CITATION: *Lucinda Woodward v Mindil Beach Sunset Market* [2011] NTMC 020

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| PARTIES: | LUCINDA WOODWARD<br>v<br>MINDIL BEACH SUNSET MARKET |
| TITLE OF COURT: | Local Court |
| JURISDICTION: | Civil |
| FILE NO(s): | 20810219 |
| DELIVERED ON: | 6 May 2011 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 25 January 2011, 27 January 2011, 28 January 2011, 31 January 2011, 1 February 2011<br>Date of final submissions 28 March 2011 |
| JUDGMENT OF: | Dr John LOWNDES |

**CATCHWORDS:**

ACTION FOR BREACH OF CONTRACT – CLAIM FOR DAMAGES AGAINST AN INCORPORATED ASSOCIATION – ASSESSMENT OF DAMAGES – MITIGATION OF LOSS

*Cameron v Hogan* (1934) 51 CLR 358 applied
*Liddle v Central Australian Legal Aid Service Inc* [1999] 150 CLR 142 considered
*Goodwin v VVMC (NSW Chapter)* [2008] NSWC 154 followed
*Wilson v Hang Gliding Federation of Australia Inc* [1977] NSWCA followed

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | Ms Woodward in person |
| Defendant: | Mr G. Clift |

*Solicitors:*

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| Plaintiff: | Ms Woodward |
| Defendant: | DeSilva Hebron |

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| Judgment category classification: | A |
| Judgment ID number: | [2011] NTMC 020 |
| Number of paragraphs: | 145 |

IN THE LOCAL COURT

AT DARWIN IN THE NORTHERN TERRITORY OF AUSTRALIA

No. 20810219

*[2011] NTMC 020*

BETWEEN:

**LUCINDA WOODWARD**
Plaintiff

AND:

**MINDIL BEACH SUNSET MARKET ASSOCIATION INC**
Defendant

REASONS FOR DECISION

(Delivered 6 May 2011)

Dr John Allan Lowndes SM:

## THE PROCEEDINGS AND THE ISSUES TO BE DETERMINED

1. The plaintiff's action is based on breach of contract as pleaded in the Amended Statement of Claim filed on 9 July 2009 and more fully particularised in the Amended Further Better Particulars filed on 27 July 2010.

2. The plaintiff, a former member of the defendant association, had her membership cancelled on 27 September 2006. As a member she had operated an arts and crafts business, under the name and style of "Tinker Traders" – at Mindil Beach Sunset Markets. She alleges that both the 2003 and 2006 constitutions of the association created a legally binding and enforceable contract between the association and its members. The plaintiff alleges that in failing to comply with the requirements of both constitutions relating to the expulsion of members the defendant breached that contract. The plaintiff is claiming damages as a consequence of her expulsion from membership of the defendant association.

3. Although the Amended Statement of Claim included a claim for damages under various heads the plaintiff confined her claim to loss of income from her business.[1]

4. The gist of the claim for loss of income is set out in paragraphs 21 – 25 of the Amended Statement of Claim:

> [21] My removal from the membership of the MBSMA meant I was no longer able to trade at the Mindil Beach Markets. All income for Tinker Traders generated from my association with the MBSMA ceased. All the expenses generated by the business of Tinker Traders continued. In order to fulfil the financial obligations of Tinker Traders I was forced to seek full time employment. Because of that full time employment the income generated by Tinker Traders at the local art and craft markets ceased. Due to breach of contract by the MBSMA my business of Tinker Traders was effectively destroyed.
>
> [22] I was left with no option but to take the matter of my removal from the MBSMA to the Courts to resolve. Because of financial constraints I had to represent myself in my litigation before the courts. Because of the need to be available to attend the courts on an ongoing regular basis during the day I had to take a full time position working at night.
>
> [23] Effectively my unconstitutional removal from the membership of the MBSMA has destroyed the business of Tinker Traders...
>
> [24] Through the various court actions I have now been returned to the membership of the markets. The income I used to enjoy from the market trade has been reduced to a minimum. The reasons for this are:
>
> (i) As I am working full time I do not have the available time to produce a large quantity of self made goods for offer at my market stall.
>
> (ii) Due to ongoing financial commitments I need to continue working full time to ensure continuation of income.
>
> (iii) The self made products I have on hand have tarnished over the period I was removed from the membership. Therefore everything I have to sell must be sold at a greatly reduced price.
>
> (iv) My established client base no longer exists.

[1] See the Amended Further Particulars filed on 27 July 2010 and the plaintiff's opening at the commencement of the hearing of these proceedings on 25 January 2011: see pages 7-8 of the transcript.

[25] ... Even though I have been returned to the membership it will take years for me to build up my business to where it was prior to my removal from the membership.

5. Particulars in relation to loss of income were not included in the Amended Statement of Claim; however these were provided in the Amended Further Better Particulars as follows:

C. The primary retail outlet for the business of Tinker Traders was the Thursday and Sunday Mindil Beach Sunset Markets.

1. The secondary retail outlet for the business of Tinker Traders was the workshop, retail outlet of Tinker Traders at the address of Shed 7, 710 Reichardt Road Winnellie. This secondary retail outlet relied solely upon custom generated from the advertising of that outlet from the retail outlet at the Mindil Beach Sunset Markets on a Thursday and Sunday.

2. The third and minor retail outlet for the business of Tinker Traders was the various craft markets which are held around Darwin by a variety of organizations not related to MBSMA. The criteria for these markets are that all items offered for sale to the public must be self made, handmade products.

3. All primary and secondary income of the business of Tinker Traders was generated because of that entity's membership of the MBSMA and the right to trade at the Mindil Beach Sunset Markets which is conferred by that membership. Once the MBSMA breached the contract between those two entities and Tinker Traders' membership of the MBSMA was illegally revoked by the committee of the MBSMA, the right to trade at the Mindil Beach Sunset Markets was denied and that income ceased entirely.

4. Once the primary and secondary income of Tinker Traders ceased it was no longer possible to pay the expenses generated for that business such as rent, insurance etc. It became necessary for me to seek ordinary employment not associated with the manufacture and sales of Tinker Traders' art and craft items.

5. Full time employment unrelated to the business of Tinker Traders meant that I was no longer able to manufacture the self-made, handmade retail goods necessary to attend the various craft market outlets and so that income has ceased entirely.

6. In this Court I am claiming the loss of income for the business of Tinker Traders for the specific years of 2006-2007, 2007-2008 and 2008-2009.

7. I am also claiming that as the breach of contract by the MBSMA was directly responsible for the loss of income to the business of Tinker Traders the MBSMA should also be considered responsible for the normal business expenses incurred since Tinker Traders was wrongfully removed from the MBSMA membership.

8. The breach of contract between the MBSMA and Tinker Traders by the committee of the MBSMA had caused me to stop doing business as Tinker Traders but did not absolve me of the responsibility of the expenses incurred by that business.

9. Legitimate business costs incurred by Tinker Traders: rent for the Tinker Traders work shop, and stock contents insurance and office expenses such as power and phone, stationary, printing and faxing.

10. I am claiming that the MBSMA should be required to reimburse me the costs I incurred in the name of the business Tinker Traders since the time of my removal from the MBSMA membership.

11. Therefore I am claiming loss of income should encompass income before expenses.

12. Gross profit averages are taken directly from the Tinker Traders' Financial Records submitted to the Federal Government's Taxation Department for the three years of financial trading directly prior to the breach of contract between Tinker Traders and the MBSMA.

| | |
|---|---|
| 2003 – 2004 | $49,388.28 |
| 2004 –2005 | $71,261.98 |
| 2005 – 2006 | $28,707.24 |

Average Gross Profit per year prior to breach of contract $49,785.83

13. Gross profit averages are taken directly from the Tinker Traders Financial Records submitted to the Federal Government's Taxation Department for the three years of financial trading directly after the breach of contract between Tinker Traders and the MBSMA.

| | |
|---|---|
| 2006 -2007 | $16,044.00 |
| 2007- 2008 | ($ 303.01) |
| 2008-2009 | $ 1, 664.83 |

Average Gross profit per year after breach of contract $5,801.94

14. Average Loss of Gross Profit per year after breach of contract

$43,983.89 X Three years

Total $131,951.67

6. The plaintiff abandoned that part of her claim in excess of the jurisdictional limit of this Court (which is $100,000) in order to bring her claim within the Court's jurisdiction. Accordingly she claimed $100,000 for loss of income.

7. In relation to her claim for loss of income the plaintiff opened as follows:

> I'm claiming loss of trading income simply because that covered my rent, my petrol, my electricity, encumbered a number of different issues. Once I stopped having the trading income of Tinker Traders and became simply an individual person, I then was required - I couldn't claim it on tax. It wasn't a deduction. It actually became an expense that I had not incurred prior to that time. .. I had stepped into the business and had bought in bulk with the intention that as time progressed, the value of the items that I owned would also increase and I would make a considerable amount of profit from those items over a period of time.[2]

8. At the hearing, which commenced on 25 January 2011, the defendant made the following concession:

> …we concede it is no longer an issue that there was a contract existing between Ms Woodward and Mindil Beach Sunset Markets. We will say it is not an issue that there was a breach of contract and specifically we concede to that breach as failure to follow strictly the processes set out in the 2006 constitution which was in place at the time the decision was taken to expel Ms Woodward from membership of the association. And we say that the consequence of those concessions is, in law, that the decision to expel was void and void ab initio, and those matters are now

[2] See pp 4-5 of the transcript of proceedings on 25 January 2011.

