

SUPREME COURT OF QUEENSLAND

CITATION: *Christian v Cooper* [2020] QSC 224

PARTIES: **JOHN CHRISTIAN**
(Plaintiff)
v
TIMOTHY COOPER
(Defendant)

FILE NO/S: BS No 1780 of 2017

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 24 July 2020

DELIVERED AT: Brisbane

HEARING

DATES: 15, 16, 17, 18, 19 and 26 June 2020

JUDGE: Bowskill J

ORDERS: **The plaintiff's claim is dismissed.**

CATCHWORDS: PARTNERSHIP – GENERALLY – FACTS AND AGREEMENTS EVIDENCING PARTNERSHIP – PARTNERSHIP IN FACT – CONSIDERATION OF INTENTION OR RELATIONSHIP — where the plaintiff and the defendant were friends who had known each other for many years and became involved in gambling on horse racing using a suite of computer software comprising different components, which they were variously responsible for creating and maintaining – where the plaintiff contends the commercial relationship between the parties was a partnership, with the suite of software used for gambling being an asset of the partnership – where the defendant had been involved in similar gambling arrangements, with other people, previously, and contends there was no partnership, merely a wagering syndicate agreement between the parties, which either party was free to bring to an end at any time – whether the gambling activities could be characterised as the conduct of a business – whether the parties were conducting any such business “in common” within the meaning of s 5 of the *Partnership Act* 1891

Partnership Act 1891 (Qld) ss 5, 6

Babka v Federal Commissioner of Taxation (1989) 89 ALR 373

Brajkovich v Federal Commissioner of Taxation (1989) 89 ALR 408

Camden v McKenzie [2008] 1 Qd R 39
Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd (1974) 131 CLR 321
Commissioner of Taxation v Visy Industries USA Pty Ltd [2012] FCAFC 106
Evans v Federal Commissioner of Taxation (1989) 20 ATR 922
Fox v Percy (2003) 214 CLR 118
Jafari v 23 Developments Pty Ltd [2019] VSCA 201
Jones v Federal Commissioner of Taxation (1932) 2 ATD 16
Sales (Finance) Pty Ltd (1974) 131 CLR 321
Salib v Gakas [2010] NSWSC 505
Trautwein v Federal Commissioner of Taxation (No 2) (1935) 56 CLR 196
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1
Visy Industries USA Pty Ltd v Commissioner of Taxation [2011] FCA 1065
Wiltshire v Kuenzli (1945) 63 WN (NSW) 47

COUNSEL: A J H Morris QC for the plaintiff
D de Jersey QC for the defendant

SOLICITORS: Australian Law Partners for the plaintiff
Dundas Lawyers for the defendant

Introduction

- [1] The plaintiff, Mr Christian, and the defendant, Mr Cooper, have known each other for many years. They first met in about 2001, when Mr Cooper employed Mr Christian as a computer programmer, to work for a company Mr Cooper then ran with his brother. They subsequently became friends, sharing a joint interest in and love of gambling of various kinds. Mr Cooper is a self-taught computer programmer. He has no formal tertiary qualifications, but is acknowledged to have significant expertise and experience in software development. From about 2001 he developed, on his own account and at times in conjunction with others, a suite of software which was used for betting on horse racing. It has been a very profitable enterprise. Mr Christian has a degree in information technology, and has worked in that field since about the late 1990s. Mr Christian joined in with Mr Cooper's horse racing enterprise from about 2011.
- [2] Over the years Mr Cooper has been involved in what he calls syndicates with various combinations of people, betting on horse racing. From about August 2013 until about June 2016, the combination comprised Mr Christian and Mr Cooper. Mr Christian contends that, during this period, the commercial relationship between himself and Mr Cooper was a partnership, with the suite of software used for gambling on horse racing being an asset of the partnership. By this proceeding, Mr Christian seeks to recover from Mr Cooper just over \$870,000, which he says is his share of the partnership business, or alternatively that sum of money as damages for breach of contract, together with an account of profits generated by Mr Cooper using the software, after the alleged partnership came to an end. Mr Cooper denies there was any partnership:

he says it was “a mates’ agreement to bet on the horses” or, as it is described in the amended defence, a wagering syndicate agreement.

- [3] The main issue for determination is whether the arrangement between Mr Christian and Mr Cooper in the period August 2013 to June 2016 is correctly characterised as a partnership.
- [4] As defined in s 5(1) of the *Partnership Act* 1891 (Qld), a partnership is the relation which subsists between persons carrying on a business in common with a view of profit.
- [5] A partnership is essentially a contractual relationship. In determining whether a partnership exists in a given case the court must decide whether there was a binding contract between the parties involving the conduct of a business in common with a view to making a profit. The question is ultimately one of law. Where, as in this case, there is no written agreement, the task of determining the characterisation, as a matter of law, of the commercial relationship between Mr Cooper and Mr Christian, involves an examination of their words and conduct, with a view to objectively ascertaining their intentions as a matter of reasonable inference from their actions.¹ The labels the parties may have used at various times to describe their arrangement is not determinative.
- [6] Before turning to an analysis of the evidence of the parties’ words and conduct, I will briefly record my findings as to the credit of the two main witnesses in the trial – Mr Christian and Mr Cooper.
- [7] My impression of Mr Christian was that he was inclined to give evidence in a somewhat contrived manner, reflecting the narrative of his pleaded case, and by reconstruction from the “chat logs” which recorded the electronic communications between the parties. What I mean by that is that he appeared to have persuaded himself that the arrangement was a partnership – subsequently – and his evidence was geared towards making good that contention. He had a tendency towards advocacy of his case, rather than simply giving evidence of the facts. He did not impress as a reliable witness for that reason. As discussed below, the absence of the chat logs for May and June 2016 is convenient for Mr Christian, and his explanation for their unavailability is unconvincing, in the context of the voluminous material which was otherwise accessible and tendered as evidence in the trial.
- [8] I place no weight on the reference in Mr Christian’s CV (exhibit 14) to his role as a “partner” in an automated wagering system. I regard that also as a contrivance. I do not accept that it is reasonable to infer Mr Christian created this version of his CV solely for the purpose of becoming an exhibit in the trial – because it would not be rational or reasonable for a person in his position to think that would affect the determination of the legal issue as to the characterisation of his arrangement with Mr Cooper. Rather, I think it evidences the mindset of Mr Christian, having convinced himself of his argument; and may also represent an attempt to aggrandise himself, in a manner perhaps many people do when looking for work (the latter conclusion is

¹ *Wiltshire v Kuenzli* (1945) 63 WN (NSW) 47 at 50-51, referred to in Fletcher, *The Law of Partnership in Australia*, 9th ed (2007) at [2.19]; see also *Salib v Gakas* [2010] NSWSC 505 at [233] and *Jafari v 23 Developments Pty Ltd* [2019] VSCA 201 at [153]-[158].

supported by the evidence that Mr Christian included a description of the work involved in this automated wagering system which he admitted he did not understand).²

- [9] I found Mr Cooper to answer questions at times in an evasive manner, giving the impression he was being careful to avoid answers that, I infer, he perceived might support Mr Christian’s case. For example, when it was put to him that the purpose of the venture was to make money, he was cautious about agreeing with that, emphasising that he was mainly doing it for fun, when plainly his gambling activities were a money-making venture, even if gambling was also the “love of his life”, as he put it. The issues about his failure to disclose certain material which emerged in the course of his cross-examination also reflected poorly on Mr Cooper’s credit. Having said that, in many respects I found his oral evidence to be corroborated by the contemporaneous records in the chat logs.
- [10] In summary, neither Mr Christian nor Mr Cooper impressed me as entirely honest or reliable witnesses. This dispute is very personal to both of them, and they each have a considerable vested interest in the outcome, not measured merely in money terms. To that extent, a propensity to give evidence which supported their respective cases may be understandable. As a guide to the impression each of them made, I found myself thoroughly unpersuaded of the plaintiff’s case at the end of Mr Christian’s evidence; but less unpersuaded of it at times during Mr Cooper’s evidence.
- [11] In the end, acknowledging the short-comings of judicial ability to judge people on the basis of their demeanour, I have placed the most weight on the contemporary materials which are available, objectively established or uncontroversial facts, and a consideration of where the objective probabilities lie, based on the contemporary materials available.³ There were in any event relatively few issues on which there was a real dispute as to the facts – as opposed of course to the central dispute as to the character of the relationship – and so in the end credit findings have not had a substantial impact on the findings I have made.

The factual context

- [12] Mr Cooper described gambling as “the love of my life ever since I was a young kid”, saying that he was always interested in games of chance and the application of computer programming to them. He began writing a computer program to bet on horse racing in about 2001 or 2002, describing this as a “dedicated effort” which continued up until mid-2017, involving at least 20,000 hours of work, and at least a million lines of source code, using various programming languages. In terms of the use of this software to place bets on horse racing, Mr Cooper said this took a few years, but was up and running by 2007.

