SUPREME COURT OF QUEENSLAND

CITATION:	*Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 2)* [2015] QSC 66
PARTIES:	**VISION EYE INSTITUTE LTD** (first plaintiff) and **ICON LASER (AUSTRALIA) PTY LTD** (second plaintiff) **v** **DR DAVID KITCHEN and MICHELLE KITCHEN (in their personal capacity and in their capacity as Trustees of the MDK Trust)** (defendants)
FILE NO:	10366 of 2009
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions 17 December 2014, 16 and 23 February 2015, 26 March 2015, 9 and 16 April 2015.
JUDGE:	Applegarth J
ORDERS:	**Proposed orders:** **1. There be judgment for the second plaintiff, Icon Laser (Australia) Pty Ltd, against the first named defendant, Dr David Kitchen in his personal capacity, for damages for breach of the Service Agreement in the amount of $10,845,476 which sum includes interest up to and including 21 April 2015.** **2. It is declared that:** **a. Dr Kitchen ceased to be an employee under the Service Agreement in circumstances where he was a "Bad Leaver" as defined in the Escrow**

Deed;

b. the defendants are not entitled to the release of the restricted securities under the Escrow Deed.

3. It is directed that the restricted securities be released from escrow on the condition that the plaintiffs are entitled to sell those shares on behalf of the defendants and to apply the Agreed Proportion of the proceeds of that sale (as defined in the Escrow Deed) in reduction of the liability of Dr Kitchen in damages for breach of the Service Agreement.

4. It is further directed that the plaintiffs provide the defendants within 14 days written notice of the proposed process of sale, and should the defendants have any objection to that process which cannot be resolved by conferral, the parties are at liberty to apply for further directions.

5. It is declared that save for cl 17.1(c) and (d) of the Service Agreement, the restraints in cl 17 of the Service Agreement are void as an unreasonable restraint of trade.

6. It is declared that save for cl 12.1(c) and (d) of the Share Purchase Agreement, the restraints in cl 12 of the Share Purchase Agreement are void as an unreasonable restraint of trade.

7. The relief sought in paragraphs 5 and 6 of the claim is refused.

8. The defendants' counterclaim is otherwise dismissed.

9. The defendants' application for leave to amend the second further amended counterclaim is refused.

10. The parties have leave to make further submissions on the question of costs following the pronouncement of judgment.

CATCHWORDS: DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – LOSS OF PROFITS – where an ophthalmologist wrongfully terminated his service agreement with a company – where the wrongful termination caused the closure of two practices owned by the company – whether damages for loss of practices and the opportunity to continue to derive earnings from them should

include income from new forms of treatment for macular degeneration – how the company's lost opportunity to continue the two practices and to derive earnings from them should be assessed – what is the most appropriate assessment of the company's loss and damage

DEEDS – ESCROW – GENERALLY – where the defendants own shares in a company – where the shares are held in escrow under the terms of a deed – where the defendants were found to not be entitled to the release of the shares – where the company does not intend to exercise its buy back rights in respect of those shares which would have allowed the defendants to receive an agreed proportion of the sale proceeds – where the shares could remain in escrow in perpetuity – whether the shares should be released from escrow to be sold by the company on behalf of the defendants and the agreed proportion of the proceeds applied in reduction of one of the defendant's liability in damages to the company

Vision Eye Institute Ltd & Anor v Kitchen & Anor [2014] QSC 260, considered

COUNSEL: S R Cooper for the plaintiffs
R J Whitington QC and B J Doyle for the defendants

SOLICITORS: Clayton Utz for the plaintiffs
Thomson Geer for the defendants

[1] On 23 October 2014 I delivered my reasons as to why there should be judgment for Icon against Dr Kitchen for damages for breach of the Service Agreement, in an amount to be assessed.[1] I later made directions for the parties to file and serve further submissions on the assessment and calculation of Icon's loss and damage, the form of declaratory or other relief that is appropriate in respect of the shares held in escrow and the form of judgment and orders in the light of my findings and reasons.

[2] Extensive written submissions have been provided by the parties, supported by a report of Mr Lom dated 17 December 2014 and a supplementary report of Mr Morris dated 16 February 2015. The reason for the parties to provide these supplementary reports is that my findings did not coincide with many of the assumptions which the experts were instructed to adopt, or which they adopted, in their Joint Experts' Report. The parties needed the assistance of experts to calculate loss on the basis of the findings made by me. For example, I found that it was likely that the defendants would have entered into new agreements whereby Dr Kitchen would work in Vision's Rockhampton practice for a year beyond the expiry of his initial Service Agreement, after which he would have been free to compete with it.[2] Because the Joint Experts' Report had not calculated loss based on this finding it was necessary for the experts to address the assessment and

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1 *Vision Eye Institute Ltd & Anor v Kitchen & Anor* [2014] QSC 260 ("*Reasons*").
2 *Reasons* [393].

calculation of loss on this basis. Neither party sought to cross-examine the experts on their supplementary reports, or to make oral submissions in support of their written submissions.

