

FINAL AND INTERLOCUTORY REMEDIES¹

Table of Contents

A.	INTRODUCTION	3
B.	FORMULATION OF FINAL REMEDIES.....	4
1.	Remedies are part of the advocacy steps	4
2.	Remedies are ultimate issues	4
3.	Adequacy of instructions	5
4.	What losses does the client think it has suffered and why?.....	5
5.	Formulating final relief.....	5
6.	Certainty.....	6
7.	Dangers of precedent	6
8.	Objects of order.....	7
9.	Subject of order.....	7
10.	Terms and conditions	7
11.	Time	7
12.	Causation.....	8
13.	Principle nexus.....	8
14.	Avoidance of full pleading.....	9
15.	Finality of remedies	9
16.	Anshun and estoppel risks	10
17.	Risks of election.....	10
18.	Equitable relief.....	11
19.	Mandatory and prohibitive injunctions	14
20.	Specific performance	15
21.	Declarations	15
22.	Discretionary final relief	16
23.	Statutory remedies	16
24.	Ancillary orders	17
25.	Alternative orders.....	18
26.	Amendment of proposed relief	18

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C. INTERLOCUTORY RELIEF	18
27. Undertaking as to damages	19
28. Notification and attempts to resolve	19
29. Full and frank disclosure.....	20
30. Balance of convenience	20
31. Serious question to be tried.....	21
32. Inadequacy of damages.....	21
33. On-going supervision.....	21
34. Duration	22
35. Delay.....	22
36. One contested interlocutory challenge.....	23
37. Exercise of discretion.....	23
38. Mareva injunctions.....	24
39. Anton Pillar orders.....	24
40. Stay of proceedings.....	25
41. Anti-suit injunction	25
42. Appointment of receivers.....	25
43. Liberty to apply.....	26
44. Discharge and variation	26
45. Interlocutory affidavits.....	26
D. DAMAGES.....	27
46. Introduction.....	27
47. Monetary expression.....	28
48. Revenue loss	30
49. Non-profit making property	30
50. Opportunity loss.....	31
51. Value loss.....	31
52. Expenditure / Repairs.....	32
53. Contributory Negligence and Contribution	33
54. Gratuitous Services and Property.....	33
55. Mitigation.....	33
56. Separate determination.....	33

A. INTRODUCTION

1. This presentation conceives of interlocutory and final civil remedies as involving a three step process. First, identification of the foundation upon which a remedy, be it final or interlocutory, might be sought. Secondly, formulating the remedy in an initiating process or motion by way of the relief sought. Thirdly, proof of the facts supporting the remedy in the form of the relief claimed.
2. Having taken into account the ethical and legislative constraints, the practitioner will want to analyse these three fundamental steps from two viewpoints, namely, aggressive and defensive. The aggressive analysis involves reflecting upon what is constructive for the client's case. The defensive analysis involves reflecting upon what is deleterious to the opponent's case.
3. The first step covers too many fields to be usefully summarised in this paper beyond emphasising the need for clarity in identifying the *gravamen* of the dispute, grasping the areas of competing merit and analysing the factual instructions by reference to each of the elements of the potential relevant causes of action. Selecting the appropriate cause of action is a matter of litigation strategy outside the scope of this paper².
4. It is the object of this discussion³ to cover the practical aspects involved primarily in the second step of formulation of the remedy and the third step of proof of facts to support the remedy.

² See paper Executing Litigation Strategy, by A.W. Street SC presented at Litigation Master Class Seminar, University of New South Wales, Faculty of Law, Continuing Legal Education, 18 March 2004

³ Reference should be made to the standard texts and authorities as this abridged paper does not exhaust the fields touched on and by dint of breadth of topics cannot be comprehensive.

B. FORMULATION OF FINAL REMEDIES

1. Remedies are part of the advocacy steps

5. As with all steps in litigation, the formulation of relief should be seen as part of the overall advocacy on behalf of the client. The hallmarks of successful advocacy are integrity, candour, clarity and brevity. It is these hallmarks that must be brought to bear on every step in the litigious process. These four hallmarks must be kept in mind in formulating any final or interlocutory remedy.

2. Remedies are ultimate issues

6. It is useful to conceive of the remedies in the form of the respective prayers for relief as reflecting the ultimate issues in the case. The prayers for relief reflect proposed orders by the Court. It is the relief claimed which is generally examined to identify the nature of the case and in this sense each remedy asked for reflects the ultimate issue between the parties. Nonetheless it is essential to consider the underlying foundation required to sustain the remedy. To identify these ultimate issues it may be useful to ask

“What do you want, why do you want it, where is it formulated and how is it to be established?”

7. As with most advocacy exercises it may be preferable to start at the end and formulate first the final relief to be asked for. Then engage in the underlying analysis to sustain that particular remedy. In this regard pleadings may not be required, however it is still useful to follow the discipline of preparing a skeleton pleading to support each particular prayer for relief. Although requests for particulars are sometimes seen as being two edged by assisting the other side to prepare its case, it is of considerable assistance to approach the skeleton of pleading on the basis of identifying full particulars so that you know precisely the case which you are advancing and the facts that have to be established. There is no single correct formulation of a proposed order and for the initial drafting reasonable clarity is sufficient. In adopting a pragmatic approach care should still be taken to formulate a proposed order that is lucid, meaningful and precise.

3. Adequacy of instructions

8. It will often be the case that further detail is required to fully understand the sphere of potential redress that may properly be the subject of orders for relief. Needless to say, just as considerable attention must be given to selecting the correct forum and litigious parties that may be entitled to a specific kind of relief, it is essential to give attention to the particular consequences for the specific litigant that is the subject of the intended redress. Attention must also be given to preservation of all relevant discoverable material in relation to the possible remedies.

4. What losses does the client think it has suffered and why?

9. Do not leave this area as one for determination by accountants. Admissible expert opinion evidence requires both proper factual foundation by identified assumptions and correct focus upon the relevant fact in issue and the subject of the opinion questions must be within the field of experience. You must understand precisely what are the areas of apparent loss that the client has identified and what are the other potential areas of detriment that may arise. The claimant's knowledge is material and its records are likely to be essential. How is each area of loss to be characterised and what records relate to each area.

5. Formulating final relief

10. Whether expressed in full old fashion common law pleading form or initiating process in the nature of summons or application, considerable care must be taken to ensure that the appropriate orders have been asked for. This, of necessity, involves consideration of the kind of relief available by reference to a particular cause of action. It is still convenient in this regard to categorise the remedies being of three general kinds, namely common law, equitable and statutory. A common law cause of action creates common law rights which will sustain common law remedies and the common law rights may support the

existence of a separate equity to sustain equitable relief⁴. An equitable cause of action creates equitable rights and obligations which will sustain equitable remedies⁵. A statutory cause of action creates statutory rights which will sustain statutory remedies. Administrative process remedies are sourced either upon general common law rights or statutory rights.

