VENDORS AND PURCHASERS—DAMAGES—REAL ESTATE PURCHASER ENTITLED TO INCREASED MORTGAGE INTEREST COSTS AS DAMAGES FROM SELLER WHO BREACHES SALES CONTRACT—*Donovan v. Bachstadt*, 181 N.J. Super. 367, 437 A.2d 728 (1981), *certif. granted*, 89 N.J. 403, 446 A.2d 138 (1982).

Nowhere has the impact of the rampant rise of inflation during the last decade been felt more than in the American housing sector.[1] Homeowners and prospective home buyers have been made well aware of this impact through one of inflation's unpleasant corollaries—the erratic rise of interest rates for home mortgages.[2] In *Donovan v. Bachstadt*,[3] the Appellate Division of the Superior Court of New Jersey recognized the potential injury that the inconstant increase in interest rates may have on a purchaser of real estate. In *Donovan*, the court held that the costs incurred by a purchaser of real estate who is forced to obtain a new home loan commitment at a higher interest rate because of the seller's breach of a contract for sale were compensable elements of damage.[4] Although the court was cognizant of the difficulties surrounding the calculation of damages in such a volatile area,[5] it is unclear whether the *Donovan* court set an appropriate formula to aid in such computation.

Edward and Donna Donovan entered into a contract to purchase a home from Carl Bachstadt on January 19, 1980.[6] The contract

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[1] Statistics compiled in the Consumer Price Index show that the cost of living had risen an unprecedented 210% during the period of 1970-80. ECONOMIC STATISTICS BUREAU OF WASHINGTON, D.C., 25 THE HANDBOOK OF BASIC ECONOMIC STATISTICS No. 1, 99-100 (Jan. 1982); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 486 (101st ed. 1980) [hereinafter cited as STATISTICAL ABSTRACT].

[2] In 1981 alone, interest rates for a conventional home mortgage with a term of 30 years rose from 15.4% in January, to 16.88% in June and then peaked at 18.23% in October before declining to 17.5% at the year's end. (Statistics represent mortgages with 30 year term to maturity at a 75% loan-to-price ratio). FEDERAL HOME LOAN BANK BD. NEWS BULLETIN, (March 5, 1982); FEDERAL RESERVE BULLETIN, DOMESTIC FIN. STATISTICS, A-3 (Jan. 1982).

[3] 181 N.J. Super. 367, 437 A.2d 728 (App. Div. 1981), *certif. granted*, 89 N.J. 403, 446 A.2d 138 (1982).

[4] *Id.* at 375-76, 437 A.2d at 733. Since the difference between what a home purchaser would have paid under an expired mortgage commitment and what he would have paid under a new mortgage at a higher interest rate was held to be ascertainable within a reasonable degree of certainty, a claim by the seller that these damages were too remote was determined by the court to be without merit. *Id.*; *see also infra* notes 28-31 & 71-77 and accompanying text; Garland, *Purchasers Interest Rate Increases: Caveat Venditor*, 27 N.Y.U. L. REV. (forthcoming) (manuscript copy on file at Seton Hall Law Review).

[5] 181 N.J. Super. at 376, 437 A.2d at 733.

[6] *Id.* at 368, 437 A.2d at 729. The property, located in Middletown Township, had a purchase price of $58,900. *Id.* Also, it is interesting to note that at the time the parties entered into the agreement, neither was represented by counsel. Brief for Appellant at 5, Donovan v.

required Bachstadt to take back a purchase-money mortgage[7] of $44,000 for a term of thirty years at an interest rate of thirteen percent.[8] Although Mr. Bachstadt apparently never represented to the Donovans the status of the title in the property, at the time the parties entered into the contract of sale, Mr. Bachstadt did not actually own the property.[9] Rather, he had intended to purchase the property before the Donovan closing[10] from Joan Lowden, whom he believed to be the record owner of the property, thereby enabling him to transfer good title to the Donovans.[11]

In February, 1980, the parties became aware of a possible flaw in the arrangement between Mr. Bachstadt and Ms. Lowden.[12] Upon requesting title insurance, the Donovans were informed that a title search of the property revealed that title was vested in Anthony and Jane Mettrick, and Joan Lowden was not the record owner.[13] Ms. Lowden had supposedly obtained title to the property from Middletown Township after a tax foreclosure action was conducted against the Mettricks in 1977.[14] The title search revealed that because of improprieties in the foreclosure proceedings, the Mettricks were never divested of title, which ultimately prevented the township from receiving the good title which Ms. Lowden believed she had properly obtained.[15]

When the date scheduled for closing had passed, the Donovans filed suit for specific performance and reduction of the interest rate in

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Bachstadt, 181 N.J. Super. 367, 437 A.2d 728 (App. Div. 1981) [hereinafter cited as Brief for Appellant].

[7] *See* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 1.1, at 1-5 (1979). "A purchase-money mortgage arises where the mortgagor's acquisition of the mortgaged real estate is financed by the mortgagee-lender. Often a seller of real estate will take back a purchase-money mortgage for part of the purchase price." *Id.* § 1.1, at 1.

[8] 181 N.J. Super. at 369, 437 A.2d at 729. The original interest rate of 13% was found to be usurious at subsequent court proceedings and ultimately reduced to 10½%. *Id.*; *see also infra* note 17 and accompanying text.

[9] 181 N.J. Super. at 369, 437 A.2d at 729; Brief for Respondent at 2, 5, Donovan v. Bachstadt, 181 N.J. Super. 367, 437 A.2d 728 (App. Div. 1981) [hereinafter cited as Brief for Respondent].

[10] 181 N.J Super. at 369, 437 A.2d at 729. The date for closing was scheduled for May 1, 1980. *Id.*

[11] *Id.* Although the Donovans admitted that Mr. Bachstadt never made any affirmative representations about title being vested in him at the time the contract was executed, the contract did include a clause requiring the seller to convey marketable title. It is unclear whether the Donovans actually had knowledge of Mr. Bachstadt's plan for obtaining title. Brief for Respondent, *supra* note 9, at 2.

[12] 181 N.J. Super at 369, 437 A.2d at 729.

[13] *Id.*; Brief for Respondent, *supra* note 9, at 7, app. 1-2.

[14] 181 N.J. Super. at 369, 437 A.2d at 729.

[15] *Id.* The Donovans were informed of the improprieties of the foreclosure proceeding and the defects in title on April 30, 1980, one day before the scheduled closing. *Id.* Brief for Respondent, *supra* note 9, at 1-2.

the contract for sale from thirteen percent to ten and one-half percent.[16] The Donovans contended that the thirteen percent rate inserted in the contract was usurious in that it exceeded the maximum legal interest rate allowable at the time the parties entered into the agreement.[17] Although it was impossible for Mr. Bachstadt to perform the terms of the contract for sale because of his inability to obtain title, the court granted the Donovans summary relief on both counts of their complaint.[18] Although the Donovans now had a judgment for specific performance,[19] Mr. Bachstadt's plan of obtain-

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[16] 181 N.J. Super. at 369, 437 A.2d at 729. Suit was filed on May 5, 1980 in the Superior Court of New Jersey, Chancery Division, Middlesex County. *Id.*

[17] *Id.* On January 19, 1980, the date the contract was executed, the maximum legal interest rate for home mortgages was 10½%. *Id.*; *see supra* note 8 and accompanying text. BLACK'S LAW DICTIONARY 1385 (rev. 5th ed. 1979) defines usury as follows:

> Collectively, the laws of a jurisdiction regulating the charging of interest rates. A usurious loan is one whose interest rates are determined to be in excess of those permitted by the usury laws. An illegal contract for a loan or forebearance of money, goods or things in action, by which illegal interest is reserved, or agreed to be reserved or taken. An unconscionable or exorbitant rate or amount or interest. An unlawful contract upon the loan of money, to receive the same with exorbitant increase. The reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest. A profit greater than the lawful rate of interest, intentionally exacted as a bonus for the forebearance of an existing indebtedness or a loan of money, imposed upon the necessities of the borrower in a transaction where the money is to be returned at all events.

Id. (citations omitted). For an explanation of the effects and purposes of state usury laws, see Nosari & Lewis, *How Usury Laws Affect Real Estate Development*, 9 REAL EST. L.J. 30 (1980); *see also Perspective on New Jersey's Usury Law*, 96 N.J.L.J. 1256, 1256 (1973).

[18] 181 N.J. Super. at 369, 437 A.2d at 729. The appellate division noted that the chancery division had ordered that " 'Carl Bachstadt specifically perform all obligations required of him under the contract, subject, however, to the interest rate stated therein of 13 percent being reformed to be 10½ . . . .' " *Id.* (quoting Donovan v. Bachstadt, (Ch. Div.)) (unreported decision).

The defendants argued that the 13% interest rate was not usurious since on the May 1, 1980 closing, the maximum interest rate allowable had risen above this figure. Since Mr. Bachstadt never appealed the decision of the chancery division, the appellate division did not review this issue and left the question open. *Id.* at 369 n.1, 437 A.2d at 729 n.1.

[19] It is unclear whether the impracticality of Mr. Bachstadt's obtaining title was known by the chancery division before it ordered specific performance. In the transcripts of the proceedings, this particular issue was not even addressed. Brief for Appellant, *supra* note 6, at 96 app. 21. The only question with which the court dealt was whether the interest rate in the original contract was usurious. *Id.*

Although the question became moot because the plaintiffs were now seeking damages at law, the chancery division could have awarded money damages in lieu of the decree of specific performance. Brief for Appellant, *supra* note 6, at 16 app. 63-65 (trial judge questioned whether fact that Mr. Bachstadt had no title in property was known to chancery judge before he decreed such remedy); J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1410 (5th ed. 1941).

