SUPREME COURT OF QUEENSLAND

CITATION:	*Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2017] QCA 254
PARTIES:	**PRINCIPAL PROPERTIES PTY LTD** ACN 072 279 675 (appellant) **v** **BRISBANE BRONCOS LEAGUES CLUB LIMITED** ACN 101 798 679 (respondent)
FILE NO/S:	Appeal No 12619 of 2016 SC No 6489 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] 2 Qd R 128; [2016] QSC 252 (Jackson J)
DELIVERED ON:	31 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2017
FURTHER SUBMISSIONS:	6 June 2017 (appellant) 12 June 2017 (respondent)
JUDGES:	Philippides and McMurdo JJA and Boddice J
ORDERS:	**1. Allow the appeal.** **2. Set aside the order made on 7 November 2016.** **3. The respondent pay to the appellant the sum of $250,000, together with interest upon that sum of $62,307.37.** **4. The parties to provide written submissions, not exceeding five pages in length, as to the orders which should be made for the costs of the proceeding in the trial division and of this appeal, within 14 days.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – LOSS OF PROFITS – where the appellant sued the respondent for loss of a commercial opportunity to acquire and develop certain land at a profit under a contract – where the project was unlikely to have made a profit because of difficulties in obtaining development approval, finance for the purchase price and development costs, and likely cost overruns –

where the trial judge concluded that on the balance of probabilities, the project would be more likely to make a loss than a profit – where the trial judge accepted that damages could be awarded where there was a less than 50 per cent chance of making a profit but distinguished a case in which a *loss* was more likely than a profit – where the trial judge concluded that where a *loss*, as opposed to no profit or loss, was more likely than a profit, the plaintiff had not suffered a compensable loss – whether a plaintiff can recover damages for loss of a commercial opportunity which is more likely to make a loss than a profit, if the magnitude of the potential profit sufficiently exceeds the magnitude of the potential loss

Chaplin v Hicks [1911] 2 KB 786, considered
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20, considered
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd (No 2) [2017] 2 Qd R 128; [2016] QSC 252, reversed
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, applied

COUNSEL: S L Doyle QC, with S S Monks, for the appellant
G A Thompson QC, with D Skennar, for the respondent

SOLICITORS: Shine Lawyers for the appellant
McCullough Robertson for the respondent

[1] **PHILIPPIDES JA:** I agree with the reasons for judgment of McMurdo JA and with the orders proposed by his Honour.

[2] **McMURDO JA:** This was a contractual claim for damages for the loss of an opportunity to acquire and develop certain land at a profit. The trial judge held that, more probably than not, the appellant would have lost money from the development. He further held that, as a matter of law, this had the necessary consequence that there was no compensable loss, and therefore he awarded only nominal damages.[1]

[3] The appellant argues that the judge was wrong in law to hold that there was no compensable loss, simply from the probability that the appellant would have lost money. It further argues that the judge was wrong to find that in fact the appellant would have lost money. And if there was a compensable loss, there is a contest about the assessment of the value of the commercial opportunity which was lost to the appellant by the respondent's breach and repudiation of the contract.

[4] For the reasons that follow, I am unable to agree with the trial judge on that legal question. The opportunity to develop this land at a profit, which was denied to the appellant by the respondent's repudiation of the contract, had *a* value, in my view. That value must be quantified, consistently with the methodology which was discussed in and illustrated by *Sellars v Adelaide Petroleum NL*.[2] But as I will discuss, that assessment must be made with regard not only to the potential profit

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1 *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd (No 2)* [2017] 2 Qd R 128.
2 (1994) 179 CLR 332.

from undertaking this development, but also, to some extent, the potential loss from doing so. And it is also necessary to discount the damages for the contingencies, according to the trial judge's findings, which might have prevented the appellant from exercising its option to purchase the land to be developed.

The case in outline

[5] In November 2009, the parties made an agreement, which the trial judge called the Call Option Deed, by which the respondent granted to the appellant an option to purchase some of its land at Red Hill in Brisbane. The agreed price, in the event that the option was exercised, was $1,000,000 plus GST.

[6] The appellant's proposal was to develop this land by the construction of 54 apartments and some other facilities. To do so, it required a development permit from the Brisbane City Council. The option was to be exercised within three years, or a longer period as extended by the appellant, during which time the development permit was to be sought from the Brisbane City Council. The parties' agreement provided that $100,000 was to be paid by the appellant to the respondent in the event of such an extension.[3] The appellant's entitlement to exercise the option was expressly subject to that approval being given. Therefore, subject to the possibility of an extension, the necessary approval had to be obtained and the option had to be exercised by 4 November 2012.

[7] The development permit was not obtained within that period. The appellant did not elect to extend the time for the exercise of its option.

[8] The trial judge held that the respondent failed or refused to perform its obligations under the option agreement, by failing or refusing to give its consent to the appellant's proposed development application. The judge found that the appellant was thereby entitled to terminate the Call Option Deed, as the appellant did on 30 September 2013. There is no challenge to those findings.

[9] The appellant's claim was for damages for the loss of its contract, that is to say the contract under which it might have become entitled to exercise its option. The appellant claimed that it had suffered a compensable loss from being deprived a valuable commercial opportunity. That was an opportunity to acquire the land, develop it and sell the apartments and associated interests so as to yield an overall profit. According to the particulars of the appellant's claim, that profit would have been nearly $7,500,000.

[10] As the trial judge noted, there was no alternative claim for damages which would be quantified by a difference between the price to be paid for the land and its value. Nor was there a claim for damages on a "reliance loss" measure, by reference to the appellant's expenses made or incurred in performing the Call Option Deed.[4]

[11] As the trial judge recognised, the appellant had to prove, on the balance of probabilities, that it had suffered a loss. It had to prove that its lost opportunity had some value. If that was proved, then it would be necessary to assess what that value was, requiring a consideration of the possible impediments to the derivation of the profit which the appellant claimed would have resulted.

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3 To become credited against the purchase price in the event that the option to purchase was exercised.

4 [2017] 2 Qd R 128 [388].

Damages for a lost opportunity

[12] A contract to provide a commercial opportunity, if breached, enables the innocent party to bring an action for damages for the loss of that opportunity. There may be a compensable loss of a commercial opportunity, even though there is a less than 50 per cent likelihood that, if pursued, the opportunity would have resulted in a financial return.[5]

[13] In order to recover substantial, as distinct from nominal, damages upon this basis, a plaintiff must establish that the lost commercial opportunity had *some* value. If the opportunity had no more than a theoretical or negligible value, then no compensable loss has been caused.[6] The fact that some loss or damage was caused must be proved on the balance of probabilities.[7] If that fact is proved, it is then for the court to assess the extent of the plaintiff's loss. The value of the lost opportunity must then be "ascertained by reference to the degree of probabilities or possibilities"[8] of relevant factual hypotheses, by the approach explained in *Malec v JC Hutton Pty Ltd*.[9]

[14] Thus, in *Chaplin v Hicks*,[10] the plaintiff suffered a compensable loss when she was deprived of the chance to win, with a financial reward, a competition (which the defendant had promised to provide). The plaintiff's chance had a value, although, more probably than not, she would not have won the competition. The degree of likelihood of winning the prize was relevant for the valuation of that chance in the assessment of her damages.

[15] In *Sellars*, Brennan J said:[11]

> "Although the issue of *a* loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation."
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> (footnote omitted)

Brennan J continued:[12]

> "As a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves, not only when they will *probably* fructify in a financial return but also when they offer a *substantial prospect* of a financial return. The volatility of the market for speculative shares testifies to both the valuable character of commercial opportunities and the difficulty of assessing the value of opportunities which are subject to serious contingencies. Provided

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5 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 349 per Mason CJ, Dawson, Toohey and Gaudron JJ.
6 Ibid, 355.
7 Ibid.
8 Ibid.
9 (1990) 169 CLR 638.
10 [1911] 2 KB 786.
11 Ibid, 368.
12 (1994) 179 CLR 332, 364.

