HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 27 Nov 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M111/2020
File Title:	Talacko v. Talacko & Ors
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	27 Nov 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No M111 of 2020

BETWEEN **JUDITH GAIL TALACKO**

Appellant

and **JAN TALACKO (AS EXECUTOR OF THE ESTATE OF HELENA MARIE TALACKO) & ORS (ACCORDING TO THE SCHEDULE)**

Respondents

APPELLANT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Can a reduction in a chance to recover a judgment debt, where the judgment debt may yet be recovered, constitute actual loss sufficient to complete a cause of action?

3 Can a party's expenses of foreign proceedings constitute actual loss sufficient to complete a cause of action, in circumstances where the foreign proceedings are ongoing and where the foreign court may order the expenses to be borne by that party?

10

4 As to the first issue, the appellant contends that a reduction in a chance to recover a judgment debt cannot constitute actual loss sufficient to perfect a cause of action. There is no loss of chance if the prospect of recovery has not been destroyed and the judgment debt may yet be recovered. In those circumstances, any loss of chance to recover the judgment debt remains prospective or contingent.

5 As to the second issue, the appellant contends that a party cannot recover its expenses of foreign proceedings by way of damages where those proceedings are ongoing and where the foreign court may order the expenses to be borne by that party. Any loss

constituted by the expenses of such proceedings remains contingent on the outcome of the proceedings.

Part III: Section 78B of the *Judiciary Act 1903*

6 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

7 The citation of the judgment of the primary judge in relation to liability is *Talacko v Talacko* [2015] VSC 287 (**PJL**). The citation of the judgment of the Court of Appeal of the Supreme Court of Victoria in relation to liability is *Bennett v Estate of Talacko (Deceased)* [2017] VSCA 163 (**CAL**). The citation of the judgment of the primary judge in relation to quantum is *Talacko v Talacko* [2018] VSC 751 (**PJQ**). The citation of the judgment of the Court of Appeal in relation to quantum is *Bennett v Estate of Talacko (Deceased) (An Undischarged Bankrupt)* [2020] VSCA 99.

Part V: Facts

8 In 1948, Alois and Anna Talacko left Czechoslovakia and settled in Australia, together with their three children, Helena, Peter and Jan Emil {CAL [9]: Core Appeal Book (**CAB**) 259}.

9 At the time of their departure from Europe, Alois and Anna owned five properties in the centre of Prague (the **Prague properties**); 17.44 hectares of horticultural land on the outskirts of Prague at Řepy (the **Řepy property**); land in Kbely, a suburb of Prague (the **Kbely property**); a 368 hectare private forest plantation at Suchá in the northeast of Slovakia (the **Suchá property**); and an apartment building and adjacent vacant land in Dresden, Germany (the **Dresden property**) {CAL [9]: CAB 259}.

10 Following their departure from Europe, these properties were seized by the Communist regimes in Czechoslovakia and East Germany {CAL [9]: CAB 259}.

11 After Alois and Anna had died, and following the end of Communist rule in Czechoslovakia in 1989, discussions took place between Helena, Peter and Jan Emil concerning the restitution of their parents' property {CAL [10]: CAB 259}.

12 Peter and Helena subsequently alleged that the three siblings had reached an agreement to pursue restitution of their parents' property together, and to share the proceeds equally. Jan Emil denied that any such agreement was reached {CAL [10]: CAB 259–260}.

13 In September 1991, Jan Emil applied for restitution of the Prague properties {CAL [11]: CAB 260}, and in March 1992 a series of properties within central Prague were restituted to Jan Emil. Thereafter, other properties and interests in properties formerly owned by Alois and Anna were restituted to Jan Emil, and in some cases to Jan Emil and Helena jointly {CAL [12]: CAB 260}.

14 In November 1995, Peter died {CAL [13]: CAB 260}.

15 On 2 October 1998, Peter's widow, Margaret, and their children, Alexandra, Martin and Rowena, together with Helena, instituted a proceeding in the Supreme Court of Victoria (the **1998 proceeding**) in which they claimed an equitable interest in the properties held by Jan Emil that were formerly owned by Alois and Anna, and sought relief for alleged breaches of contract, trust and fiduciary duties {PJL [10]: CAB 13, CAL [13]: CAB 260}.

