

# Certainty

---

A party seeking damages for a breach of contract must prove its harm with reasonable certainty. The following cases demonstrate some of the types of evidence courts consider in assessing whether the promisee has established its damages with certainty. One aspect of the certainty principle manifests in the reluctance of courts to grant damages for emotional distress in contract cases, at issue in the second opinion, below.

## **Kenford Co., Inc. v. County of Erie**

108 A.D.2d 132 (N.Y. Appellate Division 1985)

DOERR, Justice.

In the late 1960s the County of Erie obtained enabling legislation permitting it to finance and construct a sports stadium. Edward Cottrell, a local businessman, put together an assemblage of properties in the Town of Lancaster. Cottrell eventually obtained options to purchase in excess of 700 acres of land, some of which he tried to interest the County in purchasing for the purpose of building a domed stadium facility. Cottrell, who formed plaintiff Kenford Co., Inc. in 1968 [hereinafter Kenford] planned to develop the land surrounding the stadium and he also hoped to acquire a major league baseball franchise to play in the stadium. When Cottrell's efforts to interest the County in buying his land were unsuccessful, he consulted Judge Roy Hofheinz, who had developed the Houston Astrodome. Hofheinz suggested donating the Lancaster property to the County in exchange for the County permitting Hofheinz and Cottrell to lease or manage the stadium, which was to be built by the County. In May of 1969 Cottrell and Hofheinz formed plaintiff Dome Stadium, Inc. [DSI], which was owned two-thirds by Hofheinz and one-third by Cottrell. The two also agreed to share the peripheral land development scheme.

In June 1969 the Erie County Legislature passed a resolution authorizing the plan suggested by Hofheinz. Cottrell, as agent for Kenford, thereafter exercised his options on the Lancaster property, paying some \$2.6 million for the total assemblage. On August 8, 1969 the County, Kenford, and DSI signed a contract by which Kenford agreed to convey 178 acres of land in exchange for the County's promise to construct a domed stadium facility. The contract further provided that the County would either lease the stadium to DSI for 40 years, or permit DSI to manage the stadium for 20 years in accordance with an attached management agreement, if no acceptable lease could be arranged within three months. Title to the property was duly conveyed, but the parties thereafter failed to agree to lease terms, and the management contract came into being automatically.

The County sought bids on the stadium, but they were \$20 million over budget. On August 8, 1970 the County Legislature voted to abandon the project. Cottrell unsuccessfully sought to obtain substitute funding. Plaintiffs commenced the instant action alleging breach of contract and seeking specific performance or, alternatively, \$90 million in damages. Plaintiffs were granted summary judgment on the issue of liability (*Kenford Co. v. County of Erie*, 451 N.Y.S.2d 1021) and a trial was ordered on the issue of damages.

The damage trial lasted nine months, consuming over 25,000 pages of transcript. Plaintiffs attempted to prove that the breach caused them to suffer \$495 million in damages, including lost profits on a baseball franchise, a theme park, three hotels, an office park, a golf course, and a specialty retail center. Plaintiffs also sought to recover lost profit on the management contract, loss of appreciation in the value of the land surrounding the stadium site, and out-of-pocket expenses incurred in reliance on the contract. The trial court dismissed Kenford's claims of lost profits on the peripheral land development and the baseball franchise as being too speculative, but the court submitted the other items of damage to the jury, which awarded DSI lost profits of \$25.6 million on the management contract. The jury also awarded Kenford \$18 million for its lost appreciation in land value and it granted Kenford over \$6 million in out-of-pocket expenses. On appeal, the recoverability of all elements is challenged.

### **I. Lost Profits on the Peripheral Development**

In a breach of contract case, [o]nly such damages as are the natural and probable result of the breach may be recovered. Ordinarily, plaintiff may not recover for a collateral enterprise upon which he might have embarked, had defendant not breached the contract [citations omitted]. This rule is derived from the doctrine enunciated in *Hadley v. Baxendale* (156 E.R. 145, 151). Under this rule, recovery is limited to such damages as may fairly and reasonably have been in the contemplation of the parties when the contract was made (*Kerr S.S. Co. v. Radio Corp. of Am.*, 245 N.Y. 284). Thus, damages may not be recovered where the consequences of the breach are remote and indirect. "No one is answerable in law for all the remote consequences of his own acts" (36 N.Y.Jur.2d, Damages, § 13, citing *Hoffman v. King*, 160 N.Y. 618; *Coppola v. Kraushaar*, 92 N.Y.S. 436).

...In addition to the foreseeability requirement, to be recoverable "damages must be not merely speculative, possible and imaginary, but they must be reasonably certain.... They may be so uncertain, contingent and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved" (*Najjar Inds. v. City of New York*, 87 A.D.2d 329, 334, quoting *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 209). It is for the court to determine, in the first instance, whether as a matter of law the damages claimed

are too remote to permit recovery (*Fifty States Mgt. Corp. v. Niagara Permanent Sav. & Loan Assn.*, 396 N.Y.S.2d 925; *Motif Constr. Corp. v. Buffalo Sav. Bank*, 50 A.D.2d 718, 719).