The software components

- [13] Mr Cooper said that by early 2007 he had split the software into a number of separate modules, described as follows:

- (a) the bet generator module;

² T 2-37 to 2-38.

³ *Fox v Percy* (2003) 214 CLR 118 at [31]; *Camden v McKenzie* [2008] 1 Qd R 39 at [34].

- (b) the model module;
 - (c) the Betfair interface module;
 - (d) the Tabcorp interface module; and
 - (e) the Tatts interface module.
- [14] There is also a database module (also called the form and odds database).
- [15] Mr Cooper described the bet generator module as “the core” or the essential module. It is a set of mathematical techniques and tricks which uses information from the form and odds database, and the statistical information in the model module, to produce a final bet recommendation. According to Mr Cooper, the bet generator module “works by figuring out the bits of information that the public have missed”. Mr Cooper said the bet generator module was solely created by him, in terms of the actual codebase, from about 2001. It is not something which is fixed in time, but rather required ongoing work to update the software and “train” it to recent data. It was extremely valuable to him,⁴ but he never intended to sell it to anyone, noting that it is not something which you could simply sell to another person such that they would be able to use it to bet on horses. It requires knowledge of the specific hardware, the computer formation, the particular codebase and, most importantly, the mathematics. He never gave out the source code for the bet generator module or the model module, including to Mr Christian.⁵
- [16] The model module specifically looks at the form of the horses, to create factors, or ways of looking at the horse, and then creates a “relative probability to the odds”, based on statistical regression modelling – a statistical prediction, based on data, of what a particular horse might be expected to do. The software behind the model module was initially written by a person called Ron Miller, in about 2002 or 2003. Ron Miller was one of the people Mr Cooper had previously been involved in a syndicate with, as discussed further below. Mr Cooper became involved with it in about 2003, helping to improve and advance it. He developed the model module exclusively from about 2013, after Ron Miller left the scene. The “bet generator module” as described in the amended defence includes both the bet generator and model modules, as described in Mr Cooper’s evidence.
- [17] Both the bet generator module and the model module require data in order to perform the desired task. The data is contained in what Mr Cooper called the form and odds database, which he said contains the information the public *does* know. In the beginning, Ron Miller created the form and odds database; but again Mr Cooper also worked on that from about 2003. A new version was created in 2013, which I will come to in a moment.
- [18] In 2013, according to Mr Cooper, Ron Miller decided he did not want to be involved in the syndicate any more. His priorities had changed. Mr Cooper and Mr Christian agreed to create a “mirror version” of both the model module and the database module, so that they could continue betting using the system.

⁴ T 4-60 to 4-62.

⁵ T 2-88.

- [19] The creation of the model module, based on “Ron’s model”, was done by Mr Cooper exclusively, from 2013.
- [20] In relation to the database module, Mr Cooper created the “schema” for the database, using a programming tool called MySQL. The database was initially populated with data purchased from a third party, called “Southcoast”, which provides a database of horse race back history, which was copied to the MySQL database. There was then quite a deal of work to be done to clean up the data, to ensure its reliability (including correcting errors, removing duplicates, and ensuring references to horses, jockeys and trainers were consistent – referred to as “de-duping” and “aliasing”). Most of this work was done by Mr Christian. The database was the source of data and statistics for the bet generator module and the model module. It required ongoing work, keeping it up to date, in order to be effective.
- [21] The Betfair interface module is software which provides an interface between the software created by Mr Cooper, and the actual betting agency, Betfair. An entity such as Betfair utilises something called an API (application programming interface) which is like a firewall, separating their internal systems (which third parties are prevented from accessing) from their external systems (which third parties are able to access). The interface software works in two directions: first, to retrieve the odds from Betfair for every horse race, which are saved into the form and odds database (and used for or by both the model and bet generator modules); and second, to take the list of recommended bets from the bet generator (via another API), apply an algorithm to work out how much to actually bet, based on the funds available, and then place the bets with Betfair. The entity, such as Betfair, may change their API from time to time. If that happens, changes need to be made to the interface software, in order to continue to obtain access. So again, the work to maintain the Betfair interface module was ongoing.
- [22] The Betfair interface module was initially created by another person who had been involved in betting with Mr Cooper, Jonathan McNaughton, in about 2007 or 2008. But after Mr Cooper lost contact with him in 2013, another version was created by Mr Christian, between about September and November 2013.⁶ According to Mr Cooper, there was considerably less computer programming expertise required to program this interface module, compared with the bet generator and model modules. He said “it’s not an easy job, but you can hire contractors easily on the open market to be able to do that”.⁷ Mr Christian’s evidence was to a similar effect.⁸ In fact, after Mr Cooper and Mr Christian parted ways permanently in June 2016, Mr Cooper paid a contractor, Robert Norris, to help Mr Cooper reprogram the Betfair interface module. He said it took under a week to rebuild the Betfair interface.⁹
- [23] The Tabcorp and Tatts interface modules work in the same way as the Betfair interface module. They were both created by Mr Cooper, commencing in about 2006, and he continued to work on them, including to rewrite parts of them in response to changes in the API of Tabcorp and Tatts.

⁶ T 2-91.

⁷ T 3-12.

⁸ T 2-127 to 2-128.

⁹ T 3-36, 4-52 and 6-25.

- [24] Mr Cooper said that in 2007, when he split the software into various modules, he created an API for the bet generator “to make both a physical and digital logical link between the bet generator and the bet interface modules”, which he did “[p]rimarily to protect the intellectual property of the bet generator, and also so that I could get other people to program the bet interfaces and I could focus on the bet generator, because that was the most important part”.¹⁰ At that stage, the model module was primarily the work of Ron Miller. From 2013, when Ron Miller left the scene, Mr Cooper developed and maintained the bet generator module and the model module, and described them as “tightly integrated”.

Previous syndicates and arrangements

- [25] Prior to his arrangement with Mr Christian, Mr Cooper had been involved in using the suite of software in combination with other people to bet on horse racing. As Mr Cooper put it, “I have had numerous betting syndicates”. The first one was with Ron Miller and two others, Edward Nesmith and Jeremy Coutts, in 2007. A private ruling obtained from the Australian Taxation Office in May 2008 sets out the details of this arrangement (exhibit 21), which was referred to as the Betfair syndicate. It is apparent from this ruling, and from Mr Cooper’s evidence, that the software model used by this betting syndicate (the “model module” as it is described by Mr Cooper) was initially created by Ron Miller.
- [26] Mr Nesmith went back to America and no longer wanted to be involved in the syndicate, so it continued with just three members, Ron Miller, Jeremy Coutts and Mr Cooper. A private ruling obtained from the Australian Taxation Office in November 2008 sets out the details of this arrangement (exhibit 22), which was similar to the earlier one, although expanded in scope to include other betting markets. Mr Nesmith was not paid anything when he left the syndicate.
- [27] Mr Cooper worked on the programming of the bet generator module, describing that as “solely under my control” and, after Mr Nesmith left, also took over the work he had been doing on the form and odds database (de-duping and aliasing of jockeys and trainers, “making sure the data is right for betting”). The Betfair interface module used by the syndicate at this time had been created by Jonathan McNaughton, not as a member of the syndicate, but as a contractor Ron Miller had engaged to do that work.
- [28] There was no formal agreement between the participants. There was a bank account into which money for gambling was deposited, and which was used to place bets. This account was maintained by Ron Miller. The winnings were split according to the percentages agreed.
- [29] In about 2009, Mr Cooper started to bet on his own in what is referred to as the “exotics” markets (multi-leg, multiple-race markets, on the TAB, Tabcorp and Tatts). He did this using the bet generator software and the Tabcorp and Tatts interface modules he had created.
- [30] By about mid-2011 Jeremy Coutts left the syndicate. Mr Cooper said the Betfair market had been “deteriorating”, “things weren’t working”, “Ron got sick of Betfair

¹⁰ T 3-14.

and wanted to focus on win-place and trifecta betting ... on the TAB, Tote system". Jeremy Coutts was not paid anything when he left either.

