SUPREME COURT OF QUEENSLAND

CITATION:	*Maven Dental Group Pty Ltd v S & M England Pty Ltd & Ors* [2018] QSC 220
PARTIES:	**MAVEN DENTAL GROUP PTY LTD** **(Plaintiff)** **and** **S & M ENGLAND PTY LTD and OTHERS** **(Defendants)**
FILE NO/S:	SC No 519 of 2016
DIVISION:	Trial
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	7 September 2018 – ex tempore
DELIVERED AT:	Cairns
HEARING DATES:	3, 4, 5, 6 and 7 September 2018
JUDGE:	Henry J
ORDER:	**(1) Judgment in the sum of $1,446,453.23.** **(2) If costs are not agreed, I will hear the parties as to costs at 10 am on 12 October 2018 with out of town parties having leave to appear by telephone.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the second defendant is a dentist and the sole director and member of the first and third defendants – where the dental practice was sold to the plaintiff –where the second defendant's conduct led to termination of the services agreement – where the services agreement was terminated due to sexual harassment by the second defendant – where the dental practice continued in operation after termination of the agreement – where the plaintiff commenced proceedings for compensation for loss from breach of the services agreement – whether the plaintiff was entitled to be compensated for the loss of the second defendant's earning capacity and if so for how much. *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No. 6)* [2015] 329 ALR 1, cited.

Sellars v Adelaide Petroleum NL [1994] 179 CLR 332, cited.

COUNSEL: B Hall for the plaintiff

C Taylor for the defendants

SOLICITORS: Minter Ellison for the plaintiff

Mellick Smith and Associates for the defendants

[1] **HENRY J:** The second defendant, Dr England, the sole director and member of the first and third defendants, is a dentist. He built up a substantial dental practice over some decades in Cairns. By February 2015, he and another dentist, Dr Slatcher, had worked together in the same practice for about a decade. The practice operated from premises in Cairns, rented from one of the other second defendant's companies, as well as in Weipa.

[2] The practice was sold as a going concern to the plaintiff, Maven Dental Group Proprietary Limited, referred to hereafter as "Maven", on 17 February 2015. That was by the mechanisms of a Facilities and Administrative Services Agreement, a "FASA", being entered into with both dentists separately and a business purchase agreement, a "BPA", being entered into with both dentists together, along with their associated operating corporate entities, which, in the case of Dr England, was the third defendant, SJ England Pty Ltd.

[3] The FASA referred to hereafter was between Maven and S & M England Pty Ltd, the first defendant. Dr England was also a party to that FASA in which he and his company were defined as jointly and severally constituting the "practice entity".

[4] The FASA contained provisions for termination relevantly including the following, at clause 11.2:

> "**Company may terminate – Breach termination.**
>
> The company may terminate this Agreement immediately by Notice to Practice Entity on the happening of any of the following events:
>
> …
>
> (b) in the reasonably held opinion of the Company the Practice Entity has committed an act which if true would, in the opinion of the company, adversely affect the reputation or business of the company conducted from the premises; or
>
> (c) Practice Entity is guilty of any wilful negligent or misconduct;..." (Exhibit 1, tab 1, p23.)

[5] On 23 June 2015, Maven became aware of allegations against Dr England of sexual harassment towards one of the practice's dental assistants. An investigation ensued. On 20 July 2015, Maven gave notice of its immediate termination of the FASA.

[6] The termination letter indicated the company was satisfied the allegations of sexual harassment were, on balance, substantiated and stated:

> "Consequently, and as foreshadowed in our previous correspondence, the Company has formed the view that:
>
> (a) You have committed an act which has, in the opinion of the Company, adversely affect (sic) the reputation of the Company (clause 11.2(b) of the FASA); and/or
>
> (b) You are guilty of misconduct (clause 11.2(c) of the FASA)."

[7] The practice continued in operation after the termination. Maven took steps to recruit a dentist to replace Dr England, a task made more difficult because dentists with Dr England's work ethic and skill set, that is, the skill to perform orthodontic work, are said by Maven to be rare.

[8] Under the terms of the aforementioned agreement, Maven should have been assured of the services of Dr England in the practice for six years. The termination occurred about five months into the six-year term. Maven contended its consequential loss by reason of Dr England's absence from the practice for the balance of the term was $2,220,252 and made demand for payment of that sum from the first and second defendants, premised upon the FASA's terms, and also demanded indemnification in that sum from the third defendant by reason of the third defendant's alleged liability to indemnify Maven for that sum under the BPA.

