Court of Appeal
New South Wales

Case Title:	Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd
Medium Neutral Citation:	[2012] NSWCA 94
Hearing Date(s):	20 and 21 February 2012
Decision Date:	17 April 2012
Jurisdiction:	
Before:	McColl JA at 1, Basten JA at 2; Young JA at 113
Decision:	(1) Direct the parties to file short minutes of orders within 14 days of the date of this judgment. (2) In the event that agreement is not reached on any matter, (a) each party is to file, within 28 days, its proposed orders and submissions in support thereof; (b) each party may, within a further seven days, file a brief submission in reply. (3) Any application for an extension of the times provided in these directions may be made by letter to the Associate of the presiding judge. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules*

36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords:

DAMAGES - contract - negligent breach of contract - failure to exercise due care and skill - whether Civil Liability Act 2002 (NSW), Pt 1A applies - whether analysis under Civil Liability Act 2002 (NSW), s 5D incorporates policy questions - whether loss was reasonably within the contemplation of the parties as the probable result of the contract

DAMAGES - tort - negligence - failure to exercise due care and skill - whether Civil Liability Act 2002 (NSW), Pt 1A applies - whether analysis under Civil Liability Act, s 5D incorporates policy questions - whether loss was reasonably foreseeable - whether differing outcomes in tort and contract justified

DAMAGES - misleading and deceptive conduct - whether Civil Liability Act 2002 (NSW), Pt 1A applies to claim under Fair Trading Act 1987 (NSW), s 42 - whether elements of cause of action for misleading and deceptive conduct include negligence - whether position differs under Trade Practices Act 1974 (Cth), s 52 - whether losses resulting from representations that involved same consequences as simultaneous claims in tort and contract are recoverable

Legislation Cited:

Civil Liability Act 2002 (NSW), ss 5, 5A, 5D; Pt 1A; Sch 1, cl 6
Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW), Sch 3
Fair Trading Act 1987 (NSW), s 42
Statutory Duties (Contributory Negligence) Act 1945 (NSW)
Trade Practices Act 1974 (Cth), ss 52, 74, 75B

Cases Cited:

Adeels Palace Pty Ltd v Moubarak [2009]

HCA 48; 239 CLR 420
Alexander v Cambridge Credit Corporation Ltd (1987) 9 NSWLR 310
Booksan Pty Ltd v Wehbe [2006] NSWCA 3; 14 ANZ Insurance Cases 61-678; (2006) Aust Torts Rep 81-830
Gett v Tabet [2009] NSWCA 76; 254 ALR 504; (2009) Aust Torts Rep 82-005
Gray v Sirtex Medical Ltd [2011] FCAFC 40; 193 FCR 1
Hadley v Baxendale (1854) 156 ER 145
Insight Vacations Pty Ltd v Young [2010] NSWCA 137; 241 FLR 125
Malec v JC Hutton Pty Ltd [1990] HCA 20; 169 CLR 638
March v Stramare (E & MH) Pty Ltd [1991] HCA 12; 171 CLR 506
Perpetual Trustee Co Ltd v Milanex Pty Ltd (In liq) [2011] NSWCA 367
Piro v W Foster & Co Ltd [1943] HCA 32; 68 CLR 313
Ruddock v Taylor [2003] NSWCA 262; 58 NSWLR 269
Sellars v Adelaide Petroleum NL [1994] HCA 4; 179 CLR 332
Tabet v Gett [2010] HCA 12; 240 CLR 537
Travel Compensation Fund v Tambree [2005] HCA 69; 224 CLR 627
University of Western Australia v Gray (No 28) [2010] FCA 586; 185 FCR 335
Wallace v Kam [2012] NSWCA 82

Texts Cited:

J Allsop, "Causation in Commercial Law", ch 13 in eds S Degeling, J Edelman, J Goudkamp, Torts in Commercial Law (Lawbook Co 2011), p 294

DC Pearce and RS Geddes, Statutory Interpretation in Australia (7th ed, 2011) at [6.15]

Review of the Law of Negligence - Final Report (September 2002) (commonly known as the "Ipp Report")

Category: Principal judgment

Parties: Monaghan Surveyors Pty Ltd - First

	Appellant Gregory John Monaghan - Second Appellant Stratford Glen-Avon Pty Ltd - Respondent
Representation	
- Counsel:	Counsel: D L Williams SC/L Chan - Appellants J S Drummond - Respondent
- Solicitors:	Solicitors: Kennedys - Appellants Hartmann & Associates - Respondent
File number(s):	CA 2010/415820
Decision Under Appeal	
- Court / Tribunal:	District Court
- Before:	Charteris DCJ
- Date of Decision:	13 December 2010
- Citation:	
- Court File Number(s)	DC 2005/298014
Publication Restriction:	

HEADNOTE

[This headnote is not to be read as part of the judgment]

In 1997 the respondent purchased a property traversed by a right of carriageway. This right of carriageway allowed the occupants of neighbouring land access to a public road. Prior to purchase the neighbours agreed with the respondent to permit it to move the right of carriageway. The respondent contracted with the first appellant for a plan

of the new right of carriageway. Prior to the registration of the new right of carriageway, the second appellant (the principal of the first appellant) altered the plan. This was done without the agreement or knowledge of the respondent or the neighbours. The plan was registered.

The discovery of the full extent of the alterations, in February 2004, was accompanied by disputation and litigation between the respondent and the neighbours. This disputation and litigation related to the alteration of the plans and the quality of the roadway. The respondent incurred losses, being:

(a) the surveying and legal expenses required to correct the title,
(b) the costs of moving a retaining wall and fencing which encroached on the right of carriageway,
(c) the costs of the litigation in the Supreme Court between the respondent and the neighbours,
(d) the loss resulting from the inability to sell the land while it was subject to a caveat lodged by the neighbours.

The respondent brought proceedings in the District Court against the appellants, seeking to recover these losses. The respondent's action was founded in the tort of negligence, misleading and deceptive conduct contrary to *Fair Trading Act 1987* (NSW), s 42 and *Trade Practices Act 1974* (Cth), s 52, breach of contract and breach of the warranty implied pursuant to *Trade Practices Act*, s 74. The District Court ordered that the appellants pay the respondent the sum of $474,360.89.

The appellants appealed to this Court from the orders of the District Court. The appellants conceded liability and their obligation to pay for losses (a) and (b). The appellants denied that they bore responsibility for the whole of losses (c) and (d), as claimed.

The issues for determination on appeal were whether the respondent was properly entitled to recover:

(i) the whole of its legal costs in respect of the litigation in the Supreme Court between the respondent and the neighbours, and

(ii) the losses resulting from its inability to sell the property while the caveat was in place.

The Court held (per Basten JA, McColl and Young JJA agreeing), allowing the appeal in part:

In relation to (i)

1. In circumstances where a claimant seeks to recover legal costs incurred in defending proceedings brought against it, where the litigation is said to have been caused by a third party, the harm suffered may be identified as the loss of an opportunity to avoid the litigation. Where the claimant has successfully defended the litigation, the loss will be measured by reference to the difference between the costs incurred and the costs recovered from the other party: [64]

University of Western Australia v Gray (No 28) [2010] FCA 586; 185 CLR 335; *Gray v Sirtex Medical Ltd* [2011] FCAFC 40; 193 FCR 1, referred to.

However, the case was run on the basis of expenses incurred, not loss of opportunity.

2. *Civil Liability Act 2002* (NSW), Pt 1A applied to the claims for damages brought in tort and contract. These claims were assumed to involve a failure to exercise due care and skill, which constitutes "negligence" for the purposes of Pt 1A: [67]

3. Both s 5D(1)(b) and (2) of *Civil Liability Act* were intended to cover factors variously described as "value judgments", "normative considerations" or "legal policy". The normative enquiry under s 5D(1)(b) was intended to extend beyond what have been traditionally been seen as elements of causation, to cover questions raised by intervening and successive causes, foreseeability and remoteness: [69]-[70]

4. The content of the principles invoked by *Civil Liability Act*, s 5D(1)(b) and (2) may varying according to the circumstances and the cause of action: [73]

5. The result of the claim pursuant to *Fair Trading Act*, s 42 would be the same whether the claim is assessed pursuant to *Civil Liability Act*, s 5D or under the general law. However, negligence is not a necessary element of a contravention of s 42 and it would seem curious if, by a side wind, some claims under s 42 were to be subject to the *Civil Liability Act*, Pt 1A, and some were not: [75]-[78]

6. The claim under the *Trade Practices Act* was not subject to *Civil Liability Act*, s 5D, because s 82, which provided the remedy by way of damages for breach of s 52, was not constrained by State law, unless that law were picked up and applied by another Commonwealth law: [79]

Insight Vacations Pty Ltd v Young [2010] NSWCA 137; 241 FLR 125 applied.

7. The legal costs incurred by the respondent up to the point at which the full extent of the alterations was discovered fell within the scope of the first appellant's liability for breach of contract. It was not established that the ongoing litigation, after the extent of the alterations was discovered, might reasonably have been in the contemplation of the parties to the contract at the time it was made as the probable result of the breach in question: [92], [94]

Hadley v Baxendale (1854) 156 ER 145 applied.

