HIGH COURT OF AUSTRALIA

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File Number:	S115/2023
File Title:	Cessnock City Council ABN 60 919 148 928 v. 123 259 932 P
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	03 Nov 2023

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: CESSNOCK CITY COUNCIL ABN 60 919 148 928
Appellant

and

123 259 932 PTY LTD ACN 123 259 932
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. This proceeding concerns the principles that govern the availability of damages for breach of contract calculated by reference to the expenditure incurred by a plaintiff that has been wasted due to a defendant's breach (**reliance damages**). The issues in this appeal are:

3. ***First***, in what circumstances, if ever, does the law allow a plaintiff seeking to recover reliance damages to rely on an assumption that, had their contract been performed, they would have recovered their wasted expenditure (**recoupment presumption**)?

4. ***Secondly***, what limitations are there on how that recoupment presumption operates, or what is required to rebut it, so as to ensure that it does not undermine the principle in *Robinson v Harman* that "[w]here a party sustains a loss by reason of a breach of contract, he [or she] is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed"[1]?

5. The structure of these submissions is as follows: (i) overview of the factual background; (ii) summary of the reasoning in the various judgments in *Commonwealth v* ***Amann*** *Aviation*[2] (both as to points of commonality and difference); (iii) outline of the correct approach to reliance damages; (iv) statement of the errors of principle made by the Court of Appeal; and (v) application of the correct approach to the facts of this case.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

6. A notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations

7. The citations for the decisions below are: (i) *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2021] NSWSC 1329 (**PJ**); and (ii) *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 (**AJ**). The core appeal book is referred to as **CAB**.

Part V: Facts

8. In about 1998, the appellant, which owned the airport at Cessnock, called for expressions of interest for the airport's management and/or development: PJ [1], [10]; AJ [6] (CAB 8,

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[1] (1848) 1 Exch 850 at 855; 154 ER 363 at 365 (Parke B). In these submissions this principle will be referred to as the **compensatory rule**: see the discussion in A Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th ed, Oxford University Press, 2019) at 38-39.
[2] (1991) 174 CLR 64.

10, 119). In response, Aviation & Leisure Corporation Pty Ltd (**ALC**) lodged an expression of interest in November 1998: PJ [11]; AJ [7] (CAB 10, 119). ALC's proposal included a "suggestion" that hangars with attached residences (known as "hangar homes") could be erected at the airport as part of its development: PJ [13] (CAB 11). ALC was awarded "preferred tender status" in June 1999 and in July 2002 the appellant resolved to lease parts of the airport to ALC: PJ [12] (CAB 10).

9. On 12 December 2003, the appellant, as registered proprietor, lodged a development application (**DA**) for the: (i) consolidation of the land comprising the airport into two lots in DP 1064825, including proposed **Lot 2**; and (ii) subsequent subdivision of Lot 2 into 25 lots: PJ [16]; AJ [9] (CAB 11, 120). On 17 November 2004, the appellant (in its capacity as approving authority under the *Environmental Planning and Assessment Act 1979* (NSW)) granted its consent to the DA subject to a condition that the proposed lots be connected to the sewerage system: PJ [24]; AJ [12] (CAB 14, 121). The appellant undertook registration that consolidated the airport into two lots but the contemplated further subdivision of Lot 2 was never registered: PJ [31]; AJ [13] (CAB 16, 121). In March 2004, the appellant and ALC executed a lease for parts of the airport and a management agreement: PJ [21] (CAB 13).

10. The respondent was a company that hoped to build an aircraft hangar on one of the 25 lots into which Lot 2 was to be subdivided (namely "Lot 104"): AJ [14] (CAB 121). The respondent's principal, Mr James Johnston, was described by the primary judge as a "risk-taker" who "did not concern himself with detail or with documents": PJ [255], [257] (CAB 84). Her Honour formed the view that Mr Johnston "was, at heart, a speculator, who would see what angle he could obtain to sell an asset or an opportunity and move on to other things": PJ [258] (CAB 85). For example, Mr Johnston purchased multiple aircraft "without any firm plans as to where he would house them, what he would do with them and whether they could be used profitably": PJ [15], [20], [255] (CAB 11, 13, 84).

11. In about April 2005, a DA was submitted on behalf of Mr Johnston for the construction of the hangar: PJ [34] (CAB 16). The application stated that the estimated cost of the work would be $560,000. On 28 July 2006, the appellant granted development consent for the hangar; the consent described the development as a "New Aircraft Hang[a]r for Joy Flights and Advanced Flight/Aerob[at]ic Training incorporating an Aviation Museum": PJ [38] (CAB 17). Construction of the hangar commenced in the second half of 2006 and ultimately at least $3 million was spent: PJ [39], [55]-[56] (CAB 17, 22). The primary

judge: (i) noted that this amount "exceeded the figure specified in the [DA] by a factor of six"; (ii) suggested that this "profligacy and ostentation" were consistent with Mr Johnston's general approach to business; and (iii) pointed out that the scale of this expenditure meant "that recouping the cost of the hangar … from any income earned from the hangar over the life of the lease would be a much more difficult task than earning incomes in excess of the rent": PJ [256] (CAB 84).

12. By 26 July 2007, the appellant and the respondent had executed a deed entitled "Agreement for Lease" (**AFL**): PJ [2], [52] (CAB 8, 21).[3] Under the AFL:

    (a) the appellant promised, subject to and conditional on registration of a plan for the subdivision of Lot 2 (the **Plan**), to grant a lease of proposed Lot 104 for a term of 30 years commencing on the day after the registration of the Plan (cll 1.1, 3.1(a), 4.1): ABFM 10, 14, 15;

    (b) the appellant was required to "take all reasonable action to apply for and obtain" the approval and registration of the Plan on or before 30 September 2011 (the **Sunset Date)** (cl 4.2(a)): ABFM 15;

    (c) prior to commencement of the lease, the respondent was granted a licence on the same terms and conditions as the lease (cll 5.1-5.2): ABFM 16-17;

    (d) the licence fee specified in item 5 of Sch 1 to the AFL amounted to $557.69/week for the first year and $762.92/week by the fourth year; the rent provision in the proposed lease provided that, for the ensuing 30 years, each year's rent would be the figure for the previous year plus an adjustment for CPI: ABFM 36;

    (e) the "Permitted Use" of the land under the lease (and thus the licence) was "Aircraft Hangar for Joy Flights and Advanced Flight-Aerobatic-Training" (cl1 1.1, 9.1(a) and item 9 of the lease): ABFM 101; and

    (f) pursuant to cl 12.3, the respondent released the appellant from, and agreed that the appellant was not liable for any liability or loss arising from, and costs incurred in connection with, inter alia (ABFM 25-26):

        (e) loss of the [respondent's] profits; and
        (f) any liability for damage to the Land or the [respondent's] property or for any other loss (however that loss was caused or arose), including but not limited to:
            (1) financial or economic loss to the [respondent] or to any other person;

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[3] See appellant's book of further materials (**ABFM**) at 4-107.

