HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND KIEFEL JJ

TABCORP HOLDINGS LTD APPELLANT

AND

BOWEN INVESTMENTS PTY LTD RESPONDENT

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd
[2009] HCA 8
12 February 2009
M63/2008

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

N J Young QC with C C Macaulay SC and E W Woodward for the appellant (instructed by Mallesons Stephen Jaques)

D M J Bennett QC with M J Colbran QC, I W D Upjohn and T D Best for the respondent (instructed by Scanlan Carroll Business Lawyers)

CATCHWORDS

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd

Contract – Damages – Lease – Tenant's covenant – Covenant not to make any substantial alteration to premises without consent – Appropriate measure of damages for tenant's breach.

Contract – Damages – Lease – Principle in *Robinson v Harman* (1848) 1 Ex 850 [154 ER 363] – Whether costs of rectification available – Whether rectification must be reasonable – Relevance of commercial character of premises – Whether landlord entitled only to damages for diminution in value of reversion.

Words and phrases – "costs of repair", "rectification costs".

1 FRENCH CJ, GUMMOW, HEYDON, CRENNAN AND KIEFEL JJ. On Monday 14 July 1997, Mrs Maria Bergamin arrived at an office building at 5 Bowen Crescent, Melbourne. There she found that the foyer of the building had been badly damaged. A glass and stone partition, timber panelling and stone floor tiles had been removed. She was shocked and dismayed to see what remained of the floor stone work being jack hammered. A large bin was filled with the debris of the foyer. This destruction had been carried out by a tenant, Tabcorp Holdings Ltd ("the Tenant"), the appellant in this appeal.

2 Why was Mrs Bergamin shocked and dismayed? She was a director of the respondent, Bowen Investments Pty Ltd ("the Landlord"), a company which owned the building. She had taken particular care over and interest in the construction of the foyer. It was of high quality. It was made of special materials – San Francisco Green granite, Canberra York Grey granite, and sequence-matched crown-cut American cherry. The construction of the foyer had been completed less than six months earlier. The Tenant had taken possession under a lease granted by the Landlord less than six months earlier. The lease contained a covenant, cl 2.13, forbidding the Tenant to alter the premises without the prior written approval of the Landlord. Mrs Bergamin had on Thursday 10 July 1997 arranged for the Tenant to be told that the Landlord did not consent to any alteration to the foyer. Mrs Bergamin had informed the Tenant in writing on Friday 11 July 1997 that the Landlord could not consent until the Tenant's proposed alterations were examined at a site meeting at 11am on Monday 14 July 1997. It was when Mrs Bergamin arrived at 10.45am on 14 July 1997 in order to attend that site meeting that she observed the destruction which had taken place and which was continuing to take place. The trial judge specifically found that the Tenant was well aware that written consent from the Landlord to do what the Tenant had done was needed, and that that consent did not exist.

3 Mrs Bergamin protested about what had happened, but the Tenant continued to alter the foyer and substitute a new foyer until the process was complete on 31 August 1997.

4 The trial judge's description of the Tenant's conduct as involving "contumelious disregard" for the Landlord's rights was not hyperbolic. Nor has it been challenged.

5 The Landlord pursued claims against the Tenant in the Federal Court of Australia based on many causes of action. Most of them were rejected by the trial judge (Tracey J) for reasons with which the Landlord does not now cavil. The only claim which the trial judge upheld was a claim for common law

damages in relation to two breaches by the Tenant of cl 2.13: the destruction of the old foyer up to 14 July 1997, and the construction of a new foyer up to 31 August 1997. He gave judgment for the Landlord in the sum of $34,820: most of that figure was made up of the difference between the value of the property with the old foyer and the value of the property with the new foyer constructed by the Tenant[1]. The Full Court of the Federal Court of Australia increased the judgment sum to $1.38m. That sum comprised $580,000 as the cost of restoring the foyer to its original condition and $800,000 for loss of rent while that restoration was taking place[2]. In this appeal the Tenant seeks restoration of the trial judge's figure. The appeal should be dismissed for the following reasons.

The lease

6 The lease was executed on 23 December 1996. It was for a term of 10 years commencing on 1 February 1997. An option to renew for five years until 2012 was exercised: the new lease began on 1 February 2006 and will expire on 31 January 2012. There is a further option to renew for five years until 2017.

7 By cl 2.13, the Tenant covenanted:

> "Not without the written approval of the Landlord first obtained (which consent shall not be unreasonably withheld or delayed) to make or permit to be made any substantial alteration or addition to the Demised Premises".