- [31] Around this time, Jonathan McNaughton became involved as part of the syndicate (as opposed to having been contracted to do programming work previously). Mr Cooper said that he and Mr McNaughton started betting into Betfair place markets in late 2010 or early 2011. Mr McNaughton maintained the Betfair interface module. Mr McNaughton's bank account was used for the betting funds.
- [32] In around mid to late 2011 Mr Christian became involved, having been invited to bet through what Mr Cooper called the "manual betting interface". Mr Christian referred to this as "manual corporate betting". This was done via a website, which could be accessed with a username and password provided by Mr Cooper, to place bets based on the recommendations from the bet generator. Manual bets were also placed at the track. Friends and family of Mr Cooper, Mr McNaughton and Mr Christian were also involved in this manual betting (whether online or at the track), to enable a greater number of betting transactions to be undertaken. The manual betting continued up until about mid-2014. The financial arrangements with the people placing these manual bets varied significantly – sometimes it involved the person investing their own money; in other cases the person was effectively paid a share of the winnings from a particular day's betting.
- [33] According to Mr Cooper, this manual betting was very profitable in the period 2011 to 2012, but then the landscape changed and "Betfair became the bigger target". Mr Christian said for him the work involved in the manual betting started as "a weekend thing", while he was still employed elsewhere, but he eventually left his employment and "started doing this more full time".¹¹ According to Mr Christian, the arrangement in relation to the manual betting was "a third each", between Mr Cooper, Mr Christian and Mr McNaughton – they would each contribute a third of the capital and "be exposed to a third of the up or down" (winnings and losses). Mr Christian's only interest was in the outcomes of the betting activities; he acknowledges he did not have any responsibility for "the underlying software that was powering this".¹²
- [34] At this time, 2011 through to 2013, Mr Cooper was still using the bet generator module to place his own bets on the Australian exotics; was involved in betting with Mr McNaughton into Betfair; and was involved in betting with Ron Miller into the Totes.
- [35] There was a further change in the composition of the people involved in mid-2013. According to Mr Cooper, Ron Miller "decided he wanted to exit and wasn't interested in betting anymore".
- [36] Although Mr Cooper still had access to the previous form and odds database, which had been the work of Ron Miller, with Mr Miller losing interest the maintenance of the database became more difficult and, as a result, the database became less useful. As Mr Cooper explained, if the database is not updated on a regular basis, it deteriorates. There was also a problem with the model (referred to in the chat log as "Ron's model"), as a result of which Ron stopped running the part of the software that

¹¹ T 1-25 to 1-26.

¹² T 1-27.

generated the model figures, which meant that those involved could not use the system for betting. This happened in June 2013.

June 2013 onwards

- [37] The communications between Mr Cooper and Mr Christian from this time were captured because they used an electronic means of communicating with one another, either Skype or HipChat, with their (typed) communications recorded in “chat logs” which were stored and (mostly) able to be retrieved by Mr Christian.
- [38] The chat log for 12 June 2013¹³ shows that Mr Cooper proposed to Mr Christian that they would “get the aussie horse racing form data” and “build a separate (sic) race model”. Mr Cooper said that he was proposing to rebuild the components of the system that Ron Miller had been responsible for, and was not producing at that point (the model module and the form and odds database). He asked for Mr Christian’s help. At one point Mr Cooper tells Mr Christian that he is “here talking to Jonno” (Mr McNaughton) and “he’s fired up too”. Mr Christian says “sounds like a plan”. There was agreement between Mr Cooper and Mr Christian (and, at this stage, Mr McNaughton also) that they were going to collaborate on creating their own software to replace that which Ron Miller had previously controlled, to continue the betting system that Mr Cooper had been involved in for many years. Mr Cooper agreed that this was with a view to generating a profit, although said it was also for fun.¹⁴
- [39] It is clear from the chat log for 12 June 2013 and then 28 June 2013 that Mr Cooper was asking Mr Christian to assist particularly with the acquisition of the data,¹⁵ and then the coding work required to put the data into a usable form, by using it to populate the (form and odds) database.¹⁶ The distinction between their respective roles is reinforced in the chat log for 5 July 2013, in an exchange between Mr Cooper and Mr Christian in which Mr Cooper proclaims that he is going to “do it better than any of them”, referring to the model and the work of Ron Miller and others before him; and Mr Christian proclaims that “im going to be the best de-duper this world has ever seen”.¹⁷
- [40] It is clear Mr Christian had little or no knowledge of the people or system Mr Cooper had been involved with prior to this. For example, he did not know who “Ron” was (in the context of references to “Ron’s model”), did not know his surname, had never met him, and was not sure what he actually did.¹⁸ Mr Christian did not have any role in relation to programming or coding the “model” or “bet generator” modules; although his evidence was that the bet generator module depended heavily on the (form and odds) database in order to operate.¹⁹
- [41] One of the allegations in the pleading which remained in issue at the start of the trial was that Mr Christian “had significant expertise and experience in business generally”. It was also alleged that Mr Christian “had the opportunity and resources to enter into a

¹³ Ex 1, at pp 99-100.

¹⁴ T 3-98 to 3-99.

¹⁵ Ex 1, at pp 100-101.

¹⁶ Ex 1, at p 131 and T 4-10 to 4-11.

¹⁷ Ex 1, at p 161; also p 177-178.

¹⁸ T 2-3 to 2-4; 2-106 to 2-107.

¹⁹ T 2-84, 2-123.

new business venture”, which was not admitted, but was not the focus of evidence at the trial. There was evidence at the trial of Mr Christian’s university education, employment and other work history since then, which included various ventures on his own account. Ultimately, it did not seem to be contentious that Mr Christian was a well-educated person, with considerable business experience.²⁰ As to whether Mr Christian had the resources to enter into a new business venture, however, I do not consider there was evidence to support that conclusion (in so far as resources suggests money), especially given the evidence of loans to him from Mr Cooper in early 2014. But this does not affect the determination of the central issue in the case.

- [42] In terms of getting the “aussie horse racing form data”, there was initially an agreement to share the cost of purchasing that data from Southcoast “three ways” (between Mr Cooper, Mr Christian and Mr McNaughton),²¹ but after Mr McNaughton dropped out of the picture, the cost was shared equally between Mr Cooper and Mr Christian. In the chat log on 12 June 2013 Mr Christian refers to the costs quoted by Southcoast for a data subscription. The amount differs, depending on whether the subscription is for three, six or 12 months, two years or five years.²² Although Mr Christian said he believed the initial subscription was for three months, the amount paid seems more consistent with the figure provided for six months (Mr Christian’s one-third share was \$724).²³
- [43] It is also clear from the chat log for 12 June 2013 that Mr Cooper was concerned to make it clear, in the context of exchanges about sharing the cost of the data feed three ways, that he was not prepared to agree to a three way split in relation to what he called the “australian racing model and all it’s enhancements”, referring to the existing systems in play, which had taken years to build. Even if the model component supported the quadrellas (exotics), Mr Cooper said he would not accept Mr Christian getting a share of that pool. Mr Christian made it clear that was not his expectation.²⁴ Mr Christian did refer to sharing “fixed odds”, which Mr Cooper said was a reference to the “betting with traditional bookmakers and corporates like Ladbrokes and Sportsbet”, the system they were already sharing three ways with Mr McNaughton and had been since 2011 (which I take to be a reference to the manual betting, or manual corporate betting as Mr Christian described it).²⁵ Mr Christian’s evidence was to some extent consistent with this, as he said the “fixed odds” referred to the manual corporate betting and *what would become Betfair later on*.²⁶

August 2013 onwards

- [44] Although there was a plan for Mr McNaughton to continue his involvement with Mr Cooper and Mr Christian, Mr Cooper subsequently lost contact with Mr McNaughton and so the arrangement continued with just Mr Christian and Mr Cooper. The chat logs include an exchange between Mr Cooper and Mr Christian, about Mr McNaughton, on 23 and 24 January 2014, referring to the last message from Mr

²⁰ See, eg, T 2-15 to 2-16.

²¹ Ex 1, at pp 103-104.

²² Ex 1, pp 102-103.

²³ Ex 1, p 118; T 1-31.

²⁴ Ex, p 104.

²⁵ T 4-5.

²⁶ T 1-30.

McNaughton being five months ago, in August 2013.²⁷ It is apparent from exchanges between Mr Christian and Mr Cooper in August 2013 that Mr Cooper was frustrated with the inactivity and unresponsiveness of Mr McNaughton, but keen to progress with the new system with Mr Christian. Consistent with Mr Cooper's evidence that the reference to "fixed odds", back in June 2013, was a reference to the manual betting, the chat logs record Mr Cooper saying to Mr Christian, on 7 August 2013, that "in the long run... i think you gotta do betfair too john... but you'll get the rewards of the market with it".²⁸

- [45] Mr Christian contends that this was the point at which he and Mr Cooper "started to co-partner". Mr Cooper denies that.

The arrangement between Mr Cooper and Mr Christian, from August 2013

- [46] In the course of the exchange on 23 and 24 January 2014, Mr Cooper refers to a message he has sent to Mr McNaughton, in which he says "if we're going to be business partners ... we gotta start talking... both John [Christian] and I have put in an unbelievable amount of work the last few months ... it's been epic...".²⁹ Mr Cooper denied, in cross-examination, that those words accurately reflected his intention as to the character of the arrangement he had with Mr Christian and Mr McNaughton. I place little weight on this comment in the course of the chat logs. Similarly, in contrast to what he now contends, Mr Christian was shown to have used the word "syndicate" at various times in the chat logs.³⁰ Consistently with the established legal principles, the labels the parties may have used are not determinative.
- [47] Returning to the chat log for 7 August 2013, Mr Cooper refers to setting up a second "bkbet", using the "new system", and says to Mr Christian: "50/50 fixed odds"; "you do betfair feed .. you get 50 of what we can leak outta that".³¹
- [48] Mr Christian said that, at this time, he had been working for a few months "almost exclusively on this in terms of full-time work", so he saw "a lot of opportunity that I was interested in still pursuing". I infer that what he had been working on up to this point was the database.³²
- [49] Initially, Mr Cooper and Mr Christian continued to use Mr McNaughton's Betfair interface software, at least as a means of obtaining the betting odds from Betfair (if not a means of placing bets, after about May 2013). But after it became clear Mr McNaughton was no longer going to be involved, Mr Christian created a new version of the Betfair interface, from about September to November 2013. Mr Cooper and Mr Christian used the interface created by Mr Christian, as part of the suite of software, to continue to bet into Betfair. This was an automated system, enabling them to place, on Mr Christian's estimate, tens of thousands of wagers in a 24 hour period.³³

²⁷ Ex 1, p 1490-1491.