8. In relation to the claim in tort, the loss suffered by the respondent until the extent of the alterations was discovered, and resulting from the litigation pursued by the neighbours, was readily foreseeable and was appropriately recovered from the appellants. The costs of litigation after the extent of the alterations were discovered were not recoverable. The fact that the neighbours used the continued existence of the caveat to agitate other disputes, at cost to the respondent, does not provide an adequate basis for imposing liability for those costs on the appellants. In circumstances in which claims in tort and contract give rise to differing outcomes, that outcome would require an exceptional justification in circumstances where it resulted because of a breach of duty to third persons who had made no claim against the appellants: [96], [100]-[101]

9. In relation to the claims of misleading and deceptive conduct, the costs of litigation after the extent of the alterations were discovered were not recoverable in circumstances where the conduct complained of involved implied representations which involved no different consequences or considerations for the injured parties than those which arose in tort or, in relation to the first appellant, in breach of contract: [102]

In relation to (ii)

10. There is no basis to overturn the findings of the trial judge in relation to the loss resulting from the inability to sell the property while the caveat was in place. While it maybe said that the loss flowing from the breach of duty by the appellants should have ended in or shortly after the extent of the alterations was discovered, the amount in issue is not sufficient to warrant a retrial and the challenge should be dismissed: [108]

JUDGMENT

1 **McCOLL JA**: I agree with Basten JA's reasons and the orders his Honour proposes.

2 **BASTEN JA**: In 1997 the respondent purchased a property at Kurrajong Heights. The property was semi-rural. It was traversed by an unsealed road by which the occupants of neighbouring land were able to obtain access to their land from a public road.

3 Prior to purchase, the respondent sought to negotiate with the neighbours to change the location of a road across the property, over which the neighbours enjoyed a right of carriageway. After the purchase was completed, agreement was reached and a new road was constructed. A surveyor contracted by the respondent prepared a plan for registration of the new right of way, which was signed by the respondent and the benefiting neighbours. However, prior to registration, the surveyor altered the plan, without the agreement or knowledge of either the respondent or the benefiting neighbours. In 2004, several years after the plan was registered, the variations were revealed. Identification of the full extent of the changes was accompanied by rancorous disputation and litigation between the respondent and the benefiting neighbours. The respondent incurred costs in relocating the registered right of way and reconstructing in part the roadway, together with legal costs of settling the disputes with the owners of two of the benefiting properties.

4 Seeking to recover those costs and expenses, the respondent brought proceedings against the surveyor (the first appellant) and its principal (the second appellant, Mr Monaghan) who carried out the critical work. In the District Court, the respondent obtained a judgment in its favour in the sum of $474,360.89, a figure which may well have been approximately half the value of the land when the plan was registered. The correct assessment, according to the appellants, is an amount of $25,938.29, plus interest.

5 The appellants now concede liability and the dispute between them and the respondent is limited to the quantum of damages for which they are liable. Nevertheless, consideration will need to be given to the specific heads of liability, as they raise questions as to the proper basis for assessing loss.

6 For the reasons set out below, the appellants are entitled to a reduction in the quantum of the judgment, error being demonstrated in the approach adopted by the trial judge.

Factual background

7 At the date of purchase by the respondent, its land was burdened by a right of carriageway. The right provided access to three parcels of land located to the west of the respondent's land owned, respectively, by Mr and Mrs Hulbert, Mr Rees and Mrs and Ms Henderson. A sketch plan of the lands involved is annexure 1 to this judgment. Heritage Road, a public road, lay to the east of the affected lands. Thence an unsealed road proceeded across a property owned by Mr and Mrs Barrett to what was, in effect, the mid-point of the southern boundary of the land owned by the respondent, a point described in the evidence as "Barrett Junction". The roadway then proceeded due north to the northern boundary of the respondent's land, passing quite close to the house erected on the land. The roadway then swung to the southwest, leaving the respondent's land via the western boundary, at a point not far from the southwestern corner. The change which the respondent was able to agree with the neighbours to the west involved realigning the course of the roadway from Barrett Junction in a more westerly direction, so that it did not pass close to the house. Further, instead of proceeding to the northern boundary of the land, it swung due west at a point approximately halfway between the southern and northern boundaries, connecting with the old roadway shortly before it reached the western boundary of the property.

8 The directors of the respondent were Desmond and Dianne McCammon. They were also beneficiaries of a superannuation trust of which the respondent was the trustee. All relevant steps taken on behalf of the respondent were taken by Mr McCammon.

9 The first meeting between Mr McCammon and the benefiting neighbours took place in April 1997, before the respondent purchased the land. The negotiations did not prove to be straightforward. According to Mr McCammon, Ms Lucy Henderson stated that she liked the carriageway "where it is" and walked out of the meeting. There was, however, general agreement that the roadway was in a bad state of repair and required prompt restoration work. Mr McCammon was proposing that the respondent would bear the costs of surveying and constructing the roadway at the proposed new location, which would have involved a costs saving to the neighbours. By letter dated 30 April 1997, the Hulberts indicated their willingness to co-operate. However, more than a year later, on 27 August 1998, Ms Henderson wrote to the McCammons stating in categorical terms that there could no change to the right of way without either her agreement, or "by an order of the Supreme Court". She continued, "I do not agree to any relocation of the existing right of way". She also expressed concern as to the need for repairs because the roadway in its then state was "dangerous". Despite that uncompromising position, on 21 September 1998 solicitors acting for Margaret and Lucy Henderson stated that their clients "agree to the relocation of the right of way over your property provided the survey, construction etc. costs are totally payable by you and done to the necessary standard of vehicles including heavy trucks to travel upon it".

10 A deed was ultimately executed on 3 September 1999. The neighbours were described as "adjoining owners". The plan which is annexure1 to this judgment was annexed to the deed. A specification for the construction works was also annexed. The deed required the respondent, at its own expense, to construct the new right of way in accordance with the

specification: clause 1. The adjoining owners were to release the old right of carriageway, which was identified by Land Titles Office dealing and registration numbers; the respondent agreed to grant the new right of carriageway which was described as the right of carriageway coloured red on the plan and was described as the "relocated section" (being a new unsealed roadway of approximately 200 metres) and the remains of the old carriageway to which the new road joined near the western boundary of the land. The deed further provided:

> "6. The construction of the New Right of Carriageway shall be supervised by Mr G J McDonald ... of G J McDonald Associates Pty Ltd. A certificate from Mr McDonald (McDonald's certificate) certifying that the New Right of Carriageway has been completed in accordance with the Specification shall be conclusive evidence that the work has been so completed.
>
> 7. (a) Stratford [being the respondent] warrants to the Adjoining Owners that the Relocated Section will be constructed in a good and workmanlike manner.
> (b) This Warranty will be for a period of two (2) years from the date of issue of McDonald's Certificate.
> (c) Stratford warrants to the adjoining owners that within a period of two (2) years from the date of issue of McDonald's Certificate it will pay the cost of rectification of any part of the Relocated Section that has been damaged due to rainwater, storm, subsidence or that has been constructed in a defective manner due to faulty materials and/or fault workmanship.
> (d) The warranty is void in any of the following events:
>
> (i) if a motor vehicle weighing (with its load) more than 20 tonnes or any semi-trailer travels along the Relocated Section.
> ...
>
> (e) This warranty does not extend to damage caused by excessive vehicle speed or caused deliberately by persons or persons unknown."

11 The plan annexed to the deed was, self-evidently, a sketch plan and, unlike the easements and rights of carriageway already in existence, was simply identified as "(H) Proposed Access".

12 The specifications for the construction of the carriageway were required to be read "in conjunction with" a document identified in the proceedings as the "Bowdens plans". Specific requirements of the specification will be

referred to below. The Bowdens plans incorporated the necessary engineering detail, giving precise measurements for the earthworks, placement of the roadway and necessary measurements. The effect of the relocation of the roadway was to take the new section down the side of a gully or depression to the west of the house, across a relatively level area and up an incline on the western side. As will be noted, the effectiveness of the drainage of the roadway became an issue after the construction was complete.

13 Although the details are not relevant, delay in executing the deed resulted from a dispute as to the terms of the warranty in clause 7. It appears that, after the deed had been executed by Mr Rees and the Hulberts, the respondent sought a variation involving the deletion of clause 7, to avoid the obligations imposed on it by the warranty. Ms Henderson resisted the change. The respondent's solicitors obtained letters from both Mr Rees and the Hulberts indicating their willingness to join as plaintiffs in any legal action in the Supreme Court initiated by the respondent, in the event that Ms Henderson did not change her mind. On 11 August 1999 the respondent's solicitors noted that they had had a preliminary conference with counsel in relation to drafting "the necessary statement of claim and affidavits". On 31 August, however, the respondent apparently abandoned its position, whereupon the solicitor for the Hendersons sought an additional condition requiring payment to their clients of $1,150 on account of additional legal costs incurred in respect of the proposed deletion of clause 7.

