SUPREME COURT OF QUEENSLAND

CITATION:	*Hookey & Anor v Manthey & Ors* [2020] QSC 125
PARTIES:	**SCOTT GREGORY HOOKEY** (first plaintiff) **MARETTI AUSTRALIA PTY LTD** (second plaintiff) **v** **STEVEN CHARLES MANTHEY** (first defendant) **MICHAEL MANTHEY** (second defendant) **MICHAEL JOHNSTON** (third defendant) **BRENDA MANTHEY** (fourth defendant) **SC MANTHEY PTY LTD** (fifth defendant)
FILE NO/S:	BS No 7639 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2019
JUDGE:	Ryan J
ORDER:	**1. Paragraphs 51 and 52 of the 3FASOC are struck out, with leave to re-plead.** **2. To the extent to which it refers to the fourth defendant, paragraph 61 of the 3FASOC is struck out, with leave to re-plead.** **3. Unless a party wishes to submit to the contrary, the plaintiffs are to pay the costs of the first, second, fourth and fifth defendants.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the plaintiffs' statement of claim alleges that, by the defendants' breaches of the implied duty to cooperate, they have been deprived of the opportunity to share in any benefits which might have been realised upon the commercialisation of an engine – where the first, second, fourth and fifth defendants apply to strike out paragraphs of the plaintiffs' statement of claim for failing to adequately plead a claim for damages for loss of a commercial opportunity which might have arisen upon the commercialisation of the engine – where it is argued that the impugned paragraphs do not explain how it is alleged that the conduct of the defendants *caused* the plaintiffs to lose that opportunity – whether the plaintiffs are able to establish causation for their loss by proof of a breach of the implied term of the joint venture agreement and without resort to a counterfactual scenario – whether the pleading should be struck out

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – CONTENT OF SPECIFIC PLEA – WHETHER NEED TO PLEAD FACTS DEMONSTRATING EXISTENCE OF KNOWLEDGE – UNIFORM CIVIL PROCEDURE RULES – where the plaintiffs allege that the fourth defendant knew that the payments were made in breach of trust, without pleading any material facts standing behind this allegation – whether material facts supporting an inference of actual knowledge must be specifically pleaded – where rule 150(1)(k) UCPR requires knowledge to be pleaded and rule 150(2) UCPR requires any fact from which knowledge is claimed to be an inference to be specifically pleaded – where there is nothing in the statement of claim from which the fourth defendant's alleged knowledge might be inferred – whether the pleading should be struck out

Uniform Civil Procedure Rules 1999 (Qld), r 150, r 155

Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors [2017] QSC 75, considered

Banks v Alphatise Pty Limited [2014] NSWSC 1437, distinguished

Chaplin v Hicks [1911] 2 KB 786*,* applied

Executor Trustee Aust Ltd v Peat Marwick Hungerfords (1994) 15 ACSR 556, cited

Graham & Linda Huddy Nominees Pty Ltd v Byrne [2016]

QSC 221, distinguished

Mutton v Baker [2014] VSCA 43, distinguished

Peter Davis & Ors v Halliday Financial Management Pty Limited & Ors [2014] NSWSC 1371, considered

Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd [2018] 2 Qd R 584, considered

Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 7) [2019] QSC 241, distinguished

Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, considered

Tabet v Gett (2010) 240 CLR 537, applied

COUNSEL: G Coveney for the plaintiffs
N Derrington for the first, second, fourth and fifth defendants

SOLICITORS: Radcliffs for the plaintiffs
Holman Webb Lawyers for the first, second, fourth and fifth defendants

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Overview

[1] The Manthey Parties (the first, second, fourth and fifth defendants) apply to strike out paragraphs 50 – 52 of the plaintiffs' Third Further Amended Statement of Claim ('3FASOC'). They argue that the paragraphs fail to disclose a reasonable cause of action because they fail to adequately plead a claim for damages for loss of a commercial opportunity which might have arisen upon the commercialisation of a certain engine. In particular, they complain that the paragraphs do not explain how it is alleged that the conduct of the defendants *caused* the plaintiffs to lose that opportunity.

[2] The plaintiffs contend that the Manthey Parties' argument fails to appreciate the basis upon which their claim is made. It is, the plaintiffs explain, a claim in contract – not in tort – and it is established upon proof of the breach of the contract. Under the contract, the plaintiffs were promised a share of any benefits which might have been realised upon the commercialisation of the engine. They have been deprived of that opportunity to share in any benefits which might have been realised, by the defendants' breaches of the implied duty to co-operate. The impugned paragraphs thus disclose a reasonable cause of action in contract and should not be struck out.

[3] The Manthey Parties also apply for the striking out of an allegation that the fourth defendant was a knowing recipient of wrongfully distributed trust property. The plaintiffs submit that the allegation of knowledge is adequately pleaded.

Background

[4] Steven Manthey is an inventor with an interest in designing highly efficient internal combustion engines. Scott Hookey is a business owner. Hookey and Manthey met at an Exotic Track Day event at Queensland Raceway. According to Hookey, Manthey told him about a "revolutionary engine" that he and his son had designed.

[5] After their first meeting, Hookey visited Manthey at his home in late November 2015. Manthey and his son Michael showed Hookey around their "high tech" workshop. Hookey also met that day Brenda Manthey (Steven Manthey's wife) and Michael Johnston (Steven Manthey's solicitor).

[6] According to Hookey, he was shown an engine which Manthey said would be cleaner, and more efficient and economical, than a normal engine; with "unmatched" and "astronomical" commercial potential. Manthey told Hookey that he and his son Michael were looking for funding to complete their engine project.

[7] Ultimately, Hookey and Manthey entered into a business arrangement to further the development of the engine. The nature of that arrangement is the subject of dispute.

[8] Hookey asserts that, on the basis of their conduct, in January 2016, he, Steven Manthey, Michael Manthey and Michael Johnson entered into a joint venture agreement to

"commercialise" the engine through a Nevada based company called Advanced Engine Dynamics Corporation (AEDC).

[9] Hookey asserts that, in return for his contributing funds for the purposes of commercialising the engine, he received a 40 per cent interest in the joint venture. He asserts that it was an implied term of the joint venture that each of the parties to it would do all things reasonably necessary to give the others the benefit of it. (He makes an alternative claim on the basis of a common intention).

[10] The Manthey Parties deny that a joint venture was formed. They assert that the business relationship between the parties was governed by a written share option agreement, entered into by an American company under Hookey's control (SC Hookey LLC) and a company under Steven Manthey's control. Under that share option agreement, SC Hookey LLC acquired share options to purchase up to 40 per cent of the shares in AEDC.

[11] By December 2017, AEDC had insufficient funds to continue the development of the engine. It was dissolved and work on the engine stagnated.

[12] According to Hookey, by that time, he had invested more than $3 million in the engine, AEDC, and the Marretti group (a company established in 2017 for the purposes of the engine's re-design). He had also made payments to cover company expenses, reports and professional fees, including $500,000 to Michael Johnston.

[13] The plaintiffs filed a claim against the Manthey Parties, Brenda Manthey and SC Manthey Ptd Ltd, claiming *inter alia* damages for the loss of the commercial opportunity caused by the breach of the duty to co-operate implied in the joint venture agreement.

The complaints about paragraphs 50 to 52 of the 3FASOC

[14] The Manthey Parties apply for the striking out of paragraphs 50 to 52 of the 3FASOC. Those paragraphs allege that, as a result of the breach of the implied duty to co-operate, the first plaintiff has suffered loss and damage by way of, for example, the lost opportunity to share in the profits which might have been generated by the commercialisation of the engine. The Manthey Parties also apply for the striking out of paragraph 3 of the prayer for relief – that is, the claim for damages against the first and second defendants in a sum of no less than $800,000 for breach of contract.

[15] To understand the parties' arguments, it is necessary to consider some of the earlier paragraphs of the 3FASOC as well as paragraphs 50 to 52.

[16] Reduced to the detail necessary to understand my reasons, paragraphs [34] to [52] of the 3FASOC follow –

Breakdown of the Joint Venture or Common Intention

[34] In or about May 2017, the first plaintiff and the first, second and third defendants orally agreed that the Joint Venture would be amended as follows:

…

[35] The proposed corporate structure under the proposed Joint Venture restructure was as follows:

…

[36] The proposed Joint Venture restructure did not proceed.

[37] From around in late July 2017 to August 2017, the Engine was in the possession of the second defendant.

[38] In or around September 2017, the first defendant directed Terry Healy, his son-in-law and an employee of the fifth defendant, to discard the Engine's block by taking it to a metal recycling facility.

[39] In or around November 2017, at the Bonogin Property [Steven Manthey's home], the first plaintiff met with the first and second defendants ("November 2017 Meeting").

[40] During the November 2017 Meeting:

a. the second plaintiff (sic) said to the first plaintiff that the Engine was complete; and

b. the first and second defendants showed the first plaintiff an animation of the finalised Engine design on a computer.

[41] In or around December 2017, the first and/or second defendants deregistered AEDC without notice to, or the permission of, the first plaintiff or the other Joint Venture participants.

Subsequent conduct of the first and second defendants

[42] Since late December 2017, no progress has been made to develop or commercialise the Engine on behalf of or for the benefit of the Joint Venture or the Common Intention.

[43] On about 11 April 2018, the first defendant said to John Arratoon and Jamie Nikolovski [investors, introduced to Steven Manthey by Scott Hookey] words to the effect that he would not agree to continue to commercialise the Engine with the continued involvement of the first plaintiff in the Joint Venture.

[44] On 19 July 2018, the first defendant said to Travis Birch, the process server who served the originating application and supporting affidavit material, in the presence of the second and fourth defendants, words to the effect that:

a. he was working on the Engine right now; and

b. he had secured the Engine and it would be difficult for anyone, including the plaintiffs, to locate.

[45] In or around August 2018, the second defendant arranged for components of the Engine that were in the possession of FEV to be shipped to the Bonogin Property. [FEV is a German Engineering Consultancy firm which had been engaged to determine the Engine's potential.]

