Territory Sheet Metal Pty Ltd & Others v Australia and New Zealand Banking Group Limited [2010] NTSC 03

PARTIES:	TERRITORY SHEET METAL PTY LTD (ACN 009 634 333) DAVID LENNOX SMITH EDWARD CHARLES DEAN SUSAN ELLEN DEAN NICOLE KERRIAN SMITH v AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	177 of 2000 (20019222)
DELIVERED:	22 January 2010
HEARING DATES:	23 – 24 November 2009
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

DAMAGES – PUBLICATION OF PRIMARY FINDINGS OF FACT AND LAW
Supplementary argument as to residual issues concerning damages – *Ex turpi causa non oritur actio* principle – nature and extent of potential application of such principle – effect of failure to plead that principle – whether, on the evidence, the Court should, nevertheless, apply such

principle absent any pleading of it in bar of the plaintiffs' claim – assessment of damages in light of primary findings – whether damages ought to include reimbursement of refinancing costs, fees and expenses paid to or through defendant – whether appropriate to make arithmetic adjustments to damages to allow for CPI movements and taxation aspects – whether pre-judgment interest should be allowed and, if so, at what rate and from what dates.

Briginshaw v Briginshaw (1938) 60 CLR 336, followed.

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; *Bennett v Bennett* [1952] 1 KB 249; *Benward Pty Ltd v Metal Deck Roofing Pty Ltd* [2001] NSWSC 1053; *Chettiar v Chettiar* [1962] AC 294; *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147; *Clunis v Camden & Islington Health Authority* [1998] QB 978; *Derry v Peek* (1889) 14 AC 337; *Harry Goudias Pty Ltd v Akakios* (2007) 97 SASR 93; *HK Frost Holdings Pty Ltd (in liq) v Darvall McCutcheon (a firm)* [1999] FCA 795; *Holman v Johnson* (1775) 1 Cowp 341; *Holdcroft v Market Garden Produce Pty Ltd [2001] 2 Qd R 381; Hunter Area Health Service v Presland* (2005) 63 NSWLR 22; *Jobst v Inglis* (1986) 41 SASR 399; *Kalls Enterprises Pty Ltd (in liq) v Baloglow (No 3)* [2007] NSWCA 298; *National Australia Bank Ltd v Nemur Varity Pty Ltd* (2002) 4 VR 252; *North-Western Salt Company Ltd v Electrolytic Alkali Company Ltd* [1914] AC 461; *Osborne v Kelly* [2001] SASC 260 (Unreported, South Australian Supreme Court, Perry J, 24 July 1992); *Scott v Brown, Doering McNab & Co* [1892] 2 QB 724; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146; *Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd* [2009] NTSC 31; *Trio Insulations Pty Ltd v Metal Deck Roofing Pty Ltd* [2002] NSWCA 294; *Wetherell v Jones* (1832) 3 B & Ad 221; *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, discussed.

Adamson v Jarvis (1827) 4 Bing 66; *Alucraft Pty Ltd (in liq) v Grocon Ltd* (Unreported, Victorian Supreme Court, Smith J, 13 May 1994); *Australian Telecommunications Commission v Parsons* (1985) 59 ALR 535; *Clarke v Foodland Stores Pty Ltd* [1993] 2 VR 382; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; *Coulton v Holcombe* (1986) 162 CLR 1; *Ductline Pty Ltd v Arcric Investments Pty Ltd* (1995) 32 IPR 419; *Fisher v Rural Adjustment & Finance Corporation of Western Australia* (1995) 57 FCR 1; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215; *Flamingo Park Pty Ltd v Dolly Dolly Creations Pty Ltd* (1986) 65 ALR 500; *Gill v Australian Wheat Board* [1980] 2 NSWLR 795; *Gold Coast City Council v Pioneer Concrete (QLD) Pty Ltd* (1998) 157 ALR 135; *Gordon v Brophy* (Unreported, South Australian Supreme Court, Cox J, 7 April 1989); *Hexiva Pty Ltd v Lederer* [2007] NSWSC 49; *Hinds v Uellendahl* (1992) 107 FLR

254; *Jacka v Horsten* (Unreported, South Australian Full Court, 3 July 1980); *Johnson v Perez* (1988) 166 CLR 351; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350; *Maio v Sacco (No 2)* [2009] NSWSC 742; *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657; *Milatos v Clayton Utz* [2007] NTSC 44; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; *Nelson v Nelson* (1998) 184 CLR 538; *Owners of Dredger Liesbosch v Owners of SS Edison* [1933] AC 449; *Rabelais Pty Ltd v Cameron* (1995) 95 ATC 4552; *Saunders v Edwards* [1987] 1 WLR 1116; *Sherwin v Commens* [2008] NTSC 45; *SVI Systems Pty Ltd v Best & Less Pty Ltd* (2001) 187 ALR 302; *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218; *Water Board v Moustakas* (1988) 180 CLR 491; *Wheeler v Page* (1982) 31 SASR 1, referred.

Criminal Code (NT) s 227(3); *Supreme Court Act 1979* (NT) ss 84 and 85; *Supreme Court Rules* (NT) O 13.

Echonong, "*Illegal Transactions*" 1998; Edelman and Cassidy, "*Interest Awards in Australia*" (2003); Jacobs, "*Commercial Damages*" (2008).

REPRESENTATION:

Counsel:

Plaintiff:	R Sallis
Defendant:	A Wyvill SC with D McConnel

Solicitors:

Plaintiff:	Woodcock Solicitors
Defendant:	Cridlands MB

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Territory Sheet Metal Pty Ltd & Others v Australia and New Zealand Banking Group Ltd [2010] NTSC 03
No. 177 of 2000 (20019222)

BETWEEN:

TERRITORY SHEET METAL PTY LTD (ACN 009 634 333)
First Plaintiff
SMITH, DAVID LENNOX
Third Plaintiff
DEAN, EDWARD CHARLES
Fourth Plaintiff
DEAN, SUSAN ELLEN
Fifth Plaintiff
SMITH, NICOLE KERRIAN
Sixth Plaintiff

AND:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)
Defendant

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 22 January 2010)

Introduction

[1] On 9 July 2009 I published my primary findings of fact and law[1] in these proceedings, which were then adjourned to enable the parties to prepare

[1] *Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd* [2009] NTSC 31 ("my primary findings").

submissions as to various resultant issues related to the question of quantum of damages and thus the terms in which any judgment in this case ought to be entered.

[2] I have now had the benefit of both written and oral submissions concerning the outstanding issues. At what might fairly be described as the 11th hour, after initial written submissions had been exchanged between the parties and within a very brief time prior to the listing of the matter for final oral submissions by counsel in amplification of them, the defendant sought to raise a fundamental issue not previously agitated at trial.

[3] The present reasons address both that application and also reflect my final consideration of the other submissions made by the parties.

[4] I propose, in the course of these reasons, to adopt the same expressions as were defined in my primary findings.

Some relevant background history

[5] To say the least, these proceedings have had a lengthy and tortuous history.

[6] As appears from my primary findings, they relate to factual events that commenced as long ago as early 1997. The present action was instituted on 1 December 2000.

[7] The factual and legal issues were involved and extensive – a situation that is readily revealed by my primary findings. The plaintiffs' claims were based on no less than five separate causes of action.

[8] The proceedings were hard fought at all stages and it proved well nigh impossible to manage the case to a timely trial. That situation was further complicated by the fact that the commercial failure of TSM had, in practical terms, brought the plaintiffs to their financial knees.

[9] Interlocutory processes were both extensive and protracted. The pleadings were the subject of major amendments on a number of occasions. So it was, by way of illustration, that, by trial, I was, *inter alia*, called upon to consider what was titled the defendant's "Further further amended defence" to a second amended statement of claim. That statement of claim ran to 65 pages.

[10] Despite the best efforts of the Court to progress the action, it was not ready for trial until June 2008 and the trial itself was not, for various reasons, concluded until 12 February 2009. The trial occupied a very substantial number of hearing days with a transcript ultimately running to almost 3000 pages and a requirement to consider documentary exhibits encompassing thousands of pages in total.

[11] My primary findings reflected such a situation. They extended to some 517 pages.

[12] My primary findings having been published, it only remained for the parties to make submissions to me as to certain aspects related to the issue of the precise formulation of an ultimate judgment for damages reflecting those findings.

[13] Two factual issues identified at the virtual outset of the trial and which were fully canvassed as the trial proceeded were, first, the extent to which any of the plaintiffs had, in the re-financing proposal presented by TSM to the witness Bradley, incorrectly stated the relevant asset and liability situations and, second, the extent to which the defendant had, at material times, been on notice as to or was aware of those misstatements and/or had investigated or relied on them.

[14] My primary findings specifically canvassed such issues.

[15] As arranged with the parties, initial written submissions focusing on the residual topics remaining for consideration following publication of my primary findings were exchanged and filed. As I have indicated, the proceedings were then listed for oral presentations in relation to those submissions, commencing on 23 November 2009.

[16] On about 6 November 2009, present senior counsel for the defendant (who had, by then, replaced senior counsel at trial consequent upon her elevation to the bench) notified me in writing that, when the matter came on for final oral submissions, he would seek to present an argument to the effect that, by virtue of the operation of the principle *ex turpi causa non oritur actio* (to which I shall hereafter simply refer as the *ex turpi causa* principle), no damages ought to be awarded to TSM and that the plaintiffs' action should, accordingly, be dismissed.

[17] The defendant's submission in that regard, when presented, in fact encompassed a specific application to amend para [9] of the counterclaim by adding the plea:

> "In the premises, the First Plaintiff's claim to enforce an agreement for finance between itself and the Defendant is precluded by the principle *ex turpi causa non oritur actio*."

The *ex turpi causa* principle

[18] The formulation of this principle is to be extracted from several relatively early English authorities.

[19] It seems generally accepted that its genesis was the judgment of Lord Mansfield in *Holman v Johnson*.[2] That case concerned a situation in which a plaintiff sold and delivered a quantity of tea to the defendant in France, knowing that it was intended to be smuggled by the latter into England. The plaintiff was not, himself, involved in the smuggling scheme, but was said by the defendant to have been complicit in it in the sense that he deliberately agreed to make the sale for the express purpose of the tea being smuggled.

[20] An action having been initiated against him in England to recover the price of the tea, the defendant sought to defend the claim on the basis that the contract for sale had been founded upon an ultimate intention to make an

[2] (1775) 1 Cowp 341.

illicit use of the goods sold, which intention was with the privity and knowledge of the plaintiff.

[21] In the event, the plaintiff's claim was upheld on the basis that the relevant contract had been concluded in France and that it was a routine commercial contract of sale which involved no breach of the law of that country in consummating it.

