SUPREME COURT OF QUEENSLAND

CITATION:	*Westpac Banking Corporation v Jamieson & Ors* [2015] QCA 50
PARTIES:	**WESTPAC BANKING CORPORATION** ABN 33 007 457 171 (appellant/cross respondent) **v** **MARK BRYAN JAMIESON** (first respondent/first cross appellant) **LORRELL BERNADETTE JAMIESON** (second respondent/second cross appellant) **JAMIESON INVESTMENTS QLD PTY LTD** **ACN 103 273 070 as trustee for The M & L SUPER FUND** (third cross appellant)
FILE NO/S:	Appeal No 3234 of 2014 SC No 3536 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 April 2015
DELIVERED AT:	Brisbane
HEARING DATES:	18 September 2014; 19 September 2014
JUDGES:	Margaret McMurdo P and Morrison JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal filed 4 April 2014 be dismissed.** **2. The cross-appeals filed 22 April 2014 be dismissed.** **3. The first respondent's/cross-appellant's application filed 10 September 2014 be dismissed.** **4. The parties have leave to make submissions as to costs in accordance with Practice Direction 3 of 2013.**
CATCHWORDS:	DAMAGES – GENERAL PRINCIPLES – OTHER MATTERS – where a bank was found to have given negligent and misleading investment advice to a customer – where the advice did not adequately disclose that more than 10 per cent of the investor's wealth would be at risk if the investment performed poorly – where the investment performed poorly,

partly as a result of the GFC, and the customer was liable for interest under loans made to finance the investment – whether the bank is responsible for the total loss suffered by the customer – whether the rule in *Potts v Miller* should have been applied to assess the loss – whether the primary judge erred in considering what the customer would have done had he not been induced to make the investment and associated loans – whether the investor would have borrowed and invested in a tax minimising scheme and suffered a loss on that alternative investment

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – FINANCIAL PRODUCTS – GENERALLY – where a bank advised a customer to borrow to contribute to a self-managed superannuation fund – whether bank was negligent in failing to adequately advise the customer of the detriments of using borrowed money to make undeductible contributions

DAMAGES – INCIDENCE OF TAXATION AFFECTING DAMAGES – where the primary judge found that an award of damages would be assessable income under the *Income Tax Assessment Act* 1997 (Cth) – where the primary judge "grossed-up" the amount of damages on account of the tax treatment of the award – whether the figure used by the primary judge as the customer's net loss was correct – whether the methodology used by the primary judge to "gross-up" the assessed loss was correct – whether the "grossed-up" award of damages should be "grossed-up" *ad infinitum*

Australian Securities and Investments Commission Act 2001 (Cth), s 12DA(1), s 12ED
Civil Liability Act 2003 (Qld), s 11(1)(a), s 11(1)(b), s 11(4)
Income Tax Assessment Act 1997 (Cth), s 20-20, s 20-25
Uniform Civil Procedure Rules 1999 (Qld), r 766(1)(c)

Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3) (2006) 67 NSWLR 341; [2006] NSWCA 282, cited
Akron Securities v Iliffe (1997) 41 NSWLR 353, cited
Allsop v Federal Commissioner of Taxation (1965) 113 CLR 341; [1965] HCA 48, cited
Atlas Tiles Ltd v Briers (1978) 144 CLR 202; [1978] HCA 37, cited
Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1977] AC 191, considered
Batchelor v Commissioner of Taxation (2014) 219 FCR 453; [2014] FCAFC 41, cited
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2000] 3 All ER 493; [2001] QB 488; [2000] EWCA Civ 161, cited

Coco v Westpac Banking Corporation [2012] NSWSC 565, cited
County Personnel (Employment Agency) Ltd v Alan R Pulver and Co [1987] 1 WLR 916, cited
Cullen v Trappell (1980) 146 CLR 1; [1980] HCA 10, cited
Downs v Chappell [1997] 1 WLR 426, considered
Environment Agency v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; [1998] UKHL 5, cited
Expectation Pty Ltd v PRD Realty Pty Ltd (2004) 140 FCR 17; [2004] FCAFC 189, cited
Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1; [1986] HCA 3, cited
Gill v Australian Wheat Board [1980] 2 NSWLR 795, considered
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54, cited
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41, cited
Jamieson v Chiropractic Board of Australia [2011] QCA 56, cited
Jamieson & Ors v Westpac (2014) 283 FLR 286; [2014] QSC 32, considered
Kenny & Good Pty Ltd v MGICA (1992) Ltd (1999) 199 CLR 413; [1999] HCA 25, cited
Langdale v Danby [1982] 1 WLR 1123, cited
March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; [1991] HCA 12, cited
McLaurin v Federal Commissioner of Taxation (1961) 104 CLR 381; [1961] HCA 9, cited
Murphy v Overton Investments Pty Ltd (2004) 216 CLR 388; [2004] HCA 3, cited
New South Wales Cancer Council v Sarfaty (1992) 28 NSWLR 68, considered
Potts v Miller (1940) 64 CLR 282; [1940] HCA 43, considered
Rentokil Pty Ltd v Channon (1990) 19 NSWLR 417, cited
Slough Estates Plc v Welwyn Hatfield District Council [1996] 2 PLR 50, cited
Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] AC 254; [1996] UKHL 3, cited
Tefbao Pty Ltd v Stannic Securities Pty Ltd (1993) 118 ALR 565, cited
Tomasetti v Brailey (2012) 274 FLR 248; [2012] NSWCA 399, cited
Toteff v Antonas (1952) 87 CLR 647; [1952] HCA 16, cited
Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] 1 CLC 662; [2013] EWHC 111, followed

COUNSEL: S L Doyle QC, with A P J Collins and G J Watson for the appellant/cross respondent
C C Heyworth-Smith with L J Allen for the respondents/cross appellants

SOLICITORS: Sparke Helmore for the appellant/cross respondent
Schultz Toomey O'Brien for the respondent/cross appellants

[1] **MARGARET McMURDO P:** In mid-2007, Mark and Lorrell Jamieson obtained a statement of advice from Robert Tindall, a financial planner employed by Westpac Banking Corporation. Mr Jamieson acted on that advice by borrowing $5 million and investing it in a registered managed investment scheme, the MQ Gateway Trust, for three years. He hoped to generate a profit and to offset the costs of and interest on the loan to eliminate his substantial income tax liability. The Jamiesons also acted on Mr Tindall's advice to borrow $600,000 for their superannuation fund to invest in shares which they hoped would be profitable, ultimately borrowing $700,000 for that purpose. Following the global financial crisis in late 2007, both investment strategies became unprofitable and the Jamiesons subsequently suffered significant losses. They and their superannuation fund trustee company sued Westpac for damages arising from Mr Tindall's advice for breach of contract, negligence and statutory contraventions.

[2] The Jamiesons were successful on some claims. The primary judge found that Westpac was negligent and in breach of contract and of its statutory obligations under s 12DA(1) *Australian Securities and Investments Commission Act* 2001 (Cth). His Honour determined that Mr Jamieson's loss on the MQ Gateway Trust, after tax, was $623,236. Had he not taken up the Westpac recommendations, he would have invested $200,000 in agribusiness, resulting in a loss, unrelated to Westpac's advice, of $134,107. The damages of $623,236 should be reduced by $134,107 to reflect this, so that Mr Jamieson's net damages after tax were $489,129. As Mr Jamieson would have to pay tax on his damages of $489,129 pursuant to s 20-20 *Income Tax Assessment Act* 1997 (Cth), that figure had to be "grossed up" by an amount of $200,992 to ensure that he was left with $489,129 after tax. His Honour assessed Mr Jamieson's total damages arising from the MQ Gateway Trust investment as $690,121. After adding interest of $228,535, his Honour gave judgment for Mr Jamieson in the sum of $918,656. In his reasons, his Honour made clear that he considered the assessable amount of the judgment for taxation purposes under s 20-20 was $489,129.

[3] In the claim arising out of the superannuation fund investment, his Honour gave judgment for the Jamiesons inclusive of interest in the sum of $161,799.

[4] Westpac appealed and the Jamiesons cross appealed, filed a notice of contention and applied to adduce further evidence in the appeal. I agree with Applegarth J's reasons for refusing the appeal, the cross appeal and the application to adduce further evidence.

[5] I wish to make some additional brief observations on the aspect of Mr Jamieson's cross appeal relating to his Honour's assessment of the amount of $200,992 awarded for the grossing up.

