# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Fulmer v Thompson & Ors (No 2)* [2017] QSC 256 |
| PARTIES: | **PETER JOHN FULMER**<br>(Plaintiff)<br>**v**<br>**GRAHAME LIONEL THOMPSON**<br>(First Defendant)<br>**SHANE THOMPSON**<br>(Second Defendant)<br>**CAYSAND NO. 24 PTY LTD ACN 010 615 586**<br>(Third Defendant)<br>**CAYSAND NO. 25 PTY LTD ACN 117 364 511**<br>(Fourth Defendant) |
| FILE NO/S: | No 431 of 2012 |
| DIVISION: | Trial |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court at Cairns |
| DELIVERED ON: | 7 November 2017 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 14 July 2017. Further submissions in writing received 8 August 2017 and 15 August 2017. |
| JUDGE: | Henry J |
| ORDERS: | **1. Judgment for the plaintiff against the defendants in the amount of $993,161.39.**<br>**2. I will hear the parties as to costs if costs are not earlier agreed at 9.15 am on 22 November 2017.** |
| CATCHWORDS: | DAMAGES – GENERAL PRINCIPLES – DIFFICULTY OF ASSESSING DAMAGES – where the plaintiff seeks damages for breach of contract by the defendants – where the plaintiff claims loss of share value and loss of chance to profit – where the plaintiff claims loss of income that the plaintiff would otherwise have earned – where court awarded damages for breach of contract and loss of chance to profit – where court declined to award damages for loss of income<br><br>*Hadley v Baxendale* (1854) 9 Exch 341, cited<br>*Howe v Teefy* (1927) 27 SR (NSW) 301, cited<br>*Fink v Fink* (1946) 74 CLR 127, cited<br>*Jones v Dunkel* (1959) 101 CLR 298, distinguished<br>*Jones v Schiffmann* (1971) 124 CLR 303, cited |

*McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, cited
*Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625, cited
*Placer (Granny Smith) Pty Ltd v Theiss Contractors Pty Ltd* (2003) 196 ALR 257, cited
*Robinson v Harman* (1848) 1 Exch 850, cited
*TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130, cited
*The Commonwealth v Aman Aviation Pty Ltd* (1991) 174 CLR 64, followed
*Wenham v Ella* (1972) 127 CLR 454, followed

COUNSEL: M T Hickey for the plaintiff
M A Jonsson QC for the first, second and third defendants

SOLICITORS: B & G Law for the plaintiff
Preston Law for the first, second and third defendants

[1] After the plaintiff succeeded in his claim against the defendants[1] I entertained further oral and written submissions as to the appropriate orders for relief. These reasons determine the relief to be awarded, save as to costs. They assume knowledge of the reasons already given in this proceeding.

[2] The plaintiff made an election as to the relief sought[2] and subsequently indicated a number of orders sought were no longer pressed or were sought in amended form.[3] The orders ultimately sought by the plaintiff [4]are:

1. a declaration that, since 21 March 2010, Mr Fulmer has had an equitable interest in 30 per cent of the business as defined in the statement of claim;

2. a declaration that, on 21 March 2010, Mr Fulmer was entitled to have transferred or issued to him 30 per cent of the issued shares in the third defendant;

3. an order that Grahame Thompson, Shane Thompson and Caysand 24 pay Mr Fulmer damages for breach of contract in the amount of $2,102,654.48 comprising:

   (a) $550,000.00, for the value of the shares in Caysand 25, not transferred to Mr Fulmer ("loss of value of shares");

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1 *Fulmer v Thompson & Ors* [2017] QSC 119.
2 See draft order Ex 17.
3 Further written submissions of the plaintiff filed 8 August 2017.
4 Per further written submissions of the plaintiff filed 8 August 2017.

(b) $930,456.50, being the value of the loss of the chance to enjoy the profits of the business, for which Mr Fulmer bargained ("loss of chance to profit");

(c) $622,197.98, for income foregone by Mr Fulmer, in reliance upon the contract being performed ("loss of income");

4. an order that Grahame Thompson, Shane Thompson and Caysand 24 pay Mr Fulmer interest on each of the above amounts.

