HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HEYDON JJ

HTW VALUERS (CENTRAL QLD) PTY LTD APPELLANT

AND

ASTONLAND PTY LTD RESPONDENT

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd
[2004] HCA 54
12 November 2004
B99/2003

ORDER

1. Appeal dismissed.

2. Application for special leave to cross-appeal dismissed.

3. Appellant to pay the costs of the respondent.

On appeal from the Supreme Court of Queensland

Representation:

P A Keane QC with L F Kelly for the appellant (instructed by Thynne & Macartney)

J C Bell QC with G D O'Sullivan and D H Katter for the respondent (instructed by Russell Hanley & Johnson)

CATCHWORDS

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd

Damages – Contract – Tort – Trade practices – Breach of contract and negligent provision of advice – Misleading and deceptive conduct – Respondent relied on valuation advice from appellant in purchasing commercial premises – Risk of decline in market value of premises from competing business not taken into account in advice – Whether damages assessed at date of contract to purchase premises or only once risk eventuated – Whether damages based on "true value" or "market value" of premises at date of contract – Whether assessment of "true value" at date of contract includes subsequent events – Purpose of damages under *Trade Practices Act* 1974 (Cth), s 82.

Words and phrases: "true value", "real value", "market value", "contingent loss", "actual loss".

Trade Practices Act 1974 (Cth), ss 51A, 52(1), 82.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND HEYDON JJ. On 8 October 2001, Dutney J, sitting in the Supreme Court of Queensland, gave judgment for the plaintiff in the sum of $406,194.60[1]. An appeal to the Court of Appeal (McMurdo P, McPherson JA and Mullins J) challenged one component in that figure, but the appeal was dismissed on 20 August 2002[2]. This appeal, by special leave, from the orders of the Court of Appeal challenges the same component. The appeal should be dismissed, since the conclusions given effect in the orders of the courts below were sound, though for somewhat different reasons from those that were relied on.

Background

2 *The key events.* Astonland Pty Ltd ("the plaintiff") is a company of which Mrs Lyn Foster was the sole director and of which she and her husband, John Foster, were the sole shareholders. She was a chartered accountant working part-time as an employed tax agent. Her husband was an engineer who conducted a building business through a company called John Foster Projects Pty Ltd. At one time they lived in Brisbane. They then moved to Mackay and rented their Brisbane house to tenants. In early 1997, they decided to sell their Brisbane house. They were dissatisfied with its low return and low capital appreciation and wanted to invest in commercial property with a higher rate of return. They began looking for commercial property near Mackay. The plaintiff company was incorporated on 15 April 1997 as the vehicle through which the investment was to be effected.

3 The Fosters wished to invest about $500,000 using in part the proceeds of the Brisbane house and in part borrowed money. They became attracted to a small shopping arcade comprising eight shops in Central Street, Sarina ("the Plaza"). Sarina was a small satellite town with a population of 3,500-5,000, located about 37 kilometres south of Mackay. The Fosters decided to seek advice from Mr Deacon, a director of HTW Valuers (Central Qld) Pty Ltd ("the defendant").

4 On 17 April 1997, Mr Foster met Mr Deacon and, as a result, on 21 April 1997, Mr Deacon sent a letter to John Foster Projects Pty Ltd, of which Mr Foster was the sole director. The trial judge did not make any finding about

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1 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380.

2 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2002] QCA 302.

what Mr Deacon's instructions were beyond setting out the letter of 21 April 1997 and beyond preferring the evidence of Mr Deacon about the 17 April 1997 meeting. Mr Deacon's evidence was that Mr Foster provided him with a schedule of tenancies with rents and rates per square metre written down the side, said he was unfamiliar with rents in Sarina, and asked whether Mr Deacon could provide him with rental levels for retail shops in Sarina. Mr Foster then indicated that he needed the information because he wanted to know whether the rentals for the Plaza were right and how they fitted into the Sarina market generally. Mr Foster also asked whether Mr Deacon could advise as to the demand in Sarina for retail tenancies and the availability of tenants.

5 The trial judge set out the material parts of the letter of 21 April 1997 as follows[3]:

> "We refer to our meeting of 17 April 1997 wherein you requested advice relating to:
>
> - Retail rental levels in Sarina
> - Industrial investment premises at Paget
>
> Our investigations indicate very limited rental evidence for commercial premises in Sarina. We believe this to be a result of:
>
> - A relatively high proportion of owner occupation
> - Historically business in Sarina has been fairly stable and little expansion of the retail precinct has happened
> - Where new tenancies have been established, they have been primarily the result of a developer providing space for specific tenants [sic] requirements
>
> Within the town at present there are only limited vacancies. Ten (10) specialty shops to be constructed in conjunction with a 1500 square metre new supermarket on Beach Road have attracted reasonably strong interest. Two lease commitments at rents of $220 per square metre have been signed and names have been put on the other shops. Only one of these

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3 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [25].

prospective tenants are [sic] currently in business in rental premises in Sarina.

The eight (8) interested tenants are awaiting finalisation of the supermarket lease before being prepared to commit to the centre.

Other rental evidence includes:

- Cnr Anzac Street & [Broad] Street

  This is a one year old, colonial style retail complex with a highway frontage divided into five (5) shops, which are occupied as two tenancies. Sarina Realty occupies 100.3 square metres at a rent of $18,200 per annum ($181/square metre) and the Leisure Time Centre occupies 224 square metres at a rent of $41,600 ($186/square metre). Both tenants pay some outgoings in addition to the rent.

- Sarina Plaza (Subject)

  Shops 7 and 8 are new rentals established during 1996 which reflect $117 and $143 gross respectively.

  - We are aware of one vacant shop in [Broad] Street (Police Station side) with an area of approximately 60 square metres, which has a rent of $130 per week ($112/square metre).

While the available information is only limited we believe it suggests that the current rental levels are maintainable, and some are at the lower end of the market range. However it may be difficult to increase rental levels to any significant degree without some titivation of the building."

6 For that advice the defendant was paid $250, since Mr Deacon worked for two and a half hours at $100 per hour.

7 On 28 April 1997, the plaintiff entered a contract to buy the Plaza for $485,000. The trial judge found that without Mr Deacon's written advice, Mrs Foster would not have caused the plaintiff to enter that contract[4]. The plaintiff completed the purchase on 1 July 1997.

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4 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [46].

8 Central to this case are the shops at Beach Road to which the letter referred ("the Beach Road Shopping Centre"). As the letter indicated, the Beach Road Shopping Centre was to comprise a supermarket and ten specialty shops. It was about 400 metres from the Plaza. While the Plaza was part of a "strip commercial district" in the centre of Sarina, the Beach Road Shopping Centre was a detached drive-in neighbourhood shopping centre on the northern edge of the town. It was completed in early 1998 and it opened in mid 1998. The trial judge found that gross rentals for the Plaza "held up reasonably well to about March 1999 and then collapsed"[5]. The evidence was that in April 1997, the Plaza was fully tenanted, and generated nearly $60,000 per annum in rent. By March 2000, one shop had been vacant for a year, one had been vacant for 9 months, two other shops were vacant, the rent on another shop was substantially in arrears, the rents from two of the shops which were tenanted had fallen sharply, and net rental had fallen to $15,059 per annum. The trial judge found that this collapse in rentals was due in large measure to the opening of the Beach Road Shopping Centre. The trial judge excluded other possible causes, such as poor management of the Plaza, a decline in sugar prices, and a drop in new housing approvals.

