

LAW SOCIETY OF WESTERN AUSTRALIA

CPD SEMINAR

***IS IT WORTH FIGHTING FOR?  
VALUATIONS IN LITIGATION***

Wednesday, 3 March 2010

**Topic 3: Beginning With The End In Mind**

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- 1 If false representations have caused an investor to buy an income earning property and lose the opportunity to buy an alternative investment how are damages to be assessed? What evidence must be called to prove the extent of loss? What evidence is admissible?
- 2 These issues were addressed in the recent decision of the Court of Appeal of the Supreme Court of Western Australia in *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd [No.2]* [2009] WASCA 183.
- 3 Before I discuss this case I will repeat some basic principles for assessing damages. I covered these matters in my paper “*Quantification and Proof of Business Losses*” presented at the 16 October 2008 Law Society seminar **Remedies – Part 1 – Damages**.

### **Assessment principles**

- 4 The rules for assessing damages are not the same for each category of right or statutory remedy. I will consider each in turn.
- 5 Two important observations must be made. First, seemingly particular rules that apply in certain kinds of factual circumstances are applications of more general compensatory principles. The general principles are the starting point and they provide at all times the touchstone against which damages are to be assessed.
- 6 Secondly, there is a common theme. A comparison must be made between the position the plaintiff has found itself in and the hypothetical position that the plaintiff would have been in if circumstances had been different.

### *Negligence*

- 7 The basic compensatory principle for assessing damages in tort was enunciated by Lord Blackburn in *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25, 39. The plaintiff is to be awarded “that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.
- 8 This rule is well established and has been accepted and repeated numerous times by the High Court: eg. *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185, 191; *Haines v Bendall* (1991) 172 CLR 60; *Manser v Spry* (1994) 181 CLR 428.
- 9 The assessment task requires a comparison between:
  - 9.1 The actual financial position of the plaintiff;
  - 9.2 The hypothetical position the plaintiff would have been in if the tort had not been committed.

One is a finding that can be supported by evidence and made as a fact because relevant circumstances have happened. The other (what would have happened) is an hypothetical.

There must nevertheless be an evidentiary foundation to support a conclusion about the hypothetical. The facts of both must be established on the balance of probabilities.

*Contract*

- 10 In contract “where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”: ***Robinson v Harman*** (1848) 1 Ex 840, 855; ***Haines v Bendall*** (1991) 172 CLR 60, 63; ***The Commonwealth v Amann Aviation Pty Ltd*** (1991) 174 CLR 64.
- 11 Here, the assessment task requires a comparison between:
  - 11.1 The actual financial position of the plaintiff;
  - 11.2 The position the plaintiff would have been in if the contract had been performed.
- 12 The first element is the same as it is in tort cases. The second is different. In tort the rule requires an hypothetical assessment of what would have happened if the offending conduct had not occurred. The task in contract is to try to work out what would have happened if the contract had been performed. Some commentators call this an “expectation loss”. It has an analogue in tort where, but for the tort, the plaintiff’s expectation would have been fulfilled and the plaintiff would not merely have lost it money or property.
- 13 The compensatory principles for contract and tort were expressed in a compendious formulation by the High Court in ***Haines v Bendall*** - the plaintiff is entitled to an award of damages that, so far as money can do, will put the plaintiff in the position it would have been in if the contract had been performed or the tort had not been committed.

*Damages for misleading conduct*

- 14 A person who suffers loss by conduct of another person in contravention of section 52 of the *Trade Practices Act* may recover the amount of that loss or damage from the other person or against any other person involved in the contravention: section 82. Similar recovery provisions are contained in the *Fair Trading Act 1987* and the *Australian Securities & Investments Commission Act 2001* (Cth).
- 15 Where misleading conduct consists of false representations in most if not all cases the appropriate measure of damages is the measure in tort: *Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1, 14. However for claims for misleading conduct the statutory test for assessment of damages is not limited to analogies from the common law or equity: *Marks v GIO Australia Holdings* [1998] HCA 69, (1998) 196 CLR 494, 510 [38]. See also *Murphy v Overton Investments Pty Ltd* [2004] HCA 3, (2004) 216 CLR 388. The statutory question to be answered is whether the plaintiff suffered loss by the contravening conduct of the defendant.