**Declaratory relief**

[3] The declarations sought relate to the business "as defined in the statement of claim". That business was the business of the third defendant, Caysand 24. It corresponds with the business described in the Heads of Agreement and is the business which was, pursuant to the agreement, to be transferred to Caysand 25 on the completion date, 21 March 2010. In breach of the agreement it was not transferred then, or later for that matter.

[4] Mr Fulmer does not seek specific performance and rather seeks damages for the loss occasioned by the breach of 21 March 2010. Given he will be compensated for a loss suffered from 21 March 2010 it is unnecessary to decide whether or not he held some form of equitable interest arising from the agreement "since" that time in the company which did not transfer the business. It is similarly unnecessary to decide whether he therefore had a consequential entitlement to shares in that company. I decline to make the declarations sought because, even if those issues were decided favourably to Mr Fulmer, there is no utility in making the declarations.

**Damages**

*Adequacy of evidence*

[5] Aspects of the plaintiff's submissions in support of damages relied upon the veracity of some of the purported financial records which my reasons found to be infected with problems of proof and reliability. The plaintiff drew upon the principle in *Jones v Dunkel*[5] to contend that if the defendants had led financial evidence of integrity at the trial it would have shown the profits of the business were greater than shown by what was advanced and would have shown no losses in respect of Boat Scene. It was submitted that if records actually advanced through Mr Hogbin did not represent the true financial position they would not have put the defendants' position less favourably for them than the true position. Therefore, it was submitted, it would work no unfairness to the defendants if those records were used to assess the quantum of damages payable by them to the plaintiff.

[6] I reject that approach. In the present context, all that can be said of the absence of proper proof of reliable financial records by the party best placed to adduce it is that

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5 (1959) 101 CLR 298.

such a party is not well placed to contradict inferences which may be drawn from less precise forms of properly proved evidence.[6] That absence does not shift the onus from the plaintiff of proving the fact of loss and its quantum and there must be facts properly proved from which the inferences sought by the plaintiff can be drawn.

[7] The defendants contended there were no such facts, that is, that there was no evidence capable of establishing the actuality and quantum of loss.

[8] I unhesitatingly reject the contention that no actual loss was suffered. Mr Fulmer invested his money and work to acquire an interest priced at $550,000 in a profitable business but was wrongly deprived of that interest. The conclusion that loss was actually suffered is obvious.

[9] As to the task of quantifying loss as a result of breach of contract it is well established that difficulty in performing that task with precision does not absolve the court from the task and the court must estimate the quantum of loss as best it can.[7] In any event, in the present case there exists a helpful body of properly proved facts allowing informed inferences to be drawn as to the quantum of loss. For example, the evidence of the price paid by Mr Fulmer for his interest in the business provides evidence of the value of that interest. Similarly, the fact the target sum was reached on 20 January 2010 according to a contractual formula premised on measuring an accumulation of a proportion of profit in the preceding four years since 1 January 2006 allows inferences to be drawn about the profitability of the business. These aspects are canvassed further below.

*The nature of the loss contended for*

[10] The more challenging aspect of the present task is properly conceptualising the nature of the loss or losses to be assessed.

[11] The plaintiff asserts three types of loss: loss of value of shares, loss of chance to profit and loss of income. They are expanded upon below.

[12] The defendants contend for a single type of loss, namely the loss of hypothetical market value. They submit the value of Mr Fulmer's loss is the value of his proportionate share and expectancy in the capital value of the hypothetical business that ought to have been transferred to Caysand 25. They submit that value is the purchase price as at the date of breach which a hypothetical purchaser would pay, taking into account the potential profitability of the business in the light of the financial burdens, risks and uncertainties associated with the business as reconstituted under Caysand 25. Because future profitability is said to be a factor in the assessment of capitalised value they submit a separate award for loss of chance to profit would involve a double up. The defendants contend the evidence advanced by the plaintiff should have included a projection of forecast cash flows of the business if reconstituted under Caysand 25, appropriately

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6 *Placer (Granny Smith) Pty Ltd v Theiss Contractors Pty Ltd* (2003) 196 ALR 257, 259, 267.

