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

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The respondent certifies that these submissions are suitable for publication on the internet.

Part II: Issues

2. This appeal raises two principal issues.

3. *First*, whether the presumption identified in *Commonwealth v Amann Aviation Pty Ltd*,[1] that a plaintiff would at least have recovered their expenditure in reliance on the defendant contract-breaker's promise had the contract been fully performed (**presumption of recoupment**), arose in the particular circumstances of this case.

4. The first issue raises the sub-issues contained in the first and second special leave questions – namely, whether the presumption will "arise for a contract which has inherent in it a contingency in which no net profit will be made"; and whether the strength of the presumption varies "depending on how the risks that bear on whether the plaintiff would have made a profit are allocated as between the parties to the contract".

5. *Secondly*, whether the presumption of recoupment was rebutted by the appellant (**Council**) in this case. This issue raises a sub-issue as to whether, in cases where the presumption of recoupment arises, the onus on the defendant to show that, had the contract been performed, the plaintiff would not have recouped their expenditure, is a legal or an evidentiary one. Ultimately, that sub-issue will not matter in this case. The Council failed to rebut the presumption irrespective of the characterisation of the onus.

6. Both issues contain a contestable predicate – namely, whether it is apt to describe the respondent's agreement for lease (**AFL**) (and the lease which would have arisen but for the Council's breach) as a contract involving only "a contingent opportunity to secure some benefit". That description could be applied to many commercial agreements if used in the broad sense required by the Council's contentions.

Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

7. Notices under s 78B of the *Judiciary Act 1903* (Cth) are not required.

Part IV: Facts

8. The Council's summary of the facts at [8]-[19] of its submissions (**AS**) is, in some respects, incomplete, and, in others, inaccurate. The primary judge's conclusions as to central factual questions were the subject of successful challenge on appeal.[2]

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1 (1991) 174 CLR 64 (***Amann***).

2 See the respondent's *Uniform Civil Procedure Rules 2005* (NSW) rule 51.36(2) statement (RBFM 268).

9. In 1998, the Council called for expressions of interest (**EOI**) for the development and management of Cessnock Airport (**Airport**) (PJ [10], CA [6] CAB 10, 119; RBFM 6-16). The EOI included a development plan which foreshadowed the lengthening of the runway at the Airport to accommodate larger aircraft and the subdivision of lots (CA [6] CAB 119; RBFM 12-13). Aviation and Leisure Corporation Pty Ltd (**ALC**) lodged an expression of interest in November 1998 (CA [7] CAB 119; RBFM 17). ALC suggested that the Airport could accommodate hangars with attached residences for aircraft owners – a concept known in parts of the United States of America as "hangar homes" (CA [7] CAB 119; RBFM 45). It was touted as a way of "producing an income stream for the [Council] which would help pay for the airport" following its eventual development (CA [7] CAB 119). The idea was attractive to the Council (CA [7] CAB 119).

10. In July 2002, the Council resolved to lease parts of the Airport to ALC, with a view to its development in the future (CA [8] CAB 120). The Council and ALC entered into a lease and a management agreement in March 2004. It was a term of the lease between the Council and ALC that, if a subdivision of the land on which the Airport was situated were registered by 30 June 2011, ALC would be granted a 25-year lease (CA [8] CAB 120).

11. In December 2003, the Council made a development application (**DA**) (to itself) under the *Environmental Planning and Assessment Act 1979* (NSW) (CA [9] CAB 120). The DA involved, first, consolidating the land on which the Airport was situated into proposed lots 1 and 2 in deposited plan 1064825 and, secondly, subdividing lot 2 into 25 lots (CA [9] CAB 120; RBFM 61-64).

12. In April 2004, James Johnston, who became the principal of the respondent, met with Peter Gogarty, the Council's Corporate and Community Services Manager, to discuss a suitable site for a hangar to house aircraft that Mr Johnston and related entities had acquired (CA [14] CAB 121). It was his intention that any hangar to be built on proposed lot 104 would be a "high-end landmark building" and could incorporate an aviation museum and an entertainment venue (CA [14] CAB 121; RBFM 285-286). The hangar was designed by a prominent architect and a prominent position was selected for it in the planned development (RBFM 286). At around the time that the contractual arrangements between the parties were being negotiated, representations had been made to Mr Johnston by Mr Gogarty that the Council was investing considerable sums of money into development of the Airport (PJ [36] CAB 17). Mr Gogarty informed Mr Johnston that the linen plan for the subdivision cost about $10 million (RBFM 287).

13. In July 2004, the Council adopted a Development Control Plan (**DCP**) (CA [10] CAB 120). The purposes of the DCP included "to permit development that will capitalise on the advantages of the site and its strategic location"; "to encourage moderate growth in the

standard of infrastructure available and in the use of the aerodrome" and "to encourage appropriate ancillary development, related to the aerodrome" (CA [10] CAB 120). The DCP spoke of the Council's vision for the Airport as "an aerodrome facility managed in a manner which attracts new and environmentally responsible development of the aerodrome to maximise the economic benefits to the Cessnock region" (CA [10] CAB 120; RBFM 72).

14. On 30 September 2004, a Council internal memorandum described the purpose of the proposed subdivision as being "to enable the long-term development of the Aerodrome in accordance with Council's development vision" (CA [10] CAB 120; RBFM 132).

15. By November 2004, a consultant retained by the Council had prepared a report recommending that the proposed subdivision of the Airport be approved subject to conditions. That report referred to the Council's "vision" for the development of the Airport (CA [12] CAB 121; RBFM 142). Development consent was granted by the Council, subject to conditions, on 17 November 2004 (CA [12] CAB 121). One of those conditions was that the proposed lots be connected to Hunter Water Corporation's sewerage system (CA [12] CAB 121). The consent described the development as "Twenty five (25) lot Subdivision Cessnock Aerodrome Site (Hanger Sites)" (CAB [12] CAB 121; RBFM 156).

16. On 7 November 2005, the land on which the Airport was situated was consolidated into Lot 2 in DP 1064825 (CAB [13] CAB 121). However, the subdivision of the land into 25 lots, including lot 104, was never registered (CA [13] CAB 121).

17. The parties' contractual arrangements were negotiated between August 2005 and April 2007 (CA [15] CAB 121-122), culminating in the AFL containing the features referred to at CA [15]-[24] (CAB 121-126). One such feature was that the Council "must take all reasonable action to apply for and obtain" registration of a plan of subdivision of the Airport by 30 September 2011 (**Sunset Date**) (cl 4.2(a)(2)). The AFL was executed by the respondent on 23 March 2007 and by the Council on 26 July 2007 (CA [15], [111] CAB 121-122, 165-166).

18. In breach of cl 4.2(a)(2) of the AFL, the Council failed to take all reasonable action to register the plan of subdivision by the Sunset Date, or at all (CA [43] CAB 132-133). The Council did not proceed with the subdivision because it had "no intention of spending about a million dollars fixing the sewerage" (CA [30] CAB 127-128) and there "d[id] not appear … to be any benefit to Council in subdividing the airport at all" (CA [33] CAB 128-129).