The equitable remedy of specific performance is generally granted when "the subject matter of [a] contract is unique in character and cannot be duplicated or because the obtaining of a substantial equivalent involves difficulty, delay and inconvenience." 5 A. CORBIN, CONTRACTS § 1142 (2d ed. 1964 & Supp. 1980). A classic example of a contract pertaining to a unique

ing title to the land in dispute from Ms. Lowden had been all but rendered nugatory by the faulty tax foreclosure action.[20] It soon became apparent to the Donovans that Mr. Bachstadt could not comply with the trial court's order.[21]

Realizing that specific performance was unavailable, the Donovans instituted this proceeding on July 7, 1980, seeking monetary relief for the breach of the contract for sale by Mr. Bachstadt.[22] The complaint was summarily dismissed by the law division judge, subject to the Donovans being reimbursed for the costs of the title search and survey of the property in question.[23] The claim for punitive damages[24] and the claim for compensatory damages for the loss of the bargain[25] of the original mortgage at the reformed ten and one-half percent interest rate[26] were rejected outright.

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subject matter where specific performance is usually invoked is a contract for the sale of realty. G. DOBBS, REMEDIES § 12.10 (1973); J. POMEROY, *supra*, §§ 221(b).

As a general principle, when specific performance is initially deemed an appropriate remedy but subsequently becomes impractical to enforce, courts in equity can retain jurisdiction and, as an alternative, grant an award of money damages. Dunning v. Alfred H. Mayer Co., 483 S.W.2d 423, 428 (Mo. Ct. App. 1972); 6 S. WILLISTON, CONTRACTS, § 1444 (rev. ed. 1936). However, when a defendant is in such a position that it is impossible for him to comply with a decree of specific performance, such a remedy will not be granted. Villa Corp. v. S.D. Walker, Inc., 187 F.2d 493 (3d Cir. 1951); Robinson-Shore Dev. Co. v. Gallagher, 26 N.J. 59, 138 A.2d 726 (1958) (equity court will not force conveyance of defective warranty deed); J. POMEROY, *supra*, § 1450(b).

[20] *See supra* notes 14 & 15 and accompanying text.

[21] 181 N.J. Super. at 369-70, 437 A.2d at 729.

[22] *Id.* The plaintiffs originally filed suit in the Superior Court of New Jersey, Law Division, in Middlesex County. Venue was subsequently changed to Monmouth County because of the location of the property in dispute. Brief for Appellant, *supra* note 6, at 3.

[23] 181 N.J. Super. at 370, 437 A.2d at 729. The damages sought by the Donovans in their motion for summary judgment included: "1. $142.85 for the costs of searches, which disclosed that the defendants did not and never had clear title to said property. 2. $145.00 for the survey of the subject property. 3. Compensatory damages and 4. Punitive damages." *Id.*

[24] *Id.* Although the Donovans did not appeal the dismissal of the claim for punitive damages, the appellate division noted that the law divisions's ruling on the issue was correct. *Id.* at 370 n.2, 437 A.2d at 729 n.2; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 355, at 154 (1981) (remedies for breach of contract generally exclude punitive damages).

[25] The loss of the bargain theory of recovery for breach of contract by a vendor of real estate has been referred to as the "American Rule." Basically, this rule allows an aggrieved purchaser to recoup "the difference between the contract price and the market value, plus any payments which have been made." C. MCCORMICK, DAMAGES § 177, at 680 (1973); *see also* Annot., 68 A.L.R. 137 (1930). The Donovans saw the loss of the bargain of the mortgage as the difference between the terms stated in the contract and the terms they would now have to accept in the mortgage market. 181 N.J. Super. at 370, 437 A.2d at 729; *see also* Dunning v. Alfred H. Mayer, Co., 483 S.W.2d 423, 428 (Mo. Ct. App. 1972) (plaintiff's prayer for relief included interest increase costs).

The theory of recovery which New Jersey had traditionally followed in breach of land contracts is based on what is known as the "English Rule," which "limits the purchaser, except where the vendor has acted in bad faith, to the amount of the deposit paid by the purchaser, with interest and reimbursement of expenses, or, in other words, the amount which would be

The sole issue raised on appeal was the Donovans' claim that they suffered damages because of "the cost of higher financing" caused by Mr. Bachstadt's breach.[27] The Donovans asserted that had Mr. Bachstadt complied with the terms of the reformed contract, their monthly payment for a $44,000 mortgage at ten and one-half percent over thirty years would have been $402.40.[28] Because of Mr. Bachstadt's breach, the Donovans had to obtain new financing with an interest rate of thirteen and one-quarter percent. The monthly payment of a mortgage of $44,000 at this percentage rate over thirty years amounts to $495.35.[29] The Donovans claimed that the difference in the monthly payments of the two financing agreements was a compensable element of damages.[30]

The appellate division modified and remanded the judgment to the trial court for a hearing on the issue of compensatory damages.[31] Judge King, writing for the court, began his analysis with an examination of the history of a purchaser's right to recover damages caused by a vendor's breach of contract for the sale of real estate.[32] At common law, when a vendor entered into an agreement to transfer real estate with marketable title, and the title was subsequently found to be

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recoverable upon a rescission." C. McCormick, *supra*, § 178, at 684; *see* Ganger v. Moffet, 8 N.J. 73, 83 A.2d 769 (1951), *cited in Donovan*, 181 N.J. Super. at 371, 437 A.2d at 730. *But cf. infra* notes 34-38 and accompanying text. For a discussion of common law theories of compensation for breach of contract in land sales, see Garland, *supra* note 4.

[26] 181 N.J. Super. at 370, 437 A.2d at 729. The trial judge found that the claim for compensatory damages was too speculative. *Id.* He concluded "that '[t]he breach of contract was the breach of the contract to deliver the property. The mortgage financing was only incidental to the basic concept . . . .' " *Id.* (quoting Donovan v. Bachstadt, (Law Div.)) (unreported decision).

[27] *Id.* The Donovans claimed to have entered into a new agreement to purchase realty with a higher rate of interest on a new loan commitment. Since the compensatory damages issue was not given a plenary hearing in the law division, the fact that the Donovans had entered into a new transaction was not reflected in the record. *Id.* As the appellate division noted, an offer of proof on this issue would have aided the court in assessing the claims of the parties. *Id.*; *see* N.J. Ct. R. 1:7-3, which provides in pertinent part:

> If an objection to a question propounded to a witness is sustained by the court, the examining attorney may, out of the hearing of the jury (if there is a jury), make a specific offer of what he expects to prove by the answer of the witness, and the court may add such other and further statement as clearly shows the character of the evidence, the form in which it was offered, and the ruling thereon.

Id.

[28] Brief for Appellant, *supra* note 6, at 11-12.

[29] *Id.*

[30] 181 N.J. Super. at 370, 437 A.2d at 729. Through the use of simple arithmetic, the difference in the mortgage agreements over the course of a year is $1,115.40. Over the life of the mortgage, the difference equals $33,462.

[31] *Id.* at 376, 437 A.2d at 733. The law division award of survey and title search costs was affirmed. *Id.*

[32] *Id.* at 370-71, 437 A.2d at 730.

defective, an aggrieved purchaser's recovery was limited to the amount of money he may have deposited on the purchase price and the interest thereon.[33] An exception to this limitation, however, was made when a vendor "unjustifiably refuse[d] to convey the property, [did] not convey for reasons within his control, or otherwise create[d] a situation that disable[d] him from conveying the property"[34] whereby the purchaser was entitled to recover damages for the benefit of the bargain.[35]

New Jersey provides a statutory remedy, however, for recovery of deposit money and interest and cost of the title check.[36] According to the *Donovan* court, the legislature drafted the present statute, with the intention of making applicable to realty contracts the general purpose of damages in contract law—to put the injured party in the same position he would have been in had the contract been performed.[37] The court further noted that unless otherwise provided in the contract, the statute removed any common law limitation on the extent of a purchaser's recovery.[38]

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[33] *See* Ganger v. Moffet, 8 N.J. 73, 79, 83 A.2d 769, 771 (1951); Rabinowitz v. Debow, 104 N.J.L. 62, 64-65, 138 A. 891, 891-92 (1927); Mangonaro v. Kane, 84 N.J.L. 408, 87 A. 94 (1913); Gerbert v. Trustees, 59 N.J.L. 160, 35 A. 1121 (1896); N.J. REV. STAT. § 2:45-1 (1915) (repealed 1951), which provided:

> Whenever any person shall contract to sell real estate or any interest therein, and shall not be able to carry out such contract because of a defect in the title to such real estate or interest therein, the person with whom such contract was made, or his legal representatives or assigns, shall be entitled to recover from such vendor, in an action for the breach of such contract, not only the deposit money, with interest and costs, but also the reasonable expenses of examining the title and making survey, except where the contract shall provide otherwise; *provided*, this act shall not limit the recovery where the purchaser may seek to recover for the deceit or fraud of the vendor.

Id. For a list of other states which have adopted similar statutes, see C. MCCORMICK, *supra* note 25, § 179, at 687 n.30.

[34] St. Pius House of Retreats v. Diocese of Camden, 88 N.J. 571, 443 A.2d 1052 (1982); *see also supra* note 33 and accompanying text & *infra* note 38 and accompanying text.

[35] *See supra* note 25.