> not in issue. We believe in circumstances of those concessions that this matter now resolves to an assessment of damages that may flow...[3]

9. As I understand it, although the defendant admitted that there was at the material time a contract between the plaintiff and the defendant and a breach of that contract, the defendant says that the plaintiff is not entitled, as a matter of law, to an award of damages for breach of contract on the basis of the decision of the High Court in *Cameron v Hogan* (1934) 51 CLR 358, which, it says, continues to be the law in relation to associations – whether unincorporated or incorporated.

10. The defendant defended the proceedings on a further basis. It asserted that, even if the plaintiff were not precluded by reason of the decision in *Cameron v Hogan* from claiming damages, the plaintiff had not suffered any loss as a result of breach of contract. In the alternative, the defendant asserted that the plaintiff had failed to mitigate any loss caused by the breach of contract, and therefore should be denied damages.

## THE CAMERON AND HOGAN POINT

11. The *Cameron v Hogan* point was previously raised by the defendant in its interlocutory application filed on 24 December 2010, seeking, inter alia, an order that the plaintiff's Statement of Claim be struck out, and judgment be entered in favour of the defendant.

12. Following the hearing of that application, I declined to enter summary judgment in favour of the defendant, as I was not satisfied that the plaintiff could not maintain her claim for damages for breach of contract.[4] Notwithstanding the defendant's forceful argument that the decision in *Cameron v Hogan* precluded the plaintiff from claiming damages for breach of contract, I formed the view that the proceedings raised an important and difficult point of law that would need to be further investigated, and fully argued and considered at the substantive hearing.

### • Analysis of the decision in Cameron v Hogan

13. It is necessary to begin with a clear and full analysis of the decision in *Cameron v Hogan*.

14. The factual background was that the respondent, Edmond Hogan, brought an action in the Supreme Court of Victoria against Donald Cameron and others, who comprised the Central Executive of the Australian Labor Party, an unincorporated association. The respondent sought declarations that he was a member of the party and entitled to his rights and interests as such,

[3] See p 8 of the transcript.
[4] See the transcript of oral reasons for decision given on 10 December 2010.

and that his expulsion from the party was wrongful. The respondent also sought an injunction restraining the appellants from acting on or carrying into effect the expulsion and from continuing to exclude him from his rights and privileges as a member of the Australian Labor Party. In addition the respondent claimed damages.

15. Gavan Duffy J, who heard the action, awarded the respondent damages in the sum of one shilling as nominal damages for breach of contract. However, his Honour refused to make a declaration of right, as well as refusing to grant an injunction.

16. On appeal, the High Court upheld the refusal to make a declaration or to grant an injunction on the basis that the respondent had no such proprietary right or interest in the property of the Australian Labor Party as entitled him to a declaration or an injunction in respect of his expulsion from the party. However, the Court concluded that the judgment for nominal damages ought not to stand.

17. The High Court identified a number of obstacles – procedural or technical and substantive - to the respondent maintaining an action for damages based on breach of contract. These were regarded as a number of "independent legal principles", leading to the result that the respondent could not recover damages for breach of contract. [5]

18. First, the Court found that the rules of the association did not operate to create enforceable contractual rights and duties between members, or between executive officers and members. [6]

19. Secondly, the Court pointed out "the [great] difficulty of framing an action by one member of a large body of persons for damages for breach of a contract constituted by his admission to membership". [7]

20. Thirdly, the Court observed that even if "these procedural difficulties were overcome, and an enforceable contract of membership of an unpropertied voluntary association were found to have been in contemplation, it would become necessary to consider whether a breach of contract had been committed, and who was responsible". [8] The Court held that as the respondent's expulsion was a nullity, he could not recover damages for breach of contract: [9]

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[5] [1934] 51 CLR 358 at 370

[6] [1934] 51 CLR 358 at 370-371.

[7] [1934] 51 CLR 358 at 371.This procedural impediment has been commented upon by Forbes in *Justice in Tribunals* The Federation Press 2010 at [3.51]: "A procedural objection was that the unincorporated party had no legal personality of its own, so the plaintiff was suing every individual member including himself – a technical impossibility". A further procedural difficulty was that proceedings against representative defendants were inappropriate: [1934] 51 CLR 358 at 372.

[8] [1934] 51 CLR 358 at 372.

[9] [1934] 51 CLR 358 at 372-373.

> If the resolution was not authorised by the rules, it would simply be a void act: his membership would be unaffected, and there would be no breach of contract. "In the case of a purely voluntary association, a court of equity bases its jurisdiction on property, there being nothing else for it to act on. A court of common law before the *Judicature Act* regarded the invalid expulsion as void, and gave no damages. So between the two jurisdictions the plaintiff could only rely on property as the basis of jurisdiction" (per Isaacs J, *Edgar and Walker v Meade.* If the member whose expulsion has been invalidly resolved upon asserts rights arising out of his membership, it may be that those who, relying upon the attempted expulsion, resist the assertion, will be led into the commission of acts which are tortious because they lack the justification which a valid expulsion may give them. For the tort the member may sue. *Innes v Wylie* affords an example. But he cannot recover from the committee or the members for breach of contract. Cases in which a member, improperly expelled from a proprietary club, has recovered damages from the proprietor supply an illustration of another application of the same principle. Each member is entitled by contract with the proprietor to have the personal use and enjoyment of the club, in common with other members, so long as he pays his subscription and is not excluded from the club under its rules (per Stirling J *Baird v Wells* ). [10] If a member is improperly expelled by the committee, his expulsion is invalid, he remains a member, and he can enforce his contract with the proprietor.

21. The effect of *Cameron v Hogan* is that the right to injunctive or declaratory relief depends upon the denial or enforcement of a proprietary right while the right to damages depends upon a breach of a contractual right.

22. It is important to recognise that while the decision in *Cameron v Hogan* appeared to have created "a de facto presumption in practice" that the rules of all unincorporated associations are non-contractual – thereby converting a question of fact into a presumption of law – it does not "fetter a court's freedom to decide a question of contractual intention on the evidence in the instant case, and that there should be no presumption of law or fact that the rules of unincorporated societies are not meant to be enforceable at law".[11] However, the existence of a contractual relationship in a particular case does not necessarily entitle a plaintiff to obtain damages for breach of contract. As explained by Fletcher, the contract may be of "a special and limited nature, similar to but even more limited than the contract in the memorandum or articles of association of a registered

[10] In *Baird v Wells* (1890) 44 Ch D 661, Stirling, J, after finding that the plaintiff had been expelled by an improperly elected committee of the club without being given a fair hearing, compared a proprietary club with an ordinary club. In a proprietary club the facility is owned by one person and members contract to use the facility in accordance with the rules of the club. Members have no relationship inter se. His Honour concluded that in a proprietary club a member, so long as he pays his subscription and is not excluded, is entitled by contract to have the personal use and enjoyment of the club in common with other members, but has no right of property in the club that a court will protect by way of an injunction. A member of a proprietary club whose enjoyment of club facilities is wrongfully interfered with has an action in damages against the proprietor for breach of contract: see K Fletcher *Non-Profit Associations* The Law Book Company Limited 1986, p 74 fn 21.

[11] See Forbes n 7 at [3.54] and [3.57].

company" and "recognition that the relationship is contractual does not entitle a member to sue for damages when a provision is breached"[12]

- **The precedential status of Cameron v Hogan**

23. The decision in *Cameron v Hogan* presents as a precedential obstacle to members seeking to challenge decisions made by unincorporated associations, and in the process seeking either injunctive or declaratory relief or claiming damages for breach of contract. The decision has not been overruled by the High Court, and all Australian courts remain bound by that decision.

24. As observed by Forbes, the decision has been followed, or accepted as authoritative in many subsequent cases.[13] However, as also noted by the author, the decision has been bypassed by Australian courts on many occasions either by distinguishing the decision or by relying upon other legal concepts or doctrines.[14]

25. Notwithstanding the existence of a considerable body of law that has detoured round the decision in *Cameron v Hogan* the principles which emerged from that decision are binding upon this Court.

26. As stated earlier, a substantive obstacle to the plaintiff's claim for damages in *Cameron v Hogan* was that as the expulsion was a void act, the plaintiff's membership of the association was unaffected, and there was no breach of contract. However, it has been suggested that the view that an ultra vires expulsion, being a nullity, required no judicial intervention, was discredited in *Buckley v Tutty (*1971) 125 CLR 353 *and Calvin v Carr* (1979) 22 ALR 417.[15] But upon close analysis neither case supports that contention.

27. In *Buckley v* Tutty the High Court considered the rules of a club which prevented a professional football player who was a member of the club, even if he were not contractually bound to play for it, from becoming employed by another club except with the concurrence of the former club or

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[12] Fletcher n 10, p 45.

