HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

CESSNOCK CITY COUNCIL APPELLANT

AND

123 259 932 PTY LTD RESPONDENT

Cessnock City Council v 123 259 932 Pty Ltd
[2024] HCA 17
Date of Hearing: 13 February 2024
Date of Judgment: 8 May 2024
S115/2023

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with L G Moretti for the appellant (instructed by Holding Redlich)

D L Williams SC with B D Kaplan for the respondent (instructed by Dentons Australia)

CATCHWORDS

Cessnock City Council v 123 259 932 Pty Ltd

Damages – Contract – Where appellant owned land on which airport located – Where appellant and respondent entered into agreement by which respondent to lease prospective lot at airport – Where appellant breached obligation in agreement to take all reasonable action to apply for and obtain registration of plan of subdivision – Where respondent spent considerable sums in anticipation of or reliance on appellant's performance – Where expenditure wasted due to breach of contract by appellant – Where respondent entitled to be placed in the position it would have been in had the contract been performed – Whether respondent entitled to recover wasted expenditure – Proper approach to method of proof for plaintiff to establish position plaintiff would have been in if contract performed, where plaintiff incurred expenditure in anticipation of or reliance on performance of defendant's contractual obligation and defendant's breach has effect that expenditure wasted.

Words and phrases – "anticipation of", "assessment of damages", "breach of contract", "consequential loss", "contract", "damages", "expectation damages", "facilitation of proof", "facilitation principle", "fair wind", "loss", "onus of proof", "presumption", "presumption of recoupment", "reasonably incurred", "reliance damages", "reliance on", "uncertainty of proof", "wasted expenditure".

1 GAGELER CJ. This appeal concerns the recoverability in damages for breach of contract of expenditure incurred by an innocent party (a plaintiff), in reliance on an expectation of performance of a contract, rendered futile as a result of non-performance of the contract by a defaulting party (a defendant).

2 The principle governing recovery of such "wasted expenditure" was stated in the decision of the Court of Appeal of the Supreme Court of New South Wales under appeal as follows:[1]

> "To sum up: a plaintiff who is unable or does not undertake to demonstrate whether or to what extent the performance of a contract would have resulted in a profit may claim its wasted expenditure. In such a case, expenditure incurred by a plaintiff in reliance on a contractual promise made by the defendant and 'wasted' because of non-performance by the defendant is recoverable, except to the extent that the defendant shows that the plaintiff would not have recouped its expenditure had the contract been performed."

The Court of Appeal emphasised that recovery is limited by the principle of remoteness of damage associated with *Hadley v Baxendale*,[2] in respect of which the Court of Appeal added:[3]

> "[T]he proper application of *Hadley v Baxendale* as a control on remoteness of damage in a claim for wasted expenditure is whether, when the contract was made, it was within the reasonable contemplation of the parties that the relevant expenditure would be incurred and, if the contract were breached in the relevant manner, wasted."

3 In my opinion, the Court of Appeal was correct. The principle governing the recovery of damages for wasted expenditure can be generalised as follows. A plaintiff establishes a prima facie entitlement to recover damages for breach of contract if and to the extent that the plaintiff establishes that expenditure it has incurred in reliance on an expectation of performance of the contract has in fact been wasted upon breach of the contract by the defendant. The prima facie entitlement of the plaintiff prevails unless and except to the extent that the defendant establishes the counterfactual that the expenditure would still have been wasted even if the contract had been performed. Beyond the limitations imposed

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1 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 487-488 [73].

2 (1854) 9 Exch 341 [156 ER 145].

3 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 513 [146].

through the application of standard limiting principles, such as remoteness and mitigation, no further limitation on recovery should be imposed.

4 Specifically, the principle governing the recovery of damages for wasted expenditure is not erroneous or deficient insofar as the principle as so stated: does not require the plaintiff to establish an evidentiary foundation for presuming that the plaintiff would have recovered the expenditure had the contract been performed; does not have a threshold requirement that the defendant has somehow made it "difficult" for the plaintiff to prove that the plaintiff would have made a profit from performance of the contract; does not distinguish between expenditure incurred by the plaintiff in the course of or for the purpose of performing its own obligations under the contract and other expenditure incurred by the plaintiff in reliance on an expectation of performance of the contract; and imposes a legal onus on the defendant to establish the counterfactual that the expenditure would have been wasted even if the contract had been performed.

5 In the balance of these reasons for judgment, I explain my understanding of the justification for the recoverability of damages for wasted expenditure according to the stated principle of recovery: first at the level of legal principle, and second by reference to precedent in this Court. I undertake that task aware of a vast academic literature,[4] without seeking to engage with all competing academic perspectives.

Legal principle

6 The "ruling principle"[5] with respect to the recovery of compensatory damages for breach of contract at common law is that stated in *Robinson v Harman*:[6] "where a [plaintiff] sustains a loss by reason of a breach of contract, [the plaintiff] is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed". The principle is universally recognised to prevent a plaintiff from being placed by an award of compensatory damages in a better position than that which the plaintiff would have been in had the contract been performed.[7]

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4 Including, most recently, Winterton, "Reassessing 'Reliance Damages': The High Court Appeal in *Cessnock City Council v 123 259 932 Pty Ltd*" (2024) 46 *Sydney Law Review* (advance).

5 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13].

6 (1848) 1 Exch 850 at 855 [154 ER 363 at 365].

7 *Haines v Bendall* (1991) 172 CLR 60 at 63.

7 But the statement of principle in *Robinson v Harman* does not in one sentence encapsulate the totality of the necessary analysis. Critical to the operation of the principle is to distinguish between the "damages" ultimately to be assessed and the "loss" or "damage" which the plaintiff has sustained by reason of a breach of contract: "damage" being "the phenomenon in respect of which an assessment of damages is made".[8] For there to be compensatory damages, there must first be damage.[9] The damage in respect of which a plaintiff is entitled to be compensated by damages does not lie in mere non-performance of a contract but in the legally cognisable respect or respects in which the position of the plaintiff has been made worse by non-performance of the contract in comparison to the position which the plaintiff would have been in had the contract been performed. Non-performance of a contract has the potential to make a plaintiff worse off in different respects, with the consequence that "[d]ifferent, even cumulative, heads of damage may be pleaded by a plaintiff, depending on the type of contract involved and the kinds of breach and damage occasioned, provided there is no double recovery".[10]

8 The principle in *Robinson v Harman* operates both: (1) to set the framework for determining the category or categories of damage which a plaintiff has sustained by reason of a defendant's non-performance of a contract; and (2) to set a ceiling on the overall damages to which a plaintiff is entitled. Distinguishing the damage from the ceiling on damages is important to understanding the justification for and limit of the recoverability of damages for wasted expenditure.

9 Expenditure incurred by a plaintiff in reliance on an expectation of performance might well be seen to be indicative of the minimum benefit or gain which the plaintiff might be taken to have expected from performance of the contract. Damages for wasted expenditure might on that basis be seen to be a "proxy" for damages attributable to a category of damage constituted by the benefit or gain from performance which the plaintiff might be taken to have lost by reason of non-performance.[11] But it is more than that. Wasted expenditure is itself a category of damage.

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8 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 367. See also *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 616 [283].

9 Seddon and Bigwood, *Cheshire & Fifoot Law of Contract*, 12th Aust ed (2023) at 1223 [23.2].

10 *Clark v Macourt* (2013) 253 CLR 1 at 11 [26].

11 See Kramer, *The Law of Contract Damages* (2014) at 482; Barnett, *Damages for Breach of Contract*, 2nd ed (2022) at 81 [3-007].

10 That much was long ago explained by the Supreme Court of the United States in *United States v Behan*,[12] in a passage quoted and applied by the Full Court of the Supreme Court of New South Wales in *Banks v Williams*:[13]

> "If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires."

Further:[14]

> "[T]he primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage – actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. ... The claimant ... might stop upon a showing of losses. The two heads of damage are distinct, though closely related."

11 To similar effect is the relatively recent explanation of the distinction between damages for wasted expenditure and damages for loss of profits by the Court of Appeal of England and Wales in *Soteria Insurance Ltd v IBM United Kingdom Ltd*.[15] The distinction was applied in that case to hold that damages for wasted expenditure were recoverable even though damages for loss of profits were excluded from recovery by the terms of the contract.[16] A submission "that there was no such thing as wasted expenditure or even reliance loss" was rejected: it was

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12 (1884) 110 US 338 at 344. Insofar as *United States v Behan* (1884) 110 US 338 at 345-347 can be read to suggest that a defaulting party is "estopped" from asserting that the value of performance would not have equalled the expenditure towards performance, it must be read in light of *L Albert & Son v Armstrong Rubber Co* (1949) 178 F 2d 182 at 189.

13 (1910) 10 SR (NSW) 220 at 227-230, 231, 234-236.

14 (1884) 110 US 338 at 345.

15 [2022] 2 All ER (Comm) 1082. Permission to appeal was refused by the Supreme Court of the United Kingdom.

16 [2022] 2 All ER (Comm) 1082 at 1095 [40], 1103-1104 [69]-[73].

said in response that "wasted expenditure is a recognised and recoverable type of loss, well within the compensatory principle".[17]

12 To characterise wasted expenditure as a distinct category of loss or damage, it is unnecessary to go as far as Fuller and Perdue did when they famously wrote of the plaintiff in an action for breach of contract having a "reliance interest" as well as an "expectation interest" and postulated the availability of an award of reliance damages having as its object "to put [the plaintiff] in as good a position as [the plaintiff] was in before the promise was made".[18] Within the framework set by the principle in *Robinson v Harman*, a sufficient conceptual basis for characterising wasted expenditure as a distinct category of damage lies in recognising that wasting of past expenditure upon failure of performance is a legally cognisable respect in which the plaintiff is worse off as a result of non-performance in comparison to performance.[19] The phenomenon in respect of which the plaintiff is entitled to be compensated is the fact that non-performance by the defendant has caused expenditure incurred by the plaintiff to have been thrown away. Compensable damage lies in the simple fact that the plaintiff has incurred expenditure which, because of non-performance, is incapable of yielding any benefit or gain to the plaintiff.

13 Difficulty of proof of any benefit or gain which the plaintiff might have expected from performance of a contract might well furnish a practical explanation for why a particular plaintiff might choose to frame a claim for damages wholly or partly as a claim for wasted expenditure in a particular case. The reality that difficulty of proof of such benefit or gain is frequently encountered in practice by plaintiffs in a variety of different factual scenarios is a reason for recognising wasted expenditure as a distinct category of compensable damage. Not all contracts are entered into with a view to direct and immediate profit: some contracts are loss-leading, some are speculative, some are integers in a larger commercial enterprise, some are entered into not with a view to profit at all but in pursuit of a non-commercial benefit or gain as in a case of government procurement.

14 But difficulty of proof of such benefit or gain as might have been expected from performance of a contract, on this analysis, is neither a precondition to nor a

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17 [2022] 2 All ER (Comm) 1082 at 1104 [73]. See also at 1105-1106 [84].

18 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 54.

19 See Owen, "Some Aspects of the Recovery of Reliance Damages in the Law of Contract" (1984) 4 *Oxford Journal of Legal Studies* 393 at 396. See also *Chitty on Contracts*, 35th ed (2023), vol 1 at 2238 [30-025] and Seddon and Bigwood, *Cheshire & Fifoot Law of Contract*, 12th Aust ed (2023) at 1235 [23.11].

justification for awarding damages for wasted expenditure in the circumstances of a particular case. The potential for damages to be awarded for wasted expenditure in the circumstances of a particular case arises because wasted expenditure is without more a recognised category of compensable damage.

15 Wasted expenditure is easily proved and quantified. The damages attributable to that damage are ordinarily established by nothing more than the plaintiff proving the quantum of the expenditure it has incurred in reliance on an expectation of performance of the contract whilst giving credit for any benefit or gain it has obtained from the expenditure despite non-performance of the contract.

16 The outworking of the *Robinson v Harman* principle in its operation as a ceiling on the overall damages recoverable nevertheless requires that the defendant be afforded an opportunity to prove that the expenditure which the plaintiff has established is in fact incapable of yielding it any benefit or gain by reason of non-performance of the contract is expenditure which would have yielded it no benefit or gain even if the contract had been performed. For, if one thing should be uncontroversial in this theoretically fraught area of the common law, it is that "[w]e will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than [the plaintiff] would have occupied had the contract been fully performed".[20]

17 The soundness of that approach to the outworking of the *Robinson v Harman* principle in assessing damages attributable to damage constituted by wasted expenditure is illustrated in a case of a contract entered into by a plaintiff as part of a larger profit-making venture by the decision of the United States Court of Appeals for the Second Circuit in *L Albert & Son v Armstrong Rubber Co*.[21] The correctness of *L Albert & Son* was accepted in *The Commonwealth v Amann Aviation Pty Ltd*,[22] about which more will be said below, and has been accepted in courts in other common law jurisdictions.[23]

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20 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 79. See Burrows, "Damages for Breach of Contract: Expectation Limiting Status Quo" (1984) 100 *Law Quarterly Review* 27 at 28-30.

21 (1949) 178 F 2d 182.

22 (1991) 174 CLR 64 at 86-87, 105-106, 126, 138-139, 154, 156.

23 See *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3d) 325 at 334 (Supreme Court of British Columbia); *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103,464 at 103,471 [33]; *Mega Yield International Holdings Ltd v Fonfair Co Ltd* [2014] HKCA 466 at [58]; *Soteria Insurance Ltd v IBM United Kingdom Ltd* [2022] 2 All ER (Comm) 1082 at 1097 [45].

18 The Court of Appeals was concerned in *L Albert & Son* with an appeal from a judgment in an action for damages by a buyer against a seller for breach of a contract for the sale of goods constituted by late delivery of certain machines, referred to as "Refiners", for use in the buyer's rubber production operation. The Court of Appeals held that, without needing to prove that timely delivery would have contributed to the buyer making a profit from the rubber production operation, the buyer was entitled to recover expenditure it had incurred in laying a foundation for the machines.

19 Chief Judge Learned Hand said:[24]

> "Normally a promisee's damages for breach of contract are the value of the promised performance, less his outlay, which includes, not only what he must pay to the promisor, but any expenses necessary to prepare for the performance; and in the case at bar the cost of the foundation was such an expense. The sum which would restore the Buyer to the position it would have been in, had the Seller performed, would therefore be the prospective net earnings of the 'Refiners' while they were used (together with any value they might have as scrap after they were discarded), less their price – $25,500 – together with $3,000, the cost of installing them."

He continued:

> "The Buyer did not indeed prove the net earnings of the 'Refiners' or their scrap value; but it asserts that it is nonetheless entitled to recover the cost of the foundation upon the theory that what it expended in reliance upon the Seller's performance was a recoverable loss. In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee's outlay, such a result imposes the risk of the promisee's contract upon the promisor. We cannot agree that the promisor's default in performance should under this guise make him an insurer of the promisee's venture; yet it does not follow that the breach should not throw upon him the duty of showing that the value of the performance would in fact have been less than the promisee's outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other."

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24 (1949) 178 F 2d 182 at 189.

He concluded:

> "On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed."

20 Whether affording such an opportunity or "privilege" is properly regarded as imposing a legal onus on the defendant perhaps matters little. The defendant bears a legal onus of proving that the expenditure, which the plaintiff in fact incurred and which was in fact wasted in the event of non-performance, would still have been wasted in the counterfactual of the contract having been performed in the sense that the claim of the plaintiff will prevail if the defendant does not so prove.

Precedent

21 The foregoing explanation of legal principle is consistent with unanimous reasoning in each of *McRae v Commonwealth Disposals Commission*,[25] *Carr v J A Berriman Pty Ltd*,[26] and *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd*.[27]

22 *McRae* concerned an action for damages for breach of a contract for the sale of a stranded oil tanker of indeterminate size and value. The plaintiffs were the putative buyers and intended salvagers of the tanker. The first defendant was the Commonwealth Disposals Commission. The breach of contract found was constituted by breach by the Commission of a promise that such a tanker existed at or near a specified location.[28] Dixon and Fullagar JJ (with whom McTiernan J concurred) observed:[29]

> "The practical substance of the case lies in these three factors – (1) the Commission promised that there was a tanker at or near to the specified place; (2) in reliance on that promise the plaintiffs expended considerable sums of money; (3) there was in fact no tanker at or anywhere near to the specified place. In the waste of their considerable expenditure seems to lie the real and understandable grievance of the plaintiffs, and the ultimate

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25 (1951) 84 CLR 377.

26 (1953) 89 CLR 327.

27 (1963) 180 CLR 130.

28 (1951) 84 CLR 377 at 410-411.

29 (1951) 84 CLR 377 at 412.

> question in the case (apart from any question of quantum) is whether the plaintiffs can recover the amount of this wasted expenditure or any part of it as damages for breach of the Commission's contract that there was a tanker in existence."

23 The wasted expenditure which the plaintiffs had incurred and were held to be entitled to recover comprised the cost of fitting out a salvage expedition and proceeding to the place where no tanker was to be found.[30] Having concluded that the wasted expenditure was within the reasonable contemplation of the parties at the time of entering into the contract of sale and so was not too remote,[31] Dixon and Fullagar JJ turned to address an argument of the Commission to the effect that the plaintiffs had failed to discharge their onus of proving that their expenditure had been wasted given that the tanker might still have been found to have been incapable of profitable salvage even if it had existed at or near the specified location.[32] The denouement was as follows:[33]

> "The argument is far from being negligible. But it is really, we think, fallacious. If we regard the case as a simple and normal case of breach by non-delivery, the plaintiffs have no starting-point. The burden of proof is on them, and they cannot establish that they have suffered any damage unless they can show that a tanker delivered in performance of the contract would have had some value, and this they cannot show. But when the contract alleged is a contract that there was a tanker in a particular place, and the breach assigned is that there was no tanker there, and the damages claimed are measured by expenditure incurred on the faith of the promise that there was a tanker in that place, the plaintiffs are in a very different position. They have now a starting-point. They can say: (1) this expense was incurred; (2) it was incurred because you promised us that there was a tanker; (3) the fact that there was no tanker made it certain that this expense would be wasted. The plaintiffs have in this way a starting-point. They make a prima-facie case. *The fact that the expense was wasted flowed prima facie from the fact that there was no tanker; and the first fact is damage, and the second fact is breach of contract. The burden is now thrown on the Commission of establishing that, if there had been a tanker, the expense incurred would equally have been wasted.* This, of course, the Commission cannot establish. The fact is that the impossibility of assessing damages on the basis of a comparison between what was promised and what was

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30 (1951) 84 CLR 377 at 413, 415, 417-418.

31 (1951) 84 CLR 377 at 413.

32 (1951) 84 CLR 377 at 413-414.

33 (1951) 84 CLR 377 at 414 (emphasis added).

> delivered arises not because what was promised was valueless but because it is impossible to value a non-existent thing. It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on another basis, and, in so far as the Commission's breach of contract itself reduces the possibility of an accurate assessment, it is not for the Commission to complain."

24 Three points in this reasoning need to be highlighted. The first is that the expenditure which the plaintiffs proved in fact to have been incurred and in fact to have been wasted by reason of non-performance of the contract was said itself to constitute compensable damage. The second is that proof by the plaintiffs of that compensable damage was said, as in *L Albert & Son*, to shift to the Commission the onus of establishing that the expenditure would still have been wasted had the contract been performed. The third is that no part of the reasoning depended on any assumption or presumption that the plaintiffs would at least have recovered their expenditure had the contract been performed. To the contrary, the prospect of successful salvage was accepted to have been uncertain even if a tanker had existed at or near the contractually specified location.[34]

25 *J A Berriman* and *TC Industrial Plant* both illustrate the proposition that a plaintiff is entitled to frame a claim for damages for breach of contract to include a claim for wasted expenditure distinctly from and in addition to any claim the plaintiff might make for loss of profit up to the ceiling set by the principle in *Robinson v Harman*.

26 *J A Berriman* relevantly concerned an action by a builder for breach of a construction contract constituted by delay in making a site ready for construction to commence. Fullagar J (with whom Dixon CJ, Williams, Webb and Kitto JJ concurred) referred to the builder's damages having been assessed "under three heads": "loss of profit on the contract"; "expenditure incurred and wasted in 'keeping a team of men together in anticipation of being able to start work on the job'"; and an amount for which the builder was liable to a subcontractor.[35] As to the second of those identified heads of damage, his Honour remarked that "[e]xpenditure so incurred and wasted would be recoverable by way of damages, and the amount awarded under this head was not challenged".[36]

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34 (1951) 84 CLR 377 at 414. See *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 89.

35 (1953) 89 CLR 327 at 352.

36 (1953) 89 CLR 327 at 352.

27 *TC Industrial Plant* concerned an action by a buyer against a seller for breach of a contract for the sale of a stone crushing machine constituted by breach of an implied condition that the machine would be fit for the purpose of supplying crushed aggregate to fulfil a contract with the Commonwealth. The primary judge awarded damages in the sum of (1) the "expenditure and liabilities incurred by the plaintiff in the course of and for the purposes of carrying out its contract with the Commonwealth less the amounts paid to it by the Commonwealth under that contract" and (2) the estimated profits which the plaintiff would have made had it been able to carry out its contract with the Commonwealth and a further contract.[37] Kitto, Windeyer and Owen JJ rejected an argument of the seller that "the plaintiff could not recover under both the heads of damage upon which the [primary] judge based his award but was bound to elect whether it would pursue its claim for expenditure uselessly incurred as a result of the defendants' breaches of contract or, in the alternative, its claim to recover for the loss of the profits it would have earned had the crusher been fit for the purpose for which both defendants knew it was required".[38] Their Honours said:[39]

> "To sum the matter up, the seller (in effect) promised the buyer that the machine was such that upon the buyer laying out £X in acquiring and installing the machine he would be able to get £X + Y by working it. For breach of the promise the buyer, having laid out his £X, may recover, if he chooses, what the machine would have been worth to him if it had been as promised (presumptively £X) minus the actual value of the machine. Alternatively he may recover £X+Y".

