SUPREME COURT OF QUEENSLAND

CITATION:	*Wright v Groves* [2011] QSC 66
PARTIES:	**JOEY GLENN WRIGHT** (plaintiff) **v** **EDMUND S GROVES** (defendant)
FILE NO:	SC No 1317 of 2009
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	1 June 2011
DELIVERED AT:	Brisbane
HEARING DATES:	17, 18, 21, 22 February 2011
JUDGE:	Peter Lyons J
ORDERS:	**1. The defendant pay:** **(a) the plaintiff damages in the sum of $236,075.87;** **(b) the plaintiff the sum of $47,199.48 pursuant to s 47 of the *Supreme Court Act* 1995 (Qld);** **(c) the plaintiff's costs of and incidental to the action to be assessed on the standard basis;** **2. Costs are to be assessed without regard to the provisions of r 697 UCPR.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – where plaintiff engaged as the coach of a team playing in the National Basketball League by the defendant owner of the basketball club – where written agreement specified remuneration and other benefits for a three year period – where defendant surrendered the team's licence – where defendant ceased to pay the plaintiff prior to the end date of the contract – where plaintiff accepted a contract to coach another team during the period of the contract with the defendant – where plaintiff made statements to the media about his employment with the club – whether plaintiff repudiated the contract EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATION OR BREACH – WHAT CONSTITUTES – where defendant claimed the contract had been discharged for breach of contract or acceptance of repudiation – where plaintiff alleged wrongful termination of the contract – whether defendant entitled to terminate the contract

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – OTHER CASES – where defendant alleged terms of good faith and fidelity, acting in an employer's best interests and obedience to the directions of an employer were implied in the contract – whether such terms, if implied, were breached

EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – REMEDIES – AGAINST EMPLOYER – DAMAGES – whether plaintiff entitled to damages – quantum

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435, considered
Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66, cited
Byrne v Australian Airlines Ltd (1995) 185 CLR 410, cited
Irving v Kleinman [2005] NSWCA 116, cited
Malik v Bank of Credit & Commerce International SA (In liq) [1998] AC 20, cited
RDF Media Group Plc v Clements [2008] IRLR 207, distinguished
Sargent v ASL Developments Ltd (1974) 131 CLR 634, cited
Thomson v Orica Australia Pty Ltd (2002) 116 IR 186, considered

COUNSEL: N J Thompson for the plaintiff
M J Liddy for the defendant

SOLICITORS: Woods Prince Lawyers for the plaintiff
Holding Redlich Lawyers for the defendant

[1] **PETER LYONS J:** The plaintiff was the last coach of the Brisbane Bullets Basketball Team. The defendant was the last person to hold the licence for that team to play in the National Basketball League (*NBL*), and is described as being the owner of the business which was conducted (at least in part) by the employment of professional players to constitute the team. The plaintiff and the defendant entered into a written agreement specifying the remuneration and other benefits the plaintiff was to receive as coach of the Brisbane Bullets, for a term of three years commencing July 2007. The plaintiff sues the defendant for the loss of remuneration and other benefits to which he claims to be entitled under the agreement.

Background

[2] The plaintiff is a professional basketball coach. He was first engaged to coach the Brisbane Bullets by the defendant in about 2002. The plaintiff's coaching of the Brisbane Bullets was successful, in the period prior to his entering into a written contract with the defendant. Save for the 2002 year, when the plaintiff had been the coach of the Brisbane Bullets for only half of the season, the Bullets qualified for the NBL semi finals in every year, and won the championship on at least one occasion.

[3] The plaintiff is a citizen of the United States. However, by 2008, he had resided in Australia for a number of years, and had established a home in Brisbane where he resided with his family.

[4] By early 2008, the defendant was experiencing financial difficulties. The plaintiff had become aware of this by February 2008.

[5] At this time, Jeff Van Groningen was the General Manager of the Brisbane Bullets. In early March, there were conversations between Mr Van Groningen and the plaintiff relating to the plaintiff's taking a pay cut, and his continuation as the coach of the Brisbane Bullets. I shall return to these conversations later in these reasons. However, the plaintiff's conduct shortly thereafter is consistent with a belief by him that in the course of these conversations, he was asked to take a reduction in salary.

[6] Over the next few days, in the period ending 12 March 2008, the plaintiff spoke to a number of journalists. His statements to them included statements to the effect that he had been asked to take a substantially reduced salary; and to the effect that he had not been treated well by "the club's hierarchy". Initially his criticisms excepted the defendant. However, he gave evidence that the defendant had made an arrangement to meet him, which was not honoured, apparently without explanation; and it would appear that subsequently he came to the conclusion that the conduct of which he complained had the approbation of the defendant.

[7] The plaintiff's statements relating to "the club's hierarchy" occur later in this period. It will be necessary later in these reasons to refer in greater detail to the statements which the plaintiff made to journalists during this time.

[8] The defendant issued a press release stating that he could no longer sustain the Brisbane Bullets Basketball Team, and that he intended to surrender the licence. Mrs Narelle Kelly, who in 2008 was the operations manager for the Brisbane Bullets, gave evidence that this occurred on about 14 March 2008.

[9] In the second half of March 2008 Mr Van Groningen ceased to be the general manager of the Brisbane Bullets. Mrs Kelly gave evidence that this occurred in the period between 19 and 21 March.

[10] By the end of March, the plaintiff was in negotiations with the Perth Wildcats, in relation to his employment as head coach of that team. On about 1 April 2008, the Chief Executive Officer of the Perth Wildcats sent to the plaintiff a document described as a Letter of Offer in relation to this position. It recorded a visit to Perth and a meeting with the chairman of the Perth Wildcats, and the rest of the team. It contained an offer for employment for a three year term. It will be necessary to refer to other matters in this document later in these reasons. The letter stated that a more detailed employment contract would be prepared on acceptance of the Letter of Offer, and concluded, "[i]f you wish to accept this contract, please sign and return this document at your earliest convenience."

[11] At the bottom of the letter, the plaintiff wrote his name and the description "Head Coach Perth Wildcats", with his signature, beside the date 7 April 2008. The document was sent by him to the Perth Wildcats.

[12] When the plaintiff signed the Letter of Offer, he was in Bali. It appears that he returned to Brisbane shortly afterwards. At this time, a syndicate associated with Mr David Kemp (*Kemp Consortium*) was giving serious consideration to taking over the Brisbane Bullets. Mrs Kelly gave evidence that prior to then, Mr Tony Martin, the financial controller for the Brisbane Bullets, had given a general direction to her to facilitate the sale or transfer of the Brisbane Bullets. She gave evidence that she provided assistance to the Kemp Consortium at this time. She gave evidence that they

"were in the premises, but they were not financially responsible or … paid any bills … at that time". Other employees were giving assistance to the Kemp Consortium at that time.

[13] The Kemp Consortium was interested in retaining the plaintiff as the coach of the Brisbane Bullets. There were some negotiations about this, resulting in the plaintiff seeking a release by the Perth Wildcats from the agreement he had reached with them. That was provided, and the plaintiff entered into a document described as a heads of agreement, on Brisbane Bullets letterhead. The document was signed by the plaintiff; and by Mr Kemp, who described himself as "Director, Brisbane Bullets". By comparison with other contracts referred to in the case, the terms were, from the plaintiff's point of view, very favourable. However the agreement was subject to, amongst other things, the transfer of the licence for the Brisbane Bullets to a company apparently associated with Mr Kemp.