The Tenant also covenanted, by cl 2.10, to keep the premises in repair; by cl 2.11, to yield up the premises on the determination of the lease in good repair; and, by cl 2.12.4, to make good any breakage or damage.

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1 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2007] ANZ Conv R 297.

2 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494 at 501 [21].

The trial judge

8 The trial judge held that it would be appropriate to award damages for breach of cl 2.13 based on reinstatement costs only "in a relatively narrow range of cases where a tenant has so damaged or modified premises that they are unlettable at the conclusion [of] the lease"[3]. In this regard he referred to *Joyner v Weeks*[4], a case not cited by the parties. He went on to say that normally, however, "reinstatement costs will not be awarded unless there exists some special interest in reinstatement arising from a radical change to the usage to which the property can be put following renovations by the tenant"[5]. He then accepted expert evidence to the effect that whether the lease was to end in 2012 or 2017, the Tenant's changes to the foyer would occasion very little diminution in the value of the building. Accordingly he awarded only $34,820 in damages[6].

The Full Court

9 According to Rares J, the arguments of the Landlord in the Full Court "were radically different from those which the Court identified and upon which the [Landlord] ultimately succeeded."[7] The majority of the Full Court (Finkelstein and Gordon JJ) held[8]:

> "There can be no meaningful distinction between a full repair covenant and clause 2.13, at least as regards the extent to which the clause prohibits

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3 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2007] ANZ Conv R 297 at 322 [92].

4 [1891] 2 QB 31.

5 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2007] ANZ Conv R 297 at 322 [92].

6 For reasons which the parties could not explain, he included $1,000 for nominal damages for breach of cl 2.13, but the Tenant told this Court that it took no issue about that component.

7 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107 at [11] (a judgment on costs).

8 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494 at 500 [13].

> alterations or additions without approval. This is because relevantly the obligations are the same. Accordingly damages for breach of clause 2.13 are to be assessed on the same basis as for breach of a repair covenant."

They therefore saw as applicable authorities on repair covenants, of which they described cl 2.10 as an example. And they considered that the authorities on repair covenants held that the general rule for assessing damages for breach of a covenant by a lessee to deliver up the demised premises in repair is the cost of putting the premises into the state of repair required by the covenant. They described this rule as the rule in *Joyner v Weeks*. In examining whether the particular circumstances of the case should cause that "prima facie method" of calculating loss to be displaced, they said that but for a special condition in Heads of Agreement made on 15 May 2006, it would have been appropriate to take into account the fact of the renewal of the lease in 2007, the possibility that it might not end until 2017 and the lack of damage to the reversion, and thus uphold the trial judge's conclusion. But they said[9]:

> "[I]n this case the new lease and its consequences on possession must be left out of account because that is what the special condition requires. This means that damages must be assessed in an artificial environment – a notional world in which the lease expired by effluxion of time on 31 January 2007."

Hence they held that the Tenant had failed to displace the "prima facie method". Thus the majority awarded damages of $1.38m, based on the cost of reinstatement approach.

10 Rares J took a different approach. He said that cll 2.10-2.12 "ensured that if structural alterations were made in breach of cl 2.13, the tenant had to make good its unauthorised changes when the term came to an end."[10] For that reason, and applying *Joyner v Weeks*, he held that the correct basis for damages was the cost of reinstatement, not diminution in value of the land, but he would have allowed the parties to address further on relief.

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9 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494 at 502 [24].

10 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494 at 515 [68].

The Tenant's complaints

11 The Tenant made numerous complaints about the reasoning of the Full Court. It is convenient to put them on one side for the moment, because there is one short ground on which the Full Court's orders are plainly to be supported. It was not a ground squarely relied upon below, but it was explicitly raised by members of the bench in this Court and evidence could not have been given at the trial which by any possibility could have prevented the point from succeeding.

The role of cl 2.13

12 At trial, the Landlord's only claim for damages for breach of contract was based on an alleged breach of cl 2.13. Accordingly, damages are to be assessed on that basis. Clause 2.13 is an express negative covenant. It serves a function of considerable practical utility in relation to the Landlord's capacity to protect its legitimate interest in preserving the physical character of the premises leased. That function is: provided the Landlord learned of a threat to make a substantial alteration to the premises without its written consent, a speedy application could be made for an interlocutory negative injunction, an appeal could be made to the modern understanding of the principles classically stated by Lord Cairns LC in *Doherty v Allman*[11], and the status quo could readily be preserved. The

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11 (1878) 3 App Cas 709 at 720, where, speaking of negative covenants, he said:

> "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

Perhaps, as Dixon J suggested, Lord Cairns spoke too absolutely, and the position is rather that if "a clear legal duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of that act": *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 299; [1931] HCA 15. Even so, it is certainly true that in such a case in normal circumstances, in both interlocutory and final hearings, the position of the plaintiff is much stronger than that of the defendant.

clandestine conduct of the Tenant made it impossible for the Landlord to apply for an interlocutory negative injunction, but that does not detract from that aspect of cl 2.13 in assessing damages for its breach.

