HIGH COURT OF AUSTRALIA

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

COMMONWEALTH OF AUSTRALIA APPELLANT

AND

JOHN GRIFFITH CORNWELL RESPONDENT

Commonwealth of Australia v Cornwell [2007] HCA 16
20 April 2007
C10/2006

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of the Australian Capital Territory

Representation

S P Estcourt QC with K L Bennett for the appellant (instructed by Australian Government Solicitor)

B W Walker SC with R J Davis and J R C Gordon for the respondent (instructed by Snedden Hall and Gallop)

CATCHWORDS

Commonwealth of Australia v Cornwell

Limitation of actions – Negligence – Meaning of "first accrues" in s 11(1) of the *Limitation Act* 1985 (ACT) – The respondent was negligently advised in 1965 that he was ineligible for acceptance as a member of the fund established pursuant to the *Superannuation Act* 1922 (Cth) – The respondent did not institute proceedings against the appellant until 1999 – Whether the respondent's cause of action first accrued upon his retirement in 1994, or at some earlier time – Whether the respondent's cause of action was statute-barred.

Limitation of actions – Concealed fraud – Whether a consideration of s 33 of the *Limitation Act* 1985 (ACT) is required to resolve the respondent's case.

Negligence – Cause of action – Whether the respondent's cause of action accrued upon his retirement in 1994, or at some earlier time.

Negligence – Damage – Economic loss – Contingent loss – Superannuation entitlements – Statutory contingencies – Whether the respondent suffered damage when his superannuation entitlements accrued upon his retirement in 1994, or at some earlier time.

Superannuation – Defined benefits schemes – Statutory contingencies for the accrual of entitlements – Whether the respondent suffered any damage until the statutory contingencies contained in the *Superannuation Act* 1990 (Cth) were enlivened upon his retirement in 1994.

Superannuation – Membership – Transition between fund established pursuant to the *Superannuation Act* 1922 (Cth) and that established pursuant to the *Superannuation Act* 1976 (Cth) – Whether the respondent suffered loss in 1987 when he joined the fund established pursuant to the 1976 Act – Whether the respondent suffered loss when the 1976 Act commenced.

Words and phrases – "damage", "deliberately concealed", "entitlement", "first accrues".

Limitation Act 1985 (ACT), ss 11, 33.
Superannuation Act 1922 (Cth), ss 4, 19, 20, 43, 45-48, 51.
Superannuation Act 1976 (Cth), ss 3, 11, 45, 55, 56, 58, 63, 64, 66, 80, 183.
Superannuation Act 1990 (Cth), Sched Pt 4.

GLEESON CJ, GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ.

The limitation statute

1 This appeal turns upon the operation of s 11 of the *Limitation Act* 1985 (ACT) ("the Limitation Act"). Section 11 is in a familiar form, deriving from s 3 of the *Statute of Limitations* 1623 (Eng) ("the 1623 Act")[1]. It states:

> "(1) Subject to subsection (2), an action on any cause of action is not maintainable if brought after the expiration of a limitation period of 6 years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he or she claims.
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> (2) Subsection (1) does not apply to a cause of action in respect of which another limitation period is provided by this Act."

2 It is not suggested that there is any other such limitation period which would render s 11(1) inapplicable. Before the commencement of the Limitation Act, the 1623 Act had applied in the Territory[2]; it ceased to be in force there by operation of s 2(2) of the Limitation Act. No reliance is placed upon the limitation regime before that change was made.

3 The respondent, Mr Cornwell, instituted his action in the Supreme Court of the Australian Capital Territory against the appellant, the Commonwealth, on 16 November 1999. He relied upon various causes of action, negligent misstatement, breach of contract, breach of statutory duty and "estoppel". The primary judge (Higgins CJ) held[3] that "estoppel" here could found no independent cause of action, that any cause of action in contract was barred by s 11, and that, because the action for negligent misstatement was made out and was not statute barred, it was unnecessary to consider the alleged breach of statutory duty. The question before this Court is whether the action in negligence was commenced after the expiration of a period of six years running from the date on which that cause of action had "first accrue[d]" to the respondent.

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1 21 Jac I c 16.

2 Trindade and Cane, *The Law of Torts in Australia*, (1985) at 632.

3 *Cornwell v Commonwealth of Australia* (2005) Aust Torts Reports ¶81-779.

4 In *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*[4], this Court warned that assumptions which assimilated various causes of action (including those in contract and tort) may not always be sound. In that vein, Lord Mance recently emphasised[5]:

> "No issue regarding relevant and measurable damage can arise in contract, since nominal damages can be awarded for any breach."

Hence, in the present case, Higgins CJ held that any cause of action in contract had first accrued many years ago, upon breach in 1965.

5 However, to show the existence of a completely constituted cause of action in negligence, a plaintiff must be able to show duty, breach, and damage caused by the breach; accordingly, in the ordinary case, it is at the time when that damage is sustained that the cause of action "first accrues" for the purposes of a provision such as s 11 of the Limitation Act[6].

6 In *Hawkins v Clayton*[7], which turned upon a provision of the New South Wales legislation[8] relevantly indistinguishable from the Territory legislation, this Court refused to place a particular gloss upon the statutory text. The Court rejected the proposition that, at least in the case of claims in negligence for economic loss, time does not run until the plaintiff discovers, or could on reasonable inquiry have discovered, that damage has been sustained[9].

7 Before Higgins CJ, the Commonwealth failed in its defence to the negligence claim based upon s 11. His Honour entered judgment for Mr Cornwell for damages to be assessed. An appeal to the Court of Appeal of

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4 (2004) 217 CLR 640 at 649-650 [14].

5 *Law Society v Sephton & Co* [2006] 2 AC 543 at 569.

6 *Hawkins v Clayton* (1988) 164 CLR 539 at 543, 587, 599.

7 (1988) 164 CLR 539.

8 *Limitation Act* 1969 (NSW), s 14.

9 (1988) 164 CLR 539 at 543, 587, 599-600.

the Supreme Court of the Territory (Crispin P, Connolly and North JJ)[10] was dismissed on 8 May 2006 and it is from that decision that the appeal is brought by the Commonwealth to this Court. That appeal should be dismissed. The next step in the litigation will be the assessment of damages by the Supreme Court, a matter beyond the scope of these reasons.

8 By notice of contention, the respondent seeks to rely upon s 33 of the Limitation Act to escape the possibility of any adverse operation of s 11 of that statute. Section 33 operates in two classes of case. The first is where "there is a cause of action based on fraud or deceit" (s 33(1)(a)). Higgins CJ held that par (a) could have no application here[11] and correctly did so. The second class of case is found where "a fact relevant to a cause of action or the identity of a person against whom a cause of action lies is deliberately concealed" (s 33(1)(b)). The section fixes upon the date the plaintiff discovers, or ought by reasonable diligence to have discovered, the fraud, deceit or concealment, and adjusts the limitation period accordingly. The respondent submits that, by reason of par (b) of s 33(1), the reckoning of the limitation period should be found to have commenced upon a date sufficiently late to bring him within the six year period otherwise stipulated by s 11. Higgins CJ made no apparent finding respecting par (b).