19. Between May 2007 and November 2010, the respondent constructed a hangar on proposed lot 104 (CA [27] CAB 127). Prior to its construction, the Council was made aware in general terms of the extent of the then planned expenditure (PJ [36], CA [24] CAB 17, 125-126). The respondent conducted three businesses from the hangar variously between July 2009

and June 2011 (CA [28] CAB 127). Those businesses became unprofitable prior to the Sunset Date (CA [28] CAB 127). However, as Mr Johnston said in cross-examination (CA [28] CAB 127):

> … [i]f I'd been given my tenure [that is, a lease in respect of lot 104 as part of a 25-lot subdivided Airport] 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.

20. While the respondent's businesses were ultimately unprofitable, from 2009 the Council took no meaningful steps towards complying with the conditions of development consent (*cf* AS [17]; PJ [63]-[68] CAB 24-26).[3] From 2009 the respondent endeavoured to run its businesses as the only licensee at the Airport, occupying the only lot to which services were connected (PJ [243] CAB 79-80). It is in that context that Mr Johnston's attempts to sell the hangar in late 2010 need to be viewed (*cf* AS [16]). Despite being the only licensee on-site, the businesses were only unprofitable in 2009/2010 because of interest ($88,038.35) and depreciation ($42,292.29). Other expenses were minimal. The gross income of $147,501.06 exceeded the rent of $44,360.18 by more than $100,000 (ABFM 110).

21. The Council relies on findings made by the primary judge 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" (AS [15]). Those findings were the subject of specific challenge by the (present) respondent in, and overturned by, the Court of Appeal. As Brereton JA said (at CA [134] CAB 179):

> A 30-year lease from 1 October 2011 would not have expired until 30 September 2041; the evidence revealed a significant possibility of expansion and development of the airport, with Council documents over the decade from 2011 to 2020 consistently referring to the increased demand for hangarage and the Council's ambitions for development of the airport; and had the Plan been registered, there would still remain today another 19 years until 2041 for that to occur.

22. The "Council documents" to which Brereton JA referred (and to which the primary judge had no regard) included the following:

(a) The Council nomination of the airport as "a major infrastructure project" under the Hunter Infrastructure and Investment Grant Programme (CA [35] CAB 129; RBFM 166-167). A Council report for a meeting held on 15 August 2012 referred to the Council having "received around twelve requests for both hangar space and office space from businesses looking to establish or expand at Cessnock Airport and, at present, Council is unable to satisfy this demand" (CA [35] CAB 129; RBFM 170). The grant was to enable the Council "to meet, in the short-term, this demand from businesses wanting to establish within the local government area (economic benefit); provide an

[3] Affidavit of Teressa Ali Chadwick affirmed on 5 November 2019 (RBFM 300-302); report from Woromar Pty Ltd to the Council dated 1 February 2010 (RBFM 269-277, 305).

ongoing revenue stream for Council; and bring an iconic building into public ownership (social benefit)". It described the hangar as "architecturally designed (and award-winning)" and the Airport as "a key gateway to both the Cessnock town centre and the Hunter Valley vineyards district" which offered "opportunities for … aviation-related businesses looking to expand" and that, "at present, [the] Council is unable to satisfy this demand". It noted that the Council had "received more than ten requests for hangar space and office space from businesses looking to establish or expand" and the demand for space included "several companies looking to establish businesses in the region" (CA [35] CAB 129; RBFM 177-179).

(b) In January 2014, the Council released the *Cessnock Airport Strategic Plan*. This report referred to the Council's vision to attract "environmentally responsible economic development opportunities to the Cessnock region" and the potential for growth and businesses considering relocating to Cessnock (CA [35] CAB 129; RBFM 191, 200).

(c) In August 2014, the Council lodged an expression of interest with the Restart NSW Resources for Regions program, seeking $6.95 million to upgrade the Airport "to realise the community's vision of it being a well-planned and serviced facility that attracts environmentally-responsible economic development opportunities to the Cessnock region". It was said that this development "will provide opportunities for smaller aviation opportunities to re-locate to Cessnock" and "will have an enduring legacy – creating sustainable employment and increasing the economic resilience of the region in the medium to long term". The expression of interest referred to "the demand for hangars, office/shop-front accommodation", the significant economic benefits of the proposed development, and the fact that the Council was "unable to meet demand turning away around 3 aviation inquiries per week for hangar space" (CA [35] CAB 129; RBFM 207-211).

(d) In February 2020, the Council released the *Cessnock Airport Strategic Plan – Incorporating 5 Year Business Plan* (CA [38]-[42] CAB 130-132; RBFM 215-267). This report was said to "identif[y] ways in which the Airport can further develop as an aerodrome business hub". It said that the "success of this Airport lies in the fact it already has a point of difference in the market place due to its central location to the vineyards of the Hunter Valley and the current varied user base, and this should be developed". The plan "included a precinct master plan providing for additional private hangars, an historical museum area and the extension of the runway in precinct 2, and an area for commercial business opportunities in precinct 3" as well as a "business plan" (CA [40] CAB 131-132). The inclusion of an historical museum area was said to "help attract new businesses that deal in that section of the market place", with "the opportunity to cross sell to tourism, through visitations to the museum, and increase utilisation of the airport through joy flights". The business plan provided that there was "real opportunity within the current market to take the airport forward through both short and medium term actions which are considered the most appropriate and financially prudent approach to grow the Airport business" (CA [41] CAB 132).

23. By the middle of 2012, when it was evident that the Council would not comply with cl 4.2 of the AFL, the respondent abandoned proposed lot 104 (CA [34] CAB 129). In September 2013, the respondent disconnected the power to the hangar (CA [34] CAB 129). The respondent became deregistered by the Australian Securities and Investments Commission (**ASIC**) on 7 September 2015 (CA [36] CAB 130). Its property, which included the hangar, vested in ASIC by operation of s 601AD(2) of the *Corporations Act 2001* (Cth). The Council subsequently purported to acquire the hangar from ASIC for $1 in May 2016 (CA [36] CAB 130). Shortly thereafter, the Council granted a five-year lease of the hangar to Onyx Aviation Pty Ltd "for conducting an aviation related business" (CA [36] CAB 130). The Supreme Court of South Australia reinstated the respondent on 5 June 2017 (CA [37] CAB 130).

24. Thus, the present consideration of the respondent's "wasted expenditure" is only wasted so far as it is concerned. From May 2016 the Council has enjoyed the benefits of that so-called "wasted expenditure" and has commercially exploited it for its own advantage.