> an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable."

[16] Consequently, the improbability of a profit from the pursuit of a commercial opportunity is no necessary bar to the recovery of substantial damages for the loss of that opportunity. The trial judge did not question that proposition. But in his view there was a further matter to be considered in the present case: namely, the probability of a developer's loss from the project which the appellant had proposed. This was not a case, as in *Chaplin v Hicks*, where there were but two possibilities, the plaintiff would win the prize or not win the prize but there was no possibility of a loss. In the present case, the probability of a developer's loss from the development led the judge to doubt the applicability of what he described as the *Sellars* methodology. His Honour said:

> "[122] The *Sellars* methodology is not so easy to apply in such a case. If the lost commercial opportunity is valuable, the plaintiff is entitled to recover the value of the loss of commercial opportunity on the possibilities. Does this mean that a plaintiff can recover on a 30 per cent chance of making alleged projected profits, when the assessment entails that it was more likely than not that the profit would not have been made? What is to be done if it is more likely than not that the plaintiff would have actually made a loss? How does the *Sellars* methodology cope with the risk that a plaintiff would have lost money, not made a profit? It may seem surprising, but cases of authority have not dealt with these problems, so far as I am aware. The parties did not refer to any cases of assistance."

[17] The trial judge continued:

> "[123] A simple example will show that the factual context must affect the possible answers to these questions. In the mining exploration industry, a party may have developed a prospect to a point where the commercial opportunity to further develop or exploit it was clearly valuable, because the interest could have been sold to a purchaser for a substantial sum. This is so even though the venture may have been inherently speculative and on the balance of probabilities it could not be said that the interest would have become a profitable producing mining operation. Such a case fits within the *Sellars* methodology as a loss of a valuable commercial opportunity to receive a benefit.
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> [124] When the lost commercial opportunity is the opportunity to engage in a specific property development project over a short term investment time frame, the picture might be similar. A project may be put together and sold, even though there are substantial hurdles as to whether it will ever prove profitable on the development being carried out. The question in such a case would be of the project's saleability, rather than its percentage prospects of making a profit at that stage. However, the plaintiff's case was not that it could have marketed and

> sold the project before carrying out the development in the present case. It was that its loss of opportunity was to carry out the development and make the profits from doing so."

[18] The judge saw the problem with the application of the *Sellars* methodology, in a case such as the present, in being that:[13]

> "…a plaintiff who was more likely to have made a loss than a profit would be compensated by receiving a percentage of the possible profits, while the losses that were more likely would be left out of account."

[19] The trial judge then embarked upon a discussion of the authorities, including *Chaplin v Hicks*, *Takaro Properties Ltd v Rowling*,[14] *Commonwealth v Amann Aviation Pty Ltd*[15] and *Badenach v Calvert.*[16] In those cases, his Honour found "little direct authority of assistance for the applicable principles in a case of the present kind under the two-step analysis of the *Sellars* methodology."[17] Further, he observed, "the problem is not confined to the Australian common law,"[18] referring to cases in England, the United States and Canada, in which he found little assistance for the present question.[19]

[20] The trial judge then expressed his conclusion on this question as follows:[20]

> "In my view, under the *Sellars* methodology, where the postulated loss of a valuable commercial opportunity is the opportunity to engage in a business that might have made a profit or a loss, the category of loss or head of damage should only be recognised as compensable because it is concluded on the balance of probabilities that it had some value, either because it was marketable, or because if the contract had been performed the plaintiff would have been more likely to have made a profit than a loss."

[21] In that passage, the judge described the relevant commercial opportunity as "the opportunity to engage in a business". In my respectful opinion, that was something of a misdescription. The relevant opportunity, which the appellant had to prove was something of value, was the opportunity to make a profit.

[22] Consistently with the judge's findings, which are discussed below, there was more than a negligible chance that the appellant would have made a profit from this development. That being so, and having regard to the fact that the contract between the parties was one by which, in essence, the appellant was promised that opportunity, how could the opportunity have been worthless?

[23] If a commercial opportunity has *no* chance of being profitable, it is an opportunity of no value and its loss could not be compensable. I would also accept that a commercial opportunity which no rational investor would pursue, having regard to

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13 [2017] 2 Qd R 128 [126].
14 [1986] 1 NZLR 22.
15 (1991) 174 CLR 64.
16 (2016) 257 CLR 440.
17 Ibid.
18 [2017] 2 Qd R 128 [139].
19 [2017] 2 Qd R 128 [141] – [148].
20 Ibid, [149].

the relative probabilities of a profit and a loss and the likely magnitude of each, would be a valueless opportunity.

[24] However, I do not accept that the same may be said whenever it is more likely than not that the pursuit of the opportunity would have resulted in an investor's loss. Many investments are pursued with an appreciation that, more likely than not, they will not be profitable after money is spent in pursuing them. They are pursued because the magnitude of the potential profit, considered against the relatively small amount of the potential loss, makes the risk, sometimes a high risk, of that loss one which is worth taking. As the trial judge identified, examples of such investments are found in the mining exploration industry.[21] His Honour said that in such cases, the commercial opportunity would be valuable, because the investor's interest could be sold for a substantial sum, notwithstanding that on the balance of probabilities, it could not be said that the interest would have become a profitable mining operation.[22] His Honour considered that a case such as the present one was different, because the appellant's opportunity could not be traded.

[25] In my respectful opinion, that is not a basis for distinguishing a case such as the present from the example (of the explorer for minerals) which his Honour gave. Although the appellant's opportunity here might have been assigned, by exercising the appellant's right, having exercised its option, to nominate another transferee of the land, let it be assumed that the appellant's opportunity was not marketable. Nevertheless, it was capable of having a value, which could be assessed by considering what someone would be prepared to pay for it. In *Chaplin v Hicks*, the plaintiff's opportunity was not marketable, but Vaughan Williams LJ said:[23]

> "It is true that no market can be said to exist. None of the fifty competitors could have gone into the market and sold her right; her right was a personal right and incapable of transfer. But a jury might well take the view that such a right, if it could have been transferred, would have been of such value that everyone would recognize that a good price could be obtained for it."

[26] The relative probabilities of a profit and a loss, in a particular case, *could* be relevant in assessing whether the opportunity had a value. It is possible to imagine cases where both the likelihood of a profit and the magnitude of that profit are so small that no rational investor would pursue the opportunity with the risk of thereby suffering a comparatively large loss.

[27] But where, as in the present case, the provision of the opportunity was the subject matter of the contract, it will be unlikely that the opportunity will be a case of that kind. As Kiefel J (as the Chief Justice then was) said in *Tabet v Gett*,[24] in cases in contract, "the commercial interest lost may readily be seen to be of value itself."

[28] For these reasons, I am unable to agree with the trial judge on the legal question raised by this appeal. A likelihood that this would have been a loss making development did not, as a matter of law, preclude the award of more than nominal damages. The question is whether the opportunity to profit from this development had a value and that was possible although a developer's loss was more likely than a

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21 [2017] 2 Qd R 128 [123], set out above at [17].
22 Ibid.
23 [1911] 2 KB 786 at 793.
24 (2010) 240 CLR 537 [124].

profit. If it did have a value, there was a compensable loss and the extent of that loss would have to be assessed. As Brennan J observed in *Sellars*, it will usually be the same body of evidence that tends to establish both the existence of a loss and the amount to be recovered.[25] It is necessary then to go to the findings of fact and the challenges to some of them which are made in the appellant's argument.