[46] The shipping of the Engine components pleaded in paragraph 45 above was paid for by Bright Work Pty Ltd, a company controlled by the first defendant.

[47] The first and second defendants have deleted, discarded or otherwise failed to retain any specifications or designs for the Engine.

Breach of the Joint Venture Agreement

[48] In the premises pleaded in paragraphs 34 to 47 above, the first and/or second defendants have:

a. deregistered the joint venture vehicle, AEDC, without regard to the first plaintiff's interests;

b. asserted and continue to assert that the Engine is theirs to develop and commercialise to the exclusion of the first plaintiff;

c. disposed of the Engine or removed the Engine to a location which the first defendant and/or second defendant refuse to disclose to the first plaintiff;

d. denied that the first plaintiff had any interest in the Engine; and

e. deleted, destroyed or failed to retain the Engine specifications or designs;

f. taken or retained for themselves the Engine and the Intellectual Property; and

g. prevented the first plaintiff from having the benefit of the Joint Venture.

[49] In the premises pleaded in paragraph 48 above, the first and second defendants breached the Implied Term [that each of the parties to the Joint Venture would do all things reasonably necessary to give each other party the benefit of the Joint Venture].

[50] As a result of the breach of the Implied Term, the first plaintiff has suffered loss and damage in that:

a. he lost the opportunity to share in any profits or royalties which might have been generated from the commercialisation of the Engine; and

b. further or alternatively, lost the opportunity to sell his interest in the Joint Venture at a value that would reflect the stage to which the Engine would have been developed, had the first and second defendants not breached the Implied Term.

[51] The probability of the opportunity referred to in paragraph 50 above occurring was 80%.

[52] The value of the lost opportunity to the first plaintiff is at least $1m. The amount cannot be particularised further pending the completion of disclosure and the obtaining of an expert report as to:

a. the likely profits or royalties which could be earned upon the Engine being commercialised; and/or

b. the likely value of the first plaintiff's interest in the Joint Venture if the development and commercialisation of the Engine had continued.

The Manthey Parties' submissions

[17] The Manthey Parties complained that, in paragraphs 50 to 52, the plaintiffs make no attempt to plead precisely how they are said to have suffered a loss as a result of the alleged breach of contract as the authorities required them to. They submitted that the 3FASOC fails to plead sufficient facts to make out an arguable case that the relevant defendants *caused* the plaintiff to lose a valuable commercial opportunity.

[18] In writing, developing that argument, the Manthey Parties submitted that –

[16] A claim for damages for the loss of a commercial opportunity involves two stages.

[17] *First* … the plaintiff must prove not only that there was a breach of contract by the defendant, but that the breach caused the loss of an identifiable commercial opportunity: *Hart Security Australia v Boucousis* (2016) 339 ALR 659 at 687 [13].

(a) Where the claim is in contract, the cause of action is complete upon the breach of an obligation. Nominal damages can always be recovered: see *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 335; *Tabet v Gett* (2010) 240 CLR 537 at 559 [47]-[48].

(b) But to recover substantial damages it is also necessary to show that the breach caused the loss of a commercial opportunity and, on the balance of probabilities that the opportunity had some value: *Principle Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2018] 2 Qd R 584 at 587-8 [12] – [13].

[18] *Second*, if the plaintiff can prove that, then its damages are assessed as being equal to the value of the opportunity lost, having regard to probabilities or possibilities of relevant factual hypotheses: *Sellars* ...at 335; *Principle Properties* … at 588 [13].

[19] Relying on *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221 ('*Huddy v Byrne*') at [50] (see below), the Manthey Parties contended that essential elements of factual causation are missing from the plaintiffs' pleading, namely (1) the

way in which the plaintiffs said the engine would have been commercialised or further developed and the way in which that would have been brought about; and (2) what Hookey would have done to obtain profits or royalties, or to sell his interest in the joint venture agreement. Although the opportunities said to have been lost were identified, the pleading proceeded upon the *assumption* that, but for the breach of the implied term, the engine would have been commercialised or developed further. However, it was not apparent that – but for the breaches of the implied term – the engine would have been commercialised or developed further. That counterfactual had to be pleaded and particularised.

[20] The Manthey Parties had other complaints about the pleading – including that the word "commercialisation" was ambiguous, even in context. They complained that they were left to guess how commercialisation would have occurred, or how it was to be said that the engine was to be further developed to the "stage" at which Hookey might sell his interest in the Joint Venture.

[21] They submitted that, unless the commercialisation or further development of the engine *would or could* have occurred, then the alleged breach of the implied term did not cause Hookey to lose the pleaded opportunities.

[22] Further, the pleading did not comply with the requirement to plead facts to support a reasonable inference that the opportunity to sell Hookey's interest in the joint venture had something more than a theoretical or negligible value – relying on *Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors* [2017] QSC 75 at [42].

[23] The Manthey Parties submitted that the plaintiffs were wrong in their contention that because this was a case in contract, neither the counterfactuals nor the counterfactual facts needed to be proved at trial on the balance of probabilities.

[24] Regardless, the Manthey Parties submitted that even if the plaintiffs were right about what they needed to prove on the balance of probabilities, they were not excused from pleading the allegations which made up the counterfactuals and the counterfactual facts because (as per the Manthey Parties' written outline) –

(a) … those allegations are also facts material to the second step of the analysis, being the assessment of damages by reference to the possibilities of the alleged Counterfactuals occurring.

(b) Further, they are facts necessary to understand the bare allegation that the chance of the pleaded opportunities occurring was 80%.

(c) That allegation is a conclusion necessarily affected by how it is said the Engine would have been commercialised or further developed, and then how Mr Hookey would have sought to obtain profits and royalties or a sale of his interest.

(d) So, regardless of their position on the law the Counterfactuals and the Counterfactual Facts are necessary to show not just how the loss is said to have been suffered, but what it is, and also to prevent the Manthey Defendants being taken by surprise.

The plaintiffs' submissions

[25] The plaintiffs asserted that their claim for breach of contract causing a loss of commercial opportunity is adequately pleaded in accordance with the authorities.

[26] They relied upon the well-known principles which apply to strike out applications which explain that, to succeed, an applicant for strike out must show that a pleading is obviously untenable; and that it is only in the clearest of cases that summary intervention is justified.

[27] In writing, they relied upon the significance of trial evidence, and referred to paragraph [55] from the judgment of Whelan JA in *Mutton v Baker* [2014] VSCA 43, in which his Honour said –

> Even if it is said that an issue is purely a question of law, the Court should not strike out a claim on this basis if it is conceivable that some factual matter could emerge at trial which might alter the analysis.

[28] The plaintiffs submitted that I would only strike out the challenged parts of the 3FASOC if I was convinced that they could not possibly succeed, and even then, only if I was satisfied that it was inconceivable that a fact which could be proved at trial might change that conclusion.

[29] They submitted that the Mathey Parties' reliance on *Huddy v Byrne* was misplaced – a submission dealt with below. They also relied upon *Tabet v Gett* (2010) 240 CLR 537 for Gummow A-CJ's observations about the differences between a contract case – such as the plaintiffs' case here – and a case in negligence.

[30] *Tabet v Gett* concerned whether the loss of the chance of a better medical outcome was compensable damage. Dr Gett was negligent in failing to order a scan of Miss Tabet sooner than he did. The scan would have revealed her brain tumour. She deteriorated and suffered irreversible brain damage. The trial judge found that there was a 40 per cent chance that an earlier scan would have avoided some of the brain damage and awarded damages for the loss of that chance. The Court of Appeal set that decision aside. Miss Tabet appealed to the High Court which held that damages should not have been awarded: the loss of a chance of a better medical outcome is not compensable damage.

[31] The plaintiffs relied upon the paragraph in bold from the extract below. I have included its context (that is, the paragraphs before and after it) because they too are relevant to the question for me (footnotes omitted) –

> [46] … in personal injury cases the law of negligence as understood in the common law of Australia does not entertain an action for recovery when the damage, for which compensation is awarded consequent upon breach of duty, is characterised as the loss of a chance of a better outcome of the character found by the trial judge in this case.
>
> [47] **It should be said immediately that the principles dealing with recovery of damages for breach of contract offer no appropriate analogy. The action for breach of contract lies upon the occurrence of breach, but that in negligence lies only if and when**

damage is sustained. This has significance for the application of limitation statutes. But it has the further and relevant importance identified by Brennan J in *Sellars v Adelaide Petroleum NL*. This is that in a negligence action, unlike an action in contract, the existence and causation of compensable loss cannot be established by reference to breach of an antecedent promise to afford an opportunity.

[48] In a contract case the plaintiff should be entitled at least to nominal damages for loss of the promised opportunity. The jury in *Chaplin v Hicks* assessed at £100 (at the time a not inconsiderable sum) the damages for the breach found of the contractual obligation to take reasonable means to give the plaintiff an opportunity of presenting herself for selection by the defendant in a competition with twelve prizes of three-year theatrical engagements. The defendant … was a well-known actor and theatrical manager … who … presented successful musical comedies, and discovered new talent … With these matters in mind, it is readily seen that the plaintiff lost a chance of real value. The unsuccessful submission to the Court of Appeal … for the defendant was that the only remedy was nominal damages, because substantial damages were so contingent as to be incapable of assessment.

[49] *Chaplin v Hicks* is authority for the proposition that if a plaintiff, by the breach of contract by the defendant, has been deprived of something which has a monetary value, there is to be an assessment of damages notwithstanding difficulty in calculation or impossibility of making an assessment with certainty. This Court, speaking in *McRae v Commonwealth Disposals Commission* of *Chaplin v Hicks*, said that the broken promise in effect had been to give the plaintiff a chance and that she would have had a real chance of winning a prize, and thus that it was proper enough to say that the chance was worth something.

