NOTE

I&L SECURITIES PTY LIMITED V HTW VALUERS (BRISBANE) PTY LIMITED: THE HIGH COURT CONFIRMS ITS VIEWS ON DAMAGES UNDER SECTIONS 82 AND 87 OF THE *TRADE PRACTICES ACT 1974*

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In *I&L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited*,[1] the High Court confirmed the decision of *Henville v Walker*[2] when it revisited issues of causation and contributory negligence in the context of awarding damages under sections 82 and 87 of the *Trade Practices Act 1974 (Cth)* (the TPA).

The issues before the High Court were whether section 87 of the TPA conferred a discretionary power to reduce the damages that the appellant would otherwise be entitled to recover under section 82 of the TPA, and whether damages under section 82 of the TPA should be reduced for the appellant's failure to take reasonable care to protect its interests.

Material Facts

In July 1995, the appellant advanced $950,000 to the borrower, Camworth Pty Limited. The loan was made on the basis of a valuation of real estate (security for the loan) provided by the respondent. The respondent valued the real estate at $1.567 million in March 2002, and advised the appellant it could rely on the valuation. The borrower defaulted on the loan soon after the advance was made. Although the appellant took reasonable steps to realise the security, the property was not sold until January 1997. Net proceeds of the sale were $592,367.

The appellant claimed as damages the difference between the amount of the loan and the net proceeds of the sale, expenses connected with the exercise of power of sale and interest.

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1 [2002] HCA 41 (2 October 2002).

2 (2000) 206 CLR 459.

The Supreme Court of Queensland

Williams J found there were two independent causes of the loss sustained by the appellant:

- the respondent breached section 52 of the TPA by providing an erroneous valuation of the real estate to the appellant; and
- despite the valuation provided by the respondent, the appellant failed to take reasonable care to protect its own interests as it did not properly investigate the credit-worthiness of the borrower.

His Honour held the loan would not have been made, regardless of the value of the real estate offered as security, had the appellant made proper enquiries about the borrower's capacity to service the loan.[3] The award of damages was reduced accordingly.

Williams J acknowledged it was not appropriate to approach the case as if it were based on common law notions of contributory negligence. But he believed the appellant's failure to appropriately enquire as to the borrower's ability to service the loan, was an 'independent cause of the loss'[4] suffered. His Honour said:

> In deciding how the consequences of how those two causes should be divided I am of the view that the approach that should be adopted is broadly similar to that which would apply in determining apportionment of negligence.[5]

His Honour went on to say:

> Experience shows that many, perhaps most, commercial losses have a number of causes which would satisfy the *March v Strarmare*[6] test. It seems abundantly clear that the legislature did not intend to deprive someone who suffered loss as a result of deceptive and misleading conduct of the right to recover at all if there was some other demonstrable cause of that loss. Equally, in my view, the legislature did not intend that the total loss should always be recoverable regardless of the number or significance of established causes other than the misleading or deceptive conduct in question.[7]

The appellant was awarded damages for $440,987.68 (two-thirds of the amount claimed).

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3 Above n 1, [7].
4 Ibid [97].
5 Ibid [96].
6 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506.
7 Above n 1, [97].

The Court of Appeal of Queensland

The Court of Appeal of Queensland upheld William J's decision, but on different grounds. It held that pursuant to section 87 of the TPA, it was permitted to make an order that the respondent pay part only of the loss caused by the respondent. In other words, section 87 enables a court to modify (or indeed completely remove) a right to compensation conferred by section 82.

Section 87 provides:

> (1) Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in … in contravention of a provision of Part IV, IVA or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention … if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

The Court of Appeal said the words 'in whole or in part for the loss or damage' enabled it to make an order requiring a defendant to compensate a plaintiff for only part of a loss that is causally connected with the contravention.[8]

The Court formed the view that the appellant's failure to make sufficient enquiries about the borrower's capacity to service the loan was 'quite independent'[9] of the respondent's contravention of section 52 of the TPA. Accordingly, the Court awarded damages to the appellant only for the loss causally connected with the respondent's breach.

The High Court

The appellant was successful on appeal to the High Court. Glesson CJ, Gaudron, Gummow, Hayne, McHugh and Callinan JJ decided in favour of the appellant, with Kirby J dissenting.

In reaching its decision, the High Court examined both sections 82 and 87 of the TPA.

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8 Ibid [18] per Glesson CJ, at [41] per Gaudron, Gummow and Hayne JJ; I&L *Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited* (2000) 179 ALR 89, 94 and 95.