The proposed development

[29] The land in question was part of the site of the Broncos Leagues Club in Red Hill. For the development to proceed, the Brisbane City Council had to permit the respondent's land to be subdivided to create a separate parcel as the development site. The Council also had to permit a material change of use of the development site to allow the construction of an accommodation building, which included conference facilities and associated car parking. The development site was to include an area which was used by the respondent for car parking for its leagues club. It was agreed that the appellant would construct on part of the development site, what the judge described as the Vendor's Car Park, which would be conveyed back to the respondent or which would be leased to it for 100 years. Either way, that required a volumetric subdivision which, again, required the Council's permission.

[30] The accommodation building was to contain some 54 units. Each was to have one bedroom, except that a small number of them were to be let together, as "dual key" or two bedroom units. Importantly, the use of the units, for which the Council's permission would be sought, was for short term accommodation. That precluded the use of a unit by its owner as the occupier's residence. Therefore the relevant market for the units was one in which the only potential purchasers would be investors.

[31] The trial judge identified the types of risks which could have affected the appellant's commercial opportunity. The first was that the plaintiff might not obtain the necessary permissions from the Council. As to that, one of the matters for which the Council's permission was required was the construction of the Vendor's Car Park with a minimum of 149 car spaces. The judge found that the appellant's prospect of obtaining that permission, with that number of car spaces, was "just over 50 per cent".[26]

[32] A second risk was that the appellant might not have been able to pay the purchase price for the development site. As to that, the judge found that the appellant's prospect was, again, "just more than 50 per cent".[27]

[33] A third risk was that the appellant might not have been able to obtain development finance for the project to proceed. He assessed the appellant's prospects of obtaining sufficient finance at 70 per cent.[28]

[34] A fourth risk was that the plaintiff might not have been able to obtain enough pre-sales to satisfy the likely conditions of any development finance. To explain that, in order to obtain finance for the construction of this project, the appellant would have been required to sell most of the proposed units (more precisely at least 70 per cent

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25 (1994) 179 CLR 332, 364.
26 [2017] 2 Qd R 128 at [199].
27 Ibid, [228].
28 Ibid, [241].

of them) ahead of the first advance from its financier. There was a risk that the appellant would not have been able to do so, at the prices at which it proposed to offer them for sale. The judge found that the appellant's prospects of achieving sufficient pre-sales, at those prices, was no more than 40 per cent.[29]

[35] A related risk was that the revenue from the sale of the apartments and other project products would not be enough to meet the budgeted and any other costs. The trial judge said that he was left with "serious doubts" that the projected revenue of the project, or a sum approaching that amount, "was ever achievable".[30]

[36] Lastly there was a risk that the appellant's expenses might have exceeded those for which it had budgeted. In that respect, the judge found that the appellant had underestimated its likely financing costs, by nearly $900,000.[31]

[37] In September 2011, the appellant submitted to the respondent a draft application to be sent to the Council. The respondent's consent, it being the owner of the land, was necessary. No development application was made, because the respondent, in breach of contract, withheld its consent. Eventually, the appellant terminated its contract with the respondent on 30 September 2013.

[38] I go then to the appellant's arguments which challenge particular findings about the prospects of this development.

Car parks

[39] By Clause 14.1 of the contract between the parties, which the trial judge referred to as the Call Option Deed (the Deed), the appellant's entitlement to exercise its option was subject to the appellant securing what the Deed described as the Development Permit. It was agreed that this condition could not be waived by either party.

[40] The Development Permit was defined by cl 1.1 of the Deed to be a development approval which, amongst other things, allowed for sufficient car parking spaces within the development, so as to allow compliance with what was called the Car Park Condition. This was the condition expressed within cl 8.1 of the Deed, which the parties agreed would be a term of the contract of sale which would come from the exercise of the option. By that condition, the appellant agreed that its development approval would include at least 149 spaces for the so called Vendor's Car Park. The same term of the proposed contract provided for those car spaces to be either transferred or leased back to the respondent.

[41] Consequently, only a development approval which provided for at least 149 car spaces to be returned to the respondent, would have enabled the appellant to exercise its option to purchase. There was an extensive factual controversy about the likelihood of that condition being satisfied. As already noted, the trial judge assessed the appellant's prospects of satisfying the condition "at just over 50 per cent".

[42] Evidence was given by two traffic engineers: Mr Williams, who was called in the appellant's case, and Mr Douglas, who was called in the respondent's case. The trial judge discounted the weight to be given to the evidence of Mr Douglas,[32] but

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29 Ibid, [271].
30 Ibid, [309].
31 Ibid, [319].
32 Ibid, [185].

he did not reject it entirely. Nor did he accept, in its entirety, the evidence of Mr Williams.

[43] The two witnesses produced a joint report. An attachment to that report was a set of drawings, showing a layout of car spaces, which had been prepared by or under the supervision of Mr Williams. The judge said that the drawings appeared to show 154 car spaces in the areas intended for the respondent. The judge noted that Mr Williams said that there were 156 car parking spaces shown by those plans. But his Honour reasoned from the premise that the plans showed 154, not 156 spaces. The appellant says that that was an error. That argument should be accepted. There are three relevant drawings and unambiguously, they depict 89, 12 and 55 spaces respectively.[33]

[44] Beyond that point, however, the appellant's criticisms of the judge's reasons and its submission that the evidence proved that at least 149 spaces would have been approved, are unpersuasive. Most importantly, the appellant's argument does not address the necessary uncertainty about the number of car spaces which the Council, in the exercise of its discretionary powers, might have allowed. There was the Council's policy, described as the TAPS policy, which specified things such as the permissible dimensions of car spaces and access driveways. This was a policy document of the Council, which guided but did not dictate an assessment of the permissible number of spaces. The cross-examination of Mr Williams revealed a number of instances where his car parking plans, attached to the joint report, were inconsistent with the TAPS policy. Mr Williams acknowledged that inconsistency, but was confident that nevertheless, the Council would have agreed to these plans or something very similar to them. The uncertainty, in this exercise of the quantification of the number of car spaces which would have been allowed by the Council, was thereby revealed. The trial judge described the evidence of Mr Williams in this respect as follows:[34]

> "The defendant's counsel covered these areas in some detail in a careful and skilful cross-examination of Mr Williams. However, in many respects Mr Williams' response was that although the dimension for the Acceptable Solution provided under TAPS was not met, still the Performance Criteria could be met. Following upon the detail, the defendant's counsel suggested to Mr Williams generally that ten or more car parking spaces might be lost if the Council otherwise approved the plan, but Mr Williams did not agree."

[45] The judge identified some particular ways in which Mr Williams had apparently agreed that there might be a loss of car parking spaces. The judge said:[35]

> "However, Mr Williams did agree that there might be a loss of car parking spaces in relation to the absence of compliant disabled car parking spaces. Further, his answers to how an appropriate set down area would be provided for the short term accommodation unit building and how the intrusion of columns under the building into car parking spaces might affect the number of car parking spaces were incomplete."

[46] His Honour then reasoned as follows:

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33 AB 709, AB 710 and AB 713.
34 [2017] 2 Qd R 128 at [195].
35 [2017] 2 Qd R 128 at [196].

> "[197] Doing the best I can with these materials, I consider it likely that there would have been some reduction in the number of approved car parking spaces from the 154 spaces proposed in the final set of plans produced by Mr Williams. Bearing in mind that a reduction of six car parking spaces for the Development Permit would not produce compliance with the Car Park Condition, there was a real risk that the plaintiff might not have been entitled to exercise the Call Option because the Car Park Condition would not have been complied with.
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> …
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> [199] I assess the prospect of obtaining the required number of 149 car parking spaces for the Vendor's Car Park at just over 50 per cent."