9 It will be necessary to return to the issue raised by reliance upon s 33. It is sufficient at this stage to note the following. First, in cases of "concealed fraud" courts of equity refused to apply by analogy statutes of limitation which operated upon actions at law. Secondly, this doctrine of "concealed fraud" did not furnish an answer on equitable grounds to a plea in a common law court of the 1623 Act or other limitation statute to, for example, an action in tort; it was not possible to plead by way of replication on equitable grounds that the existence of the plaintiff's cause of action had been fraudulently concealed from the plaintiff by the defendant[12]. Accordingly, in *Metacel Pty Ltd v Ralph Symonds Ltd*, Sugerman JA said[13]:

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10 [2006] ACTCA 7.

11 (2005) Aust Torts Reports ¶81-779 at 67,210.

12 *Hunter v Gibbons* (1856) 1 H & N 459 [156 ER 1281].

13 [1969] 2 NSWR 201 at 203; cf *Sheldon v R H M Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 at 111, 120-121.

> "Concealed fraud remains a special doctrine of courts of equity applicable where relief is sought in those courts and is not applicable in bar of the Statute of Limitations in a pure common law action."

10 Section 33 of the Limitation Act is to be read against that background. Significantly for present purposes, it is addressed to any action, whether legal or equitable in nature.

11 Something more should be said respecting the nature of the respondent's action and of the facts.

The facts

12 On 7 May 1962, the respondent commenced employment by the Commonwealth as the only spray painter in the Transport Section of what was then the Department of the Interior ("the Department") at the bus depot at Kingston in the Territory. Although classified as a temporary employee, the respondent was employed full time. On 24 March 1987, the respondent's position was reclassified as a permanent public service position[14]. On that date, the respondent became a member of the Commonwealth Superannuation Fund ("the 1976 Fund") established by the *Superannuation Act* 1976 (Cth) ("the 1976 Act"). In 1994, the respondent's employment was transferred from the Commonwealth to that of the Territory but he remained within the Commonwealth superannuation system. Thereafter, the respondent chose to transfer to the scheme ("the 1990 Fund") which was established under the *Superannuation Act* 1990 (Cth) ("the 1990 Act"). The respondent retired on 31 December 1994 and was paid superannuation benefits referable to his combined membership of the 1976 Fund and the 1990 Fund.

13 The respondent's contention, accepted by the primary judge, was that, although he had been classified as a "temporary employee", at a date earlier than 24 March 1987 he had been eligible for acceptance as a member of the fund ("the 1922 Fund") established by the *Superannuation Act* 1922 (Cth) ("the 1922 Act"), but that he had been dissuaded by misleading advice from applying. This had been proffered negligently to the respondent by his superior officer, Mr Nelson Simpson, at a meeting during July 1965 and he had reasonably relied upon that

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14 Foreman Panel Beater, Grade 3.

advice[15]. At the time, the respondent had recently married and was concerned to obtain security for his future. He had completed three years service on 7 May 1965. Mr Simpson was then Manager of the Transport Section of the Department. The respondent, whose evidence was accepted, had asked Mr Simpson:

> "I would like to know about the superannuation situation. I can't understand why we are not entitled to it."

Mr Simpson had responded:

> "That's right. You're not entitled because you are an industrial and temporary employee, but I will see what I can do."

However, Mr Simpson had not subsequently informed the respondent of any further developments.

14 The respondent pleaded that the Commonwealth was vicariously liable for the advice given to him by Mr Simpson and that, in reliance upon that advice, he had "lost the opportunity of joining the Commonwealth Superannuation Fund on and from 8 May 1965 and in consequence upon his retirement on 31 December 1994 received a lesser benefit than that which he would have received had he been admitted to the Fund on and from 8 May 1965". The Commonwealth Superannuation Fund there referred to was the 1922 Fund.

15 Higgins CJ found that the Commonwealth was vicariously liable as alleged and that the respondent had suffered economic loss because his retirement benefit was worth less than it otherwise would have been. Further, his Honour dismissed the defence based upon s 11 of the Limitation Act. He found that, while any contract had been broken by the Commonwealth in 1965, the cause of action in tort had not accrued until the retirement of the respondent on 31 December 1994; before that date any loss suffered by the respondent had been contingent rather than actual. Translated into the terms of s 11 of the Limitation Act, the finding was that 31 December 1994 was the date on which the cause of action in tort for the negligent advice had first accrued to the respondent.

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15 See *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 16-17 [47]-[48], 22-24 [73]-[78].

The nature of the damage

16 In *Hawkins v Clayton*[16], Gaudron J emphasised the importance for actions for negligence causing economic loss in identifying the interest said to be infringed, whether it be the value of property, the physical integrity of property, or the recoupment of moneys advanced. Thereafter, in *Wardley Australia Ltd v Western Australia*, Mason CJ, Dawson, Gaudron and McHugh JJ observed[17]:

> "To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of undercompensation or overcompensation, the risk of the former being the greater."

Their Honours also said[18]:

> "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[19]. With economic loss, as with other forms of damage, there has to be some actual damage[20]. Prospective loss is not enough."

17 In *Law Society v Sephton & Co*[21], Lord Mance said, with reference to *Wardley*, that he saw the attraction of an approach:

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16 (1988) 164 CLR 539 at 601.

17 (1992) 175 CLR 514 at 527.

18 (1992) 175 CLR 514 at 527.

19 See Cane, *Tort Law and Economic Interests*, (1991) at 16-17.

20 *Forster v Outred & Co* [1982] 1 WLR 86 at 94; [1982] 2 All ER 753 at 760.

21 [2006] 2 AC 543 at 569.

> "the effect of which is that unless and until a remote contingency eventuates the claimant is not expected to issue proceedings which he would not normally issue or wish to issue unless and until that point arrives".

18 Here, the economic loss which the respondent sustained was alleged to be the lesser benefit which he obtained on his retirement, this being worth less than it would have been had he not relied upon the negligent advice given to him in 1965. But to speak simply of a "retirement benefit" and its value is to obscure the nature of the economic loss involved. This does not turn upon proprietary or other rights or obligations created and governed by the general law, such as the indemnity granted by the respondent in *Wardley*, or the continuing financial obligations undertaken by the lessees in *Murphy v Overton Investments Pty Ltd*[22]. What the respondent stood to enjoy upon "retirement" was an "entitlement" conferred by federal statute law. This "entitlement" was his "interest" in the sense used in the above passage from *Wardley*.

19 The significance attached to retirement on grounds of health, by retrenchment, for cause, upon death and for other reasons depended upon the terms of the particular legislation. What was only in prospect until the falling in of one or more of various contingencies, matured into actual loss only at the end of the respondent's service and upon the falling in of one or more of the statutory contingencies which had to be met for the respondent to be entitled to a statutory benefit. Hence the submission by the respondent that it was only upon his retirement that the relevant statutory contingency fell in upon which the respondent became entitled to a benefit which was limited or diminished and his cause of action first accrued.