[3] My provisional assessment of Icon's loss was based on certain categories. Many of them were drawn from categories in the parties' original submissions and from the Joint Experts' Report, and appeared under headings such as "Lost earnings from Rockhampton for the period ending 31 March 2011".[3] These were convenient headings to reflect what the experts describe more fully as a loss of cash flow, and which the parties' submissions characterised in different ways. It remains appropriate and convenient to approach the task of assessing Icon's damages for breach of the Service Agreement according to categories. These may be summarised as follows:

Rockhampton

(a) Closure costs

(b) September 2009 to 31 March 2011

(c) 1 April 2011 to 31 March 2012

(d) After 31 March 2012

Gladstone

(a) June 2010 to 31 March 2011

(b) After 31 March 2011

[4] Some of these categories, which have earlier been described as a claim for "lost earnings", might be more fully described as a claim for the loss of the opportunity to earn profits after a certain date from either the Rockhampton clinic or the Gladstone clinic. As the parties' original submissions recognised, and as was reflected in my reasons, many categories are concerned with the financial consequences of a lost opportunity. For example, there was the loss of the opportunity to recruit a new doctor to an existing practice and, with it, the opportunity to maintain a practice in Rockhampton and to derive earnings from it.[4] The issues which I addressed included what would have occurred to the Rockhampton practice after 31 March 2011 if Dr Kitchen had not repudiated his Service Agreement in September 2009. I concluded that Icon lost the opportunity to continue that practice as a direct consequence of Dr Kitchen's breach of contract. I considered a range of possibilities. These included:

- the possibility that Dr Kitchen would have stayed with Vision for a long time, possibly up until the time of his retirement;

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3 *Reasons* [466].
4 *Reasons* [400], [401], [409] – [419].

- the possibility that Dr Kitchen would have walked away from the practice on 31 March 2011 and never returned to practise in Rockhampton;

- the possibility that he would not have competed during the period of any valid restraint, but done so afterwards;

- the possibility that he would have sought legal advice about the validity of the restraints, and simply observed them;

- the possibility that he would have contested the restraints, the matter would have been litigated at a trial and only the restraints which I found to be enforceable would have been enforced.

[5] I concluded that the most likely scenario was that, having obtained legal advice, Dr Kitchen would not have felt bound by all the restraints. He would have stayed in Rockhampton and negotiated an arrangement with Vision whereby he worked for their mutual benefit for another year after 31 March 2011 under improved remuneration arrangements, following which he would have been free of the restraints.[5] This was a more likely scenario than others. In fact, I concluded that it was "likely that the defendants would have entered into new agreements whereby Dr Kitchen would work in Vision's Rockhampton practice for a year beyond the expiry of his initial Service Agreement. After that he and the defendant would have been free to compete."[6] It was for these reasons that the experts in their supplementary reports, and the parties in their further submissions, now have addressed a category of loss for the Rockhampton clinic for the period from 1 April 2011 to 31 March 2012.

Preliminary issues

[6] Dr Kitchen's submissions seek to characterise Icon's claim as one seeking compensation for the loss of income from the Gladstone and Rockhampton practices "until the end of time". Icon disclaims such an approach, and contends that its submissions reflect the fact that the effect of Dr Kitchen's wrongful termination was the complete loss of the Rockhampton and Gladstone practices. The claims for lost earnings after March 2012 (for Rockhampton) and after March 2011 (for Gladstone) are said to effectively represent the present value of those practices which were lost when Dr Kitchen terminated the Service Agreement. According to Icon, the possibility that such value might have been lost in any event is appropriately reflected in the adoption of a conservative percentage of the value of the Rockhampton practice and an even smaller percentage for Gladstone practice.

[7] Clearly, Icon is not entitled to recover damages for loss of income until, say, Dr Kitchen's expected, eventual retirement, let alone until the end of time. I do not understand it to be making such a claim.

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5 *Reasons* [413].
6 *Reasons* [393].

[8] The lost opportunity to have operated a practice for a substantial time after 31 March 2011 is one thing – the value attributed to it is another. The possibility that Dr Kitchen "would have stayed with Vision forever" is one of many possibilities which needed to be considered. However, an assessment of damages could not be based on that unlikely possibility to the exclusion of other possibilities. I observed:

> "In theory at least, Vision lost the opportunity to conduct a practice at Rockhampton with Dr Kitchen in charge up until the time of Dr Kitchen's retirement. However, that theoretical earnings stream is not compensable for a number of reasons. Such a possibility, like others, is subject to general constraints on the recoverability of damages for breach of contract. At a certain point losses which might be said to be sustained for many years to come could not said to be caused by Dr Kitchen's breach. They might be said to be too remote because they were not in the reasonable contemplation of the parties. Alternatively, it would not be reasonable to compensate for them because Dr Kitchen's breach did not forever preclude Vision from again establishing a clinic in Rockhampton."[7]

[9] As appears from my earlier reasons, Vision/Icon lost the opportunity to continue to derive earnings from the Rockhampton practice in the period after 31 March 2011, with or without Dr Kitchen. A range of possibilities, some which would attract a very low figure if expressed in percentage terms, arise for consideration. Excluding possibilities which are negligible or fanciful, it might be possible to separately value each of a number of possibilities by applying a percentage figure to the value placed upon that possibility. But such an approach would be an extraordinarily complex exercise, requiring the separate valuation of a large number of possibilities. For the reasons which follow in connection with the assessment of Icon's loss in respect of Rockhampton after 31 March 2011, it is possible to adopt an approach to the assessment of damages which fairly takes into account the various possibilities that arose for consideration, and which also takes account of my finding that it was likely that the defendants would have entered into a new agreement whereby Dr Kitchen would work in Vision's Rockhampton practice for a year beyond the expiry of his initial Service Agreement.

The inclusion of macular degeneration income in the assessment of lost earnings

[10] A consideration which applies to many categories is whether earnings from new ways to treat macular degeneration should be included.