14 In accordance with the timetable envisaged by the deed, namely construction within two months of the date of the deed, construction was undertaken under the supervision of Mr McDonald and completed on 28 October 1999. On 1 February 2000 Mr McDonald certified that the road had been constructed in accordance with the specifications and, generally, in accordance with the Bowdens plan "with some amendments".

15 Following the completion of the construction work, the respondent retained the appellants to prepare a "work as executed" survey and a "linen plan" to allow the new right of carriageway to be registered.

16 In fact, the survey was undertaken in November 1999, after the road base had been laid, in order to establish the centreline of the roadway and to provide some details of cross-sections and gradients. That work was undertaken at the request of Mr McDonald. Mr Monaghan undertook the boundary survey of the reconstructed part of the roadway on 8 November 1999. On 12 November 1999, he placed pegs along the centreline of the new carriageway.

17 On 29 December 1999, he sent a copy of the linen plan, together with a draft s 88B instrument to the respondent's solicitors. The McCammons were then overseas, but on their return in early February 2000 they signed a copy of the linen plan ("the original linen plan") prepared by Mr Monaghan as instructed by the respondent. The trial judge stated that, "[b]y early March 2000 all of the interested parties had signed the linen plan and the s 88B instrument": judgment, p 4. He further noted that the documents were lodged for registration on or about 13 March 2000. On 21 March 2000 the Director of Land Titles wrote to both Mr Monaghan and to the solicitors for the respondent enclosing a number of requisitions relating to the survey and requiring some changes to the s 88B instrument, primarily for the purpose of recognising the release of the existing right of way. The final version of the linen plan showing the new right of way was registered on 3 April 2000. The critical events, giving rise to the now accepted liability on the part of the appellants, occurred between 21 March and 3 April 2000.

18 Between the lodgement of the original linen plan and the re-lodgement following the requisitions, Mr Monaghan made changes to the alignment of the right of way as shown on the original linen plan. Those amendments appear in "Plan 6", which is Annexure 2 to this judgment. There were, in

substance, two amendments: the first was on the unrelocated carriageway on the western side of the property, where the boundaries were shifted by between half and one metre to the east. In some parts, this achieved a minor reduction in the width of the carriageway.

19 The second and more significant change occurred at the southeast point of the carriageway, known as Barrett Junction. There, Mr Monaghan varied the eastern boundary, in effect excising a triangular sliver of land from the right of way. At that point, the roadway dipped to the west of the higher ground, leading Mr McCammon to build a timber retaining way on the northeast (upper) side of the roadway. That retaining wall was built almost entirely within the sliver of land excluded by Mr Monaghan's amendment.

20 Why Mr Monaghan made the amendments is no longer important. Importantly, he did not disclose that he had made changes to the party which had contracted with his company to undertake the work, namely the respondent. Nor was any disclosure made at that time to the neighbours. In broad terms, the appellants now accept that they were liable to compensate the respondent for any loss suffered by it as a result of the changes to the original linen plan made by Mr Monaghan.

Nature of losses

21 The losses suffered by the respondent and claimed from the appellant fell into four categories. First, there were the surveying and legal expenses required to correct the title. Secondly, there were the costs of carrying out works on the land to move the retaining wall and fencing which encroached within the boundaries of the right of way. The appellants accepted that they were obliged to meet these heads of loss.

22 Thirdly, the respondent claimed the costs of litigation between it and the neighbours which commenced in August 2002 and continued for more than five years. Fourthly, the respondent claimed costs resulting from its inability to sell the land during the period the land was subject to a caveat

lodged by the neighbours, which was not finally withdrawn until 14 May 2009. The appellants deny responsibility for these expenses, or, in the alternative, for all but a limited part of them.

23 The largest amounts in dispute are the costs incurred by the respondent in two sets of litigation in the Supreme Court with its neighbours. In figures accepted by the trial judge, those costs were said to total some $319,437. With the amount allowed for the loss of sale, namely $20,000, and the amount allowed for re-surveying the right of way, lodging the fresh s 88B instrument and the physical work in respect of fencing, retaining walls, drainage and road works (totalling $14,780) the total amount allowed was $354,217. However, by agreement, that was reduced to $337,658, the basis of the reduction not being revealed to the trial judge (or to this Court). A further amount of $136,703 was allowed by way of interest.

24 To assess these positions it is necessary to refer to the history of the disputation between the respondent and the benefiting neighbours and identify how the changes to the linen plan were revealed. The primary question on the appeal is, therefore, whether the respondent was properly entitled to recover the whole of its legal costs in respect of the Supreme Court proceedings. That, in turn, required analysis of the conduct of three sets of parties, namely:

(a) the appellants;
(b) the respondent, through its principal, Mr McCammon, and
(c) the neighbours with whom the respondent was in dispute.

25 In relation to the benefiting neighbours, it may be noted that the Hulberts played no part in the disputation after the agreement of 1999 was concluded. Further, the evidence does not reveal any significant part being played by Mrs Dianne McCammon, although she was also a director and beneficiary of the trust held by the respondent. Nor did the evidence demonstrate any significant role played by Mrs Margaret Henderson, the

mother of Ms Lucy Henderson, although both were party to the subsequent litigation. (It is convenient hereafter to refer to the Hendersons and Mr Rees collectively as "the neighbours".) From mid-2002 at the latest, the Hulberts played no part in the disputation.

History of disputation

26 Precisely what happened between 4 April 2000 and 9 July 2002 is not well explained in the evidence. However, on the latter date, the neighbours lodged a caveat against the respondent's title. The issue raised by the caveat concerned the boundaries of the southwest ("unrelocated") section of the right of way, which was not meant to have been affected by the new ("relocated") section. In response to a query, on 20 July 2002 Mr Monaghan wrote to Mr McCammon explaining that changes had been made to the unrelocated part of the right of way.

27 The correspondence during 2000 and the first half of 2002 revealed ongoing concerns as to the drainage of the road and correct placement of the fencing on the unrelocated section. In May 2002 Mr Rees had sought to survey the whole of the new right of carriageway and the placement of the fences. On 31 July 2002, a letter of demand was sent by solicitors for the neighbours to solicitors for the respondent.

28 On 12 August 2002, the neighbours commenced the first proceedings in the Equity Division, against the respondent. The critical order sought was to be found in paragraph 5 of the summons:

> "5. An order that the defendant do all necessary acts and things and sign all necessary documents:
>
> a. to remove any encroachment upon the New Right of Carriageway;
> b. to provide adequate and proper drainage for the New Right of Carriageway;
> c. to obtain and provide to the plaintiffs a surveyor's report on the width and position of the New Right of Carriageway; and/or
> d. in the alternative to c, to permit a surveyor retained by the plaintiffs to enter onto the land ... for the purposes of preparing a

report to them on the width and position of the New Right of Carriageway."

29 Separately, and more generally than paragraph 5(b), the summons sought an order that the defendant ensure that "the condition of the New Right of Carriageway complies with the Specifications which are Annexure B to the Deed, and the Deed generally": clause 4. The defendant was to be restrained from dealing with the property until those works were completed.

30 On 14 August 2002 the respondent's solicitors indicated its willingness to resurvey the right of way and move, at its cost, any fencing which encroached upon the right of way. It rejected the request to carry out drainage works at Barrett Junction, noting that its warranty as to compliance with the specification annexed to the deed had been for a period of two years, which had expired. It also declined to pay legal costs incurred by the neighbours, noting it had been unaware of the problem in relation to the position of the right of carriageway until their letter of 31 July 2002, upon which it had immediately acted. The letter sought, in substance:

(a) variation of the registered right of way to conform to the original linen plan;
(b) removal of fencing which encroached upon the right of way;
(c) improved drainage, both at the point where the relocated section joined the unrelocated section and at Barrett Junction;
(d) a further survey to confirm that the right of way was five metres wide at Barrett Junction, and
(e) the costs of works, surveying and the neighbours' legal costs to be borne by the respondent, although the neighbours agreed to pay half the cost of moving the fencing on the unrelocated section and the drainage works where the two sections joined.

31 There was no doubt that the respondent was anxious to settle the dispute expeditiously, as it had put the property on the market and had received an offer to purchase. It needed to have the caveat removed. On 28 August 2002 its solicitors wrote again inquiring as to the intended response to their letter of 14 August and seeking a copy of the engineer's report which was to be prepared, in accordance with interlocutory orders of the Court. The neighbours' solicitors responded on 28 October 2002 accepting the resolution in principle of the surveying problem but noting a number of "practical difficulties inherent in the current right of access". They sought to explore the possibility of reaching agreement upon modifications to resolve the practical difficulties.

32 In November 2002, G J Ryan & Associates Pty Ltd, the civil engineers contracted by the neighbours, provided a report recommending a pavement width of three metres with a half metre shoulder on either side and a one metre table drain in areas of cut. Fence lines at bends were to be relocated. On 5 November 2002, the neighbours' solicitors requested compliance with the works proposed by the engineer, at the respondent's expense, access to the respondent's property for a surveyor to check the plans against the agreement of 3 September 1999 and payment of the neighbours' costs.