(2) loss of goodwill in relation to the business being carried on by the [respondent];
(3) indirect or consequential loss;
(4) loss resulting from:
…
(C) any change in the flow of members of the public in or around the Land or Aerodrome[4] for any reason.

13. The respondent operated three businesses from the hangar: an adventure flight business (from July to November 2009), an aircraft museum (from September 2009 to February 2010) and a corporate venue hire business (from August 2009 to June 2011): PJ [57]-[61]; AJ [28] (CAB 23-24, 127). Each of the businesses operated from the hanger "proved to be unprofitable prior to the [S]unset [D]ate": PJ [62] (CAB 24).

14. Indeed, Mr Johnston: (i) acknowledged that the last of these businesses – the venue hire business – was "completely unsustainable" by around June 2011: PJ [61] (CAB 24); and (ii) gave evidence that these businesses were not sustainable "in circumstances where the Airport development had been abandoned by the Council": AJ [28] (CAB 127).[5] In cross-examination, Mr Johnston elaborated as follows (see ABFM 160):

Q. Do you accept, Mr Johnston, that none of the financials for any of the companies related to this business demonstrate that they traded profitably?
A. I'm not, I, I haven't got an accountant's mind. I'd leave that to the accountant. But I, I, I haven't looked at them myself, and I'm more of a gut, gut feeling person, and my gut feeling wasn't good into the future of, of Cessnock Airport.
Q. I put it to you Mr Johnston that by October 2010 your gut feeling was to cut and run from this business because it was a significant financial disaster?
A. Now I, I, I don't, I don't agree with the word "disaster". If I'd been given my tenure I would probably say I think I can make it work. But council would have had to have developed the airport that was also promised.

15. Here, the respondent's principal conceded that, without commercial development of the airport, the hangar would be unprofitable. Critically, despite Mr Johnston's assertion to the contrary, the appellant did *not* promise to develop the airport. Further, the primary judge found that "[t]he evidence, such as it was, showed that there was little demand" for hangar homes at Cessnock and "there was little interest beyond the plaintiff's, in the further development of the airport": PJ [211] (CAB 68).[6]

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[4] Note that "Aerodrome" was defined in cl 1.1 to mean "the Cessnock Aerodrome adjacent to the Land": PJ [148]; AJ [23] (CAB 49, 125); ABFM 6.
[5] Affidavit of James Gordon Johnston (6 March 2019) at [172], [188] (ABFM 148, 152).
[6] See, eg, Mr Johnston's evidence in cross-examination that "I just realised that it was a load of waffle that I'd been given from the council about the airport being developed, and I felt like I was just the only investor in the middle of the field": T74.20-23 (ABFM 160).

16. By October 2010 at the latest (and perhaps even earlier) Mr Johnston was trying (unsuccessfully) to sell the hangar: PJ [73] (CAB 27). One advertisement for the hangar that Mr Johnston placed stated that it was "[a]vailable for immediate substantially discounted purchase/lease" and that "[a]ll reasonable offers [would be] considered": PJ [75] (CAB 28).[7] Mr Johnston's refusal to concede that he was "desperate" to sell the hangar in spite of this evidence was viewed by the primary judge as "reflect[ing] his strong tendency to concentrate only on the upside": PJ [254] (CAB 84). The critical point is that, almost a year before the Sunset Date, Mr Johnston was focused on getting his "capital outlay back … and clos[ing] the project": PJ [77] (CAB 28). By February 2011, he considered that he had "no alternative but to sell the completed Hangar".[8]

17. The appellant's employees took various steps and sought funding to facilitate the subdivision of the airport (including after the Sunset Date): PJ [46]-[48], [63]-[67], [103]-[105] (CAB 20, 24-25, 37). However, on 29 June 2011, the appellant informed ALC that it would not be proceeding with the subdivision of the airport because it had "no intention of spending about a million dollars fixing the sewerage": PJ [84]; AJ [30] (CAB 30, 128). The appellant terminated its agreements with ALC in December 2011: PJ [85] (CAB 30).

18. On 13 September 2011, the appellant wrote to the respondent's lawyer informing him that the appellant "has been unable to achieve the registration of the plan of subdivision within the timeframe anticipated in the [AFL] despite taking all reasonable action to enable that registration": PJ [88] (CAB 31). The appellant also offered the respondent five consecutive five-year licences. On 20 December 2011, the respondent rejected the appellant's offer: see PJ [92], [94] (CAB 32, 24).

19. By the Sunset Date, the respondent was in arrears of its licence fees in the amount of $4,704.07.[9] The respondent made its last (overdue) fee payment on 22 December 2011: PJ [93] (CAB 34). It requested a "rent holiday" in March 2012 but the appellant continued to send quarterly invoices: PJ [93], [99] (CAB 34, 36). The respondent's financial report for the year ended 30 June 2010 records a loss before income tax of $52,185.06.[10] A profit and loss statement for the respondent for the year ended 30 June 2012 shows that, even though it had paid no licence fees for more than half of that financial year, the respondent

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[7] See ABFM 118.
[8] Affidavit of James Gordon Johnston (6 March 2019) at [89] (ABFM 134-135).
[9] "Cutty Sark – Payment of licence fees and arrears of licence fees" (ABFM 163).
[10] "Cutty Sark Holdings Pty Ltd ABN 96 123 259 932 – Financial Report for the year ended 30 June 2010" (ABFM 110).

failed to make a profit.[11] On 6 September 2013, Mr Johnston disconnected the power as he could not pay the electricity bills for the abandoned hangar: PJ [108] (CAB 38). ASIC de-registered the respondent on 7 September 2015 for non-payment of fees: PJ [119] (CAB 41). On 5 June 2017, an application to reinstate the respondent was granted by the Supreme Court of South Australia: PJ [130] (CAB 43).

20. At first instance, Adamson J held that the appellant had breached cl 4.2 of the AFL by not committing funds to connect the proposed lots to sewerage: PJ [179] (CAB 58). However, her Honour went onto award nominal damages because: (i) the circumstances in this case could be distinguished from *Amann* and ***McRae*** *v Commonwealth Disposals Commission*,[12] such that the recoupment presumption did not arise; and (ii) even if such a presumption had arisen, the appellant had rebutted it: PJ [221] (CAB 71).

21. On appeal, Brereton JA (with Macfarlan and Mitchelmore JJA agreeing) held that the recoupment presumption was engaged, as the respondent had showed that it had incurred expenditure in reliance on the appellant's promise to take all reasonable steps to procure registration of the Plan: AJ [121]-[124] (CAB 171-172). Further, the presumption was not displaced because, although it was "speculative" whether the respondent would have recouped its expenditure by 2041 (being the date of the expiry of the lease if it had come into effect), the onus of proving that the respondent would not have so recouped fell on the appellant and had not been discharged: AJ [135] (CAB 180).

