification, rather than a matter of selection".

One of the distinctive features of the above cases, however, is that the services rendered by the plaintiff were unrequested by

^{64} id at p 518.
the defendant, the expenditures being incurred on an operation in suo.

In the City of Moncton case the services were rendered not because of the strength of the plaintiff's expectation that particular contracts would be forthcoming, and only on that basis, but merely because he thought that services rendered in the meantime would put him in an advantageous position as regards future contracts the defendant may be letting. It was only when the plaintiff found his belief to be mistaken, some four or five months later, that he asked for payment.

In the Italian Village Restaurant case the court explained that "the renovations effected by the plaintiff resulted from the plaintiff's own profit motive". This presumably means that the reason for the plaintiff's meliorations was that he hoped to add to his gains for the period remaining of the current lease through increased turnover made possible by the building of more spacious premises.

65 The absence of a specific request, of course, is not, and should not be, controlling of the question of restitutionary liability. See generally, Goff and Jones, The Law of Restitution, (2nd ed., 1978), at chapter 1; Birks, "Restitution for Services", (1974) 27 CLP 13.

66 For reasoning along similar lines in other recent Canadian "near-contract" cases, see Maron Properties et al v New Brunswick Liquor Corporation, [1977] 18 NBR (2d) 472, and Hotel Holdings Ltd v Canadian National Railway Co., 4 N & PEIR 458, affirmed 8 N & PEIR 301.

67 As they are in all the cases to be considered in the next following section.

68 Cf. Section (57), Restatement, quoted, ante, at p 18.

69 Cf. discussion in Goff and Jones (supra), chapter 1, especially pp 33-36.
(e) Analysis of the Anglo-Canadian Pre-Contract Authorities;

The "Fault-Risk" Hypothesis:

In the following pages an attempt will be made to show that the not uncommon view that contract negotiators are free to break off negotiations at any time, and for any reason, before the final consummation of agreement, is in need of serious qualification in present day Anglo-Canadian law. If there are cases to be found in the law reports, as indeed there are, allowing disappointed negotiators to recover in restitution for their wasted pre-contract expenditures, then clearly the law does place restrictions upon the conduct of parties during the negotiation process. An examination of these


"It has long been the law [of England] that ...........

each [negotiator] is at liberty, no matter how capricious his reason, to break off the negotiations at any time."

(at p 900)
The accuracy of this statement may be seriously questioned in the light of the authorities. Incidentally, it is most interesting to note that Sheppard J went on to give the plaintiff the desired relief, following contrary English authority.

71 The view that a negotiator incurring expenditures prior to the entering into of a contract is subject to the arbitrary will of the other party may be partly due to an overrigid subscription by many lawyers to the notion that if an attempted contract fails to eventuate then, seeing no contractual remedy is available, nor is any form of relief. (But, cf note (72)). Abortive negotiations are consequently often seen as "remediless".
various restrictions is conducted in the following pages.\textsuperscript{72}

The previous sections have dealt with "risk-taking" as an integral part of the contract negotiation process. A negotiating plaintiff who is taking the risk of the negotiations failing has no recourse against his co-negotiator for his wasted expenditure in the event of the desired contract being withheld. We have said that, in restitutionary phraseology, such a plaintiff is a "volunteer", the services rendered being rendered gratuitously without expectation of compensation.\textsuperscript{73}

The pertinent question at this stage therefore is; when will a negotiator be taken to be no longer acting at his own risk so as to fix the other party with restitutionary liability in the event of his unilateral and unexpected withdrawal from negotiations? Only general criteria can be offered in answer to this question, if only because fact situations never precisely duplicate themselves. Some of these criteria have already received cursory mention.\textsuperscript{74} Included amongst them is the strength of the plaintiff's expectation that a contract will be entered into. Had the negotiations acquired the degree of "seriousness" where it could be said that the awarding of the contract to the plaintiff was considered "a matter of ratification, rather than

\textsuperscript{72} The law of restitution is but one medium through which such restrictions may be imposed. There are indications that an aggrieved negotiator might, in certain limited circumstances (discussed post at p 127'), successfully bring his claim in tort. Again, although relief on the basis of a contractual theory is prima facie excluded in abortive negotiation cases, the finding of an implied-in-fact contract for the payment of reasonable remuneration in the event of the projected contract being withheld may be a possibility, and the plea has on occasion been successful; Western Asphalt Co v Valle, 171 Pi 2d 159 (1946). See p 121 post.

Moreover, in recent years the doctrine of promissory estoppel has been utilized and expanded by American courts to protect the economic interests of aggrieved negotiating parties. See p 90 post.

Thus, contract doctrine and ideas remain at least of limited relevance in the pre-contract arena.

\textsuperscript{73} & \textsuperscript{74}, please see next page.
a matter of selection" is a question usually asked by courts adjudicating claims by plaintiff negotiators.\textsuperscript{75}

An important related issue which the court endeavours to resolve is whether the plaintiff would have carried on rendering the services in question had he suspected that the defendant might abandon the project or otherwise withhold the contract. An affirmative response would seem to defeat the restitutionary claim, for here the defendant's argument that the plaintiff was taking a business risk is very appealing. On the other hand, the sort of answer given by an Australian judge\textsuperscript{76} in a recent New South Wales case (Sabemo Pty Ltd v North Sydney Municipal Council)\textsuperscript{77} goes a long way towards ensuring the success of the plaintiff's claim. There, Sheppard J responded as follows;

"It seems to me to be unthinkable that the plaintiff would have been prepared to do what it did, if it had thought that the defendant might change its mind about proceeding with the proposal."\textsuperscript{78}

Another related factor aiding the resolution of the question of who was taking the risk is whether the amount and type of work done

\textsuperscript{73} See sections (c) and (d), ante.
\textsuperscript{74} See section (c), ante. These will emerge more clearly in the course of the case-analysis conducted in this section.
\textsuperscript{75} Eg Brewer v Chrysler Canada (supra).
\textsuperscript{76} Sheppard J.
\textsuperscript{77} [1977] 2 NSWLR 880.
\textsuperscript{78} id at p 901.
fell outside that which is normally done in order to put the parties in a position to contract. 79

These, then, are the principal issues which courts, confronted with claims by aggrieved negotiators, seek to resolve in arriving at their determination of whether the plaintiff was "taking a chance", and risking losing the expenditures incurred by him in the course of negotiations.

If it is shown that the plaintiff was not a "volunteer" and performing the pre-contractual services "gratuitously", the first hurdle in the way of restitutionary recovery is cleared. The defendant, and not the plaintiff, may now be thought of as taking the risk of the negotiations failing. 80 In a sense, there has been a "passing" of the risk involved in the negotiations as they have progressed from their very early to their latter stages.

It remains to be seen how far, if at all, this change may be attributable to an "implied agreement" 80a by the negotiating parties (inferred from, or manifested by, their conduct and the facts of the particular case) that the defendant should bear the legal consequences

79 This will obviously vary with the nature of the particular contract which is proposed. For a judicial view on what is ordinarily done gratuitously by builders tendering for construction contracts, see Barry J in William Lacey (supra).

80 But not, of course, in every event, and usually only if they go off through his own fault. This point will emerge more clearly in the course of discussion.

of a possible termination, or whether liability in a pre-contract situation is always imposed by law without reference to the intention of parties.

This analysis, although important to a discussion of the potential role which contractual theory (via the implied-in-fact contract device) might play in the pre-contract arena, has been seen to be inessential to our examination of restitutionary theory. It is now generally accepted that liability is imposed in restitution "irrespective of the actual views or intentions of the parties at the time when the work was done or the services rendered." This development is the salutary consequence of widespread judicial recognition, both in England and in Canada, of the fictitious nature of the "implied

81 Viz., a liability to reimburse the plaintiff for his wasted expenditures. It may tentatively be said, however, that this approach finds little support in contemporary jurisprudence. The pitfall in the way of a contractual analysis is the common expectation of contract and the belief that the plaintiff's recompense will come out of the contract profits. This circumstance usually defeats the argument that the parties impliedly agreed that the pre-contract services should be paid for in some other way. On this point, see p 113 et seq, post.


83 See Deglman, (supra) discussed at p 2, et seq, ante. Of Goff and Jones, (supra), at chapter 1.

84 Per Barry J in William Lacey, (supra), at p 936. Cf. Greer L J at p 27, post, and Goff and Jones, (supra), at Chapter 1. Thus, restitutionary relief may be had for services rendered under a supposedly valid contract which turns out to be void for want of authority, notwithstanding the impossibility of implying a contract for payment in such a situation.

85 Eg., see the Deglman case, discussed ante at p 2, et seq, where the Canadian Supreme Court unequivocally rejected as unsound the association of restitutionary claims with "implied contract", and propounded the doctrine of unjust enrichment as the underlying principle of the law of restitution.
contract theory", and its rejection as the basis of restitutionary liability. Thus, in the landmark English case of Craven-Ellis Ltd v Canons, Greer L J, having accepted the argument that no contract could be implied from the facts before the court, went on to say that:

"In my judgment, the obligation to pay reasonable remuneration for work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods."  

The plaintiff in that case recovered upon a quantum meruit for services rendered to the defendant company under a supposed contract which was void because the directors who had caused the company's seal to be affixed to it were not qualified so to act.

We have already seen that in the majority of cases where a defendant breaks off negotiations, he will have made no gain out of the aborted relationship. One might therefore expect that his "conduct" causing the breakdown would be an influential factor in determining his liability to make recompense to the other party. The case law lends itself to such an analysis, and the courts utilize what may be called a "fault" concept as a means of determining whether liability should attach to the defendant.  

Goff and Jones, in their well-known book on restitution, castigate the "concept of implied contract" in the context of the law of restitution as a "meaningless, irrelevant and misleading anachronism." (2nd ed, at p 9).

id at p 412; In the same vein is the following statement by Barry J in William Lacey (supra), one of the most important English pre-contract authorities. His Lordship said that:

"When the beliefs of the parties were falsified, the law implied an obligation - and, in this case, I think the law should imply an obligation - to pay a reasonable price for the services which had been obtained." (at p 939).

Eg. Sabemo Pty Ltd (supra); William Lacey (supra); Brewer v Chrysler Canada (supra).
The overall picture which emerges is something as follows; if it is established that the plaintiff is no longer "taking a chance", and that the defendant now bears the risk of having to make the plaintiff whole if he should take it upon himself to resile from the negotiations, the conditions precedent to restitutionary recovery are satisfied. The event in which the risk is so borne is usually only if there is "fault", the latter being implicit in a unilateral withdrawal for reasons unrelated to the negotiations. The above provides an adequate framework for analysis of the available case law.

In *Jennings and Chapman Ltd v Woodman Matthews & Co.*, the plaintiff builders were lessees of shop premises. The plaintiffs proposed to let part of the premises to the defendant, a solicitor, and, in the course of the negotiations for the sub-lease, proceeded, on his instructions, to alter them into offices. This work was completed, but the plaintiffs were unable to grant the proposed lease, owing to a clause in the lease they held from their landlords which, inter alia, forbade alterations of the type which had been made. The defendant, it should be noted, was at all times willing, and indeed eager, to enter into the proposed lease.

The facts in *Jennings* are thus plainly distinguishable from the facts usually encountered when negotiations go off. Typically,

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90 But not always only if there is fault. There is authority for saying that a defendant may, in certain limited circumstances, be liable to reimburse the plaintiff for his wasted expenditures even in the absence of fault on his part. (eg where negotiations terminate as a result of mutual disagreement); see Denning L J in *Brewer Street Investments* (discussed, post, at p 33 et seq).

91 [1952] 2 TLR 409.
it is the defendant who puts an end to negotiations, not the plaintiff, and in this sense *Jennings* is a reversal of the situation which is our prime concern. However, the observations of the Court of Appeal in this case are invaluable to our purpose, as the concept of "fault" was employed and operated to disallow the plaintiffs recompense. 92

Given those facts, and especially that it was the plaintiffs' landlords who prevented consummation of the lease, it is somewhat surprising that the plaintiffs sought restitutionary recovery for their pre-contract expenditures in the first place. But there apparently was an agreement between the parties that the defendant would pay for the work he had instructed to be done, either on its completion or when he obtained possession, the precise time being uncertain. This agreement, however, was held by the whole court to be inapplicable on it emerging that the plaintiffs were unable to go ahead with the proposed transaction. It was considered to be no more than a step in the negotiations towards the proposed sublease, and was ignored by the Court in arriving at its decision not to give the plaintiff restitutionary relief. Somervell L J remarked that it:

"was an incident in the negotiations for a sublease and had no point unless that sublease was granted." 93

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92 Eg. see Denning L J at pp 414-415

93 at p 413. In the same vein was Denning L J who said that it was: "no use looking at the words of the contract ............ because there are no words here covering the situation which has emerged." (at p 414).
On the notions of "risk" and "fault", Denning L J, as he then was, had this to say. His Lordship asked himself:

"On whom, in all the circumstances of the case, should the risk fall? It seems to me that it should fall on the plaintiffs ....... They knew all the conditions which had to be fulfilled before they could grant a sublease. The solicitor did not know of those conditions until the work was half done ......... The underlease fell through without any fault on the solicitor's part ....... The position might have been different if it had been the solicitor's fault that the negotiations fell through,⁹⁴ as, for instance, if the head landlord was willing to give his consent but the solicitor refused to go on."⁹⁵

However, given that the defendant had given an undertaking as to the cost of the alterations, it may be that if knowledge of the terms under which the plaintiffs held the main lease had been conveyed to the defendant, he would have been taking the risk of the landlord's consent being refused, and "the chance" that it would be forthcoming.⁹⁶

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⁹⁴ The position certainly is different in that situation. See the English Court of Appeal decision in the Brewer Street Investments case (supra), decided some two years after Jennings, and by the same bench of judges.

⁹⁵ at pp 414-415.

⁹⁶ An undertaking of the kind given by the Jennings defendant (although the parties there, at the time of its entering into, did not consider the possibility of negotiations failing, and made no provision for this contingency) would appear to facilitate the imposition of risk on the party giving it, and therefore, the imposition of restitutionary liability. But, as Jennings itself shows, it is by no means conclusive of the issue, and is only one of a number of factors to be taken into account.
The fact that both parties would then have knowledge of the facts relevant to the landlord's consent would seem to preclude a finding of "fault" on the part of either, so long, of course, as both remained eager throughout to go ahead with the proposed transaction. The dispute could be decided on the basis of the inquiry "who was taking the risk of the landlord preventing consummation of the lease?" \(^97\)

If we are to apply the notion of "fault" to the rather special fact situation in Jennings, we must say that "fault" lay with the plaintiffs on the failure of the negotiations, because only they knew of the particular risk inherent in the proposed transaction. \(^98\) As far as the defendant was aware the only inherent risk of the transaction failing lay in a possible refusal by the plaintiffs themselves to carry it through. \(^99\)

\(^97\) Eg. See Denning L J in the Brewer Street Investments case (supra) and cf section (f), post, dealing with the topic of mutual breakdown of negotiations. Quid iuris, when a party has spent much time and money negotiating for a contract, and before it is concluded an unforeseen legislative measure frustrates the venture, or taints it with illegality? No reported case raises the point. Cf pp 51-60 post.

\(^98\) Viz, the necessity of obtaining the landlord's consent. Somervell L J had this to say:

"(at p 413).

\(^99\) It is suggested, however, that the term "fault" should be confined to describing those situations in which it is either the plaintiff or the defendant, almost invariably the latter, who is responsible for the negotiations falling through. It cannot comfortably be applied to cases where neither party wishes to terminate the negotiations.
However, where there is no extraneous risk element involved in the negotiations such as the landlord's consent in Jennings, the question of which party was at "fault" assumes vital importance, and is usually determinative of the issue of restitutionary liability. If the plaintiff is held to be responsible for the failure of the negotiations, he will usually be without a remedy. If the defendant is held to be responsible, this is a strong factor operating in favour of the plaintiff. In a recent case, the New South Wales Supreme Court used the following words to stress this point:

"... where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work 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

100 Or if there is, if it is not it which prevents consummation of the agreement.

101 See, for example, Brewer v Chrysler Canada (supra); Brewer Street Investments (supra); William Lacey (supra); Sabemo P/L (supra).

102 For example, Construction Design (supra). Apart from anything else, it would be hard to see the justice of a rule which would make a defendant, who has obtained no pecuniary advantage from the abortive negotiations, recompense a plaintiff whose fault prevented the deal going through.

103 See cases cited at note (101).

104 Sabemo P/L v North Sydney M C [1977] 2 NSWLR 880.
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." \(^{105}\)

Several cases illustrate more clearly this "fault" limb of restitutionary recovery in contract negotiations. *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* \(^{106}\) is such a case. There, the defendants were prospective tenants of certain premises, and in negotiation with the plaintiffs, who were the owners, as to the terms of the contemplated lease. The plaintiffs, at the defendants' request, began to make certain alterations to the premises and the latter accepted responsibility for their cost. \(^{107}\)

After much of this work had been done, negotiations broke down, the parties being unable to agree on a term concerning the possibility of a future sale of the premises to the defendants. The negotiations had proceeded to such an extent, and with such success, that both parties assumed that the lease would shortly be entered into. Hence, the alterations carried out by the plaintiffs at the defendants' request.

In due course, it emerged that the defendants would not enter into a lease on terms acceptable to the plaintiffs. It had been made clear by the plaintiffs from the very outset that they would only let

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\(^{105}\) id, at pp 902-903 per Sheppard J. *Sabemo*, it should be noted, marks a sharp departure from earlier Australian and New Zealand authority on abortive contract negotiations, and reflects the increasing judicial rejection of former notions closely associating the law of restitution with implied contract.

\(^{106}\) [1954] 1 Q B 428.

\(^{107}\) The undertaking as to the cost of the alterations, though very relevant to the question of which party was taking the risk of the negotiations failing, was not the sole, or the most important, basis of decision. See p 34 post. The Court's reasoning was based upon the concepts of "risk" and "fault".
on the condition that the lease include the term they were pressing, and not the one being urged by the defendants. Until the latter stages of negotiation, both parties probably assumed that the other would concede. But neither did.

The majority of the Court of Appeal held that it was through the prospective tenants' fault that the negotiations went off, because:

"right up to the end they insisted on getting that which they had been told already the plaintiffs were unwilling to give."\(^{108}\)

As regards the undertaking given by the defendants as to the cost of the alterations, several things ought to be said. The plaintiffs could not sue upon it, for they did not complete the work. Nor could they sue for damages for breach of contract, for the defendants were at no point in breach of their undertaking. Only a limited importance, therefore, can be attached to the fact that the defendants had given this undertaking, as it was held to be inapplicable to the situation which had emerged.\(^{109}\) Denning L J, as he then was, rejecting the contractual analysis, was clear on it. His Lordship, referring to the manner in which the plaintiffs had stated their claim,\(^{110}\) remarked that;

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108 per Romer L J at p 438. Somervell L J's comments were to the same effect:

"It is plain that the matter went off because of the defendants' own course of conduct in adhering to the condition that they should get an option when it had been made clear to them that the plaintiffs were not willing to grant an option" at p 434.

109 Cf. the undertaking given by the defendant in Jennings which the Court of Appeal ignored in arriving at its decision not to give the plaintiff recompense.

110 As one for the recovery of money paid on request to the contractors who had done the work.
"[the defendants'] request, if any, was to pay on completion of the work, and it was not completed. In these circumstances, the proper way to formulate the claim is on a request implied in law, or, as I would prefer to put it in these days, on a claim in restitution." 111

Although the other two members 112 of the Court placed more emphasis on the fact that the defendants had given this undertaking, the finding that the negotiations had gone off because of the defendants' fault was central to the decisions reached by the individual judges. 113 Further, the whole Court appeared to hold the view that if it had been the plaintiffs' fault that had brought the negotiations to an end, they would have been without remedy, notwithstanding the undertaking. 114

It is apposite to quote at length here from the judgment of Denning L J. His Lordship asked himself;

"What was the reason for the negotiations breaking down? If it was the landlords' fault, as, for instance, if they refused to go on with the lease for no reason at all, or

111 at p 435-436; His Lordship further refuted any argument that the defendants' liability arose from the undertaking given by saying that;

"The question is: on whom is the loss to fall? The parties themselves did not envisage the situation which has emerged and did not provide for it; and we do not know what they would have provided if they had envisaged it. Only the law can resolve their rights and liabilities in the new situation ......... by asking on whom should the risk fall." at p 436.

112 Somervell L J and Romer L J.

113 Cf. Minsky's Follies of Florida (supra), where the plaintiff recovered when the defendants (prospective tenants) refused to complete an oral agreement for a lease.