16 The hearing of the 1998 proceeding commenced on 21 February 2001. On 23 February 2001, the proceeding settled. The parties to the 1998 proceeding entered into terms of settlement which required Jan Emil to transfer to a person or entity nominated by the first to fifth respondents all the right, title and interest that he had in respect of the Dresden property, the Řepy property, the Kbely property and the Suchá property (the **clause 1 properties**). The terms of settlement further provided that, in the event that Jan Emil breached any term, condition or warranty in the settlement terms, the first to fifth respondents shall be entitled to enter judgment for an order that Jan Emil pay equitable compensation for breach of fiduciary duty in respect of each of the properties the subject of the 1998 proceeding (the **clause 6 properties**) {PJL [13]: CAB 14, CAL [15]: CAB 260–261}.

17 After the terms of settlement had been executed by the parties, the first to fifth respondents retained lawyers to draw up and deliver to Jan Emil documents for the transfer of the clause 1 properties to the first to fifth respondents. Jan Emil never executed those documents {CAL [17]: CAB 261}.

18 On 4 July 2005, the first to fifth respondents applied for orders that the 1998 proceeding be reinstated and that they be granted leave to enter judgment against Jan Emil for equitable compensation pursuant to the settlement terms {CAL [19]: CAB 261}. The 1998 proceeding was reinstated in November 2005 {PJL [16]: CAB 15}.

19 The 1998 proceeding proceeded to trial in November 2007, with respect to issues of breach of the settlement terms only. On 24 April 2008, Osborn J delivered judgment and found that Jan Emil had breached the terms of settlement. The question of the assessment of equitable compensation, together with the resolution of some outstanding defences, remained for later judicial determination {CAL [20]: CAB 261–262}.

20 On 12 May 2009, in Prague, Jan Emil and his sons, the seventh and eighth respondents, executed three donation agreements (collectively, the 'donation agreement') pursuant to which Jan Emil transferred to them, by way of gift, his interest in the Prague properties, the Řepy property and the Kbely property {CAL [21]: CAB 262}. On 14 May 2009, applications to transfer ownership of the clause 6 properties from Jan Emil to the seventh and eight respondents were filed at the City of Prague Cadastral Office {CAL [22]: CAB 262}.

21 On 17 July 2009, the first to fifth respondents commenced a further proceeding in the Supreme Court of Victoria (the **2009 proceeding**) against Jan Emil, the seventh and eighth respondents, and Jan Emil's wife, the appellant {CAL [24]: CAB 262}.

22 A further trial in the 1998 proceeding, including on the issue of quantum, was conducted by Kyrou J in October 2009. On 24 November 2009, his Honour delivered reasons for judgment. After a further hearing, on 11 December 2009, his Honour made final orders, giving judgment against Jan Emil and requiring Jan Emil to pay amounts totalling €10,073,818 to the first to fifth respondents, together with the costs of the 1998 proceeding on an indemnity basis (the **Kyrou J decision**) {CAL [25]: CAB 262–263}.

23 On 4 November 2011, the second to fifth respondents commenced two proceedings in the District Court of Prague 1. One of those proceedings was brought against Jan Emil and seeks to have the Kyrou J decision and a costs order recognised in the Czech Republic for the purposes of enforcement (the **second to fifth respondents'**

Enforcement Proceeding). The other proceeding was brought against the seventh and eighth respondents and seeks to set aside the donation agreement (the **second to fifth respondents' Donation Proceeding**) {PJQ [57]: CAB 152}. The second to fifth respondents' Enforcement Proceeding and Donation Proceeding remain on foot.

24 On 7 November 2011, Jan Emil was made bankrupt by order of the Federal Court of Australia, upon the petition of the first to fifth respondents {CAL [27]: CAB 263}. The bankruptcy was discharged in November 2019.