9 *The trial judge's finding of liability.* The trial judge accepted that Mr Deacon's personal view was that the Beach Road Shopping Centre was not likely to affect the Plaza rentals adversely. However, he found that the defendant was in breach of duty to the plaintiff because Mr Deacon "ought … to have qualified his advice by cautioning the reader that the effect [of the Beach Road Shopping Centre] was uncertain."[6] The duties so breached were those created by the contract under which the defendant was paid $250, by the law of tort in relation to negligent advice, and by s 52(1) of the *Trade Practices Act* 1974 (Cth) ("the Act") in relation to misleading and deceptive conduct[7].

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5 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [49].

6 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [42].

7 Section 52(1) provided:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Section 51A provided in part:

(Footnote continues on next page)

10 *The trial judge's findings on damages.* There was evidence before the trial judge from Mr Dodds, a valuer retained by the plaintiff, in a valuation dated 28 March 2000, that on 21 April 1997, just before the date of contract, the value of the Plaza was $400,000, that in July 1997, at completion, it was $375,000, and that on 28 March 2000, it was $130,000. Those figures were not significantly challenged in cross-examination, though small adjustments were made. The trial judge found that the relevant measure of damage was the difference between the price paid ($485,000) and the value of the Plaza at the end of 1998 or early 1999, after the Beach Road Shopping Centre had been operating for the better part of one year, which he found to be the same as at 28 March 2000 ($130,000)[8]. The trial judge gave judgment for the plaintiff in the sum of $406,194.60, made up as follows[9]:

> "(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
>
> (2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation."

The defendant was sued under s 82(1), which provided:

> "(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part … V ... may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

8 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [48]-[49].

9 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [51]-[54].

Difference between price and value in early 1999	$355,000.00
Trading losses	$ 21,601.51
Additional purchase costs	$ 11,600.00
Refurbishment costs	$ 8,590.00
Interest on the last three items at 5% from 1 July 1999	$ 9,403.09
Total	$406,194.60

11 *The defendant's appeal.* The defendant appealed to the Queensland Court of Appeal. It challenged only the $355,000 component of the damages award. It contended that in lieu of that figure there should have been substituted the difference between the price of $485,000 and Mr Dodds' valuation as at 21 April 1997 of $400,000 (ie $85,000), or Mr Dodds' valuation as at July 1997 of $375,000 (ie $110,000). The appeal was dismissed, and the defendant advances the same contention in its appeal to this Court.

Matters not in controversy

12 Proceedings of the present character are capable of giving rise to several questions to which the parties gave no attention, which the courts below therefore did not have to consider, and which this Court is not required to consider either. It is, however, desirable to note them.

13 The first relates to whether it is possible to sue for damages under s 82 of the Act for a breach of s 52 allegedly found in the failure to perform a contract. There is authority that a breach of warranty of present fact (for example, a warranty that a party is the owner of copyright, has not licensed it, is entitled to assign it, and is not subject to any claim or potential claim for copyright infringement)[10] constitutes a breach of s 52. Before the enactment of s 51A in 1986, there was also authority that a breach of promise relating to the future could not be a breach of s 52 unless a misrepresentation of existing fact was made, for example, that the promisor had the capacity or intention to perform the

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10 *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 505-506 per Lockhart and Gummow JJ.

promise[11]. Since the enactment of s 51A, there has been authority that a breach of promise may contravene s 52 in its operation with s 51A if there is an implied representation by the promisor of an intention or capacity to perform the promise, and there are no reasonable grounds for making that representation[12]. However, in some future cases of the present type, where the breach of contract is found in the failure by a professional adviser who has made a representation about future matters (for example, rental levels) to qualify it by a statement about their uncertainty, it may be necessary to give close attention to the question how the breach of contract falls, if at all, within the language of sub-ss 51A(1) and (2).

14 Two other matters to which no attention was directed were whether the criteria of liability in all three causes of action were identical and whether the damages in relation to each would have been identical[13]. The parties assumed that they were. These assumptions may not always be sound. Analysis of the tests for remoteness of damage in contract, in tort and under s 82 may make a difference on the particular facts of some cases. In this Court, the plaintiff contended that if there were a difference in the measure of damages, it was entitled to the highest measure of damages available on any cause of action, and that it could not do better in contract or tort than it could under s 82 of the Act. The defendant was content to fight the plaintiff on that ground.

15 If damages were to be assessed as at 28 April 1997 or as at 1 July 1997, there was a dispute between the parties as to which of the two dates was to be preferred. The defendant advocated the former, and it is the more orthodox. On that date the plaintiff became obliged to pay the purchase price on completion, the plaintiff was unable to escape that obligation, and the vendor was bound to transfer. But the difference does not matter for the outcome of this appeal.

16 The trial judge's findings on contravention and on reliance, not having been challenged in the Court of Appeal, received no endorsement from it. The same position holds in relation to this Court. Those findings are to be fully

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11 *Bill Acceptance Corp Ltd v GWA Ltd* (1983) 78 FLR 171 at 176-179 per Lockhart J.

12 *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217 at 238-239 and 240-241 per Ormiston J.

13 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [32] and [47].

accepted for the purposes of determining this appeal, though it is conceivable that in other cases persons in the position of the plaintiff might be less successful.

The plaintiff's case at trial in relation to the contested damages component

17 *The plaintiff's first approach: purchase price minus real value.* The Further Amended Statement of Claim alleged that one element in the plaintiff's loss was the "difference between the purchase price and the market price" of the Plaza, namely $355,000. In its written submissions at the end of the trial, the plaintiff took a different approach. It contended that the measure of damages was the difference, not between the purchase price and the market price, but between the purchase price and the real value of the Plaza as at the date of acquisition. It argued that the relevant date was the date of completion (which was 1 July 1997). According to the plaintiff, Mr Dodds' valuation of the Plaza as at July 1997 at $375,000 had two relevant flaws, considered as an assessment of loss. First, it related not to "real value", but "fair market value", ie the price which would be struck between a "willing buyer" and a "willing seller" – the test stated in *Spencer v The Commonwealth*[14] in relation to compensation for the resumption of land. Secondly, Mr Dodds' figure complied with Isaacs J's mandate in that case that the only events to be taken into account were those occurring up to the date on which the land was to be valued: "All circumstances subsequently arising are to be ignored."[15] The plaintiff submitted that while the approach set out in *Spencer's Case* is correct for assessing market value, it is not sound for assessing "real value". In assessing real value, it was submitted that subsequent events may be looked at in so far as they illuminate the value of the things at the relevant date. Mr Dodds considered that a valuation as at April 1997 "should have foreseen or suspected the subsequent fall in values" of commercial property because of the development of the Beach Road Shopping Centre, but the plaintiff argued that in assessing damages, it was necessary to treat the fall in values as more than a risk, and it was necessary to take into account the actual events as known at the time when the court assessed damages. The plaintiff then argued that in the light of actual events, the value in July 1997 was $193,584. The reasons for the selection of that precise figure need not now be explored.