114 This, of course, is the rationale underlying the decision in Jennings (supra).
because they demanded a higher rent than that which had been already agreed, then they should not be allowed to recover any part of the cost of the alterations. Even if the landlords derived no benefit from the work, they should not be allowed to recover the cost from the prospective tenants, seeing that it was by their fault that the prospective tenants were deprived of it."

"On the other hand, if it was the prospective tenants' fault that the negotiations broke down, as, for instance, if they sought a lower rent than that which had been agreed upon, then the prospective tenants ought to pay the costs of the alterations up to the time they were stopped."

It was further held by all the members of the court that the defendants had "taken a chance", that it was they, and not the plaintiffs, who had borne the risk of the expenditures incurred if the projected lease should not materialise from a cause other than the landlords fault. Romer L J used the following words;

"Taking the whole of the circumstances, the dates, the

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115 In similar language, Morris L J, the first instance judge, said that the defendants' liability to reimburse the plaintiffs for the cost of the alterations was dependent upon:

"the plaintiffs remaining of the same mind as they had revealed before the promise to pay for items of work was made." quoted in [1954] 1 QB 428, at p 433.

116 at p 436.

117 The undertaking given fortified this conclusion, and is one relevant item of evidence which may go to establish that one or other of the parties was taking the risk, along with such other matters as the strength of the mutual understanding that the contract would eventuate, the amount of work done, and so forth.
urgency of the matter, ....... I have no doubt that in common phraseology they were 'taking the risk' for their own purposes in the hope that they would get the benefit of it if, as they hoped and thought, a lease was finally agreed ......."118

This circumstance, coupled with the defendants' fault in bringing the negotiations to an end, went to make them liable for the expenses to which they had put the landlords. Brewer Street illustrates that the courts, when confronted with negotiation problems, work within a "fault-risk" framework, and that the "requester" in the negotiations may be said to be carrying the "risk" of having to reimburse the party doing the work for his expenditures, if the contract should fail to eventuate.119

Our task here is to explain and clarify this position: at what point does the party doing the work and spending the money no longer do so at his own risk, so that his actings shed their "voluntary" character, the risk having been "transferred" to the other party?

One of the most important English pre-contract authorities is William Lacey (Hounslow) Ltd v Davis.120 It has often been cited in Canadian courts in recent years, although it has never been squarely applied to the pre-contract situation here. It formed the basis of

118 at p 438.
119 Usually only if it is through his fault, though. But, cf Denning L J in Brewer Street (supra) who took the view that neither party was at fault in that case.
120 [1957] 1 WLR 932
122 As did Brewer Street and Jennings, both supra.
of the recent New South Wales Supreme Court decision in Sabemo Pty Ltd v North Sydney Municipal Council. The principle expounded in Lacey may thus be said to have found expression in authoritative court decisions throughout the Commonwealth.

The facts in Lacey were as follows: the defendant owned certain premises which had been damaged during the war and which he proposed to rebuild. The plaintiff builders submitted an estimate for the work. In due course they formed the belief that they would obtain the contract. At the defendant's request the plaintiffs prepared calculations for timber and steel requirements, and prepared an estimate for a notional reconstruction of the premises for negotiating a "permissible amount" with the War Damage Commission. The plaintiffs also submitted a revised estimate in accordance with fresh specifications for which they prepared their own bills of quantities. The plaintiffs later prepared and submitted a new estimate following amendments made to the plans by the defendant, and varied this estimate from time to time as further alterations were proposed by the defendant.

When the defendant later sold the premises without warning, instead of proceeding with the intended reconstruction, the plaintiffs successfully sued for remuneration on a quantum meruit for the work they had done towards the proposed contract.

The ratio in Craven-Ellis v Canons Ltd was held to govern the situation. The two earlier Court of Appeal decisions in Jennings

123 [1977] 2 NSWLR 880

124 The plaintiffs recovered all their expenditures bar the cost of preparing the original tender.

125 [1936] 2 KB 403; see p 27 ante.
and Chapman 126 and Brewer Street Investments 127 do not appear to have been brought to the attention of the court but, on analysis, Lacey was decided on essentially similar principles.

There was the "fault" of the defendant in selling the premises, rather than renovating them as he had made out to the plaintiffs he was going to do. 128 The "risk" of having to reimburse the plaintiffs for the substantial expenditures made lay with the defendant, in the event of the latter unilaterally terminating the negotiations. 129

At least two considerations led Barry J to this conclusion: the amount and the cost of the work which the plaintiffs had done, and the strength of their expectation that they would get the contract generated in them by the defendant's course of conduct. 130

As to the former it was said that;

"the whole of the work covered by the schedule fell right outside the normal work which a builder, by custom or usage, normally performs gratuitously when invited to tender for the erection of a building." 131

126 [1952] 2 TLR 409
127 [1954] 1 QB 428
128 "I find it difficult to think that any injustice will result if building owners, who obtain the benefit of all these services upon the understanding that a contract is to be given, should be required to make some payment for them, if they subsequently decide that the contract should be withheld." per Barry J at p 940. The latter part of this dictum clearly emphasises the "fault" element, consisting in the defendant's frustration of the expectation of payment by means of a confidently anticipated contract.

129 The opposite holding would, of course, be inconsistent with allowing the plaintiff recovery. See Barry J, at p 14, et seq, ante, for the situation in which a plaintiff builder does take the risk.

130 Cf. Sheppard J in the Sabemo P/L case, at p 24 ante.

131 [1957] 1 WLR 932, 935.
And as to the latter, his Lordship, after discussing the ratio in Craven-Ellis v Canons Ltd.\(^{132}\) said that he;

"was unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, and in both cases the party from whom payment was sought requested the work and obtained the benefit of it .......

the proper inference from the facts proved ....... is not that this work was done in the hope that this building might\(^ {133}\) possibly be reconstructed and that the plaintiff company might\(^ {133}\) obtain the contract, but that it was done under a mutual belief and understanding that the building was being reconstructed and that the plaintiff company was obtaining the contract."\(^ {134}\)

It would appear that had the plaintiffs only thought that they might be given the contract, they would have been taken to have been

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\(^{132}\) [1936] 2 KB 403

\(^{133}\) Emphasis mine.

\(^{134}\) [1957] 1 WLR 932, 939. It was further said that: "[the defendant] could hardly expect the builders to go on giving free estimates when a state of reality was at last approached"

(at p 934)
acting at their own risk.\textsuperscript{135}

In the circumstances which arose the \textit{Lacey} defendant was "taking the risk".\textsuperscript{136} It may well have been otherwise had the negotiations gone off because of failure to agree on some essential term of the proposed contract, or if some extraneous factor prevented it being entered into.\textsuperscript{137}

The importance of \textit{Lacey}, and the other cases just considered, lies in the fact that we can think and speak in terms of concepts such as "risk" and "fault" in the context of the law of restitution, the use of these terms facilitating its application to abortive negotiation situations. When the circumstances of a particular case warrant the making of recompense, restitution can be invoked in order to prevent a denial of justice to an aggrieved negotiator.\textsuperscript{138}

\textsuperscript{135} The Appellate Division of the New Brunswick Supreme Court distinguished \textit{Lacey} on this basis in the \textit{Construction Design} case (supra). The court said that in the case before it there was no "unqualified understanding of both parties" that the plaintiff was to be given the contract, as it was aware throughout that approval of the project by a third party was a condition precedent to its getting the contract.

\textsuperscript{136} Cf Sheppard J in \textit{Sabemo P/L} (supra) at p 901;

"I do not think it right to say that the risk should be borne \textsuperscript{139} by the plaintiff, when one party has taken it upon itself to change its mind about the entirety of the proposal."

A mere change of mind about the "entirety of the proposal" would not, of course, be per se enough to support restitutionary recovery. The plaintiff must, in addition, not have been a volunteer. He must establish that the risk inherent in the negotiations has passed from him to the defendant in accordance with the criteria outlined earlier. See pp 23 - 25 ante. For a case in which the plaintiff failed on this point, see \textit{Yates v Wright & Co}, (1920) 18 OWN 305.

\textsuperscript{137} Cf. the observations made by Sheppard J in the \textit{Sabemo P/L} case (supra), quoted at p 56, post, and more generally on the topic of "mutual breakdown", see section (f), post.

\textsuperscript{138} please see next page.
The Canadian Courts have afforded an aggrieved negotiator relief on several occasions in the last few years. The single most important authority is probably Brewer v Chrysler Canada Ltd, a decision of the Alberta Supreme Court. The Brewer plaintiff was approached by one of the defendant's employees to see if he was interested in setting up a new car dealership. He was. Thereafter he obtained the financing necessary for the venture, and applied for the dealership.

With the defendant's encouragement and approval he bought inventory, rented storage space, hired sales staff, and did other things consistent with establishing the proposed dealership. The plaintiff was notified that he had been recommended to the defendant's head office for the position. He was "given to understand that [his appointment as dealer] would follow as a matter of course and that he 'was in business'".

The plaintiff was encouraged by the defendant to do further preparatory work for the anticipated dealership, and the plaintiff, thinking his acceptance to be a "matter of ratification rather than

138 Cf. Goff and Jones (supra) at Chapter 1 and at pp 393-396; and see, for example, Brewer Street Investments (supra); Brewer v Chrysler Canada (supra); MacIver v American Motors (Canada) Ltd. (1976) 70 DLR (3d) 473. Although the court does not explicitly speak in terms of "risk" and "fault" in the latter two cases, the parallel between these and Brewer Street Investments etc, is unmistakable. The same general factors form the basis of the judicial motive which ordered the making of recompense. For an American application of the doctrine of unjust enrichment to abortive contract negotiations, see Hill v Waxberg, 237 F. 2d 936 (9th cir. 1956).

139 [1977] 3 WWR 69.

140 per H J MacDonald J at p 75.
a matter of selection", duly did this work. Soon, the plaintiff had to start using his business capital for living expenses. After being in negotiation for some six months, the defendant refused the plaintiff the dealership. The reason offered was that he could no longer produce the requisite capital. The plaintiff successfully sued on a quantum meruit for the value of his work and expenditures.

There was the "fault" of the defendant, then, in severing its relationship with the plaintiff when he had done this substantial amount of work in the expectation that he would be accepted for the dealership:

"During the months of November, December and January, to use a colloquialism, the plaintiff was "kept on a string". The defendant knew or should have known that the plaintiff had no income and that he would have to live on the capital resources he had at the end of October. The defendant knew the plaintiff was laying out not only his time but also money, which would be to the ultimate advantage of the dealership ....... it must be inferred that [the defendant] did not expect to reap the benefits of the efforts and outlays of the plaintiff without some reasonable compensation. Under the circumstances an award by way of either unjust enrichment or quantum meruit would only be equitable."143

141 at p 76.

142 As some of the capital he intended to invest with the defendant had to go to meet his own and his family's living expenses.

143 per H J MacDonald J at p 78.
Brewer is a somewhat unusual pre-contract case in that the defendant company did in fact reap a clear financial gain from the abortive negotiations. The dealership in question was eventually set up under the management of another party. The staff the plaintiff had recruited were used when the dealership finally got under way.

The importance of this circumstance is that it then becomes much easier to refute an argument that the services were rendered "voluntarily", and to find that they were not gratuitously rendered so that they were to be paid for in some way. Such gain, in other words, seem to aid the "transference" of risk from plaintiff to defendant.\footnote{This may account for the fact that Brewer was decided on a straight application of the ratio in Craven-Ellis (supra), without the necessity of resort to the fault-risk formulation upon which cases like Brewer Street Investments, Sabemo P/L, and William Lacey were decided. (All being cases where the defendant was monetarily enriched). But, cf note (138) supra.}

Given the expanded definition of benefit propounded earlier in this paper, however, the question of whether or not a pecuniary gain has been made by the defendant is not the important question.\footnote{See p 4 - 11 ante.}

Indeed, it cannot be, if present day negotiating parties are to be shielded from the potential "whims" of their co-negotiators.\footnote{Cf. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code", (1968) 54 Va L Rev 195.} The injustice done a plaintiff is not lessened by virtue of the fact that the defendant is not monetarily enriched.\footnote{Eg., had the plaintiff in the Sabemo P/L case (supra) been denied recompense, it would have stood to lose the sum of 426,000 dollars following on a unilateral abandonment by the defendant of a development project which the plaintiff had assiduously worked towards for a period of some three years. Cf. Hoffman v Red Owl Stores, Inc., 133 NW 267 (1965), and Barry J at note (284).} The motive underlying
the ordering of reimbursement in the cases we have considered does not consist so much in a desire to make the defendant disgorge a benefit received at the plaintiff's expense. It is more a desire to make the plaintiff whole. The vehicle most commonly used in Anglo-Canadian law for giving a practical effect to this desire has been the law of restitution. It does not matter that the end is achieved by adoption of an expansive, almost fictional, definition of benefit. Cases which, in effect, prevent the "unjust improvement" of a negotiating plaintiff reconcile with the more familiar unjust enrichment doctrine, so that lip service is paid to legal theory, and liabilities attached when the dictates of justice and fairness demand this course.

In America, more than forty years ago, Fuller and Perdue noticed this expansion in the scope of restitution and remarked that:

"when the benefit received by the defendant has become as attenuated as it is in some of the cases cited, and when this benefit is "measured" by the plaintiff's

148 Cf. Sheppard J in Sabemo P/L (supra) at p 902.


150 Cf. Goff and Jones (supra) at Chapter 24.

151 Some writers have characterised this increase in the scope of restitution as a step in the direction of "indemnification sounding in tort." Note, (1931) 44 Harv. L. Rev. 623, 627.

detrimenl, can it be supposed that a desire to make the defendant disgorge is really a significant part of judicial motivation? When it becomes impossible to believe this, then the courts are actually protecting the reliance interest, in whatever form their intervention may be clothed.153

Although this article is set in a predominantly contractual context, the "attenuation" of benefit notion put forward there is applicable to the law of restitution generally.154 The writers concentrated attention on the recovery of expenses incurred in reliance on existing contracts,155 and in the process exposed the fallacies of traditional contract-damage theory in the light of the case law. Our concern, on the other hand, is centered around the question of recovery of expenditures incurred in reliance on "imminent" contracts. Here, it is seen that restitutionary theory, with its expansive definition of benefit, allows disappointed negotiators to claim for costs and expenditures incurred at the defendant's request in reliance upon the prospect of an anticipated contract materialising.

The courts work on the theory that the defendant has obtained a benefit if he gets the plaintiff to perform pre-contract services for him.157 The consideration that the defendant has not been monetarily benefitted is relegated to a very secondary position as in a question

153 id, at p 394.
154 Cf. Planché v Colburn; William Lacey; Brewer Street Investments; Sabemo P/L; (all supra). See section (a) ante.
155 Albeit often unenforceable for want of formality, certainty, etc.
157 Cf, p 4 et seq., ante.
with the plaintiff's claim. It is the defendant's "hard luck" that, by his own unilateral decision, he has effectively abandoned the opportunity of turning the services given to date to his own profit at some future time.\(^1\)

But the question of financial gain does acquire a degree of importance when one comes to consider whether such benefit is recoverable.\(^2\) It will often become easier to show that the "services were rendered in circumstances which disclose an intention that they should be paid for",\(^3\) regardless of whether a contract is eventually given, if such gain is present.\(^4\) It may be viewed as a catalyst operating in the plaintiff's favour.

Consider the recent Canadian case of \textit{MacIver v American Motors (Canada) Ltd.}\(^5\) The facts of this case are somewhat complex, and particular difficulty is caused by the fact that the plaintiff was a franchise dealer of the defendant. The franchise agreement was nearing

\(^1\) Assuming, of course, that the contract would have turned out to be a gaining proposition for him.

\(^2\) Brewer v Chrysler itself illustrates this; Cf. \textit{MacIver v American Motors (supra)}.

\(^3\) This phrase is from Goff and Jones' book, "The Law of Restitution", (1966) at p 270.

\(^4\) Cf. Peter Lind & Co Ltd v Mersey Docks and Harbour Board, (1972) 2 Lloyd's Rep. 234. In other words, if the defendant has been pecuniarily benefitted, it is more likely that the risk-factor issue in contract-negotiations will be resolved in the plaintiff's favour.

the end of its term, and parties were in negotiation for a renewal of the agreement.

A short time before the negotiations were formally terminated by the defendant, the plaintiff became insolvent. It was not the plaintiff's insolvent condition, however, that brought the negotiations to a head. There was evidence before the court to show that the plaintiff would not, in any event, have been given an extension of the franchise. There was documentary evidence available sufficient to establish an intention on the part of the defendant "to eliminate MacIver from any participation in the new facility", and it would seem that the negotiations had to all intents and purposes broken down some time before the emergence of the plaintiff's insolvency. The latter merely provided the defendant with a timely excuse to do what it was going to do in any event.

As was the case in Brewer v Chrysler Canada Ltd the defendant in MacIver had obtained a clear pecuniary gain from the abortive

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164 The trial judge (Solomon J) makes no reference to the plaintiff's insolvent condition in his description of the events leading up to the dissolution of the negotiations. See (1976) 63 DLR (3d) 154 at p 159. His Lordship appeared to be of the view that the negotiations were at an end in any event, even though the defendant did, as it was contractually entitled to do, send a formal termination notice to the plaintiff specifying that it had brought the present franchise to an end on the basis of his insolvency. No "fault" could, of course, be attributed to the defendant if this had been the sole reason for the breakdown of the relationship. It would then have been truly protecting its own economic interests by getting rid of a financially insecure dealer, and the plaintiff's claim would lose much of its appeal.

165 The plaintiff's precarious financial position was, in part at least, due to the loss of profit resulting from the defendant's delay in making new premises available to him. The defendant did in fact make a promise, which it later ignored, that it would "take care" of these interim losses. This was held to be contractually binding; the plaintiff's restitutionary claims were entirely distinct from this head of claim.

166 [1977] 3 WWR 69.
negotiations, and the court found little difficulty in holding that it had been unjustly enriched. 167

The plaintiff had, inter alia, helped to develop new premises on land belonging to the defendant in confident anticipation of securing an extension of the present franchise agreement 168 and when it failed to materialise he could not, of course, get the benefit of the work he had done. The trial judge (Solomon J) summed up the situation by saying:

"Defendant was left with a viable distribution agency in the new facility patterned on the general basis envisaged in the discussions between plaintiff and defendant, and plaintiff and [plaintiff's company] were left without any business or facility in which they could operate their business" 169

The foregoing suggests that an analysis of abortive negotiation cases in terms of "fault" and "risk" factors is sound. An attempt is made in the pages which follow to state the legal consequences of breakdown resulting from "mutual disagreement", and from the plaintiff's

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167 As the headnote to the case puts it:
"the false sense of security which had been given to the plaintiff by the defendant [as a result of the latter holding itself out as willing to grant the franchise] created a situation where the court found an unjust enrichment had taken place."

168 The proposed new franchise was to be located here, the old premises having now become "obsolete".

169 (1976) 63 DLR (3d) 154 at p 159.
own fault. This will further clarify the "fault-risk" framework within which courts operate when resolving disputes arising out of abortive contract negotiations.
Breakdown of Negotiations Through Mutual Disagreement:

Where negotiations go off, not as the result of a unilateral decision by the defendant not to carry on, but because of a disagreement by the parties on some material term of the projected agreement, the plaintiff's case for recovery of his wasted expenditures becomes less appealing. Without "fault" on the part of the defendant, the "justice" of the plaintiff's claim appears to be less compelling than the defendant's plea that, in the absence of financial gain, he should not be liable to pay compensation.

No authority has been found which affirmatively supports this view, but this is not really surprising, given the paucity of cases appearing in the reports where suit has been brought against defendants who unilaterally terminate negotiations.

In the absence of relevant authority, much of what will be said on the problem of mutual breakdown will remain "speculative", and will be made by analogy with the results reached in fact situations which are only superficially similar.

The analogy with the legal consequences following upon the frustration of a contract might be persuasive. Here, Anglo-Canadian courts generally accept that a plaintiff is entitled to compensation

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170 At least, if the defendant has not reaped a pecuniary benefit from the abortive negotiations.

171 This view is on all fours with the one just espoused that "fault" on the part of the defendant is, at least in the absence of some special circumstance (cf. Denning L J in Brewer Street Investments (supra)), a prerequisite of recovery in pre-contract situations.

172 And most of these appear in the law reports of the last two decades.
only if the defendant has obtained a "financially valuable benefit" from his performance. Several eminent writers have expressed their dissatisfaction with this position in recent years.Indeed, these academic views found favour with the Law Reform Commission of British Columbia when it conducted its study on frustrated contracts legislation some eight years ago. The Commission took the somewhat novel view that:

"Entitlement to restitution should be based on what has been done by the performing party in the fulfilment of his contractual obligations, rather than on benefits received or obtained by the other party."

