HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No M111 of 2020

BETWEEN **JUDITH GAIL TALACKO**

Appellant

and **JAN TALACKO (AS EXECUTOR OF THE ESTATE OF HELENA MARIE TALACKO) & ORS (ACCORDING TO THE SCHEDULE)**

Respondents

APPELLANT'S REPLY TO THE FIRST RESPONDENT

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Argument

A Reply to the first respondent's response

2 This appeal highlights the significance of the principle that at common law a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or even likely damage.[1] Whereas the loss of a chance may constitute an actual loss sufficient to complete a cause of action, a mere reduction in chance does not. By his submissions, the first respondent claims that his cause of action has been perfected by the loss of a chance, 10 despite the fact that the chance has merely been reduced and not lost. However, the requirement that actual loss has been suffered where damage is the gist of the action cannot be circumvented. Of course, this is so even where the cause of action would otherwise be complete.

3 The first respondent says that the appellant 'conflates two separate and distinct opportunities',[2] and that a 'qualitatively different and less valuable "recovery" opportunity' against the seventh and eighth respondents[3] is not the same as an opportunity that he says 'was *lost* by virtue of entering into the donation agreement'.[4] That contention collapses under the weight of the first respondent's own acknowledgment that '[a]n amount equal to the *value* of the equitable compensation judgment is still sought to be recovered' against the seventh 20 and eighth respondents,[5] and that what he identifies as a second opportunity 'may, if successful, give rise to recover[y] against [the seventh and eighth respondents] [of] amounts equivalent to that which were the subject of the judgment debt owed by [the sixth respondent]'.[6]

4 The first respondent's contention also overlooks the fact that the chance in question is the chance of recovering the amount of the judgment debt. This was made clear both by the Court of Appeal {CAL [111]: CAB 296} and by the primary judge, who accepted that there should be an assessment in respect of the loss of a *single* opportunity, being the opportunity to recover the judgment debt {PJQ [11]–[12]: CAB 134}. That conclusion was not challenged on appeal. Rather, the only ground on which the second to fifth respondents appealed the first

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[1] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, at 526 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[2] First Respondent's Response, at [9].
[3] First Respondent's Response, at [10].
[4] First Respondent's Response, at [20] (emphasis in original).
[5] First Respondent's Response, at [17] (emphasis in original).
[6] First Respondent's Response, at [22].

instance judgment on quantum was that the primary judge had erred in assessing their chance of successfully pursuing their Donation Proceeding and any subsequent enforcement proceeding against the seventh and eighth respondents at 20 per cent {CAB 331}.

5 The approach of the primary judge in identifying a single opportunity is logically and legally correct. There are many routes by which the amount of a judgment debt might be recovered. They include payment upon demand, enforcement steps, and receiving a dividend in any bankruptcy or winding up of the judgment debtor. It is the chance of recovering the amount of the judgment debt — however that might occur — that was, and continues to be, of value to the first to fifth respondents. It is that chance which constitutes a 'valuable' opportunity in the sense described in *Sellars v Adelaide Petroleum NL*,[7] and the loss of which would constitute an actual loss sufficient to complete a cause of action. Given that the first to fifth respondents continue to have a 20 per cent chance of recovering the amount of the judgment debt, that chance has not been lost.

6 The first respondent contends that '[w]ith a more probable than not chance of the judgment being successfully recovered before [entry into the donation agreement], and a less probable than not chance after, the first to fourth [sic] respondents have established the requisite causal link between the interference and the damage'.[8] He elaborates upon this contention as follows: 'If the appellant's contention about a *single* opportunity of recovering the judgment debt is accepted (and the 20% prospect of recovery in the Czech Republic is deemed relevant), then the conspiracy which achieved its intended objective of divesting [the sixth respondent] of valuable properties against which that debt could have been enforced converted that opportunity from one that was probably going to be realised to one that is now improbable. That, on the balance of probabilities, constitutes the loss of a valuable opportunity'.[9]

7 That contention, and the submissions generally advanced in paragraphs 29–35 of the first respondent's Response, misunderstand the application of the general civil standard of proof to loss of chance claims. In a passage relied upon in the opening paragraphs of the primary judge's reasons for judgment in relation to quantum {PJQ [5]: CAB 132}, and partly

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[7] (1994) 179 CLR 332, at p 364 (Brennan J): 'Provided an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable. And, if an opportunity is valuable, the loss of that opportunity is truly "loss" or "damage" … for the purposes of the law of torts.'

