HIGH COURT OF AUSTRALIA

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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 REPLY**

## Part I: Certification

1. These submissions are in a form suitable for publication on the internet. They reply to the respondent's submissions filed on 1 December 2023 (**RS**).[1]

## Part II: Reply

2. ***Introduction* (RS [25]-[38])**: The difficulty in this appeal concerns how damages should be assessed in cases where a contract has been breached and it is unclear whether or not the plaintiff would have been able to turn a profit out of some commercial opportunity that it alleges it was promised.[2] In such cases, because neither party can prove definitively what would have happened in the absence of breach, questions of legal and evidentiary onus loom large.[3] This Court has been clear that, in such cases, where expectation damages are sought on a loss of opportunity basis: (i) the plaintiff bears the onus of proving, on the balance of probabilities, that they lost a substantial prospect of a beneficial outcome; and (ii) the Court then estimates the value of that opportunity "by reference to the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance which the contract promised": AS [40].[4]

3. The respondent contends that, on the same facts, the plaintiff could sue for reliance damages and if it did: (i) it could rely on the recoupment presumption even if it could not prove that it lost a substantial prospect of a beneficial outcome (RS [34]-[35], [51], [60]); (ii) the defendant would bear the ultimate onus of proving, on the balance of probabilities, that the contract would not have been profitable (in many cases, an impossible task) even though they will be *in a worse position* than the plaintiff to lead evidence on that question (see AS [39(b)] and fn 81; cf RS [26], [37], [43], [52], [53(c)-(d), (f)], [56]); and (iii) there should be no discounting of the damages to account for contingencies: see RS [32]. The respondent has provided no explanation as to why such radically different rules should apply to these two forms of damages, which will frequently arise for application on precisely the same facts. Instead, it contends (without explanation) that the principles that apply in loss of

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[1] Terms defined in the appellant's submissions in chief (**AS**) have the same meaning in these submissions.
[2] The attempts at RS [25]-[26] to call in aid statements in the cases to the effect that a "robust" approach should be taken to assessing damages should be rejected. Those authorities deal with circumstances where it is established that a plaintiff has suffered loss, but they have difficulty quantifying it precisely. Here the uncertainty is more fundamental: the respondent would have the Court, not merely resolve doubtful questions of quantum in its favour, but actually assume (without proof) that it has suffered any loss at all.
[3] In this regard, it is notable that reliance damages developed in the United States in response to a common law requirement that loss of profits be proved with "reasonable *certainty*": see *Amann* (1991) 174 CLR 64 at 82-83 (Mason CJ and Dawson J; emphasis added). In that context it is easy to see why reliance damages were regarded as "a common expedient and a just one": RS [29]. The need for such a remedy to be available is substantially reduced under contemporary Australian law as articulated in *Sellars* (1994) 179 CLR 33.
[4] *Sellars* (1994) 179 CLR 332 at 349 (Mason CJ, Dawson, Toohey and Gaudron JJ).

opportunity cases are “different” (RS [51]) and can be ignored: see RS [53(a)-(b)].[5]

4. The underlying rationale for the respondent’s position appears to be that the recoupment presumption should be regarded as a policy-driven mechanism, which mitigates the rigours of the compensatory rule in the interests of what is “just and fair”[6] (i.e. *because* a party is in breach it is fair that it should be made to suffer *all* the consequences of the uncertainty inherent in a contract to provide an opportunity): RS [25]-[28], [51]. That approach amounts to imposing damages for breach of contract as punishment rather than compensation.[7] It ignores the fact that all six Justices who saw a role for the recoupment presumption in *Amann* considered that it was justified only if it operated as a proxy for (not an exception to) the compensatory rule: AS [24(b)]. In the result, the respondent has failed to provide either a principled basis for its maximalist view of the recoupment presumption or an explanation as to how its conception of reliance damages can operate consistently with the compensatory rule: cf AS [4]. It follows that the appeal must be upheld.