[11] Part A of the Joint Experts' Report, which calculated the plaintiffs' damages claim on certain assumptions, was based upon the historical revenue of the practices. The historical revenue did not include any income for macular degeneration treatment as that treatment only became available after the closure of the Rockhampton clinic. The experts were not instructed to include any amount on account of income for macular degeneration for the purpose of calculating the plaintiffs' damages claim. Reference was made, however, to the additional revenue and earnings that arose from the new macular degeneration treatment from and after 2010 in Part C of the report.

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[7] *Reasons* [411].

[12] Icon's further submissions on damages are based upon calculations undertaken by Mr Lom in his supplementary report of 17 December 2014. Mr Lom was asked to include the revenue from the macular degeneration treatment on the same basis as set out in paragraph 6.4 of Part C of the Joint Experts' Report.

[13] Part A of the Joint Experts' Report was based upon an assumption that the annual growth rate in the practice was four per cent. I observed in passing in my previous reasons that the resulting assessment was a conservative one because it did not include the significant increase in revenues associated with the treatment of macular degeneration, which commenced from 2010. I went on to state that enhanced revenue from a new treatment would seem to be within the reasonable contemplation of the parties and to be recoverable. As I also noted, Dr Kitchen accepted that had he not terminated the Service Agreement, the benefit of those revenues would have gone to Vision. Both experts agreed in their evidence that there was no reason why those additional revenues would not form part of the plaintiffs' loss.[8]

[14] The appropriateness of including macular degeneration income in the assessment of Icon's damages has been the subject of supplementary submissions. My previous reasons did not conclude that an annual growth rate of four per cent was appropriate for all sources of income, or that any assessment of damages based upon my findings should disregard increased income from the treatment of macular degeneration. Instead, it seemed to me at the time I gave my reasons, that a four per cent annual growth rate is inappropriate because it fails to include the significant increase in revenues associated with the treatment of macular degeneration.

[15] Dr Kitchen raises a point of principle as to whether the losses flowing from lost income from macular degeneration treatment are properly recoverable as involving a distinct lost income stream. Recoverability of damages for breach of contract depends upon the reasonable contemplation of the parties, and this is to be assessed in contract at the date of entry into the contract, not at the date of its breach. As I found, enhanced revenue from a new form of treatment would seem to be within the reasonable contemplation of the parties to the Service Agreement and to be recoverable. At the time of entering into the agreement it was reasonable to contemplate that new forms of treatment, including new technologies, might come to be used during the term of the agreement and the loss of income arising from a breach of contract would include any additional income from such a new form of treatment. It would not be necessary for the parties to predict precisely the new form of treatment which would be developed. Improved methods to treat macular degeneration would simply be a source of additional income that arose from the conduct of the business, which was concerned with the treatment of eye conditions, including macular degeneration.

[16] Dr Kitchen's submissions acknowledge that, while it may be appropriate, in a general way, to have regard to the potential for medical advancements or new treatments to result in growth in income, and while that general consideration would be a legitimate consideration in assessing damages, it would not be appropriate, as a matter of remoteness, to proceed in the way contended for by the plaintiffs. He submits that

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[8] *Reasons* [467].

hypothetical earnings from macular degeneration treatment should be left out of account or reflected in a small uplift.

[17] I do not consider the evidence and the principles governing remoteness justify earnings from macular degeneration treatment being left out of the calculation of loss.

[18] However, it should not be assumed that the opportunity to derive significant profits from the new form of treatment would last indefinitely. No gold rush can be expected to last forever. Still, the significant earnings that were referable to macular degeneration work continued. At some future time, they might have been eclipsed by some newer form of treatment which was less profitable or additional competition. However, the evidence indicated that the work continued. Account should be taken of the possibility that, had the Rockhampton clinic and the Gladstone clinic not closed in the circumstances described in my earlier reasons, those clinics would have been conducted by Vision/Icon. As a result of Dr Kitchen's breach of contract, they lost the opportunity to earn income from the treatment of macular degeneration.

[19] Dr Kitchen's submissions also make the point in respect of this source of income that its development depended on the endeavours of Dr Kitchen, who was alienated from Vision and who would have been minded to leave it with a view to practising on his own account, if possible. He submits that the kind of income which he earned on his own account from macular degeneration revenue may not have been replicated by him in working with Vision. Dr Kitchen submitted that the additional risk of not earning this income should be reflected in a higher discount rate than the 17.5 per cent discount rate adopted by me. For example, if a discount rate of 35 per cent was to be applied to this revenue stream, rather than a 17.5 per cent figure, there would be a large reduction in the claim.

[20] I do not consider that I should proceed on the basis that Dr Kitchen would not have exploited the opportunity to earn high profits from macular degeneration treatment whilst continuing to work with Vision. He was contractually bound to support the business and therefore to do such profitable work. Despite his unhappiness with Vision in 2009, he continued to generate a very high revenue, being a revenue which was much higher than the business plan which he presented. By undertaking macular degeneration treatment Dr Kitchen would have enhanced his prospects of earning a bonus, and indirectly enhanced the value of the Vision shares which he owned. Therefore, I do not consider that it is appropriate to adopt a different discount rate for lost earnings associated with macular degeneration treatment on account of Dr Kitchen's alienation from Vision.

[21] I requested the parties to make further submissions about whether it was appropriate to bring into account any increased bonuses to which Dr Kitchen would have been entitled as a result of additional earnings from macular degeneration treatment. For the reasons appearing in the plaintiffs' addendum submissions dated 26 March 2015, it seems that Dr Kitchen would not have been entitled to any bonuses as a result of additional income from macular degeneration because his bonus depended on the EBIT of all the CQEC clinics. It has not been shown that the agreed target base EBIT for all of the clinics would have increased by the required 10% during each of the relevant periods.