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14 (1907) 5 CLR 418 at 431-432 per Griffith CJ, 436-437 per Barton J, 441-442 per Isaacs J.

15 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440.

18 *The plaintiff's second approach: purchase price minus benefits gained.* Alternatively, the plaintiff contended that the loss should be calculated by deducting the benefits gained from the transaction against the price paid for them. The price of $485,000 paid in July 1997 had generated by 2000 benefits of only $130,000, that being the value of the Plaza at 28 March 2000 as assessed by Mr Dodds.

The defendant's case at trial

19 In contrast, the defendant submitted that the correct approach was to calculate the difference between the price paid and market value as at the date of purchase. If 28 April 1997 was the relevant date, $85,000 was the correct figure according to Mr Dodds' valuation. If 1 July 1997 was the relevant date, $110,000 was the correct figure (leaving aside certain adjustments made by Mr Dodds in his oral evidence).

The trial judge's approach

20 The trial judge did not adopt either of the approaches advocated by the plaintiff. Nor did he accept the approach advocated by the defendant. He proceeded in an entirely different manner. He said[16]:

> "In a valuation case where property would not have been acquired without the intervention of the negligence the conventional measure of damages is to compare the amount paid for the property with its true value at the time. Consequential losses need to be considered separately. This case is different from such a case. In the first place it is not in fact a true valuation case since Mr Deacon did not relevantly value the property. Rather he gave a predictive opinion from which Mrs Foster formed her own opinion as to value. The negligence or breach of contract or misleading conduct was in failing to flag the possible negative impact of the Beach Road shopping centre. In such a case no loss is suffered until it is reasonably ascertainable that the purchaser is in fact worse off as a consequence of the negligence or other breach."

The trial judge then stated in a footnote:

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16 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [48].

> "This is apparent from *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527 and was restated by each member of the court in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 by way of distinguishing the standard measure of damages in valuation cases from those where the purpose of the valuation was to achieve a particular result. While factually *Kenny & Good* differs from the present case the principle is the same."

The passage in *Wardley Australia Ltd v Western Australia* to which the trial judge was referring is from the joint judgment of Mason CJ, Dawson, Gaudron and McHugh JJ in which their Honours said:

> "The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough.
>
> When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of 'loss or damage'. And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired." (footnotes omitted)

In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*, Gaudron J quoted the second sentence in that quotation[17] and Gummow J quoted the first sentence and referred to the balance[18].

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17 (1999) 199 CLR 413 at 424 [14].

18 (1999) 199 CLR 413 at 447 [85]-[86]. See also the judgment of the Court in *Murphy v Overton Investments Pty Ltd* (2004) 78 ALJR 324 at 333 [55]; 204 ALR 26 at 39.

21 The trial judge then selected the end of 1998 or early 1999 as the time to assess loss in the light of the value of the Plaza "once the anticipated market factors" (ie the opening of the Beach Road Shopping Centre in mid 1998) had operated[19]. He said he was entitled to have regard to what in fact happened to the value of the Plaza up until the time when a reasonable person in the plaintiff's position would have sold it. He noted that gross rentals collapsed from March 1999 and he described the plaintiff's unsuccessful attempts to sell the Plaza. He concluded[20]:

> "[T]he plaintiff has attempted to sell the property without success despite genuine efforts since 1999. I find that even at that time the value Mr Dodds puts on it in 2000 of $130,000 was probably close to its realistic value."

For those reasons he arrived at $355,000 as the figure for the component of damages under challenge.

The Court of Appeal's reasoning

22 The Court of Appeal's reasoning largely corresponded with that of the trial judge. The Court did not apply the test for valuation cases – the difference between price paid and actual value – on the ground that Mr Deacon was not liable for negligent valuation, but for a negligent failure to qualify his opinion[21]. The difference between price and value at the date of acquisition was said to be a "prima facie measure of damages only"[22]. Mr Dodds' valuations of $400,000 as at 21 April 1997 and $375,000 as at July 1997 "had taken into account the risk of the Beach Road shops being completed in arriving at each of those values."[23] The Court of Appeal continued[24]:

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19 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [48].

20 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [49].

21 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2002] QCA 302 at [18].

22 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2002] QCA 302 at [19].

23 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2002] QCA 302 at [20].

24 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2002] QCA 302 at [21]-[24].

> "The task undertaken by Mr Dodds in his valuation is not equivalent to the task undertaken by the court in assessing damages. According to his evidence, what Mr Dodds did in arriving at those respective values for April and July 1997 was factor into account the impact on the market at the relevant time for the risk that the Beach Road shops would be completed. This was consistent with the learned trial judge's finding that is not challenged on the appeal that it could not be reasonably ascertained what effect the Beach Road shops would have until they were constructed and opened.
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> … It was not until the Beach Road shops had been completed and opened that the risk to which the [plaintiff] should have been alerted was realised. That risk became an actuality. That actuality had a dramatic effect on the net rentals generated from the property and thus reduced the value of the property, in contrast to the effect on value of merely taking into account the risk of the nature that was contemplated by Mr Dodds when undertaking the valuations as at April and July 1997.
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> The usual measure of damages, contended for the [defendant], calculated at the date of contract or, alternatively at the date of completion, could not result in full compensation for the [plaintiff's] capital loss, as that compensation could only be calculated when the risk that the Beach Road shops would be completed and have an adverse impact on the value of the property was realised, as a result of the occurrence of those events.
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> The [defendant] argued that the measure of damages adopted by the learned trial judge was equivalent to holding the [defendant] liable for damages for breach of warranty of the maintainability of the rents of the property. It was common ground that there was no such warranty given by Mr Deacon. It does not follow from the fact that the measure of damages adopted by the learned trial judge may have resulted in the same calculation of damages, if the offending conduct had amounted to breach of such a warranty, that there is an error in the measure adopted by the learned trial judge. The issue is whether the capital loss assessed by the learned trial judge was that which was required to put the [plaintiff] in the position it would have been in, had it not purchased the property."

23 The Court of Appeal agreed with the trial judge's selection of early 1999 as the critical date for valuation of the property, and with his conclusion that $130,000 was the true value at that date.