5. ***Facts* (RS [8]-[24])**: The respondent criticises the appellant’s summary of the facts in an attempt to establish that the AFL was not a “risky” contract pursuant to which the respondent secured (at most) a chance to recoup its expenditure by trading from leased premises: see RS [6], [50], [59].[8] These submissions proceed on the false premise that Brereton JA departed extensively from the primary judge’s findings of facts and found that: (i) if the appellant had not breached the AFL, the prospect that it would not have developed the airport was “remote” (see RS [50], citing AJ [133]-[134] (CAB 178-179)); (ii) the primary judge was wrong to state that there was little demand for hangar homes at Cessnock and little interest, beyond the respondent’s, in the further development of the airport (see RS [21]-[22]); and (iii) had the Plan been registered, it is “more likely than not” that the respondent would have continued to operate its businesses: RS [64]. No such findings were made by Brereton JA and no notice of contention (which would be required) has been filed.

6. On the ***first*** matter, Brereton JA: (i) held only that there was a “remote” prospect that, if the

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[5] The folly in the respondent’s attempts to draw a bright-line distinction between damages for loss of opportunity and reliance damages is highlighted by the fact that in *Sellars* (1994) 179 CLR 332 at 349, Mason CJ, Dawson, Toohey and Gaudron JJ referred to *Amann* as a loss of opportunity case.

[6] *Amann* (1991) 174 CLR 64 at 89 (Mason and Dawson J).

[7] cf *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [37] (Kiefel CJ, Bell and Keane JJ): “It is a matter of public policy that under the law of contract a defaulting party is not to be punished for its breach”. See, also, *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 at 15.

[8] Additionally, the respondent’s reliance (at RS [63]) on the appellant having sought funding in August 2012 to purchase the hangar for $950,000 (RBFM 182, 184) misfires because: (i) the appellant was never in a financial position to make an offer (indeed no one ever made “a credible offer for the purchase of the hangar” – PJ [78] (CAB 28)); (ii) the appellant’s employees explored the possibility of a purchase as a conciliatory attempt to act “in good faith in trying to remedy the breach and the dispute between the parties” (PJ [244]-[246] (CAB 80-81)); and (iii) if the appellant had purchased the hangar for $950,000 that would have seen the respondent make a huge loss on the project (as it spent at least $3 million building the hangar): AS [11].

appellant performed the AFL, the Plan for subdivision would not have been *registered*; and (ii) expressly acknowledged that, even if registration occurred, there was only "a prospect that commercial development would follow": see AJ [77], [134] (CAB 150, 179).[9]

7. In respect of the ***second*** matter, the primary judge's findings at PJ [211] (CAB 68) were never overturned by the Court of Appeal. The passage at AJ [134] (CAB 179) relied on at RS [21]: (i) makes no reference at all to *demand for hangar homes*; and (ii) rises no higher than stating that "Council documents" referred to "increased demand *for hangarage* and the Council's ambitions for development". Those documents (see RS [22]), were mainly "pitch" documents, which the primary judge recognised contained "what needed to be said on behalf of the [appellant] to put its case for the grant of funds" – they have no weight as objective evidence of third-party *interest in development*: PJ [104] (CAB 37).[10] Ultimately, the absence of commercial interest in development of the airport was clearly established by the fact that, notwithstanding ambitious statements made by the appellant for almost two decades (see RS [13]-[15], [22]), no development has occurred: see AJ [134] (CAB 179).[11]

8. On the ***third*** matter, the respondent relies only on the evidence of its principal in cross-examination quoted at AJ [28] (CAB 127), stating that the hangar would be unprofitable unless (the unpromised) development of the airport proceeded: AS [15]; PJ [245] (CAB 80).