6. Certainty

11. The prayers for relief being formulated are in substance intended to be orders of the Court. The proposed orders may be perpetual in the sense of being permanent and final or the proposed orders may be interlocutory. In either case the proposed orders require sufficient certainty to be enforceable⁶, both from the viewpoint of the parties and the viewpoint of the Court.
12. From the Court's viewpoint, will the party bound by the order understand from its language what it is required to do to comply with the order. The Court is alive to the fact that uncertain language may tend to undermine its authority. An uncertain order is likely to evade the powers of contempt.
13. From the parties' viewpoint uncertainty may give rise to a pyrrhic victory and a want of utility in the order obtained. The practitioner should remove any apparent ambiguities and double check that what is said in each proposed order is lucid, meaningful and precise.

7. Dangers of precedent

14. The proper use of precedents in any sphere requires comprehension of the full meaning and purpose of each provision, whether it is apt and whether other provisions are required. Precedents in prayers for relief are, in general, dangerous tools if used other than at a high level for the purpose of potential double checking as to topics. It is generally best to address the particular remedy by articulating how the remedy arises from the factual foundation

⁴ *Supreme Court Act 1970*, s. 58

⁵ *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 306

⁶ *Greetings Oxford Koala v Oxford Square* (1989) 18 NSWLR 33 at 41

surrounding each cause of action, identified in a single pithy sentence. This reduces the desired outcome to its nub. Each prayer for relief must be clear, concise and simple.

8. Objects of order

15. The proposed order should be complete in identifying with certainty the object of a verbal command. Precisely what is it that the recipient of the command must or must not do. Here again, attention must be given to the breadth of conduct the subject of concern. Where a thing, property or a state of affairs is part of the proposed order, the same precision is required.

9. Subject of order

16. It is equally essential that the entity or person the subject of a command is identified with proper certainty. This includes, for example, identifying whether it is the identity alone which should be the subject of command, or whether it should include servants and agents. The same issue arises with an individual. Always check for example that it is the correct corporate name and ABN as at the time of factual issue and as at the time of seeking the proposed order. Be particularly careful if business names are involved, by checking again at the relevant time in issue and as at the time of seeking relief.

10. Terms and conditions

17. Where there is power to grant relief it should be kept in mind that the proposed order may be the subject of terms and conditions⁷.

11. Time

18. Where considerations of time or date play a part in the relief sought, the terms of the specific prayer for relief should specify the required time obligation or date⁸. Alternatively there may be an objective criteria to be determined by the

⁷ *Supreme Court Act* 1970, s. 211

⁸ As to failure to specify or use of the term “forthwith”, see *Supreme Court* Part 40 rule 7.

court which will need to be included, such as termination of an agreement upon the expiry of reasonable notice.

12. Causation

19. Although at one level the type of causal nexus may vary depending upon the precise cause of action providing the foundation for the remedy, it is important nonetheless to reflect upon the evidentiary link in identifying the kind of relief sought. For example, as a matter of strict pleading the material facts to support the kind of causal nexus should strictly be set out. By trying to consider what are the material facts revealing the link to the remedy asked for, the draughtsperson is more likely to identify correctly each of the matters that should be the subject of relief and the required causal facts in issue. Causation is a common sense issue of fact⁹ and reasonable foreseeability is then relevant¹⁰ as unforeseeable classes of loss cannot be recovered¹¹. For intentional torts foreseeability may not be required in relation to the damage suffered¹².

13. Principle nexus

20. The particular relief claimed must, as a matter of principle, be referable to the relevant cause of action. This requirement calls for consideration as to whether as a matter of correct legal principle this type of relief is available. For example common law damages are not available for breach of fiduciary duty. Further, consideration should be given as to whether there is a need to make transparent the cause of action to which the prayer for relief relates. Inserting words of reference to the cause of action may avoid unnecessary challenge to the pleadings or to the relief claimed.

⁹ March v Stramare (E&MH) Pty Ltd (1991) 171 CLR 506 AT 515-516; Edlin v State Government Insurance Commission (1995) 182 CLR 1 at 6; Chappel v Hart (1998) 195 CLR 232; Fitzgerald v Penn (1954) 91 CLR 268 at 277-278

¹⁰ Chapman v Hearse (1961) 106 CLR 112 at 122

¹¹ Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) (1961) AC 388 at 425-426

¹² Pamler Bruyn & Parker v Parsons (2001) 208 CLR 388

14. Avoidance of full pleading

21. Careful formulation of the final relief may assist the expeditious determination of the dispute avoiding the need for the delay that may flow from full pleadings. In these circumstances considerable attention needs to be given to ensuring that the prayer for relief is formulated with sufficient clarity that the other side knows precisely what the case is that is to be met. This appearance accords with the overarching devise by the Court to facilitate the just, quick and quiet execution of the real issues¹³
22. Where there are complex issues of fact, allegations of contested duties and breach or allegations of fraud, full pleadings are likely to be ordered. The prime danger where full pleadings are not ordered is that attention may not be given to each step required to establish the entitlement to the relief formulated. Moreover, in the absence of full pleadings, there is a need to consider the adequacy of the alternative forms of relief that might otherwise be available.

15. Finality of remedies

23. In formulating the relief to be sought it is important to bear in mind the overarching duty of the Court to try and achieve finality in respect of the particular dispute between the parties¹⁴. This statutory duty imposed upon the Court may give rise to a broadening of the sphere of contest. Just as the primary claim advanced will often be met by a counter attack of cross claims and third party claims, consideration needs to be given to the consequence of denials and whether for example an estoppel¹⁵ can be pleaded as an authority if that be in issue or joinder of another party for breach of warranty of authority. Nonetheless it is important to recognise that the Court will want to be seen to be achieving an efficient and effective utilisation of its resources by determining the whole of the controversy with which it has been presented. This means that artificially selective or excessively narrow formulation of the orders sought may be the subject of exposure down the track, whether by reference to applications

¹³ *Supreme Court Act 1970*, Part 1 rule 3

¹⁴ *Supreme Court Act 1970*, s. 63

¹⁵ *Pacific Carriers Limited v BNP Paribas* [2004] HCA 35

for adjournment, costs consequences, discretionary ramifications or loss of rights.

16. Anshun and estoppel risks

24. The potential landmines for the lawyer formulating remedies is enhanced by the exposure to a future Anshun estoppel in respect of relief that might otherwise have been sought in respect of the matters litigated or in respect of the matters so closely connected that the issues should have been litigated. Alternatively attention needs to be given as to the issue estoppel consequences¹⁶ or whether if the issues are omitted there may in the future be an abuse of process for re-litigation.¹⁷ This requires a reality testing of the best legal right outcomes being advanced, together with consideration of the worst potential legal right outcomes. Although this has the same ring to it as the evaluation undertaken by a mediator in a non rights based resolution, essentially that is because the same objective criteria are required for evaluating whether all relevant remedies are included in the prayers for relief. Objectively assessed, if the worst outcome were to occur what other remedy might be raised to ameliorate the outcome.
25. In what, at first glance, may be seen as the more simplistic area of identification of the heads of damage to be made the subject of the once only assessment, it is trite that an omitted head may be the subject of sound reason for its exclusion or alternatively reflect inadequate deliberation and instruction. Determine what are the heads of general and special damages that arise and avoid shutting out a real head of damages by *res judicata*¹⁸.