[36] N.J. STAT. ANN. § 2A:29-1(West 1951) reads as follows:

> When any person shall contract to sell real estate and shall not be able to perform such contract because of a defect in the title to the real estate, the person with whom such contract was made, or his legal representative or assigns, may, in a civil action, recover from the vendor, not only the deposit money, with interest and costs, but also the reasonable expenses of examining the title and making a survey of the property, unless the contract shall provide otherwise. *This section shall not preclude the recovery by the purchaser from the vendor of any other damages to which he may be entitled by law.*

Id. (emphasis added).

[37] 181 N.J. Super. at 370, 437 A.2d at 729. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 24, § 345; 11 S. WILLISTON, CONTRACTS § 1338 (3d ed. 1968).

[38] 181 N.J. Super. at 371, 437 A.2d at 730.

This interpretation, however, was subsequently rejected in *St. Pius House of Retreats v. Diocese of Camden*.[39] In *St. Pius House*, the New Jersey Supreme Court found that the legislature, in drafting the present statute, did not modify or abrogate the common law limitations on damage recovery for breach of a real estate contract.[40] The supreme court noted that these limitations do not apply to situations where the vendor's title is found to be defective.[41] Since Mr. Bachstadt never had title to the disputed property, the question of whether the title was defective does not arise. While the *St. Pius House* court inferred that these damage principles may not be applicable to the *Donovan* situation,[42] this inference is immaterial for purposes of this Note, which focuses on the *Donovan* court's examination of interest increase damages.

The court next examined whether costs of increased interest rates caused by a breach of contract are compensable items of damages, ancillary to an award of specific performance.[43] Turning to other jurisdictions which have specifically dealt with the problem, the court examined *Reis v. Sparks*.[44] In *Reis*, the Court of Appeals for the Fourth Circuit, applying Maryland law, found no abuse of discretion in the district court's award of specific performance of an option contract to purchase realty as well as a monetary award representing the increased financing and closing costs caused by the seller's breach.[45] The *Reis* court reasoned that the delay caused by the seller's refusal to honor the properly exercised option forced the buyers to obtain a new mortgage with a higher interest rate. Although the option contract contained no provisions pertaining to the financing of

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[39] 88 N.J. 571, 443 A.2d 1052 (1982).

[40] *Id.* at 586-87, 443 A.2d at 1060. Although the supreme court did not examine the soundness of these common law damage limitations, it noted that:

> [The] rule may impose on an innocent buyer a serious loss to the benefit of the seller who is at fault. This may be peculiarly true when the contract extends over a period of years while a buyer is making substantial payments upon the principal as well as improvements to the property.

Id. at 585, 443 A.2d at 1059.

[41] *Id.* at 584, 443 A.2d at 1059.

[42] *Id.* at 587 n.5, 443 A.2d at 1060 n.5.

[43] 181 N.J. Super. at 372, 437 A.2d at 730.

[44] 547 F.2d 236 (4th Cir. 1976).

[45] *Id.* at 238. The buyer-appellants consumated a contract for the sale of a portion of seller-appellee's farmland. At the time of settlement of this contract, the parties entered into a second agreement giving the buyers an option to purchase the remaining acreage of the seller's land within two years and a subsequent three-year right of first refusal. *Id.* at 237-38. When the buyers notified the sellers of their intention to exercise the option, the sellers totally refused to communicate about the option and instead instituted suit in the district court seeking a declaratory judgment to settle the rights of the parties under the option contract. *Id.*

the land[46] and the sellers claimed that the interest increase was not a foreseeable item of damages at the time of the contract's execution,[47] the court noted that the seller had actual notice of the buyer's intention to finance the land through a mortgage.[48] Since the seller refused to honor the contract even with this notice, the *Reis* court found the award to be well within the equitable power of the trial court.[49]

The *Donovan* court next examined *Godwin v. Lindbert*,[50] wherein the Michigan Court of Appeals reached a result homologous to the holding in *Reis*.[51] Applying the general principle of equity that "[a] trial court should enforce the equities of the parties in such a manner as to put them as nearly as possible in the position that they would have occupied had the conveyance of the real property oc-

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[46] *Id.* at 238. The buyers had initially obtained a mortgage with an interest rate of 7½% over 20 years in the amount of $33,000. The lowest interest rate available to buyers because of the change in the Maryland usury law at the time of the award of specific performance, was 9½%. *Id.*

[47] *Id.* at 239.

[48] *Id.* The sellers cited the rule of the famous English case of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854), which established the principle that the amounts recoverable in a breach of contract action were limited to those:

> as may fairly and reasonably be considered as either arising naturally, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Id. at 151. *See generally* Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345 (1931). The seller's contention in *Reis* was that the costs incurred by the buyer due to the interest increase were not foreseeable and therefore not recoverable under *Hadley v. Baxendale*. 547 F.2d at 239.

The court of appeals in *Reis* was quick to answer this contention with the tenet that ancillary damages given in an award of specific performance are not the same as breach of contract damages. *Id.* The former attempts to make the parties whole by enforcing the contract while the latter computes damages incurred by the contract failing. Since the rule of *Hadley v. Baxendale* has traditionally only applied to legal damages for the breach of contract, the court found it inapplicable under the facts with which it was faced. 547 F.2d at 239; *see infra* notes 124-25 and accompanying text; Garland, *supra* note 4; *see also* Bernardini v. Stefanowicz, 29 Md. App. 508, 349 A.2d 287 (Ct. Spec. App. 1975).

[49] 547 F.2d at 239-40. The court awarded the buyers an amount of $3,950.63, representing the increased interest rates and the additional closing costs, discounted to present value at an annual rate of 5%. *Id.* at 237-39.

[50] 101 Mich. App. 754, 300 N.W.2d 514 (Ct. App. 1980). The sellers in *Godwin* breached a contract for sale of real estate which contained a clause for the cash sale of the land as well as a conventional mortgage. *Id.* at 756-57, 300 N.W.2d at 515. On the scheduled date of closing, the defendant, Thomas Lindbert, did not attend because of an injunction obtained by his wife in connection with a divorce proceeding which enjoined him from contacting the plaintiffs about the contracted house sale. *Id.* Mrs. Lindbert's attorney did attend the closing and informed the buyers that she no longer intended to sell the home. *Id.* The buyers brought suit seeking specific performance and damages arguing that their original mortgage commitment had lapsed.

[51] *Id.* at 758, 300 N.W.2d at 516. In fact, the appellate court in *Godwin* noted that the trial court relied heavily on the holding in *Reis* in reading its decision to award the interest increase damages.

curred when required by the contract,"[52] the court found no abuse of discretion in awarding the difference between the buyer's original loan commitment and the subsequent mortgage necessitated by the seller's breach, in addition to specific performance.[53]

The *Donovan* court also examined *Regan v. Lanze*,[54] which allowed for the recovery of the costs of increased interest rates. In *Regan*, the Appellate Division of the Supreme Court of New York addressed the issue by perfunctorily stating that: "[t]his additional cost is a predictable consequence arising out of delay in conveying title."[55]

Having analyzed the decisions which allowed recovery,[56] the *Donovan* court addressed the holdings in cases presenting a contrary view.[57] The principal case examined was *Dunning v. Alfred H. Mayer, Co.*,[58] wherein the Missouri Court of Appeals rejected recov-

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[52] *Id.*; *see also* 6 S. WILLISTON, CONTRACTS § 1444 (3d ed. 1968). For an examination of the use and objective of the remedy of specific performance in contract settings, see J. POMEROY, *supra* note 19, §§ 1400-1410.

[53] 101 Mich. App. at 756-57, 300 N.W.2d at 515-16.

[54] 47 A.D. 2d 378, 366 N.Y.S.2d 512 (App. Div. 1975), *rev'd on other grounds*, 40 N.Y.2d 475, 354 N.E.2d 818, 387 N.Y.S.2d 79 (1976).

[55] 47 A.D. 2d at 383, 366 N.Y.S.2d at 516.

[56] 181 N.J. Super. at 372-73, 437 A.2d at 731. Although the *Donovan* court examined the decisions on the issue under consideration, similar cases have subsequently been decided in various states. Although some of these decisions will be discussed in this Note, see *infra* notes 87-92 and accompanying text. The list is by no means exhaustive. Cases in which this problem has been considered include: Reis v. Sparks, 547 F.2d 236 (4th Cir. 1976); Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975), *aff'd as modified*, 577 F.2d 424 (7th Cir. 1978); Hutton v. Glicksberg, 128 Cal. App. 3d 240, 180 Cal. Rptr. 141 (Ct. App. 1982); Cohen v. Meola, 37 Conn. Supp. 27, 429 A.2d 152 (Super. Ct. 1980); Home America, Inc. v. Atkinson, 342 So.2d 268 (Fla. Dist. Ct. App. 1980); Hemenway Co. v. Bartex, Inc., 373 So.2d 1356 (La. Ct. App. 1975); Godwin v. Lindbert, 101 Mich. App. 754, 300 N.W.2d 514 (Ct. App. 1980); Dunning v. Alfred H. Mayer, Co., 483 S.W.2d 423 (Mo. Ct. App. 1972); Regan v. Lanze, 47 A.D.2d 378, 366 N.Y.S.2d 512 (App. Div. 1975), *rev'd on other grounds*, 40 N.Y.2d 475, 354 N.E.2d 818, 387 N.Y.S.2d 79 (1976); Roanoke Hosp. Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 214 S.E.2d 155 (1975); Thompson v. Hanson, 6 Wash. App. 1, 491 P.2d 1065 (Ct. App. 1972).

[57] 181 N.J. Super. at 372, 437 A.2d at 371. One case cited for the rejection of recovery of interest rate increases simply held that there was no supporting evidence for such an award. West Hill Constr. Corp. v. Horwath, 149 Conn. 608, 182 A.2d 919 (1962), *cited in* 181 N.J. Super. at 372 n.3, 437 A.2d at 731 n.3. Although the *Horwath* court rejected this theory of damage recovery, it was unclear from the facts or language of the case whether this was the theory presented at the trial level. 149 Conn. at 612-13, 182 A.2d at 921.