7 *Howe v Teefy* (1927) 27 SR (NSW) 301,306; *Fink v Fink* (1946) 74 CLR 127, 143; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 411; *Jones v Schiffmann* (1971) 124 CLR 303, 308; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625, 642; *The Commonwealth v Aman Aviation Pty Ltd* (1991) 174 CLR 64, 83, 102, 125, 153.

discounted for the accelerated realisation and commercial risks, uncertainties and future vicissitudes associated with the reconstituted business. In the absence of such evidence they submit there is insufficient evidence to assess a capitalised value and therefore only nominal damages should be awarded.

[13] I reject that argument for three reasons. Firstly, it wrongly assumes there is inadequate evidence to allow a conclusion about profitability. The evidence of the sound profitability of the business in the four years preceding the target date provides a credible evidentiary foundation to inform consideration of profitability, even allowing for matters of uncertainty such as the consequences for profitability of the transfer of ownership of the business. Secondly, the defendants' argument ignores the parties' agreed purchase price. That provides useful evidence of the value of Mr Fulmer's acquisition. Thirdly, the defendants' argument is premised on one method of assessing loss when other methods are available.

*Loss of value of shares*

[14] The starting point in assessing damages where a party has sustained loss by reason of a breach of contract is the principle in *Robinson v Harman*[8] that, so far as money can allow it, the party is to be placed in the same position as if the contract had been performed. However as was explained by Gibbs J in *Wenham v Ella*[9] that principle is limited by the requirement of the rule against remoteness of loss in *Hadley v Baxendale*,[10] namely:

> "[D]amages … in respect of … breach of contract should be such as 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 contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[15] In the present case it would have been comfortably within the contemplation of the parties that, if the contract was not completed, Mr Fulmer would be deprived of the value of shares in a company owning the business. That is, even if he were the owner of shares in Caysand 25, his shares would be valueless if the business was not transferred to Caysand 25.

[16] The plaintiff submits that had the contract been performed Mr Fulmer would have been the owner of shares with a value of $550,000 and that he ought receive damages compensating him for that loss. That amount is half of the amount of $1,100,000, which was the target sum to be met by Mr Fulmer and Mr Clay Thompson pursuant to clause 2.2 of the Heads of Agreement. It will be recalled each man's $550,000 share was comprised of their $150,000 monetary contribution plus the $400,000 balance met from their proportionate share of net profits generated while they were working to the benefit of the business.

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8 *Robinson v Harman* (1848) 1 Exch 850, 855.
9 (1972) 127 CLR 454, 471.
10 (1854) 9 Exch 341, 354.

[17] The plaintiff contends the value of $550,000 ascribed to Mr Fulmer's shares by the parties through their agreement is good evidence of the value of Mr Fulmer's shares by the date upon which the target sum was met. The defendants on the other hand contend this was merely a target figure informing a notional process of staged payments from profits triggering what was supposed to be the transfer of the business from Caysand 24 to Caysand 25. It was more than that. It was the price paid to acquire a share of the business which was to be transferred to Caysand 25, a price paid by the accumulation of the initial cash contribution and the subsequent profit credits attributable, in effect, to Mr Fulmer's contribution to the operation of the business. It was the purchase price.

[18] Why should the purchase price which the defendants attributed to Mr Fulmer's acquisition, the first three defendants having an intimate knowledge of the true worth of the business, not speak eloquently of what its capital value would have been as at the completion date? Admittedly the price was first ascribed in late 2005, more than four years before the target sum was reached, but it was confirmed again in mid-2008 in the Heads of Agreement and the sound profitability of the business throughout the over four years preceding the completion date makes it unlikely the actual value of the shares would have diminished in that time. I find the $550,000 in effect ascribed by the parties as the purchase price of Mr Fulmer's shares is reliable evidence of what their value would have been as at the completion date if the contract had been completed.

[19] That amount should be paid as damages with interest payable on it from the completion date to the date of this judgment.[11]

*Loss of chance to profit*

[20] The plaintiff also contends that quite apart from being deprived of the capital value of the shares by the breach he also lost the chance of obtaining the benefit of deriving profits from the shares. The defendant resists compensating for such a loss on the basis the potential profitability of the business is a constituent element of the shares' capital value so that to allow for that potential in an additional head of damage would involve a compensatory double up. This has echoes of an argument run and lost in the High Court *Wenham v Ella*,[12] a case in which the plaintiff was compensated for the value as at the date of breach of an interest in income producing land as well as the loss of income from the land to the date of judgment.