17. Risks of election

26. Another matter that should be kept in mind is the risk of an election being effected by the prayer for a particular of relief as for example an affirmation of a

¹⁶ Kuligowski v Metrobus (2004) HCA 34

¹⁷ Haines v ABC (1995) 43 NSWLR 404; Rippon v Chilcotin Pty Ltd (2001) 53 NSWLR 198.

¹⁸ Blair v Curran (1939) 62 CLR 464 at 532; Ramsay v Pigram (1968) 118 CLR 271 at 276

contract where there was a right to rescind¹⁹. Whether the mutual inconsistent rights require election at the time of filing the application will depend upon the circumstances. Equally, an election may arise as a result of pursuing a particular kind of relief. For example, an election may be required prior to judgment in respect of property rights as to whether equitable compensation is to be assessed or an account taken of the profits obtained by the other side²⁰.

18. Equitable relief

27. It may be that the circumstances warrant seeking equitable compensation²¹ for breach of equitable duties, which is restitutionary in nature²² and requires, in monetary terms, the same position as if there had been actual restoration to the estate²³. An equitable interest in property or equitable assignment of property may found the entitlement to equitable relief. The restorative form of relief has different considerations in relation to causation, remoteness or measure than at common law and the losses are assessed at trial with the full benefit of hindsight²⁴ which may have attraction. Alternatively, there may be restorative orders of a proprietary kind based on an express²⁵, implied, resulting²⁶ or constructive trust²⁷.

¹⁹ Immer (No 145) Ltd v Uniting Church (1993) 182 CLR 26; Sargent v ASL Developments Ltd (1974) 131 CLR 634; Tropical Traders Ltd v Goonan (1964) 111 CLR 41 Elder's Trustee and Executor Co Ltd v Commonwealth Homes Investment Co Ltd (1942) 65 CLR 603

²⁰ Warman International Ltd v Dwyer (1995) 182 CLR 544; Tang Man Sit v Capacious Investments Ltd (1996) AC 514

²¹ The measure is determined by equitable principles and are not subject to the notion of contributory negligence Pilmer v Duke Group Ltd (2001) 207 CLR 165 at 201

²² Alexander v Perpetual Trustees WA Ltd (2004) HCA 7 at para 44;

²³ Re Dawson (1966) 84 WN NSW 399 at 406

²⁴ Youyang Pty Ltd v Minter Ellison (2003) 212 CLR 484

²⁵ Associated Alloys v CAN 001 452 106 Pty Ltd (2000) 202 CLR 588

²⁶ Nelson v Nelson (1996) 184 CLR 538; Calverley v Green (1984) 155 CLR 242; Muschiniski v Dodds (1985) 160 CLR 583

²⁷ Giumelli v Giumelli (1998) 196 CLR 101

28. Where the relevant transaction cannot be avoided, and rescission²⁸ is unavailable, the remedy of constructive trust may not be available²⁹. It may be that orders for restitution for an unjust enrichment³⁰ are available in which case consideration needs to be given to the consequences that may be imposed in order to restore the competing parties to their former position³¹ and to account for improper gain³². Where trust monies are mixed, a proportionate interest may be claimed and the first in first out principle in Clayton's case, may not be applied³³. Tracing orders might be required to assist restoration³⁴. It may be that a party is sought to be made liable for remedies in the nature of a constructive trust by reason of having received funds with knowledge of the fraud or breach of fiduciary duty³⁵ or as a result of having assisted the relevant breach of fiduciary duty³⁶. There may be injunctive relief available to prevent an anticipatory injury or threatened breach of obligation. Relief may be granted to protect confidential information³⁷.

²⁸ Foran v Wright (1989) 168 CLR 385; Vadasz v Pioneer Concrete SA Pty Ltd (1996) 184 CLR 102

²⁹ Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371 at 386-390

³⁰ An equitable proprietary claim may not be available, Westdeutsche Bank v Islington LBC (1996) AC 699; cf Chase Manhattan Bank NA v Israel-British Bank (London) Ltd (1981) Ch 105

³¹ He who seeks equity must do equity; Boardman v Phipps (1967) 2 AC 46; O'Sullivan v Management Agency and Music Ltd (1985) QB 428

³² Chan v Zacharia (1984) 154 CLR 178 at 198, 204; Hagan v Waterhouse (1991) 34 NSWLR 308

³³ Hagan v Waterhouse (1991) 34 NSWLR 308

³⁴ Re J Leslie Engineers Co Ltd (1976) 1 WLR 292; Re Diplock; Diplock v Wintel (1948) Ch 369

³⁵ Breen v Williams (1996) 186 CLR 71; Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41 at 102; United Dominions Corp v Brian Pty Ltd (1985) 157 CLR 1; Birtchnell v Equity Trustees, Executors & Agency Co (1929) 42 CLR 384

³⁶ Consul Developments Pty Ltd v D P C Estates Pty Ltd (1975) 132 CLR 373; Greater Pacific Investments Pty Ltd v Australian National Industries Ltd (1996) 39 NSWLR 143 at 153; Barnes v Addy (1874) 9 Ch App 244

³⁷ Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181; Commonwealth of Australia v John Fairfax & sons Ltd (1980) 147 CLR 39; Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) (1984) 156 CLR 414; A v Hayden (1984) 156 CLR 532; AG Australia Holdings Ltd v Burton (2002) 58 NSWLR 464; Lord Ashburton v Pape (1913) 2 Ch 469

29. There are specific and flexible remedies available in equity, such as to relieve against unconscionable conduct³⁸, fraud in equity, mistake³⁹, misrepresentation⁴⁰, duress and undue influence⁴¹. This relief may be subject to being willing and able to make restitution in integrum. The width of equitable relief for fraud may include an assignment of future property or a conditional order to hold rights as security⁴². There may be issues of priorities that are the subject of relief or relief may be granted by way of an equitable lien⁴³ or charge. There may be equitable relief to prevent a statute being used as a fraud in equity, for example where there has been part performance of a contract which by statute requires writing.
30. Alternatively, equitable relief may be sought in the nature of relief against penalties⁴⁴ or forfeiture⁴⁵ or rectification⁴⁶ in relation to which there will be an obligation to do equity and potential adverse costs consequences, despite otherwise succeeding. There may be imposed an obligation to pay into Court to obtain the relief⁴⁷.