[6] The relevant provisions of the *Income Tax Assessment Act* are set out in Applegarth J's reasons at paragraphs [196] and [197]. It is uncontentious that Mr Jamieson's damages of $489,129 were assessable under the *Income Tax Assessment Act*. The question in this aspect of the cross appeal is whether the award of $200,992 for grossing up to ensure Mr Jamieson was fully compensated for his loss is an assessable recoupment under s 20-20. If so, in order to properly compensate Mr Jamieson, it would be necessary to mathematically calculate a higher award of damages, effectively grossing up the entire

award of damages other than interest ($690,121). That was referred to in this appeal as "grossing up the grossing up".

[7] It is true that the term "recoupment" is widely defined in s 20-25 *Income Tax Assessment Act*. But to be an "assessable recoupment" under s 20-20(2), both s 20-20(2)(a) and (b) must be met. It is arguable that the award of $200,992 to compensate Mr Jamieson for the tax he would have to pay on his damages award of $489,129 was an "indemnity" under s 20-20(2)(a). But nothing to which Mr Jamieson has referred this Court, either in the *Income Tax Assessment Act* or in case law, supports the conclusion that his award for grossing up was a payment within the terms of s 20-20(2)(b). I did not apprehend him to contend that s 20-20(3) applied to that payment but he has not taken us to anything in the *Income Tax Assessment Act* or case law to show it did. It follows that he has not demonstrated that his grossing up award of $200,992 to compensate for the fact that his damages of $489,129 will be likely to be taxed in the future is an assessable recoupment under s 20-20. The contention that Mr Jamieson's grossing up award of $200,992 must be further grossed up to ensure he is adequately compensated must be rejected. The construction I would give to s 20-20 accords with common sense, the practicalities of assessing grossing up damages, and the ordinary meaning of the terms of s 20-20. And nothing to which this Court has been taken suggests that construction is offensive to the apparent spirit, purpose and scheme of the *Income Tax Assessment Act*.

[8] As Westpac's appeal has been unsuccessful, it is unnecessary to deal with the Jamiesons' notice of contention.

[9] I agree with the orders proposed by Applegarth J.

[10] **MORRISON JA**: I have had the considerable advantage of reading the draft reasons of Applegarth J. I agree with what Applegarth J has written, but wish to express some observations of my own. To do so I will adopt the headings used in Applegarth J's reasons.

The ten per cent risk issue

[11] The Bank's contention is that the Statement of Advice contained enough information in it to discharge its duty to the Jamiesons. When considering this issue it is important to keep in mind that the Bank admitted that it was retained to supply financial services, and in particular to provide a Statement of Advice recommending a financial plan. The Statement of Advice itself recorded that the advice was to achieve the following:

(a) to create wealth efficiently;

(b) to manage Mr Jamieson's tax position;

(c) to protect assets; and

(d) to create a retirement fund for the medium term.[1]

[12] Thus the advice requested, and given, had to explain, with reasonable care, what was being proposed in order to achieve the ends.

[13] The centrepiece of the Bank's case on this aspect is a section of the Statement of Advice, dealing with the investment in the MQ Gateway Trust and associated loans:

[1] Statement of Advice page 8; AB 1585.

"Investment Risk

Based on the assumptions in the illustrations attached to this Statement of advice, the following illustrates the potential outcomes in 3 different investment horizons.

Investment Return pa %	(Loss)/GAIN $ (After Tax)
0 or less	(601,875)
3.61	NIL
10	2,986,000

We have assumed the highest marginal tax rate on profits at 46.5%."[2]

[14] The Bank's contention is that the reference to an "after tax" loss in that table was sufficient to inform an astute investor with business and investment experience (as Mr Jamieson was) that the amount "at risk" was higher than had been promised by the Bank's financial adviser, Mr Tindall. He had told Mr Jamieson that the advice was appropriate, in part because "by using $5m in gearing we put less than 10 per cent of your overall net wealth at risk of loss".

[15] I agree with what Applegarth J has said in respect of this issue at paragraphs [59] – [71] of his reasons. However, there is an additional factor.

[16] The learned primary judge made various findings in respect of the evidence of Mr Jamieson, accepting his evidence in some areas, and rejecting it in others. Those findings were made with the benefit, which this Court does not have, of having seen and heard Mr Jamieson over the course of his evidence. Two findings are reflected in paragraph [42] of the primary judge's reasons:

> "I accept that Mr Jamieson did not fully understand the amount of his exposure or liability under the loans associated with investment in the MQ Gateway Trust. But I reject that he believed his only exposure was the amount of the three annual interest payments of $198,750."[3]

[17] The Bank's contentions refer to the second finding in that paragraph, but fail to grapple with what flows from the first finding. That finding is that Mr Jamieson did not fully understand the amount of his exposure or liability under the loans associated with the MQ Gateway Trust. Rejection of Mr Jamieson's evidence on the second finding in that paragraph does not detract from the first finding. The first finding was open to the learned primary judge, and not directly attacked on the appeal.

[18] The Bank's contentions essentially are that if Mr Jamieson had been more clever in piecing together the significance of the "after tax" reference in the Statement of Advice, then the qualification on the advice would have been apparent.

[19] In my view that contention should not be accepted. First, acceptance of it would permit a financial adviser to avoid performance of their duty to give advice which spelt out, in simple terms, what was being proposed, and would allow them to hide the real message

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[2] AB 1590.

[3] *Jamieson & Ors v Westpac Banking Corporation* [2014] QSC 32.

in a puzzle of references. Secondly, it confronts the finding that Mr Jamieson did not fully understand the amount of his exposure or liability. Thirdly, it would give little effect to Mr Tindall's admission, on 20 March 2009, that by reason of an oversight on his part, he had not advised Mr Jamieson of his extra exposure in respect of interest accrued in respect of the Capitalised Interest Assistance Loan. There was no suggestion that Mr Jamieson was aware of that exposure before that time. It is that exposure which is the subject of the finding in the first sentence of paragraph [42] of the primary judge's reasons.

Alternative investment – the point of principle

[20] In paragraphs [142] – [155] of his reasons, Applegarth J deals with an issue raised by Mr Jamieson. The contention was that it was irrelevant to enquire into what the Jamiesons would have done, or what other transactions they might have entered into, had they not entered into the transaction induced by the Bank's breach. Whilst I agree with what Applegarth J has said, there are some reservations which I feel should be expressed.

[21] First, the contention was raised as a legal principle, but it must not be overlooked that it was raised in a case where there was a specific pleading of an alternative loss-making transaction. In that sense the contentions were clearly confined to the present case.

[22] Secondly, policy and pragmatic considerations applicable to the administration of justice would, in my view, dictate that a defendant cannot invoke the legal principle outside the confines of a properly pleaded case. The evidential burden and level of proof required, as referred to by Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd*[4] highlight the fact that excursions into this area must be controlled in a principled way so that parties' resources are not wasted on speculative allegations in an attempt to extract documentary proof of some alternative transaction. Nor should the court's time be wasted on speculative pursuits. Any such contention would have to be pleaded with specificity and proven rigorously, as *Yam Seng* suggests.

[23] The same comments apply in respect of the points made in paragraphs [173] – [178] of the reasons of Applegarth J.

[24] I have also had the benefit of reading the draft reasons of the President. I agree with those reasons.

[25] I agree with the orders proposed by Applegarth J.

[26] **APPLEGARTH J:** Like many other high earners, Mr Mark Jamieson used financial advisers and accountants to ensure that he paid little or no income tax under Australian law. He earned a high salary as Chief Executive Officer of APN News & Media Ltd. For several years prior to 2007 he invested in "agribusiness" managed investment schemes. These resulted in tax deductions that allowed him to pay no income tax.

[27] Mr Jamieson had been a customer of Westpac for decades. Being a wealthy client, Westpac provided him with a "private banker", who in early 2007 introduced Mr Jamieson to

4 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 CLC 662 at [217]; [2013] EWHC 111 (QB). (***Yam Seng***)

a Westpac financial planner, Mr Robert Tindall. This appeal is about the written advice which Mr Tindall gave in May 2007 and its aftermath.

[28] The advice was contained in a document which was given to Mr Jamieson and his wife, Ms Lorrell Jamieson, on 16 May 2007. The Statement of Advice recorded that Mr and Mrs Jamieson were seeking the advice to achieve the following:

> "• To create wealth efficiently
> • To manage Mark's tax position
> • To protect assets
> • To create a retirement fund for the medium term."

Based upon the information the Jamiesons had provided, the statement listed their total assets as $13,220,880 and their total liabilities as $6,582,003, resulting in a net worth of $6,638,877.

[29] The Statement of Advice contained two main strategies which were implemented in reliance upon it.