What was said to be "perfectly clear" was that "the plaintiff could not have damages assessed on the one basis plus damages assessed on the other basis".[40]

28 Turning now to *Amann Aviation*,[41] to say that any explanation of the principle governing the recoverability of wasted expenditure is wholly consistent with the reasoning of the majority (Mason CJ and Dawson J, Brennan J, and Gaudron J) would be impossible given the notorious difficulty of extracting a *ratio*

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37 (1963) 180 CLR 130 at 136.

38 (1963) 180 CLR 130 at 138.

39 (1963) 180 CLR 130 at 141.

40 (1963) 180 CLR 130 at 141.

41 (1991) 174 CLR 64.

decidendi from the various reasons for judgment in that case.[42] The most that can properly be said is that the explanation I have given can be seen to be concordant with the core dispositive reasoning of Mason CJ and Dawson J.

29 *Amann Aviation* concerned an action by a private contractor against the Commonwealth for damages for repudiation of a contract to provide aerial coastal surveillance services for a specified period subject to the prospect of renewal and to the possibility of early termination for cause.[43] Without needing to prove that it would have profited from the contract, the plaintiff was held to be entitled to recover damages in the amount of the expenditure it had incurred in reliance on an expectation of the Commonwealth performing the contract.[44] The critical aspects of the joint reasons for judgment of Mason CJ and Dawson J for the present purposes are the following.

30 Mason CJ and Dawson J were clear in emphasising that the principle in *Robinson v Harman* provides the framework for determining the category or categories of compensable damage which a plaintiff might be found to have sustained by reason of a defendant's non-performance of the contract and the ultimate measure of compensatory damages to which a plaintiff might be found to be entitled. So much is encompassed within the generality of their statement that "the expressions 'expectation damages', 'damages for loss of profits', 'reliance damages' and 'damages for wasted expenditure' are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim".[45] That the principle sets a ceiling on compensatory damages was made clear by them in emphasising that "[t]he corollary of the principle in *Robinson v Harman* is that a plaintiff is not entitled, by the award of damages upon breach, to be placed in a superior position to that which he or she would have been in had the contract been performed".[46] *TC Industrial Plant* was said by them to illustrate those propositions.[47]

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42 See Treitel, "Damages for Breach of Contract in the High Court of Australia" (1992) 108 *Law Quarterly Review* 226; Lücke, "The So-Called Reliance Interest in the High Court" (1994) 6 *Corporate & Business Law Journal* 117.

43 (1991) 174 CLR 64 at 72-74.

44 (1991) 174 CLR 64 at 97-98, 115, 157-158.

45 (1991) 174 CLR 64 at 82.

46 (1991) 174 CLR 64 at 82.

47 (1991) 174 CLR 64 at 85.

31 Mason CJ and Dawson J were also clear in stating, with specific reference to *L Albert & Son* and *McRae*, that "a plaintiff has a prima facie case for recovery of wasted expenditure once it is established that the expense was incurred in reliance on the promise of the party in breach, there being a failure of performance by that party"[48] and that establishment by a plaintiff of a prima facie case for recovery of wasted expenditure shifts the onus to the defendant "to establish that such expenditure would not have been recouped even if the contract had been fully performed".[49]

32 Their Honours recognised that the recovery of damages for wasted expenditure under a contract from which no net profit would have been realised not only places the plaintiff in the position the plaintiff would have been in had the contract been fully performed but also restores the plaintiff to the position the plaintiff would have been in had the plaintiff not entered into the contract.[50] Distancing themselves from the view of the recovery of damages for wasted expenditure vindicating a "reliance interest" in the sense defined by Fuller and Perdue,[51] they noted that "[i]n this particular situation it will be noted that there is a coincidence, but no more than a coincidence, between the measure of damages recoverable both in contract and in tort".[52]

33 With reference to *TC Industrial Plant*, Mason CJ and Dawson J rejected the notion that a plaintiff has an election, in the sense of an unconstrained choice, as to whether to frame its claim for damages as one for the recovery of wasted expenditure.[53] The gist of their explanation was that how a plaintiff frames its claim for damages within the framework set by the principle in *Robinson v Harman* can be expected to turn on the nature of the contract (which might or might not have been entered into with a view to direct or immediate profit) and on the plaintiff's appraisal of the practical exigencies of proving and quantifying categories of damage that might potentially be available to be claimed.[54]

34 True it is that their Honours said that in a case of damages assessed by reference to wasted expenditure "the law assumes that a plaintiff would at least

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48 (1991) 174 CLR 64 at 89.

49 (1991) 174 CLR 64 at 82, 86-87.

50 (1991) 174 CLR 64 at 85-86.

51 (1991) 174 CLR 64 at 82-83.

52 (1991) 174 CLR 64 at 86.

53 (1991) 174 CLR 64 at 85.

54 (1991) 174 CLR 64 at 85.

have recovered his or her expenditure had the contract been fully performed" and observed that the approach taken in *L Albert & Son* and *McRae* "amounts to the erection of a presumption that a party would not enter into a contract in which its costs were not recoverable".[55] And true it is that their Honours observed that the plaintiff in *Amann Aviation* faced "difficulties" establishing "what its profits (if any) would have been had the Commonwealth not repudiated the contract".[56] But the point to which these observations ultimately led was that the case was one "in which, it being natural and appropriate for [the plaintiff] to sue to recover its wasted expenditure by way of reliance damages, the onus rested on the Commonwealth of establishing that the reliance expenditure would have been wasted even if the contract had been performed".[57]

35 The reasoning of Mason CJ and Dawson J cannot be taken to impose, as a condition of a plaintiff succeeding on a claim for damages for wasted expenditure, that the plaintiff must establish a factual basis for assuming or presuming that the plaintiff would have recouped the expenditure had the contract been performed. Nor can that reasoning be taken to impose, as a condition of a plaintiff succeeding on a claim for damages for wasted expenditure, that the plaintiff must demonstrate that it meets some objectively demonstrated threshold of difficulty of proving loss of profit.

36 The reasons for judgment of Mason CJ and Dawson J are in those latter two respects to be contrasted with those of the other two members of the majority: Brennan J and Gaudron J.[58] Brennan J and Gaudron J each saw the approach taken in *L Albert & Son* and *McRae* as directed to the establishment and quantification of damage constituted by loss of the contractually expected benefit or gain to which the wasted expenditure was directed and each saw the approach as involving a reversal of the onus of proof of that damage. They differed, however, as to the justification for that reversal of the onus of proof.

37 Brennan J explained the sufficient and necessary justification for the reversal of the onus of proof as being that "the breach of the contract itself makes it impossible to undertake an assessment on the ordinary basis" in the sense that it "is the defendant's repudiation or breach which denies, prevents or precludes the existence of circumstances which would have determined the value of the plaintiff's contractual benefits".[59] His Honour would accordingly have restricted

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55 (1991) 174 CLR 64 at 86-87 (emphasis omitted).

56 (1991) 174 CLR 64 at 89.

57 (1991) 174 CLR 64 at 90.

58 (1991) 174 CLR 64 at 104-108, 155-157.

59 (1991) 174 CLR 64 at 106-107.

application of the approach to a case in which non-performance by the defendant was demonstrated to have that practical effect.[60]

38 Gaudron J, in contrast, saw the reversal of the onus of proof as a reversal only of an evidentiary onus. Her Honour saw the justification for that reversal of evidentiary onus as lying in an assumption that the loss occasioned by repudiation or breach of contract is no less than the expenditure that has been wasted, an assumption which might or might not be justified on the facts of a particular case.[61] Her Honour said that "[a]n assumption to that effect is no more than the recognition of the ordinary expectations of the world of commerce that the value of a contract will be no less than the cost of its performance".[62]

39 For reasons I have given in explaining my understanding of the underlying legal principle, I consider that the assessment of damages according to the approach taken in *L Albert & Son* and *McRae* is directed to the establishment and quantification of a distinct category of damage constituted by wasted expenditure and I do not consider that the approach needs other justification or is otherwise restricted. The reasons of Brennan J and of Gaudron J express competing justifications for the approach, each of which would entail a concomitant restriction. Neither of those competing approaches is compelled by the doctrine of precedent.

40 The appellant draws attention to the observation by Bell, Keane and Nettle JJ in *Berry v CCL Secure Pty Ltd*[63] to the effect that *Amann Aviation* could be seen as an illustration of the general principle that a wrongdoer should suffer such uncertainty of proof as might result from its wrongful conduct. The observation was made with specific reference to the reasoning of Brennan J and unquestionably reflects his Honour's justification for the approach taken in *L Albert & Son* and *McRae*. However, the appellant overstates the significance of the observation in seeking to treat it as an authoritative distillation of the reasoning underlying the holding in *Amann Aviation*. No issue concerning the recovery of wasted expenditure arose for consideration in *Berry*.

Application

41 The essential facts of the present case are as stark as they are uncomplicated. The appellant entered into a contract with the respondent under which the appellant promised to take all reasonable action to apply for and register a plan of

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60 (1991) 174 CLR 64 at 104-108.

61 (1991) 174 CLR 64 at 157.

62 (1991) 174 CLR 64 at 156.

63 (2020) 271 CLR 151 at 169-170 [29].

subdivision and to grant the respondent a 30-year lease of land. Having obtained a licence to enter upon the land in the interim, the respondent proceeded to spend $3.7 million constructing a commercial building on the land. The appellant repudiated the contract, leaving the investment in the building stranded.

42 Those facts are alone sufficient to establish the prima facie entitlement of the respondent to recover in damages for breach of contract the $3.7 million it had spent which was wasted because of the repudiation of the contract. The appellant failed to discharge its onus of establishing that the respondent would have wasted the expenditure even if the contract had been performed.

Disposition

43 For these reasons, I agree that the appeal should be dismissed.

44 GORDON J. The appellant, Cessnock City Council ("the Council"), entered into an agreement for lease with the respondent, 123 259 932 Pty Ltd, formerly Cutty Sark Holdings Pty Ltd ("Cutty Sark"), for a 30-year lease over part of Cessnock Airport, to operate from the day after the registration date of the plan of subdivision of the land ("the Plan"). Under the agreement for lease, the Council promised to take all reasonable action to apply for and register the Plan by 30 September 2011 ("the Sunset Date"), and in the meantime granted Cutty Sark a licence to occupy the proposed Lot 104.

45 While in occupation of Lot 104, Cutty Sark built an aircraft hangar, at a cost of over $3.6 million, from which it intended to operate a business conducting joy flights and advanced aerobatic training for pilots. In breach of the agreement for lease, the Council did not take reasonable action to register the Plan. Consequently, the Plan was not registered, either by the Sunset Date or at any later time, and the proposed 30-year lease was not granted. Cutty Sark sued the Council for breach of contract, seeking "reliance damages" – namely, damages for losses suffered as a consequence of relying upon the Council's contractual promise which was breached. In this appeal, Cutty Sark sought to recover the expense of constructing the hangar.

46 The primary judge held that Cutty Sark was not entitled to reliance damages, on the grounds that the "presumption of recoupment" did not arise and was, in any event, rebutted, and awarded Cutty Sark nominal damages only. The Court of Appeal overturned the primary judge's decision and awarded Cutty Sark $6,154,459.40 (inclusive of interest).

47 The detail of the relevant background is set out in the reasons of Edelman, Steward, Gleeson and Beech-Jones JJ. For the reasons that follow, I agree that the appeal should be dismissed. I prefer to express the applicable principles in the following terms.

Damages for breach of contract

48 The general rule at common law is "that where a party sustains a loss by reason of a breach of contract, [they are], so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".[64] The corollary is that a plaintiff is not entitled, by an award of damages, to be placed in a superior position to that which they would have been in

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64 *Robinson v Harman* (1848) 1 Ex 850 at 855 [154 ER 363 at 365]. See also *Wenham v Ella* (1972) 127 CLR 454 at 471; *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653 at 667, 672; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, 98, 161; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]; *Clark v Macourt* (2013) 253 CLR 1 at 6 [7], 11 [26], 19 [60], 30 [106].

had the contract been performed.[65] This compensatory rule is fundamental to the assessment of contract damages; its status as the "ruling principle" has been repeatedly confirmed by this Court.[66] And, of course, the plaintiff bears "the legal burden of establishing the existence and amount of the loss or damage" suffered by reason of a breach of contract.[67]

49 The measure of damages for breach of contract is calculated by reference to the value of the promised performance, sometimes referred to as "expectation loss"[68] or "expectation damages".[69] "Losses directly incurred, as well as gains prevented", may be a legitimate basis for compensation.[70] Losses directly incurred include expenditures reasonably incurred in preparation for performance or in part performance of the contract (where such expenditure is not otherwise reimbursed), such expenditures being "in anticipation of the advantage that will come to [the injured party] from completed performance".[71] Gains or advantages prevented are, of course, loss of profits.[72] Damages for lost profits are any amount by which gross receipts would have exceeded expenses reasonably incurred.[73]

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65 *Haines v Bendall* (1991) 172 CLR 60 at 63; *Amann Aviation* (1991) 174 CLR 64 at 82, 136, 155, 163; *Clark* (2013) 253 CLR 1 at 11 [27], 19 [60].

66 *Tabcorp Holdings* (2009) 236 CLR 272 at 286 [13]. See also *Johnson v Perez* (1988) 166 CLR 351 at 355, 386; *Haines* (1991) 172 CLR 60 at 63; *Amann Aviation* (1991) 174 CLR 64 at 98, 116, 161; *Clark* (2013) 253 CLR 1 at 6 [7], 11 [26], 19 [60], 32 [111].

67 *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 168 [28], citing *Amann Aviation* (1991) 174 CLR 64 at 80, 88, 99, 118, 137. See also *Clark* (2013) 253 CLR 1 at 11 [27].

68 *Amann Aviation* (1991) 174 CLR 64 at 80-81, 98-99, 117, 134-135, 148, 161; *Tabcorp Holdings* (2009) 236 CLR 272 at 286 [13]. See also *L Albert & Son v Armstrong Rubber Co* (1949) 178 F 2d 182 at 189; *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2011] 1 Lloyd's Rep 47 at 50 [15].

69 *Amann Aviation* (1991) 174 CLR 64 at 80-82, 137, 161.

70 *Holt v United Security Life Insurance & Trust Co* (1909) 72 A 301 at 306. See also *Amann Aviation* (1991) 174 CLR 64 at 99.

71 *Holt* (1909) 72 A 301 at 306.

72 *Amann Aviation* (1991) 174 CLR 64 at 99.

73 *Amann Aviation* (1991) 174 CLR 64 at 81.

There can be no double recovery. Where a plaintiff establishes a loss of profits, that calculation necessarily accommodates the expenditures reasonably incurred.

50 It is sometimes impossible,[74] impossible with any certainty,[75] or difficult[76] to establish the value of the promised or lost performance. In such cases, a plaintiff is not left remediless or confined to nominal damages. A plaintiff may seek to establish, and recover, the losses directly incurred[77] – sometimes referred to as "reliance damages" – being the expenditure reasonably incurred in anticipation of, or reliance on, the promise of another party to the contract that was wasted as a consequence of the breach by the wrongdoer. That expenditure is made in anticipation of the advantage that will come to the injured party from completed performance, consistent with the rationale that ordinarily performance of a contract "results in advantage to both parties over and above that with which they part in the course of its performance".[78] In some cases, not inconsistent with that rationale, recovery of reasonable expenditure (the directly incurred costs) has been assessed by reference to a presumption or "the presumption of recoupment".[79]

51 Damages for wasted expenditure are not a separate measure or category of expectation damages but a method of calculating damages consistent with the compensatory principle that a party is entitled to damages equivalent to the amount of money required to put them in the position they would have been in had the breach not been committed or, put another way, in the position they would have

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74 *Amann Aviation* (1991) 174 CLR 64 at 81, 85-86, 89, 105-106, 126, 130-131, 137. See also *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 411, 414.

75 *Amann Aviation* (1991) 174 CLR 64 at 83, 89, 137. See, eg, *L Albert* (1949) 178 F 2d 182 at 189-190; *Anglia Television Ltd v Reed* [1972] 1 QB 60; *Omak Maritime Ltd* [2011] 1 Lloyd's Rep 47 at 53-54 [33]-[34]; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 526 at 553 [188]-[189].

76 *Amann Aviation* (1991) 174 CLR 64 at 89, 126; *L Albert* (1949) 178 F 2d 182 at 189. See also *Omak Maritime Ltd* [2011] 1 Lloyd's Rep 47 at 51 [22].

77 *McRae* (1951) 84 CLR 377 at 414-415; *Amann Aviation* (1991) 174 CLR 64 at 86, 89, 106-108, 126-127, 154. See also *L Albert* (1949) 178 F 2d 182 at 189.

78 *Holt* (1909) 72 A 301 at 306. See also *Amann Aviation* (1991) 174 CLR 64 at 89.

79 See *Amann Aviation* (1991) 174 CLR 64 at 87-90, 126; *Berry* (2020) 271 CLR 151 at 169 [29].

been in had the contract been performed.[80] As was said in this Court more than 30 years ago: "the expressions 'expectation damages', 'damages for loss of profits', 'reliance damages' and 'damages for wasted expenditure' are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim".[81] No question of election arises.[82] That is, this is not a plaintiff choosing between competing remedies.[83]

52 The value of damages for wasted expenditure is the quantum of the relevant expenditure, less any retained benefit accruing to the plaintiff from the expenditure.[84] The plaintiff must establish that, but for the promise, they would not have spent the money. The plaintiff is not worse off just because they spent money. The "wasted" expenditure must be linked to the breach of the contractual promise. That is, the plaintiff will recoup the expenditure reasonably incurred in reliance on the defendant's promise that was wasted as a consequence of the defendant's breach and their failure to perform the contract.[85] Expenditure which would have been made anyway is not recoverable.[86]

53 There is no distinction to be drawn between incidental and essential expenditure.[87] The remoteness limit is sufficient. As the Court of Appeal held,

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80 See, eg, *Amann Aviation* (1991) 174 CLR 64 at 82, 108, 134, 162-163. See also *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 142; *Omak Maritime Ltd* [2011] 1 Lloyd's Rep 47 at 55 [42]; *Yam Seng* [2013] 1 Lloyd's Rep 526 at 552 [186]. cf American Law Institute, *Restatement (Second) of Contracts* (1981), §344, §347, §348.

81 *Amann Aviation* (1991) 174 CLR 64 at 82, 108, 134, 162-163.

82 *Amann Aviation* (1991) 174 CLR 64 at 85, 108, 136-137, 155, 162.

83 cf *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 18-19; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641-642.

84 *Amann Aviation* (1991) 174 CLR 64 at 79, 127-128.

85 *McRae* (1951) 84 CLR 377 at 412-413; *Amann Aviation* (1991) 174 CLR 64 at 84, 86, 88-89, 104-105, 106, 107, 127, 129, 139-140, 154, 158, 161, 166-167. See also *Anglia Television Ltd* [1972] 1 QB 60 at 63.

86 See, eg, *McRae* (1951) 84 CLR 377 at 416.

87 See, eg, *McRae* (1951) 84 CLR 377 at 412-413; *Amann Aviation* (1991) 174 CLR 64 at 86, 88, 89, 104-106, 107, 127, 129, 139, 140, 154, 158. cf Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 73-74, 78, 79.

there is no principled basis for confining the notion of expenditure incurred "in reliance on the defendant's contractual promise" to expenditure required by the contract or required to enable the plaintiff to perform their contractual obligations. The notion that one would incur expenses only if it were reasonable to suppose that they would at least be recouped applies equally to moneys expended in reliance on the promised performance as to those expended in performing or preparing to perform the contract.

54 The references in *The Commonwealth v Amann Aviation Pty Ltd* to expenditure in preparation for or in performance of a contract do not confine the award.[88] While such a description sufficed to capture the relevant expenditure in *Amann Aviation*, it would not capture the kind of expenditure held to be recoverable, for example, in *McRae v Commonwealth Disposals Commission*.[89] That expenditure was not required by the contract or incurred in performance of, or in preparing to perform, any contractual obligation. The plaintiffs' only contractual obligation was to pay the purchase price; they were not obliged to salvage the tanker.[90] The expenditure was incurred so that the plaintiffs could acquire and exploit the property they acquired under the contract – the (non-existent) tanker – or, put differently, so that they could derive benefit from the contract.