[58] 483 S.W.2d 423 (Mo. Ct. App. 1972). In *Dunning*, the plaintiffs contracted with the defendants to purchase a specific lot of land and have the defendants construct a home on it. *Id.* at 424-25. The parties agreed on a purchase price and the plaintiffs obtained a loan commitment in the amount of $17,600 for 30 years at 6%. *Id.* at 426. When it became apparent to the plaintiffs that the defendants were not going to comply with the terms of the contract, they instituted suit, seeking specific performance and damages. *Id.* The trial court awarded money damages, since specific performance was impractical due to the construction of a different building by the defendants on the lot in question. These money damages which included the difference between the interest rates which were available to the plaintiffs on the date when

ery for damages arising out of additional costs of financing.[59] The *Dunning* court based its decision on the plaintiffs' failure to prove any injuries resulting from the rise in interest rates. Because no evidence was offered to show that the plaintiffs had entered into a similar transaction after they became aware of defendant's breach, damages were denied.[60] The court held that a judgment "representing the additional costs of financing due to increased interest rates was remote and contingent and should not under the circumstances be awarded."[61]

At least one commentator has criticized the decision in *Dunning* as unsound, stating that:

> The reason [the plaintiff] had not applied for a loan elsewhere was he was still hoping to get specific performance; there is no reason to suppose that on buying another house he would pay cash for it. *That* possibility is the one which is remote and speculative, not the possibility that on buying a house he will have to borrow money. At least it is a question of fact which possibility is more likely.[62]

The *Donovan* court perceived this criticism to be overbroad, and viewed the *Dunning* decision as simply setting forth an evidentiary standard requiring a certain level of proof pertaining to the actual damages suffered by the aggrieved home purchaser.[63]

Since the issue of damages arising out of increased interest costs was one of first impression in New Jersey, the *Donovan* court turned to New Jersey law addressing the level of certainty required when proving the extent of damages in a breach of contract action.[64] The

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judgment was entered (7½%), and the interest rates in the original loan commitment which had subsequently lapsed. *Id.* See also *supra* note 19 for a discussion of the power of equity courts to award monetary damages when specific performance becomes impractical or impossible.

[59] 483 S.W.2d at 430.

[60] *Id.* at 429.

[61] *Id.* In addition to the lack of evidence offered to show that the plaintiffs had committed themselves to a new loan agreement, it was established at trial that there was no proof of any penalty fee charged by the mortgagor for the expiration of the original mortgage. *Id.*

[62] A. CORBIN, CONTRACTS § 1098, at 202-03 (Supp. 1980)(emphasis in original).

[63] 181 N.J. Super. at 373, 437 A.2d at 731. The importance of proving that a similar transaction has been entered into by the party seeking interest increase damages is reflected in the factors which the *Donovan* court set forth for the trial court to consider in their assessment. *Id.* at 376, 437 A.2d at 733. In fact, the *Donovan* court believed that had this fact been proven by the plaintiffs in *Dunning*, the Missouri court would have permitted recovery. *Id.* at 373, 437 A.2d at 731; *see infra* notes 78-82 and accompanying text; *see also* Comment, *Missouri Stare Decisis: Specific Performance of Contracts for the Sale of Real Estate*, 43 UMKC L. REV. 199, 208-09 (1974).

[64] 181 N.J. Super. at 374, 437 A.2d at 731-32.

general principle espoused by authorities[65] and case law[66] is that the uncertainty of damages caused by a breach of contract relates more to the actual fact that damages have occurred rather than to the extent or amount of the alleged damages. When it is established that a party has been wrongfully injured by another's breach of contract, simply because the resulting damages are not measurable to an exact degree will not generally bar recovery.[67] As the court pointed out, damages have never been required to be proven with exactitude or "mathematical precision" by New Jersey courts.[68] The relaxation on the requirement of proving damage amounts with precision has not only been adopted by the courts of New Jersey, but as was stated in *Donovan*, has also been approved by the Uniform Commercial Code as adopted in New Jersey and in the Restatement on Contracts.[69]

Finally, the *Donovan* court held that the "interests of justice" required that a hearing be had on the issue of the damages caused by the breach of contract and the subsequent rise in mortgage interest rates.[70] The court enumerated several factors which trial courts

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[65] 5 A. Corbin, *supra* note 19, § 1020, at 124-27; 11 S. Williston, *supra* note 37, § 1346, at 240-45 (plaintiff must lay a basis for the extent of harm within reasonable certainty); 25 C.J.S., *Damages* § 28 (1966).

[66] Zenith Radio Corp. v. Hazelton Research, 401 U.S. 321 (1971); First Nat'l Bank v. Jefferson Mortgage Co., 576 F.2d 479 (3d Cir. 1978).

[67] *See supra* note 66 and accompanying text; *see also* Sandler v. Lawn-A-Mat, 141 N.J. Super. 437, 358 A.2d 805 (App. Div. 1976), *certif. denied*, 71 N.J. 503, 366 A.2d 659 (1976), ("mere difficulty or lack of certainty in proof or finding of quantum of damages does not inhibit an award to successful party"); Grillo v. Board of Realtors, 91 N.J. Super. 202, 230, 219 A.2d 635, 651 (Ch. Div. 1966) ("uncertainty as to measure or extent of damages should not bar recovery").

[68] 181 N.J. Super. at 374, 437 A.2d at 731; *see also* Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979). *Kozlowski* is the seminal case in New Jersey on "palimony." In that case the supreme court upheld a trial court decision awarding the plaintiff damages for the breach of an express agreement relating to cohabitation. On the issue of the measure of damages resulting from the defendant's breach, the court stated:

> While the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery—courts will fashion a remedy even though proof of damages is inexact.

Id. at 388, 403 A.2d at 908 (citations omitted), *cited in* 181 N.J. Super. at 375, 437 A.2d at 733.

[69] 181 N.J. Super. at 374-75, 437 A.2d at 732; *see* U.C.C. § 2-715 comment 4 (1978), *adopted in New Jersey at* N.J. STAT. ANN. § 12A:2-715 (West 1962) (Code "rejects any doctrine of certainty which requires almost mathematical precision in proof of loss. Loss may be determined in any manner which is reasonable under the circumstances"); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 24, § 352 comment a, at 144-45 ("A court may take into account all circumstances of breach, including willfulness, in deciding whether to require a lesser degree of certainty giving greater discretion to trier of facts").

[70] 181 N.J. Super. at 375-76, 437 A.2d at 733.

should consider to arrive at an amount that would best reflect the actual damage caused by the party in breach and the injury suffered by the aggrieved purchaser.[71]

The first factor which the *Donovan* court noted was that a plaintiff in an interest increase claim is under a general duty to mitigate damages.[72] All awards of this type were to be reduced to their present value.[73] Also, "the likely true life of the promised mortgage" that plaintiffs are forced to enter into because of the defendant's breach was specified as a consideration that must be taken into account when computing interest increase damages.[74] The *Donovan* court noted, however, that the paramount factor a trial court has to consider is proof that the parties claiming interest increase damages have entered into a new contract for the purchase of a home or that at a minimum they were likely to enter into such a transaction in the near future.[75] Indeed, the court deemed such proof so vital to a claimant's successful recovery that without such a showing, "any economic damages are remote and speculative."[76] The *Donovan* court held that by comparing the aborted loan commitment with the one that the plaintiff was forced to enter into because of the defendant's breach, the trial court can fashion an award which would initially reflect the measure of damages suffered by the plaintiffs.[77]

The "proof of new transaction" factor reflects the court's reliance on the *Dunning* decision.[78] By creating an evidentiary standard with which to comply, the *Donovan* court recognized the potential for abuse by a party who has unduly prolonged his search for a new home until interest rates have risen or alternatively, has not searched in the housing market at all. In either case, the party claiming injury from the breach of the original real estate contract has not conformed to his general duty to mitigate damages, and if a significant delay has occurred, damages may well be "remote and speculative."[79] If the

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[71] *Id.* at 376, 437 A.2d at 733.

[72] 181 N.J. Super. at 376, 437 A.2d at 733; *see infra* notes 79 & 80 and accompanying text.

[73] 181 N.J. Super. at 376, 437 A.2d at 733; *see infra* notes 83-85 and accompanying text.

[74] 181 N.J. Super at 376, 437 A.2d at 733; *see infra* notes 86 & 87 and accompanying text.

[75] 181 N.J. Super. at 376, 437 A.2d at 733.

[76] *Id.*

[77] *Id.*

[78] *See supra* notes 60-65 and accompanying text.

