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FORESEEABILITY OF PURE ECONOMIC LOSS AND CAUSATION

INTRODUCTION

In *Bonny Glen Pty Ltd v Country Energy* [2009] NSWCA 26 (24 February 2009) the New South Wales Court of Appeal held that the pure economic loss suffered by the appellant was recoverable. However, rather than arguments as to whether the appellant was vulnerable and a member of an ascertainable class, whether the respondent had knowledge of the risk to the appellant and was in a position of control and considerations as to indeterminate liability as in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, the arguments raised related to the foreseeability of the loss and causation.

FACTS

The facts, briefly, were that on 10 November 2002 electricity wires owned by the respondent came into contact with pine trees owned by Parkwood Orchard Pty Ltd. The trees were destroyed and the fire also caused damage to the neighbouring property that was owned by the appellant – 36 apple trees were destroyed and 91 apples trees were damaged. The 161 pine trees of Parkwood Orchard that were destroyed had also operated as a windbreak to the appellant's apple orchard. In August 2006 the appellant decided to cut down the apple trees that had not been destroyed by the fire as the orchard needed to be sprayed with poisonous sprays and without the windbreak the spray could drift onto the neighbouring property, opening the appellant to possible liability for the commission of an offence and prosecution. The appellant claimed in negligence for the property damage and the economic loss arising from the decision to cut down the apple trees in 2006.

At first instance the appellant was successful in its claim for damages for the property damage as the respondent owed a duty of care and had breached its duty. However, the trial judge held that the respondent was not liable for the economic loss that the appellant claimed.

THE ARGUMENTS

On appeal the appellant argued that the trial judge's decision in respect of the claim for economic loss was incorrect as she had failed to address the correct issues, including whether the economic loss was caused by the respondent's breach and that this depended upon whether the destruction of the trees by the appellant was reasonable and such a loss foreseeable by the respondent in the circumstances (at [29]). The respondent argued that as the claim was for pure economic loss, regard had to be had to policy or value judgements as well as commonsense (at [35]). Therefore the question was whether the breach of duty caused the loss or whether the voluntary act of the appellant in destroying the trees broke the chain of causation (at [36]). As to whether the appellant had acted reasonably in cutting down the trees, this was not to be assessed 'at large' but as between the appellant and the respondent – was it reasonable in the circumstances of the case (at [37]).

THE JUDGMENT

Hodgson JA delivered the judgment, with Ipp and MacFarlan JJA agreeing.

There was no appeal as to the decision that the respondent owed a duty of care to the appellant. The issue on appeal was whether the respondent's breach of duty was causative of the economic loss suffered by the appellant. At [42] Hodgson JA noted:

... it seems to me that where there is a breach of a duty to exercise reasonable skill and care not to cause property damage, and as a result of that breach of duty economic loss is caused without property damage actually occurring, that loss may be recoverable. Suppose for an example the defendant's negligence causes a fire which would cause damage to the plaintiff's ship which is in the process of being loaded at a wharf; and the ship is moved thereby preventing the property damage but causing economic loss through the move and the delay to the loading of the ship. Even if the duty of care in such a case were considered to be limited to a duty of care not to cause property damage, it seems to me at least arguable that pure economic loss caused in that way would be recoverable.

Claims in negligence for pure economic loss are not easy to establish as court are influenced by policy considerations and the relationships between all of the parties involved. However, Hodgson JA stated at [44] that the approach to causation in claims for pure economic loss do not require 'any significant change in principle' (see also [45]). The issue of causation requires a consideration of whether the respondent's breach of duty of care materially contributed to the appellant's loss (at [44]). In the case before the court, as the economic loss claimed arose from the appellant cutting down the trees because of the loss of the windbreak due to the respondent's negligence, causation depended upon not only the foreseeability of the economic loss but also whether the actions of the appellant were reasonable, 'with the question of reasonableness having regard both to the interests of [the appellant] and the interests of [the respondent]' (at [44]).

Hodgson JA held that 'but for' the respondent's breach, the appellant would not have suffered the economic loss claimed. His Honour held that this conclusion was supported by common sense. The windbreak that was destroyed by the negligence was 'plainly advantageous' to the appellant as it reduced problems associated with the spraying of poison as well as providing protection for the orchard (at [48]). Therefore, the loss of the windbreak would create problems for the appellant and result in damage.

In assessing whether the appellant's action of destroying its trees in 2006 because of the loss of the windbreak was reasonable, the interests of the appellant and the respondent had to be taken into account (at [48]). In light of the fact that the appellant could not use the poisonous sprays necessary for the apple trees until a windbreak was re-established, the risk of prosecution if they did spray and it drifted and the concern of the general community of the area, it was held that the conduct of the appellant was reasonable, having regard to both parties' interests (at [50]).

In respect of whether the economic loss was foreseeable, it was pointed out that the test is that the kind of damage must be foreseeable, not the 'precise manner in which that damage occurred' (at [52]). The respondent argued that as other orchards operated in the area without windbreaks, the economic loss claimed by the appellant was not foreseeable. Evidence of an employee of the respondent was that he knew of the advantage of the windbreak not only for the appellant but also the surrounding neighbours. Hodgson JA reasoned that due to the need to use poisonous spray and the community concern as to spray drift, the loss of the windbreak created the problems of managing any spray drift and the economic loss was foreseeable (at [51]).

It was held that the respondent was liable not only for the physical damage caused to its land but also the pure economic loss suffered from the cutting down of the trees that was considered reasonable in light of the loss of the windbreak.

The trial judge had calculated that the economic loss, should she be wrong in holding that the loss was not recoverable, to be \$753,396.72, based on an annual loss of \$78,844. The Court of Appeal held that the trial judge had erred in her assessment of the damages as no allowance had been made for vicissitudes which meant that the projected yearly figures relied upon for the assessment meant that it would be expected that the same level of profit would be achieved every year. Also, evidence of profit from the best part of the orchard was not the correct figure to use as it was over four times more than the average profit per hectare of the orchard. The court awarded \$292,400 for the economic loss and judgment was entered for \$381,985.65 in lieu of the lower court's decision of \$59,785.65 for the property damage only.

CONCLUSION

This case is interesting as even though it involves a claim for pure economic loss, the focus was not on whether a duty of care was owed in the circumstances, but whether the breach of duty caused the damage. Although it is not stated in terms of *novus actus*, the issue was whether the voluntary act of the appellant of cutting down the trees broke the chain of causation so as to relieve the respondent of liability for the economic loss arising from the act.