33 On 18 November 2002 the respondent's solicitor reiterated its earlier position, namely that in respect of the condition of the roadway, it was entitled to rely on the certificate of Mr McDonald provided in accordance with the agreement and the fact that the warranty period had expired. It indicted willingness to consider broadening the access point at Barrett Junction and noted that repositioning of the fencing along the unrelocated section of the right of way had already commenced. That offer was in substance repeated by letter dated 19 December 2002. Nothing was said in any of this correspondence as to the possibility of an outstanding sale being jeopardised by the continued existence of the caveat.

34 The respondent asked Mr Monaghan to prepare a new plan to ensure that the right of way conformed to the old right of way on the unrelocated section, and widening the right of way at Barrett's Junction. On 10 March 2003, the respondent's solicitor wrote to Mr Monaghan noting that the respondent no longer wished to concede the additional land at Barrett's Junction. There appears to have been some short delay in complying with this request, but the new plan was provided on 23 April 2003 by the appellants. On 1 May 2003 the plan was forwarded to the solicitors for the neighbours, seeking their signatures, without making the proposal conditional upon the withdrawal of the caveat or settlement of the court proceedings. Both were, however, identified as subsequent steps to be taken by them.

35 On 4 September 2003 the solicitors for the neighbours wrote again with a further proposal, seeking, in effect, a reconstruction of the Barrett Junction portion of the roadway, to ensure that they had "the benefit of five full metres useable width of carriageway" and that the "tight turn at the junction be avoided". The letter also referred for the first time to the suggestion that "the position of the road near the Barrett Junction point is different to that shown on Plan A", being the original linen plan. The neighbours agreed to pay for the construction of the road on both sides of Barrett Junction. The letter was made "without prejudice" and was understood by the respondent's solicitors as a *Calderbank* offer.

36 On 11 September 2003 the respondent's solicitors replied seeking particulars in respect of some of the proposed changes. They noted that part of the roadway near Barrett Junction was less than a consistent five metres in width and referred to a survey report of Teerman Newton of 21 August 2002. On 13 October, the neighbours' solicitors served a formal offer of compromise. The offer required that the respondent do all things necessary to ensure that the registered right of way conform to the original linen plan and, in particular, that it remove the retaining wall and fence which encroached upon the right of carriageway approximately five metres

north of the boundary of Barrett Junction. This appears to have been the first occasion on which the allegation that the retaining wall was within the right of way was expressly identified. No other works were required: there was no reference to drainage. The offer was also conditional upon payment of not more than $10,000 on account of the neighbours' costs, although an alternative offer without reference to costs was also made, costs being payable under court rules.

37 Acceptance of that offer of compromise would have ended the proceedings, without obliging the respondent to carry out road works or drainage.

38 That offer was not accepted. On 11 November 2003 the respondent's solicitors replied with, in effect, a counteroffer including the statement that "[t]he retaining wall does not encroach on the easement".

39 On 17 November 2003 counsel acting for the respondent prepared a draft formal offer of compromise which was forwarded to the McCammons on 26 November. The letter noted the solicitor's belief that the plaintiffs would not agree to pay any of the respondent's costs. On 28 November, Mr McCammon wrote to Mr Monaghan asking for a copy of a plan which restored the relocated section to its original intended position and gave a narrow strip at the Barrett Junction to allow for possible road straightening. The respondent's offer was served on 1 December 2003.

40 For many months in 2003 Mr McCammon had steadfastly resisted attempts by Mr Gibson of Teerman Newton Richmond Pty Ltd, briefed by the neighbours, to come onto the respondent's land for the purpose of resurveying the whole of the new right of way. However, on 3 February 2004, Mr Gibson was in a position to provide a plan which identified the change which had occurred north of Barrett Junction. There was no clear explanation as to how Mr Gibson's report (which appears to have constituted an essential evidential basis for the neighbours' case in the first

proceedings) came to be provided to the respondent on 4 February 2004. In 2002, the configuration of the new right of carriageway at Barrett Junction was the subject of a number of concerns, but they were unrelated to the changes to the original linen plan, which had not then been identified. The issues involved the Barretts, as well as the respondent and the benefiting neighbours. It appears to have been for the purpose of resolving those issues that, in early 2004, the neighbours obtained the survey, undertaken by Mr Gibson.

41 Mr Gibson's plan of 3 February 2004 revealed the variation to the original linen plan resulting from the removal of the "sliver" of land on the northeast boundary of the new right of carriageway at Barrett Junction. Mr Gibson's survey was sent to Mr Monaghan and, on 6 February 2004, he prepared a plan accepting the correctness of Mr Gibson's survey and noting that the timber retaining wall was within the right of way as it appeared on the original linen plan.

42 The proceedings were settled on 17 February 2005 on terms which required the summons to be dismissed with no order as to costs. The agreement, as noted in the terms, required the correction of both sets of changes to the original linen plan. It required the respondent to take steps to remove encroachments, including the timber retaining wall and certain fencing. It also required the respondent, at its own cost, to create a table drain on the east of the road, as required by the specifications forming part of the deed of 3 September 1999. The respondent also agreed to construct a "concrete dish drain with covering [grate] at Barrett Junction". The neighbours were required to deliver an executed withdrawal of caveat in registrable form within seven days following the completion of the works to be undertaken by the respondent.

43 There was very little evidence before this Court as to what happened between February 2004 and February 2005. However, as appears from a schedule of legal costs incurred by the respondent, approximately $70,000

were incurred by the respondents' solicitors up to March 2004 and a further $66,000 from March 2004 until April 2005. What can be inferred from the material in evidence is that by mid-February 2004 the respondents' then solicitors, David Pain & Co of Eastwood, were pressing Mr McCammon to make an offer of settlement which "must include a reversion to the original plan signed by all the parties and if there are any encroachments such as the retaining fence then that encroachment must be removed and relocated outside the limits of the plans": letter, 11 February 2004, emphasis in original. The letter continued:

> "We don't know where you got the idea that they are producing a different plan. The only plan they are relying on is the one they signed and incidentally the one that you signed.
>
> You can't blame Monaghan for your present predicament. We would have been in a much stronger position if you had followed the advice you had received and continued to offer the additional width near the Barrett junction to restore the width there to the original plan signed by the parties and remove any encroachments."

44 Mr McCammon responded on 16 February 2004 in terms which demonstrated a breakdown in the relationship. At about that time, the respondent instructed Hunt and Hunt as its new solicitors.

Second Equity proceedings

45 Following the settlement, the respondent engaged an engineer, from a list of three nominated by the neighbours, to supervise the construction work. Mr Hall, of Kneebone Beretta and Hall, agreed to undertake that work, but sought to have the correct boundaries of the right of way pegged by a surveyor. It was at that stage that Mr Monaghan declined to be involved any further and the respondent engaged a new surveyor, Urbanex Pty Ltd.

46 Mr McCammon gave evidence that, following the settlement, he was dissatisfied with the terms, which he considered were not sufficiently tight. Subsequent events proved that to be correct. Although the terms anticipated a "more formal document" to record the agreement, none was

prepared. The obligation of the neighbours on completion of the works to be undertaken by the respondent was to deliver an executed withdrawal of caveat in registrable form: the obligation did not expressly extend to signing the new linen plans. Nevertheless, it was clearly the intent of the agreement that, upon certification by the engineer contracted to supervise the work, those documents would be signed, provided to the respondent and registered.

47 The works were completed in May 2005 and the certificate of the engineer was sent to the neighbours' solicitors on 8 June 2005. A new linen plan, in accordance with the original signed plan, together with a new s 88B instrument, was prepared by Urbanex and sent to the neighbours' solicitors on 11 August 2005. It was not executed and returned, despite an obligation in the terms of settlement to deliver an executed withdrawal of caveat within seven days of completion of the works to be undertaken by the respondent. Instead, the neighbours sought to dispute the accuracy of the engineer's certificate, alleging that certain aspects of the works were not in accordance with the terms of settlement.

48 In May 2006 the respondent briefed new solicitors in an attempt to resolve the on-going disputation. On 2 August 2006 a second summons was issued in the Supreme Court, seeking enforcement of the terms of settlement and requiring the neighbours to execute the necessary documents to permit the registration of the new right of way and removal of the caveat. That step provoked a cross-summons by the neighbours, filed on 13 October 2006. On 7 November 2006 the respondent's solicitors made an offer of settlement. On 16 November 2006 the neighbours' solicitors responded with a counter offer in the following terms:

> "1. That the plan, and the variation of easement form, be delivered to the plaintiff [the respondent], or its solicitors, duly signed by the defendants [the neighbours] on 17 November 2006.
>
> 2. The summons, the notice of motion and the cross-summons be withdrawn and dismissed.

> 3. Each party pay their own costs in relation to the summons, the notice of motion and the cross-summons.
>
> 4. Upon the plan having been registered, and notice having been given to the defendants accordingly, the defendants will deliver a withdrawal of caveat 87592695 within seven days to the plaintiff."