[79] 181 N.J. Super. at 376, 437 A.2d at 733. The *Donovan* court specifically held that all plaintiffs in an increased interest cost claim must comply with "their general duty to mitigate damages." *Id.*; *see also* Sommer v. Kriedel, 74 N.J. 446, 378 A.2d 767 (1977). The duty to mitigate has also come to be known as the "Avoidable Consequences Rule." *See* G. DOBBS, *supra* note 19, § 3.7, at 186; C. MCCORMICK, *supra* note 25, § 33, at 127. Simply stated, the rule denies recovery by an aggrieved party "for any item of damage which could thus have been avoided." *Id.*

breaching party can show that the plaintiffs unnecessarily delayed the subsequent loan search and that a comparable loan commitment could have been entered into prior to any intervening rises in interest rates, the trier of fact can adjust the award to reflect the actual harm caused by the breach.[80] By allowing the trial court to consider not only whether the party claiming damages had entered into a new home financing agreement but also whether circumstances show it was "likely to do so in the near future," the *Donovan* court permitted the trier of fact, in his discretion, to examine certain factors.[81] For example, a trial court could examine the conditions in the housing market and the availability of comparable homes in a similarly situated area before ultimately deciding whether there was in fact a good faith effort on the part of the aggrieved purchaser to relocate and obtain new financing for a new real estate transaction.[82]

One of the devices which the *Donovan* court indicated the trial court should use when computing an award for interest increase damages is the reduction of such an award to its present value.[83] Since this type of award reflects an amount which the plaintiff would suffer prospectively, reducing it to its present worth would ensure that the plaintiff is not overcompensated by receiving the lump sum of his total damages which could be invested immediately, thereby enabling him to receive windfall profits on money that was supposedly a reflection of his future losses.[84] The United States Supreme Court stated

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[80] For example, plaintiffs might be limited to recover an amount which represents the interest increase which occurred within a reasonable time after the contract was breached rather than recover an amount which represents the difference between the broken loan commitment and the entered into mortgage after interest increases reach a peak level. If the defendant can show that the plaintiffs made no attempt to search for a similar house and obtain a new loan commitment to finance the home's purchase, there would be no injury due to interest increase and ultimately, no basis for such a recovery. *See generally supra* note 79 and accompanying text; C. McCORMICK, *supra* note 25, § 33, at 130 (defendant has burden of producing evidence to show that plaintiff could have minimized his losses).

[81] 181 N.J. Super. at 376, 437 A.2d at 733.

[82] *Id.*

[83] *Id.*; *see supra* note 73 and accompanying text. Reducing a lump sum award for future loss to its present value entails basically three steps. First, the amount of loss must be ascertained. Second, the period in which the loss will occur must be determined in order to arrive at an average weekly or monthly rate of loss. Third, these amounts must be adjusted in accordance with a discount table to arrive at a sum which represents the present value of the total award which would normally be due at a future date. G. DOBBS, *supra* note 19, § 8.7, at 570-75; Leasure, *How to Prove Reduction to Present Worth*, 21 OHIO ST. L.J. 204 (1960). For a source of discount tables used to discount present value, see G. REEVES, HANDBOOK OF INTEREST, ANNUITY AND RELATED FISCAL TABLES (1966), *cited in* G. DOBBS, *supra* note 19, § 8.7, at 571 n.9.

[84] An award discounted to present value should reflect an amount which if invested at a safe and stable interest rate would enable an injured plaintiff to draw from the award, on a specified periodic basis, an amount which would compensate for losses at the time when each loss actually

that: "[i]t is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future."[85]

The policy reason supporting reduction of future damage awards to present value also buttresses the *Donovan* court's rationale for another factor to be considered by trial courts. Recognizing that many homeowners do not own one home for the full term of the mortgage loan commitment, the *Donovan* court put forth a standard to aid in the computation of an interest increase award which manifests the court's desire to equalize, as much as possible, the actual loss caused by the defendant's breach and the actual injury suffered by the plaintiff.[86] The *Donovan* court held an interest increase "award should also represent the likely true life of the promised mortgage."[87] This reasoning is sound because it also attempts to avoid overcompensating the injured plaintiff.

Assume, for example, that a plaintiff was subjected to interest increase costs resulting in monthly mortgage payments of $100 more than would have been required under the first loan commitment which was lost due to defendant's breach. If the term of the mortgage was thirty years, it appears that the plaintiff would be entitled to recover a lump sum representating the increased monthly payments for the full term. If it is further presumed, however, that ten years into the loan commitment, the plaintiff prepays the loan in full or sells to a third party who assumes the existing mortgage, he has then been compensated for twenty years worth of interest increase costs that in actuality never materialized. It is this windfall profit that the *Donovan* court was cognizant of in formulating the damage stand-

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occurs. *See supra* note 83; Lawless, *Compensation of Future Damages: A View From the Bench*, 54 GEO. L.J. 1131 (1961). *But see* Comment, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 IOWA L. REV. 138 (1978).

Using the *Donovan* case as an example, the plaintiff would be awarded an amount which if invested in a basic savings account would draw interest at approximately 5 or 6%. To illustrate this principle, assume that the defendant's breach forced the plaintiffs to have to pay $100 a month more on their mortgage for a period of 30 years. An award discounted to present value would reflect an amount which, after withdrawing $100 every month to make up the difference in their mortgage payments, would leave the plaintiffs with a zero balance in their account after making the last payment.

For cases addressing interest increase damages which have discounted damage awards to their present value, see Reis v. Sparks, 547 F.2d at 238; Hutton v. Glicksberg, 128 Cal. App. 3d 240, 180 Cal. Rptr. 141 (Ct. App. 1982); Goodwin v. Lindbert, 101 Mich. App. at 756-57, 300 N.W.2d at 515.

[85] Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485, 489 (1916); *see also* Schaeffer, *Uncertainty and the Law of Damages*, 19 WM. & MARY L. REV. 719, 719 (1978), in which Professor Schaeffer states: "A dollar to be paid in the future is worth less than a dollar payable today."

[86] 181 N.J. Super at 376, 437 A.2d at 733.

[87] *Id.*

ard.[88] Although this standard appears to represent the best interests of both parties concerning the breached contract, in application, it may be criticized as speculative.[89]

The first obstacle to be confronted in the consideration of this factor demonstrates its weakness in utility. Simply put, how is the "likely true life" of a particular mortgage computed? It is a recognized fact in the savings and loan industry that most mortgages are fulfilled before their date of maturity.[90] There is a general assumption throughout the industry that the average true life of a mortgage is

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[88] No other reported decision awarding interest damages recognized the possibility of a plaintiff reaping an unwarranted windfall when liability under the existing mortgage is extinguished before its full term. *See* Reis v. Sparks, 547 F.2d 236 (4th Cir. 1976); Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975), *aff'd as modified*, 577 F.2d 424 (7th Cir. 1978); Cohen v. Meola, 37 Conn. Supp. 27, 429 A.2d 152 (Super. Ct. 1980); Home America, Inc. v. Atkinson, 392 So.2d 268 (Fla. Dist. Ct. App. 1980); Hemenway Co. v. Bortex, Inc., 373 So.2d 1356 (La. Ct. App. 1977); Goodwin v. Lindbert, 101 Mich. App. 754, 300 N.W.2d 514 (Ct. App. 1980); Regan v. Lanze, 47 A.D.2d 378, 366 N.Y.S.2d 512 (App. Div. 1975), *rev'd on other grounds*, 40 N.Y.2d 475, 354 N.E.2d 818, 387 N.Y.S.2d 79 (1976). In fact, one case specifically rejected defendant-sellers claim that the plaintiffs stood in a position to reap a windfall profit if the property was resold before the full term of the mortgage. *See* Hutton v. Glicksberg, 128 Cal. App. 3d 240, 180 Cal. Rptr. 141 (Ct. App. 1982).

[89] For purposes of discussion, it must be assumed that the only type of mortgage the *Donovan* court addressed in its analysis was the conventional level payment amortized loan. This remains the most widely utilized type of mortgage, even in the advent of the so-called "alternative mortgage instrument." G. OSBORN, G. NELSON & D. WHITMAN, *supra* note 7, § 11.4, at 670; *see also* STATISTICAL ABSTRACT, *supra* note 1, at 788 chart 1400.

These instruments have been heralded as an answer to the increasing costs of home financing which prevents many would-be home buyers from entering the housing market. These instruments have also been seen as an answer to the problems savings institutions face when their portfolios overflow with old, low-yielding mortgages. Generally, these mortgages offer an initial interest rate which is more affordable to the borrower, while also remaining flexible enough to allow the lender to adjust accordingly when existing interest rates rise or decline. Though a variety of alternative mortgage instruments are presently available, one common feature prevails throughout, *i.e.*, a variable interest rate that rises or declines in reference to an index reflecting changes in other interest rates. *See* Zearley, *Alternative Mortgage Instruments and Lender Risks*, 164 THE BANKER'S MAG. 61 (1981).

Computing prospective losses in an interest increase claim when an alternative mortgage instrument is present would not only involve speculation concerning the average life of the mortgage under the *Donovan* formula, but would also invoke an examination of the future rises and declines in the mortgage market likely to occur for the mortgage life expectancy. Thus, the guesswork a court would employ under a *Donovan* standard, would be compounded. For further discussion of the efficiency of a *Donovan*-type formula when alternative mortgage instruments are employed, see Garland, *supra* note 4. For a description of the various types of alternative mortgage instruments and their efforts and purposes in real estate transactions, see generally G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 7, § 11.4, at 670; Izeman, *Alternative Mortgages: Their Effect on Residential Financing*, 10 REAL EST. L.J. 3 (1981); Comment, *Adjustable Rates in Home Mortgages: A Reconsideration*, 1975 WIS. L. REV. 742.

