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 SECOND TO FIFTH RESPONDENTS

Part I: Certification

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

Part II: Argument

A Reply to the second to fifth respondents' 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 their submissions, the second to fifth respondents claim that their cause of action has been perfected by the loss of a chance, 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 According to the second to fifth respondents, the appellant contends that victims of a conspiracy should be regarded as suffering no loss or damage unless they can show that they are completely unable to unpick the effect of the unlawful conduct.[2] The appellant advances no such contention. Rather, the appellant contends that, in circumstances where the first to fifth respondents continue to have a 20 per cent chance of recovering the amount of the judgment debt, they have not incurred a loss of that chance.

4 The second to fifth respondents suggest that the appellant's argument entails an investigation into the 'hypothetical means' by which the consequences of unlawful conduct might be undone, and a conclusion that, until such steps have been taken and failed, no loss has been incurred by reason of that conduct.[3] However, that is not the logical consequence of the appellant's contention that the first to fifth respondents' chance of recovering the amount of the judgment debt has not been lost. The relevant inquiry is not what a creditor might be obliged to do in order to establish the loss of a chance to recover a debt, but rather whether the chance of recovery of the debt has been lost. In the circumstances of this case, the relevant question is not what legal steps in the Czech Republic the first to fifth respondents might have needed to exhaust in order to establish the loss of a chance to recover the judgment debt, but whether the first to fifth respondents' chance of recovering the amount of the judgment debt

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[1] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, at 526 (Mason CJ, Dawson, Gaudron and
[2] Second to Fifth Respondents' Response, at [15].
[3] Second to Fifth Respondents' Response, at [32].

has been lost. If their chance of recovering the amount of the judgment debt remains, they have not suffered a loss of that chance.

5 The second to fifth respondents say that the appellant 'elides two quite different opportunities', and that a 'new' opportunity to enforce rights against the seventh and eighth respondents is not the same as the opportunity that the first to fifth respondents lost when the donation agreement was executed.[4] That contention 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 instance judgment in relation to 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}.

6 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*,[5] 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.

7 In relation to the expenses of the ongoing Czech proceedings, the second to fifth respondents say that it is not open to the appellant to argue in this Court that any of those expenses were not, or may not have been, reasonably incurred, and that any such point should have been taken before the primary judge.[6] That statement misunderstands the appellant's contention, which is that, until the Czech proceedings have concluded, it is too early to say

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[4] Second to Fifth Respondents' Response, at [27].

[5] (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.'

whether the expenses of those proceedings were reasonably incurred[7] or legally caused by the tort. It was not for the primary judge to determine the reasonableness of those expenses.

8 The second to fifth respondents also contend that the appellant should not be heard to argue that no loss or damage has been suffered because there is a chance that the Czech proceedings may succeed, while also arguing that the irrecoverable costs of those proceedings will or may be unreasonable. They suggest that those propositions are mutually exclusive.[8] However, that is not so. It is too early to determine whether the expenses of the ongoing proceedings in the Czech Republic have been reasonably incurred.[9] The first to fifth respondents nevertheless have a 20 per chance of recovering the judgment debt through the Czech proceedings. Whilst the proceedings in the Czech Republic are ongoing, any loss referable to the first to fifth respondents' expenses in those proceedings remains contingent.

B Response to the second to fifth respondents' notice of contention

9 By the first ground in their notice of contention, the second to fifth respondents contend that the Court of Appeal and the primary judge ought to have held that the reduction in chance of recovering the judgment debt was economic loss in the form of diminution of the value of property. They say that the effect of the donation agreement 'was to sterilise the Respondents' right to have judgment entered against [the sixth respondent] in accordance with clause 6 of the Terms'[10] and to reduce the value of that 'right' or 'chose in action' by 55 per cent of the value of the prospective judgment debt.[11] In advancing that contention, the second to fifth respondents wrongly conflate a mere reduction in the first to fifth respondents' chance of recovering the judgment debt with a reduction in the value of property.