Application of these rules to the instant case leads to the inescapable conclusion that the trial court properly refused to submit to the jury Kenford's claims pertaining to the peripheral land development and the baseball franchise. Although it was known that Kenford would try to buy a baseball franchise and would try to develop the land surrounding the stadium, it was by no means certain that Kenford would have been successful in doing so or that these enterprises would have thrived. Not all business ventures prove to be profitmaking. Moreover, although Cottrell had ideas for developing the peripheral land, these plans were by no means certain as of August 8, 1969.<sup>3</sup> We know of no precedent for holding a defendant liable for profits lost on collateral matters that are as remote and undeveloped as the plans involved herein (cf. *Contemporary Mission v. Famous Music Corp.*, 557 F.2d 918 [permitting plaintiff to recover for lost sales on a record following defendant's breach of contract to promote the record, but denying lost profits on a proposed concert tour, etc.] ). The office buildings, golf course, and theme park for which plaintiff now seeks lost profits were nothing more than visions at the time the parties entered into the contract. No specific plans had been drawn for any of these ventures. The proposed baseball franchise was equally speculative. It was by no means certain that Cottrell would have been able to purchase a baseball franchise since such a purchase would have required approval of a percentage of league owners. Moreover, it is completely speculative to say that the franchise would have been a profitable one.

## II. Loss of Appreciation in Peripheral Land Values

[Kenford also sought to recover for the losses to the value of land purchased in anticipation of the development that would be spurred by the new stadium. The appellate court concluded that the trial court erred, awarding damages based on improper appraisal evidence. Kenford was allowed to try that issue again, but in the end, the Court of Appeals of New York, the court of last resort in the state, held as a matter of law that the County could not be held liable for Kenford's losses on foreseeability grounds. *Kenford Co. v. Cty. of Erie*, 73 N.Y.2d 312, 321 (1989) ("There is no indication that either Kenford or the County reasonably contemplated at the time of the contract that this risk was assumed, either wholly or partially, by the County.")'.<sup>3</sup> Eds.]

---

<sup>3</sup> For example, Cottrell's testimony revealed that, as of the contract date, there had been no feasibility study for a theme park and his experts had not yet inspected the golf course site.

### III. Lost Profits on the Management Contract

The issue of DSI's lost profits on the management contract involves two questions: whether an unestablished business may recover lost profits in New York and, if so, whether plaintiff's proof was adequate.

#### a. Per Se Rule v Rule of Evidence

We begin our analysis by noting that we found no case from a New York State court permitting a recovery of lost profits to a new business. The seminal case on the subject is *Cramer v. Grand Rapids Show Case Co.*, 223 N.Y. 63. The defendant in *Cramer* breached its contract to deliver furniture to plaintiffs thereby preventing the latter from opening their ladies clothing store in a timely fashion. In reversing an award of lost profits, the court noted that evidence of plaintiffs' subsequent profit, earned after they were able to open their store, was insufficient proof of what their lost profits would have been had defendant not breached the contract. The court did not establish a per se rule of nonrecovery of lost profits; the court merely stated that, as an evidentiary matter, a new business would almost never be able to establish sufficient proof to recover lost profits. New York has thus been characterized as having a per se rule of nonrecoverability of lost profits to a new business [citations omitted].

In juxtaposition to the New York State cases, there are several Federal cases in New York permitting new businesses to recover lost profits. The key case was *Perma Research & Devel. Co. v. Singer Co.* 402 F.Supp. 881, *aff'd*. 542 F.2d 111, *cert. denied*. 429 U.S. 987, 97 S.Ct. 507, 50 L.Ed.2d 598. In *Perma Research*, the court cited *Cramer v. Grand Rapids Show Case Co.* (*supra*) for the proposition that lost profits in a new venture are not ordinarily recoverable, but then went on to hold that lost profits may be awarded if plaintiff establishes three elements: that the lost profits are the direct and proximate result of the breach; that profits were contemplated by the parties; and that there is a rational basis on which to calculate the lost profits (*Perma Research & Devel. Co. v. Singer Co.*, *supra*, p. 898). The first two criteria reflect the lost profits test applicable to established businesses as enunciated in *Witherbee v. Meyer*, 155 N.Y. 446, 449–450, *supra*). What the court did in *Perma Research*, in essence, was to add a third requirement for new businesses by requiring them to establish some rational basis on which to calculate the lost profits. By so holding, the court converted the *Cramer* rule of nonrecoverability into a rule of evidence. [citations omitted].

Although the issue was not directly raised, we gave tacit approval to the rule as enunciated by the Federal courts in our recent decision in *Whitmier & Ferris Co. v. Buffalo Structural Steel Corp.*, 482 N.Y.S.2d 927....In accordance with our view expressed in *Whitmier & Ferris Co.*, we now

hold that there is no per se rule precluding a new business from recovering lost profits and we adopt the test employed by the Second Circuit Court of Appeals in *Perma Research & Devel. Co. v. Singer Co.* (*supra*).