Part VI: Argument

(i) Judgments in Amann (1991) 174 CLR 64

22. ***Introduction***: The decision of this Court in *Amann* has, since the time it was handed down, been regarded as "complex"[13], "difficult"[14] and involving principles that are both "multifarious and … lacking in precision".[15] Six separate sets of reasons were published; of these, five would have awarded reliance damages but only three supported the orders made (namely, those of Mason CJ and Dawson J, Brennan J and Gaudron J).[16] On orthodox

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[11] "Cutty Sark Holdings Pty Ltd ABN 96 123 259 932 – Profit & Loss Statement: July 2011 through June 2012" (ABFM 119).
[12] (1951) 84 CLR 377.
[13] HK Lücke, "The so-called reliance interest in the High Court" (1994) 6 *Corporate and Business Law Journal* 117 at 118.
[14] Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* at 80.
[15] G Treitel, "Damages for breach of contract in the High Court of Australia" (1992) 108 *Law Quarterly Review* 226 at 234.
[16] *Amann* (1991) 174 CLR 64 at 98 (Mason CJ and Dawson J), 115 (Brennan J), 158 (Gaudron J).

principles, the reasoning of a dissenting judge cannot contribute to the *ratio decidendi* of that case.[17] Only such reasoning as is "expressly or impliedly treated … as a necessary step in reaching [a] conclusion" [18] by a sufficient number of the judges in the majority as to the actual result to constitute a majority of the court will be binding in subsequent cases. Other statements, whether in a majority or dissenting judgment, are merely *obiter dicta* to be considered as "valuable discussions of legal principle" but not the "exposition of the principle embodied in the common law of Australia".[19]

23. The principles stated in the reasons that supported the orders made by the Court in *Amann* diverge at various (and important) points.[20] Thus, while it is not doubted that *Amann* has "precedential authority in respect of circumstances that 'are not readily distinguishable from'" its facts, it is very difficult to identify its *ratio decidendi*.[21] The picture is further complicated by the fact that *Amann* was determined during a period in which the High Court was refining the principles applicable to damages for loss of opportunity. Indeed, one commentator has suggested that the approach of the majority in *Amann* has "been shown to be erroneous"[22] by the seminal case of ***Sellars*** *v Adelaide Petroleum NL*.[23] That is an overstatement (not least because the plurality in *Sellars* relied on reasoning from *Amann*[24]) however it is true that the reasons in the earlier case must be read with an eye to ensuring consistency with this overlapping body of principles (see further [40] below).

24. Notwithstanding these precedential difficulties, it is obvious that the following two propositions commanded overwhelming support in *Amann* and must be regarded as fundamental to the jurisprudence on reliance damages in Australia:

    (a) ***First***, damages calculated by reference to a plaintiff's expenditure that has been wasted by reason of a defendant's breach are available under Australian law.[25]

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[17] *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 563 [112].
[18] R Cross and JW Harris, *Precedent in English Law* (4th ed, Clarendon Press, 1991) at 72. See, also, *Soong v DCT* (2011) 80 NSWLR 226 at [41]; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 at [71].
[19] *Holmes a Court v Papaconstuntinos* [2011] NSWCA 59, [3] (Allsop P; Beazley and Tobias JJA agreeing).
[20] cf G Ng, "The onus of proof in a claim for reliance damages for breach of contract" (2006) 22 *Journal of Contract Law* 139 at 139.
[21] *Re MIMA; Ex parte Te* (2002) 212 CLR 162 at [87] (McHugh J).
[22] N Seddon, "Contract damages where both parties are at fault" (2000) 15 *Journal of Contract Law* 207 at 210.
[23] (1994) 179 CLR 332.
[24] (1994) 179 CLR 332 at 349 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[25] *Amann* (1991) 174 CLR 64 at 81 (Mason CJ and Dawson J), 107-108 (Brennan J), 126-127 (Deane J), 135 (Toohey J), 154-155 (Gaudron J), 161, 163 (McHugh J).

(b) ***Secondly***, reliance damages are not awarded on a different basis from expectation damages;[26] they are a "manifestation"[27] of the compensatory rule.

25. The compensatory rule is fundamental to the assessment of contract damages; its status as the "ruling principle" in this regard has been repeatedly (and recently) confirmed by this Court.[28] It is a "corollary" of the fact that reliance damages are a manifestation of the compensatory rule that a plaintiff will not be entitled by an award of such damages "to be placed in a superior position to that which he or she would have been in had the contract been performed".[29] As Chief Judge Learned Hand explained in a much-cited[30] passage in *L Albert & Son v Armstrong Rubber Co*, reliance damages do not provide a warrant to make a promisor in default "an insurer of the promisee's venture".[31] As is developed in further detail below, the need to ensure that reliance damages serve as a proxy for, and do not in any way undercut, the compensatory rule is a central theme of all of the judgments in *Amann*. It must also guide the approach taken in this appeal.

26. ***Facts***: In *Amann* a company contracted with the Commonwealth to conduct aerial coastal surveillance for three years.[32] The company incurred a significant amount in acquiring and fitting out aircraft.[33] Upon commencing surveillance, the company did not have enough aeroplanes available, and the Commonwealth served a termination notice. However, the notice did not comply with the contract's termination provisions and the company treated it as a repudiation, which it accepted. At trial, Beamount J determined that the contract

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[26] cf AJ [68] (CAB 146). Despite earlier conflicting authorities (see *Cullinane v British "Rema" Manufacturing* [1954] QB 292 at 303; *Anglia Television Ltd v Reed* [1972] 1 QB 60 at 64; ***CCC Films** (London) Ltd v Impact Quadrant Films Ltd* [1985] 1 QB 16 at 32), this view has now been adopted under English law (see *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm) at [55]; ***Yam Seng PTE Ltd** v International Trade Corporation Ltd* [2013] EWHC 111 at [186]) and Singaporean law (see *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15 at [134]). By contrast, the *Restatement of the Law: Contracts* (2nd ed, American Law Institute, 1981) §349 still reflects the views of LL Fuller and WR Perdue, "The reliance interest in contract damages" (1936) 46 *Yale Law Journal* 52 and describes reliance damages as "based on" a "reliance interest".

[27] *Amann* (1991) 174 CLR 64 at 82 (Mason CJ and Dawson J). See, also, 107 (Brennan J), 127-128 (Deane J), 135 (Toohey J), 155 (Gaudron J); *Clark v Macourt* (2013) 253 CLR 1 at [27].