[90] U.S. LEAGUE OF SAVINGS ASS'NS, SAVINGS & LOAN FACT BOOK '80, 75 (1980) [hereinafter cited as SAVINGS & LOAN FACT BOOK] ("Although mortgages are generally written with maturities of 20 to 30 years, loan portfolios turn over at a comparatively steady rate and provide a constant stream of loanable funds").

twelve years,[91] but this figure may be somewhat inflated.[92] Statistical compilations on the average life of a mortgage show that a variety of mortgages are aggregated to compute an average, yet, these composites do not differentiate between certain characteristics which most certainly will effect the accuracy of a median life of a mortgage.[93] The one characteristic which will have a large impact on the average life of a mortgage is the mortgage interest rate and yet, mortgages with low interest rates are averaged with mortgages bearing high interest rates without differentiating between the possible effects each may have on prepayment tendencies.[94] Further, one commentator has pointed out that these figures may not be representative of prepayment patterns because many homeowners paying off mortgages with low interest rates may be reluctant to enter the market to purchase a new home when much higher interest rates exist.[95] Regardless of any statistical data compiled on the average life of a home mortgage, individual homeowners may be left grossly undercompensated if a court rigidly employs a figure for an interest increase award which itself is based on variables such as those discussed above. Also, such an application disregards the various subjective factors such as the family, age, and health of the mortgagee as well as employment and community satisfaction which may influence a particular household in its decision to remain in their home beyond the number of years which statistics indicate the average mortgage life expectancy to be.

In a case decided subsequent to *Donovan*, a California court rejected a claim by the defendant-real estate sellers that an award for

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[91] Boykin & Philips, *Implications of the 12-year Prepayment Assumption*, MORTGAGE BANKER 38-42 (Nov. 1976); Kinkade, *Mortgage Prepayments and Their Effect on S & L's*, FEDERAL HOME LOAN BANK BD. J. 12-18 (Jan. 1976); Strunk, *The Average Life of a Single Family Mortgage*, FEDERAL HOME LOAN BANK BD. J. 15-20 (June 1974); *see also* bibliography supplied by the MORTGAGE BANKER'S ASS'N OF AMERICA, PREPAYMENT EXPERIENCE & THE AVERAGE LIFE OF A MORTGAGE LOAN (Apr. 1982).

[92] Comment, *Judicial Treatment of the Due-on-Sale Clause: The Case of Adopting Standards of Reasonableness & Unconscionability* , 2 STAN. L. REV. 1109, 1111 n.6 (1975) (over 50% of mortgages in California are paid off before maturity while average home turns over ownership once every four or five years).

[93] Strunk, *supra* note 91, at 16. Mortgages with different loan-to-value ratios, interest rates and geographic origins are all compiled for the statistical average life of a mortgage. *Id.* As the author states: "It can logically be assumed that survivorship data based on a group of mortgages with such different characteristics cannot be used to indicate accurately the average-life expectancy of groups of mortgages that all have similar characteristics." *Id.*

[94] *Id.*

[95] Garland, *supra* note 4. *See generally* SAVINGS & LOAN FACT BOOK, *supra* note 90, at 41. Chart 19 indicates a decline in the number of existing one-family homes sold since 1978. Although this decline does come from a record year of sales in 1978, *id.* at 40, it nonetheless may depict homeowners' hesitancy to reenter the housing market.

interest increase costs over the full term of the mortgage would overcompensate the plaintiff buyers if the property was not held for the full term of the loan.[96] In *Hutton v. Glicksberg*,[97] the court stated that: "if in the future Buyer's resell the property subject to a 14% or higher loan, they will get a lower purchase price than if they could resell the property subject to a 9¼% loan."[98] The *Hutton* court found therefore, that the most suitable result would be reached through a lump sum compensation for the full term of the loan.[99] Although the extent to which a higher interest rate will effect a home's purchase price is itself subject to conjecture, it is a factor which weighs most favorably on the side of the aggrieved home purchaser and the granting of compensation for the full term of the loan. This is particularly true in light of the general principle in contract law that doubts as to the quantum of damage are to be resolved against the breaching party.[100] The *Hutton* court concluded that any other formula would burden courts with tremendous difficulties in computation.[101]

An alternative method of compensation of an interest increase award is to authorize periodic payments on either a monthly or annual basis. If the parties were allowed to adjust payments as their positions changed, such a method of compensation would eradicate the possibility of the plaintiffs being overcompensated.[102] If plaintiffs refinanced when interest rates declined, the parties may alter payments accordingly. If the plaintiffs sold the home, the parties may

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[96] *See infra* note 91.

[97] 128 Cal. App. 3d 240, 180 Cal. Rptr. 141 (Ct. App. 1982).

[98] *Id.* at 147. In *Hutton*, the parties entered into a contract for the purchase and sale of an apartment building. The sellers breached by cancelling the arrangement for escrow, and the buyers brought suit seeking specific performance of the contract and incidental damages for interest increase costs. *Id.* at 142, 145. At the time of the contract's execution, the buyers had a mortgage for $400,000 at 9¼% interest for a 30 year term. *Id.* at 145. At the time of the judgment, interest rates had increased to 14%. *Id.* The trial court found that the difference in the two loan commitments equaled $521,564.40 and awarded the plaintiffs $122,219, the present value discounted at 14% of the contract differential. *Id.* For a discussion of how a given interest rate may influence the purchase price a home buyer is willing to pay, see Garland, *supra* note 4.

[99] 180 Cal. Rptr. at 147-48.

[100] United States v. American Packing Corp., 125 F. Supp. 788, 791 (D.N.J. 1954) ("risk of uncertainty must be borne by party through whose fraud or wrongdoing damage was created"); Sandler v. Lawn-A-Mat-Chem. & Equip. Co., 141 N.J. Super. 437, 454, 358 A.2d 805, 814 (App. Div.), *certif. denied*, 71 N.J. 503, 366 A.2d 659 (1976); Hodgson v. Applegate, 55 N.J. Super. 1, 149 A.2d at 839 (App. Div.), *aff'd*, 31 N.J. 29 (1959).

[101] 180 Cal. Rptr. at 148.

[102] *See* Comment, *supra* note 84. This method would be extremely helpful if the mortgage in question were an alternative mortgage instrument where the interest rate was subject to periodic fluctuations during the life of the loan commitment. *See supra* note 89 and accompanying text.

terminate payments. This method, however, has been severely criticized as placing an undue burden on the administrative machinery of the court system because the parties would be required to return to court for adjustments in payments.[103] It also does not take into consideration higher interest rates reflected in a lower purchase price if the aggrieved buyer later wishes to sell his home, as was noted in the *Hutton* decision.[104]

Another alternative formulation for awarding interest increase damages was suggested in *Cohen v. Meola*.[105] In *Cohen*, the Connecticut Superior Court awarded an amount equal to a single payment which could be used to purchase an annuity by a home purchaser who suffered interest increase damages.[106] This award, if invested in an annuity as the court suggested, would guarantee a monthly payment from an insurance company which would be equal to the differential between what the plaintiff would have paid under the lapsed loan commitment and what he was subsequently forced to pay for a new mortgage because of the defendant's breach of contract. This type of award is, however, merely a variation of the requirement set down by the *Donovan* court that interest increase damages be reduced to present value.[107] Since the annuity award in *Cohen* was based on a schedule of monthly payments for twenty-five years, the possibility of windfall profits to the purchaser if he resells or refinances before the full term of the annuity, is the same as if a lump sum award for the increased costs was made.

The annuity award for increased interest damages has been taken one step further. An approach has been advanced which would theoretically alleviate many concerns about over and under compensation in this type of damage award.[108] Under this approach, the court

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[103] Fleming, *Damages: Capital or Rent?* 19 U. TORONTO L.J. 295, 319-20 (1969). *But see* Comment, *supra* note 84, at 152-55.

[104] *See supra* note 98 and accompanying text.

[105] 37 Conn. Supp. 27, 429 A.2d 152 (Super. Ct. 1980).

[106] 429 A.2d at 156-57. In *Cohen*, the defendants had leased a summer home to the plaintiffs which gave the plaintiffs a right of first refusal in the event that the defendants wished to sell the home. *Id.* at 153. The defendants subsequently received an offer from a third party to sell the property. *Id.* When the plaintiffs were informed of this offer, they informed the defendant of their wish to purchase the premises under the identical terms offered to the third party. *Id.* at 154. In the meantime, the plaintiffs obtained a loan commitment for $56,250 at 9½% interest for a term of 25 years. *Id.* This commitment ultimately lapsed when the defendants refused to comply with the plaintiffs' requests to adhere to the original contract offer. *Id.* The lowest available interest rates for a similar mortgage at the time of the decision were 14¼%. *Id.* at 156; *see also* Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975), *aff'd as modified*, 577 F.2d 424 (7th Cir. 1978).

[107] *See supra* notes 93-95 and accompanying text.

[108] Garland, *supra* note 4.

directs the breaching party to purchase an annuity with a fixed term relative to the full duration of the mortgage, rather than award the plaintiffs the cost of such an annuity as the court did in *Cohen*.[109] To avoid overcompensating the plaintiff, the terms of the annuity would provide for a type of reverter clause, whereby the annuity would automatically be reassigned to the breaching party upon sale of the injured buyer's home or prepayment of the mortgage.[110] Additionally, it is suggested that the buyer receiving the differential provided by this type of annuity should be required to refinance the mortgage if interest rates recede to a point where this becomes reasonable.[111] Refinancing may partially or totally eliminate the difference in mortgage costs for which the breaching party is liable. If this is the case, the parties could adjust the annuity payments accordingly.[112] Furthermore, the courts or the parties themselves can determine a minimum figure to which interest rates must decline before refinancing would be required.[113] In the event the buyer does not refinance according to the terms of the agreement, he could be subjected to penalties which would act as a deterrent to dissuade frivolous lawsuits.[114]

Seemingly, this method of computation would most accurately pinpoint the amount of future damages and would directly effectuate the *Donovan* mandate pertaining to damage mitigation.[115] It remains to be seen, however, whether courts will be willing to adopt so elaborate a formula. A court would be required to project a minimum interest rate at which point the plaintiff would be required to refinance. Additionally, courts may find themselves confronted at a later date with claims by either of the parties that the purchase should or should not be refinanced, regardless of deterring penalty costs. An additional criticism of the use of annuities for future damage awards is

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[109] *Id.*; *see also infra* notes 117-19 and accompanying text.