[47] It is submitted that the judge incorrectly described the evidence of Mr Williams about disabled car parking spaces. The relevant drawings showed two such spaces.[36] It was suggested to Mr Williams that the Council would have required eight such spaces, because the Vendor's Car Park was to replace an existing car park, which contained that number of spaces. More generally, it was suggested that the Council would have required more than two disabled spaces, to which Mr Williams responded "I don't necessarily believe that's the case, no". Mr Williams went on to say that he accepted that, in order to provide further disabled spaces, the overall number of car spaces would have had to be reduced. But because the existing disabled spaces, in his view, were non-compliant, in that the gradient of the land was too steep, the Council might not have required more than two (compliant) spaces. In my view, the judge's description of Mr Williams' evidence was accurate: it allowed for the possibility that more disabled car spaces might have been required by the Council with a consequential reduction of the total number of spaces.

[48] The appellant's argument admits that Mr Williams conceded that if the Council had required a "set down" car park, then one space would have been lost for this, on the lower ground floor car park.[37]

[49] The cross-examiner suggested to Mr Williams that structural columns under the building would have affected the dimensions of adjacent car spaces and thereby affected the total number of spaces. Mr Williams said that if this was a matter of concern to the Council, a solution could have been found, by relocating the columns to other locations. That would have been a solution to be reached by a traffic engineer working with the project architects. Whether the columns could have been relocated, to avoid a reduction in the number of car spaces, was a matter requiring an expertise beyond that of Mr Williams, a traffic engineer. Mr Williams agreed that if the columns could not be moved, the adjacent car spaces would not have complied with the TAPS policy. Again, this was an area of uncertainty about the outcome of the approval process. The judge's description of the evidence Mr Williams, in that respect, was not inaccurate.

[50] It is true that the judge's assessment of the prospect of obtaining the required number of spaces was premised upon the number shown on these drawings being

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36 Numbered 23 and 24 on the drawing at AB 713.

37 Appellant's outline of submissions, paragraph 52.

154, not 156. Consequently, there was a margin of seven spaces, rather than five, so that the probability of obtaining the required number of 149 was somewhat higher.

[51] Nevertheless the judge's assessment is not to be disregarded. This was not a matter would could be precisely calculated. The likely number of spaces which would have been permitted by the Council would have depended upon the exercise of the Council's discretion. On the evidence of Mr Williams, the judge's assessment of the prospect of meeting the required number of spaces was still a reasonable one.

[52] Moreover, there was a further area of uncertainty, which affected the probability of meeting the required number of spaces. The judge found that Council might have required a "buffer zone," between a retaining wall and the site's boundary with residential properties. Again there was division of expert opinion on this question. The judge found that neither opinion was more likely to be correct than the other. But he remarked as follows:[38]

> "But if the Council had required a buffer zone, it would quite possibility have significantly affected the design in relation to the proposed car parking spaces."

[53] The potential effect of that buffer zone upon the number of car spaces was not considered it seems, in the judge's (earlier) assessment of the probability of obtaining the required number of spaces. Taking account of that uncertainty but allowing for the error as to the number of its spaces depicted by the drawings, the judge's assessment of the likelihood of reaching the required number of spaces was not substantially inaccurate.

Finance

[54] The purchase price for the land was $1,000,000 plus GST, a total of $1,100,000. The respondent contended that the appellant could not have paid for the land, because it could not have borrowed the necessary funds and nor could they have been provided by the appellant's owners, Mr and Mrs McFarlane.

[55] The trial judge found that the purchase price could not have been sourced from an arm's length financier. He found that the financier of the development of the land would have required an "equity" injection of $3,000,000 by the appellant. That could have been provided by combination of the development site and funds provided by a mezzanine lender. However a mezzanine lender would have required an "equity" injection of $1,000,000.[39] There is no challenge to those findings.

[56] An amount of $250,000 was to be supplied by a Mr Ma, according to a letter of agreement between him and a related company of the appellant, dated in August 2011. However, by paragraph 4 of that agreement, it was provided that the $250,000 would be applied "for the sole purpose of paying costs, associated with making applications for and pursuing the issue of the [Development] Approvals." It was further agreed that if the Development Approvals were obtained and the required development capital was obtained, Mr Ma would be paid $450,000 or alternatively would receive a certain equity in the project. The judge found that this agreement did not "support the suggestion that [Mr Ma] would have provided

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38 [2017] 2 Qd R 128 at [212].
39 Ibid, [215].

further funds."[40] The appellant's argument challenges that finding, on the basis that it was not a point which was put to Mr and Mrs McFarlane in cross-examination. However, they could not have given admissible evidence about Mr Ma's preparedness to finance the purchase of the land. Ma did not give evidence. The fact is there was no evidence showing that Mr Ma's assistance in buying the site was a real possibility.

[57] Mr McFarlane had no funds of his own. Mrs McFarlane had available funds which, the judge said, totalled $979,000. That included an equity in her house of $750,000. The required payment for the land would have been $1,100,000. At the same time, the appellant would have had the expenses of its purchase, totalling about $58,000.[41] Therefore there was a shortfall of the order of $170,000 which the McFarlanes would have had to borrow from somewhere. Mrs McFarlane said that she might have approached members of her family for a loan. She said that her parents had "loaned us small amounts of money in the past."[42]

[58] The appellant argues that the amount which would have been required was effectively net of the GST, because having paid $100,000 on top of the purchase price, the appellant would have been entitled to a refund, when it made no sales in the relevant months or quarter. Still, the amount of the GST would have had to have been borrowed, albeit for a short period. And apart from the GST, there was an amount of at least $70,000 which would have been required, after a realisation of Mrs McFarlane's property. In that respect, as the judge observed, there would then have been "a real question as to how the family would have survived financially during the construction of the project before any profits may have been realised."[43]

[59] The judge concluded as follows:

> "[227] Nevertheless, in my view, there was a reasonable prospect that and I infer that the plaintiff might have raised the purchase price of the Land by a combination of Mrs McFarlane's resources and other personal borrowings by Mr and Mrs McFarlane. But, on the evidence, the McFarlane family finances would have been sorely stretched and it would have been a near run thing.
>
> [228] Again, I assess that prospect at just more than 50 per cent."

[60] In my opinion, the appellant has not demonstrated an error in those findings.

[61] Another issue at the trial was whether the appellant could have obtained finance for the development itself. Mr McFarlane prepared a feasibility analysis in December 2011. Each side suggested that the analysis required some adjustments. For example, as the judge noted, Mr McFarlane had made no allowance for any interest on the borrowings to finance the development.

[62] For this case, the appellant engaged a valuer, Mr Clune, to prepare a model of a feasibility analysis which might have been put to prospective lenders to obtain

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40 Ibid, [216].

41 According to a gross profit calculation, by Mr Clune, a witness in the appellant's case, there would have been stamp duty of $43,425 and fees on purchasing the land of $15,000.

42 AB 208.

43 [2017] 2 Qd R 128 at [221].

finance for the development as at 30 June 2012. The trial judge called it Mr Clune's Feasibility. It showed a net profit for the development of $5,379,402.[44]

[63] Evidence was given by a Mr Taylor on the prospect of obtaining finance for the development on the basis of Mr Clune's Feasibility. Mr Taylor said that a lender would have advanced the necessary funds upon conditions that there was an "equity" of $3,000,000 and presales of 70 per cent of the units prior to the first advance. As to the $3,000,000 equity, there was evidence from a Mr O'Sullivan that mezzanine finance would have been available to the appellant, in an amount of $2,000,000 which, together with the land, would have provided the required equity for the senior lender.