[13] Forbes n 7 at [3.55] fn 204. Those cases include *Abbott v National Coursing Association (SA)* [1941] SASR 140; *Wyldle v Attorney-General for NSW* (1948) 78 CLR 224 at 296-297; *Buckley v Tutty* (1971) 125 CLR 353 at 374; *Gamilaroi Boomerangs v Members of New England Group 19* [1999] NSWSC 495; *Heale v Phillips* [1959] Qd R 489; *Baldwin v Everingham* [1993] 1 Qd R 10; *Collard v Pullen* [1984] 9 IR 142; *Ex Parte Appleton* [1982] Qd R 107; *Finlayson v Carr* [1978] 1 NSWLR 657; *Skelton v Australian Rugby Union Ltd* [2002] QSC 193; *Trustees of Roman Catholic Church v Ellis* (2007) 70 NSWLR 565; (2007) NSWSC 117; *Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc* [2009] NSWSC 211; *Rush v WA Amateur Football League Inc* [2005] WASC 206 at [54]; *Redhead Grange Incorporated v Davidson* (2002) 55 NSWLR 14; [2002] NSWSC 90.

[14] Forbes n 7 at [3.55] – [3.59]. The instances in which courts have intervened where expulsion or suspension from membership of an association or a club has occurred in breach of the organisation's rules of natural justice have been predicated upon the aggrieved person suffering some diminution of rights of property, livelihood or trade: see *Skelton v Australian Rugby Union Ltd* [2002] QSC 193; *Rush v WA Amateur Football League (Inc)* [2007] WASCA 190.

[15] Forbes n 7 at [3.52].

a body known as the Qualification and Permit Committee, or on the payment of a transfer fee by the other club. The Court held that the "retain and transfer" rules were a fetter on the right of a player to seek and engage in employment either in New South Wales or elsewhere in the English speaking world where the game was played, and were in restraint of trade.

28. While noting that the doctrine of restraint of trade is not limited to contractual provisions, and that it was not necessary for the plaintiff to demonstrate that the rules constituted a binding contract between him and the League, the Court held that the plaintiff was entitled to a declaration that the retain and transfer rules were unreasonably in restraint of trade, as well as an injunction to prevent those rules being applied against him.

29. During the course of argument, the appellants had submitted that if the rules were in unreasonable restraint of trade the result was merely that the law will not lend its aid to enforce them, and the respondent would not be entitled to prevent the League and the clubs from continuing to observe them voluntarily if they wish to do so. It was submitted that the respondent was not entitled to any relief, and certainly not to an injunction.

30. In responding to that submission, the Court noted that "the terminology used by courts of high authority to describe the consequence of holding that a contract is in unreasonable restraint of trade has not always been uniform and precise".[16] The Court said that it was a misnomer to describe contracts in unreasonable restraint of trade as being void; and that contracts of that kind are more properly spoken of as contracts which the law will not enforce.[17] The Court went on to say:

> To say that a restraint is unenforceable does not mean that the law will simply ignore its existence or that the only remedy of a person upon whom it is sought to be imposed is to defend such legal proceedings as are brought to enforce it. The law treats unreasonable restraints as unenforceable because it is contrary to the public welfare that a man should unreasonably be prevented from earning his living in whatever lawful way he chooses and that the public should unreasonably be deprived of the services of a man prepared to engage in employment. It would indeed be a strange weakness in the law if it afforded no protection to a person who was against his will subjected in fact to an unreasonable restraint of trade. However, it seems to us now to be established that in an inappropriate case a member of an association may obtain a declaration that a rule of the association which affects him is unreasonably in restraint of trade and an injunction to prevent the rule being applied against him. [18]

31. It is difficult to see how the decision in *Buckley v Tutty* - and the reasoning underpinning the decision – amounts to a discrediting of the view taken in

[16] [1971] 125 CLR 353 at 379.
[17] [1971] 125 CLR 353 at 379-380.
[18] [1971] 125 CLR 353 at 38

*Cameron v Hogan* that the plaintiff's expulsion from membership of the Labor Party was a void act, and did not amount to a breach of contract. In *Buckley v Tutty* the Court did not treat contracts in unreasonable restraint of trade as void, but rather as being unenforceable because they are contrary to public welfare or policy. Secondly, the Court was not dealing with an action for damages based on breach of contract,[19] but an application for a declaration that the retain and transfer rules were not binding on the ground that they were in unreasonable restraint of trade. The Court based its decision on a non - contractual "restraint of trade" doctrine, without requiring the plaintiff to demonstrate either a contractual or proprietary interest as a precondition for seeking a declaration or injunction. The Court regarded the relief sought – in terms of seeking declaratory relief - as being justiciable because the rules constituted an unreasonable restraint of trade and affected a person's economic interests or livelihood.

32. It is important to bear in mind that the justiciability of the plaintiff's application in *Buckley v Tutty* turned upon the particular circumstances of the case and the nature of the relief being sought. In my opinion, the decision in *Buckley v Tutty* does not extend so far as to implicitly overrule – or even discredit – the High Court's earlier decision in *Cameron v Hogan* that the expulsion, being void in law, did not ground an action for damages for breach of contract.

33. *Calvin v Carr* also turned upon the particular circumstances of the case and the type of relief sought.

34. In that case the Privy Council held that the Committee of the Australian Jockey Club had jurisdiction to entertain the appeal from the stewards because a decision of an administrative or domestic tribunal, reached in breach of natural justice (though it may be called and indeed may be for certain purposes "void"), is nevertheless susceptible of an appeal.

35. The decision in *Calvin v Carr* in no way subverts the validity of the conclusion in *Cameron v Hogan* that the expulsion was simply a void act, leaving the expelled person's membership unaffected, with the result that there was no breach of contract.

36. In my opinion, neither *Buckley v Tutty* nor *Calvin v Carr* – or any authority unearthed during my research – is, in any way, inconsistent with the conclusion in *Cameron v Hogan* that even if an enforceable contract of membership of the Labour Party had been found to have been in contemplation, the expulsion was a void act which could not found an action for damages in contract. Furthermore, I have been unable to find any authority that would suggest that in expulsion cases an action for damages for breach of contract is maintainable, despite the fact that a resolution for

[19] It should be noted that damages are not available for restraint of trade at common law: see *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 440; *Buckley v Tutty* (1971) 125 CLR 353 at 380.

expulsion from membership of an unincorporated association is void in law.[20]

## IS THE PLAINTIFF'S ACTION FOR DAMAGES FOR BREACH OF CONTRACT JUSTICIABLE

37. The primary issue that must be determined is whether the plaintiff's action for damages based on breach of contract is justiciable. That issue needs to be considered by reference not only to the decision in *Cameron v Hogan*, but also in the context of any circumstances in the present case that might distinguish it from Hogan's case.

38. A fundamental difference between *Cameron v Hogan* and the present case is that the defendant in the present proceedings is an incorporated association formed under the provisions of the *Associations Act* (NT), and not an unincorporated association. Does the fact of incorporation make a difference to the justiciability of the plaintiff's action for damages for breach of contract?

39. This very question was considered in *Liddle and Anor v Central Australian Legal Aid Service Inc* [(1999)] 150 FLR 142.

40. In that case the plaintiff sought declarations and a mandatory injunction against the defendant, which was a voluntary association incorporated under the provisions of the *Associations Incorporation Act* (NT). In opposing the relief sought by the plaintiff the defendant submitted that CAALAS was a voluntary association established on a consensual basis, and, in the absence of a clear positive indication that the members contemplated the creation of legal relations inter se, the rules of CAALAS were not to be treated as an enforceable contract. Therefore, no action could be maintained requiring the defendant to observe its rules regulating its affairs.

41. Dealing with the defendant's argument, Mildren J noted that there was no express provision in the constitution of the defendant indicating an intention by the members that they contemplated the creation of legal relations inter se.[21] Further, his Honour noted that, in the Northern Territory, there is no provision in the *Associations Incorporation Act* equivalent to those provisions in the Acts of other states which provide that the rules of an incorporated association shall, subject to the Act, operate as a binding contract between the association and its members.[22]

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[20] See H.A.J Ford "The Use of the Injunction to Restrain Wrongful Expulsion from Voluntary Associations" [1954] 1(2) Sydney Law Review 186 at 197, where the author suggests a legal peg upon which to hang an action for damages for breach of contract., namely a duty to make a decision according to certain standards. However, no case decided subsequent to *Cameron v Hogan* has formulated such a duty as a basis for judicial intervention in breach of contract cases.

[21] [(1999)] 150 FLR 142 at 146.

[22] [(1999)] 150 FLR 142 at 146. For example s 11(2) of the *Associations Incorporation Act* (NSW) 1984 provides: "Subject to this Act, the rules of an incorporated association bind the association and the members of the association as

42. Mildren J did not consider that mere registration under the *Associations Incorporation Act* (NT) took the defendant "beyond the ambit of being a mere voluntary association".[23] His Honour went on to say:

> Despite incorporation, CAALAS remains a voluntary association as being a body of persons "who have combined to further some common end or interest which is humanitarian in character...[and] stands apart from private gain and material advantage": *Cameron v Hogan* supra at pages 370-371.[24]

43. However, his Honour identified a number of considerations that pointed to the conclusion that the rules of the defendant were intended to create legally binding rights and obligations between the members.[25] Furthermore, Mildren J considered that the plaintiff's action was justiciable because the procedural difficulties which confronted the plaintiff in *Cameron v Hogan* simply did not apply to the case at hand: the fact that the defendant was incorporated disposed of those procedural obstacles.[26]

44. Turning to the present case, the fact that the defendant is an incorporated association formed under the provisions of the *Associations* (NT)[27] removes the procedural difficulties which best the plaintiff in *Cameron v Hogan*. Therefore, there is no procedural or technical bar to the proceedings brought by the present plaintiff.

