HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

JOHN JAMES MURPHY & ANOR APPELLANTS

AND

OVERTON INVESTMENTS PTY LIMITED RESPONDENT

Murphy v Overton Investments Pty Ltd
[2004] HCA 3
5 February 2004
S78/2003

ORDER

1. *Appeal allowed with costs.*

2. *Set aside pars 5(viii), (ix), (x) and (xi) of the orders made by the Full Court of the Federal Court on 22 June 2001 and, in lieu thereof, order that:*

    (a) *Appeal allowed with costs.*

    (b) *Remit the applications in Matters N159 of 1999 and N946 of 1999 to the trial judge for consideration of the assessment of damages and interest to be allowed to the appellants conformably with the reasons given by this Court, and entry of judgment accordingly.*

    (c) *Costs of the original trial and of the further proceedings on remitter to be in the discretion of the trial judge.*

On appeal from the Federal Court of Australia

Representation:

R J Ellicott QC with G A Moore for the appellants (instructed by The Aged-Care Rights Service Inc)

J C Kelly SC with A J McInerney for the respondent (instructed by Gadens Lawyers)

CATCHWORDS

Murphy v Overton Investments Pty Ltd

Trade Practices – Remedies – Misleading conduct – Lease for unit in retirement village – Lessee liable to pay proportionate part of all expenditure incurred in operating village – Estimate of likely expenditure given to prospective lessees – Estimate misleading – Estimate did not include all expenditure being incurred in operation of the village – Accepted that respondent engaged in conduct in contravention of Pt V of the *Trade Practices Act* 1974 (Cth) – Relief available under Pt VI of the *Trade Practices Act* – Whether appellants suffered "loss or damage" within meaning of ss 82 and 87 of the *Trade Practices Act* – Whether "loss or damage" confined to economic loss – Whether incurring unexpected expenditure can be loss or damage – Whether "loss or damage" is necessarily singular – Whether loss or damage constituted only by any diminution in value of the lease – Whether increased future contributions could be awarded as damages.

Words and phrases – "loss or damage".

Trade Practices Act 1974 (Cth), ss 4K, 82, 87.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ. In 1992, the appellants, Mr and Mrs Murphy, were considering moving into a retirement home. The respondent, the developer and then owner of the Heritage Retirement Village, at Padstow Heights, a suburb of Sydney, gave the appellants an information brochure about the village. The brochure explained that the respondent was selling leasehold interests in units at the village. (The leases were to be registered leases for a term of 99 years.)

2 The brochure said that there would be an "on-going management and maintenance program" at the village. It said that "[p]resent budget figures would indicate" that, for a unit of the kind that the appellants were considering leasing, a pensioner would incur a weekly cost of $55.71.

3 The lease which the respondent offered obliged the lessee to contribute to outgoings. The relevant provision of the lease (cl 5) gave a long, but not exhaustive, list of items which could be included in the amount of outgoings. They included such things as rates, insurance premiums, and a great variety of maintenance and like expenses, but in effect extended to all expenditure incurred in carrying on the operations of the village. The lease provided that the respondent would make a periodical estimate of likely outgoings, which tenants would then pay by monthly or other instalments, and that, as soon as practicable after the end of the period, the respondent would charge or credit tenants with the amount of any difference between the estimate and the actual outgoings incurred.

4 In 1992, the appellants agreed to take a lease of Unit 53 in the village. Before they executed the relevant documents, which they did on 20 October 1992, the appellants sought legal advice about the lease. The first appellant read and understood the provisions of the lease dealing with outgoings. The reference schedule annexed to the appellants' lease said that the estimated initial outgoings for their unit, in the case of pensioner tenants (as the appellants were), was $55.71 per week.

5 The lease made plain that the figure of $55.71 given in the schedule was no more than an estimate, and that the amount of outgoings to be charged to tenants was subject to determination and variation from time to time. But the figure of $55.71 was calculated "on figures that did not adequately provide for all expenditure actually being incurred in the operation of the Heritage Village"[1]. It

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1 *Murphy v Overton Investments Pty Ltd* [2000] FCA 801 at [191].

is now not disputed that it was misleading, or likely to mislead, for the respondent to give this estimate to the appellants without disclosing that it did not adequately provide for all the expenditure then actually being incurred in the operation of the village. It is accepted, therefore, that the respondent engaged in conduct in contravention of Pt V of the *Trade Practices Act* 1974 (Cth) ("the Act").

6 The ultimate question in the appeal is what, if any, relief under Pt VI of the Act the appellants should have for this contravention of Pt V. That question arises in an appeal brought against orders of the Full Court of the Federal Court of Australia[2]. Those orders were made in appeals against the dismissal of the proceedings at first instance[3]. The Full Court ordered that the proceedings be remitted to the trial judge for further consideration of certain claims that had been made by the appellants under the *Contracts Review Act* 1980 (NSW) and a costs order. Otherwise, the appeals were dismissed.

7 The claims under the *Contracts Review Act* were held, on remitter, to fail. An appeal against those orders was abandoned.

8 In this Court, the appellants contended that the Full Court was wrong to dismiss their appeal against the trial judge's refusal to award damages. Recognising that this Court was not in a position to assess the damages which should be allowed, the appellants contended that the assessment of damages should also be remitted to the trial judge. That contention should be accepted.

9 It will be necessary to say more about the history of the proceedings in the Federal Court but, to understand that history and the issues which fall for decision in this Court, it is necessary to begin the description of the dispute between the parties at an earlier point.

The dispute about outgoings

10 Until 1997, the respondent did not charge tenants of the village all outgoings that could properly be charged under the leases. It seems that the

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2 *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182.

3 *Murphy v Overton Investments Pty Ltd* [2000] FCA 801.

prospect of increasing tenants' contributions was first raised in early 1993. Tenants opposed this suggestion. Reference was made to a code of practice known as the Retirement Village Industry Code of Practice 1989, it being said that this prevented the respondent increasing the level of contributions without tenants' approval. (This, and a later Code made in 1995, were made by regulation under the *Retirement Villages Act* 1989 (NSW).)

