

## LOSS OF OPPORTUNITY CLAIMS UNDER THE ACL

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### Introduction

1. Damages under the Australian Consumer Law (ACL) and its predecessor *Trade Practices Act* is an inherently flexible concept. Economic loss takes a variety of forms; the common feature being “prejudice or disadvantage” to the plaintiff<sup>1</sup>. It can include damages for lost opportunity.
2. How often do we see in a plaintiff’s statement of claim alleging breaches of the ACL and other duties that the plaintiff has suffered damages through a “loss of opportunity”? In my experience, it is commonly pleaded but rarely established by the evidence at trial.
3. In this paper, I will set out the well-established principles concerning a claimed loss of opportunity and then discuss some recent cases concerning an alleged loss of opportunity from a breach of the ACL<sup>2</sup> or other breach of duty.

### Principles concerning damages for loss of valuable opportunity

4. The principles concerning damages for loss of valuable opportunity are well established and are the same irrespective of whether the claim is based in tort, contract or a breach of the ACL (or the former *Trade Practices Act*).
5. In *Gates v City Mutual Life Assurance Society Ltd*<sup>3</sup>, the High Court said:

Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation. If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods on which he would have made a profit then he may recover the profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation.
6. In *Gates*, the loss of opportunity claim was not established because the plaintiff could not prove (and did not lead evidence) that he could and would have entered into policies of insurance containing a disability clause of the kind represented to him.
7. In the leading decision of *Sellars v Adelaide Petroleum*<sup>4</sup>, Mason CJ, Dawson, Toohey and Gaudron JJ said:

...we consider the acceptance of the principle enunciated in *Malec* requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s.52(1), should be

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<sup>1</sup> See, for example, *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338 at [540] where the Court of Appeal distilled relevant principles on damages under s.82 *Trade Practices Act*.

<sup>2</sup> I appeared in two of these decisions: *United Petroleum v Gold Fuels* [2016] VCC 292 and *Heaney v Just Cuts Franchising* [2017] VCC 293 (and on appeal in *Heaney Enterprises Pty Ltd v Just Cuts Franchising Pty Ltd* [2018] VSCA 25). There is further discussion of these cases below.

<sup>3</sup> (1986) 160 CLR 1

<sup>4</sup> (1994) 179 CLR 332

ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued. ...

On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence, the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities.<sup>5</sup> (emphasis added)

8. Brennan J, in a separate judgment, said:

*Gates v City Mutual Life Assurance Ltd* shows that, for the purposes of s. 82(1) of the Act, the loss of a mere opportunity to acquire a benefit is not in itself a loss, but the loss of the benefit will be such a loss if the plaintiff proves that he could and would have taken the opportunity and that the benefit would then have been yielded. That is tantamount to saying that the benefit is a loss in respect of which an amount may be recovered if the links in the chain of causation up to the loss of the benefit are proved. In this respect the law under s. 82(1) is no different from the law of torts<sup>6</sup>.

...

Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point where there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities. A constant standard of proof applies to the finding that a loss has been suffered and to the finding that that loss was caused by the defendant's conduct, whether those findings depend on evidence of historical facts or on evidence giving rise to competing hypotheses. In any event, the standard is proof on the balance of probabilities.

Although the issue of a loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation.<sup>7</sup> (emphasis added)

9. In *Sellars*, unlike *Gates*, there were parallel contractual negotiations between two companies. The first set of negotiations ceased as a result of misleading conduct enabling the other negotiations to conclude. When the latter deal could not be enforced, the first set of negotiations recommenced but for a considerably reduced contractual amount. Brennan J described the lost opportunity as follows:

In the present case, at the time when the plaintiffs discontinued the Pagini negotiations it was more likely than not that a contract would have been concluded had negotiations continued. And if the contract had been concluded, the plaintiffs

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<sup>5</sup> At 355

<sup>6</sup> At 362

<sup>7</sup> At 368

would have had a substantial prospect of acquiring the benefits that completion of the Pagini contract would have yielded. The opportunity to conclude the Pagini contract and thereby to acquire benefits under it was lost; it was a valuable opportunity and its loss falls within the ambit of s.82(1) of the Act. The opportunity was lost because the plaintiffs were induced by the defendants' false representations to discontinue the Pagini negotiations.<sup>8</sup>

10. More recently in *Badenach v Calvert*<sup>9</sup>, French CJ, Kiefel and Keane JJ said in summarising the principles in *Sellars*:

It may be accepted that an opportunity which is lost may be compensable in tort. But that is because the opportunity is itself of some value. An opportunity will be of value where there is a substantial, and not a merely speculative, prospect that a benefit will be acquired or a detriment avoided.