25 On 20 April 2012, the first respondent commenced a proceeding in the District Court of Prague 1 (the **first respondent's Donation Proceeding**). It was brought against the seventh and eighth respondents and seeks to set aside the donation agreement. The first respondent's Donation Proceeding remains on foot. On 14 February 2012, the first respondent had commenced another proceeding in the District Court of Prague 1 seeking to have the Kyrou J decision and a costs order recognised in the Czech Republic for the purposes of enforcement (the **first respondent's Enforcement Proceeding**). The first respondent's Enforcement Proceeding, which had been brought against Jan Emil, was dismissed because of a failure of the first respondent to comply with an order for the filing of evidence {PJQ [58]: CAB 152}.

26 On 10 May 2012, Helena died. Her interests have been, and are now being, pursued by her son and the executor of her estate, Jan {CAL [30]: CAB 263}.

27 On 30 September 2013, the fifth plaintiff in the 1998 proceeding, Margaret, the widow of Peter, died {CAL [35]: CAB 264}.

28 On 3 November 2014, Jan Emil died {CAL [35]: CAB 264}.

29 A trial of the 2009 proceeding was conducted before the primary judge in March 2015 {CAB 7}. On 1 April 2015, which was after the conclusion of the trial, the primary judge ordered that, if the Court determined that any of the first to fifth respondents had suffered loss or damage by reason of the causes of action pleaded by them, the quantum of any such loss or damage shall be tried separately. The order was made as a result of an application made at trial {CAL [41]: CAB 265}.

30 On 7 August 2015, the primary judge delivered judgment in relation to the question of liability {CAB 7–94}. His Honour found, among other things, that the first to fifth respondents had established three of the four elements of unlawful means conspiracy, but that they had not suffered any pecuniary loss sufficient to complete the cause of

action. The primary judge noted that the first to fifth respondents had identified six categories of pecuniary loss which they alleged they had suffered as a consequence of unlawful means conspiracy {PJL [161]: CAB 63}. His Honour considered each of those categories of claimed loss, under the following headings {PJL [162]–[192]: CAB 63–75}:

> (i) Were the [first to fifth respondents] prevented from obtaining the benefit of the terms of settlement because the Czech properties were transferred from [Jan Emil Talacko] to the [seventh and eighth respondents]?
>
> (ii) Were the [first to fifth respondents] prevented from recovering the 11 December 2009 judgment debt because the properties were transferred?
>
> (iii) Did the [first to fifth respondents] lose the amount of €10,073,818 together with accruing interest and indemnity costs because of the transfer of the properties?
>
> (iv) Have the [first to fifth respondents] incurred costs and expenses of the current proceeding, including incidental and consequential costs?
>
> (v) Have the [first to fifth respondents] incurred costs and losses in seeking to enforce the December 2009 judgment debt in the Czech Republic?
>
> (vi) Have the [first to fifth respondents] incurred the costs and expenses of seeking to ascertain the steps taken by [Jan Emil Talacko and the seventh and eight respondents] and obtaining advice about the consequences of the May 2009 transfers?

The primary judge held that the first to fifth respondents had established none of those categories of claimed loss. Relevantly for the purposes of this appeal, his Honour held that the claimed losses referred to in (ii) and (v) were contingent on the outcome of proceedings in the Czech Republic {PJL [168], [173], [176]: CAB 65, 67, 69}.

31 On 27 June 2017, the Court of Appeal allowed an appeal against the judgment of the primary judge in relation to liability {CAB 255–302, 304–306, 308–310}. It held that the first to fifth respondents had suffered a loss of a chance to recover the amount of the Kyrou J judgment, and that the first to fifth respondents' expenses of proceedings in the Czech Republic also constituted pecuniary loss {CAL [113]: CAB 297}. It held that there should be an assessment of damages representing the difference between (a) the value of the first to fifth respondents' chance of recovering the judgment debt before entry into the donation agreement, and (b) the value of that chance after entry into the donation agreement {CAL [112], [115]: CAB 296–297}. The Court of Appeal ordered, among other things, that the 2009 proceeding be remitted to the Trial

Division to determine the quantum of damages to be awarded to the first to fifth respondents in respect of their claim for unlawful means conspiracy {CAB 304}.