Part V: Argument

(a) Damages in contract: basal principles

25. The purpose of an award of damages in contract is to put the party who has suffered loss in the position, so far as money can do it, that it would have been in had the contract been performed.[4] Cognate with that principle is the rule that a plaintiff cannot recover more than it has lost.[5] However, that principle is not inflexible. It was described in *Wenham v Ella* as the "general rule".[6] It was observed in that case that rules which provide useful guidance in ascertaining damages should not be treated as "rigid rules of universal application", but rather "prima facie rules which may be displaced or modified whenever it is necessary to do so in order to achieve a result which provides reasonable compensation".[7]

26. Ordinarily, if a plaintiff wishes to recover more than nominal damages for breach of contract, it bears the burden of proving that it has actually suffered loss, the defendant caused their loss, and the loss is not too remote.[8] However, the law has devised mechanisms to ensure that reasonable compensation is provided to a plaintiff who has suffered damage as a result of a defendant's breach of contract but is unable to prove their loss. Where, for

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4 *Robinson v Harman* (1848) 1 Exch 850 (***Robinson v Harman***) at 365 (Parke B). See also *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ); *Clark v Macourt* (2013) 253 CLR 1 at [106] (Keane J).

5 *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Amann* at 82 (Mason CJ and Dawson J), 136 (Toohey J), 155 (Gaudron J), 163 (McHugh J); *L Albert & Son v Armstrong Rubber Co* 178 F 2d 182 (1949) (***Armstrong Rubber***) at 189 (Learned Hand CJ); *C&P Haulage v Middleton* [1983] 1 WLR 1461 (***C&P Haulage***) at 1467-1468 (Ackner LJ, with whom Fox LJ agreed).

6 (1972) 127 CLR 454 at 460 (Barwick CJ), 466 (Walsh J), 471 (Gibbs J).

7 (1972) 127 CLR 454 at 466, applied in *Amann* at 119-120 (Deane J). See also Heydon, *Heydon on Contract* (2019) (**Heydon on Contract**) at [26.10].

8 See, for example, *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768 at [37] (and the cases there cited) (Hayne J) (Gleeson CJ, McHugh and Kirby JJ agreeing at [7]).

example, that breach has made it "difficult" for a court to assess a plaintiff's damage, a court "should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party 'whose actions have made an accurate determination so problematic'".[9] The application of that principle is not limited to cases where, as here, the relevant evidence was in the control of the wrongdoer.[10]

27. The heads of recoverable losses include the loss of the expected benefits under a contract, such as loss of profit or loss of bargain (expectation damages),[11] and expenditure wasted in reliance on a defendant's promise (reliance damages).[12] These heads of damage are all manifestations of the principle in *Robinson v Harman*.[13]

28. Where, as here, reliance damages are sought in circumstances where it is difficult or not possible to predict what position the plaintiff would have been in had the contract been fully performed, such damages are not assessed "as a matter of strict logic"[14] in accordance with the principle in *Robinson v Harman* (*cf* AS [24(b)]).[15] If that were not so a plaintiff could never recover their wasted expenditure as it could never prove that it would have generated an income sufficient to recoup that expenditure. Therefore, to achieve a result which provides reasonable compensation the law permits the innocent party to rely on the presumption of recoupment. That the presumption of recoupment forms a part of the common law of Australia was established in *McRae* and *Amann*.[16] A presumption of a similar nature is recognised in English, Canadian and American law.[17]

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9 *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 58 (Handley JA), approved in *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [74] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Armory v Delamirie* (1772) 1 Strange 505 at 505 (Pratt CJ).

10 *McCartney v Orica Investments Pty Ltd* [2011] NSWCA 337 at [149]-[154] (Giles JA), [192] (Macfarlan JA), [193] (Young JA).

11 See, for example, *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130.

12 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 (***McRae***); *Amann*.

13 *Amann* at 82, 85 (Mason CJ and Dawson J), 107 (Brennan J), 127-128 (Deane J), 134-135 (Toohey J), 155 (Gaudron J).

14 *Amann* at 86 (Mason CJ and Dawson J).

15 The Council at AS [24(b)] has misunderstood Brereton JA's reasons at CAB 146 [68]. His Honour was not there suggesting that reliance damages are awarded on a different basis from expectation damages, but that reliance damages are available in respect of any expenditure reasonably incurred in reliance on the defendant's contractual promise and not merely expenditure that is *required* by the contract.

16 Contrary to what might be suggested at AS [23] (fn 22), Prof Seddon was critical of the failure by the majority in *Amann* to discount the reliance damages awarded to the respondent having regard to the probability of the Commonwealth terminating the agreement (and not the availability of the presumption of recoupment). See Seddon, 'Contract damages where both parties are at fault' (2000) 15 *JCL* 207 at 209.

17 England: *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 (***CCC Films***) at [37]-[40] (Hutchison J); *Omak Maritime Ltd v Manila Challenger Shipping Co* [2011] 1 Lloyd's Rep 47 (***Omak***) at [47]-[63] (Teare J); *Grange v Quinn* [2013] EWCA Civ 24 at [24]-[30] (Arden LJ), [99]-[103] (Golster J); *Yam Seng Pte v International Trade Corp Ltd* [2013] 1 Lloyd's Rep 526 at [186]-[188] (Leggatt J); *Baturina v Chistyakov* [2017] EWHC 1049 (Comm) at [227]-[229] (Carr J); *PJ Spillings (Builders) Ltd v Bonus Flooring Ltd* [2008] EWHC 1516 (QB) at [14]-[16] (Forbes J); *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796 (Comm) at [111]-[112] (Beltrami J). See also *Anglia Television v Reed* [1972] 1 QB 60 (***Anglia Television***), where the Court must be taken to have assumed that the plaintiff would, had it made the film, at least have recovered its expenditure (*CCC Films* [1985] QB 16 at 38; Edelman, *McGregor on Damages* (21st ed, 2022) (**McGregor on Damages**) at

29. At the heart of the debate in this case is a policy choice which has consistently been made by courts in circumstances where a defendant's breach has made it impossible,[18] impossible with any certainty,[19] or difficult,[20] to prove that the contract would otherwise have been profitable or led to profit. It arises because of what the law considers a "just result",[21] "a common expedient and a just one",[22] "just and fair",[23] "eminently fair",[24] and is demanded by "considerations of justice".[25]

(b) The respondent's propositions

30. The Council contends that "it is very difficult to identify" the *ratio decidendi* of *Amann* (AS [23]). While there are nuances in the various judgments, this Court has since described *Amann* as having "held" that:

> … where, upon acceptance of the Commonwealth's repudiation of a contract, Amann claimed damages for loss of the contract, Amann was entitled to recover "reliance damages" assessed on the basis of a rebuttable presumption that the net benefits to which Amann would have been entitled under the contract (if the contract had not been rescinded) would have been sufficient to cover the expenditure which Amann incurred pursuant to the contract.[26]

31. The *ratio decidendi* of *Amann* consists of (at least) the principle that reliance damages are available to be awarded based on a rebuttable presumption that, had the contract been performed, the plaintiff would have recouped the expenditure that it incurred in reliance on the defendant's (broken) promise. Contrary to AS [24(a)], *Amann* does not merely stand for the proposition that "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". That has been the position since *McRae*.[27]

32. An additional feature of *Amann* that is absent from the present case concerned the prospect of the Commonwealth terminating the contract and the question whether the award of reliance damages should be discounted accordingly. There was some divergence of views

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[4-027]). Canada: *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3d) 325 (***Bowlay Logging***) at 332-334; *Sunshine Vacation Villas Ltd v Governor and Co of Adventurers of England Trading Into Hudson's Bay* (1984) 13 DLR (4th) 93 at 105-106. USA: *Armstrong Rubber* 178 F (2d) 182 (1949) at 189-191; *Dade County v Palmer & Baker Engineers Inc* 339 F (2d) 208 (1965) (***Dade***).