[30] The first was for Mr Jamieson to borrow $5m from the Macquarie Bank and to invest the proceeds in a managed investment scheme promoted by Macquarie called the MQ Gateway Trust. The investment was for a term of three years and the investment of $5m was capital-protected, thereby allowing the principal of the loan to be repaid. The loan of $5m was a Macquarie Structured Investment Loan for a three year term at an interest rate of 7.95 per cent per annum, with a rebate from Westpac of $44,750, resulting in an effective fixed rate loan of 7.5 per cent. Mr Tindall wrote that he believed the advice was appropriate for a number of reasons. The first reason was:

> "By using $5m in gearing we put less than 10% of your overall net wealth at risk of loss."

The Statement of Advice went on to explain that the investment allowed interest costs incurred in producing assessable income to be deducted for tax purposes. Entering into the loan and the MQ Gateway Trust was said to satisfy the Jamiesons' "objectives of building additional wealth through protected gearing in a tax effective manner".

[31] The second strategy was to borrow $600,000 against existing property and "make an undeducted contribution to your newly established Self Managed Superannuation Fund". The Statement of Advice noted:

> "The interest on this debt will not be tax deductible. All debt repayment should be focussed firstly towards reducing and eliminating this loan."

[32] Both investments were unsuccessful, in part because of the effect of the Global Financial Crisis. Mr and Mrs Jamieson sued the bank and claimed damages for breach of contract, negligence and contravention of statute.

[33] The bank admitted that it was retained by Mr and Mrs Jamieson in about February or March 2007 to supply financial services, and in particular to provide a Statement of Advice recommending a financial plan. There was an implied term that the bank would take reasonable care in providing such a statement. The bank also admitted that it was under a tortious duty to take reasonable care in providing financial advice to the Jamiesons. In addition, it admitted that financial services were provided to each of the Jamiesons as a "consumer" within the meaning of s 12ED of the *Australian Securities*

and Investments Commission Act 2001 (Cth), and that there was an implied warranty in the contract that its services would be rendered with due care and skill.

The bank's liability – MQ Gateway Trust

[34] The pleadings were voluminous and complex. The Jamiesons alleged that the Statement of Advice was deficient in numerous respects, but succeeded on only a few bases.

[35] The learned primary judge found that the bank was in breach of contract and negligent with respect to the MQ Gateway Trust and associated loans in three respects. Its conduct in that regard also amounted to conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the *ASIC Act*.

[36] First, the Statement of Advice failed to mention the Capitalised Interest Assistance Loan or to describe more accurately its operation, and in particular that interest would be payable on the capitalised interest in a significant amount. The Statement of Advice referred to, without any explanation, "interest assistance". Its executive summary consisted of a chart and included the statement "Interest payments totally deductible. Approx $375,000 06/07 financial year". It also contained a box containing the words "Upfront Cash Outlay (net) $187,500". It referred to a net cash outlay of $187,500 in each of the second and third years. As the primary judge observed, because the "upfront" component was half of the total annual "payment" of interest, it was a fair deduction that half of the interest "payment" was to be capitalised, but no more than that.[5]

[37] The Statement of Advice did not state in terms that Mr Jamieson would borrow 50 per cent of the interest on the Macquarie Structured Investment Loan through the Capitalised Interest Assistance Loan, which was to be repaid by him at the date of maturity of the loans. The Statement of Advice did not make clear that 50 per cent of the interest would have to be repaid on maturity and the executive summary made no reference to this. However, as the primary judge noted, it was a fair deduction that it would be so, given the statement that the interest payments of $375,000 net per annum would be deductible for an upfront net amount of $187,500 per annum.[6] Critically, there was no reference to the "capitalised" interest bearing interest, let alone that it would be in a significant amount.

[38] The second basis of the bank's liability concerned its statement of risk, namely that "we put less than 10% of your overall net wealth at risk of loss". The primary judge found that the total sum at risk was much more than this and that the Statement of Advice should not have made such an unqualified statement.

[39] Another part of the Statement of Advice contained a section about investment risk in the following terms:

> "Investment Risk
>
> Based on the assumptions in the illustrations attached to this Statement of Advice, the following illustrates the potential outcomes in three different investment horizons:

Investment return pa %	**(Loss)/GAIN $ (After Tax)**

5 *Jamieson & Ors v Westpac* (2014) 283 FLR 286 at [64] (*Jamieson*).
6 At [65].

0 or less	(601,875)
3.61	Nil
10	2,986,000

We have assumed the highest marginal tax rate on profits at 46.5%"

The basis of the calculation of $601,875 was not set out in the Statement of Advice, but the primary judge concluded that it could be deduced without too much difficulty.[7] The document proposed annual interest "payments" of $375,000 over three years, totalling $1.125m. As a matter of arithmetic, $601,875 equals 53.5 per cent of $1.125m. The "after tax" loss was a statement about the loss that would be suffered if payments totalling $1.125m were tax deductible from income attracting a marginal rate of tax of 46.5 per cent. Incidentally, that calculation of after-tax loss did not bring into account the payment of interest in excess of $100,000 on the Capitalised Interest Assistance Loan.

[40] With the inclusion of that amount, the total amount which was at risk of being lost was more than $1.2m. The Jamiesons did not want to put at risk more than ten per cent of their overall net wealth. The primary judge accepted their complaint that the proposed transaction put at risk before tax approximately twice that amount:

> "The statement that less than ten percent of Mr and Mrs Jamieson overall net wealth is at risk of loss must be a statement of the amount of money that is put at risk. The net wealth which was calculated on page five of the updated statement of advice did not incorporate any adjustments for any potential tax liabilities (or credits) that might be associated with the realisation of any of the assets. The calculation of loss or gain through the investment on an "after tax" basis tended to understate the amount of the overall cash exposure in such a way that it appeared that only ten percent, namely the sum of $663,887, or less, was at risk. In fact, the gross sum at risk was in excess of $1,125,000 by at least the amount of the interest on the capitalised interest."[8]

[41] The third respect in which the bank was liable was in failing to provide to Mr and Mrs Jamieson the full terms and conditions of the Macquarie Structured Investment Loan, including the Capitalised Interest Assistance Loan and the Product Disclosure Statement ("PDS") for the MQ Gateway Trust. Investment in the MQ Gateway Trust and the associated loans was said by the primary judge to be "a highly complex contractual arrangement based on investments in derivative financial products."[9] It was incumbent upon the bank, in recommending such a complex product, to provide copies of the relevant documents so that the risks and benefits could be assessed by the client.

Reliance and causation

[42] The primary judge concluded that Mr Jamieson proved that he would not have made the investment in the MQ Gateway Trust:

(a) if the bank had not failed to mention that the Capitalised Interest Assistance Loan or to more accurately describe its operation, and in particular that interest would be payable on the capitalised interest in a significant amount;

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[7] At [15].
[8] At [76].
[9] At [91].

(b) if the representation that less than ten per cent of overall net wealth was at risk of loss had not been made; or

(c) if the bank had not failed to provide the full terms and conditions of the Macquarie Structured Investment Loan, Capitalised Interest Assistance Loan and the PDS for the MQ Gateway Trust.[10]

There was no reason to assume that Mr Jamieson would not have carefully read the documents. On the issue of factual causation in respect of loss arising from investment in the MQ Gateway Trust and associated loans, the primary judge made the following findings:

> "[120] Had Mr Jamieson read and considered those documents with care it would have been apparent to him that the true amount of the exposure upon the Macquarie Structured Product Investment Loan including the Capitalised Interest Assistance Loan would have been in excess of $1,125,000 by a substantial amount, in cash flow terms. Even if the updated statement of advice had fairly or accurately disclosed the effect of the loan documents, that exposure would have been apparent to Mr Jamieson. In my view, it was not apparent to him at the time.
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> [121] In my view, had Mr Jamieson known those facts he would not have invested in the MQ Gateway Trust and associated loans, because the full cash flow amount of his true exposure on the associated loans would have detracted from the attraction of the immediate taxation benefits of the proposed investment.
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> [122] Next, had Mr Jamieson been aware that the exposure was in excess of $1,125,000 by a substantial amount, and that the amount at risk substantially exceeded ten percent of Mr and Mrs Jamieson's overall net wealth, in my view he would not have invested in the MQ Gateway Trust and associated loans for an amount of $5 million because the amount of the exposure exceeded the amount that Mr and Mrs Jamieson agreed with Mr Tindall was appropriate to expose as a percentage of their net wealth.
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> [123] As well, if Mr Jamieson had read the MQ Gateway Trust PDS with care, it would have become clear that the hurdle rate of return required to make a profit on the investment on its conditions was significant, having regard to the 7.95% gross or 7.5% net interest rate applying to the associated loans and other likely expenses to be taken into account. In my view, this would have made it even more likely that he would not have invested in the MQ Gateway Trust and associated loans."