[9] Such payment not having been made, Maven instituted a claim against the defendants for payment of the aforesaid sum to be ordered pursuant to the FASA in respect of the first and second defendants and the BPA in respect of the third defendant, or, alternatively, in respect of all defendants, as damages for breach of contract of the respective agreements. The issues in the ensuing trial narrowed and the amount of the award sought also reduced. The ultimately narrow nature of the issues to be determined, explained in the extensive written closing submissions and, what turned out to be, lengthy closing oral submissions (extending into this morning), allow me to focus upon less issues than first appeared for resolution.

[10] The amount of the award now sought is $1,387,372 plus interest. Further, the claimed basis for recovery is now solely the alleged liability of each defendant to indemnify for loss under the relevant provisions of the FASA and BPA respectively. Dr England counterclaimed for some outstanding payments due to him under the FASA. That amount is agreed at $22,500. It is common ground he is entitled to that money, which Maven

concedes ought be deducted from the award it seeks. It is presently unnecessary to identify any other aspect of the counter-claim, for reasons which will become apparent.

[11] There are three main issues to be resolved. The first is whether there was a lawful termination of the FASA, in particular whether the alleged sexual harassment conduct of Dr England constituted a happening of one of the events referred to in clauses 11.2(b) or (c) of the FASA. The second main issue is whether the FASA and BPA gave a right to compensation for loss to Maven resulting from Dr England's termination and cessation of work, in the nature of a loss of opportunity to profit from Dr England's services. The third of the three main issues is the assessment of what, if any, loss of that character occurred.

[12] Because of the way this trial has been conducted, the question of whether or not there occurred an event of the kind described in clauses 11.2(b) and (c) of the FASA turns not on any dispute about whether the alleged acts of sexual harassment occurred, for that evidence is, in point of fact, now uncontested, but whether what occurred was an event defined in clauses 11.2(b) or (c) of the FASA.

[13] As to the conduct of the trial, it is illuminating to contrast it with the response of Dr England to the sexual harassment allegations when they were investigated.

[14] That response was, in summary, to concede some events as of potentially innocuous or ambiguous import and some text messages which involved sexual or romantic innuendo, while providing explanations which, if true, would tend to undermine the appearance of and mitigate the extent of sexual familiarity on the part of Dr England towards the dental assistant. However, there were many allegations of physical sexual harassment which were denied outright by Dr England. In deference to the sensibilities of those involved and the public nature of this proceeding, I will here recite no more about the content of those allegations than is necessary to explain my decision. The denied allegations included unzipping and trying to unzip the dental assistant's work shirt, grabbing her vagina outside her clothing, slapping and groping her buttocks and trying to pull her pants down. Such sexual touchings occurred repeatedly, on her account. While it was part of a pattern commencing prior to 17 February 2015, such conduct did occur post-17 February 2015. On the dental assistant's account, this physical conduct towards her was unwanted.

[15] Dr England's response to the allegations of sexual touchings during the investigation was not, as might sometimes happen in a case like this, to concede their truth but assert the consensual development of a physically familiar relationship with the dental assistant, or to assert a misunderstanding about whether his touchings were unwelcome. Rather, it was an outright denial. Those denials were maintained through to and including the time of the commencement of the trial, but the defendants made the choice not to press them at trial. That choice should be explained.

[16] Pre-trial directions required the provision of affidavits from witnesses to be called with a view to those affidavits serving as evidence-in-chief, but with the witnesses needing to be produced for cross-examination if required. Affidavits from the relevant dental technician, along with a number of other employees of the dental practice were filed and, in due course, exhibited at trial. The affidavit of the relevant dental technician provided direct evidence of incidents of sexual harassment of the kind summarised above, and the affidavits of the other witnesses connected with this topic provided evidence tending in various ways to support the reliability of the dental assistant's allegations.

[17] At an early stage of the trial, the court indicated to counsel for the defendants that if it was the defendants' intention to dispute the occurrence of the events described in those affidavits, and if they intended to exhibit an affidavit from Dr England denying the allegations, it would be necessary for them to request the production of the witnesses in order to put to them that they were wrong. In the upshot, the defendants elected not to require the relevant witnesses for cross-examination and not to include in the exhibited copy of Dr England's affidavit denials by him of the alleged acts of physical sexual harassment. The position taken by Dr England in not electing to dispute such allegations, at least for the purposes of this proceeding, has the inevitable consequence in this proceeding that the court should act on the unchallenged evidence of such conduct before it.

[18] Having chosen not to dispute the occurrence of the acts, the defendants nonetheless argued that those acts did not constitute events of the kind defined in clauses 11.2(b) or (c) of the FASA.