11 In March 1994, the respondent received advice from an accountant that much more could be charged for outgoings than was then being charged, and that to continue charging outgoings at the level then being charged "would be undesirable to the financial position" of the respondent. Thereafter the respondent attempted to increase the amounts it charged tenants for outgoings. These attempts led to several meetings between groups of tenants and representatives of the respondent in which there was much discussion, and dispute, about the rights and wrongs of increasing the levies for outgoings.

12 In July 1994, the respondent told tenants that, with effect from 1 July 1994, it would increase the levy for outgoings by more than 18 per cent and would make some other changes to the way in which outgoings would be calculated. The respondent did not demonstrate that in arriving at the increase of more than 18 per cent, categories of outgoings were taken into account which were additional to those taken into account in arriving at the estimate of $55.71.

13 The increase of more than 18 per cent appears later to have been understood as no more than an interim measure. Nonetheless, tenants consulted solicitors; consideration was given to tenants commencing proceedings in the Residential Tenancies Tribunal of New South Wales. The appellants and other tenants paid the increased charge but the underlying dispute continued to simmer.

14 In May 1996, the respondent produced its 1997 budget giving its estimate of likely outgoings for that year. In November 1996, it told tenants that it would thereafter charge all that it incurred in operating the village. This was later to be said to be the first unequivocal statement of this intention.

15 1996 saw the start of what was soon to prove to be an avalanche of litigation between the respondent and its tenants. It is necessary only to sketch an outline of that litigation.

Litigation in the Residential Tenancies Tribunal, the Local Court and the Supreme Court

16 In 1996, the respondent commenced proceedings in the Residential Tenancies Tribunal seeking orders that tenants agree to the financial budgets that the respondent had produced for its expenditure in connection with the village. The Tribunal dismissed this claim, holding that it had no jurisdiction to make the orders sought. The respondent appealed to the Supreme Court of New South Wales against the Tribunal's dismissal of its claim. In addition, it commenced proceedings against tenants in the Local Court, seeking to recover amounts which it claimed were due for outgoings it had incurred in past periods. The tenants' riposte was to commence proceedings in the Supreme Court seeking (among other things) declarations that the Retirement Village Industry Code of Practice 1989, and the 1995 Code, overrode those provisions of the leases which permitted the respondent, without the tenants' consent, to increase levels of contributions to be made by tenants.

17 A flurry of interlocutory applications followed in the Supreme Court: some dealing with the Local Court proceedings, some dealing with proceedings that had been brought by the Director-General of the Department of Fair Trading against the respondent in the Commercial Tribunal of New South Wales alleging contraventions of the Retirement Village Industry Codes of Practice. The respondent was restrained from prosecuting its Local Court proceedings. It then claimed, in the Supreme Court proceedings, the amounts it alleged were due for outgoings incurred since 1993.

18 It is necessary to give no more than a general outline of the further progress of the proceedings in the Supreme Court. The tenants' contentions that the Codes of Practice in some way overrode the obligations set out in the leases failed. Claims that the respondent had failed to use its best endeavours to conduct the village in a proper and efficient manner and had failed to act in good faith in the performance of its duties and functions gave rise to a detailed examination of amounts that had been spent in running the village. Those claims were referred to a special referee and, in substance, failed. So, too, the claims which the respondent had made for alleged shortfalls in amounts due for outgoings for the years between 1993 and 1998 were referred to the special referee. The amounts claimed included some legal and accounting costs incurred by the respondent in dealing with the dispute about how much could be recovered as maintenance levies. The total claimed on this account exceeded $496,000 and included accounting charges made for work done to provide

evidence, and for giving evidence in the Supreme Court. It did not include amounts for costs which the respondent had been ordered to pay to tenants. The special referee reported that these legal and accounting charges could be recovered as outgoings and the report in this and other respects was adopted by the Court.

19 Ultimately, therefore, the respondent obtained judgment in the Supreme Court against a large number of tenants (including the present appellants) for amounts which were held to be the balance of sums due to the respondent for outgoings. As is implicit in what is said above, these sums included legal and accounting costs incurred in dealing with the dispute. On condition that the tenant in question pay 50 per cent of the amount of the principal sum for which judgment was entered (excluding interest and costs), proceedings for enforcement of most of the judgments against the tenants (including the judgments against the appellants) were stayed pending the conclusion of the proceedings in the Federal Court which now give rise to the present appeal, or further order.

20 It was also ordered, in the Supreme Court, that certain matters, raised by tenants as defences to the claim in that Court for amounts due for outgoings, should be brought to trial by separate action, and that judgments be entered against the tenants without regard to those defences. Those matters raised as defences included contentions:

(i) that the respondent had engaged in misleading or deceptive conduct, contrary to the Act, thereby causing the tenants damage;

(ii) that the respondent, in breach of a duty of care, had negligently made misrepresentations about the level of outgoings, thereby causing the tenants damage;

(iii) that the respondent was estopped from recovering outgoings from tenants "insofar as they exceed the assumptions made" about their quantum by the tenant; and

(iv) that each tenant's lease was "unjust, harsh or oppressive within the meaning of s 7 of the *Contracts Review Act*".

Litigation in the Federal Court

21 In 1999, proceedings in the Federal Court were commenced, by the first appellant and others, as a representative claim. In August 1999, Emmett J ordered that the proceedings no longer continue as a representative claim, that the further amended statement of claim that had been filed be struck out, and that applicants other than the first appellant be removed as parties. Most tenants then commenced separate proceedings. Ultimately, Emmett J tried together the proceeding instituted by the first appellant and a separate proceeding later instituted by the second appellant. As finally framed, the appellants' claims raised each of the contentions which the Supreme Court had ordered should be brought to trial by separate action: misleading or deceptive conduct, negligent misrepresentation, estoppel, and claims under the *Contracts Review Act*.

The appellants' case at trial: misrepresentation

22 Reference should first be made to some claims that were made at trial but failed. The appellants alleged more than 20 separate misrepresentations had been made to them. These included alleged representations about the "affordability" of living in the village and about the outgoings which would be charged. They alleged that there were 13 relevant matters of which they should have been told, but were not. By the end of the trial both the number of representations and the number of omissions relied on had diminished, but the essential thrust of the appellants' case remained the same.