[64] The judge concluded as follows:

> "[240] In my view, the plaintiff may have been able to obtain development finance.
>
> [241] I assess the probability of obtaining sufficient development finance at 70 per cent.
>
> [242] However, in my view, there remains a significant question whether the finance available to the plaintiff would have been enough to enable completion of the project."

[65] There is no challenge to that assessment of the probability of obtaining sufficient development finance.

Sale prices of the units

[66] A critical element of the appellant's case was the price at which the accommodation units could have been sold.

[67] The evidence of the likely sale price, upon which the appellant's case was based, came from the valuer, Mr Clune. In his report,[45] he assessed the total receipts from unit sales at $21,934,750.[46] That equated to $406,199 per unit. Mr Clune arrived at that valuation by multiplying the number of square metres of a unit by $6,978.90. That figure came from a comparison with two short term accommodation facilities or hotels, namely "The Chasely" at Toowong and the "Central Cosmo" at Milton. The trial judge noted that a sale price in Central Cosmo had equated to $6,773 per square metre, but that Mr Clune had considered that the appellant's proposed development would have been superior to that building.[47]

[68] Mr Clune's methodology effectively assumed that the demand for accommodation in these units would had corresponded with that enjoyed by these two properties. That was challenged by a witness in the respondent's case, Ms Howes. The trial judge described her evidence as follows:

> "[254] Ms Howes's evidence did not go only to whether the units would sell as investment units to be put into a permanent letting pool for the proposed accommodation business. She gave a report and oral evidence based on her opinions as to the

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44 AB 770.
45 Exhibit 29 AB 716-771.
46 AB 760.
47 [2017] 2 Qd R 128 at [261].

> demand for short term accommodation at the subject site. Her opinion on that point was distinctly unfavourable to the development. She professed a solid and in-depth understanding of the drivers of what makes a good investment proposition in residential, mixed use or short term accommodation markets. On more than one occasion, she expressed the opinion that there was no driver of demand for the proposed short term accommodation facility at the site, such as nearby tourist facilities or a hospital or the like. In her view, there was no driver for a tourism market in Red Hill.
>
> [255] As well, in her opinion, no investor would have been confident in purchasing an off the plan short term accommodation proposition where a management rights entity (accommodation operator) was not in place.
>
> [256] The evidence of Mr Clune to the contrary effect seemed to be based on his view of the comparison between the plaintiff's proposed development and other short term accommodation facilities or hotels, particularly "The Chasely" and "Central Cosmo" located in Toowong and Milton respectively. In my view, the comparison between those properties and the proposed development was strained.
>
> [257] Central Cosmo is a purpose built accommodation building located adjacent to the Park Road restaurant and shopping precinct. It is within walking distance of Suncorp Stadium and has ready access to both the City and the South Bank precinct. There are other accommodation facilities nearby.
>
> [258] The Chasely is a converted office building that operates as a short term accommodation facility. It is located on the corner of Coronation Drive and Chasely St directly opposite the south-east corner of the Wesley Hospital campus. It is also on a major bus route to the City and not far from the Toowong shopping precinct.
>
> [259] By comparison, as Ms Howe said, there is no obvious adjacent or nearby driver of demand for an accommodation facility of approximately 50 units or apartments for letting at Fulcher Rd, Red Hill. The plaintiff's witnesses suggested that the Broncos Leagues Club might have been the driver, having regard to the entertainment and conference functions that occur there. I was not persuaded by that evidence."

[69] In the respondent's case, there was evidence from a valuer, Mr Hulcombe. His methodology was different from that of Mr Clune, in that he valued the units by capitalising their expected income. He assumed a 4.5 per cent return on the income as estimated by Ms Howes.[48] His Honour found that to be a preferable methodology to that employed by Mr Clune, because:[49]

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48 Ibid, [266].

49 Ibid, [267].

> "[I]t flows from a view as to the likely income that the letting units in the proposed development will make and the market return that an investor would expect on the purchase price to be paid for an investment in a unit solely for letting, as opposed to emphasising the bricks and mortar comparison of the proposed units to units in other short term letting unit buildings."

[70] The trial judge compiled this table to demonstrate the difference between the values of Mr Clune and Mr Hulcombe:[50]

Description	Clune	Hulcombe	Difference
One-bedroom	$18,108,750	$12,690,000	($5,418,750)
One-bedroom + study	$1,017,500	$540,000	($477,500)
"Two-bedroom"	$2,808,500	$1,950,000	($858,500)
Total	$21,934,750	$15,180,000	($6,754,750)

[71] The appellant's argument suggests that the trial judge misunderstood its case about the likely sale prices. That argument is based on a passage, towards the end of his judgment, where his Honour said this:[51]

> "The value of the loss of the commercial opportunity to make those profits was ultimately dependent on the prospect that the realisable selling prices of the units and furniture packages would be the sum of $21,934,750 (ex GST) and $891,000, namely $22,825,750, taking Mr Clune's Gross Profit Calculation based on Mr Clune's Feasibility and his evidence in support of it. Put simply, that was a prediction that purchasers would be found who would on average pay *$463,319* for a one bedroom or one bedroom plus study furnished unit for the right to participate in the proposed short term accommodation business."
>
> (my emphasis)

[72] The origin of that figure of $463,319 is not clear. It may be, as the appellant suggests, that his Honour added $21,934,750 and $891,000, and then added ten per cent GST to the total before dividing that by 54 (units). Be that as it may, the judge's reasoning overall was not infected by a mistake in that figure. As he set out in the above table, the critical difference was between Mr Clune's estimate of $21,934,750 and Mr Hulcombe's estimate of $15,180,000. At the end of his judgment, his Honour repeated his stated for his preference for the evidence of Ms Howes and Mr Hulcombe over that of Mr Clune (and a Mr Rossiter, who gave evidence in the appellant's case) on the likely demand for and consequent value of the units.[52]

[73] The appellant suggests that there was an error in paragraph [259] of the judgment, which I have set out above, about whether "the Broncos League Club might have been the driver (for demand to stay in the units), having regard to the entertainment and conference functions that occur there." Mr McFarlane's evidence was that it would have been. That was his belief, but he was not professionally qualified to

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50 Ibid, [265].
51 Ibid, [324].
52 [2017] 2 Qd R 128, [325].

give a reliable opinion. The trial judge was not obliged to accept his view as correct. The appellant then says that his Honour's conclusion in this respect was at odds with evidence by Mr Clune and concessions by Mr Hulcombe under cross-examination.

[74] The evidence by Mr Clune was as follows:[53]

> "Yes?---They'll- they will be - that - it will be a broad range of occupants. They'll be travellers. They'll be people coming to Brisbane with vehicles that they need to park for an extended period of time. They'll be people visiting family from interstate. They'll be people - they'll be Broncos supporters coming to games.
>
> But the games aren't conducted at the Broncos Club?---No, but they're a parochial team and - of supporters, and they will attract an element of - of patronage from that. There'll be attending conferences at the Broncos Leagues Club.
>
> Have you investigated what conferences are held at the Broncos Leagues Club?---They have - they have quite a large function room and - and regular functions.
>
> What are the functions - - -? ---Conferences.
>
> What are the functions that you investigated that they have?---I haven't - I haven't investigated their - their log of functions or their program, but I'm aware that they have, and I've attended functions myself at the Broncos personally.
>
> …
>
> Also, the project is - is well located. It has good amenity. It will have an outlook that's attractive to - to purchasers. It has - being adjacent to the Broncos development will attract a certain level of both patronage and investor appetite."

