SUPREME COURT OF QUEENSLAND

CITATION:	*Joyce v Gold Coast Blaze Pty Ltd* [2011] QSC 407
PARTIES:	**BRENDAN STEVEN JOYCE** (plaintiff) **v** **GOLD COAST BLAZE PTY LTD** ACN 122 467 289 (defendant)
FILE NO:	SC No 9548 of 2009
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	23 December 2011
DELIVERED AT:	Brisbane
HEARING DATES:	3, 4, 5, 6, 10 October 2011
JUDGE:	Peter Lyons J
ORDER:	
CATCHWORDS:	*Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309, cited *Allen v Carbone* (1975) 132 CLR 528, cited *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, cited *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, cited *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, cited *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, applied *HSH Hotels (Australia) Ltd v State of Queensland* [2011] QCA 329, cited *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, cited *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, cited *Van Efferen v CMA Corporation Ltd* [2001] FCA 597, considered *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687, considered *Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd* [2011] QCA 150, cited CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL

RELATIONS – AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENT – WHETHER CONCLUDED CONTRACT – where negotiations for a coach to be retained by a National Basketball League licensee occurred over a period of time – where a summary of the negotiations was documented – where the summary was signed by both parties at a press conference convened for the purpose of announcing the appointment of the coach – where the coach commenced duties prior to the finalisation of a written contract – where the parties then continued negotiations regarding terms that were documented in a draft deed – whether a contract was formed on the signing of the summary at the press conference – whether a contract was formed at a specified point during the continued negotiations

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – where the coach attended a Board meeting of the licensee, at which he was advised he would not continue to be employed as the coach once a new basketball league was formed – whether the conduct of the licensee at the Board meeting amounted to a repudiation of the contract – whether the contract was terminated by an acceptance of the repudiation

COUNSEL: D J Pyle for the plaintiff
C C Wilson for the defendant

SOLICITORS: O'Keefe Mahoney Bennett Solicitors for the plaintiff
Reichman Lawyers for the defendant

[1] **PETER LYONS J:** Mr Joyce is a basketball coach. Gold Coast Blaze Pty Ltd (*Blaze*) conducts a similarly named basketball team. Mr Joyce commenced working for Blaze in January 2007, and ceased doing so early in January 2009. He contends that he entered into a contract in January 2007, and that the contract was terminated as a result of repudiation by Blaze, and he sues for damages. Blaze contends that it was entitled to terminate Mr Joyce's employment by the terms of a contract, said to be entered into on about 8 July 2008.

Background

[2] After a successful career as a basketball player, Mr Joyce became a coach in the National Basketball League ("*NBL*") competition in about 1994. From 1995 to 2006 he was the head coach of the Wollongong Hawks Basketball Team, with a successful record. He was also the assistant coach for the Australian National Basketball Team between 2001 and 2009.

[3] In 2006, Blaze secured the rights (described as a licence) to enter a team in the NBL competition. Its "first choice of coach" was Mr Joyce. About the end of December

2006, it commenced negotiations with Mr Joyce, with a view to retaining him as the coach of the Blaze basketball team.

[4] Arrangements were then made for Mr Joyce to fly to the Gold Coast to attend a meeting of the Board of Blaze on 10 January 2007. Members of the Board present at that meeting included Mr Owen Tomlinson, who owned a controlling interest in Blaze; and Mr Dave Claxton, who was the general manager for Blaze. Another director at that time was Mr John Quinn, a solicitor, but he did not attend this meeting. At the meeting, Mr Joyce informed the Board that he wanted to come to the Gold Coast as his wife had family there, and his children could attend school in Tweed Heads.

[5] Subsequent to Mr Joyce's presentation to the Board, the Board agreed that Mr Claxton should continue to negotiate with Mr Joyce, on the basis of a four year contract if desired by Mr Joyce, bonuses if the team reached the playoffs, additional payments for success in the playoffs, and a salary otherwise all inclusive of $ 150,000. While the contract was intended to commence on 1 July 2007, the minutes record that Mr Joyce would be paid pro rata if he could commence on 1 March 2007.

[6] There were then email communications between Mr Claxton and Mr Nathan Heard, the solicitor retained by Mr Joyce for his dealings with Blaze, about the terms of a proposed contract. As a result, on 16 January 2007, Mr Tomlinson's wife, Katie Tomlinson, who was actively involved in the conduct of the Blaze basketball team, sent an email to Mr Quinn. Attached to that email was a summary of the negotiations between Mr Claxton and Mr Joyce. On 17 January 2007, Mr Quinn sent a document to Mr Heard, which included some additional clauses identified by Mr Quinn. Provision was made for the document to be signed.

[7] The Board of Blaze met again on 17 January 2007. Its minutes recorded an intention that Mr Joyce "be announced as our coach" the following day, and that the "Summary of Negotiations" document prepared by Mr Quinn (*Summary*) would be signed at the time of the announcement. At about this time, clearance was sought from Mr Chuck Harmison, who was the general manager of the NBL, for the announcement of Mr Joyce as the coach of the Blaze team.

[8] On the morning of 18 January 2007, a press release prepared by prgallery, on behalf of Blaze, was released. It recorded Mr Joyce's appointment as the coach of the Blaze Basketball Team; and advised that a media conference would take place later that day. Some of the material in the document had been provided by Mr Claxton; and his name, and that of Mr Pye of prgallery, appeared at the bottom of the document.

[9] The press conference took place later that day. Prior to it, Mr Claxton gave to Mr Joyce a copy of the Summary. Mr Joyce then contacted Mr Heard by telephone, asking whether it was okay to sign the Summary. Apparently Mr Heard had been provided with a copy, because Mr Joyce said that Mr Heard told him he would have to find and check the document. Shortly thereafter Mr Heard told Mr Joyce that it was okay for him to sign it. At the press conference, both Mr Tomlinson and Mr Joyce signed the Summary. In response to a question, Mr Claxton acknowledged it was a "multi-year deal" or a multi-year contract.

[10] In about February 2007, Mr Joyce moved to the Gold Coast with his daughter who was commencing year 11 of high school. Initially, they resided in a rented apartment at Main Beach, Blaze paying the rent. This continued for three months. In due course, Mr Joyce purchased a house on the Gold Coast, his wife and the rest of the family moving to the Gold Coast in July 2007. Their transport expenses, and the costs of relocating from Wollongong, were paid for by Blaze.