55 However, not all wasted expenses are recoverable. There are necessarily some limits. As earlier noted, the expenditure must be reasonable. Reasonableness applies to the nature and extent of the expenditure, not to the reasonableness of the reliance on the promised performance.[91] Reasonable expenditure extends to expenditure that might naturally be incurred in preparing for, performing, or exploiting the benefit of the contract, or that is or ought to have been contemplated by the defendant. In other words, it is assessed by considering whether the expenditure was in the contemplation of the parties. It is not a form of insurance.[92]

56 The wrongdoer, however, can seek to establish that the plaintiff should not recover the wasted expenditure by reference to type and amount of expenditure (it not being reasonable on one or both of the bases just identified) as well as adducing evidence of what would have happened, recognising that the latter may be difficult if not, in some cases, impossible. That is, "[i]t will still be open to a

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88 See, eg, (1991) 174 CLR 64 at 126, 135.

89 (1951) 84 CLR 377.

90 *McRae* (1951) 84 CLR 377 at 381-382, 414-415.

91 *McRae* (1951) 84 CLR 377 at 413.

92 *L Albert* (1949) 178 F 2d 182 at 189.

defendant ... to argue that, notwithstanding the fact that it is impossible to assess what profits, if any, the plaintiff would have made had the contract been fully performed, the expenditure claimed by a plaintiff would nevertheless not have been recovered even if" the defendant had performed their obligations.[93] Put another way, it is open to the wrongdoer to prove that the plaintiff's expenditure was, on the balance of probabilities, wasted anyway. It is just and fair that the wrongdoer, who caused the difficulty in proof, should bear the onus of showing that the party not in breach would have made a loss on the contract.[94] As Chief Judge Learned Hand said, "it is a common expedient, and a just one ... to put the peril of the answer upon that party who by [their] wrong has made the issue relevant to the rights of the other".[95] That is, where the wrongdoer's breach has rendered assessment of damages on the basis of lost profits impossible or very difficult, principles of justice and fairness dictate that it should be for the wrongful party to prove that the plaintiff would not at least have recovered their expenditure had the contract been fully performed or, put another way, would have made a loss on the contract.[96]

57 The creation of rules the application of which depends upon what findings of fact can be made about what benefit or benefits performance of the contract would have realised to the plaintiff is unhelpful. It is unhelpful because the determinative question will always be what sum will put the plaintiff in the position the plaintiff would have been in had the contract been performed. That assessment must be made in light of *all* relevant evidence adduced in the particular matter. If, as here, all that is known is that: the plaintiff outlaid money in the expectation of performance by the defendant; the defendant did not perform; the plaintiff has not shown that they would have made a profit over and above the expenditure; and the defendant has not shown that the plaintiff would have made a loss if the contract had been performed, then the expenditure may be recovered.

58 Damages for wasted expenditure are not awarded on the basis that their award facilitates proof of damage. There is no relaxation of proof. The trial judge reaches a concluded view on the quantum of damages based on findings that the plaintiff did make outlays in reliance on the defendant's promise that were wasted

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93 *Amann Aviation* (1991) 174 CLR 64 at 86.

94 *Amann Aviation* (1991) 174 CLR 64 at 89, 105-108, 156. See also *Omak Maritime Ltd* [2011] 1 Lloyd's Rep 47 at 51 [22], 52-53 [33], 55 [47]; *Yam Seng* [2013] 1 Lloyd's Rep 526 at 553 [188].

95 *L Albert* (1949) 178 F 2d 182 at 189.

96 *McRae* (1951) 84 CLR 377 at 412; *Amann Aviation* (1991) 174 CLR 64 at 86, 89, 105-108, 154, 157. See also *Omak Maritime Ltd* [2011] 1 Lloyd's Rep 47 at 51 [22], 52-53 [33], 55 [47]; *Yam Seng* [2013] 1 Lloyd's Rep 526 at 553 [188].

as a consequence of the defendant's breach and non-performance, the plaintiff did not show that they would have made a profit and the defendant did not show that the plaintiff would have made a loss, because predicting the outcome of the performance of the contract is "impossible", "impossible with any certainty" or "difficult" in the manner described above.[97] Other than proof of those facts, the trial judge does not undertake a forensic assessment of the gravity of the wrongdoer's conduct. Nor does the trial judge assess the *extent* of the uncertainty that results from the breach and then use that assessment as the basis for adjusting the burden placed on the wrongdoer to adduce evidence to show that the plaintiff would have made a loss. The need for the defendant to show that the plaintiff would have made a loss is not proportionate to the extent of the uncertainty caused by the defendant. The trial judge's task remains, as it always has been, to decide what the evidence shows will be the sum that will put the plaintiff in the position that they would have been in had the contract been performed. Put in different terms, if the trial judge makes the findings described, those findings show that awarding the amount wasted will *so far as the evidence reveals* put the plaintiff in that position.

59 Finally, aleatory contracts,[98] and contracts of chance,[99] are not contracts to which this method of calculation might apply. In those cases, the uncertainty of gain or loss is inherent in the nature of the contract; the uncertainty cannot be said to have been caused by the breach of contract by the repudiating party.

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97 See [50] and [56] above.

98 *Amann Aviation* (1991) 174 CLR 64 at 88.

99 See, eg, *Chaplin v Hicks* [1911] 2 KB 786.

EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ.

Introduction

60 It is long-established orthodoxy that damages for consequential loss for a breach of contract are awarded only to place the plaintiff in the same situation as if the contract had been performed. The issue on this appeal is the method of proof for a plaintiff to establish the position that they 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.

61 As will be explained in these reasons, that issue should be addressed as follows. The legal onus to prove loss arising from a breach of contract rests on the plaintiff as the party seeking to recover damages. However, where a breach of contract has resulted in (namely, caused or increased) uncertainty about the position that the plaintiff would have been in if the contract had been performed, then the discharge of the plaintiff's legal burden of proof will be facilitated by assuming (or inferring) in their favour that, had the contract been performed, then the plaintiff would have recovered the expenditure they reasonably incurred in anticipation of, or reliance on, the performance of the contract. The strength of this assumption or inference, and thus the weight of the burden placed on the party in breach to adduce evidence to rebut the inference in whole or in part, will depend on the extent of the uncertainty that results from the breach. Expressed in this way, this facilitation principle is tied to its rationale, namely the uncertainty in proof of loss occasioned to the plaintiff by the defendant's breach.

62 The appellant, Cessnock City Council ("the Council"), is the registered proprietor of land on which the Cessnock Airport is located. Against a background where the Council had hoped to develop the airport and accompanying land, the Council entered an agreement with the respondent corporation to lease a prospective lot at the airport to the respondent. The grant of the lease required subdivision of part of the Council's land. So a condition of the agreement for lease was that the Council would take all reasonable action to apply for and obtain registration of the plan of subdivision by 30 September 2011. As events transpired, that action required the Council to spend around $1.3 million. Not wishing to incur that cost, the Council breached the condition and repudiated the agreement for lease. The respondent never obtained a lease.

63 Prior to the Council's repudiation, and in anticipation of, or reliance on, the agreement for lease, the respondent spent almost $3.7 million constructing an "iconic" hangar on the land. But the respondent was not successful in conducting businesses on the site of the proposed lease. The respondent's businesses failed.

Following the Council's repudiation, the agreement for lease was treated as terminated and the Council acquired the hangar for $1. It is common ground that by this time, at the latest, the respondent's expenditure was wasted, in the sense that the respondent could not recoup any of the expenditure.

64 The respondent faced great difficulty in proving the consequential loss that it suffered by reference to the position that it would have been in if the Council had performed its contractual obligations. The respondent's difficulties of proof arose from multiple uncertainties: if the Council had obtained registration of the plan of subdivision, would the Council have further developed the airport and accompanying land? How soon would that development have occurred? If development occurred, how much more business would have been attracted to the airport precinct? How would the respondent have responded to any increase in business and operations at the airport?

65 Faced with these potentially insurmountable uncertainties, the respondent relied upon the principle described above that facilitated its proof of loss by treating its wasted expenditure as "prima facie" evidence of the amount that it would have recouped or as the "presumed" amount that would have been recouped. The primary judge in the Supreme Court of New South Wales rejected the application of that principle to the circumstances of this case and awarded the respondent nominal damages of $1. The Court of Appeal overturned the primary judge's decision, applied the principle, and awarded damages to the respondent of almost $3.7 million.

66 In this Court, there was dispute about the basis for, and the nature and operation of, the principle that the Court of Appeal applied to facilitate the respondent's proof of its loss. Consistently with the manner in which the trial and the appeal to the Court of Appeal had been run, the appeal to this Court was brought on an all-or-nothing basis. The Council did not argue that the respondent would have recovered some lesser amount of its wasted expenditure. And the respondent did not argue that it was entitled to a lesser measure of damages representing merely the reasonable cost of the action of obtaining registration of the plan of subdivision to which the respondent was entitled.[100]

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100 *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617; *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] CLC 1251 at 1254; Peel, "Excluding Liability for Wasted Expenditure: *CIS v IBM*" [2021] *Lloyd's Maritime and Commercial Law Quarterly* 425 at 429-430.

67 Although there was some disagreement between the parties about the effect of the decision in *The Commonwealth v Amann Aviation Pty Ltd*,[101] the respondent's reliance on the principle that permits facilitation of its proof of the position that it would have been in if the contract had been performed is broadly consistent with the reasoning of Mason CJ and Dawson J, as well as Deane J, who spoke of the principle as a "presumption" in favour of the plaintiff, with Brennan J, who spoke of it as a "reversal of the onus", and with Toohey J and Gaudron J, who spoke of it as placing an "evidentiary onus" on a defendant. The description "facilitation principle" emphasises that the principle is not rigid. All the circumstances must be considered and the strength with which the principle applies to facilitate a plaintiff's proof by treating reasonably incurred, but wasted, expenditure as likely to be recouped will depend upon the extent of uncertainty caused or increased by the defendant's breach. In this case, there was considerable uncertainty as a result of the Council's breach. The principle was correctly applied by the Court of Appeal. The appeal should be dismissed with costs.

Background

The Council awards a tender for development of the airport

68 The appellant is a local council which owns land on which the Cessnock Airport is located. The Cessnock local government area, as described by the Council, is "within relatively easy driving distance from Sydney, Newcastle and the Coast" and includes the Hunter Valley wine growing area, "Australia's oldest wine region and one of the most famous". The wine industry employed 2,500 people and the region recorded 737,240 visitors in 1994.

69 In 1998, the Council requested expressions of interest for the development and management of the airport. The Council explained in the request that the airport was located in the "rapidly developing Vineyards area of the Lower Hunter Valley" and that it was one of only two airports in the lower Hunter Valley. The Council said that it considered the airport to have "significant potential to accommodate expanded operations for light RPT/Commuter, charter, general aviation and sports aviation traffic".

70 The request for expressions of interest contained a "Cessnock Aerodrome Development Plan". In that development plan, the Council explained that among its proposals was a lengthened runway to accommodate significantly larger, long-range aircraft, an upgrade of terminal facilities for regular passenger and charter

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101 (1991) 174 CLR 64 at 87-89, 94, 106, 126-128, 131, 142, 156. See also *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 169-170 [29].

services, and subdivision of some of the airport land into lots for lease or sale, to be used for air-related activity. The Council observed that "the number of major projects before it" meant that it would not be appropriate for the Council to fully fund the airport development from its own resources. The Council said that it may be possible for the development to be funded from a combination of sources: sale of excess land, sale of land within the airport environment for air-related activity, or attaching private investor funding.

71 In November 1998, Aviation & Leisure Corporation Pty Ltd ("ALC"), a company unrelated to the respondent, submitted a response to the Council's call for expressions of interest. ALC sought "to coordinate the development of Cessnock Aerodrome in conjunction with various parties", including the Council. ALC observed that there were "great potential economic benefits from an upgrade of Cessnock Aerodrome which will facilitate increased visitor numbers to the region".

72 A key aspect of ALC's development strategy was "[a]dd[ing] non aviation activities to available land to help pay for the infrastructure costs to upgrade the runway, navaids and terminal". Additional services proposed by ALC included the provision of accommodation, entertainment, hospitality and retail. ALC emphasised that it "[was] ready and keen to move this project to completion very quickly" and estimated the cost of the project as greater than $3.8 million. However, ALC also noted that "[t]he viability of the project will depend on adding a mix of non aviation activities to improve cash flows on top of existing activities which should also be expanded".

73 On 2 June 1999, the Council awarded ALC preferred tender status. Earlier, the Council had invited ALC to submit a tender for its management and development of the airport. In its tender presentation to the Council, ALC reiterated that it wished to proceed with the project as soon as possible. ALC identified the airport as a "prime piece of real estate" with "opportunities to introduce to Australia ... private hangars and 'Aerotel houses'", describing those concepts (referred to by the courts below as "hangar homes") as popular in the United States of America but virtually unknown in Australia.

74 ALC also proposed "an aircraft display hangar ultimately attached to the terminal to house a vintage aircraft through glass sides to the terminal and parking areas". With respect to hangarage, ALC identified opportunities for all of the following: (i) large maintenance hangars as already exist; (ii) smaller "strip" hangars for individual aircraft; (iii) "USA style" Aerotel Units combining accommodation with aircraft and car parking; and (iv) larger USA style houses combining accommodation with aircraft and car parking. ALC identified the "financial imperative to allow sufficient development of the total site to achieve an

overall profitability". With respect to the Council's contribution to development, ALC suggested that "the Council should consider an ongoing input as long as its cash contribution can be seen to be reducing each year".

75 ALC's proposal was attractive to the Council because it had been represented as a way to produce an income stream to help the Council pay for the development of the airport, of which registration of the plan of subdivision was the first step.

The process of development begins

76 In July 2002, the Council resolved that parts of the airport would be leased to ALC with a view to the future development of the airport. In December 2003, the Council, in its capacity as a developer and a registered proprietor, lodged a development application for the consolidation of the airport land into two lots and the subsequent subdivision of Lot 2 into 25 further lots, one of which (proposed Lot 104) was the subject of the later agreement for lease to the respondent.

77 In March 2004, the Council entered a three-year lease and management agreement with ALC. The lease provided that if the plan of subdivision was registered by 30 June 2011, the Council would grant a 25-year lease to ALC upon expiry of the initial lease. The initial term of the lease to ALC was subsequently extended by agreement, with the extension reflecting the time required to register the plan of subdivision.

78 In July 2004, the Council adopted a development control plan for the airport.[102] The development control plan and the development itself had purposes that included: permitting development to capitalise on the advantages of the airport site and its strategic location; facilitating environmentally responsible development to maximise the economic benefits to the Cessnock region; and encouraging appropriate ancillary development.

79 As repeated in later Council documents, the development control plan identified the airport's location as one of its developmental advantages. The plan identified zone 1 of the airport as the hangar and development area, which included currently vacant land proposed to be used for additional hangars and related development and for the residential accommodation units, or hangar homes, associated with private hangars. An appendix contained specific guidelines for aircraft storage and maintenance hangar buildings and the plan contemplated production of detailed design guidelines for the private hangar and apartment

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102 *Environmental Planning and Assessment Act 1979* (NSW), s 72 (as it was then).

accommodation as well as development of a motel site. Zone 3, the "[t]erminal area", was identified as including an area proposed for additional airport related development, including airport and tourist related shops. Zone 4 was identified as the "[a]ssociated land uses" area "to be developed for tourist related purposes complimentary [sic] to the airport".

80 On 17 November 2004, the Council, acting in its capacity as an approving authority, approved the development application that it had made in its capacity as developer and registered proprietor of the airport. One condition imposed by the Council, condition 23, was that the proposed lots be "connected to Hunter Water Corporation's reticulated sewerage system". Although the consolidation of the airport land into two lots was registered, the plan of subdivision of Lot 2 into 25 further lots (including proposed Lot 104) was never registered by the Council.

The respondent enters an agreement for lease

81 Mr Johnston, who became the principal of the respondent, was a property developer with an interest in aircraft. In April 2004, Mr Johnston and his business partner had met with the Corporate and Community Services Manager for the Council to discuss a suitable site for a hangar in which to house aircraft owned by Mr Johnston or entities related to him. Mr Johnston and his business partner thought that the hangar could also incorporate an aviation museum and an entertainment venue for corporate events. Around July 2004, Mr Johnston obtained a copy of the Council's development control plan.

82 In April 2005, a solicitor acting on behalf of Mr Johnston submitted a development application for a proposed hangar on Lot 104 of the Council's proposed subdivision. The application provided that the site would be in operation 24 hours a day, seven days a week. The estimated cost of the work was $560,000. Development consent was granted on 28 July 2006.

83 Between August 2005 and April 2007, the solicitors for the Council and the solicitor for Mr Johnston negotiated the terms of an agreement for lease by which the Council promised to grant a 30-year lease of proposed Lot 104 from the day after the registration of the plan of subdivision. The parties to the agreement for lease were the Council (as proposed lessor) and the respondent (as proposed lessee). The respondent was a corporation which Mr Johnston incorporated on 27 December 2006 as Cutty Sark Holdings Pty Ltd. The agreement for lease was executed by the Council on 26 July 2007, following its execution by the respondent.

84 The agreement for lease contained extensive provisions in relation to works to be conducted by the respondent. The respondent was given a licence, for an

increasing annual fee which started at $29,000, to enter the area of proposed Lot 104 for the permitted use of the land as an aircraft hangar. The work contemplated by the agreement for lease included the construction of a hangar which the Council was aware would cost around $1.8 million and would be designed by a renowned architect, Peter Stutchbury. The hangar was described by the primary judge as "iconic".[103] Clause 16.8 of the proposed lease that was annexed to the agreement for lease provided that, on the expiry or termination of the lease, the hangar would be transferred to the Council unencumbered for $1.

85 The proposed lease to the respondent of prospective Lot 104 was subject to registration of the plan of subdivision. By cl 4.2(a)(2) of the agreement for lease, the Council promised to take all reasonable action to apply for and obtain registration of the plan of subdivision by a "Sunset Date" of 30 September 2011. If the plan of subdivision was not approved and registered by the Sunset Date, then each party had a power to terminate the agreement.

The respondent builds the hangar and conducts businesses from it

86 From May 2007, after the Council's grant of development consent for the hangar on 28 July 2006 and very shortly before the execution of the agreement for lease by the Council, the respondent began construction of the hangar on proposed Lot 104. Services were connected to the hangar in March 2009.

87 At various times between July 2009 and June 2011, the respondent operated three businesses from the hangar. The first business was an adventure flight business which the respondent operated between July and November 2009. The second business was an aircraft museum which the respondent operated between September 2009 and February 2010. The third business was a corporate venue hire business which the respondent operated between August 2009 and June 2011. In the financial year 2009/2010, the respondent made a loss of $52,185.06 (with a depreciation cost for buildings of $42,292.29 and interest of $88,038.85 on borrowings to build the hangar). In the financial year 2010/2011, the respondent made a loss of $13,909.94 (apparently not accounting for depreciation and interest).

88 By the Sunset Date, and without development of the airport, the three businesses plainly were not profitable. Mr Johnston gave evidence that the businesses were not sustainable because without the subdivision and development of the airport it was difficult to attract business. He said that with his "tenure" (a lease of Lot 104 following subdivision) he "would probably say I think I can make

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103 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [255].

it work. But Council would have had to develop the airport that was also promised."

The Council chooses not to fulfil the subdivision condition

89 From the time that the Council granted itself the development consent on 17 November 2004, the Council engaged consultants to produce feasibility reports and to obtain quotations for the work involved in fulfilling the Council's conditions in the development consent, including condition 23, which required the proposed lots to be connected to Hunter Water Corporation's reticulated sewerage system. The Council gave the consultants a budget for compliance with the development consent of $789,000.

90 On 1 February 2010, the consultants informed the Council that they estimated a further $1,317,764 was required to comply with the development consent. Within the Council, a bid was placed to the Council's Infrastructure Strategy Section for allocation of $1,317,800 to the "Hunter Valley Airport Development Consent". It was expected that this amount would eventually be offset by income from the airport development. In 2010 the Council's financial position included approximately $79 million expenditure on public works, an operational position (excluding capital income) of $3,292,000 and unrestricted cash and investments of $1,634,000. But the discretionary bid was refused.

91 On 29 June 2011, one day before the expiry of ALC's lease and management agreement, the General Manager of the Council informed ALC that the Council "won't be proceeding with the subdivision of the land at the airport" because the Council had "no intention of spending about a million dollars fixing the sewerage". On 1 December 2011, the Council terminated its agreements with ALC.

92 On 13 September 2011, shortly before the Sunset Date of 30 September 2011 in the agreement for lease between the Council and the respondent, the General Manager of the Council wrote to the solicitor for the respondent saying that the Council had "been unable to achieve the registration of the plan of subdivision within the timeframe anticipated in the agreement for lease". The Council offered the respondent a 25-year exclusive licence on the same terms as the proposed lease or a series of leases for successive terms of five years or fewer.

93 On 20 December 2011, the solicitor for the respondent declined the Council's offer. The solicitor observed that the respondent had spent over $2.7 million on the hangar venue. The solicitor added that the respondent "would not have entered into the Agreement for Lease if there had not been the assurance

the subdivision would proceed and allow a 30 year lease to be granted". He emphasised that the respondent entered the agreement "hoping his building would be able to contribute to the Cessnock business and tourism development" and that the respondent was "committed to endeavouring to find new uses of the building".

The respondent is deregistered and the Council acquires the hangar

94 On 22 December 2011, the respondent made its last payment of licence fees, being an amount of $14,408, for occupation of proposed Lot 104 under the agreement for lease. In mid-2012, the respondent ceased occupation of proposed Lot 104 and the hangar. In September 2013, the respondent disconnected power to the hangar as it could not pay the cost of the electricity. In September 2015, the respondent was deregistered by the Australian Securities and Investments Commission ("ASIC") for the non-payment of fees.