[22] In summary, I am unable to accept Dr Kitchen's submissions that earnings from macular degeneration treatment should be left out of account or reflected in only a "small overall uplift" to the categories of loss to which it relates. Income from macular degeneration treatment in its various forms should be brought into account. Also, account should be taken of the fact that the additional income generated from macular degeneration treatment could not be expected to continue in perpetuity. This might be achieved by adopting a figure of more than 17.5 per cent to discount forecast cash flows in respect of macular degeneration treatment income after 31 March 2012 (for Rockhampton) and after 31 March 2011 (for Gladstone). Regard may be had to the effect of applying a 35 per cent discount rate in lieu of 17.5 per cent, as explained in paragraphs 2.10 and 2.11 of Mr Morris' report. The difference is said to be in the order of $1m before allowing for interest. It is not obvious that a 35 per cent rate is appropriate, at least for the entire period. Still, some adjustment is required to Mr Lom's figures to account for the risk that the earnings stream from profitable macular degeneration treatment may not be sustained in the long term.

Cost of closing Rockhampton clinic

[23] This matter was addressed in [465] of my previous reasons. The direct costs of closure of the Rockhampton clinic were agreed by the experts to be $256,571. When discounted back to 13 September 2009, the nominal figure is $249,051. Simple interest is to be calculated on this sum from 13 September 2009 to the date of judgment. Mr Lom's calculation to 17 December 2014 arrived at a total amount of interest of $117,119. Daily interest of $44.35 has accrued since that date (125 days). This results in a total amount of interest as at 21 April 2015 of $122,663.

[24] Dr Kitchen's submissions point out that because there was a significant chance that Vision would be unable to recruit another doctor to continue the Rockhampton clinic after Dr Kitchen left it at the expiry of his employment, it may have incurred a loss in the closure of the Rockhampton clinic in any event. The chance that it would have incurred closure costs in Rockhampton in any event should be taken into account. I accept his submission that in order to avoid over-compensation on this account, the potential costs of closure should be taken into account in arriving at a probability factor in the loss of earnings from the Rockhampton clinic after 31 March 2012. This is not to say, however, that the costs of closure would have been as high as the actual costs incurred by Vision following Dr Kitchen's repudiation of his contract. Vision lost the opportunity to close its Rockhampton clinic in an orderly fashion by making suitable arrangements with a landlord and staff so as to minimise the costs of closure.

Rockhampton – 13 September 2009 to 31 March 2011

[25] This category of loss was addressed in a preliminary way at [466] – [470] of my earlier reasons. Based upon the Joint Experts' Report and Mr Lom's additional calculations, Icon has claimed damages for this period on the basis that:

(a) when Dr Kitchen terminated the Service Agreement, it lost monthly earnings of $191,100 based on the historical performance of the Rockhampton clinic, being earnings which would have grown annually at four per cent;

(b) it also lost the increase in revenue associated with the treatment of macular degeneration.

As for (b), Mr Lom calculated this to be $30,361 per month in the period to 30 June 2010 and $105,833 per month in the period to 31 March 2011. These calculations drew on the figures appearing in paragraph 6.4 of Part C of the Joint Experts' Report which were based on figures prepared and submitted by Mr Morris on behalf of Dr Kitchen. These seem an appropriate basis upon which to calculate the increase in revenue associated with the treatment of macular degeneration since, as I have found, if Dr Kitchen had been employed by Vision/Icon, then he would have exploited, as far as he could, the opportunity to derive income from this new form of treatment in undertaking his practice at Rockhampton.

[26] Based on Mr Lom's calculations, the relevant lost cash flows for the period from 13 September 2009 to 31 March 2011 is $3,757,241 to which should be added the figure of $1,256,107 on account of macular degeneration treatment. Each of these figures should be discounted by 17.5 per cent so as to arrive at figures of $3,293,256 and $1,062,991, or a total of $4,356,247.

[27] Simple interest on those lost earnings has been calculated to 17 December 2014 of $2,048,569, to which daily interest of $775.77 per day ($586.47 in respect of historic performance and $189.30 in respect of losses from increase in revenue from the treatment of macular degeneration) should be added for 125 days. Total interest to 21 April 2015 will be $2,145,540.

Rockhampton – 1 April 2011 to 31 March 2012

[28] This category relates to the period during which it is likely Dr Kitchen and Vision/Icon would have negotiated a compromise arrangement whereby he continued to work for a period of 12 months after the expiry of his Service Agreement, and would have worked on the 65 per cent remuneration model.[9]

[29] A similar approach to the calculation of loss is required based upon lost monthly earnings calculated on the historical performance of the Rockhampton clinic, to which is added amounts attributable to an increase in revenue associated with the treatment of

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9 *Reasons* [394], [471].

macular degeneration. Again, the lost earnings are discounted back to September 2009 at a rate of 17.5 per cent.

[30] Dr Kitchen submits that any compensable loss after 30 March 2011 is to be valued as a loss of opportunity and that it should not be assessed on the basis of a 100 per cent certainty that Dr Kitchen would have contracted for a period of 12 months. Dr Kitchen points to the findings which I made about possible scenarios and that, of the competing scenarios, the most likely was that Dr Kitchen would have recontracted for one year, with freedom to compete thereafter. He argues that, as with the period after 31 March 2012, one is concerned with the valuation of a lost opportunity.