23 The claims founded on alleged misrepresentation about affordability failed. The trial judge pointed out[4] the intrinsic imprecision of the statement alleged, but that was not treated as determinative of the issue. Rather, central to the trial judge's conclusions about misrepresentations and omissions were the findings[5]

(a) that the first appellant, with the benefit of legal advice, had carefully examined the lease memorandum before the appellants undertook the obligations it recorded, and

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4 [2000] FCA 801 at [174].

5 [2000] FCA 801 at [176].

(b) that the first appellant had understood that the figure given for outgoings was an estimate only, subject to determination and variation from time to time in accordance with the lease.

But the trial judge also reached critical conclusions favourable to the appellants which partly depended on the second of those two findings. These conclusions were that the statement of an estimate of outgoings implied that all expenditure that could properly be taken into account in forming the estimate had been taken into account[6]; that since it had not been, the respondent's conduct was misleading or likely to mislead in contravention of s 52 of the Act[7]; and that if the truth had been revealed, the appellants would not have entered the lease[8]. That is, though the first appellant understood that the 1992 estimate of $55.71 per week for outgoings was subject to the respondent's discretion to vary it upwards, he and his wife thought the discretion would only be exercised in future on the same basis as the basis underlying that 1992 estimate.

24 Because the misrepresentation just described was the only misrepresentation established, the case was conducted in this Court by reference only to the Act. The respondent argued that the representation was only a representation of present fact – the elements of expenditure taken into account in relation to the 1992 estimate of $55.71 per week – and that no liability could arise from departures from the representation in relation to future years. The argument fails, because as a matter of causation the misleading representation induced the appellants to enter the lease, and once they had done so they were at risk of loss if the respondent decided to employ different elements of expenditure in arriving at future levies for outgoings. The claim for damages for negligent misrepresentation need not be considered further.

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6 [2000] FCA 801 at [191].

7 [2000] FCA 801 at [191].

8 [2000] FCA 801 at [203].

The appellants' claim to relief under s 87

25 The trial judge identified[9] the appellants' primary claim to relief as being for relief under s 87 of the Act. He said[10] that "[t]hey seek to restrict [the respondent's] recovery of maintenance fees from them by reference to a proportion of the single pension from time to time". This formulation of the relief sought was dictated largely, if not entirely, by the assumption that the appellants' case about "affordability" would be made out. But it was not confined to that eventuality; it encompassed a claim to relief under s 87 if any of the allegations of misleading or deceptive conduct were to be established. It was, of course, a claim that was framed without taking account of the possibility (later realised) that the respondent might sell its interest in the land to a third party before the lease arrangements had been reformed.

The appellants' claim to damages

26 The appellants' alternative claim, to damages, was described in the Full Court[11] as being to seek "to quantify their loss by reference to the difference in value of the Lease according to whether maintenance fees are calculated in accordance with [the respondent's] legal entitlement or whether there is some restriction on [its] entitlement to recover full reimbursement for expenditure incurred in operating the Heritage Village". The trial judge pointed out[12] that there was no claim for damages related to the consideration which the appellants paid for the grant of the lease. There was, his Honour said[13], "no evidence that that consideration was other than a proper consideration for the leasehold interest" that the appellants acquired. That is, there was no evidence that the price paid on entry into the lease on 20 October 1992 exceeded its value at that date, and no case based on that contention was ever put.

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9 [2000] FCA 801 at [207].

10 [2000] FCA 801 at [207].

11 (2001) 112 FCR 182 at 187 [11].

12 [2000] FCA 801 at [208].

13 [2000] FCA 801 at [208]; see also [221].

27 The alternative claim to damages thus sought to arrive at a single capital sum to reflect the difference in *value* of the lease. The appellants rested their case upon the evidence of valuers who sought to compare the market value of the *lease* at November 1996 and at the date of trial, according to whether all outgoings could be recovered, or only some limited sum could be charged. The claim was not framed by direct reference to an assessment of the present value of the difference between the *outgoings* to be incurred in the future when assessed on alternative bases. There appears to have been no consideration given to how any shortfall in outgoings would be met or whether the respondent would be able to continue to operate the village without recovering all the outgoings incurred in its operation. These matters appear to have been treated as matters irrelevant to an assessment of what loss the appellants had suffered, or would later suffer, and the contrary was not suggested in argument in this Court.

28 Like many assessments of future economic consequences, a calculation of the present value of the difference between future outgoings assessed on alternative bases is not simple. As will be explained later, a calculation of that kind may well require a finding about how far into the future the obligation to pay outgoings (and thus the obligation to pay a larger than expected sum for outgoings) could be expected to endure. It appears that no evidence was led and no argument advanced at trial about those matters.

Conclusions at trial

29 The trial judge concluded[14] that the appellants had not proved that they had suffered any loss or damage. There were two steps taken to reach that conclusion. First, his Honour said that[15]:

> "When a claimant is induced by a misrepresentation to enter into an agreement that proves to be to his or her disadvantage, the claimant sustains a detriment, in a general sense, on entry into the agreement. That is because the agreement subjects the claimant to obligations and liabilities that exceed the value or worth of the rights and benefits that it confers upon the claimant. However, detriment in that general sense is not

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14 [2000] FCA 801 at [221].

15 [2000] FCA 801 at [215].

> universally equated with the legal concept of '*loss or damage*' – *Wardley Australia Ltd v Western Australia*[16] ... Where a misrepresentation induces a claimant to enter into an agreement to purchase property, the claimant's loss, apart from any question of consequential damage, is measured by the difference between the price paid or payable under the agreement and the value of the property at the date of the agreement – *Potts v Miller*[17]."

As has been said above, there was no evidence of any difference between price paid under the agreement and the value of the property at the date of the agreement.

30 Secondly, it was said that, because the lease obliged the appellants to pay the sums claimed as outgoings, and there was no evidence that the appellants were "not receiving value for the maintenance fees that they [were] paying", they suffered no loss "by reason of the level of maintenance fees that they [were] liable to pay"[18]. It was said that the appellants had done nothing to their detriment after the respondent indicated that it intended to charge all that it was entitled to charge under the lease for outgoings[19]. Their obligation to make those payments was undertaken when they took their lease and that obligation was not "contingent in the sense that was referred to in *Wardley*"[20].