### **b. Application of the Perma Test**

The first two *Perma Research* criteria are clearly met. The County's failure to build the stadium was clearly the proximate cause of any loss of profits stemming from the management contract and it is unquestionable that profits by DSI from the management contract were contemplated by the parties. We conclude, however, that plaintiff has failed to establish a rational basis upon which lost profits may be calculated.<sup>8</sup>

.... To establish its lost profits, plaintiff called an expert who prepared a series of projections based on the experience of other domed facilities as well as an analysis of the market in the Buffalo area. The expert opined that the facility would hold 10 professional football games a year, as well as 42 open time events including three consumer shows, six high school football games, five circuses and seven musical or entertainment events. The expert then developed an average ticket price per event, which was multiplied by his estimate of anticipated attendance. The expert also developed an approximation of what each person would spend on parking and concessions. These figures were then computed to arrive at an anticipated revenue stream. The expert also gave his opinion of what the expenses of running the operation would be. He used a flat figure for salaries and then estimated that other expenses, such as advertising and legal fees, would be a percentage of gross revenue. His projected expenses were then subtracted from his projected revenue to arrive at a before-tax net income figure. One sheet summarizing the foregoing information was prepared for each of the 20 years of the management contract. The expert's opinion of net profit for each year ranged from just under \$1 million for the first year to over \$4 million in the twentieth year. Based upon these projections of net income, the jury found lost profits totaling over \$28 million, which the court reduced to \$25.6 million after applying a formula to arrive at present value.

The issue is whether the figures supplied by the expert are sufficient, as a matter of law, upon which to base an award of lost profits. Once again, we find a decided split between the New York State cases and the Federal cases. Several Federal cases have permitted statistical analyses

---

<sup>8</sup> Although we have already resolved plaintiff's claims with respect to theme parks and the like, we note that lost profits from those ventures would not be recoverable even had they been within the parties' contemplation, due to the absence of any rational basis for calculating the loss.

to support an award of lost profits to a new business. Significantly, however, all of those cases involved only a royalty payment or the sale of a single product.<sup>9</sup> The common thread running through those cases is that only one variable was involved, i.e., how many of the product would have been sold. Thus it was certain that plaintiff would have made money and the only uncertainty was the amount. The instant case, by contrast, is filled with conjecture. The expert had to estimate, first, how many, if any, events would be held at the stadium; how many people would attend each event; and how much each person would spend on parking and concessions. Additionally, and even more compelling, the expert also had to estimate all expense items. Highly significant in our view is that the expert assumed that various expenses would be a percentage of gross revenue, such as advertising. In short, the expert was assuming the fact to be proved, to wit, that revenues would exceed expenses. It is not inconceivable that DSI could have ended up spending more promoting events than it took in as receipts.

\*\*\*

We find plaintiff's projections insufficient as a matter of law to support an award of lost profits.<sup>11</sup>

---

<sup>9</sup> See *Lexington Prods. Ltd. v. B.D. Communications*, 677 F.2d 251, *supra* [plaintiff granted defendant an exclusive license to sell its dusting brush in return for royalties and defendant was obligated to spend a certain sum in TV advertising; defendant failed to spend the required sums and plaintiff was permitted to offer proof that, had the required sums been spent, sales of plaintiff's brushes would have increased in proportion to the amount spent]; *Contemporary Mission v. Famous Music Corp.*, 557 F.2d 918, *supra* [plaintiff granted defendant an exclusive right to distribute plaintiff's record in return for royalties and defendant thereafter breached; the court permitted plaintiff to use a statistical analysis to estimate how many records could have been sold had defendant continued to promote the record]; *Perma Research & Development Co. v. Singer Co.*, 402 F.Supp. 881, *affd.* 542 F.2d 111, *supra* [defendant breached its agreement to use its best efforts to market plaintiff's patented device; plaintiff was permitted to use sales projections to establish how many of the devices would have been sold, but the court noted that the sales projections were prepared at the request of defendant prior to entering into the contract and thus were not prepared "with an eye to litigation"]; *For Children, Inc. v. Graphics Intl.*, 352 F.Supp. 1280, *supra* [plaintiff permitted to project that 75% of its books would have been sold]. The projections permitted in Federal cases involving established businesses similarly involved a royalty arrangement (*Bloor v. Falstaff Brewing Corp.*, 454 F.Supp. 258, *affd.* 601 F.2d 609); an exclusive distributorship (*Autowest v. Peugeot*, 434 F.2d 556) or the lost profit on an old business less the investment return derived from the sale of the business (*Lee v. Joseph E. Seagram & Sons*, 552 F.2d 447, *supra*). None of these cases permit a plaintiff to project both revenues and expenses of an unestablished business.