173 Eg. Parsons Bros., Ltd v Shea, (1965) 53 DLR (2d) 86; Appleby v Myers, (1867), LR 2 CP 651; cf. the English Law Reform (Frustrated Contracts) Act, 1943, which states (section 1(3)) that a "valuable benefit" obtained by reason of the other side's contractual performance is recoverable "as the court considers just, having regard to all the circumstances of the case and, in particular-(Section 1 (3) (b)) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract". The requirement of "valuable benefit" in the English Act is thought to be particularly restrictive of the rights of parties doing work when the frustrating event renders it of no value to the party for whom it was being done. See Chitty on Contracts, 24th ed., p 690-691; Anson's Law of Contract, 24th ed., p 501-502; Goff and Jones, The Law of Restitution (1966) at pp 325-339; and see the Appendix to the second edition of that work. Cf. discussion in the Law Reform Commission of British Columbia Report on the need for Frustrated Contracts Legislation in British Columbia, (1971) at p 24.

174 Eg. Glanville Williams, Law Reform (Frustrated Contracts) Act, 1943 (1944); Goff and Jones, The Law of Restitution (1966), at pp 334-335.

175 Law Reform Commission of British Columbia; Report on The Need for Frustrated Contracts Legislation in British Columbia (Project No 8, 1971), at p 32. This is an excellent report, being a very thorough and comprehensive treatment of the topic of frustration.
The Commission's recommendations are now enacted in the British Columbia Frustrated Contracts Act of 1974, which, inter alia, provides that:

"(3) Where the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution ....... that loss shall be apportioned equally between the party required to make restitution and the party to whom such restitution is required to be made." 177

"(4) In this section, a "benefit" means something done in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit". 178

The general policy issue finding expression in these provisions is that a loss for which neither party to a contract is responsible should be distributed equally between them, and not be made to lie where it falls, or transferred in toto "to the shoulders of the other party who would otherwise not have borne it." 179 In other words, it is thought that the "fairest" or the most "just" formula for adjusting the position of parties upon a frustrating event dictates that both should ordinarily be taken to have equally borne the risk

176 C 37.
177 Section 5(3).
178 Section 5(4). Cf. Section ( a ), ante.
179 per Glanville Williams (supra), p 35. It is added that to shift the whole loss to the other party would "be as objectionable as shifting none" (at p 36).
of this eventuality.  

Of what relevance might legislative measures such as the British Columbia Frustrated Contracts Act be to contract negotiations which go off without "fault" on the part of either negotiator?  

Two solutions might be canvassed, although the choice between them is not easy. The first is simply to argue that where a projected agreement goes off "in the ordinary course of negotiations and misunderstandings," the plaintiff should be left to absorb his wasted expenditures. Similarly, if parties, having been in negotiation for some time, are prevented from entering into their contract by, say, an unforeseen legislative measure. In other words, the plaintiff should be taken to have been acting at his own risk insofar as negotiations break down from a cause other than the defendant's fault.

The alternative argument is by way of analogy with the general policy behind the British Columbia legislation. One might urge that expenditures or losses incurred in the course of negotiations which

180 Goff and Jones are of the view that this formula is "more in accordance with business ethics and commercial expectations" (First edition at p 333).

181 The instant discussion, it should be mentioned, is confined to those situations in which the plaintiff's wasted pre-contract efforts do not result in pecuniary gain to the defendant.

182 per Somervell L J in Brewer Street Investments (supra) at p 434.

183 But, cf Denning L J in the Brewer Street Investments case (supra). His Lordship took the view that neither party was at fault for the breakdown, but held that the defendants were taking the risk of the negotiations failing so that they were liable to reimburse the plaintiffs for the expenses to which they had been put.
go off because of a failure to agree should not be made to lie solely with the party expending the time and money, but should be shared equally by the negotiating parties.

There are, however, some difficulties with the latter approach. In the first place, the analogy with the legal consequences of frustration is only mildly persuasive. Care should always be exercised to avoid putting one's arguments solely on the grounds of analogy with the results arrived at in situations which, although in a sense similar, are quite different. In the contract frustration situation the extent of the respective rights and duties of parties is set by agreement, and the agreement may, without too much difficulty, be regarded "as a joint adventure which has failed without fault". Hence, the appeal of the argument that parties should share the risk of a frustrating event. Furthermore, the relationship of parties who are merely in negotiation for a contract is quite different. Quite apart from the fact that the communings of parties have not yet crystallized into any sort of agreement, it is probably more easily understood in negotiating situations that the risk of losing expenditures should be borne by the party doing the work, in the event of the projected transaction going off because of a failure to agree. The obiter views of Sheppard J in the recent

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184 In much the same way, one often hears judges warn of the dangers of deciding cases "by way of analogy".


186 Especially in view of the characteristic insistence by courts on there being "fault" on the part of the defendant negotiator before holding him liable in restitution. But cf. Denning L J in the Brewer Street Investments case, and the discussion at note (183), supra. It should, however, be pointed out that his Lordship's conclusion that the defendants were taking the risk was in large measure influenced by the undertaking which they had given.
New South Wales case of Sabemo P/L\textsuperscript{187} are deserving of mention in this context. His Lordship said that:

"if the transaction had gone off because the parties were unable to agree, then I think it would be correct \ldots to say that each party had taken a risk, in incurring the expenditure which it did, that the transaction might go off because of a bona fide failure to reach agreement on some point of substance is such a complex transaction."\textsuperscript{188}

Another salient difference between contract frustration and the breakdown of negotiations is that in the former the event making further performance impossible is invariably beyond the control of the parties, and is usually unexpected and unforeseeable, whereas this is not so in the latter case.\textsuperscript{189} There is always the very real possibility that negotiators might find themselves at odds on some material term of a proposed transaction, and it may be argued that the breakdown is not really "beyond the control" of the plaintiff, in the sense that the power to keep the negotiations alive ultimately resides with him. For it is always open to him to shift his ground, and give the defendant the leeway he desires.\textsuperscript{190}

The proper conclusion to draw, therefore, might be that a

\textsuperscript{187} [1977] \textit{2 NSWLR} 880.
\textsuperscript{188} \textit{id}, at p 901.
\textsuperscript{189} But cf. the possibility of incomplete contract negotiations becoming "frustrated". See p \textit{54}, ante.
\textsuperscript{190} The defendant, however, should remain cautious, for if he pushes his demands too strongly, it is possible that he might be taken to be at fault. See p \textit{58}, post.
plaintiff incurring expenditure in the course of contract negotiations should be taken to have run the risk of their failing through mutual disagreement, at least in the absence of his wasted efforts having conferred a pecuniary benefit upon the defendant.

Assuming that the foregoing view is sound, it is plausible to make the inference that, so long as the defendant has made no gain, he is given a degree of leeway which he might use to negotiate an advantageous contract, because a future breakdown, as a result of the plaintiff refusing to accede to his demands, is likely to be labelled a "mutual breakdown" without fault on the part of either. A restitutionary remedy will then not usually be available to the plaintiff.191

On the plaintiff's side, the moral might be that he ought to give in, or at least be highly sensitive and responsive, to the defendant's demands, so that the latter might be thought of as occupying a superior bargaining position. The defendant, however, must also be wary, for without his being conscious of it, his conduct in attempting to secure the most beneficial contract might creep into the "fault" category. If he presses his demands too hard he is at

191 An exception might be where negotiating parties have had the prescience (which is very seldom) to agree on the allocation of pre-contract costs, as in Brewer Street (supra). But the "optimism" of businessmen is reflected even in those rare cases where this course is taken, for no case was found in which parties had contemplated the failure of negotiations, and made conventional provision therefor. cf. Macaulay "Non-Contractual Relations in Business", (1963) 28 AM Soc Rev 55, where some of the reasons for the avoidance of contractual commitments are discussed. The result is that such pre-contractual agreements as are made are held to be inapplicable and only marginally relevant to the resolution of legal disputes arising out of the breakdown of negotiations.
fault, and therefore liable to reimburse the plaintiff for the expenses incurred in reliance on the prospect of the deal coming off. An American writer has expressed the view that this negotiation tactic may be commonplace:

"It may be a common ploy for a party who wishes to break off to introduce a new and highly unreasonable condition into the negotiations, hoping thereby to induce the other to walk away".

Much the same would appear to apply to a defendant who has given an undertaking as to pre-contract expenses, the prima facie effect of which is to allocate the risk of a mutual breakdown to him. The plaintiff in this type of case would similarly be able to exert a degree of pressure on the defendant. But again there is the danger to him that if he presses too hard, his conduct may fall into the "fault" category. As we shall see, the law does not show much sympathy for the "delinquent" plaintiff negotiator.

Does it make a difference to the legal consequences of a mutual breakdown that the defendant has clearly been monetarily


\[193\] Summers (supra) at p 224. This strategy is constructively a unilateral termination, there being little difference between it and a straight withdrawal.

\[194\] This would appear to follow from the decision of Denning L J in Brewer Street (supra). His decision in favour of the plaintiffs in that case, and his conclusion that neither party was at fault for the breakdown, suggests that it is but prudent for the defendant to give some ground. But indications are that plaintiffs in such cases can do little more than hold their original ground; in Brewer Street, the plaintiff's position was made clear to the defendant at the inception of negotiations.

\[195\] See, for example, Construction Design & Management Ltd (supra); Jennings & Chapman (supra).
advantaged? This circumstance would prima facie appear to add to the "justice" of a plaintiff's claim, and to subtract from the "justice" of the defendant's plea that he should not be liable to make recompense in the absence of fault on his part.\(^{196}\) And the analogy with the frustration cases allowing restitution for benefits conferred further adds to the persuasiveness of the plaintiff's claim.\(^{197}\)

Ordering the defendant to make recompense in such a situation would not so much have the effect of saddling him with liability for the plaintiff's losses or expenditures (or a proportion of these)\(^{198}\) but would rather result in his being forced to disgorge a gain emanating from the plaintiff's pre-contract efforts. To ensure that a judicial award would not have the effect of shifting a proportion of the plaintiff's negotiation losses to the defendant\(^{199}\) it would appear sensible to restrict the quantum of recovery to the defendant's actual monetary gain and not allow the plaintiff to recover the full value of his services.\(^{200}\)

Put in restitutionary language, then, the benefit conferred

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196 Cf. the principle of incontrovertible benefit in the law of restitution. See Goff and Jones (supra) at pp 16-17.

197 See note (173), supra. \(\text{Brewer v Chrysler Canada and MacIver v American Motors}\) would seem to show that courts are less insistent on the plaintiff satisfying the "fault-risk" requirement where the defendant has obtained a clear pecuniary benefit from abortive negotiations. See p 81 , post.

198 See discussion on this point at pp 52 - 55 , ante.

199 This accords with our earlier conclusion that the plaintiff ordinarily takes the risk of losing the expenditures to which he has been put if negotiations fail because of mutual disagreement. See p 55 , ante.

200 However, if the defendant's gain exceeds this figure, it is possible that the cost of the services to the plaintiff should operate as a ceiling on the measure of recovery.
on the defendant (consisting in the plaintiff's performance of requested services) should be recoverable to the extent to which it has resulted in monetary gain to him.

201 See pp 4 - 11 , ante.
(g) Restitutionary Relief and The Plaintiff Who Refuses To Go On:

The plaintiff's claim has obviously the least merit in a case where he himself has put an end to the negotiations. Consequently, there is little to be said for a rule which would hold an innocent defendant liable to pay pre-contract expenses to such a plaintiff, at least in the absence of a benefit to him in a financial sense. And even then, the plaintiff's claim is less appealing than in any of the situations heretofore considered.

There is some authority to support this view, and persuasive analogies are easier to come by here than in the preceding section. The case of Construction Design and Management Ltd v New Brunswick Housing Corporation is in point.

The plaintiff builder raised an action for the recovery of a sum of nearly $25,000, being the costs and expenses incurred by it in preparing engineering and design plans for the defendant's contemplated housing project.

The plaintiff's bid, having been the lowest of the seven received, was looked upon favourably. The parties were soon in "serious" negotiation. The defendant (NBHC) hoped to raise the necessary finance from Central Mortgage and Housing Corporation (CMHC).

202 The plaintiff vendee who refuses to go on with an oral contract for the sale of heritage is invariably denied recompense for expenditures incurred by him on the property before his default. Similarly, with the plaintiff vendor who refuses or is unable to complete. The innocent vendee here will not be liable for the vendor's expenditures, even if they have been requested by him. Cf Corbin, Contracts, §1122 et seq. This inability to complete was determinative of the dispute in Jennings and Chapman (supra).

203 (1973) 36 DLR (3d) 458.
The intended financing method was by way of a mortgage loan. CMHC officials were not happy with certain features of the plaintiff's plans and designs. CMHC suggested that those be redesigned and resubmitted. The plaintiff did as it was told. When plans and designs were again submitted, CMHC gave a similar response. Over a period of six or seven months the plaintiff repeatedly revised and resubmitted its plans; they were never approved by CMHC.

The negotiations came to a head when the defendant (NB HC) refused to accept the plaintiff's demand that there be a ten per cent increase in the contract price, which change was necessitated by the delay in the award of the contract and by rising prices.

This demand that the price be increased was held to constitute a withdrawal of the plaintiff's original proposal, and a withdrawal by the plaintiff from the negotiations. Within our analysis, therefore, the plaintiff was clearly at "fault" and consequently unable to obtain restitutionary relief for its wasted expenditures.

Hugher CJNB, delivering the judgment of the court, said that the:

"... expectation [that a contract would be entered into]"

204 This procedure is laid down by statute; see the National Housing Act, 1953-54, (Can), C23, [RSC 1970, CN - 10]. CMHC's approval of the proposal for the construction had to be obtained.

205 The project was let to another contractor some two months later.

206 Another factor going to defeat the plaintiff's claim was the holding by the court (the Appellate Division of the New Brunswick Supreme Court) that there was "no unqualified understanding" between the plaintiff and NBHC that the building contract would be given, the qualification consisting in the awareness of parties that the prior approval of CMHC was essential to the project going ahead. The court, however, may have placed too much weight on this circumstance. Had the plaintiff not firmly thought that the contract would be given to it, it is most unlikely that it would have expended the time and money it did in attempting to finalise it.
was frustrated by the plaintiff's act in withdrawing from the negotiations before the approval of CMHC was obtained. In such circumstances I am unable to see why the law should imply a promise on the part of NBHC to pay for the plaintiff's work as it would be tantamount to giving a person performing work on one understanding to elect to be paid for such work notwithstanding his unwillingness to carry out his part of the understanding. 207

As it stands this dictum is without flaw. It is true that it was the plaintiff who chose to make the final move and put an end to the negotiations. The plaintiff has only itself to blame for the failure of its restitutionary claim. It cannot, in such circumstances, reasonably expect the defendant to pay the costs of services which have resulted in no gain to it. 208

Analysis of the facts in Construction Design, however, is not this simple. It is submitted that it might have been open to the plaintiff to argue that the negotiations did not go off by its "fault", and that the failure of the negotiations was the result of a "mutual breakdown" 209 In their latter stages, there was such dilatoriness on


208 This same general reasoning underlies the English Court of Appeal decision in Jennings and Chapman (supra).

209 Given the "lack of sympathy" shown the plaintiff by the New Brunswick Court, however, it is unlikely that this argument would have got very far before that court. And, even if it did, it is very doubtful whether the plaintiff would have been any better off at the end of the day. See section (f), ante, on mutual breakdown.
the part of NBHC and CMHC in responding to any of the plaintiff's proposals, and such responses as were given were negative in nature, that the plaintiff might well have formed the impression that the project would not be let to it in any event, no matter how hard it persevered. The increased price asked for by the plaintiff was made necessary by this delay: the figure originally quoted was, in the light of the unexpectedly long period of negotiation, too low to make the contemplated project a profitable enterprise.

What the above suggests is that the criteria employed in determining which, if any, of the parties was at "fault" for the failure of the negotiations must contain a degree of flexibility. It is not the party who takes the final and decisive step who is always at fault. The real motive for the withdrawal of the Construction Design plaintiff might have been that, in the circumstances, it saw this to be the most sensible strategy for the protection of its economic interests. In other words, it did not want to involve itself in further expense at a time when it had become clear that it was unlikely to be given the contract anyway. Such a plaintiff should not be taken to be at fault merely because it was he who took the initiative in the end of the day and broke off the parties relationship. Were he not to do it, chances are that the defendant would do it sooner or later.

210 Up until this time, of course, the firm belief of the plaintiff was that it was going to get the contract.

211 The result might have been different, however, had the plaintiff stuck to its original price, and had NBHC and CMHC carried on rejecting its plans ad infinitum without it ever appearing that they would be approved. The defendant should then be taken to be at fault.

212 Cf. MacIver v American Motors (supra).
Again, the defendant who walks away from negotiations at a late stage should not necessarily be taken to be the party at fault. A hypothetical illustration might clarify the point.

Suppose the defendant is a seller of "trendy" clothes. Fashions are well known to change from year to year, and even from season to season. This is in large part due to a varying and changing public demand, which prefers the new and more modern gear to the old. The defendant's practice is to issue a catalogue to all its customers at the end of every six month period. The catalogue illustrates the latest fashions, and gives the price of each garment, and so forth. The officials of the defendant company believe that its high profits are attributable to the invariably timeous issue of its catalogue, and to its undoubted quality.

The plaintiff is a catalogue printer without much experience in the field. However, as his business is located on the same street as the offices of the defendant company, the latter requests that he prepare the prints for the next catalogue. The number of copies of the proposed new catalogue which are needed, and the costs of the production, and so forth, are issues which in the printing trade are generally not agreed upon until all the preliminary work has been done. There is thus no contract for the production of catalogues until a late stage.

Precision in colour, tone, and dimensions is all important to the success of the catalogue. If any of these are in any way defective the officials of the defendant company strongly believe that there will be a sharp decline in profits. With summer coming up, the catalogue must be made available to the public in two months. Time is therefore of "the essence". At his first attempt, the plaintiff
is not quite able to get the colours to match, and the dimensions are somewhat incongruous. He is asked to remedy the defects. At his next attempt, he effects a significant improvement. The defendant is so particular in taste, however, that it suggests further modifications. The plaintiff does as he is instructed. The defendant is happy with his work this time, apart from some dissatisfaction with the standard of colour employed. The two months is now fast running out. The defendant fears that if it leaves the matter in the plaintiff's hands the catalogue will be late in coming out. And it does not want to distribute a catalogue in which the colour is not quite right.

The defendant takes the matter out of the plaintiff's hands, and places it in the hands of an established printer who has a reputation for getting jobs done in extra quick time.

There was no contract between the plaintiff and the defendant for production of the catalogue. All that was done was done as a matter of negotiation. For the purposes of restitutionary recovery the plaintiff had a sufficiently strong expectation of obtaining the contract. His belief was that compensation for the time spent and expenditure incurred by him would come from the contract entered into when the defendant placed a definite order for the catalogue. Almost two months of his time were devoted solely to the defendant's catalogue. Much work had been done, and more than was normal for printers in similar circumstances to do; any argument that he was acting without expectation of compensation, or completely at his own risk, must therefore fail. Ordinarily, therefore, if the defendant arbitrarily

213 See, for example, Pillans & Wilson v Castlecary Fireclay Co Ltd 1931 SLT 532 (Scotland). This case is unequivocal authority for the point. There, the plaintiff printer was held entitled to recover his wasted expenditures on the defendant breaking negotiations off for what was described as a "capricious" reason. It found a printer who would do the work for less cost, and it took the job out of the plaintiff's hands after having involved him in substantial expense.
breaks off negotiations in this situation, it is easy to see the justice of the plaintiff's case, and the case for imposing liability for his negotiation expenditures upon the defendant. 214

However, accepting the necessity of reserving certain measures of self-protection for negotiating defendants, the case for holding the present defendant liable loses much of its appeal. If it genuinely appeared to the defendant that the plaintiff would be unable to eradicate all the defects in the prints in sufficient time, and to produce a catalogue of a quality conformable with that issued to customers in previous years, then it would be harsh on the defendant if it were held at "fault", and therefore liable for the plaintiff's negotiation expenditures.

It was the defendant, no doubt, who took the decisive step and brought the negotiations to an end, but that per se should not be determinative of the issue of fault or liability. If the matter had been left in the hands of the plaintiff, there might have been financially detrimental consequences to the defendant by reason of reduced sales.