13 Underlying the Tenant's submission that the appropriate measure of damages was the diminution in value of the reversion was an assumption that anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid. It is an assumption which at least one distinguished mind has shared[12]. It has been dignified as "the doctrine of efficient breach". It led, in the Landlord's submission, to an attempt "arrogantly [to] impose a form of 'economic rationalism'" on the unwilling Landlord. The assumption underlying the Tenant's submission takes no account of the existence of equitable remedies, like decrees of specific performance and injunction, which ensure or encourage the performance of contracts rather than the payment of damages for breach. It is an assumption which underrates the extent to which those remedies are available[13]. However, even if the assumption were correct it would not assist the Tenant. The Tenant's submission misunderstands the common law in relation to damages for breach of contract. The "ruling principle"[14], confirmed in this Court on numerous occasions[15], with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman*[16]:

> "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

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12 *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530 at 574-575 [128]; [2004] HCA 56.

13 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 503-504; [1967] HCA 3.

14 *Wertheim v Chicoutimi Pulp Company* [1911] AC 301 at 307.

15 See for example *Wenham v Ella* (1972) 127 CLR 454 at 460 and 471; [1972] HCA 43.

16 (1848) 1 Exch 850 at 855 [154 ER 363 at 365].

Oliver J was correct to say in *Radford v De Froberville*[17] that the words "the same situation, with respect to damages, as if the contract had been performed" do not mean "as good a *financial* position as if the contract had been performed" (emphasis added). In some circumstances putting the innocent party into "the same situation … as if the contract had been performed" will coincide with placing the party into the same financial situation. Thus, in the case of the supply of defective goods, the prima facie measure of damages is the difference in value between the contract goods and the goods supplied. But as Staughton LJ explained in *Ruxley Electronics Ltd v Forsyth*[18] such a measure of damages seeks only to reflect the financial consequences of a notional transaction whereby the buyer sells the defective goods on the market and purchases the contract goods. The buyer is thus placed in the "same situation … as if the contract had been performed", with the loss being the difference in market value. However, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases, diminution in value damages will not restore the innocent party to the "same situation … as if the contract had been performed".

14 In circumstances like the present, where the relevant covenant is in the form of cl 2.13, it is not the case that, in Oliver J's words[19]:

> "the disappointment of the plaintiff's hopes and expectations from the contract becomes a relevant consideration only so far as it is measurable either by some deterioration of the plaintiff's financial situation or by some failure to obtain an amelioration of his financial situation."

To reason otherwise is to undermine a fundamental postulate inherent in cl 2.13.

15 Similar thinking underlies a statement made by Dixon CJ, Webb and Taylor JJ in *Bellgrove v Eldridge*. A builder who had built a house which, in breach of contract, contained defective concrete and mortar, contended that the measure of damages was limited to diminution in value and did not extend to costs of rectification. Their Honours said[20]:

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17 [1977] 1 WLR 1262 at 1273; [1978] 1 All ER 33 at 44.

18 [1994] 1 WLR 650 at 655; [1994] 3 All ER 801 at 806.

19 [1977] 1 WLR 1262 at 1273; [1978] 1 All ER 33 at 44.

20 (1954) 90 CLR 613 at 617 (emphasis in original); [1954] HCA 36.

> "In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract."

So here, the Landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages is the loss sustained by the failure of the Tenant to perform that obligation; and that loss is the cost of restoring the premises to the condition in which they would have been if the obligation had not been breached[21].

16 The Tenant relied heavily on findings by the trial judge that the Landlord had erected and leased the building for commercial purposes and that it was an investment property. The Tenant contended that the Landlord had never run a case that it valued the foyer for its aesthetic qualities as distinct from its having "pulling power" as a "leasing tool", and it relied on the trial judge's implicit finding, based on the resolution of conflicting expert evidence, that the old foyer was no more effective as a leasing tool than the new foyer. The answer to these submissions was put thus by Oliver J in *Radford v De Froberville*[22]:

> "Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some

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21 The Tenant relied on *Espir v Basil Street Hotel Ltd* [1936] 3 All ER 91, in which the Court of Appeal awarded damages against a subtenant who breached a covenant not to alter the premises without the lessor's consent, which were calculated on the basis of diminution in value, not cost of reinstatement. That ex tempore decision, however, did not take into account the considerations mentioned above.