95 Following the deregistration of the respondent, the Council engaged in communications with ASIC about matters including the termination of the agreement for lease and the effect of cl 16.8 of the proposed lease with the respondent, which permitted all improvements on proposed Lot 104 to become the property of the Council upon payment of $1 following determination of the lease (which was not granted). On 11 May 2016, ASIC accepted $1 from the Council in exchange for transfer of the hangar to the Council. On 6 December 2016, the Council entered a lease agreement for the hangar with a new tenant.

The Council continues to explore development of the airport

96 The Council took no subsequent action toward subdivision of the airport or to fulfil the sewerage and water infrastructure requirement in condition 23 of the development consent. Nevertheless, the Council remained enthusiastic about the prospects for development of the airport. On 15 August 2012, the Council resolved to endorse a nomination of the airport as a Major Infrastructure Project for the purpose of seeking funding from the Hunter Infrastructure and Investment Fund. The Council resolution followed the recommendation of a report by its Strategic Asset Planning Manager. The report identified the purpose of the Cessnock Aerodrome Terminal project as the provision of "terminal space, offices and hangar space for businesses looking to establish and expand at Cessnock Airport".

97 The development proposed in the report provided "for a series of modular offices/shop-fronts around the perimeter ... for businesses operating at the Aerodrome ... as well as a lounge area for customers". The remainder of the hangar space was to "be retained for leasing as aircraft hangar space or any other business opportunities [that complied with the relevant guidelines]". The report described the project as "an opportunity ... to acquire a revenue-generating asset".

98 Notably, the project endorsed in the report involved the acquisition and refurbishment of the hangar constructed by the respondent. The report observed that in 2012 the Council had "received around twelve requests for both hangar space and office space from businesses looking to establish or expand at [the airport] and, at present, Council is unable to satisfy this demand". The report described the grant funding as "an opportunity for Council to meet, in the short-term, this demand from businesses" as well as providing "an ongoing revenue stream for Council" and "bring[ing] an iconic building into public ownership". These matters were repeated by the Council in its application for funding, but the application was ultimately unsuccessful.

99 The Council continued to explore development of the airport, whilst recognising the need for sewerage and water infrastructure to attract investment and expand business activity at the airport. In January 2014, the Council adopted the Cessnock Airport Strategic Plan, which focused upon the location of the airport as key to its development potential, identifying its unique value proposition as its status as the "Gateway to the Hunter Valley". The Strategic Plan noted the "limited" future of competitor airports and the "capacity for future development on the site". The Strategic Plan noted that "[s]ignificant infrastructure investment could be funded from grants or loans".

100 There is no evidence that the Council seriously pursued the possibility of a loan to fund development of the airport. But on 14 August 2014, the Council submitted an Expression of Interest as part of the Restart NSW "Resources for Regions 2014-2015" round of funding, seeking approximately $6.95 million. The project for which funding was sought was not merely the acquisition and refurbishment of the hangar constructed by the respondent. It was an upgrade of the entire airport precinct "to realise the community's vision of [the airport] being a well-planned and serviced facility that attracts environmentally-responsible economic development opportunities to the Cessnock region". The funding application identified "large tracts of land" on the airport site as available for development, noting the absence of sewerage and water connection as having "drastically impeded investment as well as inhibiting the expansion of existing businesses". The Council sought a "one-off cash injection" which it planned to supplement with its own contribution of almost $300,000. The timeframe for project delivery was forecast to be within two years.

101 In 2020, the Council's updated Strategic Plan proposed a Precinct Masterplan for the development of the airport which divided the airport into five precincts. Precinct 2 included additional private hangars along the length of the runway, a historical museum area, and extension of the runway provided external funding was available. Precinct 3 was designated as including area for commercial business opportunities, including accommodation hangars. The updated Strategic

Plan noted that the airport would benefit from "[i]mproved infrastructure to the western side as funding becomes available". Hangar homes were identified as a potential business opportunity.

102 The updated Strategic Plan revealed that the Council was reluctant to "[u]ndertake significant capital works to attract business" on the basis that "[t]here is no guarantee that this would work [to generate additional business], and is likely to only add to the ongoing maintenance costs in future years". The Council was similarly cautious regarding proposals to enter into some form of joint arrangement, management or corporatisation of the airport. The Council considered "specific improvements to maximise income" as the "most appropriate option" for management of the airport and observed that there are "a number of business opportunities waiting to be developed for this site, [which] should be acted upon". The updated Strategic Plan concluded that "[t]here appears to be significant interest in the Airport generally and this should capitalised [sic]. Marketing of hangar land, hangar space, and other business opportunities should be a priority."

The respondent commences these proceedings

103 On 5 June 2017, the respondent was reinstated by an order of the Supreme Court of South Australia. In September 2017, the respondent commenced proceedings in the Supreme Court of New South Wales principally alleging that the Council had breached the agreement for lease and seeking recovery of damages based on the respondent's wasted expenditure in construction of the hangar.[104] Subject to some dispute about quantum of various construction costs, the case was litigated on an all-or-nothing basis. At no stage did the Council attempt to argue an alternative case that the respondent would have recouped only *part* of its expenditure.

The decisions of the primary judge and Court of Appeal

The decision of the primary judge

104 The primary judge (Adamson J) held that the Council had breached cl 4.2(a)(2) of the agreement for lease, which had required the Council to take all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011. The Council breached this obligation by

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104 A claim under s 21(1) of the *Australian Consumer Law* of unconscionable conduct by the Council was dismissed by the primary judge and no appeal was brought from that finding.

failing to commit funds to connect the proposed lots to sewerage by the Sunset Date of 30 September 2011. That breach was the effective cause of the non-registration of the plan of subdivision by the Sunset Date and the failure of the proposed lease to come into effect. The primary judge also rejected the Council's submission that the agreement for lease had excluded the Council's liability for damages.

105 As to the extent and quantification of the respondent's claim for damages based on its wasted expenditure, the primary judge held that a plaintiff could only recover damages based on wasted expenditure, without the usual proof that the expenditure would have been recouped, if the nature of the breach rendered it "impossible" to assess damages on that usual basis.[105] Further, the primary judge held that the Council was not contractually bound to develop the airport and the risk of no development was borne by the respondent, so no presumption of loss could arise in favour of the respondent consequent upon the Council's failure to develop the airport.

106 Nevertheless, the primary judge concluded that even if it could be "presumed" that the respondent would have recouped its expenditure, the Council had rebutted that "presumption". The primary judge essentially relied upon two matters in reasoning that the Council had rebutted any "presumption" that the respondent's wasted expenditure would have been recouped. First, the primary judge held that there was "little demand" for particular lots and hangar homes at the airport and that "there was little interest beyond the plaintiff's, in the further development of the airport".[106] Secondly, the primary judge placed considerable emphasis on the unprofitable nature of the respondent's businesses, holding that the respondent may have been better off without its obligations to pay licence fees under the agreement for lease because the surrounds of proposed Lot 104 might not have been developed and the respondent had shown itself unable to conduct its businesses profitably.[107] As for the possibility of a lack of development of the airport, the primary judge found that although it was not impossible for the Council to have paid $1.3 million to connect the proposed lots to sewerage, the Council

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105 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [207].

106 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [211].

107 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [219].

was in "a difficult financial position" and was barely able to fulfil its public functions, with limited capacity to service any substantial loan.[108]

107 The primary judge also held that, in any event, the respondent's wasted expenditure consequent upon the Council's breach was too remote to be recovered as damages. The primary judge relied upon factual matters for this conclusion including: the uncertainty of registration of the plan of subdivision; that the Council and the respondent had contemplated that no lease might be granted; and that the hangar would eventually be transferred to the Council for $1.[109]

108 Ultimately, the primary judge awarded the respondent nominal damages of $1 for the Council's breach of the agreement for lease.

The decision of the Court of Appeal

109 The respondent successfully appealed to the Court of Appeal (Brereton JA; Macfarlan and Mitchelmore JJA agreeing). In the Court of Appeal, the Council did not contest the primary judge's finding of breach. The Court of Appeal held that the failure by the Council to take reasonable action to procure registration of the plan of subdivision, and the Council's statements that it did not intend to do so, amounted to a continuing repudiatory breach which was accepted by the respondent when it vacated the premises, thereby terminating the agreement for lease.[110]

110 The Court of Appeal held that there was a "presumption", not confined to cases of "impossibility" of proof by a plaintiff, that wasted expenditure caused by a defendant's breach of contract could be recovered, including all wasted expenditure reasonably incurred in anticipation of, or reliance on, the performance of the defendant's contractual promise, not merely expenditure that was incurred pursuant to a contractual obligation, or required to perform the contract.[111] The absence of any obligation upon the Council to develop the airport, and the risk that it might not be developed, was only relevant to the "presumption" to the extent that

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108 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [241].

109 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [223].

110 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 498 [108].

111 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 485-488 [64]-[73], 495 [97].

it may show that it was not reasonable for the respondent to rely upon the obligation that was breached in incurring expenditure to construct the hangar.[112]

111 The Court of Appeal held that the respondent could rely on the "presumption" because the respondent's expenditure of $3,697,234.41 on construction of the hangar had been wasted in anticipation of, or reliance on, the performance of the promise by the Council that it would take all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011.[113]

112 As to whether the "presumption" was rebutted, the respondent successfully challenged the primary judge's finding that there was little demand for particular lots and hangar homes at the airport and little interest in the further development of the airport. As Brereton JA explained, the evidence had revealed:[114]

> "a significant possibility of expansion and development of the airport, with Council documents over the decade from 2011–2020 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 [in 2022] another 19 years until 2041 for that to occur".

113 As to whether the damage was too remote to be recoverable, the Court of Appeal held that it ought to have been plain to both parties at the time the contract was made that a failure by the Council to perform its obligation under cl 4.2(a)(2) would result in the respondent wasting its expenditure in the construction of the hangar. That damage was therefore considered to fall within the second limb of *Hadley v Baxendale*,[115] and the factual matters relied upon by the primary judge did not make the damage too remote.[116]

114 It may be that the question of remoteness of damage is better analysed by reference to the foreseeability of the respondent's lost potential revenue rather than

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112 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 495-496 [98].

113 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 499 [109].

114 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 509 [134].

115 (1854) 9 Ex 341 [156 ER 145].

116 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 514-515 [149].

the foreseeability of its wasted expenditure. The wasted expenditure, in the language used by the Court of Appeal, is relevant only to "enliven the presumption" that the respondent would have made revenue of at least that amount.[117] On that basis, the prospect of a loss of future potential revenue would plainly be within the knowledge that the parties would be taken to have had at the time of entering into the contract, sufficient for the general principle in *Hadley v Baxendale* to apply.[118] Perhaps for that reason, the only issue upon which the Council sought, and obtained, special leave from this Court concerned whether it could be accepted that the respondent had established that, but for the Council's repudiation, it would have obtained revenue in an amount sufficient to recoup its expenditure.

The issue in this Court

115 On appeal to this Court, there was no dispute that the Council repudiated the agreement for lease. The grounds of appeal in this Court were confined to whether the Court of Appeal erred in concluding that "a presumption arose that the respondent would at least have recouped its wasted expenditure if the contract between the [Council] and the respondent had been performed" and that "the presumption was not rebutted in the circumstances of this case".

Damages for consequential loss arising from a breach of contract

The Australian and English positions

116 From the early nineteenth century, with the rise of the will theory of contract law and the objective approach to agreement,[119] English law recognised that the basis for the remedial response of damages for a breach of contract was that damages were to be assessed objectively by reference to lost expectations.[120] Although the assessment of damages was generally a matter for a jury in the early nineteenth century, juries were guided by judges as to "a general premise that a party whose contract had been breached was entitled to be placed in the position

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117 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 487-488 [72]-[73], 517 [161].

118 See also *Jackson v Royal Bank of Scotland Plc* [2005] 1 WLR 377 at 390-391 [46]-[47]; [2005] 2 All ER 71 at 83-84; *European Bank Ltd v Evans* (2010) 240 CLR 432 at 438 [13].

119 Chitty, *A Practical Treatise on The Law of Contracts* (1826) at 5-6.

120 Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) at 213, 229.

[they] would have been in had the contract been performed".[121] In 1846, Pollock CB remarked that although questions of damages were for the jury, "there are certain established rules according to which they ought to find; and here there is a clear rule—that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken".[122]

117 Nearly two centuries later, it is now well established that there is only one measure of consequential losses for a breach of contract. As many decisions of this Court have held,[123] that is the measure that provides a sum of money that places the plaintiff "in the same situation ... as if the contract had been performed".[124] This description of damages for breach of contract necessarily requires the rejection of any notion that recovery of contract damages for consequential losses could aim to put the innocent party in the position they would have been in if there had been no contract at all. There will be cases where the impossibility of a precise calculation of damages, and the "once and for ever" nature of damages,[125] might mean that an award of damages could later be discovered to have overcompensated a plaintiff by providing the plaintiff with more than they would have received if the contract had been performed. But an award of damages for a breach of contract should not permit a court knowingly to allow a plaintiff to avoid a bad bargain by being put in the position they would have been in if the contract had not existed.[126]

118 In Australian and English law, therefore, it is not sufficient for recovery of consequential loss suffered by a breach of contract that: (i) the plaintiff spent money in anticipation of, or reliance on, performance of a defendant's contractual

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121 Lobban, "Contractual Remedies", in Cornish et al (eds), *The Oxford History of the Laws of England* (2010), vol 12, 522 at 534, 543.

122 *Alder v Keighley* (1846) 15 M & W 117 at 120 [153 ER 785 at 786].

123 *Wenham v Ella* (1972) 127 CLR 454 at 460, 471; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, 99, 134, 161; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 372; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]; *European Bank Ltd v Evans* (2010) 240 CLR 432 at 437-438 [11]; *Clark v Macourt* (2013) 253 CLR 1 at 6 [7], 11 [26], 19 [60], 30 [106].

124 *Robinson v Harman* (1848) 1 Ex 850 at 855 [154 ER 363 at 365].

125 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 490-491, quoting *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 132-133.

126 Carter, *Contract Law in Australia*, 8th ed (2023) at 801-802 [35-11].

obligation; and (ii) that money was wasted or partly wasted after taking account of any benefit obtained by the plaintiff from the expenditure. These two matters are not enough because if the money would never have been recovered on performance of the contract without any breach of contract, then the plaintiff has no consequential loss. It must also be shown that (iii) the money was wasted *because of* the breach of contract. In other words, the plaintiff would have recovered the money if that obligation had not been breached. The issue in this case concerns the manner of proof in relation to (iii).

119 The approach described above explains this Court's rejection of the notion that "reliance" losses and "expectation" losses are alternative measures of damages between which a plaintiff can elect.[127] Although labels such as "reliance loss" and "expectation loss" can be unhelpful,[128] when "expectation loss" is used to describe the measure of consequential loss suffered by a plaintiff—by comparing the plaintiff's position after breach with the position they would have been in if the contract had been performed—then it is the only measure of consequential loss. Hence, any award of contract damages that is based on expenditure in anticipation of, or reliance on, performance of a contract has been described as a "'proxy' for",[129] or "species of",[130] recovery of expectation loss: "the idea that protection of the reliance interest is an alternative measure of damages is a myth".[131] The reliance by a plaintiff upon a contract is merely part of an alternative way of proving the plaintiff's loss, that is, the position that they would have been in if the contract had been performed.

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127 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 138-142; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82, 85, 108, 155, 162-163.

128 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82; *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 348 [63].

129 Barnett, *Damages for Breach of Contract*, 2nd ed (2022) at 81 [3-007]. See also Barnett, "Great Expectations: a Dissection of Expectation Damages in Contract in Australia and England" (2016) 33 *Journal of Contract Law* 163 at 180.

130 *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2011] 1 Lloyd's Rep 47 at 55 [42]. See also *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 526 at 552 [186].

131 Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 75. See also at 79.

120 In summary, this understanding of consequential loss for breach of contract has the following effects:

1. When calculating the consequential loss suffered by a plaintiff due to a defendant's breach of contract, the goal, in general terms, is to put the plaintiff in same the position as if the contract had been performed.

2. The calculation of a plaintiff's consequential loss will permit the plaintiff to recover expenditure reasonably incurred in anticipation of, or reliance on, the performance of the contractual obligation that was breached but only to the extent that the expenditure would have been recovered but cannot now be recovered ("wasted expenditure"). Of course, the plaintiff can also recover any additional profit that would have been obtained from the contract but, in this event, the plaintiff would simply focus on the total profits that would have been made, with the wasted expenditure merely being an expense in the production of those profits.

3. In assessing the loss that can be recovered, that loss which is due to unreasonable or improvident actions of the plaintiff is generally disregarded by application of the rules of mitigation of loss. And that loss which is too remote is disregarded by application of the rules of remoteness of loss.

121 None of these propositions is controversial. It is also uncontroversial that the onus of proof in relation to (3) lies on the defendant, at least in relation to mitigation of loss.[132] This appeal is ultimately concerned with the requirements for proof of the measure of consequential loss and the availability of a method based upon recovery of wasted expenditure in (2).

The position in the United States

122 Considerable submissions were made on this appeal about the legal position in the United States, particularly due to the importance of the 1949 decision in *L Albert & Son v Armstrong Rubber Co*,[133] which was a significant feature in the reasoning of the majority Justices in *The Commonwealth v Amann Aviation Pty*

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132 *Arsalan v Rixon* (2021) 274 CLR 606 at 624-625 [32]. See also *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 138. As to remoteness, compare *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2024] 2 WLR 632 at 650 [62]-[63].

133 (1949) 178 F 2d 182.

Ltd,[134] discussed below. At the time that the decision in *L Albert & Son v Armstrong Rubber Co* was delivered, the position in the United States as set out in the *Restatement (First) of Contracts*[135] was broadly similar to the summary above.[136] The rules of damages in the *Restatement (First) of Contracts* were generally concerned with the principle of putting "the injured party in as good a position as that in which [they] would have been put by full performance of the contract".[137] And although recovery of wasted expenditure was confined to expenditure "in performance of the contract or in necessary preparation therefor" and was capped by the amount of the contract price,[138] the recovery of wasted expenditure was recognised as part of an award of damages with the onus upon the defendant to prove that performance of the contract would not have led to recoupment of some or all of that expenditure for the following reason:[139]

> "Frequently it is very difficult, and at times it is impossible, to prove the cost of completion and the amount of profit that would have resulted from full performance. It is in these cases that the rule of the present Section is essential to the plaintiff's case. Since in the usual case [the plaintiff] is entitled to expenditure plus profits, [the plaintiff's] inability to prove profits should not deprive [the plaintiff] of [the plaintiff's] right to the proved expenditure, so far as this expenditure was provident and reasonable and is not already compensated for in usable materials on hand."

123 The position in the United States has substantially changed and is now very different from Australian and English law. The *Restatement (Second) of Contracts*[140] recognises different "interests of a promisee", including an "expectation interest" and a "reliance interest".[141] Corresponding with those interests are two different "types" of damages for consequential loss following a

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134 (1991) 174 CLR 64.

135 American Law Institute, *Restatement (First) of Contracts* (1932).

136 See [120]-[121] above.

137 American Law Institute, *Restatement (First) of Contracts* (1932), §329, comment a.

138 American Law Institute, *Restatement (First) of Contracts* (1932), §333.

139 American Law Institute, *Restatement (First) of Contracts* (1932), §333, comment b.

140 American Law Institute, *Restatement (Second) of Contracts* (1981).

141 American Law Institute, *Restatement (Second) of Contracts* (1981), §344.

breach of contract. The first is "damages based on ... expectation interest", which give the injured party "a sum of money that will, to the extent possible", put that party in the same position as they would have been in "had the contract been performed".[142] The second, which is an "alternative to the measure of damages" based on the expectation interest, is damages based on the "reliance interest", including "expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed".[143]

124 The justification in the *Restatement (Second) of Contracts* for the existence of the alternative "reliance" measure of damages for a breach of contract is the "reliance interest" that the promisee is said to have in the contract. The language and justification of a "reliance interest" was taken directly by the *Restatement (Second) of Contracts* from a highly influential two-part article by Fuller and Perdue.[144] In the first part of their article, Fuller and Perdue said that "the 'normal' rule of contract damages" seemed to be "a queer kind of 'compensation'". They thought that one of the "principal purposes" of the award of contract damages was to put the plaintiff "in as good a position as [they were] in before the promise was made".[145]

125 In seeking to put the promisee in the position they were in before the contract had been made, Fuller and Perdue argued that "the promisee who has actually relied on the promise ... certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for [their] disappointment in

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142 American Law Institute, *Restatement (Second) of Contracts* (1981), §347 and comment a.

143 American Law Institute, *Restatement (Second) of Contracts* (1981), §349. See also comment a.

144 American Law Institute, *Restatement (Second) of Contracts* (1981), §344, Reporter's Note, citing Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 and Fuller and Perdue, "The Reliance Interest in Contract Damages: 2" (1937) 46 *Yale Law Journal* 373. See also Craswell, "Against Fuller and Perdue" (2000) 67 *University of Chicago Law Review* 99 at 105-106.