31 Two comments about this reasoning may be made at once. First, the difference between price and value will often be an important element in assessing the damage suffered by a person who, by a misrepresentation, has been induced to buy an item of property. As the trial judge said, there may also be questions of consequential damage. It would be wrong, however, to assume that in every case of misrepresentation (leave aside other forms of misleading or deceptive conduct) the only kind of damage which may be suffered, and compensated or redressed by orders under Pt VI of the Act, is any difference

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16 (1992) 175 CLR 514 at 527.

17 (1940) 64 CLR 282 at 297-299.

18 [2000] FCA 801 at [213].

19 [2000] FCA 801 at [214].

20 [2000] FCA 801 at [220].

between price and value or any consequential losses. In particular, care must be exercised before seeking to apply what it described as the "rule in *Potts v Miller*"[21] to claims made for relief under Pt VI of the Act . This is especially so when it is recalled that while the only monetary remedy for the tort of deceit is damages, a far wider range of remedies is available where contravention of the Act has caused or is likely to cause loss or damage to a party to the proceeding.

32 Secondly, while the trial judge rightly pointed out[22] that there was no evidence that the appellants did not receive value for the maintenance fees they paid, it does not necessarily follow that there was no loss incurred by the appellants if the outgoings for which they were liable included sums of a kind which had not been taken into account in forming the estimate they were given.

33 Both appellants' proceedings in the Federal Court were dismissed at first instance. Emmett J held that the Federal Court had no jurisdiction to make orders of the kind sought by the appellants under the *Contracts Review Act* and that those claims must be ventilated in a State court[23]. Accordingly, provision was made by the orders dismissing the appellants' claims, for the appellants to seek orders for referral to the Supreme Court of New South Wales of questions arising out of the *Contracts Review Act*. As noted earlier, the Full Court[24] reached the opposite conclusion about this jurisdictional question and neither the correctness of the Full Court's conclusion, nor the subsequent dismissal of claims to relief under the *Contracts Review Act*, is now in issue.

The Full Federal Court

34 The appellants appealed to the Full Court against the orders dismissing their claims. When those appeals came on for hearing the position which had been reached in the litigation between tenants and the respondent could be summarised as being this. First, the respondent had judgment against the

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21 (1940) 64 CLR 282. See also *Toteff v Antonas* (1952) 87 CLR 647 at 650-651.

22 [2000] FCA 801 at [213].

23 [2000] FCA 801 at [246], [249].

24 (2001) 112 FCR 182 at 200 [60] per Branson J, 208 [95] per R D Nicholson J, 230 [161]-[162] per Gyles J.

appellants and other tenants, in the Supreme Court, for the unpaid balance of amounts the respondent claimed as outgoings incurred by it in operating the village between 1993 and 1998. Those outgoings included legal and accounting costs incurred in connection with the dispute. Secondly, the tenants' contentions that the Retirement Village Industry Codes of Practice precluded enforcement of the obligation in the leases to contribute the amounts which the respondent claimed as outgoings had failed. Thirdly, execution of the judgments obtained in the Supreme Court was stayed on condition that one half of the principal was paid to the respondent. Fourthly, claims which the appellants had made, alleging misleading or deceptive conduct, negligent misrepresentation, and that the respondent was estopped from recovering some or all of the amounts it claimed, had been dismissed in the Federal Court. Fifthly, the claims that powers under the *Contracts Review Act* to reform the contractual arrangements underlying the appellants' interests in land should be exercised in the appellants' favour had not then been determined.

35 In addition, it is necessary to notice one further matter of fact which intruded between the making of orders at first instance in the Federal Court and the hearing of argument in the appeal to the Full Court of that Court. The respondent sold the village to a third party. That sale was completed on 29 June 2000 and the respondent ceased to be owner or manager of the village. That third party was not joined to the proceedings. Nor were other tenants party to the proceedings. Absence of these parties (new owner or other tenants or both) may have presented some difficulties. It would have been wrong to make any order reforming the leases the tenants had taken, in a way that would affect their future obligations to the new owner, without hearing the new owner. Similarly, if an order reforming the appellants' lease would have adversely affected other tenants, there may very well have been difficulty in making such an order without hearing from those others. Neither of these possible difficulties was debated in the courts below and they may be put aside in this Court. That is not to say, however, that they may not have to be examined in other cases like the present.

The Full Court decision

36 In the Full Court, the majority (Branson and R D Nicholson JJ) held that the trial judge was right not to make any award of damages to either appellant. That conclusion depended upon the following steps in reasoning. First, the

critical question was identified[25] as being what would the appellants have done had the respondent not engaged in contravention of a provision of Pt V of the Act. Secondly, because it was known that in that event the appellants would have entered another, identified, retirement village, the question became[26] what would the appellants' position have been had they not entered the lease they did, but entered the other village. Thirdly, because no evidence was led to establish what would have been the appellants' position had they entered the other village, the majority held[27] that the claim to damages under s 82 or s 87 or other relief under s 87 had been rightly held to fail for want of proof of loss or damage.

37 Branson J noted[28] that the primary relief sought at trial was relief under s 87 in the form of an order restricting the respondent's right to recover outgoings from the appellants. Her Honour went on to say[29] that, as the respondent no longer owned or operated the village, "an order of this nature would now be of limited value". The principal focus of the majority in the Full Court was upon the claim for damages under s 82. Yet it appears plain from the judgments in the Full Court that the claim for relief under s 87 was not then abandoned.

38 It is also clear that the arguments about relief advanced to the Full Court were, as might be expected, shaped by the course of evidence at trial. In particular, the arguments were shaped having regard to the fact that the only evidence led at trial which sought to quantify the loss suffered by the appellants was evidence about the capital value of their leases assessed at different times and on different assumptions about the extent of the obligation to meet outgoings. It may also be that the sale of the village shifted the principal emphasis of the claim away from relief under s 87 to relief under s 82.

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25 (2001) 112 FCR 182 at 195 [40] per Branson J, 207 [92] per R D Nicholson J.

26 (2001) 112 FCR 182 at 195 [39]-[41] per Branson J, 207 [92] per R D Nicholson J.