32 At a hearing on 15 December 2017, the High Court refused an application of the appellant for special leave to appeal from the judgment and orders of the Court of Appeal. It did so on the basis that the case did not, at that stage, present as a suitable vehicle for consideration by the Court of principles governing the identification of loss in the tort of unlawful means conspiracy, and that it was not in the interests of justice that the proceeding in the Supreme Court be further fragmented. It was noted during the hearing that, until an assessment of damages had occurred, the Court would not have necessary underlying findings of fact in relation to quantification.[1]

33 In July and August 2018, a trial was conducted before the primary judge in relation to the quantum of damages to be awarded to the first to fifth respondents, pursuant to the orders made by the Court of Appeal on 27 June 2017 {CAB 127}.

34 On 20 December 2018, the primary judge pronounced orders which included an award of damages and interest against the appellant {CAB 206–209}. The primary judge found that the first to fifth respondents' chance of recovering the judgment debt had been 75 per cent before entry into the donation agreement and that it was 20 per cent after entry into the donation agreement. His Honour accordingly found that the value of the first to fifth respondents' chance to enforce the judgment debt against the Czech properties which was lost by reason of the donation agreement was 55 per cent {PJQ [89]: CAB 164}.

35 The damages awarded against the appellant comprised damages in respect of that reduction in the first to fifth respondents' chance of recovery, damages in respect of the first to fifth respondents' irrecoverable expenses of proceedings in the Czech Republic, aggravated damages and exemplary damages. The total amount of the damages awarded against the appellant, inclusive of interest, is $18,524,984.50.

36 On 30 April 2020, the Court of Appeal dismissed an appeal brought by the second to fifth respondents against the judgment and orders of the primary judge in relation to quantum {CAB 343–376, 378–380}.

---

[1] *Talacko v Bennett* [2017] HCATrans 267.

Part VI: Argument

A Introduction

37 This appeal concerns the question whether a mere reduction in the chance of recovering a judgment debt, or the incurring of expenses in foreign proceedings which are ongoing, can constitute actual loss sufficient to complete a cause of action.

38 Under the common law, a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage.

39 The primary judge correctly held in his reasons on liability that both the claimed loss of the amount of the judgment debt and the expenses of the ongoing Czech proceedings could only constitute a contingent loss, and that the cause of action had therefore not been perfected {PJL [2], [168], [173], [176]: CAB 11, 65, 67, 69}.

40 On appeal from the primary judge's judgment and orders in relation to liability, the Court of Appeal held that each of the heads of loss relied on in that Court — that is, the loss of a chance of recovering the judgment debt and the expenses of the ongoing Czech proceedings — had completed the tort {CAL [117]: CAB 298}. By that conclusion, the Court of Appeal erred. Both of the heads of loss considered by the Court of Appeal remain contingent on the outcome of the Czech proceedings.

41 The first issue in the appeal is whether a reduction in a chance to recover a judgment debt, where the judgment debt may yet be recovered, can constitute actual loss sufficient to complete a cause of action.

42 The second issue is whether a party's expenses of foreign proceedings can constitute actual loss sufficient to complete a cause of action, in circumstances where the foreign proceedings are ongoing and where the foreign court may order the expenses to be borne by that party.

43 The appellant appeals from:

(a) the judgment and orders of the Court of Appeal given and pronounced on 27 June 2017 in proceedings S APCI 2016 0035 and S APCI 2015 0110, which concerned the question of liability;

(c) the judgment and orders of the primary judge that are directed at the appellant and were given and pronounced on 20 December 2018 in proceeding S CI 2009 7819, which concerned the question of quantum; and

(d) the judgment and orders of the Court of Appeal given and pronounced on 30 April 2020 and 5 May 2020 in proceeding S APCI 2019 0012, which concerned the question of quantum.[2]

44 The issues in the appeal arise from the reasons for judgment of the Court of Appeal in relation to liability, upon which the judgment and orders of the primary judge in relation to quantum, and of the Court of Appeal in relation to quantum, were consequential.

B The first issue: Can a reduction in a chance to recover a judgment debt, where the judgment debt may yet be recovered, constitute actual loss sufficient to complete a cause of action?

45 According to the factual findings of the primary judge in relation to quantum, the first to fifth respondents' chance of recovering the judgment debt was 75 per cent before entry into the donation agreement and 20 per cent after entry into the donation agreement. On that basis, his Honour found that the value of the first to fifth respondents' chance of enforcing the judgment debt against the Czech properties that was lost by reason of the donation agreement was 55 per cent {PJQ [89]: CAB 164}. The total damages awarded against the appellant in respect of that reduction in chance was $11,792,296.98.