The defendant's criticisms of the courts below

24 The defendant made many criticisms of the courts below. At this point only two of them need be noted.

25 The first criticism is that it was erroneous to say that the plaintiff had suffered no loss at the outset, and erroneous to say that it only suffered a loss when it was reasonably ascertainable what effect the Beach Road Shopping Centre would have. In truth, the plaintiff had suffered a loss when it contracted to buy the Plaza, being the difference between the price agreed to be paid ($485,000) and the value ($400,000) – $85,000.

26 Secondly, the defendant submitted that loss suffered by the retention of an asset (ie from July 1997 on, as the value of the Plaza steadily fell) was not capable of being compensated for as an aspect of loss suffered as a result of its acquisition. The retention loss was not caused by the acquisition; to impose liability for retention loss would unduly broaden the liability of professional advisers in a way disproportionate to the risks which they assumed vis-à-vis persons in the position of the present plaintiff.

Defects in the reasoning of the Supreme Court

27 In this Court, the plaintiff attempted to support the reasoning of the courts below; against the possibility of that endeavour failing, it fell back successively on the two arguments it had put to the trial judge.

28 The plaintiff's endeavour to support the reasoning of the courts below must fail, because the first criticism of that reasoning made by the defendant is unquestionably correct and sufficient to undermine it entirely. If the plaintiff had learned the day after entering the contract to buy the Plaza, or the day after completing that contract, that the defendant's conduct had been misleading in the sense ultimately found by the trial judge, it could have started proceedings then and there. There was unchallenged evidence from Mr Dodds that on either of those dates the plaintiff was in fact worse off as a result of the defendant's breach, since the market value was less than the price. It was not necessary to wait for nearly two years to ascertain that some loss had been suffered. The plaintiff could have found out at once that it had bought something which was worth less than that which it had agreed to pay and did pay. It could have

recovered at least the difference between the price paid for, and the market value of, the Plaza. The limitation period would have begun to run[25].

29 It is incorrect to treat this case as being like *Wardley Australia Ltd v Western Australia*, on which the trial judge relied. That case held that a risk of loss is not itself a category of loss, and that if a plaintiff enters a contract exposing it only to a contingent loss or liability, the plaintiff "sustains no actual damage until the contingency is fulfilled and the loss becomes actual"[26]. The plaintiff was not exposed to a contingent loss; it had suffered an actual loss.

30 Nor is the present case one like *Murphy v Overton Investments Pty Ltd*[27]. There the applicants had been induced to enter into a lease and incur an obligation to pay charges for outgoings. Whether the charges would rise above the level stated before the applicants entered the lease was contingent in the sense that it was not inevitable: the contingency could never eventuate unless the respondent exercised its discretion to increase the charges. There was thus a contingency hidden by the respondent's conduct which might or might not come to pass[28]. But in this case the risk of the catastrophic effect on rent levels of the Plaza after March 1999, to which the defendant had not alerted the plaintiff, had already had an impact on the value of the Plaza by April 1997. That, on the evidence, was not the case in *Murphy v Overton Investments Pty Ltd*[29]. The impact of the Beach Road Shopping Centre, unlike the contingency in *Murphy v Overton Investments Pty Ltd*, was not hidden and did not rest on any discretionary decision by anyone.

31 Nor is the present case – the purchase of an asset at an over-value – similar to *Henville v Walker* where "land was purchased for a specific purpose

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25 At either of the relevant times, that is, the time when the contract was entered into or the time when it was completed, s 82(2) of the Act provided for a limitation period of 3 years "after the date on which the cause of action accrued."

26 (1992) 175 CLR 514 at 532 per Mason CJ, Dawson, Gaudron and McHugh JJ.

27 (2004) 78 ALJR 324; 204 ALR 26.

28 (2004) 78 ALJR 324 at 333 [55] and 336 [70]; 204 ALR 26 at 39 and 43.

29 (2004) 78 ALJR 324 at 329 [26]; 204 ALR 26 at 32-33.

and … the development project involved not only the acquisition of the land but also the building and marketing of units"[30].

32 On the other hand, the difficulties with damages assessment in the present case cause it to bear some resemblance to cases where a wrong results in the immediate loss of a chance or commercial opportunity which had some value, although the process of measuring the worth of that chance or opportunity depends on estimating the significance of events which are, or may be, yet to come[31].

33 There is no doubt, then, that from the moment it contracted to buy the Plaza, the plaintiff suffered a loss, and to that extent the defendant's criticisms of the reasoning below are correct. The central question on this appeal is whether that loss is the only loss (apart from the other four items of loss found by the trial judge, which the defendant did not challenge) that the plaintiff can recover. In substance, the defendant argued that if a plaintiff acquires an asset on the strength of advice from a professional about a contingency, the measure of damages if the professional contravenes s 52 (or does not fulfil duties in tort and contract) is not the loss which the plaintiff suffers when the contingency happens, but the value which the market would place on the risk associated with the contingency. Hence, the defendant argued that while the plaintiff could recover $85,000 if 28 April 1997 were the relevant date, or $110,000 if July 1997 were the relevant date, it could not recover anything for greater losses in value thereafter.

<u>The plaintiff's preferred approach: price minus value at acquisition date assessed in the light of subsequent events</u>

34 *The applicable principles.* The plaintiff's defence of the reasoning in the courts below having failed, it is necessary to turn to the primary argument put by the plaintiff to the trial judge. That argument was that the correct measure of damages, apart from consequential losses, was to deduct the value of the Plaza at the date of acquisition from the purchase price, and in assessing that value to bear in mind post-acquisition events.

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30 *Henville v Walker* (2001) 206 CLR 459 at 471 [22] per Gleeson CJ.

31 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 348 and 355 per Mason CJ, Dawson, Toohey and Gaudron JJ, 364 per Brennan J; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 278 [29] per Gaudron J.

35 The approach of subtracting value from price is commonly employed where the acquisition of land, chattels, businesses or shares is induced by deceit. It has also been commonly employed under s 82 of the Act[32]. It is sometimes described as the rule in *Potts v Miller*[33]. Even in the areas in which that approach is often applied, and even apart from cases in which consequential losses have been recovered, the "rule" is not universal or inflexible or rigid. This perception is not novel[34]. It has existed at least since the judgment of Dixon J in *Potts v Miller* and has been quite plain since that of Gibbs CJ in *Gould v Vaggelas*[35]. Even Jordan CJ, who called the rule "well settled", acknowledged that it was only a "rule of practice"[36]. The flexibility of the rule can be seen by reference to a number of its characteristics.

36 One key qualification of the rule which prevents it from being inflexible is that the test depends not on the difference between price and "market value", but price and "real value"[37] or "fair value"[38] or "fair or real value"[39] or "intrinsic"

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32 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 6-7 per Gibbs CJ, 12 per Mason, Wilson and Dawson JJ; *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 291 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

33 (1940) 64 CLR 282.

34 cf *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254.

35 (1985) 157 CLR 215 at 220-221.

36 *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187 at 192.