<sup>11</sup> We have considered the cases cited to us from other jurisdictions but find that, even under the holdings of those cases, the instant award of lost profits could not be sustained (see *S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.*, 58 Cal. App. 3d 173 [parking garage operator was permitted lost profits after developer failed to construct garage, but court noted that lessee was experienced in the business and the operation of a parking garage is a relatively simple operation with sufficiently few decisions to make the prediction of profits reasonably possible]; *Smith Dev. Corp. v. Bilow Enterprises*, 112 R.I. 203 [allowing a McDonald's Restaurant lost profits based on the experience of other McDonald's restaurants in the area; the court noted the high degree of similarity among restaurants in this franchise]; see also, *Riley v. General Mills*, 226

#### IV. Out-of-Pocket Expenses

Lastly, defendant seeks reversal of the \$6 million awarded Kenford as reliance and mitigation damages. It is well settled, of course, that a party may not recover both the expense of performing his side of the contract and the profit to be received under it, since “an award of lost profits ... will make plaintiff whole” (*R & I Electronics v. Neuman*, 66 A.D.2d 836, 837). By contrast, a party may recover mitigation expenses in addition to lost profit, because mitigation expenses would not have been incurred had defendant not breached the contract, and hence there is no double recovery. We view all damages awarded after the date of breach (August 8, 1970) as mitigation damages properly submitted to the jury, and accordingly we affirm the jury’s finding of mitigation damages of \$6,160,030.46. The jury’s finding of expenses prior to that date (\$6,218.17 and \$636,502.34), however, is reversed and the matter remitted for a new trial. Upon retrial, plaintiff’s proof should not include any sums expended for land acquisition expenses (i.e., brokerage commissions, recording fees, etc.) or for interest paid on the mortgages, since these sums would have been paid even without the breach and since plaintiff will be compensated for these sums by being awarded loss of appreciation of land value. Only expenses incurred as preparatory to the aborted management agreement, for which no lost profits are recoverable, may be awarded.<sup>12</sup>

Accordingly, the judgment should be modified and the matter remitted for further proceedings in accordance with this opinion.

Judgment modified, on the law, and as modified, affirmed, without costs, and matter remitted to Supreme Court, Erie County, for a new trial, in accordance with this opinion.

O’DONNELL and SCHNEPP, JJ., concur.

---

F.Supp. 780 [permitting recovery of loss of commissions on insurance policies]; *Sandler v. Lawn-A-Mat Chem. & Equip. Corp.*, 141 N.J.Super 437 [breach of a distributorship agreement]). Of these cases, only two involved projections of expenses, and in these cases (involving the McDonald’s restaurant and the parking garage) there was a high degree of similarity between the business not constructed and the businesses from which data was derived.

The instant case is more analagous to those cases denying recovery to a new business (*China Doll Rest. v. Schweiger*, 119 Ariz. 315, 580 P.2d 776 [a restaurant]; *Evergreen Amusement Corp. v. Milstead*, 206 Md. 610 [drive-in theater]; *Albin Elevator Co. v. Pavlica*, 649 P.2d 187 [Wyo.] [wheat farm]).

<sup>12</sup> We feel compelled to note that the Court is unanimous in its determination of all major issues raised on this appeal, save one—loss of appreciation of peripheral land values—the dissenters differing views on this single issue being expressed at pages 956-957 of the dissenting opinion.

HANCOCK, J.P., and BOOMER, J., dissent in part in the following opinion by HANCOCK, J.P. (omitted).

### Notes and Questions

1. Historically, some courts flatly barred recovery of lost profits by a new business on the ground that without a track record of sales and expenses, lost profits are too difficult to prove. The majority of courts now take a more liberal approach, rejecting a per se bar. Courts instead look for evidence sufficient to establish the new business's claimed losses with reasonable certainty. See, e.g., *Fera v. Village Plaza, Inc.*, 242 N.W.2d 372 (Mich. 1976).
  - a. Would a rule barring lost profit analysis in new business cases reach better results in the long term?
  - b. How new is new? When is a new business no longer a new business? If an established business enters a somewhat different type of work, should it get the "new business" treatment? Imagine a company that has historically managed Subway restaurants that wants to branch out to Taco Bell franchises. New business?
2. Courts attempting to calculate lost profits will find the endeavor easier if a business has a track record. But even without a track record, courts may accept evidence including expert testimony, economic and financial data, market surveys, market analysis, and business records of similar enterprises. See also Restatement (Second) of Contracts § 352.
3. Consider the following: Rebennack is a student at Severinsen College of Medicine. Two months short of graduation, the school dismisses him. Rebennack prevails on a breach of contract claim for wrongful dismissal. Rebennack argues he should be able to plead and prove damages from the loss of his earning capacity as a doctor. Severinsen College argues that Rebennack's earning capacity is too speculative. What result? See *Sharick v. Southeastern University of Health Sciences, Inc.*, 780 So.2d 136, 140 (Fla. App. 2000).
4. The UCC contemplates that a seller of goods can recover lost profits, UCC § 2-708(2), and it is not necessary to show a history of earnings, even if the seller is engaged in a new venture. *Id.*, § 2-708, Comment 2. Cf. § 2-715, Comment 4 ("The burden of proving the extent of loss incurred by way of consequential damage is on the buyer,



but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.”). Is the UCC approach to certainty different from the approach under the common law?

5. Did you find it interesting that the state court stated a federal case applying New York law misstated its doctrine but then adopted the federal approach to certainty doctrine going forward?