[31] I generally agree with that submission. As I indicated in [411] of my previous reasons, one is concerned with the value that is to be attributed to the lost opportunity for Icon to continue the practice after 31 March 2011. A number of possibilities need to be taken into account. I have summarised some of these possibilities above, and noted the complexity that would be involved in separately valuing each of a wide range of possibilities. Some possibilities were more favourable to Vision/Icon than the possibility which I found to be the most likely scenario. Others were less favourable. Ultimately I concluded that it is likely that Vision/Icon would have entered into a new agreement with Dr Kitchen.

[32] It is appropriate to assess loss on the basis of the scenario which I found most likely. Such an approach is a means of taking into account a range of other possibilities, some more favourable to Vision/Icon, and some less favourable than the scenario which was most likely. This is not to say that the scenario which I found most likely was 100 per cent certain to occur. It simply is a means to fairly assess the loss of the opportunity to have pursued that likely scenario, as well as other less likely scenarios, each having different financial consequences.

[33] Overall, I consider the most appropriate approach to assessment of loss of earnings for the period 1 April 2011 to 31 March 2012 is to adopt the most likely scenario.

[34] On this basis, Mr Lom's calculations, including amounts for macular degeneration, total $1,592,195 (a loss of $1,116,330 based on historical performance and $475,865 based on treatment of macular degeneration, discounted as at 13 September 2009). To this should be added interest of $784,219 to 21 April 2015 (the sum of $748,746 to 17 December 2014 and a further 125 days at a daily rate of $283.54).

Rockhampton – after 31 March 2012

[35] I previously found that Icon is entitled to be compensated for the loss of the opportunity to recruit a replacement doctor into an existing practice so as to continue to derive earnings from the Rockhampton clinic, and that this loss extended after 31 March 2012. However, I concluded that a relatively low value should be placed on that loss of opportunity to reflect the likelihood that Vision/Icon would not have been able to recruit a new doctor to replace Dr Kitchen after 31 March 2012, or that if it had been able to do so, that practice was at risk of losing staff and patients to Dr Kitchen when he established a new practice in Rockhampton.

[36] In the light of my findings, I consider that the value of Icon's loss of opportunity in this regard should be approached on the basis of calculating the profits that it might have earned from the Rockhampton clinic after 31 March 2012, and discounting those lost profits to reflect the chance that Icon would have recruited a doctor to replace Dr Kitchen after 31 March 2012. As discussed above, this approach does not award an income stream in perpetuity. I do not consider that I should adopt Dr Kitchen's suggestion of limiting the period to no longer than one additional year, so as to limit the total loss of opportunity to a period of two years post-termination.

[37] In its calculations, Icon has assumed that a doctor replacing Dr Kitchen would initially achieve 40 per cent of Vision's previous market share or revenue as at 31 March 2012, but would, over time, grow the practice to the point where Vision/Icon's Rockhampton clinic earned 50 per cent of the revenue it would have earned prior to Dr Kitchen's assumed departure on 31 March 2012. Although Dr Kitchen's submissions described these assumptions as somewhat optimistic, they accept that they are within a reasonable range. I adopt them.

[38] Icon seeks to rely upon an affidavit of its Chief Executive Officer, Mr Coverdale, which addresses the issue of staff costs, being a matter which Mr Lom took into account in calculating loss during the relevant period. The defendants object to the reception of that affidavit. However, I consider that it is appropriate to receive his affidavit because it enables the experts to calculate loss and damage on the basis of a factual scenario which I found. At the conclusion of oral argument it was envisaged that I would make findings of fact and provide the parties with the opportunity to address the assessment of loss and damage in the light of my findings. Mr Coverdale's evidence about staffing costs facilitates this process. If the defendants wished to cross-examine Mr Coverdale about staffing costs, then I would have allowed them to do so. The reception of Mr Coverdale's limited evidence about staffing costs does not preclude the defendants from making submissions about whether it is realistic to assume that variable costs could be reduced to reflect changes in revenue. The evidence of Mr Coverdale about minimising staff costs and the figures produced by him are optimistic. However, his evidence should be admitted. The risk that costs could not be controlled in the way he explains should be factored into an appropriate percentage.

[39] Mr Lom calculated Icon's lost profits from the Rockhampton clinic for the period after 31 March 2012 to be $4,982,084. As with previous calculations, this involved the adoption of a discount rate of 17.5 per cent.

[40] Vision/Icon submits that this figure should be discounted to reflect a 30 per cent degree of probability that it would have recruited a replacement doctor. It submits that the matters of uncertainty identified in my reasons are accounted for on the basis that its calculations are based upon a replacement doctor earning only 50 per cent of the revenues earned by Dr Kitchen and already brings into account a discount of 17.5 per cent.

[41] Dr Kitchen submits that, given the findings made by me about the difficulties which would have been encountered in recruiting a replacement doctor, the possibility of recruiting one should be put at 15 per cent.

[42] Whilst, for the reasons previously given, Vision/Icon would have encountered difficulty in recruiting a doctor to replace Dr Kitchen after 31 March 2012, it had a strong financial incentive to do so. I consider that the likelihood of its doing so should be assessed at 20 per cent.

[43] For the reasons earlier given, Mr Lom's calculation of lost profits from the Rockhampton clinic for the period after 31 March 2012 may be too optimistic concerning costs assumptions, including the salary and other incentives which might have been necessary to attract a doctor to replace Dr Kitchen. They also apply the same discount rate of 17.5 per cent to practice income, whereas a higher discount rate might be appropriate in respect of the component of macular degeneration treatment income over that period.