45. There is no provision in the *Associations Act* (NT) which provides that the rules of an incorporated association shall, subject to the Act, operate as a binding contract between the association and its members. However, as made clear in *Liddle and Anor v Central Australian Legal Aid Service Inc*, the rules of an incorporated association may still be treated as creating legally binding rights and obligations between the association and its members, if that was what was intended.

46. As affirmed by the High Court in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 187 ALR 92 an essential precondition to contractual liability is an intention to create an enforceable agreement. Determining

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if the rules had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the rules".

[23] [(1999)] 150 FLR 142 at 149.

[24] [(1999)] 150 FLR 142 at 149.

[25] [(1999)] 150 FLR 142 at 151-152. His Honour referred to a number of provisions of the constitution indicating that it was the intention of the drafters of the constitution that the rules were to be legally binding upon the members. His Honour also considered the nature of the undertaking itself and the main purposes of the association to be matters of some significance. Furthermore, although not determinative, his Honour considered the fact that the defendant was incorporated under the *Associations Incorporation Act* (NT) pursuant to which it was required to file a copy of its rules with the Registrar, and not permitted to alter its rules other than in compliance with the Act, to be a relevant consideration.

[26] Although the plaintiff's action was found to be justiciable the Court declined on discretionary grounds to grant any of the declarations sought. The Court also declined, in the exercise of its discretion, to grant a mandatory injunction.

[27] This statute is the successor to the *Associations Incorporation Act* (NT) which was considered by Mildren J in *Liddle and Anor v Central Australian Legal Aid Service Ltd* [(1999)] 150 FLR 142.

intention is a question of fact that involves the application of an objective test.[28]

47. In applying that objective test, it is useful to bear the mind what Mahoney JA said in *Scandrett v Dowling* (1992) 27 NSWLR 483 at 503- 505, albeit in the context of an application for declaratory and injunctive relief:

> In considering whether such a breach should be restrained by injunction or the subject of a declaration, it will ordinarily be of assistance to consider three matters: whether the rules of the voluntary association were intended to create binding rights and obligations between the members; (if they were) whether there has been a breach of rules creating such rights and obligations; and (if there has) whether the rules or the breach are such that it was intended that legal consequences should flow from the breach and (if it was) whether those consequences warrant intervention to restrain the breach.
>
> Whether, considered as a whole, the rules of a particular voluntary association were intended to create such rights and obligations must be determined according to nature of the association, the terms of the rules, and the general context.

48. At the time of the plaintiff's expulsion from membership of the association the 2006 constitution was in place. Furthermore, the plaintiff was wrongfully expelled due to a failure to adhere to the relevant procedures set out in that constitution. Accordingly, the 2006 constitution needs to be closely examined to see whether the rules of the defendant association were intended to create a binding and enforceable contract between the association and its members.

49. Clause 6 of the 2006 constitution provides:

> This Constitution binds every member and the Association to the same extent as if every member and the Association had signed and sealed this Constitution and agreed to be bound by it.

50. In my opinion, clause 6 evinces a clear and positive intention that the rules of the association contemplated the creation of legal relations inter se, and were intended to create legally binding rights and obligations between the defendant association and its members. The following considerations also point to the conclusion that the rules of the defendant association were intended to create legally binding rights and obligations between the members:

- Clause 7 provides that the Association may alter the Constitution by special resolution but not otherwise;[29]

[28] See M Keyes and K Burns "Contract and the Family: Whither Intention? [2002] MULR 30 at 31.

[29] The defendant association is required by s 23(1) of the *Associations Act* (NT) to file with the Commissioner any alteration of the objects or purposes of the association, the constitution of the association or a trust relating to the association.

- Pursuant to s 8(4) (b) of the *Associations Act* (NT) the association was required, at the time of the application for incorporation , to lodge a copy of the constitution with the Commissioner of Consumer Affairs;[30]

51. It should also be noted that, subject to the *Cameron v Hogan* point, the defendant conceded that there was a contract between it and the plaintiff.

52. Accepting that there was a breach of the rules of the defendant association,[31] the question that remains to be answered is whether the rules of the defendant association or the breach of those rules are such that it was intended that legal consequences should flow from the breach, and (if it was) whether those consequences warrant intervention in the form of an award of damages for breach of contract.

53. Although not exactly on point, it is helpful to consider the decision of White J in *Goodwin v VVMC Club Australia (NSW Chapter)* [2008] NSWSC 154 (15 February 2008).

54. In that case the plaintiff successfully claimed damages for breach of contract as a consequence of wrongful expulsion from membership of the defendant association, an association duly incorporated under the provisions of the *Associations Incorporation Act* (NSW) 1984.[32]

55. White J was of the view that s 11(2) of the Act[33] removed any doubt as to whether the principle in *Cameron v Hogan* could be applied to prevent the rules of an incorporated association being interpreted as creating a legally enforceable relationship between members and the association. His Honour found that s11 (2) not only provides for the rules of an incorporated association to be binding, but for them to be binding to the same extent as if all members had given covenants under seal to observe the provision of the rules. White J went on to say that " a covenant under seal, that is by deed, is the most solemn act a person can perform with respect to a piece of property or other right (*Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 at 369)".[34]

56. During the course of his decision, White J referred to the decision of Campbell J in *McClelland v Burning Palms Surf Life Saving Club* [2002] 191 ALR 759, where his Honour stated:

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[30] See s 8 (4)(b) *Associations Act* .
[31] This was also conceded by the defendant.
[32] See Forbes n 7 at [ 3.64] where the author says:
" Incorporation also extends the list of possible remedies. Incorporated societies are amenable not only to declarations and injunctions but also to awards of damages."
[33] See n 22.
[34] [2008] NSWSC 154 (15 February 2008) at [34].

> …s 11(2) has an effect which cuts two ways concerning an expulsion from the club. So far as the member is concerned, he or she has the benefit of a deemed covenant with each other member to observe all the provisions of the rules, which has as a consequence a contractual obligation on each member not to expel any other member save in accordance with the rules.[35]

57. White J went on to say at [36] – [37]:

> It will be observed that his Honour (referring to Campbell J) treated s 11(2) as creating contractual obligations on each member. In *Rose v Boxing NSW Inc* [2007] NSWSC 20, Brereton J (at [57]) also referred to there being a deemed contract on the terms of the constitution between an incorporated association and its members….
>
> Counsel for the defendant referred to *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95. The question in that case was whether it should be inferred that the parties intended to enter into contractual relations in respect of the plaintiff's employment by the defendant, that is to say the issue was whether there was an intention to enter into a contract of employment. No issue arose, and there is no discussion on the question of whether the contract between a member and the incorporated association would arise on the terms of its constitution.

58. Before proceeding to award damages to the plaintiff, White J stated at [46]:

> The next question is that of contractual damages. In *Rose v Boxing NSW Inc& Anor* Brereton J held that damages may be awarded for a breach of natural justice or for purported actions in excess of power by an incorporated club or association on the basis of damages for breach of contract between the members and the club founded on the constitution.

59. The right to claim damages for breach of contract was also recognized by Powell JA in *Wilson v Hang Gliding Federation of Australia Inc* [1997] NSWCA 348 (15 April 1997) at [32], another case involving the application of s 11(2) of the NSW legislation:

> …it is well enough established that a member of an association…has the right to invoke the assistance of the Court to enforce the terms of the contract between himself and the association and, in an appropriate case, to claim from the association damages for breach of the contract between himself and the association constituted by the rules of the association in any case in which he can establish that he has suffered damage by reason of the breach by the association of the terms of that contract (see, for example, *Bonsor v Musicians Union* [1956] AC 104; *Edwards v Society of Graphical and Allied Trades*(1970) 1 AER 905).

60. Although *Goodwin v VVMC Club Australia (NSW Chapter)* turned upon the application of s 11(2) of the NSW *Associations Incorporation Act*, and there

[35] [2008] NSWSC 154 (15 February 2008) at [35].

is no comparable provision under the *Associations Act* (NT), I consider that the actual intention to create legal relations and create legally binding rights and obligations reflected in clause 6 of the 2006 constitution ( which was expressed in similar language to that used in s 11(2) of the NSW legislation) renders the plaintiff's claim for damages as justiciable as the plaintiff's action in *Goodwin*.

61. In my opinion, it does not matter how an intention to create legally binding rights and obligations is attributed to the constitution of an incorporated association. Such an intention can be deemed to exist by force of statute or alternatively, as in the present case, actually manifested by the constitution. A deemed intention carries no more weight than an actual intention, except where there is an inconsistency between the deemed intention and actual intention.[36]

62. In both *Goodwin* and the present case the essential ingredients of an enforceable contract were present. There was not only an intention to create legal relations but an agreement as to the terms of the contract.[37] In particular, there was a contractual obligation on each member not to expel any other member save in accordance with the rules of the association.[38] That obligation was either express or implied. Unlike the position in *Abbott v Sullivan* [1952] 1 KB 189, there is a legal peg in this case on which to hang an award of damages. That peg consists of the negative stipulation contained in the 2006 Constitution that no member be expelled except in accordance with the prescribed procedures.