[110] Garland, *supra* note 4. A different type of annuity would simply terminate upon the buyer's resale of the house. In this case, the author suggests that the purchase price of the annuity should be lower than the type discussed in the text because of the probability that the true life of the mortgage will be less than its full term. *Id.* This approach, however, contains the same type of speculation that surrounds computation of lump sum payments based on the statistical average mortgage interest term. *See supra* notes 90-93 and accompanying text.

[111] *See* Garland, *supra* note 4.

[112] *Id.* It is suggested that a partial reduction of the mortgage rate by refinancing would enable the buyer to reassign a partial portion of the annuity payment to the breaching seller. *Id.* A total reduction would provide for a total reassignment.

[113] *Id.*

[114] *Id.* Such penalties might include losing a portion or all of the annuity payments and in egregious cases awarding counsel fees and costs. It is contended that these penalties would act as a sufficient deterrent to buyers not complying with the terms of the agreement. *Id.*

[115] *See supra* note 71 and accompanying text.

that the defendant purchasing such an annuity is not only compensating the plaintiff, but is also paying for the profits and overhead of the annuitant. Under the type of agreement discussed above, the defendant would also be required to bear the costs of plaintiffs' refinancing as well.[116] Since this means that the defendant is being held liable for an amount greater than the actual injuries sustained, the annuity costs may be seen as improper items of damages.[117] Though this theory of compensation does keep the best interests of the parties in mind, the complexities that arise in employing so intricate a formula are exactly what prompted one court to forecast "tremendous practical difficulties in attempting to fashion a remedy which would involve Sellers in providing partial financing to Buyers over an indefinite period of time or which could require the parties to come back to court if Buyers resold or refinanced the property."[118]

One consideration which the *Donovan* court failed to discuss was whether the increased interest costs should be classified as general or consequential damages.[119] In contract law damages are classified as general when they are deemed to have flowed directly from the breach of the contract and result naturally as a consequence of the breach.[120] Because general damages are viewed as obvious consequences of the breach, they usually require little proof on their foreseeability.[121]

Damages classified as consequential are those necessitating proof that they were within the contemplation of the parties at the contract's execution.[122] Because these damages are considered unusual in that they are not the natural consequence of the contract's breach, the requirement of proof of knowledge or reasonable foreseeability protects breaching parties from liability. Therefore those who were not or should not be aware of special or unusual circumstances resulting from a breach are free from liability.[123]

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[116] *See* Garland, *supra* note 4.

[117] Lawless, *supra* note 84, at 1139; *see also* Farmers Union Federated Co-op. Shipping Ass'n. v. McChesney, 251 F.2d 441 (8th Cir. 1958); Annot., 53 A.L.R.2d 1454 (1957).

[118] 180 Cal. Rptr. at 147.

[119] See *supra* note 48 and accompanying text for the limitation of damage principles set forth in *Hadley v. Baxendale*.

[120] *See* Paris of Wayne v. Richard A. Hajjar Agency, 174 N.J. Super. 310, 318-21, 416 A.2d 436, 441-43 (App. Div. 1980); Garland, *supra* note 4; RESTATEMENT (FIRST) OF CONTRACTS § 330, at 509 (1932).

[121] *See supra* note 120.

[122] *See* Weiss v. Revenue Bldg. & Loan Ass'n, 116 N.J.L. 208, 182 A. 891 (1936); 11 S. WILLISTON, *supra* note 37, §§ 1347-1357, at 251-98; Garland, *supra* note 4. *See generally* Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975).

[123] *See supra* note 117.

All of the previously discussed non-New Jersey cases which the *Donovan* court analyzed dealt with interest increase damages as an ancillary award to specific performance.[124] Since these cases were decided in equity, the rules limiting contract damages discussed above are inapplicable because these types of awards are generally looked upon in equity as compensation, rather than as awards of legal damages.[125]

Examination of decisions similar to *Donovan* dealing with increased interest costs in the sphere of legal damages for breach of contract reveals a tendency, albeit a small one, to classify these damages as consequential.[126] For example, in *Roanoke Hospital Association v. Doyle & Russell, Inc.*,[127] the Virginia Supreme Court held that increased interest costs caused by delays in construction must be considered consequential damages.[128] Noting that it was not the construction delays which caused the increase in interest rates, but rather unpredictable pressures in a volatile money market, the court concluded that "increases in interest rates are 'special circumstances,' and damages resulting therefrom are consequential and not compensable unless such circumstances were within the contemplation of the parties."[129]

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[124] *See supra* notes 43-63 and accompanying text.

[125] *See* Annot., 7 A.L.R.2d 1204, 1206 (1949), where it is stated:

> The compensation awarded as incident to a decree for specific performance is not breach of contract and is therefore not legal damages. The complainant affirms the contract as being still in force and asks that it be performed . . . often the result is more like an accounting between the parties than like an assessment of damages.

Id.

[126] *See* Roanoke Hosp. Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 803, 214 S.E.2d 155, 161 (1975) ("damages resulting from increased interest rates are not direct damages"); Thompson v. Hanson, 491 P.2d 1065, 1068 (Ct. App. 1972) ("evidence does not sustain conclusion that wide swing in interest rates was within contemplation of parties at time contract was signed; nor was it reasonably foreseeable at that time").

[127] 215 Va. 796, 214 S.E.2d 155 (1975). In *Roanoke*, the defendants entered into a construction contract with the plaintiffs which required the construction of a new wing on the plaintiffs' existing facilities. The plaintiffs had obtained a loan commitment for a $5,500,000 mortgage payable over 15 years at 6⅜%, which was contingent upon the completion of construction by October 13, 1970. *Id.* at 797, 214 S.E.2d at 15. Completion of the project was delayed for a variety of reasons. When it became apparent to the plaintiffs that the date set for completion in the loan commitment would not be met, they obtained and subsequently exercised an option for permanent financing. *Id.* at 798, 214 S.E.2d at 158-59. The new loan commitment was identical to the original except that the interest rates had risen from 6⅜% to 8½%. The plaintiffs brought suit to recover, among other things, the increased interest costs allegedly due to the defendants' delay. The trial court denied recovery for the increased costs of financing but awarded the plaintiffs damages sustained during the construction delay period. *Id.* at 800, 214 S.E.2d at 159. The supreme court, noting that both of these awards were properly labeled consequential damages, found the verdict to be "irreconcilably inconsistent" and remanded the case for a new trial on the issue of consequential damages. *Id.* at 804-05, 214 S.E.2d at 162.

[128] *Id.* at 803, 214 S.E.2d at 161.

[129] *Id.*

This reasoning is applicable to a *Donovan* situation. The increase in interest rates to which any home purchaser is subjected cannot be the direct result of a real estate vendor's breach of contract. Home mortgage interest rate increases result from a number of variables affecting the economy, primary among which are corresponding rises in inflation rates and the cost of purchasing a home.[130] Another factor affecting mortgage interest rates is that many lending institutions have retained in their portfolios long-term loans at preinflation interest rates. The low rate of return from these loans makes it difficult to offset the short-term obligations to customers who invest in savings accounts which yield higher interest rates.[131] As one commentator has noted, a home purchaser who takes out a mortgage for fifteen or sixteen percent today, can be seen as subsidizing the home purchaser of yesterday who has a low mortgage interest rate which still remains in the lending institution's portfolio.[132] Therefore, the injury suffered by a home buyer subjected to a vendor's breach of the contract for sale, could not be that which arises naturally or "according to the usual course of things"[133] when a contract is breached, but rather that caused by special circumstances which must be in the contemplation of the parties at the time of contracting before recovery is allowed, *i.e.*, consequential damages.[134]

The question remains, ultimately, whether at the time the parties in *Donovan* entered into the bargain, increase interest damages were a reasonably foreseeable result of a real estate vendor's breach of a

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[130] *See* McTernan & Nagel, *The GPM/VRM: A Mortgage For Inflationary Times*, MORTGAGE BANKER 39 (Oct. 1981) (chart 1, *id.* at 42, shows correlation over last 20 years between increases in inflation, home appreciation rates, income growth and mortgage rates). *See generally* Izeman, *supra* note 89.

[131] Savings and loan associations obtain a large portion of the money which they make available for home loans from turnovers in their mortgage loan portfolios and from short term deposits. SAVINGS & LOAN FACT BOOK, *supra* note 90, at 75. To obtain short term deposits, these institutions must attract investors by offering favorable returns on investments through high interest rates on savings accounts to offset the problems caused by holding more than 80% of their assests in mortgage loans. *Id.* at 66. When a large number of low yielding interest rate mortgages are held by savings and loan associations, it becomes difficult to affect the higher interest rates paid to their savings depositors. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 7, at 672; Thomas, *Alternative Residential Mortgages for Tomorrow*, 26 THE PRAC. LAW. 55 (1980); Comment, *Renegotiable Rate Mortgages: Keeping Pace With a Fluctuating Economy & Equalizing Competition Within the Home Financing Industry*, 10 STETSON L. REV. 293, 294 (1981).

[132] Izeman, *supra* note 89, at 4.

[133] Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854).