[22] However, in the course of his judgment,[3] his Lordship commented that the principle of public policy was that no Court would lend its aid to a man who founded his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of the country "there the Court says he has no right to be assisted".

[23] The published authorities[4] indicate that the word "illegal", as used by Lord Mansfield, was expressed by him in the sense of conduct that is prohibited by the law, ie conduct that is in violation of the general law (whether civil or criminal) or a relevant express statutory prohibition, or which is otherwise illegal as contrary to public policy.

[24] Not all transactions fit in to a single clear cut category as either unenforceable, void or illegal. It has been said[5] that there are "grey areas", of which covenants in unreasonable restraint of trade constitute an example.

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[3] *Holman v Johnson* (1775) 1 Cowp 341 at 343.
[4] As to which see the valuable discussion in *Nelson v Nelson* (1998) 184 CLR 538 at 550-559.
[5] Echonong, "*Illegal Transactions*" 1998 at 2.

To employ the words of Denning LJ (as he then was) in *Bennett v Bennett*[6] "[such] covenants offend public policy … [t]hey are not 'illegal' in the sense that a contract to do a prohibited or immoral act is illegal."

[25] As readily emerges from *Derry v Peek*,[7] it is important to draw a clear distinction between mere misrepresentation of material fact that may found rescission of a contract, on the one hand, and fraud – which necessarily involves proof of the making of a false representation knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

[26] That case, *inter alia*, gave rise to the proposition that a false statement, made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud, giving rise to an action of deceit.

[27] In the case of *Scott v Brown, Doering McNab & Co*[8] Lindley LJ commented that:

> "no Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is, himself, implicated in the illegality. It matters not whether the defendant has pleaded the illegality or not. If the evidence adduced

[6] [1952] 1 KB 249 at 260.
[7] (1889) 14 AC 337.
[8] [1892] 2 QB 724 ("*Scott*").

by the plaintiff proves the illegality, the Court ought not to assist him."[9]

[28] This dictum reflected earlier dicta such as that of Lord Tenterden CJ in *Wetherell v Jones*,[10] who held that where a contract which a plaintiff seeks to enforce is, expressly or by implication, forbidden by law, no Court will lend its assistance to give it effect.

[29] The case of *Chettiar v Chettiar*[11] concerned a claim by a father against his son for a re-transfer of land that had been placed in the son's name to achieve an illegal purpose. The Privy Council, in extension of the concept above referred to, held that the claim could not be entertained, as "in the present case, the father has, of necessity, to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved".[12] That purpose had been to achieve a deliberate circumvention of governmental rubber production control regulations and the plaintiff was seeking to directly reap the benefits of his own illegal activity.

[30] In the Australian context the *ex turpi causa* rule was articulated by Mason J as being that "the court will not enforce [a] contract at the suit of a party who has entered into [the] contract with the object of committing an illegal act."[13]

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[9] *Scott* [1892] 2 QB 724 at 728.
[10] (1832) 3 B & Ad 221 ("*Wetherell*").
[11] [1962] AC 294 ("*Chettiar*").
[12] *Chettiar* [1962] AC 294 at 303.
[13] *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 ("*Yango*") at 427.

[31] In the course of his judgment in *Yango*,[14] Gibbs ACJ noted that, in *Wetherell*, Lord Tenterden CJ had expressly made the point that whilst the Court will not lend its assistance to give effect to an illegal contract, nevertheless, where the situation is such that the consideration for a contract and the matter to be performed pursuant to it are both legal, a plaintiff has never been precluded from recovering by an infringement of the law, not contemplated by the contract itself, in the performance of something to be done on his part.

[32] *Wetherell* arose from a situation in which a vendor had sold alcoholic spirits without first procuring an excise permit specifying their strength. The Court held that, although the vendor's conduct in selling the spirits without a permit was a violation of the law, it did not deprive him of the right to sue upon a contract which was, in itself, perfectly legal – there having been no agreement, express or implied, in that contract that the law should be violated in the manner in which it was carried into effect.

[33] In *Yango*, Mason J made reference to the case of *Cleaver v Mutual Reserve Fund Life Association*,[15] in which Fry LJ was reported as saying that no system of jurisprudence can, with reason, include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person.

[14] *Yango* (1978) 139 CLR 410 at 418.
[15] (1892) 1 QB 147 ("*Cleaver*") at 156.

[34] In the same case, Lord Esher MR, having accepted that, if the performance of the contract would be contrary to public policy, that performance cannot be enforced, went on to make a further important point. He was of the view that:

> "when people vouch that rule to excuse themselves from the performance of the contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule [ie the *ex turpi causa* rule] ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires".[16]

[35] This was an aspect also identified by Mason J in *Yango*.[17] He made the point that the application of the relevant principle often involves a conflict between two competing common law policies. That conflict is between the principle that, on the one hand, no Court ought to assist a criminal to derive benefit from his crime and, on the other, the principle that contracts deliberately undertaken by persons not under disability ought to be enforced.

[36] In *Yango* it was argued that, because the plaintiff had lent money in circumstances in which it was unlawfully conducting a banking operation contrary to regulatory legislation, that money was irrecoverable.

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[16] (1892) 1 QB 147 at 151.
[17] *Yango* (1978) 139 CLR 410 at 428.

[37] Mason J expressed the view that to uphold such an argument would be to provide an inappropriate windfall to the borrower who had received the full benefit of the relevant transaction. He emphasised that the main considerations from which the *ex turpi causa* principle arose could be seen in the reluctance of the Courts to be instrumental in offering an inducement to crime or removing a restraint to crime.

[38] In the same case Gibbs ACJ took, as his commencement point, the fact that it could not be said that the relevant contract itself was performed for any illegal purpose. There was no suggestion that the money was borrowed for an illegal purpose and the fact that the contract was made in the course of the unlawful banking business did not mean that the contract was made in order that the lawful purpose of carrying on a banking business without authority could be achieved or carried out.

[39] Once it was held that neither the making nor the performance of the contract was unlawful, the fact that the contract was made in the course of the conduct of an unlawful business provided no ground for denying relief to the plaintiff. The illegality was something merely casual or adventitious.

[40] It is to be noted that this was a general process of reasoning that attracted approval in the later decision of the High Court in *Fitzgerald v F J Leonhardt Pty Ltd*.[18]

[18] (1997) 189 CLR 215.

[41] It is convenient to move on from there to a consideration of the judgment of Spigelman CJ in *Hunter Area Health Service v Presland.*[19] In that case the learned Chief Justice held that the mere fact of the existence of relevant unlawful conduct is not finally determinative. It does not *necessarily* lead to a denial of remedy at law. The weight to be given to any unlawful conduct of a plaintiff depends on a range of considerations.

[42] These include:

(1) The closeness of the connection between the unlawful conduct and the subject matter of the claim – whether the plaintiff's claim arises *ex turpi causa*, or whether it is merely incidental to a genuine wrong suffered.[20] The facts giving rise to the claim must be inextricably linked with relevant criminal activity;[21]

(2) The criminal conduct must be sufficiently serious to merit the application of the principle. The plaintiff's degree of moral culpability is of significance;

(3) The impugned conduct must be wilful and culpable and the *ex turpi causa* rule is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act;[22] and

[19] (2005) 63 NSWLR 22 ("*Presland*").
[20] Cf *Saunders v Edwards* [1987] 1 WLR 1116 at 1134.
[21] *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218 at 236 [70].
[22] *Adamson v Jarvis* (1827) 4 Bing 66 at 73.

(4) As was said by the Court of Appeal in *Clunis v Camden & Islington Health Authority*[23] –

"public policy only requires the Court to deny its assistance to plaintiffs seeking to enforce a course of action if he was implicated in the illegality and, in putting forward his case, he seeks to rely upon the illegal acts".

[43] It is to be noted that *Presland* arose from a situation in which a plaintiff had been acquitted of murdering his brother's fiancée on the ground that he had been in a psychotic state at the time of the killing. The day before, he had been taken to a psychiatric hospital by police following an episode of bizarre and extremely violent behaviour. He was released after being interviewed by the psychiatric registrar on duty. He sued the local area health service and the registrar for negligently discharging him and for damages for the harm caused to himself while incarcerated prior to his acquittal.

[44] Spigelman CJ concluded his analysis of the relevant legal principles by making the point that the significance of moral culpability in determining the weight to be given to unlawful conduct is clearly established on the authorities. Where, as in *Presland*, a person has been held not to be criminally responsible for his or her actions on the ground of insanity, the

[23] [1998] QB 978 at 987.

common law ought not to deny that person the right to a remedy as a plaintiff.

[45] The key point that he sought to make was that, in such a context, the unlawfulness of the conduct was not entitled to weight in a multifactorial analysis.

[46] It only remains necessary to refer to the decision of the Full Court in *Harry Goudias Pty Ltd v Akakios*.[24]

[47] That case involved an allegation that the plaintiff had entered into a conspiracy with others to defraud the revenue – in that certain loan agreements were entered into in pursuance of a scheme said to have been designed to benefit the plaintiff with interest that would not be declared as income to the ATO.

[48] Whilst not denying the possibility of cases in which relevant illegality might come to the notice of the Court absent pleadings identifying the issue, the Full Court made the points that, where a defendant sought to rely on the fraudulent and dishonest conduct on the part of a plaintiff, it was incumbent on them both to clearly and unequivocally plead allegations of such conduct, with very specific particulars of the conduct sought to be relied on, and also

[24] (2007) 97 SASR 93 ("*Goudias*").

to prove the alleged conduct to a standard that conformed with the reasoning of the High Court in *Briginshaw v Briginshaw*.[25]

[49] The corollary of that reasoning is, of course, that if the Court is to take cognisance of illegality absent formal pleadings raising the issue, it may only properly do so if the evidence before it plainly establishes a relevant illegality to the same standard of proof.

[50] Finally, it is to be noted that in *Goudias* the Full Court, relevantly, confirmed two other important points.

[51] First, it considered that the Court should not refuse to enforce contractual rights arising under a contract merely because the contract is associated with or is in the furtherance of an illegal purpose where that contract is not made in breach of a statutory prohibition upon its formation or upon the doing of a particular act essential to its performance or otherwise making unlawful the manner in which the contract is performed.

[52] Second, it pointed out that the nature and seriousness of any illegality and the extent to which it was wholly incidental or peripheral to a contract were important considerations.

[53] As this is I note the citation by Gray J with approval in *Goudias*[26] of the dictum of Thomas JA in *Holdcroft v Market Garden Produce Proprietary*

[25] (1938) 60 CLR 336 ("*Briginshaw*"). See also *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.
[26] Ibid at [51]

Limited[27] to the effect that, in determining whether public policy requires the court to refuse to enforce an agreement, it will take into account many factors. These may include, where appropriate, the degree to which each party is involved in intended illegality, the expected level of benefit of each, the seriousness of the illegality, the consequences to other citizens or institutions, public morality, whether the Court can bring about a just result without undermining respect for the law, and many others.