27 (2001) 112 FCR 182 at 195 [42] per Branson J, 207 [92] per R D Nicholson J.

28 (2001) 112 FCR 182 at 187 [11].

29 (2001) 112 FCR 182 at 187 [11].

39 What is clear is that the reasons of the majority in the Full Court focused upon whether the appellants had proved an entitlement to damages. The majority held that they had not.

40 The third member of the Court (Gyles J) held that the respondent should have been found to have been estopped from recovering part of the outgoings it claimed and that, accordingly, damages could have been awarded. He concluded[30] that it was "not possible to make any final orders for relief, as much depends upon further decisions to be made by the judge and elections to be made by the appellants". He referred[31], in this connection, to what appeared to be difficulties in giving effect to the estoppel, to what he called "other complications" which followed from the respondent's sale of the village, and to the possible effect of "other collateral proceedings" upon relief.

41 Gyles J would have remitted to the trial judge, for further consideration, the question of what relief should be allowed. In part, the conclusion reached by Gyles J was based on the view[32] that the respondent should have been held to be estopped from claiming outgoings of a kind other than those that had been taken into account in forming the estimate the appellants were given.

42 This abbreviated description of the reasons of the Full Court reveals that the majority of the Court focused upon what might be described as the capital consequences to the appellants of the respondent's misleading or deceptive conduct. The majority confined attention to whether the appellants had paid too much for the lease they had acquired. By contrast, Gyles J, in dissent, can be understood as directing attention to a more general inquiry about whether, and how, the appellants were worse off as a result of the respondent's contravention.

43 This division of opinion in the Full Court was understood to raise a fundamental question about what the Act means by "loss or damage" and how loss or damage is to be identified. Particular attention was given, both in the

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30 (2001) 112 FCR 182 at 230 [164].

31 (2001) 112 FCR 182 at 230 [164].

32 (2001) 112 FCR 182 at 228 [153].

reasons of the Full Court[33] and in the arguments advanced in this Court, to analysing this Court's reasons in *Marks v GIO Australia Holdings Ltd*[34] concerning the identification of loss or damage. In the end, however, the resolution of this appeal does not depend upon identifying the nature or extent of any differences there may be between the separate reasons given in *Marks*. It depends upon the application of the Act according to its terms.

Some general principles affecting remedies under Pt VI

44 This Court has now said more than once[35] that it is wrong to approach the operation of those provisions of Pt VI of the Act which deal with remedies for contravention of the Act by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law. No doubt analogies may be helpful, but it would be wrong to argue from the content of the general law that has developed in connection, for example, with the tort of deceit, to a conclusion about the construction or application of provisions of Pt VI of the Act. To do so distracts attention from the primary task of construing the relevant provisions of the Act. In the present case, analogies with the tort of deceit appear to have led to an assumption, at least at trial, that a person can suffer only one form of loss or damage as a result of a contravention of Pt V of the Act.

45 The Act's references to "loss or damage" can be given no narrow meaning. Section 4K of the Act provides that loss or damage includes a reference to injury. It follows that the loss or damage spoken of in ss 82 and 87 is not confined to

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33 (2001) 112 FCR 182 at 192-193 [29]-[33] per Branson J, 206-207 [84]-[90] per R D Nicholson J, 218-220 [126]-[131] per Gyles J.

34 (1998) 196 CLR 494.

35 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 503-504 [17] per Gaudron J, 510 [38] per McHugh, Hayne and Callinan JJ, 529 [103] per Gummow J, 549 [152] per Kirby J; *Henville v Walker* (2001) 206 CLR 459 at 501-502 [130]-[131] per McHugh J; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 124-125 [42]-[48] per Gaudron, Gummow and Hayne JJ.

economic loss[36]. What kinds of detriment constitute loss or damage, when a detriment is to be identified as occurring or likely to occur, and what remedies are to be awarded, may all raise further difficult questions. Especially is that so when it is recalled that remedies may be awarded to compensate, prevent or reduce loss or damage that has been or is likely to be suffered by conduct in contravention of the Act.

46 In *Wardley Australia Ltd v Western Australia*, a case about the application of s 82 of the Act, not s 87, a majority of the Court held[37] that risk of loss is not itself a category of loss, and that, if a plaintiff enters a contract which exposes the plaintiff to a *contingent* loss or liability, that plaintiff "sustains no actual damage until the contingency is fulfilled and the loss becomes actual"[38]. *Wardley* illustrates that it is necessary to identify the detriment which is said to be the loss or damage which has occurred (or, when considering the application of s 87, has occurred or is likely to occur). In that case, the mere entry into obligations which might, but need not, have had detrimental consequences in the future was held not to have occasioned loss or damage to the party making the contract.

Loss is not necessarily singular and may require more than one remedy

47 Both s 82 and s 87 of the Act invite attention to whether a person has suffered (or, in the case of s 87, has suffered or is likely to suffer) loss or damage by contravention of (among other provisions) a provision of Pt V. Section 87 invites attention to whether any of a wide range of orders might be made to compensate, in whole or in part, for the loss or damage or to prevent or reduce the loss or damage.

48 It is convenient to explain and illustrate the points that are to be made about the operation of those provisions by drawing on the distinction made in the law of taxation between capital and revenue account[39]. But it must be

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36 *Marks* (1998) 196 CLR 494 at 513 [46] per McHugh, Hayne and Callinan JJ, 526-527 [93]-[96] per Gummow J.

37 (1992) 175 CLR 514 at 526-527 per Mason CJ, Dawson, Gaudron and McHugh JJ.

38 (1992) 175 CLR 514 at 532 per Mason CJ, Dawson, Gaudron and McHugh JJ.

39 *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639.

emphasised that the distinction is drawn only for the limited purposes of explanation and illustration. The Act draws no such distinction. It speaks only of loss or damage.

49 It should not be assumed that the loss or damage which a person suffers as a result of a contravention of Pt V is necessarily singular. Nor should it be assumed that loss or damage is incurred *either* as a loss on capital account, *or* as a loss on revenue account which, if to be compensated by an award of damages, must be translated into a single capital sum. These assumptions find no support in the language of the relevant provisions.