[28] *Tabcorp Holdings Ltd v Bowen Investments P/L* (2009) 236 CLR 272 at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). See, also, *Clark v Macourt* (2013) 253 CLR 1 at [7], [26], [60], [106]; *The Golden Strait Corporation. v NYKK ("The Golden Victory")* [2007] 2 AC 353 at [29].

[29] *Amann* (1991) 174 CLR 64 at 82 (Mason CJ and Dawson J). See, also, 108 (Brennan J); ***C&P Haulage** v Middleton* [1983] 1 WLR 1461 at 1467.

[30] See *Amann* (1991) 174 CLR 64 at 82 (*Mason* CJ and Dawson J), 105 (Brennan J), 138 (Brennan J); ***Bowlay Logging** Ltd v Domtar Ltd* (1978) 87 DLR (3d) 325; *CCC Films* [1985] 1 QB 16 at 39; *Yam Seng PTE Ltd* [2013] EWHC 111 at [186].

[31] (1949) 178 F 2d 182 at 189.

[32] See *Amann* (1991) 174 CLR 64 at 73-74.

[33] *Amann* (1991) 174 CLR 64 at 74.

would have resulted in a net profit of $819,000 if it had run to term. That amount was reduced by half to allow for the contingency that, in the absence of a breach, the Commonwealth would have exercised its termination rights.[34] On appeal to the Full Court, Davies and Burchett JJ held that the company was entitled to recover $5,475,184 (plus interest) representing a full reimbursement of its net wasted expenditure plus the return of a security deposit and reimbursement for termination payments that it had been required to make.[35] In dissent, Sheppard J stated that the company was entitled to reliance damages, however he would have reduced its entitlement to $2,737,592 (plus interest) in order to account for the possibilities that: (i) the Commonwealth might have lawfully terminated the contract; and (ii) the contract might not have been renewed.[36]

27. ***Mason CJ and Dawson J*** stated that in cases where it is not possible to predict whether a contract for "supplying goods or rendering services"[37] would have been profitable: (i) a plaintiff may rely on the recoupment presumption to recover their reasonable expenses;[38] and (ii) the defendant bears "the onus of showing that the [plaintiff] would have made a loss on the contract".[39] Although not expressly stated by Mason CJ and Dawson J, subsequent commentators have suggested that their conception of the presumption imposes a legal rather than evidentiary onus on defendants.[40]

28. Nonetheless, Mason CJ and Dawson J recognised that it would not be "appropriate" to apply the recoupment presumption to all commercial contracts. Their Honours recognised that "almost by definition, it would not be appropriate to apply the presumption" to a "purely aleatory contract" because "inherent in the entry into such a contract is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit".[41] The technical definition of an "aleatory contract" is an agreement where the promisor's performance is dependent on the occurrence of a fortuitous event (such as a wagering contract).[42] However, as has been noted by a number of

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[34] *Amann Aviation Pty Ltd v Commonwealth* (1988) 100 ALR 267 at 354-355.
[35] *Amann Aviation Pty Ltd v Commonwealth* (1990) 2 FCR 527 at 540 (Davies J), 576 (Burchett J).
[36] *Amann Aviation Pty Ltd v Commonwealth* (1990) 2 FCR 527 at 547-548.
[37] *Amann* (1991) 174 CLR 64 at 81.
[38] *Amann* (1991) 174 CLR 64 at 87, 89.
[39] *Amann* (1991) 174 CLR 64 at 89.
[40] See D Winterton, "Commonwealth v Amann Aviation Pty Ltd 25 years on: Re-examining the problem of pre-breach expenditure in contract law" in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co, 2016) at 337-338.
[41] *Amann* (1991) 174 CLR 64 at 88.
[42] See JD Heydon, *Heydon on Contract: The General Part* (Lawbook Co, 2019) at [26.130].

commentators,[43] Mason CJ and Dawson J seemed to have had in mind a broader category of contract, given that their Honours referred to an agreement which provided an opportunity to win a boat race as an example of an "aleatory contract".[44] That Mason CJ and Dawson J regarded it is necessary, before applying the recoupment presumption, to assess whether the plaintiff had accepted outsized contractual risks is reinforced by a passage later in their judgment where, after analysing the allocation of risks under the contract, their Honours said that *Amann* was a case in which it was "natural and *appropriate* for [the plaintiff] to sue to recover its wasted expenditure".[45]

29. ***Brennan J*** conceived of the principles that govern reliance damages in different terms to the other members of the majority. His Honour accepted that "[a] plaintiff who seeks to recover reliance damages must ordinarily prove that the net value of the benefits to which he [or she] would have been entitled if the contract had been performed … would have exceeded the wasted expenditure incurred in reliance on the defendant's promise".[46] To assist in discharging that onus, a "plaintiff may be able to raise and rely on an inference that a party would not incur expenditure in reliance on the other party's promise without a reasonable expectation that … the expenditure would be recouped".[47] That "inference" is "of varying strength".[48] However, where (and only where) the defendant's breach:[49]

> … has made it impossible for the plaintiff to prove that the net value of his [or her] contractual benefits … exceeds the wasted expenditure incurred in reliance on the defendant's promise … it is just to shift to the defendant the ultimate onus of proving that, had the contract been performed, the net value of the plaintiff's benefits would not have covered the expenditure …

30. ***Deane J*** considered that a plaintiff could rely on the recoupment presumption to recover reliance damages.[50] Deane J's judgment articulates the most demanding test for what is required to rebut the recoupment presumption. His Honour said it will not be displaced:[51]

> … merely by the circumstance that the benefits which the plaintiff would have obtained from performance by the defendant included the chance of some more remote benefit and it is a matter of speculation whether that ultimate benefit would have in fact been obtained …

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[43] See N Seddon, R Bigwood & M Ellinghaus, *Cheshire & Fifoot: Law of Contract* (10th Australian ed, LexisNexis Butterworths, 2012) at [23.12] (fn 73); Lücke, "The so-called reliance interest in the High Court" at 126-127.
[44] *Amann* (1991) 174 CLR 64 at 88, citing *Aldwell v Bundey* (1854) 9 Ex 341; 156 ER 145.
[45] *Amann* (1991) 174 CLR 64 at 90 (emphasis added).
[46] *Amann* (1991) 174 CLR 64 at 104.
[47] *Amann* (1991) 174 CLR 64 at 105.
[48] *Amann* (1991) 174 CLR 64 at 105.
[49] *Amann* (1991) 174 CLR 64 at 105.
[50] *Amann* (1991) 174 CLR 64 at 126-127.
[51] *Amann* (1991) 174 CLR 64 at 127.

31. That statement was relied on repeatedly at AJ [51], [127], [135], [137] (CAB 136, 175, 180-181). However, it should be noted that Deane J: (i) dissented as to the outcome in *Amann*; and (ii) was careful to confine narrowly the category of expenditure that was captured by the recoupment presumption (repeatedly stating that such damages extended only to expenditure incurred "either in procuring the contract or in its performance"[52]).