18 *Amann* at 81, 85-86 (Mason CJ and Dawson J), 105-106, 112 (Brennan J), 126, 130-131 (Deane J), 137 (Toohey J).

19 *Amann* at 83, 89 (Mason CJ and Dawson J).

20 *Amann* at 89 (Mason CJ and Dawson J), 126 (Deane J).

21 *Amann* at 86 (Mason CJ and Dawson J).

22 *Armstrong Rubber* 178 F 2d 182 (1949) at 189, quoted in *Amann* at 86-87 (Mason CJ and Dawson J), 105 (Brennan J). See also *Story Parchment Co v Paterson Parchment Paper Co* 282 US 555 (1931) at 563-565.

23 *Amann* at 89 (Mason CJ and Dawson J).

24 *CCC Films* [1985] QB 16 at 40, quoted in *Amann* at 87 (Mason CJ and Dawson J).

25 *Amann* at 126 (Deane J).

26 *Berry v CCL Secure Pty Ltd* (***Berry***) at [29] (Bell, Keane and Nettle JJ). See also Heydon on Contract at [26.130], [26.440].

27 At 89 (Mason CJ and Dawson J), 107 (Brennan J).

on this issue in *Amann*. But in respect of the primary issues about the existence of the presumption of recoupment and how it operates, the differences between the various judgments are not nearly as substantial. They primarily concerned the nature of the onus of the defendant to rebut the presumption of recoupment.

33. In this appeal, the respondent advances five propositions, as follows.

34. *First*, at least where it is difficult or not possible, "whether at all or with any certainty",[28] for a plaintiff to prove damage resulting from a breach of contract had it been fully performed, it may claim reliance damages for expenditure that it has incurred in reliance on the promise of another party to the contract. It is entitled to the benefit of a rebuttable presumption that, had the contract been performed, it would have recouped at least that expenditure. Support for that proposition can be found in the judgments of six members of this Court in *Amann*.[29]

35. *Secondly*, save for purely aleatory contracts, the presumption of recoupment is available in respect of any commercial contract, irrespective of the contingencies that may be inherent in it. No member of this Court in *Amann* imposed a restriction on the availability of the presumption of recoupment based on the allocation of risk between parties to a contract. The Council does not suggest otherwise at AS [39(a)]. Instead, it seeks to impose an *additional* restriction, not hitherto articulated, on the availability of the presumption on the basis that "nothing said in *Amann* that is inconsistent with the principles stated at [AS] [34]-[40] above is binding on this Court". The restriction sought to be imposed by the Council would erode the presumption of recoupment to the point of virtual extinction.

36. *Thirdly*, the presumption of recoupment will arise where expenditure has been incurred in reliance on the defendant's promise. Contrary to AS [39(c)], that expenditure may, but need not, be incurred in preparing for, or performing, the contract.[30] It extends to expenditure contemplated by the contract (CA [61]-[68], [113] CAB 142-146, 166).[31]

37. *Fourthly*, where the presumption of recoupment is engaged, the onus is on the defendant to prove that, had the contract been performed, the plaintiff would not have recouped the expenditure that it incurred in reliance on the defendant's promise.[32] Contrary to AS [39(b)],

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28 *Amann* at 88 (Mason CJ and Dawson J).

29 At 86-89 (Mason CJ and Dawson J), 105-107 (Brennan J), 126-127 (Deane J), 134, 142-143 (Toohey J), 155-156 (Gaudron J).

30 *McRae* (1951) 84 CLR 377 at 414 (Dixon and Fullagar JJ); *Amann* at 86, 88, 89 (Mason CJ and Dawson J), 104, 105, 106, 107 (Brennan J), 127, 129 (Deane J), 139, 140 (Toohey J), 154, 158 (Gaudron J). See generally CA [61] CAB 142-143.

31 *McRae* (1951) 84 CLR 377 at 413, 415 (Dixon and Fullagar JJ), exemplified by the discussion of *Hadley v Baxendale* (1854) 9 Exch 341 in *Amman Aviation* at 92 (Mason CJ and Dawson J), 100 (Brennan J), 136 (Toohey J).

32 At 86-90 (Mason CJ and Dawson J), 105-108, 114 (Brennan J), 127, 131 (Deane J). That Deane J did not join in the orders made by the majority is of no relevant consequence (*cf* AS [22]): his Honour's reasoning

the notion that the presumption of recoupment could be rebutted by a defendant by pointing to a "prospect" (which, on the Council's case, must mean a mere possibility) would defeat the purpose of erecting a presumption in the first place. Ultimately, however, whether the burden borne by the wrongdoer is a legal or an evidentiary one makes no difference to the outcome of this appeal. However the onus is described, the Council did not rebut the presumption of recoupment.

38. *Fifthly*, the courts below were not asked to consider two of the three limitations or nuances said by the Council now to arise in the various judgments in *Amann*. As is explained immediately below, the statements of principle that the Council derives from the judgments in *Amann* at AS [27]-[33] are inaccurate or incomplete.

(c) The judgments in Amann

39. Mason CJ and Dawson J: Their Honours recognised that, "where it is not possible for a plaintiff to demonstrate whether or to what extent the performance of a contract would have resulted in a profit for the plaintiff" (at 81), either because "it is impossible to assess what would have been the outcome had the contract been performed or … th[e] outcome is otherwise uncertain" (at 85), the plaintiff may seek to recoup their expenses incurred. In that circumstance "the law *assumes* that a plaintiff would at least have recovered his or her expenditure had the contract been fully performed" (at 86). As to onus, Mason CJ and Dawson J found the judgments of Learned Hand CJ in *Armstrong Rubber* and Hutchison J in *CCC Films*,[33] where it was held that the defendant wrongdoer must prove that the plaintiff would not have recouped their outlay, persuasive (at 86-87). Their Honours considered that the placing of the onus of proof on a defendant amounted to "the erection of a presumption that a party would not enter into a contract in which its costs were not recoverable" (at 87). Notions of fairness and justice were also said to justify the reversal of the onus (at 87, 89).[34]

40. Contrary to the suggestion at AS [27], the statement of principle in the judgment was not confined to contracts for the supply of goods or services (at 81, 85-88). Nor did their Honours "recognis[e] that it would not be 'appropriate' to apply the presumption of recoupment to all commercial contracts" (AS [28]). Their Honours merely identified a narrow category of contracts in respect of which the presumption of recoupment would not apply – "*purely* aleatory contract[s]" 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".