[19] Dealing firstly with clause 11.2(c), Maven contends that as at the date of termination Dr England had been guilty of misconduct. The term "misconduct" is not defined by the FASA. The ordinary meaning of the word is well enough known and its definition in the Macquarie Concise Dictionary Fourth Edition includes, for example, "Improper conduct; wrong behaviour".

[20] Whether conduct is misconduct is obviously a question of degree, informed by the context in which the conduct falls for consideration. The defendant's counsel argues, on the proper construction of clause 11.2(c), the misconduct must be wilful misconduct. I agree. It, in any event, would be an odd use of the English language for conduct to be "misconduct" if it were not wilful. To remove doubt however, I infer Maven accorded it that meaning in electing to terminate, it being the obvious meaning.

[21] In the context of this case, there is no serious suggestion that Dr England's sexual touchings of the dental assistant were unwilled, or that he made a genuine mistake about the unwanted character of his conduct. This was a course of sexual harassing conduct, not some once-off potential error or misunderstanding. I conclude on the evidence before me Dr England appreciated his touchings were unwelcome. If his conduct was

objectively misconduct, there is nothing subjective from him to suggest it was other than wilful misconduct.

[22] The question of whether Dr England's conduct constituted wilful misconduct within the meaning of clause 11.2(c) is informed by the focus of the FASA, namely, an agreement calculated at perpetuating the conduct of a dental practice, a practice which employs staff, including persons such as the dental assistant. It cannot sensibly be suggested that junior staff in a workplace should be the subject of unwanted touching in intimate areas of their bodies in the workplace by anyone, let alone senior staff.

[23] I readily conclude that Dr England's sexual touchings of the dental assistant constituted wilful misconduct within the meaning of the FASA. While the touchings spanned a period of time prior to the commencement of the FASA, they also continued thereafter and their continuation included unwanted touchings of the kind described above. It follows that as at the date of termination, there had been a happening of an event defined in clause 11.2(c), namely, Dr England had been guilty of wilful misconduct.

[24] The sexual touchings post 17 February 2015 are obviously sufficient in their own right to support the requisite conclusion of lawful termination under the FASA. It is why my reasons have proceeded directly to them. Because of my finding, it is unnecessary to consider whether any or all or some of the other actions complained of, some of which had been the subject of some explanation during the investigation, also constituted misconduct.

[25] It is likewise unnecessary to consider whether an event of the kind described in clause 11.2(b) had occurred. Clause 11.2(b) is more difficult to interpret than clause 11.2(c). While clause 11.2(c) is focused upon whether or not the acts complained of actually happened, clause 11.2(b) is focused upon whether, in the reasonably held opinion of the company, Dr England had committed an act which, if true, would, in the opinion of the company, adversely affect the reputation or business of the company conducted from the premises. On one view, it may not matter for the purposes of clause 11.2(b) whether the alleged act is actually true and, rather, what matters for the purpose of that clause is, firstly, whether it was reasonable for the company to hold the opinion the act had been committed and, secondly, whether, if it had, it would adversely affect the reputation or business of the company.

[26] Curiously, clause 11.2(b) requires the latter opinion to be that the act would adversely affect reputation, not would "potentially" adversely affect reputation. It might be thought that whether an event would affect reputation depends upon it becoming known. As at the time of trial, the only evidence as to how well-known Dr England's conduct towards the dental assistant in question was seems to suggest it was only known about amongst the employees of the dental practice. On one view, that may not have been enough to have affected the reputation of the company. An arguably contrary view would also exist.

[27] However, it is unnecessary to resolve the point or, indeed, any of the defendants' counsel's arguments which related solely to clause 11.2(b), for, as already explained, it is clear, based on the uncontested evidence in this trial, that Dr England was, within the meaning of clause 11.2(c), guilty of wilful misconduct.

[28] One of counsel's arguments relating to clause 11.2(b) was reiterated in respect of clause 11.2(c) in a way which conflated considerations relevant to the respective clauses. It will be recalled clause 11.2(b) requires that the company formed a particular opinion. For that reason, it was said to have parallels with the due process requirements of a decision of an administrative character. In that context, the defendants' counsel invoked reference to the FASA's clause 22.3, which provides:

> "Each party to this Agreement shall do all things and sign, execute and deliver all deeds and other documents as may be legally necessary or reasonably required of it by Notice from another part to carry out and give effect to the terms an intentions of this Agreement and to perfect, protect and preserve the Rights of the other parties to this Agreement."

[29] The defendants' counsel submitted these words mean each party was obliged to do all things to perfect, protect and preserve the rights of the other parties to the agreement. It was submitted the plaintiff was thereby obliged to do what was necessary to protect and preserve the defendants' rights to enjoy the benefit of the agreement. In effect, this would mean, by reference to clause 11.2(b), that the plaintiff would afford Dr England a reasonable opportunity to respond to any allegations against him and consider that response before being able to be in a position to consider whether it should reasonably hold the opinion required in clause 11.2(b).