[14] At about this time, the plaintiff was engaged with Mr Brian Kerle (who was then acting as the General Manager for the Kemp Consortium), in signing up basketball players for the Brisbane Bullets, acting on the basis that the team would be under the control of the Kemp Consortium. In the second half of April, the plaintiff flew to the United States, scouting for players on behalf of the Kemp Consortium. He went to Orlando, Florida, on about 25 April 2008. While there, on about 28 April 2008, he learnt that the Kemp Consortium would not be proceeding with the purchase of the Brisbane Bullets Basketball Team. The plaintiff gave evidence that Mr Kerle at that time assured him that the expenses he had incurred would be reimbursed by the Kemp Consortium.

[15] The plaintiff remained in the United States until July 2008. He gave evidence that during his time in the United States, he contacted people associated with professional basketball who might assist him in finding alternative employment. However, these efforts were unsuccessful.

[16] The plaintiff executed a document dated 21 July 2008, by which he ended his association with Mr Kemp, and released him from any claim he might have against the Kemp Consortium, for the sum of $8,750. The plaintiff gave evidence that the sum was calculated by reference to the expenses he incurred in travelling to the United States on behalf of the Kemp Consortium, and expenses incurred in the United States which he considered to be recoverable from the Kemp Consortium. Examples were identified by reference to credit card bills. A number of expenditures were incurred well after April, and indeed into July 2008.

[17] The plaintiff subsequently was able to obtain employment as a basketball coach with the Seastar Apoel Club in Cyprus. He entered into a written contract for this employment, dated 17 August 2008. Shortly thereafter, the plaintiff went to Cyprus. Although the contract made provision for accommodation, there were significant defects with what was provided. In addition, the club itself was in some disarray. There were also financial difficulties. The plaintiff gave evidence that at times he and others were not paid; at times payment cheques were not honoured; and at other times payment cheques were dated in a way that prevented them from being paid. The plaintiff ceased to coach Seastar Apoel and left Cyprus in October 2008.

[18] Early in 2009, the plaintiff entered into negotiations with the Gold Coast Blaze Basketball team. On 27 April 2009, he came to Australia for the announcement of his appointment as the coach of that team. It seems that an agreement had been reached about his appointment by this time, though a formal written contract was not entered into until 21 September 2009.

[19] The plaintiff's wife and children had returned to the United States in the latter part of 2008. The Gold Coast Blaze paid for the cost of their return to Australia in June 2009.

Issues

[20] It will be recalled that the plaintiff's contract with the defendant was for a term of three years, commencing in July 2007. The statement of claim alleges that in about July 2008, the defendant wrongfully terminated the contract. However, this allegation is followed by particulars, setting out a series of allegations of repudiatory conduct by the defendant and his agents, commencing on 1 March 2008, and continuing to 15 July 2008. These have the appearance of substantive allegations of fact, and were treated as such in the defendant's defence: the defence includes allegations in response to them, together with an allegation that the plaintiff failed to mitigate his loss by his conduct in April 2008 in obtaining a release from his contract with the Perth Wildcats.

[21] These allegations in the statement of claim are followed by a further allegation that the effect of the conduct of the defendant and one of his agents (Mr Van Groningen) was that the agreement between the plaintiff and the defendant was wrongfully terminated. This is followed by a claim for loss and damage.

[22] The defence alleges that there were implied terms in the contract. One is a term that the plaintiff "would act with good faith and fidelity in the exercise of the agreement". Another is that the plaintiff "would act in his employer's best interests when exercising his duties under the agreement". A further term alleged to be implied is that the plaintiff "would obey the directions of his employer."

[23] The defence separately alleges duties owed by the plaintiff to the defendant to act with good faith and fidelity in the exercise of the agreement; to act in his employer's best interests when exercising his duties under the agreement; and to obey the directions of his employer. It also alleges that fiduciary duties were owed by the plaintiff to the defendant: to carry out his duties as an employee in good faith; and to act in the best interests of the defendant.

[24] The defence alleges that the plaintiff repudiated the agreement by agreeing to coach the Perth Wildcats, or in the alternative, by signing a contract with the Kemp Consortium. It also alleges that the plaintiff breached the implied term requiring him to act with good faith and fidelity, or the implied term requiring him to act in the defendant's best interests, or the implied term requiring him to obey the defendant's directions, by the interviews with journalists mentioned previously, and by participating in an interview with Fox Sports News. The defence alleges that the defendant accepted these matters as terminating the agreement, by ceasing to pay the plaintiff, on about 1 July 2008.

[25] The defence also alleges that by breaching the fiduciary duties and the other duties mentioned earlier, the plaintiff repudiated the contract. It further alleges that by reason of the breach of these duties, the defendant terminated the contract on reasonable grounds. No explanation was given for the proposition that a breach of a duty, said to exist independently of the contract, might amount to repudiation of the contract. Nor was there any explanation of the relevance of the assertion that, by reason of the breach of these duties, the contract was terminated on reasonable grounds, and was not wrongful. These allegations were not pursued in the submissions made on behalf of the defendant. Accordingly, I do not propose to give them further consideration.

[26] The defence further alleges that the contract was discharged by frustration, on the basis either that the defendant's licence from the NBL to operate the Brisbane Bullets

Basketball Team was surrendered on 1 July 2008; or that a breakdown of trust and confidence between the parties resulted from the plaintiff's discussions with journalists (including the Fox Sports News interview). Again, there was no explanation of the proposition that the conduct of the parties can bring about the frustration of their contract; nor were these allegations the subject of submissions on behalf of the defendant. Again, I do not propose to give them further consideration.

[27] The plaintiff's reply does not admit the implication of the terms alleged in the defence. It denies that the plaintiff breached the contract. It also asserts that any breach by the plaintiff of the contract which might constitute a ground for its termination was waived by the defendant's conduct in continuing to pay the plaintiff's salary until July 2008.

[28] More specific allegations, particularly those relating to the quantum of the plaintiff's claim, are more conveniently dealt with at a later point. However, it is necessary to return to two areas of some factual dispute.

The plaintiff's conversations with Mr Van Groningen in March 2008

[29] The plaintiff gave evidence of a discussion with Mr Van Groningen at a restaurant called the Fasta Pasta Restaurant early in March 2008 concerning his continued employment at the Brisbane Bullets. His evidence was that Mr Van Groningen then made an offer to him, on behalf of a group that was considering purchasing the Brisbane Bullets, of employment at a substantially reduced salary. The plaintiff considered the offer overnight, and told Mr Van Groningen the following day that he could not accept it. The plaintiff's evidence was that at that point Mr Van Groningen told him that if he did not accept that offer, he would no longer be the coach of the Brisbane Bullets; and that Mr Van Groningen then told him that he was fired. He also gave evidence that shortly afterwards Mr Van Groningen spoke with him about taking a coaching position with the Perth Wildcats; and that Mr Van Groningen told him that he should pursue this.

[30] In cross-examination, the plaintiff stated that in these conversations he had been asked by Mr Van Groningen to accept a pay cut. He understood the request initially to be on the basis that the Brisbane Bullets team would be owned by someone other than the defendant; and his evidence was that he was simply asked to take a pay cut. He stated that in the course of these conversations, Mr Van Groningen told him that the Brisbane Bullets would need to look at reducing budgets; and that there was discussion about the defendant's financial difficulties.