[21] Here the plaintiff seeks damages for the loss of chance to profit as distinct from loss of profit but that is not a point of distinction emphasised by the defendants and does not detract from the relevance of the High Court's reasoning to the present point. The defendants do however emphasise that *Wenham v Ella* involved the acquisition of real estate rather than a business. There Stephen J observed:

> "The appellants' submission appears to me to involve treating the interest in real estate as if it were no more than a right to an annuity for a term of years, the value of which is only the sum of future annuity payments, less a

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[11] To remove doubt, given it may in one sense be said I gave judgment in delivering my earlier reasons I take the approach that because judgment as to damages owing is occurring today the interest on such damages should be calculated as pre-judgment interest to today.

[12] (1972) 127 CLR 454.

> discount to take account of their deferred receipt. The interest in land here in question is of a quite different character. It confers no mere right to a finite number of future income payments; its value does not necessarily decline with the passing of time as does that of an annuity for a term of years. Indeed, due to inflation or to supply and demand factors or both, it may greatly appreciate as time passes. …
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> Basic to the appellants' argument must be the proposition that the value of the interest in land, which value forms the first element of the damages awarded, included within it the full amount of the lost income which forms the second element of damages. Only if this be so will that second element wholly duplicate some part of the first element of damages awarded. The proposition so expressed appears to me to be untenable; not only is the income entitlement one of indeterminate duration but, more significantly, only a discounted fraction of any entitlement to income in the future, discounted for futurity of receipt, will be reflected in the first element, market value.
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> No doubt in theory one constituent of the market value of the interest reflects the discounted value of future income which it will bring in. Were it ever possible to separate that element from others, … it might properly be taken into account in reduction of the second element of damages here awarded."[13]

[22] The defendants submit the interest in shares in the present case is different than an interest in real estate and analogous to the example of an annuity referred to by Stephen J. This is presumably on the basis future profit from shares in a company which owns a business is somehow akin to future payments under an annuity. However, the future profit which a company may derive from a business and distribute to its shareholders is not the only constituent feature of the value of shares in the way annuity payments are the only constituent value of an annuity. Share ownership in a company which owns a business, particularly a small business, may have value merely by reason of the platform it provides its owners for the professional and personal satisfaction of participating in and managing the business. It may have value as an avenue for self-employment, providing a good, reliable income for its owners as an operating expense of the business, without necessarily generating distributions from profit to its owners as shareholders.

[23] If the contract had been performed here the plaintiff would not only have obtained the value of his shares in the company which would have owned the business but would also have received any profit which that share produced after the date of completion of the contract. The loss of that opportunity to subsequently profit was directly caused by the breach. The contemplation by the defendants of such a loss here was therefore as readily apparent as the contemplation of loss by the appellants in *Wenham v Ella*, of which Gibbs J observed:

> "[I]t must reasonably be supposed that the appellants, if they had applied their minds to the question at the time when they entered into the agreement, would have contemplated that such a loss would flow from a breach. On principle, therefore, the damages would appear to be recoverable."[14]

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[13] (1972) 127 CLR 454, 475.
[14] (1972) 127 CLR 454, 472.

[24] It is necessary to now consider whether the loss of a chance to profit had some value (not being a negligible value) on the balance of probabilities, and if so, to estimate the value of that loss by reference to the degree of probabilities or possibilities attending it.[15]

[25] The plaintiff's submissions approached these tasks simultaneously, relying upon Mr Coutts' analysis.[16] On that analysis, assuming the target amount was met by 30 June 2012 Mr Fulmer's entitlement (net of wages and tax) representative of his 30 per cent interest in the business was $1,330,456.50 and, taking into account the $400,000 balance of the vendor finance sum payable, the "residual distribution" to Mr Fulmer for the period until 31 March 2014, was the sum of $930,456.50.

[26] It is uncontroversial that, subject to qualifications discussed below, Caysand 24's profitability may inform consideration of the likelihood of profitability of Caysand 25. However, the above calculation carries no weight given the problems already identified with the reliability of data made available to Mr Coutts and the randomness of the dates adopted. It also appears to involve an attempt to identify actual lost profit rather than the inherently less precise value of the lost chance to profit.