³⁸ Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447; Garcia v National Australia Bank Ltd (1998) 194 CLR 395; Bridgewater v Leahy (1998) 194 CLR 457; ACCC v CG Berbatis Holdings Pty Ltd (2003) HCA 18

³⁹ Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (2002) 3 WLR 1617

⁴⁰ A.H. McDonald & Co Pty Ltd v Wells (1931) 45 CLR 506

⁴¹ Yerkey v Jones (1939) 63 CLR 649

⁴² Demetrios v Gikas Dry Cleaning Ind (1991) 22 NSWLR 561 at 572-574

⁴³ Firth v Centrelink (2002) 55 NSWLR 451

⁴⁴ AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170; relief will be on condition that the party relieved from the penalty must pay the damage suffered, Bridge v Campbell Discount Co Ltd (1962) AC 600 at 632

⁴⁵ Romanos v Pentagold Investments Pty Ltd (2003) HCA 58; Tanwar Enterprises Pty Ltd v Cauchi (2003) HCA 57; Legione v Hatley (1983) 152 CLR 406

⁴⁶ Pukallus v Cameron (1982) 180 CLR 130

⁴⁷ Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161; Harvey v McWatters (1949) 49 SR 173

31. Then again it may be that equitable contribution⁴⁸ is available for example in relief of an alleged co-ordinate liability⁴⁹, like the contribution between insurers where there is double insurance⁵⁰. Alternatively there may be obligations in the nature of subrogation and marshalling. There is also an equity that may arise for delivering up and cancellation of documents where for example there has been a fraud or for specific restitution of other property. Relief might be sought in the nature of a bill for discovery in equity⁵¹. The supervisory jurisdiction, including judicial advice, may also found particular relief or there may be a right to equitable set-off⁵².

19. Mandatory and prohibitive injunctions

32. The injunctive power is extremely broad⁵³. It is essential to distinguish between acts and conduct that are sought to be made the subject of orders prohibiting the same, and on the other, hand acts and conduct sought to be made the subject of a mandatory obligation. A negative stipulation will more readily be the subject of a prohibitive order⁵⁴. In either case the precise act or conduct must be identified with clarity. Because of the potential need for enforcement these orders should be taken out and served⁵⁵.

⁴⁸ Burke v LFOT Pty Ltd (2002) 209 CLR 282; Mahoney v McManus (1981) 180 CLR 370; Belan v Casey (2003) 57 NSWLR 670

⁴⁹ Cockburn v GIO Finance Ltd (No 2) (2001) 51 NSWLR 624

⁵⁰ Albion Insurance Co Ltd v GIO (1969) 121 CLR 342

⁵¹ *Supreme Court Rules* Part 1 rule 14; and Part 3.

⁵² D Galambos & Son Pty Ltd v McIntyre (1975) 5 ACTR 10

⁵³ *Supreme Court Act* 1970, s. 66

⁵⁴ BHP v Hapag-Lloyd (1980) 2 NSWLR 572 at 578-579

⁵⁵ *Supreme Court* Part 42 rules 6 and 8

20. Specific performance

33. Whether the agreement is one in respect of which specific performance⁵⁶ is desired, will need to be evaluated, as well as whether in fact the relevant party is ready, willing and able to complete, and not otherwise in breach of the agreement. The relief must be formulated with precision as to what is required and not create exposure to repeated applications or supervision⁵⁷. There must be mutuality of enforceability by the parties. There may be sound reasons for not seeking specific performance, and the consequential election that may flow from the relief sought, needs to be fully understood. The remedy may not be granted where the order is futile or performance impossible.

21. Declarations

34. The declaratory power is one of the most useful orders binding upon the parties to the suit⁵⁸. The full scope of the declaratory power is awesome. The consequences of the declared state of facts or legal rights as between the parties provides an extremely useful mechanism for identifying the subject matter in issue, and may facilitate a very swift rights based determination.

35. The declaratory relief may for example extend from factual scenarios as to statutory contraventions, statutory rights, tortious conduct, contractual breaches, absence or existence of agreement, termination or construction, rescission for repudiatory conduct⁵⁹ or anticipatory breach⁶⁰, administrative process failure, constitutional rights or excess of jurisdiction. Indeed, the declaratory power enables an estoppel to be used as a sword.

⁵⁶ Fullers' Theatres Ltd v Musgrove (1923) 31 CLR 524; Mehmet v Benson (1965) 113 CLR 295; Green v Sommerville (1979) 141 CLR 594

⁵⁷ Co-Operative Insurance Society Ltd v Argyll Stores (1998) AC 1

⁵⁸ *Supreme Court Act* 1970, s. 75

⁵⁹ Carr v J.A. Berriman Pty Ltd (1953) 89 CLR 327 at 351; Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623 at 633.

⁶⁰ Rawson v Hobbs (1961) 107 CLR 466 at 480

36. Apart from the constitutional advantages of the prerogative relief recognised by s. 75(v) of the Constitution⁶¹, declarations may adequately achieve what may earlier have been addressed by prerogative writs such as *mandamus*, *procedendo*, *quo warranto*⁶², *certiorari*, *prohibition*⁶³, *habeas corpus*⁶⁴, *capias* and *ne exeat*⁶⁵. Nonetheless it may still be prudent to seek an ultimate order in the nature of the desired outcome by reference to the actual section from which power to make the order flows. The Court will not make interlocutory declarations.

22. Discretionary final relief

37. There are some orders in relation to which the Court will need to evaluate whether, as a matter of discretion, this type of final order should be made. It is in this sphere that a want of clean hands⁶⁶ may play a prominent part in undermining the entitlement to relief, as well as the consequences of laches and acquiescence.

23. Statutory remedies

38. All will be readily familiar with statutory rights of contribution between joint tortfeasors and the potential statutory remedies available under the *Trade Practices Act* and the *Fair Trading Act*. There may be relief available under the *Contracts Review Act* 1980. The sphere of statutory relief is too vast to address. In every dispute consideration should be given to what statutory provisions may apply to the controversy including what statutes if any govern the entities involved and the underlying transaction. It is important to be wary of assumptions as to existing common law or equitable theory in understanding the

⁶¹ Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

⁶² *Supreme Court Act* 1970, ss. 12 and 70

⁶³ *Supreme Court Act* 1970, ss. 65 and 69

⁶⁴ *Supreme Court Act* 1970, s. 71

⁶⁵ *Supreme Court Act* 1970, ss. 10 and 69

⁶⁶ Official Trustee in Bankruptcy v Tooheys Ltd (1993) 29 NSWLR 641

breadth and extent of the statutory powers that may have been conferred.⁶⁷ In determining the alleged loss or damage it is important to identify the detriment that has been occurred⁶⁸. The scope of the Courts' powers under, for example s.82⁶⁹ and s. 87 of the *Trade Practices Act* is not constrained by pre-existing notions that may have bedevilled an entitlement to equitable relief⁷⁰. More than one remedy may be available, rather than say a single lump sum award of damages, particularly as an additional remedy to prevent future losses, including more onerous outgoings. It is prudent to examine with great care precisely what heads of loss or other relief might be sought under the particular statutory provision.

24. Ancillary orders

39. Apart from the prayers for relief to achieve the desired legitimate outcome there may be a number of ancillary orders. There may be a desire to appoint a Court officer or other specified person to execute documentation failing compliance by the other party⁷¹. It may be that prayers for an accounting exercise are required. There may be specific contractual interest rates or a right to statutory interest⁷² or where fraud or a trustee is involved a right to compound interest in equity⁷³. Generally, there will be a prayer for relief for costs, and also as a catch-all, "Such further or other relief as this honourable Court deems fit". In addition, the catch-all expression may also be used to accommodate a more onerous type of cost order or Bullock orders. The catch-all formula enables additional orders or refinement to be achieved, subject to the dictates of procedural fairness. However do not rely upon the catch-all formula as all orders desired should be specified.