[54] That reasoning is, of course, in conformity with the multi-factorial approach espoused by Spigelman CJ in *Presland*.

The propounded application of the principle in this case

[55] I have dwelt on the relevant authorities at some length, because they serve to illustrate that the *ex turpi causa* rule is strictly confined in its practical application.

[56] What the Court sets its face against is, relevantly, being party to the giving effect to a contract, the express object or proposed execution of which is unlawful or intended to achieve an unlawful purpose, or alternatively to the aiding of a plaintiff in prosecuting a claim that is specifically founded upon that person's illegal conduct and is, itself, designed to achieve or fulfil an illegal purpose – ie where a plaintiff seeks to directly and necessarily rely on his illegal conduct in putting forward his case.

[27] [2001] 2 Qd R 381

[57] In the instant case, the defendant seeks to advance its submissions based on the *ex turpi causa* principle on the footing that the plaintiffs DLS and ECD, as the directors of TSM, knowingly made false representations to the defendant to induce it to enter into the finance agreement. It goes so far as to seek to assert that TSM's conduct, in the circumstances, amounted to the offence of obtaining credit by deception, contrary to s 227(3) of the *Criminal Code*.

[58] It is sought to be asserted that, specifically, the re-financing proposal set out, falsely, to portray the existence of a comfortable excess of assets over liabilities on the part of TSM, LTD and their directors, viewed as a single group.

[59] The defendant seeks to rely on the facts that, to achieve that result, the refinancing proposal did not disclose that:

(1) LTD had borrowings of $800 000 from NPG, on which it was paying interest at the rate of 33% per annum, which borrowings were secured by a fixed and floating charge over the assets of LTD (including a property which TSM was offering by way of unencumbered first mortgage security); and

(2) TSM owed substantial sums to the ATO which obligated it to pay $1000 per week in reduction of long-standing unpaid group tax liabilities.

[60] It further relies, *inter alia*, on my primary finding that had the defendant known of those matters, it would not have entered into,[28] or would probably have withdrawn from,[29] the finance agreement.

[61] Against that background, the essential arguments that the defendant seeks to propound are that:

- TSM is, in the circumstances, seeking to claim on a "breach of covenant which [it] was induced to give by TSM's fraud";
- the fact that the ultimate breach arose from the subsequent criminal activity of Godwin does not avoid a conclusion that the entry into the finance agreement giving rise to the obligation now sought to be enforced would not have occurred but for the fraud; and
- the conduct of TSM constituted the offence under the *Criminal Code* previously referred to.

The proposed plea in bar of a damages award

[62] There can be no doubt that, in now seeking to plead a new fundamental issue of illegality based on both civil deceit and an alleged breach of the *Criminal Code*, the defendant is in clear breach of O 13 of the Northern Territory *Supreme Court Rules*. This is so despite the plea of deceit in para [9] of the counterclaim. Rule 13.07 expressly stipulates that a party shall, relevantly

[28] My primary findings [2009] NTSC 31 at [1709].
[29] My primary findings [2009] NTSC 31 at [1557].

in its defence, specifically plead a fact or matter which the party alleges makes the claim of the opposite party not maintainable.

[63] No such plea is contained in the defence. Whilst the defence does assert various misrepresentations of fact, these are merely pleaded as an answer to a claim by the plaintiffs to equitable relief.

[64] It is stating the obvious to say that the primary purpose of pleadings is to clearly identify the issues arising between the parties and to prevent surprise – absent which it is impossible to conduct fair and orderly litigation. Proper pleadings constitute an integral part of the overall case management process.

[65] The trial in this matter went forward on the basis of the finally amended pleadings and there was never any hint that the matter now sought to be ventilated (in the manner in which the defendant now seeks to propound it) was a live issue between the parties.

[66] No plea based on the *ex turpi causa* principle, as such, has ever previously been raised in the pleadings, notwithstanding the fact that relevant inaccuracies and omissions in the re-financing proposal constituted a very live factual issue from the outset and was the subject of the counterclaim in deceit pleaded in para [9] of the counterclaim. Nor was such a contention ever remotely agitated at trial.

[67] The plea of deceit in the counterclaim fell far short of constituting a plea (or at least a satisfactory plea) of illegality giving rise to the application of the *ex turpi causa* principle.

[68] It was a global plea, generally asserting falsehood of a wide range of alleged representations, and was not particularised. On any view, it was scarcely a form of pleading that conformed with the requirements of authorities such as *Gold Coast City Council v Pioneer Concrete (QLD) Pty Ltd*,[30] *Fisher v Rural Adjustment & Finance Corporation of Western Australia*[31] and *Hinds v Uellendahl*.[32]

[69] It must be inferred that, from its perspective, this strategy was a considered decision on the part of the defendant.[33]

[70] Another important consideration, quite apart from the pleading rules, relates to the more general case management aspects of this litigation.

[71] An enormous amount of the time and resources of both the parties and the Court has been devoted to the preparation for and conduct of what has been a long and complex trial, directed to the factual and legal merits of this case, based on the pleadings in the form in which they finally emerged.

[72] As I have said, the factual basis of what is now proposed to be pleaded has been apparent to all concerned at all relevant stages. The alleged

[30] (1998) 157 ALR 135.
[31] (1995) 57 FCR 1.
[32] (1992) 107 FLR 254 at 260.
[33] As to the significance of which compare the conceptual reasoning in cases such as *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 and *Water Board v Moustakas* (1988) 180 CLR 491 at 497-498, albeit in the appeal context.

misstatements came as no new revelation or topic by reason of the publication of my primary findings. Those alleged misrepresentations were canvassed in considerable detail in the course of evidence as to issues of witness credibility and were identified in the very early stages of the trial.

[73] Had the issue of *ex turpi causa* been pleaded or raised in a timely manner, it might well have given rise, for example, to a consideration of the desirability of conducting an initial trial related to the issue of liability, prior to the very considerable expenditure of time and resources on issues related to quantum of damages.

[74] Moreover, as counsel for TSM points out, absent any plea of illegality, or even mention of *ex turpi causa* at trial, no attention was given by TSM to such issues in developing its evidentiary case to meet any issues of that type.

[75] An amendment as now proposed would effectively deny TSM procedural fairness unless the cases of the parties were reopened to permit a proper exploration of relevant factual aspects pertinent to the new issue – specifically as to issues bearing on whether or not there had been relevant knowing and deliberate dishonesty on the part of TSM or its directors in any acts of commission or omission; by way of contrast with mere negligent misstatements or misstatements arising in relation to a faulty perception of relevant situations or even obligations to disclose. There may also be a need

to recall various defence witnesses for further cross-examination as to aspects relevant to the *ex turpi causa* issue.

[76] That proposition is not met by a mere riposte that the evidence at trial canvassed certain aspects potentially going to deceit, especially as to mental state considerations arising in relation to fraud or any alleged specific breach of the criminal law.

[77] Such a reopening – with its attendant delay, expense and escalation of the scope of the trial – would be unthinkable.

[78] As to this, I note the point made by Mr Wyvill, senior counsel for the defendant, that para [9] of the counterclaim certainly articulated the assertion that TSM knew that the written and implied representations there referred to were false and that TSM knew that they were false.

[79] However, this did not give rise to a need for TSM to direct attention to what evidentiary matters might need to be addressed to meet, for example, an asserted breach of s 227(3) of the *Criminal Code*, as now contended or, indeed, any other criminal behaviour – specifically those related to necessary mental state elements bearing on deliberate, knowing falsehood or omission. Nor did it necessitate an exploration of the factual relevance of any incorrect statements in relation to their actual impact upon the ultimate contractual relationships entered into by the parties. This is a particularly

important consideration when my assessment of the personalities of DLS and ECD is borne in mind.[34]

[80] In short, the attempted formal plea of *ex turpi causa* at this juncture is nothing short of a complete negation of any notion of proper case management.

[81] It seems to me that the conceptual principles emerging from the dicta of the judges of the High Court in its recent decision in *Aon Risk Services Australia Ltd v Australian National University*[35] are pertinent to the situation in this case – at least by a parity of reasoning given that *Aon* focused on a belated application for leave to amend a statement of claim so as to raise a new basis of claim.

[82] It is fair to say that the plurality judgment in *Aon* did not accept a proposition based on dicta in the earlier decision in *State of Queensland v JL Holdings Pty Ltd*[36] that, generally speaking, a just resolution of litigation requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs thrown away.

[83] The plurality judgment cited with approval dicta to the effect that case management considerations were an important factor to be borne in mind and that, where a party has had ample opportunity to plead its case and has, in effect, elected to pursue a given course, it may be necessary for the Court

[34] My primary findings [2009] NTSC 31 at [32].
[35] (2009) 239 CLR 175 ("*Aon*").
[36] (1997) 189 CLR 146.

to decline to permit the making of fundamental amendments to pleadings in the course of a trial, especially at virtually the end of that trial process.

[84] As the plurality commented, to say that case management principles should only be applied in extreme circumstances, to refuse an amendment implies that considerations such as delay and costs can never be as important as the raising of an arguable case. It also denies the wider effects of delay upon other litigants.

[85] To that I would, with respect, add that it also denies the effect of a proposed fundamental amendment in terms of the wanton waste of scarce and expensive public resources. To adopt the language of the plurality, it simply cannot be said that just resolution of litigation requires that a party be permitted to raise *any* arguable case at *any* point in the proceedings on payment of costs.

[86] In the instant case, my primary findings having been published and, having indicated a potential liability of the defendant in damages, that party now seeks to plead and argue a new, fundamental issue that it could have pleaded at the outset but did not.

[87] To grant leave to amend in such circumstances would be to constitute a parody of the pleading rules, to fly in the face of important case flow management principles and considerations and to ignore any notions of procedural fairness. This is particularly so when it is borne in mind that what is now proposed is the strategy of a defendant with deep pockets in

attempting, at the last moment, to thwart the claim of plaintiffs with very limited resources.

[88] In those circumstances, the application for leave to amend must be refused.

The residual duty of the Court

[89] Quite aside from its proposed amendment, the defendant also now seeks to argue that, in any event even absent such an amendment, the authorities render it clear that this Court is bound, as a matter of public policy, to refuse to lend its assistance when relevant illegality is, as here (it contends), duly brought to its notice.[37]

[90] It therefore becomes necessary to consider whether, as a matter of public policy, the Court ought, in recognition of any relevant matters coming to its attention, to decline to grant relief to TSM on such a basis.

