SUPREME COURT OF QUEENSLAND

CITATION:	*JNJ Resources P/L v Crouch & Lyndon* [2014] QSC 13
PARTIES:	**JNJ RESOURCES PTY LTD ACN 100 733 631** (plaintiff) v **CROUCH & LYNDON (a firm)** (defendant)
FILE NO/S:	BS3750/13
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	19 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2014
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application for summary judgment is dismissed.**
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 – TORTS – ACTIONS AGAINST SOLICITORS – application for summary judgment or, alternatively, that the claim be struck out under UCPR r 171(2) – the respondent company alleges the applicant solicitors gave the respondent's directors negligent advice regarding contracts for sale and purchase of land – where contract for purchase of land terminated because plan of survey not approved within stipulated timeframe – continuing five year lease to the respondent's directors over the land - the respondent company operates business on land but has no formal right of occupation– land subsequently acquired by the State of Queensland – whether the limitation period had expired under s 10 of the *Limitation of Actions Act* 1974 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 293, r 171(2) *Limitation of Actions Act* 1974 (Qld), s 10
COUNSEL:	RA Ashton for the defendant applicant

MD Martin QC and A Nicholas for the respondent plaintiff

SOLICITORS: Coyne & Associates for the defendant applicant

ClarkeKann for the respondent plaintiff

[1] **JACKSON J**: The proceeding was started on 24 April 2013.

[2] The defendant applies for summary judgment on the whole of the plaintiff's claim under the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 293. In the alternative, the defendant applies for an order that the statement of claim be struck out under UCPR r 171(2) as failing to disclose a reasonable cause of action and having a tendency to prejudice or delay the fair trial of the proceeding.

[3] The ground of the application for summary judgment is that the plaintiff's cause or causes of action arose more than six years before the proceeding was started. The relevant statutory provision is s 10 of the *Limitation of Actions Act* 1974 (Qld) which provides, relevantly, as follows:

> "(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose –
>
> (a) … an action founded on … tort where the damages claimed by the plaintiff do not consist of or include any damages in respect of personal injury to any person …"

[4] For a proceeding started on 12 April 2013, the earliest date on which the cause of action can have arisen and not be brought after the expiration of six years from that date is 11 April 2007. The dispute between the parties is when the plaintiff first suffered loss or damage for the defendant's alleged negligence.

[5] The plaintiff's claim is founded on tort. The defendant contends that the plaintiff's cause or causes of action arose either in December 2005, on 27 January 2006 or on 2 March 2006.

[6] A cause of action for damages for negligence does not arise until actual loss or damage, being non-minimal or measurable damage, recognised in law, has been suffered.

[7] The plaintiff company carries on business supplying stock feeds, bentonite products and soil conditioners. From prior to September 2005 it has carried on that business on part of lot 53 on SP103160 in the county of Churchill, Parish of Jeebropilly, Title Reference 50218401.

[8] John and Judy Seppanen were the directors of the plaintiff. Mrs Seppanen was the shareholder as trustee. They were the registered proprietors of lot 53. The plaintiff conducted the business on part of lot 53 with the permission of Mr and Mrs Seppanen. There was no formal licence or lease granted by Mr and Mrs Seppanen to the plaintiff. The plaintiff did not pay Mr and Mrs Seppanen licence fees or rental for the use of the relevant part of lot 53.

[9] On 8 September 2005, or thereabouts, Mr and Mrs Seppanen retained the defendant to act as their solicitors and to advise them in connection with selling lot 53 to Maximus Industrial Pty Ltd ("Maximus"). The precise scope of the retainer and its date are in issue.

[10] The plaintiff alleges that the retainer was for transactions comprising the sale of lot 53 to Maximus and the simultaneous purchase from Maximus of a portion of lot 53 known as proposed lot 530 and to get advice on the appropriate procedures to achieve those matters and the appropriate contracts, including the terms thereof.

[11] The plaintiff alleges that the retainer was oral and that, at the meeting when the retainer was made, Mr and Mrs Seppanen instructed the defendant that the plaintiff conducted its business from lot 53 and the portion of lot 53 to be sub-divided was that part on which the business was conducted. The plaintiff alleges that Mr and Mrs Seppanen said that, whilst they wished to sell lot 53 to Maximus, they would only do so if they could retain the proposed lot 530.

