

# SUPREME COURT OF QUEENSLAND

CITATION: *Bankier v HAP2 Pty Ltd (No 2)* [2019] QSC 180

PARTIES: **MICHELLE ANN BANKIER**  
(plaintiff)  
**v**  
**HAP2 PTY LTD**  
ACN 005 806 744  
(defendant)

FILE NO: BS No 2715 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 25 July 2019

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: Martin J

ORDER: **The plaintiff is to bring in minutes of order.**

CATCHWORDS: DAMAGES – GENERAL PRINCIPLES – where it was found that, through the provision of certain financial advice, the defendant caused the plaintiff loss – where the parties were invited to make submissions about the quantum of loss and the possible “grossing up” of that amount – whether damages for loss ought to be “grossed up” – whether that amount ought to be further “grossed up” to reflect the fact that it will be subject to capital gains tax and wholly taxable

*Uniform Civil Procedure Rules 1999, r 360*

*Jamieson & Ors v Westpac* [2014] QSC 32, distinguished

COUNSEL: D J Campbell QC and B Hall for the plaintiff  
R S Ashton QC for the defendant

SOLICITORS: Shine Lawyers for the plaintiff  
Moray & Agnew Lawyers for the defendant

[1] I gave judgment in this matter on 1 May 2019. Further submissions were sought from the parties on four matters:

- (a) whether the amount of \$637,508 accurately reflected the agreement between the parties about the calculation of loss,
- (b) what “grossing up” of that amount should take place,
- (c) the interest payable, and
- (d) costs.

### **Calculation of loss**

[2] In [182] of my reasons I said:

“As I understand the calculation set out in Exhibit 12, on the findings I have made, the loss suffered by the plaintiff, at 30 June 2010, is \$637,508. I will invite the parties to make further submissions about the consistency of that figure with my findings and with respect to the possible ‘grossing up’ of that amount on the basis that it is liable to tax as an assessable recoupment.”

[3] The defendant has sought to make further submissions as to the date of the calculation of loss. The assessment I made was at 30 June 2010. Exhibit 12 was a moderately complex set of calculations of loss that was based on a number of scenarios. While the defendant made no concessions as to liability it did agree that, if certain findings were made, then Exhibit 12 set out the loss which would follow. The reference to the date of 30 June 2010 in [182] determines the date of loss.

[4] I am satisfied that the amount of \$637,508 accurately reflects the agreed loss based upon the findings I made.

### **Grossing up**

[5] The next point concerned the issue of “grossing up” of the award. This arises out of the considerations dealt with by Jackson J in *Jamieson & Ors v Westpac*.<sup>1</sup>

[6] The plaintiff submits that the correct measure of damages is to add to the award of \$637,508 an amount of \$81,926 which represents the total tax which would be payable. The defendant says that the amount should be \$45,850.75, leading to a total grossed up amount of \$683,359.

[7] The defendant argues that the plaintiff’s calculation is incorrect because it calculates tax payable on what it derived as the total grossed up figure and added that amount of tax to the loss figure and, in doing so incorrectly “grossed up” the “grossed up figure”.

[8] I do not accept that argument. The exercise in this case differs from that undertaken by Jackson J in *Jamieson*. In that case, the court was dealing with an assessable recoupment for the purposes of s 20-20 of the *Income Tax Assessment Act 1997*. In this case, the parties are in

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<sup>1</sup> [2014] QSC 32.

agreement that the damages will be reported to the Australian Taxation Office as a capital sum, it will be subject to capital gains tax, and, as such, will not be treated as a “recoupment of a loss or outgoing” within the meaning of that section. A grossed up sum subject to capital gains tax will be wholly taxable in the hands of the plaintiff and so a further grossing up is required to result in the defendant receiving the identified award.

- [9] It follows that judgment will be for the sum of \$719,434.00

#### **Interest**

- [10] The defendant argues that it should not be awarded for the whole period because of what it refers to as unreasonable delay in commencing proceedings. The defendant argues that the delay in commencing the proceedings, together with a decision not to serve the claim for close to a year, should result in a denial of interest for at least the period of that delay. I do not accept that. The negligence of the defendant caused the plaintiff to be held out of that sum of money from 30 June 2010 onwards. A plaintiff, on this type of claim, has six years in which to commence an action and, if successful, a defendant will have had the benefit of holding any award for that period. Statutory interest should flow from 30 June 2010. Interest should be assessed from 30 June 2010.

#### **Costs**

- [11] The parties have asked to be heard on costs.

#### **Conclusion**

- [12] The plaintiff is to bring in minutes of order.