*Equity*

- 16 Equitable compensation, which is a remedy that is analogous to an award of damages for breach of a duty in tort or contract, may be awarded for breaches of fiduciary duty: *Nocton v Lord Ashburton* [1914] AC 932, 958; *McKenzie v McDonald* [1927] VLR 134. Usually an identifiable fund of money has been paid and lost or identifiable property has been lost.
- 17 There is an important difference between recovery of equitable compensation and recovery of damages for a breach of duty in tort or contract. In equity it is not necessary to show that losses were caused, as a matter of fact and common sense, by the breach of equitable obligations. In equity the enquiry appears to be whether the loss would have happened if there had been no breach: *Re Dawson* [1966] 2 NSW 211, 214-5; *Hill v*

*Rose* [1990] VR 129; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, 427; *Permanent Building Society (In Liq) v Wheeler* (1994) 11 WAR 187.

### **Time for assessing loss**

- 18 The time at which damages are to be assessed is selected to give effect to the general compensatory principles. The general rule is that damages are assessed as at the date of breach or when the cause of action arose. The plaintiff's actual position is contrasted with the position the plaintiff would have been in, as at that point in time. This rule gives way in particular cases and the time for assessment may be varied so as to ensure that the damages awarded will fairly compensate the plaintiff for the wrong it has suffered: *Dodd Properties Ltd v Canterbury City Council* [1980] 1 WLR 433; *Johnson v Perez* (1988) 166 CLR 351.
- 19 Sometimes where the subject of the dispute is about property that has been bought or sold its value may change over time. The general measure of loss is the difference between price paid and real value of the property at the time of acquisition: *Potts v Miller* (1940) 64 CLR 282; *HTW Valuers v Astonland Pty Ltd* [2004] HCA 54, (2004) 217 CLR 640, 656-9.
- 20 Subsequent events may be taken into account where they throw light on the real value of the property at the time of purchase: *Gould v Vaggelas* (1985) 157 CLR 215, 220. If the value fell after the date of acquisition then this will be taken into account in assessing value at the time of purchase if the cause of the decline was inherent in the nature of the property. If the cause was "independent", "extrinsic", "supervening" or "accidental" then it will be ignored: *Potts v Miller* 298; *HTW Valuers* 659. See also *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281, 291.
- 21 If an asset is acquired at an over value but later developed and sold at a profit the court may or may not, according to the particular facts of the case, require the profit to be

taken into account when assessing the plaintiff's loss: *Tay v Koh* (unreported, WASCA, 28 May 1988, Lib no. 9802234); cf *Manwelland v Dames & Moore Pty Ltd* [2001] QCA 436.

### **Property worth less than price paid**

- 22 In tort the fundamental measure of damages is the difference between the sum paid and the value of the property: eg *Potts v Miller* (1940) 64 CLR 282; *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281; *HTW Valuers v Astonland Pty Ltd* [2004] HCA 54, (2004) 217 CLR 640. Events subsequent to sale may be taken into account if they bear upon the value at the time of acquisition.
- 23 When value is determined it is necessary to hypothesise a sale between a willing, but not anxious, vendor and a willing, but not anxious, purchaser and the decision as to what price would be achieved in that sale involves a factual judgment that may be made by reference to comparable sales or a capitalisation of profits formula or, in certain circumstances, by reference to costs of reinstatement or other criteria: *Yates v Boland Property Corporation Pty Ltd* [1999] HCA 64 [79], [99], [109]-[110], (1999) 74 ALJR 209. These are different ways of applying the general compensatory principles.
- 24 Evidence of an offer to buy or sell has long been held to be inadmissible as proof of value: *McDonald v Deputy Federal Commissioner of Land Tax (NSW)* (1915) 20 CLR 231, 239-240; *Gregory v Commissioner of Taxation (Cth)* (1971) 123 CLR 547; *Henderson v Amadio Pty Ltd* (1995) 62 FCR 1. This rule was recently affirmed by the Court of Appeal in Western Australia: *Auxil Pty Ltd v Terranova* [2009] WASCA 163.
- 25 Where misleading conduct results in the plaintiff paying more for an asset than its true value the appropriate guide to assessing damages is the rule that applies for assessing damages in tort. One consequence is that damages from purchase of a business as a result of a misleading statement are assessed by reference to the difference between the