**Chung v. Kaonohi Center Co.**

62 Haw. 594 (Supreme Court of Hawaii 1980)

RICHARDSON, Chief Justice.

This case arises out of a contract to lease concession space for a fast-food Chinese kitchen in the Pearlridge Mall. Plaintiffs-appellees, Farrant Chung, Jordon Y. S. Lum, and J & C Company, a partnership consisting of Chung and Lum, brought a successful breach of contract action in the circuit court of the first circuit against defendants-appellants, Kaonohi Center Company, a Hawaii general partnership, Sheldon M. Gordon and E. Phillip Lyon, individual general partners, and Pearlridge Mall-joint venture 315068, Ed Brennan, Sheldon M. Gordon, E. Phillip Lyon, John Fujieki, and Northwestern Mutual Life Insurance Company, a Wisconsin corporation, partners and joint venturers. We affirm.

In September 1971, plaintiffs negotiated with William Prosser, defendants’ agent, for a ten-year lease on a Chinese fast-food outlet as one component of an international kitchen to be constructed by defendants at the Pearlridge Mall. At that time, plaintiff Chung was a stockbroker and plaintiff Lum owned and operated the House of Dragon, a Chinese restaurant in the Pearl City Shopping Center.”

As a result of the negotiations, a contract to lease the Chinese kitchen was executed on January 17, 1972. On January 20, 1972, plaintiffs paid defendants a \$1,666 deposit on the lease.<sup>3</sup> In anticipation of operating the Chinese kitchen, plaintiffs arranged for financing, ordered equipment and furnishings, hired chefs and workers, advertised in the yellow pages of the telephone book for the to-be-built kitchen, and incurred other expenses.

---

<sup>3</sup> A formal lease between the parties may have been entered into. However, the document in evidence is not signed by either party. In any event, the jury below found that defendants breached their contract to enter into a lease.

Plaintiffs were in frequent contact with defendants after the lease was signed and the record shows voluminous correspondence between the parties concerning the design and operation of the fast-food Chinese kitchen. Whenever plaintiffs inquired about an opening date, they were told to be patient and were assured that they would be notified as soon as a firm date was set. During this period, defendants were negotiating with other parties about leasing the Chinese kitchen. Defendants had given a right of first refusal to a Ms. Liza Chong and were also negotiating with a Mr. Sergio Battistetti, whose partnership eventually obtained the lease on the entire international kitchen operation. Plaintiffs were never informed of these other negotiations. In fact, when confronted with a newspaper article naming Battistetti as the lessee of the international kitchen, Prosser denied the report.

In early June 1973, Prosser sent a letter to plaintiffs informing them that the landlords of Pearlridge Shopping Center had decided not to pursue plaintiffs' lease of the Chinese kitchen. A check for \$1,666, the amount of plaintiffs' deposit, was enclosed.

In the trial court, plaintiffs sought specific performance of the lease agreement, contract damages including damages for emotional distress and loss of future profits, and punitive damages for fraudulent, malicious and intentional misrepresentation and acts. The trial judge denied plaintiffs' request for an instruction on punitive damages,<sup>4</sup> but allowed instructions on damages for emotional distress and lost profits. The jury returned a special verdict awarding \$50,000 for emotional distress and \$175,000 for lost profits. Defendants then moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motion was denied and this appeal followed.

On appeal, appellants do not challenge the jury's finding with respect to liability. With one exception, this appeal is premised entirely upon the jury's award of \$225,000 in contract damages.

## **II. Damages for Emotional Distress and Disappointment.**

Appellants argue that the trial court erred in giving Plaintiffs' Instruction No. 11, which read:

If you find in favor of the plaintiffs, plaintiffs have a right to recover all damages which they have suffered and which the defendants or a reasonable person in the defendants' position should have for[e]seen would result from their acts or omissions. Such damages may include reasonable compensation for emotional

---

<sup>4</sup> On appeal, the ruling on punitive damages is not challenged by plaintiffs.

distress and disappointment, if any, which plaintiffs have suffered as a proximate result of the defendants' conduct. There is no precise standard by which to place a monetary value on emotional distress and disappointment, nor is the opinion of any witness required to fix a reasonable amount. In making an award of damages for emotional distress and disappointment, you should determine an amount which your own experience and reason indicates would be sufficient in light of all of the evidence.

In the trial court, appellants objected to the instruction on the grounds that "such emotional distress is recoverable only under special circumstances and not in an ordinary commercial contract such as we have here today." Appellants also urged this same contention in the briefs filed on appeal. However, at oral argument and in response to an inquiry from the court, appellants argued alternatively that even if damages for emotional distress could have been awarded, the instruction was defective because it was incomplete....

The seminal case in this jurisdiction on damages for emotional distress and disappointment arising from breach of a contract is *Dold v. Outrigger Hotel*, 501 P.2d 368 (1972). In *Dold*, plaintiffs, who were visitors from the mainland, had booked hotel accommodations at the Outrigger Hotel. Upon arriving at the hotel, plaintiffs were refused accommodations and transferred to another hotel of lesser quality because the Outrigger lacked available space. We upheld a jury instruction allowing damages for emotional distress and disappointment, stating that "where a contract is breached in a wanton or reckless manner as to result in a tortious injury, the aggrieved person is entitled to recover in tort." 54 Haw. at 22, 501 P.2d at 372.