[43] On the basis of these findings, the proven breaches of contract and negligence in relation to the MQ Gateway Trust and associated loans were found to constitute "a necessary condition" of the harm alleged in terms of s 11(1)(a) of the *Civil Liability Act* 2003 (Qld). In other words, the bank's failure to take reasonable care caused Mr

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[10] At [108] – [110].

Jamieson to enter the recommended transaction, and if each of the breaches had not occurred the transaction would not have come about.

Loss and damage

[44] A separate issue, which may be described in the language of causation, was whether the bank's breach, having caused the transaction to come about, caused the claimed loss. The issue was whether the bank's liability should extend to all of the losses arising from the investment in the MQ Gateway Trust and associated loans. A related issue was proof of loss in such a "no transaction" case and the most appropriate approach to measure it.

[45] The bank contended at the trial that Mr Jamieson did not prove any recoverable loss because:

(a) the applicable measure is in accordance with the so-called "rule in *Potts v Miller*"[11] being the difference between the price paid and real value of what was acquired at the time of entering into the MQ Gateway Trust investment and associated loans; and

(b) Mr Jamieson would have entered into some other similar transaction, in any event, and therefore was required to prove that alternative transaction in order to demonstrate that he had suffered compensable loss, by comparison with the actual investment and associated loans.

The primary judge, applying the decision of the High Court in *HTW Valuers Pty Ltd v Astonland Pty Ltd*,[12] found that the measure discussed in *Potts v Miller* does not apply in all cases. His Honour reviewed leading authorities about the appropriate measure of damages in a case such as this and adopted what may be described as "the net gains or losses approach". Such an approach necessarily includes gains or losses which occur after the transaction. The bank objected to that approach in this case on the basis that it captured loss caused by general market decline. It argued that the general market decline was "extraneous and not caused by the contravening conduct". However, the primary judge concluded that the loss caused by the general market decline associated with the GFC should not be regarded as extraneous in measuring the loss that was caused by the breaches of contract, negligence or breach of statute.[13]

[46] In assessing loss, the primary judge rejected a submission by Mr Jamieson that once it was determined that he would not have invested in the MQ Gateway Trust it is irrelevant to have regard to what he would or might have done instead. His Honour also rejected the bank's general proposition that Mr Jamieson was required to prove the alternative transaction that he would have entered into in order to demonstrate that he had suffered compensable loss by comparison with the actual investment and associated loans.

[47] The primary judge went on to find that there was a reasonable likelihood that had Mr Jamieson not invested in the MQ Gateway Trust and associated loans he would have sought out an alternative investment that had the effect of substantially reducing his liability to income tax. In each of the 2003, 2004, 2005 and 2006 tax years Mr Jamieson made investments in agribusiness financial products in a way that reduced his

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[11] (1940) 64 CLR 282 at 289, 299.

[12] (2004) 217 CLR 640 at 656 – 7 [35] ("*Astonland*").

[13] *Jamieson* at [216].

income tax liability to nil. The result was that the amount of taxation paid by his employer by deduction of instalments during the year was returned to Mr Jamieson. In effect, Mr Jamieson was investing in a way where the return of the sum paid on account of his income tax for the year "funded" the agribusiness investment he made, at least in part. Against this background, the primary judge concluded that had Mr Jamieson not invested in the MQ Gateway Trust and associated loans, it is more likely than not that he would have made another or other agribusiness investments similar to those that he had made in prior years for the purpose of reducing or eliminating his liability to pay tax for the 2007 tax year.[14] He would have made an alternative investment in agribusiness in 2007 in the global amount of $200,000.

[48] As to whether Mr Jamieson would have made a similar investment in the year ending 30 June 2008, the primary judge found that by this time there were "significant tremors in equity markets consequent upon the dislocation which spread through credit markets in the second half of 2007".[15] He was not able, on the evidence, to conclude that Mr Jamieson would have made a similar investment in the year ending 30 June 2008. It was a matter of speculation whether Mr Jamieson might have made any other investment and what its outcome might have been.

[49] Because the primary judge was unable to find what Mr Jamieson would have done by way of an alternative investment in either 2008 or 2009 if he had not invested in the MQ Gateway Trust and associated loans for those years, the amount of the reduction to Mr Jamieson's loss reflected the after-tax effect of an alternative agribusiness investment of $200,000 in the year ended 30 June 2007. That investment would have been lost. As a result, Mr Jamieson's claim for damages was reduced to reflect the after-tax effect of a lost investment of $200,000.

[50] Having arrived at the basis upon which to calculate the total of Mr Jamieson's damages from investing in the MQ Gateway Trust, the primary judge concluded that a sum would need to be added to that amount to "gross up" any receipt under a judgment to take account of the tax liability on an assessable recoupment. He invited the parties to make further submissions about the calculation of the "grossed-up sum". Judgment was awarded to Mr Jamieson for $918,656, inclusive of statutory interest of $228,535.

Superannuation investment

[51] In April 2007 Mr Jamieson was keen to establish a self-managed superannuation fund. He established one on 20 April 2007. Having been informed in the Statement of Advice of the advantages of making a large contribution to superannuation in the 2007 financial year, Mr and Mrs Jamieson borrowed $700,000 from the bank. It was contributed to the fund before 30 June 2007. The trustee of the fund invested the contribution in self-funding instalment warrants. This accorded with the bank's advice.

[52] Mr and Mrs Jamieson and the trustee made numerous allegations of breach of contract, negligence and breach of statute in connection with the recommendation to borrow from the bank and to contribute the amount and other amounts as undeducted contributions to the superannuation fund. The claim by the trustee failed for reasons which are not presently relevant. Many of the Jamiesons' allegations about a failure to exercise

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14 At [240].

15 At [243].

due care and skill also failed. These centred on the advice to invest in self-funding instalment warrants.

[53] Mr and Mrs Jamieson succeeded, however, on one aspect of their claim in respect of the bank's advice to use borrowed money to make undeducted contributions to superannuation. The following paragraphs of the judgment are an essential background to the crucial finding that the bank failed to exercise due care and skill in not properly advising about the detriments of using borrowed money to make undeducted contributions to superannuation.

> "[286] In assessing the viability of the investment strategy of borrowing to make a superannuation contribution, the cost of borrowing (here about 7%) and the tax payable on income of the superannuation fund (15%) have to be taken into account. The borrowing is non-deductible, so there is no offsetting tax benefit of borrowing to make the investment. In the result, if the aim of the investment is growth, while the borrowing exists, the rate of return needs to exceed the cost of borrowing and the tax costs of earnings in the fund, as well as any inflation. The relevant comparison would be made with borrowing for a direct investment by Mr or Mrs Jamieson. A complete comparison would also require consideration to be given to any tax payable on a notional distribution on the scenario that the investment is held for a period and sold for a profit or loss.
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> [287] The Bank relies on the recommendation in the updated statement of advice that that [sic] Mr and Mrs Jamieson repay the non-deductible borrowing (ultimately $700,000) as soon as possible. Had that occurred, the effect of borrowing $700,000 to make the contributions would have been avoided."

[54] The primary judge's critical finding on the bank's liability followed:

> "[288] However, in my view, in April and May 2007, the Bank can have given little or no consideration to from where the cash flow to repay that debt as soon as possible might come. Mr and Mrs Jamieson were relatively highly geared before this borrowing, including an amount of excess of $1 million for the Aspect unit as their official principal place of residence. Other assets which were held as investments were likely to have tax liabilities associated with any sale to fund repayment of the non-deductible borrowing proposed. As well, Mr Jamieson's investment in the Macquarie Gateway Trust and associated loans would produce an additional negative net cash flow of about $200,000 per annum for the next three years to his existing investments. In the absence of a likely source of cash flow to pay down the non-deductible borrowing, in my view the strategy of borrowing $700,000 from the Bank to make undeducted contributions of superannuation in the 2007 year was flawed. In my view, without proper explanation of that flaw, the Bank's recommendation of that strategy was made in breach of contract or negligently."

[55] The Jamiesons claimed damages for their loss in relation to borrowing $700,000 from the bank to make contributions to their self-managed superannuation fund. They claimed the interest incurred in borrowing the $700,000 from May 2007 to the date of judgment.