[91] In doing so, I particularly note the propositions established in *North-Western Salt Company Ltd v Electrolytic Alkali Company Ltd*.[38] They are conveniently summarised in *Illegal Transactions*[39] in these terms:

> "… first, where a transaction is *ex facie* illegal, the court will raise the illegality of its own motion, whether the illegality is pleaded or not;

[37] *Scott* [1892] 2 QB 724 at 728; *Chettiar* [1962] AC 294 at 302. See also Echonong, "*Illegal Transactions*" 1998 at 22-23.
[38] [1914] AC 461.
[39] Echonong, "*Illegal Transactions*" 1998 at 22 [1-5B].

> secondly, where the transaction is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object will not be admitted unless the circumstances relied on are pleaded; thirdly, where unpleaded acts which, taken by themselves, show an illegality have been revealed in evidence (because, perhaps, they were adduced for some other purpose), the court will not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the transaction is illegal, it will act on the illegality, whether the facts are pleaded or not".

[92] In reviewing the situation, I commence with the comment that there may well be grave doubt as to whether the evidence in this case can properly be said to extend so far as to establish, to the necessary standard,[40] that TSM was guilty of any criminal conduct amounting, in particular, to the offence created by s 227(3) of the *Criminal Code* as asserted by the defendant or any other conduct proscribed by that statute, having regard to the specific omissions now sought to be relied on and the mental state elements required to sustain any relevant finding in that regard.

[93] It seems to me that Mr Sallis, counsel for TSM, made telling points as to this. However, I find it unnecessary to pursue that aspect in depth.

[94] The critical considerations for present purposes are these:

[40] As to which see the discussion in *Goudias* (2007) 97 SASR 93 at [37].

(1) It must firmly be borne in mind that, whatever the misstatements were in the re-financing proposal, this was not the basis on which the ANZ Business Credit Application ultimately went forward. The re-financing proposal originally formed the basis of initial, preliminary discussions with the witness Bradley but, in the event following those discussions, LTD dropped out as one of the parties to the re-financing arrangements.

(2) Those discussions went forward on the basis that TLS and ECD at all material times remained ignorant of the fact that Godwin had no means of contributing the $400,000 promised by him and that he would in fact withdraw far more than he ever contributed. No doubt they were incredibly and foolishly naive in that regard, bearing in mind what actually transpired over time, but there can be little doubt that they genuinely believe that the financial health of TSM and/or LTD was or would be much better than it actually was. Moreover, Bradley was given full access to TSM's accountants to obtain any information that he required for his purposes.[41]

(3) As I pointed out in my primary findings,[42] the formal genesis of the application as actually proceeded with – then limited to TSM – was, in fact, the indicative proposal generated by Bradley on or about 22 October 1997, in light of the discussions that he had had with DLS, ECD and Godwin up to that point.

[41] T1550
[42] [2009] NTSC 31 at [204].

(4) It is to be noted that the indicative proposal set out not only the details of possible advances to be made available, but also full particulars of the security that would be required to support them – a requirement that was later expanded as a result of the normal, internal ANZ credit review process. Moreover, the indicative proposal specifically required provision of:

"

- Financial figures for Territory Sheet Metal Pty Ltd prepared by your accountant for taxation purposes. Years ending the 30th of June '95, '96 and '97.
- Cash Flow Forecast prepared by your accountant for the following 12 months.
- An aged list of creditors/debtors for the company.
- Statement of Financial Position for the directors of Territory Sheet Metal Pty Ltd.
- Credit Reference Association of Australia search authorities.
- Copy of the Memorandum and Articles of Association and Certificate of Incorporation of Territory Sheet Metal Pty Ltd and trust deeds of applicable.
- Authorities to value the relevant properties."

(5) The financial documentation sought was duly provided and is set out in sequence in Exhibit D51. As I understand the evidence, the liability for ATO payments was in fact included in the financial documentation supplied to the defendant, albeit, perhaps, not clearly identifiable as such.[43]

(6) The formal business credit application was then filled out by Bradley, together with an attached schedule of proposed securities, as appears at tabs 8 and 9 of Exhibit D51.[44] This appears to have reflected the financial documentation above referred to. The evidence does not indicate whether either DLS or ECD ever saw or signed the credit application, so prepared. Separate Personal Statements of Position were, of course, completed by the various personal plaintiffs and Godwin, as appears at tabs 13 to 15 inclusive of the same exhibit. In its totality this documentation formed the primary basis for the credit approval assessment of the credit application, in the form in which it was finally made.

(7) Even if it can fairly be said that any conduct on the part of TSM or its directors was criminal in nature (an aspect to which I shall return), the plain fact is that the defendant was well aware, prior to any implementation of loan approval, that there were obvious substantial misstatements or discrepancies in the original re-financing proposal and

[43] See Exhibit P1 at 135 under the heading 'Fines'.
[44] T1505

chose not to follow up the obvious significance of them, by pertinent enquiries of the directors or other investigations or enquiries of TSM's accountant, to whom it was given free access.

(8) It is to be particularly noted from the evidence given by Baylis in the course of his cross examination[45] that, prior to the settlement of the finally approved advances, he had become aware that some monies had been advanced by Mike Flynn (ie NPG) to ensure that the LTD townhouse projects could be completed, even that he was unaware of the precise figure involved. He was also aware, by about 27 November 1997, of the existence of certain liabilities of LTD, by virtue of the CBA letter of that date.[46]

(9) Because LTD was not party to the re-financing arrangements, it did not ever become directly necessary for *its* position to be placed before the defendant, nor did the defendant elect to call for such information. The defendant did, nevertheless, become aware of a substantial debt situation of that entity by no later than about 27 November 1997.[47]

(10) Whether or not the defendant would have granted loan approval had it known of the specific circumstances currently identified and sought to be relied on by the defendant, the plain fact of the matter is that it took careful steps to ensure that loan approval, as ultimately given, was

[45] Transcript of Proceedings, *Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd* (Northern Territory Supreme Court, Olsson AJ) at 1843-1844.
[46] Exhibit P1 at 291.
[47] See Exhibit P1 page 291

contingent upon it receiving first mortgage security that was more than adequate to cover the monies advanced.

(11) There is no specific evidence that the defendant, in fact, ever relied upon the full accuracy of the content of the re-financing proposal as the basis upon which credit approval was ultimately given. Its primary preoccupation was to ensure that it received adequate security for any advances made. Furthermore, some of the statements sought by the defendant to be impugned for present purposes in any event require a careful examination from a *Briginshaw* perspective.

(12) By way of example and as counsel for TSM points out, it needs to be borne in mind that para [5] of the re-financing proposal qualified the assertions elsewhere contained in the document in two respects, namely;

(1) It stated that the relevant security proffered was offered 'on the proviso that the Directors can withdraw charges over certain properties as other properties become available as assets', and that;

(2) "TSM/LTD would provide $300 000 as security in a fixed deposit account (yet to be finalised)."

I take the latter statement to relate to the $300 000 fixed deposit said to be available ex Godwin.

(13) It is stating the obvious to say that these qualifications, the meanings of which were not, in my view, fully explored at trial, are of considerable potential significance as to any relevant state of mind of the drafters of the proposal in assessing the existence, or otherwise, of any possible illegal conduct on their part.

(14) It was implicit in the arrangements concluded as between the defendant and TSM that, not only would the former make the approved advances upon the giving of the requisite security, but that TSM would also transfer its general banking operations from the CBA to the defendant.

(15) So it was[48] that the defendant opened a TSM business cheque account on 17 November 1997, well prior to the settlement of the approved loans. It also permitted immediate operations on that account, the first transaction been recorded as of 20 November 1997. It even allowed a temporary unsecured overdrawing of the account. The defendant became TSM's general banker at that time.

(16) The impugned cheque transactions were processed through that account as being, in the eyes of Baylis, unexceptional business transactions on such account in the course of day-to-day lawful, commercial banking operations.

(17) Given that, in fact, the relevant cheque proceeds were actually used to ensure the provision of the first mortgage security required by the

[48] As referred to in my primary findings [2009] NTSC 31 at [1262].

defendant, the presentation and processing of the cheques had no direct relationship with any alleged criminal or unlawful conduct and the cheques were not, strictly speaking, even processed as part and parcel of the loan advances themselves.

(18) All that can be said is that, had the defendant initially been fully informed of the relevant circumstances, it may well not have become the TSM banker because it may not have agreed to make the advances in question.

(19) The cheque transactions were no more than precursors to the settlement of the advances. Indeed, Baylis professed a substantial ignorance of precisely how they related to the approved advances, other than that the resultant account credits and debits enabled him to secure the release of certain securities required by the ANZ.

(20) In that event, upon the settlement of the relevant advances and notwithstanding any express or implied misrepresentations in the re-financing proposal, the defendant received all of the security that it had mandated as a pre-requisite to settling the approved loans in and following the indicative proposal.

(21) Ultimately, it, in effect, called up the loans and, indirectly, the securities supporting them. It received full repayment of the advances. It was not only paid the due interest accruing on all loans as stipulated

in the loan approvals, but also demanded and received an increased rate of interest when Godwin's criminal conduct became apparent.

(22) In other words, it derived a normal commercial profit from the loan transactions, as in the ordinary course of its business – including the charging of interest on the TSM business operating overdraft account.

(23) In summary, irrespective of how and why the relationship of banker and customer came into existence, that relationship, when brought into existence, was an ordinary and lawful commercial arrangement. The contractual obligations arising pursuant to it were normal and routine incidents of such a situation.

(24) The impugned transactions arose in the course of ongoing, commercial banking operations in relation to the business account of TSM. As I have indicated, they were operations from which the defendant ultimately profited in the ordinary course of its business.

(25) The only connection with any possible illegal conduct of TSM (if there was any such conduct) was that, as I have said, the defendant may well not have become the TSM banker, had it known the full extent of the liabilities or potential liabilities of that entity.

[95] Taking the defendant's factual propositions at their highest, this is not a case where, in the relevant sense, TSM has, of necessity, to assert any illegal conduct as the basis for its claim.

[96] On the contrary, it merely relies on the breaches by the defendant of its obligations under a lawful commercial contract that benefited both parties. The defendant received full consideration and security in return for the assumption by it of those obligations.

[97] To the extent that monies were advanced for the purposes of and within the banker/customer relationship, they were advanced for the lawful commercial operational purposes of TSM. To employ the words of Gibbs ACJ, any illegality – if illegality there was – was something merely casual or adventitious. It was no more than a then somewhat remote collateral circumstance.

[98] I reject the proposition that any misrepresentations (if they were relevantly illegal) went to the whole core of the pertinent banking relationship and operations.

[99] On conducting the multi-factorial analysis envisaged by Spigelman CJ, it is at once apparent that, if there was any unlawful conduct on the part of TSM, it did not have any relevant weight in the present context. Indeed, it seems to me to ill behove the defendant to seek to evade liability in the circumstances, on the basis that it seeks to propound.