²⁸ Ex 1, pp 277-278.

²⁹ Ex 1, p 1491. There are also references earlier in this chat lot to Mr Cooper using the word "partner", in the context of complaining about the inactivity of Mr McNaughton, at pp 213 and 235.

³⁰ Ex 1, pp 670 (referring to the "TJ syndicate", agreeing at T 1-74 that the TJ referred to Tim [Cooper] and John [Christian]), 696, 721, 726, 742 (although Mr Christian contended that all of these references applied to the manual corporate betting arrangement) and 1529.

³¹ Ex 1, p 278.

³² T 1-36.

³³ T 3-54.

- [50] Counsel for Mr Christian contended that the arrangement between Mr Cooper and Mr Christian was an “entirely new operation”. On the basis of the evidence before the court, I do not accept that. The arrangement was the continuation of a system Mr Cooper had been involved in with various other people over a number of years, albeit now using a model created by Mr Cooper, based on the model previously created and controlled by Ron Miller, and a (form and odds) database which was largely the work of Mr Christian.
- [51] In terms of expenses associated with the arrangement, the main shared expense was the data from Southcoast, the cost of acquiring which was shared between Mr Cooper and Mr Christian.³⁴
- [52] The suite of software was stored on servers paid for and controlled by Mr Cooper. Mr Cooper’s evidence was that he had bought the servers prior to his arrangement with Mr Christian in August 2013, that they were worth \$150,000, and he spent about another \$100,000 on the servers over the next year and a half (it was not clear exactly when this time period was).
- [53] In early 2015 it was agreed that Mr Christian would contribute \$500 per month towards the costs of data hosting.
- [54] Another shared expense was the commissions paid to the betting agencies (which were deducted from the trading accounts with those agencies).
- [55] There were no staff employed. Mr Cooper engaged a computer programmer, Mr Norris, from February 2016, to work on the website interface to the form and odds module,³⁵ which he paid for himself. He also had a personal assistant who provided secretarial assistance, paid for only by him, but he regarded that as separate from the arrangement with Mr Christian (as did Mr Christian).
- [56] There were no business premises. I infer each of Mr Cooper or Mr Christian did their respective work from their homes.
- [57] There were no other expenses.
- [58] Records of moneys received as winnings and rebates were kept. But there were no formal accounting records prepared. Both parties proceeded on the assumption their respective shares of the winnings were not taxable, seemingly on the basis of private taxation rulings obtained in relation to earlier syndicates Mr Cooper had been involved in.³⁶
- [59] Perhaps reflective of the friendship between the parties, the arrangement was informal; not documented in any way; and not the subject of any professional legal or accounting advice at any stage.
- [60] During the arrangement between Mr Cooper and Mr Christian:

³⁴ See, for example, ex 1 at p 1940 (subscription to Southcoast for 12 months).

³⁵ T 3-36.

³⁶ T 2-14 to 2-16; T 3-16 to 3-18.

- (a) Mr Cooper was solely responsible for working on the bet generator module and the model module;
- (b) Mr Cooper was also solely responsible for working on the Tabcorp and Tatts interface modules;
- (c) Mr Christian created and maintained the Betfair interface module; and
- (d) Mr Cooper and Mr Christian both worked on the form and odds database; although the lion's share of the work of "cleansing" the data to ensure its reliability was done by Mr Christian.

- [61] In the time they were working together, Mr Cooper and Mr Christian agreed to share the winnings from their betting activities in varying proportions at different times.
- [62] In August 2013, at what is said to be the start of the arrangement between them, Mr Cooper proposed a 50/50 split of the winnings on the Betfair fixed odds (Australian), on the basis that Mr Christian was to start working on the "betfair feed",³⁷ which I infer is a reference to the Betfair interface. At this stage, Mr Christian had no other interest in any other betting that Mr Cooper was doing, including what were referred to as the totalisator markets.
- [63] According to the chat logs, Mr Christian did not actually start working on the Betfair interface until late September 2013.³⁸
- [64] On 25 September 2013, Mr Cooper and Mr Christian agreed to split the Betfair winnings 60/40, in favour of Mr Cooper.³⁹ That agreement followed an offer from Mr Cooper to Mr Christian to either loan him some money, or pay him as a contractor to do the work on Betfair, in circumstances where Mr Christian had cashflow problems at the time.⁴⁰ Mr Cooper's evidence about the reason for this change was that Mr Christian needed some money to keep working on the system. Mr Cooper gave him a loan. The loan was interest free, but the consideration for the loan was a higher apportionment of the winnings for Mr Cooper.⁴¹ The chat logs corroborate his evidence in this regard. Mr Cooper said he made two loans to Mr Christian, a few months apart, of \$20,000 and then \$10,000. The loans were repaid.⁴² Mr Christian confirmed that Mr Cooper had loaned him \$20,000 in December 2013, but claimed he could not remember the reason why. He could not remember another \$10,000 being loaned to him in January 2014.⁴³
- [65] In about August 2014, the arrangement reverted back to a 50/50 split on the Betfair market. Mr Cooper's explanation for this change was that Betfair changed their API, which necessitated some recoding of the Betfair interface module. Mr Cooper agreed that in return for Mr Christian doing that work, he would readjust the distribution of winnings to 50/50.⁴⁴

³⁷ Ex 1, p 278.

³⁸ Ex 1, pp 703, 706, 707, 708.

³⁹ Ex 1, p 708.

⁴⁰ Ex 1, pp 705-708.

⁴¹ T 4-35.

⁴² T 3-29.

⁴³ T 2-115.

⁴⁴ T 1-38, 4-35; ex 1, at p 1940.

- [66] According to Mr Christian, in the first year of his arrangement with Mr Cooper, he did a significant amount of work on the database – downloading the data from Southcoast, and then running checks through the database to make sure the data was reliable for betting, as well as writing scripts to streamline the process of “cleansing” the data (including de-duping and creating aliases). He said it was a full time job in the first year. His other responsibility was the Betfair interface.⁴⁵
- [67] Also in about August 2014, Mr Cooper agreed to give Mr Christian 10% of the winnings from the bets Mr Cooper placed on the Australian exotics markets. Mr Christian was not actually involved in betting on exotics, using the software, but Mr Cooper said he wanted to give him a share because he “wanted to share the love just based on ... what we’d done so far”. Mr Cooper’s decision to give a 10% interest to Mr Christian was an acknowledgment that Mr Cooper used the Betfair feed (which I take to mean a part of the Betfair interface) and the form and odds database which Mr Christian worked on, for the purpose of his betting on exotics; and was an additional compensation for Mr Christian’s work in that respect.⁴⁶ The discussion of this in the chat log includes Mr Cooper referring to having paid \$18k to Mr Christian “for that work for the data feed”, and indicating that they had agreed it was not worth that much. But rather than Mr Christian paying anything back, \$8k would come out of the 10% that he was to receive from “the Doubles” (which I infer is a reference to the exotics), on the basis that the “doubles have to make \$80k for you to pay the \$8k back. and then you get 10% from there”. As to that, Mr Cooper also said “It’s not just a bonus, but incentivises (sic, incentivises) you to keep it running :) You have to agree to maintain the feeds.. And also deal with TABcorp and Tatts when time comes to negotiate rebates”. Mr Christian said “its a deal”.⁴⁷
- [68] In about July 2015, Mr Cooper and Mr Christian expanded from betting in the Australian Betfair market, to the UK market. This involved obtaining the UK data (from an equivalent source to Southcoast) and creating software to use the bet generator and model to bet on Betfair UK. Mr Cooper and Mr Christian agreed to share the cost of the data feed for the UK market equally. The arrangement for sharing the winnings from this market was said to have come about in the following way. Mr Christian and Mr Cooper had a conversation in the early hours of the morning, at a casino, whilst intoxicated, and agreed to share any winnings 66/33 in Mr Cooper’s favour.⁴⁸ Mr Cooper said he subsequently realised that the work he would have to do, to build the model for the UK, would be significantly greater than the work Mr Christian would be doing (on the database) and they “corrected it back to 80/20”. Mr Christian’s evidence was to the same effect.⁴⁹
- [69] This is also supported by the chat logs on 30 July 2015.⁵⁰ Although there was still work for Mr Christian to do on the database, it was a lot less than was required for the Australian data, because “the data from UK was a lot cleaner”. Some slight modifications were required to the Betfair interface module, in order to use it to bet into the Betfair UK market. Mr Cooper said he agreed to the 80/20 split because this

⁴⁵ T 1-38 to 1-39.