37 *Twycross v Grant* (1877) 2 CPD 469 at 545 per Cockburn CJ; *Cackett v Keswick* [1902] 2 Ch 456 at 468 per Farwell J; *Potts v Miller* (1940) 64 CLR 282 at 289 per Starke J; *Toteff v Antonas* (1952) 87 CLR 647 at 650 per Dixon J; *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 291 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

38 *Broome v Speak* [1903] 1 Ch 586 at 605 per Buckley J; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 31 per Gibbs J.

39 *Potts v Miller* (1940) 64 CLR 282 at 299 per Dixon J.

value[40] or "true value"[41] or "actual value"[42] or what the asset was "truly worth"[43] or "really worth"[44] or "what would have been a fair price to be paid … in the circumstances … at the time of the purchase"[45]. This distinction is sometimes difficult to draw, but it is old[46] and fundamental.

37 A second qualification flows from the first. The distinction between a value which answers one of the tests just stated and market values means that market values – the prices actually obtainable in market sales – may be disregarded if they are "delusive or fictitious" because they are the result of "a fraudulent prospectus, manipulation of the market or some other improper practice on the part of the defendant"[47]. There are other reasons why the law does not limit recovery by reference to market value – the amount for which the plaintiff might have sold the assets acquired. One is that, subject to mitigation issues, the plaintiff is "not bound to sell them"[48]. Another is that there may not be a market[49]. Another is that the market is mistaken on some basis other than manipulation. It is common to speak of shares being undervalued (or overvalued) by the market.

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40 *Potts v Miller* (1940) 64 CLR 282 at 300 per Dixon J.

41 *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187 at 192 per Jordan CJ.

42 *Cackett v Keswick* [1902] 2 Ch 456 at 468 per Farwell J.

43 *Gould v Vaggelas* (1985) 157 CLR 215 at 255 per Brennan J.

44 *Stevens v Hoare* (1904) 20 TLR 407 at 409 per Joyce J.

45 *Davidson v Tulloch* (1860) 3 Macq 783 at 790 per Lord Campbell LC; quoted in *Arkwright v Newbold* (1881) 17 Ch D 301 at 312 per Fry J.

46 *Peek v Derry* (1887) 37 Ch D 541 at 591 per Cotton LJ, 594 per Sir James Hannen, 594 per Lopes LJ.

47 *Potts v Miller* (1940) 64 CLR 282 at 299 per Dixon J; see also *Peek v Derry* (1887) 37 Ch D 541 at 591-592 per Cotton LJ.

48 *Peek v Derry* (1887) 37 Ch D 541 at 594 per Sir James Hannen.

49 *Peek v Derry* (1887) 37 Ch D 541 at 591 per Cotton LJ.

38 The last point is supported by another matter to which Dixon J referred, in the context of shares[50]:

> "[T]he real value of what the plaintiff got must be ascertained in the light of the events which afterwards happened, because those events may show, for instance, that what the shares might have sold for was not their true value or that it was a worthless company."

He referred to Sir James Hannen's observation in *Peek v Derry*[51]:

> "[S]ubsequent events may shew that what the shares might have been sold for was not their true value, but a mistaken estimate of their value."

Dixon J continued:

> "[L]ooking back from subsequent events to the earlier state of the company it may appear that at the time the shares were taken the assets of the company did not correspond in value to the money paid."

39 In the same way, in *Kizbeau Pty Ltd v W G & B Pty Ltd*[52] this Court pointed out that, in many fields of law, assessments of compensation or value at one date are commonly made taking account of all matters known by the later date when the court's assessment is being carried out. This has been so in relation to the remarriage of widows[53], the termination of a dependency by early death after the date from which damages were to be assessed[54], the death of a person having a claim for personal injuries which was unexpectedly early and

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50 *Potts v Miller* (1940) 64 CLR 282 at 299 per Dixon J.

51 (1887) 37 Ch D 541 at 594. See also *Gould v Vaggelas* (1985) 157 CLR 215 at 220 per Gibbs CJ.

52 (1995) 184 CLR 281 at 291-296 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

53 *Willis v The Commonwealth* (1946) 73 CLR 105; cf *De Sales v Ingrilli* (2002) 212 CLR 338.

54 *Williamson v John I Thornycroft & Co Ltd* [1940] 2 KB 658.

unrelated to those injuries[55], rises in wage rates[56], assessing the value of reversionary life interests which never came into possession[57], valuing annuities[58], and assessing compensation for the acquisition or destruction of property rights[59]. The limpid words of Lord Macnaghten about the duty of an arbitrator in determining compensation are far too well known to escape repetition[60]:

> "Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"

The significance of *Kizbeau Pty Ltd v W G & B Pty Ltd* is that it endorsed that approach in relation to s 82 of the Act when the court is assessing damages by comparing the price and the real value of the asset at the date of the acquisition.

40 Finally, although the court is entitled to take into account events after the date of acquisition, it must distinguish among possible causes of the decline in value of what has been bought. "If the cause is inherent in the thing itself, then its existence should be taken into account in arriving at the real value of the shares or other things at the time of the purchase. If the cause be 'independent',

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55 *Jaksic v Cossar* [1966] 2 NSWR 581.

56 *The "Swynfleet"* (1947) 81 Ll L Rep 116.

57 *In re West; Denton v West* [1921] 1 Ch 533 at 542-543 per Astbury J.

58 *In re Bradberry; National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 42 per Uthwatt J ("Why should the court neglect known facts and put itself in the position of a prophet who, when he knows all the facts, projects himself to an earlier date and predicts as the span of life of a person known to be dead the length of life of the hypothetical person who lives his actuarial life?").

59 *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426.

60 *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 at 431.

'extrinsic', 'supervening' or 'accidental', then the additional loss is not the consequence of the inducement."[61]

41 *Application of the plaintiff's preferred approach.* In the light of these principles, the starting point must be Mr Dodds' evidence that the market value of the Plaza fell from $400,000 in April 1997 to $375,000 in July 1997, and to $130,000 in March 2000, considered in the light of the evidence of its letting history. However flawed Mr Dodds' figures as assessments of true value may be, they demonstrate that the cause of the decline in market value was not independent, extrinsic, supervening or accidental. It lay in circumstances crucial to the value of the Plaza at the time when the plaintiff acquired it – the current building, and the impending opening, of the Beach Road Shopping Centre.

42 Indeed, the cause of the decline was what the defendant was found liable for not warning about. While "unexpected competition" has been described as a "supervening" event[62], expected competition is not, and competition from the Beach Road Shopping Centre was expected – by Mr Dodds as early as 1996[63], and by Mr Deacon in April 1997[64].

43 The "subsequent events" in this case arose from "the nature" of the Plaza and its commercial and geographical environment; they were not events which arose from "sources supervening upon or extraneous to the fraudulent inducement"[65]. The rental levels (and therefore the value) of the Plaza were doomed from the start – "pregnant with disaster"[66] – because so long as the building of the Beach Road Shopping Centre continued, the loss was inevitable. The only way the loss could have been averted would have been if its owner had gone into liquidation, or some physical catastrophe like a fire or a collapse of the

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61 *Potts v Miller* (1940) 64 CLR 282 at 298 per Dixon J; see also *Gould v Vaggelas* (1985) 157 CLR 215 at 220 per Gibbs CJ.