[11] Mr Joyce commenced working for Blaze in February 2007, his salary being paid from the first day of that month.

[12] Blaze retained solicitors, Reichman Lawyers, to prepare a draft contract. A draft was provided to Mr Joyce by Mr Claxton in about June or July of 2007, which he sent to Mr Heard for advice. There were then negotiations between Mr Heard, and initially Mr Claxton, and subsequently Mr Reichman, the principal of Reichman Lawyers, about the draft.

[13] The playing season for the NBL competition commenced in about October 2007. Negotiations about a formal contract continued at a relatively leisurely pace until December 2007, and resumed in about May 2008.

[14] It would appear that by the end of May 2008, there was some concern about the potential cost of providing Mr Joyce with a car. He proposed, as an alternative, that he be paid an additional $800 per month plus GST. On 13 June 2008, Mr Claxton sent an email to Mr Joyce stating, "We will go with the extra money in place of car".

[15] In late June 2008, Mr Joyce advised Mr Heard's office that he would take over the finalisation of the written contract. On 29 June 2008, Mr Joyce sent an email to Mr Claxton, asking for a copy of the contract, including the agreed changes.

[16] Mr Joyce was overseas in early July 2008. He spoke by telephone with Mr Claxton. One of these conversations occurred on 8 July 2008. To some extent, Mr Claxton's evidence of this telephone conversation is contentious. Its effect was that, during this conversation, by and large, agreement was reached about terms of the draft contract which, until then, had been in dispute.

[17] Mr Joyce returned to Australia in the latter part of July 2008. He was provided with a form of contract. Shortly after, on 27 July 2008, Mr Joyce sent an email to Mr Claxton saying he had examined the contract and noted that the changes which had been previously agreed had not been made. Mr Joyce, who was about to go to China with the Australian Basketball Team, stated that the documents could be forwarded to him, and said, "I can sign and reply when I receive them". That proposal did not result in a signed contract. On 2 September 2008, Mr Joyce sent an email to Mr Claxton asking Mr Claxton to give him "the contract with the agreed changes … so I can go over it again". It would appear that a document was again provided to Mr Joyce. On 10 September 2008, he sent an email to Mr Claxton stating that he had "had the chance to go through the contract again and changes that were agreed and there are still some of the agreed changes that have not been made.(*sic*)"

[18] By October 2008 some difficulties were emerging in the relationship between Mr Joyce and the Blaze Board. Mr Joyce attended a Board meeting on 29 October

2008, where difficulties were discussed. That resulted in a letter being sent to Mr Joyce under the hand of Mr Dunn, the chairman of the Blaze Board, containing a number of directions, and recording some other matters. Mr Joyce replied in writing on 10 December 2008.

[19] During 2008, a substantial review of the operation and constitution of the NBL was undertaken. The events which took place during the review are not fully explained in the evidence. However, at a meeting held on 8 November 2008, a resolution was passed bringing to an end on 30 June 2009, the agreement by which clubs had until then participated in the NBL. An Interim Board for the entities associated with the conduct of the NBL, namely, NBL Management Limited and NBL Enterprises Pty Limited, was appointed. On 23 January 2009, a letter was sent to Blaze in relation to the next playing season, expected to commence in October 2009. That letter invited expressions of interest in the "NewNBL" competition.

[20] The Board of Blaze met on 28 January 2009. Mr Joyce had been summoned to the meeting. He was told that the new NBL would be effective from 1 July 2009; and that all contracts, including for coaches, would come up for renewal. While there is some contest about what was said, it is clear that it was made known to Mr Joyce that Blaze would not continue to employ him after the end of the current season, of which three games remained. He was asked whether he wanted to complete the current season, and said that he did.

[21] Mr Joyce then consulted a solicitor, who on his behalf sent a letter of demand to Blaze, for the damages resulting from the termination of his services. That resulted in correspondence between the solicitors, in which the solicitors for Blaze asserted that Mr Joyce's employment had not been terminated. However, on 4 March 2009, Mr Tomlinson sent by email a letter to Mr Joey Wright, another basketball coach, stating that, "We have set our plans in place for the coming season with you firmly in the position of Head Coach and we are really excited about that." In the letter, Mr Tomlinson confirmed that the restructure of the NBL would proceed. The letter set out further details of Mr Wright's proposed employment, including as Head Coach of the Blaze, "when the Head Coach position becomes vacant". That led to the signing of an agreement dated 30 March 2009 for Mr Wright's employment as Head Coach with Blaze for a term of three years.

[22] On 20 May 2009, Basketball Australia sent to Blaze a Licence Agreement, under cover of a letter which stated that the agreement, when executed, would confirm Blaze's participation "in the NBL for season 2009/10". There were changes to the competition for that season, some of which are discussed later in these reasons.

The parties' cases

[23] Mr Joyce's case is that the Summary constituted a contract, for his employment for a term of four years, with a salary of $150,000 per annum (inclusive of superannuation). A clause of the contract promising a car for the last three years of the term was subsequently varied, by the substitution of monthly payments of $800 (not including GST). Blaze repudiated the contract early in 2009 (the statement of claim refers to 18 February 2009, but the case presented, without objection, was that the conduct relied upon occurred on 28 January 2009), that conduct being subsequently accepted by Mr Joyce as bringing the contract to an end. He has claimed the benefits to which he would have been entitled had the contract

continued, but which he did not receive, namely two years salary of $150,000 and the payments in respect of a motor vehicle, for a period of two years.

[24] Mr Joyce's statement of claim alleged that at the Blaze Board meeting early in 2009, Mr Joyce elected to continue the contract; but that further repudiatory conduct occurred (including the appointment of Mr Wright). The statement of claim also alleged that the contract had been terminated, without specification of the date. However, the primary case presented on behalf of Mr Joyce, again without objection, was that at the meeting on 28 January 2009, he accepted the conduct of Blaze as terminating the contract.

[25] In his reply, Mr Joyce has alleged that Blaze is estopped from denying the contract on which he relies. He has also alleged that Blaze engaged in misleading conduct, contrary to the provisions of the *Trade Practices Act* 1974 (Cth) (*Trade Practices Act*), an allegation which appears, a little surprisingly, in the reply.