⁴⁶ T 4-36; see also at T 1-43.

⁴⁷ Ex 1, at p 1962

⁴⁸ T 2-120.

⁴⁹ T 1-45 to 1-46; 2-120; 3-33 to 3-34.

⁵⁰ Ex 3, at pp 235-237.

was a “friend’s operation”, rather than on the basis that it represented an accurate representation of the work involved, as he considered he was doing way more than 80% of the work.⁵¹

- [70] At this time, Mr Cooper also asked Mr Christian to contribute to the hosting and server bills, which Mr Christian then did, paying \$500 per month. Mr Christian acknowledged that he did not know what Mr Cooper paid for his servers, nor what they cost to buy.⁵²
- [71] During the arrangement between Mr Cooper and Mr Christian, the money to be used for gambling was paid into and out of a bank account controlled and operated by Mr Cooper.⁵³ The participants would pay money into this account, and the money would then be paid out to the betting agencies. There was no shared bank account. Winnings were distributed to Mr Christian, according to the percentage interests agreed between the parties from time to time. There was and is no dispute about the accuracy of those distribution payments made to Mr Christian during the subsistence of his arrangement with Mr Cooper.
- [72] In addition to winnings, there were also rebates received from the betting agencies, which were effectively bonus payments for reaching a certain (high) level of transactions. It is my understanding that these rebates were also distributed according to the shared proportions of winnings.

February 2016, the cracks appear

- [73] In February 2016, the cracks began to appear in Mr Cooper’s and Mr Christian’s relationship. A personal dispute arose, in connection with Mr Cooper’s personal assistant, Candice. In response, on 28 February 2016, Mr Cooper locked Mr Christian out of access to the servers Mr Cooper controlled. According to Mr Cooper, by this time “there were trust issues” between them. That is corroborated by text messages sent by Mr Christian at the time.⁵⁴ The text messages reveal a crude and somewhat juvenile argument that went on for a few days between Mr Cooper and Mr Christian. Interspersed in these messages were statements by Mr Christian to the effect that he was finished with Mr Cooper, coupled with requests from Mr Christian for Mr Cooper to provide his “restructure plan”.⁵⁵ Mr Christian agreed that both his personal and working relationship with Mr Cooper looked “terminal” at this stage.⁵⁶
- [74] By 3 March 2016, Mr Cooper had agreed to reinstate Mr Christian’s access, saying “if you do your work then we keep the horse racing running”, but adding “don’t go thinking this is any concession on the personal side”.⁵⁷ Mr Christian responded that he wanted “assurances from you with regards to work. Some kind of formal agreement or whatever”. Mr Cooper declined. Mr Christian said he would “do Aus data and uk data as I’ve always done”.⁵⁸ Mr Cooper said he was “not looking to destroy our many years

⁵¹ T 4-37 to 4-38.

⁵² T 2-114.

⁵³ Ex 19.

⁵⁴ Ex 2, at pp 3, 8-9.

⁵⁵ Ex 17, at pp 288, 289, 291, 292

⁵⁶ T 2-21 to 2-22.

⁵⁷ Ex 2, at p 32.

⁵⁸ Ex 2, pp 32-33.

of business work”, but needed some time as he was very annoyed. Mr Christian said he was too.⁵⁹ The text messages reveal some further disputes in March, although Mr Cooper said he and Mr Christian did “patch things up”.⁶⁰ It appears from the text messages that the personal friendship may not have recovered.⁶¹

[75] In the latter part of April 2016, Mr Christian asked the question “do you want me out of horse racing?” Mr Cooper said “not particularly if you keep doing what you doing”, later saying:⁶²

“Here’s what I expect to keep horse racing going. You do the imports and locks. And also do the occasional code to improve things. Is that something you still want to proceed with?”

[76] This refers to work on the database.⁶³

[77] Mr Christian said he was happy to do that, and that “if you’re happy for that and still want me around in that capacity then I am happy and thankful for that yes”.⁶⁴

[78] By the beginning of May, at least according to the text messages, the relationship seemed to have improved.⁶⁵ The messages contained in exhibit 2 end on 3 May 2016. According to the text messages contained in exhibit 17, on 4 May 2016 Mr Christian asked Mr Cooper to go back to HipChat, which he did.⁶⁶

June 2016, the relationship ends

[79] In late June 2016, Mr Cooper and Mr Christian had another falling out, which this time was terminal.

[80] According to Mr Cooper, by June 2016, there were issues and problems with the form and odds database (not being updated) and with the Betfair interface module (not running properly and missing some place markets, which had been highly profitable), as well as with the model module. Mr Cooper said that in the period May to June 2016 it became more difficult to work with Mr Christian and to get problems fixed. Both their personal and their business relationship had deteriorated.⁶⁷

[81] According to Mr Cooper, there were messages exchanged between him and Mr Christian, in May and June 2016, which record his complaints about Mr Christian failing to update the database, and other problems with the Betfair interface module. Mr Christian denies this. Somewhat conveniently, amongst the (literally) thousands of pages of chat logs from Skype and HipChat which were able to be accessed and downloaded by Mr Christian, who was the person with control of the chat logs, he says he could not access the messages exchanged between 4 May and 28 June 2016. Mr Christian’s evidence was that he had downloaded all the HipChat messages as soon as

⁵⁹ Ex 2, p 35.

⁶⁰ T 4-42.

⁶¹ Ex 2, p 70.

⁶² Ex 2, pp 70-72.

⁶³ T 6-28.

⁶⁴ Ex 2, p 72.

⁶⁵ Ex 2, p 82.

⁶⁶ Ex 17, p 317.

⁶⁷ T 3-37.

he “knew this was going to be an escalated matter”, but that he could not now provide them as the computer he used at the time is now “completely unfunctional”. He said he subsequently tried to go to the source, HipChat, but the service is no longer available. In relation to the computer, Mr Christian’s evidence was that he replaced it about a year or a year and a half after his relationship with Mr Cooper terminated. The claim in this proceeding was filed on 22 February 2017 (about eight months after the termination of the relationship). Mr Christian also said he thought he printed out the chat logs in hard copy to show his lawyers, agreeing that he selected relevant extracts, rather than providing the whole transcript.⁶⁸

- [82] What is in evidence are screen shots of messages on HipChat from 28 June 2016.⁶⁹ It is apparent from these messages that the personal dispute had been reignited. I infer from the content of the 28 June messages that they did not “come out of the blue”. Something must have been said in the lead up to this. At the top of the first page of exhibit 4 a portion of a message can be seen, posted by, I infer, Mr Christian (because of the layout and colouring the messages) which supports Mr Cooper’s assertion of (some) problems with the software having been communicated prior to this.
- [83] I find Mr Christian’s explanation as to why the messages from May and June 2016 were not disclosed unconvincing. If he had, as he said in his evidence, downloaded the chat log from HipChat (which seems to have been the platform they were using at the time), and since he has been able to produce the chat log which is exhibit 3, it is difficult to see why the messages from May and June 2016 were not included. There clearly were such messages, as is apparent from the screen shots comprising exhibit 4. Mr Christian’s computer, on his evidence, was still functioning well after this proceeding was commenced.
- [84] In the absence of the messages, and on the basis that I do not accept Mr Christian’s explanation as convincing, I infer that the content of the missing messages exchanged in May and June 2016 would not have supported Mr Christian’s case; although do not draw any specific inference otherwise as to their content.
- [85] Mr Cooper gave evidence that the system had been deteriorating in this period, as a result, at least in part, of Mr Christian not doing what he was supposed to be doing. In contrast to that, the evidence was that the winnings were up in May and June 2016, at least in relation to Betfair Australia and Betfair UK; although there were substantial losses in March (Betfair UK) and April (both).⁷⁰ I am not prepared to make a specific finding about what the particular issues were in this period, as Mr Cooper’s evidence was fairly general. I do accept, however, that there were ongoing issues between Mr Cooper and Mr Christian in the period from February to June 2016, and that by the end of June 2016 the system was not performing well, as far as Mr Cooper was concerned. It seems likely, and I infer, that neither of them had fully recovered from their dispute in February / March 2016, and it clearly did not take long for the cracks to reappear and the vitriol to seep out again. By this time, the work required from Mr Christian

⁶⁸ T 2-31.

⁶⁹ Ex 4.

⁷⁰ Ex 9.

seems to have been fairly limited in any event – on his evidence, he was working no more than about an hour per day in April, May and June 2016.⁷¹

- [86] On 28 June 2016, amongst messages in relation to their personal dispute, Mr Cooper sent messages (between 12.00 pm and 12.54 pm) saying:

“I can’t see how we can proceed”.