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as to onus is at least "weighty dicta" which "deserve[s] respectful consideration" (*Jones v Bartlett* (2000) 205 CLR 166 at [206] (Gummow and Hayne JJ), referring to Cross and Harris, *Precedent in English Law* (4th ed, 1991) at 92). According to one commentator, this Court's judgment in *McRae* and the judgments of Mason CJ and Dawson J and Deane J in *Amann* were said to cast on the defendant a "legal onus": Heydon on Contract at [26.130]. To that list may be added the judgment of Brennan J.

33 [1985] QB 16 at 39-40. See also McGregor on Damages at [4-030], where it was said that Hutchison J's conclusion as to onus was "sensible".

34 See also *Parker v SJ Berwin & Co* [2008] EWHC 3017 (QB) (***Parker***) at [77] (Hamblen J).

Such contracts were "distinguished" from contracts "where the outcome of the contract, if it had been fully performed, cannot be demonstrated with any certainty" (at 88-89).

41. No part of the joint judgment lends any support to the proposition, advanced by the Council (AS [28]), that whether the presumption of recoupment is engaged is informed by an assessment of "whether the plaintiff had accepted outsized contractual risks". The limitation that the Council seeks to place on the operation of the presumption would fly in the face of the statement that it applies "*in the case of a contract which would not have been profitable* and in the case of a contract where the outcome of the contract, if it had been fully performed, cannot be demonstrated whether at all or with any certainty" (at 87-88).[35] The limitation is also unprincipled and raises more questions than it answers. Just what level of risk must a commercial contract contain before it could be said that it would not be "appropriate" to apply the presumption? How is the risk to be assessed? And how could the presumption ever operate when there is risk associated with the entry into most, if not all, commercial contracts? Issues of risk are relevant to the factual question of whether the presumption of recoupment has been rebutted by the defendant, not whether the presumption is engaged in the first place.

42. Brennan J: His Honour drew a distinction between two types of case. The first was the ordinary case where a plaintiff must prove their loss, even if seeking reliance damages (at 104-105). To discharge their onus of proof in the ordinary case, the plaintiff may rely on an inference, "of varying strength according to the circumstances", that "a party would not incur expenditure in reliance on the other party's promise without a reasonable expectation that, on performance of the contract, the expenditure would be recouped" (at 105). The ordinary case was thereafter contrasted with one where a defendant's breach "has made it impossible for the plaintiff to prove that the net value of [their] contractual benefits … exceeds the wasted expenditure incurred in reliance on the defendant's promise", then "it is just to shift to the defendant the ultimate onus of proving" that the plaintiff would not have recouped their expenditure (at 105). His Honour drew support from *Armstrong Rubber* and considered that the justification for "shifting" or "reversing" (at 106-108) the onus to the party in breach was that "the breach of the contract itself makes it impossible to undertake an assessment on the ordinary basis" (at 106). His Honour also implicitly approved the judgment of Pitney Ch in *Holt v United Security Life Ins & Trust Co*, where "general principles of justice" were said to justify the reversal of the onus of proof where the party in breach, by their conduct, prevented the innocent party from proving their loss.[36] Importantly,

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35 *McRae* (1951) 84 CLR 377 and *Anglia Television* [1972] 1 QB 60 were said to fall into the latter category. But both categories stood apart from purely aleatory contracts.

36 (1909) 72 Atlantic Reporter 301 (***Holt***) at 305-306.

Brennan J's reference to an "inference of varying strength" was directed to the ordinary case and not to that where it was just to shift the ultimate onus to the defendant.

43. Deane J: The Council's account of Deane J's judgment at AS [30]-[31] only deals with the rebuttal of the presumption, not when the presumption will be engaged. Where a plaintiff "has incurred expenditure either in procuring the contract or in its performance" but it is "impossible or difficult" to establish the net benefit that it would have derived from the contract had it been performed by the defendant, then, Deane J held, "considerations of justice" demand that the plaintiff "may rely on a presumption that the value of those benefits would have been at least equal to the total detriment which has been or would have been sustained by the plaintiff in doing whatever was reasonably necessary to procure and perform the contract" (at 126). In support of that proposition, Deane J referred to *McRae*, *Holt* and *Armstrong Rubber* – cases which are all consistent with the imposition of an ultimate onus on the defendant.[37] His Honour explained that the presumption "will be rebutted if it be self-evident or established" that the plaintiff would not have derived a financial or other benefit from performance of the contract or that any such benefit which would have been derived would not have been sufficient to cover their outlay (at 127). His Honour added that the presumption (at 127; see also 130-131):

> … will not be displaced 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 or by the circumstance that the perceived 'benefit' which the plaintiff sought and for which [it] incurred the past expenditure … or which, for some other reason, is not capable of being objectively valued in monetary terms.

44. Toohey J: His Honour was "in general agreement with the principles enunciated" in the joint judgment. However, his Honour took "a different view" in relation to onus of proof (at 134). His Honour recognised that "in some instances, damage may … be inferred or presumed" (at 138) and that, in cases of "uncertainty", the burden would not "remai[n] throughout with the plaintiff"(at 142). Toohey J did not accept that the defendant bore the ultimate or legal onus of showing that the plaintiff's outlay would not have been recovered had the contract been performed (at 143); rather, there is "an evidentiary onus on the defendant to show that receipts would not have equalled outlay by the plaintiff, though ultimately the aim is to determine what loss has occurred on the basis of all available evidence" (at 142). In the absence of evidence to the contrary, Toohey J held that it "may be assumed … that the plaintiff would have recovered [its] costs" (at 142-143). That was based either on "a presumption that persons would not enter into a contract if they were

[37] See also *Bowlay Logging* (1978) 87 DLR (3d) 325 at 334, where Berger J accepted the allocation of the burden of proof as articulated *Dade* 339 F 2d 208 (1965).

not able to recover at least their costs" or "the proposition that, as a matter of policy, the party in breach should in the absence of evidence be favoured" (at 143).

45. Gaudron J: Her Honour accepted the availability of the presumption of recoupment in cases of reliance damages (at 155-156). Her Honour considered that the presumption reflected "the ordinary expectations of the world of commerce that the value of a contract will be no less than the cost of its performance" and would "ordinarily be maintained unless displaced by evidence pointing to the contrary" (at 156). However, the onus of proving that the plaintiff would not have recovered their expenditure had the contract been performed, Gaudron J held, was merely "a practical or evidentiary onus" (at 156). Her Honour justified the imposition of that onus by pointing out that "[t]he law does not operate so as to impose a burden of proving what is impossible of proof" (at 157). The last sentence in AS [32] involves a misstatement. Gaudron J did not speak of an "allocation of contractual risks in a given case" (at 157); rather, her Honour was pointing out that there may be some cases in which it is obvious that receipts would have been less than the amount of wasted expenditure.