[30] The complaint in that context was that after Dr England responded to the dental assistant's initially assembled allegations, which were substantial, the plaintiff received information alleging additional misconduct by him and Dr England was not given the opportunity to respond to those allegations before the plaintiff purported to arrive at the opinion referred to in clause 11.2(b) and to terminate. This omission fed into an argument Dr England was deprived of a fair and reasonable opportunity to respond, inconsistently with clause 22.3, as well as with the obligation to act reasonably and with fair dealing, which is said to arise by implication in respect of any contractual clause empowering one party to act to the detriment of another – see *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No. 6)* [2015] 329 ALR 1.

[31] Whether on the facts of the case Dr England should have been given a further opportunity to respond before the plaintiff could arrive at a reasonably held opinion per clause 11.2(b) need not be decided, for it is enough that clause 11.2(c) was met for the termination to be lawful. These considerations do not apply in quite the same way to clause 11.2(c). The happening of the event referred to in clause 11.2(b) was a reasonably held opinion. The alleged failure to afford an opportunity to respond had the potential to ground an argument

that the event of a "reasonably held opinion" could not have occurred because the requisite opinion could not be reasonably held until Dr England had a reasonable opportunity to respond. The event in clause 11.2(c), however, is not the formation of an opinion on the part of Maven; rather, it is the occurrence of an objective fact.

[32] The event was not Maven's opinion that Dr England was guilty of wilful misconduct. It was that Dr England was guilty of wilful misconduct. It is inherent in its decision that Maven did have the opinion Dr England was guilty of misconduct, but the requisite event was the objective fact of Dr England's guilt of wilful misconduct.

[33] In this context, "guilt" is clearly not a reference to a formal finding of guilt. The use of the word "guilt" reflects the blameworthy character of the conduct. It is a reference to having committed the blameworthy conduct, namely, having committed wilful misconduct. To use a criminal law example, a person might not be found guilty of a murder committed in 2015 until charged and convicted in, say, 2018, but that does not alter the objective fact that person was guilty of murder back in 2015, when the act of murder was committed.

[34] Whether or not Dr England had a chance to respond is irrelevant to whether, as a matter of objective fact, he had committed wilful misconduct. Extending such a chance was arguably relevant to the reasonable opinion for a clause 11.2(b) happening, but it could not conceivably be relevant to, or alter the happening of, the objective fact of guilt of wilful misconduct in clause 11.2(c).

[35] If there was a failure to act reasonably with fair dealing, it might potentially be a breach of the implied duty to so act, or of clause 22.3, thus grounding a potential basis for the first and second defendants to have sued the plaintiffs. We are simply not concerned with such a suit here. I pause to reflect such a suit would be pointless, not only because of its poor prospects, but because there can hardly have been a loss if, notwithstanding an absence of fair process, the facts relied upon for termination were, as I have found, correct.

[36] Returning to the first major issue, the effect of my earlier finding is that, as a matter of fact, Dr England was guilty of wilful misconduct and the termination was therefore lawful.

[37] I turn then to the second major issue in the case, beginning with consideration of what rights flowed to the plaintiff by reason of the termination. Clause 11.2 conferred no entitlement on its own terms to compensation, nor did its terms deem the events listed in clause 11.2 to be breaches of the contract. Instead, clause 9.1 of the FASA conferred an entitlement to indemnification for loss resulting from a clause 11.2 termination. It did so by this language:

> "**9.1 Indemnity.**
>
> Practice Entity indemnifies and must keep indemnified the Company and its Associates and hold the Company and its Associates harmless from and against all Loss they suffer or incur arising in any way from or in connection with:
>
> ...
>
> (f) any early termination of this Agreement by the Company in accordance with clause 11.2."

[38] It is this clause upon which the plaintiff now relies as the sole foundation for its claim against the first and second defendants.

[39] The defendants' counsel contended it could not be correct to interpret clause 9.1(f) as conferring any right to compensation for loss of the chance to profit from Dr England's services when that loss was caused by Maven's own act of termination, an option it had, but was not obliged under clause 11.2 to exercise. It is an unsustainable contention.

[40] As a matter of fact, the termination was, on any view, as result of Dr England's misconduct. It was hardly a happy decision for Maven, which stood to lose by it, but Maven was endeavouring to act responsibly in dealing with a problem which Dr England's misconduct created. As a matter of law, though, it is not to the point whether the termination under clause 11.2 is discretionary. The clear import of clause 9.1(f) is that an early termination of the FASA under clause 11.2 entitles Maven to the first and second defendant indemnifying it against all loss suffered, incurred or arising in any way from or in connection with such early termination. Terms like "arising in any way" and "in connection with" cast a very broad causative net. The definition of "loss" in the definition clause of the FASA is likewise very broad.