62 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 291 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

63 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [35].

64 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [25].

65 See *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 291.

66 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 267 per Lord Browne-Wilkinson.

foundations had taken place. The Plaza may be compared to a horse which "dies of some latent disease inherent in its system at the time" of its purchase, as distinct from one which dies of some disease contracted after the purchase[67].

44 Although the plaintiff had suffered a loss in April 1997 in that had it sued and gone to court at that time it could have proved a loss of at least $85,000, with the benefit of hindsight operating from the time of the trial in 2001, it can be seen that that loss was much greater. When Mr Dodds, on 28 March 2000, estimated the value of the Plaza on 21 April 1997 as being worth $85,000 less than what the plaintiff had promised on 28 April 1997 to pay for it, he took into account the "serious risk" of the Beach Road Shopping Centre being completed as having an "impact on the market at that time". His estimation of the market value on 28 March 2000 as being $130,000 does not demonstrate that he made some egregious error in his valuation for 21 April 1997, considered strictly as a valuation. In arriving at the valuation for 21 April 1997, on his evidence as accepted by the Court of Appeal, he was ignoring events which had not yet unfolded as at that date, and taking account only of existing facts in the form of the impact on the value of the Plaza presented by the risk of the Beach Road Shopping Centre being completed[68]. But in arriving at the valuation for the Plaza as at 28 March 2000, he was taking account of events as they had unfolded up to that date. In carrying out valuations, he had to take account of risks so far as the market perceived them to be present realities at the date at which value was to be fixed. The task of valuation is to be conducted without hindsight – that is, without knowledge of events which have not happened by the date at which the value is to be ascribed, though they have happened by the date on which the valuation takes place. That task is different from the task of assessing loss, because the latter task is to be conducted with hindsight.

45 Thus, in assessing damages in this case, the court is not limited to the assessment of risk as at 28 April 1997, but is entitled to take account of how those risks had evolved into certainties at dates after the date on which the comparison of price and true value was being made. The market values Mr Dodds arrived at may well have been entirely accurate; if so, they demonstrated not that he was in error, but that the market assessment of the risk

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67 *Twycross v Grant* (1877) 2 CPD 469 at 544-545 per Cockburn CJ.

68 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2002] QCA 302 at [20]-[22].

was erroneous. In short, the market value in 1997 was not a "true value, but a mistaken estimate of … value"[69].

46 Figures worked out by analysing what willing but not anxious buyers and willing but not anxious sellers would agree on, without taking account of subsequent events, may correspond with market value; but they do not necessarily correspond with true value because the market can operate under some material mistakes. In particular, some material factor may not be apparent to it. A mistake of this kind, it seems likely, was present here. Though the market value on 21 April 1997 was $400,000, and in July 1997 it was $375,000, one matter was not apparent then which was apparent later. The trial judge found that $130,000 was "the value of the land more or less since it became apparent that tenants were largely unavailable except at minimal rentals."[70] That unavailability was an inevitable consequence of the Beach Road Shopping Centre once it was completed, but the perception of the likely effect of that completion was obscure in 1997, and only became clearer from the latter part of 1998 on.

47 *The contrary arguments.* The defendant argued that it was not possible to demonstrate a sufficient loss as at the acquisition date in 1997 to render the trial judge's assessment correct. It pointed to a lack of specific evidence on the subject. However, while it is true that there was no direct evidence placing the "true value" in the vicinity of $130,000 on 28 April 1997, there does not have to be. Barwick CJ said that, provided there was some evidence of damage, in the field of assessing damages for fraud, "as in other fields, a tribunal of fact must do the best it can in assessing damages"[71]. Fry J found no difficulty in assessing the difference between the price paid and "value" in the sense of "real value" or "a fair price to pay … in the real circumstances at the time" of purchase, even though there was no direct evidence on the point[72]. Here, indirect evidence can be found in the market values at the later dates. While the course of actual events is excluded to a greater degree the further back in time the dates at which values are stated, the later values, being based on fuller experience, and being

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69 *Peek v Derry* (1887) 37 Ch D 541 at 594 per Sir James Hannen.

70 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [51].

71 *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 26.

72 *Arkwright v Newbold* (1881) 17 Ch D 301 at 312.

unaffected by extraneous causes in this case, are capable of pointing to the underlying reality of earlier times.

48 Thus it is likely that the "true value" on 28 April 1997 was much lower than $400,000. But, even with the benefit of hindsight, can it be said to have approached $130,000?

49 The trial judge found no difficulty in concluding that Mr Dodds' valuation of the Plaza in March 2000 at $130,000 justified the view that that figure "was probably close to its realistic value" at the end of 1998 or in early 1999[73]. The unavailing efforts that had been made to sell the property in 1999, which in part led him to that view, were matched by the development of plans to sell the property in 1998 and attempts to place it for sale from 1998 on[74]. The trial judge thought that an assumption that the Plaza could be fully tenanted seemed over-optimistic, even on 7 October 1998[75]. The trial judge accepted the evidence of Mrs Foster that in the nine months up to April 1998 no inquiries from any potential purchaser had been received; that tenants were slow with the rent; that when the Beach Road Shopping Centre opened it had nine vacancies and the Plaza had three, without any inquiries from prospective tenants; and that tenants were complaining of a lack of customers. This evidence suggests that the woes of 2000 were already developing in the mid 1997 period, and tends to suggest that the true value may have been approaching $130,000 even then. However, it remains possible that the "true value" as at 28 April 1997 may not have been as low as $130,000, if only because at that stage the Plaza was fully tenanted. In theory, any landlord of the Plaza would have had at least the income stream for the duration of the tenancies, and that may have kept the true value above $130,000 in April 1997. But they were only short term tenancies. The value of tenanted premises on 28 April 1997 would be reduced as the events that unfolded after that date revealed that some of the tenants were unable to pay the rent after mid 1998 because of the competition from the Beach Road Shopping Centre, and that to some extent tenants could not be attracted at all, or only at much lower rents than formerly. If the true value in April 1997 was above $130,000, it must certainly have been falling sharply.

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73 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [49].

74 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [49].

75 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [49].

50 *Conclusion: a just assessment.* Let it be assumed in favour of the defendant that the true value in April 1997 was above $130,000, and that, to that extent, the plaintiff's preferred approach does not go far enough to support the trial judge's verdict. Just as the estimation of market value must be an inexact process, so must the assessment of damages based on an estimate of true value. The verdict of the trial judge, on the present approach, can only be upheld if the true value in April 1997 was about $130,000. But even if it was above that figure, so that that component in the award was wrong, the total sum for which the trial judge ordered judgment has not been shown to be so wrong as to have caused an injustice to the defendant. That is particularly so when it is remembered that in certain other respects the trial judge appears to have made errors in calculating damages which are adverse to the plaintiff.