63. In my opinion, both *Goodwin* and the present case can be clearly distinguished from *Cameron v Hogan*.

64. In that case the four High Court Justices, who delivered a joint judgment, concluded that even if it were found that an enforceable contract of membership was contemplated by the members it would be necessary to see whether a breach of contract had been committed. The four justices adopted the views of Isaacs J in *Edgar v Meade* (1916) 23 CLR 43 that a court of common law before the Judicature Act regarded the invalid expulsion as void, and they added that if the expulsion was not authorised by the rules it would simply be a void act leaving the expelled person's membership unaffected, and there would be no breach of contract.

65. However, that statement of law does not prevent the legislature from passing legislation which has the effect of altering the rights and obligations of parties in the case of a wrongful expulsion. In my opinion, the effect of a statutory provision like s11 (2) of the *Associations Incorporation Act* (NSW) is that it enables a member of an incorporated association to sue for damages for breach of contract, in the event of a wrongful

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[36] See *Goodwin v VVMC Club Australia* (NSW Chapter) [2008] NSWSC 154 (15 February 2008) at [36].
[37] See *Rose and Frank Company v JR Crompton & Bros Ltd* [1924] UKHL 2; [1923] 2 KB 261 at 282.
[38] The terms of the contract went beyond any implied term that the association would only act intra vires: see *Abbott v Sullivan* [1952] 1 KB 189.

expulsion. Simply put, such a statutory provision overcomes the common law prohibition on maintaining an action for breach of contract, as articulated in *Cameron v Hogan*.[39]

66. In a similar vein, there is nothing in *Cameron v Hogan* that would prevent an association and its members from adopting a constitution whose rules not only evince an intention to create legally binding rights and obligations between the members, but also an intention that any breach of the rules (including those relating to the expulsion of members) would have legal consequences, warranting the intervention of the courts in terms of an award of damages for breach of contract. If the constitution were to contain a negative stipulation that no member should be expelled except in accordance with the rules of the association,[40] then that would overcome the common law prohibition on maintaining an action for damages in contract in wrongful expulsion cases.

67. In the present case, clause 6 of the 2006 constitution overrides that common law prohibition by imposing a contractual obligation on each member of the association not to expel any other member of the association except in accordance with the rules of the association. For that reason, the plaintiff's claim for damages for breach of contract is justiciable.

## THE ASSESSENT OF DAMAGES FOR BREACH OF CONTRACT

68. Given my finding that the plaintiff's claim is justiciable, it is now necessary to consider what, if any, damages should be awarded to the plaintiff on account of the defendant's breach of contract. The Court also needs to consider whether any damages awardable to the plaintiff should be reduced on account of any failure on her part to mitigate her loss.

### • The plaintiff's case and evidence

69. As a result of the wrongful expulsion, the plaintiff claimed damages from the effective date of expulsion through to the year ending 30 June 2009. The plaintiff claimed damages in the sum of $33,000 per annum for the financial years 2007, 2008 and 2009. In support of that claim the plaintiff relied upon, and tendered as evidence in her case, an income book (Exhibit P1). The following financial data can be gleaned from that exhibit:

- For the financial year ending 30 June 2004 the income book records an annual income of $43,456;

[39] See Forbes n 7 at [3.60] – [ 3.65]. As pointed out by Forbes at [3.60] "the tradition of non –intervention goes by the board".

[40] Such a term is necessary to enforce what is essentially a personal contract between an association and one of its members.

- For the financial year ending 30 June 2005 the recorded annual income is $47,213.23; and

- For the financial year ending 30 June 2006 (the financial year antedating the expulsion) the exhibit records an annual income of $28,303.

70. The income for these three financial years (which predate the expulsion) are relied upon by the plaintiff as evidence of the income that she was able to generate whilst she was a member of the defendant association.

71. The evidence given by the plaintiff in support of her claim for lost income was as follows.

72. The plaintiff began her evidence thus:

> The fact that my income from the markets never appeared to be particularly high, is not consistent with the quality of my lifestyle as many facets of my lifestyle, when I was a sole business owner, were paid through the business. Whereas without that in the business, it actually became more costly for me to survive in Darwin.[41]

73. The plaintiff proceeded to give evidence that she was claiming loss of trading income "simply because that covered my rent, my petrol, my electricity, encumbered a number of different issues".[42] She went on to say:

> Once I stopped having the trading income of Tinker Traders and became simply an individual person then I could not claim it on tax. It was not a deduction. It actually became an expense that I had not incurred prior to that time. I had stepped into the business and had bought in bulk with the intention that as time progressed, the value of the items that I owned would also increase and I would make a considerable amount of profit from those items over a period of time. [43]

74. At page 12 of the transcript, the plaintiff gave this evidence:

> I lived and worked in a workshop and the majority of my expenses were covered by the fact that it was business expenditure, expenses such as rent, phone, office. The income that I used – that I earned from one year, would assist me to continue to make an income to the following year and a great deal of expenditure went into building up the stock which were the assets of my business.

75. Ms Woodward then went on to give the following evidence:

> The income fluctuated. There was never a defined amount that you earn in a given week and there was never a defined amount that would be in

[41] See p 3 of the transcript of proceedings on 25 January 2011.
[42] See p 4 of the transcript.
[43] See p 4 of the transcript.

> the expenses as a lot of the expenses that came up in relation to the purchasing of glass or objects would sometimes be based on the fact that a particular object would no longer be available and had to be purchased at that time or you would lose it, or wholesalers would give you an opportunity to buy certain items at a much reduced price as an end of clearance of stock. My job was not only at the Mindil Beach Sunset Markets but also with trading from my showroom – work room – where people would attend me and I would get orders for different things. Mindil Beach markets was the place where I did all the advertising for my business and Mindil Beach was the place that generated all the extra business that came attached to my business. [44]

76. The plaintiff stated that her claim was for $100,000 damages. As to how that figure was arrived at the plaintiff stated:

> Well, firstly, because that's the limit and secondly, because I think that would be a fair assessment - that would work out to be $33,000 a year of business income which is less than what I believe I would have made but would be a fair and reasonable amount in my consideration.[45]

77. When asked by the Court whether she wished to tender any documentation in support of her damages claim, the plaintiff tendered her book of income, which became Exhibit P 1.[46] Ms Woodward referred to the income book as the "original record" of her income.[47] She gave the following evidence about the book of income:

> All my transactions were cash so it's the record of all the transactions on a weekly basis and where those amounts came from, the date that I received them and at the end a total of the figure for the year…it's just a record of my income…
>
> After I'd done a market I write in the book the amount that I've made that night… I would finish the markets of the evening. The next day I would put the amount into the book. The figures that are used in this book are the figures that were used in my income tax returns.[48]

78. The plaintiff went on to say that the book only dealt with income, and not expenses and like matters.[49] At page 16 of the transcript the plaintiff stated that she had no time for writing invoices or receipts during the course of her business.

79. The plaintiff was asked by the Court whether she relied on anything other than the income book to substantiate her claim for expenses. She replied as follows:

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[44] See p 13 of the transcript.
[45] See p 13 of the transcript.
[46] See pp 13 and 15 of the transcript.
[47] See p 14 of the transcript.
[48] See p 15 of the transcript.
[49] See p 15 of the transcript.

> My claim is for my trading income. That is the only document that I have apart from my income tax returns that indicate my trading income. The income tax returns are – do reflect a different position in the fact that I was in possession of a substantial amount of money which I also put into the business of the Mindil Beach – the business of Tinker Traders, and that money – that I used was also included as income on my income tax returns. But as far as the trading income, that is the document.[50]

80. Ms Woodward did, however, agree that she had a number of expenses.[51] She also agreed that in order to generate her income she would have had expenses.[52] However, the plaintiff did not agree that her actual income would be less after taking into account her expenses, and responded as follows:

> That's my trading income prior to expenses which is what I am claiming because the income is what I would have generated from sales. That is – that is the trading income. Any other income came from bank accounts and private money. That income is the income that I generated before I paid for expenses, and I'm requesting that the court allow me my trading income for the time that I was – my contract was breached. I had already paid those expenses out of my own pocket out of going to work but I could not claim any of those expenses.[53]

81. The plaintiff gave the following explanation as to why she could no longer claim those expenses:

> Because I was no longer an artist. I couldn't claim my vehicle registration, my business vehicle registration. I couldn't claim my business phone. I couldn't claim the full rent on my shed. Once I stopped trading in my business as Tinker Traders, I could no longer legally make the clams to the business of Tinker Traders. So that the income that I would've generated would've had all those amounts taken out of it but it has been paid separately anyway. It's already been paid for but wasn't paid by the business. It was paid by me personally.[54]

82. The plaintiff was again asked whether there was anything further she wished to say or produce in support of her claim for damages. The plaintiff simply responded:

> …I really feel that that document is the pivotal document in so that it is the record of my earnings for the time previous to the breach of contract.[55]

83. At page 17 of the transcript the plaintiff stated:

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[50] See p 16 of the transcript.
[51] See p 16 of the transcript.
[52] See p 16 of the transcript.
[53] See pp 16 -17 of the transcript.
[54] See p 17 of the transcript.
[55] See p 17 of the transcript.

> …I'm saying that my loss was to the value of that level and that I have been quite generous in saying that it – I would only claim for $33,000 per year when the figures that I was generating prior to that were in fact much higher and that I had already paid all the expenses that would've been incurred by my business. And so what I'm actually seeking is the income that would have paid for those expenses had I been working with my business.