[12] On 20 December 2005, Mr and Mrs Seppanen executed a contract to sell lot 53 to Maximus for the sum of $2,500,000. The date for completion was 20 January 2006. The contract was made conditional upon the parties' simultaneous entry into a contract of purchase by Mr and Mrs Seppanen from Maximus of proposed lot 530.

[13] Also on 20 December 2005, Mrs Seppanen as trustee entered into a contract to purchase proposed lot 530 from Maximus for the sum of $100. The date for completion was 14 days after the plan of survey issued for proposed lot 530. The contract of purchase also provided that in the event that development approval was not obtained for the plan of survey to create proposed lot 530 within 36 months from the contract date either party may terminate the contract by written notice to the other.

[14] On 27 January 2006, the contract to sell lot 53 was settled.

[15] Contemporaneously, Maximus granted a lease of proposed lot 530 and rights of access to the proposed lot to Mrs Seppanen as trustee for a term of 5 years. The lease was renewed in 2011 for a further term of 5 years.

[16] As at 23 November 2009, the development application for the plan of survey to create proposed lot 530 had not been approved. By letter of that date, from Maximus' solicitors to the plaintiff, Maximus terminated the contract to purchase proposed lot 530.

[17] The plaintiff alleges that the defendant was negligent because the contract of sale of lot 53 was not made conditional upon prior completion of the contract of purchase of proposed lot 530[1] contract, because the defendant failed to advise the plaintiff that the development application for the sub-division and creation of proposed lot 530 may not be approved and failed to advise the plaintiff that if proposed lot 530 was not created the contract to purchase proposed lot 530 could be terminated at the election of Maximus after 20 December 2008.

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[1] It is difficult to comprehend "prior" settlement of the contract of purchase of proposed lot 530, as the plaintiff would be purchasing land of which it was still the proprietor, since the contract of sale of lot 53 would not have settled.

[18] The plaintiff alleges that if the defendant had advised the plaintiff of those things Mr and Mrs Seppanen would not have entered into the contract of sale of lot 53 or the contract of purchase of proposed lot 530.

[19] The plaintiff alleges that the defendant's negligence caused Mr and Mrs Seppanen to sell lot 53 in circumstances where otherwise they would not have sold it on its own for $2,500,000, resulting in loss and damage to the plaintiff.

[20] The amount of the loss or damage alleged is $18,200,000 consisting of two components. The first component is alleged to be that "the plaintiff will be unable to sell the stockpiled raw materials stored on the land resulting in a loss of profit to the plaintiff". The particularised amount of that loss is $4,200,000. The second component is that "the stockpiled raw materials will become unsaleable due to the passage of time and will need to be disposed of at a cost to the plaintiff". The alleged cost is $14,000,000 approximately.

[21] It will be noticed that although the sum of $18,200,000 is alleged to be loss and damage resulting from the defendant's negligence, those amounts are alleged to be losses that will be suffered in the future. The basis of the plaintiff's claim for loss and damage is that it "will not be able to operate the business on the land as its security of tenure is an unregistered lease granted by the previous owner Maximus…"

[22] The land is no longer owned by Maximus. That is because in 2011 it was acquired by the State of Queensland from Maximus for the purpose of future use as a rail corridor.

[23] There is no apparent dispute that at present the State of Queensland recognises the current lease as valid. However, in order to continue its occupation of the land after expiry of that lease in 2016, the plaintiff is dependent upon Mrs Seppanen or the plaintiff being able to make further agreement with the State of Queensland as lessor and registered proprietor. Present indications are that the State may be prepared to renew the lease for a period of up to five years, perhaps because the rail corridor is not required until a significant period into the future. However, the State has indicated that it would expect a market rental for any renewal.

[24] The defendant denies that the plaintiff will suffer the alleged loss because the plaintiff has continued to operate the business on the land and reasonably can be expected to do so in the future.

[25] The defendant also alleges that the plaintiff's cause or causes of action, if any, "accrued not later than 27 January 2006, when the lot 53 contract settled". It also alleges that the time limitation for commencement of the proceeding expired on 27 January 2012 by operation of s 10 of the *Limitations of Actions Act* 1974 (Qld).[2]

[26] In reply the plaintiff says its cause of action accrued at the earliest when the proposed lot 530 contact came to an end on 23 November 2009.