20 It is against this background that attention must be given to the respective legislative schemes.

The 1922 Act

21 The scheme provided by the 1922 Act was a defined benefits scheme: employees made "contributions" for "units of pension" according to a prescribed scale (ss 19, 20). As it stood in 1965, upon retirement a contributor then became "entitled" to receive a pension determined according to the number of units for

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22 (2004) 216 CLR 388.

which the contributor was contributing at retirement (s 43). Separate provision was made for the entitlements conferred if retirement was on the ground of invalidity or physical or mental incapacity to perform the contributor's duties (s 45). Provision also was made for payment of pensions to widows and in respect of certain children and orphans (ss 46-48). Section 51(1) provided:

> "Where a contributor resigns or is dismissed or discharged there shall be paid to him the amount of the actual contributions paid by him under this Act, irrespective of the cause of his resignation, dismissal, or discharge."

22 The definition in s 4(1) of the term "contributor" directed attention to that of "employee". This relevantly brought in a person "employed in a permanent capacity by the Commonwealth, who is by the terms of his employment required to give his whole time to the duties of his employment". However, the special provision made by s 4(5) met the situation of the respondent. This sub-section stated:

> "Where –
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> (*a*) a person employed by the Commonwealth otherwise than in a permanent capacity is by the terms of his employment required to give the whole of his time to the duties of his employment;
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> (*b*) that person has been so employed for a continuous period of not less than three years; and
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> (*c*) the Public Service Board, or, on appeal from the Public Service Board, the Treasurer, certifies that that person's employment is likely to be continued for a period of at least seven years,
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> the Treasurer may direct that that person be deemed to be an employee within the meaning of this section, and that person shall be deemed to be such an employee as from the date of the direction."

23 The respondent satisfied pars (a) and (b) at the time of his interview with Mr Simpson. He had no entitlement to join the 1922 Fund but, subject to certification under par (c), the Treasurer was empowered to deem him to be an "employee" in the defined sense. Higgins CJ found that, had Mr Simpson followed the matter up and given the respondent accurate information, the

respondent would have acted upon it and his application to join the 1922 Fund "almost certainly" would have been approved[23].

24 Further, had the respondent thereafter become aware of the true position at a time whilst the 1922 Fund was still accepting new contributors, it may have been open to him, by paying more for each unit, thus to place himself in the same position as if he had joined in 1965. However, the respondent did not appreciate until at least 1996 what had been his position in 1965 under the 1922 Act. As it was, while the 1922 Act remained in force, the respondent made no outlays on units and, in that sense, had been free to apply elsewhere any moneys he might have spent on units.

The 1976 Act

25 The appellant contends that the introduction on 1 July 1976 of the 1976 Fund and the closure of the 1922 Fund[24] brought about a decisive change in the legal situation. Before that date, any necessary damage to complete the respondent's cause of action in negligence had not occurred and had remained truly "contingent"; thereafter, so it is submitted, "the Respondent's loss was necessarily and irretrievably sustained" and s 11 of the Limitation Act must be applied from that date.

26 The 1976 Act resembled the 1922 Act in making provision for certain temporary employees to be classified as eligible employees for the 1976 Act (s 11(1)).

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23 *Cornwell v Commonwealth of Australia* (2005) Aust Torts Reports ¶81-779 at 67,207.

24 The legislative scheme was to migrate ongoing employees from the 1922 Fund to the 1976 Fund. A new s 19A was inserted into the 1922 Act by the *Superannuation Amendment Act* 1976 (Cth) ("the 1976 Amendment Act") providing, subject to a number of exceptions of a transitional character, that "[c]ontributions shall not be made under this Act on or after 1 July 1976". Section 43 and the other sections of the 1922 Act conferring "entitlements" were also amended so as not to apply to contributors who ceased service after 1 July 1976.

27 The 1976 Fund also was a defined benefits scheme. Again, members were required to make contributions (s 45). However, the 1976 Act provided for the calculation of benefits for "eligible employees" by reference to years of "contributory service" rather than by reference to contributions for pension units. The appellant emphasises that, whilst before the introduction by the 1976 Act of the concept of contributory service it would have been possible for a person in the position of the respondent to join the 1922 Fund later than 1965 and pay more for his units in the 1922 Fund, that was not possible after the commencement of the 1976 Act; the respondent, even if he had forthwith joined the 1976 Fund, could not have made up the quantum of his benefits to allow for his 11 years of service since 1965. Pensions under the 1976 Act were calculated as a percentage of final salary, the percentage being fixed by reference to the "period of contributory service"; the greater the number of complete years of contributory service, the higher the percentage of final salary paid as a pension.

28 The "period of contributory service" for the purposes of the 1976 Act was defined to commence on the "first day of service", this being fixed by reference to the day when a person became an "eligible employee" (s 3(1)). As the 1976 Fund was to be open to persons who were previously eligible to join the 1922 Fund, persons who were "employees" for the purposes of the 1922 Act at the time when the 1976 Act commenced, and who continued to be such, were defined to be eligible employees for the purposes of the 1976 Act by par (a) of the definition of "eligible employee" in s 3(1). Such persons who were members of the 1922 Fund were also defined to be "existing contributors" for the purposes of the 1976 Act.

29 Section 183(2) of the 1976 Act authorised regulations to be made "modifying this Act, or a provision of this Act specified in the regulations, in the application of this Act or that provision" to eligible employees. Regulations were later made pursuant to s 183(2) modifying the definition of "period of contributory service" so as to credit persons who commenced service prior to 1 July 1976 with a period of contributory service calculated by reference to the date the person commenced making contributions to the 1922 Fund[25]. The

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25 Superannuation (Period of Contributory Service) Regulations (Cth), reg 4 and Items 1 and 2 of the Schedule, deemed to have come into force on 1 July 1976. Item 1 of the Schedule modified the definition of "period of contributory service" so as to be the aggregate of the period from 1 July 1976 to the last day of service plus the period prescribed under s 194 or s 195. Sections 194 and 195 were part of a new Div 6 of Pt XII of the 1976 Act inserted into the Act only in so far as that

(Footnote continues on next page)

respondent, therefore, not being a member of the 1922 Fund, could not by recourse to these provisions make up the lost years of service.

The 1990 Act

30 The 1990 Act established the 1990 Fund, which was also a defined benefit scheme. The Schedule to the 1990 Act set out the Rules for the administration of the scheme it established. Part 4 dealt with members' benefits and, like the 1922 Act and the 1976 Act, conferred an entitlement to various benefits upon satisfaction of stipulated criteria (rr 4.1.1, 4.2.2, 4.3.1, 4.5.1).

The contentions of the parties

31 The appellant submits that the respondent's loss in reliance upon the negligent advice had ceased to be contingent and had "actualised" on 1 July 1976; accordingly his cause of action was statute barred long before 1999.