32. ***Toohey and Gaudron JJ*** published separate reasons. The key distinction between their judgments was that Toohey J thought that the company's damages should be discounted to reflect the possibilities of termination by the Commonwealth and non-renewal.[53] However, both judgments: (i) rejected the notion that the law imposes an onus on the defendant to prove, on the balance of probabilities, that the plaintiff would *not* have recovered their expenditure if the contract had been performed;[54] and (ii) endorsed the view that the recoupment presumption operates to impose an "evidentiary onus" on the defendant to show that the plaintiff would not have recovered their expenditure such that it is only "in the absence of evidence to the contrary" that it is assumed that the plaintiff would have recovered their expenditure.[55] Significantly, Gaudron J also expressly recognised that the allocation of contractual risks in a given case "may be such as to preclude" the application of the recoupment presumption (in whatever form it takes).[56]

33. ***McHugh J*** stated that unless a plaintiff has proved "that the defendant's breach has made it impossible to prove the outcome of the contract … expenditure wasted in reliance on the defendant's promise is not recoverable".[57] On the facts in *Amann*, McHugh J considered that this condition had not been satisfied.[58]

(ii) The proper approach to reliance damages

34. The plaintiff "generally [bears] the legal burden of establishing the existence and amount of the loss or damage" suffered by reason of a breach of contract.[59] In some cases, damages

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[52] *Amann* (1991) 174 CLR 64 at 126-127, 131. See, also, 81 (Mason CJ and Dawson J), 99, 107, 115 (Brennan J), 155, 157 (Gaudron J).
[53] *Amann* (1991) 174 CLR 64 at 147-148.
[54] *Amann* (1991) 174 CLR 64 at 137-138, 140-141 (Toohey J). See, also, 156-157 (Gaudron J).
[55] *Amann* (1991) 174 CLR 64 at 142-143 (Toohey J). See, also, 156 (Gaudron J): The defendant bears only a "practical or evidentiary onus of the kind which arises because, in the absence of evidence to the contrary, some particular thing is assumed to be the case".
[56] *Amann* (1991) 174 CLR 64 at 157.
[57] *Amann* (1991) 174 CLR 64 at 166.
[58] (1991) 174 CLR 64 at 172-173.
[59] ***Berry*** *v CCL Secure Pty Ltd* (2020) 271 CLR 151 at [28] (Bell, Keane and Nettle JJ), citing *Amann* (1991) 174 CLR 64 at 80, 88 (Mason CJ and Dawson J), 99 (Brennan J), 118 (Deane J), 137 (Toohey J).

may be assessed by reference to the expenditure incurred by a plaintiff in preparation for, or performance of, their obligations under the contract that was wasted by reason of the defendant's breach. A majority of the judgments in *Amann* supported the proposition that, when seeking to recover reliance damages, a plaintiff may, in some circumstances, rely on a "presumption", "assumption" or "inference" that, had the contract been performed, they would have recovered such expenditure as was incurred by the time of breach.[60] Two explanations have been advanced to explain this recoupment presumption; they are engaged in different circumstances.

35. ***First***, the presumption arises (so as to place an onus on the defendant to prove that the plaintiff would not have recouped their expenditure) where it is the defendant's breach of contract *itself* that has made it "impossible to undertake an assessment on the ordinary basis".[61] *McRae* is the classical illustration of this principle.[62] In that case, the Commission promised that there was a tanker at or near the Jourmaund Reef.[63] It is the particular nature of the breach of such a promise that makes it *impossible* to assess damages by comparing the value of "what was promised and what was delivered" (not merely because of the difficulties of predicting what contingencies would have occurred but because, as in *McRae*, "it is impossible to value a non-existent thing").[64]

36. ***Secondly***, the recoupment presumption has been justified as a prima facie "assumption" that is applied because it is "the ordinary expectations of the world of commerce that the value of a contract will be no less than the cost of performance".[65]

37. The rationale for each of these forms of the recoupment presumption is such that they could only ever involve the shifting of an evidentiary onus.[66] In relation to the first form, as Bell, Keane and Nettle JJ explained in *Berry*, this manifestation of the recoupment presumption is a "modern application" of the "principle encapsulated in *Armory v Delamirie*,[67] that where a wrongdoer has destroyed or failed to produce evidence which the innocent party requires to show how much he or she has lost, it is just that the wrongdoer should suffer

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[60] *Amann* (1991) 174 CLR 64 at 87-88 (Mason CJ and Dawson J), 105 (Brennan J), 126-127 (Deane J), 142-143 (Toohey J), 155-157 (Gaudron J).
[61] *Amann* (1991) 174 CLR 64 at 106 (Brennan J); cf 166-167 (McHugh J).
[62] (1951) 84 CLR 377.
[63] *McRae* (1951) 84 CLR 377 at 412 (Dixon and Fullagar JJ; McTiernan J agreeing).
[64] *McRae* (1951) 84 CLR 377 at 414 (Dixon and Fullagar JJ; McTiernan J agreeing).
[65] *Amann* (1991) 174 CLR 64 at 156 (Gaudron J). See, also, 87-88 (Mason CJ and Dawson J), 126-127 (Deane J), 142-143 (Toohey J).
[66] See the reasons of Toohey and Gaudron JJ in *Amann* (1991) 174 CLR 64 at 140, 142-144, 156-157.
[67] (1772) 1 Strange 505 at 505; 93 ER 664 at 664 (Pratt CJ).

the resulting uncertainty".[68] As this explanation for the recoupment presumption is concerned with the destruction or availability of evidence it could only support a "shift[ing of] the evidentiary burden".[69] Similarly, the second form of the recoupment presumption is, at most, "a traditional inference based on logic and common sense".[70] It follows that it can give rise to no more than a presumption of fact that must yield to the evidence in any given case. Indeed, as multiple commentators have noted, the placing of the ultimate legal onus on the defendant to prove that the plaintiff would not have recouped their expenditure was not supported by a majority of the Justices in *Amann* (let alone those Justices who agreed in the orders)[71] and would only make sense conceptually if reliance damages operated (as in the United States) as "a remedy intended to place the plaintiff into his or her pre-contractual position".[72]

38. Additionally, both forms of the recoupment presumption remain subject to the compensatory rule.[73] This requires particular care in cases where the recoupment presumption is said to be justified by "the ordinary expectations of the world of commerce". Reality provides many examples of unprofitable contracts that defy those ordinary expectations, such that this justification for the recoupment presumption is variable at best.[74] It follows that there is a real danger that if the presumption is applied as an inflexible rule without regard to the allocation of risks under the contract in question, and the circumstances at the time of breach, it will frequently place plaintiffs in a better position than if their contracts had been performed.