[75] Mr Hulcombe's evidence, which is relied upon in this respect, consisted of a series of suggested concessions about the facilities of the Broncos Leagues Club and the uses which are made by various groups of its facilities. But there was no concession by Mr Hulcombe of the proposition that the Leagues Club would have been a "driver". More importantly, there was no concession (or suggested concession) by Ms Howes in that respect, and it was open to the trial judge to prefer her evidence to that of Mr Clune and Mr Rossiter.

[76] Finally it is argued that the judge was in error, by being influenced by the fact that Mr Rossiter had relied upon figures in the report of Norling Consulting. The authors of that report did not testify, so the judge said it should be given little weight. Mr Rossiter had prepared an analysis of the demand for, and income from, the letting of the units, which I discuss below under the heading of Management Rights. It is argued that Mr Rossiter also relied upon other data, such as material published by the Australian Bureau of Statistics. But that does not show an error in his Honour's observation that Mr Rossiter's analysis was based upon an assumed

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53 AB 283, 298.

level of demand from the report of Norling and Associates.[54] The relevant statement by Mr Rossiter in his report was as follows:[55]

> "Our projected Occupancy has been derived from a number of sources and, particularly, after reviewing the demand analysis prepared for the site by Norling Consulting."

The appellant's argument provides no basis for disturbing the trial judge's findings which were based upon a preference for the evidence of Ms Howes.

[77] It follows that the appellant has demonstrated no error in the trial judge's preference for the valuation of Mr Hulcombe over that of Mr Clune.

[78] The effect of the judge's reasoning, which I have discussed thus far, was that units in the proposed development would not have the value assessed by Mr Clune and that they would have a value which was consistent with the evidence of Mr Hulcombe. But the trial judge then said:

> "[268] There are, however, two logical difficulties with accepting Mr Hulcombe's evidence as to the value of the letting units. The first is that if the total value of the units to be sold was $15.1 million, the project would never have been profitable. There is no reason to think that the plaintiff would ever have proceeded to sell the units by pre-sales at a price level that would cause the project to fail.
>
> [269] Second, although the true value of the units may have been less than the plaintiff's proposed prices that is not the loss of a valuable commercial opportunity on which the plaintiff's case theory is predicated. The plaintiff's case theory is that it lost the commercial opportunity to acquire and develop the Land to sell the units at the prices proposed in the Feasibility or something like them. Although a reduction in the prices may have increased the likelihood of sales, including pre-sales, that was not the plaintiff's case."

[79] His Honour said that it was necessary to make a finding of the degree of likelihood that the units would have been sold at Mr Clune's valuation. He assessed the prospect of the appellant obtaining the required pre-sales, to comply with the conditions of the development finance, as "about and no more than 40 per cent."[56]

[80] As to the probability of selling the balance of the units, at Mr Clune's valuation, the judge said that "the same considerations apply as in the discussion of pre-sales, except that the plaintiff would have had the construction period to sell the balance of the units."[57] He said that had the appellant been able to finance the project and achieve the required levels of pre-sales, the appellant would have had a greater likelihood of selling the balance of the units over the construction period than of reaching the required number of pre-sales in the relatively short period allowed by Mr McFarlane's Feasibility Study.[58]

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54 [2017] 2 Qd R 128, [313].
55 AB 779.
56 [2017] 2 Qd R 128, [271].
57 Ibid, [307].
58 Ibid, [308].

[81] At that point that his Honour remarked:

> "[309] Nevertheless, from the earlier discussion it is apparent that I have serious doubts that the projected revenue of $21,934,750 (ex GST), or a sum approaching that amount, was ever achievable."

Management Rights

[82] The appellant's case was that the rights to manage these units could have been sold by it for $2,300,000. The trial judge concluded that the amount which should be allowed, in calculating the appellant's potential revenue from the development, was $1,080,000. The appellant argues that the judge erred in that respect, in several ways.

[83] The appellant's figure was the subject of evidence from Mr Clune. He said that the rights could be valued by using a multiplier of 4.5, applied to the expected EBIT[59] of the hypothetical manager. Mr Rossiter had calculated the net profit of the manager at $507,044. However, the trial judge was not persuaded by Mr Rossiter's evidence in that respect. One difficulty with it, his Honour said, was that Mr Rossiter had assumed certain occupancy rates upon the basis of the report by Norling and Associates. Further, and in the judge's view more importantly, this hypothetical EBIT had less weight for the fact that it could not be based on any actual trading history, because the development had not gone ahead. In other words, this was not an existing business in which a prospective purchaser of the management rights might have had more confidence. In addition, Mr Clune had allowed a sale price of only $1,080,000 in what the judge described as Mr Clune's Feasibility.[60]

[84] As already discussed, the trial judge found the evidence of Ms Howes more persuasive. In her report, she projected the likely occupancy rates and the likely charges per night. In each case they were lower than the corresponding figures suggested by Mr Rossiter. The comparison appeared from attachment B to her report.[61] Mr Rossiter's calculation of "total occupied room nights" over a period of 12 months was 13,381. The corresponding estimate by Ms Howes was 11,976, which was about 89.5 per cent of Mr Rossiter's estimate. The average daily room rate, according to Mr Rossiter, would have been $174. The corresponding figure estimated by Ms Howes for letting a one bedroom unit, was $113. The total rental revenue estimated by Mr Rossiter was $2,070,020, compared with Ms Howes's estimate of $1,402,829.56. In that last respect, Ms Howes's document showed a difference in the estimated "Total Tariff Revenue", not of $687,191, but instead an amount of $550,137. That last figure featured in this part of the judge's reasoning:

> "[315] The defendant allowed $1,080,000 as the value of the management rights in its submissions as to the calculations of the values for the plaintiff's loss of opportunity claim. There was no basis for this amount in the defendant's evidence, either through Ms Howe or Mr Hulcombe. There was, however, evidence from Ms Howe in her report projecting the likely income from the proposed letting business in comparison to Mr Rossiter's

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59 Earnings before interest and tax.
60 [2017] 2 Qd R 128 [314].
61 AB 1212.

> projections of the same. She allowed $550,137 per annum less than he did. That reduction would wipe out the EBIT of $507,004 Mr Rossiter arrived at for the management rights business.
>
> [316] Accordingly, it may well be that the defendant's allowance of $1,080,000 for the value of the management rights is too high. However, I will adopt it for the purposes of the assessment of the plaintiff's gross profit calculation. That reduces Mr Clune's Gross Profit Calculation by $1,305,000."

[85] As the appellant argues, that figure of $550,137 was misunderstood by the judge. This was said to be a difference in the respective estimates of the total rent revenue from the units. That was not to be compared with Mr Rossiter's projected EBIT. A difference of $550,137 in rental receipts would translate, at a manager's rate of commission of 12 per cent, to a difference in the manager's income of $66,016. That difference in rental income would not have wiped out Mr Rossiter's EBIT.

[86] Nevertheless this Court should proceed upon his Honour's preference for the evidence of Ms Howes, of that of Mr Rossiter, when there is no demonstrated basis for departing from it. The use of her assessments of the likely occupancy and rental amounts in Mr Rossiter's calculation of net operating income, would be as follows. His estimates for commissions and credit card charges (totalling $264,548) would be reduced by 30 per cent, because her estimate of total tariff revenue was about 70 per cent of his estimate.[62] That would warrant a reduction in his estimated income for the manager of $79,364. And the other items of a manager's income, apart from $64,900 attributed to "body corporate salary",[63] would be expected to vary with a difference in turnover. Her estimate of the number of occupied rooms was about 90 per cent of Mr Rossiter's estimate.[64] Therefore other items of a manager's income, which Mr Rossiter assessed at $247,181, might be reduced by 10 per cent, or $24,718. On those bases, his estimate of the net operating income of the hypothetical manager would be reduced by $104,000. Applying his multiplier of 4.5, that would reduce the value of the management rights by $468,000.

