SUPREME COURT OF QUEENSLAND

CITATION:	*Hutchinson & Anor v Equititour Pty Ltd & Ors* [2010] 104
PARTIES:	**ANTHONY BRUCE HUTCHINSON &** **ALISON PATRICIA HUTCHINSON** (plaintiffs/appellants) **v** **EQUITITOUR PTY LTD** ACN 069 116 409 (first defendant/first respondent) **PHILIP KEITH SULLIVAN** (second defendant/second respondent) **CARLSON HOTELS ASIA PACIFIC PTY LIMITED** ACN 000 708 332 (third defendant/third respondent) **JAMES DODD** (fourth defendant/fourth respondent)
FILE NO/S:	Appeal No 10524 of 2009 DC No 2124 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2010
JUDGES:	Muir and Chesterman JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – SIMPLE CONTRACTS, QUASI-CONTRACTS AND TORTS – ACCRUAL OF CAUSE OF ACTION AND WHEN TIME BEGINS TO RUN – SIMPLE CONTRACTS – OTHER MATTERS – where the respondents made applications for summary judgment on the ground that the appellants' claims were statute barred – where the appellants contended that the loss was not ascertained or ascertainable until after the limitation date – whether appellants' causes of action had accrued prior to the limitation date LIMITATION OF ACTIONS – EXTENSION OR

POSTPONEMENT OF LIMITATION PERIODS – FRAUD AND DECEIT – where the appellants contended that the contract in question contained a contingency, which might or might not come to pass – where the appellants contended that the contingency was hidden by the conduct of the respondents – where the appellants submitted that the behaviour of the respondents in hiding the contingency constituted fraud – where the contingency did come to pass – where the appellants contended that the fraud was not discoverable until after the limitation period – whether s 38 of the *Limitation of Actions Act* 1974 (Qld) defeated the respondents' limitation defence

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – where the appellants bore the onus of proving a critical issue – where the appellants adduced no evidence to discharge the onus – where evidence indicated that the critical issue should be determined adversely to the appellants – whether summary judgment should be refused by reference to the critical issue

Fair Trading Act 1989 (Qld), s 100
Limitation of Actions Act 1974 (Qld), s 10, s 38
Trade Practices Act 1974 (Cth), s 82
Uniform Civil Procedure Rules 1999 (Qld), r 293

Banque Commerciale SA (In Liq) v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, applied
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31, considered
Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd (2008) 19 VR 358; [2008] VSCA 26, distinguished
Hawkins v Clayton (1988) 164 CLR 539; [1988] HCA 15, applied
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54, considered
L Shaddock & Associates Pty Ltd v Parramatta City Council [No 1] (1981) 150 CLR 225; [1981] HCA 59, considered
Murphy v Overton Investments Pty Ltd (2004) 216 CLR 388; [2004] HCA 3, distinguished
Potts v Miller (1940) 64 CLR 282; [1940] HCA 43, cited
Sullavan & Anor v Teare [2010] QCA 70, applied
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, applied
Winnote Pty Ltd v Page (2006) 68 NSWLR 531; [2006] NSWCA 287, considered

COUNSEL: A Bell SC, with A Collins, for the appellants
D S J Jackson QC, with T J Bradley, for the first, second and fourth respondents
J D McKenna SC, with D C Piggott, for the third respondent

SOLICITORS: Slater & Gordon Layers for the appellants
Minter Ellison Lawyers for the first respondent
Minter Ellison Lawyers for the second respondent
Mallesons Stephen Jaques for the third respondent
Minter Ellison Lawyers for the fourth respondent

[1] **MUIR JA:** I agree with the reasons of Peter Lyons J and with the order he proposes.

[2] **CHESTERMAN JA:** I agree that the appeal should be dismissed with costs, for the reasons given by Peter Lyons J.

[3] **PETER LYONS J:** The appellants (to whom I shall refer as "the Hutchinsons") entered into a contract dated 18 December 1996 to purchase a unit (*Lot 179*) from the first respondent (*Equititour*) in a development then being carried out, and described as the Radisson Palm Meadows Resort and Conference Hotel (*the Resort*). The contract settled on about 9 April 1998. The Hutchinsons commenced the present action on 21 July 2006. They claimed damages against all defendants for negligence, pursuant to s 100 of the *Fair Trading Act* 1989 (Qld) (*FTA*) and s 82 of the *Trade Practices Act* 1974 (Cth) (*TPA*), although their pleadings also include allegations of fraud. The question on the appeal is whether summary judgment should have been given in favour of the defendants on the basis that the claim is statute barred.