[50] But these considerations do not appear in the frame of reference for the present case. As Brennan J indicated in *Sellars*, in an action in tort where damage is the gist of the action, the issue which precedes any assessment of damages recoverable is whether a lost opportunity, as matter of law, answers the description of "loss or damage" which is then compensable.

[32] The plaintiffs submitted that their cause of action was complete upon breach of the contractual promise in the joint venture agreement to – in effect – afford them the commercial opportunity. Unlike a negligence case, what the plaintiffs would have done was not a necessary causal condition.

[33] I will now consider other authorities to which I was referred, and the arguments made by the parties about them.

Relevant authorities

***Mutton v Baker* [2014] VSCA 43 ('*Mutton v Baker*')**

[34] *Mutton v Baker* concerned an appeal from a decision to dismiss a claim for damages for the tort of malicious prosecution. In that case, the Court of Appeal of the Supreme Court of Victoria discussed the principles which applied to applications for summary dismissal and strike out; the *General Steel* test (that a claim must be so obviously untenable that it cannot possibly succeed); and that things had become more complicated since the enactment of the *Civil Procedure Act* 2010 (Vic).

[35] At [19], Santamaria JA said, in the context of discussing the provisions of that Act –

> …No doubt, courts will more readily hold that its provisions are satisfied where the resolution of a dispute depends upon a question of law rather than upon disputed questions of fact. Although the rules of pleading are designed to ensure that the factual issues underlying a dispute are clearly articulated before trial, trial judges know from experience that, sometimes, the reality of the dispute has defied the best efforts to define it. Not infrequently, it is not until witnesses give their evidence that the true nature of the dispute is revealed. For that reason, among others, courts have power to dispense with compliance with the rules.

[36] His Honour then referred to section 64 of the Act, which empowers a court to order that a matter proceed to trial – despite there being no real prospect of success – if the court considers it in the interests of justice to do so, or that the dispute is of such a nature that a full hearing on the merits is appropriate.

[37] In *Mutton v Baker* it was held that the pleading omitted an allegation essential to ground an action in malicious prosecution and that the claim had no real prospect of success. It was also held that the pleading of the claim for malicious prosecution was embarrassing. The evidence which might be led at trial did not feature in the consideration of the matter. It is in that context that the quoted statement of Whelan JA must be viewed.

[38] For completeness I note that, as a footnote to the passage quoted and relied upon by the plaintiffs, Whelan JA referred to *Executor Trustee Aust Ltd v Peat Marwick Hungerfords* (1994) 15 ACSR 556, in which Bollen J said, at [29], that he "vigorously supported" the suggestion that an application to strike out ought to be reserved for the plainest of cases and that –

> … where there are, or could be, complex questions of law to be determined it is well if the matter go to full trial for one can never be sure but that some piece of evidence might be of great significance in interpreting the facts to which the law is to be applied …

[39] While I respectfully agree with the statements of Whelan JA and Bollen J, I did not understand the plaintiffs in this case to be pressing an argument that any analysis of the sufficiency of their pleading might alter upon the production of evidence at trial. Their position was that their pleading on its face was adequate.

Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL* (1994) 179 CLR 33*2 ('Sellars')

[40] This case explains the way in which economic loss is to be measured in contract, tort and under the *Trade Practices Act* 1974 (Cth) ('TPA').

[41] In *Sellars*, the High Court upheld decisions of the Federal Court which found that the plaintiffs – Adelaide Petroleum and its directors – were entitled to damages under section 82(1) of the TPA for the loss of a commercial opportunity.

[42] By early 1988, Adelaide Petroleum needed working capital to retain its exploration opportunities. It entered into parallel discussions with two companies – Poseidon and Pagini – with a view to persuading one of them to acquire a director's shareholding in it. By the middle of May 1988, Adelaide Petroleum was close to an agreement with Pagini (the 'draft Pagini agreement'). But Adelaide Petroleum's directors decided to enter into an agreement with Poseidon instead.

[43] Adelaide Petroleum and Poseidon signed a Heads of Agreement. Three weeks later, Poseidon advised Adelaide Petroleum that the Heads of Agreement had been prepared and signed by their executive, Sellars, in excess of his authority. Adelaide Petroleum treated the Heads of Agreement as repudiated. Ultimately, Adelaide Petroleum entered into another agreement with Pagini which was not as favourable to Adelaide Petroleum as the draft Pagini agreement.

[44] Adelaide Petroleum and its directors commenced proceedings against Poseidon and Sellars, claiming damages under the TPA for misrepresentations. Adelaide Petroleum and its directors claimed that they lost the opportunity or chance of securing the commercial benefits which the draft Pagini agreement would have brought – that is, they claimed a form of economic loss.

[45] The trial judge found – on the balance of probabilities – that were it not for the breach of section 52 of the TPA (inherent in Sellers' conduct), Adelaide Petroleum would have entered into the draft Pagini agreement, but that certain conditions precedent to the agreement would not have been fulfilled. Nevertheless, Adelaide Petroleum was entitled to damages for the loss of opportunity to enter into the agreement, discounted to reflect the risk that the conditions precedent would not have been fulfilled.

[46] Mason CJ and Dawson, Toohey and Gaudron JJ said, at 349*ff* (most footnotes omitted, my emphasis) –

> **In the realm of contract law, the loss of a chance to win a prize in a competition resulting from breach of a contract to provide the chance is compensable**, notwithstanding that, on the balance of probabilities, it is more likely than not that the plaintiff would not win the competition [*Chaplin v Hicks* [1911] 2 KB 786]. **As the contract contained a promise to provide the chance, the breach of the contract resulted in the loss of the chance and that loss was for relevant purposes an actual loss**, in the sense in which Dixon and McTiernan JJ. used that expression in *Fink v Fink*. And, where there has been an actual loss of some sort, the common

law does not permit difficulties of estimating the loss in money to defeat an award of damages. **The damages will then be ascertained by reference to the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance which the contract promised**.

This approach is not confined to contracts relating to games of chance, sporting contests or other competitions … And **there can be no doubt that a contract to provide a commercial advantage or opportunity, if breached, enables the innocent party to bring an action for damages for the loss of that advantage or opportunity**. So in *The Commonwealth v Amann Aviation Pty Ltd*, Mason CJ and Dawson J, Brennan J and Deane J concluded that a lost commercial advantage or opportunity was a compensable loss, even though there was a less than 50 per cent likelihood that the commercial advantage would be realized. **Damages for breach of contract were assessed by reference to the probabilities or possibilities of what would have happened**.

Damages in tort have also been assessed by reference to the probabilities or possibilities of what will happen or what would have happened. That approach has been frequently adopted in the assessment of damages for personal injuries where a court has been called upon to assess future possibilities and past hypothetical situations. In *Malec v J C Hutton Pty Ltd*, this Court drew a distinction between, on the one hand, proof of historical facts – what has happened – and, on the other hand, proof of future possibilities and past hypothetical situations. The civil standard of proof applies to the first category but not to the second, particularly when it is necessary to determine future possibilities and past hypothetical situations for the purpose of assessing damage.

In *Malec*, Deane, Gaudron and McHugh JJ explained the way in which the matter is to be approached in these terms:

> "If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring … But unless the chance is so low as to be regarded as speculative – say less than 1 percent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability."

…

Neither in logic nor in the nature of things is there any reason for confining the approach taken in *Malec* concerning the proof of future possibilities and past hypothetical situations to the assessment of damages for personal injuries. The reasons which commended the adoption of that approach in assessments of that kind apply with equal force to the assessment of

> damages for loss of a commercial opportunity, as the judgments in *Amann* acknowledge.
>
> But *Amann* concerned damages for breach of contract. The question here is whether the same approach is to be adopted in determining whether an applicant has suffered loss or damage under s 82(1) for a contravention of s 52 and, if so, in assessing damages …

[47] After a thorough review of relevant authority, their Honours said, at page 355 –

> …[W]e consider that acceptance of the principle enunciated in *Malec* requires that **damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued**. The principle recognized in *Malec* was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind.
>
> … [T]he general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. **Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities**. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.

[48] In the present matter, the plaintiffs relied particularly upon the paragraph in bold (below) in the judgment of Brennan J (at page 358*ff*, some footnotes omitted) –

> The ultimate objective of the plaintiffs was to acquire the financial benefits that would have flowed to them if the Pagini contract had been entered into and completed. Before that objective could be attained, there were several contingencies which had to be satisfied: [his Honour listed them]. If the relevant loss be identified as the financial benefits which it was the ultimate objective of the plaintiffs to acquire, the plaintiffs must fail for they failed to prove all the links in the chain of causation. That, indeed, is the defendants' submission. But if the loss of an opportunity to continue the negotiations with Pagini be identified as a loss entitling the plaintiffs to recover under s 82(1), they succeed for they were induced to lose that opportunity. The amount of that loss can be assessed by evaluating the prospects or possibilities of satisfying all the contingencies that stood between the continuing of the negotiations and the ultimate acquisition of the financial benefits that would have flowed from the completion of the Pagini contract.

> And that, indeed, is the plaintiffs' submission. The parties cited passages from a number of cases in support of their respective submissions. The cases illustrate what had to be shown in the particular circumstances of each case in order to identify and establish the plaintiff's loss and thereby to identify the final link in the chain of causation.
>
> **The cases where a plaintiff seeks damages only for breach of a contractual promise to afford the plaintiff an opportunity to acquire a benefit are in a different category from the cases under s 82(1) and cases in tort where damage is the gist of the cause of action. In a case like *Chaplin v Hicks*, the relevant loss is identified by the contractual promise to afford the plaintiff an opportunity to acquire a benefit or to avoid a detriment [*McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at p 412]. A breach of the promise to afford that opportunity necessarily establishes that the loss flows from the breach. In contract cases, a plaintiff may be entitled to nominal damages for loss of the opportunity promised even though the plaintiff fails to prove what, if any, value performance of the unfulfilled promise would have had [*Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at pp 301, 312]** But in cases arising under s 82(1) of the Act, as in cases of tort where damage is the gist of the action, a lost opportunity may or may not constitute compensable loss or damage. In such cases, the existence and causation of a compensable loss cannot be proved by reference to an antecedent promise to afford an opportunity. The plaintiff, who bears the onus of proving a loss suffered as the result of the defendant's contravening or tortious conduct, must prove the existence and causation of the alleged loss in some other way. The manner of discharging the plaintiff's onus will presently be mentioned.