145 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 52-54. See also *Sullivan v O'Connor* (1973) 296 NE 2d 183 at 189.

not getting what was promised".[146] The usual damages based on the "expectation interest" were, on Fuller and Perdue's approach, a proxy for a plaintiff's reliance loss.[147] Indeed, they recognised that, in principle, their approach might have the effect that a plaintiff could recover more than the loss that the plaintiff would have incurred if the defendant had performed the contract.[148]

126 The justification in the *Restatement (Second) of Contracts* for the recovery of wasted expenditure as consequential loss for a breach of contract thus now rests upon a rationale that has been rejected in this country.[149] Rather than compensating the plaintiff with a sum of money that places the plaintiff in the same position as if the contract had been performed, the rationale is to place the plaintiff in the same position as if the contract had never existed, even though the breach of contract did not cause the plaintiff to enter the contract or incur the expenditure. By contrast, the Australian approach of placing the plaintiff in the same position as if the contract had been performed treats the essence of contract law as performance.[150]

Onuses and methods of proof of consequential loss

The legal onus and a principle of facilitation of proof

127 The legal onus to prove loss arising from a breach of contract falls upon the plaintiff.[151] Whilst this legal onus is not frequently stated, the reason for the infrequency may simply be that "the rule is beyond doubt".[152] But although the

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146 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 56.

147 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 61-62.

148 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 77-79.

149 See above at [116].

150 Friedmann, "A Comment on Fuller and Perdue, the Reliance Interest in Contract Damages" (2001) 1 *Issues in Legal Scholarship*, Article 3 at 2. See also *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 574-575 [128].

151 *Skelton v Collins* (1966) 115 CLR 94 at 99.

152 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 137, quoting *McGregor on Damages*, 15th ed (1988) at 1134 [1779] fn 2.

plaintiff bears that legal onus, in some circumstances the common law facilitates its discharge. For instance, as explained above, a defendant has the burden of establishing that a plaintiff's loss was unreasonable in the sense required by the rules concerning mitigation of loss. So too, in a principle deriving from the law of torts, a plaintiff is assisted in proof by reasonable inferences where a defendant's breach has resulted in difficulties or impossibilities of proof of loss or damage. This principle of assistance in proof, or "facilitation principle", lies at the heart of this appeal.

128 The precise description of this principle of facilitation of proof by a plaintiff has varied in the cases, although the substance of the principle is generally the same. In some Australian judgments the principle has been described as giving rise to a defendant's "evidentiary onus"[153] (although that expression can be used to mean different things[154]). In some Australian judgments the principle has been described as giving rise to a "prima facie inference"[155] or prima facie case for the plaintiff.[156] In other Australian judgments, including the decisions of the primary judge and the Court of Appeal in this case, the principle has been referred to as a "presumption".[157] The reference to "presumption", which is used in a variety of different senses in law,[158] is best avoided in this context because it has been associated with a different rationale for the facilitation of proof by an assumption of fact, namely that in the ordinary course of commercial dealings a party will

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153 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 142, 156, 165. See also *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 169 [29], referring to an "evidentiary burden".

154 Williams, "Burdens and Standards in Civil Litigation" (2003) 25 *Sydney Law Review* 165 at 168.

155 See *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 165-166; *Amann Aviation Pty Ltd v The Commonwealth* (1990) 22 FCR 527 at 571.

156 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414; *Amann Aviation Pty Ltd v The Commonwealth* (1990) 22 FCR 527 at 571.

157 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 87, 126; *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 169-170 [29].

158 *Masson v Parsons* (2019) 266 CLR 554 at 575 [32], referring to Thayer, "Presumptions and the Law of Evidence" (1889) 3 *Harvard Law Review* 141 and Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), ch 8.

expect at least to recoup their expenses.[159] As explained below, that proposed rationale for the principle should not be accepted.

129 Whatever the description of the principle, its essence is that it facilitates the discharge of the plaintiff's legal onus of proof of loss in circumstances where the defendant's wrongdoing has resulted in uncertainty regarding the quantum of loss. This facilitation principle operates where uncertainty arises from the defendant's breach and is capable of coexisting with other principles concerning facilitation of proof that might assist either the plaintiff or the defendant, such as the principle in *Blatch v Archer*[160] that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted".

(1) The law of torts

130 The facilitation principle was most famously stated in the context of a tort in *Armory v Delamirie*.[161] In that case, the defendant wrongfully deprived the plaintiff of the plaintiff's possessory title to a jewel which had been set in a socket in a ring. Since the defendant refused to produce the jewel, it was impossible for the plaintiff to prove the value of the jewel. Evidence was given of the value of the best jewels that would fit in the socket. Pratt CJ directed the jury that in the absence of production of the jewel the jury should "presume the strongest" against the defendant and award the plaintiff the market value of the best jewels.

131 Two centuries later, the facilitation principle for assessment of damages in the law of torts was explained by the Supreme Court of the United States in *Story Parchment Co v Paterson Parchment Paper Co*[162] as applying "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty[;] it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for [their] acts". As so explained, the facilitation principle is not confined to circumstances where it is impossible to assess damages, or to intentional acts of a defendant,[163] but has been applied in particular categories of

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159 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 81, 87.

160 (1774) 1 Cowper 63 at 65 [98 ER 969 at 970].

161 (1722) 1 Strange 505 [93 ER 664].

162 (1931) 282 US 555 at 563.

163 See *Allen v Tobias* (1958) 98 CLR 367 at 375.

case where the wrongdoing of the defendant has resulted in uncertainty that has made the assessment more difficult. In those particular categories of case, the risk of uncertainty that results from the acts of the wrongdoer should be thrown on the wrongdoer rather than the injured party.

132 In other contexts, in this Court the facilitation principle has been described as one which permits inferences to be drawn in favour of a plaintiff where the wrongdoing of the other party "made quantification difficult".[164] Naturally, however, the greater the difficulty in proof that results from the defendant's wrongdoing, the stronger the inference the court will be prepared to draw against the wrongdoer.

(2) Breach of contract

133 In *Wilson v Northampton and Banbury Junction Railway Co*,[165] the Lord Chancellor (with whom James and Mellish LJJ agreed) explained that the same principle that permits inferences to be drawn against a tortfeasor applies also to permit inferences to be drawn against a party whose breach of contract has resulted in uncertainty for the purpose of assessing damages. The Lord Chancellor said that "the principle is to be reasonably applied according to the circumstances of each case".[166]

134 One circumstance in which the principle has been applied is where a plaintiff has expended money in anticipation of, or reliance on, the performance of a contractual obligation and the defendant's breach of that obligation has made it difficult or impossible for the plaintiff to prove that any reasonably incurred expenditure would be recouped. An early recognition of the principle was the decision of Chief Judge Learned Hand in the Second Circuit of the United States Court of Appeals in *L Albert & Son v Armstrong Rubber Co*.[167] That case was decided prior to the general recognition by United States courts of an independent "reliance interest" in a contract itself.

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164 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at 416 [74]. See also *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 at 508; *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 59.

165 (1874) LR 9 Ch App 279 at 285-286.

166 (1874) LR 9 Ch App 279 at 286.

167 (1949) 178 F 2d 182.

135 One issue in *L Albert & Son v Armstrong Rubber Co* was the assessment of damages for a breach of contract by a seller of four machines who delivered two of the machines at a time so late as to justify the buyer's refusal to accept all four machines. The buyer did not claim for any alleged loss of profits from the use of the machines but instead successfully claimed damages based on alleged wasted expenditure of $3,000 that was spent building a foundation for the machines.

136 In upholding that part of the buyer's argument, Chief Judge Learned Hand commenced his analysis by recognising the usual rule for damages for breach of contract: "Normally a promisee's damages for breach of contract are the value of the promised performance, less [their] outlay, which includes ... any expenses necessary to prepare for the performance".[168] The principle in *Story Parchment Co v Paterson Parchment Paper Co* was then applied: "[i]t is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by [their] wrong has made the issue relevant to the rights of the other".[169] Nevertheless, it was said that the promisee's prima facie right to recover their "outlay in preparation for the performance" is subject to "the privilege of the promisor to reduce [recovery] by as much as [they] can show that the promisee would have lost, if the contract had been performed".[170]

137 The same issue arose before this Court in an appeal heard a little over a year after the decision in *L Albert & Son v Armstrong Rubber Co*. In this Court, in *McRae v Commonwealth Disposals Commission*,[171] the same approach was broadly taken in relation to damages for breach of contract in the context of a contract for the sale of an oil tanker. In that case, the Commonwealth Disposals Commission, contracting on behalf of the Commonwealth—which was ultimately the party held liable[172]—had promised the plaintiffs that there would be a tanker located at a specific place known as Jourmaund Reef. The plaintiffs paid £285 to secure the contract and spent approximately £3,000 searching for the oil tanker. There was no tanker at that place. The Commission was in breach of its contractual promise that the oil tanker existed. The difficulty in assessing damages for that

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168 (1949) 178 F 2d 182 at 189.

169 (1949) 178 F 2d 182 at 189.

170 (1949) 178 F 2d 182 at 189.

171 (1951) 84 CLR 377.

172 (1951) 84 CLR 377 at 419.

breach of contract was that it was "quite impossible to place any value on what the Commission purported to sell".[173] Dixon and Fullagar JJ (with whose conclusion McTiernan J concurred) said that following proof of the wasted expense due to the breach of contract the plaintiffs had a "prima-facie case". They said that "[t]he burden is now thrown on the Commission of establishing that, if there had been a tanker, the expense incurred would equally have been wasted":[174]

> "It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis [of valuing a non-existent tanker]. It is not impossible, however, to undertake an assessment on another basis, and, in so far as the Commission's breach of contract itself reduces the possibility of an accurate assessment, it is not for the Commission to complain."

138 The reference by Dixon and Fullagar JJ to a "prima-facie case" describes the facilitation of the discharge of the plaintiff's legal onus of proof rather than a positive shift of a legal onus of proof to the defendant.[175] Dixon CJ, Webb, Fullagar and Taylor JJ later said of a plaintiff's "prima facie case" in the context of the doctrine of *res ipsa loquitur* that the prima facie case would succeed "unless [alternative] facts are proved ... In this sense, and in this sense alone, the defendant may, perhaps, be said, to carry an onus".[176] As Gleeson CJ and McHugh J said of the same doctrine, "the principle is not a distinct, substantive rule of law, but an application of an inferential reasoning process [in which] the plaintiff bears the onus of proof ... even when the principle is applicable".[177]

139 In summary, the facilitation of the plaintiff's proof arises in cases where the defendant's breach of an obligation results in uncertainty and difficulty of proof of loss for the plaintiff, who has incurred expenditure in anticipation of, or reliance

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173 (1951) 84 CLR 377 at 411.

174 (1951) 84 CLR 377 at 414.

175 See also Ng, "The Onus of Proof in a Claim for Reliance Damages for Breach of Contract" (2006) 22 *Journal of Contract Law* 139 at 153; Winterton, "Commonwealth v Amann Aviation Pty Ltd 25 Years On: Re-examining the Problem of Pre-breach Expenditure in Contract Law", in Degeling, Edelman and Goudkamp (eds), *Contract in Commercial Law* (2016) 333 at 338.

176 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 120-121.

177 *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 132-133 [22]. See also at 163 [110].

on, the performance of the obligation that was breached. The facilitation of proof that reasonably incurred expenditure would have been recovered has been described by Leggatt J as an example of courts doing the "best they can not to allow difficulty of estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing".[178] In applying the principle "reasonably ... according to the circumstances of each case",[179] the plaintiff is given an evidential "benefit of any relevant doubt" that expenditure would be recouped to the extent that it was reasonable, with the practical effect of giving the plaintiff "a fair wind" to establish loss.[180] The strength of the wind will depend upon the extent of the uncertainty resulting from the breach by the defendant.[181] And all of the circumstances, including any evidence led by the defendant, must be considered. The plaintiff is given a "fair wind" but not a "free ride".[182]

140 The nature of the decision in *McRae v Commonwealth Disposals Commission* as one that is concerned with issues of proof, rather than the recognition of a separate head of damages, is confirmed by the decision of this Court in *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd*.[183] In that case, a stone crushing machine was purchased for use in the performance of a contract that the buyer had entered with the Commonwealth. The buyer was awarded damages when the machine was unfit for the purpose for which it was supplied and the contract with the Commonwealth could not be completed. The damages award included: (i) a sum of £15,889 for wasted expenditure incurred in performing work under the contract with the Commonwealth less amounts paid to the buyer by the Commonwealth under that contract, and (ii) £12,000 for additional loss of profits on that and another contract. The seller argued that the

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178 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 526 at 553 [188]. See also *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2011] 1 Lloyd's Rep 47 at 50-57 [11]-[57].

179 *Wilson v Northampton and Banbury Junction Railway Co* (1874) LR 9 Ch App 279 at 286.

180 *Browning v Brachers* [2005] EWCA Civ 753 at [210].

181 *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2011] EWHC 2895 (Comm) at [349].

182 Kramer, "Proving Contract Damages", in Virgo and Worthington (eds), *Commercial Remedies: Resolving Controversies* (2017) 228 at 232.

183 (1963) 180 CLR 130.

buyer could not accumulate both amounts. This Court rejected that argument but emphasised that no question of election arose because both amounts were aspects of a single measure of damages: the wasted expenditure claimed was not separate from the claim for lost profits. A plaintiff, "having expended £X which he would have got back together with £Y profit" had the contract been performed, can recover "£X + Y; and it makes no difference if you prefer to say that he can recover £X under the name of cost plus £Y under the name of [additional] profit".[184]

The facilitation principle in *Amann Aviation*

141 The leading decision on the application of these principles is the decision of this Court in *The Commonwealth v Amann Aviation Pty Ltd*.[185] It is not easy to identify a ratio decidendi at any level of specificity from the six different sets of reasons in that case. Nevertheless, as explained below, the decision broadly conformed with the principles discussed above.

142 Amann Aviation entered a contract with the Commonwealth to conduct aerial coastal surveillance of Australia's northern coastline. The contract term was three years. There was a strong prospect that the Commonwealth would renew the contract at the expiry of the three years because, by that time, Amann Aviation "would be fully equipped with the cost of its aircraft written down. It would be very difficult for a competitor to match this advantage."[186] At trial in the Federal Court, and on appeal to the Full Court of the Federal Court, it was held that the Commonwealth repudiated the contract six months after entry. One basis upon which Amann Aviation put its claim was to recover its wasted expenditure. In anticipation of, or reliance on, the performance of the Commonwealth's contractual obligations, Amann Aviation had spent considerable sums in reasonable pre-operational expenditure, in acquiring and fitting out aircraft (which had a resale value of far less than the amount spent), in termination payments and on a security deposit.

143 The primary judge held that Amann Aviation would have made a profit on the contract, without renewal, of $820,000 but that, since there was a 50 per cent chance that the Commonwealth would lawfully have terminated the contract, the damages were limited to $410,000. The Full Court of the Federal Court, however, held that Amann Aviation was entitled to have its damages assessed on the basis

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184 (1963) 180 CLR 130 at 142.

185 (1991) 174 CLR 64.

186 (1991) 174 CLR 64 at 74.

of its wasted expenditure, which the Commonwealth failed to prove was expenditure that would not have been recouped. A majority of the Full Court refused to discount the damages for what it assessed to be a 20 per cent chance that the contract would have been lawfully terminated before conclusion. The total awarded, before interest, was $5,475,184.

144 In this Court, the appeal by the Commonwealth was dismissed by a majority of Mason CJ and Dawson J, Brennan J, and Gaudron J. In dissent, each of Deane J, Toohey J, and McHugh J would have awarded a lesser amount to Amann Aviation. Deane J and Toohey J would have allowed (different) discounts from the award to reflect the possibility that the Commonwealth might lawfully have terminated the contract. McHugh J would have made an award based on expected profit rather than wasted expenditure.

145 In the majority, although the detail of reasoning was not common to all judges, there were certain strands of commonality. Each member of the majority accepted that the general rule at common law was that damages for breach of contract aim to put the innocent party in the same position as if the contract had been performed.[187] Each member of the majority rejected the notion that "reliance damages" were an alternative to the general rule, or a measure which the plaintiff could elect to claim.[188] Hence, as Mason CJ and Dawson J observed, the decisions in the United States concerning "reliance damages" needed to be treated with "some reserve".[189]

146 Each member of the majority relied upon the uncertainty resulting from the acts of a wrongdoer as a reason in favour of the facilitation of the discharge of the plaintiff's legal onus of proving loss.[190] That facilitation took the form of treating the loss as equivalent to the amount of wasted expenditure incurred in anticipation of, or reliance on, the performance of the obligation that was breached.[191] Consistently with the principles described above, their Honours described this

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187 (1991) 174 CLR 64 at 80, 98, 148.

188 (1991) 174 CLR 64 at 85, 107-108, 155.

189 (1991) 174 CLR 64 at 83.

190 (1991) 174 CLR 64 at 86, 115, 154.

191 (1991) 174 CLR 64 at 86, 109, 113, 153, 155-156.

facilitation of proof of recovery of expenditure reasonably incurred as a "just result"[192] or "just and fair"[193] or proper.[194]

147 Each member of the majority justified their approach by reference to the reasoning in *L Albert & Son v Armstrong Rubber Co*,[195] with Mason CJ and Dawson J, and Brennan J, quoting from Chief Judge Learned Hand to the effect that in situations of uncertainty resulting from wrongful acts "it is a common expedient, and a just one ... to put the peril of the answer upon that party who by [their] wrong has made the issue relevant to the rights of the other".[196] And each member of the majority refused to discount the damages award to account for the possibility of a lawful termination because that possibility was "unlikely to occur"[197] or because even the 20 per cent possibility of termination did not preclude a conclusion that Amann Aviation could have recouped its expenditure.[198]

148 Beyond these matters, there were differences in the reasoning of the majority judges. For instance, there was some terminological dispute about the proper description of the legal rule that facilitates proof of the plaintiff's loss. Mason CJ and Dawson J considered the rule to be one that placed the onus of proof on the defendant.[199] Brennan J also spoke of the "reversal of the onus"[200] although his Honour referred also to the plaintiff establishing a "prima facie case".[201] Although the difference on this point is primarily terminological, if the language of "onus" is to be used then the better description is that of Gaudron J, who treated

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192 (1991) 174 CLR 64 at 86. See also at 105.

193 (1991) 174 CLR 64 at 89.

194 (1991) 174 CLR 64 at 154.

195 (1991) 174 CLR 64 at 87, 105-106, 156.

196 (1991) 174 CLR 64 at 87, 105, citing *L Albert & Son v Armstrong Rubber Co* (1949) 178 F 2d 182 at 189.

197 (1991) 174 CLR 64 at 97-98. See also at 114, 158.

198 (1991) 174 CLR 64 at 115.

199 (1991) 174 CLR 64 at 86-90.

200 (1991) 174 CLR 64 at 106, 107-108.

201 (1991) 174 CLR 64 at 108.

the legal onus of proving loss as borne throughout by the plaintiff, but described the facilitation principle as one which is concerned with a "practical or evidentiary onus".[202]

149 Another difference is that Mason CJ and Dawson J and Gaudron J, but not Brennan J, relied upon an additional reason for facilitating the plaintiff's legal onus of proving loss by treating the loss as equivalent to the amount of wasted expenditure. The additional reason was that "[i]n the ordinary course of commercial dealings" a party will expect at least to recoup expenditure.[203] Mason CJ and Dawson J described this as a "presumption that a party would not enter into a contract in which its costs were not recoverable".[204] That reasoning is unnecessary to support the facilitation principle and it cannot be accepted.

150 It is not uncommon in the ordinary course of commercial dealings that a party might make what, in hindsight, turns out to be a bad bargain, so that the party does not recoup the expenditure made in anticipation of, or reliance on, the performance by the other party of their contractual obligations. The general, and sometimes unrealistic, expectation of parties to commercial contracts that their expenditure will be recouped is not a basis to facilitate the discharge of that party's legal onus of proving that the expectation was well founded at the time of breach of contract. Of course, as Brennan J observed, the facts of a particular case might be sufficient for an inference that the contractual performance of the defendant would lead the plaintiff to recoup their expenditure.[205] But these facts, and this inference, are for the plaintiff to establish; there is no presumption of fact.

151 In *Berry v CCL Secure Pty Ltd*,[206] Bell, Keane and Nettle JJ synthesised the commonalities in the reasoning of the judgments of the majority in *Amann Aviation* in similar terms. Their Honours described the legal burden of proving loss as resting with the plaintiff but recognised that an "inference" (leading to an "evidentiary burden") could arise from the wrongdoer's conduct, consistently with

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202 (1991) 174 CLR 64 at 156. See also at 142. See also *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 169-170 [29], 188 [65]-[66].

203 (1991) 174 CLR 64 at 81. See also at 156.

204 (1991) 174 CLR 64 at 87.

205 (1991) 174 CLR 64 at 105.

206 (2020) 271 CLR 151 at 169-170 [29].

the "principle encapsulated in *Armory v Delamirie*[207]". Their Honours recognised that the principle was applied in *Amann Aviation* due to the uncertainties in Amann Aviation's proof of its loss resulting from the repudiation of the contract by the Commonwealth. They endorsed Brennan J's reasoning that it was "just" that the shift in evidentiary burden meant that the "Commonwealth should bear the ultimate onus of proving at least a prospect that Amann's returns under the contract would not have been sufficient to recoup that expenditure". The greater the likelihood of non-recoupment proved by the Commonwealth, the greater would be the reduction in the plaintiff's damages.