[27] A more reliable source of information as to Caysand 24's profitability is what Mr Fulmer's proportionate share of its net profits was during the period from 1 January 2006 up to the point when the target sum was reached. That is readily ascertainable by working backwards from my finding that the target sum had been met by 20 January 2010.

[28] It will be recalled Mr Fulmer, agreed to work as a manager in the business from 1 January 2006, being paid out of his proportionate share of profit with the balance of his proportionate share of profit paying off the target sum. That sum, or purchase price as I have described it, had been met by 20 January 2010. That fact means that between 1 January 2006 and 20 January 2010, four years and 19 days later, Mr Fulmer's proportionate share of profits generated by Caysand 24, after that share also paid his income, must have been a total of $400,000 (the $550,000 purchase price, less the $150,000 monetary contribution). That represents an average annual proportionate profit share of $98,648.65, that is, about $100,000 per annum.

[29] While profitability will vary from year to year this data represents an average of four years and therefore provides a reasonable evidentiary indicator of Mr Fulmer's prospect of profiting as a shareholder subsequent to the completion date. Of course, if the agreement had been honoured and if the transfer to Caysand 25 had occurred, it must be borne in mind that transfer was to exclude stock and real estate and that Caysand 25 was to lease Caysand 24's business premises. While the non-transfer of real estate is unlikely to have materially affected the quantum of the aforementioned trend in profit share,[17] the need for a business of this kind to lease premises and acquire afresh a sizeable trading stock of vehicles would invariably have had a material effect on the

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[15] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355, 368. A process recently discussed in *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2017] QCA 254.

[16] Ex 1 Vol 1 tab 4 p 316.

[17] See for example the February 2009 profit and loss statement, the content of which shows the calculation of Mr Fulmer's proportionate share of profit did not include profit from real estate.

profitability of the transferred business. Nonetheless it should also be borne in mind Mr Fulmer's notional share of profit was 30 per cent. Because his above-mentioned profit share of about $100,000 per annum was not more than 30 per cent of overall profit,[18] the per annum profit generated by the business prior to the completion date comfortably exceeded $300,000 per annum. While I accept the transferred business under Caysand 25 would not have been as profitable as it had been under Caysand 24 in the four years preceding the completion date, I readily infer it would still have made a profit of substance. I therefore find Mr Fulmer did lose a chance to profit and that it was a chance of some value.

[30] In estimating the value of that loss it is necessary to allow for the aforementioned material effect on profitability which the transfer of the business to Caysand 25 would have involved.

[31] It ought also be borne in mind in this hypothetical exercise that there would likely have remained an on-going need to pay both Mr Fulmer and Clay Thompson or someone performing their roles. A contingency flowing from this is that there have been changes to the financial management of the payment of salaries as distinct from profit payable to shareholders.

[32] For instance, it will be recalled Mr Fulmer, who had previously earned $150,000 to $200,000 per annum, agreed to work as a manager in the business from 1 January 2006 for a lesser income, starting at $80,000, paid by part of his proportionate share of profit in return for the balance of his proportionate share of profit paying off the target sum. Supposing the contract was completed, it may have been Mr Fulmer would have wanted to be paid a salary more in line with his pre-2006 pay levels, say $150,000, and to be paid it as an operating expense, not as part of his shareholder profit. Using the past arrangement to illustrate, if he had been paid a salary of $150,000 per annum rather than say $80,000 out of profits prior to the completion date, representing a salary increase of $70,000, that would have reduced the balance of his profit share from about $100,000 per annum down to about $30,000. Even if his salary had been closer to say $90,000, as the evidence suggests,[19] but it instead became $150,000, the reduced profit share would be about $40,000 per annum. This entirely theoretical example illustrates how significantly new arrangements for the payment of incomes – arrangements which might be thought more conventional than what had been occurring – could impact upon future distribution of corporate profit to shareholders.

[33] Another contingency to bear in mind is that it is in the nature of a used car sales business that its success depends in an on-going way on the combined application of the industry and talent of the individuals managing it. In other words, what Mr Fulmer could make of his chance to profit as a shareholder would depend not only upon the

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[18] It was actually less in that Mr Fulmer's income was also deducted from profit. But the point does little to inform the debate because similar considerations applied for instance to Clay Thompson, another holder of a 30 per cent interest and there is no helpful evidence of whether the profit shares of the first and second defendants were treated as clear profit or were apportioned in some way to also cover salaries.