46 The factual findings of the primary judge on the question of quantum support the conclusion that his Honour had reached on the question of liability. In his Honour's reasons on liability, the primary judge had held that the first to fifth respondents had not made out their claim in unlawful means conspiracy on the basis that any relevant pecuniary loss was contingent on the outcome of proceedings in the Czech Republic {PJL [2]: CAB 11}. With respect, that conclusion was correct. Given that the first to fifth respondents continue to have a 20 per cent chance of recovering the judgment debt through proceedings in the Czech Republic, the reduction in their chance of recovery can only represent a prospective or contingent loss, as opposed to an actual loss.

---

[2] As noted above, the appeal to the Court of Appeal on the question of quantum was brought by the second to fifth respondents. Although the Court of Appeal dismissed that appeal, it was necessary for the appellant to seek special leave to appeal from the Court of Appeal's judgment and orders in relation to quantum given that she had sought and obtained special leave to appeal from the primary judge's judgment and orders in relation to quantum. See *Wishart v Fraser* (1941) 64 CLR 470, at p 483; *R v Marks* (1981) 147 CLR 471, at p 476.

47 As the primary judge observed in his Honour's reasons on liability, the legal effect of Kyrou J's judgment and orders was not extinguished by the donation agreement {PJL [169]: CAB 66}. Nor have the first to fifth respondents been prevented from recovering the judgment debt by reason of the donation agreement, given that they may succeed in the Czech proceedings {PJL [167]: CAB 65}. The primary judge correctly held that there are a number of potentially different outcomes from the proceedings in the Czech Republic, and in those circumstances it is not open to conclude that a pecuniary loss attributable to the donation agreement has been suffered {PJL [177]: CAB 70}.

10 **48** On appeal from the primary judge's judgment and orders in relation to liability, the Court of Appeal held that upon entry into the donation agreement there was an immediate loss of chance to recover the amount of an anticipated equitable compensation judgment {CAL [111]: CAB 296}, and that that loss of chance was sufficient to complete the cause of action {CAL [117]: CAB 298}.

49 According to the Court of Appeal, the loss of chance occurred when the donation agreement was entered into and the prospect of enforcement of the equitable compensation judgment, yet to be entered, was 'impeded' by the transfer of the Czech properties {CAL [111]: CAB 296}. The Court stated that the donation agreement, which it said was 'calculated to make [recovery] harder' {CAL [112]: CAB 296},
20 created an additional 'barrier' to enforcement which was from the outset going to cost the first to fifth respondents money to overcome {CAL [111]: CAB 296}.

50 The Court of Appeal also concluded that the first to fifth respondents had 'lost the opportunity of recovering their judgment debt against Jan Emil's future trustee in bankruptcy by resort to the Czech properties' on the basis that 'the prospect of recovery of the anticipated judgment was impeded by the transfer of the Czech properties'. It stated that the value of the chance that the first to fifth respondents had before the donation agreement, compared with what they had after it, was a question for the assessment of damages {CAL [115]: CAB 297}.

51 The Court of Appeal thus characterised an 'additional impediment' {CAL [112]:
30 CAB 296} to recovery of the judgment debt as actionable damage. It determined that the creation of this additional impediment constituted the loss of an opportunity to recover the amount of the judgment debt, both through enforcement of the judgment

and through the bankruptcy. The primary judge correctly observed on remittal that '[t]he Court of Appeal's reasoning requires the loss of the plaintiffs' opportunity to recover the judgment debt and costs orders by resort to the Properties to be measured in accordance with the value of the *reduction* in that opportunity subsequent to the Donation Agreement' {PJQ [7]: CAB 132} (emphasis in original). With respect, the approach required by the Court of Appeal's reasons involves a misapplication of the loss of chance doctrine, including because it equates a reduction in chance with a loss of chance.