To twist the facts a bit, assume that time was not of the essence, and that the defendant was a seller, not of clothes, but of electrical goods for which the public demand does not oscillate, but remains fairly constant from year to year. The reason for the defendant taking the production of the catalogue out of the plaintiff's hands is not fear of the financial consequences to himself by virtue of the possibility of reduced sales, but because he finds a third party whom he believes will do the job at a lower cost. The defendant is

214 Cf, William Lacey, Brewer v Chrysler, and Sabemo P/L, (all supra).
clearly at fault here. The plaintiff should be able to recover his pre-contract expenditures in a restitutory claim. In determining the issue of "fault" in contract negotiations, therefore, we must adopt a wide concept of relevancy. The conduct of both parties from the inception of the negotiations until they failed must be considered, as must all the circumstances surrounding the proposed transaction. Only then can the issue of fault be properly decided.

Present case law, therefore, will deny a plaintiff who is himself at fault for the breakdown of negotiations recovery for his wasted expenditures. His unwillingness to proceed is inconsistent with an expectation on his part that payment is to be made for the services rendered. Although he was not taking the risk of getting no return for what had been done in the event of the defendant unilaterally resiling, and possibly in the event of a mutual breakdown, he was taking the risk of losing the expenditure to which he had been put if it was by his own "fault" that the expected contract was in fact not concluded. He has, by his own act, deprived himself of the opportunity to get recompense for his expenditures out of the

215 Having been put to so much expense, the defendants ought to give the plaintiffs every chance of bringing the catalogue prints up to the required degree of precision.


217 Such as, for example, time being of the essence in the illustration just given.

218 Eg., Construction Design (supra); cf the views of Denning L J in Brewer Street Investments (supra), quoted at p 35 , ante.

219 Cf Jones, (supra), at pp 279 - 280, for the legal position of a purchaser under an unenforceable contract for the sale of land who effects improvements on the vendor's land in anticipation of the contract later being reduced to writing. If the purchaser later changes his mind about the sale his claim for the return of his expenditures in unlikely to get very far. That writer concludes that his "prospects [of success] are indeed bleak."

220 See section (f), ante.
proceeds of the anticipated contract. And, having frustrated this common expectation of contract, the courts will not entertain his claim "to elect to be paid for his work notwithstanding his unwillingness to carry out his part of the understanding."221

Even if the defendant obtains a pecuniary benefit from the abortive negotiations, the chances of the plaintiff's claim having any success still remain very slim.222 No authority has been found which is directly in point, but if the analogy with the case of the purchaser who, under an oral and therefore unenforceable contract for the sale of heritage, improves another's land and then refuses to complete the purchase is sound, the plaintiff's claim will almost certainly fail. Further, the characteristic insistence of the Common Law in denying restitutionary relief to a person in breach of an entire contract points in the same direction.223

221 per Hughes CJNB in Construction Design (supra) at p 465.

222 Certainly slimmer than in the case of breakdown through mutual disagreement.

223 Cf, Goff and Jones (supra), at p 386 et seq, and Jones (supra) at p 278 et seq.
A Brief Comparison with the Legal Position of an Estate Agent whose Principal "Refuses to Complete":

One frequently encounters situations in commercial life where businessmen consensually make payment conditional upon the occurrence of a certain event, say, the sale of company shares by their owner to a purchaser to be located by the efforts of another party. The agreements entered into by estate agents and literary agents with their principals provide us with good examples of this practice. A look at the position of such an agent when his principal refuses to complete may be instructive in our understanding of the risks commonly assumed by commercial men in their dealings with each other. Like the contract negotiator who assiduously works towards a proposed contract, the agent may do much work and as a result of his efforts might find, say, a prospective purchaser for his principal's property. At the last minute, the latter has a change of mind and refuses to sell. Quid iuris?

In view of the House of Lords decision in Luxor (Eastbourne) Ltd v Cooper, it now seems that, as a general rule, if the plaintiff (the agent in the above example) does not earn his remuneration in accordance with the provisions of the agreement between himself and

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224 Eg., Luxor (Eastbourne) Ltd v Cooper, [1941] 1 ALL ER 33; Frickett v Badger, (1856), 1 CBNS 296; Inchbald v Western Coffee Co., (1864), 17 CBNS 733.

225 Assume the agreement makes sale one of the conditions of payment, not the mere location of a purchaser, and that the principal does not contractually bind himself to sell to a purchaser found by the agent.

226 [1941] 1 ALL ER 33.
the defendant (the principal in the above example), he will be entitled to nothing for his efforts if the defendant should have a change of mind.\textsuperscript{227} The plaintiff has assumed this risk, and unless the terms of the agreement limit the defendant's freedom of action, the law will be loath to imply a term which has this effect:

"it may seem hard that an agent who has introduced a potential purchaser, able and willing to complete, should get nothing for what he has done if during the negotiations the principal decides not to complete, according to his own pleasure, and without any reason which, quoad the agent, is a sufficient excuse, but such is the express contract ...."\textsuperscript{228}

The defendant, by his prevention of the stipulated condition, does not put himself in breach of his agreement with the plaintiff. Under the contract he retains to himself the freedom to refuse to deal or negotiate with any willing purchasers found. Such being the case, there is no room left for allowing a quantum meruit to recover the reasonable value of what has been done.\textsuperscript{229}

\textsuperscript{227} Cf Trollope (George) & Sons v Martyn Bros., [1934] 2 KB 436, and Trollope (George) & Sons v Caplan, [1936] 2 KB 382, contra, and overruled by the House of Lords in Luxor (supra).

\textsuperscript{228} per Lord Wright in Luxor (supra), at p 55.

\textsuperscript{229} "the indispensable condition of succeeding either on a claim for damages or on one of quantum meruit is to establish that the defendant has been guilty of a breach of contract," per Freedman J A in Swanson Construction Co v Government of Manitoba, (1963) 40 DLR (2d) 162, at p 166. cf. Peter Kiewit Sons' Company of Canada Ltd v Eskins Construction Ltd [1960] SCR 361, 22 DLR (2d) 465.
The point of distinction between this type of case and the line of cases represented by Prickett v Badger,\textsuperscript{230} and Inchbald v Western Coffee Co\textsuperscript{231} (where the restitutionary claims did succeed), seems to be that in the latter the defendant was in breach of a stipulation in the contract,\textsuperscript{232} which allowed the plaintiff to rescind and bring an action on a quantum meruit.\textsuperscript{233} All that is needed to make the principal's action in refusing to sell an actionable breach of contract is merely astute draftsmanship. For example, if the contract in Luxor\textsuperscript{234} had bound the defendant to sell his property to "any willing purchaser" found by the plaintiff, and the defendant refused to sell, the plaintiff could have treated this as a repudiation, and raised an action to recover for the reasonable value of his services on a quantum meruit.

This is so, notwithstanding the fact that the contract may have prescribed that a condition precedent to remuneration was a sale of the property. The restitutionary claim operates to give the plaintiff just compensation for his wasted efforts, even although the agreement stipulated for payment only in the event of a condition which never materialised.\textsuperscript{235}

The Luxor type case (where the defendant does not contractually restrict himself as to what he can do in the future) is useful to us

\textsuperscript{230} (1856), 1 CBNS 296 (defendant's refusal to sell shares to a willing purchaser found by the plaintiff agent; the defendant, it seems, had bound himself to sell if such a purchaser were located, although commission was stipulated to be payable only on completion of the sale).

\textsuperscript{231} (1864) 17 CBNS 733.

\textsuperscript{232} Cf Lord Wright's speech in Luxor (supra) at pp 58 - 59.

\textsuperscript{233} In other words, the distinction to be drawn is between cases where the defendant's non-performance in preventing the requisite condition arising amounts to a breach of contract (as appears to have been the case in Prickett and Inchbald (supra), for example), and cases where this is not so: eg, Luxor (Eastbourne) (supra). Only in the former does it appear that the plaintiff can obtain relief in restitution. In the latter the plaintiff has agreed to take the risk of the defendant changing his mind.

\textsuperscript{234} [1941] 1 ALL ER 33.

\textsuperscript{235} Eg Prickett (supra). Cf Lord Wright at note (233), supra.
in that it illustrates the risks frequently undertaken by businessmen in their dealings with each other. Substantial work may be done in the hope that it will eventually be remunerated by, say, the defendant effecting a sale of property. The latter may, however, like the prospective car purchaser and the landowner spoken of earlier, frustrate this expectation without being held liable to an accounting for the plaintiff's expenses.

That is the general rule. There are, however, exceptions to it:

"... it is necessary to reserve certain eventualities in which an agent may be entitled to damages where there is a failure to complete even under a contract like the one in this case...... If the negotiations between the vendor and the purchaser have been duly concluded and a binding executory agreement has been achieved, different considerations may arise...... If he refused to complete he would be guilty of a breach of agreement vis-a-vis the purchaser. I think ..... that it ought then to be held that he is also in breach of his contract with the commission agent."237

Thus, it seems that the court may, in such a situation, overlook the expressed intention of the parties and compensate the plaintiff for the work he has done, notwithstanding that the sale has not been

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236 In section (c), ante.

237 Per Lord Wright in Luxor (supra) at pp 55 - 56.
Let us compare the above with a slightly different fact situation. Assume there is an agreement between, say, an architect and an employer (an owner of land) for the doing of preliminary work for a contemplated project. It provides that the employer is not obligated to make any payment for this work unless it can obtain the funds necessary to finance the project. For some reason, the employer does not endeavour to raise the necessary financing, and abandons the project. Can the architect recover for his wasted expenditures? In the United States, at least, it would appear that his prospects of success are quite bright. The Court of Appeals of Kentucky was recently called upon to adjudicate on the above facts in the case of Carroll Fiscal Court v McClure. \(^ {239} \) The architect was held entitled to recover for the costs incurred by him in doing the work. The Court endorsed the view that where it can be shown that:

"the party obligated \[to make the payment\] has prevented the creation of the conditions under which the payment

\(^ {239} \) 455 SW 2d 547 (1970). It is, of course, a very different question whether an Anglo-Canadian court would resolve this dispute in the architect's favour. His chances of success would appear to be very slim, Anglo-Canadian courts being far more hesitant than their American counterparts to impose "good faith duties" upon contracting parties. See generally, Summers, "'Good Faith' in General Contract Law 'and The Sales Provisions of The Uniform Commercial Code", (1968) 74 Va L Rev 195. The architect, like the estate agent who goes in pursuit of a prospective purchaser, would probably be taken to have assumed the risk of this eventuality. (viz. the employer making no attempt to raise the necessary funding).
would be due, without fault on the part of the other party, he is estopped to avail himself of a situation brought about by his own wrong. An obligation of mutual good faith and fair dealing is imposed by law because of the contractual relations of the parties.  

In other words, the American court appears to have recognised the existence of a good faith duty in the performance of contractual obligations. The effect of the decision was to render the stipulated financing condition nugatory for the want of good faith on the part of the defendant in his making no effort to comply with it.

However, it is apparent that only in very limited and exceptional circumstances will courts be prepared to go beyond the strict letter of the agreement entered into by the parties and make an award for wasted expenditures. Practically speaking, persons like estate agents and literary agents do take the risk of a future change of mind by their principals, no matter how "arbitrary or capricious" their reasons might be. Although there are reasonable expectations on both sides, or at least on the plaintiff's side, that the condition upon which payment becomes due will be fulfilled, these expectations

240 455 SW 2d 547 (1970) at p 549.

241 Again, cf. the article by Summers (supra). The McClory decision may be an indicator of the accuracy of that writer's prescience.

242 Cf. Odem Realty Co v Dyer, 45 SW 2d 838 (1932). We have already said that it is very doubtful whether an Anglo-Canadian court would arrive at the same result. See note (240), supra. The case of Moon v Witney Union (1837, 3 Bingham's New Cases, 314), however, might provide a degree of encouragement in the other direction.

243 Cf. Lord Wright's view, quoted at p 71, ante.
are subordinated to the terms of the arrangement which the parties have entered into. Moreover, in the type of business in which such agreements are employed, it is the "common understanding of men" that it is quite proper that this risk be taken by the agent, it being considered an integral part of day-to-day business.

For instance, if fifteen out of twenty of an estate agent's principals allow him to earn his commission every week by selling their property to purchasers located by him, that is a reasonably efficient way of conducting one's business. And when one considers that it is commonplace for vendors to instruct several agents to find a purchaser willing to buy, it becomes ridiculous to urge that the property-owner, if he should now change his mind and sell privately or not sell at all, should recompense all the disappointed agents for the time and trouble to which they went.

The multiple agent situation just instanced is comparable to the case of several builders tendering for a construction job. In both cases, the "voluntary" character of the work done would preclude a restitutionary claim. Both parties have taken what may be called "one of the risks of the game". Neither the tenderer nor the

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244 Only if it denies the defendant the freedom to deal with his property, or whatever, in whichever way he chooses will a quantum meruit recovery go to replace the expectation frustrated by the defendant eg. Prickett (supra).

245 per Denning L J in Fowler v Bratt, [1950] 2 KB 96 at p 104.

246 "Common sense and ordinary business understanding clearly give negative answers" to these questions; per Lord Wright in Luxor (supra) at p 94.

247 Cf Yates v Wright & Co., (1920) 18 OWN 305.
agent have any expectation of compensation, in the event of their being unsuccessful. Nor do the parties they deal with intend to make any payment for what has been done.

The television engineer and the garage mechanic spoken of earlier fall into the same category. The end sought to be attained in their respective trades is the getting of a sufficiently high number of television and car owners to agree to get their repairs done, so that each business will show a profit. Wasted time is merely considered to be one of the overheads involved in running the business.

248 In section (c), ante.
(1) **A Final Comment on the Meaning of Benefit in the Law of Restitution:**

We have already seen that the notion of benefit conferred is central to the unjust enrichment doctrine. The theory is that a defendant is required to disgorge a benefit received by him at the plaintiff’s expense. In determining whether a defendant has been benefitted in a particular case, courts seem to work on the theory that the plaintiff’s requested performance constitutes a legal benefit in the hands of the defendant. It becomes unnecessary to inquire whether the defendant has made a financial gain from the abortive negotiations. The plaintiff may, if the other criteria for recovery are satisfied, recover on a quantum meruit for the reasonable value of his services, regardless of whether his wasted efforts have resulted in gain to the defendant.

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249 Section (a), ante.


251 See section (e), ante. Cf. the expansive definition of benefit contained in section 5(4) of the British Columbia Frustrated Contracts Act, 1974, quoted at p 53 , ante.

252 See generally, Goff and Jones (supra) at Chapters 1 and 24.

253 Cf. the latest edition of Goff and Jones’ work on the law of restitution endorsing (at p 308) the views of an American judge in a well-known case (Kearns v Andree, 139 A 695 (1928), discussed at p 10 , ante.). In that case Maltbie J said that: "The basis of [the court’s] implication is that the services have been requested and have been performed by the plaintiff in the known expectation that he would receive compensation, and neither the extent nor the presence of benefit to the defendant from their performance is of controlling significance" (at p 697). It is difficult, however, to reconcile the giving of restitutionary relief in Kearns (because of the "no benefit" finding by his Lordship) with the tenets of the unjust enrichment doctrine. This is why it has been felt necessary to adopt an expansive definition of benefit in this paper, it being urged that the plaintiff’s requested performance constitutes a benefit to the defendant.
On the other hand, Goff and Jones, in their well-known book on restitution, would appear to take the view that, in the case of unrequested services or goods, the defendant is not benefitted even where it is clear that a monetary gain has been made: 254

"In cases of services rendered or goods supplied, the requirement that the defendant must have received a benefit is particularly restrictive because of the principle ...... that the defendant will not usually be regarded as having been benefited by the receipt of services or goods unless he has accepted them (or, in the case of goods, retained them) with an opportunity of rejection and with actual or presumed knowledge that they were to be paid for." 255

With respect, it is suggested that this dictum tends to confuse the issue of whether a benefit has been conferred with the question of whether the criteria essential for its recovery are satisfied. The better view, it is submitted, is to accept that the "objective" gain to the defendant is a benefit to him, and then to admit that it is irrecoverable because it has, for example, been officiously or voluntarily conferred. 256

254 Cf. the case of Estok v Heguy, [1963] 40 DLR (2d) 88, discussed at p 4, ante.

255 The Law of Restitution, (1966) at p 30. This view is somewhat modified in the second edition of that work. See, at p 15 et seq.

256 However, pre-contract work resulting in gain to a defendant negotiator and for which the plaintiff negotiator seeks restitutionary recovery will very rarely be done without the request of knowledge of the former. It is possible to imagine such a situation though. Eg. a negotiator anticipates his contractual obligations, enters upon the defendant's land, and proceeds to level it. The levelling increases the market value of the defendant's land. The expected building contract is subsequently withheld. A restitutionary claim by the plaintiff for this item of expenditure would probably fail for the want of knowledge on the part of the defendant that it was being incurred. Cf. Goff and Jones (supra), at p 15 and at p 393. The plaintiff was taking a "risk" quaed this item of expenditure, and the concept of "voluntariness" will defeat his claim.
Then it can be agreed that cases like *Estok v Heguy*\(^{257}\) are correctly decided on the issue of benefit, but err in allowing it to be recovered. In the same way, given the correctness of Pollock CB's words in *Taylor v Laird*\(^{258}\) that when "one cleans another's shoes, what can the other do but put them on?",\(^{259}\) it must be inferred that the owner of the shoes has received a benefit. Its value cannot be recovered because it was conferred without the owner's knowledge.

We thus reach the position where a defendant is presumed to have obtained a benefit when, in an objective sense, there has been an increase to his assets, and regardless of whether such benefit was requested,\(^{260}\) and also where he has requested that the plaintiff do something, and the plaintiff does it, regardless of whether a financial gain is made. Then cases such as *Brewer Street Investments* and *William Lacey* may comfortably be viewed as cases preventing unjust enrichment. It was the "hard luck" of the defendant that, by his own "fault", he put an end to the negotiations, and was, at the end of the day, unable to turn that benefit to his financial advantage.\(^{261}\) Allowing the plaintiff to recover does not detract from the benefit principle in restitution.

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\(^{257}\) [1963] 40 DLR (2d) 88.

\(^{258}\) (1856) 25 L J Exch., 329.

\(^{259}\) id at 332.

\(^{260}\) Indeed, acceptance of the notion that a benefit may be conferred in situations where a defendant can not be said to have "freely accepted the plaintiff's services or goods" would appear to be essential to the further development of the so-called principle of incontrovertible benefit in the law of restitution. See generally, Jones, "Restitutionary Claims for Services Rendered", (1977) 93 LQR 273 at p 284 et seq.

\(^{261}\) Cf. McCamus, "Restitutionary Remedies", Law Society of Upper Canada, Special Lectures, 1975, p 255; "Where the benefit was requested it should not be a defence that the defendant has not been able to turn it to account". at note (116).
As in restitutionary actions in other and more familiar contexts we thus have a benefit received and certain circumstances in which it is recoverable: viz, if it can be inferred that the pre-contract services were rendered in the expectation of compensation in the event which has arisen (here, the defendant's unilateral termination of negotiations).

However, although the presence of financial gain may in theory be irrelevant to the operation of the unjust enrichment doctrine, there are indications to be found in some quarters that such gain does facilitate actual recovery by aggrieved negotiators.

The case of MacIver v American Motors, adverted to earlier, may illustrate an increased judicial willingness to make restitutionary awards in cases where financial advantage has resulted from the plaintiff's pre-contractual efforts, even although in both cases there is an equally strong expectation on the part of the plaintiff that his compensation will come out of the profits of the contract which it is hoped will be concluded at some date in the near future.

In the same vein as MacIver is Brewer v Chrysler Canada. Both proceed upon broad statements of principle of the law of restitution.

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262 For example, Barry J, in the William Lacey case, drew an analogy with the action for money had and received.

263 Utilization of the notions of "risk" and "fault" in contract negotiation settings may thus be viewed as a necessary process for determining whether the criteria necessary for restitutionary recovery are satisfied. (In particular, whether or not the pre-contractual services have been "voluntarily" or "gratuitously" rendered).


265 ie. also in the case where no financial gain results.

266 [1977] 3 WWR 69.
applying the ratio in Craven-Ellis v Canons Ltd,\textsuperscript{267} and also quoting with approval Lord Wright's formulation of the doctrine of unjust enrichment in England.\textsuperscript{268} No explicit reference is made to the fact that the plaintiff, and not the defendant, might have been taking the risk of the negotiations going off. Similarly, no explicit mention is made of the defendant being at "fault", although it is abundantly clear that in both cases the defendant was at "fault" within the analysis being made here. It is as if this factor is assumed when a defendant resiles from negotiations having made a profit. The plaintiff's claim is at its most appealing in this situation.