[49] His Honour also said, at pages 362 – 364 (footnotes omitted, my emphasis) –

> There is another category of case to be mentioned, namely, an opportunity to acquire a benefit … which is more than a mere opportunity in the sense that the opportunity itself is something of value. Although *The Commonwealth v Amann Aviation Pty Ltd* was a case in contract, it is instructive that the commercial advantage which Amann Aviation would have enjoyed as a tenderer for future contracts was itself treated as a head of damage for breach of its current contract. The opportunity to make a competitive and profitable tender was treated as something valuable in itself. Deane J, dealing with proof of damages for breach of contract and putting aside cases where only nominal damages might be recovered, said:
>
> > "The frequent inability of curial procedures to determine with certainty what has happened in the past, let alone what would have been or what will be, necessarily gives rise to a need for a number of subsidiary rules governing the determination of the loss or injury which a plaintiff has actually sustained by reason of a wrongful act. One such subsidiary rule is that … a plaintiff bears the onus of establishing the extent of the loss or injury on the balance of probabilities. To satisfy the requirements of that rule, a plaintiff must, if he is to recover more than a nominal amount in such an action,

> affirmatively establish assessable damage, that is to say, loss or injury which is capable of being measured in monetary terms. In many cases, proof of the full extent of the loss or injury sustained will involve establishing an evidentiary foundation for positive and detailed ultimate findings by the court upon the balance of probabilities. There are, however, cases where considerations of justice or the limitations of curial method render ultimate findings, about what would have been or will be, impracticable or inappropriate. In such cases, damages must be assessed on some [other] basis … In particular, it may be appropriate that damages be assessed by reference to the probabilities or the possibilities of what would have happened or will happen rather than on the basis of speculation that probabilities would have or will come to pass and that possibilities would not have or will not."

His Honour takes as an example the loss of a

> "real and valuable chance … of becoming the successful tenderer for some commercial undertaking or of deriving some other advantage, **in circumstances where a court can decide that a proportionate figure precisely or approximately reflects the chance of success** but can do no more than speculate about whether, but for the defendant's wrongful act, the plaintiff would have actually won the … tender or derived the advantage".

There is no rational basis for distinguishing between a loss for which more than nominal damages may be awarded in contract and a loss for the purposes of s 82(1) of the Act and the law of torts.

As a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves, not only when they will *probably* fructify in a financial return but also when they offer a *substantial prospect* of a financial return. The volatility of the market for speculative shares testifies to both the valuable character of commercial opportunities and the difficulty of assessing the value of opportunities which are subject to serious contingencies. Provided an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable. And, if an opportunity is valuable, the loss of that opportunity is truly "loss" or "damage" for the purposes of s 82(1) of the Act and for the purposes of the law of torts.

…

Although the loss of a valuable opportunity and the assessment of its amount are concepts that can be logically separated, in practice it will usually be the same body of evidence that tends to establish both the existence of a loss and the amount to be recovered …

[50] The plaintiffs argued that the key to the present case was to recognise that the causal connection was established, as Brennan J made clear, upon proof of the breach: "The

breach of the promise to afford the opportunity necessarily establishes that the loss flows from the breach". The plaintiffs said –

> … that gets you nominal damages, and realistically, the strikeout application goes no further because my learned friend has conceded that, on the pleading, the plaintiff could be entitled to nominal damages. That means it has a cause of action, pure and simple. The question of whether it gets substantial damages is another question, but it does not mean that the breach of contract claim fails …

[51] Referring to the passages quoted by Brennan J from *The Commonwealth v Amann Aviation*, and in particular, the phrase in bold above, the plaintiffs submitted that in terms of their loss –

> … the damage that's likely to have been suffered is whatever the value of the thing that's been taken away from the joint venture is inherently worth, or what it might have been worth had the breach not occurred …

[52] The plaintiffs asserted that it was no part of their case to say – nor were they required to say – that, but for the breach, certain stages of development of the engine would have been achieved.

[53] In terms of the value of the lost opportunity, the plaintiffs referred again to Brennan J's decision to make their point that commercial opportunities are self-evidently valuable. I do not think that the Manthey Parties contended that that the opportunity said to be lost in this case was not valuable.

Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 7)* [2019] QSC 241 *('Sanrus')

[54] The Manthey Parties relied particularly on this case.

[55] The *Sanrus* litigation involved a joint venture between the plaintiffs and the defendants to exploit coal at Monto in Queensland (the 'Monto Coal Project'). The plaintiffs complained that the defendant, Monto Coal 2, breached the joint venture agreement by deciding to suspend all work on the Monto Coal Project, among other alleged breaches. Essentially, the plaintiffs claimed that, by reason of the impugned conduct of Monto Coal 2, they lost the opportunity to earn a profit from the sale of coal and to receive royalties therefrom. They also lost their opportunity to sell their interests in the joint venture at a value which would reflect the stage to which the Monto Coal Project would have advanced had the impugned conduct not occurred.

[56] This particular decision in the *Sanrus* litigation concerned the defendants' objections to the plaintiffs' expert evidence in the context of the plaintiffs' pleading. As his Honour, Bond J, explained –

> [7] … The defendants contended (and I agree) that it had become apparent for the first time during the course of the submissions that the plaintiffs sought to advance a case in reliance on the proposed

> evidence of Mr Freeman [an expert], which suggested that it was part of their counterfactual case to contend that expert advice would have been given and acted on from time to time during the three years prior to the time the Stage 2 Feasibility Study would have been prepared, not just in the form of the Stage 2 Feasibility Study itself. The defendants contended that the plaintiffs could not be permitted to advance such an unpleaded case and that the evidence of Mr Freeman could not be received for that purpose …

[57] The Manthey Parties relied upon Bond J's statements and observations about the pleading required in a loss of opportunity case to make their argument that the plaintiffs' pleading was deficient. His Honour said (my underlining, bold as emphasis in original) –

> [16] Rule 149 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) requires plaintiffs to set out a statement of all the material facts on which they rely, including by stating specifically any matter that if not stated specifically might take another party by surprise. Of course, the purpose of pleading material facts is not just to avoid surprise: it is to enable the pleader's case to be defined and confined and to enable the defendants to plead to that case, thereby defining and confining the issues for decision. That is reinforced by the terms of r 157 UCPR.
>
> [17] It is a trite proposition of law that defendants are entitled to a direct and unambiguous identification of the material facts relied on to establish the causal link between the conduct which plaintiffs impugn and the loss they allegedly suffered, and which identification at least arguably establishes that link.
>
> [18] I made this point in *Lee v Abedian* [2017] 1 Qd R 549 at [81] and in *Chan v Macarthur Minerals Ltd* [2017] QSC 13 at [39]. The defendants particularly sought comfort from my observation in *Lee v Abedian* (at [81](f)) that:
>
> > The defendants are entitled to have the plaintiff pinned down to a causation hypothesis which is not characterised by imprecision and ambiguity and which, at least arguably, establishes the requisite causal connection between the implementation of the conspiracy and the suffering of loss. If there is more than one causation hypothesis, then the statement just made must apply to each one. The pleading device of merely cross-referring back to events alleged to have happened is unlikely to be a satisfactory way of addressing a proper plea of causation. There must be a direct and unambiguous identification of the material facts relied on to establish the causal link which the law requires. And it must be something which makes narrative sense. The defendants should not be required to cherry pick through the pleading to work out what the case is that they have to meet in this regard.
>
> [19] In *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221, Jackson J collected some further general statements of principle,

to similar effect. His Honour made it clear that he was doing so to demonstrate that there was no shortage of case law for the proposition that the plaintiff must plead a relevant counterfactual scenario to establish the alleged causal link between breaches of contract or negligence and the loss. His Honour observed (footnotes omitted, emphasis added):

> [26] However, there is no shortage of relevant case law [which stands as such authority]. In *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*, Chesterman J said:
>
> "**In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of** (here the relevant non-disclosure) **and the alleged later event** (here the making of the dragline agreement) **stand to each other in the relation of cause and effect […]**"
>
> [27] Another well-known judgment in this area is *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*, where French J said:
>
> "**The material facts establishing the necessary causal link should be pleaded**. In cases of contravention of s 52 said to be constituted by misrepresentation this will generally require more than appears in the opening words of par 50: 'by reason of such conduct …'.
>
> Some guidance to the proper approach may be derived from the ordinary rule of pleading applicable in cases of fraud of which Lord Watson said in *Dow Hager Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 221:
>
> > '… The ordinary rule of pleading applicable to cases of fraud, … was thus expressed by Earle Selborne in *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697: 'General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice." It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by

> general averments. **Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complied of stood to each other in the relation of cause and effect.**'
>
> A perusal of the relevant precedents in [Bullen, Leake & Jacob's *Precedents of Pleadings* 12th ed, pp 702-7] supports the view that the approach enunciated by Lord Watson is equally applicable to actions for negligent misstatement."""

[20] As the Full Court of the Federal Court said in *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102 at [30]:

> There should be no doubt about whether any particular cause of action is relied upon. At a minimum, the pleading should be pellucidly clear about the causes of action, or claims, relied upon by the applicant, including any claims made on an alternative hypothesis. **The explicit clarity with which a claim is expressed should ensure that there be no need for the opposite party to closely scrutinise the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged**, much less to decide whether a particular cause of action is raised. The same basic requirement applies to any defence raised in answer to a claim.

[21] The result is that where a party's causation hypothesis depends on establishing a particular counterfactual scenario to establish the alleged causal link between breaches of contract and the loss which it is said would have eventuated if the conduct which the party impugns had not occurred, that counterfactual scenario must be pleaded and particularised in accordance with the rules of pleading. This should be done with the degree of clarity referred to in *Oztech Pty Ltd v Public Trustee of Queensland*. The pleading so framed must at least arguably establish a reasonable inference that the impugned conduct and the claimed loss stand to each other in the relation of cause and effect.