An equivalent principle in English law

152 An equivalent to the facilitation principle has been recognised in English law, where the principle is described as a "fair wind" for plaintiffs.[208] For instance, in what was later described as a "masterly judgment",[209] in *Omak Maritime Ltd v Mamola Challenger Shipping Co*[210] Teare J explained: damages based upon wasted expenditure were an illustration of "the fundamental principle in *Robinson v Harman*" so that there was only one principle "governing the law of damages for breach of contract";[211] the language of "election" is not appropriate in that it is not a choice between inconsistent remedies;[212] and "the practical impossibility of

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207 (1722) 1 Strange 505 at 505 [93 ER 664 at 664].

208 *Browning v Brachers* [2005] EWCA Civ 753 at [210]. See also *Hickman v Blake Lapthorn* [2006] PNLR 371 at 391 [62], 392 [73]; *The Law Debenture Trust Corporation Plc v Elektrim SA* [2009] EWHC 1801 (Ch) at [165]; *Double G Communications Ltd v News Group International Ltd* [2011] EWHC 961 (QB) at [5]; *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2011] EWHC 2895 (Comm) at [239]; *University of Wales v London College of Business Ltd* [2016] EWHC 888 (QB) at [9]; *Marathon Asset Management LLP v Seddon* [2017] ICR 791 at 834 [165]; *Redbourn Group Ltd v Fairgate Developments Ltd* (2018) 177 ConLR 207 at 222 [59].

209 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 526 at 552 [186].

210 [2011] 1 Lloyd's Rep 47.

211 [2011] 1 Lloyd's Rep 47 at 56-57 [55].

212 [2011] 1 Lloyd's Rep 47 at 56 [52]-[53].

proving loss of profit"[213] due to the defendant's breach should require the defendant to bear an onus to establish that wasted expenditure would not have been recovered.[214] And in *Yam Seng Pte Ltd v International Trade Corporation Ltd*,[215] Leggatt J reiterated these points and added, in an eloquent summary of what we have described as the facilitation principle, that in instances of wasted expenditure by a plaintiff:[216]

> "[T]he attempt to estimate what benefit the claimant has lost as a result of the defendant's breach of contract or other wrong can sometimes involve considerable uncertainty ... The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties."

153 These principles from these two decisions were referred to with approval by the Court of Appeal of England and Wales in *Soteria Insurance Ltd v IBM United Kingdom Ltd.*[217] That case concerned the interpretation of an exclusion clause and consideration of whether a claim for loss based on wasted expenditure was a claim for "consequential losses" (and thus irrecoverable under the exclusion clause), which was defined as a separate exclusion from "loss of profit", or whether the claim was for "direct loss" (and thus recoverable), which was defined to include "the reasonable, incremental costs of procuring substantially similar replacement or alternative[] services or systems".[218] One issue was whether financing costs and payments to third party suppliers fell within recoverable "direct loss[es]" rather than irrecoverable "consequential losses" within the meaning of the exclusion clause.

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213 [2011] 1 Lloyd's Rep 47 at 52-53 [33], citing Hutchison J in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 at 40.

214 [2011] 1 Lloyd's Rep 47 at 55-56 [46]-[47], [49].

215 [2013] 1 Lloyd's Rep 526.

216 [2013] 1 Lloyd's Rep 526 at 553 [188].

217 [2022] 2 All ER (Comm) 1082 at 1095 [42], 1096 [45].

218 [2022] 2 All ER (Comm) 1082 at 1090 [24], 1091 [26].

154 However, in the course of reasoning concerning this question of interpretation of the exclusion clause, Coulson LJ, with whom Phillips LJ and Zacaroli J agreed, also said: "[c]laims for wasted expenditure are an entirely different animal" from claims for loss of profit; claims for wasted expenditure were "different types of loss";[219] and the plaintiff has a "choice" and can elect between claims for wasted expenditure and loss of profits.[220] In light of the approval by Coulson LJ of the reasoning described above from *Omak Maritime Ltd* and *Yam Seng Pte Ltd*, we do not understand Coulson LJ to have endorsed the adoption of a principle akin to that which operates in the United States, where recovery of reliance expenditure is a separate type of loss that does not aim to place the plaintiff in the same position as if the contract had been performed. Otherwise, we note that in *Soteria Insurance Ltd v IBM United Kingdom Ltd* Coulson LJ characterised the wasted expenditure as "easily-ascertainable" rather than "speculative and uncertain", and therefore found that it fell within the contractual description of a "direct loss" rather than a "consequential loss[]".[221] A petition for leave to appeal to the Supreme Court was refused on the basis that the application did not raise an arguable point of law of general public importance.

The Council's challenges to the facilitation principle and its scope

155 The Council challenged the existence and scope of the facilitation principle in four ways. The Council submitted: (i) the facilitation principle is inconsistent with the legal rules concerning loss of a chance; (ii) any recognition of the facilitation principle should not apply to speculative contracts; (iii) any recognition of the facilitation principle should apply only to "essential" reliance; and (iv) any recognition of the facilitation principle should require the contract breaker only to establish a prospect of non-recoupment of wasted expenditure. None of these submissions should be accepted.

(i) The facilitation principle is consistent with legal rules concerning loss of a chance

156 The Council disputed any application of the facilitation principle to speculative contracts, submitting that the principle was inconsistent with the legal rules concerning damages for loss of a chance. The Council submitted that a claim

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219 [2022] 2 All ER (Comm) 1082 at 1103 [69], [71],

220 [2022] 2 All ER (Comm) 1082 at 1095 [40], citing *Anglia Television Ltd v Reed* [1972] 1 QB 60 at 63-64.

221 [2022] 2 All ER (Comm) 1082 at 1103 [70].

for damages based upon loss of a chance requires a plaintiff to prove that there was "a substantial prospect of a beneficial outcome"[222] and that this condition would be undermined if a plaintiff could rely upon the facilitation principle to, in the Council's words, "throw the burden of uncertainty that is inherent in speculative contracts onto defendants".

157 The Council's submission conflates two different types of loss. In cases where the plaintiff's claim is for wasted expenditure, the plaintiff's loss is an outcome that did not occur: recovery of the expenditure under the contract. In cases where the plaintiff's claim is for loss of a chance, the plaintiff's loss is a valuable opportunity of which it was deprived, not the outcome.[223] If the defendant's breach of contract results in uncertainty for the plaintiff's proof of either type of loss then the facilitation principle can operate in each case.[224] In relation to a claim for a lost chance, it has been said that the uncertainty resulting from the defendant's breach permits the plaintiff to prove the existence of the valuable opportunity merely by showing "a real (more than negligible) possibility" of that opportunity.[225] The quantification of that valuable opportunity will depend on informed estimation.

(ii) The facilitation principle can apply to speculative contracts

158 In *Amann Aviation*, Mason CJ and Dawson J said that one circumstance in which it would not be appropriate to apply the facilitation principle in favour of the plaintiff was in the case of a pure aleatory contract "for the reason that inherent in the entry into such a contract is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit".[226] The Council sought to expand this circumstance so that the facilitation principle would not apply to any contract for a speculative venture. The Council defined the

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222 *Badenach v Calvert* (2016) 257 CLR 440 at 454 [40]. See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364-365, 368; *Badenach v Calvert* (2016) 257 CLR 440 at 467 [98].

223 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364; *Tabet v Gett* (2010) 240 CLR 537 at 560 [49]; *Badenach v Calvert* (2016) 257 CLR 440 at 454 [39], 467 [98].

224 *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 170 [30], referring to "either of the presumptions considered in *Amann Aviation*".

225 *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 170 [29].

226 (1991) 174 CLR 64 at 88.

relevant class of speculative contracts as those where speculation as to the future is inherent in the bargain.

159 If the Council's submission were correct then there would be little, if any, scope for the facilitation principle, since the very circumstances in which it usually operates are those in which the defendant breaches a contract the consequences of which involved speculation as to the future, thus making it difficult or impossible for the plaintiff to prove their loss. *Amann Aviation* itself involved a speculative contract in the sense that Amann Aviation could only have speculated about the possibility of renewal of its contract after three years in circumstances where, if the contract had not been renewed, Amann Aviation would not have recouped its pre-operational expenditure spent acquiring and fitting out aircraft.[227]

160 As already noted, it is unsound to make the operation of the facilitation principle depend on the subjective intentions of the parties as to whether the expenditure would be recouped under the contract. Similarly, whilst there might be doubt about the scope of a category of "purely aleatory" contracts,[228] it is unsound to attempt to identify such categories of contracts as ones to which the principle does not apply. Many contracts involve risk and are in some sense speculative. It does not assist to attempt to characterise those contracts as "purely aleatory" or not. The critical issue is the extent to which the breach causes or increases uncertainty in the innocent party's proof of loss. For example, where the defendant's contractual breach is a failure to obtain insurance against a known event then, in the ordinary course, that breach will not have caused or increased any uncertainty for the plaintiff in proving loss. If the event occurred, and thus the risk to be insured against materialised, then the plaintiff can recover as though the insurance had been obtained. If the event did not occur and the risk did not materialise then the plaintiff has not suffered any consequential loss. On those scenarios no question arises of the innocent party recovering wasted expenditure, such as the premium; the breach did not cause or increase the uncertainty of proof and the facilitation principle has no role to play.

(iii) The facilitation principle is not confined to "essential" reliance

161 The Council sought to rely upon a distinction drawn by Fuller and Perdue between two different types of reliance interest that could be protected. The Council argued that if the respondent were to be facilitated in any aspect of its onus

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227 (1991) 174 CLR 64 at 130, 157.

228 Compare *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 88, citing *Aldwell v Bundey* (1876) 10 SALR 118.

of proof this should only be in relation to "essential reliance", being partial contract performance or necessary preparations for performance. By contrast, the Council argued, "incidental reliance", being any other reliance which follows naturally and foreseeably from the contract,[229] should not be the subject of any facilitation of the plaintiff's onus.

162 The concepts of essential reliance and incidental reliance were developed by Fuller and Perdue in the course of their proposed development of the law in the United States. As explained above, their approach is very different from that adopted in Australian and English law. Moreover, a distinction between essential reliance and incidental reliance is difficult and elusive. Even Fuller and Perdue's suggested rule concerning reliance damages included both types of reliance, with the authors acknowledging that the cases they referred to had not limited relief to essential reliance.[230] Similarly, the *Restatement (Second) of Contracts*[231] permits recovery of wasted expenditure based on "'incidental' reliance", giving the example of a purchaser of a retail store who, after incurring expenditure on inventory, suffers a loss on the resale of that inventory following the seller's repudiation of the contract for sale of the store.

163 The Council correctly observed that, in *L Albert & Son v Armstrong Rubber Co*,[232] the $3,000 of expenditure that had been wasted on building a foundation for the machines was described as a case of what Fuller and Perdue had described as "essential reliance". But Chief Judge Learned Hand did not decide that case on the basis of a "reliance interest" and did not suggest that the result would be different if the $3,000 had been "incidental reliance".

164 The decision in *L Albert & Son v Armstrong Rubber Co* also illustrates why, as a matter of principle, it is difficult to justify the different treatment of wasted expenditure that is reasonably incurred as a necessary preparation for performance of an extant contract and wasted expenditure to the extent that it is incurred

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229 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 73-74, 78.

230 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 79; Fuller and Perdue, "The Reliance Interest in Contract Damages: 2" (1937) 46 *Yale Law Journal* 373 at 374 fn 78.

231 American Law Institute, *Restatement (Second) of Contracts* (1981), §349, comment a and illustration 4.

232 (1949) 178 F 2d 182 at 191.

reasonably in anticipation of a contract. There is no justification in principle for treating the wasted expenditure differently depending upon whether, as the Council submitted on this appeal, the $3,000 had been reasonably spent on foundations for the machines in order to accept delivery or whether the $3,000 had been reasonably spent on foundations for the machines to operate efficiently. In both cases, it should be sufficient that the expenditure was wasted as a result of the defendant's breach of contract and the defendant did not overcome the uncertainty resulting from its breach of contract to reduce the award of damages by establishing that some or all of the expenditure would not have been recovered.

(iv) The facilitation principle can apply despite evidence of a prospect of non-recoupment

165 The Council submitted that any facilitation of the plaintiff's onus of proof could put no more than an evidentiary onus upon a defendant to show that there was a "prospect" that the plaintiff would not recoup its wasted expenditure. Once that prospect of non-recoupment was established, it was submitted, the plaintiff could not recover anything without proof that the loss would positively have occurred. It is hard to see how such an approach could be consistent with principle or with the outcome of *Amann Aviation*, which was not challenged on this appeal.

166 If the force of the facilitation principle could be spent by a slight evidentiary onus being cast upon defendants to show nothing more than a prospect of non-recoupment, then plaintiffs will generally bear the difficult or impossible task of overcoming the uncertainty caused by the defendant's wrongdoing. That is not consistent with the foundations of the facilitation principle. Indeed, in *Amann Aviation*, the majority held that even a 20 per cent chance that Amann Aviation's contract would have been lawfully terminated before its expiry after three years was not sufficient to *reduce* the award of damages based on wasted expenditure, although their Honours did refer also to the significant likelihood of renewal of the contract and the reasoning of Brennan J expressly relied upon the significant prospect that the contract would have been renewed after the three years.[233] The prospect of termination of the contract was not, in all the circumstances, sufficient to establish a prospect that the expenditure would not be recovered.

167 The Council submitted that support for the slight evidentiary onus could be found in the reasons of Bell, Keane and Nettle JJ in *Berry v CCL Secure Pty Ltd*,[234] where their Honours said that the evidentiary onus upon the Commonwealth was

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233 (1991) 174 CLR 64 at 97-98, 111-112, 158.

234 (2020) 271 CLR 151 at 170 [29].

to prove "at least a prospect that Amann's returns under the contract would not have been sufficient to recoup that expenditure". But, in that statement, their Honours were not saying anything more than that the minimum necessary to reduce a plaintiff's damages based on wasted expenditure is to show ("at least") a prospect that the returns under the contract would not have been sufficient to recoup "any part of the expenditure [the plaintiff] had incurred".[235] In other words, if the Commonwealth in *Amann Aviation* had proved that there was a ten per cent prospect that the returns would not have been sufficient to recoup the wasted expenditure, then damages based on wasted expenditure should have been reduced by ten per cent.

168 In summary, the facilitation principle arises in cases where the defendant's breach of an obligation results in uncertainty and difficulty of proof of loss for the plaintiff, who has incurred expenditure in anticipation of, or reliance on, the performance of the obligation that was breached. The facilitation of the plaintiff's proof by an assumption that the plaintiff has suffered loss in the amount of reasonable expenditure is neither a blunt rule nor able to be bluntly dismissed in every case by a slight evidentiary onus. The strength with which the principle applies will depend upon the extent of uncertainty resulting from the defendant's breach. And the extent to which evidence from a defendant can reduce or eliminate the loss represented by a plaintiff's wasted expenditure will depend upon the extent to which that evidence establishes a likelihood of non-recoupment.

The respondent's wasted expenditure established its loss

The reasonable expenditure on the hangar was wasted in anticipation of, or reliance on, performance of the obligation breached

169 The Council did not challenge the conclusion of the Court of Appeal that, in expending money to construct the hangar, the respondent relied upon the Council performing cl 4.2(a)(2) of the agreement for lease by taking all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011. That registration would have resulted in a lease to the respondent of proposed Lot 104. Mr Johnston had consistently referred to his desire for "bankable tenure", by which he meant a lengthy leasehold interest against which he could borrow, or which he could sell.[236]

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235 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 113, cited in *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 170 [29] fn 52.

236 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [258].

170 Further, although the Council referred in oral submissions to the dramatic increase in the cost of construction of the hangar beyond the initial estimate, there was no ground of appeal in this Court that asserted that the quantum of damages should be reduced because (i) the cost of approximately $3.7 million for the "iconic" hangar was unreasonable or improvident or (ii) the wasted expenditure should be confined to the initial estimate of the cost of a hangar of $560,000, identified in Mr Johnston's April 2005 development application. The absence of any such ground was likely informed by the fact that the agreement for lease, executed by the Council on 26 July 2007, required the consent of the Council for works performed by the respondent and made specific reference to the erection of a hangar, the cost of which was known by the parties at that time to be much more than the initial estimate.

171 Prior to the Council's grant of development consent for the hangar on 28 July 2006, Mr Johnston had told the relevant Council officer that he would be spending "between 2 to 3 million on a Peter Stutchbury building" and that he needed a "decent tenure" for that reason. As Brereton JA concluded, there is no doubt that both the Council and the respondent "had in contemplation the expensive and iconic hangar which was ultimately constructed".[237] Indeed, prior to the execution of the agreement for lease, the solicitor for the respondent had written to the solicitors for the Council saying:

> "It is noted that the Plans for the Hangar have been prepared by an award-winning architect, the design is of a very high standard and the iconic hangar once completed will be [a] very worthwhile visual and working hangar situated on this very important part of Cessnock Airport.
>
> It can be appreciated that our client could have submitted a Development Application for a more modest building which would cost approximately one half of the cost to build the hangar as approved and which would make the proposed business to be run from the building more economically viable. However our client decided that the hangar as designed and consented to by Council is a much more appealing building for the future of the airport and a worthwhile addition to the tourist landscape for the airport and the adjoining Pokolbin area."

172 The consequence of the Council's repudiation was that the respondent never obtained the leasehold tenure that it had required to exploit its investment of nearly $3.7 million in the construction of the hangar. The conclusion of the Court of Appeal, unchallenged in this Court, was that it was reasonable for the respondent

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237 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 471 [24].

to reject the Council's inferior offer of a 25-year licence or five consecutive leases of five years, an offer made in circumstances where "any prospect of a more conducive commercial environment was precluded".[238]

173 The respondent's expenditure was wasted and there was no prospect of recoupment, at the very latest, when the Council acquired the hangar for $1. The respondent's expenditure had been incurred in anticipation of, or reliance on, the performance by the Council of its obligation to take all reasonable action to apply for and obtain registration of the plan of subdivision by 30 September 2011, so that the respondent could obtain a lease of proposed Lot 104.

The uncertainties for proof of loss resulting from the Council's breach

174 On appeal to the Court of Appeal, and also to this Court, there was rightly no challenge to the primary judge's finding that the consequences of the breach by the Council were that the plan of subdivision, and therefore the lots in the subdivision (including proposed Lot 104), was not registered, and therefore that the respondent did not become entitled to a 30-year lease of proposed Lot 104. The Council's breach, and these consequences of it, resulted in three significant areas of uncertainty for the respondent in seeking to prove that it would have recouped its wasted expenditure.

175 First, although there is a ready inference that can be drawn that the Council would have engaged in substantial development if funds were available, there is uncertainty about whether funding for development of the airport might have been obtained in the event that the Council complied with its contractual obligation and had the subdivision registered. Possibilities for funding were from the Council's own funds, or from grants, loans or equity funding.

176 As to funding from the Council's own funds or use of the Council's funds for a loan, the primary judge found that it was possible for the Council to have paid $1.3 million to fulfil condition 23 and connect the proposed lots to Hunter Water Corporation's reticulated sewerage system, but her Honour also found that the Council was in a difficult financial position.[239] Nevertheless, the Council may have been amenable to using some of its funds to develop the airport, or to service loans for development, if it had already expended $1.3 million to connect the sewerage system and registered the plan of subdivision. The Council's financial position in 2010 included approximately $79 million expenditure on public works, an

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238 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 508 [132].

239 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [241].

operational position (excluding capital income) of $3,292,000 and unrestricted cash and investments of $1,634,000.

177 It was also uncertain whether equity investment could have been attracted or if any grant applications would have had more success if the Council had made an initial $1.3 million commitment to the development by connecting the proposed lots to Hunter Water Corporation's reticulated sewerage system.

178 The uncertainty regarding which funding possibilities would eventuate, if any, was a result of the Council's breach of contract in failing to commit the $1.3 million in funds to connect the proposed lots to the sewerage system. None of these possibilities for funding development of the airport could be said to be remote or fanciful. The connection of proposed lots to the sewerage system and registration of the plan of subdivision would have significantly improved the prospects of development of the airport. In the Council's 14 August 2014 Expression of Interest for funding from Restart NSW Resources for Regions, under a section titled "Economic Assessment: Benefits", the Council identified "large tracts of land" on the airport site as "available for development for aviation and related business investment". The explanation provided for the lack of development was the absence of sewerage and water connections on that part of the site, "which has drastically impeded investment as well as inhibiting the expansion of existing businesses". The Council explained:

> "The connection of sewer will enable additional land to be available for development (as it will no longer be required for on-site sewage management systems), while the connection of water will unlock proposed development areas on the western side of the airport and it will allow existing aviation-related businesses to expand due to the removal of the restriction on the size of hangars due to fire safety codes. This will result in phased revenues from additional aviation-related developments of up to $275,000 per annum."

179 Secondly, a further area of significant uncertainty resulting from the Council's breach concerned the extent of increased potential demand for the respondent's businesses and use of the "iconic" hangar. Again, however, it is not remote or fanciful to suggest that there would have been a substantial increase in demand for allotments at that location following registration of the plan of subdivision. This possibility would flow from an increase in demand that would come with any development. But even without development of the airport as contemplated in the Council's documents, there was already an excess of demand for hangarage which the Council could not satisfy. The uncertainty resulting from the Council's breach concerns the extent to which that demand might have been

satisfied, and the manner in which it would have been managed, once subdivision occurred.