[41] Maven contends that, but for the loss, the FASA would have remained on foot for the balance of the six-year period, by which it was entitled to the shared fruits of Dr England's work. As it turns out, the dental business continued to operate, so the loss was not an outright loss of the dental business. However, absent the specifically terminated FASA, Maven was left to carry on the dental business without the money-making services of Dr England. Maven paid a very significant sum to acquire the dental business. The component of that sum paid to acquire the interest of Dr England and his relevant corporate entity was about $2.8 million. For that, it was supposed to have been assured by the FASA of Dr England's money-making services – see, for example, the FASA, schedule 1, clause 1.1(h). The termination triggered by Dr England's misconduct meant they did not get what they bargained for.

[42] The defendants' counsel asserted the termination meant the FASA no longer entitled Maven to anything, for the benefits the FASA conferred would not continue unless the FASA continued. It was contended the foundation of Dr England's obligation to Maven

to work and thereby generate revenue for them ended on termination, so that what might have been, but for termination, is irrelevant.

[43] However, despite some arguable ambiguity in its pleading, the plaintiff's case as disclosed, opened and conducted, without suggestion of surprise from the defendants, was not that it was seeking to claim what Dr England would actually have earned for them for the balance of the six years, and rather was seeking to claim the value of the money-making opportunity lost by the premature termination of the FASA. I readily conclude the loss of such an opportunity was within the broad definition of "loss" and a loss within the broad meaning thereof in clause 9.1(f). Clause 9.1(f) obliges the first and second defendants to indemnify Maven for the loss of the opportunity to make money from Dr England's services under the FASA.

[44] As to the third defendant, Maven's now sole foundation for its claim against the third defendant is an entitlement to indemnity for the same form of clause via clause 6.7(b) of the BPA. It is helpful to consider clause 6.7 as a whole first. It provides:

> "**6.7 Continuing commitment of the practitioner.**
>
> (a) The parties acknowledge that the Purchaser has entered into this Agreement on the basis that the Practitioner continues to operate its Dental Business. The parties acknowledge the profitability of the Facilities and Administrative Services business is likely to decrease in the event that the Practitioner provides services negligently or ceases to operate its dental business before termination of the Facilities and Administrative Services Agreement in accordance with issue of a Convenience Termination Notice (as that term is defined in the Facilities and Services Agreement).
>
> (b) The Purchaser will be entitled to recover from the Vendor and is indemnified by the Vendor, against all loss which the Purchaser suffers or incurs in connection with the Practitioner ceasing to provide the services contemplated in clause 6.7(a). This clause does not limit Loss recoverable at law in contract, in tort (including negligence), under statute, in equity, under judicial or statutory bodies or under industrial awards or agreements or under any other clause of this Agreement.
>
> (c) Without prejudice to clause 6.7(b), where the Practitioner does not provide the services contemplated in clause 6.7(a) because of any breach by the Practitioner or the entity which is providing the services in clause 6.7(a) the Vendor must refund as a debt immediately due and payable on demand by the Vendor any Deferred Capital Payments which have been paid."

[45] In respect of clause 6.7(c), I record for completeness, the timing of the termination preceded the time when deferred capital payments had to be made. While clause 6.7(b) is the pertinent clause, it is noteworthy clause 6.7(a) recognises the obvious, which is that

the agreement was premised upon Dr England continuing to operate what was, in effect, his former dental business and that if he ceased, profitability would likely suffer.

[46] Turning to clause 6.7(b), it entitled Maven to recover from the third defendant, and be indemnified by the third defendant, against "all loss" which Maven suffers or incurs "in connection with" Dr England "ceasing to provide the services contemplated in clause 6.7(a)". The defendants' counsel accepts those services obviously included the provision of dentistry work to patients. "Loss" is again very broadly defined in clause 1 of the BPA and clause 6.7(b)'s language again casts a very broad causal net. It is again sufficient to encompass Maven's loss of the opportunity to profit from Dr England's services.

[47] The defendants' counsel submits "ceasing to provide the services" should be read as only relating to cessation of service provision that occurs voluntarily. The word "cease" is not defined by the BPA and there is no qualification of its meaning in the context of its use to suggest it ought be read down as meaning voluntarily ceasing. The word "ceasing" describes an event, namely something stopping, coming to an end. It does not describe, and is entirely neutral as to, the reason for the event. Clause 6.7(b) uses the word in that unqualified, neutral way, so as to identify the event, the ceasing, and not the reason for it, as the trigger for the right to indemnification for loss suffered in connection with the ceasing.