[100] Having enjoyed a commercial profit from the transaction, it now seeks to retain that profit, whilst also seeking to eschew the contractual obligations that it assumed towards its customer by becoming its banker and so

obtaining such profit. It is, in a very real sense, seeking to 'have its cake and eat it too'.

[101] Finally, it must be said that, on the present state of the evidence, the Court simply could not conclude, to the *Briginshaw* standard, that there was relevant illegal conduct on the part of TSM attaching to the financing transaction as it ultimately went forward, by reason of the state of mind and knowledge of its directors.

[102] As to the matters to which the attention of the Court is specifically directed, these points arise:

(1) The evidence simply does not establish the extent to which, if at all, any express or implied misstatements in the re-financing application (by way of contrast with the documentation raised subsequent to the indicative proposal) affected the ultimate credit approval process;

(2) As to the $800 000 borrowed by LTD from NPG, the understanding of DLS was that, at the relevant time, money was not actually owed to NPG because, as is referred to in paras [280] and [281] of my primary findings, an arrangement was in force whereby the previous debt had been satisfied by NPG taking over the completed townhouse proposal – an arrangement that was consummated on or about 10 October 1997 and not called off until about 17 November of that year;

(3) In any event, Baylis became aware of third-party indebtedness to NPG prior to settlement of the approved advances; and

(4) The ATO liability was, in fact, reflected in the financials of TSM supplied to the defendant at its request, as to the general content of which it was open to the defendant to make enquiries of the TSM external accountant, which it did not pursue.

[103] I did not make any positive finding of illegal conduct or fraud in my primary findings, nor was there any sufficient basis of evidence on which I could properly have done so. In the event, the counterclaim in deceit necessarily failed, on any view, on the issue of causation. No finding as to the issue of deceit was therefore required.

[104] In short, I perceive no basis upon which the Court ought, in any event, to decline to entertain and uphold the TSM claim for an entitlement to damages. The relevant relationships between the parties and the relevant transactions within the banker/customer relationship have not been shown to be, *ex facie*, illegal, in the relevant sense. Even if I be considered in error as to such a conclusion, on applying the multi-factorial approach to which I have earlier referred, the circumstances of this case are such that this Court can patently enforce the defendant's relevant contractual obligations without undermining respect for the law. It ought to do so.

[105] I therefore turn to a consideration of the outstanding issues in the proceedings, following publication of my primary findings.

The outstanding issues following publication of the primary findings

[106] As appears from my primary findings, I concluded that ANZ had breached the implied terms of its contract as banker for TSM in the manner in which it processed both the $570 000 cheque and the $460 000 cheque.

[107] In essence, it is the contention of TSM that, as a consequence of that conclusion and on my primary findings of fact, it is entitled to judgment in a total sum comprised of the following components:

(1) damages reflecting the capital loss of its business;

(2) damages reflecting loss of future income of the business;

(3) damages by way of reimbursement to it of refinancing costs fees and expenses paid to the ANZ and, in effect, thrown away;

(4) arithmetic adjustments to damages to allow for CPI and taxation aspects; and

(5) interest on damages at appropriate rates over the relevant period.

[108] For its part, ANZ argues that the approach espoused by TSM necessarily involves a double counting as to computation of damages and that the correct conceptual approach to assessment of damages for economic loss (the loss asserted being a loss of opportunity) where the loss has been sustained for all time, ought to be based on the conclusion arrived at by

Palmer J in *Benward Pty Ltd v Metal Deck Roofing Pty Ltd*,[49] as confirmed by the New South Wales Court of Appeal in *Trio Insulations Pty Ltd v Metal Deck Roofing Pty Ltd*.[50]

[109] It also asserts that, in any event, when benefits that flowed to TSM by virtue of the mode of application of the proceeds of the two impugned cheques are taken into account by way of offset to any damages properly assessed, TSM is, at best, entitled to an award of nominal damages.

[110] Quite apart from those issues, the parties also remain in dispute as to certain matters of detail related to components (4) and (5) above.

[111] I therefore proceed to a consideration of the disputed issues, taken successively.

The proper conceptual approach to quantum

[112] In the course of my primary findings I recited the considerable conflict of opinion that had arisen between the expert accounting witnesses Martin, Clark and Edwards. I concluded that, with regard to the differences canvassed in my reasons, I generally preferred the views of Edwards, subject to certain qualifications.

[113] In so doing I was essentially addressing various matters of detail concerning the figures espoused by the accountants concerned for the purposes of

[49] [2001] NSWSC 1053 ("*Benward* damages").
[50] [2002] NSWCA 294.

computations, rather than focusing on the core issue of the ultimate correct conceptual approach to an assessment of quantum in this matter.[51]

[114] So it was that I proceeded to canvass what I concluded to be the correct computation of potential loss of profit for the period 1998 to 2007[52] and of capital loss.[53]

[115] As I understood the evidence, both Martin and Clark argued that the loss sustained as a consequence of the ANZ breaches consisted of both a capital component and a loss of profit component.

[116] In his initial report, Edwards joined serious issue with the validity of the figures adopted by those witnesses but I did not take him, initially, to expressly join issue with them as to the basic conceptual approach to assessment of loss.

[117] However, in his subsequent report as amended during the trial, he expressed the stance presently adopted by the solicitors for ANZ.[54]

[118] As amended, the relevant paragraphs of his second report read as follows:

> " 51. On the assumption that what has been lost is the value of the business at the date of the alleged wrong, in my opinion, from a commercial and valuation perspective, the appropriate method of valuing that loss is as follows.

[51] My primary findings [2009] NTSC 31 at [1113]-[1126]. See also my primary findings [2009] NTSC 31 at [1669]-[1688].
[52] My primary findings [2009] NTSC 31 at [1675]-[1684].
[53] My primary findings [2009] NTSC 31 at [1685]-[1688].
[54] Trial Book Volume 11, Report (19 September 2008) at [51]-[53].

52. The value of the loss to the plaintiffs in the present case is the value of the incomes (in the form of profits or capital gains) which the plaintiffs would have earned 'but for' the alleged breach of the ANZ.

53. In determining the value of the loss, it is necessary to consider the amount that an investor would have paid for it, or alternatively the amount that the applicant would have sold it for, at the time it was lost. A common definition of value is the amount that would be exchanged between a knowledgeable, willing but not anxious buyer and a knowledgeable willing but not anxious seller in an open and unrestricted market, acting at arm's length."

[119] It seems to me that the very assumption that Edwards seeks to make begs the question as to whether the loss occasioned by the ANZ breaches of contract was, indeed, merely the loss of value of the business – which I take to be the essential thrust of *Benward* damages. As Mr Wyvill SC himself emphasised, the loss under consideration was a loss of opportunity to pursue the relevant business activity and continue to make an appropriate profit.

[120] The case of *Benward* damages focused on the measure of damages in tort, consequent upon the roof of a plaintiff's business premises collapsing due to the negligence of a contractor. The collapse had the practical effect of disrupting the plaintiff's printing business for a time, as a consequence of

which it lost the business of certain major clients because of inability to meet printing deadlines.

[121] Palmer J accepted the contention that, in such circumstances, it was not appropriate to quantify the consequential economic loss suffered by the plaintiff by reference to some defined period during which the business was said to have failed to earn as much profit as it would have earned, had the collapse not occurred.

[122] He agreed with an expert accountant that, in the particular circumstances, the plaintiff had suffered and would continue to suffer a permanent loss in the value of its business and that the most appropriate method of quantification of the loss was therefore an adoption of the capitalisation of future profits method.

[123] This involved estimating the NPAT which the business was likely to have earned after adjusting for abnormal items, to produce a future maintainable profit figure. An appropriate rate of capitalisation multiplier was then to be applied to that figure.

[124] From the resultant amount, the present value of the business (arrived at in a similar mathematical fashion) was to be deducted, the resultant net difference being the compensable loss.

[125] As appears from the relevant judgment, such an approach essentially valued the diminution in goodwill of the printing business, due to the loss of the major clients in question.

[126] In the Court of Appeal Young CJ in Eq made the point that, on the facts there under consideration, the judgment at first instance was that there was a loss of value of the business and that the capitalisation rate adopted meant that the plaintiff was, in practical terms, being compensated for 4.5 years of lost profits – a result that was appropriate in the circumstances.

[127] Giles JA expressed the view that, in the particular circumstances, the loss in value method was appropriate because, due to the permanent loss of clientele, it was not feasible to assess a loss of income stream for any finite period.

[128] In the instant case, my task, conformably with the reasoning in *Sellars v Adelaide Petroleum NL*[55] and *National Australia Bank Ltd v Nemur Varity Pty Ltd*,[56] is to assess damages by reference to the loss that flowed naturally from the breach, or was loss of the type that should have been in the contemplation of the breaching party.[57]

[129] On the basis of reasoning in *Benward* and in *Owners of Dredger Liesbosch v Owners of SS Edison*[58] (which was also a claim in tort and turned on the

[55] (1994) 179 CLR 332 ("*Sellars*").
[56] (2002) 4 VR 252 ("*Nemur Varity*").
[57] See also the principles discussed in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 *et seq*.
[58] [1933] AC 449 ("*The Liesbosch*").

questions of the concept of *restitutio in integrum* applied to loss by reason of a tortious act and the extent to which the external consideration of the financial situation of the ship owner was relevant, if at all), it was argued on behalf of the defendant that, in the instant case, the correct approach to be adopted was that, because the loss sustained by TSM was a loss for all time, the loss of the relevant commercial opportunity fell to be assessed solely as a loss of capital value.

[130] Here, the effective result of the breaches was ultimately, as asserted by TSM, to cause the relevant business to fail (thereby giving rise to a serious diminution in capital value) whilst, at the same time, also denying TSM the opportunity of continuing and developing that business, so as to earn profits.

[131] In my opinion an award of *Benward* damages, which were the product of a quite different factual scenario and in a tort context, would not achieve a relevant and just end result in conformity with the authorities to which I have referred.

[132] Having said that, and as Finn J pointed out in *Ductline Pty Ltd v Arcric Investments Pty Ltd*,[59] albeit in relation to assessment of damages for contravention of s 52 of the *Trade Practices Act 1974* (Cth), it is important to ensure that double compensation is not awarded. Given that imperative, he was, nevertheless, of the opinion that, on the facts of that case, it was appropriate that damages be awarded both in respect of loss of business

[59] (1995) 32 IPR 419 ("*Ductline*") at 427-428.

profits resulting from the relevant contravention and also for damage to the applicant's goodwill.[60]

[133] In this case both logic and justice dictate that TSM ought to recover both its capital loss, in terms of the dissipation of the value of the business and its goodwill, and also an appropriate sum in recognition of its loss of opportunity to trade on, develop its business and earn profits, both components being losses that should have been in the reasonable contemplation of ANZ at the time of its breaches.[61] The conceptual approach adopted by Wilcox J in the contract case of *Flamingo Park Pty Ltd v Dolly Dolly Creations Pty Ltd*[62] supports such a conclusion.