Less valuable package of rights

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2 It is immaterial whether it was 27 or 28 January 2012.

[27] The defendant argues that the plaintiff's "security of tenure" was lost immediately upon execution the contract documents on 20 December 2005 or at the latest when the transactions were settled on 27 January 2006. It submitted that:

> "…From that time on, [the plaintiff], at best would have the indirect benefit of [Mrs] Seppanen's 5 year lease from Maximus. Beyond that, its tenure was in the hands of others whom it did not control or with whom it did not enjoy a special relationship of the kind that obtained as between it and [Mr and Mrs Seppanen]."

[28] The defendant also relied upon the opinion of an accountant, Mr Benjamin, as follows:

> "In my opinion, the effect of entering into the Contract for Sale was to subject the Business to a 5 year lease term with no option to renew, whereas previously the Plaintiff could have provided whatever lease term was required [to] protect the goodwill of the Business.
>
> Given the above, in my opinion, there would have been a diminution in the value of the Business as a result of the Plaintiff entering into the Contract of Sale. There is currently insufficient information to quantify the extent of the diminution of value."

[29] In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*[3] the High Court recently said this:

> "In *Wardley Australia Ltd v Western Australia*, a distinction, in principle, was drawn between the legal concept of loss and damage, and the detriment which a plaintiff may be said, in a general sense, to have suffered upon being induced by a misrepresentation to enter an agreement which proves to be disadvantageous. Entry into a loan agreement in these circumstances does not necessarily mean that a plaintiff has suffered damage, because it will not immediately be self-evident that the value of the chose in action acquired, the right to repayment of the moneys advanced, is worth less than the amount paid.
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> [32] A mortgage negligently drawn is also not necessarily productive of loss, except perhaps in the case of the mortgagor whose equity of redemption is affected immediately on its execution. Recourse to a mortgage will not be necessary in every case. In general terms, in a case involving a loan of moneys, damage will be sustained and the cause of action will accrue only when recovery can be said, with some certainty, to be impossible. There are good reasons for a principled analysis of actual damage. One reason is that it would be unjust to compel a plaintiff to commence proceedings before the existence of his or her loss is ascertainable." (footnotes omitted)

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3 (2013) 247 CLR 613, 631 [31].

[30] The contention that upon entering into the transaction the plaintiff had a "package of" rights less valuable than it was entitled to expect requires that the relevant rights and expectations be identified. Although it occupied the land the subject of proposed lot 530, the plaintiff had no particular right of occupation. It had neither a lease nor a formal licence from Mr and Mrs Seppanen. There was no contract under which the plaintiff had given consideration in exchange for a right of occupation. Because Mr and Mrs Seppanen were the plaintiff's directors and Mrs Seppanen as trustee was the shareholder of the plaintiff, and they had for years permitted the plaintiff to occupy the land so as to carry on its business, it might be said reasonably that the plaintiff expected to be able to continue to enjoy that occupation into the future whilst it was the proprietor of the business. However, that does not mean that the plaintiff owned any property or had any asset of value based on an ongoing right of occupation.

[31] The value of the plaintiff's business must have been affected by the circumstance that it had no continuing right of occupation. Mr Benjamin's opinion skirts around that analysis of rights by his statement of the assumption that "the Plaintiff could have provided whatever lease term was required to protect the goodwill of the Business". However, it was not the plaintiff who could provide that. It was Mr and Mrs Seppanen who could do so by conferring a right upon the plaintiff that it did not otherwise have (or by contemporaneously selling it themselves to a purchaser of the plaintiff's business). If the plaintiff, under their control, had sold its business and for that purpose they had granted to the plaintiff a right to occupy the premises so as to provide "security" for the ongoing conduct of the business on the land, Mr and Mrs Seppanen would have conferred a right of value upon the plaintiff measured by the value of the right of occupation and its effect, if any, upon the value of the plaintiff's business goodwill. But that was not a right or value which the plaintiff already enjoyed or which it lost upon the contract of sale of lot 53 being entered into or being settled. To make the contrary assumption treats the plaintiff as the pre-existing owner of a right and as enjoying the value of that right which it did not then have.