50 Loss or damage may be a loss of capital. But there may also be a loss on revenue account which, unless some other remedy is granted which will prevent it continuing into the future, will, or may, continue into the future. And the losses on capital account may be sustained at a time different from any loss on revenue account. The latter form of loss may, in many cases, be sustained after the loss on capital account has been suffered. In some cases the loss on capital account may overlap with a loss on revenue account. If that is so, it is necessary to mould relief in a way which will avoid double compensation.

51 A loss on revenue account, whether past or future, can be reduced to a single capital sum. Courts often undertake that exercise, and in doing so may acknowledge that it is difficult and that the result is imperfect. But the frequency with which the courts have had to grapple with the problem of translating a continuing stream of future losses (sometimes of uncertain amounts, over an indefinite and uncertain time) into a single capital sum does not mean that the only kind of loss which a person may sustain as a result of conduct of the kind now in issue is the loss of a capital sum. Nor does it mean that remedies other than an award of damages may not be made under the Act to compensate for, prevent or reduce those future losses.

52 It would be wrong, therefore, to assume that, where a person is induced by misleading or deceptive conduct to undertake a continuing future obligation, the remedy to be awarded for a contravention of Pt V of the Act must be, or even ordinarily will be, a lump sum award of damages. There will be cases in which that will be the appropriate remedy. But that is a conclusion to be reached only after identifying the loss or damage which has been or will likely be suffered. That loss or damage may take several forms. It may be incurred at different times. Whether damages are to be awarded in compensation may depend upon what other forms of relief are to be awarded. In particular it will be much

affected by what orders to prevent or reduce the loss or damage are made under s 87.

The appellants' loss

53 No doubt the appellants' disclaimer of any contention that they had suffered loss when they entered the lease in 1992 must be understood in the light of the three year limitation period then prescribed by the Act in ss 82(2) and 87(1CA)(b)[40]. It was important for the appellants to demonstrate that they had suffered loss or damage only when the respondent first said, in 1996, that it would recover from tenants all amounts that it was entitled to under the lease. If that were established, no limitation defence could be made out. It by no means follows, however, from the fact of disclaimer of any contention that damage was suffered by the appellants when they took the lease, that they did not suffer loss later.

54 In the present case, the finding that the appellants had been induced to enter the lease by a statement of estimated outgoings that was misleading, because it did not take account of all amounts that could properly be charged as outgoings, meant that the appellants undertook an obligation which may, but need not, have proved to be larger or more costly than they had been led to believe. There may be cases in which a person misled in this way suffers loss upon entering the agreement. That may be so if it could be shown that the sum paid exceeded the market value. But that was not this case. No evidence at trial suggested that they had paid more than market value. There was no misrepresentation about the nature or quality of the property being acquired. The first appellant knew and understood that the lease obliged the appellants, as tenants, to pay outgoings in amounts which the lessor was to determine.

55 What the appellants did not know was that the estimate of outgoings they were given did not provide for all the outgoings that were then being incurred. Here, therefore, the appellants suffered no loss as a result of undertaking the obligations they did unless and until the contingency which the misrepresentation hid (that items other than those used to form the estimate were then being incurred and could be charged as outgoings) was first realised. That was a

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40 The periods prescribed in those sections were extended to six years by the *Trade Practices Amendment Act (No 1)* 2001 (Cth).

contingency in the sense that the adverse risk might never have eventuated. When the lease was entered in 1992, the respondent was charging levies in relation only to limited categories of the overall outgoings. The respondent might have chosen to continue to charge the appellants only for those limited categories. On the other hand, it was possible that after 1992 it might decide to charge for wider categories. It was only from the time when it in fact decided to depart from the 1992 position and charge for the wider categories that the adverse risk eventuated. When it did, but only then, the appellants suffered loss and damage. And this Court's decision in *Wardley*[41] requires the conclusion, on the evidence in this case, that it was only when the contingency came to pass that the appellants sustained loss or damage. It follows that no limitation defence was available.

56 The onus of establishing that the appellants' claim under ss 82 and 87 was statute barred by reason of s 82(2) and s 87(1CA)(b) lay on the respondent[42]. The respondent accepted that onus by pleading the defences. The only ways by which the respondent endeavoured to discharge the onus were to contend that loss occurred on entry into the lease on 20 October 1992, or to contend that it occurred on payment of the 18.37 per cent increase in contributions to outgoings from 1 July 1994. Since the respondent called no evidence that the value of the lease was less than the consideration paid and failed to establish loss arising on 20 October 1992 in any other way, the first contention failed. And since the respondent did not establish that the 18.37 per cent increase in contributions was based on items of outgoings which were additional to those used in relation to the estimate conveyed in the representation, the second contention failed. However, even if one or other of these contentions had succeeded, it would not necessarily follow that all of the appellants' claims were statute barred. That is because while s 82(1) and s 87(1A) may prevent an applicant from suing for some items of loss or damage, they may leave open the possibility of recovering others, even though all items of loss or damage arose from a single piece of contravening conduct. The question was raised briefly in argument but not debated. Its resolution is unnecessary in this case, and should be postponed until some case arises in which its resolution is necessary and it is fully debated.

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41 (1992) 175 CLR 514 at 532-533 per Mason CJ, Dawson, Gaudron and McHugh JJ.

42 *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410 at 415; *State of Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 at 259.

The appellants' case in this Court

57 Although the claim for relief under s 87 was not abandoned, the chief weight of the appellants' case in this Court (as it had been in the Full Court) was placed on their claim to damages. They maintained their contentions that the loss or damage they had sustained was reflected in a diminution in value of their leasehold interest and submitted that the diminution in value of the unit due to increased future contributions (said by the appellants to be but *one* aspect of their loss) could be awarded as damages. In addition, however, it was said that the loss or damage they had suffered was reflected in "the increase in levies above those paid prior to the inclusion of all expenditure". It was submitted that orders *could have been* made under s 87(2)(a), (ba) or (c) (for the reforming of the lease and refunding of sums already paid) *if* the respondent had still been manager.