[44] Taking these matters into account, I consider that lost profits from the Rockhampton clinic for the period after 31 March 2012 should be assessed at $4,500,000 before applying a 20 per cent degree of probability to the chance of recruiting a replacement doctor. This results in a figure of $900,000 before the addition of interest.

Interest

[45] I calculate simple interest at 10 per cent for the period of 1,313 days to 18 April 2013, then at seven per cent to 30 June 2013, 6.75 per cent to 31 December 2013 and 6.5 per cent from then to 21 April 2015. This produces a figure of $443,273.

Gladstone – June 2010 to 31 March 2011

[46] This category involves an assessment of the value of the lost opportunity to continue to operate the Gladstone clinic. I reached the following conclusion about lost earnings from the Gladstone clinic for the period ending 31 March 2011:

> "[457] By reason of Dr Kitchen's wrongful termination of his Service Agreement, Vision lost the opportunity to:
>
> (a) persuade Dr Steyn to remain with it operating its Gladstone clinic under Dr Kitchen's mentorship up to at least 31 March 2011;
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> (b) find a replacement for Dr Steyn in far different and better circumstances to the circumstances in which Vision found itself in May 2010 when Dr Steyn resigned, forcing the closure of Vision's Gladstone clinic.
>
> [458] If Dr Kitchen had not wrongfully terminated his Service Agreement in September 2009, then the Gladstone clinic would not have lost its permanent support staff in May 2010 and Dr Kitchen would have remained available to mentor and support Dr Steyn. However, it is likely that Dr Steyn would have resigned and left Vision well prior to March 2011 and Vision would have had great difficulty in finding a permanent replacement for him.

> [459] Vision is entitled to be compensated for the loss of the small chance to keep the Gladstone clinic operating at a profit after June 2010."

One of the findings upon which these conclusions was based was that it was likely that Dr Steyn would not have remained with Vision after mid-2010, notwithstanding support from Dr Kitchen.

[47] The plaintiffs' supplementary submissions contend that there was a real prospect that if Dr Kitchen had continued to work for Vision/Icon in mid-2010 he would have arranged for Dr Martin to replace Dr Steyn in the Gladstone clinic until at least 31 March 2011. In fact, he would have made arrangements for Dr Martin to work there up until 31 March 2012 (during which time Dr Kitchen would have remained with Vision under a compromise arrangement), following which Dr Kitchen and Dr Martin would have opened their own clinic in Gladstone. The plaintiffs accept that Icon's lost profits from the Gladstone clinic for the period up to 31 March 2011 under an arrangement with Dr Martin (or some other doctor) should be substantially discounted to take account of the degree of probability of that scenario having eventuated. The plaintiffs' submissions accept that this category should be calculated on the basis of a 20 per cent degree of probability or, expressed differently, an 80 per cent discount on the lost profits up to 31 March 2011.

[48] Dr Kitchen submits that the probability of 20 per cent is too optimistic and that a figure of 15 per cent should be adopted.

[49] I take account of the unchallenged evidence that Dr Martin did not like working for Vision, and that his consultancy deed with it expired in August 2010. It seems very unlikely that he would have been prepared to relocate to Gladstone simply to work for Vision for a short period. However, if he had the prospect of working effectively in partnership with Dr Kitchen after 31 March 2012, then he may have been prepared to negotiate with Vision to be paid in accordance with the 65 per cent remuneration model, which was more than he was prepared to accept from Dr Kitchen when he left Vision. The prospect of his coming to some such arrangement with Vision and Dr Kitchen seems to me to be no less than 20 per cent and I will adopt a 20 per cent figure for the degree of probability to be applied to the lost earnings.

[50] Mr Lom's supplementary report has assessed those lost earnings at $26,686 per month, based on historical performance and $18,474 on account of lost earnings attributable to macular degeneration treatment. If these cash flows to 31 March 2011 are discounted to reflect their net present value as at 13 September 2009 they consist of sums of $208,923 and $136,355, or a total of $345,258. Applying a 20 per cent degree of probability, one arrives at a figure of approximately $69,052 before interest. Simple interest on that amount to 17 December 2014 totals $32,472 and continues to accrue at $12.30 per day. As at 21 April 2015 the total interest amount is $34,010.

Gladstone – after 31 March 2011

[51] The plaintiffs submit that loss of earnings from the Gladstone clinic after 31 March 2011 should be calculated on the assumption that Dr Kitchen and Dr Martin would have operated the clinic for Vision until 31 March 2012, whereupon they would have been free to open a competing clinic, and that Vision lost the chance to recruit a new doctor for the Gladstone clinic. That doctor would have initially retained some part of Vision's previous market share and he would have, over time, increased it. Mr Lom calculated Icon's lost profits on this basis and with certain assumptions about staffing costs.

[52] The critical issue is the chance or probability that should be applied to the relevant lost earnings. The plaintiffs contend for a discount of 90 per cent or in other words the application of a 10 per cent chance to the lost profits which Mr Lom calculated to be $1,620,505. Dr Kitchen maintains his submissions about the exclusion of macular degeneration earnings and that the income stream should not extend beyond two years from 31 March 2011. He also submits that, on the basis of the evidence and findings about the prospects of recruiting a doctor to Gladstone, the likelihood of Vision recruiting someone should be assessed at no more than five per cent.