52 An impediment to the recovery of a debt, where the debt may yet be recovered, does not constitute the loss of a chance to recover the debt. In those circumstances, even if the prospect of recovery has been reduced, there has been no loss of chance; the chance of recovery has not been destroyed. The loss of a chance is not merely a risk of some future loss, but is itself a loss which has actually been sustained.[3] The Court of Appeal's approach to the loss of chance doctrine is discordant with that principle.

53 What the Court of Appeal held had been lost by the first to fifth respondents was the chance of recovery of the judgment debt {CAL [111]: CAB 296}. However, the first to fifth respondents' chance of recovering the judgment debt existed at the time when the proceedings below were commenced and at the time of judgment in relation to both liability and quantum. The chance remains to this day. Even if the donation agreement introduced an 'additional impediment to recovery' {CAL [112]: CAB 296}, and even though it reduced the chance of recovery, that does not constitute a loss of chance that is sufficient to complete a cause of action.

54 The findings of the primary judge on remittal from the Court of Appeal make clear that the first to fifth respondents' chance of recovering the judgment debt was not lost, but was only reduced, after entry into the donation agreement. In circumstances where the first to fifth respondents continue to have a 20 per cent chance of recovering the judgment debt through proceedings in the Czech Republic,[4] there has been no loss of

[3] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, at p 544.

[4] If the Donation Proceedings are successful, the donation agreement will be set aside but the Czech properties will remain registered in the names of the seventh and eighth respondents. However, the first to fifth respondents would have the right to enforce the Kyrou J judgment against the Czech properties by way of a separate proceeding against the seventh and eighth respondents {PJQ [60]: CAB 152–153}.

chance. Rather, there has only been a reduction in the chance. The chance has not yet 'run its course';[5] it has not yet 'played out'.[6]

55 The first to fifth respondents' claimed loss of the amount of the judgment debt thus remains contingent upon the outcome of the Czech proceedings, whether or not it is viewed through the lens of the loss of chance doctrine.

56 In so far as their chance of recovering the judgment debt has merely been reduced and not lost, the first to fifth respondents are in a similar position to the unsuccessful claimant in *Gregg v Scott*,[7] whose chance of recovering from cancer was reduced, but not destroyed, by reason of the defendant's negligent misdiagnosis. The question posed rhetorically by Gummow A-CJ in his discussion of that decision might equally be posed here: 'how, it might be asked, had the damage, the loss of the chance which was the gist of the action, yet been sustained?'[8]

57 The distinction between the loss of a chance and a contingent loss has been discerned and correctly articulated by the New South Wales Court of Appeal. In *Segal v Fleming*, Hodgson JA (with whom Handley JA and Young CJ in Eq agreed) observed that there is a significant difference between 'the loss of a chance' and 'the chance of a loss',[9] or in other words between a loss of chance and a contingent loss. His Honour noted that, in the former case, it will never be known how things would have turned out if the chance had not been lost, so that the only possible compensation that a plaintiff can obtain is for the value of the chance itself.[10] On the other hand, his Honour stated, where a person incurs a chance, even a substantial chance, of suffering a loss, in due course it may become clear that no loss is ultimately suffered; and, so long as there is some appreciable chance that no loss will be suffered, it is unreasonable to award damages against a defendant.[11]

---

[5] *Tabet v Gett* (2010) 240 CLR 537, at p 551 [16].

[6] Ibid, at p 584 [131].

[7] [2005] 2 AC 176.

[8] *Tabet v Gett* (2010) 240 CLR 537, at p 551 [16].

[9] [2002] NSWCA 262, at [24]. See also *Lee v Brand* [2003] NSWCA 198, at [70]–[72]; *Leda Pty Ltd v Weerden* (2007) 63 ACSR 636, at pp 658–9 [70]–[72].

[10] *Segal v Fleming* [2002] NSWCA 262, at [25].

[11] Ibid, at [26].

58 The error in the Court of Appeal's approach in this case reveals itself even more clearly when it is considered that, according to that approach, any reduction in the first to fifth respondents' chance of recovering the judgment, presumably so long as it is not a negligible reduction, would constitute actual loss sufficient to complete the cause of action. So, for example, even a reduction from a 90 per cent chance of recovery to an 80 per cent chance of recovery would, according to the Court of Appeal's reasoning, perfect the tort.