[31] With reference to these conversation, Mr Van Groningen gave evidence that he and the plaintiff had a "long standing gentlemen's agreement" that should Mr Van Groningen become aware of any change in circumstances relevant to the plaintiff, then, as a friend, Mr Van Groningen would pass that on to him. Mr Van Groningen stated that at that time "the basketball world financially was changing by the day and all of it bad" and that he wanted to pass this on to the plaintiff. He said that in the course of the meeting, he told the plaintiff that he was thinking about offering to take a pay cut himself, and he drew attention to the very difficult financial situation in which the Brisbane Bullets team found itself. His evidence was that that led to a discussion about the level of pay of basketball coaches in Australia, which Mr Van Groningen thought would not continue. He also gave evidence that, at his request, the plaintiff agreed not to discuss what had been said with anyone, other than his wife.

[32] Mr Van Groningen said there was also discussion at this meeting about the coaching position at Perth; and he said he told the plaintiff that "as a friend", Mr Van Groningen

"wouldn't hold him back" from pursuing the position with the Perth Wildcats. Mr Van Groningen denied telling the plaintiff that he was fired from the position of coach of the Brisbane Bullets. He also said that he told the plaintiff that "this was a friend to friend discussion".

[33] In cross-examination, Mr Van Groningen denied stating that he told the plaintiff that he should take a pay cut, and that if he did not do so he would no longer be the coach of the Brisbane Bullets.

[34] Mr Van Groningen was cross-examined about an interview with him conducted by a Brisbane journalist on about 11 March 2008. It is clear that the interview was conducted on the basis that the plaintiff was leaving the Brisbane Bullets**.** Mr Van Groningen denied saying that he had forced the plaintiff out of the Brisbane Bullets. However he admitted that he had said that he did not make important decisions without the consent of the owner; and that he had said the decisions made were decisions that the defendant supported.

[35] My observation of the plaintiff giving evidence was that he was an honest witness. Indeed, Mr Liddy of Counsel, who appeared for the defendant, expressly disavowed any suggestion to the contrary. It seemed to me that the plaintiff genuinely tried to recount his honest recollection of the events about which he gave evidence; and that in cross-examination he was prepared to make concessions about matters which may have appeared adverse to him, without attempting to colour the events in a way favourable to his case.

[36] I formed a substantially less favourable view of Mr Van Groningen as a witness. However I am conscious of the difficulty in reaching an adverse conclusion about a witness's evidence based solely on the demeanour of the witness in the witness-box.

[37] There were, to my mind, some difficulties about the evidence of Mr Van Groningen. In March 2008, he was the General Manager of the Brisbane Bullets, then owned by the defendant. He was plainly aware that the defendant was experiencing significant financial difficulties; and that the defendant had a very real interest in selling the Brisbane Bullets. The plaintiff had been a successful coach, and it seems likely that Mr Van Groningen would have appreciated that, at least for some potential purchasers, the retention of the plaintiff as coach would be attractive. It therefore seems to me a little surprising that Mr Van Groningen would have discussed favourably the prospect of the plaintiff taking a position as coach at the Perth Wildcats, if the plaintiff remained an employee of the defendant. Indeed, in those circumstances, it seems to me even more surprising for Mr Van Groningen to be telling the plaintiff "as a friend" that he would provide no opposition to a remove by the plaintiff to the Perth Wildcats. A more likely explanation is that, by this time, Mr Van Groningen knew that the defendant did not intend to continue to employ the plaintiff for the balance of the contractual term. The evidence is also consistent with both Mr Van Groningen and the plaintiff knowing by this time that the plaintiff was not to continue as the coach of the Brisbane Bullets.

[38] The statements made by Mr Van Groningen to the journalist on about 11 March 2008 do not, in my view, sit comfortably with his evidence about his conversations with the plaintiff a short time previously. On his evidence, he had made no decision which would have justified consultation with the defendant, or which was supported by the defendant. His statement about there being a number of other candidates for the plaintiff's position is consistent with the plaintiff no longer being regarded by Mr Van Groningen as the coach of the Brisbane Bullets.

[39] The plaintiff's conduct when speaking to the press in the days following his conversations with Mr Van Groningen is generally consistent with Mr Van Groningen having told him that he had to take a substantial pay cut. The plaintiff's statements to the press in this period do not record a statement to the effect that he had been fired by Mr Van Groningen. Some of his statements come close: for example, that he had been given a "take it or leave it" offer (which he had refused). However he later said that "…they haven't verbally come out and told me I am sacked". He was not asked about the apparent inconsistency between this statement and his evidence that Mr Van Groningen had earlier told him he was fired, either in his evidence-in-chief or in cross-examination. It may be that his evidence of his conversations with Mr Van Groningen reflects the effect of what was said; while his statement to the press, though perhaps literally accurate, did not reflect the true position between the parties.

[40] The submissions for the defendant at one point seemed to suggest that the explanation for the plaintiff's statements to the press were the result of an emotional reaction to his discussions with Mr Van Groningen. However, later in his submissions, Mr Liddy maintained that, while the plaintiff gave his evidence honestly, the statements which he made to the press in March 2008 were not honest, as he knew at the time that they were untrue. It was not put to the plaintiff that, at the time he made statements to the press, he knew them to be untrue. Moreover, there is some difficulty with the proposition that the plaintiff was dishonest in his statements to the press, when it is accepted that he gave his evidence in the Court honestly.

[41] It seems to me to be correct to say that when the plaintiff spoke to the press in the first half of March 2008 about his relationship with the Brisbane Bullets, he was experiencing an emotional reaction. That does not necessarily suggest that his statements were not, in general, factually correct; rather, their correctness may well be the explanation for his reaction.

[42] There is an apparent conflict between the plaintiff's evidence of his conversations in March with Mr Van Groningen, and the fact that he continued to be paid by the defendant until July 2008. However, the plaintiff was not cross-examined about this conflict. Indeed, he was cross-examined on the basis that he was working for the Kemp Consortium from early in April 2008. People from the Kemp Consortium occupied the offices of the Brisbane Bullets at this time. The plaintiff gave evidence that he did not know the arrangements made between the defendant and Mr Kemp for this period. No doubt the continued assistance of the plaintiff, particularly to a potential purchaser, during this period when the defendant was attempting to sell the Brisbane Bullets, would have been important to the defendant, and may have explained the fact that the defendant continued to pay the plaintiff's salary, even after the plaintiff had been fired. The defendant did not give evidence himself, nor was any witness called on his behalf to explain the basis for the continuation of payments to the plaintiff between March and July 2008. By about 14 March, the defendant had announced that he intended to surrender the licence. The continuation of payments to the plaintiff could only have been seen as a temporary arrangement, and not evidence that the defendant intended to continue the employment of the plaintiff for the balance of the contractual term. The apparent conflict mentioned earlier does not lead me to reject the plaintiff's evidence.

[43] Accordingly, I generally accept the plaintiff's evidence about the effect of his discussions with Mr Van Groningen in the early part of March 2008. His evidence finds support in some events which are generally contemporaneous; and I am in part influenced by the impression which the plaintiff gave in the witness-box. I therefore find that at this time, Mr Van Groningen asked the plaintiff to take a pay cut; that Mr

Van Groningen told him that if he did not take a pay cut he would not continue as the coach of the Brisbane Bullets; and, when the plaintiff refused to accept the pay cut, Mr Van Groningen made it clear to him that he no longer held the position of coach of the Brisbane Bullets. However, on balance I think it less likely that Mr Van Groningen told the plaintiff in terms that he was fired; and that the plaintiff's evidence on this point is not an accurate recollection of the words used by Mr Van Groningen.