Appellants urge us to adopt a rule limiting the holding of *Dold* to "personal" contracts such as contracts of marriage, contracts of burial, and contracts to deliver personal messages. They argue that under traditional contract law, damages are allowable only for those injuries which are reasonably foreseeable at the time the contract was made. Since the primary objective of a "personal" contract is that of comfort, happiness, or well-being, emotional distress is a foreseeable injury which could result from a contract breach. Appellants reason that, unlike a personal contract, a commercial contract has as its primary objective financial gain and it is not reasonably foreseeable that the breach of such a contract could cause emotional distress and disappointment.

In several recent cases, see *Island Holidays, Inc. v. Fitzgerald*, 574 P.2d 884 (1978); *Uyemura v. Wick*, 551 P.2d 171 (1976), we have implied that damages for emotional distress and disappointment may be recoverable when the relationship between the parties is based on a commercial contract. We now expressly so hold. We do not think that the dispositive factor

in allowing damages for emotional distress is the nature of the contract. The dispositive factor is, rather, the wanton or reckless nature of the breach. The basis of our holding in *Dold* was our recognition that “certain situations are so disposed as to present a fusion of the doctrines of tort and contract.” 54 Haw. at 22, 501 P.2d at 372.

The facts in this case present an ideal situation for application of the *Dold* rule. Appellants negotiated with three separate parties, including appellees, for the lease of the Chinese kitchen. At the time appellants signed the contract to lease to appellees, they had already given a right of first refusal to Liza Chong. During the year and a half after the contract to lease the kitchen was signed, appellants’ agent, William Prosser, made numerous representations to appellees that they had secured the lease. Prosser and Sheldon Gordon, one of the general partners of Kaonohi Center Company, were also well aware of the effort and funds expended by appellees in reliance on the lease and allowed appellees to continue to believe that they had secured the lease. Finally, Prosser flatly denied a newspaper report that the kitchen would be leased to another party. The actions of appellants in this case were reprehensible and clearly amounted to wanton and/or reckless conduct sufficient to give rise to tort liability.

### **III. Damages for Loss of Anticipated Profits.**

We turn now to appellants’ contention that damages for loss of anticipated profits should not have been allowed. The trial court, over defendants’ objection, charged the jury as follows:

Where the breach of contract consists of repudiating the contract or preventing its performance, the non-defaulting party may recover profits, presumed to have been contemplated by him, reduced to present day value, (that) he would have realized had the contract been fully performed, as is proved by the preponderance of the evidence. The profits which would have been realized had the contract been performed and which have been prevented by its breach are included in the damages recovered where from the express or implied terms of the contract or from the special circumstances under which it was made, it may be readily presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

Plaintiffs’ Instruction No. 9.

Appellants argue that, as a matter of law, expected profits from a new or unestablished business are too speculative to warrant recovery. Alternatively, they contend that even if this

court should hold such profits recoverable, the proof in this case failed to meet the standard of reasonable certainty.

The general rule with regard to damages in a breach of contract action is that “when one sustains loss by breach of a contract, he is entitled to have just compensation commensurate with his loss.” *Ferreira v. Honolulu Star-Bulletin*, 356 P.2d 651, 655 (1960). In *Ferreira*, plaintiff sought damages for loss of profits which would have been realized had defendant, Honolulu Star-Bulletin, fulfilled its contract to print an advertisement for an upcoming attraction at plaintiff’s theater. We recognized that future profits may be an appropriate element of contract damages, but found the proof offered in the case insufficient to establish profits with reasonable certainty....

While *Ferreira* recognized that lost profits may be awarded in a contract action, we have never ruled directly on whether future profits in an established or new business are allowable.

\*\*\*

Recent cases in several jurisdictions, however, have rejected a per se rule based upon the classification of a business as new or unestablished and focused instead upon whether a plaintiff can prove lost profits with reasonable certainty. *S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.*, 130 Cal.Rptr. 41 (Ct. App. 1976); *Vickers v. Wichita State University, Wichita*, 213 Kan. 614 (1974); *Smith Development Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203 (1973); *Wyoming Bancorporation v. Bonham, Wyo.*, 563 P.2d 1382, reh. denied. 566 P.2d 219 (Wyo. 1977). See “*Remedies-Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated*,” 56 N.C. L. REV. 693 (1978). We find the reasoning of this latter line of cases persuasive and reject the harsh rule which forecloses recovery merely because a business is new or unestablished. In our opinion, it would be grossly unfair to deny a plaintiff meaningful recovery for lack of a sufficient “track record” where the plaintiff has been prevented from establishing such a record by defendant’s actions. Thus, we hold that where a plaintiff can show future profits in a new or unestablished business with reasonable certainty, damages for loss of such profits may be awarded.

