HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Feb 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S115/2023
File Title:	Cessnock City Council ABN 60 919 148 928 v. 123 259 932 P
Registry:	Sydney
Document filed:	Form 27F - Respondent's Outline of oral argument
Filing party:	Respondent
Date filed:	13 Feb 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No: S115/2023

BETWEEN:

CESSNOCK CITY COUNCIL
ABN 60 919 148 928
Appellant

and

123 259 932 PTY LTD
ACN 123 259 932
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The respondent certifies that this outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. The appellant attempts to frame this appeal as one where the respondent has not explained why it is that damages assessed on the basis of wasted expenditure operate on different principles to claims where a party sues for loss of opportunity (**ARS [3]-[4]**).

3. The respondent does not rely on some newly formulated statement of principle (***cf* ARS [4]**). It relies on the principles enunciated in multiple judgments of this Court in *Amann* (**JBA vol 1 tab 5**) (**RS [39]-[48]**). Whilst there are variations and nuances between the reasoning in the various judgments, the respondent's case falls comfortably within all of them. The rationale is summarised briefly in **RS [29] (fn 18-25)**. It is rooted in notions of fairness and justice (*Amann* at 86-87, 89, 105, 126 and the cases referred to therein).

4. All judgments in *Amann* accepted that reliance damages were available as part of Australian law (**AS [24(a)]**). There is nothing in the nature of reliance damages that offends *Robinson v Harman*. Reliance damages are a "manifestation" of, "in complete conformity with", or a "working out" of, the compensatory principle (**RS [27]-[28]**) (*Amann* at 80-85 [esp 82.2, 85.2], 107-108, 127.9, 134-135 [esp 134.5, 135.8], 154.5).

5. *Robinson v Harman* requires a plaintiff to be "placed in the same situation, with respect to damages, as if the contract had been performed" (*Amann* at 98). The fundamental problem for the appellant in this case is that it did not adduce or point to any evidence based upon the correct counterfactual (**RS [60]**).

The presumption of recoupment

6. The presumption will arise at least where it is impossible or difficult to ascertain what would have happened had the contract been performed (**RS [26], [28]-[29], [34]**); *Amann* at 86, 105, 112-113, 126, 130, 134-135, 137, 140, 150, 153-154, 157, 163-164, 166. This case is a paradigm example.

7. The Court of Appeal made no error in failing to discern the limitation for which the appellant now contends at **AS [39(a)]** (**RS [38]**). That limitation did not arise expressly or implicitly from the judgments in *Amann*, the cases considered in *Amann*, and those that deal with the similar principle in other jurisdictions (**RS [35], [46]-[51]**).

8. The appellant's new proposition is that where a contract confers 'no more than a chance to secure a benefit', it is a 'speculative' or 'risky' contract to which the presumption does not apply (**AS [40]**). Most contracts involve some level of risk. Those considered in *Amann* and *McRae*

(**JBA vol 1 tab 7**) certainly did. There is no principled basis upon which risk can be measured, by some sort of sliding scale, for the purposes of determining whether or not the presumption of recoupment should arise.

9. The appellant's argument based upon "aleatory contracts" ignores the distinction identified by Mason CJ and Dawson J at 87-88 (**RS [40], [49]**).

10. As to the suggested third limitation (**AS [39(c)]**; **ARS [13]**), no member of the Court in *Amann* stated that as a confining feature (**RS [54]**). In any event, the expenditure in building the hangar can properly be seen as expenditure in preparation for, or performance of, the contract. The whole premise of the agreement for lease (**AFL**) was for the respondent to build the hangar and operate its businesses from it.

11. Although it does not expressly say so, the appellant's minimalist view of reliance damages amounts to a challenge, by a sidewind, of the reasoning inherent in those judgments in *Amann* about the availability of the presumption (**RS [51]**). On the appellant's argument, the results in *Amann* and *McRae* should have been that no presumption arose in the first place as each was a 'speculative' or 'risky' venture.

12. The present case also satisfies Brennan J's narrower formulation (**RS [57]-[58]; CA [122]-[124] (CAB 171-172)**). The appellant's repudiation/breach was one which "denies, prevents or precludes the existence of circumstances which would have determined the value of the plaintiff's contractual benefits" (**CA [53]**; **CAB 138**).