[58] Bond J then explained that the plaintiffs had been permitted to amend their pleading to accord with certain new expert reports. His Honour set out the pleading of the causation hypothesis in paragraph [23] of the statement of claim. It asserted that, by reason of Monto Coal 2's breaches of the Joint Venture Agreement – (a) the development of Stage 1 of the project had not been achieved; (b) the Stage 2 Feasibility Study had not been undertaken; and (c) the plaintiffs had lost the opportunity to (*inter alia*) earn a profit from the sale of the coal.

[59] Particulars followed, which set out that which the plaintiffs contended would have happened had the defendants not been in breach of the Joint Venture Agreement. Those particulars included assertions like –

(a) Stage 1 would have been completed;

(b) The Stage 2 Feasibility Study … would have been prepared by about May 2005;

(c) Coal produced from Stage 1 would have obtained market acceptance;

(d) The stage 2 Feasibility Study would have demonstrated [certain things]… [In the alternative …(da) …];

(e) The Joint Venture Participants or the Manager would have convened a meeting … [convened in about May or June 2005];

(f) Each of the Participants' Representatives would have … exercised their vote in favour of undertaking the Mine Development of Stage 2 …

(g) Coal would have been produced and sold from Stage 1 and Stage 2 at a profit with a net present value of … [In the alternative …(ga)]

(h) …

(i) …

(j) …

(k) Monto Coal 2 would have paid its Respective Proportion … of the Royalty payable to the plaintiffs quarterly … [in accordance with certain calculations];

(l) The plaintiffs would have received a free carried interest in Stage 1 capital costs, such interest having a net present value of …

[60] His Honour made certain observations about the causation hypothesis as pleaded, including those which follow (at [23] of his judgment) (my emphasis) –

(a) The counterfactual propositions are pleaded as particulars, when they should be pleaded as material facts …;

(b) **It is evident that the plaintiffs' causation hypothesis does depend on establishing a particular counterfactual scenario.** The plaintiffs' case is that no decision to suspend Stage 1 would have been made and Stage 1 would have been completed. [The Stage 2 Feasibility document would have been prepared and it would have had particular content which would have demonstrated that Stage 2 would have been profitable.]

(c) …

(d) …

(e) …

(f) That a Stage 2 Feasibility Study having one or other of the pleaded alternative contents would have been prepared in about May 2005 is a critical part of the counterfactual scenario … It is obvious that it is the decision at [the Joint Venture Management meeting in May or June of 2005] which would necessarily have taken account of the Stage 2 Feasibility Study which it is alleged would have been available, which is the gateway to the proposition that profits would have been earned during Stage 2.

(g) The result is that, in terms of counterfactual decisions by or on behalf of the Joint Venture, the statement of claim plainly directs the reader to the content of the Stage 2 Feasibility Study prepared in the time frame I have identified and to the

decision of the Joint Venture Management Committee which would have been made shortly after the document was received.

[61] Then his Honour identified the problem with the pleading and what was required of it –

> [24] The problem is that the identification of the date of production and of the content of the Stage 2 Feasibility Study and the decision made at the Joint Venture Management Committee meeting is only an incomplete statement of the counterfactual scenario on which the plaintiffs' case is based … [I]n order for the Stage 2 Feasibility Study to have been produced in about May 2005 having the content alleged, over the previous 3 years a whole raft of other counterfactual propositions concerning decisions, agreements and acts made by the Joint Venture but also by various third parties (landholders, statutory bodies and regulators, corporate infrastructure providers and the like) –
>
> (a) would have had to come to pass; and
>
> (b) would have had to come to pass in a particular time frame.
>
> [25] None of those counterfactual propositions have been pleaded. It is convenient to refer to these as **the plaintiffs' unpleaded counterfactual case.**
>
> [26] …
>
> [27] …
>
> [28] Compliance with the rules of pleading required the plaintiffs to frame their pleading in such a way that the plaintiffs' unpleaded counterfactual case was identified at an appropriate level of detail in the pleading …The plaintiffs' failure to do so was a major deficiency in their pleading.

[62] Drawing on Bond J's statements in *Sanrus*, the Manthey Parties submitted, in effect, that a multitude of assumptions lay under the case pleaded in paragraphs 50 to 52 which ought to have been pleaded.

[63] In oral submissions, counsel for the Manthey Parties complained that the pleading –

> … doesn't tell us how it is that the engine would have been commercialised. It doesn't tell us whether or not the joint venture vehicle company, AEDC, had the capacity to do so. It doesn't tell us whether or not that was something that was to be done by the defendants, whether or not it was something that the plaintiffs would themselves have done or caused to be done.

[64] The Manthey Parties argued that those matters were a necessary part of the counterfactual case which had to be pleaded to enable them to meet it. The same was true of the alternative opportunity which was pleaded in paragraph 50(b). It was not

clear how the plaintiffs could have sold an interest in an agreement which was formed by conduct – and the Manthey Parties were unable to meet such an allegation.

[65] In reply to the plaintiffs' argument that they had sufficiently pleaded a breach of contract claim, the Manthey Parties submitted that the plaintiffs ought not to be permitted to lead whatever evidence was necessary to prove the facts as pleaded – without appropriately confining their case. A similar argument had been rejected in *Sanrus*.

[66] As appears above, in *Sanrus*, Bond J noted the major deficiencies in the plaintiffs' pleading but acknowledged that those deficiencies had been to some extent ameliorated by the provision of, *inter alia*, witness summaries and expert opinion evidence. His Honour discussed the importance of the superimposition, on a case conducted by pleadings, of orders requiring the parties to identify, pre-trial, the evidence by which they intended to prove their case, to facilitate the just and expeditious resolution of the real issues at minimum expense. Those pre-trial orders also served the purpose of avoiding surprise and narrowing the issues. (I do not understand the present case to be case managed by this Court.)

[67] His Honour went on to explain that, to achieve those purposes, it was necessary to confine the parties to proving their cases in the way in which they flagged they were intending to do so – in that case, by the provision of material in accordance with case management orders.

[68] Ultimately, his Honour concluded that the plaintiffs could not – on the state of the pleadings – advance what his Honour defined as the "unpleaded advice case". The plaintiffs in *Sanrus* had argued that (as set out at [51]) –

> … they could seek to establish the facts pleaded in the statement of claim at [23] in whatever way they thought fit. They contended that the various counterfactual propositions contained in what I have defined as the plaintiffs' unpleaded counterfactual case were to be regarded as evidence of the material facts pleaded and particularised in the statement of claim at [23] and not matters which were necessary to be pleaded.

[69] His Honour dealt with this argument at [57] –

> For the reasons I have expressed at [16] to [21] above, where, as here, a party's causation hypothesis **depends on establishing a particular counterfactual scenario to establish the alleged causal link between breaches of contract and the loss which it is said would have eventuated if the conduct which the party impugns had not occurred, that counterfactual scenario must be pleaded and particularised in accordance with the rules of pleading**.

[70] The plaintiffs in *Sanrus* had only pleaded part of that case. One of the reasons why the plaintiffs were not permitted to run their unpleaded counterfactual case was that they had not set out their case with sufficient specificity to allow the defendants the chance, by their evidence, to engage with the matters alleged in the unpleaded case. In his

Honour's view, neither the pleadings, the course of the lay evidence, the contents of Mr Freeman's reports, nor the plaintiffs' opening submissions fairly revealed to the defendants that the plaintiffs were advancing the unpleaded advice case.

[71] In response to the Manthey Parties reliance on *Sanrus*, the plaintiffs made the point that it was a case about the admissibility of evidence – not about pleadings (although the plaintiffs acknowledged that the pleadings governed the evidence which might be led). The plaintiffs submitted, in effect, that the issues for Bond J in *Sanrus* were different from those confronting me and I ought to bear that in mind when considering the Manthey Parties' reliance on that case.

[72] The plaintiffs argued that their case was not similar to the plaintiff's case in *Sanrus*. *Sanrus* concerned a joint venture to develop land. The plaintiffs in *Sanrus* were asserting that "but for" the breach of the joint venture agreement, certain things would have happened. That was not the plaintiffs' case here. It concerned a chattel – the engine. The submissions continued –

> … The pleading is that the first and second defendants assert ownership to it, contrary to the pleaded joint venture, and they have denied … the interest of the first plaintiff, at least, in the … engine.
>
> So why is that different? Well, it's different because it's not pleaded here that had they not breached the joint venture, then the engine would have been developed and would have achieved some commercialisation. That's not the case pleaded …
>
> … *Sanrus* is not authority for the proposition that you must plead a counterfactual to make good a loss of commercial opportunity. But it is authority for the proposition that if you do plead a counterfactual, well then you must plead it adequately and in accordance with the rules …

[73] I was referred to paragraph [21] of his Honour's decision (see above). The plaintiffs emphasised that their case did not depend on a contention that the engine would have reached a certain level of development – rather, their case was it had been taken away from the *joint* venture.

***Graham & Linda Huddy Nominees Pty Ltd & Anor v Byrne & Ors* [2016] QSC 221 ('*Huddy v Byrne*')**

[74] The two plaintiffs in this case were companies associated with Mr Huddy. Huddy decided to go into business – through his companies – with Mr Byrne, through Byrne's companies. The first to the fifth defendants in the matter were Byrne and his associated companies. The sixth defendant was a solicitor. She applied for the striking out of the statement of claim as against her. The statement of claim included a claim for loss of opportunity.

[75] One of the business' projects related to the acquisition of land called "the Eagle Farm Road Property", which was owned by Queensland Rail ('QR'). In the course of the parties collaborating to acquire the land, they entered into a Heads of Agreement and

the QR Assignment Agreement. The sixth defendant acted for the plaintiffs in connection with those documents.