The interjection of Romer L J in arguendo in the Brewer Street Investments case,\textsuperscript{269} and the response of Denning L J is most instructive to the present inquiry. Romer L J posed the following situation:

"Suppose that, whilst parties were in negotiation for a lease, the landlords allowed the prospective tenants to go on the land and spend money on it in anticipation of a lease. If the landlords subsequently broke off negotiations for no reason at all they could not get the benefit of the work without paying for it. Equity would give a remedy".\textsuperscript{270} Denning L J added that:

"Whether equity would do so or not, the common law, nowadays, would give the prospective tenants the right to recover the value of the work done in an action for restitution".\textsuperscript{271}

\textsuperscript{267} [1936] 2 KB 403.
\textsuperscript{268} See p 2, ante.
\textsuperscript{269} [195*] 1 QB 428.
\textsuperscript{270} id at p 431.
\textsuperscript{271} id at p 431.
The increase in the value of the defendant's assets effected by the improvements, coupled with his decision not to proceed "for no reason at all", was considered by their Lordships to be decisive of the question of recovery.

The suggestion that an aggrieved negotiator's claim is more likely to be successful if the defendant has been pecuniarily advantaged may perhaps be rationalized by taking the view that in such circumstances less need is felt to make an inquiry as to "who was taking the risk or as to 'which party was at fault?'" of the negotiations failing?", both of which operate as limiting factors on recovery in restitutionary actions arising out of ordinary abortive negotiations. Alternatively, it might be possible to look at the matter from the point of view that the fault and risk criteria are, at least in the absence of evidence to the contrary, presumed to be satisfied if the defendant pulls out having reaped a gain.

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272 Assume the defendant used the premises as a dwelling house. The plaintiff half converts it into a shop, at which point the defendant resiles. The modified state of the premises is of no practical use to the defendant, and he proceeds to reconvert them to their original state. The like result would probably be reached here, so that the plaintiff's detriment, and not the defendant's gain, is the motivating factor prompting the giving of restitutionary relief. Cf. Goff and Jones (supra) at p 396.

273 Cf. Goff and Jones (supra) at p 396 and note (20) on that page, where it is said that equity may give relief by way of the doctrine of acquiescence in such a situation.

274 There being no monetary advantage to the defendant.

275 Eg. evidence going to establish that the plaintiff had been made aware at the inception of negotiations, and at regular intervals thereafter, that the defendant might eventually decide not to proceed with the contemplated project would be a strong indicator that the plaintiff was taking the risk of the defendant making this decision, notwithstanding that his efforts pecuniarily benefitted the defendant. Cf. Sheppard J at p 24 , ante.
It is at least true to say that both of these requirements are more easily satisfied if there is a financial gain.\footnote{Cf. the suggestion made earlier that there might be a case for arguing that a defendant who has gained a monetary benefit from negotiations which fail because of mutual disagreement should return the amount of that benefit to the plaintiff. See p 59, ante.} It is more readily understood that the plaintiff is taking the risk of the negotiations failing, if, and for so long as, his performance does not monetarily benefit the defendant. And, in the abstract, the conduct of a defendant who has gained such an advantage and then resiles is more reprehensible than the conduct of one who resiles having made no such gain. Thus, the fault requirement also comes to be more easily satisfied.

Although in both instances the defendant is legally benefitted by the mere performance on request, the criteria for recovery are more stringent in operation in cases where he has made no financial gain. Thus the prerequisite that the defendant has been at "fault" in putting an end to the negotiations is usually much more firmly insisted on in such cases.\footnote{Eg., see Sabemo P/L and Brewer Street Investments, both supra.} If the plaintiff fails to establish this fact then he is usually without remedy, no matter how heavy his losses.\footnote{Eg., Construction Design and Jennings and Chapman, both supra.}

The underlying premise would appear to be that, in the abstract, it is prima facie more "just or equitable" to order a defendant to pay for the cost of the plaintiff's services in a case where such cost is more or less commensurate with a monetary gain to him, than it is in a case where there has been no resultant monetary gain.\footnote{Cf. the view of Goff and Jones, who say that: "The combination of unjust impoverishment and unjust gain presents the strongest case for judicial intervention and relief". (The Law of Restitution, 2nd ed., (1978), at p 13).}
Therefore, the law insists on something more than a mere request and performance in such cases, and, on occasion, the need felt to compensate the plaintiff takes precedence over the defendant's plea that he should not be made to pay for services which have not resulted in gain to him.
Summary and Conclusion

It is a not uncommon view that incomplete contract negotiations are insufficient as a basis for legal rights; the assumption is therefore often made that a negotiator can break off negotiations at any time, and for any reason, no matter how "capricious", without incurring a liability to recompense the other party for his wasted expenditures. The cases we have been considering, which in certain circumstances allow aggrieved negotiators to recover for expenditures incurred in reliance upon the prospect of obtaining a contract at a future date, show that legal rights and duties may indeed emanate from abortive contract negotiations, so that it is not universally correct to say that it remains the right of everyone to resile from negotiations before the final exchange of consents. If such were the rule, and parties had an absolute and unfettered power to put an end to negotiations at any time before the final exchange of consents, contract negotiators would have to tolerate gross injustices, being subject to the "arbitrary whim" of the party for whom the work was being done, who could resile from advanced negotiations without exposing himself to any liability for the


281 Academic writing has tended to concentrate on "negotiation wrongs" only when parties' relations have come to be regulated by a contract. (eg. the doctrine of precontractual misrepresentation, the duty to make full disclosure in contracts of insurance, and so forth). The legal aspects of abortive negotiations have received only the most perfunctory recognition in the literature. Civilian writers, however, have been more cognizant: See Saleilles, "De La Responsabilité Précontractuelle", 6 Revue Trimestrielle De Droit Civil 697 (1907).
expenditures to which he has put the other party. The courts, particularly in the last twenty five years or so, have thus deemed it necessary that certain qualifications be introduced to the "freedom of negotiation" principle, so as to avoid or reduce the rigours and hardships attendant on its unmitigated application. Restrictions are placed upon the conduct of contract negotiators, and actions which contravene these restrictions (eg the introduction of an unexpected and highly unreasonable term into negotiations at a late stage) will result in the imposition of restitutionary liability.

The overall effect of the judicial decisions is a placing of minimal standards of "fair-play" upon negotiating parties. A negotiator who breaches them becomes liable to reimburse the plaintiff for his wasted expenditures.

Restitutionary theory achieves this result primarily by the adoption of an expansive definition of benefit, and also by a judicial willingness to clarify and to operate the dual notions of "risk" and "fault" in the contract negotiation process to effect a sound balance between the economic interests of the negotiating plaintiff, and those of the negotiating defendant. The extensive meaning given to the notion of benefit means that lip-service is being paid to the doctrine of unjust enrichment when courts make restitutionary awards

282 See p 57 , ante.

283 In the Brewer v Chrysler Canada case (where negotiations for a car dealership were abandoned by the defendant) the Alberta Supreme Court said that: "..... it must be inferred that [the defendant] did not expect to reap the benefits of the efforts and outlays of the plaintiff without some reasonable compensation" per H J MacDonald J at p 78.
to parties suffering losses when their co-negotiators unilaterally pull out of contract negotiations. The application of the doctrine to the negotiating process appears to be triggered by a judicial desire to avoid the serious hardships occasioned if disappointed plaintiffs were left to absorb substantial expenditures incurred by them during the abortive negotiations.\(^{284}\)

The notion of "risk", and the judicial determination of whether it lies with the plaintiff, or has been "transferred" to the defendant, is a convenient way of ascertaining whether the concept of "voluntariness" defeats the restitutionary claim.\(^{285}\) When we say that a plaintiff is acting at his "own risk" (for instance, a builder lodging his initial tender, or an estate-agent going in pursuit of a prospective purchaser), all we are essentially saying is that the plaintiff does not expect compensation in the event of the other party making a decision to terminate their relationship, or not to sell his property, or whatever.\(^{286}\) The plaintiff was taking a purely business risk. In this situation, the doctrine of "voluntariness" will go to defeat a later restitutionary claim.\(^{287}\)

Similarly, when we say that it is not the plaintiff, but the defendant who is taking the risk, all we are essentially saying is

\(^{284}\) Cf. Barry J in the William Lacey case (supra). His Lordship said that it would "amount to a denial of justice to the plaintiff" if he were not permitted to recover compensation for the work he had done.

\(^{285}\) Thus, enabling the courts to strike a balance between the respective economic interests of negotiating parties. Requiring the plaintiff to satisfy the fault-risk formula ensures that the defendant's economic interests receive adequate protection.

\(^{286}\) Or, it may be more accurate to say that a "reasonable negotiator" placed in the position of the plaintiff would not expect compensation in such an event.

\(^{287}\) Cf. Yates v Wright & Co., (1920) 18 OWN 305.
that services of such a kind, and of such a quantity, have been rendered
that the plaintiff is no longer acting voluntarily, and expects
compensation for what has been done in the form of a later contract. 288
The defendant, throughout the entire negotiation period, evinced a
willingness to enter into a contract at a later date. All along,
therefore, the plaintiff's services were rendered in the confident
anticipation that the contract would eventuate. If he had suspected
that the defendant might withhold it, he would not have expended a
fraction of the amount of money which he now seeks to recover. 289

The plaintiff was prepared to go to trouble and expense in
the meantime, expecting his reimbursement and profit to come from
the proceeds of the "imminent" contract. When the defendant's
private decision frustrates this expectation, the law of restitution
will come to the plaintiff's aid and provide an alternative
medium of recompense. The work was done to meet the defendant's
request and he cannot now deny his liability to pay for it.

288 Had the contract been successfully concluded, payment for the
pre-contract work would have come out of the profits made
thereunder.

289 Cf. Sheppard J at p 24 , ante. The inference of gratuity is
weakened as more and more work is done, and as confidence
increases in the prospect of final agreement being reached.
THE RECENT APPLICATION OF THE DOCTRINE OF PROMISSORY ESTOPPEL
TO ABORTIVE CONTRACT NEGOTIATIONS IN THE UNITED STATES.

(a) Background and Discussion of the Case Law:

Many commentators have noted the expansive application given the doctrine of promissory estoppel in American courts in recent decades. The doctrine, embodied in Section 90 of the Restatement of Contracts, has been applied to new and varying fact situations in order to give a measure of protection to parties who have detrimentally relied upon "promises", unenforceable under traditional contract rules because unsupported by consideration. For instance, the literature and the case law of thirty years ago laid down that the theory of promissory estoppel had application only to donative or gratuitous promises (i.e., promises of gifts). Nowadays, "the usual setting out of which a Section 90 promise emerges ..... is commercial, not benevolent". Two cases illustrating the change


291 Restatement Of Contracts, Section 90, (1932); Restatement (Second) of Contracts, Section 90, (1965). See p 94 , post.

292 No attempt will be made here to analyse these recent developments in any detail. A thorough treatment of the present American position may be found in Henderson and Sutton, both supra. Our attention will be more or less confined to the role of the doctrine in abortive contract negotiation situations.


294 Henderson, (supra), at p 344.
might briefly be contrasted here.

In 1933, the Federal Circuit Court of Appeals, in the case of *James Baird Co v Gimbel*, held that the doctrine of promissory estoppel did not apply to the situation of a tender submitted on the faith of a supplier's bid which was later revoked, as it was applicable only to donative promises. The plaintiff contractor, relying on the defendant sub-contractor's offer to supply linoleum at a certain fixed price, tendered for a public construction job. He obtained the contract. The defendant withdrew his offer when he discovered that an error had been made in arriving at the price (which was far below what it should have been). The plaintiff was left without remedy.

Later courts expressed their disapproval of the restrictions imposed by the *Baird* decision, concluding that the doctrine did indeed have application to "promises" in commercial settings (eg. offers for bilateral contracts such as the sub-contractor's bid in the construction industry). The culmination of this retreat from

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295 (1933) 64 F (2d) 344, (Cir Ct App).


297 Eg. Northwestern Engineering Co v Ellerman, (1943) 10 NW (2d) 879; Robert Gordon Inc v Ingersoll-Rand Co., (1941) 117 F (2d) 654. The Ellerman court said that: "it would [be] unjust and unfair, after appellant was declared the successful bidder and imposed with all the obligations of such, to allow respondents to then retract their promise and permit the effect of such retraction to fall upon the appellant". (10 NW (2d) 879 at p 883). Cf N Litterio and Co v Glassman Construction Co., (1963) 319 F (2d) 736; *Chrysler Corp v Quimby* (1958) 51 Del 264, 144 A (2d) 123.
Baird is represented by Drennan v Star Paving Co., a decision of the Supreme Court of California. On facts very similar to those in the Baird case, it was held that a contractor's reliance upon a paving sub-contractor's bid had the effect of making the bid "irrevocable until the offeree has had a reasonable opportunity to accept". The court found in the offer an "implied subsidiary promise" not to revoke, based upon the promisee's "foreseeable prejudicial change of position" in reliance upon the offer.

What is of particular importance to the present study, however, is the recent extension of the benefits of the doctrine to contract negotiators who have relied to their detriment upon assurances of eventual bargain held out by their co-negotiators. The case of Hoffman v Red Owl Stores Inc., a decision of the Supreme Court of Wisconsin, is probably the single most important authority.


299 (1958), 333 P (2d) 757 at p 760.

300 (1958), 333 P (2d) 757 at p 760.

301 (1965), 133 N W (2d) 267, (8 Ct. Wis).
There, Hoffman, the plaintiff, who owned and operated a bakery in Wautoma, Wisconsin, was in negotiation with the defendant, hoping to obtain a franchise for one of its supermarkets. During the negotiations, which extended over a period of some two years, an agent of the defendant told the plaintiff that an outlay of approximately 18,000 dollars would be sufficient for this purpose. At an early stage in the negotiations, the plaintiff had become confident that the "deal was on", and that his establishment as a franchisee of the defendant was but a matter of time. This optimism was in part generated by assurances of eventual bargain made by the agents of the latter at various stages of the negotiations. 302

Hoffman's expectations thus raised, he sold his existing bakery at a loss and bought a small grocery store to gain experience in food store management. In addition, he secured an option to purchase land for the proposed supermarket, and rented a home close to the proposed site. The plaintiff having changed his position thus, the defendant subsequently insisted that the investment required for the proposed franchise would be 34,000 dollars. This figure was almost double that suggested by the defendant at the inception of negotiations. The plaintiff, not being able to afford this increased sum, resiled from the negotiations. He subsequently raised an action, founded on the theory of promissory estoppel, for the recovery of the losses and expenditures incurred by him in reliance on the defendant's conduct in holding itself out as being willing to take him as franchisee for a capital contribution of 18,000 dollars, and

302 Eg., the defendant told the plaintiff that he "would have to sell [his] bakery business and bakery building, and that [his] retaining this property was the only 'hitch' in the entire plan".
on the assurances given to the effect that "there would be no problems in establishing him" in the desired business. The plaintiff was successful, the Supreme Court of Wisconsin affirming the trial court judgment ordering the defendant to recompense him for his wasted losses and expenditures. The court held the doctrine of promissory estoppel as promulgated in Section 90 of the Restatement of Contracts to be applicable to the parties' relationship. That section provides that:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise". 303

The above Section 90 has now been modified by the provisions of the Second Restatement of Contracts. 304 The new Section 90 provides that:

"A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires". 305

303 Restatement of Contracts, Section 90, (1932).
304 Restatement (Second) of Contracts, Section 90, (1965).
305 Emphasis mine. This "remedy limitation" is important, as it allows the courts added flexibility in their application of the doctrine of promissory estoppel. On this point, see K C T Sutton, Consideration Reconsidered, (1974), at p 167 et seq; Discussion in (1966) 65 Mich L Rev. 351; and see p 100, et seq., post.
The American application of the doctrine of promissory estoppel to the contract negotiation process is to be welcomed. In view of the endorsement of the ratio in Hoffman by subsequent American courts, it now seems that a party making assurances of eventual bargain in the United States will be liable to recompense his co-negotiator for losses and expenditures incurred on the faith of the contemplated agreement being entered into, if he should in the meantime change his mind and back out of advanced negotiations. Once the requirements of Section 90 are satisfied (viz.; (1) a promise which the promisor would reasonably expect to induce action or forbearance on the part of the promisee; (2) action by the promisee in reliance on the promise; (3) the causing of injustice if the promise were not enforced), promissory estoppel becomes applicable to the contract negotiation process.

Notwithstanding the undoubted latitude which Section 90 gives to American courts in their application of the promissory estoppel theory, the Hoffman result does represent a somewhat unusual use of the doctrine, and evinces an increased judicial preparedness to extend its application to new factual settings. Like the construction bidding cases, adverted to earlier, Hoffman marks a departure from

306 The ratio in Hoffman was unanimously approved by the United States Circuit Court of Appeals in Janke Construction Company Inc., v Vulcan Materials Company, (1976), 527 F (2d) 772, 777, (a construction bidding case). See also cases reported in 386 F S 690, (at p 692 - 698), and 242 N W (2d) 180 (at p 183). Cf. Chrysler Corp. v Quimby, (1958) 51 Del 264, 144 A (2d) 123.

307 Cf., p 105, et seq, post.

308 Cf., the very narrow formulation of the doctrine in Anglo-Canadian law. See, eg., Anson and Chitty at note (290), supra.


310 See p 91, et seq, ante.
the "traditional" American use of promissory estoppel as a "substitute for consideration" where a promisee has relied to his detriment on a gratuitous promise. The courts would enforce gratuitous promises on which a plaintiff had detrimentally relied, the estoppel plea going to prevent the interposition of the defence of lack of consideration.

However, unlike the construction bidding cases, the "operative promise" in the Hoffman case did not constitute an offer by the defendant which would have contractually bound him on acceptance by the plaintiff. The negotiations had not been conducted in sufficient detail for the defendant's proposal to be effective as an offer, the communings between the parties not having gone beyond the "pure negotiation" stage at the date of the breakdown of their relationship. In response to the defendant's plea that this circumstance was fatal to the application of the promissory estoppel doctrine, the Wisconsin Supreme Court said that the question of

311 Per Cardozo J in Allegheny College v National Chautauqua County Bank, 246 N Y 369, 373, 159 N E 173, 175 (1927). Cf the 1936 edition of Williston, where it is said that: "Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract." (Williston, Contracts, (1st ed.), p 307, sec 139).

312 The application of the doctrine to the formative stages of commercial bargains has, however, long been urged by eminent writers. For instance, in 1938 Dean Boyer wrote that: "So long as it is applied only when the fact situation fits a preconceived pattern, such as a gratuitous promise to give land..... its possibilities will not be completely utilized. The restraint of compartmentalization must be overcome if the courts are to recognize that the doctrine of promissory estoppel is one of universal application". (Boyer, "Promissory Estoppel: Principle From Precedents: I", (1952) 50 Mich L Rev 659, 674).


314 But cf Burridge v Ace Storm Window Co., 69 Pa D & C 184, (C P 1949); Chrysler Corp v Quimby, 51 Del 264, 144 A (2d) 123, (1958); Goodman v Bicker, 169 F (2d) 684, (D C Cir 1948); Morris v Ballard, 16 F (2d) 173, (D C Cir 1926).
"whether the promise necessary to sustain a cause of action for promissory estoppel must embrace all essential details of a proposed transaction between promisor and promisee so as to be the equivalent of an offer that would result in a binding contract between the parties if the promisee were to accept the same" must be answered in the negative. An affirmative answer would, of course, have deprived the plaintiff of any remedy.

If the doctrine of promissory estoppel is to be developed by modern courts into a mechanism aiding the imposition of a degree of "fairness" upon the conduct of contract negotiators, and preventing abuses of the power to terminate negotiations before the final exchange of consents, the stance taken by the court in Hoffman was, in the nature of things, necessary. In modern society commercial transactions are so intricately complex that it will not usually be possible to extract a "promise" which qualifies as a "fully effective offer" from the mass of communings exchanged between the parties until a very late stage of the negotiations. Negotiations have to be conducted in vast detail before a clear picture emerges of the respective rights and duties of parties under a proposed transaction. This circumstance should not insulate a party making

316 But cf. discussion at p 106 , et seq., post.
317 Along with restitutionary theory.
318 Viz., its preparedness to invoke the doctrine in situations where the defendant's promises have not "achieved the level of an operative offer"; Henderson, (supra), at p 359.
assurances of eventual bargain from liability to recompense the other party for the expenditures which he induced him to incur, if he should go back on his word. Hence, the rejection by the Wisconsin Court of the argument that the "promise" founding the cause of action had to be sufficiently definite to constitute an effective offer. Its acceptance would have resulted in the practical exclusion of the promissory estoppel doctrine from the negotiating process.  