[134] *But see* Garland, *supra* note 4. The author imputes knowledge on the part of a real estate vendor as to the volatility of home mortgage interest rates in his conclusion that these interest increase costs can be viewed as natural consequences of a breach of contract, *i.e.*, direct damages. *Id.*; *see also* notes 122 & 123 and accompanying text.

land contract.[135] Prospective home buyers are faced with one of two options when purchasing a home: either to pay cash or some equivalent for the home or to have the transaction financed. Considering that the price of existing and new homes has risen at a rate of over two hundred percent since 1970,[136] it is easy to understand why the majority of home buyers finance their purchases through the use of a mortgage;[137] they simply cannot afford to pay for a home in cash. With this factor in mind, it is a fair assumption that because the vast majority of home purchases are financed through mortgages, the average home buyer would be familiar with not only the exorbitant price of homes but also the state of the mortgage market and interest rates accompanying it. Since a real estate vendor must be aware of the existing market price of homes at the time he wishes to sell, he should also be aware that the majority of prospective home buyers will be financing the purchase through a mortgage.[138] Given that increased interest rates are an oppressive and well publicized reality,[139] it is not unreasonable to assume that parties who enter into a real estate contract in today's market are cognizant that interest rates for home mortgages are subject to fluctuation.[140]

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[135] *See supra* notes 122 & 123 and accompanying text; *see also* C. McCormick, *supra* note 25, § 138, at 565, in which it is stated:

> This standard [for consequential damages] is in the main an objective one. It takes account of what the defendant who made the contract might then have foreseen as a reasonable man, in the light of the facts known to him, and does not confine the inquiry to what he actually did foresee.

Id.

[136] Statistical Abstract, *supra* note 1, at 486, 778-80; *see also* Savings & Loan Fact Book, *supra* note 90, at 20, 23. Statistics compiled by the Department of Housing and Urban Development show that in 1973, over 70% of the homes sold in the United States had a purchase price of less than $40,000. By 1979, only 10% of newly bought homes had purchase prices less than this figure. *Id.* at 23 chart 9.

[137] Statistical Abstract, *supra* note 1, at 788. Statistics show that over 84% of new homes purchased since 1970 have been financed through the use of a mortgage. *Id.*; *see also* Garland, *supra* note 4 ("Mortgage financing is so much a part of average real estate purchase and sufficiently frequent, that vendor alleging ignorance of purchaser's financing displays a level of understanding beneath that acceptable from a reasonable person").

[138] Increase in housing prices also represents increases in the value of existing homes. Savings & Loan Fact Book, *supra* note 90, at 41 (average price of existing homes rose to $64,000 in 1979).

[139] *See supra* note 132. Whether a vendor had notice that a home buyer would be using a mortgage to finance the purchase was not at issue in *Donovan* since Mr. Bachstadt had taken back a purchase money mortgage himself. 181 N.J. Super. at 369, 437 A.2d at 729. This factor has, however, influenced decisions on whether these damages were foreseeable. Reis v. Sparks, 547 F.2d at 239; Hutton v. Glicksburg, 180 Cal. Rptr. at 146-47; Cohen v. Meola, 429 A.2d at 156.

[140] The rise in mortgage interest rates has been the topic of discussion in legal journals and periodicals; *e.g.*, Nat'l L.J., March 22, 1982, at 1, col. 4; Nat'l L.J., March 15, 1982, at 11; 107 N.J.L.J. 236 (1981); in newspapers, and magazines; *e.g.*, N.Y. Times, August 16, 1981, § 8, at 1; *see also* Garland, *supra* note 4.

However one phrases the issue, whether damages caused from interest increases when a breach of contract occurs will be considered foreseeable or within the contemplation of the parties is a question that must be resolved by the trier of fact.[141] A contracting party may not know the particular way injury will result if the contract is breached; nor may he necessarily foresee each item of damage or the extent of the possible harms. These factors should not, however, act as a bar to an injured plaintiff's recovery when the circumstances show that a breaching defendant had reason to foresee the possibility that certain injuries might occur upon a breach of contract.[142] Based upon this standard of foreseeability, a reasonable person, possessing knowledge that the party with whom he is contracting will be financing the purchase of a home in a mortgage market whose instability has become almost common knowledge, should not escape liability for a buyer's cost of higher financing arising from his breach by claiming that these items of damage were not within the contemplation of the parties.

The ultimate goal of the *Donovan* court was to put forth a formula for the computation of interest increase damages that would subsume all the principles of law that normally apply in a contract setting. Primary among these principles is the tenet that the parties

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[141] 5 A. CORBIN, *supra* note 19, § 1012, at 89; C. MCCORMICK, *supra* note 24, § 140 at 574. Indeed, one commentator has gone as far as to say that the question of foreseeability is so subjective that it retains little validity. *See* G. DOBBS, *supra* note 19, § 12.3, at 814. He states:

> The idea is so readily subject to expansion or contradiction that it becomes in fact merely a technical way in which judges can state their conclusion. Unless there is proof that the parties specifically mentioned an item of damage in contracting, the judges are free to describe that item as an unforeseeable one.

Id.

[142] G. DOBBS, *supra* note 19, § 12.3, at 812; *see also* 5 A. CORBIN, *supra* note 19, § 1012, at 88 ("the rule does not require that anything should have been foreseeable to a dead certainty; seldom can anything be predicted with such assurance as that"); 6 S. WILLISTON, *supra* note 37, § 1347, at 251-52 ("when a defendant has reason to know . . . of facts indicating that unusual damages will follow or *may follow* his failure to perform his agreement, he is liable for such damages") (emphasis added).

This interpretation of the foreseeability rule has also been applied in commercial settings and is embodied in the Uniform Commercial Code which allows for the recovery of consequential damages by a buyer for losses which the seller had reason to know of at the time of contracting. U.C.C. § 715(a)(2)(1978). As stated by White and Summers:

> The better-reasoned authority emerging from [the] background [of *Hadley v. Baxendale*] and the intent of the draftsmen declare that the basic test for the recovery of consequential damages is whether the losses were foreseeable (not foreseen) by the seller at the time he entered the contract. The trend of Code cases to date strongly suggests that the courts will construe this foreseeability requirement to the plaintiff's benefit.

J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4, at 325 (1972), *cited in* Paris of Wayne v. Richard A. Hajjan Agency, 174 N.J. Super. at 320, 416 A.2d at 442.

incident to a breach of contract should only be put in the position they would have enjoyed had the contract been performed.[143] It is ironic, then, that the issue of determining the likely true life of a mortgage, which distingushes the *Donovan* court's decision from the other cases addressing the issue of interest increase damages is the factor that makes such a formula so difficult to ascertain.

A number of considerations reveal, however, that the approach taken by the *Donovan* court is the most economical and appropriate method of computation for both the courts and the parties involved. Courts are generally allowed a wide degree of discretion in determining what method of damage computation they wish to employ.[144] First, there was clearly no abuse of discretion on the part of the *Donovan* court in utilizing the standard it set forth. Secondly, the *Donovan* approach attempted to find an amount of damages that best equalizes the actual damage sustained and the injury caused while at the same time minimizing the necessity of the parties returning to court at a future date to reassess or redesign payment procedures.

Although statistics have shown a solid pattern of mortgage prepayment,[145] there is always the possibility that a party who prevails in an interest increase claim will not fit into the statistical prepayment norm. Statistics representing the average life expectancy of a mortgage are merely compilations of what the trend of mortgage prepayments has been, from which, predictions of what mortgage prepayments will be, can be made. What the average life expectancy of a mortgage is, becomes unanswerable when one realizes that, "[n]o one can really answer this question because to do so would require looking into the future."[146] If a court examines certain circumstances unique to each plaintiff in these types of claims, the possibilities of over or undercompensation may be further minimized. The age and previous moving history of a family may be relevant in deciding whether a mortgage life expectancy should be greater than the statistical average. This would involve a certain amount of guesswork on the part of the trier of fact but since this entire theory of compensation is based on probabilities, consideration of a plaintiff's present living situation should not negatively affect a court's formulation. Also, if a court

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[143] *In re* Van Dyk Research Corp., 13 Bankr. 487 (D.N.J. 1981); Giumarra v. Harrington Heights, 33 N.J. Super. 178, 109 A.2d 695 (App. Div. 1954), *aff'd*, 18 N.J. 548, 114 A.2d 720 (1955).

[144] Commonwealth Land Title Ins. Co. v. Conklin Assoc., 152 N.J. Super. 1, 377 A.2d 740 (Law Div.), *aff'd*, 167 N.J. Super. 392, 400 A.2d 1208 (App. Div. 1977); Endress v. Brookdale Community College, 144 N.J. Super. 109, 364 A.2d 1080 (App. Div. 1976).

[145] See *supra* notes 90-95 and accompanying text.

[146] Strunk, *supra* note 19, at 15.

wishes to employ a statistical base for the average life of a mortgage, perhaps an additional term could be added to reach a conservative estimate. For example, since the vast majority of thirty year mortgages are not held for their full term, a court could approve a term of payment covering fifteen or twenty years. This indicates an awareness of the probability of prepayment and minimizes the risk of undercompensation. Again, the extenuating circumstances of each individual plaintiff should influence such a result.

By recognizing the problems inherent in an increase interest claim, the New Jersey Appellate Division in *Donovan* showed insight and a willingness to confront a factor that has heretofore been rejected or unrecognized. In the final analysis, any formula used in an increased interest claim which attempts to reduce excessive court involvement, while attempting to maintain the best interests of the parties, will involve a certain amount of speculation. A court applying the rationale for interest increase claims as set forth in the *Donovan* decision, can deal with problems of speculation and continue on what appears to be the correct road of recovery for so unique a type of damage award.

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Errata

Volume 12:4, page 916, footnote 4 should read:

Garland, *Purchasers Interest Rate Increases: Caveat Venditor*, 27 N.Y.L. SCH. L. REV. (forthcoming) (manuscript copy on file at Seton Hall Law Review).