84. During cross-examination, the plaintiff appeared to accept that her tax return for the financial year ending 30 June 2006 disclosed a taxable income of $5,194.[56] The plaintiff conceded the possibility that her taxable income for the financial year ending 30 June 2007 was $17,691.[57] She also appeared to accept that her tax return for the financial year ending 30 June 2008 disclosed a taxable income of $39,601 and a trading income of $2300.[58] Finally, the plaintiff accepted that her tax return for the financial year ending 30 June 2009 showed a taxable income of $43,035 and a trading income of $1664.[59]

- **Evaluation of the plaintiff's evidence**

85. Since *Robinson V Harman* [1948] 1 Exch 850 at 855 damages for breach of contract are awarded on the basis that the injured party is, so far as money can achieve it, to be placed in the same situation as if the contract had been performed. This is the compensatory principle that underpins the award of damages in breach of contract cases: a plaintiff is to be put in the position he or she would have been had the contract not been breached.[60] According to that principle a plaintiff must be awarded no more than that which has been lost as a result of the breach of contract.

86. The measure of damages is worked out by calculating "the difference between the position that would have been created by full performance of the contract and the position that has actually been created by its breach".[61] The learned authors go on to explain the process of assessment of damages:

> A money value is placed on each position. A loss has been suffered if the value of the hypothetical position is greater than that of the actual position. Damages are awarded to cover that loss.

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[56] See p 41 of the transcript.
[57] See p 41 of the transcript.
[58] See p 41 of the transcript.
[59] See p 41 of the transcript.
[60] See British Transport Commission v Gourley [1956] AC 185; Atlas Tiles v Briers (1974) 144 CLR 202; Cullen v Trappell (1980) 146 CLR 1.
[61] See N.C Seddon and M.P Ellinghaus Cheshire and Fifoot's Law of Contract Ninth Australian Edition Lexis Nexus Butterworths 2008 at [23.6].

87. As explained in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 the plaintiff carries the burden of establishing the hypothetical position on which the claim is based.[62]

88. In the present case the plaintiff claims damages for loss of income as a consequence of the defendant's breach of contract. Such loss is recognized as being "compensable on the basis of the hypothetical performance principle".[63] Therefore, the plaintiff bears the onus of proving that she suffered a loss of income in accordance with the hypothetical performance principle.

89. Consonant with that principle, the starting point is the income that the plaintiff would have received had the contract not been breached. As the plaintiff was carrying on a business as a sole trader immediately prior to the breach of contract, it is her "net income" – and not trading income - that forms the basis for calculating the income that she would have received had the contract not been breached. Net income, in the present context, is defined as the difference by which the amount of money she would have received during the course of her business trading as Tinker Traders (referred to in *Commonwealth v Amann Aviation Pty Ltd* as gross receipts[64]) would have exceeded her business expenses.[65] The plaintiff bears the onus of proving the net income that she would have received had there been no breach of contract.

90. Furthermore, in accordance with *Commonwealth v Amann Aviation Pty Ltd* the plaintiff must prove on the balance of probabilities that she not only expected that she would receive such a net income through her undertaking at the markets, had the contract not been breached, but that expectation had " a likelihood of attainment rather than being a mere expectation".[66]

91. Finally, the plaintiff bears the onus of proving, on the basis of that hypothetical net income, that she has actually suffered a loss. To establish a compensable loss the plaintiff must show that the net income she would have received had the contract not been breached would have placed her in a better financial position than she actually found herself following the breach of contract.

92. It will be immediately seen that the manner in which the plaintiff asked the Court to assess her damages – namely on the basis of "income before expenses" (trading income)[67] – is not only difficult to comprehend, but clearly does not conform to the conventional approach to calculating

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[62] See Seddon and Ellinghaus n 61 at [23.6].
[63] See Seddon and Ellinghaus n 61 at [23.6].
[64] Alternatively, the gross receipts could be referred to as trading income.
[65] See Seddon and Ellinghaus n 61 at [23.13].
[66] See Seddon and Ellinghaus n 61 at [23.13[.
[67] Presumably with the objective of reimbursing her for costs and expenses incurred in the name of Tinker Traders since her expulsion from membership of the association.

damages in cases like the present. For the reasons that follow the plaintiff's claim for compensatory damages must fail.

93. The plaintiff chose to couch her claim for damages in terms of loss of "trading income" as disclosed in Exhibit P1. Trading income is usually conceived of as income generated during the course of a business, without taking into account such expenses that were incurred in order to produce that income. By confining her claim to loss of trading income, the plaintiff failed to adduce evidence, or sufficient evidence, of the net income generated by Tinker Traders during the three financial years preceding the date of breach of contract.

94. The plaintiff muddied the waters by saying that the expenses of her business undertaking were paid prior to the receipt of income. However, regardless of the manner in which that occurred, it was the plaintiff's evidence that those expenses were claimed through the business of Tinker Traders. That would have entailed a reduction in her gross business income thereby yielding a net income, which for all intents and purposes would have been her taxable income. The problem with the plaintiff's evidence is that she:

    1. failed to explain the manner in which her expenses were prepaid;

    2. failed to itemize those expenses that were referable to the operation of the business, and that were claimed through the business; and

    3. failed to disclose her net income (taxable income) after deducting her business expenses from her trading income.

95. All of these aspects demonstrate the inherent deficiencies of Exhibit P1, upon which the plaintiff predicates her claim for damages for loss of income, and undermine the utility of that document as a basis for assessing the plaintiff's compensable loss.

96. Furthermore, the fact that the plaintiff either accepted the fact or possibility that her taxable income for the relevant preceding three financial years was considerably less than the trading income she postulated that she was entitled to claim from the defendant further illegitimates the use of Exhibit P 1 as a basis for assessing the plaintiff's compensable loss.

97. The best – and most reliable - evidence before the Court as to the net income generated by and through the business trading as Tinker Traders, prior to the breach of contract, is that disclosed during the course of cross examination of the plaintiff as to her taxable income for the financial year immediately proceeding the date of breach of contract

98. As submitted by Mr. Clift, counsel for the defendant, the plaintiff's taxable income of $5,194 for the financial year ending 30 June 2006 is "the datum point...for ascertaining whether or not, leaving aside legal liability, as a

factual matter, has the plaintiff proven a loss as a consequence of her expulsion".[68]

99. The figure of $5,194 is an important piece of financial data as it not only throws light on the net income generated by the plaintiff's business for the financial year ending 30 June 2006, but points to a net income for the preceding two years considerably less than the trading income claimed by the plaintiff, and bearing a relationship to trading income similar to the proportionate relationship for the year ending 30 June 2006. In other words, it is more likely than not the plaintiff's net (and taxable) income) for the preceding two financial years would have, in all probability, been in the range of 18% to 20% of her trading income.

100. Net (or taxable) income in that range becomes the datum point for calculating the plaintiff's compensable loss. The plaintiff's income prior to the breach of contract must be compared with not only the income she expected and was likely to earn through her business, but also with the income that she actually received, through whatever source, after the contractual breach. In order to be awarded damages for loss of income the plaintiff must prove that following the breach of contract she was financially worse off.[69] In order to do that, the Court would have to be satisfied that had the contract not been breached and the plaintiff continued to trade at the markets, her business undertaking would have generated a net income which would have placed her in a financially superior position to the position in which she found herself following the breach of contract.

101. The starting point is the financial position that would have been created had the contract not been breached and the monetary value to be placed on that hypothetical position. As adverted to earlier, the benchmark is the net income – not trading income - generated by the business during the three financial years preceding the date of the breach of contract. The most reliable indicia of net income is the plaintiff's taxable income. Duly acknowledging that the assessment of damages in breach of contract cases is not a mathematically precise exercise and often approximations have to suffice, the best one can do is to extrapolate from the preceding three years taxable income her net (and taxable) income for the financial years proceeding the breach of contract. It is difficult to calculate her projected income. In this case the Court is compelled to take what is, in effect, "an estimate upon estimate" approach, and to inevitably engage in a degree of guesswork that is inherent in such an approach. On all the evidence the best prediction is that the plaintiff would have continued to generate a net income comparable to that produced for the financial years prior to the breach of contract. That is the monetary value to be placed on the plaintiff's hypothetical position.

102. The next step is to examine the plaintiff's actual financial situation following the breach of contract, and to attribute a monetary value to that.

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[68] See p 220 of the transcript of proceedings on 1 February 2011.
[69] This is consistent with the compensatory element of damages for breach of contract.

103. The evidence discloses that the plaintiff was gainfully employed, having had a taxable income of $17,691 for the financial year ending 30 June 2007, a taxable income of $39,601 for the financial year ending 30 June 2008 and a taxable income of $43,035 for the year ending 30 June 2009.