Background and claims

[4] The development of which Lot 179 forms part was intended to be a resort hotel. Lot 179 was sold to the Hutchinsons subject to a lease for a term of five years in favour of the third respondent, whose name at that time was Radisson Hotels Pty Limited (*Radisson*). The marketing of lots in the development was carried out by Capeglen Developments Pty Ltd (*Capeglen*). The second respondent (*Mr Sullivan*) was a director of Equititour and a director of Capeglen. The fourth respondent (*Mr Dodd*) was, until about December 1997, an employee of Capeglen.

[5] In essence, the plaintiffs allege that representations were made to them prior to entry into the contract about financial returns they would receive if they purchased Lot 179. Returns were in fact "guaranteed" for the first five years by reason of the lease to Radisson. After the first five years, projections provided to the Hutchinsons proceeded on the basis that Radisson would exercise options to renew its lease. The Hutchinsons allege that the representations made to them amounted to a representation that the projected returns would be those resulting from the renewal of the lease to Radisson, with the Hutchinsons, rather than Radisson, having the option to renew the lease.

[6] In fact, at least in its early years, the project was not successful, and Radisson elected not to exercise the option to renew the lease in 2002. Subsequently the Hutchinsons agreed to lease Lot 179 to Radisson at a reduced rental. The result was that the "guaranteed" return was paid until about December 2002, but a lesser amount was received for subsequent periods. On that basis, the Hutchinsons allege that their loss commenced in about December 2002, with the consequence that the causes of action on which they sue did not accrue until that time, and their action was commenced within the relevant limitation periods.

[7] The respondents made applications for summary judgment on the ground that the claims made by the Hutchinsons were statute-barred. The proceedings had been commenced on 21 July 2006. The respondents contended that the Hutchinsons' causes of action had accrued prior to 21 July 2000 (*the limitation date*). That date was significant because (subject to the submissions made on appeal relating to fraud) any cause of action on which the Hutchinsons relied, and which accrued before that date, would be statute-barred.

[8] When the application first came on for hearing on 7 March 2008, after extensive argument, an adjournment was granted to enable the Hutchinsons to reformulate their pleading and adduce further evidence. When the hearing of the application ultimately resumed on 16 May 2008, Senior Counsel then appearing for them described the material presented on their behalf as being "as good as it gets".

[9] At the resumed hearing, a proposed amended statement of claim was placed before the court. Given that the respondents sought summary judgment, it seems to me that the case should be determined having regard to this document. It does not affect the basic features of the Hutchinsons' claim previously described. However, allegations relating to the Hutchinsons' loss were altered. The document retained a claim for the difference in value between the purchase price paid of $169,900, and the "true market value" of Lot 179, of approximately $100,000. The latter seems to relate to the date of the contract to purchase the Lot. The claim for interest on the difference between these values was altered to a claim for interest either from December 2002, or alternatively for eight years. The claim included an item for "Incidental Costs of Acquisition", being legal fees and outlays; stamp duty; and borrowing costs, with an adjustment for mortgage release fees. It also included an item for "Net Holding Costs" calculated by reference to interest charges, council rates, body corporate fees and some other charges, less rent received, from 1998 through to 31 March 2007.

[10] The proposed statement of claim added an allegation that the fact that Lot 179 had a value, at the date of purchase or subsequently, which was less than the purchase price, was not ascertained and was not ascertainable until about December 2002, with the result that the Hutchinsons did not suffer a loss or alternatively their cause of action did not accrue, until that time.

[11] The proposed statement of claim retained allegations from its predecessor that, if the representations had not been made, or if Equititour and/or Radisson had made accurate representations, the Hutchinsons would not have entered into or completed the contract. The statement of claim also alleged that, as a consequence of entering into and completing the contract, they suffered the loss to which I have referred.

[12] In light of submissions made on behalf of the Hutchinsons, it is useful to note the allegations of fraud found in the proposed statement of claim. Relevant representations are express and implied representations found in an advertising brochure, and a document identified as the "Key Fact Sheet". Equititour is alleged to have "produced" the brochure and the Key Fact Sheet. Radisson is said to have approved the creation, publication and distribution of the brochure and the Key Fact Sheet to potential purchasers. On that basis, it is pleaded that Equititour and Radisson made the representations (express and implied), attributed to those documents. It is also alleged that Equititour and Radisson made the representations with knowledge that they were false, or without belief in their truth, or recklessly.

There are analogous allegations made in respect of Mr Dodd. Although it is alleged that Mr Sullivan was the controlling mind of Equititour and of Capeglen, and that he created the brochure and the Key Fact Sheet, it is not alleged against him that he fraudulently made the representations previously referred to. The claim for relief relies on causes of action other than fraud.