[56] The primary judge concluded that had Mr and Mrs Jamieson not been advised to borrow from the bank to make undeducted contributions to their self-managed superannuation fund, they would not have done so.[16] Having found that the bank's breach of contract, negligence and contravention of statute caused them to borrow $700,000, the primary judge considered the appropriate scope of loss and whether the bank's liability to Mr and Mrs Jamieson should extend beyond the initial interest payments that were made to the full period to trial and for the future. His Honour concluded that the bank was not liable for, in effect, the indefinite cost of replacing the $700,000 borrowed from the bank. Damages were assessed on the footing that the Jamiesons should be compensated for the interest paid as a loss unless they should have avoided that liability. There was no immediate reason for them to realise that the advice they had been given to borrow for the purpose of making superannuation contributions was negligent. However, they were advised to pay down the loan as soon as possible, and Mr and Mrs Jamieson did not do so.

[57] The primary judge concluded that it was reasonable in the circumstances to treat the interest payable for two years as caused by the bank and as not being too remote for the purpose of assessing damages. However, by mid-2009, Mr and Mrs Jamieson should have been able to realise other assets to repay the borrowing of $700,000. As a result, interest paid for the year ended 30 June 2008 and the year ended 30 June 2009 totalling $106,587 was awarded. No adjustment by reason of tax was required. The addition of statutory interest of $60,496 resulted in a judgment of $167,083 in favour of Mr and Mrs Jamieson.

The appeal and cross-appeal

[58] The bank's appeal, Mr Jamieson's cross-appeal and Mr and Mrs Jamieson's cross-appeal raise numerous issues which may be grouped as follows:

MQ Gateway Trust

1. The ten per cent risk issue;

2. Factual causation issues, particularly whether Mr Jamieson would have entered into the Macquarie Gateway Trust investment and the associated loans:

   (a) if he had been told that interest was capitalised on the Capitalised Interest Assistance Loan (so that, in effect, interest would be payable on the deferred component of the interest to be paid on the $5m loan);

   (b) if the true extent of his exposure had been disclosed in cash flow terms, so as to inform Mr Jamieson of his true risk of loss and that it substantially exceeded ten per cent of Mr and Mrs Jamieson's net wealth;

   (c) if he had been provided with the full terms and conditions of the MQ Gateway Trust and the various loans.

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16 At [317].

3. Responsibility for loss and measure of loss issues, particularly:

   (a) whether Mr Jamieson's recoverable loss is restricted to no more than the capitalised interest because the loss of the $1.125m principal interest was unrelated to the bank's breach and caused by the unsatisfactory performance of the MQ Gateway Trust; and

   (b) whether the approach in *Potts v Miller* should have been applied, leading to an award of damages no greater than the difference between the price paid (being the total interest payable) less the true value of what was received (which, according to the bank, was the total interest excluding the unknown capitalised interest) thereby producing a figure of $107,774 before tax or $57,659 after tax.

4. Alternative investment issues, particularly:

   (a) Mr Jamieson's contention that it is irrelevant to inquire what he would have done had he not been induced to enter into the transaction, and that the primary judge erred by reducing the award to reflect the after-tax effect of an alternative agribusiness investment of $200,000 in the year ended 30 June 2007;

   (b) The bank's contention that the primary judge erred in finding that the amount of that investment should be limited to $200,000 in the financial year 30 June 2007, and erred in failing to find that an alternative investment in agribusiness would have been made in the financial year ended 30 June 2008.

Superannuation Investment

5. The bank's liability in respect of the superannuation investment, when, according to the bank, the Jamiesons were given all the information necessary to make an informed choice about the risks of the proposed strategy and understood that they should pay down the non-deductible debt as soon as possible.

6. The Jamiesons' cross-appeal against the decision to limit damages in relation to the superannuation fund loan to two years' interest payments.

Grossing-Up Damages

7. Mr Jamieson's cross-appeal against the methodology used by the primary judge to "gross-up" the assessed loss, and the correctness of the figure used as Mr Jamieson's net loss.

The ten per cent risk issue

[59] The bank appeals against the finding that it stated "in an unqualified way that investment in the MQ Gateway Trust and associated loans put less than ten percent of Mr and Mrs Jamieson's overall net wealth at risk of loss".[17] It relies on the fact that the Statement of Advice referred to in the table which I have set out above was an "after tax" loss. If the loss after tax was $601,875, then the pre-tax loss would be more. As a result, when the Statement of Advice was read as a whole it did not make an

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17 At [90].

unqualified statement that less than ten per cent of the Jamiesons' net asset position was at risk.

[60] The primary judge rejected Mr Jamieson's evidence that he believed that his only exposure was the amount of the three annual interest payments of $198,750,[18] but accepted that he did not fully understand the amount of his exposure or liability over the loans associated with the investment in the MQ Gateway Trust.[19] On the basis of the Statement of Advice, it was possible for Mr Jamieson to conclude that he would be required to pay three annual amounts of $375,000 or $1.125m, despite that figure not being stated in the Statement of Advice.

[61] Any appreciation by Mr Jamieson that his exposure or liability under the loan agreements involved three annual amounts of $375,000 is relevant to the issue of causation. It does not determine, however, the prior issue of the content of the bank's contractual and other duties in advising about the risks associated with the proposed transactions. In essence, the bank's position is that its duty extended no further than:

- stating that its strategy put less than ten per cent of the Jamiesons' overall net wealth (i.e. less than $663,887.70) at risk of loss;
- providing somewhere else in the document a statement about the after tax loss which might be suffered based on an assumption about the highest marginal tax rate of 46.5 per cent and certain other unspecified assumptions;

and leaving it to the client to work the rest out. Even then, the Statement of Advice would not allow the client to work out the true exposure to loss. It omitted any reference to the operation of the Capitalised Interest Assistance Loan, and that interest would be payable on the capitalised interest in a significant amount. The Statement of Advice did not allow a person in Mr Jamieson's position to calculate the extent of his exposure to loss so as to allow him to understand how much more than $1.125m his pre-tax loss might be.

[62] The bank's duties under the general law, and its statutory obligation to not engage in conduct that was likely to mislead, required it to do more than state without immediate and obvious qualification that its strategy put less than ten per cent of the Jamiesons' overall net wealth at risk of loss. The exercise of reasonable care required the bank to spell out in simple terms that its strategy risked losing much more than ten per cent.

[63] If the bank chose to assert that less than ten per cent was at risk of loss, then it should have immediately qualified this by stating that this was an after-tax loss and that its calculation of $601,875 depended on Mr Jamieson:

(a) having the cash flow to pay his annual interest obligations;

(b) continuing to work or otherwise earn a sufficiently high income so that interest payments would be allowable deductions on income that would otherwise be taxed at a marginal rate of 46.5 per cent;

and that it did not take account of the fact that he was required to pay, not only three annual payments totalling $1.125m, but also interest totalling $107,774 by way of

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18 Which reduced to $187,500 after receipt of the interest rebate.
19 *Jamieson* at [42].

interest on the Capitalised Interest Assistance Loan, and to repay that loan (including interest) at the end of the three year period. More than $700,000 would need to be found at that point to repay the loan.

[64] Mr and Mrs Jamieson should not be supposed to have been interested in simply the risk of an after-tax loss. An accurate statement about the percentage of their estimated net wealth that was at risk by the proposed transaction required a clear statement about the amount that was in fact at risk, and the assumptions upon which an after-tax loss limited to $601,875 was based. The exercise of reasonable care by a trusted professional financial adviser also required the bank to alert Mr and Mrs Jamieson to the risk of those assumptions not being realised.

[65] The Jamiesons, and Mr Jamieson in particular, required the cash flow to implement the strategy so that losses might be limited to less than ten per cent of net wealth after paying tax. The bank knew that the Jamiesons wanted to put no more than ten per cent of their net wealth at risk. The fact that the proposed strategy achieved the objective of putting less than ten per cent of their overall net wealth at risk of loss was the first matter mentioned by the bank in the Statement of Advice in explaining why its advice was appropriate.

[66] If Mr Jamieson lost his employment, or otherwise was not able to pay annual interest totalling $1.125m, then the risk of loss was higher than ten per cent. If the interest payments were not able to be claimed as deductions against income which attracted a marginal tax rate of 46.5 per cent then the loss would be higher than the figure of $601,875 which the bank calculated (even disregarding the interest that would be payable on the capitalised interest of $107,775 or $57,569 after tax at that assumed rate).