104. In light of that evidence, Mr. Clift submitted that the plaintiff had failed to prove a loss as a consequence of her expulsion for the following reasons:

> Because the evidence of taxable income received by her in the years that she claims damages for is this. For the year ending 30 June 2007, a taxable income of $17,691 was declared to the tax man. I pause there, the evidence is that involves paid employment either as a console operator or otherwise but certainly in non-artistic endeavours.
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> From March 2007 to June 2007, some three to four months. Obviously much more than taxable income for the previous financial year. And then for the financial year ending 30 June 2008, the evidence is that her taxable income was $39,601. And finally for the financial year ending 30 June 2009, the evidence is that her taxable income was $43,035.
>
> Thus, in factual terms our primary submission is...no loss is established. In fact quite the contrary, things have improved for Mrs Woodward in terms of taxable income since her expulsion.
>
> You cannot be satisfied...on the material that there has been any loss. And I pause to note that obviously for 2008 and 2009 in real terms the taxable income exceeds the amount that's claimed at $33,000 per annum. Now if you pro rata out 2007 she would have earned roughly the same had she worked for the full 12 months, but that's another matter and I'll come to that in terms of mitigation.[70]

105. The first observation that needs to be made is that the plaintiff's taxable income following the breach of contract appears to be substantially in excess of both the net (or taxable) income of the plaintiff prior to the contractual breach and the hypothetical net/taxable income of the plaintiff subsequent to the breach of contract. On that basis the plaintiff does not appear to have suffered a loss as a consequence of her expulsion from the defendant association. Prima facie the plaintiff's financial situation appears to have improved after the date of the breach of contract.

106. However, it is important to avoid taking a too simplistic approach to the plaintiff's financial situation either side of the contractual breach. The reason for that is that the plaintiff claims that as a result of the breach of contract her overall financial situation was altered to her detriment. Ms Woodward claims that prior to the contractual breach she was able to include as part of the operating expenses of her business certain expenditure such as rent, telephone and vehicle registration and claim such expenses as a tax deduction. However, upon the cessation of her business

[70] See p 221 of the transcript of proceedings on 1 February 2011.

she says that she was no longer able to treat such expenses as operating expenses and claim them as a business tax deduction. Ms Woodward says, in effect, that her lifestyle and enjoyment of the amenities of life in economic terms, were affected by her expulsion from the defendant association.

107. Although the plaintiff might genuinely hold the belief that she was financially worse off following the breach of contract, there is no objective evidence to show that she was in a financially less advantageous position after the breach of contract. The plaintiff's case would have benefited greatly from a detailed financial analysis comparing her overall financial position prior to the breach of contract with her financial position following the breach, in terms of lifestyle and enjoyment of the amenities of life. A comparative analysis could have been provided of her business income less deductible expenses, prior to the breach of contract, and her income (as an individual income earner) less any deductible expenses. That would have assisted the Court in determining whether the plaintiff's overall economic situation had altered to her detriment as a result of the breach of contract. However, no such analysis was provided to the Court.

108. In my opinion, the plaintiff has failed to provide sufficient evidence to enable the Court to objectively assess, in accordance with the approach laid down in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, her overall financial position prior to the contractual breach compared with her financial situation after the breach, with a view to determining whether she suffered a compensable loss as a result of her expulsion. The plaintiff has failed to prove, on the balance of probabilities, that she lost income as a consequence of the breach of contract. As actual loss must be proved to receive compensatory damages, the plaintiff is not entitled to an award of damages for loss of income.

109. Furthermore, to the extent that this has not been dealt with in the preceding analysis, the plaintiff has failed to satisfy the Court that she is entitled to damages equivalent to her trading income for the three financial years preceding the breach of contract by way of compensation for costs and expenses that were incurred by her previous business as a result of her wrongful expulsion. First, the plaintiff has failed to demonstrate the logic of or to provide a proper basis for assessing damages in terms of loss of trading income. Secondly, in terms of causation and quantum, the plaintiff has failed to show how the business expenses and obligations, which she says continued to be incurred after the breach of contract, were in fact caused by the breach of contract, and how, and to what extent, those expenses and obligations impacted upon her overall economic position after the breach of contract.

110. That leaves the question of nominal damages for breach of contract. A party who has breached a contract is liable to pay at least nominal damages, even if no loss has been caused.[71] The breach in itself allows the

[71] See Seddin and Ellinghaus n 61 at [23.1].

injured party to claim nominal damages.[72] However, the law treats such damages as being insignificant.[73]

111. Although the plaintiff has failed to prove an entitlement to compensatory damages, I consider that she is entitled to nominal damages.

- **Mitigation of the plaintiff's loss**

112. In its Amended Defence the defendant alleged that the plaintiff had failed to mitigate her loss. Mr. Clift made extensive oral submissions in that regard.[74]

113. In my view, it is not strictly necessary to deal with this aspect of the matter because the failure of a plaintiff to mitigate his or her loss only becomes an issue if the plaintiff has established by direct or circumstantial evidence a prima facie case for compensatory damages or other damages. As stated by Dixon J in *Watts v Rake* (1960) 108 CLR 158 at 159:

> If it appears satisfactory that damages in a particular form or to a particular degree has been suffered by the plaintiff as a result of the wrong but the defendant maintains the plaintiff might have avoided or mitigated that consequence by adopting some course which it was reasonable for him to take it seems clear enough that the law places upon the defendant the burden of proof upon the question whether by the course suggested the damage could have been so mitigated and upon the reasonableness of pursuing that course.

114. The duty to mitigate ensures that a loss caused by failure to mitigate is not compensable. In other words, "damages cannot be recovered for any loss which could have been prevented by reasonable mitigating action of the injured party".[75] Again the matter of mitigation only falls for consideration where there is a prima facie case that a plaintiff has suffered loss as a consequence of breach of contract.

115. However, despite the plaintiff being unable to prove a loss, I consider that it is desirable to briefly address the mitigation aspect.

116. The duty to mitigate was explained by Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689. There, the court observed that the principle of mitigation imposes on a plaintiff:

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[72] See W Covell and K Lupton *Principles of Remedies* Butterworths 1995 at [3.5]. There the authors cite the following cases: *O'Connor v SP Bray Ltd* (1936) 36 SR(NSW) 248 at 260; *Bowen v Blair* [1933] VLR 398 at 402; *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286.
[73] Covell and Lupton n 72 at [3.5].
[74] See pp 221 – 228 of the transcript of proceedings on 1 February 2011.
[75] Seddin and Ellinghaus n 61 at [23.41].

> …the duty of taking reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

117. In a similar vein O'Connor J in *Hasell v Bagot, Shakes and Lewis Ltd* (1911) 13 CLR 374 at 388 observed:

> There is no question that it is one of the principles on which damages are assessed that a party to an agreement suffering injury from the other party's breach of its terms is bound to exercise reasonable care in mitigating the injurious consequences of the breach, and is not entitled to recover from the party in default any damage which the exercise of reasonable care on his part would have prevented from arising.

118. The question of what steps should be taken to mitigate a loss is a question of fact and must be decided on the facts of the case.[76]

119. I begin by observing that the plaintiff in the present case, by obtaining gainful employment following the breach of contract, took reasonable and significant steps to mitigate or minimize loss caused by the defendant's breach. However, the problem for the plaintiff was that she was unable to prove a compensable loss, after taking into account her mitigating action. The plaintiff was unable to prove any residual loss.

120. At pages 221 to 222 of the transcript of proceedings on 1 February 2011, Mr. Clift made the following submissions on behalf of the defendant:

> Now we say that the evidence is that there had been unreasonable behaviour in this context by the plaintiff such as to totally de-bar any liability that may exist in the defendant to pay damages to her as a consequence of her expulsion.
>
> And the evidence is via Ms McCourt and Mr. Dudgeon that had the plaintiff applied to return to the markets in 2007, she would have been accepted .I don't think it was ever put and I stand to be corrected, on reading the transcript, I don't think it was squarely put to them that that couldn't have been the case and as is accepted as I understand from what has been said by the plaintiff that there would have been no loss had she returned in 2007.
>
> Thus unexplained failure to do so, or unreasonable failure to do so be-bars her under the concept of mitigation. …I took Ms Woodward to a number of passages in the transcript before Wallace SM, where there were numerous statements in the context of an invitation to return in 2008, a number of statements by the plaintiff that she didn't want to accept that as she believed it was unconstitutional on the basis that she'd been thrown out by the committee, it was only the membership in general – sorry she'd been thrown out by the membership in general, I'm getting

[76] See *TC Industrial Plant Pty Ltd v Roberts Qld Pty Ltd* (1963) 37 ALJR 289

> myself confused, which was the procedure that was actually adopted. There was only them that could return her.
>
> It must follow from, if you accept that as being the reason, it must follow that she didn't want to return in 2007 until the membership asked her back, they let her back. So now to mount some sort of argument that she could not have returned in 2007 ignores the evidence as to her intentions in that regard in any event. It was objectively reasonable that she take the limited steps necessary, that is to apply to return.

121. It should be noted at the outset that Mr. Clift did not put to the plaintiff in cross examination that had she applied to return to the Markets in 2007 she would have been accepted back as a member. However, Ms Woodward did put to Ms McCourt in cross examination this question: "If I had put in an application to attend the 2007 Mindil Beach Markets would I have been approved". The witness replied: "I believe you would have, with the criteria that we use. It's not a decision by one person, it's an operation team which usually consists of three people and we use the criteria to score a point system. So what I know of your product, yes, it would have gone through".[77] In response to the further question "Would the 2007 committee have allowed me to re-attend the Markets", Ms McCourt stated:

> They only deal with the membership side. The operation team, well the staff deal with the operational side. So we access your product, the space that you require and go from there. Then a recommendation is given to the members and the committee to ratify you as a member.[78]

122. When questioned by the plaintiff as to whether the members would have voted to allow her to return to the markets, Ms McCourt said:

> Again, I don't know. I mean the membership changes every year, we bring in new members, so I don't know, but usually what happens is we go to a general meeting, if the operation team have their recommendations there's usually not too many problems after that and it's a straightforward process.[79]

123. When the witness was asked whether she thought the members who had voted to remove her in 2006 would have voted to allow her to return to the Markets, she replied:

> …certainly there would probably have been some members that would have said no, but there may have been a lot of members that said yes. It's usually a fairly straightforward process. Once we've made that recommendation, the members seem to go with that … and vote them in.[80]

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[77] See p 118 of the transcript of the proceedings of 28 January 2011.
[78] See p 123 of the transcript.
[79] See p 123 of the transcript.
[80] See p 124 of the transcript.