Decision at first instance

[13] The primary judge characterised the claim made by the Hutchinsons as a claim for loss or damage both of capital and income, where financial detriment was suffered upon the acquisition of Lot 179, by funding the purchase price and acquisition costs of something that was not of commensurate value, and which could not then be disposed of without incurring further costs. He noted that the investment made by the Hutchinsons was negatively geared. He considered their case to be founded upon the proposition that they were financially worse off from the moment of acquisition. He considered that, by reason of costs associated with the acquisition (*transaction costs*), the Hutchinsons had paid out a greater amount than the value of Lot 179 (on the basis that it could have been resold soon after purchase for the purchase price). Because the purchase was made with borrowed money, and the interest payments substantially exceeded returns from the outset, he also considered that the Hutchinsons suffered consequential loss from the time of the purchase, and before the limitation date.

[14] Finally, his Honour noted the clear evidence of poor underlying performance of lots leased to Radisson, with the returns to Radisson being substantially below what was required to pay the "guaranteed" return in the first five years of the operation of the Resort. His Honour found that, by July 2000, the lot had a "poor underlying performance relative to projections", and had not been performing to expectations for a significant period of time.[1] Those findings were not challenged. His Honour also noted that the evidence showed 23 re-sales of lots in the development between August 1999 and July 2007; with the first resale at a substantial discount to the original purchase price occurring on 5 October 1999. However, he did not rely on a finding that the value of Lot 179 was less than its purchase price at any time before the limitation date.[2]

Contentions on appeal

[15] The logical starting point for the written submissions advanced on behalf of the Hutchinsons was that, in the hearing at first instance, the onus lay upon the respondents to establish that the Hutchinsons had no real prospect of succeeding on all or part of their claim, in the face of a limitations defence, and there was no need for a trial.[3] They submitted that the case is one which falls within what was described as the "third category" identified in *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd*[4]. This category was described as one where a contingency is said to be hidden by the conduct of the defendant, and might or might not come to pass. In such a case, the limitation period is said not to begin to run until the contingency occurs. It was contended that the contingency in the present case was the decision by Radisson not to pay the projected rental beyond the

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1 See the reasons for judgment at first instance (*RJ*) at [36], [56].
2 See RJ [37]-[42], [57].
3 See r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*).
4 (2008) 19 VR 358 at [105].

initial five year period (a consequence of the fact that Radisson did not exercise the option to renew the lease of Lot 179, and was prepared only to enter into a fresh lease at a lower rental).

[16] The written submissions on behalf of the Hutchinsons also relied on s 38 of the *Limitation of Actions Act* 1974 (Qld) (*Limitation Act*). The argument advanced in the submissions is that the fraud was not discoverable until 2002, when Radisson did not renew the lease. It is then submitted that if a limitation defence is not made out (at least for the purposes of summary judgment) on that basis in respect of claims under the general law (and presumably the *FTA*), then the action under the *TPA* should have been allowed to proceed also.

[17] A separate submission was made that, at first instance, the onus had been reversed and placed on the Hutchinsons to prove that the limitation period had not expired.

[18] It was also submitted that the payment of the transaction costs did not constitute a loss, resulting in the accrual of a cause of action, because money was paid to acquire an asset capable of producing an income stream. However, the loss was again said to be contingent, and not to occur until the contingency (apparently that the income would become less than projected) had in fact occurred.

[19] The oral submissions presented on behalf of the Hutchinsons primarily addressed the question whether they suffered loss before the limitation date. However, in response to a question from the Court, reliance was placed on the written submissions relating to s 38 of the *Limitation Act*.

[20] The first, second and fourth respondents submitted that the Hutchinsons' cause of action accrued when a loss had "crystallised", which may not be the time at which the loss was "discoverable". They also submitted that the Hutchinsons had suffered a capital loss at the time of purchase, the true value of the unit being $76,000, compared to the purchase price of $169,000. They also relied on the transaction costs, and the net losses incurred in holding the property; and the lost opportunity to earn income, on the basis of the Hutchinsons' money committed to the purchase, all as demonstrating that the Hutchinsons had suffered loss before the limitation date. They submitted that this was not a case where the loss was in truth the result of a contingency which depended upon the conduct of Radisson.

[21] They also pointed out that the contention based on s 38 of the *Limitation Act* was not raised in the proceedings below. They submitted that it was for the Hutchinsons to plead, and the onus lay on them to prove, that s 38 defeated the limitation defence. They submitted that the Hutchinsons had not delivered a pleading which brought s 38 into play. They submitted that there was no evidence showing when the Hutchinsons first learnt of the falsity of the implied representations. They pointed to the absence of any evidence to suggest that the true situation was not reasonably discoverable by the Hutchinsons until after the limitation date. They drew attention to the fact that the contract incorporated a copy of the lease, which disclosed that after the initial term, extensions were at the option of Radisson; and that some 16 months passed between the date when the Hutchinsons received the lease and the date of settlement of the contract.