32 However, the respondent submits that to fix upon 1 July 1976 is to start the clock far too early. He points to the following features of the legislation.

33 Even if admitted as a deemed eligible employee under s 11(1) of the 1976 Act at the inception of the 1976 Fund, the respondent could have had no entitlement to benefits under the 1976 Act until he had satisfied any applicable statutory contingency for the accrual of benefits under the 1976 Fund. In this respect, the 1976 Act followed the pattern of the 1922 Act. To become "entitled" to the "standard age retirement pension" specified in ss 55 and 56 of the 1976 Act, an eligible employee would be required by s 55, among other criteria, to have ceased to be such an employee on or after attaining the specified ages of 60 and 65 years. Likewise, the entitlement to an "early retirement benefit" depended upon satisfaction of various temporal and other criteria for voluntary or involuntary early retirement (s 58). Entitlement to an "invalidity benefit" again depended upon satisfaction of statutory criteria (s 66). In certain circumstances, an election was provided for commutation of pensions otherwise payable (ss 63,

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Act applied to persons within par (a) of the definition of "eligible employee". See also the Superannuation (Former Contributors for Units of Pension) Regulations (Cth), which were also deemed to have come into force on 1 July 1976 and modified the 1976 Act in relation to persons within par (a) of the definition of "eligible employee".

64). Where there was no entitlement to any of these benefits and an eligible employee ceased to be such otherwise than by reason of death, accumulated contributions made by that person were payable out of the 1976 Fund (s 80).

Collateral issues

34 Two matters may be put to one side. The first concerns the measures now made by Pt VIIIB (ss 90MA-90MZH) of the *Family Law Act* 1975 (Cth) respecting superannuation interests[26]. Section 90MC states that an interest "*is to be treated as property* for the purposes of paragraph (ca) of the definition of ***matrimonial cause***" which appears in s 4 (emphasis added). Paragraph (ca) refers to certain proceedings "with respect to the property of the parties to the marriage"; s 79 provides for the alteration of such property interests. That s 90MC is cast as a deeming provision is significant. Further, "splitting orders" may be made which operate whenever "a splittable payment becomes payable in respect of the [superannuation interest in question]" (s 90MT(1)(a)). The reference to that which is "payable" is also significant. The provisions of Pt VIIIB thus provide no indication that the respondent's cause of action for negligent advice "first accrue[d]" (within the meaning of s 11(1) of the Limitation Act) before his retirement at the end of 1994.

35 The second matter concerns the operation of the provision in s 51(xxxi) of the Constitution respecting "the acquisition of property on just terms". The respondent disavowed any reliance upon s 51(xxxi). His case is not that he was deprived by a federal law of rights with the constitutional character of property. The respondent complains that he acted upon advice, negligently given, that membership of the 1922 Fund was shut to him, with the result that what he eventually (after 1987) acquired was less valuable than would otherwise have been the case. Accordingly, it is unnecessary to enter here upon any questions respecting the operation of the mandate of just terms where any prejudicial alterations are made to the rights of subsisting members of federal statutory superannuation and pension schemes[27].

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26 Part VIIIB was inserted by the *Family Law Legislation Amendment (Superannuation) Act* 2001 (Cth).

27 cf *Theophanous v The Commonwealth* (2006) 225 CLR 101.

Conclusions respecting accrual of the cause of action

36 The submission upon which the appellant placed great weight, that respecting the significance for the respondent's position of the commencement of the 1976 Act, should not be accepted. It is true that thereafter it was no longer open to the respondent to make up for his years of service since 1965 by paying more for units under the 1922 Fund arrangements so as to have his actual years of service count towards his "period of contributory service" for the purposes of the calculation of benefits under the 1976 Act. But his loss had not then been necessarily and irretrievably sustained, as the appellant would have it. Nor should the appellant's secondary contention in the grounds of appeal be accepted. This is that, until 24 March 1987 when he joined the 1976 Fund, the respondent "continued to accumulate loss and damage" but this then crystallised and the limitation period had closed on 23 March 1993.

37 Even if the respondent had joined the 1922 Fund in 1965, his pension entitlements thereunder would prior to the commencement of the 1976 Act still have been contingent upon meeting the statutory criteria set out earlier in these reasons. The respondent could have been assured that the amount of his actual contributions paid under the 1922 Act were secured to him by s 51(1) were he to resign or to be dismissed or discharged for any cause. But, beyond that, his entitlements were prospective and contingent upon the falling in at a future time of the statutory criteria. The same was true of the respondent's position under the 1976 Act after 24 March 1987 and before his retirement seven years later, subject to the qualification that the amount of his actual contributions would no longer have been paid to him unless the conditions of s 80 were met[28].

38 The respondent also correctly emphasised that his was not a "transaction case" where property was sold or acquired[29] at a disadvantageous price, or the opportunity was lost of the lucrative exploitation of contractual rights or of some

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28 Section 51 of the 1922 Act was amended so as not to apply to persons who resigned, or were dismissed or discharged on or after 1 July 1976: 1976 Amendment Act, s 32. Provision was made in s 177 of the 1976 Act for amounts in the 1922 Fund to be paid to existing contributors, or to be deemed to be an amount of supplementary contributions paid by that person under the 1976 Act.

29 As, for example, *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 654-655 [28].

other commercial opportunity. The appellant submitted that the respondent's loss was "necessarily and irretrievably sustained" when the 1976 Fund commenced and replaced the 1922 Fund in the manner described briefly earlier in these reasons. However, whether in 1976 the respondent would have been better or worse off had he invested elsewhere the contributions he otherwise would have placed for units under the 1922 Fund arrangements is a matter of speculation. He could not be said, consistently with remarks in *Sellars v Adelaide Petroleum NL*[30], in 1976 to have sustained loss of a commercial opportunity which had some value, as a matter of the degree of probabilities and possibilities.

39 On the issues raised by the appellant, the appeal should fail. There remains the respondent's notice of contention and reliance upon s 33 of the Limitation Act.

Deliberate concealment

40 The phrase "deliberately concealed" as it appears in s 33 of the Limitation Act has its provenance in United Kingdom legislation, s 32 of the *Limitation Act* 1980 (UK) ("the 1980 UK Act"). In *Cave v Robinson Jarvis & Rolf*, Lord Millett explained the matter as follows[31]:

> "A defendant was formerly unable to take advantage of the Limitation Acts if he had been guilty of 'concealed fraud'. This equitable doctrine was given statutory effect by section 26(b) of the Limitation Act 1939 [(UK)], which postponed the start of the limitation period where the plaintiff's right of action had been 'concealed by the fraud of [the defendant or his agent]'. This was an inapt and inelegant expression which caused much difficulty. It put the emphasis on the fraud rather than the concealment."

41 Of the 1939 legislation, Brightman J said in *Bartlett v Barclays Bank Trust Co Ltd*[32]:

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30 (1994) 179 CLR 332 at 353. See also *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 655 [29]-[30].

31 [2003] 1 AC 384 at 392.

32 [1980] Ch 515 at 537.

