SUPREME COURT OF QUEENSLAND

CITATION:	*Jardine v Windsor Craig Solicitors* [2003] QCA 442
PARTIES:	**TONY ALLEN JARDINE** (plaintiff/respondent) **v** **WINDSOR CRAIG, SOLICITORS (A FIRM)** (defendant/appellant)
FILE NO/S:	Appeal No 1778 of 2003 DC No 452 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	17 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2003
JUDGES:	Davies JA, Jones and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Judgment below set aside** **2. Substitute judgment for the respondent in the amount of $3,539.20** **3. Appellant to pay the costs of the proceedings below on the appropriate Magistrates Court scale** **4. Respondent to pay appellant's costs of the appeal**
CATCHWORDS:	DAMAGES – GENERAL PRINCIPLES – GENERAL AND SPECIAL DAMAGES – where respondent entered into a contract with a third party to transfer a car in exchange for a block of land – where land had a mortgage over it – where appellant breached duty to properly advise the respondent – whether the mortgage debt was the consequence of the appellant's breach – whether the respondent suffered any loss *Johnson v Perez* (1988) 166 CLR 351, distinguished
COUNSEL:	A C Barlow for the appellant S R D Blaxland for the respondent
SOLICITORS:	Hyland Lawyers for the appellant Swanston & Associates (Minyama) for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Holmes J and with the orders she proposes.

[2] **JONES J:** For the reasons set out in the judgment of Holmes J, I agree with the orders proposed.

[3] **HOLMES J:** The appellant firm of solicitors appeals against a judgment against it in the sum of $42,131, being damages for its admitted negligence in failing properly to advise the respondent. At the end of December 1996, the respondent sought the assistance of the appellant in relation to a proposed transaction with one Barry Donovan. Earlier that month, he had agreed with Donovan to exchange a vehicle registered in the name of the respondent and his wife for a block of land owned by Donovan. Donovan represented the land as unencumbered. In fact, during December 1996, he borrowed $24,000 using it as security, and a mortgage was registered on 20 December.

[4] On 30 December 1996, the respondent, his wife and Donovan attended the office of the appellant, where an employee prepared the necessary documents to effect the transfers. The respondent and Donovan signed a contract and a transfer under the *Land Title Act*. The purchase price on the contract was $32,000 and the completion date was 20th January 1997, three weeks off. Donovan also signed an acknowledgement that the receipt of a duly executed transfer vehicle registration form, together with a roadworthy certificate for the motor vehicle, would be a full discharge for the purchase price under the contract of sale. The respondent was not warned against giving possession of the vehicle to Donovan pending completion. Because he thought nothing remained to be done, he provided both the vehicle and a transfer of registration signed by him and his wife to Donovan about a week after his attendance at the appellant's office. Donovan promptly sold the car, and soon after decamped.

[5] On 13 January 1997 an employee of the appellant undertook a search in respect of the land which revealed that it was encumbered by a mortgage. A letter from the solicitors for the mortgagee dated 10 March 1997 advised that the amount owing under the mortgage was $24,000.

[6] The respondent was thus left in a position where he had given his car to Donovan, and it could not be retrieved. He elected to proceed with the transfer of the land into his name, a proper course in mitigation of his loss in respect of the car. By way of costs and outlays on the conveyance, he paid to the appellant, and a firm of solicitors which subsequently acted for him, $907 comprising professional costs, a title search fee, a fee on provision of the settlement notice to the Department of Natural Resources and stamp duty. The land was valued for the purposes of the mortgage given by Donovan at $36,000, leaving an equity in the property of $12,000. At trial a valuation of the motor vehicle at $13,305 was tendered, and was not challenged by the respondent.

[7] The learned trial Judge assessed damages on the basis contended for by the respondent's counsel: that the respondent had not only parted with his vehicle but had had no other option than to proceed with the transfer of the land, which was taken subject to a mortgage. The mortgage debt was, his Honour accepted, the respondent's loss; thus the appellant should be required to pay $24,000, the amount due under the mortgage as at January 1997. He added to that figure the cost of registering a release of the mortgage at $440, and interest on the sum awarded, which he calculated at $17,691.

[8] The difficulty with that reasoning is that it treats the appellant as if it had breached a warranty that the land was unencumbered. Plainly enough, no such warranty was given by it; its breach was solely and simply the failure to advise the respondent that he should not hand over his car until searches confirmed the represented position of the land.

[9] Counsel for the respondent sought to support the award by reference to statements made by Mason CJ in *Johnson v Perez*[1] as to the need for flexibility in awarding damages. But those statements are a reference to departure in the interests of justice from the general rule that damages are to be assessed as at the date of breach or arising of the cause of action, as the case may be. In the present case, there was no issue as to the date at which the respondent suffered his damage; no evidence was put forward to suggest that some other date than that when he handed over his car, and his loss crystallised, was relevant.

[10] It is well-established that the purpose of compensatory damages, in an action for breach of contract or tort, is to put the plaintiff, as far as possible, in the position in which he would have been, if it had not been for the breach or negligence.[2] In this case, had it not been for the appellant's breach, the respondent would have had a car worth $13,305 or, on a less favourable view, a half interest, worth $6,652.50, in the car. Acting appropriately to mitigate his loss, he proceeded with the transfer of the land to him, gaining an equity of $12,000. Against that is properly offset the costs of $907 involved in the transfer. Unfortunately, by the time of trial the amount of the mortgaged debt had, by reason of accrued interest, reached a level far in excess of the value of the land. But in the absence of any evidence that the land and the respondent's equity in it was not, when he acquired it, realisable or, indeed, that there was any attempt to realise it, that reduction in the respondent's equity cannot be laid at the door of the appellants.

[11] If the respondent lost no more than a half interest in the car, he would, of course, have no net loss once his acquisition of the equity in the land was taken into account. The question of the extent of his interest in the vehicle is thus of some importance. His Honour did not make any clear finding of fact on the point. He referred to the appellant's argument that the respondent was entitled to half of the value of the car so that he had improved his position when he received the land, and also referred generally to the appellant's arguments as seeming correct, but he did not, in the event, accept them. In the absence of any finding on the point, and given the view I have taken as to the proper approach to assessing the respondent's damages, it is appropriate to make a finding now on the evidence at trial.

[12] The respondent's evidence was not particularly clear; he said that he had bought the car with "family money". But it also appears from his evidence that he had made something of a practice of buying and selling motorcycles and vehicles, and it was the proceeds of those transactions which had been used to buy the car. The receipt for its purchase was made out to him. It was, he said, registered and insured in both his and his wife's name because he had some understanding that, as she would be driving it, that was the appropriate course. His wife, Katherine Jardine, gave evidence that she regarded the vehicle as belonging to her husband, and it was up to him what he did with it. On the whole, the evidence points to the vehicle belonging

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[1] (1998) 166 CLR 351 at 354.

[2] *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 638; *Haines v Bendall* (1991) 172 CLR 60.

to the respondent. He was, it follows, entitled to seek to recover for the loss of the vehicle as a whole, not merely as to a half interest.

[13] The respondent's damage, then, was the difference between the equity in the land at $12,000, less the costs of acquiring it, $907, and the value of the car at $13,305, an amount of $2,212. He is entitled to interest on that amount for the six years from January 1997 to the date of judgment, which at 10% per annum adds a further $1,327.20.

[14] I would set aside the judgment below and substitute judgment for the respondent in the amount of $3,539.20, with an order that the appellant pay the costs of the action on the appropriate Magistrates Court scale. The appellant having been successful should have its costs of the appeal.