[22] Several submissions were made on behalf of Radisson with respect to s 38 of the *Limitation Act*. One of them was that s 38 applies to an action "based upon the

fraud of the defendant or the defendant's agent"; and the Hutchinsons had not claimed damages for fraud. Radisson submitted that even if s 38 were available in respect of a cause of action, that does not justify permitting other causes of action to survive. Radisson also submitted that the acquisition costs constituted loss which had the consequence that the Hutchinsons' causes of action accrued at about the date of settlement of the contract. Radisson also relied on ongoing losses relating to the cost of holding the lot from the date of its purchase. It submitted that the reliance by the Hutchinsons on a contingent loss of the kind described in *Murphy v Overton Investments Pty Ltd*[5] is misplaced.

Valuation evidence

[23] At the resumed hearing, the Hutchinsons relied on evidence from a valuer, Mr LJ Hamilton. He noted that (excluding what he described as "multi-sales") there were 220 sales in the development by Equititour up to December 1998, at an average sale price of approximately $169,256. He expressed the view that as at 18 December 1996 (the date of the contract between the Hutchinsons and Equititour) the contractual price "was a reasonably fair price in the then market price for this and similar properties". He considered the price to be "underpinned" by the rent payable by Radisson for the first five years after purchase.

[24] Mr Hamilton then valued Lot 179 as at 6 December 2007 (the date of his valuation report) in the sum of $70,000. That valuation was based upon a comparison with a number of relatively contemporaneous resales of lots within the development.

[25] Mr Hamilton then expressed an opinion as to what he described as the "true value of the unit as at 18 December 1996". He identified that value as one made "in light of all subsequent events that with the benefit of hindsight, would have operated to influence the assessment at that time". Thus he took into account the benefit of the lease for the first five years. That led him to conclude that the "true value" of Lot 179 at 18 December 1996 was $100,000 ($70,000, plus a sum representing the capital value of the five year lease to Radisson). By the time the lease had expired in December 2002, the true value had declined to $70,000. Mr Hamilton also expressed the view that the true value of Lot 179 as at 18 December 1996 "only became ascertainable when Radisson did not enter into a new lease for a second term and instead, entered the arrangement whereby it managed the entire resort for the licence or management fee to unit owners", the "fee" varying between a little over $5,400 and a little under $6,000.

Fraud and limitation period

[26] In *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd*[6] the High Court was considering the provisions of s 69 of the *Trustee Act* 1925 (NSW), which imposed a six year limitation period on the bringing of an action for breach of trust, but which included words in the form of a proviso which stated that the limitation should not "affect any action suit or other proceeding where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy …". Mason CJ and Gaudron J held that those words constituted an exception, notwithstanding their form; and that a party wishing to rely upon it must both plead

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5 (2004) 216 CLR 388.

6 (1990) 169 CLR 279.

and prove fraud, or fraudulent breach of trust.[7] The judgment of Brennan J was to the same effect, his Honour specifically agreeing that the onus of proving fraud for the purposes of s 69 lay with the plaintiff.[8] The same might be said of the judgment of Toohey J.[9]

[27] The views expressed in *Banque Commerciale* support the conclusion that, in the present case, the onus fell on the Hutchinsons to prove fraud under s 38 of the *Limitation Act*. I see no reason to come to a different conclusion. Moreover, the operation of s 38 may depend upon when a plaintiff "discovered the fraud". That is a matter almost inevitably within the knowledge of a plaintiff, and often not within the knowledge of a defendant. The alternative basis for the operation of the section is that "the plaintiff … could with reasonable diligence have discovered (the fraud)". Again, this raises matters much more likely to be within the knowledge of a plaintiff than a defendant. In my view, these considerations confirm the conclusion that the onus of pleading and proving the matters which bring s 38 into operation rests on a plaintiff.

[28] In the present case, no evidence was adduced on behalf of the Hutchinsons to demonstrate when they discovered the matters which they allege constitute the fraudulent conduct of Equititour and Radisson. They have failed to establish that they did not discover those matters until after the limitation date.

[29] Nor does their evidence in terms address when they could, with reasonable diligence, have discovered those matters. The affidavit of Mr Hutchinson shows that in about December 1996 the Hutchinsons received a copy of the contract of purchase which was signed, and returned (possibly to Mr Dodd). The affidavit does not state whether a copy was retained by them. Annexure D to schedule 5 of the contract is the lot lease. There is no suggestion that this was not included with the documents provided to the Hutchinsons in about December 1996. The lease annexed to the contract made it clear that it was for a term of five years; and that Radisson as lessee had the option to take three further terms, each of five years. No provision was made permitting the lessor to require Radisson to extend the lease beyond its original term.