49 That offer was apparently not accepted, and a notice of motion filed on 16 November 2006 by the respondents seeking summary judgment in respect of orders sought in its summons, proceeded to hearing before Macready AsJ. Judgment was delivered on 1 December 2006. His Honour found that, in one respect, the respondent had not complied with its obligation under the terms of settlement and accordingly rejected the application for specific performance.

50 There was no material in the evidence to which the Court was taken explaining why the respondent did not accept the offer of November 16. It would appear to have achieved the withdrawal of the caveat, which was the result, adverse to the respondent's interests, remaining outstanding from the dispute caused by the appellants, who were not parties in the enforcement proceedings.

51 On 24 October 2007 the neighbours made a further offer to settle the proceedings on the following terms:

> "1. That the first, second and third defendants [the neighbours] execute:
>
> (a) the Linen Plan (as referred to in the Summons filed on 2 August 2006); and
> (b) the Variation of Easement document (as referred in the said Summons).
>
> 2. That the defendants deliver the executed Linen Plan and the executed Variation of Easement to the Plaintiffs' solicitors within seven days of the acceptance of this offer.
>
> 3. That the Summons and Cross-Claim be discontinued forthwith after delivery of those documents, such withdrawal being with the consent of all parties and on the basis that there be no order as to costs and that all previous costs orders be vacated. The parties

> shall exchange notices of consent and shall file notices of discontinuance accordingly.
>
> 4. That each party bear his, her or its own costs of and incidental to the proceedings, including costs already subject of costs orders.
>
> 5. That this settlement, when performed, shall be in full compromise, discharge and release of all the parties' respective rights and claims asserted in the subject litigation."

52 That offer was stated to remain open for acceptance by the respondent until 4pm on 31 October 2007. On that day, the respondent's solicitors wrote to the solicitors for the neighbours accepting the offer and confirming certain matters, discussed in a telephone conversation, namely that:

> "(a) Stratford [the respondent] will pay the standard fees charged by mortgagee St George Bank for execution and production of the linen plan;
>
> (b) your clients will provide the Withdrawal of Caveat on notice of registration of the linen plan;
>
> (c) should Land and Property Information raise requisitions as to form on the linen plan the parties will co-operate to satisfy such requisitions;
>
> (d) by reason of the necessity to involve third parties there may be difficulties satisfying the time limits in the offer but the parties will work cooperatively to complete the matter as close to those time limits as the circumstances permit."

53 Each of the steps outlined in the offer of settlement was taken by 12 December 2007. However, difficulties were raised with registration of the documents, requiring new documents to be executed. The proposed amendments were set out in a letter from the respondent's solicitors on 12 February 2008. Further delays ensued, the fresh documents being finally registered on 5 December 2008. Even then, the withdrawal of caveat was not executed by the neighbours until 14 May 2009 and was registered on that date.

Findings of trial judge

54 The issue on the appeal involved the proper assessment of damages payable by the appellants to the respondent. There was no challenge to

findings of liability. Nevertheless, it is necessary to identify the source of liability in order to assess the consequences for which the appellants should properly be held liable.

55 The trial judge spoke in broad terms of the conduct of the appellants involving "a gross departure from [their] obligation to the [respondent] and the benefiting owners": judgment, p 38. He found that Mr Monaghan's actions "led him to make amendments to the linen plan which inevitably in my view resulted in a real potential for litigation": p 41.

56 The findings as to liability dealt separately with claims in contract, breach of the *Trade Practices Act 1974* (Cth), ss 52 and 74 and the tortious duty of care. It is necessary to identify the findings separately in respect of each.

57 In respect of contract, the trial judge found the first appellant "guilty of a fundamental breach of express and implied terms of the contract": p 41. Two points should be noted: first, Mr Monaghan did not contract with the respondent and, accordingly, was not found liable in breach of contract. Secondly, there was no clear identification of the "express and implied terms" of which there was a "fundamental breach". The contract, as pleaded, imposed a number of obligations on the first appellant, which were in summary:

(a) to carry out a Land Titles Office search to enable the precise location of the original right of way to be determined;

(b) to place survey pegs identifying both the non-relocated section and the relocated section of the right of way, so that the latter would conform to the plan attached to the deed;

(c) to prepare a "works as executed" survey of the new right of way to ensure that the construction conformed to the deed;

(d) to prepare a linen plan and s 88B instrument to identify the location of the new right of way as constructed;

(e) to notify the respondent if there were differences between the plan attached to the deed and the new right of way as identified by survey, and

(f) to prepare for execution by the respondent and the benefiting owners a linen plan accurately identifying the new right of way as constructed.

58 There were also alleged to be implied terms, including an obligation to exercise reasonable care and skill in undertaking the works, which were not in dispute. The trial judge found that there was a breach of the warranties implied into the contract by virtue of s 74 of the *Trade Practices Act*, as then in force: judgment, p 41.

59 There were in effect two elements of the contractual obligations imposed on the first appellant which were breached and caused loss. First, the placement of the survey pegs, it was held, led the respondent to build fences and construct the timber retaining wall in locations which encroached on the right of way. Secondly, the changes to the linen plan resulted in the right of way being registered in a location which varied from the agreed location. There may have been satisfactory reasons for the changes, but it was a breach of contract for the surveyor to incorporate such changes without obtaining approval from the respondent. The respondent did not assert that there was any obligation on the appellants to obtain approval from the neighbours, but clearly it (the respondent) would have had a contractual obligation to take that step itself.

60 In respect of the cause of action in tort, the trial judge found that there was liability on the part of the appellants, who had breached a duty of care to carry out the survey and record the results on the linen plan, in accordance with their instructions. The breach could properly be identified in the way

set out above in respect of the first appellant's contractual obligation to the respondent. However, the duty of care undoubtedly extended to the neighbours who were to obtain the benefit of the right of way over the respondent's land.

61 In respect of the statutory cause of action, the trial judge upheld a claim for breach of s 52 of the *Trade Practices Act*, referring to "misleading and deceptive representations". Those representations were not identified, but it may be understood that any conduct which fell within s 52 took the form of representations, either express or implied. Although the pleading in respect of s 52 referred to various paragraphs in the amended statement of claim, some of which were not obviously relevant, it may be accepted that the representations upheld as constituting the misleading or deceptive conduct, were in the terms as pleaded at par 37, namely that the registered linen plan -

(a) was the same document as that executed by the respondent and the neighbours in February 2000;
(b) correctly identified the new right of way as constructed;
(c) identified the new right of way as constructed in accordance with the plan attached to the deed and the certificate of the engineer.

There may also have been an implied representation that the retaining wall and part of the fencing on the non-relocated section did not encroach upon the new right of way, whereas in fact they did.

62 In finding liability under s 52, the trial judge identified the respondent as a consumer under a contract for the supply of services: p 41. Although it is not entirely clear, the finding appears to have been limited to implied representations made to the respondent. It may, however, have included representations made to the neighbours, although one might have expected that to be stated as an express finding, if made.

63 His Honour concluded that Mr Monaghan was liable "under the accessorial provisions of s 75B of the *Trade Practices Act*", but did not say for what: p 42. It may be assumed that he was intending to refer to s 52 of the *Trade Practices Act* as, in the following sentence, he noted that Mr Monaghan was also liable under s 42 of the *Fair Trading Act 1987* (NSW).

Causation of loss - legal principles

64 The first step in considering the question of causation is to identify the nature of the loss or losses suffered. In circumstances where a claimant seeks to recover legal costs incurred in defending proceedings brought against it, where the litigation is said to have been caused by a third party, the harm suffered may be identified as the loss of an opportunity to avoid the litigation. Where the claimant has successfully defended the litigation, the loss will be the difference between the costs incurred and the costs recovered from the other party: see, for example, *University of Western Australia v Gray (No 28)* [2010] FCA 586; 185 FCR 335 (Barker J) and, on appeal *Gray v Sirtex Medical Ltd* [2011] FCAFC 40; 193 FCR 1 (Bennett, Gilmour and Gordon JJ). That case involved an invention by a staff member at the University which he sought to develop commercially through a company (Sirtex) of which he was a director. The University brought proceedings against Sirtex, unsuccessfully asserting a claim to intellectual property in the invention. However, Sirtex cross-claimed against Dr Gray on the basis that his failure to advise Sirtex of a possible claim of intellectual property in the University caused it to incur the costs of the litigation. It was successful in recovering those costs from Dr Gray as damages incurred by it as a result of his breach of duty. Dr Gray asserted that what had been lost was a commercial opportunity, which should have been assessed by reference to the probabilities or possibilities of the issue being resolved without litigation, in accordance with principles identified in *Sellars v Adelaide Petroleum NL* [1994] HCA 4; 179 CLR 332: *Gray (No 28)* at [7]. The primary judge adopted that approach, which was not challenged on appeal, assessing Sirtex's loss as 86% of its costs, being

the probability of the realisation of the lost chance of settlement without litigation: at [190].