⁶⁷ Henjo Investments Pty Ltd v Collins Marrickville (No.2) (1989) 40 FCR 76 at 93; T.N. Lucas v Centrepoint Freeholds Pty Ltd (1984) 1 FCR 110 at 113-116; Tiplady v Gold Coast Carlton Pty Ltd (1984) 3 FCR 426 at 464; Neilsen v Hampston Holdings Pty Ltd (1986) 65 ALR 302.

⁶⁸ Wardley Australia Ltd v Western Australia (1992) 175 CLR 514 at 532

⁶⁹ Section 4K of the *Trade Practices Act* extends the meaning of loss and damage to include injury.

⁷⁰ Murphy v Overton Investments Pty Ltd (2004) HCA 3; Marks v GIO (1998) 196 CLR 494; Henville v Walker (2001) 206 CLR 459; I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109

⁷¹ *Supreme Court* Part 42 rule 9

⁷² *Supreme Court Act* 1970, s. 94; *Insurance Contracts Act*, s. 57

⁷³ President of India v La Pintada Compagnia Navigacion SA (1985) AC 104 at 116

25. Alternative orders

40. Leaving to one side the consequences that may arise in relation to an election, there is in principle sound reason why alternative orders for relief might be formulated in the relevant process. Some orders may be expressed to be further and in the alternative and others may be truly alternative remedies. Common law remedies say for monies had and received may be necessary to recover alleged unjust enrichment⁷⁴ at the expense of the plaintiff⁷⁵. It is necessary for the draughtsperson to have included the appropriate alternatives, as it would be quite erroneous to assume that the Court will necessarily permit a reformulation of the desired orders.

26. Amendment of proposed relief

41. Where it becomes apparent that the prayers for relief are not in fact appropriate or additional remedies should be sought, prompt attention should be given to filing an amended process or obtaining the appropriate consent or leave to do so. Quite apart from time bars it will not always be the case that the Court will grant the indulgence required because the prejudice appears curable by a costs order. Case management considerations may be taken into account and it is for this reason that prompt notice should be given to the opponent of the proposed amendment as soon as reasonably practical after proper instructions and formulations.

C. INTERLOCUTORY RELIEF

42. This part of the paper is primarily concerned with interlocutory relief of an injunctive kind as there are a myriad of interlocutory processes. Generally, interlocutory injunctive relief will arise by reason of a desire to either maintain

⁷⁴ Roxborough v Rothmans of Pall Mall (2001) 208 CLR 516; David Securities Pty Ltd v Commonwealth Bank of Australia (1993) 176 CLR 344

⁷⁵ Passing on the charge may not prevent relief, Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd (1994) 182 CLR 51 at 75

the status quo by preventing further acts or conduct, or from a fear to prevent an abuse of process. If of an injunctive kind consider what is the right or equity that requires interlocutory relief⁷⁶. Ask what is the equity that supports the injunction⁷⁷. Where the plaintiff has sufficient interest injunctive relief may be available to enforce public law⁷⁸. A mandatory interlocutory injunction will require a stronger prospect of success if interlocutory relief is to be obtained. Accordingly, it is useful to try and formulate an interlocutory injunction in the form of a negative restraint, as this type of prohibition is more likely to be the subject of interlocutory relief. The same types of issues and questions arise formulating interlocutory relief as addressed above.

27. Undertaking as to damages

43. Generally interlocutory injunctions must be supported by an undertaking as to damages⁷⁹ given to the Court. The full meaning of the undertaking as to damages needs to be clearly understood together with the full ramifications of a failure to comply with an undertaking to the Court. The adequacy of the undertaking being given will often arise. In some cases this may be solved by joining additional parties or security, such as payment into Court so as to be a funded undertaking. A foreign entity without assets within the jurisdiction may, depending upon the circumstances, need to provide adequate funding in order to obtain the interlocutory order.

28. Notification and attempts to resolve

44. In general the Court will be reluctant to grant interlocutory orders where clear notice has not been given of the desired relief to the other side. Obviously the circumstances may dictate the need for expeditious conduct, which does not facilitate earlier notice, or there may be circumstances where notice will destroy

⁷⁶ ABC v Lehan Game Meats Pty Ltd (2000) 208 CLR 199

⁷⁷ The Commonwealth v Verwayen (1990) 170 CLR 394 at 434-435

⁷⁸ Cooney v Ku-ring-gai Corporation (1963) 114 CLR 582 at 602-603; Bateman's Bay v Aboriginal Fund (1998) 194 CLR 247

⁷⁹ *Supreme Court* Part 28 rule 7

the efficacy of the interlocutory order. Generally, however, the Courts will require the giving of clear notification to the other side of the desired interlocutory relief, and the party's intention, if not resolved or the subject of consensual undertaking, to approach the Court for its assistance. Be clear whether what is desired is an inter-parties undertaking or an undertaking to the Court. If an adequate opportunity has not been provided to respond, this may impact on the Court's willingness, as a matter of discretion, to grant the interim relief sought. Also give consideration as to whether there should be both an open letter of demand and a without prejudice letter exploring settlement (except as to costs including costs on an indemnity basis).

29. Full and frank disclosure

45. All *ex parte* applications to the Court for an order must be the subject of careful instructions, to ensure full and frank disclosure⁸⁰ of any known matter likely to be material to the making of the order. A failure to make full and frank disclosure is likely to result in vacation of the order, and the burden upon a legal practitioner is all that more onerous, given the obligation never to mislead the Court. In some circumstances, the disclosure can adequately be made from the Bar table, however it should be assumed that all facts of which the Court is to be informed has been reflected upon as to the truth of the same, as if the deponent were putting on an affidavit. Indeed, on occasions a Court will require the information that has been provided as part of the obligation of disclosure to be deposed to on oath.

30. Balance of convenience

46. The Court will weigh the balance of convenience in determining whether to grant injunctive relief⁸¹. This means that attention needs to be given in the evidentiary material as to the existing state of affairs, the urgency of the matter

⁸⁰ Thomas A. Edison Ltd v Bullock (1912) 15 CLR 679 at 681-682; Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1981) 146 CLR 249 at 311

⁸¹ Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148 at 143;

and the consequences faced by the respective parties if relief is not granted. The risks identified should be supported by evidence of the underlying factual matrix and the factors relevant to the likelihood of occurrence to permit an assessment of the extent of the risks. Cogent reasons must be given as to why the Court's assistance is necessary.

31. Serious question to be tried

47. The evidence must establish a serious question to be tried which supports the interlocutory relief. The more significant the consequences of the interlocutory relief, the greater the degree of persuasion likely to be required. In the context of a mandatory injunction, the Court may require satisfaction as to the existence of a strong probability of obtaining ultimate relief, particularly where the interlocutory order operates substantively as final relief⁸².