> "'Fraud', in the context of section 26(b), does not mean common law fraud or deceit. But it does seem to envisage conduct which, if not fraudulent in the more usual sense, is unconscionable having regard to the relationship between the parties: see *Kitchen v Royal Air Force Association*[33]. 'Fraud' is used in the equitable sense to denote conduct by the defendant or his agent such that it would be against conscience for him to avail himself of the lapse of time."

42 In Australia, a different reading was given to legislation in various jurisdictions which had been modelled upon s 26(b) of the 1939 legislation. Speaking of s 55(1)(b) of the *Limitation Act* 1969 (NSW), McLelland J in *Hamilton v Kaljo* remarked[34]:

> "For my own part, I would regard it as a misuse of language, and unsound, to apply the statutory expression 'fraudulently' in s 55 to any conduct which did not involve some form of dishonesty or moral turpitude."

(With respect to the Tasmanian legislation[35], Heerey J in *Mulcahy v Hydro-Electric Commission*[36] agreed with that statement by McLelland J.) Thereafter, in *Seymour v Seymour*, Mahoney ACJ, speaking for the New South Wales Court of Appeal, said[37]:

> "In my opinion, there must be in what is involved a consciousness that what is being done is wrong or that to take advantage of the relevant situation involves wrongdoing. At least, this is so in the generality of cases. (There is in this as in many things, the problem of dealing with the person who 'closes his eyes to wrong' or is so lacking in conscience that he is not conscious of his own lack of proper standards.)"

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33 [1958] 1 WLR 563; [1958] 2 All ER 241.

34 (1989) 17 NSWLR 381 at 386.

35 *Limitation Act* 1974 (Tas), s 32(1)(b).

36 (1998) 85 FCR 170 at 246.

37 (1996) 40 NSWLR 358 at 372.

43 Section 33 of the Limitation Act supplements the use of the term "deliberately concealed" in s 33(1)(b) by additional provision in s 33(3). This states:

> "Without derogating from the generality of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

This text reflects that of s 32(2) of the 1980 UK Act.

44 What amounted to deliberate concealment for the purposes of s 32 of the 1980 UK Act was considered in *Cave*[38]. The House of Lords held that what was included was a deliberate breach of duty either concealed or undisclosed and committed in circumstances such that it was unlikely to be discovered for some time, and also the taking of active steps to conceal a breach of duty after becoming aware of it; but what was not included was failure to disclose a negligent breach of duty that the actor was not aware of committing.

45 The respondent accepts that the Territory legislation is based on s 32 of the 1980 UK Act, and refers to *Cave*. It may be assumed, without now deciding, that what was said in *Cave* respecting the United Kingdom legislation applies also to s 33 of the Territory legislation.

46 However, on that assumption, it would be unsafe to proceed any further in a consideration of the issues the respondent seeks to raise in his notice of contention respecting deliberate concealment. The respondent asserts a systemic course of misinformation to employees of the appellant, including the respondent, by middle and senior management and over a long period of time.

47 The primary judge made no clear findings to that effect, and certainly no findings which would support deliberate concealment in the sense given that phrase in *Cave*.

48 Hence it is inappropriate for this Court to supplement its conclusion respecting s 11 of the Limitation Act with any determination that there was an erroneous decision or failure to decide an issue arising under s 33(1)(b) of the

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38 [2003] 1 AC 384.

Limitation Act. The conclusion respecting s 11 is sufficient to sustain the orders of the Court of Appeal affirming the orders of the primary judge.

Conclusion

49 The appeal should be dismissed with costs.

CALLINAN J.

Introduction

50 In an ideal world courts would be able to assess damages with precision. This is an exercise which may only confidently be done in retrospect, when the facts are known and all of the vicissitudes of life have occurred. But the courts have to function in a real world in which competing considerations are in play. One clearly is the desirability that there be as complete and accurate an assessment of compensation for a wrong done as is possible. Another is that it is in the interests of both the person wronged, and the wrongdoer, that the compensation be calculated and provided in a timely way: of the former, so that amelioration and mitigation may begin as soon as possible; of the latter, to enable it to make proper provision for its liability, and to conduct its affairs without the continuing distraction of the possibility of claims against it. As time passes, documents disappear, witnesses die or go away, memories fade, and the chances of a fair trial recede[39]. Further, it is in the interests of justice, and the peace and wellbeing of society as a whole, that arguments not be prolonged and differences be settled quickly, and when they are that they be settled for all time. I do not think that the last could be put better than it was by Campbell J in *Jeter v Hewitt*[40]:

> "[T]he maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth."

51 Lawmakers have long been conscious of the tensions. Statutes of Limitation are designed to resolve them. Equity has done so by its invention of the doctrines of application by analogy, laches and acquiescence. In modern times there has been, by the enactment of extension provisions, a recognition that the Statutes, if expressed in an absolute form, may operate unjustly in some circumstances. Even so, courts, and this Court itself very recently, have taken the view that although a statutory extendable time limit of thirty years, applicable to a severely disadvantaged person, had not expired, he should not be permitted to pursue his claim made 29 years after the event, because, so the majority held, a fair trial would not now be possible[41].

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39 cf *Batistatos v Roads and Traffic Authority (NSW)* (2006) 80 ALJR 1100 at 1111 [37], but see also at 1142-1143 [225]-[227]; 227 ALR 425 at 435, 477.

40 63 US 352 at 364 (1860); see also *D'orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 120 [380] per Callinan J.

41 See *Batistatos v Roads and Traffic Authority (NSW)* (2006) 80 ALJR 1100; 227 ALR 425.

52 Yet, in this case, a primary judge, an intermediate court of appeal, and the majority in this Court hold that this respondent may pursue his claim, in tort, for negligent misstatement now more than 41 years after he says that it was made, and concurrently find, not only that the statement in question was then uttered, but also that he would have acted quite differently but for it. Despite those judges' willingness to find those matters, all have effectively held, that, whether the respondent might voluntarily or involuntarily have retired or become disabled, or otherwise have not continued to be employed by the appellant, are "contingencies" as to which findings could not until now be made, and financial consequences attached and quantified, because, it is said, not all of the various contingencies had occurred.

The resolution of contingencies

53 In this case the claim by the respondent is a claim for, as it is sometimes described, "pure economic loss": of effectively the reduction in the benefit potentially available to him on retirement had he not been negligently misled. The other judges hold that "the interest" which *Wardley Australia Ltd v Western Australia*[42] required the Court to identify as a first step in the process of establishing damage should be characterized as an entitlement that the respondent stood to enjoy, citing this passage from the joint judgment of Mason CJ, Dawson, Gaudron and McHugh JJ[43]:

> "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[44]. With economic loss, as with other forms of damage, there has to be some actual damage[45]. Prospective loss is not enough."

It is, with respect, important to note that their Honours do not suggest there that for the wrong to be actionably complete, all, most, or even a great deal of the damage must actually have occurred. The language used is entirely consistent

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42 (1992) 175 CLR 514.

43 (1992) 175 CLR 514 at 527.