[8] First Respondent's Response, at [32].

[9] First Respondent's Response, at [37].

extracted by the first respondent in his Response,[10] the plurality in *Sellars v Adelaide Petroleum NL* explained the position as follows:

> … the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.[11]

8 Whether the conduct of the appellant and the sixth to eighth respondents caused a loss of chance is to be determined on the balance of probabilities. If a chance has been lost, then the value of the chance is to be assessed 'by reference to the degree of probabilities and possibilities'. The first respondent is wrong to suggest that the chance of recovering the amount of the judgment debt was lost because, in ascertaining 'the degree of probabilities and possibilities', the primary judge assessed the value of the chance as 75 per cent before entry into the donation agreement and as 20 per cent after entry into the donation agreement. Proof on the balance of probabilities has no part to play in such an evaluation.[12] Properly analysed, the chance has not been lost on the balance of probabilities because the chance remains. Pursuant to the Court of Appeal's reasons for judgment on liability, that chance has been assessed as having a value of 20 per cent after entry into the donation agreement.

9 The first respondent states that the primary judge ought to have compared the position that the first to fifth respondents were in before the donation agreement with the position that they were in immediately after the donation agreement was executed, which he says involved 'zero chance of recovery'.[13] The primary judge made clear that the Court of Appeal's reasons on liability required 'the loss of the [first to fifth respondents'] opportunity to recover the judgment debt and costs orders by resort to the Properties to be measured in accordance with the value of the reduction in that opportunity *subsequent to the Donation Agreement*' (emphasis removed and emphasis added) {PJQ [7]: CAB 132}. The primary judge concluded that the first to fifth respondents had a 20 per cent chance of recovering the amount of the judgment debt by reason of the donation agreement being entered into {PJQ 89: CAB 164}.

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[10] First Respondent's Response, at [36].
[11] (1994) 179 CLR 332, at p 355 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[12] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, at p 368 (Brennan J).
[13] First Respondent's Response, at [11].

The Court of Appeal upheld that conclusion on appeal {Court of Appeal's reasons for judgment on quantum (**CAQ**), at [109]–[113]: CAB 373–4}. Accordingly, there is no basis for the first respondent now to contend that his chance of recovering the amount of the judgment debt immediately after entry into the donation agreement was zero.

10 In relation to the expenses of the ongoing Czech proceedings, the first respondent states that the appellant is not a party to the Czech proceedings, and that any award of costs in those proceedings would not serve to answer any liability of the appellant to pay those expenses.[14] He also states that whether or not the expenses of the Czech proceedings might stand to be recovered by some other means is a matter for the assessment of damages.[15] However, neither the fact that the appellant is not a party to the Czech proceedings, nor the fact that the primary judge took account of the first to fifth respondents' recoverable costs in the Czech proceedings, bears upon the contingent nature of any loss constituted by those expenses.[16] Until the Czech proceedings have been concluded, it is too early to say whether those expenses were reasonably incurred[17] or legally caused by the tort.

B Response to the first respondent's notice of contention

11 By his notice of contention, the first respondent contends that the primary judge erred in holding that the first respondent's prospects of successfully pursuing legal proceedings in the Czech Republic were a matter to be taken into account in assessing the value of the opportunity prior to the donation agreement to recover the judgment debt against the trustee in bankruptcy by resort to the Czech properties.[18] He further contends that the Court of Appeal and the primary judge ought to have held that the first respondent's prospects of successfully pursuing legal proceedings in the Czech Republic were not relevant to the value of the opportunity to recover the judgment debt, which was zero. The first respondent claims that '[t]he divestment of the properties through the donation agreement made the *recovery* of the *judgment debt* impossible'.[19]