9. Even more problematically, the respondent's challenge to the appellant's characterisation of the AFL focusses only on the *prospects of the airport being developed* and ignores the other contingencies that needed to work out in the respondent's favour: see AS [47(c)]. It is the combined effect of those contingencies that led even Brereton JA to recognise that the prospect of expenditure being recovered was no more than "speculative": AJ [135] (CAB 180). Nothing in the RS undermines that conclusion of Brereton JA's or the propositions that: (i) the AFL was risky (AS [49]); (ii) the AFL was fundamentally different to the transaction in *Amann* (AS [53]; cf RS [58]); and (iii) the evidence at trial established that the appellant's breach, if anything, saved the respondent from further losses[12] and ongoing

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[9] See, also, AJ [132] (CAB 178): "the surrounds might have been developed". Note also that there was no finding that, if the Plan had been registered, "the commercial environment in which the respondent would have conducted its business … would have been vastly different": RS [50]; cf AJ [131] (CAB 176-177).

[10] Further, when regard is had to the broader contents of these documents, they reveal that the airport experienced declining usage from FY11-FY15 (RBFM 241, 261) and was consistently unprofitable: RBFM 243, 247, 266. These documents could never establish that there was third-party interest in development.

[11] Note that "the general preference of the law [is] for fact rather than hypothesis" such that damages should not be assessed on the basis of "a fiction in disregard of the actual facts": *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 156 (Hope JA). See, also, *Bunge SA v Nidera BV* [2015] UKSC 43 at [86] (Lord Toulson JSC; Lords Neuberger, Mance and Clarke JJSC agreeing).

[12] At RS [20], [63] the respondent seeks to make something of the fact that its income exceeded rental payments in the year ending 30 June 2010 and submits that its businesses were only unprofitable "because of interest". This point goes nowhere because, as was explained at PJ [256] (CAB 84), the scale of the respondent's expenditure meant "that recouping the cost of the hangar" from income earned over the life of

liability to pay rent: see PJ [197] (CAB 63); AS [50]; cf RS [64].

10. ***The three limitations on the recoupment presumption at AS [39]*** **(RS [39]-[54])**: The respondent asserts that the three limitations on the recoupment presumption articulated at AS [39] are unsupported by *Amann* in particular and the authorities more generally. These submissions overlook the fact that, in addition to the specific passages cited,[13] all three limitations derive support from the necessity (recognised by five Justices in *Amann*) of ensuring that the recoupment presumption conforms with and gives effect to the compensatory rule: AS [24(b)], [39]. The basic problem with the respondent's approach in this section of its submissions is that it asserts that – with the exception of certain expansive passages from Mason CJ and Dawson J and Deane J's reasons in *Amann* that were relied on by Brereton JA (see RS [41]-[43]) – all statements in the authorities should be narrowly confined and that this Court should ignore the fact that they all reflect an overriding concern with ensuring that compensation remains "the cardinal concept"[14]: eg RS [35], [40]-[41], [44]-[45], [48]-[49], [51], [53], fns 40 and 46. Dealing with each of the limitations in turn:

11. On the ***first limitation*** (AS [39(a)]), at RS [35], [40]-[41], [49], [59] the respondent denies that this case concerns a "purely aleatory contract" but then makes no attempt to explain how the existence of an exception for such contracts is reconcilable with its view that the recoupment presumption is available for all contracts "irrespective of the contingencies that may be inherent in" them. The respondent also suggests that the first limitation "raises more questions than it answers" (RS [41]) even though the appellant has explained (at AS [40]) precisely how this limitation should apply in cases (like this) where what was contracted for was no more than a chance to secure a benefit.[15] As to the submission (at RS [35], [37], [41], [51]), that the appellant's approach leaves little work for the recoupment presumption to do, this argument ignores that: (i) not all contracts are to provide an opportunity; and (ii) even for such contracts, the appellant's approach provides for the availability of a different quantum of damages in cases where the presumption is engaged.[16]

12. As to the ***second limitation*** (AS [39(b)]), the respondent contends that the recoupment presumption imposes the ultimate legal onus on the defendant. No principled explanation

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the lease was always going to "be a much more difficult task than earning incomes in excess of the rent".