124. Finally the witness stated that the plaintiff "didn't necessarily need to be invited back, [she] could have applied to come back if she wanted to".[81]

125. It should be noted that prior to putting the above series of questions to Ms McCourt, Ms Woodward had indicated that the purpose of the questions was to demonstrate that had she re-applied for membership she would not have been let back in because she was perceived "as a whistle blower or a troublemaker".[82]

126. During the plaintiff's cross examination of Mr. Dudgeon the witness expressed the opinion that she would have been allowed to return to the Markets in 2007, had she applied for membership.[83] Mr. Dudgeon later stated:

> You could have come to us and said "Look we've had our differences, can we now come back as members of the association and we'll endeavour to do our best to comply with the rules and regulations as other members do and not cause dissension which is what it seemed to me that you were doing.[84]

127. I find myself unable to accept the first part of Mr. Clift's submission, that is, had the plaintiff applied to return to the Markets in 2007 she would have been accepted; and that her failure to re –apply for membership of the association constituted a failure to mitigate her loss. First, that proposition was never put to the plaintiff in cross examination. Nor was evidence in chief given by either Ms McCourt or Mr. Dudgeon in support of that proposition. Secondly, in my opinion, it was most certainly not a forgone conclusion that had the plaintiff re-applied for membership her application would have been accepted, bearing in mind her prior expulsion from the association and the surrounding circumstances. Thirdly, I am not satisfied that the plaintiff acted unreasonably in failing to re-apply for membership, given the history that preceded the expulsion and the purported basis for the expulsion.

128. In my view, the defendant failed to discharge the onus of proof that it bore in showing that the plaintiff failed to mitigate her loss through her failure to re-apply for membership of the defendant association.

129. Having said that, the second part of Mr. Clift's submission carries far greater weight, and, in my opinion, is irresistible. In March 2008 the plaintiff was informed that the notice of cancellation of her membership, dated 27 September 2006, had been withdrawn. In my opinion, that notification amounted to a clear invitation to the plaintiff to re-apply for membership of the defendant association. The failure of the plaintiff to take up that invitation amounted to a failure to mitigate her loss. Her reasons for not

[81] See p 124 of the transcript.
[82] See p 117 of the transcript.
[83] See p 176 of the transcript of proceedings on 31 January 2011.
[84] See p 179 of the transcript.

attempting to resume trading at the Markets between March 2008 and April 2009 [85] are totally unconvincing, and do not justify her failure to take mitigating action by re-applying for membership.[86] The defendant has satisfied the Court that the plaintiff acted unreasonably in not re-applying for membership following the March 2008 notification.

130. What then are the implications of that failure to re-apply for membership within the context of the plaintiff's claim for damages for loss of income?

131. Theoretically, the plaintiff would be debarred from recovering any part of her loss of income due to her neglect to re-apply for membership of the association. In effect, the plaintiff would be prevented from recovering any loss of income (caused by the breach of contract) which was suffered following the March 2008 notification of the withdrawal of the notice of cancellation of the plaintiff's membership. However, in practical terms , the plaintiff's failure to mitigate does not impact upon the plaintiff's claim for damages, as the plaintiff has, on the evidence, failed to establish loss of income as a consequence of the breach of contract. If, however, the plaintiff had been able to establish such a loss, then she would not have been entitled to damages for loss of income suffered by her from March 2008 and onwards. Any such loss would be considered to have been caused by the failure to mitigate – and not by the breach of contract.

132. The defendant also asserted that the plaintiff had failed to mitigate her loss in another respect:

> …it was, of course, we say objectively reasonable in any event for her to have pursued her stated preference that is in 2007 and onwards to continue as an artist that was her evidence. And she could have done that by operating at Parap market, Nightcliff market, Rapid Creek market and Palmerston markets. We say the evidence is abundantly clear that had she applied to each and every one of those markets, it's more likely than not she would have been able to run her stall under cover at those markets.[87]

133. Against that, the plaintiff asserted that the other markets referred to by the defendant were not financially viable and were not able to provide adequate cover for the operation of her particular business.[88] The plaintiff also claimed that the Palmerston markets were an unsuitable venue because of the incompatibility of the clientele with the character of the goods that she sold during the course of her business.[89]

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[85] It being noted that the plaintiff resumed trading at the Markets on 14 May 2009.

[86] At p 39 of the transcript of proceedings on 25 January 2011 the plaintiff stated that she considered the letter of "reinstatement" to be unconstitutional and did not believe that she would be treated properly if she returned to the Markets. She saw no point in going back to the Markets if she was to be harassed again.

[87] See p 222 of the transcript of proceedings on 1 February 2011. The defendant's full oral submissions in relation to this aspect of the plaintiff's failure to mitigate appear at pp 222 – 224 of the transcript.

[88] See p 223 of the transcript. See also the plaintiff's submissions at p 234 of the transcript.

[89] See p 223 of the transcript.

134. In my opinion, the defendant has failed to satisfy the Court that the plaintiff failed to mitigate her loss by not seeking to continue her business at the other markets. I do not believe the plaintiff acted unreasonably in not shifting her business to the other markets. Quite to the contrary, having formed the view in March 2007 that she was not going to be allowed to return to the Mindil Beach Markets the plaintiff (bearing in mind her concerns about operating at the other markets) quite reasonably sought alternative employment, which according to the defendant, not only mitigated her loss, but improved her financial position.

135. In any event, any failure on the part of the plaintiff to set up business at the other markets is immaterial in the overall context of the case, as the plaintiff was unable to discharge the burden of proving that she suffered a loss of income as a result of the breach of contract.

136. Finally, the defendant asserted that the plaintiff had failed to mitigate her loss by unreasonably limiting herself to the type of employment that she undertook from April 2007 onwards. In that regard the defendant relied upon the evidence of Ms Scally and Mr. Blenkinship. Particular reliance was placed on the evidence of Ms Scally and the evidence contained in Exhibit D7. The defendant relied upon the fact that "the taxable income from eight of eleven of the jobs that are referred to (in Exhibit D7) and surveying assistant jobs all come in at a taxable income level in excess of, and well in excess of in some instances, of the sums that were actually earned in taxable income terms by other employment that was undertaken by the plaintiff post-expulsion".[90]

137. Mr. Clift made the following submission, on behalf of the defendant:

> We say that it was not reasonable for her to limit herself to the type of employment that she did and her evidence was that it was employment that either involved solely night work and/or involved virtually time off where necessary. Her evidence was she took this type of employment from 2007 onwards so that she could undertake litigation and the vast majority of litigation…involved other proceedings.
>
> Even if it could be said to be reasonable to do that rather than undertake other employment and hire a solicitor to do your legal work for you, it's simply not reasonable to so limit fields of employment undertaken by reference to pursuit of the defendant in other proceedings, not involved in this course of action…[91]

138. Again, this aspect of the plaintiff's failure to mitigate her loss has no practical implications in terms of the determination of the plaintiff's claim for damages. This aspect does not fall for consideration as no prima facie case as to consequential loss of income was made out by the plaintiff.

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[90] See p 226 of the transcript.
[91] See p 226 of the transcript.

139. However that aside, I make the following observations.

140. First, I am not satisfied on the whole of the evidence that all of the positions referred to in Exhibit D7 would have been reasonably available to the plaintiff had she applied for them.

141. Secondly, a plaintiff is required to only take such steps as are reasonable in all the circumstances.[92] As observed in *NRMA Ltd v Morgan* [1999] NSWSC 407 at [1289] "a plaintiff is not obliged to act otherwise than in the ordinary course of business, and the standard is not a high one because the defendant is a wrongdoer".

142. Thirdly, it does not matter how a plaintiff organizes his or her working hours and how they apportion their employment duties and private time. The guiding principle is whether a plaintiff has taken reasonable steps to mitigate his or her loss according to the applicable standard.

143. Fourthly, in undertaking the type of alternative employment that she did during the period April 2007 to March 2008 [93] the plaintiff acted reasonably in mitigating any substantiated loss. In my view that is amply supported by the defendant's submission that as a result of undertaking that alternative employment the plaintiff was, in fact, financially better off following the breach of contract.

**THE DECISION OF THE COURT**

144. The plaintiff's claim for damages succeeds to the extent that she is entitled to an award of nominal damages, which remain to be assessed.

145. Before entering judgment in favour of the plaintiff I propose to hear the parties in relation to nominal damages. At the same time I will hear the parties in relation to the question of costs.

Dated this 6 May 2011.

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**Dr John Allan Lowndes**
STIPENDIARY MAGISTRATE

[92] Seddin and Ellinghaus n 53 at [23.43].
[93] See the Court's earlier findings in relation to the plaintiff's failure to mitigate loss after March 2008.