44 See Cane, *Tort Law and Economic Interests*, (1991) at 16-17.

45 *Forster v Outred & Co* [1982] 1 WLR 86 at 94; [1982] 2 All ER 753 at 760.

with the requirement that, in tort, damage is the gist of the action, and that non-minimal or not insignificant damage will suffice[46].

54 It is perhaps arguable that as early as the date of the misstatement in 1965, or a reasonable time thereafter, a matter which it is unnecessary to decide because of the appellant's reliance upon events in 1976 as producing the last of the necessary elements of the tort, non-minimal damage, time began to run. There was certainly at least an opportunity lost in 1965. The law does not necessarily require a plaintiff who has suffered damage to act immediately to rectify it[47]. An answer to an assertion that there has been loss might however be that the respondent kept, and was free to invest the money otherwise payable to buy units of superannuation, and that it should not be assumed that his use of it would be less advantageous to him than it would have been if expended on the units. Whether that may have been the position in 1965 or, for that matter 1976, as to 1977 there is no doubt that it was a year of real loss to the respondent. I refer to 1977, because regulations made in that year, deemed to have come into force on 1 July 1976, certainly had the effect of making it clear, or confirming that, had the respondent been a contributor from 1965, he would have been eligible for the greatly improved pension benefits available under the 1976 Act[48].

55 But before demonstrating how a real "interest", however that be defined, of the respondent was then reduced and became quantifiable, I would point out that it has never been the law of tort, or indeed of the sub-category of it, of tortious conduct causing "pure economic loss", that damage occurs only when the loss is ascertained or ascertainable. The passage as follows from *Wardley*[49] (a case to which I will return) quoted by the majority in this case cannot be taken literally, or, as members of the Court in *Wardley* elsewhere made plain, as a statement of general application[50]:

> "To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing

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46 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 771-772 per Lord Reid, 773-774 per Lord Evershed, 776 per Lord Morris of Borth-y-Gest, 778-779 per Lord Pearce.

47 See *Gould v Vaggelas* (1985) 157 CLR 215.

48 See footnotes 24 and 25 of the joint judgment.

49 (1992) 175 CLR 514 at 527.

50 (1992) 175 CLR 514 at 527.

damages by reference to established events. In such a situation, there would be an ever-present risk of undercompensation or overcompensation, the risk of the former being the greater."

56 Daily, actions are tried and damages assessed, before all of the contingencies have passed and the loss becomes perfectly ascertainable. Courts regularly estimate damages on the basis of likelihood or probability. In the result, inevitably over-compensation or under-compensation may occur, but experience recalls that there is no reason to suppose that the risk of one is greater than the other.

57 The sort of simple case in tort which comes repeatedly before the courts provides a ready and clear example. A plaintiff is negligently, personally and permanently injured. He may partially recover: his pain may or may not abate; he may never work again, or he may work in a less remunerative capacity; he may lose an opportunity of transfer or promotion, or of working to a greater age; he may, or may not lose the capacity to improve his qualifications by study; employment prospects in his calling might, in the ordinary course, have diminished, and he might have lost his position anyway. These are all contingencies bearing directly on the damages recoverable. They are contingencies which might take all of an ordinary adult lifetime to play out. But the courts do not await a lifetime. They assess damages, once and for all, on the basis of the probabilities, as to which cogent evidence is called. Indeed, the recent decision of this Court of *Golden Eagle International Trading Pty Ltd v Zhang*[51] is a case in point. There the Court was concerned with the proper choice of life expectancy tables, historical or current. The Court, not surprisingly, preferred the latter, never questioning for a moment that they provided useful evidence directly bearing on the plaintiff's damages, having regard to the contingency of the date of his death. There is no separate or different rule for economic loss. In *Golden Eagle*, the plaintiff's likely future earnings, but for his injuries, were entirely future unascertained "economic loss" arising out of his injury.

58 In *Perre v Apand Pty Ltd*[52] in which there were claims for statutory deceptive conduct, breach of contract, and in tort for "pure economic loss", the Court was asked to entertain a claim for past and prospective losses for a period of some years. In this Court, no assessment (or review of an assessment) was in fact required, as it was at first instance of the primary judge von Doussa J[53]. His

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51 [2007] HCA 15.

52 (1999) 198 CLR 180.

53 see *Sparnon v Apand Pty Ltd* unreported, Federal Court of Australia, 20 December 1996.

Honour embarked upon the exercise of assessment, a purely conventional one, in the familiar way, and had no difficulty in weighing up the many contingencies or chances in play there, including the seasons and the markets, making judgments about them, and assessing damages accordingly in respect of the claim in negligence.

59 I do not accept that it is the law that it is only when a relevant, or as it is put here, *the* relevant statutory contingency, in this case, of retirement, falls in that a plaintiff (here, the respondent) becomes entitled to an ascertainable interest.

The respondent's position

60 The respondent began to work for the appellant in May 1962 with the status of a "temporary employee". In July 1965 the negligent misstatement that he was not entitled to participate in the superannuation scheme provided by his employer was made. On the findings, he would otherwise have applied, probably successfully, to participate. At that point he lost therefore the opportunity of doing so. What would the respondent have got had he joined then? The answer is, a right to receive, in the future, a pension calculated according to a statutory formula based wholly or in part upon his own contributions.

61 1965 needs however no further consideration as a starting point. This is so because the appellant puts its case this way. It was in 1976 – I would prefer 1977 for the reasons stated – that radical beneficial changes to retirement entitlements occurred. The years of contributory service by contributing members to the superseded scheme were then credited to participants under the new scheme. Thereafter, retirement benefits were calculable solely by reference to years of contributory service and final salary. On retirement, a beneficiary might take his actual contributions plus interest, as a lump sum, or as an addition to a wholly unfunded pension for life. By virtue of his membership, had it existed before 1 July 1976, of the superseded fund, the respondent could, pursuant, perhaps to the 1976, but certainly the 1977 law, have become a member of the new scheme, and have enjoyed the improved benefits for which it provided.

62 I do not doubt that actuaries and accountants calculate the value of such benefits and rights from time to time, and that decisions of great financial moment are made on the basis of them. Here the appellant demonstrated beyond contradiction how, between 1976 or 1977, and 1982, the respondent's right and entitlement could have been calculated, and, in consequence, the monetary value of the diminution of it:

> "[H]ad the Respondent joined the 1922 Act Fund in 1966, he would have carried over to the [new scheme] 11 years of contributory service, and as at retirement in 1994, would have had 29 years of contributory service,

> and an entitlement to a pension calculated as 44.1% of his final salary. Had he joined the [new scheme] on 1 July 1976, he would have had 18 years of contributory service, and his pension would have been 32.4% of final salary. By joining the [new scheme] in 1987 (and retiring on 31 December 1994), he had 7 years of contributory service, and, had he stayed in the [new scheme] his pension entitlement would have been 12.6% of his final salary." (footnote omitted)

In 1983, that is, on the expiration of a limitation period beginning in 1977, it would have been possible to measure in money, the difference, in dollars of the day, between the lump sum value of the respondent's entitlement or interest on notional participation, and the lesser value by reason of his actual non-participation consequent upon the misstatement. The difference in 1983, might not have had regard to the possibility of increased salary (with or without promotion) and consequentially increased pension in nominal dollars, but nor should it. He would, on such an assessment, judgment and payment, be receiving his future entitlement in an accelerated way, in the dollars of the day, and would be free to invest it in the future.