[48] It is therefore not to the point that it can be said Maven's exercise of its right to terminate is what caused the ceasing of Dr England's provision of services. It would be no more to the point from a different perspective that Dr England's own misconduct was a cause of the termination. It matters not under clause 6.7(b) what the reason for the ceasing was. The fact is there was a ceasing of provision of Dr England's services and clause 6.7(b) on its terms obliges the third defendant to indemnify Maven for the loss of the opportunity to make money from Dr England's dental services.

[49] The nature of the loss claimed for indemnification by the third defendant is thus the same as that claimed for indemnification by the first and second defendants. If there is to be judgment for such a loss, it will be judgment as against as all three defendants. I turn to the assessment of that loss.

[50] It is unnecessary to recite all the authorities to which I have been referred on the nature of this assessment. It is useful, however, to note by way of reminder the observations of Brennan J in *Sellars v Adelaide Petroleum NL* [1994] 179 CLR 332, 368 where His Honour observed:

> "Although the issue of a loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such

> hypotheses or possibilities: evaluation is a matter of informed estimation."

[51] In this case, the estimation of the hypothetical value of the money-making opportunity lost on termination of the FASA on 20 July 2015 is informed by a mixed array of reliable historical information preceding the FASA, overlayed with reliable information about what money was actually made during the five months when the FASA was in operation. Further to that, a further three years having gone by, the overall dental practice having continued to operate without Dr England practicing in it but with attempted replacements of him occurring. There therefore exists a useful contrasting body of information, allowing an informative comparison to be made between what might have been made with Dr England as part of the practice and what has been made as the practice has continued on in the wake of his loss.

[52] Commencing with the historical information preceding the commencement of the FASA on 17 February 2015, the dental practice which Maven effectively acquired by the BPA and FASA's was longstanding and profitable. The financial information about it is in evidence and the detail requires no recitation here. It shows that the practice's existing practitioners generated very significant revenue, foremost among them Dr England. He worked long hours and, in addition to general dental work, also performed orthodontic work. In Maven's experience as an owner of many dental practices, he was one of the highest generators of revenue for dental services it had encountered. His performance of orthodontic work, thus preserving additional revenue generating work in-house, was also uncommon among dentists. It cannot be doubted that he was an above-average generator of dental income and presented a money-making opportunity for Maven which was materially more beneficial than that presented by the average dentist. It is little wonder Maven paid a significant price and that its FASA locked Dr England into continuing to work at the practice, for a number of hours and days not materially less than he previously worked.

[53] The defendants' counsel emphasises that the FASA had no more specific clauses to ensure Dr England remained as productive as he had been, so that if he chose to, he could work at a slower, less productive rate. That theoretical prospect ought be borne in mind. Dr England's commendable professional work ethic was well-established. On his own testimony, he intended, had the FASA continued, to work as hard as he had already done, doing the type of work he had always done. The financial structure of the FASA gave him the financial incentive to do so. It is likely he would have continued on as before, subject to the modest, slowing influence of aging. He is in his 50's, and in apparently fair health, so a significant change in pattern over six years was unlikely.

[54] Turning to the five-month period during which the FASA was in operation, the financial results are in evidence and again require no recitation in detail. The analysis of that evidence by the plaintiff's expert accountant shows the same general financial trends for

the practice as in the past, although differences in record-keeping bear upon the precision of that comparison.

[55] On that evidence, Dr England's invoicing in that five months was $542,407. If annualised, the resulting figure would be about 1.3 million dollars, somewhat lower than the average of about 1.5 million in the preceding four years for him. However, that minor disparity is explained by the fact earlier financials blended billing for hygienists, who were working on Dr England's patients, with billing for Dr England's work, which did not occur post-acquisition – see, for example, exhibit 1, tab 16, page 20.

[56] The patterns of revenue generation at the practice after Dr England left are also instructive. That is because the value of the loss suffered by Maven as a result of termination was the value of the opportunity held by Maven, immediately preceding termination, to make money from the work Dr England would likely perform for the business over the remaining five years and seven months following termination, and which it would not otherwise have had the opportunity to make without him working for the business. The latter qualification is important for the opportunity arose in the context of a business in which Maven could make money from a variety of other actual and potential future employees. Much was said by Maven of how unique Dr England was, but it ought be appreciated it is not him, and rather the revenue-raising opportunity he uniquely presented which ought be the focus.