9 (2000) 179 ALR 89, 95; above note 1, [41].

The High Court on section 82

On section 82, Gleeson CJ said:

> The relevant purpose of the statute was to proscribe misleading and deceptive conduct in circumstances which included those of the present case. In aid of that purpose, the statute provided for compensation, by an award of damages, to a victim of such conduct. The measure of damages stipulated was the loss or damage of which the conduct was *a* cause. It was not limited to loss or damage of which such conduct was the *sole* cause. In most business transactions resulting in financial loss there are multiple causes of the loss. The statutory purpose would be defeated if the remedy under s 82 were restricted to loss of which the contravening conduct was the sole cause. … In a financing transaction, a lender takes security to protect itself against the risk of default by the borrower. One aspect of that risk is that the lender might have failed adequately to assess the borrower's capacity to service the debt. I cannot see why, as a matter of principle, such failure by a lender should be treated, in the application of s 82, as a factor which diminishes the legal responsibility of a valuer by negativing in part the causal effect of the valuer's misleading conduct. The statutory rule of conduct found in s 52, when applied to the relationship between a valuer and a prospective lender, gives rise to a legal responsibility in a case such as the present which extends to the *whole of the loss* of which the valuer's misleading conduct is a *direct* cause.[10] (emphasis added)

Gaudron, Gummow and Hayne JJ said:

> In particular, it follows from the decision in *Henville v Walker*[11] that there is nothing in s 82(1), in other provisions of the Act, or in the policy of the Act, to suggest that a claimant's carelessness may be taken into account to reduce the amount of the loss or damage which the claimant is entitled to recover under s 82(1).[12]

It follows that it will be sufficient for the purposes of section 82 to demonstrate that contravention of section 52 was a cause of the loss or damage sustained (not the sole cause).

Their Honours went on to say:

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10 Above n 1, [33].

11 Above note 2, 482 [66] per Gaudron J, 505 [140] per McHugh J, 507 [153] per Gummow J, 510 [166] per Hayne J.

12 Above note 1, [50].

> As was recognised in *Henville v Walker,*[13] there may be cases where it will be possible to say that some of the damage suffered by a person following contravention of the Act was not caused by the contravention. But because the relevant question is whether the contravention was *a* cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare. Further, it is only in a case where it is found that the alleged contravention did not materially contribute to some part of the loss claimed that it will be useful to speak of what caused that separate part of the loss as being 'independent' of the contravention.[14]

McHugh J acknowledged that the appellant's conduct 'undoubtedly contributed to its loss.'[15] But His Honour noted that *Henville v Walker* precludes the apportionment of loss or damage suffered by a plaintiff according to the parties' culpability.[16]

His Honour said:

> The statutory nature of the right of action under s 82 necessarily distinguishes it from actions at common law in tort or contract. Section 82 contains no express limitation on the kinds of loss or damage that may be recovered under the section. Nor does it contain any express indication that some kinds of loss or damage are to be regarded as too remote to be compensated.[17] Because the Act does not state the principles applicable in determining an award under s 82,[18] courts have used the principles applied in awarding damages in tort and contract cases as a guide to awarding compensation for loss or damage falling within s 82. In many cases, the application of tort or contract principles leads to a just result. But while analogies with the law of tort and contract are useful aids, they cannot be substituted automatically for the flexible and general language of s 82[19]. Focusing on the similarity of the circumstances involved in s 82 cases with those involved in tort and contract cases may sometimes result in the section being treated 'as a mere supplement to or eking out of' pre-existing law.[20]

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13 Above note 2, 474 [35] per Gleeson CJ, 481-483 [65]-[72] per Gaudron J, 493 [106] per McHugh J, 507 [153] per Gummow J, 510 [166] per Hayne J.

14 Above note 1, [62] per Gaudron, Gummow and Hayne JJ.

15 Ibid [69] per McHugh J.

16 Ibid [69] per McHugh J.

17 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 509 [34] per McHugh, Hayne and Callinan JJ.

18 See *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 11 per Mason, Wilson and Dawson JJ.

19 cf *Marks v GIO Australia Holdings Ltd (1998*) 196 CLR 494 at 529 [103] per Gummow J: 'Analogy, like the rules of procedure, is a servant not a master.'