The plaintiff's statements to the press

[44] The plaintiff acknowledged speaking to the press in the period shortly after his conversations with Mr Van Groningen. In the course of his cross-examination, he was given a photocopy of a number of press articles and was asked about their content. In some cases, he admitted making the statements recorded in the article, or accepted that he may well have made those statements. However he denied making some statements; and said of others that he did not believe that he had made them.

[45] I accept that the plaintiff made those statements attributed to him in the press articles about which he was cross-examined, and which he accepted, or which he said he may well have made. I do not accept that he made other statements apparently attributed to him in those articles. In summary, I find that the plaintiff, in the period after his discussions with Mr Van Groningen in the early part of March 2008, said to journalists that Mr Van Groningen had made him a "take it or leave it offer" which he had to refuse because of the severe pay cut; and that he told a journalist he did not want to leave the Brisbane Bullets, but that he had to support a wife and four children. I also find that on another occasion, the plaintiff had said that he had been asked to take a pay cut; and that people at the Brisbane Bullets had tried to trick him into leaving.

[46] The defence refers to an interview which the plaintiff is alleged to have had with Fox Sports News. The plaintiff did not recall giving such an interview, and there was no evidence to establish any statement alleged to have been made by the plaintiff in such an interview. In those circumstances, I propose to give no further consideration to the allegation in the defence relating to a Fox Sports News interview.

[47] In the course of the plaintiff's cross-examination, it was put to him that in March 2008 he said to a member of the press that he was being unfairly targeted. He answered that he thought that that was something he would have said. He also agreed that he believed he was being unfairly targeted at the time. No document was produced to the plaintiff to indicate that in fact he had made such a statement. It seems to me that this matter is a little different to the statements recorded in press articles which were shown to the plaintiff, and which he agreed that he might have said. In those cases, it is implicit that he accepted that there was a roughly contemporaneous record of the statements attributed to him, and that there was some objective basis for accepting that the statements were made. With respect to the statement that he was being unfairly targeted, there was no suggestion of any such record; and the absence of such a record is itself, in my view, of some significance. If the plaintiff had made the statement to any of the press, it seems a little unlikely that it was not recorded in one of the articles published in the first half of March 2008. The plaintiff obviously had no specific recollection of having made such a statement. Notwithstanding his evidence that at the time he believed he was being unfairly targeted, it seems to me that the evidence does not establish that he made a statement in those terms. That may not be critical to the defendant's case, because the statements the plaintiff accepts he made indicate that he felt that he was treated badly by those associated with the management of the Brisbane Bullets.

Was there a breach by the plaintiff of implied terms of the contract?

[48] In his defence, the defendant alleged that the plaintiff's conduct in participating in the press interviews referred to earlier amounted (amongst other things) to a breach of an implied term of the agreement between the parties that was said to require the plaintiff to obey the directions of the defendant. Mr Van Groningen's evidence relating to the conversation in March 2008, to the effect that he and the plaintiff would keep their discussions confidential, was referred to in the written submissions as something the plaintiff was asked, and agreed, to do. This, however, is not evidence of a direction. Moreover, I have not accepted this evidence. The submissions on behalf of the defendant do not otherwise address this alleged breach of the contract. No direction or order given by or on behalf of the defendant to the plaintiff has been identified. It is therefore unnecessary to give further consideration to this alleged breach.

[49] Two other implied terms on which the defendant relies have been mentioned previously. The defendant's submissions do not deal separately with the two alleged terms. Rather they deal with an implied term of "trust and confidence"; and duties of "fidelity and good faith". A number of authorities were cited in support of the proposition that the contract included an implied obligation to act in good faith.[1] Substantial reliance was placed on the following passage from *Blyth Chemicals Ltd v Bushnell*:[2]

> "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal …."

Subsequently, a submission was made that the plaintiff's discussions with journalists in March 2008 were not in the interests of the team nor of the defendant; and adversely affected the defendant's trust and confidence in the plaintiff. It had earlier been submitted that after those conversations, any prospect that mutual trust and respect between the plaintiff and defendant might have been revived, no longer existed.

[50] The pleaded terms make reference to a duty to act in a particular way "in the exercise of the agreement" or "when exercising (the plaintiff's) duties under the agreement". This aspect of the pleaded terms was not addressed in the submissions by the parties, and I do not propose to discuss it further.

[51] The defence also pleads that the statements by the plaintiff to the journalists in March 2008 "destroyed the mutual trust and confidence of the employment relationship between the plaintiff and the defendant". The allegation of a breach of these implied terms follows shortly after.

[52] If the defendant's case were strictly confined to the implication and breach of the terms pleaded, his defence might well fail. However, that course would not reflect the approach taken by the parties at the hearing. It seems to me, therefore, appropriate to deal with the case on the basis of a term somewhat similar to those pleaded by the

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1 *Russell v Trustees of the Roman Catholic Church* (2007) 69 NSWLR 198, and on appeal (2008) 72 NSWLR 559; *Quinn v Gray* (2009) 184 IR 279; *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; *Byrnes v Treloar* (1997) 77 IR 332; *Bednall v Wesley College* [2005] WASC 101; *RDF Media Group Plc, v Clements* [2008] IRLR 207.

2 (1933) 49 CLR 66 at 81, per Dixon and McTiernan JJ.

defendant, referred to in the principal authorities relied upon in the defendant's submissions.

[53] The defendant's submissions refer to a statement from a leading Australian textbook on this area of the law[3] to the effect that it is part of the English law that a contract of employment includes an implied term of trust and confidence; but that there is no definitive High Court decision accepting this as part of Australian law. There is clearly a substantial body of authority in this country which has accepted the implication of such a term, and it may well be thought that the implication of such a term forms part of the ratio of at least some of those decisions.[4] Nevertheless, it is also clear that in some cases there have been express reservations about whether such a term is to be implied.[5] I therefore propose to proceed on the basis that this area of the law in Australia is unsettled.

[54] The present case makes it necessary to pay attention to one qualification on the implied term, apparent from the following passage from the judgment of Allsop J (as his Honour then was) in *Thomson v Orica Australia Pty Ltd*:[6]

> "… there is ample authority for the implication of a term in a contract of employment that the employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee …"

[55] Although this formulation refers to an obligation imposed on the employer, there can be little doubt that, if there is such an obligation, it is imposed on both parties.[7]

[56] The qualification in the above statement of Allsop J is that the conduct is not to occur "without reasonable cause". The qualification may be traced back (at least) to *Woods v WM Car Services (Peterborough) Ltd.*[8] It was adopted by a majority of their Lordships in *Malik v Bank of Credit & Commerce International SA (In liq);*[9] the only judgment not including it being that of Lord Nicholls of Birkenhead.[10] However, a later formulation by his Lordship included such a qualification.[11] Subsequent cases in England have paid attention to this qualification.[12]

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3 Carolyn Sappideen, Paul O'Grady & Geoff Warburton, *Macken's Law of Employment* (LawBook Co, Sydney: 6th Ed, 2009) at [5.105].

4 A number of Australian cases which are said to have assumed the implication of such a term are identified in Kelly Godfrey, 'Contracts of Employment: Renaissance of the Implied Term of Trust and Confidence' (2003) 77 *ALJ* 764.

5 See for example *Russell v Trustees of the Roman Catholic Church* (2008) 72 NSWLR 559 at [1], where Giles JA made it clear that his decision was based on the assumption that such a term would be implied, without deciding the correctness of the assumption; the judgment of Campbell JA at [73] is to similar effect.

6 (2002) 116 IR 186 at [141].