39. For these reasons, at least the second form of the recoupment presumption is subject to the following rules (that ensure conformity with the overarching compensatory rule):

    (a) ***First***, the presumption will not be engaged in cases where, having regard to the

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[68] (2020) 271 CLR 151 at [29].
[69] *Berry* (2020) 271 CLR 151 at [29].
[70] *Masson v Parsons* (2019) 266 CLR 554 at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See, also, *FCT v Carter* (2022) 96 ALJR 325 at [29], [42] (Edelman J); *Bosanac v FCT* (2022) 96 ALJR 976 at [99]-[103] (Gordon and Edelman JJ).
[71] Lücke, "The so-called reliance interest in the High Court" at 145, 147; Winterton, "Commonwealth v Amann Aviation Pty Ltd 25 years on: Re-examining the problem of pre-breach expenditure in contract law" at 353.
[72] Ng, "The onus of proof in a claim for reliance damages for breach of contract" at 144, 149-150; Winterton, "Commonwealth v Amann Aviation Pty Ltd 25 years on: Re-examining the problem of pre-breach expenditure in contract law" at 338-339; M Owen, "Some aspects of the recovery of reliance damages in the law of contract" (1984) 4 *OJLS* 393 at 395.
[73] See fns 27 and 29.
[74] See *Amann* (1991) 174 CLR 64 at 142 (Toohey J), 165-166 (McHugh J); Treitel, "Damages for breach of contract in the High Court of Australia" at 229.

circumstances of the case (and in particular the allocation of risks under the contract), it would be unreasonable to *assume* that the plaintiff would have recovered their expenditure because: (i) it was never contemplated that the expenditure would be recovered from the performance of the contract;[75] and/or (ii) the plaintiff was engaged in a speculative venture,[76] in respect of which the defendant had accepted no relevant risk.[77]

(b) ***Secondly***, the presumption operates only "in the absence of evidence to the contrary".[78] In other words, as the plurality stated in *Berry*, the presumption is rebutted if the defendant can show that there is a "prospect" that the plaintiff would not have recouped their expenditure.[79] This is appropriate because: (i) "[t]he law does not operate so as to impose a burden [on the defendant] of proving what is impossible of proof";[80] and (ii) the information as to whether and how the plaintiff was to make a profit on the contract in question "is likely to be in the hands of the plaintiff rather than the defendant".[81]

(c) ***Thirdly***, the presumption can only be relied on to establish a plaintiff's entitlement to recover expenditure incurred *in preparation for, or performance of*, the contract in question.[82] Allowing recovery of all expenses incurred in reliance on a defendant's promise: (i) divorces the assessment of damages from both the terms of the contract and the rationale for the recoupment presumption; and (ii) may

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[75] See Gaudron J's discussion of expenditure on plant/equipment in *Amann* (1991) 174 CLR 64 at 157.
[76] A Kramer, *The Law of Contract Damages* (3rd ed, Hart, 2022) at [18-82] and the authorities there cited. See, also, *Amann* (1991) 174 CLR 64 at 88 (Mason CJ and Dawson J) in respect of contracts "inherent in the entry into" which "is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit"; *C&P Haulage* [1983] 1 WLR 1461 at 1468 (Fox LJ) referring to cases where a "high risk of waste was from the very first inherent in the nature of the contract itself"; and ***Ti Leaf*** *Productions v Baikie* [2001] NZCA 303 at [49].
[77] See ***Parker*** *v SJ Berwin* [2008] EWHC 3017 (QB) at [64]-[66], [74], [76]-[78], [82] and *NRMA Ltd v Morgan* [1999] NSWSC 407 at [1361] – both cases in which it was held that the recoupment presumption was not applicable where reliance damages – representing costs incurred in pursuing a corporate transaction – were sought for breach of a term in a retainer requiring a solicitor to exercise reasonable care. See, also, *Roach v Page (No 37)* [2004] NSWSC 1048 at [502]-[503]; and the discussion of *Ti Leaf* [2001] NZCA 303 in D McLauchlin, "The limitations on reliance damages for breach of contract" in R Halson and D Campbell (eds), *Research Handbook on Remedies in Private Law* (Elgar Publishing, 2019) at 100-102; and K Barnett, *Damages for Breach of Contract* (2nd ed, Sweet & Maxwell, 2022) at [3-017].
[78] *Amann* (1991) 174 CLR 64 at 142-143 (Toohey J), 156 (Gaudron J).
[79] (2020) 271 CLR 151 at [29] (Bell, Keane and Nettle JJ).
[80] *Amann* (1991) 174 CLR 64 at 157 (Gaudron J).
[81] *Amann* (1991) 174 CLR 64 at 138 (Toohey J). See, also, *Parker* [2008] EWHC 3017 (QB) at [78]; Winterton, "Commonwealth v Amann Aviation Pty Ltd 25 years on: Re-examining the problem of pre-breach expenditure in contract law" at 340.
[82] This was the nature of the expenditure recovered in *Amann*: see [31] above and the discussion in McLauchlin, "The limitations on reliance damages for breach of contract" at 100.

reward inefficiency on the part of a plaintiff.[83] Even in the United States, where the Courts expressly protect parties' reliance interest, a cognate limitation on the recovery of what Fuller and Perdue refer to as "incidental reliance"[84] expenditure has been recognized.[85] The American case law acknowledges that "[t]he risk of expenditures in reliance on hopes of remote future gains must to a high degree remain upon the one who makes them".[86]

40. These limitations are particularly important in cases where what was contracted for was no more than a chance to secure a benefit. This Court has repeatedly stated that where a plaintiff seeks expectation damages for loss of opportunity "[i]t remains necessary to prove, to the usual standard, that there was a substantial prospect of a beneficial outcome".[87] However, as has been pointed out by Treitel,[88] and was recognised by the plurality in *Berry*,[89] there is a tension in this area of the law. That tension arises because, if a plaintiff can rely on the recoupment presumption by pointing only to some slim possibility of recovering their expenditure, then reliance damages may be used by plaintiffs to: (i) avoid the need to prove a "substantial prospect of a beneficial outcome"; and (ii) instead throw the burden of uncertainty that is inherent in speculative contracts onto defendants. The courts must be careful to ensure that they do not "impose the risk of the plaintiff's contract on the defendant" in cases where "the risk (of profit or loss) was far greater on the plaintiff's part than on that of the defendant".[90] For that reason, in cases where the plaintiff could only ever seek expectation damages on a loss of opportunity basis (if at all), the limitation in [39(a)] above should be applied so that the recoupment presumption will not be engaged unless the plaintiff can first prove that the defendant's breach has caused them to lose a substantial prospect of a beneficial outcome.[91]

