HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M111/2020
File Title:	Talacko v. Talacko & Ors
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument-Outline of Oral Submiss
Filing party:	Respondents
Date filed:	09 Mar 2021

Important Information

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

BETWEEN: **JUDITH GAIL TALACKO**
Appellant

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and

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

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OUTLINE OF ORAL SUBMISSIONS OF THE SECOND TO FIFTH RESPONDENTS

Part I: Certification as to publication on the internet

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

Part II: Propositions to be advanced in oral argument

A. Notice of Appeal [2] (CAB 414): loss of the opportunity to recover under the Terms

2. The second to fifth respondents adopt the submissions for the first respondent and otherwise rely upon their written submissions at 2-5RS [9] to [34].

B. Notice of Appeal [3] (CAB 415): expense incurred in trying to overcome the conspiracy is damage for the purpose of completing the tort

3. The award of damages on account of expenses (CAB 206-207) was correct. The appellant is wrong to argue that a Czech court might order the first to fifth respondents (the **respondents**) to bear their costs of the Donation Proceedings. **First**, McDonald J found at PJQ [100] (CAB 168) that the majority of the expenses are irrecoverable: 2-5RS [35]-[37]. The incurring of those irrecoverable expenses is damage. **Second**, the proposition that a Czech court might order the respondents to bear their own costs (and that those costs might be unreasonably incurred) was never advanced below, and instead the different proposition was advanced that because a Czech court might order indemnity costs in favour of the respondents, the loss was merely contingent: CAL [87]-[88], [93], [102], [103]; CAB 285-288, 289, 293-4. It is now too late for the appellant to bring this forward as a ground of appeal, for it might have been met by evidence below: 2-5RS [38].

4. The appellant is also wrong to argue (AS [66]) that it would be anomalous if the respondents could obtain damages against her but not her joint tortfeasors for the costs of the Czech proceedings. The appellant's reliance upon *De Reus v Gray*[1] is misplaced, because damages were awarded against all tortfeasors: 2-5RS [42]. The reliance upon *Anderson v Bowles*[2] is misplaced because: (i) even if the appellant were to be permitted to advance the proposition that a Czech court might one day order the respondents to bear their own costs, this is mere speculation unsupported by finding or evidence, and (ii) the awarding of costs of the Donation Proceedings as damages for conspiracy does not offend the principle in *Anderson v Bowles*: 2-5RS [9], [10], [40]-[42]. The appellant's reliance upon *McGregor on Damages* at [21.055]-[21.063] (ARS [7]) is also misplaced, for the passages relied upon are concerned with remoteness of loss, which is not germane.

[1] (2003) 9 VR 432 (CA), 451-2 [27], relied upon AS [66].
[2] (1951) 84 CLR 310, 323, relied upon AS [66].

C. Cross-appeal [2]-[3], [7] (CAB 427-8): damages should have been calculated as 75% not 55% of the Kyrou J judgments

5. Special leave to cross-appeal should be granted (r 42.08.4). Leave is not opposed. The ground involves a discrete question of law that mirrors the ground of appeal: if there is not a 'single reduced opportunity', but a lost opportunity, there is no reason why damages for the lost opportunity should be assessed as if it were reduced but not lost.

6. The Court of Appeal held that damage was suffered because by divesting the sixth respondent (Jan Emil) of his assets the conspiracy caused an 'impediment' to recovering against him: CAL [45], [108], [111]-[115]; CAB 266, 295-7; 2-5RS [19]. On remitter, McDonald J found that the conspiracy had caused the prospect of recovery against Jan Emil to be wholly lost: PJQ [55], [56], [86]; CAB 151, 163. McDonald J valued the opportunity to recover against Jan Emil (but for the conspiracy) at 75% of the Kyrou J judgment and costs order: PJQ [89]; CAB 164. Quantifying the damages suffered by reason of the 'impediment' should have involved calculating the difference between that amount and zero.

7. McDonald J was wrong to accept the appellant's submission that damages should be reduced by reference to the prospects of recovery against the seventh and eighth respondents (David and Paul). That formed no part of the 'impediment' to recovering against Jan Emil: 2-5RS [63], [64]. The new 'opportunity' to recover against David and Paul is not properly an opportunity at all, but is instead an assessment of the possibility of the victims of a conspiracy being able to unpick it; assessing quantum in this way also introduces absurdities that the law should turn its face against; and it is contrary to principle to throw the risk of recovering the shortfall (viz. the 20% deducted, equal to $2,142,570) on to the victims of the conspiracy: 2-5RS [66]-[74].

D. Notice of contention [2] (CAB 421): loss of value of the respondents' chose in action against Jan Emil is damage that completes the tort

8. There is a difference between loss of a *chance* that may never come about, and the reduction in value of an existing property right whose *value* depends on the probability of future events. In the former case, there is no more than a hope which may never eventuate; in the latter case, an exigible right exists. For the latter, damage will be sustained if a loss of value has occurred, whether from an extinction of the prospect of future recoveries, or a mere reduction in their probability: 2-5RS [50], [58].

9. As at 12 May 2009, the respondents held a right under the Terms that was property: 2-

5RS [53], [54]. That right had value depending upon what assets Jan Emil held: 2-5RS [55]. That value was significantly, if not totally, lost by reason of the Donation Agreement: 2-5RS [55]-[57]. Even if the respondents' right is not characterised as a lost opportunity, its loss of value is properly characterised as damage that founds the tort: 2-5RS [58]-[60]. McDonald J's findings support a conclusion that the value of the respondents' chose in action was reduced by 55% of the prospective judgment debt (73.3% in value): 2-5RS [57].

10. The appellant's reliance at ARS [10] upon *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [32] is misplaced. That passage is concerned with cases where the loss claimed comprises an inability to recover monies lent. McDonald J did not find that there was an inability to recover upon the judgment debt. He found that the prospect of recovery had been reduced (from 75% to 20%). The relevant passage is therefore the second sentence of [31] of *Hunt & Hunt Lawyers*.

E. Notice of contention [3](a), (b) (CAB 421-2): the orders may be upheld as an award of equitable compensation

11. If the common law will not award damages via the tort of conspiracy, equity will (in its gap-filling role) award compensation, responding to the presence of equitable fraud, even if there is no trust or fiduciary relationship between the plaintiff and defendant: *Nocton v Lord Ashburton* [1914] AC 932 at 952-4; *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 55-6; Story, *Commentaries on Equity Jurisprudence* (1836, vol 1) §§184, 187, 252-3, 328, 349, 377; 2-5RS [77]-[80]. The necessary findings of equitable fraud have been made, and no new findings are required: 2-5RS [81].

12. The relevant damage is either the loss in value of the chose in action held by the respondents, or the loss by them of the pre-existing state of affairs where Jan Emil held assets which could be enforced against by an Australian trustee in bankruptcy to pay out the full value of his liability under the orders he consented to in the Terms. The quantum of compensation is to put the respondents in the position they would have been in had the fraudulent conduct not occurred: either the lost value of their chose in action, or the amount they could have recovered against Jan Emil had he still held the properties.

Date: 10 March 2021

Dominic O'Sullivan **Ben Kremer** **Olaf Ciolek**