Assessment of damages for property damage

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The evidence was that the flooding has only affected approximately 10% of the floor area of the store. However, instead of having work carried out to bring the premises back to its condition as before the water damage, the respondent closed the business for 29 working days for a complete internal refurbishment – at a cost substantially more than simple rectification.

On appeal it was argued that the trial judge had assessed the damages incorrectly as by undertaking a complete refurbishment had the effect that the respondent did not suffer any loss as a consequence of the negligence in relation to the fit-out. It was asserted that the claim for damages was in the circumstances a claim for betterment. It was also argued that the damages should not include a component for GST.

Campbell JA gave reasons, with Macfarlan JA and Sackville AJA agreeing.

OVERCOMPENSATION?

Before the Court of Appeal the appellant criticised the trial judge's assessment because the damages she had allowed were "theoretical", the argument being that they were damages for work that never was carried out and for loss of trade for the completion of that work: at [32].

The court was referred to cases in which damages were claimed for breach of contract where the defendant (builder or architect) had carried out defective work. The appellant argued that these authorities established that if rectification of the property could not occur, no damages could be awarded on the basis that rectification work could be carried out. Campbell JA examined a number of these cases.[1] His Honour then noted that all of these cases were considering rectification work not being carried out because the plaintiff was "unlikely to rectify the defects, in the sense that the property remained in the defective condition": at [88]. In the case before the court, this was not the scenario as the respondent had rectified the damaged property, just not to the same condition as prior to the flood. The flood caused the respondent to suffer damage and it was reasonable for the respondent to rectify the damage and claim the damages: at [88].

Campbell JA, noting that the cases examined were contractual cases, discussed cases which measured damage for tortious damage to property.[2] His Honour concluded:

> What counts as making good the damage, for the purpose of assessing damages for torts, needs to be understood bearing in mind what the purpose is for which one is asking what counts as "making good". That purpose is ascertaining what the work is that is necessary to undo the

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[1] *Bellgrove v Eldridge* (1954) 90 CLR 613; *Director of War Service Homes v Harris* [1968] Qd R 275; *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28; *Central Coast Leagues Club Ltd v Gosford City Council* (unreported, NSWSC, Giles CJ Comm D, 9 June 1998, BC9802257*); Hyder Consulting (Aust) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313; *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462; *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253; *UI International Pty Ltd v Interworks Architects Pty Ltd* [2007] QCA 402; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

[2] *Murphy v Brown* (1985) 1 NSWLR 131; *South Parklands Hockey & Tennis Centre Inc v Brown Falconer Group Pty Ltd* (2004) 88 SASR 65; *Kirkby v Coote* [2006] QCA 61; *Lodge Holes Colliery Co Ltd v Wednesbury Corporation* [1908] AC 323; *Minter v Eacott* (1952) 69 WN (NSW) 93; *Evans v Balog* [1976] 1 NSWLR 36; *Hollebone v Midhurst and Fernhurst Builders Ltd* [1968] 1 Lloyd's Rep 38.

> consequences of the tort having been committed. The only interest of the defendant that bears upon the question of whether rectification work is reasonable is a financial one, sometimes expressed in the principle that a plaintiff must mitigate his damage.
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> The cost of making good is merely one way of putting a dollar figure on the damage that the plaintiff has suffered, for the purpose of carrying through the compensatory principle. There are circumstances, of which the present is one, when the fact that money has not been spent on the precise items that would need to be acquired to restore property to its pre-damage condition does not prevent the cost of acquiring those items being the appropriate way of giving effect to the compensatory principle. Similarly, in circumstances where profits have been lost as a result of the shop being closed during the time it took to undertake the (loose sense) rectification that was carried out, and a lesser time would have involved in effecting a (precise sense) rectification, the appropriate quantum for loss of profits is the profits that would have been lost during the lesser of those times: at [105]-[106].

The appellant argues that the refurbishment of the shop was not an act of making good the damage but rather separate and distinct action, derived from the respondent's pre-existing intention to refurbish the ship premises. Campbell JA made an analogy with an injured plaintiff who voluntarily seeks medical treatment which is completely successful, stating that "in that situation the plaintiff can still recover damages to the extent that they have been caused by the tort in the period up to the effecting of the successful cure, including the costs of obtaining that cure" at [109].

The fact that the respondent took the opportunity to refurbish the shop did not mean that the premises had not been damaged by the flood water. The flood water was one of the causes of the refurbishment and Campbell JA stated:

> To the extent to which there were contributing causes besides the water damage, it was the judge's task to assess the compensation that would make good those consequences properly attributable to the flooding. This she did by allowing the amount that a precise rectification of the water damage alone would have cost, and leaving the respondent to bear any amount it had spent in excess of that: at [111].

The appellant also alleged that the trial judge had erred by not taking into account the benefits gained by the respondent from the refurbishment. The compensatory principle requires an account to be taken if an award of damages confers a benefit.[3] There was no evidence that the respondent's business was more profitable due to the refurbishment "or in any other way more valuable than it would have been if the damage had never occurred: at [127]. Unlike the case of *Hoad v Scone Motors Pty Ltd*, the respondent's business was not about to close so that the refurbishment would add sale value, thereby conferring a benefit.

Campbell JA upheld the trial judge's assessment, stating:

> to the extent that the installation of the new fitout was more than the respondent needed to do to make good the damage caused by the flooding, it cannot recover the full cost of the fitout, but it has not claimed the full cost of the fitout, and the judge has endeavoured to find the means of measuring the extent to which the respondent has suffered damage caused only by the flooding: at [127].

GST?

The trial judge had included in her assessment of damages an amount to reflect GST. The appellant argued that there should not be an allowance for GST as at all times the respondent was a trading corporation registered for GST purposes. Therefore any payment of GST could be claimed back by the respondent as there would be no permanent loss.

Campbell JA went through in detail the relevant provisions of the A New Tax System (Goods and Services Tax) Act 1999 (Cth) and held that any goods or services paid for the purpose of improving the respondent's shop's appearance or usability was a "creditable purpose" as under s 11-5 of the Act, allowing the GST to be claimed back: at [140]-[145]. Therefore even though the

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[3] *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447; *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co Ltd* [1912] AC 673; *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88.

respondent may pay GST on the refurbishment, it was entitled to recover that amount and therefore, "the amount of GST component of any payments it made for making good the premises would not ultimately be a loss that it suffered": at [147]. As such, GST should not have been included in the assessment of damages by the trial judge.

Amanda Stickley