“Due to poor performance this system is closed... And needs a complete restructure”.

“I’m out... you can have all your code... I’m paying you out... and this system is closed. I’m going to rewrite the betfair code”.

- [87] Likewise, amongst messages in relation to their personal dispute, Mr Christian responded (at 1.31 pm):

“Im not wanting to fight anymore – you can chose to accept this and move on like we had tried doing, or end it. I can’t be wondering where the next attack is coming from.”

“As for ballsy⁷²/racing – I agree – if you are going to be on the defensive from here on in, lets end it cause its not gonna work. No more fights... just end it”

- [88] Mr Christian agreed that when he said “just end it”, he was referring to his commercial relationship with Mr Cooper.⁷³

- [89] Then Mr Christian sent a message (at 1.47 pm) saying:

“you’ve locked me out of doing data... so im not doing it.

so that’s it tim – send me my money and im done. im sick of your bullshit

I tried. perhaps even you did. i can’t deal with this anymore.”

- [90] The reference to “send me money and im done” was a reference to the balance of the money belonging to Mr Christian which was in Mr Cooper’s bank account, and which was subsequently paid to him on 2 July 2016.⁷⁴

- [91] Mr Cooper responded “either can I – the trust is gone”.

- [92] Mr Christian then messaged (at 1.52pm):

“once its all sorted – i can take you or rob through whatever you want – hand over the hipchat room and you can continue. sorry it didn’t work

⁷¹ See ex 13 (although I express my reservations about the weight to be given to this document as a reliable indicator of hours worked per month dating back to August 2013, as it was said to be based on Mr Christian’s recollection, and having regard to the chat logs); and Mr Thynne’s evidence of his instructions at T 3-64.

⁷² The reference to “ballsy” is to some work Mr Cooper and Mr Christian were doing in relation to betting on soccer games, which is not said to have any relevance to the present claim.

⁷³ T 2-76.

⁷⁴ T 2-77.

out – thanks for the opportunity and thank you for the good times while they were good.. it was fun. Just seems too much is coming between us but I wish you all the best....

[93] All of those messages were exchanged on 28 June 2016.⁷⁵

[94] On 1 July Mr Cooper sent an email to Mr Christian, saying:

“Ok here’s an offer,

I will pay you out your money owes and held.

I will give you an extra \$50,000, if you provide full details of how to do all the processes you have developed so far.

We have a 6 month break, to the new year. To clear out the psych and try and do a reset.

And then in the new year, try and reconnect, if we both want to, and maybe return to where we were.

I value you in my life, it has been too long. But I think we need a temporary reset – and this here may be a way to do it.

Your thoughts?”⁷⁶

[95] The reference to paying out the moneys owed and held was a reference to the money in the gambling account, as Mr Christian described it, the operating capital. The amount of \$61,449.53 was paid out of Mr Cooper’s bank account to Mr Christian on 2 July 2016.⁷⁷ Mr Cooper’s evidence was that this offer was “trying to find a way to keep it together”. He was hoping that, after six months, they could reconnect and continue. As to what “processes” he was referring to, Mr Cooper said that was keeping the modules Mr Christian was responsible for maintaining going – namely, the database module, and the Betfair interface. When it was put to Mr Cooper in cross-examination that, given his evidence that it only took two and a half days to replace the Betfair interface module, that could not have been worth \$50,000 to him, Mr Cooper said that the \$50,000 offer was based on what Mr Christian had earned in the previous six months, and was an offer to effectively enable him to keep earning the same amount, before hopefully reconnecting in six months’ time.⁷⁸

[96] On 2 July 2016 (at 1.51 am) Mr Christian sent an email to Mr Cooper, saying:

“I think its perhaps better to look at a path where we don’t need to consider a future business reconnection where we are at now deal wise. I think if our friendship has any life left in it – our business together needs to revert back to zilch and the idea of a partnership is something we both move on from.

I would like you to provide a fair offer for a full buyout and full right to use everything I’ve done without any future obligations. You get

⁷⁵ Ex 4.

⁷⁶ Ex 6.

⁷⁷ Ex 19, p 50 and T 2-73.

⁷⁸ T 5-21 to 5-22.

everything outright. Betfair/bettors/data procs.. If its fair... I'll take it and we move on. When making your offer I'd like to simply remind you that we both took risks getting into this venture. It was 18 months before any significant monies were made (from my end) at regular intervals. During my 7 months in Turkey and for a year or so after it was rebuilding from scratch and refining. I went into significant debt to get this out the gate – I never told you about that and I'm still working to get that off my back. I'd just like to remind you that we both attacked this project with vigour and passion and there was a lot of work without promise of success. Having said that, obviously. it would have been impossible to achieve what we did without you, your experience and your skills. And so – once again – I am and have been extremely thankful to be a part of it.

Included in that offer, I will recommence daily data for you in the short term for a period of 3 months for free while I can show you what's involved and we go through issues as they arise..

After that three months, you can choose to contract me at fair rate to do data for you daily. Pure contractor relationship. I'd offer this cause it's a real grind that I think you'd prefer to hand out and you don't have to give it to someone who would have to relearn it all.

I will also make myself available at an hourly rate to fix any bugs or issues that may arise for areas I had control over.

While we're sorting this out – I would also like you to consider swapping your 10% in parsec tech⁷⁹ for all ballsy code. Given your investment was \$20k worth, I've put well more than that in it over the years. I can help with that handover too to whoever you chose to work on it there – but from then on we nullify all partnership at the ballsy level as well.”⁸⁰

[97] Mr Cooper responded:

“Nah negative..

You've shown your true colours.

You've made so much money out of me, it's a joke.

I owe you nothing.

Now bye. You can have your parsec shares.

You're an idiot.”⁸¹

[98] Also on 2 July 2016, Mr Cooper emailed Mr Christian, saying:

“I will rewrite all your code...

⁷⁹ Parsec was a business Mr Christian had set up, and in which he had asked Mr Cooper to invest (unrelated to their gambling activities) – T 1-54 – 1-55.

⁸⁰ Ex 7.

⁸¹ Ex 7.

Easy.. So Easy...

And I will pay you the balance of your accounts.

Silly, silly, silly, large ego, jealous man.”⁸²

- [99] In cross-examination, Mr Cooper said he understood from Mr Christian’s email of 2 July 2016 that Mr Christian “was looking to sell the bits that he’d done to me”, “[b]ut previously, in all other betting syndicates I’d been in, when someone leaves, we replace their software because it’s hard to use. I can’t use his software even if I buy it”. Mr Cooper said it’s easier and quicker to re-code.⁸³ Mr Cooper had the Betfair interface software (which is what is being referred to as Mr Christian’s software) on his server at this time, but he considered it Mr Christian’s property and moved as quickly as possible to remove it and re-write it,⁸⁴ saying it took less than a week to rebuild the Betfair interface. In relation to the (form and odds) database, Mr Cooper said both he and Mr Christian had a copy of it, and Mr Christian was free to use it if he wanted to.⁸⁵ Mr Christian said he had the (Betfair interface) software, but not the database, and the software was all but useless to him without the database.⁸⁶ I infer it was also useless without the benefit of the bet generator and model modules. The reconciliation of these two apparently conflicting positions seems to be, and I find, that Mr Christian had a copy of the database at a given point in time; but that as a result of being locked out of the server by Mr Cooper, Mr Christian could not do the work he had been doing in terms of maintaining and updating the database, the updated version of which was stored on Mr Cooper’s server, to be accessed and used by the other parts of the software system.
- [100] Mr Christian was never given access to the system again after this. Mr Cooper continued to bet, using his software and the database, through to about December 2017. This was the subject of some controversy at the trial, as Mr Cooper’s evidence initially was that he had stopped betting in about May 2017; but subpoenaed records obtained from the betting agencies, Betfair, Tabcorp and Tatts, showed he continued to bet, at least in relation to the exotics, until November or December 2017.
- [101] The proceeds of the gambling activities of Mr Cooper and Mr Christian in the period from November 2013 to June 2016 are set out in exhibit 9.
- (a) In relation to Betfair Australia, overall, there was a profit (surplus of winnings over losses) of \$501,810.04 during this period; with \$264,361.30 paid to Mr Cooper and \$237,448.74 paid to Mr Christian.
 - (b) In relation to Betfair UK, for the period August 2015 to June 2016, the overall profit was \$144,460.07; with \$115,568.06 paid to Mr Cooper and \$28,892.01 paid to Mr Christian.
 - (c) In relation to what is called the exotics (or Tabcorp and Tatts), the overall profit, including rebates, seems to have been about \$1,009,797, with Mr Cooper receiving just over \$909,000 of that, and Mr Christian just over \$100,500.

⁸² Ex 8.

⁸³ T 4-49 to 4-50.

⁸⁴ T 4-51.