[87] The trial judge was also critical of Mr Rossiter's calculation of EBIT, because it did not include an allowance for the cost of two employees. In his Honour's view, that meant that the calculation did not provide for the cost of all necessary inputs.[65] The appellant argues that there is a rational explanation for Mr Rossiter not including those costs, because the management rights were likely to be purchased by a couple who would work in the business, so that no employee would be required. Mr Rossiter was not cross-examined on this point. This then is one of the many unknowns about the hypothetical development upon which the case was based. Possibly the management rights would have been sold to a couple who would do the work themselves, but possibly the buyer would have employed someone.

[88] The trial judge treated this component, the sale price of management rights, differently from the claimed revenue from the sale of the units. For the units, he worked from the premise of the appellant's evidence (Mr Clune's valuation) and then discounted for the risk that the appellant's price would not have been reached. But for the management rights, the judge found, in effect, that there was no chance

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62 $1,402,829.56 compared with $2,070,020.

63 As a caretaker's salary by agreement with the body corporate.

64 11,976 compared with 13,381.

65 [2017] 2 Qd R 128 [312].

of the rights being sold for more than $1,080,000. In my opinion, that finding cannot stand. There was an evidentiary basis for a higher estimate. There was no issue as to the capitalisation rate used by Mr Clune (4.5 per cent). There was a substantial issue as to the likely income of the manager. But as I have discussed, accepting the evidence of Ms Howes would have resulted in Mr Clunes estimate being reduced by $468,000, rather than by $1,220,000. For the purposes of an assessment of the appellant's loss overall, I would allow $1,800,000 for this component.

Adjustments to Mr Clune's Profit Calculation

[89] Mr Clune calculated the estimated profit from the development as follows:[66]

Category	Item Description	Amount ($)
Income		
	Sale price of 54 apartments (ex GST)	21,934,750
	Furniture packages	891,000
	Management rights	2,300,000
	Conference facilities	220,000
	GST in income debit	(2,095,068)
Selling expenses		
	Selling fees	(1,269,516)
	Conveyancing on sales	(52,920)
Expenses		
	Land	(1,100,000)
	Duties Act duties	(43,425)
	Conveyancing on Land purchase	(15,000)
	Consultants' fees	(2,379,934)
	Construction	(13,463,289)
	Rates and taxes	(46,391)
	Other	(726,282)
	Contingency	0
	GST Input Tax credits add	1,696,231
	Interest	(470,754)
Adjustments		
	Matrix Project Management deducted as expense twice – add	0
	Development Management Fee would not be payable – add	0
	Sales fees on units would be reduced by half – add	0
Total		**$5,379,402**

[90] The trial judge made some adjustments to that calculation, most of which are not challenged by appellant.

[91] The first of them was to add $47,000 to the cost of obtaining the "senior" debt of the project. Mr Clune had allowed an amount of $20,000 as an establishment fee. Mr Taylor's evidence, which the judge said should be accepted, allowed $60,000.

66 Ibid, [274].

Mr Clune's calculation allowed $33,000 for a report or reports by an independent valuer. Mr Taylor allowed $40,000. Again, his view was accepted.

[92] There were adjustments in the amounts of $35,000 and $800,000 in respect of the costs of obtaining mezzanine finance. Mr Clune's calculation had not allowed for an establishment fee. Another witness, Mr O'Sullivan, said that it would be an amount of 1.5 to 2 per cent. The trial judge added a fee of 1.75 per cent (on $2,000,000), which is the amount of $35,000. Mr Clune's profit calculation did not allow for interest on the mezzanine finance. Acting on Mr O'Sullivan's evidence, the judge added $800,000 for this expense, which he said was not in dispute.[67]

[93] The trial judge also adjusted for what he found was overstatement by Mr Clune of the likely price for the management rights. As I just discussed, Mr Clune estimated $2,300,000, but, the trial judge said that he would allow $1,080,000.

[94] The judge also added, as an additional expense, an amount of $200,000 for what he described as Mr Ma's interest. By that he meant the difference between Mr Ma's contribution of $250,000 and the agreed payment to Mr Ma of $450,000, in the event that the project went ahead.

[95] The judge adjusted Mr Clune's calculation, but in the appellant's favour, by an amount of $110,909, in respect of what he described as a "GST collected reduction", which need not be discussed. He also substituted an amount of $594,464 for "other expenses", in place of Mr Clune's $726,282.

[96] The result of the adjustments made by his Honour to Mr Clune's gross profit calculation was to reduce the profit to an amount of $3,320,129. Absent an adjustment for the management rights, the adjusted profit would have been $4,540,129. Only that adjustment is now challenged.

[97] The appellant argues that the trial judge should have effectively reduced the costs of selling the units by an amount of $418,205. Mr Clune allowed agent's commissions at the rate of 3.3 per cent, totalling $836,410. The appellant's argument at the trial, as it is here, was that half of that amount should be added back to the gross profit calculation, because of an agreement to that effect between Mr McFarlane and an agent. The respondent argued that such an agreement would have been illegal, but the trial judge found it unnecessary to resolve that question. The judge found that a commission at the rate of 3.3 per cent would have been low. He noted that Mr Clune's opinion was that a rate of 5 per cent might have been necessary for "a product which was difficult to sell."[68] The trial judge thought that this was such a project. He noted that although there was evidence that Mr McFarlane and an agent had made a handshake agreement to split the commission, it was not demonstrated that the agent had agreed to do so at a rate of commission as low as 3.3 percent. For that reason, his Honour said it was inappropriate to add $418,205 to the estimated profit calculation. The appellant argues here that there was no reason not to add it to Mr Clune's estimated revenue. As I have explained, there were reasons given by the judge and in my view, his finding should not be disturbed.

[98] Lastly, it is said that the judge erred in an amount which he allowed for what the submission described as the "Broncos' profit share". This was an amount of $220,000,

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67 Ibid, [279].

68 [2017] 2 Qd R 128, [298].

representing five per cent of an assumed gross profit of $4,400,000, as an amount which would have been payable to the respondent. If the profit was overstated by Mr Clune, and instead the correct amount was $3,320,129, as per the judge's adjustments, this expense would have been lower. That may be accepted. Consequently, the adjustments to Mr Clune's figures could have been discounted by 5 per cent. Nevertheless, Mr Clune's estimated profit of approximately $5,300,000 would still be adjusted, on the judge's findings, to approximately $3,400,000.

[99] With one exception, the adjustments to Mr Clune's profit calculation, as made by the trial judge, should be accepted. The qualification is the adjustment for the management rights. As already discussed, they should not have been adjusted by $1,220,000. In my view, an appropriate adjustment would have been $500,000.[69] In round terms, that would result in a potential profit of $4,000,000. That amount would represent the maximum profit which might have been derived from the project, if the units had been sold for prices corresponding with Mr Clune's valuation.

Conclusions by the trial judge

[100] Having adjusted Mr Clune's profit calculation, the trial judge said:[70]

> "The critical assumption in that calculation is that the units would sell at the estimated prices or near them. Looking at the evidence overall, in my view that conclusion is not justified. On the balance of probabilities, in my view, the plaintiff was more likely to lose money than it was likely to make profits because the proposed sale prices were not achievable. I reach that view because I prefer and was persuaded by the evidence of Mr Hulcombe and Ms Dawes in preference to that of Mr Clune and Mr Rossiter."

[101] Had the judge adjusted the profit to $4,000,000, on his findings he would have reached the same conclusion as he expressed in that paragraph. More probably than not, the sale prices would have been consistent with the evidence of Mr Hulcombe, and in that event, the total revenue from the units would have been reduced by approximately $6,750,000. The loss, more probably than not, of completing this development would have been of the order of $2,750,000.