[26] Blaze's defence denied that the Summary constituted a contract. It alleged that a contract was made on 8 July 2008, between Mr Joyce, and Mr Claxton on behalf of Blaze. Its terms were said to be in a draft deed. (At the hearing, it qualified its position and made reference to clauses agreed, usually in correspondence, but not included in the draft.) The defence denied the events which the statement of claim alleged occurred early in 2009, in effect asserting that Mr Joyce was simply told of the degree of Blaze's "present thinking". It admitted the appointment of Mr Wright from 1 July 2009. It alleged that the contract formed on about 8 July 2008 included a term permitting it to terminate Mr Joyce's contract if certain changes occurred to the NBL competition; and it alleged that such changes having occurred, it was entitled to terminate Mr Joyce's contract, which it did validly on 5 June 2009.

[27] Mr Joyce's reply denied the formation of a contract on about 8 July 2008.

[28] It is convenient to dispose of some matters immediately. Both the estoppel allegation and the *Trade Practices Act* allegation raised by Mr Joyce's reply depend upon an alleged representation by Blaze that it intended to enter into a four year contract, generally in the terms contained in the Summary. It appears to me to be clear from the evidence, that at the time the Summary was prepared, Blaze held that intention, an intention which it continued to hold for a considerable period thereafter. The form of the allegation makes it inevitable that Mr Joyce cannot rely on the provisions of the *Trade Practices Act*. Nor does the evidence, in my view, demonstrate that Blaze departed from what was alleged to have been represented. Accordingly, the allegations relating to the *Trade Practices Act* and the estoppel are, as the case is pleaded, of no assistance to Mr Joyce. So much appeared to be conceded by Mr Pyle of counsel, who appeared for Mr Joyce.

[29] The critical issues in the case may therefore be summarised as follows:

(a) On about 18 January 2007, did the parties enter into a contract, the terms of which are recorded in the Summary?
(b) Did Mr Joyce and Blaze enter into a contract on about 8 July 2008, made orally between Mr Joyce and Mr Claxton, the terms of which are (substantially) recorded in a draft deed?
(c) Did the contract between the parties permit, by reference to changes in the NBL competition, the termination by Blaze of its contract with Mr Joyce?

(d) Was the contract between the parties terminated on about 28 January 2009, and if so was the termination the result of an act of Blaze, authorised by the contract; or was it the result of Mr Joyce's acceptance of repudiatory conduct by Blaze?
(e) What is the quantum of Mr Joyce's claim?

Was the Summary a contract?

[30] Before considering the submissions of the parties on this question, it is appropriate to refer to some of the history of the parties' dealings in greater detail.

[31] On 13 January 2007, Mr Claxton sent an email to Mr Heard, pursuant to an arrangement with Mr Joyce. The email recorded that Mr Joyce had asked Mr Claxton to send to Mr Heard "details of our discussions regarding our offer to him" to become the coach for Blaze. The email set out the proposed salary, the term of the employment, proposed bonus payments and a proposal for the provision of a car, or an annual sum in lieu thereof. Reference was also made to employment prior to the commencement of the appointment as coach; payment for rental accommodation for three months; and the payment of moving costs by Blaze. The substantial part of the email concluded, "The plan will be when this is signed of (*sic*) by both parties we will fly (Mr Joyce) up and make official announcements", followed by "I believe that this covers all our discussions laid out in simple terms." Mr Heard responded on 15 January 2007, recording an agreement to some of the terms, and proposing variations of others. His email concluded:

> "If we can clarify those few aspects noted above, (Mr Joyce) is prepared for us to commit each other to these terms and make a public announcement as requested. The detail of the contract can be agreed later next week, and of course will be subject to acceptable terms being agreed between the parties. We look forward to receiving a draft contract as soon as it may be available."

[32] Mr Claxton replied on 16 January, generally agreeing to the terms proposed by Mr Heard. This email concluded,

> "Nathan, (Mr Joyce) would like to come up Thursday so I will get to you tomorrow a 1 pager of these points to sign while we have the contract document put together are you happy with all that and I will book the flights and (Mr Joyce) can reimburse us his daughters' flight."

[33] On the same day, there was a telephone call between Mr Joyce and Mr Claxton. Mr Joyce's evidence was that Mr Claxton asked whether what had been offered was okay, to which he replied, "Yep … we got a deal"; after which, Mr Claxton said, "We will fly you up in a couple of days to sign at a press conference."

[34] On 17 January 2007, Mr Quinn sent to Mr Heard a document, described in the email as "Heads of Agreement for the Employment Contract". The email recorded that Mr Quinn had added to the summary, and asked if any changes were required for Mr Joyce. Mr Heard subsequently requested some changes. These resulted in an email from Mr Quinn to Mr Heard on 18 January 2007 attaching the Summary, and inquiring whether Mr Joyce would execute the document. The Summary was signed at the press conference. In cross-examination, Mr Claxton accepted that he

said, as he handed the Summary to Mr Joyce, "Here is the letter of the agreement containing the agreed terms of your appointment as the coach of the Blaze." That was also the effect of Mr Joyce's evidence.

[35] After the Summary was signed, Mr Joyce and Mr Tomlinson shook hands. Mr Joyce gave evidence that Mr Tomlinson said, "You're the guy we wanted, mate. You are going to be here for a long time." Mr Tomlinson did not recall making that statement.

[36] It is at this point necessary to refer to the Summary in greater detail. It is headed, "Summary of Negotiation with Brendan Joyce". It includes five clauses. The first four clauses deal with salary, a four year term, bonuses, and the provision of a motor vehicle. Clause 5 is not without some importance. It is as follows:

> **"5. Other**
>
> (a) Payment commencing Feb.l 2007 to May 31 2007 monthly salary payment equivalent to the same monthly instalment he would receive from contract e.g.$150,000 divided by 12. These payments as a consultants fee payable to B&J Management Pty Limited, GST exclusive with the Club able to claim the GST payable on the invoice.
>
> (b) The Club will provide payment for (3) months for rental accomodation capped at between $500-$600 per week (Brendan provide own bond) to assist while looking for suitable accomodation for family.
>
> (c) The Club will pay for transport of furniture and (2) cars from W'Gong to Gold Coast. (Brendan to get quotes from his end) and we will see after that what we can get from this end. Registration of vehicles in Queensland we consider Brendans' responsibility.
>
> (d) Relocation costs include one way air fares for Brendan and his family."