65 As this Court explained in *Gett v Tabet* [2009] NSWCA 76; 254 ALR 504; (2009) Aust Torts Rep 82-005 at [332]:

> "The history of claims for a loss of a chance in Australia has an uncertain foundation. The uncertainty arises in part from the narrow dividing line between matters going to causation (to be determined on the balance of probabilities) and matters involving the assessment of loss in hypothetical circumstances. Cases falling within the latter category include those where damages are reduced on account of contingencies which may possibly have affected the continuation of the causal effect of the tort...."

66 The respondent did not plead a case involving a lost opportunity, but rather asserted boldly that its losses were the actual amounts expended by it. Nor, it would seem, did either party contend that the damages might be reduced on account of contingencies, in accordance with the principles for assessment of loss identified in *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638. On the other hand, the appellants did plead in their defence that there should be a reduction for contributory negligence and claimed that the respondent had failed to mitigate its damages. Thus, for the purposes of addressing questions of causation, the harm is to be identified as the costs incurred by the respondent and not by reference to any loss of opportunity to avoid such expenses. Where a quantified financial loss has accrued, rather than the failure of a hoped for benefit to eventuate, it cannot be said that this approach was erroneous: see generally, *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [38]-[39] and [47]-[49] (Gummow ACJ); [69] (Hayne and Bell JJ); [113] and [122]-[124] (Kiefel J).

67 The harm suffered by the respondent was economic loss. Putting to one side the claims under the *Trade Practices Act* and the *Fair Trading Act* for misleading or deceptive conduct, each of the other claims appears to have been assumed to involve a failure to exercise reasonable care and skill. That form of breach of duty constitutes "negligence" for the purposes of

the *Civil Liability Act 2002* (NSW), Pt 1A. Accordingly, that Part applied to the claims for damages brought in tort and contract: s 5A(1). To determine whether particular elements of harm were recoverable, the Court needed to apply s 5D, appearing in Div 3 "Causation". The relevant parts of the provision read:

> "**5D General principles**
>
> (1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).
>
> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
>
> ...
> (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

68 Although the conduct in breach of contract and in tort occurred (at least in part) before the commencement of Part 1A (on 6 December 2002) those provisions had application to civil liability arising before their commencement, so long as the proceedings were not commenced before that commencement: *Civil Liability Act*, Sch 1, cl 6(1). These proceedings were commenced in 2005.

69 It is clear that both s 5D(1)(b) and (2) were intended to cover factors variously described as "value judgments", "normative considerations" or "legal policy". Whether paragraph (a) of s 5D(1) also includes policy considerations is less clear. The purpose of s 5D(1) has been identified as establishing a two-stage test of causation whereby what is described as

"factual causation" is to be addressed separately from "scope of liability": *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [43]. Factual causation may identify the relationship between the conduct of the tortfeasor held to involve a breach of duty and the harm claimed to have occurred as a consequence. It thus identifies a relationship between conduct and consequence which is not necessarily free of normative considerations. First, there are normative considerations which will influence a finding that particular conduct constitutes a breach of duty, which cannot usefully be ignored in considering the relationship between the conduct and the harm asserted by the plaintiff. In circumstances where the relationship between the conduct and the consequence is well understood (because explained by Newtonian physics) the temporal link may be sufficient to establish "causation". In other circumstances, there may be a statistical correlation, without a full understanding as to the physical mechanism by which the particular consequence may result from the tortious conduct. (An example may be asbestos exposure followed by mesothelioma.) In other circumstances again, some elements of harm may depend upon the conduct of the injured party or the further conduct of third parties. On one view, normative elements cannot be entirely expunged from a "counter-factual inquiry" in determining whether the conduct was a necessary condition of the occurrence of harm. In a sense, so much is implicit in sub-s (2), which recognises that in some cases where the counter-factual condition cannot be satisfied, there may nevertheless be an imposition of liability: see *Wallace v Kam* [2012] NSWCA 82 at [163].

70 Secondly, it appears to have been intended that the normative inquiry under paragraph (b) would extend beyond what have traditionally been seen as elements of causation, to cover questions raised by intervening and successive causes, foreseeability and remoteness.

71 Furthermore, it is apparent from the report which formed the basis of the Act, *Review of the Law of Negligence - Final Report* (September 2002) (commonly known as the "Ipp Report") that the focus of the reform was on

concepts familiar in tort law. In respect of "factual causation" that does not cause a difficulty. As stated by McHugh JA in *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 352C, in a passage which is reflected in the terms of s 5D:

> "So far as the law of tort is concerned, the 'but for' test must be taken in this Court to be the leading and, in all but exceptional cases, the exclusive test of causation. And I can see no reason why the same test should not be applied in contract. Once causation-in-fact is established, the only question is whether the damage is so remote from the breach that the defendant should not be held responsible for it."

72 In tort, concepts of remoteness are at least partly determined by reference to that which was "reasonably foreseeable" at the time of the conduct. In contract, according to the classic statement of Alderson B in *Hadley v Baxendale* (1854) 156 ER 145 at 151, liability will extend to that which "may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it". This test, with its two limbs, may operate differentially depending upon whether the claim is for loss of an expected benefit or for a loss which flows from reliance by the injured party on the proper performance of the contract.

73 Although the purpose of s 5D(1)(b) and (2) is to focus on what may, succinctly, be identified as policy issues, there is no suggestion that the content of the principles is uniform, rather than varying according to the circumstances. Nor is there any suggestion that they will not vary according to the cause of action. Although entirely obiter, in circumstances where s 5D had no operation, Ipp JA expressed the view in *Ruddock v Taylor* [2003] NSWCA 262; 58 NSWLR 269 at [89] that s 5D embodies principles in regard to causation that "are in accord with the common law". As already noted, whether s 5D is properly understood to be limited to questions dealt with as "causation" under the common law may be

doubted. As Allsop P, writing extra-judicially has noted, it is arguable that the structure of s 5D is apt to reflect the approach of McHugh J, rather than the reasoning of Mason CJ (for the majority) in *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; 171 CLR 506: J Allsop, "Causation in Commercial Law", ch 13 in eds S Degeling, J Edelman, J Goudkamp, *Torts in Commercial Law* (Lawbook Co 2011), p 294; see also *Adeels Palace* at [43]-[44]. On the other hand, the fact that s 5D(1) identifies two separate issues which need to be addressed, does not mean that the Court must adopt a two-stage approach to its inquiry, or that the issues can properly be regarded as separate and discrete, each from the other.

74 One question raised by the form of s 5D(1) is how it should be applied in respect of continuing or consecutive harm. Thus, if the negligence was a necessary condition of some harm, is the question of liability for continuing or consecutive harm to be answered by reposing the counter-factual question from time to time, or by reference to the policy issues intended to be covered by paragraph (b)? The question illustrates the artificiality of the attempt to impose a two-stage process. The difficulty in answering the counter-factual question arises in part from the difficulty in predicting how third persons, not witnesses or parties to the litigation, would have acted, had the circumstances been different in one respect. If the answer to the counter-factual question, on the balance of probabilities, is that the breach of duty was a necessary condition of the further harm, there would then be a question as to whether liability should be limited on the basis of a remoteness principle. If the answer to the counter-factual question was in the negative, it might then be necessary to ask whether, in policy terms, the uncertainty should be put to one side because responsibility should be placed on the tortfeasor in any event, pursuant to s 5D(2).

75 There is a separate issue as to whether the claim under the *Fair Trading Act* must assessed in accordance with s 5D of the *Civil Liability Act*. If the conduct in a particular case involved a negligent misrepresentation, it is arguable that it would be caught by the definition of "negligence" in s 5 of

the *Civil Liability Act*. However, negligence is not a necessary element of a contravention of s 42 of the *Fair Trading Act* and it would seem curious if, by a side wind, some claims under s 42 were to be subject to the *Civil Liability Act*, Pt 1A, and some were not.

76 In *Perpetual Trustee Co Ltd v Milanex Pty Ltd (In liq)* [2011] NSWCA 367, in considering whether a defence of contributory negligence was available in response to a claim under s 42 of the *Fair Trading Act 1987* (NSW), Macfarlan JA (Campbell and Young JJA agreeing) noted that ss 5R and 5S of the *Civil Liability Act* did not confer a right to raise a defence of contributory negligence, but operated where such a defence was otherwise available: at [87]. His Honour continued:

> "In any event Part 1A *Civil Liability Act*, of which ss 5R and 5S form part, applies only to claims 'for damages for harm resulting from negligence' (s 5A), requiring in my view that negligence be an element of the relevant cause of action (although, as s 5A makes clear, it does not matter whether the claim is brought in tort, in contract, under statute or otherwise). However, negligence is not an element of a claim for damages arising out of contravention of s 42 *Fair Trading Act* .... A contravention of that section may occur whether or not the defendant has been negligent. That a defendant might as a matter of fact have been careless does not convert a claim against it under s 42 into one based upon negligence."