\*\*\*

We look now at the evidence of future profits in this case to determine whether it met the standard of reasonable certainty. Plaintiffs’ key witness on anticipated profits was Don Voronaeff, a real estate and business appraiser. Voronaeff valued the proposed Chinese

kitchen using three different valuation approaches a reproduction cost analysis,<sup>7</sup> a comparative market analysis,<sup>8</sup> and an income stream analysis.<sup>9</sup> In reaching a final valuation figure, Voronaeff relied primarily on his income stream analysis, but included both the reproduction cost analysis and comparative market analysis as a check on that figure.

While appellants do not challenge the different valuation approaches utilized by Voronaeff, they do challenge the basis for his figures. They particularly focus on his assumptions regarding costs and expenses of plaintiffs' proposed operation. In order to evaluate plaintiffs' evidence, we must examine in some detail Voronaeff's income stream analysis.

\*\*\*

In his analysis, Voronaeff used \$420,000 as the gross income for the first year of operation and projected that that figure would increase by ten percent each year.<sup>10</sup> Voronaeff testified that he arrived at this figure by looking at the actual gross income of the Chinese kitchen in the Pearlridge International Kitchen run by Mr. Battistetti....

Appellants object to the gross income figure utilized by plaintiffs' expert since it was based on an existing operation not run by plaintiffs. We reject this argument for obvious reasons. Appellants' contract breach prevented appellees from establishing a profit and loss record on which to base a gross income figure. The restaurant most nearly approximating plaintiffs' proposed kitchen was Battistetti's Chinese kitchen. It was in the identical location and served the same type of food to the same type of clientele as plaintiffs' proposed restaurant. Further, plaintiffs' expert also testified that he considered the gross income from other Chinese restaurants and ran an independent survey of the Battistetti operation as a check on the gross

---

<sup>7</sup> The cost, based on current prices, of reproducing the assets of the business is determined; this method produced an appraisal of \$78,471.

<sup>8</sup> Recently sold businesses of a similar nature are compared by both gross and net income to the subject business to indicate a fair market value; this method produced an appraisal according to gross income of \$331,800 and according to net income of \$385,365.

<sup>9</sup> The net income the business will produce over its life is determined and capitalized at a rate reflecting an appropriate rate of return to the investor and the risk involved in the business venture. See discussion in text.

<sup>10</sup> The ten percent per year projected increase was based on Voronaeff's investigation of population and growth studies of the surrounding area which indicated at least a ten percent annual increase in population. Voronaeff testified that with proper management, a business operating in the area should also increase its volume by that percentage.

income figure. Under these circumstances, we find no error in allowing Mr. Voronaeff to use \$420,000 as the first-year gross income of plaintiffs' proposed business.

The next stage in Voronaeff's analysis was estimating the cost of goods and expenses and subtracting them from the gross income to reach a net income figure. While plaintiffs' expert relied primarily on the Battistetti operation in establishing a gross income figure, he did not use the actual expenses and cost of goods from Battistetti's Chinese kitchen. Instead, he subtracted estimates which he testified were based on industry standards.... After subtracting each expense, Voronaeff derived a net income figure of \$67,608 for the first year of operation. He then capitalized that net income figure at a rate of 20% over the ten-year life of the lease to reach a final value of approximately \$225,000.<sup>11</sup>

Appellants argue that Voronaeff's testimony as to cost of goods and expenses was speculative and lacked a factual basis. Thus, they contend, the net income on which Voronaeff based his income stream analysis was highly conjectural and the resulting valuation inaccurate.

It is well established in this jurisdiction that a witness having the necessary qualifications may give an opinion as to the value of property. *State v. Kunimoto*, 62 Haw. 502, 617 P.2d 93 (1980); *State v. Dillingham Corp.*, 60 Haw. 393, 591 P.2d 1049 (1979).

\*\*\*

In the instant case, plaintiffs' expert testified in great detail on estimated expenditures, explaining the amount of money to be spent in each category. These estimates were based on his appraisal experience and his examination of other restaurant operations.<sup>12</sup> Once a witness

---

<sup>11</sup> In explaining this method, Voronaeff stated, "What we're saying is that someone would pay \$225,000 to obtain an annual net income of \$67,000 and they'd be getting a 20 percent return to their investment."

In a separate analysis, Voronaeff also calculated the net income of the restaurant for a ten-year period by projecting an increase of ten percent in both gross income and expenses. He concluded that the total net income would be \$1,077,000, which discounted to present-day net value would be \$419,000.

<sup>12</sup> This case is distinguishable from *State v. Davis*, 53 Haw. 582, 499 P.2d 663 (1972), in which we disallowed testimony of an expert real estate appraiser that was based on information obtained from an unidentified engineer. We stated "an expert witness may not, however, serve as a mere conduit for the hearsay opinion, the factual basis of which is not established through evidence, of another expert who does not testify when the expert who does testify lacks the requisite qualifications to render the opinion in his own right. 53 Haw. at 589-90, 499 P.2d at 669. In this instance, Voronaeff's opinion was based on his own estimates and knowledge. Of course, the defendants could have asked him to produce evidence of the underlying facts upon which he based his estimates. Although appellants made a running objection to Voronaeff's testimony on hearsay grounds, they did not specifically object on these grounds nor request proof of the underlying facts. In any event, we note that there is a substantial authority for the receipt of expert opinion testimony notwithstanding the

is qualified as an expert appraiser, he or she should be permitted to give an opinion using any of the accepted methods of valuation. Weaknesses in reaching the valuation go to the weight of such testimony. It is incumbent on the opposing party to bring out any such weaknesses on cross-examination or through presentation of counter evidence.