58 The conditional expression of this proposition must be noted. It is a proposition which appeared to assume that the respondent's sale of the village necessarily precluded the making of orders under those provisions of s 87. That assumption, if made, would not be universally right. Orders under s 87 could be made reforming the contractual arrangements between the appellants and the respondent at least for as long as that relationship had subsisted. For the reasons given earlier, the formulation of orders affecting the purchaser would have presented other and more difficult questions. Be this as it may, the appellants' proposition about the availability of relief under s 87 was advanced only as the premise for the conclusion which they submitted that this Court should reach. It was said that, because orders could have been made under s 87 if the respondent had still been manager, it followed that it was open to this Court to make an order that the respondent pay the appellants "an amount which represents the present value of the anticipated increased payments in contributions due to the falsity of the representation". And the orders which the appellants asked this Court to make were confined to orders remitting the matter to the trial judge to determine damages. No orders under s 87 were sought.

59 Relief under Pt VI by way of damages is not contingent upon showing that an order, not requiring the payment of money, could be made under s 87[43].

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43 *I & L Securities* (2002) 210 CLR 109 at 124-125 [42]-[48] per Gaudron, Gummow and Hayne JJ.

Although the premise for this aspect of the appellants' argument (that orders under s 87, which did not require the payment of money, could have been made if the respondent had still owned the village) happens to be right in this case, that is irrelevant to the inquiry about damages. What must be shown is that the appellants had suffered or were likely to suffer loss or damage by conduct of the respondent engaged in contravention of a relevant provision of the Act. For the reasons given earlier, that was established.

60 Three points should be made, however, about the particular formulation of the appellants' claim to damages. First, the claim for alleged difference in value of the lease must deal with the fact that the trial judge preferred[44] the evidence of a valuer called by the respondent (to the effect[45] that there was no substantial diminution in value of the appellants' property as a result of the increase in outgoings after November 1996) to the evidence given on that topic by the appellants' valuer. Secondly, the claim for alleged difference in value of the lease and the claim for the present value of the anticipated increased payments must be treated as alternative claims if double compensation is to be avoided. Although that was not conceded, the appellants offered only faint resistance to its being accepted. Thirdly, the claim for the present value of anticipated increased payments represented a significant departure from the way in which the case was conducted both at trial, and on appeal to the Full Court. It proffered a wholly new basis for assessment of damages and did so explicitly recognising that, in order to deal with it satisfactorily, further evidence might have to be called by the parties.

61 The appellants' contention that they should be allowed damages assessed by reference to an asserted difference in value of their lease, according to whether the respondent may recover from the appellants all or only part of the outgoings it incurred, should now be rejected.

62 First, as we have said above, there is the evidentiary difficulty presented by the trial judge's preference for the evidence of one expert over the other. There is no reason to set aside that finding. The opinions expressed by both experts were supported by argument and explanation. In the end, the critical

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44 [2000] FCA 801 at [289]-[290].

45 [2000] FCA 801 at [283].

question of opinion which each answered was: what effect, if any, did the false statement implicitly conveyed by the estimate of outgoings have on the value of the lease at various times? The trial judge was entitled to prefer one opinion over the other.

63 Secondly, if the appellants confine their claim, as they did in this Court, to a claim for damages, and if, further, they intend to retain ownership of the lease, the obligations under which are not to be reformed by Court order, the property which they retain is identical with the property they bought. If they are entitled to recover damages assessed by reference to the amount by which the obligation to meet outgoings is larger than the estimate led them to anticipate, it would be to give the appellants double compensation to award an additional sum said to represent the difference in value of the lease of the unit. It would be double compensation because the assertion of difference in value seeks to compare the value of the lease of the unit assessed on the assumption that the representation made by the respondent was true (and the estimate did take full account of outgoings incurred) and the value assessed on the assumption that the representation was not true. Yet the damages which the appellants seek to be allowed for past and future outgoings would make good the position they would have been in had the misrepresentation not been made. It is neither necessary nor appropriate to award some further sum.

64 The third point noted earlier was that the contention that the appellants' damages should be assessed as the present value of anticipated increased payments for outgoings appears to be wholly new. The evidence led at trial did not quantify the amount by which it was alleged that *future* payments for outgoings would increase due to the falsity of the representation. The weight of the appellants' argument at trial was directed to questions of affordability. That being so, argument at trial appears to have focused upon the allegation that *increases* in amounts charged for outgoings should be limited by reference to changes in the Aged Pension. In addition, however, there was argument directed to demonstrating that certain kinds of charge imposed in the past (particularly legal and accounting costs) could not be recovered as outgoings.

65 In argument in this Court we were taken to no evidence about the likely period for which the appellants would be exposed to the obligation to pay outgoings and to no evidence about the way in which the present value of that future stream of expenditures should be valued. So far as the appeal books reveal, no evidence of that kind was adduced at trial.

Quantifying the appellants' loss

66 The appellants had been induced by the respondent's conduct to undertake an obligation which may, but need not, have been more onerous than the respondent's representation led them to believe. When the respondent started to charge all the outgoings it was entitled to charge, the appellants suffered a loss. The amount of that loss was not to be determined, as the majority of the Full Court held, only by comparing the financial position of the appellants according to whether they entered this lease or took some other accommodation. The appellants did not contend that they had suffered loss in that way. The appellants suffered loss because the continuing financial obligations they undertook when they took the lease proved to be larger than they had been led to believe. The question then became: how much larger was that burden?

67 Answering that question is not easy. It would be necessary to take account of a number of considerations. First, the appellants knew that outgoings might increase. When they took the lease they knew, or at least must be taken to have known, that unexpected outgoings could occur in the future: unexpected both as to the subject-matter of the expense and the amount. It would be wrong to compensate them for their incurring outgoings of that kind, but how is proper account to be taken of that fact?

68 The nature of this difficulty (and its resolution) may be illustrated by reference to the legal and accounting costs which the respondent incurred in connection with the dispute about fixing outgoings. Those could be described as unexpected outgoings. But had the respondent not engaged in the misleading or deceptive conduct it did, these outgoings would not have been incurred. The incurring of them was, therefore, caused by the conduct of which complaint was made and, being part of the sums for which the appellants are liable under the judgments entered in the Supreme Court, are prima facie to be allowed in assessing the damage they have suffered.