59 A further corollary of the Court of Appeal's approach is that the first to fifth respondents would have been statute barred from commencing the Victorian proceeding after six years from entry into the donation agreement, even though at that time they continued to maintain proceedings in the Czech Republic by which they sought to enforce the judgment debt. However, it would be unjust to compel a plaintiff to commence proceedings for the loss of a chance to recover a debt in circumstances where the chance remains, including where the plaintiff maintains proceedings to enforce the debt. It would be unjust and unreasonable to expect such a plaintiff to commence proceedings before the contingency represented by the enforcement proceedings had been fulfilled. In such a situation, there would be an ever-present risk of undercompensation or overcompensation.[12]

60 Although the donation agreement reduced the prospect of recovery of the judgment debt, the first to fifth respondents have not suffered the loss of a chance in circumstances where they continue to have a chance of recovery through proceedings in the Czech Republic. Any loss of that chance remains contingent on the outcome of the Czech proceedings.

61 The reduction in the first to fifth respondents' chance of recovering the judgment debt therefore does not constitute actual loss sufficient to complete the cause of action.

---

[12] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, at p 527. It would be anomalous if the awarding of damages for a reduction in the first to fifth respondents' chance of recovering the judgment debt resulted in those respondents recovering both those damages and the amount of the judgment debt, in circumstances where they are successful in the Czech proceedings.

C The second issue: Can a party's expenses of foreign proceedings constitute actual loss sufficient to complete a cause of action, in circumstances where the foreign proceedings are ongoing and where the foreign court may order the expenses to be borne by that party?

62 Any loss constituted by the first to fifth respondents' expenses of the ongoing proceedings in the Czech Republic remains contingent on the outcome of those proceedings. The first to fifth respondents may fail in those proceedings and may be ordered to bear their own costs. Further, until the Czech proceedings have been determined, it is not possible to say whether the first to fifth respondents' expenses have been reasonably incurred. Those expenses thus remain a contingent, as opposed to an actual, loss.

63 In the primary judge's reasons for judgment in relation to liability, his Honour correctly held that, until such time as the proceedings in the Czech Republic are concluded, any loss referable to the costs related to those proceedings is contingent {PJL [173]: CAB 67}. His Honour stated that the first to fifth respondents sustained no pecuniary loss until such loss was crystallised, and held that contingent loss did not constitute pecuniary loss for the purpose of completing the cause of action {PJL [176]: CAB 69–70}.

64 On appeal from the primary judge's judgment and orders on the question of liability, the Court of Appeal held that the tort 'required the plaintiffs to incur the expense of taking proceedings to set aside the donation agreement', and that the amounts already expended represented immediate pecuniary loss {CAL [102]: CAB 293}.[13] With respect, that conclusion was erroneous. Whether such a conclusion can ultimately be drawn must await the outcome of the proceedings in the Czech Republic.

65 Until the proceedings in the Czech Republic have been concluded, it is too early to say whether the first to fifth respondents' expenses of the proceedings were reasonably incurred or were legally caused by the tort. It is questionable whether those expenses were incurred reasonably, as a matter of Australian law, given that the Czech

[13] Pursuant to the Court of Appeal's judgment and orders in relation to liability, the primary judge assessed damages to be awarded to the first to fifth respondents in respect of their expenses of seeking to set aside the donation agreement. The primary judge awarded $143,988.27 to the first respondent and €100,000 ($157,257.43) to the second to fifth respondents, comprising their irrecoverable costs and expenses of their respective Donation Proceedings, their entitlement to interest on those sums, and amounts reflecting their future costs and expenses of their respective Donation Proceedings {PJQ [99], [101], [103]: CAB 167–169, 207}.

proceedings have been maintained in order to enforce a judgment debt against the property of a bankrupt despite the absolute bar on enforcement under sec 58(3)(a) of the *Bankruptcy Act 1966* (Cth).[14] In any event, a determination of whether the first to fifth respondents' expenses of the Czech proceedings were reasonably incurred could only properly be undertaken once those proceedings have been concluded.

66 Further, it would be anomalous, and contrary to principle,[15] if any costs of the Czech proceedings were properly recoverable by way of a damages award against the appellant, but were not properly recoverable against her joint tortfeasors, being the defendants to the Czech proceedings, in respect of the same tort.[16]

67 The first to fifth respondents' expenses of the ongoing Czech proceedings therefore do not constitute actual loss sufficient to complete the cause of action.