[53] One approach is to apply different percentages to the period from 31 March 2011 to 31 March 2012 and to the period thereafter. The alternative is to select, as the parties' submissions have done, a single percentage that applies to the entire period after 31 March 2011. In arriving at a fair assessment of Icon's loss, it seems to me appropriate to separately consider the year up to 31 March 2012. Mr Lom calculated a loss of $453,478 (as at 13 September 2009), based on the historical performance of the Gladstone clinic of $228,158 and a further $225,320 due to the increased revenue arising from the treatment of macular degeneration. If one was to apply a 20 per cent degree of probability for this period on a similar basis to that applied for the period up to 31 March 2011, one would arrive at a figure of approximately $90,000.

[54] To this might be added a very small percentage of no more than five per cent for the period after 31 March 2012 in respect of a loss which Mr Lom calculated to be $1,167,027. If that approach was taken then the appropriate percentage would only be a few per cent. The relevant scenario is not simply one of Vision, against the odds, recruiting a doctor to operate its clinic in Gladstone. It is the chance of recruiting a doctor and staff to operate such a clinic in competition with Dr Kitchen and Dr Martin and any staff who followed them.

[55] Rather than apply, as the plaintiffs seek, a 10 per cent chance to a total loss of $1,620,505, I consider it more appropriate to take a different approach, based upon a 20 per cent chance of deriving the kind of earnings which Mr Lom calculated at $453,478 for the year up to 31 March 2012, and to take account of the very slight chance of Vision/Icon recruiting a doctor after 31 March 2012 to Gladstone.

[56] Account also should be taken of the costs that would have been incurred by Vision/Icon in closing the Gladstone clinic. It might have been closed in some orderly fashion along the lines that occurred when Dr Steyn left. Costs might have been minimised. But if it maintained its clinic in the calendar year 2012 in the hope of recruiting a new doctor to it, then costs would have been incurred in closing it. Also, if there was a 20 per cent chance of recruiting Dr Martin (or some other doctor) so as to operate the Gladstone clinic, there was a corresponding 80 per cent chance of being unable to do so and

incurring some costs in operating it under difficult circumstances and in eventually closing it.

[57] Overall, a broad-brush approach is required to assessment of Icon's lost opportunity to derive earnings from the Gladstone clinic after 31 March 2011. An assessment of loss must include the prospect that Vision/Icon would have incurred costs in the event that Dr Kitchen had performed his contract and Vision/Icon had been unable to recruit another doctor to operate the clinic and incurred costs in running the clinic at less than full capacity before eventually being forced to close it. It seems to me that an appropriate figure, which has particular regard to the 20 per cent chance of earning approximately $450,000 for the year up to 31 March 2012, is an assessment of a loss of $100,000 (discounted to 13 September 2009) to which interest is added.

[58] Interest is calculated for the periods and at the rates earlier stated, which results in interest of $49,256.

Summary of the assessment of Icon's losses

[59]

Category	**Assessment (Discounted to 13 September 2009)**	**Interest (From 13 September 2009 to 21 April 2015)**
Rockhampton closure costs	$249,051	$122,663
Rockhampton September 2009 to 31 March 2011	$4,356,247	$2,145,540
Rockhampton 1 April 2011 to 31 March 2012	$1,592,195	$784,189
Rockhampton after 31 March 2012	$900,000	$443,273
Gladstone – June 2010 to 31 March 2011	$69,052	$34,010
Gladstone after 31 March 2011	$100,000	$49,256
Total	$7,266,545	$3,578,931
Total including interest	**$10,845,476**	

The escrow shares

[60] The defendants own certain shares in Vision which are held in escrow, subject to the terms of the Escrow Deed.[10] The defendants counter-claimed, seeking an order that the escrow shares should be released. However, I found that Dr Kitchen ceased to be an employee in circumstances which would make him a "Bad Leaver" as defined in the Escrow Deed. As a result, the defendants did not establish an entitlement to the relief sought by them.

[61] I indicated in my reasons that I would hear the parties as to whether Vision intended to exercise its rights in respect of the Buy Back Offer that was triggered. Vision advised in its further submissions that it does not intend to exercise its right to accept the Buy Back Offer.

[62] This has the potential to lead to a situation where the restricted securities remain in escrow in perpetuity. That is not desirable for either party.

[63] The plaintiffs submit that, in circumstances in which Dr Kitchen is liable to Icon in damages for breach of the Service Agreement, the most appropriate manner in which to deal with the restricted securities is to permit Vision to sell those shares on the market on behalf of the defendants and to apply the "Agreed Proportion" of the proceeds of that sale (as defined in the Escrow Deed) in reduction of his liability in damages. The "Agreed Proportion" is defined in cl 6.1 of the Escrow Deed by reference to the balance of complete years' service performed at a certain reference date as a proportion of the full initial term of the relevant Service Agreement.

[64] Therefore, in addition to the declarations which I proposed in my earlier reasons, the plaintiffs submit that there should be an order that the restricted securities be released from escrow on the condition that the plaintiffs are entitled to sell those shares on behalf of the defendants and to apply the Agreed Proportion of the proceeds in reduction of Dr Kitchen's liability in damages. The defendants are broadly content with the proposal advanced by the plaintiffs, subject to two matters.

[65] The first is that there should be a regime to ensure that the plaintiffs sell the shares by a transparent process and with a view to maximising the available return. The intent is that the sale proceeds are realised promptly so that the defendants are not prejudiced by any delay in carrying out the steps contemplated by the orders to be made. This seems sensible and I propose to direct that the plaintiffs provide the defendants within 14 days written notice of the proposed process of sale, and should the defendants have any objection to that process which cannot be resolved by conferral, the parties are at liberty to apply for further directions.