32. Inadequacy of damages

48. Ordinarily, if damages would be an adequate remedy, the Court will not lend its aid in the form of interlocutory injunctive relief. Whether there is an adequate basis to support an interlocutory order and to meet the requirements such as the undertaking as to damages, rather than seeking the final remedies or relief in the nature of damages, will need to be the subject of concise identification and reflection. If there is an adequate common law remedy, or the parties have contractually addressed the consequences of breach, the Court may decline to grant injunctive protection. It is quite common for parties to insert in the transactional documents that damages will not be regarded as an adequate remedy. Although such provision may assist, this will not bind the Court in its assessment of the true position and the dictates of justice.

33. On-going supervision

49. The Court will be quite reluctant to make any order that requires on-going supervision by the Court, including repeated need for applications. Where the

⁸² Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533

order requires numerous on-going discretionary or value judgments to be formed, which cannot be the subject of straightforward exercise in compliance with the interlocutory order, this is likely to involve an inappropriate requirement of supervision. In substance, it is the inability of the Court to supervise the on-going performance of, for example a contract of service that leaves the parties to their remedy of damages.

34. Duration

50. The nature of an interlocutory order requires that it be expressed to be subject to further order or of limited duration in its terms. Generally, an interlocutory order of this kind will be expressed as an order, until further order⁸³, or up to and including a specified date restraining X by itself, its servants and agents from transferring, removing, concealing/disposing, selling, encumbering or otherwise dealing with Y up to and including a specified date or until execution of final judgement and costs orders or until further order. There may be time periods to be identified in the ancillary interim orders needed, such as for delivery up of certain things or documents, affidavits as to specific matters, particular discovery and preservation of identified records.

35. Delay

51. It is also necessary when seeking interlocutory relief to avoid unreasonable delay as the Court will be reluctant to grant urgent relief where a party or its representatives have been idle. What is unreasonable delay will vary depending upon the circumstances involved and may in fact be due to conduct by the opponent. In general delay due to constructive attempts to resolve the matter may be a satisfactory explanation. Where the laches or acquiescence⁸⁴ has real adverse consequences relief is likely to be refused.

⁸³ Resort Hotels Management Pty Ltd v Resort Hotels of Australia Pty Ltd (1991) 22 NSWLR 730

⁸⁴ Orr v Ford (1989) 167 CLR 316

36. One contested interlocutory challenge

52. It is important to bear in mind that generally on an interlocutory application there is only one contested interlocutory challenge, unless there has been an unanticipated material change of circumstances. For this reason, it is not appropriate to have an initial bite at the cherry on the first return date if, in fact, intending to have a fully contested hearing as otherwise the opportunity for a contested hearing will be lost. In this regard, it is often appropriate to proffer open undertakings, expressly identified to be of an interim nature to preserve the status quo, upon the moving party's undertaking to the Court as to damages, pending determination of the interlocutory contest. Alternatively, the plaintiff's case may be assessed as under-baked or insufficiently strong to require any adjournment and an immediate contest may be tactically advantageous. Care needs to be taken to avoid the open undertakings being said to amount to an agreement of a final nature or until final hearing. Equally, it is important to ensure that any open undertakings are based on the reciprocal obligation which would exist, being the undertaking as to damages. To agree to an open undertaking regime, without the opponents undertaking as to damages, diminishes the client's protection if ultimately successful. Again identify clearly whether the undertakings are to the party, the Court or both.

37. Exercise of discretion

53. As the granting of interlocutory relief is in substance an exercise of discretion, the Court will in fact take into account the whole of the circumstances when determining what interim order, if any, is just. Consideration of matters like the balance of convenience, status quo, explanation of delay, utility of the undertaking as to damages, the nature and strength of the serious question and adequacy of damages are relevant criteria for the Court to take into account. The Court will try and avoid at an interim stage having to determine substantive or ultimate issues and is likely to be most reluctant to permit exploration of credit issues. Another material matter, will be the potential adverse impact of any interim relief on innocent third parties.

38. Mareva injunctions

54. A Mareva injunction is essentially an order to prevent an abuse of process by providing for the interim preservation of assets or property for enforcement of the ultimate judgement⁸⁵. Where fraudulent conduct has occurred a Court will more readily conclude that a real danger of abuse of process arises. Like any injunctive relief, the Mareva order should be framed no wider than the minimum equity necessary to protect the moving party. The order should clearly specify the precise activity and property the subject of restraint, qualified by limits upon outgoings for ordinary business expenses in the ordinary course of business, in amounts not exceeding a specified sum or up to a total maximum amount, as specified. Similar limitations by reference to an amount for ordinary living expenses or legal expenses might be specified, as well as in certain circumstances an overall quantum limit in respect of the restraint. The order may need to expressly exclude potential third party interests which might otherwise be adversely affected⁸⁶.

39. Anton Pillar orders

55. Here again the Court is trying to prevent an abuse of process by destruction of documents or property that are likely to be relevant evidence⁸⁷ or necessary for enforcement of the ultimate relief. It may be necessary to provide access to at least two independent lawyers who are available, willing and able to give independent advice, at the time of execution of the interim order. Affidavits will need to be filed verifying the steps taken in compliance with the Court's procedure specified in the Anton Pillar orders. The affidavit of compliance may need to include steps taken in the searches conducted, depose to and exhibit the list of documents or electronic records uplifted, and may, depending upon the circumstances, include photographic or vide recording of what has been

⁸⁵ Cardile v LED Builders Pty Ltd (1999) 198 CLR 380; Jackson v Sterling Industries Ltd (1987) 162 CLR 612

⁸⁶ Patrick Stevedores Operations No 2 Pty Ltd v MUA (1998) 195 CLR 1 at 41-42

⁸⁷ Long v Specifier Publications Pty Ltd (1998) 44 NSWLR 545

obtained. Where property has been delivered up considerable care must be taken in identifying and preserving the property obtained. This may require specific focus on the chain of custody, limited specified access, and for purposes of authenticity, maintaining the sequence and unaltered state of records (particularly where photocopying takes place).

40. Stay of proceedings

56. Interlocutory relief may be sought to stay the proceedings by reason of inappropriate forum⁸⁸, enforcement of an arbitration clause, or other dispute resolution clauses. Alternatively, a stay may be sought pending the provision of security or other grounds such as abuse of process. Whatever the foundation is, this should be apparent from the form of orders drafted, and clear attention needs to be given to ensuring that the evidentiary foundation has been established.

41. Anti-suit injunction

57. In substance, an anti-suit injunction or an anti-anti-suit injunction is an order to prevent an abuse of process by multiple proceedings on the same subject matter⁸⁹. Whether as a matter of comity the Court should make the order will depend upon the particular circumstances surrounding the multiple proceedings.