(d) The Council's formulation of the limitations on the presumption of recoupment is wrong

46. The Council formulates two justifications for the presumption of recoupment arising (AS [35]-[36]). The suggested limitations are not advanced in respect of the first justification – i.e. where it is the defendant's breach of contract itself that has made it "impossible" to undertake an assessment on the ordinary basis (see AS [39]). For the reasons given at [57] below, the Council's breach of contract was one which itself gave rise to that impossibility. In respect of the second justification, the Council seeks to erect three limitations (AS [39]). The first two were not the subject of submissions before the courts below. None of the three is identified in the judgments in *Amann* or recognised in English, Canadian or American law.[38]

47. The *first* is that the presumption will not be engaged in cases where it would be "unreasonable to *assume* that the plaintiff would have recovered their expenditure"[39] because "(i) it was never contemplated that the expenditure would be recovered from the performance of the contract" and/or "(ii) the plaintiff was engaged in a speculative venture, in respect of which the defendant had accepted no relevant risk" (AS [39(a)]).

48. The former sub-limitation is said to find support in that part of the judgment of Gaudron J (only) where her Honour observed that "it would not ordinarily be assumed that expenditure on plant or equipment would be entirely recouped from one contract, or that breach or

38 See the cases referred to in footnote 17 above.
39 Emphasis in original.

repudiation would result in significant wastage of that expenditure" (at 157). The analogy is inapt. The present case is not one involving mere plant or equipment. The "Permitted Use" under the AFL expressly contemplated the construction of a hangar from which it could operate its businesses (CA [20] CAB 124). Nor does her Honour refer to the "allocation of risks under the contract" (*cf* AS [39(a)]).

49. The second sub-limitation is unsupported by *Amann* and the authorities to which the Council refers (AS [39(a)] fn 75-77). Reliance is only placed on the judgment of Mason CJ and Dawson J in *Amann*. The Council's reliance on "purely aleatory contracts" being a class of contract where it would not be appropriate to raise the presumption of recoupment runs into the difficulties canvassed at [40]-[41] above. The AFL was not a purely aleatory contract. Like all commercial contracts, it was not free from risk (for there was no guarantee that the respondent would have made a profit over 30 years as the lessee of a lot in a 25-lot Airport had the Council complied with cl 4.2). But the existence of that risk has nothing to do with the question whether the presumption of recoupment is engaged in the first place.[40] There were, of course, commercial risks inherent in the contracts in *McRae* and *Amann* as well as those considered in foreign jurisdictions (collected in footnote 17), yet there is no suggestion in those cases that an assessment of risk must be conducted to determine whether or not the presumption is engaged.

50. Further, contrary to AS [40], it is not correct to describe the AFL (and the lease) as nothing more than "a chance to secure a benefit" as though it were a contract of wager. The lease would have conferred on the respondent a proprietary right in respect of a parcel of land as part of a 25-lot subdivided Airport in circumstances where (a) the subdivision of the Airport was the first step in its development, (b) the prospect that the Council would not have developed the Airport had it complied with the conditions of development consent was "remote", and (c) the commercial environment in which the respondent would have conducted its businesses, had the Airport been subdivided as contemplated, would have been vastly different from the position it found itself in as at the Sunset Date (CA [133]-[134] CAB 178-179). The risk that the respondent did not accept was that the development

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40 See, for example, *Bowlay Logging* (1978) 87 DLR (3d) 325. The passage in Kramer, *The Law of Contract Damages* (3rd ed, 2022) at [18-82] is concerned with rebuttal of the presumption of recoupment rather than its existence. *Ce&P Haulage* [1983] 1 WLR 1461 was an obvious case of no loss: see 1466E-F (Ackner LJ). No question of the burden of proof arose in that case: see *Omak* [2011] 1 Lloyd's Rep 47 at [33]. *NRMA Ltd v Morgan* [1999] NSWSC 407 is consistent with the reasoning of at least Mason CJ and Dawson J, Brennan J and Deane J in *Amann Aviation* (see at [1360] (Giles J). The presumption of recoupment was not engaged in a solicitors' negligence case because the expenditure was not wasted in reliance on the contractual promise (see at [1461]). *Roach v Page (No 37)* [2004] NSWSC 1048 at [503] (Sperling J) and *Parker* [2008] EWHC 3017 (QB) at [74]-[76] fall into the same category. Nor does *Ti Leaf Productions Ltd v Baikie* [2001] NZCA 303 (***Ti Leaf***) at [49] impose the limitation for which the Council contends at AS [39(a)]. *Ti Leaf* involved the rejection of the propositions that (a) in the case of wasted expenditure the defendant was estopped from demonstrating no loss (at [34]-[36]), and (b) the defendant's onus was any greater than on the balance of probabilities (at [37]-[42]) The qualification in *Ti Leaf* (at [49]) concerned a situation where expenditure is incurred "for a *separate* and highly speculative venture" [emphasis added]. That is not the present case.

of the Airport would be rendered impossible because the Council did not take the necessary steps to procure registration of the subdivision, which was a necessary precondition to it (CA [101] CAB 160-161).

51. The additional suggested limitation (AS [40]), that the 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", suffers from two deficiencies. The *first* is that it appears to be based on loss of opportunity cases.[41] While ultimately controlled by the compensatory principle, the principles applicable to the assessment of damages for lost chances are different from those applicable to reliance damages in contract.[42] The *second* is that it effectively erodes the presumption of recoupment to a vanishing point. What work would be left for the presumption to do if a plaintiff were required to establish that (a) the defendant caused their loss, and (b) it lost a substantial prospect of a beneficial outcome? If, as the Council contends (AS [40]), the evidence before a court suggests that a plaintiff only has "some slim possibility of recovering their expenditure", the defendant could more readily rebut the presumption of recoupment. The imposition by the law of a burden on a defendant in those circumstances does not make the defendant an insurer of the plaintiff; rather, it is a policy choice which recognises that a wrongdoer should "suffer the uncertainty resulting from its own conduct".[43]

52. The *second* limitation is said to be that the presumption "operates only 'in the absence of evidence to the contrary'" and thus it imposes only an evidential or practical onus on the defendant to "show that there is a 'prospect' that the plaintiff would not have recouped their expenditure" (AS [39(b)]; see also [35]-[37]). The suggested justifications in AS [39(b)] are inapplicable. It was within the Council's power to call evidence that the development of the Airport was unlikely to go ahead even if it complied with its contractual promises.