[37] After clause 5(d), there were three paragraphs, without numbering. The first of these provided that the parties "acknowledge and agree that the foregoing terms shall form the essential elements of an Employment Contract" between Mr Joyce as "Head Coach" and Blaze, as "holder of the Gold Coast Franchise of the National Basketball League", and subject to compliance with the NBL rules and regulations, "to be included in the Contract of Employment between the parties together such other terms, covenants and conditions as may reasonably be required in order to protect the interests of each of the parties hereto".

[38] The second additional clause was a confirmation by Mr Joyce that he was no longer bound to coach the Wollongong basketball team. The third clause contained an undertaking by the parties to negotiate the final terms of the contract of employment in good faith, in the best interests of Blaze, the game of basketball, and the NBL; and an acknowledgment that the contract of employment would follow the form and content of a nominated contract for basketball players, to the extent it reflected the position of a coach rather than a player.

[39] At the end of the document provision was made for the signature of each of the parties. That for Blaze (then known as Gold Coast Basketball Pty Ltd) was as follows:

> "SIGNED by GOLD COAST BASKETBALL PTY LTD
> in accordance with the terms of it's Constitution by it's
> duly authorised Directors"

[40] A somewhat similar provision appeared in the place for execution on behalf of Mr Joyce's management company.

[41] There is no real dispute about the relevant principles to be applied in determining whether the parties entered into a contract by executing the Summary. Thus Blaze submitted that the question whether the parties intended to make a binding agreement is one to be determined objectively from the language the parties have used, and by reference to their conduct. The objective approach was supported by reference to *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd.*[1] Mr Pyle's submissions referred to the judgment of Muir JA (with whose reasons the other members of the Court agreed) in *Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd.*[2] His Honour there referred to *Allen v Carbone*, where the following appears:[3]

> "It is common ground that this informal agreement amounted to a limited consensus, but it is disputed that what then occurred amounted to a concluded contract. In resolving this dispute it is legitimate to ascertain the terms of the agreement then made by the parties, that is to say, what the parties relevantly intended, by drawing inferences from their words and their conduct in the making of that agreement. Where parties reach an agreement which is expressed informally, whether in writing or orally, the terms of their bargain are not ordinarily recorded in meticulous detail in the words which they use. To ascertain their relevant intention it is often necessary to resort to inference, a process for which there is little or no scope when the parties have taken care to comprehensively record the terms of their agreement in written form."

[42] Muir JA also cited the decision of the New South Wales Court of Appeal in *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd.*[4] In that case, the court had to determine whether a document recording an agreement, and setting out its terms, was intended to have contractual effect. Mahoney and McHugh JJA both concluded that the question is to be answered by reference both to the terms of the document, and by what the parties said and did.[5] It is apparent in the judgment of Hope JA that the extrinsic evidence relied upon in support of the existence of a contract extended to circumstances occurring after its signature.[6]

[43] In *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd,* (*GR Securities*)[7] McHugh JA (with whose reasons the other members of the court agreed) stated that, in determining whether a document was to have contractual effect, the decisive issue was always the intention of the parties, which must be ascertained objectively from the terms of the document when read in the light of the

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1 (2004) 219 CLR 165 at [40].
2 [2011] QCA 150.
3 (1975) 132 CLR 528 at 532.
4 (1985) 2 NSWLR 309.
5 Ibid at 334, 337.
6 Ibid at 313.
7 (1986) 40 NSWLR 631.

surrounding circumstances.[8] His Honour also noted that the fact that the document envisaged additional terms did not prevent the formation of a contract. His Honour said:[9]

> "Even when a document recording the terms of the parties' agreement specifically refers to the execution of a formal contract, the parties may be immediately bound. Upon the proper construction of the document, it may sufficiently appear that 'the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms': *Sinclair, Scott & Co Ltd v Naughton*.[10]"

[44] Finally, reference may be made to the following statement by Allsop J (as His Honour then was) in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*[11] (the other members of the court agreeing with His Honour's reasons):[12]

> "(Contracts) can also arise when business people speak and act and order their affairs in a way without necessarily stopping for the formalities of dotting 'i's and crossing 't's or where they think they have done so. … Sometimes this failure occurs because, having discussed the commercial essentials and having put in place necessary structural matters, the parties go about their commercial business on the clear basis of some manifested mutual assent, without ensuring the exhaustive completeness of documentation. In such circumstances, even in the absence of clear offer and acceptance, and even without being able (as one can here) to identify precisely when a contract arose, if it can be stated with confidence that by a certain point the parties mutually assented to a sufficiently clear regime which must, in the circumstances, have been intended to be binding, the court will recognise the existence of a contract. … The essential question in such cases is whether the parties' conduct, including what was said and not said and including the evident commercial aims and expectations of the parties, reveals an understanding or agreement or, as sometimes expressed, a manifestation of mutual assent, which bespeaks an intention to be legally bound to the essential elements of a contract. …"

[45] Mr Wilson of Counsel, who appeared for Blaze, submitted that the Summary fell within the third class identified in *Masters v Cameron*,[13] namely, an agreement upon terms of a contractual nature, with the intention that a formal contract be prepared, where the parties do not intend to make a contract until the execution of a formal document. He submitted that the Summary could be characterised as an agreement in honour only, an agreement to agree, or an agreement which was not to be operative until execution of a formal contract. He relied on the intention expressed in the document to agree to additional terms; the fact that the document did not state that the parties would be immediately bound; the fact that the last three paragraphs

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8 Ibid at 634.
9 Ibid.
10 (1929) 43 CLR 310 at 317.
11 (2001) 117 FCR 424.
12 Ibid at [369].
13 (1954) 91 CLR 353; see at 360.

plainly envisaged another document, referred to as a "Contract of Employment"; the fact that certain terms were to be incorporated "to the extent permitted by law and in terms that comply with the NBL Rules and Regulations"; and the use of the expression "Heads of Agreement" by Mr Quinn to describe the document in an email prior to 18 January 2007. Reliance was placed on the fact that Mr Joyce was unfamiliar with the terms of the document said to be the source of some proposed additional terms.

[46] Mr Pyle relied upon the conduct of the parties before, at the time of, and subsequent to the execution of the Summary. It is not necessary to record in detail his submissions.