[30] The contract also records that solicitors were appointed for the Hutchinsons. There is, however, no evidence as to whether, and if so when, those solicitors received a copy of the contract, and whether, and if so what, advice they gave the Hutchinsons about it. The Hutchinsons have adduced no evidence to establish (on the assumption that they did not know the matters constituting the alleged fraud) that they could not, with reasonable diligence, have discovered the fraud until after the limitation date.

[31] I am conscious that this is an appeal against an application for summary judgment. On such an application, the onus rests on the party seeking summary judgment to demonstrate that at a trial, the other party has no real prospect of success, and that there is no need for a trial. When the onus rests on the party against whom judgment is sought to prove a critical issue, that party adduces no evidence to discharge the onus, and such evidence as is before the court indicates that the issue

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7 See *Banque Commerciale* at p 285-287.

8 See p 290.

9 See in particular at p 303.

should be determined adversely to the party bearing the onus in respect of it, it seems to me that summary judgment should not be refused by reference to this issue. In the present case, that conclusion is reinforced by the course which the proceedings took below. I am therefore satisfied that, subject to the other issues to be considered on this appeal, the respondents have demonstrated that they are entitled to summary judgment, notwithstanding the submissions made on behalf of the Hutchinsons in reliance on s 38 of the *Limitation Act*.

[32] That conclusion makes it unnecessary to deal with a number of other matters which arose from the submissions of the parties. In my view, at least in respect of some of those matters, it is undesirable to do so, because they were not fully argued. They include the following:

(a) whether s 38 could be relied upon by the Hutchinsons in this appeal, when they did not raise it at first instance;
(b) whether s 38 was available to the Hutchinsons, since they do not seek any relief based on their allegations of fraud;
(c) the significance of the fact that there is no allegation of fraud against Mr Sullivan or Mr Dodd;
(d) if the Hutchinsons had some prospect of successfully establishing the matters raised by s 38, the consequences for their actions under the general law and the *FTA*;
(e) if the Hutchinsons had some prospect of successfully establishing the matters raised by s 38, the consequences for their claim under the *TPA*.

Accrual of cause of action

[33] Under s 10 of the *Limitation Act*, the Hutchinsons were entitled to institute proceedings based on their claims other than the claim under the *TPA*, within six years from the date on which their causes of action arose. For a claim under s 82 of the *TPA*, the position is a little more complex. Where a cause of action under that section accrued before 26 July 1998, the limitation period is three years. Where a cause of action accrued at a later date, the limitation period is six years.[10] For all of the claims made by the Hutchinsons, damage was an essential ingredient of the cause of action.

[34] For the Hutchinsons, it was submitted that they did not suffer loss or damage prior to the limitation date; and in particular, they did not suffer loss or damage when they entered into the contract, or on the date on which it was completed. On Mr Hamilton's evidence, the market value (as he used this expression) of Lot 179 at the date of contract was the same as the price which the Hutchinsons paid for the Lot. At first instance, the submission made on their behalf was that, having purchased the unit at its market value, they could have promptly resold it, for the same price, and accordingly they suffered no loss.[11]

[35] There can be no doubt that the Hutchinsons suffered a loss, by reference to the "true value" of Lot 179, (at the latest) when the contract settled. In determining the true or real value of the unit, account may be taken of subsequent events.[12] When the

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10 See *Trade Practices Amendment Act (No 1)* 2001 (Cth) ss 2 and 3; and Schedule 1 Items 20 and 21.
11 See RJ [45].
12 *Potts v Miller* (1940) 64 CLR 282, 289; see also *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 656-658.

contract settled, the Hutchinsons parted with the purchase price, and in exchange received an asset, the true value of which was approximately $70,000 less than the amount they paid. Mr Hamilton's evidence demonstrates this. There is no evidence to suggest otherwise, and no reason to think that on the date of settlement the Hutchinsons did not in truth suffer some loss, measured by reference to the "true value" of the Lot on the date of settlement.

[36] In the present case, there is evidence which may suggest that the Hutchinsons could not have discovered, either at the date they entered into their contract, or on the date of its settlement, that the "true value" of Lot 179 was less than the purchase price. Mr Hamilton's evidence shows that similar properties were sold at about these dates for similar prices. Thus the price which the Hutchinsons paid for Lot 179 is consistent with its market value at that time, in the sense that, had they chosen to sell it shortly after settlement, they were likely to have received a sum consistent with what they paid.