22 [1977] 1 WLR 1262 at 1270; [1978] 1 All ER 33 at 42.

> other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit."

In *Ruxley Electronics and Construction Ltd v Forsyth* the latter half of the passage was quoted with approval by Lord Jauncey of Tullichettle[23], and the passage was referred to with approval by Lord Mustill[24].

17 The Tenant stressed that in *Bellgrove v Eldridge* this Court pointed out that there was a qualification to the rule it stated in regard to damages recoverable by a building owner for the breach of a building contract. "The qualification … is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt."[25] The example which the Court gave of unreasonableness was the following[26]:

> "No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks."

That tends to indicate that the test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances. The example given by the Court aligns closely with what Oliver J said in *Radford v De Froberville*, that is, that the diminution in value measure of damages will only apply where the innocent party is "merely using a technical breach to secure an uncovenanted profit." It is also important to

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23 [1996] AC 344 at 358 (Lords Keith of Kinkel and Bridge of Harwick concurring).

24 [1996] AC 344 at 360 (Lords Keith of Kinkel and Bridge of Harwick concurring).

25 (1954) 90 CLR 613 at 618.

26 (1954) 90 CLR 613 at 618.

note that the "reasonableness" exception was not found to exist in *Bellgrove v Eldridge*. Nothing in the reasoning in that case suggested that where the reasoning is applied to the present circumstances, the course which the Landlord proposed is unnecessary or unreasonable.

18 As part of the same submission, the Tenant relied on *Ruxley Electronics and Construction Ltd v Forsyth*[27]. The House of Lords there held in a building case that where the expenditure necessary to rectify the defect in the building was out of all proportion to the benefit to be obtained the appropriate measure of damages was not the cost of reinstatement but the diminution in the value of the work occasioned by the breach, even if that would result in a nominal award. The House rejected a claim for £21,560 damages for reconstructing a swimming pool that was 1 foot 6 inches too shallow. The House saw the following matters as indicating that the cost of reconstruction was not recoverable[28]:

> "The trial judge made the following findings which are relevant to this appeal: (1) the pool as constructed was perfectly safe to dive into; (2) there was no evidence that the shortfall in depth had decreased the value of the pool; (3) the only practicable method of achieving a pool of the required depth would be to demolish the existing pool and reconstruct a new one at a cost of £21,560; (4) he was not satisfied that the respondent intended to build a new pool at such a cost; (5) in addition such cost would be wholly disproportionate to the disadvantage of having a pool of a depth of only 6 feet as opposed to 7 feet 6 inches and it would therefore be unreasonable to carry out the works; and (6) that the respondent was entitled to damages for loss of amenity in the sum of £2,500."

Their Lordships quoted and referred to various passages in *Bellgrove v Eldridge* and *Radford v De Froberville* without dissent. Although they reversed the Court of Appeal, in which the leading judgment, that of Staughton LJ[29], quoted various passages from *Radford v De Froberville*[30], they did not disagree with what those cases said as a matter of principle, and seemed to consider that their decision was

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27 [1996] AC 344.

28 [1996] AC 344 at 354-355 per Lord Jauncey of Tullichettle.

29 *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 1 WLR 650; [1994] 3 All ER 801.

30 Including the last sentence of the one set out above at [16].

consistent with the principles stated by Oliver J. The result at which their Lordships arrived is on one view inconsistent with those principles, but for present purposes it is sufficient to say that the facts of *Ruxley Electronics and Construction Ltd v Forsyth*, which their Lordships evidently saw as quite exceptional, are plainly distinguishable from those of the present appeal.

19 Further, the Landlord correctly submitted that the Tenant's submission misconstrued what this Court said in *Bellgrove v Eldridge*. The "qualification" referred to in the passage quoted above[31] that the "work undertaken be necessary to produce conformity" meant, in that case, apt to conform with the plans and specifications which had not been conformed with. Applied to this case, the expression "necessary to produce conformity" means "apt to bring about conformity between the foyer as it would become after the damages had been spent in rebuilding it and the foyer as it was at the start of the lease". And the Landlord also correctly submitted that the requirement of reasonableness did not mean that any excess over the amount recoverable on a diminution in value was unreasonable. The Tenant's submissions rested on a loose principle of "reasonableness" which would radically undercut the bargain which the innocent party had contracted for and make it very difficult to determine in any particular case on what basis damages would be assessed. That principle should not be accepted.