[47] There are features of the Summary itself which, in my view, provide strong support for the view that the Summary was intended to have contractual effect. One of its provisions was to commence within a fortnight. Moreover, it envisaged Mr Joyce moving from Wollongong to the Gold Coast in the near future, and included a promise for the payment of the cost of renting accommodation while Mr Joyce looked for permanent accommodation for his family. It also envisaged the Joyce family moving from Wollongong to the Gold Coast in the relatively near future. The Summary therefore clearly envisaged that Mr Joyce would take actions in the very near future, likely to be of considerable significance to him and his family, including in relation to the education of his children. It seems to me unlikely that the parties intended these actions to be taken, without the benefit of binding promises from Blaze.

[48] Moreover, the Summary included the confirmation by Mr Joyce that he was no longer bound to the team in Wollongong. That was a matter likely to be of considerable importance to Blaze. Its inclusion in the Summary suggests something more than an agreement binding in honour, or an agreement to agree.

[49] Finally, the formality of the execution clause, including a reference to the constitution of Blaze, and the due authority of the directors, is difficult to understand if the Summary was to be of no legal effect.

[50] While it is clear that further terms were envisaged, and that fact may suggest that the Summary was not intended to be a binding contract, it is not a decisive consideration, as the passage set out earlier from *GR Securities* demonstrates.

[51] There has been no suggestion that essential terms necessary for the formation of a binding contract were not included in the Summary. If there were any doubt about that matter, the fact that Mr Joyce was able to work as the coach of the Blaze for almost two years after the Summary was signed, without the completion of a formal contract, would dispel it.

[52] The immediate circumstances in which the Summary was signed, in my view, reinforce this conclusion. The signing occurred at a press conference. That rather strongly suggests an intention to show to the world at large that a legally binding relationship had been created. The fact that immediately after signing, Mr Tomlinson and Mr Claxton shook hands with Mr Joyce, provides further support for this conclusion. Mr Tomlinson's statement to Mr Joyce, "You're the guy we wanted, mate. You are going to be here for a long time" is also consistent with this,

as is Mr Claxton's response to the question whether the contract was a multi-year contract.

[53] Further support for this conclusion may be found in the press release, authorised by Mr Claxton, a copy of which was given to Mr Joyce on the morning of 18 January 2007; the fact that Mr Claxton described the Summary as a "letter of agreement" when handing it to Mr Joyce; and the fact that Mr Joyce sought legal advice before signing it. Indeed, the prior involvement of solicitors on both sides is consistent with the document having legal effect, though, in my view, it does not provide particularly strong support for this conclusion.

[54] The conduct of the parties after 18 January 2007 also supports this conclusion. As has been mentioned, Mr Joyce moved, with his daughter, to the Gold Coast. He rented a unit at Main Beach for some months. He subsequently purchased a house, and arranged for the rest of his family to move to the Gold Coast. He commenced working for Blaze on 1 February 2007. He received payments, in accordance with the Summary. Indeed, the leisurely approach taken by the parties to the preparation of a formal deed of agreement, in my view, also supports the view that the Summary was intended to be of contractual effect.

[55] Taken together, the matters to which I have referred seem to me to provide strong support for a finding, which I make, that the parties entered into a contract on the execution of the Summary, in accordance with its terms.

Did the parties enter into a contract on about 8 July 2008?

[56] Mr Reichman, who was Blaze's solicitor, prepared a draft contract at about the end of February 2007. There were then negotiations, which might be described as sporadic, in 2007 and the first half of 2008. On 16 May 2008, Mr Shaw, working under the supervision of Mr Heard, responded to a letter from Mr Reichman of 11 December 2007. That letter had referred to changes to the draft proposed on behalf of Mr Joyce, a number of which were not accepted. Two clauses which were the subject of debate should be mentioned. Clause 1.2 provided that a decision of Blaze included a decision by the general manager, Mr Claxton. Mr Joyce objected to this, wishing to be subject only to the control of the Board. Clause 2.1 identified Mr Joyce's relationship with Blaze as one of employee and employer. Mr Joyce had sought the deletion of clause 2.1. Mr Shaw's email of 16 May 2008 described Mr Joyce's position in respect of Mr Reichman's proposals about clause 1.2 and clause 2.1 as "Not Agreed". With respect to other proposals, two are described as "Agreed"; while in respect of three others, the response was "Noted". Mr Reichman maintained Blaze's position in respect of clause 1.2 and 2.1 in subsequent correspondence. Mr Shaw in reply referred to Blaze's position about clause 2.1 as "Noted"; and suggested a variation to clause 1.2. In this period, negotiations also continued about a phone allowance, and whether a car would be provided, or money paid to Mr Joyce in lieu thereof.

[57] As previously mentioned, Mr Joyce informed Mr Shaw on 8 June 2008 that he would take over the conduct of the negotiations. On 29 June 2008, Mr Joyce sent an email to Mr Claxton asking for a copy of the contract "with the changes … and I will go over it. (Mr Dunn) and I spoke about the last clause and it is ok."

[58] In his evidence-in-chief, Mr Joyce said that he did not discuss the contract with Mr Claxton in the period around 8 July 2008. However, in cross-examination he conceded that he may have discussed the car allowance that was then the subject of negotiation. However, when it was put to him that in a telephone conversation with Mr Claxton which occurred while Mr Joyce was in Greece, Mr Claxton had discussed clauses 1.2 and 2.1, Mr Joyce replied, "I don't believe he spoke about those clauses to me."

[59] Mr Claxton gave evidence of a telephone conversation between himself and Mr Joyce while Mr Joyce was in Greece in July 2008. He recalled the date of the conversation as 8 July, that he made the telephone call, and that the duration of the call was about 15 minutes. He gave evidence that both clauses 1.2 and 2.1 were discussed. As to the first, he said that Mr Joyce stated that he understood Mr Dunn's explanation to the effect that Mr Joyce was an employee of Blaze. As to clause 1.2, Mr Claxton's evidence is that Mr Joyce said "I'm ok with that. Let's move on with it." The conversation also dealt with a telephone allowance for Mr Joyce. However, even with the assistance of reference to Mr Joyce's email of 11 July 2008, he could not recall whether the motor vehicle allowance had been discussed in this conversation.

[60] Mr Joyce's email to Mr Claxton of 11 July 2008 commenced with a reference to "your call last Tuesday". Mr Joyce asked Mr Claxton to arrange payments of the motor vehicle allowance stating, "As explained we have have (*sic*) gone and bought a car as per the agreement made." There was also reference to an amount for superannuation not having been paid. There was, however, no reference to resolution about clauses 1.2 and 2.1.