7 This is consistent with the statement from *Blyth Chemicals* previously cited; see also the reference to *Malik v Bank of Credit & Commerce International SA (In liq)* [1998] AC 20 found in *Concut* at footnote 20; *Concut* itself was concerned with the obligation of an employee, whereas *Malik* was concerned with the obligation of an employer.

8 [1982] ICR 666 at 670.

9 [1998] AC 20 at 45, 33.

10 [1998] AC 20 at 35.

11 Expressed as, "Without reasonable and proper cause"; see *Eastwood v Magnox Electric plc* [2005] 1 AC 503 at [5].

12 *Cantor Fitzgerald International v Bird* [2002] IRLR 867 at [116]; *Transco Plc v O'Brien* [2001] IRLR 496 at [35]; *Gogay v Hertfordshire County Council* [2000] WL 989480 at 10; reported at [2000] IRLR 703.

[57] In *Concut Pty Ltd v Worrell* the joint judgment of Gleeson CJ, Gaudron and Gummow JJ referred with apparent approval to Lord Steyn's formulation in *Malik*, which included the qualification.[13] At first instance in *Russell v Trustees of the Roman Catholic Church* Rothman J cited both the passage from the judgment of Allsop J in *Thomson* which has previously been set out, and the statement of Lord Steyn in *Malik* which includes the qualification.[14] On appeal, the assumption made by Giles JA expressly included the qualification,[15] while Basten JA seems also to have recognised it.[16] In *Irving v Kleinman*,[17] the New South Wales Court of Appeal struck out an allegation of an implied term to the effect that an employee had an obligation to act in a manner "not likely to destroy or seriously damage the relationship of trust and confidence between the plaintiff and her employer", because the pleaded term "omits the vital words 'without reasonable and proper cause'", the allegation being struck out so that it might be correctly pleaded.[18]

[58] Apart, therefore, from what appears to me to be the good sense of the qualification, the authorities demonstrate that if such a term is to be implied, the term includes a qualification to the effect that the conduct not occur without reasonable cause.

[59] As has been mentioned, the plaintiff's pleadings take broad issue with the formulation of the term in the defence. The plaintiff did not make specific reference to the reasonable cause qualification. In the course of oral argument I drew the attention of Mr Liddy of Counsel for the defendant to the fact that a number of authorities to which he had helpfully referred in support of the implication of a good faith term into the contract made reference to the reasonable cause qualification. His response was to submit, by reference to *RDF Media Group Plc v Clements* (*RDF*)[19] that the plaintiff's conduct in the course of his discussions with the journalists was extreme, thereby implying that it went beyond any conduct for which reasonable cause might exist.

[60] It should be recalled that, at least until March 2008, the plaintiff was entitled to be paid by the defendant in accordance with the contract for a further period in excess of two years. The defendant was in the process of attempting to sell his rights in relation to the Brisbane Bullets. He was plainly in serious financial difficulties at that time. It seems to me, therefore, that the plaintiff had reasonable cause for making public the fact that he had been told that he must take a substantial pay cut, which he was not prepared to do.

[61] The plaintiff's conduct, however, went further. It described the deterioration in the relationship between himself and the Brisbane Bullets in emotive and critical terms. It seems to me that a party to a contract who requires the other party to accept substantially less than that party is entitled to, particularly where the other party is an employee, provides the other party with a proper basis for criticism, including public criticism, of such conduct. I am therefore not satisfied that the plaintiff's statements to the press were made "without reasonable cause".

[62] The question whether there was reasonable cause for the conduct of a party to a contract, which is alleged otherwise to be in breach of an implied term, is undoubtedly a question of fact to be determined in the circumstances of a particular case. However,

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13 (2000) 176 ALR 693 at [25].
14 69 NSWLR 198 at [121], [133].
15 72 NSWLR 559 at [1].
16 72 NSWLR 559 at [33].
17 [2005] NSWCA 116.
18 Ibid at [27].
19 [2008] IRLR 207.

in view of Mr Liddy's submissions, I shall make brief reference to the facts of *RDF*. In that case, the defendant had unilaterally given notice of termination of an employment contract, well before the completion of its term. This provoked public criticism of the defendant by the managing director of a subsidiary of the RDF Media Group Plc, who spoke to the press on behalf of, inter alia, the defendant's employer. Her statements to the press were described in the reasons for judgment as "a campaign of vilification in the Press".[20] The statements went beyond a description of the defendant's repudiatory conduct, and criticism of him for it; they extended to general criticisms of his character and his competence, in matters unrelated to his withdrawal of his services.[21] Not surprisingly, they were found to exceed the range of statements for which there might be reasonable and proper cause.[22] On analysis, *RDF* does not provide a substantial basis for finding, by analogy, that the plaintiff's statement to the press in March 2008 exceeded the range of statements for which reasonable and proper cause existed.

[63] For the plaintiff it was submitted that no evidence had been led by the defendant to establish any damage to the employer-employee relationship. The submission seemed to imply that accordingly, no breach of an implied term had been established. In my respectful opinion, that submission does not reflect the true effect of the implied term. In *Malik*, Lord Nicholls said:[23]

> "The objective standard just mentioned provides the answer to the liquidator's submission that unless the employee's confidence is actually undermined there is no breach. A breach occurs when the proscribed conduct takes place: here, operating a dishonest and corrupt business. Proof of a subjective loss of confidence in the employer is not an essential element of the breach …"

[64] However, it seems to me that the conduct said to be in breach of the implied term is not to be looked at without regard to the circumstances in which it occurred, and in particular, the state of the relationship at that time. The defendant's financial difficulties (at this time by no means a secret), the fact that attempts were being made to sell the Brisbane Bullets, and the statement made to the plaintiff requiring him to take a substantially reduced salary, must inevitably have had a significant effect on that relationship. In my view, the defendant has failed to establish that the statements of the plaintiff to the press would be materially damaging to it. A somewhat similar conclusion was reached in *RDF*.[24]

[65] For completeness, I should record that the plaintiff did not assert that the defendant had repudiated the contract by reason of his inability to render substantial performance of it.[25] Nor did the plaintiff suggest that, whether for that reason, or because Mr Van Groningen's statements to the plaintiff early in March 2008 constituted repudiatory conduct, the defendant was precluded from terminating the contract by reason of the plaintiff's alleged breach of it.[26]

[66] In summary, I have concluded that the plaintiff did not breach any implied term relating to trust and confidence between the parties, both by reference to the state of the

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20 *RDF Media Group Plc v Clements* [2008] IRLR 207 at [134].

21 Ibid at [75].

22 Ibid at [133].

23 [1998] AC 20 at 35.

24 *RDF Media Group Plc v Clements* [2008] IRLR 207 at [141].

25 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44].

26 See *Segacious Pty Ltd v Fabrellas* [1991] 1 Qd R 471 at 479, for the question whether performance of the implied term and to the defendant's obligation to make contractual payments were interdependent obligations would then require consideration; see also *RDF* at [140].

relationship between the parties at the time where the plaintiff spoke to journalists in the early part of March 2008; and because it has not been shown that his conduct occurred without reasonable cause.

Summary dismissal and termination of employment contract

[67] For the plaintiff it was submitted that repudiatory conduct by the employer has the effect of immediately discharging the contract of employment. It would follow that a statement by Mr Van Groningen to the plaintiff to the effect that the plaintiff had to take a pay cut, or that he was no longer the coach of the Brisbane Bullets, would have the immediate effect of terminating the contract; so that it could not be said that subsequent statements by the plaintiff to journalists could amount to a breach of it.