[37] There are passages in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* which relate the discoverability of loss to the time when proceedings could be commenced; and they therefore arguably may be read as suggesting that there is no cause of action until it is possible to identify that the price paid exceeded the value of the property purchased. Thus it was said:[13]

> "If the plaintiff had learned the day after entering the contract to buy the Plaza, or the day after completing that contract, that the defendant's conduct had been misleading in the sense ultimately found by the trial judge, it could have started proceedings then and there. There was unchallenged evidence from (a valuer) that on either of those dates the plaintiff was in fact worse off as a result of the defendant's breach, since the market value was less than the price. It was not necessary to wait for nearly two years to ascertain that some loss had been suffered …The impact of the Beach Road Shopping Centre, unlike the contingency in *Murphy v Overton Investments Pty Ltd*, was not hidden and did not rest on any discretionary decision by anyone."

[38] It is necessary to appreciate the context in which these statements were made. *Astonland* was not concerned with the accrual of a cause of action, or a question relating to limitations. It was concerned with the correct method of assessing damages. The question was whether the plaintiff was limited to the difference between the purchase price, and the value of the property on the date on which it was purchased, as was contended on behalf of the defendant; or whether the capital loss suffered by the plaintiff was the difference between the price paid, and the "true value", determined with the benefit of hindsight. The High Court held the latter test to be correct, and applied it in upholding the assessment of damages made by the trial judge.[14] This case does not determine that a cause of action does not accrue in respect of a capital loss until the loss is discovered, or may reasonably be discovered.

[39] In *Hawkins v Clayton*[15] Deane J reiterated the proposition that a cause of action in negligence is complete when the damage caused by the breach of duty is sustained,

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13 At [28].

14 *Astonland* at [39]-[58].

15 (1988) 164 CLR 539.

and went on to reject a submission that that proposition should be qualified, in the case of a claim for damages for economic loss, by a proposition that time does not commence to run for the purposes of a statutory limitation period, until the plaintiff discovers, or could on reasonable inquiry have discovered, that the damage had been sustained.[16] In that view he enjoyed the express support of Mason CJ and Wilson J.[17] In the same case, Brennan J accepted that a cause of action accrues "irrespective of the claimant's knowledge".[18] As a result, in *Wardley Australia Ltd v Western Australia,*[19] Deane J said that in *Hawkins v Clayton*, the High Court had rejected a submission that in such a case, the cause of action accrues only when the plaintiff discovers, or could on reasonable inquiry have discovered, that loss had been sustained.[20] More recently in *Sullavan v Teare*[21], in a case factually quite similar to the present case, Chesterman JA said:

> "The notion that a limitation period does not begin to run unless a plaintiff knows of the facts which constitute his cause of action and make it complete is contrary to the highest authority, including *Commonwealth v Cornwell*[22]; *Cartledge and Others v E Jopling & Sons Ltd*[23]; *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)*[24]; *Law Society v Sephton & Co (a firm) and others*[25]."

[40] It follows that the Hutchinsons' causes of action accrued, at the latest, when the contract settled in 1998.

[41] The Hutchinsons submit that in the present case, what they were purchasing was an asset which was capable of producing an income stream. The submission seems to imply that in such a case, no detriment is suffered until the stream's projected flow is not achieved. The submission may be thought to derive some support from the observation of Gaudron J in *Hawkins*[26] that, where a claim is made for economic loss, it is necessary to identify the interest of the claimant said to have been infringed. That may suggest that, in a case like the present case, an interest which was infringed was the interest of the Hutchinsons in receiving income from their investment; and the infringement did not occur until December 2002.

[42] However, that can hardly have been the only economic interest of the Hutchinsons relating to the transaction. One interest was surely their interest in receiving a property which had a value commensurate with its purchase price. The asset itself, and its value, were at least as important to the Huchinsons, as the prospect of receiving income from the property. Their economic interest which was first infringed was the transfer of a property, the real value of which was substantially less than its purchase price.

[43] On behalf of the Hutchinsons, it was also submitted that the present case fell within the third class of cases identified in *Environmental Systems Pty Ltd v Peerless*

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16 Pages 587-588.
17 *Hawkins* at 543.
18 See pages 560-562.
19 (1992) 175 CLR 514.
20 *Wardley* at p 540.
21 [2010] QCA 70 at [28].
22 (2007) 229 CLR 519.
23 [1963] AC 758.
24 [1983] 2 AC 1.
25 [2006] 2 AC 543 at 561.
26 At 601.