value of the business at the date of purchase and the price paid for the business: *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281; *HTW Valuers v Astonland Pty Ltd*.

- 26 The primary reason for the common adoption of this rule for assessing damages is the desirability of separating out losses that result from extraneous factors in the later history of the asset: *HTW Valuers* 659, 667. Other approaches to assessment of damages for misleading conduct are permitted so long as they work no injustice: *HTW Valuers* 667.

### **Proof and opportunities**

- 27 The plaintiff carries the onus of proving first that a loss has occurred and secondly that it was caused by the defendant's tort: *Chamberlain v Boyd* (1883) 11 QBD, 407, 416; *Sykes v Midland Bank Executor Co* [1971] 1 QB 123, 124-5, 127-8, 130; *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149, 160-1, 172, 173; *Gates v The City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 13, 15; *Sellars v Adelaide Petroleum* (1994) 179 CLR 332, 355, 368.
- 28 Many cases draw a distinction between proof that a loss has occurred and valuation of that loss: eg *Howe v Teefy* (1927) 27 SR (NSW) 301, 305-6; *Fink v Fink* (1947) 74 CLR 127; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 411; *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422, 438; *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167.
- 29 If the plaintiff alleges that, but for a breach of duty, a benefit would have been obtained under an hypothetical contract (that the plaintiff would have entered into but for the breach) then it is necessary to show on the balance of probabilities that the contract would have been made: *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 15. If a contract would have been made but it may not have resulted in a benefit of money or property then the plaintiff is entitled to the value of the lost chance of that contract yielding a benefit: *Chaplin v Hicks* [1911] 2 KB 786; *Sellars v Adelaide*

*Petroleum* (1994) 179 CLR 332. In truth this is the value of the “lost” contract at the time it was “lost”, rather than a lost “chance” or “opportunity”.

- 30 In order for a “lost opportunity” to be relevant the plaintiff must establish on the balance of probabilities that it has lost something of value, for example that it lost a contract that it could and would have entered into or has lost a right or something else that can be valued. It is then necessary to determine the value of that right or thing: *Sellars v Adelaide Petroleum* (1994) 179 CLR 332, 355, 368; *Adelaide Petroleum NL v Poseidon Ltd* (1990) 98 ALR 431, esp 531-2.
- 31 In that assessment of value events can be taken into account even though the likelihood that they would have happened is less than 50% or they were no more than possibilities: *Sellars v Adelaide Petroleum* 355, 368. They may be relevant if, in the event that they were to happen, they would have resulted in the plaintiff obtaining a benefit such as money or property. Hence a right to take part in a beauty contest for a prize of a paid engagement as an actress has value even though there may have been little chance that the plaintiff would have won: eg *Chaplin v Hicks*. The prize had measurable value. A contract that was not entered into may have had value even though the chance was small that the contract would have led to any benefit: eg *Sellars v Adelaide Petroleum*.
- 32 Where there are difficulties in proving the value of a loss the court is not precluded from awarding damages. Once it is established that a loss has occurred the court must quantify the loss as best it can even if a degree of speculation and guess work may be involved: *ENZED Holdings Ltd v Wynthea* (1984) 4 FCR 540. See also *Howe v Teefy* (1927) 27 SR (NSW) 301, 305-6; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.
- 33 In the assessment of damages the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered: *Callaghan v Williams C Lynch Pty Ltd* [1962] NSW 871, 877.