[68] The submission was founded on the following passage in the judgment of Dixon J in *Automatic Fire Sprinklers Pty Ltd v Watson*:[27]

> "A contract for the establishment of the relation of master and servant falls into the same general category of agreements to pay in respect of the consideration when and so often as it is executed, and is, therefore, commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act.
>
> …
>
> The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employment may be to serve and however much he stand by his contract and decline to treat it as discharged by breach …"

[69] In my view, this passage does not support the submission. It recognises that the contract between the employer and employee may remain on foot, notwithstanding a "discharge from … service". In such a case, it may be said that the employer's wrongful conduct brings to an end the relationship of employer and employee. This may have important consequences other than simply preventing the employee from earning the contractual wage; it may, perhaps, bring to an end an implied licence to enter the employer's property, or to use the employer's chattels, for work-related purposes. It may perhaps mean that the former employer is no longer vicariously liable for subsequent conduct of the former employee. It is not necessary in the present case to decide what the consequences of such a discharge are. Without more, it does not terminate the contract. As Mr Liddy's submissions point out, Macken relies on *Watson* as establishing that in Australia a contract of employment is not automatically terminated by an employer's repudiatory conduct.[28] In my respectful opinion, this is a correct reading of the judgment.[29]

[70] The distinction between the relationship of employer and employee and the contract of employment was clearly recognised in *Byrne v Australian Airlines Ltd*.[30] It was there said, in reliance on *Watson*:

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27 (1946) 72 CLR 435 at 465.
28 Macken at [7.220].
29 See also *Watson* at 450-453, 461-463.
30 (1995) 185 CLR 410 at 427.

> "It does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of employment may continue until the employee accepts the repudiation constituted by the wrongful dismissal and puts an end to the contract."

[71] It follows that I do not accept the submission made on behalf of the plaintiff that the contract between the parties was terminated by any statement made by Mr Van Groningen early in March 2008.

Waiver

[72] The plaintiff's reply alleges that any alleged repudiation of the contract by the plaintiff in March 2008 was waived by the defendant's continuing to pay the plaintiff's salary until July 2008. The only authority relied upon for the submission was *Sargent v ASL Developments Ltd.*[31] In that case it was pointed out that waiver, said to result from asserting one of two inconsistent legal rights, is better regarded as a case of election. It was then said:[32]

> "A person confronted with a choice between the exercise of alternative and inconsistent rights is not bound to elect at once. He may keep the question open, so long as he does not affirm the contract or continuance of the estate and so long as the delay does not cause prejudice to the other side. An election takes place when the conduct of the party is such that it would be justifiable only if an election had been made one way or the other … So, words or conduct which do not constitute the exercise of a right conferred by or under a contract and merely involve a recognition of the contract may not amount to an election to affirm the contract."

[73] The submissions made on behalf of the plaintiff did not attempt to demonstrate that the defendant had positively exercised a right conferred by or under a contract, after he learnt of the conduct of the plaintiff which is alleged to be repudiatory. The submissions for the plaintiff imply that an election occurred when the defendant accepted the benefit of the continued performance of the contract by the plaintiff, and continued for his part to perform the contract by paying the plaintiff's salary; but no authority was cited for this. In view of the findings made earlier, it is unnecessary to reach any conclusion in respect of the plaintiff's case that the defendant waived his breaches of contract.

Other allegations that the plaintiff breached the contract

[74] The defence alleges that the plaintiff breached his contract with the defendant by entering into the contract with the Perth Wildcats in April 2008. The evidence shows that the contract was entered into on about 7 April 2008. It was terminated on about 14 April 2008. There is no evidence that the contract with the Perth Wildcats interfered with the performance by the plaintiff of any obligation he owed to the defendant in that relatively brief period. It may be debated whether entry into the contract with the Perth Wildcats resulted in an actual breach of the contract between the plaintiff and the defendant. In so far as entry into the contract with the Perth Wildcats may be regarded as an anticipatory breach of the plaintiff's contract with the defendant, its effect ceased well before the defendant ceased paying the plaintiff.

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31 (1974) 131 CLR 634.

32 Ibid at 656; see also *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570.

[75] The allegation only matters if the contract between the plaintiff and the defendant remained on foot early in April 2008. The better view may be that the plaintiff, by his actions in the latter part of March and early April, and at the latest by his entry into the contract with the Perth Wildcats, accepted the defendant's repudiatory conduct as terminating the contract. This view does not sit entirely comfortably with the fact that the plaintiff's salary continued to be paid until July; but in my view there is substantial ambiguity about the circumstances in which these payments were made and accepted. In April the plaintiff entered into the contract with Mr Kemp; and he appears to have been regarded as working for the Consortium at this time. As has been mentioned, there remained some benefit to the defendant in maintaining some connexion between the plaintiff and the Brisbane Bullets at this time.

[76] In any event, Mr Liddy submitted that the plaintiff was given permission by the "Bullets" to enter into the contract with the Perth Wildcats. His submissions relating to breach of the contract of employment did not refer to the plaintiff's entering into the contract with the Perth Wildcats. In those circumstances, it is unnecessary to consider further this aspect of the defendant's pleaded case.

[77] Mr Liddy's submissions dealing with breach of contract by the plaintiff argued that the plaintiff repudiated his agreement with the defendant by entering into the contract with the Consortium. The agreement with the Consortium was expressly made subject to the transfer of the NBL licence for the Brisbane Bullets to a company apparently associated with Mr Kemp. If that occurred, the defendant would clearly not have been in the position to perform the contract; nor to require performance of it by the plaintiff. This contract, therefore, was not inconsistent with the plaintiff's obligations under the contract with the defendant (if it remained in force at this time).

Termination

[78] It follows that the defendant was not in a position to terminate the contract on or about 1 July 2008, as alleged in his defence.

[79] The defendant denies the entitlement of the plaintiff to damages on the basis that the defendant lawfully terminated the contract; or alternatively, because the contract was frustrated. These contentions fail. It follows that the plaintiff was entitled to such damages as may be assessed.

[80] The plaintiff's statement of claim alleges that the contract was brought to an end by various actions of either Mr Van Groningen or the defendant in the period between March and July 2008. To the extent that it is alleged that any of these actions had the effect of automatically terminating the contract, I have earlier concluded that this is inconsistent with authorities by which I am bound. However, the defendant has not suggested in his pleading that the plaintiff's claim for damages should fail, save on the bases just mentioned. In those circumstances, it seems to me that it is open to find that the plaintiff accepted the defendant's repudiatory conduct, and terminated the agreement. This occurred, in my view, by July 2008, at the latest. By then, the defendant had ceased making payments to the plaintiff under the contract. The plaintiff was actively, and no doubt publicly, seeking employment as a coach with other teams. The plaintiff had surrendered the car which had been provided to him under the contract. However, one element of the plaintiff's claim relates to bonus payments, the right to which was said to have accrued prior to termination. I propose to deal with that topic next.

Claim to accrued bonuses

[81] The contract provided for the payment, in addition to an annual salary, of what were described as game bonuses. The amounts specified were $500 for each game won; $2,000 for making the playoffs; $5,000 for each round advanced in the playoffs; and $10,000 for winning the championship.

[82] The plaintiff's evidence was that for the 2007-2008 season he was paid a bonus for some of the wins, but that there were 10 wins for which no bonus had been paid. In addition, he was not paid the bonus for making the playoffs; nor was he paid the bonus for each of the two rounds through which the Bullets advanced during the playoffs. He submitted that in total, $17,000 due for these bonuses had not been paid. He stated that bonuses were paid in cash; and that he was last paid a bonus somewhere between the middle and the end of the last season in which he coached the Brisbane Bullets. The plaintiff also gave evidence that he calculated the amount owing about the beginning of March 2008, shortly after he learnt of the defendant's financial difficulties.