[19] The February 2009 profit and loss statement (Ex 1 Vol 3 tab B p 1105) contains references to Mr Fulmer's wages, confirming he did begin on $80,000 per annum and indicating in the period between January 2006 to December 2008 his annual income drifted as high as $92,309 back to as low as $83,074 (which is the annualised figure derived from the half-yearly figure of $41,537 for July to December 2008).

contribution of his industry and talent to the operation of the business, it would also depend upon the contribution of others with a determinative role to play in the business. A related point is that the unreliable behaviour in business exhibited by the defendants towards Mr Fulmer suggests that even if they had performed or been compelled to specifically perform the contract from the completion date the new business was unlikely to have enjoyed the same level of success in the long term as was enjoyed by the former.

[34] Further to these considerations, allowance must also be made for ordinary contingencies, including the inherent risks and vicissitudes of conducting a vehicle sales business, such as variations in external economic influences and technological trends in respect of vehicles and how they are sold.

[35] In my conclusion, I estimate the value of the loss of Mr Fulmer's chance to profit occasioned by the breach was $75,000. That amount should be paid as damages, with interest payable on that sum, calculated from the completion date, when this loss occurred, to the date of this judgment.

*Loss of income*

[36] As to damages for income foregone, the plaintiff submits Mr Fulmer in effect took a pay cut in reliance upon his expectation the contract would be completed. It is submitted he ought be compensated for the income he would otherwise have earned. There are factual and legal difficulties associated with this foundation for an award of damages.

[37] As to the factual problems, the plaintiff highlights that, prior to entering into the contract, Mr Fulmer's annual income had been at least $150,000 to $200,000 whereas, between the effective commencement of the contract and him being made redundant in February 2012, he was only being paid $80,000, later up to $100,000 a year, in remuneration. Taking $175,000 as Mr Fulmer's average income prior to entering into the contract, the plaintiff calculates, by reference to the period from 1 January 2006 to February 2012, that but for entering into the contract Mr Fulmer would have earned $1,080,286.98. The plaintiff contends, given Mr Fulmer, on Mr Coutts' analysis, earned only $418,089 during the aforesaid period, he incurred a lost income of $662,197.98 in reliance upon his expectation that the contract would be completed.

[38] My reasons for judgment have already identified the shortcomings in the pedigree and reliability of the evidence relied upon for the purpose of Mr Coutts' analysis. Nonetheless there is other evidence in the case from which some reasonable factual conclusions can be drawn.

[39] For the purpose of the exercise, bearing in mind the plaintiff carries the onus, it would be arguably appropriate to take the conservative approach of adopting the lower end of the range of Mr Fulmer's past annual income, namely $150,000, as the income he would, but for the contractual arrangements, have otherwise earned. The plaintiff contends for an approach which would deduct from that annual total the figure actually earned annually by Mr Fulmer while working for Caysand 24. The evidence lacked some precision about actual earnings but for the purposes of this exercise it would be

appropriate to take a conservative approach more favourable to the defendant as the party not carrying the onus and adopt a figure of $90,000 per annum. The plaintiff's argument, in effect, is that Mr Fulmer's loss of income was suffered in every year that he worked for Caysand 24 and for each year the loss was the gap between his annual actual income amount and the annual amount he would otherwise have earned. Thus, deducting $90,000 from $150,000 would give a theoretical loss of income of $60,000 per annum.

[40] Such a methodology would arguably be sufficiently grounded in the evidence to overcome the aforementioned evidentiary difficulties but it remains to consider the legal difficulties attending the plaintiff's assertion of an entitlement to damages for loss of income.

[41] Such damages are sometimes described as reliance damages, that is, damages for loss occasioned by reliance upon the contract. In contrast, the above-discussed damages for loss of share value and loss of chance to profit are sometimes described as expectation damages, that is, damages for deprivation of the benefit of the expected performance of the contract. Those descriptions are, as was observed in *The Commonwealth v Amann Aviation Pty Ltd*,[20] simply manifestations of the principle in *Robinson v Harman*[21] and are not mutually exclusive forms of damages.[22]

[42] However, where there are mixed sources of damage relied upon it is obviously necessary to take care there is no element of duplication or doubling up of relief. It is also necessary to consider what was described in *The Commonwealth v Amann Aviation Pty Ltd*[23] as the corollary of the principle in *Robinson v Harman*, namely, that the plaintiff is not placed in a superior position to that which he or she would have been in had the contract been performed.