77 The logic of that reasoning is undeniable, in terms of the language of the statute. However, it does not address an aspect of the history of the legislation which might suggest a different result. Prior to the enactment of the *Statutory Duties* (*Contributory Negligence) Act 1945* (NSW), contributory negligence constituted a defence to a claim for breach of statutory duty under the general law: *Piro v W Foster & Co Ltd* [1943] HCA 32; 68 CLR 313. The statutory reversal of that principle by the 1945 Act was repealed by the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), Sch 3. In *Booksan Pty Ltd v Wehbe* [2006] NSWCA 3; 14 ANZ Insurance Cases 61-678; (2006) Aust Torts Rep 81-830, Ipp JA stated (with the concurrence of Giles and Tobias JJA) that the repeal of the 1945 Act reinstated the rule laid down in *Piro* and contributory

negligence "once more became a defence to a cause of action based on breach of statutory duty": at [162]. Whether the assumption as to revival of the old common law principle is correct need not be considered here: c f DC Pearce and RS Geddes*, Statutory Interpretation in Australia* (7th ed, 2011) at [6.15]. What is of greater concern is the possibility that Pt 1A of the *Civil Liability Act* should apply in relation to a breach of statutory duty, which, as explained by Latham CJ in *Piro* "is absolute in the relevant sense when it requires that a particular thing be done, without reference to any questions of intent or negligence, as distinct from requiring only that the person subject to the statute shall do his best to do a particular thing": at 319. In *Booksan*, Ipp JA stated at [167]:

> "In my opinion the consequences of the repeal of the 1945 Act ... and the insertion of s 5A into the *Civil Liability Act*, are clear. Irrespective of how a claim is formulated, if - in substance - it is a claim for damages for harm resulting from negligence, a defence of contributory negligence may be raised to that claim even if it is based on a breach of statutory duty."

78 Having held that there had been no breach of the regulations giving rise to the statutory duty, it was "not strictly necessary to determine" the issue as to contributory negligence: *Booksan* at [155]. It may also be said, though perhaps not entirely plausibly given the context of the remarks, that Ipp JA was intending to refer to the elements of a cause of action as involving negligence. No party having identified the issue in the present case, it should not be taken further, as it is not necessary to determine it. On the assumption that s 5D(1)(b) and (2) engage questions raised under the general law as to the scope of liability, and impose no constraints themselves on relevant considerations, the result will be the same, whether the exercise is undertaken pursuant to s 5D or directly under the general law. Similarly, s 5D permits the policy of the statute under which liability arises to be given effect.

79 The claim under the *Trade Practices Act* will not be subject to s 5D, because s 82, which provided the remedy by way of damages for breach of s 52, was not constrained by State law, unless that law were picked up

and applied by another Commonwealth law: *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137; 241 FLR 125 at [85]-[91]. It was not suggested in this case that any relevant Commonwealth law had that operation in respect of s 52 of the *Trade Practices Act* (as then in force).

80 The relevant legal principles to be applied in considering the statutory causes of action must derive from the statutory purpose, which may be treated as the same in respect of both Commonwealth and State legislation. In dealing with questions of remoteness, the result is not determined by applying principles relevant to contract or tort law, although in particular circumstances the result may not be materially different: *Travel Compensation Fund v Tambree* [2005] HCA 69; 224 CLR 627 at [29]-[30] (Gleeson CJ); [49]-[50] (Gummow and Hayne JJ).

Application of principles

81 During the period from July 2002 until the changes to the original linen plan were first fully disclosed in February 2004, the respondent showed reasonable diligence in seeking to settle the proceedings. It might be said that, once Mr McCammon understood that the neighbours were claiming that the location of the new right of way was not in accordance with the linen plan signed by all the parties, he should have sought to protect his position in respect of potential costs by immediately offering to settle on the basis that an independent survey would be undertaken and, if errors were identified, the title deeds would be corrected and any encroachments removed at his expense. The respondent might also have sought advice as to whether it might have liability for any deficiency in the construction of the roadway and made a similar offer based on an independent engineering report.

82 These steps were not taken and, indeed, when the neighbours made an offer of compromise, which involved them paying for any reconstruction of the road, it was not accepted.

83 Further, after Mr Monaghan told Mr McCammon that he had changed the location of the old right of way on the western side of the land, neither he nor Mr McCammon appears to have considered whether any other changes were made. It would have been a simple task for Mr Monaghan to have checked the original plan for the new carriageway against the registered plan, assuming he had forgotten the changes he had made some two and a half years earlier.

84 At that stage of the proceedings, the respondent was relying, it appears, upon Mr Monaghan's assurances that he had not misconducted himself in such a way as to give rise to any liability. Neither did Mr Monaghan suggest that any steps be taken in relation to the litigation to protect either the respondent or the appellants against any potential liability. Further, the respondent was unaware until February 2004 of the changes to the original linen plan at Barrett's Junction.

85 Once Mr McCammon was aware of the changes to the original linen plan made in both areas by Mr Monaghan, the respondent had to decide whether to support the changes (despite their non-disclosure) and resist the counter arguments of the neighbours, or to concede that the changes should not have been made and hold the appellants responsible for the consequences. Either position was, of course, amenable to compromise if the parties were willing to resolve their disputes by varying the original linen plan to accommodate their respective interests.

86 Until at least April 2005, the respondent adopted the first approach, seeking to justify the changes. In that month, following settlement with the neighbours, the respondent invited the first appellant to undertake a survey defining the correct boundaries of the right of way, so as to allow further road works to be undertaken. According to Mr McCammon, Mr Monaghan declined to be involved. The respondent obtained alternate surveyors, namely Urbanex. On 1 November 2005 the respondent commenced proceedings against the appellants.

87 It is apparent from the correspondence with his then solicitors, that Mr McCammon received advice in February 2004 that the respondent should offer to settle on the basis of the changes necessary to restore a right of way free of encroachments in conformity with the original linen plan. The respondent did not take that advice, but rather changed solicitors. This Court was not taken to any material which demonstrated the reasonableness of that conduct. The trial judge did not specifically address any events between February 2004 and February 2005; he therefore made no specific findings as to the reasonableness of the respondent's conduct in that period: judgment pp 21-22.

(a) breach of contract

88 Applying the contractual test, it would fairly and reasonably be expected, in the usual course of events, that the respondent would rely upon the survey of the right of way to avoid constructing encroachments. The cost of re-surveying, re-pegging and removing the encroachments would all flow naturally from the breach of contract. It may also be expected that when the breach became known, the respondent would be required by the benefiting owners to prepare and arrange for registration of complying instruments.

89 The critical question is whether, in the ordinary course, it would expected that the benefiting owners would be likely to bring legal proceedings against the respondent to have the registered instrument corrected, or whether, having regard to the knowledge of both parties as to the relationship between the neighbours and the respondent, such a course was a probable result of the breach in this particular case.

90 The changes in the plan might have favoured, in a practical sense, the benefiting owners or the owner of the burdened land. As a matter of fact, the respondent never expressed an objection to the changes and, from its apparent reluctance to rebuild the retaining wall, it may be inferred that it

was at least neutral as to the amended plan. Thus, to the extent that there was a breach of the duty owed to the respondent, any harm suffered by the respondent was the result of its breach of the separate duty owed by it to the neighbours. It was foreseeable in those circumstances that the neighbours might bring proceedings in tort against both appellants. No doubt it would have been necessary to join the respondent as the owner of the burdened land as a necessary party to any change in the registered right of way. Had that happened, the first appellant would have borne the cost of any litigation which resulted from its recalcitrance in conceding a breach of duty. Indeed, it is difficult to see why it would have resisted appropriate orders as, apart from bearing the immediate costs resulting from its own breach of contract, it had no interest in the substantive issue as to the location of the right of way.

91 However, no such proceedings were brought: instead, the neighbours placed a caveat on the respondent's title and sought to justify it by legal proceedings against the respondent. It might also reasonably have been expected that the respondent would join the appellants to the proceedings brought by the neighbours. At no stage did the respondent purport to resile from the agreement reflected in the original linen plan and it had an interest in ensuring that the appellants bore any costs resulting from a departure from that plan.

92 There are two considerations which suggest that the legal costs up to February 2004 properly fell within the scope of a claim in contract against the first appellant. First, on the findings of the trial judge, the appellants were aware that relations between the neighbours and the respondent were prickly and that there was a lack of trust on each side. Secondly, when doubts were raised as to the correctness of the registered right of way by the neighbours, the appellants sought to justify their conduct to the respondent and, further, failed to reveal the full extent to which changes had been made to the original linen plan. In a finding which has not been challenged, the trial judge treated the failure to disclose the full extent of

the alterations as a continuing breach. It was not clearly identified until early 2004 and was only conceded by the appellants at that time. Accordingly, the legal costs incurred by the respondent up to that point fell within the scope of liability which would arise from the application of the rule in *Hadley v Baxendale.*

93 In those circumstances, it is not necessary to consider the other bases upon which liability for those elements of harm might be imposed on the first appellant, but it may be important to determine the separate liability of Mr Monaghan, to which it will be necessary to turn. It is convenient first to address the first appellant's liability after February 2004 in terms of the claim in contract.