[76] The plaintiffs alleged that the sixth defendant acted (or omitted to act) negligently in certain ways which were in breach of contract, negligent and in breach of her fiduciary obligations and that, as a consequence of her acts or omissions, the second plaintiff suffered loss.

[77] The plaintiffs' pleading included the following –

> 114. By reason of each of the breaches of duty pleaded in paragraphs 110 and 111 in relation to the completion of the QR Assignment Agreement [the second plaintiff] has suffered loss and damage being:
>
> (a) that part purchase price between [the second plaintiff] and PWT for the purchase of the leasehold interests in the Eagle Farm Road Property under the Heads of Agreement that has been paid in the form of monies that Huddy [the first plaintiff] and [the second plaintiff] caused to be advanced to Byrne and his various corporate entities … in anticipation of the Heads of Agreement, which monies have not been repaid notwithstanding the QR Assignment Agreement has become impossible of performance and the Heads of Agreement is at an end;
>
> (b) the transaction costs incurred in attempting to complete the QR Assignment Agreement, being:
>
> …

[78] The sixth defendant submitted that this pleading was deficient for several reasons, including because the plaintiffs had failed (among other failings) to allege that *but for* the breaches of contract or negligence, the QR Assignment Agreement would have been completed. She submitted that the plaintiffs had failed to plead, as they must, a relevant counterfactual scenario to establish the alleged causal link between the breaches of contract or negligence and the loss.

[79] Jackson J considered that there was a potential difficulty with the pleading in paragraph 114(a) and –

> [24] … the allegation that the loss alleged in par 114(a) was caused by the breaches of contract or negligence alleged against the sixth defendant in par 110. The purchase price paid referred to in par 114(a) is the purchase price referred to in paras 35 and 36 of the FASOC. It was paid when the Heads of Agreement were entered into. How that sum is a loss suffered by the acts or omissions alleged against the sixth defendant for the first group of causes of action, relating to the later QR Assignment Agreement, is not apparent.

[80] It was at about this point in his Honour's judgment that he discussed the relevant case law, as set out in *Sanrus* by Bond J. Of relevance to the present matter are certain parts

of Jackson J's discussion of the authorities which were omitted by Bond J. Those parts follow.

[81] At [26] Jackson J quoted further from Chesterman J's judgment in *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* (my emphasis) –

> … Douglas J put it this way in *LBS Holdings Pty Ltd v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229 (at para [3]):
>
> > '… The principle relied on is that facts must be set out which lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect and that the plaintiff must plead the necessary facts showing that causal link …'
>
> His Honour referred to *Dow Hager Lawrance v Lord Norreys & Ors* (1890) 15 App Cas 210 at 221 and *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215 at 221 – 222. In the first of those cases Lord Watson had said:
>
> > 'There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; **and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments**. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and injuries complained of stood to each other in the relation of cause and effect.'

[82] Jackson J then discussed the application of the *Civil Liability Act* 2003 (Qld) ('CLA') and the factual causation element required by section 11 of that Act. At [29] his Honour said –

> The loss alleged in par 114 of the FASOC is loss suffered "[b]y reason of each of the breaches of duty pleaded in paragraphs 110 and 111". The breaches of duty alleged in par 110 are breaches of tortious or contractual duties to take reasonable care or exercise reasonable skill. The factual causation element required under s 11 of the CLA must inform the facts to be pleaded by way of causation for a loss of the kind alleged in par 114.

[83] At [44], his Honour said –

> In a case to which s 11 of the CLA applies, that part of the necessary causal condition is the requirement of factual causation, to be determined on a "but for" basis. Accordingly, in a case like the present where the breaches of contract and negligence alleged are breaches of duty within the meaning of s 11, and the relevant causal conditions include "what the [plaintiff] who suffered harm would have done if the [defendant] had not been so in breach" the question is what the particular plaintiff would have done. This part of the assessment must be made on the balance of probabilities.

[84] His Honour concluded that the current plea of causation for the loss alleged in 114, that "by reason of" the breaches of duty alleged, the second plaintiff suffered the loss alleged in 114(a) was inadequate. The paragraph was struck out with leave to re-plead.

[85] The sixth defendant also made a complaint about paragraph 115 of the pleadings, which asserted that –

> 115. By reason of each of the breaches of duty pleaded in paragraphs 112 and 113 in relation to the negotiations for the acquisition of the freehold to the Eagle Farm Property [the second plaintiff] has suffered loss and damage, in the sum of at least $14,500,000 being that lost opportunity to acquire the freehold to the Eagle Farm Road Property, particulars of the amount of loss and damage from losing such opportunity, in advance of expert evidence, include:
>
> …

[86] The sixth defendant submitted that the loss alleged involved the assumed counterfactual that – but for the alleged breaches of contract or negligence – the second plaintiff would have acquired the Eagle Farm Road Property, but that was not expressly alleged. She submitted that the assumption was that the second plaintiff "could and would" have acquired the freehold, but the pleadings did not allege how that could or would have occurred.

[87] The plaintiffs submitted that the allegation in 115 was a clear allegation of a "lost opportunity to acquire the freehold" and that the loss claimed valued that opportunity at 100 per cent of the difference between the value of the land and the price that the plaintiff would have paid for it. His Honour explained that the difference between the sixth defendant's submission, that the model of loss claimed was that the second plaintiff "could and would" have acquired the land, and the plaintiff's submission that the model of loss claimed was a "lost opportunity to acquire the land", was one of legal significance. (I note the similarities between the different conceptualisations of the model of loss in the present case to those in *Huddy v Byrne.*)

[88] Jackson J discussed the legal significance of the distinction, commencing at [36]. His Honour discussed *Sellars* in which, as above, the court adopted an analysis which began with whether, on the balance of probabilities, there was a loss of a valuable opportunity.

[89] His Honour found that the plaintiffs in *Huddy v Byrne* were not required to plead or prove that the second plaintiff could and would have acquired the Eagle Farm Road Property. His Honour continued –

> [42] … In the first place, it is enough to allege, to an extent that complies with the pleading rules, that they have lost the opportunity to acquire that land and that the opportunity was valuable.
>
> [43] However, proof that there was a commercial opportunity to acquire the land and that it was valuable is not proof that the plaintiff has lost that opportunity. As a matter of logic, the necessary causal conditions which demonstrate that a plaintiff *has lost* a valuable commercial

> opportunity will almost always include that the plaintiff would have done the voluntary acts or omissions required on its part to pursue or avail itself of that opportunity. The same part of the necessary causal conditions was reflected in the "would" part of the now discarded formulation that a plaintiff was required to prove that it "could and would' have obtained the alleged lost benefit.

[90] Observing that he had not been referred to any authority which discussed the required elements of pleading, his Honour articulated the following relevant propositions (my emphasis) at [50] –

- First, it is necessary for a plaintiff who alleges loss of a valuable commercial opportunity to plead that the loss it has suffered is a loss of a valuable commercial opportunity, identifying the opportunity with some particularity.
- Second, it is also necessary that the plaintiff pleads what it would have done, **where what the plaintiff would have done if the defendant had not been in breach of duty is a necessary causal condition to deciding factual causation**.
- Third, it is necessary for a plaintiff who alleges such a loss to plead the percentage or proportion of the opportunity that was lost, in assessing value on the possibilities, in order to plead the amount of the damages claimed, as is specifically required [by the *Uniform Civil Procedure Rules*].
- Fourth, where a plaintiff alleges a loss of a 100 per cent possibility or the certainty that they would have obtained the hoped for or expected benefit under a transaction which did not occur, it is to be expected that the plaintiff will allege with some particularity the facts by which that certain outcome would have been achieved.

[91] His Honour added – at [51] –

> …where a plaintiff alleges loss of a valuable commercial opportunity, the plaintiff should in most cases also allege the extent of the loss it says it suffered on the possibilities. It is not sufficient for a plaintiff to simply allege a 100 per cent possibility of obtaining the hoped for or expected benefit, leaving it open to contend that the issue to be decided by the court is the actual degree of likelihood anywhere between 100 per cent and 1 per cent. To require a plaintiff to formulate its case with all reasonable precision does not detract from the power of the court to grant relief generally other than that specified in the pleadings, subject to the application of rules of procedural fairness.

[92] His Honour found that 115 mostly measured up. It alleged a loss of a valuable commercial opportunity which it identified with particularity. And it alleged the amount of damages claimed, from which it might be inferred that the loss alleged on the possibilities was 100 per cent. But it did not allege what the plaintiff would have done to obtain the hoped for benefit. The reader was left to infer what the hypothetical past transactions might have been. They should have been pleaded. Paragraph 115 was struck out with leave to re-plead it.

[93] As I have noted above, the plaintiffs argued that the Manthey Parties' reliance on this decision, particularly for the statements made at [50] (at my paragraph [90]), was misplaced. After emphasising the phrase which I have emphasised in [50] (at my [90]), the plaintiffs submitted in writing –

> [23] However, reliance on *Huddy* in this case is misplaced. In that case, the plaintiff alleged a breach of duty by its solicitor. That duty was alleged in contract and in tort, but the substance of the action was the same, namely, that the solicitor had been negligent. A claim for a breach of duty imported the need, pursuant to s 11 of the *Civil Liability Act* 2003 (Qld) to plead and prove factual causation. This can be clearly seen in paragraphs [28], [29], [44] and [53] of his Honour's judgment.
>
> [24] The present case is entirely different. Here is alleged that the relevant joint venture parties contracted for the promise of a share in any benefits realised upon the commercialisation of the engine …

[94] The plaintiffs then referred to –

- Brennan J's observations in *Sellars* at 359 (above at my paragraph [48] and in bold) in which his Honour differentiated cases in contract and tort (and under section 82 of the TPA); and
- Gummow A-CJ's observations in *Tabet v Gett* (above at [31] and in bold) that no appropriate analogy could be drawn between the principles dealing with the recovery of damages for breach of contract with those in negligence,

to make the point that their cause of action was complete upon breach.

***Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors* [2017] QSC 75 ('*Aklia*')**

[95] The Manthey Parties relied on this case for their argument that there was no "coherent causation hypothesis" pleaded in paragraphs 50 – 52.

[96] One of the issues in *Aklia* was the pleading of the plaintiff's loss of chance case. Aklia was one of three companies which held shares in the corporate trustee of a unit trust ('TCG'). The three shareholder companies were parties to an agreement intended to govern their relationship with TCG. As per the agreement, the directors of TCG were persons associated with the three shareholder companies – Birk (for Aklia), Ball and Sa. Aklia claimed that Ball and Sa caused it to be deprived of its shares in TCG by causing its shares to be transferred to the other two shareholder companies. Aklia alleged that the transfer was wrongful and without its consent, and that it had caused it loss in several ways including by way of a loss of a chance. Bond J found Aklia's pleading of its loss of chance case deficient.

[97] Speaking broadly, Aklia alleged that upon the wrongful transfer of its shares, it lost its ability to control the distribution of TCG's funds; the management of the sale of the business run by TCG; and the way in which TCG's debts were paid. It alleged that –

43B But for the occurrence of the matters pleaded in paragraph 43A herein [the share transfer]:

(a) …

(b) [Aklia] would have been able to exercise its powers and ability as a shareholder to cause [TCG] to pay its debts, as and when they fell due, including to the Commissioner of Taxation; and/or

(c) [Aklia] would have been able to cause [TCG] to sell the business of TCG; and

(together, **the consequences**)

(d) it is more likely than not that [TCG] would not have been placed in liquidation.

43C As a result of the consequences and effect of [TCG], as pleaded at paragraph 43B herein, [Aklia]:

(a) lost the chance to prevent [TCG] from being placed into liquidation …;

(b) lost the chance to recover, from [TCG], distributions from the Unit Trust which had been assigned to [Aklia] …; and

(c) as a result, has lost all prospect of recovering from [TCG], distributions from the Unit Trust which had been assigned to – Aklia] …

44 Further in the premises, by reason of the share transfers in [TCG] and the unit transfers:

(a) [Aklia] suffered loss and damage being the amount which [Aklia] could have received but for the matters pleaded in paragraph 43C above, calculated as follows –

…

[98] The defendants applied to have struck out paragraphs 43B, 43C and 44(a)..

[99] Bond J observed that one of the difficulties for the defendants in being able to demonstrate that Aklia had no prospect of succeeding on this claim was their inability to identify just what it was about what Aklia said it could and would have done that Aklia had no real prospect of demonstrating. His Honour said (my emphasis)–

> [42] That was not their fault because, in truth, the case pleaded by Aklia in …[43B](b), [43B](c), [43B](d) and [43C] is deficient. The generality of the language used does not actually convey what it was that Aklia would have been able to do to achieve each of the outcomes mentioned in [43B](b), [43B](c) and [43B](d). The defendants are left entirely in the dark as to the nature of the chain of events which Aklia

says it could have instituted which would have achieved those outcomes. **It has failed to plead the material facts which establish the causal link between the counterfactual of it having the shares and the units and the outcomes on which it relies. If the damages case truly is a case of damages for loss of a valuable chance, these matters are the means by which the chance is both shown to be lost and demonstrated to be valuable** …

[43] In argument before me Aklia contended that either by:

(a) persuasion; or

(b) litigation under the *Corporations Act*,

Aklia could have taken steps which could and would have achieved the outcomes referred to in [43B]. It should be permitted to do so at trial.

[44] If that is so, then the steps which it says it could and would have done should be pleaded and the connection between those things and the outcome articulated. Senior Counsel for Aklia took me to other aspects of the evidence which suggested bases on which it might be thought that the opportunity was valuable … but again if considerations of this nature are said to be matters which suggest that the opportunity lost was valuable, then they are matters which should have been pleaded

[100] His Honour struck out [43B], [43C] and [44](a), with leave to re-plead.

***Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2018] 2 Qd R 584 ('*Principal Properties*')**

[101] This matter involved a claim for damages for the loss of an opportunity to acquire and develop land at a profit. The appellant contended that the primary judge was wrong in law to hold that there was no compensable loss because of the probability that the appellant would have lost money from the development. The appellant succeeded. The Court of Appeal found that the opportunity to develop the land at a profit, which was denied to the appellant, had a value.

[102] McMurdo JA, with whom Philippides JA and Boddice J agreed, discussed damages for a lost opportunity (footnotes omitted)–

[12] A contract to provide a commercial opportunity, if breached, enables the innocent party to bring an action for damages for the loss of that opportunity. There may be a compensable loss of a commercial opportunity, even though there is a less than 50 per cent likelihood that, if pursued, the opportunity would have resulted in a financial return.

> [13] In order to recover substantial, as distinct from nominal, damages on this basis, a plaintiff must establish that the lost commercial opportunity had *some* value. If the opportunity had no more than a theoretical or negligible value, then no compensable loss has been caused. The fact that some loss or damage was caused must be proved on the balance of probabilities. If that fact is proved, it is then for the court to assess the extent of the plaintiff's loss. The value of the lost opportunity must then be "ascertained by reference to the degree of probabilities or possibilities" of relevant factual hypotheses …
>
> [14] Thus, in *Chaplin v Hicks*, the plaintiff suffered a compensable loss when she was deprived of the chance to win, with a financial reward, a competition (which the defendant had promised to provide). The plaintiff's chance had a value, although, more probably that not, she would not have won the competition. The degree of likelihood of winning the prize was relevant for the valuation of that chance in the assessment of her damages.
>
> [15] … [His Honour considered Brennan J's judgment in *Sellars*.]
>
> [16] Consequently, the improbability of a profit from the pursuit of a commercial opportunity is no necessary bar to the recovery of substantial damages for the loss of that opportunity …

Discussion

[103] The plaintiffs submitted that it was enough for them to prove a breach of contract – without needing to prove a loss on the balance of probabilities – to establish a reasonable cause of action. The Manthey Parties submitted that the plaintiffs were obliged to prove loss on the balance of probabilities.

[104] In addition to their primary submissions, the Manthey Parties submitted – and I did not understand this submission to have been contradicted by the plaintiffs – that neither *Chaplin v Hicks* nor *Tabet v Gett* stood for the proposition that a plaintiff could receive substantial, rather than nominal damages, upon proof of a breach of contract.

[105] Referring also to *Principal Properties*, the Manthey Parties submitted that the loss (or the way in which it was sustained) had to be pleaded "with proper material facts". The real question, they submitted, was whether the pleading contained all of the facts to establish that a loss was suffered on the balance of probabilities and the facts upon which a court might assess damage.

[106] They referred me to rule 155(4) of the *Uniform Civil Procedure Rules* 1999 which states –

> … a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise.

[107] They submitted that the questions they raised about the pleading at 50 to 52 and the nature of the opportunity and how it would have been realised are facts which would, if not pleaded, take the Manthey Parties by surprise.

[108] The plaintiffs submitted, essentially, that on a proper understanding of their pleading, they had not failed to properly plead causation. Their causation hypothesis did not depend on a counterfactual scenario. Causation was established upon proof of the breach of contract – and the pleading in paragraph 50 was not deficient.

[109] Establishing the claim for substantial damages was a matter of evidence. It was all about probabilities and possibilities as the High Court had explained. The plaintiffs had provided in paragraph 51 their estimate – that the "probability of the opportunity" was "80%". That was sufficient. Proving its value was a matter of evidence. The plaintiffs submitted (referring to Brennan J in *Sellars* and the notion that a commercial opportunity was self-evidently valuable) that – not only might it be inferred as a matter of common commercial experience that an opportunity is of value – it was directly pleaded at paragraph 52 that it was worth $1 million. That was enough.

[110] It seems to me that the Manthey Parties do not seriously disagree with the plaintiffs' position that on their pleading as it stands, at least in so far as paragraph 50 is concerned, their cause of action in contract is pleaded sufficiently and nominal damages may be available. Indeed, the Manthey Parties say so much in their written submissions.

[111] There is no doubt, as several of the cases discussed illustrate, that a contract to provide a commercial advantage or opportunity, if breached, enables an "innocent party" to bring an action for damages for the loss of that advantage or opportunity. In other words, the loss of a chance to "win", resulting from a breach of contract, is compensable. As in *Chaplin v Hicks*, if the contract contains a *promise to provide a chance to "win"* and the contract is breached and the promise is broken, then the breach of contract has caused the loss of that chance. Of course, the loss must be an actual loss of some value. But, as the cases establish, there is value in commercial opportunities – even in those where a profit is not guaranteed or unlikely. (And I did not understand the Manthey Parties to be suggesting that the opportunity said to be lost in this case was not valuable.)

[112] In my view, in this case – unlike in *Sanrus* – the plaintiffs are able to establish causation for their loss by proof of a breach of the implied term of the joint venture agreement and without resort to a counterfactual scenario. Of course, a counterfactual scenario *may* be required in a breach of contract case to establish a link between the breaches of contract alleged and the loss suffered – as it was in *Sanrus* – but it is not required in this case.

[113] In my view and notwithstanding the way Bond J expressed himself at [19] in *Sanrus,* it is not the case that a plaintiff *must* prove a relevant counterfactual scenario to establish the alleged causal link between breaches of contract and loss. Indeed, his Honour clarified the position at [21] and [23](b) in *Sanrus*. See too Jackson J's second proposition in *Huddy v Byrne* at [50].

[114] As the authorities to which Jackson J referred in *Huddy v Byrne* make plain, it is necessary to plead facts which lead to a reasonable inference of a causal link between the breach and the loss. Sometimes, that might require pleading a counterfactual. But not in every case.