10 The primary judge correctly held in his reasons on liability that the donation agreement did not prevent the first to fifth respondents from obtaining the benefit of the terms of settlement, which benefit consisted of an award of equitable compensation of €10,073,818 {PJL [163]: CAB 63–4}. Nor did it cause the loss of the amount of the equitable compensation judgment {PJL [169]: CAB 66}. Those conclusions were not challenged or disturbed on appeal. After quoting from the judgment of French CJ, Hayne and Kiefel JJ in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*, the second to fifth respondents

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[6] Second to Fifth Respondents' Response, at [38].
[7] 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.
[8] Second to Fifth Respondents' Response, at [38].
[9] Including having regard to s 58(3)(a) of the *Bankruptcy Act 1966* (Cth). Although the Czech properties were transferred to the seventh and eighth respondents, those transfers must be void against the trustee in bankruptcy by operation of s 121 of the *Bankruptcy Act 1966* (Cth).
[10] Second to Fifth Respondents' Response, at [50].
[11] Second to Fifth Respondents' Response, at [57].

suggest that the infringed interests of the first to fifth respondents are '"in the value of property", comprising a chose in action, and are analogous to the interest of a lender in the recovery of moneys advanced'.[12] However, as French CJ, Hayne and Kiefel JJ noted:

> In general terms, in a case involving a loan of monies, damage will be sustained and the cause of action will accrue only when recovery can be said, with some certainty, to be impossible. There are good reasons for a principled analysis of actual damage. One reason is that it would be unjust to compel a plaintiff to commence proceedings before the existence of his or her loss is ascertainable.[13]

In circumstances where the donation agreement has not rendered recovery of the amount of the judgment debt impossible, the first to fifth respondents have incurred neither the loss of a chance of recovering the judgment debt nor a reduction in the value of property.

11 By the second ground in their notice of contention, the second to fifth respondents contend that the primary judge ought to have held that the appellant and the sixth to eighth respondents were liable to compensate the second to fifth respondents in equity and that the measure of equitable compensation was to restore those respondents to the position that they would have been in had the donation agreement not been executed. They say that the ground arises 'if the tort of unlawful means conspiracy is not made out for any reason'.[14] However, there is no basis for concluding that the primary judge ought to have awarded equitable compensation, given that the Court of Appeal remitted the 2009 proceeding to the Trial Division for a determination of the quantum of damages to be awarded to the first to fifth respondents in respect of their claim for unlawful means conspiracy {CAB 304}.

12 Even if the primary judge had been permitted to make an award of equitable compensation, any such award would not have been justified given that the first to fifth respondents have sustained no actual loss. The second to fifth respondents' contention appears to be that, even if a plaintiff cannot obtain common law damages for a mere reduction in chance, a plaintiff might nevertheless recover equitable compensation in respect of that reduction. That contention should be rejected. A reduction in chance, where the chance has not been lost, should not be treated as compensable loss, whether at common law or in equity.

C Response to the second to fifth respondents' notice of cross-appeal

13 By their notice of cross-appeal, the second to fifth respondents contend that the primary judge erred in holding that the opportunity to recover upon the judgment should be

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[12] Second to Fifth Respondents' Response, at [59]–[60], citing *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, at pp 629–30 [26].
[13] (2013) 247 CLR 613, at p 631 [32] (footnotes omitted), citing *Hawkins v Clayton* (1988) 164 CLR 539, at p 601; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, at pp 527, 533; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, at p 425 [16].
[14] Second to Fifth Respondents' Response, at [7].

valued taking into account their prospects of success of later proceedings commenced in the Czech Republic against the seventh and eighth respondents. They further contend 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. According to the second to fifth respondents, the primary judge erred in conflating two distinct and different opportunities.[15] However, as referred to in paragraph 6 above, the primary judge was correct to identify a single opportunity.

14 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' {Court of Appeal's reasons for judgment on quantum, at [31]: CAB 350}.

15 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. The cross-appeal should therefore be dismissed.

5 February 2021

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[15] Second to Fifth Respondents' Response, at [63].

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