The promise upon which the court founded was of a much more general nature, and consisted in the assurances given by the defendant that it was prepared to grant a franchise on terms derogating not too markedly from its original statement that a capital contribution of approximately 18,000 dollars would be a sufficient outlay for the projected venture. It was the expectation of eventual agreement generated by these optimistic assurances, subsequently frustrated by the defendant's heightened capital demands, which was the decisive factor in the plaintiff's favour. Had it not been for the series of assurances held out to the plaintiff by the defendant's representatives, the plaintiff would not have acted to his detriment by substantially changing his position in anticipation of the proposed franchise eventually being concluded. It was these assurances, and not an offer of a franchise on any definite terms, which constituted the operative "promise" and provided the condition precedent for relief in the Hoffman case. One eminent writer on the law of contract has said that:

319 "By freeing the promise which triggers application of [Section 90] from the context of offer-acceptance rules, Hoffman does away with the bridge commonly used to link promissory estoppel with orthodox consideration doctrine." (Henderson, (supra), at p 359).

320 please see next page.
"the court in Red Owl uses "promise" in a very loose sense to mean simply optimistic statements respecting the probability of agreement ultimately being reached". 321

Hoffman, and subsequent American authorities endorsing the principle therein enunciated, 322 indicate that American law has begun the process of utilizing the promissory estoppel doctrine embodied in Section 90 of the Restatement of Contracts 323 to enable it to deal more effectively with the complexities inherent in the negotiation of contracts in modern society, and in particular to accord a measure of protection to the economic interests of a party incurring expenditure on the faith of promises of ultimate agreement which are later broken. This is in part being achieved by a judicial preparedness to accept, as a sufficient basis for a promissory estoppel action, words and conduct of the party putting an end to negotiations that fall short of "fully effective offers", 324 and differ from the kind of promise more ordinarily encountered 325 when a plaintiff successfully invokes the doctrine of promissory estoppel. 326

320 The result might have been different, therefore, had the defendant insisted on a capital contribution of only, say, 19,000 or 20,000 dollars. Had the plaintiff then resiled from the negotiations, the court might have been persuaded to hold that the defendant had not, in fact, broken its promise, thus denying the plaintiff recovery. On the actual facts, however, the court could only hold that the defendant had repudiated its promise and just wanted to terminate its relationship with the plaintiff.


322 See cases cited at note (306), supra. Cf Drennan v Star Paving Co., (1958) 333 P (2d) 757, and see also cases cited at note (298), supra.

323 Quoted, ante, at p 94, et seq.

324 Eg. as in Drennan v Star Paving Co., (supra).


Tied up with the application of promissory estoppel to negotiating situations is a felt need to restrict the measure of the plaintiff's recovery to the extent of his reliance upon the prospect of the expected contract materialising. Indeed, were it not for recognition of the fact that, in certain circumstances, the damages awarded for breach of promises enforced on the theory of promissory estoppel should be limited to the plaintiff's reliance losses, the Hoffman court would have been understandably hesitant to enforce Red Owl's promise.

Consider the effects of adherence to a "full contract damages" policy in Hoffman type situations. Assume for the sake of argument that the plaintiff was able to establish that had Red Owl honoured its promises and granted the said franchise, he would have earned profits of circa 80,000 dollars before the projected expiry date.

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328 As opposed to "full contract damages" or "expectancy losses".


330 please see next page.
Allowing the plaintiff to recover his expectation losses would operate harshly on the defendant.\textsuperscript{331} The result would be a liability on his part to compensate the plaintiff for losses of around 80,000 dollars\textsuperscript{332} (the losses actually suffered by Hoffman in reliance on the defendant's assurances were in the region of 3,000 dollars). One writer has said that if the courts, when confronted with Hoffman type claims, were limited to choosing between a liability for full expectancy damages, or no liability at all, there would often be a heavy reluctance to invoke the doctrine of promissory estoppel to protect the interests of aggrieved promisees:

"if the value of what has been promised is out of all proportion to the extent of the action taken in reliance thereon ..... a court will be reluctant to conclude that injustice can be avoided only by the enforcement of the

\begin{footnotesize}
\begin{enumerate}
\item There are, however, obvious practical difficulties here; as a matter of proof it would be extremely hard for the plaintiff to establish what losses he in fact suffered by reason of the defendant's failure to fulfil its promise. Certain material terms of the proposed franchise had not been settled by the parties when the defendant broke off the negotiations, and these would all have a bearing on the amount of the said losses. See discussion at p 103, post, on the undesirability of attempting to compensate a Hoffman type plaintiff for "expectancy losses", and cf discussion in (1966) 65 Mich. L. Rev. 351.
\item "... it would smack of inequity if a [negotiating defendant] who without bad faith had induced 3,000 dollars of reliance losses were held liable for 20,000 dollars in full contract damages". (Note, (1966) 65 Mich. L. Rev. 351 at p 356.) "... protection to the extent of the action taken in reliance on the promise will usually avoid injustice to the promisee, while at the same time preventing undue hardship to the promisor". (Sutton, (supra), at p 168.)
\item Minus, of course, the plaintiff's expected earnings for the same period in another vocation.
\end{enumerate}
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promise. Courts will be reluctant to enforce a promise in its entirety if to do so will cause hardship to the promisor, and will therefore deny any relief whatsoever, thus working an injustice to the promisee."

As a result of increasing judicial recognition, in the forty seven years since the doctrine of promissory estoppel was first promulgated in the Restatement of Contracts, of the inappropriateness, in many situations, of clinging to a "full contract damages" theory of enforcement, it now appears to have become widely accepted that damages should on occasion be limited to reimbursement of the plaintiff's reliance expenses.

The Wisconsin Supreme Court, advocating this more flexible approach to the damages problem in the Hoffman case, pointed out that:

"Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule of thumb approaches to the damage problem should be avoided."

333 As required by Section 90.
336 133 NW (2d) 267 at p 276.
Other considerations too, point in the direction of restricting the measure of an aggrieved negotiator's recovery to the extent of his detrimental reliance upon the prospect of the assured contract materialising. First, the indispensable condition of being successful in an action grounded in promissory estoppel, and indeed the entire basis of that doctrine, is reliance by the plaintiff. Thus, as is pointed out by one writer, if Hoffman:

"had not undergone a change of position no cause of action would have arisen, despite identical conduct by the defendant". 337

It seems sensible, therefore, in cases where the expectancy measure of recovery is thought by the court to be inappropriate, to proceed on a reliance theory of damages. 338

A more practical consideration favouring a reliance recovery in Hoffman type situations would be the extreme difficulty of estimating, with any degree of exactitude, the plaintiff's expectancy losses, that is the loss suffered by reason of the defendant's promises not having been fulfilled. Such matters, for instance, as the size and the terms of construction of the building which was to house the proposed franchise had not been conclusively worked out by the parties when the negotiations broke down. Nor had agreement been reached on the terms of the lease of the said premises (rent, renewal, purchase options, and so forth). All these matters, not yet fully worked out by the parties, would have a bearing on the issue. Hence, the difficulty with attempting to compute damages for the purpose of putting Hoffman into the position he would have been

338 Cf. Note (331), supra.
in had Red Owl not broken its promise and demanded a capital contribution of $34,000 dollars.\(^{339}\)

\(^{339}\) If, however, the main terms of the projected agreement have been agreed upon by the parties at the time of the breakdown, there are some indications that the courts might be prepared to base the plaintiff's damages upon an expectancy measure. In *Chrysler Corp v Quimby* ((1958) 51 Del. 264, 144 A (2d) 123) the defendant promised to renew the plaintiff's automobile franchise for a further term if the plaintiff purchased all the outstanding stock in the franchise. The defendant failed to fulfil its promise. The plaintiff raised an action based on promissory estoppel and was awarded the profits which would have been made had the defendant fulfilled its promise and renewed the franchise. Calculation of expectancy losses was much less speculative here than it would be in a Hoffman type situation. Given that the plaintiff was presently a franchisee of the defendant, and that the promised renewal was to be on the same terms as the existing franchise, reference could be had to past profits for the purposes of measuring expectancy losses. See p 131, post, however, for the more likely reason underlying the awarding of expectancy losses in the *Chrysler v Quimby* case.
(b) A Functional Analysis of the Role of Promissory Estoppel Theory in Abortive Contract Negotiations.

The use made of the promissory estoppel doctrine in the Hoffman case provides us with a further illustration of legal liability emanating from abortive contract negotiations. One writer sums up the effects of extending the benefits of the doctrine to aggrieved contract negotiators by saying that:

"it will no longer be possible for one party to scuttle contract negotiations with impunity when the other has been induced to rely to his detriment on the prospect that the negotiations will succeed."

In other words, a contract negotiator who induces prejudicial reliance by promising the other party a contract, and then resiles from negotiations, will be liable to reimburse that party for his negotiation expenditures. As in the case of the negotiator who is successful in his restitutionary claim, the effect of a judicial award in favour of the party who successfully brings his claim in promissory estoppel is to make him whole. He is returned to his pre-promise position. Whether the award is based on restitutionary

340 See cases approving the ratio in Hoffman, cited at note (306), supra. Cf. Chrysler Corp v Quimby, (1958) 51 Del 264, 144 A (2d) 123; Goodman v Dicker, 169 F (2d) 684 (D C Cir, 1948); Burridge v Ace Storm Window Co., 69 Pa D & C 184 (C P 1949); Terre Haute Brewing Co v Dugan, 102 F (2d) 425 (8th Cir. 1939).


theory, or takes the form of damages in promissory estoppel theory, it essentially reimburses the aggrieved party for the losses and expenditures to which he has been put by the other party during the negotiation period.\textsuperscript{343}

An interesting point arising here concerns the potential overlap in the respective spheres of operation of the two theories. Given the expansive definition of benefit propounded in an earlier part of this paper, might Hoffman not have been successful had he brought his claim in restitution, rather than upon promissory estoppel?\textsuperscript{344} It may be recalled that Hoffman's financially detrimental actions were taken at the urging, or on the advice, of the defendant. The performance of these requested acts, therefore, should constitute a legal benefit in the hands of the defendant. There was also the "fault" of the defendant, who constructively put an end to the negotiations by demanding a sum, almost double that initially insisted upon, at a late stage in the negotiations, knowing that the plaintiff could not afford it.\textsuperscript{345} Furthermore, the plaintiff had a sufficiently strong expectation of obtaining the projected franchise on the terms originally negotiated (viz., his making a capital contribution of circa 18,000 dollars) to displace any inference that what had been done was done "gratuitously" or at "risk".\textsuperscript{346} Apart from anything


\textsuperscript{344} See p 4 , et seq, ante, and p 22 , et seq, ante. Cf. Hill v Waxberg, 237 F (2d) 936, (9th Cir 1956); Minsky's Follies of Florida Inc., v Sennes, 206 F (2d) 1; Kearns v Andree, 139 A 695, (1928).

\textsuperscript{345} The term insisted upon was so clearly unreasonable that it could not have been advanced with any expectation of acceptance. Cf. p 58 , ante.

\textsuperscript{346} please see next page.
else, Red Owl had expressly assured him that a franchise would be forthcoming if he would invest this amount of capital, and he subsequently changed his position only because of the strength of his expectation that the transaction would eventually be consummated.

The principal elements conducive to recovery in restitution, therefore, were present in the Hoffman negotiations. This matter is not without practical significance, for a plaintiff negotiator, suing for his wasted pre-contract expenditures in American courts, might, in a suitable case, have alternative forms of action.\textsuperscript{347}

Again, where a plaintiff is unable to establish that the criteria necessary for recovery on the basis of one theory are satisfied, he might be successful in a claim based on the other theory. The plaintiff might not, for instance, be able to show that the defendant specifically requested or directed him to incur expenditure or otherwise act to his detriment (eg. by selling his existing business or acquiring options to purchase land, in anticipation of obtaining a projected franchise), as he must usually do if his restitutionary claim is to be successful.\textsuperscript{348} He might, however,

\textsuperscript{346} Once the inference of "gratuity" or "risk" is overcome, the doctrine of unjust enrichment will not allow the defendant, with impunity, to frustrate the plaintiff's expectation of obtaining recompense from the proceeds of the expected contract. Cf. Barry J at p 40 , ante. For a discussion of this and the other criteria employed by the courts in determining which of the parties is taking the risk of the negotiations failing, see p 22 , et seq., ante.


still be able to succeed on the basis of promissory estoppel. No request or inducement on the part of the defendant is necessary here. It is provided in Section 90 of the Second Restatement of Contracts that evidence of "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee" is a sufficient basis for the plaintiff's claim.\textsuperscript{349} The "foreseeability" or the "reasonableness" of the acts done in reliance on the promise, and not whether they have been requested, is what is important to the operation of Section 90.\textsuperscript{350}

It will, however, be necessary for there to have been a promise given, or assurances made, by the defendant that the proposed contract would be forthcoming, before a plaintiff negotiating can proceed on the basis of promissory estoppel. Thus a plaintiff in a \textsuperscript{351}Lacey type situation could not avail himself of the doctrine of promissory estoppel because, although there was "a mutual belief that a contract was about to be entered into", no explicit assurance of future bargain was made.\textsuperscript{352}

It will be recalled that much of our discussion on the operation of the law of restitution in contract negotiation situations was concerned with the issue of "risk". We saw that, in order to be

\textsuperscript{349} See p 94, ante. Cf. p 109, et seq, post, where it is said that the courts will scrutinize with care the "reasonableness" of unrequested actions in reliance by negotiating parties.


\textsuperscript{351} [1957] 1 WLR 932.

\textsuperscript{352} [1977] 2 NSWLR 880.

\textsuperscript{353} Therefore, a plaintiff in such a situation will have to bring his claim in restitution, eg. see Hill v Waxberg, 237 F (2d) 936, (9th Cir. 1956).
successful in his restitutionary claim, the plaintiff had to establish that it was not he, but the defendant, who was taking the risk of the negotiations failing.\footnote{354} The notion of risk (and also the notion of fault) provide the courts with handy concepts which facilitate the striking of a balance between the respective economic interests of negotiating parties. The limitations placed upon recovery under Section 90, and the flexibility in approach which the Section allows, suggest that American courts, when asked by negotiating parties to invoke the doctrine of promissory estoppel, will similarly take into account the risks inherent in the negotiation process, and seek to strike a balance between the respective economic interests of negotiating parties.\footnote{355}

Thus, a plaintiff might be denied recovery for the detriment caused by certain actions taken during negotiations without the request of the defendant. For instance, a party entering into

\footnote{354}{See p 23, ante.}

\footnote{355}{Eg. Henderson states that:

"... the insistence of traditional theory upon clear promises, upon close attention to the reasonableness of conduct in reliance ..... fulfill a valid purpose and should not be hastily discarded in the effort to protect every relying promise ..... \Whether or not the limitations inherent in Section 90 will keep the reliance principle within bounds in the bargain context will ultimately depend upon the degree to which courts recognize the dangers of imposing liability too readily in the formative stages of the bargaining process"

"lucrative" sub-contracts on the faith of a promise that the principal contract will soon be granted, would likely find himself without remedy if the defendant should withhold the contract. Such reliance would probably be held not to be "reasonable", and not to have been "foreseeable" by the defendant.\footnote{356}

The case of \textit{Hill v Corbett}\footnote{357} illustrates the point. There, the defendant lessor promised to renew the plaintiff's lease when the present term expired. Relying on this promise, the plaintiff sold the property to which he had intended to move at the expiration of the term. The plaintiff was unsuccessful in his claim on promissory estoppel as the court was not satisfied that the defendant, at the time of the making of the promise, should reasonably have expected the plaintiff to change his position thus. As one writer has said of the doctrine of promissory estoppel in contract negotiation situations:

"It may be expected that courts will not allow Section 90 free rein in bargain negotiation contexts. If promissory estoppel is to provide a standard of fairness by which the conduct of negotiations may be judged, it is likely that the courts will examine the reasonableness of alleged reliance with some care".\footnote{358}

\footnote{356} Cf. Henderson, (supra), at p 361. It may be recalled here that Hoffman's detrimental actions were either urged or advised by Red Owl. Such "acquiescence" by the defendant will doubtlessly assist plaintiffs in establishing the "reasonableness" of their reliance for the purposes of satisfying the requirements of the doctrine of promissory estoppel.

\footnote{357} (1949) 204 P (2d) 845 (S Ct Wash).

\footnote{358} Henderson, (supra), at pp 360 - 361.
Again, where the plaintiff’s reliance is held to be both "reasonable" and "foreseeable", the court retains a discretion as to whether the promise is to be enforced. Relief will only be granted under Section 90 if the court is of opinion that enforcement is necessary to avoid injustice.\(^{359}\) Therefore, a party who has incurred merely preliminary expenditures on the faith of a promise to contract will have little chance of being successful in recovering them in an action based on promissory estoppel.\(^{360}\) The courts will have regard to the risks commonly undertaken by parties entering into commercial negotiations, and will be extremely reluctant in such a situation to conclude that injustice would result if the promise were not enforced. On the other hand, it is easy to see the injustice occasioned if the defendant’s promises of eventual contract were not enforced in a case where much work had been done on the faith of these promises being fulfilled. Hoffman itself is a perfect illustration.

\(^{359}\) Eg., see, K C T Sutton, Consideration Reconsidered, (1974), at p 166, et seq. The Hoffman court said that the final decision to invoke Section 90 in order to prevent injustice is a "policy decision" for the court.

\(^{360}\) See, section (1), (c). ante.
(c) **Conclusion.**

The **Hoffman** decision opens a new avenue of protection for plaintiffs who have detrimentally relied on promises of contract held out to them by their co-negotiators. Like the cases allowing restitutionary relief, the motive underlying the granting of relief in **Hoffman** is a desire to avoid the injustices occasioned when a negotiating party "abuses the privilege"\(^3\) to put an end to negotiations:

"..... injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment".\(^3\)

In recognising that legal rights do indeed inhere in contract negotiations, **Hoffman** is further proof that the adage that "a negotiating party is at liberty to break off negotiations at any time, and for any reason"\(^3\) is only partially correct. The courts have felt it necessary to introduce qualifications to it.

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\(^3\) This phrase is used in Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code", (1968) 64 Va L Rev 195, 223.

\(^3\) 133 NW (2d) 267, at p 275.

ABORTIVE CONTRACT NEGOTIATIONS AND CONTRACT DOCTRINE: THE LIMITS OF THE IMPLIED-IN-FACT CONTRACT DEVICE.

(a) Background and Discussion of the Case Law:

In this section of the paper, we shall consider the question of whether an aggrieved plaintiff negotiator might be able to argue that the defendant has impliedly agreed to recompense him for his negotiation expenditures in the event of the expected contract being withheld.

Confusion has often surrounded the use of the term "implied-contract". In the past the phrase has been used to denote those situations in which the "law implies an obligation" on the part of a person to make restitution or recompense to another party. Contractual language was therefore being used to describe obligations arising in cases where it was clear that there was no semblance of agreement between parties. As is pointed out by Goff and Jones, in their well known book on the law of restitution, the vast majority of situations in which restitution is granted defy analysis on a

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364 Cursory mention has already been made of this point. See p.25 et seq. ante, where it was concluded that an aggrieved negotiator's prospects of succeeding on the basis of an implied agreement argument were very slim.

365 An excellent discussion of the historical reasons underlying this unfortunate use of the phrase "implied contract" is to be found in Goff and Jones, The Law of Restitution, (2nd ed., 1978) at Chapter 1.

366 An extreme example is Upton-on-Severn R D C v Powell, [1942] 1 A.L.R. 220. Coke Cotton L J once said that: "... the term "implied contract" is a most unfortunate expression, because there cannot be a contract 'by a lunatic....... It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries. I think that the expression 'implied contract' is erroneous and very unfortunate." (continued on next page).
on a contractual basis. Recognition by English and Canadian courts of the substantive principle of unjust enrichment which underlies the law of restitution has now made references to implied contract in the context of the law of restitution obsolete.

However, apart from this "erroneous and very unfortunate" usage of the term implied contract, the concept of implied agreement is of great importance in the law of contract. Thus, a leading writer on the law of contract states that:

"Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct".