⁸⁵ T 4-50.

⁸⁶ T 1-55.

- [102] By way of contrast, exhibit 9 indicates that in the period from April 2011 to 31 January 2013, Mr Cooper’s 50% share of the winnings from the Betfair betting with Mr McNaughton was just over \$405,000.
- [103] Mr Christian agreed that there was no contractual obligation as between Mr Cooper and Mr Christian for either of them to continue doing what they were going, in terms of their respective work in the context of their arrangement.⁸⁷ Mr Cooper’s description was that the arrangement was “a mates’ agreement to bet on the horses and either of us could stop at any time”.⁸⁸
- [104] The evidence of Mr Christian and Mr Cooper was consistent in that they agreed that each of the “modules” were required to be maintained continuously in order to continue to operate effectively, and valuably. This applied in particular to the database module, but also the bet generator and model modules, as well as the interface modules to some extent.⁸⁹

Characterisation of the arrangement between the parties

- [105] As defined in s 5(1) of the *Partnership Act*, a partnership “is the relation which subsists between persons carrying on a business in common with a view of profit”. The word “business” is defined to include “every trade, occupation or profession”.
- [106] Section 6 of the *Partnership Act* sets out some rules for deciding whether a partnership exists. That section provides:

“6 Rules for deciding existence of partnership

- (1) In deciding whether a partnership does or does not exist, regard must be had to the following rules –
 - (a) joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything held or owned jointly or in common, whether the tenants or owners do or do not share any profits made by the use of anything held or owned jointly or in common;
 - (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;
 - (c) the receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make the person a partner in the business, and in particular –

⁸⁷ T 2-70 to 2-71.

⁸⁸ T 4-26.

⁸⁹ T 2-124 to 2-125; 3-60; 4-62.

- (i) the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not itself make the person a partner in the business or liable as such;
 - (ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not itself make the servant or agent a partner in the business or liable as such;
 - (iii) a person being a deceased partner's child or spouse, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;
 - (iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender is to receive a rate of interest varying with the profits, or is to receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such;
 - (v) a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by the person of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.
- (2) A contract mentioned in subsection (1)(c)(iv) must be in writing and signed by or on behalf of all the parties to the contract.
 - (3) This section does not apply in relation to an incorporated limited partnership”

[107] Otherwise, and as discussed at the outset, in determining whether a partnership exists in a given case the Court must decide whether there was a binding contract between the parties involving the conduct of a business in common with a view to making a profit. Where, as in this case, there is no written agreement, the task of determining the characterisation, as a matter of law, of the commercial relationship between Mr Cooper and Mr Christian, involves an examination of their words and conduct, with a view to objectively ascertaining their intentions as a matter of reasonable inference from their actions.

- [108] It is questionable whether the gambling activities Mr Cooper and Mr Christian engaged in could be characterised as carrying on a business. Although the activities would not seem to fall within the ordinary meaning of trade, occupation or profession, the definition of “business” in the *Partnership Act* is an inclusive one, and so the question is not capable of being answered simply by reference to that, as opposed to a closer analysis of what was involved, by reference to analogous cases.
- [109] On the one hand, despite the systemised use of complex computer software to maximise the ability to place large numbers of bets automatically (rather than manually), it remains the case that winning (or losing) money on those bets remained predominantly a matter of chance. The use of computer software and a systemised, automated betting process, did not enable either Mr Cooper or Mr Christian to influence the odds of winning in any particular race; although the automated harnessing of information (through the model and bet generator software, in conjunction with the form and odds database) and economies of scale plainly increased the prospect of making a profit (an excess of winnings over losses) overall.
- [110] The predominance of chance as an element in the relevant activity is a matter which has been consistently held, in analogous taxation cases, to be a contrary indicator to the activity being a “business”.⁹⁰
- [111] In addition, the fact that the gambling activities were not associated with any other business, such as bookmaking, breeding or training horses also militates against a conclusion that they constituted a business.⁹¹ As may the absence of other objective indicia of carrying on a business, such as having business premises, a business plan and the preparation of financial records for the business.
- [112] On the other hand, the gambling activities of Mr Cooper and Mr Christian may be said to demonstrate many of the indicia identified in *Evans* as supporting a conclusion that they were sufficiently systematic and organised to amount to carrying on a business. For example:
- (a) the betting activities were systematically conducted, using complex interlinked software, to generate recommended bets based on form and odds data, and an automated system of placing bets through an interface with the betting agencies;
 - (b) a fund of money was used for betting, kept in the bank account operated by Mr Cooper;
 - (c) records were kept, of bets placed, winnings and losses;
 - (d) considerable technical skill and effort was involved in the creation and maintenance of the various components of the software and the database;

⁹⁰ See, for example, *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 at 939; *Babka v Federal Commissioner of Taxation* (1989) 89 ALR 373 at 379-380 and *Brajkovich v Federal Commissioner of Taxation* (1989) 89 ALR 408 at 415; but cf *Visy Industries USA Pty Ltd v Commissioner of Taxation* [2011] FCA 1065 at [109], upheld on appeal in *Commissioner of Taxation v Visy Industries USA Pty Ltd* [2012] FCAFC 106 at [58].

⁹¹ See, for example, *Trautwein v Federal Commissioner of Taxation (No 2)* (1935) 56 CLR 196; cf *Jones v Federal Commissioner of Taxation* (1932) 2 ATD 16; both discussed in *Evans* at 939-940.

- (e) that effort occupied a significant amount of time, particularly in the early stages of the arrangement – for a time being the sole source of income for Mr Christian, and a primary source of income for Mr Cooper;
- (f) the activities were plainly engaged in for the purpose of making money, as opposed to simply for fun or entertainment (although I accept that it was both of those things as well), or for that matter to satisfy an addiction, which it may also have been.

[113] The question whether the gambling activities amounted to carrying on a business is an objective one, involving questions of fact and degree. On one view, having regard to the indicia identified in *Evans*, the arrangements may be said to rise above the activities of the mere punter, and be characterised as carrying on a business. However, I note that on the basis of the earlier decided cases, the view of the taxation authority has been, and remains, that it will be a rare case in which a taxpayer with no connection with racing other than betting will be found to be carrying on a business of betting or gambling: see *Taxation Ruling IT 2655*. Indeed I was not referred to any cases in which gambling activities, on any particular scale, with no other connection with racing, have been characterised in that way.

[114] In the absence of any such connection, and because of the intrusion of chance into the activity as a predominant ingredient, and having regard to the informal nature of the arrangement between Mr Cooper and Mr Christian, it seems to me the better view, even in circumstances where, as here, the gambling activity is conducted in a systemised and organised way, is that it does not amount to carrying on a business, within the meaning of s 5 of the *Partnership Act*. However, the circumstances of this case must be said to come close to the line.

[115] But even if the activity is appropriately characterised as carrying on a business, I am not persuaded that Mr Cooper and Mr Christian were in any sense carrying on such a business “in common” within the meaning of s 5 of the *Partnership Act*, such that the relationship between them could aptly be characterised as a partnership. There was not the requisite mutuality of rights and obligations between them regarding the gambling activities they were engaged in, such as to conclude that the arrangement bore the indicia or hallmarks of a partnership.⁹²

[116] The following findings underpin my conclusion in that regard:

- (a) Mr Cooper brought to the arrangement an established system, comprising the components described above. This included the important elements of the bet generator and model modules. The evidence clearly establishes that Mr Cooper regarded that software as extremely valuable to him, and had no intention of sharing the code underpinning that software with anyone, including Mr Christian, and also that Mr Cooper had no intention of sharing the gambling profits he had been making, using that system, other than in the discrete manner agreed from time to time with Mr Christian. Even if I had reached the conclusion that the arrangement was a “partnership”, I would not have found that

⁹² Cf *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 326-327; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11; and the discussion in Fletcher, *The Law of Partnership in Australia*, 9th ed (2007) at [2.15], [2.45], [2.50] and [2.65].

the software within Mr Cooper's domain – in particular, the bet generator module, the model module, Tatts and Tabcorp interface modules – were partnership property. The evidence of Mr Cooper's intentions in that respect, which I accept, is entirely inconsistent with that. So, too, is the evidence of Mr Cooper continuing, with the knowledge of Mr Christian, to use the software, which he regarded as his own, to bet on the "exotics" for his own gain, separately from the arrangement with Mr Christian.