20 If the benefit of the covenant in cl 2.13 were to be secured to the Landlord, it is necessary that reinstatement damages be paid, and it is not unreasonable for the Landlord to insist on their payment.

21 For these reasons the orders of the Full Court are upheld. It is thus not necessary either to set out, or to consider the merits of, the Tenant's complaints[32], because those complaints do not touch upon the validity of these reasons. It is desirable, however, to note briefly three matters which arose in argument.

The Landlord's case under Lord Cairns' Act

22 Counsel for the Landlord contended that "the simplest and most direct way of getting to the correct result in this case" was to apply Lord Cairns' Act, ie

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31 See [17].

32 See [11] above.

s 38 of the *Supreme Court Act* 1986 (Vic)[33]. On a benevolent reading of the Amended Application, the Landlord claimed a mandatory injunction and in the alternative damages in lieu of it. A form of the proposed injunction was handed to the trial judge: he made criticisms of the claim for an injunction in oral argument, but did not deal with the matter in his judgment. The Landlord's Notice of Appeal to the Full Court did not complain about that, but after some brief argument in the Full Court a form of orders was produced seeking a mandatory injunction in the form handed to the trial judge, and in the alternative damages on a reinstatement basis. That claim for an injunction was briefly rejected by the majority in the Full Court as involving "all manner of difficulty". However, no Lord Cairns' Act claim for damages was discussed.

23 The Tenant submitted that this Court should not entertain a Lord Cairns' Act damages claim on the ground that it had been abandoned. While it may be true to say that the claim was put more clearly at some times than others, it was advanced on a number of occasions, and hence the submission is questionable: but it is desirable not to deal with it, or with the Landlord's invocation of Lord Cairns' Act, for the following reasons. First, the Landlord does not seek a more favourable result than that secured by the orders made by the Full Court: those orders are to be upheld for the reasons given above, and hence there is no point in investigating the position under Lord Cairns' Act as distinct from the position at common law. Secondly, the Tenant raised various questions of some significance about the availability of Lord Cairns' Act damages in the present circumstances as a matter of law: because they were not debated in this Court it is undesirable to say anything about them.

Betterment discount?

24 In theory, if the Landlord employs the damages (with interest earned) after the lease expires in 2012 or 2017 on rebuilding the foyer, it would be better off than it would have been if cl 2.13 had not been breached. If it had not been breached, the Landlord would have retaken possession of the foyer which had

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33 That section provides:

> "If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

The Tenant submitted that s 38 applied by virtue of the *Judiciary Act* 1903 (Cth), s 79.

been subjected to 15 or 20 years' wear and tear so that, as the trial judge found, the foyer would probably have to be refurbished.

25 Had the Tenant requested a discount in the damages awarded against it to take account of this "betterment" problem, its application, if backed by appropriate evidence, may have had merit. But although the matter was raised by the Landlord below, the Tenant made no such application at any of the three levels of hearing: its position was that no reinstatement damages were awardable, and it did not contend that if any were awardable they should be discounted to allow for betterment. Accordingly nothing more need be said on the subject.

Date of assessment of damages

26 Any reinstatement of the foyer by the Landlord would not take place until 2012 or 2017. Sometimes when damages are awarded in relation to loss arising from the need to spend money in future or from the suffering of a future incapacity, they are awarded on the basis of an estimate as to the amount required at a future date, and discounted down to present value, leaving the plaintiff to invest the damages and employ the increased sum at a future date. A second approach is to assess damages for breach of covenant as at the date of breach. In that event it would be normal to order that the damages carry interest from the date of breach. In this case a third approach was adopted. The damages figures selected by the Full Court were based on the Landlord's claim. The precise quantum of that claim was uncontroversial once reinstatement was accepted as the basis. The claim does not appear to have been based on 1997 costs, but on costs around the time of the trial, partly 2004 costs and partly 2006 costs. In other cases there may be controversies in relation to the date of assessment[34]. But in the circumstances of this case, the potential difficulties can be put aside because the Tenant took no point about them in relation to the claim for damages at common law for breach of cl 2.13.

Orders

27 The appeal must be dismissed with costs.

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34 For instances when damages are not assessed as at the date of breach, see *Johnson v Perez* (1988) 166 CLR 351 at 355-356, 367, 371 and 380; [1988] HCA 64 and *Radford v De Froberville* [1977] 1 WLR 1262 at 1285; [1978] 1 All ER 33 at 55-56.