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[83] See *Bowlay Logging* (1978) 87 DLR (3d) 325 at 335.
[84] Fuller and Perdue, "The reliance interest in contract damages" at 88.
[85] See *Rochester Lantern Co v Stiles & Parker Press Co* (1892) 135 NY 209 at 217-218; *Interfilm Inc v Advanced Exhibition Corporation* (1998) 249 AD 2d 242 at 242. See, also, the discussion of *L Albert & Son v Armstrong Rubber Co* (1949) 178 F 2d 182 in McLauchlin, "The limitations on reliance damages for breach of contract" at 98, 100.
[86] AL Corbin, *Corbin on Contracts* (West Publishing Co, 1964) Vol 5, §1035, page 213.
[87] *Badenach v Calvert* (2016) 257 CLR 440 at [40] (French CJ, Kiefel and Keane JJ). See also [98] (Gordon J); and *Sellars* (1994) 179 CLR 332 at 367-368 (Brennan J).
[88] Treitel, "Damages for breach of contract in the High Court of Australia" at 235.
[89] (2020) 271 CLR 151 at [29].
[90] *Amann* (1991) 174 CLR 64 at 142 (Toohey J).
[91] cf *Sellars* (1994) 179 CLR 332 at 349. Note the analogous approach taken in *Apotex Inc v Global Drug Ltd* (Court of Appeal for Ontario, Morden, Austin and Borins JJA, 2 October 2001) at [5]-[8].

(iii) The Court of Appeal's errors of principle

41. The reasoning of the primary judge conforms with all three of the rules referred to at [39] above: note PJ [204], [207], [211]-[221] (CAB 65-73). By contrast, Brereton JA adopted a maximalist view of when reliance damages should be available free of any of these qualifications. This can be seen in the following features of his Honour's reasoning:

42. ***First***, Brereton JA relied on *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd*[92] and only the reasons of Mason CJ and Dawson J and Deane J in *Amann* to articulate a hard-edged conception of the recoupment presumption that imposes the *ultimate onus* of proving that expenditure would have been wasted in any event on the defendant: AJ [55]-[56], [127] (CAB 139-140, 175).

43. ***Secondly***, it was repeatedly denied (at AJ [83]-[84], [98], [101]-[103], [163] (CAB 152-153, 159-162, 191)) that the allocation of risks under a contract was relevant to whether the recoupment presumption was engaged. Brereton JA was seemingly of the view that the presumption could arise for any contract provided that "expenditure has been incurred in reliance on a defendant's contractual promise which the defendant has failed to perform": AJ [72]-[73], [161] (CAB 148-149, 190-191).

44. ***Thirdly***, Brereton JA stated that, to rebut the presumption, the defendant is required to "show[] that the plaintiff would not have recouped its expenditure had the contract been performed": see AJ [57], [73], [161], [166]-[167] (CAB 141, 148, 190-193). That requirement applies even in cases (like this) where it imposes an "impossible" burden of disproving a "speculative" prospect: AJ [135], [137], [140], [167] (CAB 180, 182, 193).

45. ***Fourthly***, the recoupment presumption was said to extend to *all* expenditure reasonably incurred in reliance on a defendant's promise: AJ [61], [64]-[68], [73], [109], [113], [161] (CAB 142-143, 145-146, 148, 164, 166, 191).

46. Thus, the Court of Appeal's reasoning on the recoupment presumption was inconsistent with [37] above and rejects all three of the rules stated at [39]. In adopting that reasoning, the Court below fell into error, which must be corrected.

(iv) Application of the proper approach to the facts in this case

47. Applying the correct approach, the respondent's claim for reliance damages ought to have failed for four reasons. Before turning to the four arguments, it is helpful to draw together

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[92] [2020] NSWCA 234 at [29] (Macfarlan JA; Bell P and Meagher JA agreeing).

the key facts. If the appellant had never breached cl 4.2 of the AFL, as at the Sunset Date:

(a) It is likely that the respondent would have secured a lease, however that lease: (i) would not have entitled the respondent to *receive* money, rather, it would have obliged it to pay substantial rent for 30 years; and (ii) would have provided the respondent with nothing more than a secure entitlement to premises from which it could trade, and thus attempt to recoup its expenditure from third parties;

(b) the three businesses that the respondent had sought to operate from the hangar had proved unprofitable (see [13]-[15] above); and

(c) the prospects of the respondent ever recouping its expenditure were contingent on: (i) commercial development of the airport proceeding (with respect to which there was little to no demand, see [15] above); (ii) others taking up lots in the development so that the hangar operated in a viable commercial precinct (again see [15] above); (iii) general trading conditions; and (iv) whether the respondent would have been in a sufficiently strong financial position to pay rent through the unprofitable period of indeterminate length until these events occurred, notwithstanding the fact that, by the Sunset Date, it had defaulted on its licence fee payments and had attempted to sell the hangar (see [16], [19] above).

48. The ***first*** reason that the claim for reliance damages ought to have failed is that, contrary to AJ [119], [121]-[123] (CAB 169-172), this was not a case where the first form of the recoupment presumption (see [35] above) was engaged. The appellant's breach of contract did not *itself* "den[y], prevent[] or preclude[] the existence of circumstances which would have determined the value of the plaintiff's contractual benefits".[93] This was because this was a contract, like many, where the position that the plaintiff would have been in if the contract had been performed would vary depending on whether certain contingencies (in this case those described at [47(c)]) eventuated. The appellant's breach of contract only gave rise to "uncertainty and evidentiary difficulty"[94] because it prevented continued performance of the contract, which would ultimately have revealed which contingency would prevail. Thus, the appellant's breach did not *itself* make it impossible to assess damages by comparing the value of "what was promised and what was delivered".[95] So much is clear because "[h]ad it been attempted before the [appellant's] breach to predict

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[93] *Amann* (1991) 174 CLR 64 at 106-107 (Brennan J).
[94] *Amann* (1991) 174 CLR 64 at 142 (Toohey J).
[95] *McRae* (1951) 84 CLR 377 at 414 (Dixon and Fullagar JJ; McTiernan J agreeing).

the [respondent's] chances of profit, it would have been just as difficult as it was afterwards".[96] Therefore, because the uncertainties were inherent within the contract, and were not the result of the appellant's breach, there is no reason why "the defaulting party should, as a matter of fairness, bear the burden of uncertainty".[97] It follows that: (i) this case does not engage the principled justification for Brennan J's approach in *Amann* as explained in *Berry* (see [37] above);[98] and (ii) the primary judge was correct to say (at PJ [216] (CAB 70)) that this case could be distinguished from *McRae*. Thus, consistent with ground 1 of the Notice of Appeal (**NoA**) (CAB 240), the Court of Appeal ought to have held that the first form of the recoupment presumption did not arise.