[57] It is inherently unlikely that the revenue generating potential of any individual dentist is entirely irreplaceable. The lost value of the opportunity for a dental business to make money from an individual dentist who tends to bill more than average because of a propensity to work long hours and an ability to perform in-house orthodontic work must necessarily be informed by the alternatives by which such a dental business can generate like revenue without such an individual.

[58] A dental business can replace departing dentists with a view to avoiding or at least diminishing any loss to it of dentist's billable servicing of patients. In the case of replacing an exceptionally hardworking dentist, if the available patient billable hours does not materially alter, the replacement might potentially be two dentists, one working full time and the other part time. This assumes there is room for an extra dentist and the support costs for an extra practicing dentist are inevitably an added cost, not previously incurred.

[59] As to the former, it is instructive to consider the available space at the practice. The number of surgeries, that is to say the number of available dental patient chairs at which billable work could be performed, has not changed. The practice had six such surgeries. It was a five day a week practice. It has 30 so-called chair days available a week. Pre-acquisition, Dr England and Dr Slatcher used four chair days a week. That is eight chair days. Two other junior dentists, Dr Long and Dr Nadine Slatcher, used 3.5 and two chair

days a week respectively. That is 5.5 days. Three hygienists used five, 4.5 and four chair days a week respectively. That is 13.5 days. This gives a total of 27 chair days out of a possible 30 chair days. The evidence therefore shows there was room for some growth in billable hours for patient chair use. I record for completeness that there was also a room used for general anaesthetic procedures which had the potential for use as a dental surgery.

[60] The notion of just employing more dentists using the spare available chair days to make up for the shortfall in having someone such as Dr England as some sort of answer to the lost opportunity to profit from Dr England is misconceived. It is tolerably clear Maven did intend to try and grow the practice and increase the billable hours worked – see, for example, exhibit 11, page 29, paragraph 29 and its exhibits at pages 30, 42 and 44. But any such increase and any associated extra profit would be in addition to the billable hours of Dr England from which Maven stood to profit if it had not lost that opportunity on termination and his cessation. The distinction requires some elaboration, but before moving to that elaboration another aspect of the evidence ought be noted.

[61] A table summarising profit and loss appears at clause 7.5 of the report of the plaintiff's expert accountant, Mr Lytras – see exhibit 1, tab 16, pp. 223 (p.15 of the report). It shows by way of illustration for present purposes that the practice's total income in 2014 was $3,285,848 and in 2017 was $3,259,487. A superficial approach would observe that they are similar amounts and therefore the absence of Dr England had no impact upon the profitability of the practice. This overlooks two obvious points. The first is inherent in the document itself. Perusal of the cost in particular of dental supplies, materials and laboratory fees shows a dramatic drop in their cost to the practice in 2017 as compared to 2014, explained by the economies of scale acquisitions of a large operation such as Maven. In its own right this provides an obvious explanation as to why, notwithstanding the absence of Dr England, the total income was on the face of it not materially different in the two years I have mentioned. The other consideration though is that this exercise overlooks the distinction in comparing the operations of the practice in the absence of Dr England without taking into account the inability of Maven to have a dentist who would generate the same income as Dr England.

[62] The distinction becomes obvious when one compares two hypothetical acquisitions of dental practices with a view to be practicing in the space of the dental practice in question. Compare the acquisition of practice A, an acquisition delivered by the combined agreements in the case at least until the termination date, that is, an acquisition effectively including Dr England, Dr Slatcher and two junior dentists, with an acquisition of practice B, that is, an acquisition of the same entity except without Dr England and instead of him, an average billing dentist, who I will for convenience call Dr Average.

[63] Either dental practice could be made more profitable in time by employing additional dentists in time. On any view of it one would pay more for practice A than practice B

because of the inherently greater opportunity for profit inherent in acquisition A. The key difference is that even if both practices grow and extra profits flow from new employees, Dr England is inevitably going to earn more profit for the owner than Dr Average. It might rhetorically be asked why would not an investor prefer to instead buy practice B with a view to then recruiting an equivalent to Dr England rather than another Dr Average. The answer in the real world, as the evidence shows, is that Dr Englands are not easily found.

[64] Maven had ample motivation to find one. I am satisfied on the evidence that it tried and could not find such a person. That is hardly surprising. High billing, experienced dentists are a valuable commodity, unlikely to be readily drawn into practice with a corporate operator like Maven, absent the purchase of their existing practice or some other very significant financial incentive at an inevitably high cost to the corporate operator.

[65] It is unsurprising the evidence shows as a matter of fact that Maven could not just replace like with like. In the sense that it in due course recruited a dentist to replace the departed Dr England, it was a replacement who was a dentist whose billing was materially less than Dr England's. Ensuing events have not left Maven any more able to recruit a replacement remotely close to Dr England's billing league.