[134] When it is appreciated that the capitalisation of future maintainable profits is simply a means of measuring, in capital terms, the inherent value of the relevant business and its goodwill, there is no double counting in adopting the approach to which I have referred, as asserted by ANZ.

[135] In its submissions, the defendant contends that the correct calculation of damages should simply be based on the capitalised value of the loss of the business as at 2 January 1998 (the date of breach) being the NPAT for the 1998 year ($79 873) to which a PER multiplier of three should be applied – giving rise to a resultant figure of $239 619, from which the capital value of the business as at 1997 should be deducted.

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[60] See also Jacobs, "*Commercial Damages*" (2008) at 81-87 [40.100], although care must be taken to distinguish between authorities based on tortious liability and those arising from breach of contract.
[61] Cf *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, 388, 406 and 410-411.
[62] (1986) 65 ALR 500 at 521-525.

[136] In my primary findings[63] I concluded that the *methodology* adopted by the witness Clark in calculating capital loss was appropriate and gave rise to a resultant figure of $189 018, which ought to be discounted by 50 per cent to $94 509. This contrasts with a figure of $119 809 arrived at by the defendant by its different mathematical approach.

[137] The present submission, in effect, asks me to revisit my primary findings. Those findings were the considered product of my review of the submissions made at trial and I am of the view that it is inappropriate to do so. I adhere to such findings.

[138] I merely comment that there is considerable force in the TSM contention that a mere capitalisation of the loss of value of the business at or about 2 January 1998 ignores the fact that the business continued to trade for a considerable time thereafter, albeit unsuccessfully in the particular circumstances; and TSM has not received the benefit of any compensatory amount. There was never any intention of selling the business as at 1998 and the principals of TSM strove to maintain it, even though their efforts did not ultimately prove fruitful. There was no permanent destruction of TSM or of its undertaking as at, or immediately following, the relevant breaches.

[139] I see no reason to question the Clark and Martin *methodology* in light of the evidence of Edwards. Each of them was disposed to consider the loss of potential profit over a ten-year period.

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[63] [2009] NTSC 31 at [1685]-[1686].

[140] I agree that, bearing in mind the fact that a loss of opportunity assessment must, inevitably, involve a broad axe approach, the loss assessed must, nevertheless, necessarily be based on some reasonable finite time span. Various minds may reasonably differ as to what that span ought to be but I see no reason to quarrel with the period selected by the two experts.

[141] In practical terms, TSM is entitled to have, as the commencement point for its assessment of damages, loss computed in accordance with my primary findings, in the following manner:

Damages representing capital loss of the business:	$ 94 509
Damages for loss of profit:	$526 381
	$620 890

The defence contention related to benefit said to have been received by TSM

[142] In my primary findings[64] I made reference to the submission of counsel for ANZ that the clearing of the $460 000 cheque had not resulted in loss to any of the plaintiffs because TSM obtained a benefit of like value. This was said to be by virtue of the fact that the effect of the drawing of the cheque was that the alleged Godwin properties became available to provide first mortgage security to support the ANZ loan facilities – which securities were ultimately so dealt with as, in effect, to realise full value to TSM and/or other plaintiffs.

[64] [2009] NTSC 31 at [1649].

[143] That assertion was not factually correct, at least to the extent that, in any event, a $48 286.25 portion of the cheque proceeds was paid to the credit of Godwin's account with the NAB and, inferentially, applied for his own purposes.

[144] Bearing in mind that the $570 000 cheque (against the proceeds of which the $460 000 cheque was drawn) was paid to the credit of TSM's account and applied for *its* purposes rather than those of LTD to whom NPG purported to make the relevant loan, it must be said, as a general comment, that TSM clearly became liable to account to LTD and/or NPG at the time for that sum and thus increased its total liabilities at the time by that amount.

[145] The individual, personal security owners simply exchanged one creditor for another and the ANZ loan facilities were made *de facto* available to TSM, thereby rendering it primarily liable, in any event, to repay the secured debts to the bank, as well as also being liable to its sureties in the event that the mortgages were, in effect, called up. The figures before the Court indicate that the net liability of TSM to DLS, NKS, ECD and SED alone, as sureties, amounted to some $408 000.

[146] At the end of the day, the net result was that, by reason of the $570 000 cheque transaction, TSM's liabilities, *prima facie*, remained increased by that amount over and above its originally contemplated and then existing debt level.

[147] That said, I also note the protest of TSM that this contention was never the subject of express pleading and that the evidence was therefore never directed to topics such as:

(1) the precise application of the proceeds of the $570 000 cheque;

(2) the accounting treatment that was given to the relevant transactions, including the alterations in the respective liability positions of each of TSM, LTD and the personal plaintiffs by virtue of the two impugned cheque transactions; or

(3) the circumstances leading to the entry by the parties into what is said to be a deed of settlement dated 9 March 2000 related to the proceeds of sale of the Brayshaw Crescent property and the $50 000 said to have been paid by Walter Lew Fatt to retain the Wells Street property. That deed of settlement is not before the Court.

Such protest was well founded.

[148] Moreover, the precise liability situation of TSM vis-a-vis NPG in respect of its receipt of the $570 000 cheque intended to be for the benefit of LTD was never explored, save for the fact that it is clear that TSM undoubtedly received the proceeds of the cheque and that it was not negotiated through the account of LTD.

[149] It follows that, quite apart from other considerations, there is a dearth of evidentiary basis for the submission presently made by the defendant.

[150] That aside, and putting to one side the considerations to which I have referred, the defendant's submission ignores the facts that:

(1) The proceeds of the $570 000 cheque, having first been paid to the credit of the TSM account, were initially applied -

(a) as to $460 000 to satisfy the cheque forged by Godwin, which was applied as to $48 286 for his personal purposes and as to the balance to pay out existing guarantee mortgages and substitute others in their place – a commitment that was not a TSM commitment, and

(b) as to approximately $110 000 to do the same in respect of the Raffles Road property to the exoneration of Godwin.

(2) The practical effect was that TSM was liable to the mortgagors to the extent that guarantee mortgages were called up – albeit that the guarantee liability was to a different bank.

(3) Bearing in mind that the $570 000 liability was money borrowed by LTD, TSM, *prima facie*, became liable to account for the receipt and application of the money, to the extent that it may have applied that money for its own purposes.

(4) Indeed, there is also a moot question as to whether, in all the circumstances, TSM further became liable to NPG, having regard to the

fact that it negotiated a cheque drawn by way of a loan expressly made to LTD.

(5) In practical terms, the initial receipt of the $570 000 into its account did not, *prima facie*, give rise to any net benefit to TSM. On the contrary, its liabilities increased by a similar amount.

[151] It follows that the contention that the two cheque transactions gave rise to a corresponding benefit to TSM, resulting in an offset entitlement, cannot be upheld.

Refinancing costs fees and expenses

[152] Under this head of claim TSM seeks payment of the following amounts:

	$
Reimbursement of additional interest paid to the defendant, as from 17 February 1998, as a consequence of ANZ reclassifying the risk ratings of the loans by reason of the impact of Godwin's criminal behaviour and defaults said to have been made by TSM.	222.98
Reimbursement of discharge fees and expenses paid to the CBA	763.64

Fees and interest paid to the defendant that would not have been incurred or paid, had the relevant advances not been proceeded with:	
(a) Business cheque account -	
Loan approval fee	2000.00
Excess interest levied as from 8 January 1998	7691.40
Interest charged to TSM by reason of payout of ATSIC liability	5654.19
Reimbursement of registration fees	415.00
(b) Business Mortgage Loan account -	
Title search fee	30.00
Mortgage fee	540.00
Guarantee fees	25.00
Mortgage debenture fee	800.00
Total (1998 values)	18 142.21

[153] TSM further seeks interest on that sum since 2 January 2008.

[154] The defendant disputes liability to pay the sums claimed by TSM as scheduled above or interest on them. Alternatively, it disputes liability to pay certain of the components claimed.

[155] As I understand the defendant's primary contention, it is that (what it describes as) the broad brush assessment of the capitalised value of TSM, based on the hypothetical NPAT adopted for 1998, necessarily picks up all of the income and expenditure of that entity for the whole year.

[156] In those circumstances it is said that the specific items identified as paid in relation to re-financing on or after 2 January 1998 amount to a departure from the adopted hypothetical financial performance, but only in relation to one specific category of expenses.

[157] Accordingly, it is argued, it would double compensate TSM and double penalise the defendant to award damages by both arriving at a capitalised value of that entity based on the alternative 1998 financial year net profit and also allow a specific item of expenditure incurred in the equivalent 'actual' year, by reason only of its direct connection with events close to the breach.

[158] The defendant seeks to argue that an award of damages for the diminished capital value of TSM based on its hypothetical financial performance adequately compensates TSM for its loss. It then becomes inappropriate to consider individual items of expense associated with re-financing.

[159] In the alternative, the defendant contends that no interest differential is claimable, because the ANZ simply exercised its contractual rights under the finance agreement following default by TSM, by reassessing the risk rating for TSM, thus giving rise to the relevant increased interest rates.

[160] It is argued that, at best, the amounts properly justifiable on the evidence are $925 paid to ATSIC[65] and $1845 paid to ANZ for security fees. It is submitted that the evidence does not justify or vouch any other fees claimed.

[161] I consider that there is an inherent fallacy in the defendant's contention concerning a double compensation in respect of this head of claim.

[162] In my opinion, the criticism proffered would be valid if the expenses that are in contemplation were normal operating expenses of the TSM business or were expenses of a type that, manifestly, it would have incurred in any event in the normal course of its operations. This was not the situation.

[163] Leaving aside the excess interest component, the expenses incurred were extraordinary, '*one-off*' expenses directly associated with the implementation of the ANZ loan transactions and required to settle them. They were, in no sense, normal operating expenses of TSM.

[164] In fact, the inclusion of the items in question in the normal operating expenses of TSM necessarily has had the practical effect of actually diminishing the figures utilised to assess both capital and income losses in

[65] See Exhibit D51, document 51.

what, technically, is probably an inappropriate manner. There is a reasonable argument that it has thus actually benefited the defendant in a windfall manner.

[165] However that may be, there can be no logical basis on which it can be asserted that their allowance will result in any double counting in favour of TSM.

[166] Nor, in my opinion, is there validity in the contention that the excess interest charged by the defendant post 5 February 1998 is not claimable because it was no more than the product of a contractual right exercised by ANZ pursuant to the relevant loan conditions.