68 The Court should allow the appeal.

Part VII: Orders sought

69 The appellant seeks the following orders:

(a) The appeal be allowed.

(b) Paragraphs 3 and 4 of the orders of the Court of Appeal of the Supreme Court of Victoria pronounced on 27 June 2017 in proceeding S APCI 2016 0035 be set aside.

(c) In lieu thereof:

(i) the appeal to the Court of Appeal of the Supreme Court of Victoria in proceeding S APCI 2016 0035 be dismissed; and

(ii) the first respondent pay the appellant's costs of and incidental to the appeal to the Court of Appeal of the Supreme Court of Victoria in proceeding S APCI 2016 0035.

(d) Paragraphs 3, 4 and 7 of the orders of the Court of Appeal of the Supreme Court of Victoria pronounced on 27 June 2017 in proceeding S APCI 2015 0110 be set aside.

---

[14] Notwithstanding this, the first to fifth respondents have a 20 per cent chance of enforcing the judgment debt through proceedings in the Czech Republic.

[15] See *De Reus v Gray* (2003) 9 VR 432, at pp 451–2 [27].

(e) In lieu thereof:

(i) the appeal to the Court of Appeal of the Supreme Court of Victoria in proceeding S APCI 2015 0110 be dismissed; and

(ii) the second to fifth respondents pay the appellant's costs of and incidental to the appeal to the Court of Appeal of the Supreme Court of Victoria in proceeding S APCI 2015 0110.

(f) The orders of the Supreme Court of Victoria that are directed at the appellant and were pronounced on 20 December 2018 in proceeding S CI 2009 7819 be set aside.

10 (g) In lieu thereof, the first to fifth respondents pay the appellant's costs of and incidental to proceeding S CI 2009 7819, including reserved costs, from the date of remittal by order of the Court of Appeal of the Supreme Court of Victoria pronounced on 27 June 2017 in proceeding S APCI 2015 0110.

(h) The orders of the Court of Appeal of the Supreme Court of Victoria pronounced on 30 April 2020 and 5 May 2020 in proceeding S APCI 2019 0012 be set aside.

(i) In lieu thereof, the second to fifth respondents pay the appellant's costs of and incidental to the appeal to the Court of Appeal in proceeding S APCI 2019 0012.

20 (j) The first to fifth respondents pay the appellant's costs of and incidental to this appeal.

Part VIII: Time estimate

70 The appellant would seek no more than 2 hours for the presentation of the appellant's oral argument.

---

[16] See *Anderson v Bowles* (1951) 84 CLR 310, at p 323.

27 November 2020

Bret Walker

Phone	(02) 8257 2527	Phone	(03) 9225 6232
Fax	(02) 9221 7974	Fax	(03) 9225 8668
Email	maggie.dalton@stjames.net.au	Email	jeremy.masters@vicbar.com.au

Jeremy Masters

Counsel for the appellant

SCHEDULE OF PARTIES

JUDITH GAIL TALACKO
Appellant

and

JAN TALACKO (AS EXECUTOR OF THE ESTATE OF HELENA MARIE TALACKO)
First Respondent

and

ALEXANDRA ANN BENNETT
Second Respondent

and

MARTIN THORBURN TALACKO
Third Respondent

and

ROWENA KIRSTEN EVE TALACKO
Fourth Respondent

and

ALEXANDRA ANN BENNETT AND DAVID ADAMS (AS EXECUTORS OF THE ESTATE OF MARGARET HELEN TALACKO)
Fifth Respondent

and

ESTATE OF JAN EMIL TALACKO (DECEASED) (FORMERLY AN UNDISCHARGED BANKRUPT)
Sixth Respondent

and

DAVID TALACKO
Seventh Respondent

and

PAUL ANTHONY TALACKO
Eighth Respondent

and

PETER ANDREW NOEL TALACKO
Ninth Respondent

and

AMANDA MAREE FISCHER
Tenth Respondent

and

STATE TRUSTEES LTD (ACN 064 593 148)
Eleventh Respondent