Holdings Pty Ltd.[27] That class was described as one "where a contingency is hidden by the defendant's conduct and may or may not come to pass (for example, where it is within the power of a landlord to increase tenancy charges but, at the time of entry into the agreement, the landlord is yet to decide to increase the charges)". *Murphy v Overton Investments Pty Ltd*[28] was said to constitute an example of this class.

[44] It should first be noted that, in *Environmental Systems*, the court held that in a case where an asset was purchased for a price commensurate with its true value, and the asset was purchased for a particular purpose, no loss is incurred, and a cause of action relating to its purchase does not accrue, until the asset is applied to the particular purpose and is found not to be as it had been represented. The present case is not such a case.

[45] The description of the third class in *Environmental Systems* refers both to a contingency (which might no doubt result in loss to a plaintiff, depending upon subsequent events) and to that contingency being "hidden by the defendant's conduct". If loss is suffered only when a contingent event comes to pass, then it is difficult to see why this class is materially different from the second class, an example of which is found in *Wardley*, and what is added by the reference to the contingency being hidden. I have not identified an explanation in the reasons, and, when questioned, counsel in the present case could not point to one. If, in the present case, the loss suffered by the Hutchinsons was contingent on the occurrence of an event subsequent to completion of their contract, then their cause of action would not have accrued until that event occurred.

[46] In *Murphy*, the plaintiffs had entered into a lease of a unit in a retirement village. They had been told that the weekly cost of outgoings would be a certain amount. That statement did not adequately provide for all of the expenditure being incurred in the operation of the retirement village. Some years later, the charges were increased, so that all of the expenditure might be recovered. The plaintiffs sued, and the defendants relied upon a limitation defence, the action having commenced more than six years after the lease was entered into. The defence failed. An important fact was that there was no evidence to show that the amount the plaintiffs paid to enter into the lease exceeded the market value of the rights they received.[29] It was held that they suffered no loss until the contingency (that the fees which they were required to pay might be increased to cover all outgoings) was first realised; it was a risk which might never have eventuated.[30] Accordingly, the claim was not statute-barred.

[47] *Murphy's* case is obviously different from the present case. In the present case the Hutchinsons allege, and they lead evidence to show, that at the date of settlement, the true value of Lot 179 was substantially less than the purchase price.

[48] There is an additional reason for holding that the limitation period had expired before the proceedings were commenced. From the outset, the Hutchinsons incurred losses resulting from their ownership of the unit. From that time, the holding costs exceeded the economic return which the unit provided to them.[31] The

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27 (2008) 19 VR 358, 392.
28 (2004) 216 CLR 388 at [26].
29 *Murphy* at 409.
30 Page 410.
31 The details appear at p 31C of the record.

total loss from 1998 to 31 March 2007 was calculated at $41,593; and after allowance was made for tax benefits, the loss was calculated to be $33,175, the amount claimed in the most recent version of the statement of claim.

[49] There can be no doubt that this is a recoverable loss. Part of this loss was suffered before the limitation date.

[50] The respondents relied upon the acquisition costs incurred by the Hutchinsons as demonstrating that the cause of action accrued more than six years before the commencement of proceedings. They rely on a number of authorities. Some of those authorities are cases which demonstrate that, in an action for damages for breach of contract, a plaintiff may in some circumstances recover "reliance damages" rather than "expectation damages"[32], and in such a case, the award takes account of wasted expenditure, including acquisition costs. The general utility of such cases in the present context may be questioned. However, another authority, *Winnote Pty Ltd v Page*[33], provides a stronger analogy. It was an action against a firm of solicitors for negligent advice relating to the acquisition of the right to extract peat from another person's land. The firm advised the plaintiff that a lease should be executed with the owner of the land in which the deposit was located. The plaintiff acted on that advice, incurring expenses in obtaining the lease and paying money to the landowner. However, the advice was wrong. Peat was a mineral, and the right to extract it depended upon the grant of a mining licence. The plaintiff then sued the firm, some seven years after obtaining the advice and acting on it. It was held that the claim was statute barred. The primary test adopted by the court to determine when the cause of action accrued was a comparison between the amounts which the plaintiff paid, and the value of the bundle of rights received by the plaintiff. However, the court also held that there had been measurable damage from the outset, in part by reason of the payment of professional costs for drafting the lease and for obtaining legal advice in relation to it; and in part by reason of payments made to the landowner. The result was that the claim was statute-barred.