The point therefore arises of whether an agreement for payment of remuneration for pre-contractual services can be implied in a contract negotiation situation. The prima facie obstruction in the way of a contractual analysis is the common belief in the imminence

(continued) (Re Rhodes, (1890) 44 Ch D 94 at p 105). In a similar vein, Lord Atkin has more recently castigated "these fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared". (United Australia Ltd v Barclays Bank Ltd, [1941] A C 1 at p 28., quoted in Goff and Jones, (supra), at p 10).


The implied contract fiction was rejected by the Supreme Court of Canada in Deglman v Guaranty Trust Co of Canada, [1941] SCR 725, discussed, ante, at p 1 ... and by the English Court of Appeal in Craven-Ellis v Canons Ltd., [1936] 2 KB 403, discussed, ante, at p 27. Cf. Goff and Jones, (supra), at p 10.

Per Cotton L J in Re Rhodes, (1890) 44 Ch D 94, at p 105.


Chitty, (supra), at p 10. Steven v Bromley & Son, [1919] 2 KB 722, is a good illustration of the inference of agreement from conduct.
of contractual relations. The difficulty is that this common belief appears to negative the suggestion that the negotiating parties impliedly agreed that the pre-contractual services should be paid for otherwise than out of the profits of the proposed contract. Several Australian and New Zealand cases,\(^{372}\) decided earlier this century, provide us with illustrations of unsuccessful attempts by aggrieved plaintiff negotiators to establish implied-in-fact contracts for the payment of reasonable remuneration for work done when their co-negotiators unilaterally abandoned the negotiations.

Consider the case of *Sinclair v Rankin*,\(^{373}\) a decision of the Western Australian Full Court. The plaintiff was an accountant who performed services at the defendant's request on the understanding that he would be remunerated by being made a partner in the defendant's accountancy business. Parker C J described the facts as follows:

"It [is] clear .... that [the plaintiff] commenced and continued to work for the defendant, and performed all the services in question on the defendant's promise or undertaking that he (the defendant) would take the plaintiff into partnership in the defendant's business of an accountant, and that the plaintiff relied on the defendant's performance of this promise as a remuneration for such services".\(^{374}\)

The defendant later refused to execute a partnership agreement with the plaintiff. The plaintiff sought to recover for the costs of

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\(^{373}\) (1908) 10 W A L R 126.

\(^{374}\) id at p 128. Cf. Hoffman v Red Owl Stores, (1965) 133 NW (2d) 267, which indicates that a party promising a contract in the United States will be liable to reimburse the other party for his needless expenditures.
his services, founding upon an implied agreement by the defendant to pay reasonably for the said services. The court took the view that the common expectation of partnership stood in the way of a contractual analysis. The learned Chief Justice said that is it was understood that the plaintiff's services were to be compensated:

".... by the [defendant] taking him into partnership, it is impossible to imply an agreement to pay for such services in money, although the defendant refused to carry out his promise to compensate the plaintiff in the manner agreed upon. The plaintiff ... never contemplated a money payment. He relied upon the defendant's promise to take him into partnership as the mode, and the only mode, in which he was to be remunerated for his services. The fact that the defendant has broken this promise does not, in my opinion, improve the plaintiff's position in this action. That fact cannot ....... warrant the Court in implying a contract which neither party contemplated. To hold the contrary the Court must, in effect, find that the defendant impliedly agreed to pay in the usual manner for the plaintiff's services, and the plaintiff intended to claim the usual payment for such services, and thus set up a contract which is not only opposed to the facts, but repudiated by both parties". 375

375 (1908) 10 W A L R 126 at pp 129 - 130. Burnside J was also emphatic in denying the existence of an implied agreement for payment by the defendant if he should withhold the expected partnership. His Lordship said that:

"Where work is done in anticipation of a contract, and such contract is not entered into, no action can be maintained on a quantum meruit in respect of the work done [because no] contract, express or implied, can be inferred by the defendant to remunerate the plaintiff".
An almost exact parallel is to be found in the case of *Watson v Watson*, a decision of the Supreme Court of New Zealand. The plaintiff in this case left his employment in Wellington and joined his brother, the defendant, in Taihape, with a view, ultimately, to the erection of a sawmill and its conduct by the brothers in partnership. The plaintiff went at the defendant's invitation. The latter admitted that it was understood that the plaintiff should become a partner when the sawmill was erected. The plaintiff brought with him certain equipment which he had purchased out of his own moneys. For seven months the brothers did agricultural work and cut firewood. In August 1947 work commenced on the erection of the sawmill, and it was completed towards the end of 1949. Thereafter, both brothers worked in the mill. No wages were at any point paid to the plaintiff brother for the services rendered by him.

The defendant took no steps towards settling the terms of the protected partnership. His explanation for this was that "it more or less lapsed or drifted". Eventually, in May 1952, the plaintiff left Taihape because of the defendant's refusal to consummate the expected partnership agreement.

For five years, therefore, the plaintiff had assiduously worked towards the day when he would be admitted as a partner into the defendant's business. Moreover, all his efforts were in reliance upon the defendant's express assurances that he would be taken into partnership. An action was raised in which the plaintiff sought to establish the existence of an implied agreement by the defendant that he would pay

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reasonably for the services rendered over the five year period. The plaintiff was partially successful in his claim. It is well to quote at length here from the judgment of Gresson J. His Lordship took this view of the limits on the use of contractual theory in contract negotiation situations:

".... for the period up to the commencement of the construction of the mill, the plaintiff gave his services in anticipation of a partnership later being concluded. These services were given on a basis that excluded any implied contract for remuneration. I think this is equally true of the period whilst the mill was under construction. Plaintiff worked as a prospective partner to further what was intended to become a partnership venture. An implied contract to pay for such services would be quite inconsistent with the basis upon which the work was done".  

However, very interestingly, Gresson J went on to hold that the contractual inference could be drawn for services rendered after this point of time, and that the defendant had impliedly agreed to make a reasonable payment to the plaintiff for services rendered subsequent to the coming into operation of the mill. His Lordship said that:

"When the mill came into operation, perhaps in August, 1949, perhaps a little later, nothing was done to complete the projected partnership. Finally

378 id at p 272.
plaintiff, having become - not unreasonably - disgusted at defendant's indifference or dilatoriness, took his departure in May, 1952. I think the defendant must be treated as having by his conduct repudiated the understanding. When, subsequently to the completion of the mill, the defendant accepted the services of the plaintiff in operating it ...... this I think amounted to an election by the defendant to accept the benefit of the plaintiff's services on a basis implying payment in the event of no partnership being arrived at. The services were given on the footing that plaintiff would become a partner but, when eighteen months or thereabouts had passed and no partnership had been completed the defendant must be regarded as having accepted the services not exclusively on the basis of a prospective partnership but on the basis that plaintiff might become a partner but that, if he did not, payment for his services would be made.

When completion of the understanding was so long delayed as to amount to refusal on defendant's part to implement it and in the meantime the defendant continued to accept the benefit of the plaintiff's work, this must be deemed to have raised an inference to pay for such work".

"My view is that, though plaintiff may not have been entitled to sue on a quantum meruit for work done in anticipation of the completion of a partnership agreement, nevertheless he did become entitled on a subsequent contract to be implied between the parties when defendant's long-continued unwillingness to complete a partnership
amounted to a refusal to honour the understanding."  

The court in Watson therefore took the view that the finding of an implied-in-fact contract for payment for services rendered during the negotiation period was dependent upon the strength of the expectation of eventual contract. If the expectation of contract is weak (as was thought by the Watson court to be the case in the latter stages of the five year period of negotiation), there is room for the finding of an implied agreement for payment in the event of the agreement not being consummated by the defendant, for here, it is said, the contractual inference "is not opposed to the facts", 380 On the other hand, if the expectation of contract is strong this precludes the finding of an implied agreement for remuneration. 381

However, while the implied-in-fact contract argument has been rejected by Australian and New Zealand courts, and also by Anglo-

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379 id at p 272.

380 Evidence that the pre-contract services were rendered in the expectation of compensation, quite apart from the possibility of contract being entered into, and their acceptance by the other side on this basis, would serve as a basis for the finding of an implied agreement for payment in the event of the defendant subsequently deciding not to contract. Cf. Bond v Colonial Investment and Loan Co., (1908), 11 O WR 617, at p 620 per Britton J; Turriff Construction Ltd v Regalia Knitting Mills Ltd [1972] C L Y 461.

381 Cf., the discussion on the law of restitution at p 23, et seq, ante, where it is said that a strong expectation of contract is often decisive of the question of restitutionary recovery. Thus, in the William Lacey case, Barry J., while accepting counsel's argument that the common expectation of contract precluded the finding of an implied agreement for remuneration, went on to hold that the plaintiff could succeed on the basis of restitutionary theory.
Canadian courts, the plea has on occasion been successful in the United States. One case may be mentioned in this context, if only to show the limits to which some courts might be prepared to stretch contractual theory in order to recompense an aggrieved negotiating party. The case is that of Western Asphalt Co v Valle, a decision of the Supreme Court of Washington. The plaintiff subcontractor prepared estimates at the request of the defendant, a general contractor. The defendant used the plaintiff's figures and estimates in preparing his own bid for the main contract. The defendant was awarded the main contract, but gave the sub-contract work for which the plaintiff had bid to another sub-contractor. The court said that:

"The fact that respondent hoped to obtain a subcontract from the general contractor to whom the work might be awarded, and that with this idea in mind respondent made available to appellant its figures and computations concerning that portion of the general contract in which respondent was interested, is not necessarily inconsistent with its expectation that it would be entitled to receive reasonable compensation for the service rendered if appellant was awarded the construction contract and did not award the respondent the sub-contract which respondent desired. We are not in accord with the view that such services rendered in connection with a contemplated contract and with the hope of obtaining a benefit from


383 (1946) 171 P (2d) 159.
from such contract are necessarily not so remedied in expectation of compensation."³⁸⁴

This effort by the Washington court to circumvent the objections to the finding of an implied agreement in the context of contract negotiations³⁸⁵ is not entirely satisfactory. A party performing pre-contract work ordinarily does so on the assumption that he will be rewarded for his present efforts by the profits of the expected contract.³⁸⁶ Indeed, were it not for the fact that he confidently believed that he would get the contract and be paid out of its proceeds, he would not have been prepared to do the work which he did.³⁸⁷

According to the Washington court, however, this belief in the imminence of contractual relations is "not necessarily inconsistent" with an expectation on the plaintiff's part to receive compensation for his efforts if the defendant should unilaterally withhold the contract. In much the same way, the court attributes to the defendant a readiness to remunerate the plaintiff for his pre-contract expenditures, if he should put an end to negotiations and frustrate the common expectation of contract.³⁸⁸


³⁸⁵ Eg., see Sinclair v Rankin, (1908) 10 WALR 126; Watson v Watson, [1953] NZLR 266; William Lacey (Hounslow) Ltd v Davis, [1957] I WLR'932; cf Sabemo Pty Ltd v North Sydney Municipal Council, 1976 2 NSWLR 880.

³⁸⁶ But cf note (380), supra.

³⁸⁷ Eg., see Sheppard J at p 24 , ante.

³⁸⁸ Even if one were to accept this tortuous explanation in principle, there is still a difficulty in applying it to the facts in Western Asphalt. Surely the understanding between the parties was that the plaintiff sub-contractor was "taking a chance" in preparing its tender and initial estimates. Cf. Barry J at p 14, ante, and see also Schultz, "The Firm Offer Puzzle, A Study of Business Practice in the Construction Industry", (1952) 19 U Chi L Rev 237.
Serious objection may be taken to this method of getting around the limitations of contract theory in contract negotiation situations. One commentator says of the case that:

"there is a logical reason for not applying the rules for the construction of implied-in-fact contracts to the principal case. The services were performed with the understanding on the part of the parties that they would be compensated for indirectly by an agreement to be made in the future. Under these circumstances the present intent of the parties was to contract in the future; therefore, there was no showing of a present intent to contract. Hence there can be no implied-in-fact contract for compensation". 389

In a similar vein, one English writer has recently said that it is:

"distinctly artificial to envisage [contract] negotiations going on against a comfortable fall-back position". 390

A comment by the same writer on the case of William Lacey (Hounslow) Ltd v Davis 391 illustrates the point:

"The builder did the work in the confident belief that he would get the contract. And the developer knew it. At the last minute the developer chose to sell rather than develop. The builders successfully sued for their quantum meruit. By the use of conditions it would have

389 Comment, (1946) Wash L Rev 139 at p 140. As is pointed out by the commentator, a restitutionary claim would have been preferable. Cf. Birks, "Restitution for Services", (1974) 27 C L P 13, at pp 27 - 28, and see discussion at p 124, et seq, ante.


been possible to torture that quantum meruit into contractual shape. It could have been said without obvious repugnancy that the developer intended to remunerate the builder by giving the contract or, if he did not do that, by paying reasonably. But that had not been the real intention, and Barry J refrained from the futile artificiality and expressly characterised the quantum meruit as quasi-contractual. 392

It is submitted that the above objections are fatal to the finding of an implied agreement by a defendant negotiator to recompense the other party for his wasted pre-contract expenditures. 393 The court in the Western Asphalt case attributes "intentions" or "expectations" to the negotiating parties which are not supported, and indeed are seemingly contradicted, by the facts. 394 Also, the "torturing of contracts out of borderline situations" 395 has undesirable side effects. Contractual theory might become distorted in the sense that parties are found to have reached agreement on the basis of "expectations" and "intentions" which it is not clear that they had. Accordingly, "since there is no reason to blur the line between imputation and genuine implication, the non-contractual analysis ought to be preferred as the more natural". 396

393 But cf note (380) supra.
395 Per Birks, (supra), at p 15.
396 Per Birks, (supra), at p 27.
(b) **Summary and Conclusion:**

We have seen that an aggrieved negotiator who seeks to establish the existence of an implied agreement for payment of his wasted expenditures has little prospect of success. In actual practice, however, this is of little consequence. The law of restitution ensures that plaintiff negotiators are adequately protected from the potential "whims" of their co-negotiators.\(^{397}\) The factor fatal to the drawing of the contractual inference\(^{398}\) is one of the main criteria used by the courts in deciding whether to grant the plaintiff restitutionary relief.

Therefore, while accepting that the decisions in *Sinclair v Rankin*\(^{399}\) and *Watson v Watson*\(^{400}\) are correct statements of the contractual position, they seemingly err in denying the plaintiffs relief on the basis of restitutionary theory.\(^{401}\) In both cases it was assumed by the court that the fact that no contract could be implied was determinative of the question of restitutionary recovery.\(^{402}\) In other words, it seems to have been thought that the circumstances in which a restitutionary claim was appropriate were coextensive.

\(^{397}\) See chapter II (1), supra.

\(^{398}\) Viz., the common expectation of contract, and that payment for the services presently being rendered will come out of the contract profits.

\(^{399}\) (1908) 10 W A L R 126.

\(^{400}\) [1953] N Z L R 266.


\(^{402}\) see next page, please.
with those in which an implied agreement for payment could be inferred. Nowadays, with increasing judicial recognition of the doctrine of unjust enrichment which underlies the law of restitution, the approach to restitutionary theory taken by the Sinclair and Watson courts is untenable.

"[The cases of Sinclair and Watson] were decided upon ordinary contractual principles. No common intention could be presumed or implied; accordingly no recovery was permitted". per Sheppard J in Sabemo, (supra), at p 898. The court in Sabemo did not follow the cases of Sinclair and Watson on the question of restitutionary relief, but accepted that they were correct statements of the contractual position. Sinclair, it might be noted, was decided at a time when the "implied contract fiction" held sway in England. See eg Sinclair v Brougham, [1914] A C 398. The court in Watson, while noting Craven-Ellis v Canons Ltd ([1936] 2 K B 403), did not realise the implications of that decision and distinguished it on the most slender of grounds, viz., that it extended only to restitutionary claims for work done under void contracts. This distinction is not adhered to either in England or Canada. See cases cited at note (401), supra, and cf Birks, "Restitution for Services", (1974) 27 C L P 13.

See p 1 , et seq, ante.

III INITIATING NEGOTIATIONS WITHOUT SERIOUS INTENT TO CONTRACT.

(a) A Look at the Available Case Law.

A party may enter into negotiations with another party and involve him in substantial expenditures without having any intention of contracting at the end of the day. Such instances are likely to be rare, but a party might negotiate in "pursuance of a scheme never to come to terms" so as to:

"tie up the other party in order to stall for time or in order to keep him from competing in another venture or deal. He also might be going through the motions of negotiating merely to comply formally with some rule of law that requires him to shop around for the best deal".406

What protection does the law afford the victim of such a scheme? The question has been raised on several occasions before the American Courts. The case of Heyer Products Co. v United States, a decision of the Court of Claims, is the main authority on the matter. The defendant Government agency invited bids to be lodged for the manufacture of electrical equipment. The plaintiff alleged that the defendant had rejected its bid in "bad faith", having

405 This phrase is used in Kessler and Fine, "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study", (1964) 77 Harv L Rev 401 at p 419.


decided to retaliate against it for testifying against the defendant at an earlier senate hearing. The plaintiff claimed expenses of 7,000 dollars incurred by it in preparing its bid. The Court of Claims held that the plaintiff was entitled to the relief sought upon proof of the facts alleged. In the course of judgment, it was said that:

"It was an implied condition of the request for offers that each of them would be honestly considered..... No person would have bid at all if he had known that "the cards were stacked against him". No bidder would have put out 7,000 dollars in preparing its bid ..... if it had known the [defendant] had already determined to give the contract to the Weidenhoff Company. It would not have put in a bid unless it thought it was to be honestly considered. It had a right to think it would be. [The defendant] impliedly promised plaintiff it would be. This is what induced it to spend its money ..... "

The court thus found what was termed an "implied promise" by the defendant that it would "honestly consider" the plaintiff's bid. A leading American writer on the law of contract, however,

408 The plaintiff, it should be noted, was the lowest bidder. The contract in question was awarded to a company which had submitted a bid almost twice as great as the plaintiff's.

409 (1956) 140 F Supp 409 at pp 412 - 413. And again: "..... when [defendant] invited plaintiff to incur this expense, it must necessarily be implied that [the defendant] promised to give fair and impartial consideration to its bid". (at p 413). Cf. Kessler and Fine, (supra), at p 420.

410 A breach of this promise would result in a liability to recompense the plaintiff for expenditures needlessly incurred. Cf. United States v Purcell Envelope Co., 249 U S 313, 39 S Ct 300.
suggests, correctly it is submitted, that the cause of action against a party who initiates negotiations without intending to contract is not based on contract at all, and that the adoption of contractual language by the Heuer court was "prompted by the jurisdictional peculiarities of the Court of Claims". The appropriate theory of recovery, it is said, is tort. This view is supported by subsequent American cases which endorse the ratio in Heuer, and state that the cause of action against a negotiator who has no intention of contracting is founded on tortious principles. Again, Judge Laramore, who dissented from the majority opinion in Heuer, considered the plaintiff's action to be tortious in nature, and therefore falling outside the jurisdiction of the Court of Claims.

Hudson, the leading English authority on the law relating to building and civil engineering contracts, considers the legal position of a party who has been led to incur expense by a negotiator who has no intention of contracting. It is concluded that:

"[where] it can be shown that the employer has no intention of letting the contract to the person invited to tender, or to one of a number so invited, the invitation

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411 Summers, (supra), at p 257. The "jurisdictional peculiarity" spoken of is that actions sounding in tort fall outside the original jurisdiction of the Court of Claims. Summers is of the view that this circumstance forced the majority of the Heuer Court to base liability upon contractual principles. Cf. the dissenting opinion of Judge Laramore.


413 Cf Luce v United States, 498 F (2d) 1348, (1974).
is clearly fraudulent and an action will lie [in tort for deceit] to recover such expenses by way of damages.\textsuperscript{414}

The writer finds authority for this proposition in the case of Richardson v Silvester.\textsuperscript{415} There, the defendant inserted an advertisement in a newspaper for the letting of a farm. The plaintiff, desirous of becoming the tenant, incurred expenditure in going to and inspecting the property, and in the employment of persons to inspect and value it for him. It afterwards transpired that the defendant had in fact no power to let the property, and "caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement". "The plaintiff successfully brought an action in tort for deceit, and was held entitled to recover the amount of his wasted expenditures. In the course of judgment Blackburn J said that:

"it was a false statement knowingly made ..... and the natural consequence would be that a person who was desirous of becoming a tenant would ..... incur expense in looking at the farm .... [If a person] acts on it,, and is injured, he has a cause of action.\textsuperscript{416}

Thus, in English law, it would appear to be settled that a party who suffers losses as the result of another's ulterior negotiating motives has a right of recourse against that person in tort.\textsuperscript{417}

\textsuperscript{414} Hudson, Building and Engineering Contracts, (10th ed. 1970), at pp 229 - 230. This is also the position in Scotland. See Gloag, Contract, (2nd ed 1929), at p 19.

