

LOSS OF OPPORTUNITY

Introduction

The full bench of the Federal Court has recently considered the circumstances in which a claimant may recover damages for loss of a commercial opportunity, including the standard of proof required to succeed on such a claim.¹ This decision provides much needed clarity in respect to that burden of proof and the assessment of damages for loss of opportunity claims.

Facts

The appellant, La Trobe Capital & Mortgage Corporation Limited (**La Trobe**), was the manager of a managed investment scheme which involved the investment of members' funds in interest producing loans. La Trobe lent \$2.4 million to Jet Constructions Pty Limited (**Jet**). The security for the loan was a property owned by Jet. The property was valued at \$4 million by Hay Property Consultants Pty Limited (**Hay**) who were the valuers retained by La Trobe. The loan was secured by a first mortgage over the property. Some interest payments were made by Jet. However, Jet defaulted on the loan and La Trobe subsequently sold the property for \$2.2 million.

La Trobe sued Hay on the basis that it relied to its detriment on Hay's \$4 million valuation of the property.

At first instance

At trial², it was admitted that Hay's valuation of the property was negligent. It was also conceded that had the property been correctly valued, then La Trobe would not have entered into the loan. In its claim against Hay, La Trobe claimed:

- a capital loss, being the difference between the \$2.4 million loan and the proceeds of the sale of the property; and
- loss of income, being the difference between the interest payments actually received from Jet and the interest that it would have received if it had entered into a hypothetical performing loan with another borrower (ie the loss of opportunity claim).

La Trobe's claim for damages for loss of income was based upon the assertion that it would have lent \$2.4 million to another borrower on similar terms and derived income from that hypothetical transaction.

Hay accepted liability, but disputed quantum. Specifically, Hay disputed that La Trobe had lost an opportunity to invest the funds, loaned to Jet, in an alternative hypothetical performing loan. Hay asserted that La Trobe made a profit from the loan. It contended that La Trobe received a total of \$2,751,283 (which included, amongst other things, the proceeds of the sale of the property, interest payments from Jet, and an application fee) from the loan to Jet. This sum was over and above the sum of the \$2.4 million originally advanced by La Trobe to Jet.

The trial judge considered that La Trobe had failed to prove that there was a particular loan that it could have entered into at the time it entered into the loan with Jet. He held that as La Trobe was unable to identify any specific alternative loan (and was only able to give generalised evidence that it would, as a matter of course, have found an alternative loan) it had not proved that it had lost any commercial opportunity. In other words, La Trobe failed to establish its loss of income claim.

¹ Finkelstein, Jacobson & Besanko JJ (*La Trobe & Capital Mortgage Corporation Limited v Hay Property Consultants Pty Limited* [2011] FCAFC4)

² Marshall J (*La Trobe & Capital Mortgage Corporation Limited v Hay Property Consultants Pty Limited* [2011] FCA250)

The trial judge found that La Trobe had not suffered a loss. He assessed the claim on an aggregated basis which took into account both lost capital and lost income. Accordingly, the total payments received by La Trobe pursuant to the loan were assessed and it was found that La Trobe had not shown any capital loss, but a small profit.

La Trobe appealed to the full bench of the Federal Court.

Full bench of the Federal Court

The full bench of the Federal Court allowed La Trobe's appeal. The full bench reversed the trial judge and held that:

- damages for loss of capital and loss of income should be assessed on an aggregated basis;
- La Trobe did not need to adduce direct evidence of any specific alternative loan, rather it only need establish that, on the balance of probabilities, it would have taken steps to enter into an alternative performing loan;
- La Trobe's loss of income was then to be assessed by an estimation as to what it would have received had it entered into a hypothetical performing loan with the amount of damages adjusted to reflect future possibilities.

The full bench rejected the trial judge's finding that La Trobe had failed to establish a lost commercial opportunity because it could not show that it would have entered into a particular alternative transaction. Despite the fact that La Trobe could not identify a particular lost opportunity, the full bench was satisfied that La Trobe had established a loss of commercial opportunity of some value. In this respect, the full bench was of the view that in the ordinary course it would be impossible to provide precise evidence about a lost commercial opportunity. The court considered that it was more probable than not that an alternative loan would have been entered into but that any precision in respect to the alternative hypothetical transaction was not required.

Assessing damages on an aggregated basis resulted in all the benefits La Trobe received from the loan to Jet being set off against all losses. Those losses included the loss of income La Trobe would have received if it had invested the \$2.4 million in a hypothetical performing loan.

The full bench did make some small allowance for the possibility that there may have been some delay in securing an alternative loan and that there was a risk that the alternative loan may not have performed. Accordingly, the full bench considered that there was an 85% probability of La Trobe achieving the lost opportunity.

In summary, the full bench considered that La Trobe had lost a commercial opportunity to invest the \$2.4 million in a hypothetical performing loan and that La Trobe should receive damages (reduced by 15%) as a consequence.

Observations

Assessment of damages for loss of opportunity is often an imprecise and difficult area of law as it concerns the assessment of hypothetical circumstances and outcomes. Damages are assessed by reference to the degree of probability that the hypothetical transaction would have been entered into and performed. The full bench's decision brings further clarity to this area of law.

Importantly, this decision is authority for the proposition that a claimant is not required to adduce direct evidence that it lost a specific commercial opportunity. Rather, the evidence that is required needs to show that it was more probable than not that another transaction would have been entered into and would have performed. This is an important clarification of the law as evidence concerning how funds may otherwise have been used is often uncertain and imprecise. This has constituted an impediment to loss of opportunity claims succeeding in the past.

The decision serves to highlight the nature and extent of damages that many professionals (including valuers, accountants and financial advisors) may commonly be exposed to. Accordingly, it has relevance for underwriters when assessing and valuing risk for those types of professional indemnity polices.

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This article was prepared by Robert Finnigan, Senior Associate and Kathryn Rigney, Director. Robert Finnigan can be contacted on 9231 7018 or at rfinnigan@ypol.com.au and Kathryn Rigney can be contacted on 9231 7027 or at krigney@ypol.com.au.

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LEVEL 2, 39 MARTIN PLACE
SYDNEY NSW 2000

DX 162 SYDNEY

T: +61 2 9231 7000
F: +61 2 9231 7005
WWW.YPOL.COM.AU

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