[67] It was not sufficient for the bank, in discharging its duties to the Jamiesons, to include a reference to a potential after-tax loss of approximately $600,000, and to not refer to the true nature and extent of their exposure. Even ignoring the undisclosed liability to pay interest on the capitalised interest, the bank's advice did not state the amount of money which the Jamiesons would need to find and place at risk in order to limit their eventual loss to $601,875. The primary judge was correct to conclude that the calculation of loss or gain through the investment on an "after-tax" basis tended to understate the amount of the overall cash exposure in such a way that it appeared that only ten per cent, namely the sum of $663,887 or less, was at risk. In reality that was based on certain assumptions which the Statement of Advice should have recognised and explained. The Statement of Advice was found to have not made apparent to Mr Jamieson the true amount of his exposure in cash flow terms and that the amount at risk substantially exceeded ten per cent of net wealth.

[68] The cash flow implications of the bank's strategy were important matters that should have been disclosed in the Statement of Advice or elsewhere in a document which the Jamiesons would read and understand. That the Jamiesons required a large cash flow to limit their loss to less than $663,887 on an after-tax basis was an important matter for a financial adviser in the bank's position to mention. The significance of cash flow was increased by the fact that the Statement of Advice recommended at the same time that the Jamiesons borrow $600,000 to make an undeducted contribution to superannuation. The recommendation to borrow $600,000 had cash flow implications which were not adverted to in the Statement of Advice in connection with the cash flow required to service the recommended borrowing of $5m to invest in the MQ Gateway Trust.

[69] The Statement of Advice went on to recommend that Mr Jamieson exercise options and contribute their net proceeds to superannuation, also as an undeducted contribution. If Mr Jamieson followed this advice then the proceeds of those employee options would not be available to fund interest expenses or to partly repay the capitalised interest which was to fall due. Borrowing $600,000 might be supposed to result in an asset held in the self-managed superannuation fund of equal value in the form of investment warrants, and not change the overall net-asset position of the Jamiesons and their self-managed superannuation fund. However, borrowing the $600,000 reduced Mr Jamieson's capacity to borrow to meet obligations under the proposed $5m loan, namely to make annual interest payments, to pay capitalised interest and to pay interest on the capitalised interest. After meeting annual interest payments, Mr Jamieson would need to find more than $700,000 to pay out the Capitalised Interest Assistance Loan. The Statement of Advice should have made clear that the potential loss was not limited to the three annual interest payments referred to in the executive summary and included interest on interest.

[70] The Statement of Advice was careless and misleading in not highlighting that the total sum at risk was in excess of $1.125m by at least the amount of the unstated interest on the capitalised interest. The bank's duty to its clients required it either to not make the statement that the strategy put less than ten per cent of the Jamiesons' overall net wealth at risk or to immediately qualify such a statement. An appropriate qualification required it to state that the transaction placed at risk much more than ten per cent of the Jamiesons' overall net wealth and that the loss would only be limited to ten per cent or less of their wealth on an after-tax basis if certain assumptions were fulfilled:

- if the Jamiesons were able to fund interest payments from available cash flow; and
- if Mr Jamieson continued to earn a high income so that interest payments would be deductible from income otherwise attracting a marginal tax rate of 46.5 per cent.

[71] In summary, the Statement of Advice was deficient in simply representing that less than ten per cent of the Jamiesons' overall net wealth was at risk of loss and only qualifying this statement by a later entry about an after-tax loss which was calculated on the basis of largely unstated assumptions.

Factual causation

[72] The bank challenges findings that if each of the three breaches found by the trial judge had not occurred, then Mr Jamieson probably would not have made the investment in the MQ Gateway Trust and entered the associated loans. Grounds 8, 11 and 12 of its notice of appeal separately challenge factual causation findings in relation to each of the bank's three breaches. In addition, the bank challenges what it describes in its submissions as conclusions in a "rolled up form" which I have earlier quoted[20] about the collective effect of the bank's breaches.

[73] The primary judge's conclusions about the causal potency of each breach, considered separately, and what probably would have happened if the bank had done its duty, are largely founded on findings which are not challenged by the bank. These include findings that:

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[20] See [42] and [43] above and *Jamieson* at [120] – [124].

(a) the bank did not disclose that interest was capitalised on the Capitalised Interest Assistance Loan (so that in effect interest would be charged and payable on the deferred component of the interest to be paid on the loan of $5m);

(b) Mr Jamieson did not fully understand the amount of his exposure;[21]

(c) if the bank had provided him with documents which explained the terms and conditions of the transaction, then he would have read them and thereby appreciated that the true amount of his exposure "would have been in excess of $1,125,000 by a substantial amount, in cash flow terms";[22]

(d) his true exposure would have been disclosed to be substantially more than ten per cent of Mr and Mrs Jamieson's net wealth and higher than the agreed exposure;[23]

(e) the full cash flow amount of his true exposure would have detracted from the taxation benefits of the proposed transactions;[24]

(f) the rate of return required to make a profit on the investment was significant.[25]

[74] The bank's challenge to the "rolled up" conclusions on causation rests largely on the argument that the additional matters that the bank was required to advise Mr Jamieson about would not have significantly altered his knowledge because he already knew much about his exposure. The bank's argument on factual causation centres on what Mr Jamieson knew and what more he would have known if the bank had done its duty.

[75] The primary judge found that Mr Jamieson knew that his exposure was more than the three annual interest payments of $198,750, and that the annual interest was $375,000, which was fully deductible.[26] By March 2009, in reliance on the Statement of Advice, he believed his "exposure" to Macquarie was $601,875, being "three years interest assistance".[27] The figure was wrong because $601,875 was not the true amount of the capitalised interest, let alone the total amount of capitalised interest together with interest upon it. But Mr Tindall told Mr Jamieson on 20 March 2009 that the figure was correct as the amount of the three years interest assistance, and broke the news to Mr Jamieson that there was an interest expense on the interest assistance loan. Later that day he admitted that this was an oversight by him. The present relevance of these 2009 communications is that:

(a) Mr Jamieson knew then of his exposure to pay the amount of interest assistance;

(b) he presumably knew at an earlier stage of an exposure in this regard;

(c) he did not know that interest accrued on the interest assistance because, as the bank admits, it had not told him about this.

[76] The primary judge did not specifically find that Mr Jamieson knew that the interest assistance was $187,500 per annum, and found that it was far from clear on the face of the Statement of Advice that 50 per cent of the interest would have to be paid on maturity. However, this was a "fair deduction."[28] The inference is that Mr Jamieson

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21 *Jamieson* at [42].
22 At [110], [119], [120].
23 At [122].
24 At [121].
25 At [123].
26 At [42] – [57].
27 At [47] – [50].
28 At [65].

must have known that half of the annual interest of about $375,000 was the subject of "interest assistance".

[77] Mr Jamieson's evidence was that the Statement of Advice and Mr Tindall's oral references to "interest assistance" and a certain level of "participation rate" led him to believe that in return for providing this assistance, Macquarie, not him, would enjoy "the upside" beyond that participation rate. The primary judge concluded that an objective reader of the Statement of Advice would not assume that the "participation" or "participation rates" meant that Macquarie would not require repayment of 50 per cent of the interest, but did not specifically reject Mr Jamieson's evidence about what he understood about "interest assistance" and who benefitted above a certain level of "participation".

[78] The primary judge's findings are consistent with Mr Jamieson having some understanding that he was potentially liable to repay half of the interest payment at the end of the three year period. As the primary judge found, "Mr Jamieson did not fully understand the amount of his exposure or liability under the loans".[29] There is no evidence that he knew that the half of the interest paid by Macquarie itself attracted interest.

[79] The bank's case on factual causation was fairly acknowledged by its counsel on the appeal to depend upon the success of its appeal on the ten per cent risk issue. The bank's case was that the Jamiesons did not need to be told that more than ten per cent of their net wealth was put at risk by the MQ Gateway Trust Strategy because:

(a) the Statement of Advice qualified its advice that less than ten per cent of their net wealth was at risk of loss;

(b) Mr Jamieson knew that he had to make three annual "payments" of about $375,000; and

(c) he could have worked out that more than ten per cent of his and his wife's net wealth was at risk.

From this foundation, the bank contended that if the Jamiesons had been told more about the transaction, by being given various documents which explained the transaction and its risks in greater detail, it probably would not have made a difference. In addition, if the Jamiesons had been told about the Capitalised Interest Assistance Loan and that Mr Jamieson was required to pay about $107,000 interest on capitalised interest, it probably would not have made a difference to the decision to enter the MQ Gateway Trust transaction and the associated loans.

The ten per cent risk issue

[80] The causal issue is not tested by constructing what Mr Jamieson actually knew and by inquiring into the exposure and risks which he would have assessed based on that knowledge, left to his own devices. It is tested by inquiring what he probably would have done if he had been told by the bank in the Statement of Advice and other documents what his true exposure was in cash terms and that his exposure greatly exceeded ten per cent of the Jamiesons' estimated net wealth.