53. Aside from relying on the judgments of Toohey J and Gaudron J in *Amann* (which, as discussed above, did not enjoy the support of a majority of this Court so far as matters of onus of proof were concerned), the Council calls in aid the dicta of Bell, Keane and Nettle JJ in *Berry*.[44] *Berry* does not assist the Council:

(a) It was not a case about reliance damages. It was decided on the basis of the principles laid down in *Sellars*.[45]

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41 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (***Sellars***) at 367-368 (Brennan J); *Badenach v Calvert* (2016) 257 CLR 440 at [40] (French CJ, Kiefel and Keane JJ), [98] (Gordon J).

42 As Hamblen J recognised in *Parker* [2008] EWHC 3017 (QB) at [76]-[82].

43 *Berry* (2020) 271 CLR 151 at [34] (Bell, Keane and Nettle JJ).

44 (2020) 271 CLR 151 at [29]; *cf* Heydon, *Cross on Evidence* (13th ed, 2021) at [7205].

45 See (2020) 271 CLR 151 at [36]-[37].

(b) The statement (at [29]), that "[w]hile a claimant bears the legal burden of establishing the amount of its loss or damage, the nature and circumstances of the wrongdoer's conduct may support an inference or presumption that shifts the evidentiary burden" needs to be understood in context. The cases listed in footnote 48 do not include *Amann* and none concerned reliance damages.[46]

(c) After stating that *Amann* was a modern application of the principle in *Armory v Delamirie*, their Honours referred, with apparent approval, to Brennan J's formulation of the presumption (at 105-106, 113). At 105, Brennan J spoke of it being "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 he [or she] had incurred before rescission". At 106, his Honour spoke of "an onus to prove the plaintiff would not have recouped reliance damages had the contract been performed". And at 113, his Honour stated that "Amann is therefore entitled to an assessment of its damages as reliance damages and to cast upon the Commonwealth the onus of showing that, had the contract been performed, Amann would not have been entitled to benefits of sufficient net value to cover any part of the expenditure it had incurred". That is the language of ultimate onus.

(d) *Berry* does not establish that this Court (or at least Brennan J) held in *Amann* that, where a plaintiff invokes the presumption of recoupment in the case of reliance damages, the defendant bears a practical or evidential onus the discharge of which requires nothing more than a possibility that the plaintiff would not have recouped their expenditure.

(e) The plurality referred to *Pitcher Partners Consulting Pty Ltd v Nevilles Bus Service Pty Ltd*[47] as having "discerned the existence of a qualification to the general proposition that a claimant bears the onus of proving damages, to the effect that, in cases where damage is claimed to have been suffered by reason of a deliberate wrong, the court should assess the damages in a robust manner relying on the presumption against wrongdoers whose actions have made an accurate determination problematic".[48] In *Pitcher Partners*, the Full Federal Court referred to the judgments of Mason CJ and Dawson J, Brennan J and Deane J in *Amann* as supporting the proposition that, in cases of reliance damages, "the onus shifts to the defendant to prove that the plaintiff would not have [recouped their expenditure], or that the contract was worthless".[49]

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46 *Morison v Walton* (unreported, House of Lords, 10 May 1909), as explained in *Coldman v Hill* [1919] 1 KB 443 at 458 (Scrutton LJ), was consistent with the imposition of a legal onus on the defendant.

47 (2019) 271 FCR 392 (***Pitcher Partners***) at [116] (Allsop CJ, Yates and O'Bryan JJ).

48 (2020) 271 CLR 151 at [34].

49 (2019) 271 FCR 392 at [116], referring to *Amann* at 94-95 (Mason CJ and Dawson J), 106-107 (Brennan J), 128 (Deane J).

(f) In this context, where it was acknowledged that Brennan J held that the ultimate onus is reversed where the presumption of recoupment is engaged, it would be incongruous to read the word "prospect" as referring to anything other than "likelihood" (*cf* AS [37], [39(b)], [40]).

54. The *third* limitation, that "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" (AS [39(c)]),[50] is not one that any member of the Court in *Amann* stated as a confining feature. The expression was used as a shorthand for describing the heads of loss claimed and allowed.[51] This issue was comprehensively dealt with by Brereton JA (CA [58]-[68] CAB 141-146). As his Honour pointed out at CA [64] (CAB 145), the relevant expenditure in *McRae* was not incurred pursuant to a contractual obligation or required to perform the contract. At CA [61] (CAB 142-143), his Honour collected the various expressions used in *Amann* which demonstrated that the third limitation was not one which emerged from any of the judgments. The suggested rationale for the third limitation is accommodated by *Hadley v Baxendale* principles. There is nothing in *Amann* that prevents the wasted cost of construction of the hangar being claimed as reliance damages. It was expenditure contemplated by the parties.[52] The whole premise of the AFL was for the respondent to build the hangar and operate its businesses from it.[53]

(e) The Court of Appeal made no error

55. The Council's assertions of error (at AS [41]-[46]) depend upon acceptance of its propositions at AS [37] and [39]. For the reasons given above, the limitations which the Council seeks to impose (AS [39]) on the presumption of recoupment are not established. That is a complete answer to its allegations of error (which, in any event, are misconceived for the reasons that follow).

56. *First*, contrary to AS [42], Brereton JA correctly analysed the various judgments in *Amann* and concluded that the Council bore the ultimate onus of proving that the respondent would

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50 Emphasis in original.

51 See *Amann* at 76 (Mason CJ and Dawson J).

52 The article by Fuller and Perdue, 'The reliance interest in contract damages: 1' (1936) 46 *Yale Law Journal* 52 is contrary to the Council's third limitation. At 91-92 (fn 63-65), the authors collected multiple cases of successful reliance damages claims. In their subsequent article, 'The reliance interest in contract damages: 2' (1936) 46 *Yale Law Journal* 373 at 374 (fn 78), the authors noted that "[t]hese cases suffice to show that the relief is not limited … to expenditures in performance of the contract, or in preparation to perform it". In *Rochester Lantern Co v Stiles & Parker Press Co* 31 NE 1018 (1892), the damages were too remote because they were not in the contemplation of the parties at the time of contract (at 1021 (Earl CJ)). The brief report of *Interfilm Inc v Advanced Exhibition Corporation* 249 AD 2d 242 (1998) lists multiple reasons for denying reliance damages in addition to expectation damages.

53 See cll 1.1 (definitions of "Instrument", "Lessee's Works", "Permitted Use" and "Plan"), 3.1, 5.1, 6.1, 6.3(a) and 6.7 of the AFL; cll 2.2(a) and 9.1(a) of the Lease (ABFM 9-10, 14, 16, 18-19, 52, 61). While Annexure C to the AFL was not in evidence, as the primary judge found (PJ [138] CAB 45), it was common ground that it "referred to the wider development of the airport".

not have recouped the money it spent in constructing the hangar had the contract been performed (CA [50]-[53] CAB 135-138).