69 As for other kinds of unexpected outgoings (for example, for the early repair of some piece of capital equipment in the village that could reasonably have been expected to have given longer service) the relevant question would be whether, when the original estimate of outgoings was given, such an amount had been incurred or foreseen as likely to be incurred and could then have been included in the estimate. If it could have been included, but was not, the later inclusion of similar amounts in levies for outgoings is prima facie reason to consider those sums to be a part of the damage the appellants have suffered. But

if those amounts had not been incurred and could not have been included, then, unless more is shown, they are not part of the appellants' loss or damage.

70 Secondly, once the contingency which had been hidden by the misrepresentation came to pass, it may be necessary to consider whether it was then reasonable for the appellants to continue to remain in the village rather than attempt to sell their interest and move elsewhere. It would, however, be for the respondent to raise this issue, being, as it is, a matter going in answer to the appellants' claim to damages. Though we were taken to no pleading, evidence or argument advanced by the respondent along these lines, the issue was raised in par 1 of the respondent's Notice of Contention. In all the circumstances it is not appropriate that we resolve it. As will be seen, we propose to remit the assessment of damages to the trial judge. If the respondent wishes to persist with the issue of whether the appellants behaved reasonably, and if the trial judge, in the light of the course of proceedings, considers that it is open to the respondent to raise it, it may be investigated as part of the remitter. The inquiry would, no doubt, have to give due weight to the then age of the appellants, their state of health and other matters affecting whether it was reasonable to expect them to confront the turmoil, cost and burdens associated with selling their residence, buying or renting another, and shifting to it. The trial judge summarised, not unsympathetically, some evidence of the first appellant as to why he and his wife did not move out after the 18.37 per cent increase of 1 July 1994[46]. That evidence may also have relevance to the question of whether it was reasonable not to move out in 1997. But if it were found that it was, or would at some later time become, unreasonable for the appellants not to sell their interest in the lease, the point at which they could be expected to sell the lease would mark the outer limit to the period for which they would be exposed to the obligation to pay more outgoings than they were led to anticipate.

71 Thirdly, as has been mentioned earlier, it would in the circumstances of this particular case, in which the appellants accepted that there could be no claim in relation to the period after their deaths, have been necessary to estimate how long this larger financial burden would likely be borne by the appellants. This would be a matter for the appellants to establish. It would require estimates of life expectancy and the making of adjustments to take account of possibilities

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46 [2000] FCA 801 at [132]-[134].

like the decline in health of the second appellant which necessitated her moving to other accommodation.

Estoppel

72 As noted earlier, Gyles J concluded[47] that the respondent should have been held to be estopped from claiming any outgoings of a kind which had not been taken into account in forming the estimate the appellants were given before they entered the lease. There are at least two reasons to reject this formulation of an estoppel. First, it is an estoppel which deals only with the dealings between the appellants and the respondent for the period during which the respondent was owner of the village. No account is taken of the intervening sale of the village. Secondly, as indicated earlier, the particular formulation adopted by Gyles J made no allowance for the fact that it must be taken to have been within the contemplation of all concerned, at the time the lease was made, that there may be unexpected outgoings. If an estoppel were to be found it would have to be framed differently.

73 Given that the appellants now frame their claim as one for damages, there is little utility in examining the questions which now arise by reference to notions of estoppel. The remedies to be allowed under Pt VI, and in particular the allowance of damages under s 82 (in respect of past damage) and further, or alternatively, under s 87 (in respect of future, or past and future damage) are adequate to meet the consequences that would follow from a finding of estoppel.

Conclusion and orders

74 The reasoning employed by the Full Court in reaching the conclusion that the appellants proved no loss or damage was erroneous. The appellants did establish that they had undertaken an obligation which, in the events that happened, proved to be larger than the respondent's misleading conduct led them to believe. Though at the end of the day the appellants may fail to prove any loss or damage, it is possible that they will demonstrate that they have suffered loss or damage. The matter should be remitted to the trial judge to assess the damages, if any, to be allowed to the appellants. The trial judge, while hearing the remitted

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47 (2001) 112 FCR 182 at 228 [153].

issues, may think it proper to draw inferences in favour of the appellants, if it is concluded that the respondent's wrong itself made quantification difficult[48].

75 The order for remitter is not an order for retrial. Nothing we have said, however, should be understood as indicating any view about whether, on remitter, an application by either side for leave to reopen its case to lead further evidence should be granted. That question has not yet arisen. We do not have the full record of the evidence led at trial that may bear upon the assessment which must now occur. We do not know whether, or to what extent, either side may contend that the evidence already led is deficient. We do not know how, or why, any deficiency of proof or answer at trial may have come about.

76 While the length, the complexity and, in some of its branches, the futility of this litigious saga is to be deprecated, it will be for the trial judge to deal with any question of reopening that is raised. If that is the footing on which the litigation leaves this Court, the Federal Court will be better equipped to discharge its obligation to ensure that "as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided[49]".

77 The issue raised by par 1 of the respondent's Notice of Contention of whether the appellants behaved reasonably in not leaving the village is also remitted to the trial judge, but, as indicated above, it will be for him to decide, given his close familiarity with the course of the trial, whether it is open to the respondent now to rely on it.

78 The appeal to this Court should be allowed with costs. Paragraphs 1 to 4 and sub-pars (i) to (vii) of par 5 of the orders of the Full Court should not be disturbed. (Paragraph 5(vii) providing for remitter of the claims under the *Contracts Review Act* is now spent.) Paragraph 5(viii), (ix), (x) and (xi) of the orders made by the Full Court on 22 June 2001 should be set aside. In their place there should be orders that:

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48 *Armory v Delamirie* (1722) 1 Stra 505 [93 ER 664]; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 at 508; *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 59.

49 *Federal Court of Australia Act* 1976 (Cth), s 22.

1. The appeal is allowed with costs.

2. The applications in Matters N159 of 1999 and N946 of 1999 are remitted to the trial judge for consideration of the assessment of damages and interest to be allowed to the appellants conformably with the reasons given by this Court, and entry of judgment accordingly.

3. The costs of the original trial and of the further proceedings on remitter are to be in the discretion of the trial judge.