[13] In the space available in this reply it is not possible to respond to all of the respondent's assertions that the authorities cited for various propositions in the appellant's submissions do not in fact support those contentions. It suffices to say that the appellant maintains its reliance on *all* of the authorities it has cited.

[14] *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[15] Consistent with *Sellars* (1994) 179 CLR 332 at 348-349.

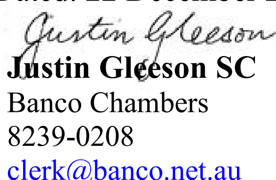
[16] More generally, the submissions at RS [35], [37], [41], [51] tend to assume as their premise that the recoupment presumption exists as a substantive rule of law rather than a mere evidentiary presumption that arises in the absence of evidence to the contrary. However, that is the very point at issue in this case.

is given as to why that should be so (cf AS [37]) so this contention can be put to one side as wrong in respect of *both* forms of the recoupment presumption: contra RS [46], [57].

13. In respect of the ***third limitation*** (AS [39(c)]; cf RS [36], [61]), *Amann* was concerned with expenditure incurred in procuring a contract or in its performance and so the statements collated by Brereton JA at AJ [61] (CAB 142-143) must be read having regard to that context:[17] contra RS [54]. The result in *McRae* has a different explanation (see AS [35]) so Brereton JA was mistaken to rely on it to reject the third limitation: cf RS [54].

14. ***Application of the correct approach at AS [34]-[40] to the facts of this case*** **(RS [55]-[65])**: Two points should be noted. ***First***, the respondent has provided no answer to the appellant's explanation (at AS [48]) as to why its breach did not *itself* make it impossible to assess damages. Further, it has not articulated how Brereton JA's conception of Brennan J's approach in *Amann*, if correct, would not give all plaintiffs that have lost only a speculative opportunity an effectively irrebuttable entitlement to reliance damages. For those reasons, the arguments at RS [46], [57] must be rejected. ***Secondly***, on the question of whether the recoupment presumption has been rebutted, because the prospects of the respondent recovering its expenditure were no better than "speculative" (AJ [135] (CAB 180); AS [47], [51]; and [5]-[9] above), the respondent can succeed only if the presumption operates to shift the ultimate legal onus onto the defendant, so as to require it to negative the possibility that the plaintiff would have recovered its expenditure: contra RS [32], [37], [62].[18] The preponderance of evidence in this case[19] supports the conclusion that the respondent would not have recovered its expenditure such that if, as the appellant contends, the recoupment presumption is "a mere inference of probability which the court may draw"[20] then, as the evidence is not "evenly balanced",[21] the presumption has no work to do (in other words, it has been rebutted) and the appeal must be allowed.

Dated: 22 December 2023



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[17] See *Quinn v Leathem* [1901] AC 495 at 506 (Lord Halsbury LC).

[18] Note the internal inconsistency in the respondent's submissions that emerges at RS [41], [51], which state that if the evidence "suggests that a plaintiff only has 'some slim possibility of recovering their expenditure', the defendant could more readily rebut the presumption". *This* is that case and yet the respondent says the presumption is *not* rebutted because the appellant bore the impossible onus of negativing that slim possibility.

[19] Including evidence led by the appellant (see eg evidence that the respondent was in arrears under the licence referred to at AS [19]; see also PJ [196] (CAB 63)): contra RS [52], [62]. In any event, where an evidential burden rests on a party, it may be discharged by reference to evidence adduced in cross-examination (or even by the other side): see *Momcilovic v The Queen* (2011) 245 CLR 1 at [665] (Bell J).

[20] LH Hoffmann, *The South African Law of Evidence* (2nd ed, 1970) at 369.

[21] *Bosanac v FCT* (2022) 96 ALJR 976 at [102] (Gordon and Edelman JJ).