It remains necessary to prove, to the usual standard, that there was a substantial prospect of a beneficial outcome. This required evidence of what would have been done if the opportunity had been afforded. The respondent has not established that there is a substantial prospect that the client would have chosen to undertake the inter vivos transactions. Therefore, the respondent has not proven that there was any loss of a valuable opportunity. (footnotes omitted)(emphasis added)

11. Finally, the Victorian Court of Appeal in *Masters v North East Solution*<sup>10</sup> said:

In considering damages for loss of a commercial opportunity, the court asks first whether there was a commercial opportunity of some value (which is more than speculative or negligible); that is, was there a chance? Secondly, the court looks to whether that opportunity has been lost; that is, would the plaintiff have pursued the opportunity? The third step is to consider what amount should be awarded having regard to the prospects of success if the opportunity had been pursued. In taking this third step, the courts' task is to apply a discount which reflects the prospects of success. This is sometimes referred to as a Sellars discount. (footnotes omitted)(emphasis added)

### **Recent applications of *Sellars* and consideration of lost opportunity**

12. A number of recent decisions show how difficult it is to establish damages by way of a lost commercial opportunity.
13. In *La Trobe Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd*<sup>11</sup>, the financier was held to be entitled to recover the loss of revenue it would have earned had it used its funds elsewhere. Following a default by the original purchaser (that had purchased the property at \$2.4 million), La Trobe entered possession and resold the property for a lesser amount of \$2.2

<sup>8</sup> 368-369

<sup>9</sup> (2016) 257 CLR 440 (a case concerning alleged professional negligence) Although, it has been suggested that *Sellars* and *Badenach* are not easily reconciled: see *Mal Owen Consulting Pty Ltd v Ashcroft* [2018] NSWCA 135 per Macfarlan JA at [61]-[62], [65]

<sup>10</sup> [2017] VSCA 88 (a case concerning alleged breaches of contractual duties)

<sup>11</sup> (2011) 190 FCR 299

million. La Trobe claimed that but for the misleading and negligent valuation, it would have lent \$2.4 million to another borrower on similar terms and was therefore deprived of the chance to earn interest from this hypothetical transaction.

14. The applicant led evidence from a bank employee to the effect that had money not been lent to the original purchaser, the same amount would have been lent to another commercial borrower on similar terms. This was critical evidence<sup>12</sup>. The trial judge dismissed the damages claim partly on the basis that it found that La Trobe had suffered no loss of opportunity. However, on appeal, the Full Court of the Federal Court found that La Trobe had established a lost commercial opportunity of some value (relying on the direct evidence of the bank employee) but discounted the value of the opportunity against the risk that the alternative loan would not have been entered into<sup>13</sup>.
15. In *United Petroleum Franchise Pty Ltd v Gold Fuels Pty Ltd*<sup>14</sup>, a petroleum franchisee sought damages by way of counterclaim for a myriad of alleged contractual breaches and breaches of the ACL. All counterclaims were dismissed. It pleaded a lost opportunity to sell the business at \$225,000.00. Although it was strictly unnecessary to consider the damages issue, the trial judge after considering the evidence, concluded that there was no relevant loss of opportunity in any event. Her Honour said<sup>15</sup>:

Even if the business was worth something, there was also absolutely no evidence whatsoever that a purchaser was likely to be found who would pay \$225,000.00 or anything for that matter, nor the precise conditions on which United would consent to any such arrangement under clause 27 of the Franchise Agreement. Although Mr Nijhawan made vague reference to the existence of “purchasers” none were identified or called.

Finally, even if all of these hurdles were overcome, there was no evidence that Mr Nijhawan would sell the business for anything like \$225,000.00 (as claimed). Put a different way, there was no evidence that Mr Nijhawan could and would have taken the opportunity to sell the business at a price of \$225,000.00 or anything less than his full investment.

...

Overall, then, I am unable to be satisfied that Mr Nijhawan would have sold the business for anything less than what he paid (\$370,000.00 plus GST). There was no evidence that the business was worth anything like this (there was no evidence the business was worth anything) nor was there any evidence that a purchaser was available who would pay this.

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<sup>12</sup> There were detailed objections to this evidence but both the trial judge and the Full Court concluded that it was admissible.

<sup>13</sup> Using a specified mathematical formula, Finkelstein J reduced the value by 5%. Adopting the same formula, Jacobson and Besanko JJ reduced the value by 15%.

<sup>14</sup> [2016] VCC 292

<sup>15</sup> At [221] – [222], [225] – [226]

In such circumstances, even if (contrary to the above) the termination, was unlawful, I am not satisfied that Gold Fuels lost an opportunity (of any value) to sell the business.

16. In *Badenach v Calvert*, the High Court overturned a decision that a solicitor was negligent toward Calvert, the intended beneficiary, by not disclosing to the client steps to avoid an estate being exposed to a claim for testator's family maintenance (by the daughter which later occurred) and that this negligence caused damages by way of a lost opportunity.
17. In relation to the claimed lost opportunity, the Court concluded that there was no evidence as to what course the client would have undertaken had he been so advised and therefore there was no substantial prospect the client would acted differently in relation to his will in a manner benefitting Calvert<sup>16</sup>. In these circumstances, there was no factual causation of loss. On this issue, Gordon J said<sup>17</sup>:

Mr Calvert was required to adduce evidence of what would have been done by the testator if the appellants had observed that the testator's instructions made no provision for any family member and then made an inquiry of the testator about this family. He did not do that. There was no evidence, let alone persuasive evidence, that was sufficient to establish what the testator would have done if the appellants had not breached the duty that they owed. ...