49. ***Secondly***, the AFL was a risky contract for the respondent under which: (i) it was never contemplated that expenditure would be recouped *from the appellant*; (ii) the respondent's income was not guaranteed; (iii) at most, performance of the contract would have provided the respondent with the incidental benefit that it would be able to trade from leased premises and possibly recover its expenditure from third parties; and (iv) the respondent's prospects of operating profitably were dependent on the contingencies identified above at [47(c)], none of which was the subject of contractual promises by the appellant (and indeed in cl 12.3 of the AFL the parties had made it clear that the risk of future development of Cessnock Airport occurring "was to be borne by the [respondent] and not the [appellant]": PJ [220] (CAB 71)). The primary judge recognised (at PJ [217], [220] (CAB 70-71)) that these features of the AFL made it inappropriate to apply the recoupment presumption in this case.[99] Applying the first limitation on the recoupment presumption described at [39(a)] above, there was no basis to assume that the respondent would recoup its expenditure, and it would be unfair for the Court to re-write the parties' bargain to make the appellant the insurer of the respondent's (risky) venture. Accordingly, as asserted in ground 1 of the NoA (CAB 240), the recoupment presumption was not engaged.

50. ***Thirdly***, at the point of the appellant's breach on the Sunset Date (see PJ [159] (CAB 52)) the circumstances described above at [13]-[16] and [19] demonstrate that the risks inherent

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[96] Lücke, "The so-called reliance interest in the High Court" at 147. See, also, Winterton, "Commonwealth v Amann Aviation Pty Ltd 25 years on: Re-examining the problem of pre-breach expenditure in contract law" at 353.
[97] *Amann* (1991) 174 CLR 64 at 142 (Toohey J).
[98] Indeed, if it were accepted that the *McRae*-style justification *was* engaged in this case then it must be true that an irrebuttable entitlement to reliance damages arises *in any case* where a plaintiff has lost only a speculative opportunity by reason of the defendant's breach of contract (cf [40] above).
[99] Further, any assumption premised on "ordinary expectations of the world of commerce" (see [36] above) will likely be inapposite to a "speculator" and "risk-taker" like Mr Johnston (see [10] above).

in the AFL were not working out in the respondent's favour. The respondent's businesses had failed; it was in default under the licence; there was no indication it would be able to fund future rent payments; and it had attempted to sell the hangar. The respondent was on a trajectory that would see it recover none of its expenditure. In this case, there was no "absence of evidence" as to what would have happened if the contract had been performed (cf [39(b)] above). The evidence clearly indicated that losses would flow from the AFL and that the appellant's breach merely "saved [the respondent] from incurring further losses" and liability to pay rent: see PJ [219] (CAB 70-71).[100] It follows that the respondent could not establish that it lost a substantial prospect of a beneficial outcome such that, applying the approach articulated at [39(a)] and [40] above, the recoupment presumption should not arise in this case and ground 1 of the NoA is made out (CAB 240).

51. Alternatively, if the recoupment presumption was somehow engaged, the matters referred to in the previous paragraph establish that there was more than a "prospect" that the respondent would *not* have recouped its expenditure (see [39(b)] above). Consequently, as asserted in ground 2 of the NoA (CAB 240), the appellant rebutted that presumption. In reaching the contrary conclusion, Brereton JA said that all of the matters referred to in the previous paragraph were irrelevant because the presumption required the appellant to do the "impossible" and disprove the "speculative" possibility that the respondent might have recouped its expenditure by 2041: AJ [135], [140] (CAB 180, 182). That reasoning only serves to highlight the harshness of Brereton JA's conception of the presumption and the preferability of adopting the correct approach to reliance damages articulated above.

52. ***Fourthly***, in order for the respondent to perform its obligations under the AFL, and the lease that it was proposed would eventuate, the respondent was required only to occupy the site and to pay rent or licence fees. Thus, performance of the contract did not require the respondent to incur the very considerable expense of constructing a hangar in the manner it did. It follows that contrary to AJ [60]-[68] (CAB 142-146) and consistent with: (i) the third rule stated at [39(c)] above; and (ii) ground 1 of the NoA (CAB 240), the recoupment presumption is not engaged in relation to the respondent's expenses incurred in constructing the hangar and cannot justify an award of damages for those expenses.

53. Finally, it is desirable to explain why this case can be distinguished from *Amann* (as the primary judge stated at PJ [217] (CAB 70)). For reasons explained at [22]-[23] above,

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[100] In the words of Berger J in *Bowlay Logging* (1978) 87 DLR (3d) 325 at 334-335.

nothing said in *Amann* that is inconsistent with the principles stated at [34]-[40] above is binding on this Court. However, in any event, unlike in this case, reliance damages could be awarded in *Amann* consistently with all three of the rules identified at [39] above. To take the most glaring distinction between the cases, in *Amann* the payments that the plaintiff was to receive from the Commonwealth,[101] and the fact that it would have been uniquely well-placed at renewal to capitalise on the Commonwealth's continuing need for aerial surveillance – because it would have owned fully-written down planes, enabling it to tender at an advantage or sell those planes to a rival tenderer[102] – meant that, had the contract been performed, the plaintiff would have secured a commercial advantage that was plainly "substantial" even if "it [could not yet] be quantified with any degree of accuracy".[103] Whereas, in this case the respondent could not prove, on the balance of probabilities, that it lost a prospect of any value because, contrary to AJ [130] (CAB 176), the "commercial development of the airport" was not "'a distinct commercial benefit', inevitably contemplated by the parties as enuring to the advantage of [the respondent] from performance of the contract". In fact, whether the AFL was performed had no real impact on whether development would proceed: cf AJ [134] (CAB 179). Thus, unlike in *Amann*, all that the respondent lost by reason of the appellant's breach was the virtually non-existent possibility of reversing the dire trajectory that its venture was on. In those circumstances, a damages award of around $3.7 million plus interest to the respondent is unjustifiable.

Part VII: Orders sought

54. The appellant seeks the orders set out in the NoA (CAB 240-241).

Part VIII: Time required for presentation of oral argument

55. The appellant estimates that it will need approximately 2 hours for oral submissions in chief and 15 minutes in reply.

Dated: 3 November 2023

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[101] *Amann* (1991) 174 CLR 64 at 157 (Gaudron J).
[102] *Amann* (1991) 174 CLR 64 at 74, 89-90 (Mason CJ and Dawson J), 111-113 (Brennan J), 130 (Deane J), 152, 157 (Gaudron J).
[103] *Amann* (1991) 174 CLR 64 at 112 (Brennan J). See, also, *Sellars* (1994) 179 CLR 332 at 349.

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of the Practice Direction No 1 of 2019, the Appellant sets out below a list of the particular constitutional provisions and statutes referred to in its submissions:

- *Environmental Planning and Assessment Act 1979* (NSW) – historical version for 1 July 2004 to 30 November 2004.