[167] The reality of the situation is that the right to charge a higher rate of interest stemmed from the ANZ risk re-assessment consequent upon the revelation of Godwin's criminal conduct in relation to the $570 000 cheque and the impact that this ultimately had on TSM's ability to meet its obligations.

[168] The evidence does not suggest that, absent those factors, TSM could lawfully have been called upon to pay the higher rate of interest actually levied, in the normal course of events.

[169] I conclude that the amounts claimed are losses directly sustained by TSM as a consequence of the defendant's breaches of contract and should be included in any damages awarded to it.

[170] Subject to wider considerations pertinent to the award of interest, to which I will separately come in due course, I consider that TSM is also entitled to recover interest on the total of the expenses, pursuant to s 84 of the *Supreme Court Act*.

Issues as to CPI adjustments, interest and taxation

[171] Counsel for TSM contends that it is entitled to certain arithmetic adjustments to damages awarded to allow for CPI, interest and taxation aspects.

CPI adjustment

[172] He takes, as his commencement point, the facts that the two major components of damages assessed were:

(1) loss of profits during the 10 year period ended 30 June 2007; and

(2) capital loss in the sum of $94 509 as at 30 June 2007.

Those figures were arrived at using as a base the figures contained in TSM's 1997/1998 financial statements.

[173] In advancing this claim, Mr Sallis seeks to draw comfort from authorities such as *Australian Telecommunications Commission v Parsons*[66] and *Gordon*

[66] (1985) 59 ALR 535.

v Brophy.[67] Reference was also made to cases such as *Osborne v Kelly*,[68] *SVI Systems Pty Ltd v Best & Less Pty Ltd*[69] and *Maio v Sacco (No 2)*.[70]

[174] It is argued on behalf of TSM that any ultimate award of damages must be expressed in present day values. This necessarily mandates that assessments initially based on past figures should be adjusted to take into account relevant CPI movements, so as to achieve such a result.

[175] It is further contended that s 84 of the *Supreme Court Act* expressly recognises that it is proper for the Court to include in any judgment interest at an appropriate rate in respect of the period between the date on which the relevant cause of action arose and the date of judgment to compensate plaintiff for the loss and detriment suffered by being kept out of that party's money during the period in question.[71]

[176] It is said that the proper basis of computation of any such interest is by reference to the rates published in the Law Almanac.[72]

[177] Finally, it is argued on behalf of TSM that there should be an arithmetic adjustment of damages to allow for taxation on the basis adverted to by

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[67] (Unreported, South Australian Supreme Court, Cox J, 7 April 1989).
[68] [2001] SASC 260 (Unreported, South Australian Supreme Court, Perry J, 24 July 1992).
[69] (2001) 187 ALR 302 ("*SVI Systems*").
[70] [2009] NSWSC 742.
[71] Cf *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657.
[72] *Sherwin v Commens* [2008] NTSC 45 ("*Sherwin*") at [68]. These rates are primarily directed towards the award of post-judgment interest pursuant to s 85 of the *Supreme Court Act*.

Einfeld J in *SVI Systems*.[73] In doing so, the basis of reasoning is said to be that:

(1) damages have been assessed by reference to NPAT figures;

(2) TSM lodged income tax returns on an accruals basis; and

(3) tax will be payable on any award of damages on account of loss of income.

[178] As readily emerges from my primary findings, the figures calculated by me in respect of both capital loss and loss of opportunity to earn future income were, indeed, derived from initial 1997/1998 values.

[179] In *Jobst v Inglis*[74] Matheson J made reference to the decision of the Full Court in *Jacka v Horsten*,[75] in which King CJ commented:

> "… it is to be remembered that the mere aggregation of the sums which plaintiff would have earned but for the accident underestimates his true loss under inflationary conditions. The trial judge must have regard to pre-trial inflation and consequent diminution in the value of money. A plaintiff's damages are to be assessed in the money of the date of judgment. To provide just compensation plaintiff should receive the equivalent in the money of the day of judgment, of the amounts which he would have earned …"

[73] (2001) 187 ALR 302 at 337.
[74] (1986) 41 SASR 399.
[75] (Unreported, South Australian Full Court, 3 July 1980).

[180] However, in the case of *Osborne v Kelly*,[76] having cited what fell from King CJ in *Wheeler v Page*[77] to the effect that:

> "… the situation with the component which represents pre-trial economic losses stands differently. If the theory of the assessment of damages were applied strictly, compensation for such losses would be assessed on the basis of the value of the money of the day of assessment and the actual amount of the loss would have to be adjusted to allow for inflation. In practice, however, actual amounts are usually allowed. Adjustment for inflation would be difficult and calculation of actual amounts is convenient. Clearly, however, if there is no adjustment for inflation, the rate of interest applicable to that component of the award must approximate the prevailing market rate".

Perry J went on to refer to the following dictum of Cox J:[78]

> "I accept the submission that in this case I should assess past earning capacity on the present day figures."

[181] Perry J expressed the view that it follows that there is clear authority which, as a matter of strict principle, points to the soundness of the proposition that the relevant figures ought to be adjusted for inflation. However he was of the view that, for the reasons mentioned by King CJ, this

[76] [2001] SASC 260 (Unreported, South Australian Supreme Court, Perry J, 24 July 1992).
[77] (1982) 31 SASR 1 at 7-8.
[78] *Gordon v Brophy* (Unreported, South Australian Supreme Court, Cox J, 7 April 1989).

was an area where strict theory did not necessarily always correspond with day-to-day practice.

[182] It was his perception that, in practice, most cases proceeded on the basis of the calculation of past loss of earning capacity in historic terms without any direct adjustment for depreciation in the value of money. It was normally left, he said, to the award of interest which, on pre-trial economic loss, is at commercial rates, to redress the element of under compensation which would otherwise be apparent.

[183] Nevertheless, he conceded that, as had been pointed out by some judges in *Johnson v Perez*,[79] an award of interest may not always be adequate to that task.

[184] Perry J went on to further comment that he suspected that, in the case before him, where the Court was addressing a loss extending over some 14 years, an award of interest at the levels conventionally awarded, would prove to be inadequate fully to redress the effects of inflation over that period. He said that the Court owes a duty to select the process of assessment which is likely to ensure, so far as is possible, that the plaintiff *is* put in the position he would have been in, had the injury not been suffered.

[185] Accordingly, in the case before him, that aim was best achieved if the assessment of the allowance for past loss of earning capacity proceeded on the basis of levels of remuneration adjusted to reflect current values.

[79] (1988) 166 CLR 351.

[186] In the instant case, such a conclusion would, in my opinion, give rise to a clear situation of double counting if, as I consider should be the case, full market rates of interest are allowed pursuant to s 84 of the *Supreme Court Act*. I therefore decline to make CPI adjustments, as proposed by counsel for TSM

Interest

[187] Two major issues arose between the parties concerning the quantum and basis of an award of interest pursuant to s 84 of the *Supreme Court Act*.

[188] First, the defendant joined issue with TSM as to the propriety of adopting interest rates published in the Law Almanac. It was pointed out that these rates have been published from time to time for the express purposes of s 85 of the statute. They are rates payable in respect of unpaid judgment liabilities and there is no evidence that they necessarily reflect prevailing commercial rates at the times pertinent to this case.

[189] Second, it contended that, having regard to the considerable delay in these proceedings coming to trial and what were said to be TSM's contributions to that delay, it would be inappropriate for the defendant to have to pay pre-judgment interest in respect of what were said to be significant periods of that delay.

[190] The defendant further argued that, as certain damages calculations were necessarily based on financial results as at 30 June 1998, it was appropriate that interest run from that date.

The concept of pre-judgment interest

[191] Section 84 of the *Supreme Court Act* vests in the Court an unfettered discretion to include in any judgment sum interest at such a rate as it thinks fit on the whole or any part of damages awarded for the whole or any part of the period between the date when the cause of action arose and the date of judgment.

[192] The essential purpose of statutory interest, as contemplated by the section, is to compensate the plaintiff for the loss or detriment which that party has suffered by being kept out of its money during the applicable period.[80]

[193] The statute envisages the formal fixation of relevant rates of interest for the purposes of s 85 and these are published in the Law Almanac, but no rates are prescribed for the purposes of s 84. *Prima facie*, to achieve the aim of statutory interest under the latter section, the rates adopted in relation to economic loss ought to be relevant commercial rates applicable to the periods in question.

[194] I do not take the defendant to argue to the contrary. Such a conceptual approach to what constitutes "restitutionary" interest is implicit in what fell

[80] *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 663; *Clarke v Foodland Stores Pty Ltd* [1993] 2 VR 382 ("*Clarke*") at 396.

from the Court of Appeal in *Kalls Enterprises Pty Ltd (in liq) v Baloglow (No 3)*.[81]

[195] I consider that the approach of Southwood J in *Sherwin*[82] is not an authority to the contrary. In that case the s 85 rate was adopted by reason of the fact that there was simply no evidence led to establish that it was penal or non-commercial, or to propound any other alternative rate.

[196] In the instant case, I have had the benefit of data indicating relevant commercial rates related to cash management accountant transactions and short term fixed interest deposit transactions, during applicable periods.

[197] These indicate the following 10 year approximate average rates offered by four major banks:

Cash management accounts	4.14%
30 day term deposits	2.76%
60 day term deposits	3.15%
90 day term deposits	4.22%

[198] On the basis of that information (which is no more than indicative of some helpful commercial rates) I conclude that it is appropriate, on a broad axe basis, to adopt an average rate of 3.8% for present purposes.

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[81] [2007] NSWCA 298 ("*Kalls*") at [16]-[19]. See also *Hexiva Pty Ltd v Lederer* [2007] NSWSC 49; *Clarke* [1993] 2 VR 382.
[82] [2008] NTSC 45 at [68].

The issue of delay

[199] In its submissions, the defendant asserts that these proceedings were characterised by what it terms substantial periods of inactivity or delay by all plaintiffs which, it contends, ought to lead to a disallowance of pre-judgment interest in respect of those periods. I will shortly return to the submissions of Mr Wyvill SC bearing on this factual aspect.

[200] The defendant bases its argument on what fell from Finn J in *HK Frost Holdings Pty Ltd (in liq) v Darvall McCutcheon (a firm)*[83] and Ashley J in *Nemur Varity*.[84]

[201] In *Frost*,[85] Finn J observed that there is considerable diversity in judicial opinion as to the extent to which, if at all, the period selected for an interest award should be moulded adversely to a party that delays in the prosecution of a claim, where no resultant detriment to the other party is proved.

[202] He felt that, absent binding contrary authority, he was justified in adjusting periods of interest allowed, if not to do so would work an injustice to the other party – that, as he put it, "an applicant that has been held out of the benefit of its money because of its own unreasonable actions should not be allowed, as of course, to cast the effects of a 'self-inflicted burden' onto the respondent".