Appellants had sufficient opportunity at trial to bring to the jury's attention any fallacies in Voronaeff's appraisal. Our examination of the record shows that appellants' counsel vigorously cross-examined Voronaeff on his expense and cost assumptions. It was made clear to the jury that some of Voronaeff's cost and expense figures were estimates.

\*\*\*

The jury, as fact-finder, had the responsibility of judging the credibility of the witnesses, resolving conflicting evidence and assessing the weight of the expert's testimony. We are of the opinion that, on the whole, the jury had sufficient data from which to make a rational judgment as to the loss of future profits and on which to base its award.

\*\*\*

Affirmed.

### Notes and Questions

1. Hawai'i was one of the few states where a plaintiff could recover damages for emotional distress in a contract case. See Andre Keith Sanders, *Brown v. Fritz: A Further Restriction on the Recovery of Damages for Emotional Distress Arising from a Breach of Contract*, 14 AM. J. TRIAL ADVOC. 203, 214–15 (1990). But Hawai'i's Supreme Court retrenched in 1999, holding in *Francis v. Lee Enterprises, Inc.*, 89 Haw. 234, that "Hawai'i law will *not* allow tort recovery [in a contract case] in the absence of conduct that (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract." *Id.* at 235.
2. Damages for emotional distress are frequently described as tort-like in nature, and thus courts express concern that granting emotional distress damages in contract cases

---

fact that the expert's sources of information are not admissible. Cf. 3 WEINSTEIN'S EVIDENCE P 703 (02) (1978); Hawaii Rules of Evidence, Act 164 (10th Leg. Sess. 1980), Rule 703 and commentary thereto. It is within the discretion of the trial court to disallow expert testimony where it feels the underlying facts or data indicate lack of trustworthiness. *Id.*



threatens to collapse the distinction between tort and contract. Granting emotional distress damages in contract cases is also seen as likely to reduce the predictability of resolving contract disputes. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1988). Do either of these rationales sufficiently justify denying recovery of damages for emotional distress? Why should maintaining distinct common law regimes and/or the predictability of damages in contract cases matter more than remedying the wholly foreseeable harms suffered by the promisee?

3. As noted by one court, were the rule in *Hadley* literally applied, “damages for mental distress would be recoverable for virtually every breach of contract” because the ““pecuniary loss”” following the breach ““almost invariably causes some form and degree of mental distress.”” *Valentine v. General American Credit, Inc.*, 260 362 N.W.2d 628, 629 (1984) (quoting DAN E. DOBBS, REMEDIES, § 12.4). And yet the general rule is to “uniformly deny” recovery for mental distress damages even though they are foreseeable. *Valentine*, 420 Mich. at 260 (quoting GRISMORE, CONTRACTS (rev. ed.), § 203, p. 320).
4. There are a handful of circumstances where the nature of the contract is personal and damages for emotional distress are more readily granted. For example (as cited in *Valentine*), in *Vanderpool v. Richardson*, 52 Mich. 336 (1883), recovery was allowed for breach of a promise to marry. In *Stewart v. Rudner*, 349 Mich. 459 (1957), a doctor who failed to fulfill his promise to deliver a child by caesarean section was required to pay mental distress damages. In *Mibolevich v. Mid-West Mutual Auto Ins. Co.*, 261 Mich. 495 (1933), the plaintiff, who was jailed for failure to pay a liability judgment, recovered mental distress damages from an insurer who had failed to pay the judgment. Courts in Michigan distinguish between commercial or pecuniary contracts, in which emotional distress damages are generally not awarded, from “contracts of a personal nature,” for which damages for emotional distress may be recovered. *Lane v. KinderCare Learning Centers, Inc.*, 231 Mich. App. 689, 693 (1998) (citing *Stewart v. Rudner*, 349 Mich. 459, 469, 84 N.W.2d 816 (1957)). Breaches that result in physical injury to the person, as in the medical malpractice context, may also result in an award of damages for emotional distress. *See, e.g., Sullivan v. O’Connor*, 296 N.E.2d 183 (Mass. 1973) (botched cosmetic surgery). *See also* Restatement (Second) of Contracts § 353 (an exception to the general rule denying emotional disturbance damages for breach of contract if “the contract or breach is of such a kind that serious emotional disturbance was a particularly likely result”).

5. While a person's home seems a cite for potential personalized injury, and damage to the home a potential cause of significant emotional distress, courts generally do not permit emotional distress damages for contract claims of negligent construction of a personal residence. As the Supreme Court of California noted in *Erlich v. Menezes*, 21 Cal. 4th 543, 560 (1999), permitting such claims would "make the financial risks of construction agreements difficult to predict."