[32] Immediately before Mr and Mrs Seppanen entered into the relevant transactions, immediately after they did so, and after the transactions were settled, the plaintiff still did not enjoy any right of occupation. What changed was that Mr and Mrs Seppanen's rights as owners of the indefeasible title to lot 53 were exchanged for the purchase price of the sale of that lot and the rights of a lessee under a five year lease together with the rights as purchaser to purchase proposed lot 530 under a conditional contract.

[33] Two things follow from those conclusions. First, because there was no right of the plaintiff which was altered or not altered when it should have been altered, there was no right that was made less valuable as a result of Mr and Mrs Seppanen entering into the transactions or settling them. Secondly, in any event, Mr and Mrs Seppanen may or may not have suffered loss. They received the price under the contract of sale of lot 53. Mrs Seppanen obtained a leasehold interest over proposed lot 530 for a term of five years. Mrs Seppanen also received the rights under the contract of purchase of proposed lot 530. But because Mr and Mrs Seppanen's loss is not the plaintiff's loss, it is irrelevant to analyse whether they suffered loss any further.

[34] If the plaintiff did not lose a right as a result of Mr and Mrs Seppanen entering into the transactions or the transactions being settled, what was the effect of their doing so? The ability of Mr and Mrs Seppanen to fulfil the plaintiff's expectation of continuing uninterrupted occupation of the land was affected by the risk that the contract of purchase of proposed lot 530 may not be completed. Neither of the parties addressed the question whether that change is or could be compensable as loss or damage for the purpose of the accrual of a cause or causes of action for damages for negligence.

[35] It is difficult to find an analogous case of high authority. In *Hill v Van Erp*[4] the claim was made by a disappointed beneficiary for damages for negligence against a testatrix's solicitor who had delayed in drafting an updated will to give effect to the testatrix's revised intention to dispose of her estate before death. The loss of that expectation was described by Brennan CJ as follows:

> "… in the case of an ineffective gift intended to be given by a testator to a beneficiary, the thing intended to be given passes on the testator's death to another. It is no longer the property of the donor. And, unless the intended but disappointed beneficiary can claim the thing from the testator's estate in proceedings under a statute … the testator's intention is frustrated and the thing which passed from the testator on death is irretrievably lost to the intended donee. That is the nature of the 'loss' with which this class of case is concerned. It is a loss that is suffered upon the dropping of the testator's life."[5]

[36] Dawson J said:

> "It was said that at the time of the solicitor's negligence the only interest that the intended beneficiary had in the bequest was an expectation … There was no enforceable right or interest. That approach overlooks the fact that, in this case, upon the testatrix's death, Mrs Van Erp would have had an enforceable right to her bequest had it not been for the negligence of the solicitor. In this case, what Mrs Van Erp lost was no mere expectation; it was a share in the testatrix's estate. But in any event there is no rule preventing recovery of damages in tort for loss of an expectation."[6] (footnotes omitted)

[37] Gaudron J said:

> "To determine what has been lost, it is necessary to look to the situation as it would have been had there no negligence. And when viewed in that way, it is apparent that the intended beneficiary has lost a legal right, namely, the right to have the testator's estate properly administered in accordance with the terms of the will. There is nothing novel in the imposition of liability in tort for the loss or impairment of a legal right."[7]

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4 (1995 – 1997) 188 CLR 159.
5 Ibid, 168.
6 Ibid, 179.
7 Ibid, 197.

[38] For present purposes, the point about cases such as *Hill v Van Erp* may be that although at the time of the solicitor's negligence the plaintiff had a mere expectation of receipt of a benefit, that expectation was an identifiable loss of an opportunity to obtain a future right of value. The loss of opportunity was a concrete proposal in that case. In the present case, the plaintiff does not allege that at the relevant time Mr and Mrs Seppanen intended to confer a right of occupation of the land upon the plaintiff in such a form that increased the value of the plaintiff's assets.