## **Interest**

- 34 An award of interest in addition to, and calculated by reference to, the award of damages for past losses is usually added to the claim. The reason for awarding interest conforms with the compensatory principles. The purpose of the award of interest is to compensate the plaintiff for being kept out of its money: cf *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 663-5; *Haines v Bendall* 66.
- 35 In some cases what otherwise appears to be a claim for interest may be brought as a claim for damages: *Hungerford v Walker* (1989) 171 CLR 125, 149, 152. It is a claim for damages for loss of use of money.
- 36 The Supreme Court of Western Australia has power to award interest on an award of damages by virtue of section 32 of the *Supreme Court Act 1932* (WA). This provision is also relevant in claims in the District Court: see sections 50 and 53 of the *District Court Act 1969* (WA).
- 37 When computing interest for the purposes of section 32 the Court may use as a guide the rate of interest prescribed from time to time for the purposes of section 8 of the *Civil Judgments Enforcement Act 2004* (WA): Order 36 Rule 20. The rate prescribed by regulation 4(1) of the *Civil Judgments Enforcement Regulations 2005* is 6% per year.

## **Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd**

- 38 In an action in the Supreme Court Mr and Mrs Frigger recovered damages after false representations by the vendor induced them to buy a property that was worth less than they paid for it. They were diverted from buying a different property. They recovered the difference between the value of the property and what they paid. They also recovered damages for the lost opportunity of making a greater capital gain on an alternative property.

- 39 The damages awarded at trial were substantially reduced on appeal. They lost the award of lost opportunity damages.
- 40 Mr and Mrs Frigger were the owners of Computer Accounting and Tax Pty Ltd. In late 2002 and early 2003 they had investigated a number of residential and commercial properties for real estate investment. The appellant, Professional Services of Australia Pty Ltd, owned a service station in Armadale. It came to the Friggers' attention when it was advertised for sale in a newspaper. The property had a service station and a workshop, each of which was leased to a separate tenant.
- 41 Mr Banning for the vendor made a number of false representations and that influenced the Friggers decision to buy the property. They stopped looking at alternatives.
- 42 Banning said that the tenants each conducted a business that was "extremely successful", there were "secure leases in place", each tenant was up to date in payments due under the leases, and there was no reason to believe that either tenant would default in payment of rent and outgoings and there was no dispute with either tenant relating to those matters.
- 43 Events that occurred shortly after settlement suggested everything was not quite right.
- 44 The purchase was settled on 1 May 2003. The following day the buyer, Computer Accounting and Tax Pty Ltd, commenced proceedings against the service station tenant claiming payment of rates and taxes due under the lease for the service station.
- 45 On 25 June 2003 Mr and Mrs Frigger received a letter from the workshop tenant requesting a reduction in rent and time to pay. The following month they agreed to a reduction in rent.
- 46 That month the tenant of the service station abandoned the premises. The buyer terminated the lease and retook possession and sought another tenant. Eventually a new tenant was found.
- 47 The buyer commenced an action in the Supreme Court and claimed as damages:

- 47.1 The difference between the price it had paid for the land and its true market value;
- 47.2 Unpaid rent for the service station;
- 47.3 The difference between rent due under the lease with the original tenant and that actually received following expiry with the lease with the new tenant of the service station; and
- 47.4 Loss of an opportunity to purchase an alternative property which would have appreciated in value to a greater extent than the service station.
- 48 No award at trial was made for the third head of loss. A modest allowance was made for the second head. The Court of Appeal considered the award was wrong in principle but because no challenge was made to it on appeal it was allowed to stand.
- 49 The important components that were the subject of the appeal were the first and fourth claimed heads of loss – that is, the difference between price paid and market value and the value of a lost opportunity to purchase an alternative property.
- 50 On appeal there were two threads to the challenges to the decision of the trial Judge. Namely:
- 50.1 The admissibility of expert evidence that was relied on by the buyer to support its claim for damages for loss of an opportunity; and
- 50.2 Whether the assessment made by the trial judge accorded with the correct principles for assessing damages.
- 51 I will start by considering matters of principle rather than questions of evidence, although that was not the order in which those broad issues were addressed in the reasons of the Court. Reasons for decision were delivered by Martin CJ. Buss and Newnes JA agreed with his reasons.