[81] If the bank had been true to the agreed objective of not exposing the Jamiesons to a loss of more than ten per cent of their net wealth, the proposal should not have been advanced at all, or only on the basis of a clear statement that the true exposure greatly

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29 At [42].

exceeded this figure. In that event, Mr Jamieson would have better understood the extent of his liability and his exposure to loss, and, as the primary judge found, probably would not have entered the transaction. Instead, the bank, by referring in one place to an after-tax loss, and otherwise making the unqualified statement that less than ten per cent of the Jamiesons' net wealth was put at risk, understated the amount of their actual exposure. As the primary judge found, the Statement of Advice made it appear that only ten per cent, namely a sum of $663,887, or less, was at risk.

[82] If instead of misleading the Jamiesons in this and other respects, the bank had disclosed that the proposed transactions put at risk a sum that was far in excess of $1.125m and that their risk of loss exceeded ten per cent, then the Jamiesons probably would not have committed to the transaction.

Documents

[83] Because on this basis the MQ Gateway Trust and associated loan transactions would not have proceeded and loss would not have been suffered as a result, the separate causative potency of the bank's other breaches are not practically important for the purpose of the appeal. However, because they are the subject of separate challenges they need to be addressed.

[84] The bank has a reasonable argument about the causative potency of the documents breach, viewed in isolation and based on a certain hypothesis. On the counter-factual hypothesis that the Statement of Advice had properly advised the Jamiesons about the extent of their exposure and adequately informed them about the substance of the complex transactions that the bank was recommending, then providing them with the PDS and other documents which the bank should have provided may not have made much of a difference. The documents, once read, would have more fully informed the Jamiesons of what was involved in the proposed transactions and their risks, but not greatly altered their understanding of those matters. But as it happened, the deficient Statement of Advice, unaccompanied by the documents which the bank should have provided,[30] did not explain the nature and extent of the "interest assistance" to which it referred or other aspects of the loan transactions. Critically, it did not bring home to the Jamiesons that in addition to annual interest payments, they were required to repay the Capitalised Interest Assistance Loan and interest on that interest of more than $100,000. This resulted in a pre-tax exposure to loss of much more than ten per cent of their wealth.

[85] The causative potency of the bank's breach in relation to the documents, considered in isolation, depends on the counter factual assumption that is made. If one assumes that the Statement of Advice itself clearly and comprehensively set out the nature of the proposed transactions and their risks, then providing documents which spelled these things out in greater detail probably would not have made much difference to the decision to proceed with the transactions. However, because the Statement of Advice was an incomplete statement of the nature of the transactions and their risks, the bank's failure to provide documents which more fully explained these things did make a difference.

[86] Because the Statement of Advice itself was seriously deficient, the bank's breach of duty in not providing the documents led to the Jamiesons being misled in circumstances

[30] Unchallenged findings that the relevant documents were not provided appear at *Jamieson* [61] and [81].

in which provision of the documents would have given them much-needed information and advice about the bank's proposal and its risks. The primary judge's separate finding on the factual causation issue relating to the documents breach should be understood as a finding about the difference which providing the documents would have made in the circumstances which in fact prevailed. Viewed in that context, the primary judge's finding that providing the documents probably would have made a difference to entry into the transactions has not been shown to be erroneous.

Capitalised Interest Assistance Loan

[87] I turn to the separate finding about the difference which informing the Jamiesons about the Capitalised Interest Assistance Loan's operation would have made. Again, context is important.

[88] Lamentably, the Statement of Advice did not explain the nature of the "interest assistance", or refer to the Capitalised Interest Assistance Loan and that it operated to generate an additional liability to pay about $107,000 interest. The Statement of Advice's executive summary did not even record that the capitalised interest, together with interest on that interest, would be payable in three years' time. That this liability existed came as something of a surprise to Mr Tindall in early 2009 when the issue arose. He might be forgiven for having forgotten about it if he relied on the Statement of Advice.

[89] If the Statement of Advice on its own, or in combination with other documents, had properly informed the Jamiesons about the nature of the transactions and their risks, but neglected to disclose that an additional amount of about $100,000 of "interest on interest" would have to be paid under the Capitalised Interest Assistance Loan, then it is debatable whether that neglect would have made a difference. The argument is that in a transaction of this proposed scale, with the potential to produce the after-tax profit described in the table, an additional exposure of $107,774 (or $57,659 after tax) would make no difference. Incidentally, the potential after-tax profit of $2,986,000 appearing in the table was incorrectly calculated by the bank. The pre-tax profit, assuming a ten per cent investment return per annum and a 120 per cent "participation rate", was $1,986,000. The correct after-tax figure on this amount is $1,062,510. In other words, the bank overstated the assumed after-tax profit by about $2m.

[90] Ignoring this significant error, the bank's argument has some attraction if the Capitalised Interest Assistance Loan breach is viewed in isolation and the Jamiesons are supposed to have been informed of other matters by the bank in accordance with its duties, including the true extent of their exposure to loss if things went badly. A properly informed client, who was clearly told that he stood to lose at least $1.125m if things went badly and who committed to the transaction knowing of that risk, may have done the same thing if he also had been told of the additional interest on interest liability of approximately $100,000. However, this scenario does not reflect the reality. As the primary judge found, the Jamiesons did not appreciate their true exposure to loss and the Statement of Advice did not make the Jamiesons appreciate that more than ten per cent of their net wealth was at risk.

[91] The bank's inadequate explanation of the risk of loss is the true context in which to assess the difference which disclosing more about the Capitalised Interest Assistance Loan liability would have made. In that context, a disclosure of a liability to pay a

further $107,000 in interest would have served to focus attention on the pre-tax losses to which Mr Jamieson would be exposed. That, in turn, would have highlighted to the Jamiesons that the "less than ten per cent" representation about loss was referring to an after-tax loss, which was based on a number of assumptions about Mr Jamieson's continuing income levels, cash flow and tax rate. In that context, an additional exposure of more than $100,000 was likely to make a difference.

[92] It is not particularly to the point to say that on an after-tax basis the further payment of $107,774 would be reflected in an after-tax loss of $57,569, which when added to the represented after-tax loss of $601,875 appearing in the table would still be less than ten per cent of the Jamiesons' estimated net worth. The bank's duty was not to focus the Jamiesons' attention on the potential after-tax loss, based on a number of unspecified assumptions, leaving them to work out their cash exposure and whether they would have the resources to meet it. The bank's duty required it to give reasonable advice and essential information in the Statement of Advice about the Jamiesons' exposure to an actual loss in cash terms. It was not confined to disclosing what their loss might later be limited to if they had the cash flow to pay those liabilities and claim the interest payments as allowable deductions on income that would attract a high marginal rate of tax.

[93] If one assumes that the bank performed its duty, save for explaining the liability to pay interest on interest of more than $107,000, and also assumes that Mr Jamieson would have committed to the investment and associated loans in those circumstances, then disclosing the additional liability to pay interest on interest may not have made a difference. Even then, I am not persuaded that the additional $100,000 cash exposure may not have changed the course of events, especially if the bank had correctly calculated the potential "upside". However, the assumption that the bank otherwise performed its duty is misplaced.

[94] For the reasons given, the bank did not disclose to the Jamiesons all that its duties required. Disclosure of how the Capitalised Interest Assistance Loan operated probably would have led to a fuller explanation of the cash flow implications of the proposed transaction, the pre-tax losses to which Mr Jamieson would be exposed and that they exceeded ten per cent of the Jamiesons' estimated net wealth. These explanations would have given the Jamiesons a better appreciation of their exposure. The primary judge did not err in concluding that the transactions would not have occurred if the bank had done its duty and properly explained the operation of the Capitalised Interest Assistance Loan.

Conclusion – factual causation

[95] Because the primary judge was correct to find the bank breached its duty in the three respects, the relevant causal inquiry is not limited to the causal potency of each breach, viewed in isolation. The breaches together led the Jamiesons to not be properly informed of their exposure to loss and that it substantially exceeded ten per cent of their net wealth.