[83] [1999] FCA 795 ("*Frost*") at [3]-[11].
[84] [1999] VSC 366 at [22].
[85] [1999] FCA 795 at [11].

[203] In *Nemur Varity*, Ashley J was of the view that, under the applicable statutory provisions in Victoria that mandated the disallowance of interest where 'good cause' is shown for so doing, delay to plaintiff was a relevant consideration.

[204] In my opinion, the appropriate statement of principle applicable to the instant case is that expressed by the Court of Appeal in *Kalls*.[86]

[205] The Court unanimously held that delay is, ordinarily, not a reason for refusing or reducing the inclusion of interest. The defendant has had the use of the money and the plaintiff has been out of its use and should be compensated accordingly. The core purpose is, in fact, to compensate the plaintiff for being kept out of its money. Interest ought therefore to be included in order to fulfil that purpose, unless good cause to the contrary be shown.

[206] However, the Court went on to say that delay can, nonetheless, be relevant in the exercise of the statutory discretion. Unreasonable delay coupled with a high interest rate may mean that the defendant is unjustly left as the source of the plaintiff's investment income. The question is one of whether, in the circumstances, injustice is occasioned to the defendant. If, for example, the interest rates *are* unduly high, the plaintiff's self-inflicted loss of use of money ought not to be unfairly made a burden on the defendant.

[86] [2007] NSWCA 298 at [10]-[12].

The concept applied

[207] It is at once seen that the rationale of the conceptual reasoning in *Kalls* is not that delay *per se* is a basis for moderating an allowance of interest. Rather, it is the demonstrated adverse impact on a defendant in particular circumstances (eg where there are unusually high prevailing interest rates) that is the touchstone leading to a disallowance.

[208] In the present case, no such impact has been demonstrated. As I understand its argument, the defendant propounds the simplistic proposition that, merely because there has been alleged undue delay on the part of TSM, that, in itself, ought to lead to an appropriate disallowance of interest.

[209] I note that, in their most helpful work, Edelman and Cassidy[87] make the point that a bald proposition such as that now sought to be advanced by the defendant has not generally been upheld. Numerous examples of decisions in which delay has been held not to deny a plaintiff an entitlement to interest are referred to.

[210] Of particular significance for present purposes is the decision of Smith J in *Alucraft Pty Ltd (in liq) v Grocon Ltd*.[88] In that decision, having reviewed the relevant authorities, his Honour concluded that no good cause had been shown for disallowing interest by reason of delay, because the delay in question had been caused by the plaintiffs lack of means to prosecute its

[87] Edelman and Cassidy, "*Interest Awards in Australia*" (2003) at 146-147.
[88] (Unreported, Victorian Supreme Court, Smith J, 13 May 1994) ("*Alucraft*").

claim in a timely manner, that lack of means having, in turn, been caused by the defendant's wrongful conduct.

[211] It is to be noted that, in *Alucraft*, no injustice had been demonstrated. The defendant was, at all material times, aware of the plaintiff's claim and Smith J was not persuaded that the delay that had occurred had raised any expectation that the relevant payment claimed would not be required in due course.

The nature and extent of delay in this case

[212] In his written submissions, the defendant set out a detailed chronology of events. As I understood him, Mr Wyvill SC contended that, by reference to this, there are two specific periods in relation to which pre-judgment interest ought not to run.

[213] First, he said, the defence having been filed on 5 March 2001, no further action was taken by the plaintiffs to progress the proceedings for some 13 months thereafter, as a consequence of which the defendant ultimately made application for the dismissal of the proceedings for want of prosecution.

[214] Second, he argued that there should be a further disallowance of interest in respect of the period from December 2003 to 11 May 2006 when a substantially amended statement of claim was eventually produced. During that period, a show cause motion was listed, but this was survived by the plaintiffs who were, on 17 March 2006, given leave to file an amended

statement of claim within two months thereafter, that deadline being later extended.

[215] Mr Wyvill SC, having identified those periods of substantial inactivity, did not set out to demonstrate any specific detriment occasioned to the defendant by the delays, save that he advanced the general proposition that the defendant would have had significant, ongoing in-house management costs in dealing with major litigation such as this. He did not explain how those costs would continue to accrue, if nothing was in fact happening as he asserted.

[216] In essence, his submissions really amounted to an appeal to policy considerations related to case management and the need, as he put it, to incentivise the proper conduct of cases.

[217] All that need be said as to such a proposition is that it does not derive any support from the authorities and runs counter to the very basis upon which interest is awarded pursuant to s 84.

[218] Some specific major considerations that need to be borne in mind are:

(1) as I found in my primary reasons,[89] it was the defendant's breaches that triggered off the events that brought TSM to its financial knees;

[89] See, eg, [2009] NTSC 31 at [1622] and [1634].

(2) much, if not most, of the delay that occurred in the prosecution of the proceedings was directly due to the acute lack of resources experienced by the plaintiffs collectively and which stemmed from those breaches;

(3) the situation was further exacerbated by the complication of the liquidation of TSM, followed by its voluntary administration and, later, its deed of company arrangement. Those steps necessarily involved intervention by the liquidator and administrator, his investigation of the circumstances relating to the litigation and the exploration by him of the means of progressing it, including the exploration of any possibility of a negotiated settlement; and

(4) that overall situation was further complicated by a successful application by the defendant for an order for security for costs, which led to desperate efforts by the plaintiffs not only to obtain the means of giving that security, but also to retain solicitors to attend to the requisite legal work to progress these proceedings.

[219] It will at once be seen that the delay that has occurred was in no sense occasioned by any deliberate dilatoriness on the part of any of the plaintiffs, or by any lack of desire on their part to progress the litigation. The material before me abundantly indicates that they were in a well-nigh desperate financial situation and did their best to proceed as and when they could and (subject to the requirements of the liquidator and administrator) with what modest resources they were able to garner from time to time.

[220] Added to that, they were faced with litigation that was inherently complex and was always going to take a very substantial time in which to come to trial in the normal course. The volume of evidence and the massive discovery processes evident at trial bore eloquent testimony to those aspects.

[221] It is to be noted that, at least in the latter stages of the proceedings when I became involved in the management of them, the honours were fairly evenly divided between the plaintiffs and the defendants as to failure to meet appropriate deadlines. I do not make that comment in a denunciatory fashion. It was a simple fact of life that preparation for trial by both parties was an extremely time-consuming and resource costly process.

[222] The inevitable conclusion must be that this is a situation of the category adverted to by Smith J in *Alucraft*. Conformably with *Kalls*, I see no proper basis for denying TSM pre-judgment interest from the date of the occurrence of the cause of action to date of judgment.

[223] I therefore direct the parties to prepare and lodge with me an appropriate computation of interest on the basis of the rate that I have earlier indicated, within 21 days. If they are unable to agree, I will hear supplementary argument on that question.

[224] *Prima facie*, bearing in mind the non-allowance of CPI adjustments, interest should run on the damages assessed as from 2 January 1998, and on the refinancing costs fees and expenses from their respective dates on which they were incurred, save that, as a matter of practicality, interest may fairly

be calculated on the additional interest paid by the defendant as from the last date of payment of such interest.

Taxation aspects

[225] TSM takes, as its commencement point, the fact that the damages assessment in this case has derived from NPAT figures stemming from the 1997/1998 financial year data.

[226] It makes the point that the income-tax returns lodged with the ATO were prepared on an accruals basis, as appears from the TSM documentation tendered in these proceedings[90] and also the affidavit of DLS sworn on 28 September 2009.

[227] It is argued that, because TSM will become liable to pay tax on any profit-based component of a damages award, it becomes necessary to "*gross up*" such award to reflect that situation.

[228] In support of that proposition, Mr Sallis directs attention to the reasoning of Einfeld J in *SVI Systems* and what fell from Rogers J in *Gill v Australian Wheat Board*.[91]

[229] With respect, it seems to me that the conclusion that was come to by Rogers J in the latter case accords with plain common sense and logic.[92]

[90] Exhibit P1 at 98-154.
[91] [1980] 2 NSWLR 795.
[92] See also the authorities referred to in *Milatos v Clayton Utz* [2007] NTSC 44.

[230] However, as Mr Wyvill SC points out, TSM necessarily confronts two fundamental hurdles in propounding its "*grossing up*" contention.

[231] First, this issue was never raised in the pleadings related to damages and also it was never agitated at trial. It is said to be now too late to seek to raise the issue, because to do so would be to deny the defendant an opportunity of obtaining and leading expert evidence pertinent to it.

[232] Second, and perhaps more importantly, it is argued that there is simply no definitive evidence before the court to establish what net tax liability (if any) is likely to arise and thus no basis of fact on which the court could properly make any satisfactory calculations.

[233] In this latter regard, it is patent that the ultimate tax outcome is, on the information currently available, quite unpredictable due to issues such as possible accumulated offset losses and other relevant accounting factors associated with the liquidation and other administration processes.

[234] I took Mr Sallis to submit that the taxation issue did not really emerge until at least the essential thrust of my primary findings became apparent. He submitted that, given that the factual evidence was not before me or even presently available to enable any tax liability to be ascertained, the proper course would be to adopt the approach of Hodgson J in *Rabelais Pty Ltd v Cameron*.[93]

[93] (1995) 95 ATC 4552.

[235] I was invited to either make some appropriate declaration or, alternatively, reserve leave to TSM to apply for an order for additional damages referable to any necessary grossing up, when the final tax situation is eventually known.

[236] Just as the defendant's proposed case on *ex turpi causa* was un-pleaded and fatally belated, so also is this present issue. It must have been abundantly apparent that the TSM claim to damages would potentially give rise to this type of issue, yet the plaintiffs chose to go to trial without pleading or identifying it, in a fashion that has precluded the defendant calling expert evidence with regard to the question.

[237] Whilst it is true that a reservation of this question would enable that problem to be overcome, it would also necessarily cause a reopening of trial issues and at least a limited, end on, further trial to take place. Such a process would necessarily give rise to a concomitant additional delay and a further significant cost in arriving at a final conclusion of this litigation.

[238] In all of the circumstances I am not prepared to adopt the course proposed by TSM. It would be a gross negation of case management principles to do so.

Summary

[239] By way of conclusion, I now proceed to a summary of the items that go to make up the judgment to which TSM is entitled.

[240] Leaving aside the question of costs for further consideration, these are:

Damages representing capital loss	$ 94 509
Damages for loss of profit	$526 381
Re-financing costs, fees and expenses	$ 18 142.21
S84 interest at 3.8% on the above amounts	
on the bases indicated in these reasons	To be calculated

[241] I will hear the parties as to interest calculations if these cannot be agreed and as to the question of costs.