42. Appointment of receivers

58. Where the business or property can be shown to be at risk the Court may also make orders appointing an appropriate receiver⁹⁰ and where necessary for example in partnership disputes, appointing a receiver and manager. An undertaking as to damages will still be required⁹¹ and consent from the person

⁸⁸ Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491; Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538

⁸⁹ CSR Ltd v Cigna Insurance Ltd (1997) 189 CLR 345

⁹⁰ *Supreme Court Act* s. 67; *Supreme Court Part 29*; Mariconte v Batiste (2000) 48 NSWLR 724

⁹¹ National Australia Bank Ltd v Bond Brewing Holdings Ltd (1990) 169 CLR 271 at 277

to be appointed should be obtained. The Court's powers may provide a useful supplement to the powers found, for example in the *Corporations Act 2001* (Cth)⁹² and the powers found in contractual security documents.

43. Liberty to apply

59. Interlocutory orders will generally provide for liberty to make further application so as to avoid a potential injustice that may not have been adequately addressed. Generally such liberty requires notification within the timeframe specified⁹³. However, there is always scope to seek urgent ex parte relief if circumstances of necessity arise.

44. Discharge and variation

60. Where a material change of circumstance that was not foreseeable has taken place or the orders are adversely affecting a third party, application should be made promptly to seek any necessary variation or discharge. The Court will not welcome a second bite at the cherry in respect of an interlocutory dispute and it is important to identify the existence of the real material change.

45. Interlocutory affidavits

61. The evidence to support the interlocutory relief should be the best evidence able to be obtained in the exigencies. In this regard, it is necessary to try and adduce the material in final admissible form to avoid the need for duplication, and to ensure that the facts are properly presented before the Court. Hearsay evidence, if the proceedings are genuinely interlocutory in nature, may be admissible if the source is adduced, but generally if readily available failure to put on proper evidence from the source will go to weight⁹⁴. The whole of the underlying transactional documents should have been obtained from the appropriate persons. There is an obvious need to avoid conclusions and to set forth the

⁹² Part 5.2 of the *Corporations Act 2001*

⁹³ *Kraft v Kupperwasser* (1991) 23 NSWLR 236; *Toben v Len Sadleir Productions Pty Ltd* (1993) 30 NSWLR 374

⁹⁴ *Evidence Act 1995* s. 75; *Supreme Court Rules* Part 36 Rule 4

underlying facts and explain the urgency. The affidavit should avoid matters of mere argument, unqualified statements, as well as irrelevant or scandalous matter. Preferably, the affidavit should be in chronological sequence with the indented conversations, in separate paragraphs, being complete and exhaustive, to minimise allegations of recent invention. The annexures or exhibits need to be fully paginated and the affidavit should be properly sworn (and never amend an affidavit after being sworn – re-swear the affidavit).

D. DAMAGES

46. Introduction

62. This is an area which is far too often left without careful and detailed analysis. There is a need to descend down into the detail of how each head of claim is to be sustained, and it is not sufficient to treat areas of damage as one for the accountants. The underlying assumption material will have to be properly proved from the relevant business records, and there is a need to descend into a detailed level of particularity, to understand precisely the nature of each head of loss sought to be made the subject of relief. Again consider where that loss has been so formulated and identified and how it is to be established. The days of cloak and dagger are gone and, accordingly, in this era of procedural fairness, the nature of each component of the damages claimed should be clear and accurate. If it is a liquidated claim or liquidated pursuant to a contractual provision the underlying basis for the specified amount should be quantified by reference to the actual entitlement. The method of calculation should be specified and clear, including the causal facts.
63. Both the kind of economic loss sustained and the time at which first sustained, are determined by considering, first the nature of the interest infringed, and secondly the nature of the interference to which that interest is subjected⁹⁵. Actual damage is to be distinguished from prospective loss and no loss is suffered until it is reasonably ascertainable that because of the burdens imposed

⁹⁵ Warley Australia Ltd v Western Australia (1992) 175 CLR 514 at 527

the plaintiff is worse off than if the transaction had not been entered into by the plaintiff.

64. The damages may involve settlement of other third party claims, which may require evidence from the legal advisers, and the reasoning that lead to the settlement, in determining whether the settlement was reasonable⁹⁶.
65. Although the general remedy of common law for tort is compensatory, including aggravated damages, exemplary damages are in nature punitive⁹⁷ as well as vindication and condemnation⁹⁸. Exemplary damages are available for tortious conduct, where not otherwise punished⁹⁹, but are not recoverable for breach of contract¹⁰⁰.
66. The assessment of damages for personal injuries, defamation and the ramifications of the Civil Liability Act 2002 or whether damages might be increased to compensate for tax payable¹⁰¹ are not covered in this paper.

47. Monetary expression

67. The overarching principle in awarding compensatory damages is that the injured party should receive compensation in a sum which so far as money can do puts the party in the same position if the contract had been performed or the tort had not been committed¹⁰². The difficulty of expression in monetary terms of the actual loss or harm does not prevent estimation where precise evidence is not available. However actual loss or harm must still be proven, and evidence must

⁹⁶ Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 193 CLR 603

⁹⁷ Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 149

⁹⁸ Lamb v Cotogno (1987) 164 CLR 1 at 9-10

⁹⁹ Gray v Motor Accident Commission (1998) 196 CLR 1

¹⁰⁰ Butler v Fairclough (1917) 23 CLR 78 at 79; Whitfeld v De Lauret and Co Ltd (1920) 29 CLR 71 at 81

¹⁰¹ NSW Cancer Council v Sarfaty (1992) 28 NSWLR 68

¹⁰² Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1 at 12; Butler v Egg & Egg Pulp Marketing Board (1966) 114 CLR 185 at 191; Haines v Bendall (1991) 172 CLR 60 at 63

be adduced to permit reasonable estimation, by a rational method, in respect of that loss or harm. The method must be reasonably reliable in identification and quantification of the loss sustained. In substance it should be derived from the best evidence available and this is usually the primary source documents and primary books of account. The alleged loss must be shown to have been sustained as opposed to a speculative or arbitrary sum. Where the wrong has contributed to the difficulty of proof favourable inferences may more readily be drawn¹⁰³.

68. Nor should it be assumed that the date of assessment will always be the date of the wrong¹⁰⁴.
69. The damages may be expressed in a foreign currency if that most closely reflects the loss¹⁰⁵.
70. For breach of contract damages will be governed by the tests of remoteness being the two limbs in Hadley v Baxendale¹⁰⁶. The principle was also formulated by Lord Reid in C Czarnikow Ltd v Koufos (The SS Heron II)¹⁰⁷ and adopted in Baltic Shipping Co v Dillon (The Ship Mikhail Lermontov)¹⁰⁸:

"The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

¹⁰³ Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46 at 59; L J P Investments Pty Ltd v Howard China Investments Pty Ltd (1990) 24 NSWLR 499 at 508

¹⁰⁴ Smith and Newcourt Securities v Citibank (1997) AC254 at 264

¹⁰⁵ Mitsui OSK Lines Ltd v The Mineral Transporter (1983) 2 NSWLR 564

¹⁰⁶ (1854) 9 Exch 341 at 354

¹⁰⁷ [1969] 1 AC 350 at 385

¹⁰⁸ (1993) 176 CLR 344 at 368 See also Wenhan v Ella (1972) 127 CLR 454 at 471-472; Burns v MAN Automotive (Aust) Pty Ltd (1986) 161 CLR 653 at 667