20 Pound, 'Common Law and Legislation', (1908) 21 *Harvard Law Review* 383, 388 cited by Gummow J in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 [100]; see also at 503 [15] per Gaudron J, 510 [38] per McHugh, Hayne and Callinan JJ, 549

> Too much emphasis on tort and contract analogies also overlooks that s 82 provides a remedy for breach of a range of provisions different in kind from that provided by s 52.[21]
>
> Just as s 82 is free from the restraint of common law rules regarding measure of damages, so also is it free from doctrines that reduce those damages at common law.[22]

His Honour was also concerned that if the High Court adopted the reasoning of Williams J, it would lead to inconsistencies in applying section 82 to the broad range of provisions to which it may apply, namely breaches of sections 51AC and 52, and Parts IV, IVA, IVB and V.[23]

In a strong dissent, Kirby J agreed with the approach (and result) of Williams J's decision. Concerned more with policy and achieving a just result, Kirby J said:

> If the view is taken, as Callinan J puts it (correctly in my opinion), that the outcome favoured by the majority is 'unfair … [and] unlikely to have been intended by the legislature',[24] the mind of a judge naturally searches for an alternative construction that avoids such an affront to justice. Where alternative constructions are available, conventional rules of statutory interpretation encourage judges to attribute to Parliament a purpose to produce a just outcome rather than one that causes unfairness and unjust over-compensation at the price of another. The principle of consumer protection reflected in the Act is one of fairness to consumers. Except to the extent expressly provided in terms of penalties and punishments, it is not one of over-compensation and unjust excess. Providing windfall gains to litigants is not part of the scheme of the legislation. That scheme contemplates that all should be responsible, but only responsible, for the damage that they cause.
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> Care must be taken in adopting too narrow a view of what is involved in a 'discrete', wholly severable and 'independent'[25] cause. A narrow view would hardly be 'principled'. Why would such an arbitrary basis of disentitlement be adopted by the Parliament? Classifying a cause or causes of events as 'discrete' or 'independent' obviously involves elements of judgment. One person might consider the view that the borrower's default in the present case was an 'independent' cause and the assessment of the consequential loss or damage to be a matter of 'common sense'. That, after all, is the

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[152] per Kirby J. See also *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 290.

21 See *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd* [No 2] (1987) 16 FCR 410, 418-419 per Gummow J, to which I referred in *Henville v Walker* (2001) 206 CLR 459, 503-504 [135].

22 See above n 1, [84]-[85] per McHugh J.

23 Ibid [104] per McHugh J.

24 Ibid [211] per Callinan J.

25 Ibid [62] per Gaudron, Gummow and Hayne JJ.

> ordinary touchstone adopted by this Court for judging issues of causation.[26] Others might describe it as 'visceral' or a 'bare assertion'.[27] I am of the former school because its approach promotes a just operation of the Act. It avoids manifest unfairness. And it achieves the policy of the Act as I perceive it.[28]

The High Court on section 87

The majority agreed the words 'in whole or in part' in section 87 does not confer any discretion to reduce the amount of damages to which the appellant would otherwise be entitled to under section 82.[29]

Kirby J did not comment on the application of section 87.

Conclusion

While some members of the High Court recognised that the result may have been 'unfair' or 'unlikely to have been intended by the legislature',[30] the majority confirmed its strict interpretation of sections 82 and 87 of the TPA. The High Court again definitively rejected the application of common law notions of contributory negligence to these provisions.

Callinan J suggests that the legislature urgently consider amending section 82 of the TPA, as it did in relation to sections 75AD (liability for defective goods causing injuries – loss by injured individual) and 75AE (liability for defective goods causing injuries – loss by person other than injured individual) by introducing section 75AN (contributory acts or omissions to reduce compensation).[31] Interestingly, the legislature chose not to amend section 82 at the time it amended the TPA to include section 75AN.

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26 Above n 6, 515, 522-523 applying *Fitzgerald v Penn* (1954) 91 CLR 268, 277-278; *Chappel v Hart* (1998) 195 CLR 232, 243 [24], 256 [63], 269 [93], 290 [148]; *Rosenberg v Percival* (2001) 205 CLR 434, 460 [85], 464-465 [95], 500-501 [211].

27 Above n 1, [59] per Gaudron, Gummow and Hayne JJ; *S&U Constructions Pty Limited v Westworld Property Holdings Pty Limited* (1988) ATPR 40-854.

28 Ibid [178] per Kirby J.

29 Ibid [69], [118] and [122] per McHugh J and [220] per Callinan J.

30 Ibid [211] per Callinan J, [178] per Kirby J.

31 Ibid [211] per Callinan J.