[61] On his return to Australia, Mr Joyce sent an email to Mr Claxton, on 25 July 2008, which included the following:

> "As discussed , can you please have the contract for me to examine and sign."

[62] Mr Claxton responded the same day stating he had a copy of the contract for Mr Joyce. On 27 July 2008, Mr Joyce sent an email to Mr Claxton, referring to a telephone conversation that day. The email stated that Mr Joyce had examined the contract, and noticed that the changes previously agreed between the solicitors had not been made. As mentioned earlier, this email was sent when Mr Joyce was about to travel to China, and suggested that Mr Claxton email documents to him, which he could "sign and reply when I receive them". There was no evidence that this occurred. On 2 September 2008, Mr Joyce again sent an email to Mr Claxton, the substance of which was, "can you please leave the contract with the agreed changes on my desk tomorrow so I can go over it again." On 10 September 2008, Mr Joyce again sent an email to Mr Claxton. It is apparent that by then he had read another version of the contract. He stated in the email that "there are still some of the agreed changes that have not been made."

[63] I accept that Mr Claxton and Mr Joyce spoke by telephone on 8 July 2008, while Mr Joyce was in Greece, and that in the course of that conversation, the contract was discussed.

[64] Mr Claxton's evidence generally suggested that he did not have a particularly reliable recollection of a number of events of significance in the case. His precision

about the date and length of the conversation, and the fact that it was he that made the telephone call, were a little surprising, and may reflect the assistance of documentary records relating to the telephone conversation.

[65] Mr Joyce's email of 11 July 2008 makes it highly likely that the telephone conversation included discussion of the motor vehicle allowance, consistent with the evidence of Mr Joyce. However, Mr Claxton did not recall it. The email suggests that in the telephone conversation, Mr Joyce had told Mr Claxton that he had purchased a car in reliance on the agreement, which would make Mr Claxton's lack of recollection of this part of the conversation a little more surprising.

[66] It is also a little surprising, that although, on Mr Claxton's evidence, issues had been resolved in the telephone conversation of 8 July 2008, Mr Claxton did not confirm that in some way in writing, for example, by an email to Mr Joyce. Nor did he report the conversation at any Board meeting. Indeed, on 9 August 2008, Mrs Katie Tomlinson sent an email to Mr Claxton asking whether Mr Joyce had signed the contract. Had Mr Joyce by then made an oral commitment to it, it is a little surprising that Mr Claxton did not report this.

[67] It is understandable that neither Mr Joyce nor Mr Claxton had a convincing recollection of this telephone conversation. On balance, I am not prepared to accept Mr Claxton's version of it, so far as his evidence dealt with clauses 1.2 and 2.1.

[68] Nevertheless, it seems to me relatively clear that by late July 2008 there was no longer any dispute about the clauses of the contract. That, however, does not establish that, by that time, the parties had made a binding agreement. The negotiations which had by then been conducted over a relatively lengthy period were plainly directed to the production of a written record of the agreed terms, to be signed by both parties. It is apparent from Mr Joyce's emails that he wished to see the document in final form, and to ensure that it included terms in which he had shown some particular interest, before he was prepared to sign the document. In my view, this demonstrates that Mr Joyce was not prepared to commit to a new agreement, until it was fully recorded in a document to be signed by him, and, no doubt, a representative of Blaze.

[69] Some emphasis was placed by Mr Wilson on the correspondence between the solicitors, and in particular to those parts where Blaze's attitude to some disputed terms resulted in the response, "Noted". In my view, this does not demonstrate final agreement about the contract. In respect of other matters, agreement was expressed. While it seems to me that Mr Joyce did not intend to press for matters in respect of which the position of Blaze was noted, it by no means follows that his solicitors were communicating an agreement by him to be bound by those terms. Indeed, such a position would be inconsistent with the evidence of both Mr Claxton and Mr Joyce that by 8 July 2008 issues about clauses 1.2 and 2.1 were not finally resolved.

[70] I am therefore not prepared to find that on 8 July 2008, or about that time, Mr Joyce and Blaze entered into a contract, in accordance with the draft deed, but subject to a number of agreed variations.

Could Blaze have terminated Mr Joyce's contract under clause 8 of the draft deed?

[71] In view of the findings made earlier, it is unnecessary to determine this question. However, since substantial attention was paid to it at the hearing, it is convenient to deal with it.

[72] Clause 8 of the draft deed was in the following terms:

> "**8. TERMINATION**
> 8.1 If, during the Term:
> (a) the NBL competition ceases to operate; or
> (b) there is a material alteration in the format of the NBL competition as currently operated by the NBL; or
> (c) there is a reduction or suspension of the NBL competition and/or the NBL; or
> (d) the Club's licence is suspended or surrendered or the Club is declared ineligible to participate in the NBL competition through no fault of its own;
> 8.2 If this Contract is terminated in accordance with clause 8.1, then:
> (a) the Coach agrees that the Club is discharged from any liability to pay any further payments to the Coach under this Contract from the date of termination; and
> (b) the Club must immediately declare the Coach to be a free agent."

[73] I do not propose to canvas fully the submissions of the parties on this question. The evidence demonstrates that whereas in the 2008-2009 season there were 30 regular season games, and the playoff competition at the end of the regular season was determined by a "best of five" competition, in the following season the number of regular season games was 28, and the competition to determine the season winner was a "best of three" series.

[74] The only basis on which Mr Pyle submitted that clause 8.1(c) would not permit termination of Mr Joyce's contract (assuming it included clause 8) was that the clause was uncertain. The meaning of a clause which is ambiguous is to be determined by what a reasonable person would have understood it to mean, with reference to the text, the surrounding circumstances known to the parties, and the purpose and object of the transaction.[14] There has been no suggestion that the surrounding circumstances known to the parties, or the purpose and object of the transaction, could influence the way a reasonable person would understand the language of this provision. In any event, in my view, the meaning of clause 8.1(c) is plain. If, in the interpretation of an exclusion clause, the natural and ordinary meaning of the clause is to be given effect (subject to the effect of context, and, where appropriate, ambiguity),[15] there seems no reason to refuse to give clause 8.1(c) its natural and ordinary meaning. That meaning would have the effect that any reduction in the competition would make the clause applicable. That understanding of the clause is reinforced by the absence of the word "material" from

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14 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].; see also *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [39]; *HSH Hotels (Australia) Ltd v State of Queensland* [2011] QCA 329 at [19].