94 Liability for the expenses incurred by the respondent after February 2004 fall into a different category. The offers to compromise made by the neighbours prior to that date demonstrated a willingness to end the litigation once the agreement recorded in the original linen plan was effected. A dispute as to the construction of the road was no part of the breach of contract by the first appellant. The conclusion that the on-going litigation, after February 2004, might reasonably have been in the contemplation of the parties to the contract, at the time it was made, as the probable result of the breach in question, was not established. It certainly would not have been covered by an assessment of the usual course of things, within the first limb of *Hadley v Baxendale,* nor did the trial judge make findings as to the specific circumstances known to the appellants at the time of the contract which could have given rise to an expectation, within the second limb. There should not have been a finding that the litigation after February 2004 fell within the scope of contractual liability. The contrary conclusion reached by the trial judge bears the flavour of hindsight. Further, it is by no means clear that it was reached in application of the contractual test of remoteness.

(b) claim in tort

95 The liability of the appellants in tort must be separately assessed. The duty of care arose in relation to the requirement to survey the new right of way and record it on a linen plan for registration on the respondent's title. That duty was owed to each of the parties to the agreement constituted by the original linen plan. No doubt it was reasonably foreseeable that undertaking and recording the results of a survey of a road as constructed might reveal practical questions arising from its intended use as a right of way. To the extent that such issues arose, it would have been reasonable to expect that they would be dealt with in preparing the original linen plan and, to the extent that they involved a departure from the broad instructions given to the surveyor, they could then have been discussed with the parties. Changes were made thereafter, which were not communicated to the parties, nor was approval sought. That constituted the breach of duty.

96 There is no reason to suppose that the analysis set out above in respect of the claim for breach of contract against the first appellant would not produce an identical result in respect of an assessment of damages in tort against both appellants. In other words, although separate duties of care were owed to the neighbours and the respondent, for breach of which the neighbours did not sue the appellants, the losses suffered by the respondent as a result of proceedings brought against it were readily foreseeable and were appropriately recovered from the appellants. The next question is whether the appellants were liable in tort for the legal expenses incurred by the respondent after February 2004.

97 These costs fall into two categories. First, there are the costs of the period from February 2004 until February 2005, which related to the first proceedings. Secondly, there were costs incurred thereafter. The respondent commenced proceedings against the appellants on 1 November 2005. By that stage, the continuing disputation between the respondent and the neighbours related to the adequacy of the construction work and its compliance with the terms of settlement. However, the

neighbours did not commence litigation in respect of that: it was the respondent who issued a further summons on 2 August 2006. The connection between that disputation and the breach of duty by the appellants rested on the existence of a caveat over the respondent's land. The counter-factual question raised by s 5D(1)(a), was, originally, 'would the caveat have been lodged but for the breach of duty of the appellants?' That question must be answered by reference to the likely conduct of the neighbours, none of whom gave evidence or was involved in the proceedings between the respondent and the appellants.

98 This raises the question as to the operation of s 5D noted at [74] above.

99 It may be assumed for present purposes that the disputation as to the construction of the road was arguable on both sides and hence foreseeable. The respondent's position was that the certificate of the engineer was conclusive. The neighbours' position was that, in particular respects, it could be demonstrated objectively (and was ultimately conceded) that the road was not in compliance with the specification. There was a dispute as to whether the variations were significant, were desirable in terms of engineering principles and the result of physical constraints imposed by the location of the road. Once the scope of that dispute is accepted, the finding of the trial judge that the respondent (through Mr McCammon) acted reasonably in dealing with the on-going disputation with his neighbours, is not conclusive as to the imposition of liability for the additional costs on the appellants.

100 The critical question in this context is why, assuming the litigating parties each had a legitimate complaint in relation to the construction of the road, which had nothing to do with the original breach of duty by the appellants, the appellants should be required to compensate the respondent for the costs of resolving that dispute. While accepting that the breach of duty by the appellants provided the neighbours' bargaining chip, in the sense of the original entitlement to place a caveat on the respondent's land, it is

clear from the offers made prior to February 2004 that the neighbours were prepared to settle their dispute over the appellants' breaches of duty on terms which were unrelated to the complaints they then had as to the construction of the road. The fact that, somewhat opportunistically, they used the continued existence of the caveat to agitate other disputes, at cost to the respondent, does not provide an adequate basis for imposing liability for those costs on the appellants.

101 There is a further reason for reaching that conclusion. It is found in the circumstance that those costs would not, as found above, be recoverable in breach of contract. Although it may be accepted that the principles for assessing damage under tort and contract are not identical, and may in some circumstances give rise to differing outcomes, that result should be carefully scrutinised to see why the law is imposing liability in tort in circumstances where liability would not arise under the contractual arrangement between the parties. Importantly in this case, for the reasons already explained, such an outcome would require an exceptional justification in circumstances where it resulted, not because of a breach of duty in tort to the other contracting party, but because of a breach of duty to third persons, who had made no claim against the appellants.

(c) breach of statutory duties

102 The final question is whether the further costs after February 2004 were recoverable in causes of action for misleading or deceptive conduct, either under the *Fair Trading Act* or under the *Trade Practices Act*. No submission was put in the present case which would justify recovery on the statutory causes of action in respect of harm not recoverable in tort or contract. It is not, therefore, necessary to consider whether, and if so why, this might be an exceptional case where different results would apply to assessment of loss under the statutory schemes. The reason why such a differential outcome is implausible is that the conduct complained of involved implied representations which involved no different consequences

or considerations for the injured parties than those which arose in tort or, in relation to the first appellant, in breach of contract.

Conclusions as to recoverable loss

103 It follows that the respondent was entitled to recover its reasonable expenditure under the following heads:

(a) removal and replacement of the retaining wall and fencing; costs of resurvey and preparation of a new s 88B instrument and linen plan; registration expenses; and
(b) cost of first Supreme Court proceedings up to 28 February 2004.

104 The appellants submitted that the heads of damage contained in (a) totalled $9,910.50. However, the amounts allowed by the trial judge for these items appear to be of the order of $10,397: judgment, p 47. The correct sum can no doubt be agreed.

105 With respect to (b), the appellants identified the respondent's legal costs of the first proceedings in an amount of $134,049.27. This figure appears to have been agreed after the trial.

106 The respondent is not, however, entitled to recover legal costs incurred after February 2004, being the legal costs of the first proceedings from 1 March 2004 to settlement in February 2005, and the on-going disputation including the second proceedings. The figure for the first period appears to be approximately $66,000. The figure for the latter period appears to have been agreed to have totalled $153,245. The judgment must be reduced by these amounts.

107 The trial judge also allowed an amount for engineering and construction works on the road, totalling $20,453. On the basis that disputes as to the construction of the road were not relevantly related to the appellants' breach of duty, except to the extent that the entitlement to lodge a caveat,

flowing from that breach of duty, provided the neighbours with an opportunity to pursue their claims with respect to the road works, that amount should be disallowed on the same basis as the refusal of the costs of the second proceedings, discussed above. The judgment must be reduced accordingly.

108 Finally, there was an amount allowed by the trial judge to compensate the respondent for its inability to sell the property between July 2002, for almost seven years, whilst the caveat was in place. There was a separate challenge to the allowance of that item. The trial judge accepted that the respondent had put the property on the market in July 2002 and received an offer at that time. (There was a copy of the advertisement for sale of the property in evidence.) He also accepted an estimate by a valuer that the market value of the property had decreased by approximately $50,000 between August 2002 and July 2009, when the caveat was finally removed. There is no basis to overturn those findings. Such figures are undoubtedly attended by a degree of uncertainty and his Honour discounted the amount claimed by the respondent significantly, allowing a figure of $20,000, without interest. While it may be said that, on the reasoning accepted above, the loss flowing from the breach of duty by the appellants should have ended in or shortly after February 2004, the amount in issue is not sufficient to warrant a retrial and the challenge should be dismissed.

109 The trial judge allowed interest on the judgment in an amount of $136,703. That figure will need to be recalculated by the parties in the light of the adjustments noted above.

Costs

110 In broad terms, the appellants have been successful in reducing the amount of their liability in damages by approximately three-quarters. In these circumstances, it would seem appropriate that there be no order as

to costs in this Court, on the basis that each party has been partly, but only partly, successful.

111 With respect to the costs of the trial, the orders sought in the notice of appeal are not pellucid. It appears that there was an offer of compromise made in August 2009, probably by the respondent, given the order made by the trial judge. In the light of the orders proposed in this Court, the parties should have an opportunity to make brief submissions in respect of costs, if appropriate orders cannot be agreed.

Directions as to orders

112 In the result, the appeal should be allowed in part, and the parties should be given an opportunity to bring in short minutes of orders to give effect to these reasons and in respect of costs, both in this Court and in the Court below. The Court should give the following directions:

(1) Direct the parties to file short minutes of orders within 14 days of the date of this judgment.

(2) In the event that agreement is not reached on any matter,

(a) each party is to file, within 28 days, its proposed orders and submissions in support thereof;
(b) each party may, within a further seven days, file a brief submission in reply.

(3) Any application for an extension of the times provided in these directions may be made by letter to the Associate of the presiding judge.

113 **YOUNG JA**: I agree with Basten JA.

****

Annexure 1 Annexure 2