[39] I am conscious that, not long after *Wardley*, the High Court decided in *Sellars v Adelaide Petroleum NL*[8] that:

> "…[d]amages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s. 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued."[9]

[40] The proviso is that the plaintiff:

> "…shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities".[10] (emphasis in the original)

[41] In other words, loss of such an opportunity is itself a species of loss or damage recognisable in law. See also *The Commonwealth v Cornwell*[11] where the High Court identified a case where "the opportunity was lost of the lucrative exploitation of contractual rights or of some other commercial opportunity" as one in which loss or damage recognisable in law is suffered.

[42] If the plaintiff's expectation of continuing occupation were able to be characterised as a valuable opportunity which, if lost, would amount to compensable loss or damage, the next questions are whether and when the plaintiff lost that opportunity?

[43] As already stated, the defendant submits that it was lost on entry into the contracts for the transactions or on settlement. From the plaintiff's point of view, the only difference was the risk that the conditional contract for transfer of proposed lot 530 to Mrs Seppanen as trustee would not be completed. That risk presented a risk of loss to the plaintiff because it might interfere with the plaintiff's future continuing occupation of the land. However, at the same time, the plaintiff had the expectation that its continuing occupation of the land by the grace of Mr and Mrs Seppanen would be protected by the five year lease granted to Mrs Seppanen as trustee.

[44] The further difficulty presented by those facts is whether the distinction in principle drawn in *Wardley* between loss and damage recognised in law and a detriment in a general sense, which does not amount to loss and damage, is engaged where the risk or fact of loss is seen to be contingent.

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8 (1992-1994) 179 CLR 332.
9 Ibid, 355.
10 Ibid, 355.
11 (2006-2007) 229 CLR 519, 531[38].

[45] *Wardley* itself was a clear case of the distinction. The loss or damage in question was the liability of the State as indemnifier to Rothwell's creditors. The contingency was that the State was not liable to indemnify until the creditor made demand upon the State. Before then, Rothwell's risk of insolvency and the exposure of the State to the creditor in the event that a demand was made by the creditor under the indemnity constituted obvious detriment to the State in entering into the contract of indemnity. But until demand was made the detriment did not crystallise into a liability recognisable in law as loss or damage.

[46] On the other hand, in other cases the distinction is not as easily drawn. The point made in *Hunt v Hunt* in the passage set out above is that a lender in a transaction secured by mortgage does not suffer loss until recovery of the loan can be said "with some certainty" to be impossible, either from the borrower or the security property or guarantors. That was also the position *Kenny & Good Pty Ltd & Anor v MGICA.*[12] The line of cases in the High Court since *Wardley* has followed a consistent direction on these points.[13]

[47] The defendant relied on a number of cases in support of its contentions that the plaintiff suffered loss or damage on Mr and Mrs Seppanen entering into the contracts for the transaction or on settlement.

[48] Some of them were decided before *Wardley* or under the common law of England and Wales and must be viewed in the light of *Wardley* and subsequent High Court cases.[14] Others can be distinguished on their facts. So, in *Scarcella v Lettice*[15] the question was resolved by one of the Judges characterising the partial absence of an easement for access to the rear of the property bought by the plaintiff as an obvious defect in title which would be discovered on any resale and therefore not a contingent loss. The other Judges concluded that loss was suffered because had the plaintiffs known of the defect they would not have bought the property which, with that defective access, was worth less than they paid for it – a clear and conventional case of loss being suffered on settlement of a purchase. And in *Winnote Pty Ltd v Page*[16] the plaintiff's failure to obtain a required mining lease over a peat deposit which led to it being gazumped by a later applicant was characterised as measurable damage. This was because the rights obtained by the plaintiff under the transaction were of a dramatically inferior kind. The lease from the owner of the land, for which and under which the plaintiff paid consideration to that owner, conferred no right to work the peat deposit by extracting and selling the peat at all. *D'Agostino v Anderson*[17] was a similar case to *Scarcella*. A business and the land on which the business was located were bought by the plaintiff on the basis that there was a development approval permitting the business to be carried on. That right did not exist. The plaintiff had paid a premium for it. The price paid for the land was more

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12 (1992) 199 CLR 413, 448 [89].

13 *Wardley Australia Limited v The State of Western Australia* (1992) 175 CLR 514, 527-531; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1998-1999) 199 CLR 413, 447-449 [85]-[92]; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 407-8 [46]; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 655-6 [29]-[31]; *The Commonwealth of Australia v Cornwell* (2006-2007) 229 CLR 519, 525-6 [16]-[18] and 531-2 [38].