15 See *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

clause 8.1(c), when that word was used in clause 8.1(d). Accordingly, in my view, the changes which occurred in the competition in the two seasons mentioned a little earlier would have enabled the invocation by Blaze of a clause such as clause 8.1(c), if it formed part of the contract with Mr Joyce. Since Blaze did not contend that the Summary included a clause similar to clause 8, it was not entitled to terminate Mr Joyce's contract by reference to changes to the NBL.

Was Mr Joyce's contract terminated in January 2009?

[75] It is apparent from the minutes of the Blaze Board Meeting of 29 October 2008, the letter from Mr Dunn on behalf of Blaze to Mr Joyce of the same date, and Mr Joyce's reply, that considerable difficulties had emerged in the relationship between Mr Joyce and the Blaze Board by January 2009.

[76] Mr Joyce was summoned on short notice to the board meeting held on 28 January 2009. As was customary, the meeting was also attended by Ms Nicolaou, a personal assistant with substantial experience in recording speech in shorthand. Ms Nicolaou was engaged by Blaze to record what was said at board meetings. Ms Nicolaou took shorthand notes of the meeting of 28 January 2009, and produced a transcript of her notes of that meeting shortly thereafter. Her transcript of that meeting forms the body of Exhibit 25. Although some of Ms Nicolaou's answers in cross-examination invited adverse submission, I accept that, at least for the purpose of matters of present significance, her transcript is a reasonably reliable record of what was said at that part of the meeting.

[77] Mr Quinn, although no longer a member of the Board, spoke on behalf of the Board. He is recorded as having made statements to the following effect:

(a) The Board had recently received a set of documents showing that "the new NBL" would take effect from 1 July 2009.
(b) The introduction of the new league had the effect that all contracts with coaches would come up for renewal.
(c) The present thinking of the Board was "that it is unlikely that we will engage (Mr Joyce) as the head coach for the Blaze".
(d) Mr Joyce's role would continue "until the new league is formed".
(e) It was important that everyone associated with Blaze was "working as a one unit (*sic*) in the one direction", and that the Board believed that Mr Joyce and the Board were not "working in the same way in order to achieve the objectives".
(f) Mr Joyce was invited to make a joint statement with the Board about the decision which had been reached.
(g) There was potential damage to Mr Joyce's reputation as a consequence of what had happened.

[78] This summary includes some element of interpretation of the words recorded by Ms Nicolaou, but it seems to me to be relatively uncontroversial.

[79] For Blaze it was submitted that what Mr Quinn said at the meeting was not repudiatory of the contract, but was simply an indication of Blaze's intention to exercise a right said to have been conferred by the contract alleged to have been made on 8 July 2008. It was submitted that Mr Quinn's conduct did not amount to "anticipatory repudiation"; and that it did not convey that Blaze was immediately terminating Mr Joyce's contract; nor that it was doing so on a conditional basis. For

Blaze it was also submitted that if Mr Quinn's conduct was repudiatory, then Mr Joyce did not then elect to terminate the contract on the basis of that conduct. Mr Joyce's response did not amount to a plain election to accept Mr Quinn's conduct as bringing the contract to an end. Any repudiatory conduct was subsequently retracted by Blaze's solicitor's letter of 30 March 2009. The contract with Mr Wright was not repudiatory, because it did not fix a start date, and accordingly did not demonstrate an intention to employ Mr Wright while Mr Joyce's contract remained on foot.

[80] It was submitted for Blaze that Mr Quinn did no more than convey "the present thinking" of the Board. I do not accept this submission. If no definite decision was being communicated, there is no obvious reason for raising the matter directly with Mr Joyce. However, Mr Quinn expressed a sense of obligation to do so, and to state what the Board's thoughts "…are *in reality* going forward" (emphasis added). On two occasions, Mr Quinn described the Board's position as its "decision". The fact that the Board was prepared to take part in a press release also indicates that the Board had adopted a definite position, in relation to the future retention of Mr Joyce. Mr Quinn expressed some discomfort in having to communicate to Mr Joyce the Board's position; and he thought that what Mr Joyce had been told might come as a "shock". These matters, in my view, suggest that a definite decision was being communicated to Mr Joyce.

[81] Mr Joyce later stated at the meeting that what had happened was "upsetting", and referred to the fact he had brought his family to the Gold Coast for four years, with his children by then attending local schools. It was not suggested to him that he had misunderstood the effect of what he had been told.

[82] Moreover, shortly before Mr Joyce left the meeting, Mr Claxton asked him whether he wanted to see the season out. Implicit in the question was the proposition (from which no one present appears to have dissented) that Mr Joyce had two options, namely to cease acting as the coach of the Blaze basketball team forthwith; or to do so in a relatively short time, when the playing season ended. Continuation in accordance with the contract beyond that point was not an option.

[83] Albeit some of the statements to the effect that Mr Joyce would not be the coach of the basketball team might arguably be regarded as conditional on the establishment of the "new NBL", that circumstance was plainly considered by Blaze, as was the case, to be a reality. Indeed, Mr Tomlinson, who was present at the meeting on 28 January 2009, had also been present representing Blaze at the meeting of 8 November 2008, when a decision had been made to terminate the NBL Participants Agreement (at that time, the termination was to take effect on 30 June 2009). He was no doubt aware of the steps being taken to bring about the changes to the NBL. The letter of 23 January 2009 (Exhibit 17) inviting expressions of interest in "NewNBL" was no doubt a significant step in the process of change which was substantially underway. It is clear, both from what Mr Quinn said, and the options presented to Mr Joyce, that the position taken by Blaze about Mr Joyce's future with Blaze was not a position taken subject to a condition.

[84] It has not been part of Blaze's case that, if its contract with Mr Joyce was constituted by the Summary, there was a provision of the contract which entitled it to terminate Mr Joyce's contract if there were changes to the NBL competition. Accordingly, in my view, at the meeting on 28 January 2009 Blaze asserted a right

to terminate Mr Joyce's contract which was not available to it under the contract which I have found to be in force between the parties. Blaze manifested an intention not to be bound by that contract.