[83] Mr Van Groningen gave evidence that all of the bonuses were paid. He said that he paid some himself, but that others were paid "by the Club". He could not identify the amount paid, nor the occasions on which payments were made. He said no record was kept of the payments he made. He gave evidence that any payment made by the Brisbane Bullets would have been by a transfer of funds to the plaintiff's account. However, no record was produced to confirm the making of these payments. He gave evidence that there were issues relating to the payment of bonuses to some of the players, but said that these related to the timing of the payments.

[84] Consistent with the approach taken earlier to the evidence of these witnesses, I accept the evidence of the plaintiff. He was entitled to, but was not paid, game bonuses in the sum of $17,000 in the 2007-2008 season.

Loss of annual remuneration

[85] The plaintiff's contract with the defendant entitled him to the sum of $US100,000 annually for the three years of the contract, with a 10 percent increase in the second year, and a further 10 percent increase in the third year. Mr Liddy has calculated that for 11 months of the second year (apparently by reference to conversion rates accepted by both parties), the amount payable would have totalled $140,069.31. The monthly payments for the third year, as calculated by Mr Liddy, totalled $143,821.56. The calculations indicate that allowance has been made for the annual increases.

[86] The calculations for the second year exclude one month's payment. The plaintiff's evidence was that the monthly payments to him stopped at the end of June or the middle of July 2008.

[87] The submissions on behalf of the plaintiff referred to the plaintiff's tax return for the 2008-2009 financial year, with a view to demonstrating that he received no payment from the defendant after 30 June 2008. However, the plaintiff did not give oral evidence about this aspect of the tax returns, and it is not particularly easy to relate the 2008-2009 tax return to the payments made to the plaintiff under the contract. The plaintiff's own evidence raises a real possibility that he received a monthly payment in July 2008. Given the state of the evidence, I am not satisfied that the plaintiff did not receive a payment in July in respect of what was payable to him under the contract for the 2008-2009 year. Accordingly, I find the amount which the plaintiff would have

been entitled to receive by reason of the annual sums payable under the contract to be the amounts calculated by Mr Liddy.

[88] The plaintiff was paid $US32,000 for coaching in Cyprus in the period after August 2008. It is common ground that this should be taken into account in calculating the plaintiff's loss, and it seems to be accepted that the equivalent in Australian currency is $37,515.

[89] In the 2009-2010 year the plaintiff received income as the coach of the Gold Coast Blaze Basketball team. It seems to be common ground that the amount of that income was $144,996, which should also be taken into account.

[90] Mr Liddy's submissions appear to suggest that a greater deduction should be made by reason of the plaintiff's earnings from coaching in Cyprus. He draws attention to the fact that the salary under that contract was $US62,000. There is, however, no evidence that the plaintiff was paid more than the $US32,000 previously referred to. I have earlier mentioned the plaintiff's evidence about the conduct of his employer in Cyprus. It seems to me that the plaintiff's conduct in departing from Cyprus was quite reasonable. At that time, the plaintiff had no other employment and was supporting a family. It seems to me quite unlikely that he would have ceased employment in Cyprus if his employer was likely to continue paying him. I am therefore not prepared to make any further deduction based on the amount payable annually under the plaintiff's contract with Seastar Apoel.

[91] A submission was also made that the payments were to be tax free, and that accordingly, a greater amount should be allowed than the amount received by the plaintiff. There is no evidence to suggest that any tax was paid by the plaintiff's employer in Cyprus. Given the conduct of the employer which has been previously mentioned, it seems to me unlikely that the employer paid tax. I am not, therefore, prepared to make a reduction of the plaintiff's damages on the basis that some tax was paid on his behalf under his contract with Seastar Apoel.

[92] There was an unusual feature of the plaintiff's contract with the Gold Coast Blaze. It was that the sum of $145,000 for the plaintiff's future employment with this Club was to be paid in the 2008-2009 year, prior to his having commenced coaching. The effect of the contract was that the base salary for the second year was to be paid during the first year; and the base salary for the third year was to be paid during the second year; with the result that the plaintiff would coach in the third year, without, in fact, being paid any base salary. Mr Liddy expressly disavowed any suggestion that these provisions of the contract were not genuine.

[93] A schedule Mr Liddy provided seeks to have credited in his client's favour in the assessment of damages the sum of $145,000 paid by the Gold Coast Blaze to the plaintiff in the 2008-2009 year; as well as the sum paid in the following year. His oral submissions suggested that in truth there was no loss to the plaintiff in the 2008-2009 year; but that he had a future loss in the third year of the contract with the Brisbane Bullets.

[94] Another way to look at this is to assume that in the second and third years of the plaintiff's contract with the defendant, the plaintiff received the sum of $145,000, 12 months earlier than he otherwise would have; and to identify the benefit to the plaintiff by calculating interest on that sum. The first payment under the Blaze contract was made shortly before the commencement of the 2009-2010 year, which effectively is on average in the order of 6 months in advance of when the payments under the Bullets

contract would have been made (assuming they would have been made monthly over the next 12 months); and the payments made in the 2009-2010 year may be regarded as being made 12 months in advance of when they otherwise would have been made. I was not given any assistance in determining what interest the plaintiff might have saved, or earned, by reason of the early receipt of these moneys. Bearing in mind that interest rates were relatively low in this period, it seems appropriate to make a modest global assessment of the benefit of these early payments to the plaintiff, for which purposes I adopt the sum of $15,000. It therefore seems to me appropriate to deduct the sum of $160,000 from the damages which would otherwise be awarded to the plaintiff under this head.

[95] In summary, I would calculate the plaintiff's loss related to his annual salary as follows:

Payable by the defendant	2008-2009	$140,069.31	
	2009-2010	$143,821.56	$283,890.87
Less income from Seastar Apoel			$37,515.00
			$246,375.87
Less Benefit of Blaze contract			$160,000.00
			$86,375.87

[96] The defendant contends that I should also deduct the sum of $8,750, paid to the plaintiff on behalf of the Consortium. It is said that this is money he would not have received, but for the fact his contract with the defendant came to an end. The plaintiff's evidence is that this was reimbursement for expenses incurred on the trip which he made to the United States whilst scouting for the Consortium, including his airfares. It by no means includes all of the expenses he incurred in the course of that trip. There is no reason to think that the amount paid by the Consortium did not represent expenditure incurred by the plaintiff. Nor is there any evidence to suggest that the plaintiff would have incurred these expenses, had the contract with the defendant continued. In those circumstances, I am not prepared to take the sum paid by the Consortium into account by way of reduction of the award to be made to the plaintiff.

Other items claimed

[97] The plaintiff has claimed the sum of $17,500 per annum by way of lost bonuses for the second and third years of his contract with the defendant. The amount claimed approximates the amount which, on the plaintiff's evidence, remained unpaid for the 2007-2008 year, the total for the year being somewhat greater. In at least one of the earlier years, the Brisbane Bullets had been more successful than in the 2007-2008 year. Bearing these things in mind, and notwithstanding the uncertainties about likely success in the second and third years of the contract, this claim seems to me to be modest. I would therefore include the sum of $35,000 for lost bonuses.

[98] The plaintiff's contract with the defendant included a monthly fuel allowance of $250 per month, for each of 9 months in each year. None of the subsequent contracts included a fuel allowance. The evidence was somewhat vague as to the extent to which the plaintiff benefited from this provision of the contract during its period of operation. I propose to adopt a figure of $3,000 as indicative of the loss.

