HIGH COURT OF AUSTRALIA

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Details of Filing

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Registry:	Melbourne
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M111 of 2020

BETWEEN: **JUDITH GAIL TALACKO**

Appellant

JAN TALACKO (AS EXECUTOR OF THE ESTATE OF HELENA MARIE TALACKO) & ORS

Respondents

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Outline

2. **Not a 'reduction of a chance' case.** The appellant's first ground of appeal (**CAB, 414)** rests on a false premise. Two errors inhere in the appellant's characterisation of the issue as *"whether a reduction in a chance to recover a judgment debt, where the judgment debt may yet be recovered, can constitute actual loss sufficient to complete a cause of action*" (**AS, [41]**):

   a. First, the donation agreement destroyed (cf. reduced) the chance to recover the judgment debt.

   b. Second, some years after that chance was eliminated, a qualitatively different chance arose in its place. They are separate and distinct chances, not a single chance.

3. The donation agreement destroyed the chance to enforce the judgment debt against the properties. The judgment debt arose in circumstances where Jan Emil had breached terms of settlement, contractually entitling the respondents to equitable compensation: **AS, [17], [19]**. Kyrou J delivered judgment in the respondent's favour on 24 November 2009 (**SAB, 56)**. Between Jan Emil being found liable to pay equitable compensation, and Kyrou J fixing the amount of that compensation, the donation agreement was entered into, by which Jan Emil transferred his interest in the properties to his sons David and Paul: **AS, [20].**

4. That event had a significant, adverse impact on the respondents' interests which were the subject of the proceeding before Kyrou J. There was an immediate and irrevocable loss of the opportunity to recover the amount of the anticipated equitable compensation judgment against the properties (see Court of Appeal (liability), [108], [111]: **CAB, 295, 296**). The *measure* of that loss (cf. *existence*) was a different question (see Court of Appeal (liability), [108]: **CAB, 295**).

5. The total loss of this chance to enforce the judgment debt against the properties in the hands of Jan Emil applied equally to the chance of enforcing the judgment debt against Jan Emil's trustee in bankruptcy (see Court of Appeal (liability), [115]: **AB, 297**).

6. Had the donation agreement not been entered into, the respondents enjoyed a 75 per cent chance of recovering the debt created by entry of judgment *against Jan Emil, through realisation of the properties*: McDonald J (quantum), [54]: **CAB, 149**. Recourse to the properties was necessary to satisfy the judgment. By the donation agreement, the chance of executing the equitable compensation judgment against the properties held by Jan Emil – the only judgment debtor – was eliminated (cf. reduced).

7. The appellant describes the 'reduced chance' in the abstract – viz, *"chance of recovering the judgment debt"* (**AS, [37]**) and *"chance of recovering the amount of the judgment debt"* (**ASR, [4]**) – without reference to the person against whom the

judgment debt may be recovered. This abstraction is an attempt by the appellant to side-step the basis on which she was unsuccessful in the Court of Appeal. The Court of Appeal clearly identified the opportunity lost as the opportunity to recover the judgment against the (only) judgment debtor, *Jan Emil* (eg Court of Appeal (liability), [111], [112]: **CAB, 296**; **1RS, [17], [35]**; **2 – 5 RS, [29]**).

8. Eliminating the chance of enforcement as against the judgment debtor plainly constituted "*some damage*": *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 351 (***Sellars***). The sustaining of that damage, upon entry into the donation agreement, perfected the cause of action in conspiracy (first respondent's submissions (**1RS**), **[16] – [19]**; second to fifth respondents' submissions (**2 – 5 RS**), **[21] – [24]**. The cause of action was not, and could never be, 'unperfected' by subsequent events.

9. A different, inferior chance arose some years after the first chance was destroyed. That chance arose in the form of proceedings taken in the Czech Republic against Jan Emil's sons, David and Paul. It is a chance to lessen – in effect, mitigate – the damage occasioned by the donation agreement.

10. The appellant's argument relies on eliding two separate chances which are temporally, legally, and jurisdictionally distinct: **1RS, [19] – [25]; 2 – 5 RS, [25] – [34].**

11. The second to fifth respondents commenced their donation proceeding in the Czech Republic on 4 November 2011. The first respondent commenced his on 20 April 2012. The inception of each action post-dated the donation agreement and Kyrou J's equitable compensation judgment by several years. The appellant has not addressed the question of how it could be said that the respondents did not suffer loss and damage in the period between 12 May 2009 (entry into the donation agreement) and 4 November 2011 (institution of the first donation proceeding).

12. The Czech proceedings are not being brought against the judgment debtor or his estate; they are brought against David and Paul, and they are proceedings under article 42A of the Civil Code (McDonald J (quantum), [65] **CAB, 154**; provision, **SAB, 196**). Success in those proceedings would ultimately create a different debt or compensation obligation (ie, on the part of Paul and David) to that which existed against Jan Emil, the judgment debtor, which further demonstrates the error in the appellant's 'single chance' premise.

13. **Reduction of a chance still constitutes damage sufficient to perfect the cause of action in conspiracy.** Even if the factual circumstances here fall within the notion of 'reduction of a chance', that reduction still occasioned damage. The respondents went from having a 3 in 4 chance of recovery to a 1 in 5 chance.

14. That is damage in the form of detrimental difference when comparing the position the respondents were in before the donation agreement with the position they were in after: *Tabet v Gett* (2010) 240 CLR 537, 564 [66] (***Tabet***); **1RS, [32] – [35]**).

15. The different factual and policy context in which medical negligence cases like *Tabet* are assessed is important. The commercial interest lost in a loss of a commercial

opportunity case may readily be seen to be of value itself, whereas the same cannot be said of a chance of a better medical outcome: *Tabet*, 581, [124]; **1RS, [36]**).

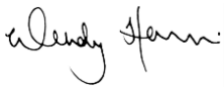
16. The reduction in the value of a commercial opportunity is recoverable: *Sellars*, 343, 345, 356, 365. The fact, consonant with the reasoning in *Sellars*, that the respondents have lost a valuable commercial opportunity through the diminishment in the *value* of the opportunity which existed before the conspiracy, with what existed after, means damage has been sustained and the cause of action perfected even if it is correct to characterise the opportunity as a 'single' opportunity in respect of which the prospects of realisation have been reduced.

17. **Notice of Contention, cross appeal: chance of success in Czech Republic irrelevant to value of lost chance.** This issue arises by way of notice of contention, on the decision of the Court of Appeal, which ought to have made clear not only that loss of a chance occurred at the time the donation agreement was entered into, but that the Czech donation proceedings were not relevant to calculation of the value of that loss (cf Court of Appeal (liability) [112], **CAB 296**). The same issue arises by way of cross-appeal from the judgment of McDonald J, who erred in setting off the value of the chance created by the donation proceedings against the value of the lost chance to enforce the judgment debt against the properties (cf McDonald J (quantum), [56], [89], **CAB 15-152, 164**).

18. Leave to cross-appeal should be granted under Rule 42.08.04: the issue is raised by the notice of contention, and is in any event inextricably linked with the subject matter of the appeal. The chances set off against one another were different chances; the first, lost chance to enforce the judgment debt against the properties was not revived in a reduced form by the later initiation of the donation proceedings. Further, and in any event, nothing has happened in the donation proceedings which have reduced the loss that has been suffered through loss of the first chance.

19. Substantive argument on this point, and the **second ground of appeal concerning legal expenses**, will otherwise be advanced on behalf of all respondents by the second to fifth respondents.

Dated: 10 March 2021



W A Harris QC

K A Loxley