*Difference between price paid and market value*

- 52 The trial judge considered first the contrast between price paid and actual value.

53 He relied on the evidence of a valuer, that was not challenged on appeal, that the value of the land on acquisition was more than \$400,000 whereas the price paid, including stamp duty and penalties, was more than \$700,000. He awarded damages of \$287,125 with interest on that amount from the date of settlement (1 May 2003) until the date of judgment.

54 The trial judge did not stop there.

*Loss of opportunity for capital gain*

55 The trial judge considered the additional claim for a lost opportunity. Importantly he held that but for the misrepresentations the buyer would have acquired an investment property, either commercial or residential, which was securely tenanted or could become securely tenanted quite readily. He did not however make a finding that a particular property with a particular value and income earning capacity and history would have been acquired. Nor did he find that the buyer would have acquired a specific property from a particular selection of properties.

56 The trial judge used the middle of the year of the trial (2007) as the time for making a comparison between the value of the property that was bought (in 2003) and his estimated value of an unspecified alternative property. He relied on the evidence of a second expert valuer to assess the value of an unspecified alternative property.

57 The trial judge found that as at 30 June 2007 an alternative residential property would have been valued at more than \$1.4 million and an alternative commercial property at more than \$1.7 million. He decided to take account of the possibility that the buyer might have invested either in the residential market or the commercial property market he would take a mid-point value between the two of almost \$1.6 million for the value of the alternative investment for the purposes of assessing what the buyer had lost.

58 He contrasted the increase in assessed capital appreciation for the hypothetical property with the assessed capital appreciation for the property that was purchased and found the difference to be more than \$700,000. From this amount he deducted the amount of the stamp duty that would have been paid on the alternative investment.

59 The assessed lost opportunity was the loss of an opportunity to make an increased capital gain from an alternative investment.

*Assessment overall*

60 The trial judge's overall assessment was of the order of \$1.1 million made up of:

60.1 \$287,125 for the difference between the price paid for the Armadale property and its true value;

60.2 interest on that sum,

60.3 \$675,078 for the value of the lost opportunity to invest in a different property, and

60.4 interest on that sum.

61 The award of \$1.1 million resulted from payment of \$665,000 for a property that was worth about \$410,000. The overpayment (excluding stamp duty) was about \$250,000.

62 The award for loss of opportunity damages with interest was set aside by the Court of Appeal.

*Challenges to the assessment*

63 The principal challenges on appeal related to the assessment of the lost opportunity for alternative investment. They were that no award should have been made over and above the damages awarded for the difference between price paid and value at the date of acquisition, that the buyer had not discharged the burden of proof that it could and would have secured an alternative investment opportunity, and that the trial judge should not have relied on the expert evidence that was used to support the assessment of the hypothetical value of an alternative investment because that evidence was not admissible.

*Approach of trial judge*

64 Martin CJ made a number of observations about the approach taken by the trial judge to assessment of damages for a lost opportunity. I will not set them all out. For the purpose of identifying error in approach he identified the following points:

64.1 The trial judge assessed damages (in connection with value of an hypothetical property) by reference to the mid-point of appreciation in values that might have been expected if a commercial property had been acquired and that might have been expected if residential property had been acquired without allowing for the reduction in rental income that would have been received by the buyer if it had acquired a residential property;

64.2 There were substantial differences in approach taken by the trial judge relating to assessing the hypothetical value of a residential property and the approach taken regarding commercial property;

64.3 The trial judge made no finding as to the period over which the opportunity was lost. Damages were awarded on the presumed basis that the opportunity would not have been taken up until trial;

64.4 The award of damages for loss at the time of acquisition plus interest compensated the buyer for the loss of the opportunity to invest the difference between the two relevant values from the date of settlement. Despite interest compensating for the lost opportunity the trial judge awarded damages for lost opportunity to invest the full acquisition price and hence allowed double recovery;

64.5 The approach of the trial judge assumed that the buyer would have acquired an investment property that achieved at least average appreciation;

64.6 There was an air of unreality about the trial judge's overall conclusion. Having found that the buyer paid about \$250,000 more than the property was worth he

awarded a total amount of damages of almost \$1 million and in addition awarded interest. The award with interest was about \$1,100,000.