[51] Transaction costs are commonly the price which a person will pay to secure a property, and are an item of expenditure additional to the purchase price. Should a purchaser immediately choose to sell the property, and be unable to obtain a price higher than that which the purchaser had paid, the transaction costs will not be recovered. Transaction costs are somewhat different to other matters usually raised in an assessment of damages, such as the fact that the price paid exceeded the true value, or a net loss of revenue. Moreover, a purchaser who has entered into a transaction and purchased property as a result of a wrongful act may nevertheless choose to retain the property. In respect of such a case, Cooper J in *Demagogue Pty Ltd v Ramensky*[34] said:

> "The *prima facie* rule that the measure of damage in deceit is the difference between the value of the property and the price paid is inappropriate where the contract is not completed.[35] Where the contract remains unrescinded the costs associated with the conveyance of the property are costs arising out of the contract and

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32 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

33 (2006) 68 NSWLR 531.

34 (1992) 39 FCR 31, 47-48.

35 *Myers v Transpacific Pastoral Co Pty Ltd* [1986] 8 ATPR 47,421 at 47,424.

> of performing the obligations imposed thereby. Until the contract is rescinded such costs and expenses do not take on the character of costs and expenses thrown away and as such recoverable loss and damage under the general law."

[52] His Honour considered that a broader approach would apply to relief under s 87 of the *TPA*. In the present case, the Hutchinsons have not rescinded their agreement with Equititour.

[53] In *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[36], the High Court had to determine damages payable to a company which had purchased property as a result of a negligent statement made on behalf of a local authority. At first instance, the local authority was held not to be negligent, but damages were assessed. In addition to the difference between the value of the land and the purchase price paid, the amount assessed included consequential damage. Part of the consequential damage was the difference between stamp duty and solicitor's costs payable on the purchase price, and those expenses determined by reference to the value of the land. The High Court held they were to be included in the award of damages. In dealing with this issue, Mason J (with whom Stephen and Aickin JJ agreed[37]) said:[38]

> "The judge found that, but for the negligent mis-statement, the appellants would not have bought the land, the land being useless for the purpose for which it was acquired. Consequently, the appellants' loss includes, not merely the diminution in value of the land, but also the expenses of acquisition and retention for a reasonable time, expenses which would not have been incurred had the respondent not been negligent. It was not suggested that the items in question fell outside the boundary of foreseeability. The measure of recoverable damages for negligent mis-statement is the amount of money necessary to restore the plaintiff to the position he was in before the statement, subject to the loss being foreseeable."

[54] In *Shaddock*, the appellants had not claimed the full amount of transaction costs. Nevertheless, the statement of principle applied by Mason J seems to me to warrant the identification of such costs as an item of damages, at least in a case where the true value of land purchased as the result of negligent advice or some other analogous wrongdoing, does not sufficiently exceed the purchase price to compensate the purchaser for the transaction costs.

[55] In the present case, the transaction costs were incurred at about the time the contract was entered into and settled. The true value of Lot 179 was less than its purchase price. Its market value was the same as the purchase price. Accordingly, on any approach, the transaction costs represent loss which was incurred before the limitation date.

[56] In *Murphy*, it was noted that there may be loss which is of a capital nature, and a loss which is on a revenue account; and that it did not necessarily follow that because claims for some items of loss or damage are statute barred, that claims for other items could not be pursued, though the Court did not there resolve the

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36 (1981) 150 CLR 225.

37 See pp 244, 256.

38 See p 255.

question.[39] In *Winnote*, Mason P stated that where a plaintiff can demonstrate separate causes of action arising out of "separate incidents of damage", the plaintiff is free to select those accruing within the limitation period, and sue on them.[40] As in *Murphy*, it is unnecessary in this case to determine the correct legal position.

[57] On any view, any capital loss suffered by the Hutchinsons occurred before the limitation date. To the extent that the transaction costs represent recoverable damage, a cause of action based on this loss also accrued before the limitation date. Revenue losses commenced from about the time of completion of the contract. It seems to me that on any view, a cause of action based on loss of revenue accrued once outgoings exceeded receipts, at least unless there was a real prospect that the position would reverse in the short term, resulting in an overall profit. That was not the case. Accordingly, if there is a separate cause of action relating to lost revenue, it too accrued before the limitation date. It seems to me that, so far as the revenue stream became less than was projected, this is not a separate incident of the occurrence of damage, so as to constitute a fresh cause of action. I think that the better view is that it is reflected in the "true value" of the land at the date of settlement. Alternatively, it is an element of the loss on revenue account suffered by the Hutchinsons. In either case, the cause of action accrued before the limitation date.

[58] The views expressed to this point are based upon the evidence produced before the primary judge. There is nothing to suggest that there is any prospect that further evidence could materially affect the conclusions. In those circumstances, the respondents have established that the Hutchinsons have no realistic prospect of success in their action.

Conclusion

[59] The appeal should be dismissed with costs.

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39 Pp 408, 410-411.

40 Page 180 at [64] ; see also *Darley Main Colliery v Mitchell* (1886) 11 App Cas 127.