[66] The second matter relates to the "Agreed Proportion". As the defendants observe, the plaintiffs' proposal means that the defendants only enjoy a proportion of the value of the shares held in escrow, whereas the plaintiffs will receive the full value of the shares, as well as the damages assessed by the Court. The defendants submit that that involves

[10] *Reasons* [479] – [481].

conferring on the plaintiffs an advantage above and beyond the loss suffered by them, and has a corresponding punitive consequence for the defendants. They submit that the matter ought to be approached on the basis that the entire proceeds are treated, in effect, as "part payment" of the damages to be assessed. Otherwise, it is submitted that the provision in respect of the "Agreed Proportion" has the character of a penalty.

[67] The plaintiffs respond that to make orders which have the effect of paying the defendants the full value of the escrow shares rather than the Agreed Proportion would be to treat the defendants as being entitled to have the shares released from escrow. The Court has found that the defendants have no such entitlement. It would be to effectively ignore the provisions of the Escrow Deed and the limitations which it places on the defendants' ability to realise the value of those shares.

[68] The plaintiffs submit that their proposal for the proceeds of sale to be divided according to the Agreed Proportion defined in the Escrow Deed is the most appropriate outcome in circumstances where the shares might otherwise remain in escrow in perpetuity.

[69] It is important to recognise that the present issue does not arise as the result of any issue raised at the trial about the enforceability of provisions of the Escrow Deed which entitled Vision to exercise its rights to "Buy Back Securities" pursuant to cl 2.11 of the Escrow Deed. The present issue arises because neither party addressed the issue of what was to be done in respect of the escrow shares in the event the defendants did not establish an entitlement to the relief sought by them. The parties are agreed that it is undesirable that the escrow shares remain held in escrow in perpetuity.

[70] In circumstances in which the issue of whether certain provisions of the Escrow Deed have the character of a penalty has not been litigated, it is not appropriate for me to decide that issue. I express no opinion about whether, and in what forum, the defendants might seek to litigate the issue of whether the contractual regime in relation to the escrow shares involves an unenforceable penalty.

[71] The defendants submit that the appropriate form of order is one which gives judgment for Icon against Dr Kitchen for damages for breach of the Service Agreement in an amount which takes account of the gross sale proceeds of the restricted securities. This does not seem to me to be an appropriate order. First, it has the potential to confuse the judgment to which Icon is entitled, and the enforcement of that judgment in circumstances in which neither party has a present entitlement to the proceeds of any sale of the escrow shares, but where the parties agree that those shares should be sold in the near future. Second, the order sought by the defendants would effectively involve the determination of the penalty issue in the defendants' favour and, as I have noted, it is inappropriate for me to resolve that issue.

[72] If the defendants have a good argument that they are entitled to the entire proceeds of sale of the escrow shares because the relevant provisions of the Escrow Deed have the character of a penalty (a matter about which I express no opinion), then the defendants can seek to litigate that issue, subject to any arguments the plaintiffs may have in respect of an *Anshun* estoppel. If the defendants wish to argue that all of the sale proceeds should be brought into account in determining whether a judgment in favour

of Icon has been satisfied, then that issue may need to be addressed by a court at an appropriate time.

[73] There is no utility in the restricted securities remaining in escrow in perpetuity. Those shares should be sold by an agreed process so that at least the Agreed Proportion of those proceeds are made available as soon as reasonably possible to partly satisfy the judgment to which Icon is entitled. There is no suggestion that the balance of the proceeds of sale is at risk of being lost or dissipated.

Form of order

[74] The parties have made submissions about the appropriate form of order. The only issue between them relates to directions in respect of the restricted securities that I have just canvassed. I propose to make the following orders:

1. There be judgment for the second plaintiff, Icon Laser (Australia) Pty Ltd, against the first named defendant, Dr David Kitchen in his personal capacity, for damages for breach of the Service Agreement in the amount of $10,845,476 which sum includes interest up to and including 21 April 2015.

2. It is declared that:

   (a) Dr Kitchen ceased to be an employee under the Service Agreement in circumstances where he was a "Bad Leaver" as defined in the Escrow Deed;

   (b) the defendants are not entitled to the release of the restricted securities under the Escrow Deed.

3. It is directed that the restricted securities be released from escrow on the condition that the plaintiffs are entitled to sell those shares on behalf of the defendants and to apply the Agreed Proportion of the proceeds of that sale (as defined in the Escrow Deed) in reduction of the liability of Dr Kitchen in damages for breach of the Service Agreement.

4. It is further directed that the plaintiffs provide the defendants within 14 days written notice of the proposed process of sale, and should the defendants have any objection to that process which cannot be resolved by conferral, the parties are at liberty to apply for further directions.

5. It is declared that save for cl 17.1(c) and (d) of the Service Agreement, the restraints in cl 17 of the Service Agreement are void as an unreasonable restraint of trade.

6. It is declared that save for cl 12.1(c) and (d) of the Share Purchase Agreement, the restraints in cl 12 of the Share Purchase Agreement are void as an unreasonable restraint of trade.

7. The relief sought in paragraphs 5 and 6 of the claim is refused.

8. The defendants' counterclaim is otherwise dismissed.

9. The defendants' application for leave to amend the second further amended counterclaim is refused.

10. The parties have leave to make further submissions on the question of costs following the pronouncement of judgment.

[75] I shall delay formally pronouncing judgment so as to allow the parties to check the arithmetic in my calculations. I will provide a spreadsheet of my calculations to the parties and make it an exhibit. I will also hear from the parties, if required, on a date to be fixed in relation to the issue of costs.