48. Revenue loss

71. It is sometimes useful to distinguish between losses of a capital account kind, as against losses of a revenue account kind, although the distinction is really only for the purpose of explanation and comprehension. In a claim for lost profits, it will be necessary to demonstrate that but for having been deprived of or for having to deploy labour and resources, there is a reasonable likelihood that the profit claimed would have been available. This requires identification of the particular profit making activity, in which the labour and resources would have been deployed, so as to reveal the loss of profits that reasonably could be expected to have been derived. It must be shown that there would otherwise have been a capacity to derive the alleged profit.
72. Alternatively, damages may be required to place the injured party in the position it would have been, but for the breach of contract may be for wasted expedience.¹⁰⁹

49. Non-profit making property

73. Where the alleged loss relates to non-profit earning property, there is still an entitlement to damages, which may as a matter of convenience, be calculated by different methods, such as rental value of property concerned, cost of maintenance and depreciation of property for the period in question, or interest upon capital value.
74. The entitlement to damages for loss of use of a non-profit earning chattel, through tortious conduct, was recognised by Lord Halsbury LC in the “The Mediana¹¹⁰”:

“Whereby the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all that is of itself a ground for damages.”

¹⁰⁹ Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64 at 85.

¹¹⁰ [1900] AC 113 at 116

50. Opportunity loss

75. Damages may also be recoverable for loss sustained as a result of lost opportunity.¹¹¹ The court will assess whether the chance said to be lost has a value upon the probabilities or possibilities¹¹².

51. Value loss

76. The value of property is determined by reference to the hypothetical willing but not anxious purchaser and not unwilling or anxious vendor¹¹³. This test assumes an efficient market¹¹⁴ in which both seller and buyer have access to all current information that affects the property, including factors like risks of market rise and fall, location, proximity if relevant of other conveniences inconveniences, surrounding features, character and quality. Generally a decline in market value will not sound in damages for the difference in true value of the property and a lesser price because of market decline. This is because of the theory that the market value has already factored in and reflects the likelihood of foreseeable future risks¹¹⁵. The damages for a negligent valuation will generally be the difference between the price paid for the property and the price that would have been paid on the basis of the correct market value, together with such expenses and losses that naturally flow from the breach, or were reasonably in the contemplation of the parties. In the lending context the difference may be between what was lent and what would have been lent on the correct market value, and any expenses or losses that meet the above criteria¹¹⁶. It may be that but for the negligent valuation no specific

¹¹¹ Hungerfords v Walker (1989) 171 CLR 125 at 143-144; Sellars v Adelaide Petroleum NL (1994) 179 CLR 332 at 355; I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; Dart Industries Inc v Decor Corporation Pty Ltd (1993) 179 CLR 101 at 114; 123-125; Apand Pty Ltd v Kettle Chip Co Pty Ltd (No 2) (1999) 162 ALR 505 at 520

¹¹² Sellars v Adelaide Petroleum NL (1994) 179 CLR 332

¹¹³ Spencer v The Commonwealth (1907) 5 CLR 418 at 441

¹¹⁴ An economic theory itself the subject of scope for debate. If there is no market see The Arpad (1934) P 189; Furness v Adrium (1996) 1 VR 668; El Greco (Australia) Pty Ltd v MSC (2004) FCAFC 202

¹¹⁵ Kenny & Good Pty Ltd v MGICA (1992) Ltd (1999) 199 CLR 413 at 435-436,449

¹¹⁶ High Court is reserved on HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd heard 19/5/04

transaction would have been entered into, such as mortgage insurance, so that with a correct valuation no loss would be suffered. Where misrepresentation at common law has resulted in a loss relating to the acquisition of property, the damages are generally assessed by reference to the difference between the price paid and the market value at the date of the relevant agreement¹¹⁷. A flexible approach is required as damages may also be allowed for subsequent losses where for example it was reasonable to continue to carry on a business¹¹⁸.

52. Expenditure / Repairs

77. Proof of expenditure should descend into each outgoing when the liability was incurred, to whom, for what, the underlying contractual documents/invoice, the amount, where applicable the conversion rate, the date paid and payment record. If referable to physical damage, such as repairs, lay evidence may be required to identify the physical state prior to the relevant alleged cause and after the alleged cause, as well as opinion evidence as to that causal link.
78. The nature of the work carried out may need to be proved, including the qualifications of the personnel, the persons in attendance and hours from time sheets, the standard or quality control applied to the work undertaken, the reasonableness of the hours involved, the method of charging, and the reasonableness of the hourly rates applied. So too, proof may be required of the materials used, the standard or quality of the materials, method of quantification, reasonableness of quantity and reasonableness of charges applied. The repute of the particular repairer may be of relevance as will be earlier quotations. The reasonableness of incurring the expenditure and the reasonableness of the quantum, may need to be addressed, as well as the decision maker in respect of the expenditure, including if relevant steps to mitigate the loss. If market value is in issue, appropriate assumptions as to the property, relevant dates, location and market may be required to support expert opinion, and in turn the foundation for that opinion from the relevant comparable market data.

¹¹⁷ Potts v Miller (1940) 64 CLR 282 at 297-299; Toteff v Antonas (1952) 87 CLR 647 at 650-651

¹¹⁸ Gould v Vaggelas (1985) 157 CLR 215 at 220-223; Kizbeau Pty Ltd v W G & B Pty Ltd (1995) 184 CLR 281 at 290-291

53. Contributory Negligence and Contribution

79. The damages may be reduced for contributory negligence where a tortious or contractual duty of care arises.¹¹⁹ There may be a right to seek contribution¹²⁰ or indemnity.¹²¹

54. Gratuitous Services and Property

80. Damages may be recovered for the market cost or commercial rate of services albeit gratuitous¹²² or substitute property from a third party¹²³.

55. Mitigation

81. The duty to mitigate¹²⁴ the loss differs from assertions of bringing to account other financial benefits, which will turn on their character and purpose.¹²⁵

56. Separate determination

82. There may be grounds to defer assessment of damages or an entitlement to an inquiry into damages. The tactical considerations of these avenues will need to be weighed. However, for the reasons discussed above, detailed consideration should still be given to this type of ultimate relief and the consequences of hiving off for separate determination.

10 August 2004

A W STREET SC

¹¹⁹ *Law Reform (Miscellaneous Provisions) Act 1965*; Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492; cf Astley v Austrust Ltd (1999) 197 CLR 1

¹²⁰ Austral Pacific Group Ltd v Airservices Australia (2000) 203 CLR 136

¹²¹ *Law Reform (Miscellaneous Provisions) Act 1946*.

¹²² Van Gervan v Fenton (1992) 175 CLR 327 at 333-334.

¹²³ Anthanasopoulos v Moseley (2001) 52 NSWLR 262

¹²⁴ Wenkart v Pitman (19989) 46 NSWLR 502

¹²⁵ National Insurance Co. of NZ Ltd v Espagne (1961) 105 CLR 569 at 588-589; Redding v Lee (1983) 151 CLR 117 at 137.