[99] The plaintiff's contract with the defendant provided that he was to have the benefit of a fully maintained vehicle for work and private use. He is provided with a vehicle under

his contract with the Gold Coast Blaze, so that there is no claim for this loss in respect of the third year of his contract with the defendant. In the course of the hearing, it was agreed that the value of a fully maintained motor vehicle to the plaintiff in the 2008-2009 year would have been $8,000. In this period, the plaintiff was in Cyprus for 2 months, where he was apparently provided with a motor vehicle. I therefore assess the value of the benefit of a motor vehicle under the contract lost by the plaintiff at $6,700.

[100] For the defendant, it was submitted that the claim should not be allowed because the plaintiff was out of Australia in this year; and accordingly, he would not have made use of the car. The submission ignores the fact that the plaintiff's absence from Australia was the result of the contract with the defendant coming to an end; and that otherwise, it was highly likely that he would have been in Australia in the 2008-2009 year. It seems to me therefore that the plaintiff is entitled to recover the value of the lost benefit of the provision of a motor vehicle by the defendant.

[101] The plaintiff's contact with the defendant included a rental allowance of $18,000 per year. For the defendant, it was submitted this should not be allowed for the 2008-2009 year, because in that year the plaintiff did not live in Australia. Moreover, he owned houses in the United States. Further, it appears to be submitted that no amount should be allowed in this year, because the plaintiff's family were able to live rent-free in the United States. Moreover, the defendant relies on the fact that while the plaintiff was in Cyprus, accommodation was provided for him.

[102] The defendant's submissions do not go so far as to say that the plaintiff's family lived rent-free in the United States in this year. Nor did the evidence explore the question whether the properties owned by the plaintiff in the United States were rented to other persons. It seems to me that, *prima facie*, the plaintiff is entitled to the rental allowance for which the contract made provision in the 2008-2009 year.

[103] I have also given consideration to whether there should be some deduction, because of the accommodation provided to the plaintiff in Cyprus. However, for reasons which to me seem appropriate, the plaintiff's family did not live with him there, and had to be accommodated elsewhere. I therefore would not make any deduction for this reason.

[104] There is also evidence that, when the plaintiff entered into a contract with the Gold Coast Blaze, he was flown out from the United States, where he was then living, to the Gold Coast, and was accommodated there at the expense of the Gold Coast Blaze for a period of approximately seven weeks, from about the end of April to about the middle of June 2009. There was no suggestion that his family accompanied him, or was accommodated by the Gold Coast Blaze, in this period. In those circumstances, I am not prepared to reduce the amount of the award, by reason of the accommodation provided by the Gold Coast Blaze.

[105] There is no suggestion that the plaintiff had the benefit of accommodation or a rental allowance from any other source in the 2009-2010 year. Accordingly, I would include in the award to be made in favour of the plaintiff, a sum of $36,000 for the lost benefit of the rental allowance under his contract with the defendant.

[106] The plaintiff's contract with the defendant included two annual travel benefits. One was for three round trip flights, to the value of $9,500; and the other was simply described as a travel allowance, in the sum of $10,000. The plaintiff's evidence was that he could use these allowances for travel, as he chose. He had a son living in the United States, who flew out to Australia on occasions, by virtue of the travel allowance. His mother did likewise. The plaintiff gave evidence that the $10,000 was

paid to him in cash. He gave evidence that he used up most of the allowance of $9,500, but because the allowance was limited to three round trips it was not able to be fully utilised.

[107] The defendant submits that no amount should be allowed under this head. One basis for the submission appears to be that there is no evidence of the plaintiff travelling at his own cost. It seems to me that that fails to recognise the fact that the allowances provided a benefit to the plaintiff which he has lost; and which he gave evidence of using when it had been available to him.

[108] The defendant also submits that the Gold Coast Blaze paid for the plaintiff to travel from the United States to Australia and back in the period between April and June 2009; and that his contract with the Gold Coast Blaze provides for an annual trip to the United States.

[109] The trip to Australia in 2009 was for a specific purpose, namely, the announcement of the plaintiff's appointment of the coach of the Gold Coast Blaze. It seems to me to be in a different category to the discretionary benefits available to the plaintiff, by virtue of the travel allowances under his contract with the defendant. The annual trips paid for by the Gold Coast Blaze are for recruiting purposes only. I would not reduce the amount to be recovered by the plaintiff, by reference to either of these considerations.

[110] Accordingly, I would allow the plaintiff the sum of $10,000 for each of the two remaining years of the contract, for the lump sum travel allowance for which it provided. The plaintiff was, under the other allowance, limited to three round trip flights which may not have cost a total of $9,500 in each year. It seems to me appropriate to make some small reduction of the award to reflect this. I propose to allow $8,000 per year for the loss of this benefit. Accordingly, I would include a sum of $36,000 for the loss of the two travel allowances provided for in the plaintiff's contract.

[111] The contract also included an annual allowance for family medical insurance, to the value of $5,000. The defendant submits that the award should not include any provision for the loss of this benefit. It is submitted that the plaintiff gave no evidence that he had been put to any expense on account of medical insurance during the two remaining years of the contract with the defendant; and in one year he resided in the United States. It was also submitted that he was provided with health insurance while he worked in Cyprus.

[112] The plaintiff gave evidence that he did not receive medical insurance under his contract with the Gold Coast Blaze.

[113] He gave evidence that, with four children, the allowance under the contract was "extremely valuable", and suggested that medical treatment in the United States was more expensive than in Australia.

[114] Notwithstanding that the plaintiff personally may have had the benefit of medical insurance in Cyprus, it seems to me that, with his family living in the United States, no deduction should be made for that reason. The evidence does not suggest that the fact that his family, and for a time he, lived in the United States meant that the loss of this benefit was offset by some other factor. Accordingly, I propose to allow the sum of $10,000 under this head.

[115] The plaintiff also claims his expenses for moving to Cyprus, and the expenses of moving his family to the United States on termination of the contract. In support of his claim for the expense of moving his family to the United States, the plaintiff produced American Express records demonstrating payment of a sum of slightly more than $4,500. That was the cost of three airfares, for Mr Wright's wife and two children. He said, in addition, that there were costs of a rental car and hotel accommodation. There was evidence from Ms Tomlinson, the General Manager of the Gold Coast Blaze, that, when the plaintiff was appointed as the coach of this team, payment was made for the cost of relocating his wife and two daughters from the United States to the Gold Coast, which was approximately $7,000. The amount claimed is $6,000. Although the evidence is by no means perfect, it seems to me to be not inappropriate to allow this amount.

[116] There is, however, no evidence that the plaintiff himself incurred any cost in moving to Cyprus. In the absence of evidence, I would not allow this element of the plaintiff's claim.

Summary

[117] I have concluded that the plaintiff is entitled to recover damages from the defendant consequent upon the defendant's repudiation of his contract with the plaintiff. I have determined the amount to be recovered, by reference to the following heads of claim:

Annual Remuneration	$86,375.87
Accrued bonus	17,000.00
Post-Termination bonus	35,000.00
Fuel allowance	3,000.00
Use of motor vehicle	6,700.00
Rental allowance	36,000.00
Travel allowance	36,000.00
Family medical insurance	10,000.00
Relocation of family to US	6,000.00
Total	**$236,075.87**

[118] The plaintiff is entitled to recover damages against the defendant in the sum of $236,075.87.