



HIGH COURT OF AUSTRALIA

8 May 2024

CESSNOCK CITY COUNCIL ABN 60 919 148 928 v 123 259 932 PTY LTD ACN 123 259 932
[2024] HCA 17

Today, the High Court unanimously dismissed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales. The appeal concerned the measure of damages for breach of contract. The issue was the method of proof for a plaintiff to establish the position that it would have been in if the contract had been performed, where the plaintiff has incurred expenditure in anticipation of, or reliance on, the performance of a defendant's contractual obligation and the defendant's breach of that obligation has the effect that the expenditure is wasted.

As part of an initiative to develop the Cessnock Airport, Cessnock City Council ("the Council") entered into an agreement with the respondent by which the respondent was to lease a prospective lot at the airport. The grant of the lease required subdivision of part of the Council's land and, accordingly, a condition of the agreement was that the Council would take all reasonable action to apply for and obtain registration of the plan of subdivision by a certain date. The Council breached that condition and repudiated the agreement. The respondent never obtained a lease. By that time, the respondent had spent considerable sums in anticipation of, or reliance on, the agreement, by constructing an "iconic" aircraft hangar on the site of the proposed lease. The respondent's businesses failed and, following the Council's repudiation, the agreement was terminated.

The respondent commenced proceedings in the Supreme Court of New South Wales seeking recovery of damages based on its wasted expenditure in constructing the hangar. The primary judge awarded the respondent only nominal damages, finding that: a presumption of recoupment only arose if the nature of the breach rendered it "impossible" to assess damages on the usual basis; the Council was not contractually bound to develop the airport (leaving the risk of non-development with the respondent); and, in any case, the Council had "rebutted" any presumption of recoupment. The Court of Appeal allowed the respondent's appeal, finding that the presumption was not confined to cases of "impossibility" of proof, and the presumption had not been rebutted by the Council as there was a significant possibility of development of the airport during the period of the proposed lease.

In dismissing the Council's appeal, the plurality held that, where a defendant's breach of contract has resulted in uncertainty about the position that the plaintiff would have been in if the contract had been performed, the discharge of the plaintiff's legal burden of proof to prove loss will be facilitated by assuming in their favour that, had the contract been performed, the plaintiff would have recovered the expenditure that they reasonably incurred in anticipation of, or reliance on, the performance of the contract. The Council's breach of contract caused considerable uncertainty about the respondent's position. In the circumstances, the respondent was to be treated as having established its loss in the amount of its reasonable expenditure on the hangar. That expenditure was incurred in anticipation of, or reliance on, the performance of the Council's obligation to take all reasonable action to obtain registration of the plan of subdivision.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.