51 The first relates to the trial judge's decision to allow interest at 5 percent on $41,791.51 from 1 July 1999. That sum was made up of three components. The first comprised additional purchase costs in the form of stamp duty of $11,600. That was made up of the difference between what was payable on a purchase at $485,000 and what was payable on a purchase at $130,000. The duty to pay the stamp duty on $485,000 was incurred in April 1997, and the stamp duty was actually paid on or about 1 July 1997. The second component was $8,590 for refurbishment costs, paid in July-September 1997. The third component was trading losses of $21,601.51. The trial judge found that these were incurred on various dates from 1 July 1999. The trial judge allowed interest only from 1 July 1999 on all three components, and did so at 5 percent per annum.

52 The trial judge's selection of 1 July 1999 as the date from which interest should run was correct for the trading losses, since they were only incurred from that time. But it was incorrect for the first two components, since in relation to the first the loss was suffered on or about 1 July 1997 and in relation to the second the loss was suffered progressively from July to September 1997.

53 Although at one stage of the trial the plaintiff claimed that the correct rate of interest was 7.5 percent per annum, in final address it claimed 10 percent. At the trial the defendant did not take issue with that claim. On any view a rate of 5 percent appears too low, since the cost of money in 1997-2001 would have been higher. The figure of 5 percent also appears out of line with the practice of the Court. Throughout the period 1 July 1997 to October 2001, the rate of interest prescribed by Practice Directions of the Supreme Court of Queensland for interest on default judgments, for example, was successively 10 percent and then 10.5 percent. The trial judge gave no explicit reason for rejecting the plaintiff's claim for 10 percent. However, he appears to have selected the 5

percent interest rate on the trading losses because they were not all incurred on 1 July 1999, but were incurred progressively over the next two years. That approach was justifiable, but it appears to have been extended to the other two components. For them it was wrong, in view of the dates on which the losses were suffered. The result of these errors is that the plaintiff should have received interest on $20,190 at 10 percent from approximately 1 July 1997 for four and a quarter years, not 5 percent for two and a quarter years. The difference is about $7,700.

54 A further error, also relating to interest, arose from the trial judge's endeavour to avoid double counting. He refused to allow "interest on the funding for the purchase of the Plaza" on the ground that it was included in the trading losses[76]. This would be correct if the whole of the $485,000 had been borrowed. But the evidence suggests that it was not all borrowed. Mr Foster said that the purchase of the Plaza by the plaintiff was to be funded in part by $140,000 derived from the sale of the Brisbane house. This suggested that approximately $340,000 was borrowed. His evidence was corroborated by Mrs Foster, who said that seventy percent of the funds needed were to be borrowed, and that a contribution to the purchase price to be paid by the plaintiff was to come from the sale proceeds of the Brisbane house. There was documentary evidence that the contribution was $128,791.45. The plaintiff accepted in written submissions to this Court that this was a correct figure. On the trial judge's approach, which was that by early 1999 the land was worth about $130,000, by that date the plaintiff had lost $355,000 (the difference between $130,000 and the purchase price of $485,000). In this Court the defendant accepted that the trial judge was wrong not to award interest at 10 percent in relation to the $128,791.45 but denied that interest should run on the whole sum. It contended that whatever loss was suffered, only 26.55 percent of it should be referable to the component contributed from the sale of the home as distinct from borrowed funds. The figure of 26.55 percent was arrived at by dividing $128,791.45 by $485,000, and multiplying the result by 100. Let it be assumed, without deciding, that the plaintiff is correct in that methodology. If the plaintiff is correct, the trial judge should have awarded additional interest at 10 percent per annum for approximately two and a half years on 26.55 percent of $355,000, ie approximately $25,400.

55 The fact that for additional purchase costs and refurbishment costs the trial judge erroneously selected an interest rate of 5 percent and applied it from too

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76 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [53].

late a date, and the fact that he allowed no interest on the component of the purchase price which was not borrowed, deprived the plaintiff of over $30,000 even if the trial judge's basic approach was correct.

56 However, the real issue is whether, on an application of the correct approach, and taking account of the trial judge's errors on interest, the verdict arrived at by the trial judge was unjust. If it were the case that the true value of the land as at 28 April 1997 was more than $130,000, the reasoning above[77] suggests that it was not much more than $130,000. If it were as much as $185,000, the plaintiff's primary loss would have been $300,000. The interest at ten percent per annum for nearly four and a half years on 26.55 percent of $300,000 is about $42,700. The component representing the difference between what was actually paid in stamp duty on a purchase of $485,000 and what would have been payable on a purchase of $185,000 would fall, but the interest-related errors of the trial judge mean that even if he gave $55,000 too much by way of primary loss, the plaintiff should recover in excess of $45,000 more in interest than he allowed. The difference between what he did give and what he ought to have given is insufficiently substantial to suggest that the trial judge's verdict was out of line with what the overall justice of the case called for.

57 *Conclusion in relation to the plaintiff's preferred approach.* Subject to some additional matters dealt with below, this reasoning is sufficient to support the conclusion that the appeal should be dismissed. In all the circumstances, although the reasoning of the courts below is erroneous, the overall judgment figure has not been shown to be unjust to the defendant or unduly generous to the plaintiff. While there may be doubts about whether the true value on 27 April 1997 was as low as $130,000, they are tempered by the excessive generosity shown by the trial judge to the defendant in other respects.

58 It is therefore not necessary to consider the merits of the figure of $193,854 as the true value on 27 April 1997, a figure put to the trial judge and urged on this Court by the plaintiff in its Notice of Contention and Cross-Appeal, but strongly attacked by the defendant.

The comparison with damages for breach of warranty

59 *Alleged excessive professional liability.* Before departing from the preferred approach of the plaintiff, one argument of the defendant remains to be

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77 At [49].

dealt with. The defendant submitted that the question of what damages were recoverable by the plaintiff depended on what interest was affected by the misconduct inducing the plaintiff to enter into the transaction complained of. According to the defendant, the interest affected was the interest in getting a valuable acquisition in return for the price paid; there was no promise that there would be no impact on rents from local competition. The defendant contended that the damages were too high, because they corresponded with those recoverable on a breach of warranty; yet the defendant never gave, and the plaintiff never paid for, any warranty[78]. The defendant also contended that if the decisions below stood, the measure of the loss to be paid by any professional expressing a view on maintainable earnings which contravened s 52 (or which did not fulfil duties in contract and tort) after the existing earnings worsened, would be "the difference between the price paid and the value of the property when the risks come home" – independently of whether the professional's conduct had a continuing effect, and independently of whether the plaintiff acted unreasonably.