180 The demand for hangar space at the airport substantially increased between 2012 and 2014. As noted above, in 2012 the Council had received around 12 requests for both hangar space and office space from businesses looking to establish or expand at the airport, which it was unable to meet. By the time of the Council's 14 August 2014 Expression of Interest for funding from Restart NSW Resources for Regions, the 12 requests received in 2012 had become three requests per week, an increase of 1,200 per cent, with the Council observing that it "is unable to meet demand turning away around 3 aviation inquiries per week for hangar space".

181 Thirdly, and finally, another area of uncertainty concerned the manner in which the respondent would have operated its businesses in circumstances where it held a leasehold interest in one lot within a 25-lot subdivision in a potentially developed airport precinct with potential increased demand for its businesses. In part, this uncertainty concerned attributes and business techniques of Mr Johnston, rather than uncertainty derived from the Council's breach of contract. For instance, the Council relied upon findings by the primary judge that Mr Johnston was a "risk-taker" who "did not concern himself with detail or with documents" and who was, "at heart, a speculator, who would see what angle he could obtain to sell an asset or an opportunity and move on to other things".[240]

182 But even this third area of uncertainty still derived in part from the Council's breach of contract. But for the breach of contract by the Council, Mr Johnston would have had a leasehold interest over proposed Lot 104 and the airport may have been developed with a potential increase in business, depending upon the nature and extent of the development and the management of demand for hangar space. The business decisions and risks that Mr Johnston took for the respondent would have been informed by his lease over proposed Lot 104 and any accompanying increase in demand for the respondent's businesses and/or hangar that flowed from development of the airport.

With the facilitation of the respondent's proof, loss was established

183 The uncertainties that arose from the Council's breach of contract made proof of the respondent's loss very difficult. Without any facilitation of the respondent's legal onus of proof to establish that its expenditure on construction of

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240 *123 259 932 Pty Ltd v Cessnock City Council [No 2]* [2021] NSWSC 1329 at [255], [257]-[258].

the hangar would have been recouped, the respondent would have been required to lead evidence as to the prospect that, having spent $1.3 million to fulfil the sewerage and water infrastructure requirement in condition 23, the Council would have obtained or used funds to develop the airport, in a manner that would have resulted in a sufficient increase in demand, and within a period of time during which the respondent's businesses could be sustained. Large uncertainties and speculation would be involved.

184 In the absence of further evidence concerning these uncertainties, the facilitation principle treats the respondent as having established its loss in the amount of its reasonable expenditure on the hangar, incurred in anticipation of, or reliance on, the performance of the Council's obligation that was breached. The extent of the uncertainty that resulted from the Council's breach was such as to require the Council to lead substantial evidence as to these matters of uncertainty to establish that some or all of the respondent's wasted expenditure would not have been recouped.

185 It is a notable feature of this litigation that the Council ran no alternative case that the respondent would have recouped part, but not all, of its expenditure. As senior counsel for the Council expressed the point in oral submissions, the Council's argument was that "no recoupment is more likely than any recoupment". The Council did not lead any evidence to dispute the inference from its own documents that, with the subdivision and the connection of the proposed lots to Hunter Water Corporation's reticulated sewerage system, the development of the airport was seen as highly desirable. Nor, apart from evidence as to its finances, did the Council lead any evidence to establish that funding for development from a loan would have been prohibitively expensive or that equity investment was unlikely to be attracted, especially in the event that the Council had incurred the expenditure necessary to have the subdivision registered. The Council led no evidence concerning how demand for products or services at the airport might have been affected by development, including any time lags in increased demand. The Council did not even call any witness who worked for the Council at the time when the agreement for lease was negotiated and executed or at any time until very shortly before the Sunset Date.

186 It may be that the limited evidence upon which the Council relied could have assisted to establish a likelihood that the respondent would not have recouped part of its expenditure. But the case, as developed, concerned only the binary question of whether or not it was more likely that the respondent would not recoup any of its expenditure at all. With the benefit of the application of the facilitation principle, the Court of Appeal was correct to conclude that the respondent established that it would have recouped its expenditure.

Edelman J
Steward J
Gleeson J
Beech-Jones J

Conclusion

187 The appeal should be dismissed with costs.

188 JAGOT J. No good can come from a circumstance in which a local government body takes action to foster the development of its area without also being willing and able to fund the action it has contractually promised to undertake. In this case, the hazard inherent in that circumstance has come to pass in the form of the respondent's claim for damages against the appellant, Cessnock City Council ("the Council"), for breach of contract.

189 The damages the respondent claimed were for its wasted expenditure in constructing an aircraft hangar at the Cessnock Airport, being land owned by the Council, in connection with an agreement for lease between the Council as lessor and the respondent as lessee under which the Council promised to "take all reasonable action to apply for and obtain" registration of a plan of subdivision of the Cessnock Airport by the "Sunset Date", being 30 September 2011. The Council no longer disputes that it breached the agreement for lease by not undertaking the works necessary to obtain registration of the plan of subdivision, but contends that the Court of Appeal of the Supreme Court of New South Wales (Brereton JA, Macfarlan and Mitchelmore JJA agreeing) erred in awarding the respondent damages on account of such wasted expenditure in the amount of $6,154,459.40 (representing the cost of constructing the hangar of $3,697,234.41 and interest).

190 The Court of Appeal did not err in applying to this case the principle that where a party expends money in reliance on the contractual promise of another party, and that other party breaches or repudiates the contract by not performing that promise, a presumption of fact arises that the expenditure is "wasted" by reason of the other party's breach or repudiation. Because such expenditure is presumptively characterised as "wasted" by reason of the other party's breach or repudiation, that expenditure is properly recoverable as loss suffered by the party who has expended the money consistent with the principle in *Robinson v Harman*: "where a party sustains a loss by reason of a breach of contract, [that party] is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".[241]

191 The relevant controls to maintain the operation of this presumption within the limits of the *Robinson v Harman* principle, the effect of which is that no plaintiff may be placed in a better position than they would have been in had the contract been performed, are that: (a) the claimed wasted expenditure must have been incurred in reliance on, but is not required to have been incurred in performance of, the contract; (b) the claimed wasted expenditure must not be too remote under the rule in *Hadley v Baxendale*, which confines recovery to the loss that "may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the

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241 (1848) 1 Ex 850 at 855 [154 ER 363 at 365].

time they made the contract, as the probable result of the breach of it";[242] (c) the claimed wasted expenditure must not exceed the amount of the expenditure in performance of or reliance on the contract; and (d) once the presumption is engaged, the party in breach can rebut the presumption in whole or part by proving that the claimed wasted expenditure is not "wasted" because, had it performed the contractual promise, "the expense incurred would equally have been wasted" by the other party in whole or part.[243]

192 Further, a claim for wasted expenditure does not exclude a claim for lost profits resulting from a breach of contract but in such a case no "double recovery" is permitted; recovery of lost profits which can be proved to have been suffered over and above the claimed wasted expenditure must account for the capital outlay which the wasted expenditure represents, an expenditure necessary to earn the claimed lost profits (over and above the amount of the claimed wasted expenditure).[244]

193 Given the reasoning in *McRae v Commonwealth Disposals Commission*[245] and *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd*,[246] from which these principles emerge with clarity, no greater complexity than this should be sown into or permitted to invade this field.

194 This approach to the engagement of the presumption and the controls on its operation also represents an appropriately robust and practical approach to the assessment of damages for contractual breach based on considerations of fairness and justice.[247] The aptness of such an approach is exposed by the facts and principled resolution of the present case.

The critical facts

195 Given the other reasons for judgment, the facts may be identified in summary form. Most of these facts do no more than expose the wisdom of the

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242 (1854) 9 Ex 341 at 354 [156 ER 145 at 151].

243 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414.

244 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 141.

245 (1951) 84 CLR 377.

246 (1963) 180 CLR 130.

247 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 89, 119, 126, 154.

common law's robustly pragmatic approach to damages for breach of contract, including by recognising that wasted expenditure is a compensable head of loss.

196 From late 1998 onwards, the Council considered that the development of the Cessnock Airport would bring substantial benefits to the Cessnock local government area. To that end, the Council: (a) obtained a consultant's report, the "Cessnock Aerodrome Development Plan"; (b) issued an expression of interest for the development and management of the Cessnock Airport; (c) negotiated with the preferred tenderer, ultimately entering into an agreement for lease and a management agreement with the preferred tenderer, Aviation & Leisure Corporation Pty Ltd ("ALC"), in March 2004; and (d) lodged with itself a development application proposing to consolidate the various lots comprising the Cessnock Airport into two lots and then to subdivide the new lot 2 into 25 lots, most of which would be located to the west of the existing runway and a few of which would be located to the east of the existing runway including a proposed Lot 104.

197 The Council granted itself a development consent for the proposed consolidation and subdivision subject to conditions on 17 November 2004. The conditions, in effect, required the subdivided lots to be serviced to the satisfaction of all relevant authorities. Condition 23 required that the lots be connected to the existing reticulated sewerage system. The Council commenced this development by carrying out physical works on the land, the effect of which was to ensure that the development consent did not lapse (which it otherwise would have done had the development not been commenced within five years of the operative date of the development consent, which was 18 November 2004).

198 Commencement of a development the subject of a development consent to prevent the lapse of the consent is one thing. Complying with all conditions of a development consent as required so that a plan of subdivision can be registered to create new lots is another.

199 The Council obtained registration of the plan of consolidation of the Cessnock Airport into two lots as contemplated by the development consent. The Council also did other things. The Council: (a) adopted a development control plan for the Cessnock Airport, Development Control Plan No 53 – Cessnock Aerodrome ("DCP 53"), setting out its vision and requirements for the development of the Cessnock Airport in July 2004; (b) negotiated with the principal of the respondent, Mr James Johnston, a property developer with an interest in aircraft, about an agreement for lease of land within the Cessnock Airport on which Mr Johnston proposed to construct a hangar for aircraft used in an aviation adventure flight business; (c) granted a development consent for "New Aircraft Hanger [sic] for Joy Flights and Advanced Flight/Aerobic Training incorporating an Aviation Museum" on part of the Cessnock Airport in July 2006; (d) permitted Mr Johnston to construct the hangar on part of the Cessnock Airport commencing in the latter part of 2006; (e) executed an agreement for lease with

the respondent in July 2007; and (f) in partial compliance with the conditions of the development consent for the subdivision, caused works to be carried out so that the land on which the hangar was located was connected to utility services, including works for disposal of wastewater via an extension of the existing reticulated sewerage system.

200 The relevant effects of key provisions of the agreement for lease between the Council and the respondent were that: (a) the land to be leased to the respondent was to be Lot 104, being a lot to be created by registration of the plan of subdivision the subject of the grant of development consent by the Council to itself in November 2004; (b) the commencement date of the lease was to be the day after, relevantly, registration of that plan of subdivision; (c) the Council's obligation to enter into the lease was conditional on registration of the plan of subdivision and, by cl 4.2(a)(2), the Council was required to "take all reasonable action to apply for and obtain" registration of the plan of subdivision on or before the Sunset Date, being 30 September 2011; and (d) if the plan of subdivision was not registered on or before the Sunset Date, being 30 September 2011, either party could "rescind" the agreement for lease by notice and, if so rescinded, neither party could make a claim for damages against the other.

201 For its part, in or around mid-2009, the respondent substantially completed construction of the hangar on what was to be Lot 104 if the plan of subdivision were to be registered. As noted, in constructing the hangar, the respondent spent $3,697,234.41. From July to November 2009, the respondent conducted an adventure flight business from the hangar. The respondent ceased operating that business in November 2009 because it was not profitable to continue. From around September 2009 until February 2010, the respondent used the hangar as an aircraft museum, but that business was also unprofitable and ceased as a result. Between August 2009 and May 2011, the respondent used the hangar for corporate events, but this business became "completely unsustainable" in or around June 2011, and therefore ceased. In this context, it is to be recalled that the Sunset Date by which the plan of subdivision was to be registered was 30 September 2011.

202 In the meantime, in February 2010, the Council's consultant for the subdivision works advised the Council that a further $1,317,764 would be required to be spent by the Council to comply with the conditions enabling registration of the plan of subdivision, including connecting the proposed lots on the western side to the existing reticulated sewerage system as required by condition 23. After it received the consultant's estimate, the Council tried to get internal approval from the Council's Infrastructure Strategy Section for the allocation of $1,317,800 to enable such compliance and, thereby, registration of the plan of subdivision. The Council failed to secure that allocation.

203 At some time before 29 June 2011 (and, as discussed below, it should be inferred that it was well before that date), the Council must have decided that it was not willing to pay the $1,317,764 necessary to comply with the conditions of

the development consent to enable registration of the plan of subdivision. This is apparent from the fact that on 29 June 2011 the Council's General Manager told a representative of ALC that "[w]e won't be proceeding with the subdivision of the land at the Airport. Council has no intention of spending about a million dollars fixing the sewerage. We don't have the money and won't be doing it."

204 On 13 September 2011, the Council also wrote to the respondent's legal representative saying that the "Council has been unable to achieve the registration of the plan of subdivision within the timeframe anticipated in the Agreement for Lease despite taking all reasonable action to enable that registration including: obtaining the subdivision approval, construction of landscape buffers and arboreal mounding, provision of concrete access crossings, construction of an intersection dust abatement seal and partial construction of a sewer carrier main", and offering to grant to the respondent an exclusive licence for a term of 25 years or a number of successive leases for five years or less.[248]

205 Although the Council asserted that it had taken all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011, that assertion was self-serving. Nothing in the terms of the agreement for lease made the Council's financial position, or willingness or unwillingness to incur debt or otherwise fund the works necessary to comply with the conditions of the development consent in the ordinary course, relevant to the reasonableness or unreasonableness of its conduct. Absent any circumstance that could be said to engage the doctrine of frustration (and no such circumstance existed), any consideration of the Council's financial position is misplaced. The Council had bound itself to take all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011. Having so bound itself, it could not avoid that obligation by crying poor.

206 The Council's notice to the respondent's legal representative on 13 September 2011 constituted a repudiation of the Council's obligations under the agreement for lease. After further failed negotiations between the respondent and the Council, the respondent vacated proposed Lot 104 in mid-2012. The Council terminated the agreement for lease in September 2015, a termination which the primary judge found valid and against which the respondent did not appeal. Brereton JA's analysis of these circumstances (Macfarlan and Mitchelmore JJA agreeing) is correct. Brereton JA said:[249]

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248 Section 23G(d) of the *Conveyancing Act 1919* (NSW) provides for the registration of a lease of part of an existing lot for a period that does not exceed five years. Otherwise, s 23F applies, the effect of which is that a lease for a period greater than five years may be refused to be registered.

249 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 498 [108].

> "Although it may be doubted whether, having repudiated its essential and fundamental obligation under the Agreement, the Council was entitled to terminate for breach by [the respondent], this holding was not challenged on appeal. ... By refusing to take reasonable action to procure registration of the Plan and stating that it did not intend to do so, the Council plainly engaged in repudiatory conduct; and there was a continuing repudiatory breach so long as the Council failed to take the reasonable steps required to procure registration. In vacating the premises, [the respondent] had accepted the repudiation and thereby terminated the Agreement. ... But if that be incorrect, and the absence of a formal acceptance of the repudiation meant that the contract remained on foot with the theoretical possibility that the Council might yet, albeit belatedly, remedy its breach by taking steps to procure registration of the Plan, it put it beyond its capacity to do so when it terminated in 2015".

Other relevant aspects of the evidence

207 In its call for expressions of interest in 1998, the Council said that the "Cessnock Aerodrome is strategically located in the rapidly developing Vineyards area of the Lower Hunter Valley" and had "failed to achieve its full potential", but that "[o]pportunities are now arising for more productive use of the aerodrome's assets". The call for expressions of interest referred to the consultant's report, the Cessnock Aerodrome Development Plan, which recommended in favour of "significant upgrading and expansion of Cessnock Aerodrome" on eight bases, including that the "Aerodrome is Strategically located in the mid Hunter and is at the prime 'Gateway' to the Vineyards District", tourism and demand for pilot training is increasing, and there "is significant potential in the site for air-related industry development (Western side) and some potential for tourism development (Eastern side)".

208 In DCP 53, published in 2004, the Council said that "[t]he proposals for expansion of the airport and associated facilities are based on a realistic balance between the potential for growth in aircraft movements over a range of categories against the cost of development and maintenance of facilities, and the need to complement those activities which make the Vineyards District a unique and important part of the City of Cessnock".

209 In August 2012, the Council endorsed the nomination of the development of the Cessnock Airport as a priority project for funding under the Hunter Infrastructure and Investment Fund. The report to the Council recommending in favour of the nomination recorded that the "Council took back management of the aerodrome in December 2011", amongst other things, to "[p]romote economic and tourism development across the local government area" and to "[p]rovide a sustainable revenue stream". The report said that "[t]his year Council has 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" and "grant funding is an opportunity for Council to meet, in the short-term, this demand from businesses wishing to establish within the local government area (economic benefit); provide an ongoing revenue stream for Council; and bring an iconic building into public ownership (social benefit)". The "iconic building", as disclosed in the nomination as submitted, is the hangar the respondent constructed. According to a subsequent application the Council made for funding, "[w]ith the expansion of Bankstown Airport being opposed by Bankstown City Council, there are strong prospects for Cessnock Airport to become the base for aviation-related businesses looking to expand". The proposal was to acquire the hangar, to fit out part of the hangar with modular office space for "businesses operating at the Aerodrome (such as helicopter flights, jet rides, vintage flights, etc)" and to lease the remainder as hangar space or for other business opportunities. The funding sought for this project was $2,000,000.

210 In 2014, the Council applied for grant funding for a "significant infrastructure upgrade of Cessnock 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". The Council sought nearly $7,000,000 in funding. The application identified that the "Cessnock Airport is a centrally-located general aviation airport ... currently being utilised for adventure, scenic and charter flights (including mining fly-in fly-out charters), ballooning, recreational flying, flying school operations and aircraft maintenance", but was lacking in the infrastructure and facilities to enable it to be used as a passenger transport or freight hub. The application also said this:

> "On the western side of the airport there are large tracts of land available for development for aviation and related business investment, *however, there is no connection of sewer or water on this part of the site, which has drastically impeded investment as well as inhibiting the expansion of existing businesses*." (emphasis added)

211 These "large tracts of land" on the western side of the Cessnock Airport are the location of the majority of the 25 lots proposed to be created and fully serviced in accordance with the development consent for the subdivision the Council granted to itself in November 2004.

212 The application also said that the "Cessnock Airport offers a major opportunity to meet the economic, employment, social and sustainability needs of all the communities and their residents across the [local government area] and become a key community asset. It is ideally situated and investment ready."

213 The Council released another version of the Cessnock Airport Strategic Plan (first released in 2014 and thereafter amended) in February 2020. This Strategic Plan described the Cessnock Airport as a "vibrant hub and an integral component to the Hunter community", the success of which was "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 Strategic Plan said that "[w]ater, sewerage and power is available to the eastern side of the Airport. The western side water is via tanks, and sewerage is treated through individual on site sewerage management systems." This reflects the fact that the Council completed only part of the works required by the development consent for the subdivision. The Strategic Plan also said that a "Precinct Masterplan will aid in attracting future development". Again, Masterplans were required to be completed under condition 20 of the development consent for the subdivision. According to the Strategic Plan, the "Cessnock Airport has excellent opportunities to capitalise on developing networks with other airports both within the Hunter Region and other adjoining regions, including metropolitan Sydney". The Strategic Plan said that "[c]onsideration to a centralised waste water system on the western side may also be an option instead of connection to 'mains'". It should be inferred that this option was raised due to the fact that the connection of the western side of the Cessnock Airport to the existing reticulated system, as required by condition 23 of the development consent before the plan of subdivision could be registered, had been estimated in 2010 to cost the best part of $1,317,764.

214 An affidavit of Teressa Chadwick, the Governance and Council Support Coordinator, who worked at the Council from October 2017 onwards, attaches documents, including documents from the Council's consultant overseeing compliance with the conditions of the development consent for the subdivision. The affidavit attaches numerous documents from the consultant from 2005 to 2008. Between 2009 and 2010, a few documents are attached from the consultant. In 2011, no documents are attached from the consultant. The documents are described as including: (a) a contract entered into in January 2007 with a contractor for the construction of sewer mains at the Cessnock Airport, with invoices and progress claims by the contractor being provided in April and May 2007, and January, February and March 2008; and (b) a quotation for the preparation of a Masterplan for the Cessnock Airport in August 2007, and further proposals for the preparation of the Masterplan by consultants in April and June 2008. From May 2009, the main communications from the consultant overseeing compliance with the conditions of the development consent for the subdivision comprised status reports rather than invoices, and other documents associated with progressing the works required to comply with the conditions of the development consent.

215 The Council called no evidence to suggest that any inference that would otherwise be drawn from the documentary record should not be drawn. The inferences that should be drawn are that: (a) at least until sometime in 2008, the Council was committed to ensuring that the conditions of the development consent for the subdivision were satisfied; (b) by no later than early 2009, the cost of those works caused the Council to reconsider its willingness to ensure that it continued to take all reasonable action required to comply with those conditions and, thereby, obtain registration of the plan of subdivision; and (c) from no later than early 2009 onwards, the Council was manifestly not continuing to progress all or at least most

of the works required to comply with the conditions of the development consent for the subdivision.