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[14] First Respondent's Response, at [41].
[15] First Respondent's Response, at [42].
[16] In fn 40 on p 13 of his Response, the first respondent relies on a sentence from *Berry v British Transport Commission* [1962] 1 QB 306, at p 321, but omits the final clause of the sentence. The full sentence is (footnotes omitted, emphasis added): 'It follows that if as the result of a breach of contract—see *Agius v Great Western Colliery Co Ltd*—or a tort—see *The Solway Prince*—a person brings unsuccessfully an action against a third party or loses an action brought by a third party, he may recover against the wrongdoer who has broken his contract or committed the tort the costs of the suit; *and he will get all the costs he has reasonably expended.*'
[17] See generally *McGregor on Damages* (20th ed, 2017), at [21.055]–[21.063], which discusses the reasonableness of costs incurred in *previous*, as opposed to ongoing, proceedings.
[18] Presumably the first respondent means to say that the primary judge erred in holding that those prospects were to be taken into account in assessing the value of the 'loss' of that opportunity. See PJQ [14]: CAB 135.
[19] First Respondent's Response, at [27] (emphasis in original).

12 In the primary judge's reasons for judgment on the question of quantum, his Honour found that, if the Donation Proceedings are successful, the seventh and eighth respondents will retain title to the Czech properties, but the first to fifth respondents 'would have standing to seek to enforce the equitable compensation judgment directly against the [seventh and eighth respondents]' {PJQ [55]: CAB 151}. That finding, which was made on the basis of the evidence of the first to fifth respondents' own Czech lawyer, was not challenged or otherwise disturbed on appeal. Indeed, in its reasons for judgment on quantum, the Court of Appeal stated that 'success in the donation proceeding would provide [the second to fifth respondents, who were the appellants in that appeal] with standing to institute a separate enforcement proceeding, in which they could seek to enforce the Kyrou J orders against [the seventh and eighth respondents], and, through them, execute against the Prague, Řepy and Kbely properties' {CAQ [31]: CAB 350}.

13 It is clear from that factual finding, which was restated by the primary judge {PJQ [60]: CAB 152–3} and by the Court of Appeal, and was not disturbed on appeal, that the first to fifth respondents might enforce the judgment by way of future enforcement proceedings in the Czech Republic against the seventh and eighth respondents, and thereby execute the judgment against the Czech properties. It was thus correct for the primary judge to take account of the prospect of success of any future enforcement proceedings against the seventh and eighth respondents in assessing the value of the first to fifth respondents' chance of recovering the amount of the judgment debt after the donation agreement was entered into.

C Response to the first respondent's notice of cross-appeal

14 By his notice of cross-appeal, the first respondent contends that the primary judge erred in holding that the opportunity to recover upon the judgment should be valued taking into account his prospects of success of later proceedings commenced in the Czech Republic against the seventh and eighth respondents. He further contends that the primary judge ought to have held that the value of the opportunity to recover upon the judgment, which opportunity was lost, was the amount identified as 75 per cent of the value of the judgment. For the reasons referred to in paragraphs 3–5, 12 and 13 above, the cross-appeal should be dismissed.

5 February 2021

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SCHEDULE OF PARTIES

JUDITH GAIL TALACKO
Appellant

and

JAN TALACKO (AS EXECUTOR OF THE ESTATE OF HELENA MARIE TALACKO)
First Respondent

and

ALEXANDRA ANN BENNETT
Second Respondent

and

MARTIN THORBURN TALACKO
Third Respondent

and

ROWENA KIRSTEN EVE TALACKO
Fourth Respondent

and

ALEXANDRA ANN BENNETT AND DAVID ADAMS (AS EXECUTORS OF THE ESTATE OF MARGARET HELEN TALACKO)
Fifth Respondent

and

ESTATE OF JAN EMIL TALACKO (DECEASED) (FORMERLY AN UNDISCHARGED BANKRUPT)
Sixth Respondent

and

DAVID TALACKO
Seventh Respondent

and

PAUL ANTHONY TALACKO
Eighth Respondent

and

PETER ANDREW NOEL TALACKO
Ninth Respondent

and

AMANDA MAREE FISCHER
Tenth Respondent

and

STATE TRUSTEES LTD (ACN 064 593 148)
Eleventh Respondent