57. Brereton JA did not only rely on the reasons of Mason CJ and Dawson J and Deane J in *Amann* or the earlier judgment of the Court of Appeal in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* (which applied the reasoning of Mason CJ and Dawson J)[54] in finding that the presumption of recoupment arose in this case. At CA [122]-[123] (CAB 171-172), Brereton JA applied the view of Brennan J – that the presumption arises if the breach "denies, prevents or precludes the existence of circumstances which would have determined the value of the plaintiff's contractual benefits" – to the facts of the case. Those "circumstances" included registration of the plan of subdivision (*cf* AS [48]). It was not possible for the respondent to ascertain how much it would have made as lessee of a lot in a 25-lot Airport because the Council's breach of contract foreclosed any prospect of the subdivision proceeding.

58. Contrary to AS [48], like the commercial advantage lost in *Amann* the Council's breach of the AFL itself precluded the occurrence of events, including the subdivision of the Airport, which would have permitted assessment of the value of the prospect of further development prior to 2041 (CA [123], [135] CAB 172, 180). While that was not guaranteed by the AFL, it was a distinct commercial benefit that was in the contemplation of the parties at the time that they entered into the AFL (*cf* AS [53]). The commercial development of the Airport was "admittedly the ultimate purpose of the proposed subdivision" (CA [130], [134] CAB 176, 179). It is therefore not correct to submit that "whether the AFL was performed had no real impact on whether development would proceed" (AS [53]) – see CA [134] CAB 179.

59. *Secondly*, Brereton JA was correct in finding that risks in the parties' contractual arrangements were not matters relevant to the question whether the presumption of recoupment was engaged (CA [103] CAB 161-162; *cf* AS [43], [49]). As his Honour said (CA [101]-[103] CAB 160-162), pointing to risks in the AFL that the respondent accepted is beside the point and ignores the one risk that eventuated but which the respondent did not accept: that the Council would breach its obligation to take all reasonable action to register the plan of subdivision. It is therefore inapt to describe the AFL as "risky" (AS [49]). Had it not been deliberately breached, it would have led to secure tenure over land on which the respondent had erected its hangar with 30 years to recoup its expenditure in an environment where there was demand for hangarage and commercial development and a real prospect of development (*cf* AS [47(a)], [47(c)]).

54 [2020] NSWCA 234 at [1] (Bell P), [29] (Macfarlan JA), [47] (Meagher JA).

60. *Thirdly*, contrary to AS [47(b)] and [50]-[51], the lack of viability of the respondent's businesses by the Sunset Date (a) does not have the consequence that the presumption of recoupment was not engaged, and (b) was insufficient on its own, or in combination with the fact that the Council was not contractually obliged to develop the Airport, to enable the Council to rebut the presumption. Where, as here, the Council's breach of contract made it difficult or impossible for the respondent to prove its loss, for the presumption to arise all that the respondent had to show was that it incurred expenditure in reliance on the Council's promise to take all reasonable action to register the plan of subdivision and that such expenditure was wasted (CA [109]-[124] CAB 164-172). The Council's submissions (AS [50]) otherwise proceed on an erroneous footing (see [55] above; AS [39(a)], [40]).

61. *Fourthly*, the proposition that the cost incurred by the respondent in constructing the hangar is not recoverable expenditure (AS [45], [52]) flies in the face of authority (CA [61]-[68], [73] CAB 142-146, 148). It is at odds with the terms of the parties' agreements (see [54] above). Those agreements were made in a context where the characteristics of the hangar featured in negotiations, the Council had granted development consent in respect of the hangar and preliminary planning works on the hangar had already been carried out by the respondent by the time the AFL was entered into.

(f) The recoupment presumption was not rebutted

62. The Council contends that it rebutted the presumption of recoupment by meeting an evidentiary onus. It appears to be conceded by the Council that, if it had to discharge a legal onus, it could not rebut the presumption on the facts of this case. That concession is well-made. At trial it led no lay or expert evidence to rebut the presumption. For the reasons that follow, however, the Council failed to rebut the presumption even if that process is described as an evidentiary onus.

63. The "key facts" listed by the Council at AS [47] are but a part of the relevant factual matrix (CA [134]-[135] CAB 179-180; see Part IV above). To these may be added that the Council itself was prepared to pay $2 million to purchase and refurbish the hangar in 2012 (but was unable, at that stage, to obtain a grant (CA [35] CAB 129; RBFM 182, 184)). Of course, that was at a time when no subdivision had occurred and the respondent had "a mere licence over an isolated site not separately titled with no other lots created in the vicinity for potential commercial development" (CA [120] CAB 170-171). It is also relevant that, in 2009/2010, the respondent's revenue exceeded rental payments by over $100,000 (see [20] above).

64. The prospect of the development of the Airport (like the prospect of an extended term in *Amann*) is a proper matter to which the Court should have regard in deciding whether the

presumption had been rebutted (CA [126] CAB 174-175).[55] Brereton JA found that there was at least "a significant possibility of expansion and development" at the Airport, "if not immediately then later" (CA [134], [137], [140] CAB 179-182). While it was not possible for the respondent to demonstrate that, had the plan of subdivision been registered, it would have recouped its wasted expenditure on the hangar over the course of a 30-year lease, it *was* possible for the Council to prove otherwise by marshalling evidence relating to the prospect of the Airport being developed in accordance with, or notwithstanding, its own reports (*cf* AS [44]).[56] But the Council took no such steps at trial. The course of events lends support to the proposition that, had the plan of subdivision been registered, it is more likely than not that it would have remained on site and continued to operate its businesses (CA [28] CAB 127). That is especially so in circumstances where development of the Airport would have resulted in a more conducive commercial environment for the respondent to conduct its businesses (CA [131]-[132], [140] CAB 176-178, 182).

65. Finally, to the extent that the resolution of the appeal depends in part upon questions of policy, it is relevant in this case that, as a consequence of its deliberate breach of contract (CA [116] CAB 168), the expenditure "wasted" by the respondent has provided a free commensurate commercial benefit to the Council (CA [4], [36] CAB 118-119, 130).

Part VI: Notice of contention or cross-appeal

66. The respondent has not filed a notice of contention or a notice of cross-appeal.

Part VII: Estimate of time required for presentation of oral argument

67. The respondent estimates that it will require approximately two-and-a-half hours for the presentation of its oral argument.

Dated: 1 December 2023

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55 *Amann* at 90-92 (Mason CJ and Dawson J), 113, 115 (Brennan J), 126-127, 131-132 (Deane J).

56 See *Ti Leaf* [2001] NZCA 303 at [35]. In saying that "the speculative nature of the benefit to [the respondent] renders it impossible for the Council to rebut the *Amann* presumption" (CA [135] CAB 180), Brereton JA should be understood to be saying that it was impossible to rebut the presumption of recoupment *on the evidence adduced at trial* (*cf* AS [51]).

ANNEXURE

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

- *Environmental Planning and Assessment Act 1979* (NSW) (as at 17 November 2004).