65 Martin CJ held that it was an error to award damages on the basis that another asset would have been acquired that would have produced a greater return than the asset actually acquired as well as interest. It provided double recovery.

66 Although Martin CJ did not expressly say so the double recovery was that the buyer had been compensated twice for the loss sustained over the period from date of acquisition to date of trial. It was compensated for that loss by an award of interest and also by an award of the difference between capital appreciation for the hypothetical investment and capital appreciation for the property that was in fact acquired.

*Onus of proof*

67 Martin CJ held that the plaintiff carried the primary burden of establishing, on the balance of probabilities, that but for the contravening conduct of the defendant an alternative investment would have been acquired which carried a prospect of profit greater than that achieved from the investment which was acquired. The buyer had not made out a case that if (during the period between the date of acquisition of the service station and the reasonable time required for it to decide whether to retain or dispose of the investment after it became aware of the true position) it had not acquired the service station it would have acquired an alternative investment that would have produced a greater return in terms of income and capital appreciation than that achieved from the service station.

68 Martin CJ said that the case could have been established by, for example, leading evidence of specific alternative investments that were available in March 2003 and analysing the combined benefits (of rental income and capital appreciation) that would have been derived from making such an investment, as compared to the combined

benefits derived from the service station up to the point in time at which it was reasonable for the respondent to have elected whether or not to retain the service station – for example, 12 months after its acquisition.

69 Although the position was not stated this way by Martin CJ an alternative formulation may have been that the buyer could have established its case by leading evidence that it could and would have purchased a particular property or one of a group of identified properties.

*Inadmissibility of expert evidence on value of hypothetical*

70 The expert valuation evidence that was relied on by the buyer to support conclusions about the value of the alternative investment was held by Martin CJ to have been inadmissible. The evidence was objected to at trial on the grounds that it was irrelevant and that it was based on hearsay.

71 The buyer’s expert evidence on value of the hypothetical alternative property relied on “aggregate” data on changes in median prices of residential properties (for a few suburbs selected by the valuer) that were obtained from the Real Estate Institute of Western Australia (REIWA), Landgate data and the Australian Bureau of Statistics.

72 The valuer concluded that the hypothetical alternative investment of \$665,000 in residential property in 2003 would have produced an unspecified property with a value of more than \$1.4 million in 2007.

73 The valuer selected four commercial properties that had been bought and sold a number of times as the basis for his opinion on changes in values of commercial properties. They were in Malaga and East Perth. He examined the changes of prices over time for those particular properties. He gave evidence that he had made enquiries and satisfied himself that the facts pertinent to transactions were comparable but that was irrelevant.

74 The commercial properties that formed the basis for the valuer's opinion were in Malaga and East Perth. Their values were about or less than 50% of the amount the buyer spent when it purchased the Armadale service station.

75 The valuer produced an estimated capital value of \$1,725,006 as at 30 June 2007 for an unspecified commercial property that was purchased in 2003 for \$665,000.

*Inadmissibility*

76 It appears to be well established in this State that where a valuer relies on the prices obtained in specific transactions as the foundation for an opinion on value of a property then the specific transactions must be proved by admissible evidence: *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370, 374-375. A valuer may however rely on the valuer's personal experience to express opinions on limited issues where the valuer is not able to identify the specific transactions that underlie that experience. However the extent to which opinions can be expressed is not well defined. It extends to giving a general exposition of the subject, speaking about market trends, or saying whether a particular transaction was aberrant or consistent with overall market conditions: *Pownall* 374. These points were made by Martin CJ.