[102] The trial judge observed that "[t]he value of the loss of the commercial opportunity to make … profits was ultimately dependent on the prospect that the realisable selling prices of the units and furniture packages would be [as per] Mr Clune's Gross Profit Calculation."[71] The judge referred to these matters as indicating the unlikelihood of those prices being reached: the owners would not be able to use their units for personal long term accommodation, their income would depend on the success of the accommodation business, there was no well-known operator who was being proposed to market the units, there was no guarantee or indemnity which would be offered to purchasers as is sometimes seen in sales of strata title rooms or units in an hotel and there was no obvious driver for demand for these units, such as a nearby large hospital.[72]

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69 $2,300,000 claimed by Mr Clune less $1,800,000 as discussed above at [85] - [87].
70 [2017] 2 Qd R 128, [320].
71 [2017] 2 Qd R 128, [324].
72 Ibid.

[103] The judge observed that had the appellant been required to reduce prices for the units in order to achieve sales, a reduction of 15 per cent would have resulted in a loss overall. This was upon the premise of his adjustments to Mr Clune's gross profit calculation. A reduction of 15 per cent on the amount of $21,934,750, as allowed by Mr Clune for the unit sales, would have reduced the revenue and thereby the profits by $3,290,000. His Honour said that because of his preference for the evidence of Ms Howes and Mr Hulcombe over the evidence of Mr Clune and Mr Rossiter, on the likely demand for and corresponding value of the units, in his view, "overall that was the more likely outcome."[73]

[104] Because, in his view, the project was more likely to be loss-making than profitable, the trial judge held that there was not a valuable commercial opportunity. He therefore awarded nominal damages. However, the judge added this at the conclusion of his judgment:

> "[327] However, if I am wrong in that conclusion, drawing together some of the many threads, it is possible to summarise the important conclusions.
>
> [328] Having regard to the many contingencies, the possibilities of the plaintiff making $3.3 million gross profit would have to be discounted for a number of factors. Simple probability theory applied to the chances of the plaintiff obtaining a complying Development Permit (50 per cent), acquiring the Land (50 per cent) and achieving the pre-sales (40 per cent) would result in an overall possibility of 10 per cent of that amount before discounting for any other risks including the financing and sales risks. While it may be mathematically correct to do so, I consider that this approach fails to recognise that the underlying assessments of chances are necessarily very broad brush. Accordingly, rather than pursue the arithmetic in that way, in my view, it is better to recognise the uncertainties and the impossibility in a case like the present of arriving at a reasonable result by calculation.
>
> [329] In the circumstances, I would award the plaintiff the sum of $330,000 as a global assessment of the amount of damages to be awarded for the loss of the valuable commercial opportunity to acquire, develop and sell the Land if I have erred in the conclusion that the plaintiff did not suffer the loss of a valuable commercial opportunity."

My conclusions

[105] The potential profit, as Mr Clune's calculation should be adjusted, was approximately $4,000,000. There was more than a negligible prospect that the appellant could have undertaken this development. There were contingencies which could have prevented the development from proceeding: the car park question, the finance required to purchase the site, the finance required for construction and the achievement of pre-sales of 70 per cent of the units. Nevertheless there was a substantial, rather than a negligible, prospect that the land would have been developed.

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73 Ibid, [325].

[106] Consistently with the judge's findings about the likely prices for the units, there was a substantial, rather than a negligible, prospect that the prices suggested by Mr Clune would have been achieved. As I have discussed, the judge was prepared to put that prospect as high as 40 per cent. The basis for a probability as high as that, once Mr Clune's opinion was not accepted, is far from clear. If, as the judge found, Mr Clune's methodology was not appropriate, then there appeared to be little evidentiary foundation for the assessment of a 40 per cent chance of selling the units at Mr Clune's price. However, the judge's estimate of 40 per cent should not be disregarded. The respondent's argument did not suggest that this Court should do so.

[107] Broadly speaking, it could be said that there was a potential profit of the order of $4,000,000 and a potential loss as high as $2,750,000. Between those two outcomes, there was a range of other possibilities, according to the price at which the units could be sold. Obviously the likelihood of a sale would have increased with a reduction in the price. On the judge's calculations, the project would have produced a loss had the prices of the units been reduced by 15 per cent. Working from my potential profit of $4,000,000, a reduction closer to 20 per cent would have been required to eliminate the profit. However, in my view, there is little to be gained from looking at the matter in that way, because it cannot be thought that the appellant would have gone ahead with the development upon the basis that it would barely break even.

[108] The market for these units would have been tested in the period when the appellant sought to achieve the requisite number of pre-sales. Those pre-sales would have been required in order for the appellant to obtain finance for construction to commence. If, as the judge found would have been more likely, the requisite number of pre-sales was not achieved, the proposal would have been abandoned, at least for want of finance. In that event, there would not have been a loss from the development, because there would not have been a development.

[109] Had the number of pre-sales been achieved, the only substantial contingency, according to the judge's findings, was a 30 per cent chance that the development finance would not be obtained. Had the project reached the point where development finance was obtained, there would have been a high probability of achieving a profit of the order of $4,000,000. In other words, had this development been undertaken, more probably than not, it would have yielded a profit. More probably than not, the development would not have proceeded. But a loss from the development, if undertaken, would not have been probable.

[110] It follows that had I accepted the judge's conclusion of law, namely that a commercial opportunity which would probably result in a loss must be considered to be worthless in this context, I would not have agreed with the factual premise by which his Honour applied that principle.

[111] Undoubtedly this opportunity was affected by many contingencies, and the prospect that the development would proceed was small. But there was some prospect that it could have proceeded, and if so, there would then have been a high probability that it would have been profitable. It was an opportunity which a rational business person might have pursued, although many would not have done so. It was an opportunity which had a value.

[112] Consequently, this Court should assess the worth of that opportunity. In that assessment, the Court must assess, at best it can, the extent to which the potential profit (on my assessment, $4,000,000), should be discounted to allow for the various possibilities that could have prevented that profit from being derived. The trial judge referred to several contingencies: the 50 per cent chance that a complying development permit would not be obtained, the 50 per cent chance that the land would not have been acquired, and the 60 per cent chance that the required pre-sales would not have been reached at Mr Clune's prices. His Honour said that that would represented "an overall possibility of 10 per cent of that amount (the adjusted profit) *before discounting for any other risks including the financing and sales risks*."[74] The appellant's argument criticises that approach. But, in my view, had it been applied, it would have been logical.

[113] The prospects of achieving a profit of the order of $4,000,000 were less than 10 per cent, on his Honour's findings. The "financing … risks" to which his Honour referred was the 30 per cent chance that development finance would not be obtained. Further, some allowance must be made for the prospect, although relatively small, that this project would have resulted in an overall loss. A project with, say, a 10 per cent chance of a profit of $4,000,000, but *no* risk of a substantial loss, would be a more valuable opportunity than the present one.

[114] In my conclusion, the appellant should be awarded an amount of $250,000 as damages. There should be interest on that sum, calculated from 30 September 2013 which was the date of termination of the contract, to the date of this judgment.[75]

Orders

[115] I would order as follows:

1. Allow the appeal.
2. Set aside the order made on 7 November 2016.
3. The respondent pay to the appellant the sum of $250,000, together with interest upon that sum of $62,307.37.
4. The parties to provide written submissions, not exceeding five pages in length, as to the orders which should be made for the costs of the proceeding in the trial division and of this appeal, within 14 days.

[116] **BODDICE J:** I agree with McMurdo JA.

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74 [2017] 2 Qd R 128, [328].

75 Using the rates of interest which apply to default judgments under Practice Direction 7/2013.