HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S115/2023
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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **CESSNOCK CITY COUNCIL ABN 60 919 148 928**
Appellant

and

10 **123 259 932 PTY LTD ACN 123 259 932**
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of submissions is in a form suitable for publication on the internet.

Part II: Outline of argument

Principles for 'reliance damages' in contract – AS [22]-[46], AR [10]-[13]

2. ***First***, at all times, the legal onus remains on the innocent party to prove, on the balance of probabilities, the existence of compensable loss and the amount of that loss. *Robinson v Harman* (1848) 1 Exch 850; 154 ER 363 being the governing principle, compensable loss requires proof by the innocent party that, if the contract had been performed, the innocent party would have been in a better position, in some identifiable and quantifiable respect, than its actual position following the breach.

3. ***Secondly***, in Australia, unlike the position in the United States as propounded by LL Fuller and WR Perdue in 'The reliance interest in contract damages: 1' (1936) 46 *YLJ* 52 (**JBA 5, Tab 42**), and reflected in the ALI's *Restatement of the Law: Contracts* (1981, 2nd ed), §349 (**JBA 5, Tab 45**) (and as seen in some of the earlier English authorities), contract damages do not, whether directly or indirectly, seek to protect a reliance interest, nor to put the innocent party back in the position it was in before the contract was entered, nor do they give rise to any sort of election.

4. ***Thirdly***, Australian law does permit, within limits, the innocent party to point to its expenditure in reasonable reliance upon the promise of the other party, and wasted by reason of the breach, as evidentiary material providing a 'starting point' for the discharge of the legal onus imposed on it. Even where this is permitted, there is never a shifting of the legal onus to the contract breaker. At most, there is a shifting of an 'evidentiary' onus, as frequently occurs within a trial, it being incumbent on the contract breaker to point to or adduce some evidence from which it might be inferred that the innocent party, absent breach, would not have recouped some or all of that expenditure. Once the contract breaker can do so, the innocent party remains bound to discharge its legal onus, having regard to all the evidence in the record.

5. ***McRae*** *v Commonwealth Disposals Commission* (1951) 84 CLR 377 (**JBA 1, Tab 7**) is an illustration, on special facts, of the third proposition. In *McRae*, the defendant's breach (of a promise that there was a tanker at the site when there was none) rendered it impossible for the innocent party to prove damages on the usual *Robinson v Harman* measure, it being impossible to value a non-existent thing. The court was prepared to treat an alternative position, namely expenditure in reliance on the promise and wasted by the breach, as a 'starting point' for the position that the innocent party would have

been in had the promise been honoured. The contract breaker was unable to point to or adduce any evidence from which it might be inferred that the innocent party would not have recouped its expenditure had the promise been honoured. Accordingly, the innocent party was permitted to rely upon its reliance expenditure in discharge of its legal onus, being a proxy for its true *Robinson v Harman* damages. *McRae* did not involve any presumption of recoupment.

6. ***Fourthly***, there are cases, of which *Commonwealth v* ***Amann*** *Aviation Pty Ltd* (1991) 174 CLR 64 (**JBA 1, Tab 5**) is an example, where, unlike *McRae*, the breach has not created any impossibility of proof on the normal measure, but the innocent party is permitted to set up a presumption of fact that its expenditure in performing or preparing to perform its side of the bargain in reasonable reliance on the promise, and which was wasted by the breach, would have been recouped out of the contractual benefits to come from the other party. The rationale for the presumption is said to be that the innocent party would not have entered the contract and incurred this expenditure without a reasonable expectation of recoupment under the contract. In *Amann*, the applicant established, on the usual measure, that some of its expenditure would have been recouped under the original contract (see 90, 109-110, 157). The presumption was raised only in respect to the balance of the expenditure and the prospect of recoupment of it from a potential valuable renewal of the contract.

7. Critical to the *Amann* principle is that: (a) the presumption does not arise for all contracts, or for all forms of expenditure relating to a contract; (b) the presumption is one of fact, not law; (c) the presumption being based on the usual expectations of commerce, whether a presumption arises, and if so with what strength, is wholly dependent on the nature of the particular contract, the allocation of risks under it, the nature and degree of the expenditure and its relationship (essential or incidental) to the contract, the expected source of recoupment of the expenditure (from the contract breaker or otherwise), the degree of speculation inherent in the contract or expenditure, and the actual conditions referable to the contract leading up to the breach.

8. ***Fifthly***, even if the presumption arises, its 'rebuttal' requires no more that the contract breaker point to or adduce some evidence from which it could be inferred that there was a prospect that the innocent party would not have recouped some or all of the expenditure from the source alleged. Once that is done, the innocent party remains under its full legal onus to prove, on the balance of probabilities, that some or all of its expenditure would have been recouped as it alleges but for the breach.

9. Accordingly, the Court of Appeal erred at AJ [57], [73] (**CAB 140-141, 148-149**) in finding a majority in *Amman,* whether in the Justices concurring in the orders or otherwise, for its hard-edged principle which ignores all of the above qualifications.

Application of principles to the present case: AS [8]-[21], [47]-[53]; AR [5]-[9], [14]

10. ***First***, non-performance of cl 4.2(a) of the agreement for lease (**AFL**) did not make it impossible to assess any consequential loss suffered by the Respondent: contra AJ [122]-[123] (**CAB 171-172**). *McRae* has no application in this case.

11. ***Secondly***, it was not appropriate to raise an evidentiary presumption that the Respondent would have recovered the expenditure it incurred in constructing the hangar when: (a) that expenditure was not incurred in the performance of obligations under the AFL or in the expectation of recouping the expenditure *from the Appellant*; but rather was to be recovered from *third parties* if the Respondent's ventures (to be operated from the promised leased premises) were successful; (b) their success would depend, in part, on whether other persons decided to take up surrounding lots and could establish successful businesses on them – matters which the Appellant did not warrant (cf cl 12.3-12.4 (**ABFM 25-26**)); (c) their success would also depend on matters where the key evidence would lie with the Respondent (what businesses it would seek to conduct and how it would seek to finance them); and (d) the nature and quantum of the expenditure was extravagant referable to the promises under the AFL (noting the choice for an expensive non-demountable hangar in the face of cl 16.8 of the lease).

12. ***Thirdly***, the disastrous performance of the Respondent's businesses up to breach: (a) demonstrated that the opportunity to operate from leased premises that a lease would have conferred had no value; and (b) confirmed the inappositeness of any presumption being raised – or, alternatively, provided some evidential material sufficient for the Respondent's legal onus to require it to prove on all the evidence that it would have recouped some or all or its expenditure out of its future businesses. It failed to do so.

13. ***Fourthly***, in the alternative, if (erroneously) the Appellant was required to go further and prove on the balance of probabilities the most likely 'single point' outcome of the AFL if performed, there was no relevant error in the findings at PJ [221] (**CAB 71**). The most likely outcome was that the Appellant's breach spared the Respondent suffering further losses in payment of 30 years' rent as against failed businesses.

13 February 2024

Justin Gleeson SC