63 In assessing the respondent's damages in 1983 the court would have been able to proceed in an orthodox way. Evidence would have been led of the respondent's life expectancy, his health, his current earnings and entitlements, his prospects and his intentions. The court would then have applied the legislation to its findings to ascertain the value, at time of trial, of lost pension or part thereof payable as an income stream on the respondent's likely date of retirement for his probable remaining lifetime. It is not without irony that the judges have had no difficulty in making a finding about his intentions and related matters in 1965 and thereafter, but hold that the other contingencies deny evaluation and assessment before now. The respondent's own likely evidence in a notional trial, in, say, 1982, that he was in good health and intended to work until at least 55, can be seen now to have been borne out by events[54]. In other words, such evidence then would have been available, entirely credible, and likely to have been accepted. Why, on the issue of "assessment-defying contingencies", should regard not be had to this, when the whole foundation for the respondent's case is his evidence about his likely contemporaneous state of mind about joining a scheme in 1965?

64 Examples of comparable assessments that necessarily take account of contingencies can be multiplied. Even though the measure of damages in deceit is the amount required to put the plaintiff as far as possible in the position that he

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54 cf *Parker v The Commonwealth* (1965) 112 CLR 295 at 310-311 per Windeyer J, where his Honour points out that the vicissitudes of life are not likely to be all one way. Some may be happy ones, some not.

would have been in if he had not acted on the misrepresentation, there will still be cases in which, in order to assess that amount, notional future business profits or losses will need to be calculated[55]. That exercise will inevitably involve a consideration of the contingencies attendant upon any human activity or enterprise, and a determination as to the probability of the occurrence of each of them, just as it will in any case in which the present value of a future stream of net income has to be assessed. It is not uncommon for courts to be called upon to assess the value of land, not only in cases of contract, but also of tort. That will often require close attention to such contingencies as the obtaining or otherwise of a valuable planning approval[56] or permission to subdivide. Every one of these is a familiar curial task as to which it cannot be suggested that the courts do not have the capacity to perform it, or that the commencement and the resolution of litigation must be delayed until each of the contingencies occur or can be eliminated as a possibility.

65 All of this is entirely conventional. It shows that, by reference to established law, and well understood methodology of assessment of damages the respondent did in fact have a measurable valuable interest which he lost by 1977. There was, in short therefore, an assessable, irretrievable loss sustained by the respondent by 1977. The so-called "statutory contingencies", of incapacity or early death, or retirement, each giving rise to a different, but nonetheless better financial consequence for the respondent if he had not been misled in 1965[57], are no different in kind from the contingencies with which the courts necessarily deal all the time. Indeed, practically nothing is certain or can be guaranteed in life or human affairs. This is why courts must do the best that they can, and assess damages, well understanding that exactitude will usually be impossible. That it is not possible provides no excuse for failing to do it[58].

66 The relevant "statutory criteria" here are no different from other criteria in other cases for financial benefit or loss, for example, capacity to work, or perform a contract, changes in the economic climate, the obtaining of a permit or approval, the state of the market place, or indeed practically any event at all that might influence a monetary outcome. It was always open to the respondent from at least 1977 to prove the likelihood or otherwise of each of the relevant statutory contingencies[59].

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55 *Gould v Vaggelas* (1985) 157 CLR 215 at 220-221 per Gibbs CJ.

56 cf *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209; 167 ALR 575.

57 See the joint judgment at [33].

58 *Chaplin v Hick*s [1911] 2 KB 786 at 792-793, 795-797, 798-799.

59 See the joint judgment at [33].

The significance of *Wardley*

67 I go back to *Wardley*[60]. That case should not be taken as stating a rule of general application with respect to the completion of a tort, and the running of time therefrom, for these reasons.

68 *Wardley* was concerned with a statutory cause of action only, a claim for deceptive conduct made under s 52 of the *Trade Practices Act* 1974 (Cth) with respect to which the courts have, under ss 82 and 87 of that Act, a much broader discretion as to remedies than they have in granting relief for causes of action at common law.

69 The judgments in *Wardley* are replete with statements emphasizing the statutory, and therefore special nature of the causes of action and relief available. One of these is as follows[61]:

> "In determining when a plaintiff first suffers economic loss or damage in an action under s 82(1) based on misleading conduct constituting contravention of s 52, it is necessary to have regard to the applicable measure of damages. In this respect, it would not be right to conclude that the measure of damages recoverable under the sub-section necessarily coincides with the measure of damages applicable in an action for deceit or in an action for negligent misrepresentation. The measure of damages recoverable under s 82(1) can only be fully ascertained after a thorough analysis of those provisions in Pts IV and V of the Act for contravention of which the statutory cause of action may be maintained. But the common law measure of damages will in many cases be an appropriate guide, though it will always be necessary to look to the provisions of the Act with a view to ascertaining the existence of any relevant legislative intention."

Deane J in particular, was, with respect, careful to make it clear that the Court was not laying down any general principle of common law[62]:

> "It is not possible to derive from the authorities[63] or from settled principle a simple negative or affirmative answer to the abstract question

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60 (1992) 175 CLR 514.

61 (1992) 175 CLR 514 at 526 per Mason CJ, Dawson, Gaudron and McHugh JJ. See also at 534 per Brennan J, 542, 545 per Deane J, 551-552 per Toohey J.

62 (1992) 175 CLR 514 at 540-541.

> whether, for the purposes of a limitation provision, the mere incurring of a contingent liability to make a monetary payment in the future suffices to give rise to a cause of action of which loss or damage is a necessary ingredient. Nor, in my view, is it practicable or desirable for the courts to attempt to provide in advance an unqualified affirmative or negative answer to that abstract question. For one thing, the answer may vary according to the facts of the particular case, including the nature and implications of the contingent liability and whether the circumstances were such that, even without the benefit of hindsight, the distinction between contingent and certain loss or damage was illusory rather than real."