It is for that reason that issues of the sufficiency or value of the "opportunity" purportedly lost do not arise for consideration – the first and necessary step of proving, on the balance of probabilities, a causal relationship between the tortious conduct and the purported "loss of opportunity", before the any assessment of the amount of the loss was absent ...

18. In *Hart Security Australia Pty Ltd v Boucousis*<sup>18</sup>, the plaintiff company (**HSA**) brought a claim for damages for lost commercial opportunity by reason of a director's alleged breaches of directors' duties. HAS alleged that the director sought to gain benefits for himself by pursuing a security services contract with a third party which HSA itself would have obtained had negotiations continued.
19. The New South Wales Court of Appeal upheld the trial judge's decision that there was no loss of a valuable opportunity because there was no substantial prospect that the third party would have entered into a security services agreement with HSA, even though they were continuing to negotiate. Part of its reasoning was that there was no real prospect that HSA would ever meet the third party's stated requirement of a \$1 million bank guarantee as part of any service contract.

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<sup>16</sup> For example, by specifically providing for the daughter in the will

<sup>17</sup> At 466-7

<sup>18</sup> (2016) 339 ALR 659

20. In *Heaney v Just Cuts Franchising Pty Ltd*<sup>19</sup>, the plaintiff franchisee (**Heaney**) brought a claim for damages for lost opportunity arising from various alleged breaches of the Australian Consumer Law by the franchisor (**JC**) principally from the non-provision of documents required under the Franchising Code of Conduct (**the Code**). Its damages claim comprised an alleged reduction in profits and loss of value of the franchise following JC's appointment of another franchise in Williams Landing, near Heaney's franchise in Point Cook. Heaney pleaded that it was denied "the right to negotiate an exclusive territory that would have protected the goodwill that was created at the Point Cook shop".
21. The trial judge found that there was a failure to comply with the Franchising Code of Conduct in that a proposed franchise agreement, a copy of the Code and the disclosure statement was not provided by Just Cuts. However, the trial judge concluded that Heaney had not established that it would have acquired a valuable opportunity (that is, a valuable opportunity to renegotiate the territorial limit of the franchise) and therefore its damages claim however framed<sup>20</sup> was dismissed.
22. In reaching this conclusion, the trial judge considered a number of matters including the absence of any attempt by Heaney to negotiate terms concerning territory, the absence of variation of the terms of the "usual form" of franchise agreement, the absence of any pursuit of other commercial opportunities by Heaney, the plaintiff's belief that her territory was confined to the Point Cook shopping centre, and the absence of evidence of any JC franchise territory beyond a shopping centre.
23. Finally, in a recent defamation proceeding, *Bauer Media Pty Ltd v Rebel Wilson*<sup>21</sup>, the Victorian Court of Appeal allowed an appeal in relation to a claimed lost commercial opportunity by the plaintiff to earn US15million from lead roles in three feature films she contended she lost as a result of the defamatory publications. After undertaking a real review of the evidence, the Court of Appeal concluded that the inferences drawn by the trial judge that the valuable opportunity claimed by the plaintiff had existed and had been lost were not reasonably open.

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<sup>19</sup> [2017] VCC 293 The proceeding went on appeal, the grounds of which included an allegation that the judgment was procured by fraud: *Heaney Enterprises Pty Ltd v Just Cuts Franchising Pty Ltd* [2018] VSCA 25 but following a remittal of the fraud allegation to the County Court, the proceedings were settled and the appeal discontinued.

<sup>20</sup> Heaney pleaded a number of causes of action under the ACL including non-compliance with the Franchising Code, misleading conduct by silence, unconscionable conduct and alleged contractual breaches. Each pleaded cause of action alleged damages by way of lost opportunity.

<sup>21</sup> [2017] VSCA 154

**Conclusion**

24. Plead ACL (and other similar) claims alleging a loss of valuable opportunity should be carefully considered. They are very difficult to establish.
25. It requires a plaintiff to specifically plead the alleged lost opportunity and then lead admissible, plausible and credible evidence of the opportunity and how it would have pursued it but for the impugned conduct (that there was a substantial prospect), as well as the value of that lost opportunity (addressing the prospects of success of the opportunity materialising).
26. Plaintiffs and their lawyers should carefully consider the plausibility of the loss of opportunity argument and the admissible lay and expert evidence they can adduce in support of it. They should also prepare for inevitable attacks to the evidence and legal argument.
27. Defendants and their lawyers should closely scrutinise the pleaded lost opportunity, hold the plaintiff to that pleading and attack its evidentiary foundations, wherever possible. This could include emphasising the lack of evidence about the claimed lost opportunity or adducing evidence showing how the lost opportunity would never, or at least be unlikely to, have materialised.

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