14 *Forster v Outred* [1981] 1 WLR 86; *Gillespie v Elliott* [1987] 2 Qd R 509; *Deputy Commissioner of Taxation v Zimmerlie* [1988] 2 Qd R 500; *Bell v Peter Browne & Co* [1990] 2 QB 495.

15 (2000) 51 NSWLR 302.

16 (2006) 68 NSWLR 531.

17 [2012] NSWCA 443.

than it was worth without the benefit of the development consent. It was another clear and conventional case of loss being suffered on settlement of a purchase.

[49] In the present case, the question when the plaintiff suffered loss might be approached by asking the question when with some certainty it could be said that completion of the contract for Mrs Seppanen as trustee to purchase proposed lot 530 would not occur. The plaintiffs say that was when Maximus terminated the contract. The defendants say that was when the sub-division of proposed lot 530 from lot 53 was effectively prohibited by amendments to the Southeast Queensland Regional Plan on 2 March 2006. In effect, that is a contention that amendments to the Southeast Queensland Regional Plan frustrated the contract of purchase of proposed lot 530.

[50] It is unnecessary and undesirable to discuss this contention further as a matter of fact or law. It depends on the factual conclusion that relevant amendments were made to the Southeast Queensland Regional Plan and the factual and legal conclusions that the amendments effectively prohibited the sub-division of proposed lot 530 and, possibly, the further legal conclusion that such a state of affairs frustrated the contract for purchase of proposed lot 530. None of those steps was adequately addressed in evidence or in argument.[18] An additional reason for concern is that accrual of the cause or causes of action on 2 March 2006 for that reason was not pleaded, when in my view it should have been.

[51] Accordingly, it also becomes unnecessary to finally decide whether the difference in the plaintiff's position because of the change in Mrs Seppanen's rights if the contract to purchase proposed lot 530 was frustrated on 2 March 2006 amounts to loss or damage suffered by the plaintiff.

[52] For those reasons, it would also be inappropriate to reach any further legal conclusion. The defendant's application for summary judgment on the ground that the plaintiff has no real prospect of succeeding on all of its claim because it is statute barred under s 10 of the *Limitations of Actions Act* 1974 (Qld) should be dismissed.

[53] In reaching the conclusion that the defendant's application for summary judgment must be dismissed I also acknowledge the injunction in *Wardley* that it is:

> "…undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance to the hearing of the action, except in the clearest of cases".[19]

[54] However, a matter of added concern is the submission made by the plaintiff that:

> "Whilst the plaintiff has not suffered any actual loss to date there is a real possibility this will occur in the future when it is forced to relocate. The quantum of the alleged losses is approximately $18m."

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18 For reasons which are not entirely clear, affidavit evidence on which the defendant intended to rely upon this point was neither filed nor read.

19 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 533.

[55] It will be recognised at once that if the plaintiff has not suffered any actual loss to date then its claim for damages for negligence must fail because no cause of action is complete. Damage is the "gist" of a cause of action for damages for negligence in tort.

[56] I note that the statement of claim alleges that the defendant's negligence caused Mr and Mrs Seppanen to sell lot 53 in circumstances "resulting in loss and damage to the plaintiff in the sum of $18.2 million" because "the plaintiff will be unable to sell the stockpiled raw materials" and that they "will need to be disposed of at a cost to the plaintiff". Future expenses may be recoverable as damages suffered by reason of a defendant's negligence in tort, provided there is also past or present loss or damage which has been suffered. The plaintiff will be required to prove the past or present loss or damage in order to succeed in the proceeding.

[57] However, I have not further considered this point, for two reasons. First, inconsistently with the submission extracted above, the plaintiff's reply alleges that "its cause of action accrued at the earliest when the lot 530 contract came to an end on 23 November 2009". Secondly, whether the plaintiff has no real prospect of succeeding on the whole of its claim because it cannot demonstrate past or present loss was not a question joined between the parties on the hearing of the application for summary judgment.

[58] Although the defendant applied to strike out the statement of claim in the alternative to summary judgment, no separate point was agitated on that aspect of the application.

[59] The application for summary judgment is dismissed. I will hear the parties as to any further orders to be made.