77 On the question of admissibility of expert evidence Martin CJ referred to the well known decision of the New South Wales Court of Appeal, and particularly the reasons of Heydon JA, in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 and the decision of the Western Australian Court of Appeal in *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2004] WASCA 229.

78 The problems that Martin CJ identified with the data relied on by the valuer regarding movements in prices of residential property were:

78.1 The trial judge rejected reliance on the REIWA data and there was no cross appeal from that ruling;

- 78.2 The accumulated data from Landgate did not provide a reliable measure of the likely increase in any particular property;
- 78.3 The Landgate data concerned specific properties and none of the relevant transactions was proven;
- 78.4 The buyer's valuation evidence had not assessed changes in values of particular properties that had been investigated by the buyer before it decided to buy a service station;
- 78.5 Although the buyer had investigated properties in Applecross and Attadale there was no reason to select, as the valuer did, the suburbs of Attadale, Applecross and South Perth as indicative of the type of investment that they might have made and the evidence did not establish that those suburbs were representative of Perth residential suburbs as a whole.
- 79 Martin CJ found that the data supporting the trial judge's conclusion valuing an alternative residential property at more than \$1.4 million in 2007 was not admissible and the finding based upon it could not be sustained.
- 80 The valuer had relied on specific transactions to support his opinion on movements in values of commercial property but the specific transactions had not been proved by admissible evidence. Further the specific transactions were of properties that were not shown to be comparable to a property in which the buyer might have invested.
- 81 Martin CJ held that this evidence was based on what the valuer was told by others and it was hearsay and inadmissible. Evidence was not given that proved the facts and circumstances of the four transactions or the extent to which they were comparable to a property that the buyer might have invested in if it had not bought the service station in 2003. The evidence didn't enable the conclusion that the buyer would have acquired any of the properties identified by the valuer if it had not bought the service station.

82 Accordingly, Martin CJ concluded that the evidence that was adduced was not capable of sustaining a conclusion that if the buyer had not invested in the service station it might have invested in commercial property that would have had a value of more than \$1.7 million as at 30 June 2007.

83 Martin CJ also observed that when objections were taken to the admissibility of expert evidence at trial then generally speaking the ruling should be made at trial and not deferred until the conclusion of the trial. Where an objection was taken that an expert had relied on inadmissible hearsay there was every reason why it should be ruled upon at the time it was made.

*Avoiding double recovery*

84 Martin CJ observed that where the claim concerned acquisition of an income producing asset and damages were claimed for the difference between purchase price and value of the asset when it was acquired, and also for reduced or absent profitability, care must be taken to avoid an award that was a double recovery. The danger of double recovery arose because the capital value of an income producing asset generally will reflect the income likely to be produced by the asset in the future.

*Time for assessing value of lost opportunity*

85 Where a claim is made that the plaintiff has lost the opportunity of making an alternative investment, according to Martin CJ, the time at which the plaintiff became aware of the true position was relevant. The capacity to claim ongoing losses did not cease immediately upon the innocent party becoming aware of the true position but the relevant question arose as to what was the point in time thereafter when it would be reasonable for the innocent party to put an end to its losses by disposing of the property it had acquired.

86 No evidence was led to establish why after it relet the service station the buyer did not sell the service station and reinvest its funds in an alternative investment while at the same time pursuing a claim for damages for its loss.

87 His Honour might have expressed the issue of timing differently. According to the general compensatory rules in cases of this kind the time for assessing damages usually is the date of acquisition. However the time for assessment may be varied so as to ensure that the damages awarded will fairly compensate the plaintiff for the wrong it has suffered. The trial judge implicitly assessed damages by reference to a time later than the date of acquisition but without explaining that choice or why the difference between price paid and true value at acquisition, together with interest to the date of trial, did not fairly and adequately compensate the buyer.

88 A potential reason (in a hypothetical case and not the case under discussion) for varying the time for assessing damages to a date after the date of acquisition might be that at a particular later date the buyer would have bought a particular alternative property. Timing of the alternative acquisition would in those circumstances be relevant to the presumed hypothetical value of what was lost.