The required comparison

216 The position if the Council had performed its obligations under the agreement for lease must be compared with the actual position by reason of the Council's failure to perform its obligations under the agreement for lease. This will enable assessment of the Council's argument that, if the presumption of recoupment did arise (contrary to its case), it rebutted the presumption.

217 The Council's obligation was to take all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011. To comply with that obligation the Council would have had to satisfy all conditions of the development consent required to be satisfied before registration of the plan of subdivision and, thereafter, apply for registration of the plan of subdivision. It may be accepted that, once the Council had done these things, it could do no more to obtain registration of the plan of subdivision other than promptly dealing with any inquiries or requisitions from the registering authority.

218 It is apparent, therefore, that to enable registration of the plan of subdivision by the Sunset Date of 30 September 2011 the Council would have had to ensure compliance with the conditions of the development consent well before the Sunset Date of 30 September 2011. Had it done so and obtained registration of the plan of subdivision by the Sunset Date of 30 September 2011 then, by satisfying the conditions of the development consent, all 25 proposed lots would have been fully serviced. That is, all required kerbs, gutters, footpaths, driveways, roads, landscaping, street lighting, and drainage works would have been completed. In addition, all connections of each lot to energy services, water services, telecommunications services, and the reticulated sewerage system would have been made available to each proposed lot. Further, all required cross-easements, other easements, rights of carriageway, and dedication of land for public road purposes would have formed part of the application for approval of the plan of subdivision, ensuring legal access and provision of all services to and from all lots in the subdivision. Moreover, as required by condition 20, the Council would have prepared and approved the Masterplans as required by DCP 53. Finally, had these works been completed in sufficient time to enable the plan of subdivision to be registered by the Sunset Date of 30 September 2011, the respondent's hangar would have been located on a legal lot in a registered subdivision comprising that lot and 24 other legal lots, each lot capable of separate long-term lease by the Council and development by a third party, on the basis of approved Masterplans for the overall development of the Cessnock Airport, DCP 53 contemplating that development.

219 The actual position as at the Sunset Date of 30 September 2011, by reason of the Council's failure to perform its obligations under the agreement for lease,

was that only some of the works required by the development consent for subdivision had been satisfied. In particular, the Council had not complied with condition 23, requiring the connection of all lots to the existing reticulated sewerage system. Accordingly, none of the 25 lots had been created. Nor had any of the rights (for example, cross-easements, other easements, rights of carriageway, and dedication of land for public road purposes) which would have been created by approval of the plan of subdivision. None of the proposed lots were capable of being the subject of the grant of a lease exceeding five years.[250] The hangar continued to exist on a large parcel that included proposed Lot 104, but neither proposed Lot 104 nor any of the other 24 proposed lots existed.

220 Two further points should be made in this comparative exercise. First, the respondent commenced its business operations from the hangar on proposed Lot 104 once it had been connected to services as the development consent required, but the time during which it conducted those business operations (from July 2009 to June 2011) coincided with the period by and within which the Council manifestly was not proceeding to complete the works required for the plan of subdivision to be registered and within which the Council positively decided that it would not be doing so. Second, at least in its application to obtain grant funding in 2015, the Council considered that the lack of connection of the western side of the Cessnock Airport to the existing reticulated sewerage system "has drastically impeded investment as well as inhibiting the expansion of existing businesses", that being the main development area for hangars and hangar homes identified in DCP 53, which, to enable secure tenure to be granted, would have required registration of the plan of subdivision.

The Council's case

221 The essence of the Council's case, as relevant to this appeal, was that the respondent had to prove that the money it spent on building the hangar was "wasted" in the sense that, had the Council performed its legal obligations under the agreement for lease, the respondent would have recouped at least that amount of money over the term of the lease. Putting it another way, the Council's case was that the respondent had not proved that it was in any different position from that in which it would have been had the Council performed its legal obligations under the agreement for lease, with the asserted consequence that the respondent suffered no loss by reason of the Council's breach of contract. According to this argument, the respondent's business proposals for the hangar were inherently speculative and, even if the Council had taken all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011, the respondent's businesses would have failed by no later than June 2011 in any event (as they did in fact fail).

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250 *Conveyancing Act 1919* (NSW), ss 23F, 23G(d).

222 This argument also involved the proposition that the businesses the respondent operated from the hangar between July 2009 and June 2011 could never have been profitable without the development of the Cessnock Airport otherwise proceeding, the Council never guaranteed that such development would have occurred either by the Sunset Date of 30 September 2011 or at all, and such development depended on the actions of third parties and therefore was outside of the Council's control. By reason of these matters, the Council contended that either the presumption did not arise at all in this case or that, if the presumption arose, it had been rebutted.

McRae

223 In *McRae*, Dixon and Fullagar JJ explained the principles that should be applied in a case of claimed wasted expenditure by distinguishing between: (a) a fallacious conception of that case as one of non-delivery of a contracted-for item (an oil tanker capable of salvage) which meant that the plaintiffs' expenditure on seeking to salvage the non-existent tanker could not be "wasted" in the sense necessary to constitute recoverable loss; and (b) the correct conception of the case as one in which "the contract alleged is a contract that there was a tanker in a particular place, and the breach assigned is that there was no tanker there, and the damages claimed are measured by expenditure incurred on the faith of the promise that there was a tanker in that place".[251] On that correct basis, Dixon and Fullagar JJ said that:[252]

> "[The plaintiffs] have now a starting-point. They can say: (1) this expense was incurred; (2) it was incurred because you promised us that there was a tanker; (3) the fact that there was no tanker made it certain that this expense would be wasted. The plaintiffs have in this way a starting-point. They make a prima-facie case. The fact that the expense was wasted flowed prima facie from the fact that there was no tanker; and the first fact is damage, and the second fact is breach of contract. The burden is now thrown on the Commission of establishing that, if there had been a tanker, the expense incurred would equally have been wasted. This, of course, the Commission cannot establish. The fact is that the impossibility of assessing damages on the basis of a comparison between what was promised and what was delivered arises not because what was promised was valueless but because it is impossible to value a non-existent thing. It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on another basis, and, in so far as the Commission's breach of contract itself reduces

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251 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414.

252 (1951) 84 CLR 377 at 414.

> the possibility of an accurate assessment, it is not for the Commission to complain."

224 Their Honours were not saying that the plaintiffs had to prove that it was impossible to assess damages on the usual basis of returns had the contract been performed before the plaintiffs could recover their loss. They were recognising wasted expenditure as a category of recoverable loss and saying only that it hardly befitted the party in breach to complain about the fact that the plaintiffs could not prove their loss on the usual basis. They also were not saying that the contract had to be within some special class before expenditure in reliance on (not mere performance of) the contract would be characterised as "wasted" by reason of the non-performance of the contractual promise.

Amann Aviation

225 It may be accepted that the reasoning in *The Commonwealth v Amann Aviation Pty Ltd*[253] is not as straightforward as that of Dixon and Fullagar JJ in *McRae*. But that is no reason to elevate every or any nuance of the Court's reasoning processes to the level of principle.

226 Mason CJ and Dawson J concluded that "a plaintiff has a prima facie case for recovery of wasted expenditure once it is established that the expense was incurred in reliance on the promise of the party in breach, there being a failure of performance by that party", it being "just and fair that the repudiating party should bear the onus of showing that the party not in breach would have made a loss on the contract".[254] As they put it, "it was a case in which, it being natural and appropriate for Amann to sue to recover its wasted expenditure by way of reliance damages, the onus rested on the Commonwealth of establishing that the reliance expenditure would have been wasted even if the contract had been performed".[255] This accords precisely with the reasoning in *McRae*, the only difference being their Honours' observation that, unlike *McRae*, "it was not impossible, as a matter of theory, for Amann to establish what its profits (if any) would have been had the Commonwealth not repudiated the contract".[256] Again, the point is not that the Commonwealth's breach had to make it impossible or even difficult for Amann to prove loss other than on the basis of wasted expenditure. It is simply that it is hardly for the party in breach to complain about that impossibility or difficulty.

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253 (1991) 174 CLR 64.

254 (1991) 174 CLR 64 at 89.

255 (1991) 174 CLR 64 at 90.

256 (1991) 174 CLR 64 at 89.

227 The exception to the presumption which Mason CJ and Dawson J contemplated, of "a purely aleatory contract" where "inherent in the entry into such a contract is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit",[257] should not be permitted to be expanded beyond its strict terms. An aleatory contract is one in which the required performance depends entirely on a mere chance event, such as a life insurance contract. The agreement for lease between the Council and the respondent was not of this kind. There is no principled basis available to expand the exception to the presumption which Mason CJ and Dawson J contemplated.

228 Brennan J accepted that "the amount which a plaintiff has reasonably expended in reliance on the defendant's promise and which is wasted by reason of the defendant's breach of his promise is a proper subject of damages for breach of contract"[258] and that while the onus of proof of loss was on the plaintiff a "sufficient and necessary justification for shifting the onus to the party in breach in the assessment of damages for wasted expenditure incurred in reliance on the defendant's promise before rescission for breach is that the breach of the contract itself makes it impossible to undertake an assessment on the ordinary basis".[259] This conception of the justification for the presumption or prima facie case of recoupment also does not make impossibility of an assessment of loss on the ordinary basis a prerequisite to the engagement of the presumption or prima facie case of recoupment.

229 Deane J, quoting an observation of Cooke J, observed that "[i]t has been truly said that the assessment of damages in contract and tort is 'a pragmatic subject ... [which] does not lend itself to hard-and-fast rules'".[260] Reflecting that pragmatism, his Honour said that "[i]n a case where a plaintiff has incurred expenditure either in procuring the contract or in its performance but it is impossible or difficult to establish the value of any benefits which the plaintiff would have derived from performance by the defendant, considerations of justice dictate 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".[261] Deane J continued, saying that "[w]here that

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257 (1991) 174 CLR 64 at 88.

258 (1991) 174 CLR 64 at 104.

259 (1991) 174 CLR 64 at 106.

260 (1991) 174 CLR 64 at 119, quoting *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 at 69.

261 (1991) 174 CLR 64 at 126.

presumption is operative, it enables the recovery by a plaintiff of what are commonly referred to as 'reliance damages', that is to say, damages equivalent to the wasted expenditure which has been reasonably incurred in reliance upon the assumption that the contractual promises of the defendant would be honoured" but that the "presumption will be rebutted if it be self-evident or established that the plaintiff would have derived no financial or other benefit from performance of the contract or that any financial or other benefit which would have been derived from future performance would not have been sufficient in value to counterbalance the past expenditure".[262] This reasoning is not readily reconcilable with *McRae* and involves the contradiction of, on the one hand, requiring the assessment of damages on the usual basis (returns from the performance of the contract) to be impossible or difficult and, on the other hand, imposing an onus on the party in breach to disprove the impossible or difficult.

230 Toohey J considered that the principle in *Robinson v Harman*[263] – that damages for breach of contract are to place the party who has sustained loss, so far as money can do so, in the same position as if the contract had been performed – accorded with the concept of reliance damages provided that such damages did not exceed the wasted expenditure.[264] Toohey J accepted that "if the plaintiff would not have recouped [their] outlay in any event, [they are] not entitled to reliance damages".[265] His Honour reiterated that "the primary rule is that it is for the plaintiff to establish the damages to which [they are] entitled",[266] but this was "not to say that, in some instances, damage may not be inferred or presumed".[267] His Honour resolved the question of onus on the basis that "[t]here is, in effect, 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. It may be assumed, in the absence of evidence to the contrary, that the plaintiff would have recovered [their] costs."[268]

231 Gaudron J identified that "[t]he present case is one in which the uncertainties are such that it is not possible to make any reliable estimate of the value of Amann's contractual rights. Thus, it is one in which the assessment of

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262 (1991) 174 CLR 64 at 126-127.

263 (1848) 1 Ex 850 at 855 [154 ER 363 at 365].

264 (1991) 174 CLR 64 at 135.

265 (1991) 174 CLR 64 at 136.

266 (1991) 174 CLR 64 at 137.

267 (1991) 174 CLR 64 at 138.

268 (1991) 174 CLR 64 at 142-143.

damages might properly be approached having regard to Amann's wasted expenditure."[269] Gaudron J said that "[o]nce it is appreciated that damages assessed by reference to wasted expenditure are awarded to compensate for the loss of contractual rights or for loss of profits, it is apparent that what is involved is an assumption that the loss is no less than that which has been outlaid and wasted by reason of repudiation or breach".[270] Gaudron J rejected the notion that the party in breach was subject to a legal onus, but said that "[t]he assumption which underlies the award of damages by reference to wasted expenditure, like all assumptions, is one which, once made, will ordinarily be maintained unless displaced by evidence pointing to the contrary. In a practical sense that may mean that the assumption will often be made and maintained unless the defendant proves otherwise."[271] As a "starting-point", the assumption had to "give way if there is evidence to the contrary".[272] Further, "the circumstances may be such as to preclude any assumption to that effect. Thus, the assumption will not be made if it appears that receipts would have been less than the amount of the wasted expenditure."[273]

232 McHugh J did not accept that *McRae* was based on a principle "that proof of expenditure gives rise to a prima facie inference that it will be recouped by the carrying out of the contract", that decision being "satisfactorily based on the broad principle of justice that, if the breach of the defendant has made it impossible to ascertain whether or not the plaintiff would have made a profit from the performance of the contract, it is only fair that the defendant should reimburse the plaintiff for expenditure which it has wasted as the result of the breach".[274] Accordingly, his Honour considered that once the plaintiff had proved that it was impossible to assess the outcome of performance of the contract, the plaintiff "is entitled to be compensated for all expenditure wasted in reasonable reliance on the defendant's promise to perform its side of the contract".[275] This approach, like that of Deane J, may also elevate the impossibility of ascertaining damages on the usual basis to a precondition to the engagement of the presumption, contrary to *McRae*.

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269 (1991) 174 CLR 64 at 154.

270 (1991) 174 CLR 64 at 155-156 (footnote omitted).

271 (1991) 174 CLR 64 at 156.

272 (1991) 174 CLR 64 at 156.

273 (1991) 174 CLR 64 at 157.

274 (1991) 174 CLR 64 at 166.

275 (1991) 174 CLR 64 at 166-167.

Post-*Amann Aviation*

233 In *Berry v CCL Secure Pty Ltd*,[276] in explaining *Amann Aviation*, Bell, Keane and Nettle JJ said that:[277]

> "While 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 ... One relevant modern application of that principle is reflected in this Court's decision in *Amann Aviation*".

234 While their Honours referred to Brennan J as having explained that, in the circumstances of that case, "it was just that the Commonwealth should bear the ultimate onus of proving at least a prospect that Amann's returns under the contract would not have been sufficient to recoup that expenditure",[278] their Honours should not be understood as suggesting that a party in breach in such a case will discharge its onus merely by proving a "prospect" of non-recoupment had the contract been performed. There was no need for their Honours to consider the presumption on the facts of that case,[279] and it is clear from the reasoning in *Amann Aviation* that the mere prospect of non-recoupment was not sufficient to defeat Amann's claim for recoupment of wasted expenditure.

235 The approach of Dixon and Fullagar JJ in *McRae* accords with that of Mason CJ and Dawson J in *Amann Aviation*. That approach has the advantage of embodying the robust practicality, informed by considerations of fairness and justice, that the common law takes to the assessment of damages for contractual breach. That approach should be applied as indeed the Court of Appeal did.[280]

The presumption

236 The applicable principles, if engaged, do not permit the Council's attempts to elevate what are truly matters of the sufficiency of proof – namely, for the party in breach to rebut the presumption by discharging the legal onus on it in a particular case – to the status of preconditions to the engagement of the presumption. Accordingly, leaving aside purely aleatory contracts (where the presumption may

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276 (2020) 271 CLR 151.

277 (2020) 271 CLR 151 at 169 [29] (footnotes omitted).

278 (2020) 271 CLR 151 at 170 [29].

279 (2020) 271 CLR 151 at 170 [30].

280 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 487-488 [73].

not arise at all), the strength of the presumption does not vary depending on the nature of the particular contract or the allocation of risks under it. The presumption is the presumption. It is a presumption that expenditure in reliance on the other party's performance of the contract is wasted expenditure and, therefore, is a recoverable category of loss if the contract is not performed by reason of that other party's breach. What may vary is the evidence necessary to rebut the presumption having regard to the nature of the particular contract or the allocation of risks under it. Similarly, considerations such as the nature and degree of the expenditure and its relationship (essential or incidental) to the contract, the expected source of recoupment of the expenditure (from the contract breaker or otherwise), the degree of speculation inherent in the contract or expenditure, and the actual conditions referable to the contract leading up to the breach – all of which were called in aid by the Council to support its case – do not determine whether the presumption is engaged or not. Nor do such considerations determine the strength of the presumption. But they may be relevant to the question of the remoteness of damage, the reasonableness of the expenditure, and the evidence sufficient to rebut the presumption by discharge of the legal onus of the party in breach.

Application of *McRae* and *Amann Aviation* to the present case

237 No party challenged the correctness of *McRae* or *Amann Aviation* in this appeal.

238 The respondent spent the $3,697,234.41 constructing the hangar. There can be no proper suggestion in this appeal that this expenditure was unreasonable. The respondent constructed the hangar relying on the Council's contractual promise to take all reasonable action to apply for and obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011. While that contractual promise did not guarantee registration of the plan of subdivision, it did guarantee that the Council would do everything reasonable to enable such registration. Those actions included satisfying the conditions of the development consent for the subdivision. The loss in the form of the wasted expenditure is within the second limb of the rule in *Hadley v Baxendale*,[281] namely such loss as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as being the probable result of the breach. The Council has not proved that the respondent would not have recouped the cost of constructing the hangar if the Council had fulfilled its contractual promise.

239 One problem with the Council's arguments that it rebutted the presumption is that they fail to recognise the difference between: (a) on the one hand, operating the businesses the respondent operated from the hangar between July 2009 and June 2011 in circumstances where the Council was manifestly working towards completing all works required by the development consent to enable registration

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281 (1854) 9 Ex 341 [156 ER 145].

of the plan of subdivision and obtaining approvals for the Masterplans required by DCP 53; and (b) on the other hand, operating those businesses in circumstances where those works had manifestly stalled due to lack of the commitment of funds by the Council to complete those works. Another problem with the Council's arguments that it rebutted the presumption is that, as is apparent from the Council's own documents referred to above, everything the Council said and did from 1998 in relation to the development of the Cessnock Airport is irreconcilable with those arguments.

240 It is also not to the point that the profitability of the respondent's businesses being conducted from the hangar always depended on the patronage not of the Council but of others. It is obvious that the patronage of others was going to be heavily dependent on the Council fulfilling its contractual obligation to take all reasonable action to obtain registration of the plan of subdivision by the Sunset Date of 30 September 2011. The Council did not guarantee that others would take up the development potential of the other lots to be created by the subdivision. But it did guarantee to take all reasonable action to create those lots by the Sunset Date of 30 September 2011. And, in guaranteeing that, it also guaranteed to satisfy the conditions of the development consent. Had it done so, those proposed lots would have been fully serviced and immediately available for development. That hypothesised circumstance bears no resemblance to the reality of the respondent's business operations from the hangar between July 2009 and June 2011, in which development could not occur on the western side of the Cessnock Airport because the Council was unwilling to spend the money required to service that land in accordance with the development consent for the subdivision.

241 Further, it is not correct to say, as the Council contended, that the respondent's success depends on matters where the key evidence lay with the respondent, namely as to what businesses it would have sought to conduct and how it would have sought to finance them if the Council had fulfilled its contractual promise. The respondent conducted businesses from the hangar, but they failed in the actual situation of the Council not having fulfilled its contractual promise. Accordingly, the "disastrous performance" of the respondent's businesses up to breach, as the Council described it, proves nothing. It is quite unrealistic to infer that the failure of the respondent's businesses in the actual situation in which it found itself between 2009 and 2011 would have been the same had the Council not repudiated the contract. It is one thing to accept that the repudiation did not occur until 13 September 2011, when the Council wrote to the respondent. It is another to assume or infer that the respondent's businesses would have been in the same circumstances between 2009 and 2011 irrespective of that repudiation.

242 The Court of Appeal was correct to conclude that "the fact that there was no promise to develop the airport does not mean that the potentiality of its development is irrelevant when considering whether the Council had shown that [the respondent] would not recoup its expenditure", as "it is permissible to have regard also to potential benefits that might have accrued to the plaintiff, although

they are not contractual entitlements, if they may reasonably be supposed to have been in the contemplation of the parties" when they entered into the contract.[282] The Court of Appeal was also correct to conclude that "[p]roof of losses in the early stages of a business or enterprise that was to run for many years does not establish that, over the term of the Lease, [the respondent] would not have earnt sufficient revenue to recoup its costs".[283] This is particularly so in the circumstances identified above, namely that the respondent's businesses were operating in an environment not comparable to the environment in which they would have been operating had the Council fulfilled its contractual promise. Accordingly, the Council did not discharge the onus of proving that the expenditure on the hangar would have been wasted irrespective of its repudiation of the contract. Therefore, the presumption of recoupment was not rebutted.

243 For these reasons, the appeal should be dismissed with costs.

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282 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 505 [126].

283 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at 507 [131].