[85] I am therefore satisfied that the effect of what was communicated to Mr Joyce at the meeting of the Blaze Board on 28 January 2009 was that Blaze would not continue to employ Mr Joyce as the coach of the Blaze basketball team when the "new NBL" came into operation, and that that event was expected to occur on (or by) 1 July 2009. Mr Joyce was given two choices, namely, to cease his employment forthwith, or to continue as the coach of the Blaze basketball team for the remainder of the current season (a relatively short time). Neither was consistent with the future performance by Blaze of its obligation under the agreement made in January 2007, namely, to employ Mr Joyce for a term of four years.

[86] When Mr Joyce was presented at the meeting with the two options previously mentioned, he agreed to continue as coach for the remainder of the season. Shortly before he left he said, "I think I'm done with basketball." In my view, Mr Joyce then accepted the conduct of Blaze as bringing his contract with it to an end. It was clear that both parties took the position that the contract earlier made between them would not remain in force.

[87] I therefore find that Blaze repudiated its contract with Mr Joyce at the meeting of 28 January 2009, and Mr Joyce's acceptance of Blaze's conduct had the effect of bringing the contract to an end. It is unnecessary to deal with other submissions dealing with the termination of the contract.

Quantum of Mr Joyce's claim

[88] Blaze submitted that any amount of damages awarded to Mr Joyce should be discounted for "vicissitudes". It submitted that there was a prospect that Mr Joyce would have terminated the contract in the remaining two years; and that consistent with the decision in *Van Efferen v CMA Corporation Ltd* (*Van Efferen*),[16] a discount of 10 per cent should be allowed, notwithstanding that in *Van Efferen* the prospect that the plaintiff would have terminated his contract was remote. Reference was also made to the decision in *Walker v Citigroup Global Markets Australia Pty Ltd* (*Walker*),[17] where it was said a discount was allowed, though the claim was framed as a "loss of chance" claim. The submissions also referred to Blaze's right "at general law to terminate Mr Joyce's engagement for misconduct justifying summary dismissal".

[89] On the second day of the hearing, in the course of the cross-examination of Mr Joyce, objection was taken to questions which appeared directed to demonstrating that Mr Joyce's conduct might result in the termination of the contract by Blaze, at some time subsequent to January 2009. The objection was not determined at that time. On the following morning, I was informed that an agreement had been reached between the parties as to the scope of the issue relating to discounting damages. As I recorded it, the agreement was that in determining what discount of damages should be made for the vicissitudes of life, I should exclude consideration of evidence suggesting that an early termination of the plaintiff's contract might

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16 [2001] FCA 597 at [72].

17 (2006) 233 ALR 687.

occur, other than by reason of the events of early 2009, the subject of the present proceedings. Blaze's submissions relating to the right at general law to terminate the contract on the grounds of Mr Joyce's misconduct, would therefore seem to be outside the scope of the matters which have been agreed are to be taken into account.

[90] *Walker* concerned an employment contract containing a provision permitting its termination on one months' notice. The Full Court of the Federal Court held that on the proper construction of the agreement, the right to terminate for notice was not available until after the end of the calendar year in which the contract was formed.[18] The court held that for this period, the plaintiff having lived through it, there was no occasion for any deduction for the vicissitudes of life.[19] It then proceeded to consider the prospect that the plaintiff's contract might have been terminated subsequently. Consistent with the submissions made for the plaintiff, the court found that a discount of 25 per cent should be allowed, to take account of the possibility of early termination, the court proceeding on the basis that, after the end of the calendar year which has been mentioned, there was no implied restraint upon the exercise of the termination clause.[20] In my view, *Walker* provides no support for discounting an award in favour of Mr Joyce. Indeed, the approach taken to discounting the award for the vicissitudes of life in the initial period would suggest that no such discount should be made in the present case.

[91] *Van Efferen* was a case involving an employment contract terminable on notice which was wrongfully terminated by the employer. The discount allowed on the basis that the contract might have been lawfully terminated at a later time was based on the prospect that the employer would do this, the alternative prospect that the plaintiff would do so having been regarded as remote.[21] It seems to me that Blaze's submission did not correctly identify the effect of this decision.

[92] There has been no evidence to suggest that by reason of health or otherwise, Mr Joyce would not have continued his employment with Blaze for the balance of the term, but for its interruption by the events of January 2009.[22] There is no basis in the present case for discounting the award by reference to the general vicissitudes of life, consistent with the approach of the Full Court in *Walker*. There is no reason to think that Mr Joyce would have elected to terminate the contract. There has been no suggestion that he was likely to have secured a more attractive contract, which might have led him to do this; nor, in any event, has it been suggested he had a contractual right to terminate in such circumstances. I see no reason to discount the award, therefore, on the basis that Mr Joyce might have terminated the contract. In view of the agreement, the prospect that Mr Joyce's contract might be lawfully terminated by Blaze is to be disregarded. In any event, it has no foundation in the evidence, and appears to be remote. In my view, it is not therefore appropriate to allow a discount of any award made to Mr Joyce.

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18 Ibid at [76]-[78].

19 Ibid at [79].

20 Ibid at [84], [86].

21 *Van Efferen* at [72].

22 A range of considerations relevant to a claim for damages for personal injury was identified in *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 497. Not all of them are relevant to the present case.

[93] Blaze expressly acknowledged that this was not a case where it had been established that Mr Joyce failed unreasonably to mitigate his loss. Except for the submissions relating to discounting the award discussed previously, there has been no substantial contest about the quantum of Mr Joyce's claim. Substantially, it is for two years' salary at $150,000 per annum. In addition, there is a claim for what I have referred to as the motor vehicle allowance. I have earlier recited the facts which, in my view, establish a variation of the contract recorded in the Summary to substitute this allowance. There was no suggestion that, if the contract was constituted by the Summary, it was not effectively varied to provide for the motor vehicle allowance. The amount claimed under this head is $19,200.

[94] The evidence established that in the two years from 1 July 2009, Mr Joyce has earned $8,883.52 (inclusive of GST). Although it has not been pleaded, Mr Pyle conceded that this amount should be deducted from any award. There is no other issue relating to the mitigation of the damages to be awarded.

Conclusion

[95] I am satisfied that the contract between Mr Joyce and Blaze is constituted by the Summary, and that it came to an end as a result of the repudiatory conduct of Blaze, accepted by Mr Joyce on 28 January 2009. I therefore propose to award Mr Joyce the sum of $319,200, less $8,883.52.