- (b) There were elements of the system which were labour intensive and which Mr Cooper no longer wanted to do – in particular, the creation and maintenance of the form and odds database. Mr Christian agreed to undertake that work, and was to be remunerated for it by receiving a share of the profits from the gambling activities.
- (c) There were other elements of the system for which former associates of Mr Cooper had been responsible – namely, the Betfair interface module – which again Mr Christian agreed to recreate, after Mr McNaughton ceased to be involved and effectively took his software with him. Again, Mr Christian was to be remunerated for that work by receiving a share of the profits from the gambling activities.
- (d) To that extent, the work of each of them was separate, although together contributed to the operation of the system. That sharing of the workload was consistent with the arrangements Mr Cooper had been involved in before, with other people.
- (e) There was no legal (contractual) obligation on either Mr Cooper or Mr Christian to continue doing the work they each undertook to do. It was a mutually beneficial arrangement while it lasted; but there was no obligation on either of them to continue.
- (f) The arrangements for sharing the winnings from time to time were reached on an ad hoc basis, and in most respects reflected what Mr Cooper was prepared to offer, by way of remuneration to Mr Christian for the work he contributed to the system (the database and the Betfair interface module); including an adjustment to that when, from Mr Cooper's perspective, it was disproportionate to the work required. The contemporaneous written materials do not evidence a mutual negotiation in this respect; but rather the expression by Mr Cooper of what he was prepared to offer Mr Christian, and Mr Christian willingly accepting that.
- (g) Relatedly, there was, I find, an imbalance between Mr Cooper and Mr Christian, in the sense that Mr Christian was subordinate to Mr Cooper in the arrangement, rather than being an equal "partner". Mr Cooper was in control of the arrangement, as opposed to such control being mutually shared between Mr Cooper and Mr Christian. Mr Cooper not only controlled the operation, but also access to the servers on which the software and the database was held, and the bank account into which the gambling money was paid.
- (h) Although there was agreement to share the costs of the data feed from Southcoast and, towards the end, for Mr Christian to make a contribution to the costs of maintaining the server, the expenses otherwise involved were not shared, but were borne by Mr Cooper – consistently, I find, with his control of the arrangement (including the substantial costs of establishing and maintaining

the servers and engaging a contractor when further programming work was required in February 2016; as well as employing his own administrative assistant).

- (i) The very real impression that is formed having regard to the contemporaneous exchanges is that this was not a partnership in any sense. The arrangements reached from time to time for Mr Christian to receive a share of winnings in the various markets were more in the nature of remuneration for work done, rather than indicative of the relationship being a partnership.⁹³ Although Mr Christian submits he worked exclusively for the venture for close to three years, without a salary, and without anything of value to compensate him for his efforts – on the evidence, he in fact received about \$428,000 over the course of his involvement in the arrangement with Mr Cooper (including the final payment of just over \$61,000).

[117] As s 6(1)(b) and (c) of the *Partnership Act* make plain, sharing gross returns, or receiving a share of profits – whichever is the more apt to describe what occurred here, in terms of sharing the gambling winnings – do not create or, for that matter, provide conclusive evidence that the arrangement is, a partnership. No one factor is determinative. The question for the court is to ascertain, objectively, from the course of dealing between the parties, what their intentions were, as a matter of reasonable inference from their actions. Having undertaken that task, I am not persuaded that the arrangement between Mr Cooper and Mr Christian is appropriately characterised, as a matter of law, as a partnership.

[118] Included amongst the list of issues to be determined is whether, if the arrangement was not a partnership, it was a wagering syndicate agreement as pleaded in the defence, and whether Mr Christian breached that agreement. There is no magic in the word “syndicate”, but I accept and find that the arrangement may appropriately be described as a wagering syndicate, conducted by agreement between Mr Cooper and Mr Christian, the central terms of which were:

- (a) Mr Cooper, Mr Christian (and, initially, Mr McNaughton) agreed to collaborate – in the sense of each contributing time and programming skill – to create a system of software for betting on horse racing to replace that which had been in use while Mr Cooper was involved with Ron Miller in a gambling syndicate;
- (b) Mr Cooper would be responsible for the bet generator and model modules;
- (c) Mr Christian would assist with the acquisition of data, and putting it into a usable form;
- (d) later, once Mr McNaughton left the scene, Mr Christian took on the task of creating the Betfair interface – which had previously been the work of Mr McNaughton;
- (e) Mr Christian would receive a share of the winnings from the Betfair Australia market, in return for his work on the database and Betfair interface, which was initially to be split 50/50, later shifting to 60/40 as consideration for a loan made by Mr Cooper to Mr Christian;

⁹³ Cf s 6(1)(c)(ii) of the *Partnership Act*.

- (f) expressly, initially, Mr Christian would not receive any share of the winnings in other markets Mr Cooper was betting into, using the software system – in particular, the exotics;
- (g) later, Mr Cooper agreed to pay Mr Christian 10% of the winnings from his betting in the exotics markets, as further remuneration for Mr Christian’s work;
- (h) in July 2015, the agreement expanded to include betting in the Betfair UK market, with an eventual arrangement for Mr Christian to receive 20% of the winnings from that market;
- (i) each of the parties retained their “ownership” of the software created by them – in Mr Cooper’s case, the bet generator software and the model module, as well as the Tatts and Tabcorp interfaces; and in Mr Christian’s case, the Betfair interface module;
- (j) ownership of the database is less clear, although most likely was something to which both parties were entitled (at least consistently with the entitlement to use the data conferred by the third party, Southcoast) – it was made up of data acquired from a third party, the cost of which was shared equally, but in relation to which ongoing work and effort was required to be applied to put it into a usable and reliable form;
- (k) bets were placed automatically, using the system of software – and winnings were divided up and paid according to the arrangements agreed from time to time;
- (l) each of the parties had a responsibility, during the currency of the arrangement, for maintaining their part of the system;
- (m) but there was no legal obligation on either of them to keep doing that work and either party could terminate their involvement in the arrangement at any time, taking their software with them; and
- (n) other than in terms of paying out the person’s entitlement to winnings, at the time of termination of the arrangement, there was no agreement between the parties as to any other payments, on termination of the arrangement.

[119] The messages exchanged on 28 June 2016, set out at paragraphs [86]-[92] above, demonstrate the parties’ contemporaneous words and conduct were consistent with the term just referred to. Mr Cooper’s actions, in taking steps to recreate the Betfair interface, is also consistent with that.

[120] The evidence does not support the inference of a term as to payment – for example, on a quantum meruit basis – for any ongoing value of the work performed, for example, on the database module (such as the scripts written for de-duping etc). In any event, no such alternative claim is pleaded on behalf of Mr Christian. His claim is pleaded solely on the basis of the existence of a partnership, which I have found is not established on the evidence.

[121] I do not regard it as necessary to reach a concluded view in relation to whether Mr Christian breached the agreement with Mr Cooper. I am inclined to the view that in fact the arrangement came to an end consistently with the term referred to at subparagraph (m) above, rather than as the result of breach by any party. There is, in

any event, no counterclaim by Mr Cooper, and so it is not necessary to address this further.

[122] Accordingly, as the only basis of the plaintiff's claim was the pleaded existence of a partnership, the plaintiff's claim is dismissed.

[123] For completeness, I observe that if my conclusion as to the characterisation of the commercial relationship between Mr Cooper and Mr Christian is incorrect, and it was a partnership, then I can see no reason to conclude that it was anything other than a partnership at will, with either partner free to bring it to an end at any time. That is not in fact contested by Mr Christian.

[124] Consistently with the finding I have made at paragraph [116](a) above, I would find that the software modules within Mr Cooper's domain did not become partnership property.

[125] I would further find that the assumptions underpinning the plaintiff's expert, Mr Thynne's opinion (exhibit 24) – as to growth rate, and length of time the partnership may have continued to operate – are not established on the evidence. I can see no basis to conclude that, if there was a partnership, it would be reasonable to find it would have continued for a further five years. The history of Mr Cooper's prior arrangements is inconsistent with this; as is the variable and fluctuating nature of the gambling activity they were involved in; the fact that there was no legal obligation on either of them to continue; and the volatile nature of Mr Cooper's and Mr Christian's personal relationship, on which the continuation of the arrangement clearly depended.

[126] The valuation analysis (scenario one) undertaken by the defendant's expert, Mr Stephens (exhibit 23), more appropriately reflects the factual findings I have made.

[127] In so far as the claim for an account of profits is concerned (as a result of Mr Cooper continuing to bet, using the suite of software, after termination of the arrangement), this would be affected by the findings that the software within Mr Cooper's domain was not partnership property; that Mr Cooper moved fairly quickly to replace the Betfair interface module which had been created by Mr Christian; and that the database module required ongoing maintenance, work and input to be valuable and reliable. In that last respect, it would be a difficult task to ascribe any value to the database module, attributable to the "partnership". Accordingly, it would be strongly arguable that, even if the arrangement was found to be a partnership, once that came to an end, and Mr Christian ceased doing any work on the database module, any betting profits that Mr Cooper subsequently earned could no longer be said to be accountable to the partnership.

[128] Had I reached the opposite conclusion, that the arrangement was a partnership, it would have been necessary to receive further submissions from the parties about the appropriate relief, if any, in light of my findings. For present purposes, given that I have concluded the arrangement was not a partnership, beyond recording those findings, it is unnecessary to address these matters any further.

[129] For those reasons, the plaintiff's claim is dismissed. I will hear the parties as to costs.