\textsuperscript{415} (1873) L.R. 9 Q.B 34.

\textsuperscript{416} id at p 36. Cf Quain J at p 27.

\textsuperscript{417} please see next page.
If a party initiating negotiations without intending to contract makes assurances or promises that he will in fact contract, there is authority in the United States for the view that the "victim" of his scheme may be able to recover his expenditures in an action based upon the theory of promissory estoppel. In *Chrysler Corporation v Quimby*, the defendant promised to renew the plaintiff's automobile franchise if the latter purchased all the outstanding stock in the franchise. The defendant broke the promise and there was evidence before the court that the defendant made the promise without any intention of ever fulfilling it. The promise was made solely in order to induce the plaintiff to buy the remaining stock. The plaintiff subsequently raised an action in promissory estoppel and was awarded the loss resulting from the defendant's failure to fulfill the said promise.

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417 In Continental law, a party who negotiates without intending to contract will be liable in damages to the other party under the culpa in contrahendo doctrine. E.g., see 6(1) Planiol & Ripert at No. 133 (French law); Erman, Beiträge Zur Haftung für das bei Vertragsverhandlungen, 139 Archiv Für Die Civilistische 273, 275 (1934) (German law). Cf Kessler and Fine (supra); Von Mehren, The Civil Law System, 2nd ed., at p 837, et seq.

418 See chapter II(2), ante, and Cf Kessler and Fine (supra). He need, of course, not raise the plea of promissory estoppel at all, for he should be able to recover his needless expenditures in an action based upon the principle expounded in the Heyer case. Cf Snyder, "Promissory Estoppel as Tort", (1949) 35 Iowa L Rev 28.

419 (1958) 51 Del 264, 144 A 2d 123. See discussion at note (339), supra.


421 In other words, the court based the plaintiff's recovery upon an "expectancy" measure rather than upon a "reliance" measure. Two reasons may be offered in explanation. Firstly, the plaintiff's expectation loss could in fact be measured without too much difficulty in the Quimby Case. See note (339), supra. Secondly, given the above, the defendant's deceitful conduct was felt by the court to justify the award of damages on an expectancy footing. Cf Restatement (Second) of Contracts (Tentative Draft), Section 90, comment (e); (1966) 65 Mich L R 351 at p 357.
(b) Conclusion

We have seen that most legal systems have thought it necessary to protect plaintiffs suffering losses at the hands of parties who initiate negotiations without any intention of entering into a contractual relationship at the end of the day. Indeed, the denial of relief in such a situation could not, on any view of justice, be supported. It could not seriously be argued that parties entering into contract negotiations should assume the risk that their co-negotiators might merely be "leading them on", or instilling them with a "false sense of security".

Thus, the conduct of a party who negotiates with another in order to prevent him from competing in another deal can not be condoned. Nor can the conduct of a party who negotiates merely in order to exact some advantage from another party. For instance, a landowner might get a builder to prepare plans and estimates for a dwelling he proposes to construct by his own hand; the builder is led to believe that serious negotiations for the construction job are in progress, unaware that the landowner is "using him" in order to avoid the costs involved in employing the services of an independent architect. Here, the law of tort will come to the builder's aid and award him the amount of his needless expenditures by way of damages.

The same argument would extend to the case of a party who "bona fide" initiates negotiations, and subsequently decides that he does not wish to contract, but for some reason fails to notify the other party of his change of mind, thus involving him in further expense. The defendant in this situation should, on the same principle as above, be held tortiously liable to reimburse the party
doing the work for expenditures incurred after the decision not to contract was made.\footnote{422}{Cf Goff and Jones, The Law of Restitution, (2nd ed, 1978) at Chapter 32.}
IV THE AGGRIEVED CONTRACT NEGOTIATOR IN SCOTS LAW.

This short section of the paper examines the protective devices available to a party entering into contract negotiations in Scotland. The case law indicates that an aggrieved negotiating party might obtain restitution for his wasted expenditures in one or other of two situations. The first line of cases, paralleling the Anglo-Canadian cases which allow negotiating plaintiffs relief on the basis of restitutionary theory, is analysable within a "fault-risk" framework. A second possibility, indicated by two early nineteenth century cases,  is the recovery by a pursuer of his wasted expenditures on the basis of what is somewhat loosely called "the wrongful acts or conduct" of the defender during the negotiation period. We shall consider each of these heads of recovery, beginning with the former.

423 See analysis of Anglo-Canadian cases at Chapter II(2)(e), ante.

424 Walker v Milne, (1823) 2 Shaw 338; Heddle v Baikie, (1846) 3 D 376; Cf Bell v Bell, (1841) 3 D 1201.
(a) Discussion of the Scottish Cases Allowing Recovery on the Basis of the "Fault-Risk" Formula.

We have already dealt with the notions of "fault" and "risk" in some detail in our study of the Anglo-Canadian pre-contract authorities. In deciding whether the claim of an aggrieved negotiating party for the recovery of his wasted expenditures should succeed, the Scottish courts, it seems, work within a broadly similar framework.

Consider the case of Pillans and Wilson v Castlecary Fireclay Co Ltd. There, the pursuers were a firm of printers and the defenders were manufacturers of fire bricks. The parties were in negotiation for a contract for the production of a trade catalogue with coloured representations of the various kinds of brick marketed by the defenders. The negotiations spanned over a period of some fourteen months. The pursuers did much work for the defenders; at one stage the "style" of the catalogue was changed by the pursuers because of the defenders desire to add new material, and the pursuers even bought a different type of colour-block on which to print the catalogue. Proofs of the finished work were submitted and resubmitted to the defenders at various stages throughout the fourteen month period.

The pursuers acted throughout in the firm expectation that the defenders would contract and place an order for the production of the catalogue. The work done went far beyond what printers ordinarily do gratuitously or at risk when negotiating for contracts. Just when it appeared that the projected contract was about to be consummated,

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425 See note (423), supra.
426 1931 S L T 532
427 Cf Barry J at p 39 , ante.
the defenders put an end to the negotiations, and placed the business in the hands of another firm of printers. In so doing, they were clearly at "fault". Lord Murray said that it was clear that:

"the real and only reason for the termination was that [the defenders] thought ..... that [they] could place the business in other hands at a cheaper rate". 428

This they could not do with impunity for, having put the pursuers to so much trouble and expense, the latter were no longer taking the risk of a unilateral termination of negotiations by the defenders. 429 Remuneration for their present efforts was expected by both parties to come out of the profits of the "imminent" contract, and when the defenders frustrated this common expectation of contract, the law of restitution provided the pursuers with an alternative medium of recompense.

The case of Sinclair v Logan 430 is decided on essentially similar principles. The pursuer, a joiner, and the defender, the owner of a public house, were in negotiation for a contract for the carrying out of alterations to the said public house. The pursuer, on the instructions of the defender, prepared detailed plans of the proposed alterations; the pursuer obtained estimates from sub-contractors

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428 1931 SLT 532 at p 536. Cf Sheppard J at p 32 , ante. The pursuers had given an estimate of the cost of the catalogues at an early stage of the negotiations. The defenders took no objection to it, and did not even attempt to negotiate a lower price with the pursuers in the final stages of the abortive negotiations.

429 As is, for example, a common tenderer. The fortuitous occurrence of another printer coming along who was prepared to do the job at an unusually low price could not defeat the plaintiffs claim for remuneration when they had done so much work over a period of fourteen months. Cf discussion at p 65 , et seq, ante.

430 1961 SLT (Sh Ct) 10.
and conducted negotiations with the police department on behalf of
the defender; the pursuer's plans were approved at a sitting of the
licensing court; the pursuer prepared amended versions of these
plans at the defender’s request; the pursuer obtained approval of
these amended plans from the licensing court.

The pursuer was held entitled to remuneration on a quantum
meruit for these various services when the defender refused to
proceed with the proposed alterations. The court said that the pursuer
would not have done what he did were he not:

"to be remunerated either directly .... or in the profit
he would derive from being the principal contractor". 431

A more recent case illustrates the "risk-factor" in contract
negotiations working to defeat a restitutionary claim by a potential
contracting party. In Site Preparations Ltd v Secretary of State for
Scotland, 432 the pursuers, on hearing that the Department of Agriculture
and Fisheries was proposing to start on an oil complex development in
the North of Scotland, approached the Department indicating their
interest in participating in the development. Thereafter, they prepared
plans and details of the construction and operating costs of the
proposed development, and various reports were sent to the Department.
The evidence established that Site Preparations had been made aware
from the outset that the Department was only prepared to consider their
proposals as proposals of one of "several possible developers", 433
it being a distinct possibility that the Department itself might

431 id at p 12. The court followed the earlier case of Landless v
Wilson, (1880) 8 R 289.

432 1975 S L T (Notes) 41.

433 However, it seems that no other party did in fact submit proposals.
decide to carry out the development. At the end of the day Site Preparations were informed by the Department that it had decided to carry out the construction work itself.

An action was then raised in which Site Preparations sought to recover the expenditures incurred during the abortive negotiations. The action was dismissed by Lord Kincraig in the Outer House of the Court of Session. His Lordship agreed with the submission of defending counsel, who urged that since:

"no aspect of error was involved, the pursuers having been made aware at the outset that there could be no guarantee of a contract, there was no room for the application of the remedy of recompense."

The key to the decision lies in the finding that the Department had not held itself out as willing to contract with the pursuers. Indeed, the defender had made it clear at various stages of the negotiations that it might decide to carry out the development work itself. Therefore, there was no "common belief in the imminence of contractual relations". Rather, the pursuers were "determined businessmen", willing to expend time and money in the hope that the defender might later contract with them. They put themselves to expense, not because they thought they "had the contract", but

434 In fact, the main thrust of the pursuers' case was that the Department used the information supplied in their plans and reports, and had been thereby "lucratus" to the extent of £30,000. Generally speaking, financial gain does assist the pursuer's case. See, eg, MacIver v American Motors (Canada) Ltd, [1976] 5 WWR 217; Brewer v Chrysler Canada Ltd [1977] 3 WWR 69.

435 1975 SLT (Notes) 41, at p 42.

436 As was the case, for example, in William Lacey (Hounslow) Ltd v Davis [1957] 1 WLR 932; Brewer v Chrysler Canada, [1977] 3 WWR 69; Sabemo Pty Ltd v North Sydney Municipal Council [1977] 2 NSWLR 880.
because they thought their present efforts would maximise their chances of getting it. In other words, they were taking the risk that the defender might not award them the contract.

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(b) A Brief Look at the Cases Basing Recovery on the Defender's "Wrongdoing".

A few nineteenth century decisions allow pursuers recovery for expenses incurred in pre-contractual settings seemingly on the ground of the defender's "unjustifiable" or "wrongful" conduct during the negotiation period. The facts of these cases are set out in the following pages, and an attempt will then be made to determine the nature and the type of actions which may be held to constitute "wrongful conduct".

The case of Walker v Milne and Others, decided in the Court of Session in 1823, will be considered first. There, a group of persons was proposing to erect a monument in memory of Lord Melville. The pursuer's land was thought by all concerned to be the most attractive site upon which the monument could be built. The pursuer was approached with a view to securing his agreement on the matter. Much discussion thereafter took place, but no agreement, enforceable in a court of law, had been reached by the parties when the defenders changed their minds about building on the pursuer's land and broke off the negotiations. In the words of the court, "although there had been a communing, no contract had been concluded". The subscribers subsequently erected the monument elsewhere.

The pursuer raised an action to recover certain expenditures incurred by him in anticipation of the commencement of the erection

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438 See Walker v Milne, (1823) 2 Shaw 379, and Heddle v Baikie, (1846) 8 D 376, as explained in the later cases of Allan v Gilchrist, (1875) 2 R 587, and Gilchrist v Whyte, 1907 SC 984. Cf Dobie v Lauder's Trustees, (1873) 11 M 749.

439 (1823) 2 Shaw 379.
of the monument, and for loss sustained by reason of certain alterations made to his land by the subscribers while negotiations were in progress. The court concluded that:

"the pursuer is entitled to indemnification for any actual loss and damage he may have sustained, and for the expenses incurred in consequence of the alteration of the monument."

The pursuer in the case of Heddle v Baikie was also successful in his claim for the recovery of wasted expenditures. Heddle's predecessors had been the tenants of a farm under a succession of leases from the predecessors of Baikie for about 50 years, when, the farm being advertised to be let, Heddle, whose father was the outgoing tenant, applied for a 19 year lease. The pursuer was immediately let into possession, and expended money on the farm in anticipation of the conclusion of the lease. The defender later refused to grant a written lease. The pursuer was held entitled to recover the expenditures incurred by him on the defender's property.

As is the case with Walker v Milne, it is not easy to discern the basis of the court's decision in Heddle. Later authoritative decisions of the Inner House of the Court of Session do, however, attempt to isolate the ratio of the decisions. It is said that they rest upon the "wrongful conduct" of the defender during the

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440 The pursuer had let the subscribers into possession of his land at an early stage of the negotiations.

441 (1823) 2 Shaw 379 at p 380. For the basis of decision, see p 142 et seq, post.

442 (1846) 8 D 376.

443 Cf Romer L J and Denning L J in the Brewer Street Investments case at p 82 , ante.
abortive negotiations.

Lord Deas, in the case of Allan v Gilchrist,\textsuperscript{444} said that:

"what was recognised \([\text{in the cases of Walker v Milne and Heddle v Baikie}]\) \ldots\ldots\ was a claim for re-imbursement of substantial loss occasioned to the one party by the representations and inducements recklessly and unwarrantably held out to him by the other party".

Lord Ardwall, in the later case of Gilchrist v Whyte,\textsuperscript{445} used similar language and said that Heddle's award was for:

"loss sustained in consequence of the unjustifiable representations and inducements made and held out by the one party to the other contrary to all good faith, and his unjustifiable conduct throughout the whole transaction".\textsuperscript{446}

His Lordship further says that the Court will only entertain a claim for recompense where there is a refusal to consummate a contemplated agreement:

"in very special circumstances indeed, and for the most part only in cases where (1) loss has been wrongfully caused by one of the parties to the other; (2) where the wrong has been done without any excuse; (3) where the losing party is in no way to blame for the loss."\textsuperscript{447}

\textsuperscript{444} (1875) 2 R 587.

\textsuperscript{445} 1907 S C 984.

\textsuperscript{446} id at p 993. The pursuers in the cases of Allan v Gilchrist and Gilchrist v Whyte were unsuccessful because the defenders' conduct was not thought by the court to be "wrongful". In Allen v Gilchrist, the defender refused to complete a contract for the sale of a shop. In anticipation of the conclusion of the contract, the pursuer, with the knowledge of the defender, had dismissed his employees and made arrangements for retiring from business. As a result he suffered substantial losses. His claim for recompense for these losses was dismissed by the court because the defender's conduct during the negotiations did not disclose the requisite element of "wrongfulness". But cf Dobie v Lauder's Trustees, (1873) 11 M 749.

\textsuperscript{447} please see next page.
The question therefore arises of what is meant by the term "wrong" in this context. Nowhere in the cases is there an explanation of the term but, with its delictual undertones, it would seem to mean something more than just an ordinary unilateral termination of advanced negotiations. Both Lord Deas and Lord Ardwall speak of "representations and inducements recklessly and unwarrantably held out" to the pursuer negotiator by the defender. Thus, the conduct of a party who initiates negotiations without intending to contract would, it seems, clearly be classifiable as "wrongful" within Lord Ardwall's formulation.

Express statements or promises by the defender that he will contract with the pursuer, and expenditure by the pursuer at the defender's urging in reliance on these promises may be facts which would persuade the court to hold that the defender has "wronged" the plaintiff if he goes back on his word. The pursuer's case would appear to be stronger if the defender has been pecuniarily benefitted by his efforts. The combination of financial gain with

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447 1907 SC 984 at pp 993 - 994. This dictum, insofar as it purports to confine restitutionary recovery to a pursuer to whom loss has been "wrongfully" caused, (see p 143, post), cannot stand with the Scottish authorities considered in the preceding section which are analysable with a "fault-risk" framework. Indeed, these authorities make no reference to those earlier cases which proceed upon the basis of notions of wrongdoing.

448 In Allan v Gilchrist, (supra).

449 In Gilchrist v Whyte, (supra).

450 See, Gloag, Contract, (2nd ed, 1929) at p 19; Bell v Bell (1841) 3 D 1201. It is thought that these facts would, as in English law, also present a prima facie case of fraud for which damages could be claimed in delict. See chapter III, ante; Gloag, (supra); and cf Mackay v Rodger, 1907, 15 SLT 42; Hamilton v Lochrane, (1899) 1 F 478.

451 Cf Dobie v Lauder's Trustees, (1873) 11 M 749. The pursuer here might, of course, be successful if he bases his case on the "fault-risk" framework discussed earlier. See Chapters II and IV(a), ante.
the defender’s unfulfilled promises of contract may be a sufficient basis upon which to argue that the defender’s conduct in resiling from the negotiations amounted to a "wrong". 452

452 But, see note (451), supra.
V SUMMARY AND CONCLUSION

It has been seen that the legal systems which have been the subject of this study do give a measure of protection to parties entering into contract negotiations. Qualifications have been introduced to the principle of "freedom of negotiation"\(^\text{453}\) in order to avoid the injustices which would result if a party doing substantial work and expending vast sums of money during the negotiation period were subject to the "whim" of the other negotiator. The courts have said that a party breaking off negotiations at a late stage will, if certain requisite criteria are satisfied,\(^\text{454}\) incur a liability to recompense the other party for his wasted expenditures.

Most of the cases allowing negotiators recovery for their wasted expenditures appear in the law reports of the last thirty years or so. This may be partly due to the fact that the modern commercial contract is preceded by a much more protracted period of negotiation than was the case in former times.\(^\text{455}\) Therefore, aggrieved negotiators would be suffering much less substantial losses than in present day conditions, and as a result would be less inclined


\(^{454}\) Eg., see Chapter II(1), ante, for a discussion of the circumstances in which negotiating plaintiff may avail himself of a restitutionary remedy in Anglo-Canadian law.

\(^{455}\) An idea of the scale and magnitude of modern construction projects may be gleaned from cases like Sabemo Pty Ltd v North Sydney Municipal Council [1977] 2 NSWLR 880, where the plaintiff negotiator expended close to half a million dollars during negotiations extending over a period of five years.
to attempt to recover them. Nowadays, with the sheer magnitude and complexity of the subject matter of commercial transactions, the amount, of pre-contract work done by, for example, builders negotiating for large construction jobs is enormous (eg Sabemo Pty Ltd), as is the work done by prospective franchisees (eg Hoffman and MacIver v American Motors) and prospective dealers (eg Brewer v Chrysler Canada).

It is not being urged that courts should increasingly or too readily interfere with the freedom of parties to resile from contract negotiations and impose liability merely because one party suffers loss when the other walks away from incomplete negotiations. Increasing erosion of the principle of freedom of negotiation would "unduly clog contractual negotiations" and place too onerous a duty upon contract negotiators, and may even cause parties to enter into contracts "they do not wish" for fear of incurring a liability to the other party if they should break off the negotiations.

Thus, the doctrines of unjust enrichment and promissory estoppel, while in certain circumstances allowing aggrieved negotiating parties recovery for their wasted expenditures, at the same time

456 Hence, the assumption may have emerged that parties entering into contract negotiations always took the risk that their co-negotiators might withhold the projected agreement.

458 (1965) 133 NW (2d) 267.
460 [1977] 3 WWR 69.
461 Von Mehren, (supra), at p 850.
462 Cf Kessler and Fine, (supra), at p 412.
spell out the inherent limitations on recovery; a party basing his claim upon the former doctrine has to surmount the limitations imposed by the requirements of "fault" and "risk", whereas a party who proceeds on the basis of promissory estoppel must establish that his actions in reliance were both "foreseeable" and "reasonable", and that injustice would be caused unless the promisor were held to his word.464

However, while the freedom to withdraw from negotiations may in form be retained, it clearly cannot be absolute. If it were, the most serious of injustices would be going without redress. Against it must be balanced other considerations, and if certain criteria are satisfied it may in certain cases be impinged upon.465

463 See p 22 , et seq, ante.
464 See Chapter II(2) ante.
465 In much the same way, freedom of contract and certainty, though prime values in the law of contract, are not absolute values. Courts will, on occasion, overlook the expressed intention of contracting parties, and give relief running counter to the stipulations of their agreement. Eg. see Stockloser v Johnson, [1954] 1 QB476.
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