[115] In my view, in this case, once the plaintiffs' case is understood, the link between the breach and the loss is established on the facts pleaded. The plaintiffs' complaint is not that the Manthey Parties failed to develop the engine as they had agreed to do – in which case a counterfactual scenario may have been necessary to establish the causal link between the breach and the loss. Instead, broadly speaking, the plaintiffs' complaint here is that, in breach of their agreement with Hookey, the Manthey Parties (or some of them), in effect, cancelled the joint venture; denied any arrangement to develop the engine for their joint benefit; disposed of the engine; and hid its specifications and other intellectual property associated with it. The loss claimed by the plaintiffs was the loss of the opportunity to be *part of* the venture which might have led to the development of the engine to the point at which profits and royalties might have flowed therefrom. In other words, the plaintiffs' case is that the defendants have broken their promise to give him a chance at a commercial opportunity.

[116] The plaintiffs' position is akin to the position of the plaintiff in *Chaplin v Hicks*. As Brennan J in *Sellars* explained, the relevant loss is identified by the contractual promise to afford the plaintiff an *opportunity* (in this case, by being part of the joint venture) to acquire a benefit. That loss may be established upon proof of the breach alleged. In that sense, the pleading is adequate. And, as the cases make plain, nominal damages for the loss of the opportunity may be available – even if the plaintiff fails to prove the value that performance of the unfulfilled promise would have had.

[117] The plaintiffs submitted that my acceptance of the proposition that their loss may be established on proof of the breach alleged, in effect, got them home and the pleading was not therefore liable to strike out. But the plaintiffs here seek more than nominal damages. For the breach of contract, they seek damages of at least $800,000.

[118] As Bond J reinforced in *Sanrus*, the purpose of pleading material facts is not just to avoid the other party being taken by surprise: it also enables the pleader's case to be defined and confined, so as to permit a defendant to meaningfully respond to it, thereby defining and confining the issues for decision.

[119] In my view the pleading in paragraphs 51 and 52 are deficient. As presently pleaded, they do not allow for a meaningful response by the Manthey Parties. Further, the plaintiffs cannot be permitted to establish the facts pleaded as broadly as they are pleaded in paragraphs 51 and 52 in whatever way they think fit.

[120] The plaintiffs' pleadings do not, in clear and unambiguous terms as required, explain the basis of their claim in paragraph 51 that the "probability of the opportunity referred to in paragraph 50 above occurring was 80%." Does that probability attach to the loss in 50(a) or (b) or both? Are the plaintiffs suggesting that there was a 20 per cent chance that Hookey might not wish to proceed with the joint venture? Or are they suggesting that there was a 20 per cent chance that something else – other than a breach of contract

– might have interfered with the occurrence of the opportunity? Or is it intended to suggest that there was a 20 per cent chance that there might be no market for an interest in the joint venture? Or is it intended to suggest something else altogether?

[121] Nor, in my view, is it sufficient for paragraph 52 to nominate $1 million as the value of the lost opportunity without more.

[122] As the authorities establish, where the breach of a contract has resulted in the loss of a commercial opportunity, whilst estimating the loss in dollar terms may be difficult, damages will be ascertained by reference to the degree of probabilities or possibilities inherent in a successful outcome had the plaintiff been given the chance to engage in the commercial opportunity.

[123] So as to ensure that the defendants understand the case they have to meet and to plead to it, and to ensure they are not taken by surprise, the plaintiffs are required to plead the assumptions or methodology or similar upon which the identification of an 80 per cent probability of the opportunity occurring, and the valuation of the lost opportunity at $1 million, are based.

[124] It follows that I consider that paragraph 50 sufficiently pleads the causal link between the breaches alleged and the loss suffered by the plaintiffs. However, paragraphs 51 and 52 are inadequate. They will be struck out, with leave to re-plead.

[125] In deciding to grant leave to re-plead, I have taken into account the Manthey Parties' arguments that I ought not to grant such leave because the plaintiffs had have ample opportunity to improve their pleading and have been unable to do so. I have compared the previous pleadings with the 3FASOC. I have also considered Brown J's earlier decision in this matter ([2018] QSC 207), at which time the pleadings were in a different state. I do not consider that the point has been reached at which a court might say there is no chance of an adequate pleading of this issue.

The complaint about the pleading of the fourth defendant's knowledge

[126] The Manthey Parties submitted, in effect, that the pleading of the fourth defendant's knowledge, in paragraph 61 of the 3FASOC, was deficient because it did not contain facts from which it might be inferred that Brenda Manthey *knew* that she had received property which had been distributed in breach of trust.

[127] Under the heading "Unauthorised payments from AEDC", the pleadings assert, at paragraph 58, that between certain dates, the first defendant caused AEDC to make certain payments from AEDC's bank account ('Unauthorised Payments'). Paragraph 59 asserts that the Unauthorised Payments were not for the purpose of the Joint Venture or the Common Intention. Paragraph 60 asserts that AEDC acted in breach of trust in making the Unauthorised Payments.

[128] The Manthey Parties apply for the striking out of the word "fourth" in paragraph 61 which states –

> Each of the first, second, fourth and fifth defendants received their respective Unauthorised Payments knowing that:
>
> a. the payments were made from AEDC;
>
> b. the payments were made in breach of trust, because each of them knew that:
>
> i. the payments were not in furtherance of the commercialisation of the Engine; and
>
> ii they were not entitled to receive funds held by AEDC.

[129] Referring to rule 150(1)(k) of the *Uniform Civil Procedure Rules* 1999, the Manthey Parties submitted that it was necessary to plead that Mrs Manthey had notice of the trust pleaded in paragraph 28 of the 3FASOC. And, by reference to rule 150(2), it was necessary to plead the facts from which her knowledge might be inferred. It was not sufficient for the plaintiff to rely upon the allegation that Mrs Manthey knew that the payments were not in furtherance of the commercialisation of the engine. On its own, that did not establish that Mrs Manthey knew she was not entitled to receive the funds because she was not alleged to have knowledge of the trust.

[130] The breach of trust allegation followed from the pleading in paragraph 28, which was the final paragraph of the section of the 3FASOC headed "The relationship between the parties from December 2015". Paragraph 28 stated –

> In the premises pleaded in paragraphs 20 to 27 above, it is to be inferred that AEDC would hold the Intellectual Property, and any product developed during the course of the Joint Venture or Common Intention, on trust for the benefit of the first plaintiff and the first, second and third defendants, in proportion to their proposed respective interests in the Joint Venture…

[131] It may be noted that Mrs Manthey is not referred to in paragraphs 20 to 27. It is asserted, in paragraph 4 of the 3FASOC, that she and her husband, Steven, were the directors of SC Manthey Pty Ltd, the fifth defendant. It is also asserted, in paragraph 18, that AEDC paid the fifth defendant $1 million for the engine prototype and associated designs. Mrs Manthey is not otherwise mentioned in the 3FASOC.

[132] In defending their pleading, the plaintiffs argued that it was sufficient to assert that Mrs Manthey had the actual knowledge she is said to have in paragraph 61. That was enough to found liability under *Barnes v Addy* (1874) LR 9 Ch App 244. And reading paragraph 61 together with paragraphs 4 and 18 was enough, they submitted, "to get past a strike out".

[133] The Manthey Parties referred me to *Peter Davis & Ors v Halliday Financial Management Pty Limited & Ors* [2014] NSWSC 1371. That case concerned the sufficiency of a pleading of actual knowledge that a representation was untrue. As is the case here, to defend the pleading, counsel for the plaintiffs said that they were not

required to allege any other material fact standing behind the fact that they wished to prove, namely, actual knowledge. The response to the allegation of actual knowledge might simply and appropriately be a denial.

[134] In striking out the allegations of actual knowledge, with leave to replead the facts by which it was alleged that the defendants had the relevant actual knowledge, Kunc J said –

> [25] … the inquiry as to whether an allegation has been sufficiently made does not stop at the point of identifying that a bare factual allegation of the kind the law requires to be made has been pleaded. A further inquiry needs to be answered, namely, "whether the cause of action is pleaded at the level of particularity that is sufficient to define the issues and inform the other party of the case that it has to meet, in the context of the particular allegations" [citing *Young Investments Group Pty Ltd v Mann & Ors* (2012) 293 ALR 537]. It is against that further inquiry that the proposed amended statement of claim fails.
>
> [26] There will be cases where the mere allegation of actual knowledge by a defendant will be sufficient as a matter of pleading. The circumstances of that case will make it obvious how it can be said that a defendant had actual knowledge of something. This does not seem to me to be such a case.

[135] Counsel for the Manthey Parties brought to my attention a case to the contrary: *Banks v Alphatise Pty Limited* [2014] NSWSC 1437 (Brereton J). In that case, his Honour disagreed with Kunc J that the facts from which it is contended that an inference of actual knowledge should be drawn are material facts that must be pleaded in a pleading. His Honour explained that a defendant did not need particulars to know whether or not to admit actual knowledge.

[136] Regardless of the difference of opinion in New South Wales, the present proceeding is governed by the *Uniform Civil Procedure Rules* 1999 (Qld). Rule 150(1)(k) requires knowledge to be specifically pleaded. Rule 150(2) requires any fact from which knowledge is claimed to be an inference to be specifically pleaded. The pleading of Mrs Manthey's knowledge does not comply with the rules. The allegation against Mrs Manthey is a serious one. She is entitled to know the facts upon which it is contended one might draw an inference of her actual knowledge that she received funds in breach of trust. There is nothing in the 3FASOC (nor was my attention drawn to anything in the evidence) from which Mrs Manthey's alleged knowledge might be inferred. It follows that paragraph 61 – to the extent that it concerns Mrs Manthey – will be struck out, with leave to re-plead.

Conclusions

[137] Paragraphs 51 and 52 of the 3FASOC are struck out, with leave to re-plead.

[138] To the extent to which it refers to the fourth defendant, paragraph 61 of the 3FASOC is struck out with leave to re-plead.

[139] The Manthey Parties have been substantially successful. Unless a party wishes to submit to the contrary, I order that the respondents to this application (the plaintiffs) pay the Manthey Parties' costs. If a party wishes to submit to the contrary, then they must so notify my associate by 4 pm on 26 May 2020, in which case further directions will be made.