*Extrinsic factor affecting value*

89 Most of the discussion in the case concerned valuation of the hypothetical alternative investment. However, according to the Court, there were problems with using the value of the appreciated Armadale service station as at June 2007 when assessing the value of lost opportunity for capital appreciation.

90 Events that follow the acquisition and arise from something inherent in the asset itself and its condition at the time of acquisition may be taken into account when assessing the true value of the asset at the time of acquisition.

- 91 A further found difficulty with the trial judge's assessment of damages for lost opportunity was that the expert evidence about the capital appreciation to 2007 of the Armadale property was to the effect that a significant factor in the reduced appreciation of the property (compared with appreciation for other properties) were changes in the structure of the market for the retail sale of petrol that were unrelated to the misrepresentations that had induced the buyer to acquire and which occurred after the buyer knew about the true position with the tenancies. These changes affected all service stations in the metropolitan area of Perth.
- 92 Martin CJ found that this supported the conclusion that the reduced rate of capital growth of the service station was caused by changes in the market that occurred after the time the buyer became aware of the true position. That reduced rate therefore was properly attributed to the decision of the buyer to elect to retain its investment in the Armadale service station. It was properly characterised as a "supervening" or extraneous cause.

*Appeal outcome*

- 93 The ultimate result of the appeal that the damages award of about \$675,000 for the claim of lost opportunity was set aside and the award remained for the difference between the acquisition price and the value on acquisition together with interest. A small reduction was made for penalty on stamp duty that should not have been awarded.

**Lessons from the case**

- 94 Two major issues emerge from the decision:
- 94.1 Lost opportunity damages arising from buying property for more than it is worth – what principles govern recovery and how do you prove the loss and its value;
- 94.2 Proof of value.

- 95 When addressing these issues you must start with the basic principles that govern assessing damages.
- 96 The controlling principles require that you contrast the position the plaintiff is in with the position it would have been in but for the breach.
- 97 Application of the applicable controlling compensatory principle should lead you to avoid formulating claims that overlap and result in double recovery.
- 98 It may well be that a claim for a lost opportunity is an alternative to, and not cumulative with, a claim for the difference between price paid and value.
- 99 On the issues of loss of opportunity damages (as well as difference between price paid and true value), and time of assessment, you must ask and answer the question: what would the plaintiff have done but for the defendant's breach?
- 100 You must prove on the balance of probabilities that the breach has caused the buyer to lose something of value (that it would have obtained but did not obtain) and when it was lost. This might be an alternative property. In a case about being induced to buy a business it might be an alternative business. Or in a contract case, an alternative contract.
- 101 The simplest case will be to show, on the balance of probabilities, that the plaintiff would have bought a particular identified property at a particular time. Another provable case would be proof that the plaintiff would have bought one of a (preferably small) number of properties at a particular time. Mere proof that an unidentified property would have been bought at some time before trial might not be sufficient, as exemplified by the outcome in *Professional Services*.
- 102 If the case is that the hypothetical property would have been sold to make a capital gain then you should provide evidence about when it would have been sold.
- 103 Next, you will need expert evidence of the value of the property under consideration; the property in fact purchased or the hypothetical alternative.

104 Ideally valuation evidence should be based on transactions that are comparable to the transaction that you wish to have valued (actual or hypothetical).

105 Each of those comparable transactions should be proved by admissible evidence.

106 Other facts underlying the expert evidence must be proved by admissible evidence or in some other way rendered admissible, if they are not agreed. How to prove these underlying facts, what statutes might be relied on and what orders might be made to facilitate or permit proof, are issues for its own seminar.

### **Special leave to appeal to the High Court**

107 The buyer has applied to the High Court for special leave to appeal.

108 The reasoning of the Court of Appeal will be challenged on the grounds that:

108.1 In order to recover loss of opportunity damages the buyer was not required to prove why it did not sell the service station and buy another property; and

108.2 The valuation evidence was not inadmissible by reason of its reliance on non-specific data of land transactions from Landgate.

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3 March 2010

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