60 *The argument is rejected.* This argument fails, partly because even if the interest affected is defined as the defendant would have it – and not as the interest of the plaintiff in conducting an ongoing investment business through the premises – the figure selected by the trial judge can stand, since the defendant's argument does not give sufficient significance to the court's power to take into account, in assessing "real" or "true" value as at the date of the transaction, events which have taken place after that date up to the time when the assessment is made. That is, the defendant's argument seeks to shift attention to the date "when the risks come home", as distinct from assessing "real" or "true" value at the date of the transaction in the light of the risks as they subsequently eventuated.

61 The argument also fails because its assumption that the damages recovered correspond to damages for breach of warranty is not established: there was no investigation of what damages the plaintiff would recover if there had been a breach of warranty that rents would remain at about $60,000 per annum. Recovery might well have been higher in such a case than what was in fact recovered here.

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78 Reference was made to *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213-214 per Lord Hoffmann.

62 In any event, whatever anomalies in relation to damages may be revealed by comparing liability for negligently supplied information with liability for breach of warranty, no error in assessment is demonstrated by comparing the contractual measure of damages with the s 82 measure of damages. The wide language of s 82 is compatible with a legislative desire to broaden the scope of recovery, not to keep it within the bounds of some comparison with the common law[79].

The plaintiff's alternative approach: price minus benefits "left in its hands"

63 *An alternative approach.* The alternative approach of the plaintiff at trial was to contend that it was entitled to recover the purchase price of $485,000 less whatever was "left in its hands". In view of the conclusions reached above, it is unnecessary to rest the determination of the appeal on that approach. However, it may be said that that approach, whether it is viewed as the only acceptable path to damages under s 82 in this case, or whether it is viewed as a means of checking the soundness of results achieved by other possible paths, does not lack merit. In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*[80], a majority of the House of Lords held that "there can be circumstances in which it is proper to require a defendant only to bring into account the actual proceeds of the asset provided that he has acted reasonably in retaining it." And Lord Steyn, who reached the same result, pointed out that the fundamental rule was that the plaintiff should be compensated; that the rule which turns on an assessment of value is only a means of giving effect to the overriding compensatory rule; and that the valuation of assets as at the date of the transaction is "simply a second order rule applicable only where the valuation method is employed."[81] He went on:

> "If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of

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79 *Murphy v Overton Investments Pty Ltd* (2004) 78 ALJR 324 at 332 [44]; 204 ALR 26 at 37.

80 [1997] AC 254 at 265 (see also 267 (propositions (4) and (5)) per Lord Browne-Wilkinson, Lords Keith of Kinkel, Mustill and Slynn of Hadley concurring.

81 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 284.

transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it."

64 *Advantages of the approach.* While here the plaintiff cannot bring into account the actual proceeds of sale of the Plaza, because, despite its best efforts, it has not succeeded in effecting a sale, the principle would permit the value of the Plaza at the time of the trial to be the relevant figure.

65 There is certainly no reason why an approach of that kind is not open under s 82 of the Act. The deduction of true value at the acquisition date from the price paid is no more than a guide to the assessment of damages under s 82. Section 82 does not in terms refer to that method, and the width of s 82 permits other approaches to the assessment of damages so long as they work no injustice[82]. The alternative approach advocated by the plaintiff has particular appropriateness in the present circumstances. That is because a primary reason for the common adoption, in assessing damages in deceit, of the test of comparing the price paid for an asset with its true value when acquired is the desirability of separating out losses resulting from extraneous factors in the later history of the asset[83]. Here, the trial judge found that the decline in value of the Plaza had no cause other than the completion of the Beach Road Shopping Centre[84]. The present case is from that point of view an unusually pure one. Since there are no losses resulting from extraneous factors to separate out, there is correspondingly less need to look to a comparison of purchase price and real value on acquisition as the appropriate approach.

66 The House of Lords majority in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* saw the comparison of price and value at the date of acquisition as a test which may well produce a fair result "if

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82 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 503-504 [17] per Gaudron J, 510 [38] and 512 [41] per McHugh, Hayne and Callinan JJ, 529 [103] per Gummow J and 549 [152] per Kirby J; *Henville v Walker* (2001) 206 CLR 459 at 470 [18] per Gleeson CJ, 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; *Murphy v Overton Investments Pty Ltd* (2004) 78 ALJR 324 at 329-330 [31] and 332 [44] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; 204 ALR 26 at 34 and 37.

83 *Henville v Walker* (2001) 206 CLR 459 at 471-472 [24]-[25] per Gleeson CJ.

84 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [38].

the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired)"[85]. It also said that that general rule "will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property."[86] In argument before this Court, the defendant contended that the misrepresentation had not continued to operate after the date of the acquisition, or at least after late 1997, when the Fosters were becoming concerned by the departure of tenants and the inability to replace them, and therefore engaged Mr Clacher, a valuer, to prove that a loss had been suffered, which he duly did by valuing the Plaza at $350,000. However, while the defendant was not guilty of fraud, its unlawful conduct had locked the plaintiff into the Plaza.

67 *Conclusion: a fairer result.* After the Fosters began to become conscious of their difficulties in late 1997, and received Mr Clacher's valuation in early 1998, they began planning methods of selling the Plaza additional to using real estate agents, and began making what the trial judge found to be "genuine efforts" to do so from 1999[87]. The difficulties with the plans and the failure of the efforts demonstrate that the plaintiff's options were confined in the sense that, because of the defendant's conduct, the plaintiff was induced to buy the Plaza at a time when it was perceived to be valuable, and was forced to retain it because it increasingly came to be perceived as being of declining utility and value. In short, the Plaza was not "a readily marketable asset". The alternative contention of the plaintiff produces a fairer result than that urged by the defendant would produce. But, as already indicated, the determination of the appeal does not rest on this alternative contention of the plaintiff.

The two loss theory

68 It is not necessary to consider the merits of a further approach briefly alluded to by the plaintiff to the effect that the plaintiff could recover two losses – one being its loss on acquisition of the Plaza created by the risk of the Beach

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85 [1997] AC 254 at 266.

86 [1997] AC 254 at 267.

87 *Astonland Pty Ltd v HTW Valuers (Central Qld) Pty Ltd* [2001] QSC 380 at [49].

Road Shopping Centre eventually opening, the other being the additional loss arising when that risk came to fruition[88].

The application for special leave to cross-appeal

69 The plaintiff applied for special leave to cross-appeal. The application had the goal of persuading this Court to substitute for $130,000 as the true value the figure of $193,854 in the event that this Court thought the figure of $130,000 was wrong. The consequence of dismissing the appeal is that the cross-appeal becomes unnecessary and special leave is therefore refused.

Orders

70 The damages recovered by the plaintiff, provided for in the orders of the courts below, have not been shown to be erroneously excessive. The appeal and the application for special leave to cross-appeal should be dismissed. The defendant should pay the costs.

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88 Cf *Murphy v Overton Investments Pty Ltd* (2004) 78 ALJR 324 at 332-333 [47]-[52]; 204 ALR 26 at 38.