What also is significant about *Wardley* is that the statutory deceptive conduct there induced the representee to enter into an *indemnity*. As the respondent correctly submitted in that case[64], at law an action on an indemnity cannot be commenced until the indemnity has been called upon and paid[65]. It is easy to see why there might be a special rule for cases concerned with indemnities. They, as with guarantees, are expressly given or provided on a contingency, of the failure

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63 There are no authorities binding on this Court directly in point and there is conflict in judgments in the decided cases: see, for example, for at least prima facie support for the view that loss or damage is sustained immediately upon the assumption or coming into existence of a contingent liability: *Forster v Outred & Co* [1982] 1 WLR 86 at 98, 99-100; [1982] 2 All ER 753 at 764, 765; *Baker v Ollard & Bentley (a firm)* (1982) 126 Sol Jo 593; *Gillespie v Elliott* [1987] 2 Qd R 509; *Deputy Commissioner of Taxation v Zimmerlie* [1988] 2 Qd R 500; *D W Moore and Co Ltd v Ferrier* [1988] 1 WLR 267 at 278, 279-280; [1988] 1 All ER 400 at 409-410, 410-411; *Jobbins v Capel Court Corporation Ltd* (1989) 25 FCR 226 at 231; *Bell v Peter Browne & Co* [1990] 2 QB 495 at 502-503, 510; and, for at least analogous support for the rejection of such a view: *City of Kamloops v Nielsen* [1984] 2 SCR 2 at 39-40; *Hawkins v Clayton* (1988) 164 CLR 539 at 601; *SWF Hoists and Industrial Equipment Pty Ltd v State Government Insurance Commission* (1990) ATPR ¶41-045 at 51,612-51,613; *Zoneff v Elcom Credit Union Ltd* (1990) ATPR ¶41-058 at 51,747-51,748; *Broadcasting Corporation of New Zealand v Progeni International Ltd* [1990] 1 NZLR 109 at 113; *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1 at 17-18, 24-26.

64 (1992) 175 CLR 514 at 518.

65 *Collinge v Heywood* (1839) 9 Ad & E 633 [112 ER 1352]; *Commercial Bank of Australia Ltd v Colonial Finance, Mortgage, Investment and Guarantee Corporation Ltd* (1906) 4 CLR 57 at 66, 69; *Walker v Bowry* (1924) 35 CLR 48; *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213; *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957; *Van Win Pty Ltd v Eleventh Mirontron Pty Ltd* [1986] VR 484 at 488.

and inability of the principal debtor to meet the primary liability. It is in the nature of the transactions in respect of which indemnities or guarantees are customarily given, for example long term debts and mortgages, that they may not be called upon for years or at all[66]. They can be compared to policies of insurance. They are expressly concerned with risk, and are in a sense a form of insurance against its occurrence. Insurance contracts of indemnity in terms of course, are designed to protect the insured against the materialization of specified risks, that is, of contingencies[67]. The judgments in *Wardley* turn as much upon the proper construction of the indemnity as they do upon the special nature of the statutory claim under consideration there. They have little or nothing binding to say about identification of the time of the occurrence of non-minimal damage and the quantification of damages at common law.

70 I can conclude my references to *Wardley* with a passage from the judgment of Deane J which restates the common understanding that a loss of a chance will, in an appropriate case, sound in damages[68]:

> "Where loss or damage has actually been suffered, the assessment of compensation will necessarily take account of a consequent risk of future economic loss flowing from that loss or injury[69]. Nor is it to deny that the loss of a mere chance of some future economic benefit may itself constitute loss or damage for the purpose of completing a common law cause of action[70]. The loss of a chance of an economic benefit is not merely a risk of some future loss. The loss of the chance is itself a loss which has actually been sustained and which is, in an appropriate case, capable of sounding in damages. I have added the qualifications 'isolated' and 'prima facie' in what has been written above for the reason that I would not exclude the possibility that the circumstances of a particular case may be such that the incurring of a truly contingent liability to make a payment of money may itself represent immediate loss or damage. For

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66 cf *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 543 per Deane J.

67 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 532 per Mason CJ, Dawson, Gaudron and McHugh JJ.

68 (1992) 175 CLR 514 at 544-545 per Deane J.

69 See, for example, *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 640, 642-643.

70 See, for example, *Chaplin v Hicks* [1911] 2 KB 786 at 792-793, 795-797, 798-799; *Hall v Meyrick* [1957] 2 QB 455; *Kitchen v Royal Air Force Association* [1958] 1 WLR 563; [1958] 2 All ER 241; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 90-94, 103-104, 118-126.

example, I would leave until another day consideration of the case where the person incurring the contingent liability incurred it in the ordinary course of carrying on a business involving the undertaking of contingent liabilities."

71 Even if, as is not the case here, a court could not have calculated the damages with reasonable accuracy from 1977 onwards, by reference to the present value of a likely pension on notional retirement, it would at least have been obvious then that a substantial opportunity had been lost, and, therefore, as Deane J pointed out, damage suffered, to which a sum of money could be attributed.

72 The reasoning generally in *Wardley* does not assist in the resolution of this case.

Other matters

73 I agree, having regard to the cases advanced by the parties, that it is unnecessary to consider any question of an acquisition under s 51(xxxi) of the Constitution, of the kind which fell for consideration by this Court in *Smith v ANL Ltd*[71].

Fraud and concealment

74 There does remain however, the respondent's contention which relied on s 33 of the *Limitation Act* 1985 (ACT) which provides as follows:

"**Fraud and concealment**

(1) Subject to this section, if—

(a) there is a cause of action based on fraud or deceit; or

(b) a fact relevant to a cause of action or the identity of a person against whom a cause of action lies is deliberately concealed;

the time that elapses after a limitation period fixed by or under this Act for the cause of action begins to run and before the date when a person having (either solely or with other persons) the cause of action first discovers, or may with reasonable diligence discover, the fraud, deceit or concealment, as the case may be, does not count in the reckoning of the limitation period for an action on the cause of action by him or her or by a person

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71 (2000) 204 CLR 493.

claiming through him or her against a person answerable for the fraud, deceit or concealment.

(2) Subsection (1) has effect whether the limitation period for the cause of action would, apart from this section, end before or after the date mentioned in that subsection.

(3) Without limiting subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(4) For subsection (1), a person is answerable for fraud, deceit or concealment if, but only if—

(a) he or she is a party to the fraud, deceit or concealment; or

(b) he or she is, in relation to the cause of action, a successor of a party to the fraud, deceit or concealment under a devolution from the party occurring after the date when the fraud, deceit or concealment first occurs.

(5) If property is, after the first occurrence of fraud, deceit or concealment, purchased for valuable consideration by a person who is not a party to the fraud, deceit or concealment and does not, at the time of the purchase, know or have reason to believe that the fraud, deceit or concealment has occurred, subsection (1) does not, in relation to that fraud, deceit or concealment, apply to a limitation period for a cause of action against the purchaser or a person claiming through him or her."

75 In regard to the operation of that provision I am indebted to the majority for their review of the authorities. In this case, no deliberate breach of duty occurred: nothing was concealed deliberately or otherwise; nothing unreasonable was done; there was neither dishonesty nor moral turpitude; and no advantage was taken of the respondent. The respondent obtained no finding from the primary judge of a systematic or other course of deliberate concealment, and nor should he have. Such a strong allegation, for its proof, requires a degree of persuasiveness of which the evidence here falls well short[72].

76 I would allow the appeal, and set aside the orders of the Court of Appeal and enter judgment for the appellant.

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72 *Rejfek v McElroy* (1965) 112 CLR 517 at 521-522 per Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ.

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