13. Contrary to **ARS [2]-[3] (fn 3-5)**, nothing in *Sellars* (**JBA vol 1 tab 9**) undermines the availability of the presumption accepted in *Amann*.

Rebuttal of the presumption

14. Rebuttal evidence needs to address the correct counterfactual. The appellant adduced no evidence on that basis. The appellant does not contend that it discharged an ultimate onus (**ARS [14]**; **RS [62]**). Nor did it discharge any evidentiary onus (**RS [62]-[64]**).

15. Rebuttal involves an ultimate onus, not merely an evidentiary onus (**RS [37], [52]-[53]**; ***cf*** **AS [39(b)]**, **ARS [12]**): *Amann* at 86-90, 105-108, 114, 127, 131; *Pitcher Partners* at [116] (**JBA vol 3 tab 24**). That accords with the position in the UK, the USA and Canada. The appellant is reliant on the minority view of Toohey and Gaudron JJ on this issue. The obiter comments in *Berry* at [29] (**JBA vol 1 tab 4**), properly understood, do not detract from that proposition (**RS [26], [53]**; *Amann* at 105-106, 113). However, they do gainsay **ARS [2] (fn 2)**.

16. Reliance on *Bosanac* (**ARS [14] fn 21**) is misplaced. The word 'presumption' "is applied to a disparate range of distinctive legal techniques and doctrines" and a rebuttable presumption of law "may be conceived of as a rule of law": *Masson v Parsons* at [32] (**JBA vol 1 tab 6**). The recoupment presumption is one of law: *Amann* at 86, 105.5, 126-127.

17. The correct counterfactual requires assumed compliance with the AFL – resulting in a registered plan of subdivision (**RS [52], [58]**). The development of the airport along the lines of the subdivision was its ultimate purpose (**CA [130] (CAB 176)**; **PJ [211] (CAB 68)**; ***cf*AS [53]**). The registration of the subdivision was the first step in the eventual development of the airport (**PJ [13]; CAB 11**).

18. The position post-registration was reasonably contemplated and likely to be a leasehold interest in a subdivision of the airport which was being developed in accordance with Council plans (**RS [58]**). Instead, the plaintiff's businesses were being conducted on "an isolated site not separately titled with no other lots created in the vicinity for potential commercial development" (**CA [120]**; see also **[119]**; **CAB 169-170**). Or, as Mr Johnston described it, "in the middle of a field" (**JSBFM 67.27-28**; see also 59.20, 63.29-32, 67.27-28, 77.11-13, 111.16-19, 112.14-18 and 26, 120.43-44, 121.12-17).

19. Contrary to **ARS [5]-[7]**, all six grounds of appeal succeeded (**CAB 106-108**; **RS [8] (fn 2)**; **RBFM 268**). See, esp., ground 5(c) (**CA [134], [167]**; **CAB 179, 192-193**).

20. The Council documents "consistently referr[ed] to the increased demand for hangarage" and its "ambitions for development of the airport" (**RS [9]-[22], esp [22]**; **CA [134], [35] (CAB 179, 129)**; ***cf*ARS [7]**).

21. It is not to the point that the businesses were not successful absent the appropriate counterfactual (**CA [131] (CAB 176-177)**; ***cf*ASR [14] (fn 19)**). Even without the subdivision, there was evidence to show that, for 2009/2010, the businesses generated net $100,000 (excluding interest and depreciation) (**RS [63]; ABFM 110**). The natural inference would be that development of the airport of some sort, consistent in general terms with the Council's planning documentation, would occur. The businesses would have been conducted in a very different commercial environment than in fact occurred (**CA [131], [140], [167]**; **CAB 176-177, 182, 192-193**).

22. The respondent would have had at least 30 years, and potentially longer, to recoup its investment. In that sense, this case is stronger factually than *Amann*.

23. To the extent that reliance damages are one of those "grey areas of the law of damages", as Deane J remarked in *Amann* (at 117-118), "it is desirable to keep in mind the importance of the doctrine of restitution or unjust enrichment as the rational basis for significant parts of the common law in determining the content of [common law] rules". See **RS [25]**. Here, the appellant, for the sum of $1, has obtained, retained and exploited the benefit of the respondent's wasted expenditure (**RS [23]-[24], [65]**).

Dated: 13 February 2024

David L. Williams

Bora Kaplan