[43] The defendants complain in effect that the plaintiff's approach has an element of duplication. They submit it fails to bring into account the cost or burden of the counter-performance required on the plaintiff's part in acquiring his contractual expectation. I have already concluded that the plaintiff will be compensated for the loss of that expectation so as to put him, as far as money can, in the same position as if the contract had been performed. However, by seeking damages for loss of income the plaintiff also appears to be seeking compensation for the performance cost of acquiring that expectation.

[44] The point is readily illustrated by reference to the watershed point at which the target sum was met on 20 January 2010. While not the focus of significant questioning at trial it is likely on the evidence that, prior to 20 January 2010, Mr Fulmer had, by working for Caysand 24, been earning less income than he otherwise would have. However, that was the sacrifice he in effect signed up to in order to acquire shares worth $550,000 as at 20 January 2010. If he is to receive damages compensating for the loss of the value of those shares, as he will, then it would be doubling up if he were also awarded an

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20 (1991) 174 CLR 64, 82.
21 (1848) 1 Exch 850, 855.
22 See for example *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130, 138-143.
23 (1991) 174 CLR 64, 82.

amount for the income he sacrificed as part of the very arrangement by which he acquired the right to shares worth that amount. It is therefore clear there should be no damages awarded to compensate him for loss of income to 20 January 2010.

[45] The position is more problematic after that date. Mr Fulmer continued to work for Caysand 24 beyond 20 January 2010 until he was made redundant in February 2012. Using the methodology discussed above and assuming the relevant redundancy date was 1 February 2012, that equates to a hypothetical loss of $60,000 per annum over two years and twelve days, which is a total of $121,972.56. In fact, if Caysand 24 continued to be profitable Mr Fulmer's notional profit share after payment of his salary would no longer have been financing his acquisition but there is no claim made for damages for that notional profit share.

[46] It is difficult not to feel sympathy for the position Mr Fulmer was placed in, effectively being strung along, working for Caysand 24 when he might potentially have earned more elsewhere. He evidently continued on while no longer even receiving the benefit of that part of his notional profit which was not required to pay his salary. He probably believed the target sum had been met and politely hoped that completion would eventually occur if he did not agitate. However, the case was not litigated on the basis he should be compensated for the cost in lost income to him of continuing to work for Caysand 24 after the completion date.

[47] The evidence adduced at trial did not meaningfully address the reasons for Mr Fulmer lingering on working for Caysand 24 or whether or not there was alternate work at a materially higher salary likely available elsewhere. The want of evidence of the latter would appear to be fatal of itself.

[48] Further, the absence of a specifically pleaded and evidenced pathway to compensation for loss of income post completion date highlights a fatal problem with the remoteness of the loss on the case actually advanced. The loss of income incurred by electing to continue on in employment with Caysand 24 after the completion date can hardly be regarded as arising naturally from the pleaded breach of contract or as being within the contemplation of the parties at the time they made the contract.

[49] For these reasons I decline to award damages for loss of income.

**Damages plus interest table**

[50] The above findings support the below tabulation of damages and interest:[24]

| | Damages | Interest Period(s) | Interest Payable | Total |
|---|---|---|---|---|
| Loss of value of shares | $550,000 | 21.03.10 – 07.11.17 | $323,982.03 | $873,982.03 |
| Loss of chance to profit | $ 75,000 | 21.03.10 – 07.11.17 | $ 44,179.36 | $119,179.36 |

[24] Interest calculated using Qld Courts website interest calculator.

| | | | | |
|---|---|---|---|---|
| Total | $625,000 | | $368,161.39 | **$993,161.39** |

**Orders**

[51] My orders should reflect the total amount of damages plus interest.

[52] It will be necessary to hear the parties as to costs if they are not agreed.

[53] My orders are:

1. Judgment for the plaintiff against the defendants in the amount of $993,161.39.

2. I will hear the parties as to costs if costs are not earlier agreed at 9.15 am on 22 November 2017.