[66] An examination of the profit Dr England did and would have earned Maven, had he stayed, compared to the profit Maven has been able to and will likely to continue to derive from his purported replacement or a like replacement was conducted by the plaintiff's expert, Mr Lytras. The accuracy of the underlying figures and calculations are agreed by the defendant's expert, Mr Delaney. The agreements reached on such matters by the experts, who gave useful concurrent evidence, allows me to proceed directly to the conclusions flowing from the exercise.

[67] Comparing the profit forecasts in respect of what would have occurred had Dr England continued, with the forecasts pertaining to Dr England's replacement dentist through to the completion of the six year period identifies an overall gap in lost prospective gross profit of $1,904,533. The experts are agreed an appropriate discount to apply to that exercise in respect of the net present value of future loss calculations is 12.5 per cent, which would give rise to the value of the aforementioned lost profit as expressed at the date of termination being $1,387,372 – see exhibit 13.

[68] The agreed discount of 12.5 per cent makes reasonable allowance for an array of relevant, though imprecise, considerations, allied with business risk along with allowance for the time value of money. The calculated amount, the plaintiff contends, is the value of the opportunity to make money from Dr England working in its practice which was lost by him ceasing work on termination. The exercise of valuing the lost opportunity of course involves consideration of an array of information which can sometimes descend to

imprecise estimations. However, it ought be acknowledged the exercise as described is very well-informed by reasonably reliable information.

[69] While the exercise in which I am engaged is an assessment of that which is, in essence, hypothetical, the above exercise allows the court to arrive at an estimation which is considerably better-informed than often occurs in a court undertaking such an exercise.

[70] It was argued that the above mentioned notional profit disparity exercise was, in fact, conservative. This was premised on the notion that the net profit after tax evidently identified as part of the exercise was $496,167, not the figure of $600,000 constituting the profitability target which would have triggered the payment of deferred consideration. The evidence of Dr England was that he would likely have reached that target. As against this, however, the exercise itself does not take account of the cost to the company of having to make the deferred capital payments had the target been reached. When one weighs up those two competing considerations, it seems to me they have the practical effect of neutralising each other as a relevant consideration, neither giving rise to a concern that the accountant's exercise is either too generous or too harsh.

[71] The value of the above exercise of the accountants, to my own assessment, still turns, despite the underlying reliable data used in that exercise, upon an assumption, namely that the replacement dentist's billing trends is an appropriate comparable indicator to illustrate the notional gap in profitability. I am not blessed with average billing information in respect of the dental profession generally. I am asked, in effect, to assume the replacement dentist billings represent the type which typical, competent dentists who are available in the marketplace generate. It is likely that the replacement dentist whose billing is featured in the accountant's exercise is within the range of such a typical billing and competent dentist, it being inherently unlikely that Maven would recruit and keep a dentist billing markedly less than, at least, the average.

[72] That said, over a five year seven month period, there is a realistic prospect such a recruit would bill progressively better over time, albeit not in the same stratosphere as Dr England's high billing levels. In a similar vein, there is also the consideration that the passage of time increases the prospect of a somewhat higher billing dentist being able to be recruited as a replacement for Dr England. Either way, it is reasonable to infer at least a slightly less significant notional gap in profit as the period of five years and seven months proceeds. I acknowledge events to date tend not to bear that expectation out, but it remains a reasonable expectation and there remains a substantial proportion of time to run. Thus, even allowing for what has occurred, I think an at least modest lowering of my prospective assessment is warranted.

[73] Applying that approach to my assessment, informed as it is by the information I have outlined, I, in all the circumstances, assess the value of the loss of opportunity at 21 July 2015, the day after termination, as being $1,250,000. It is necessary to deduct an agreed

sum of $22,500 from that figure to allow for the fees owed to Mr England at termination. This gives an award of $1,227,500.

[74] Applying the court costs calculator gives an interest award to today of $218,953.23, resulting in a total award of $1,446,453.23.

[75] This outcome dispenses with the counter-claim completely, save, of course, for the deduction I have already mentioned. Finally, another loss claimed by the plaintiff was for fees Maven paid to allegedly complete or repair incomplete orthodontic work. The evidence advanced did not prove that Maven was lawfully obliged to make such payments and did not, in turn, establish an entitlement to recover the quantum of those payments from Dr England.

[76] On the face of the facts before the Court costs should follow the event but it may be that there are considerations unknown to me, so it will be necessary to hear the parties as to costs at a future date.

[77] My orders then are:

(1) Judgment in the sum of $1,446,453.23;

(2) If costs are not agreed, I will hear the parties as to costs at 10 am on 12 October 2018 with out of town parties having leave to appear by telephone.