[96] Critically, the statement that the strategy put less than ten per cent of their wealth at risk was not properly explained or qualified at the point in the Statement of Advice at which this influential statement was made. The primary judge's finding that this breach caused Mr Jamieson to enter the transaction when he probably otherwise would not

have done so was correct. Being alerted to the fact that the strategy put more than ten per cent of wealth at risk would have made a difference. The bank accepts that a failure to overturn the causation finding on the ten per cent risk issue undermines its causation arguments in respect of its two other breaches. Each of those other breaches, even when viewed in isolation, had the potential to make a difference to Mr Jamieson's decision to commit to the recommended transactions. This is because if the bank had provided all of the necessary documents or explained the Capitalised Interest Assistance Loan's operation, Mr Jamieson would have better appreciated the commitments he would be required to make, their cash flow implications, his exposure to loss and that it significantly exceeded ten per cent of his and his wife's net wealth. The Statement of Advice did not give him a proper appreciation of these things because of the individual and combined effects of the bank's breaches of duty.

[97] The fact that Mr Jamieson knew some things about the proposed transaction and its risks, and should have deduced other things, does not invalidate the primary judge's findings on factual causation. The fact that Mr Jamieson committed to the proposal knowing many things about it does not mean that he still would have done so if the bank had advised him that his true exposure in terms of cash far exceeded the agreed ten per cent level. The bank did not even correctly state the extent of Mr Jamieson's after-tax exposure to loss.

[98] On the issue of factual causation, one is concerned with the difference between a deficient, negligent and uninformative Statement of Advice and one which would have disclosed the true extent of loan obligations, their cash flow implications and the risk that, with their other commitments, the Jamiesons may lack the cash flow to meet the loan obligations. The primary judge was correct to conclude that the MQ Gateway Trust and the associated loans probably would not have been entered into if the bank had not breached its duty. To adopt the language of the *Civil Liability Act* 2003 (Qld), s 11, the bank's breaches were "a necessary condition of the occurrence of the harm". The bank's parallel contravention of the *ASIC Act* by engaging in conduct that also constituted a breach of contract and negligence caused Mr Jamieson to enter the transactions. He would not have done so if the bank had not contravened the Act.

Causation: attribution of legal responsibility

[99] When lawyers use the term "causation" one of two different types of enquiry may be involved. The first and factual enquiry is the role played by something in the history of an outcome. It is about "how things came about".[31] It may be an enquiry into whether a defendant's breach of contract, negligence or contravention of statute played a role, along with other conditions or "causes", in the plaintiff's entry into a loss-making transaction. This is a "factual causation" enquiry.

[100] The second enquiry is not about how things came about. It proceeds on the basis of an understanding of factual causes. It enquires into whether legal responsibility should be attributed to the defendant for a given occurrence, for example, the economic loss suffered by the plaintiff arising from a transaction.

[101] Causation in law is not concerned simply with a factual or historic enquiry into the relationship between conditions. As Mason CJ stated:

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31 J Stapleton, "Perspective on Causation" in J Horder (ed), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 61).

> "In law, ... problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. ... Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage."[32]

In undertaking the second type of enquiry in deciding whether or not to attribute legal responsibility for a given occurrence, value judgments are made about the appropriate scope of liability.

[102] A court may refuse recovery of all or part of claimed losses, despite, as a matter of incontrovertible fact, the defendant's conduct being a cause of the loss, in the sense that the loss would not have occurred but for the defendant's conduct. Sometimes this occurs because the losses were incurred beyond a certain date. In other cases it is because the losses are characterised as too remote or not foreseeable. In some cases the loss, although having been caused as a matter of historical fact by the defendant's conduct, will not be recoverable because extreme or unreasonable conduct by the plaintiff occurs, such that the court concludes that the defendant's conduct should be found not to have "caused" the plaintiff's loss. In other cases, recovery of all or part of claimed losses may be denied because of a supervening factor. In each of these cases the court limits the recovery of losses on the basis of a judgment about the appropriate scope of legal responsibility, not on the basis of an enquiry into historical fact.

[103] At law, a person may be responsible for a loss when his or her conduct was one of a number of conditions sufficient to produce that loss. Whether or not the person is made legally responsible for all or part of a loss for which his or her conduct was *a* cause is an enquiry into whether it is appropriate to attribute legal responsibility for a given occurrence in the context of particular legal norm.[33]

[104] The enquiry into attribution of legal responsibility for loss in this case occurs in the light of the conclusions earlier reached about factual causation. These are that the bank's breach of contract, negligence and contravention of statute caused Mr Jamieson to enter the MQ Gateway Trust investment and associated loans, which resulted in Mr Jamieson suffering a loss. In theory, different normative or policy-based factors may affect an enquiry into attribution of legal responsibility in the context of contravention of a statute concerned with consumer protection for advice about financial products to those that apply to liability for breach of a contractual or tortious duty to take reasonable care in providing financial advice to a client. However, the parties did not suggest that different outcomes would apply in respect of each cause of action. The causal enquiry into attributing legal responsibility is governed by s 11(1)(b) of the *Civil Liability Act* 2003 (Qld) in respect of the claims for breach of duty. The enquiry is whether "it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused." In deciding this "scope of liability" issue, the court is "to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."[34]

[105] The factual basis upon which the scope of liability enquiry and the parallel causal enquiry in respect of the statutory contravention proceeds is that the breaches of duty and contravention caused Mr Jamieson to invest $5m in the MQ Gateway Trust and

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32 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 509.

33 *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 27.

34 *Civil Liability Act* 2003 (Qld) s 11(4).

assume obligations under loan agreements. But for the bank's conduct the transaction would not have occurred and Mr Jamieson would not have sustained a liability to pay interest which was unable to be funded by returns on the investment. Because the transaction had a protection on capital, capital losses on the investment did not materialise into an actual loss, and the ultimate loss on the transaction was the unfunded liability to pay interest.

[106] The essential "causation in law" issue is this: the bank's breaches having in fact caused the loss, should the bank have legal responsibility for that loss attributed to it? In the terms of the *Civil Liability Act* 2003 (Qld), why should responsibility for the harm which the bank's breach caused not be imposed upon it? To adapt the words of Gleeson CJ in the case of a contravention of a consumer-protection statute which also constituted negligent advice:

> "What is there ... in the justice and equity of the particular case that might lead to a conclusion that [the bank] should not be regarded as legally responsible for the whole of the loss, even though the contravention was a cause of the whole of the loss? Upon what principle might such responsibility be diminished?"[35]

The bank's submissions

[107] The bank's submissions on this aspect of causation tend to assume that its only causative breach was in not disclosing the operation of the Capitalised Interest Assistance Loan, and in particular that the deferred interest attracted interest of approximately $107,774, so that the recoverable loss is restricted to this amount. However, its submissions raise more general issues about the loss for which it should be responsible. Its argument on this aspect of the appeal is in two related parts:

- that Mr Jamieson received, in large measure, what he expected, and his recoverable loss should be restricted to no more than interest on capitalised interest;
- that this result accords with the measure of damages under the rule in *Potts v Miller*.

[108] The first argument notes that Mr Jamieson received:

(a) units in the MQ Gateway Trust to the value of $5m;

(b) a loan of $5m from Macquarie at a rate of 7.95 per cent (subject to a rebate), half of which interest was deferred until maturity.

The loss of the $1.125m principal interest (as distinct from the interest on that interest) is said to have been caused by the unsatisfactory performance of the investment which was "unrelated" to the bank's breaches. The bank was not alleged to have misled Mr Jamieson about the expected performance of the MQ Gateway Trust. The loss of principal interest is contended to have been not due to the bank's conduct, but due to Mr Jamieson's decision to enter into the transaction with Macquarie (as he understood it) and to market changes.

[109] An associated principle is invoked to argue that a party will not be held liable for loss that would have been suffered if the information or advice was correct. According to this principle, and on the assumption that the interest payable did not include interest on

35 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 122 [33].

the capitalised interest, the bank argues that Mr Jamieson would have suffered the loss of the principal interest even if matters had been as represented in the Statement of Advice i.e. that the deferred interest did not attract interest.

[110] The proposition that his loss should be limited to $107,774 (or $57,659 taking account of the benefit of tax deductions) is said to accord with the approach of measuring damages according to the difference between the amount paid and the true value of the units at the date of acquisition: the so-called rule in *Potts v Miller*.

[111] Critically, the amount "paid" for the units is said by the bank to be the obligation to pay interest on $5m at 7.95 per cent per annum for three years (less the rebate) with half the interest capitalised and payable on maturity. The bank does not include the price paid for the units of $5m on the basis that this capital amount was protected and can be ignored.

[112] On a similar basis the true value or the fair value (as distinct from the market value) of the units is said to be capable of assessment. According to the bank, "the fair value of the units" was what Mr Jamieson was prepared to pay for them. This was the known cost of interest and excludes the interest on capitalised interest. The difference between the "price paid" and the "true value" is the amount of the unknown interest on interest of $107,774 (or $57,659 after tax).

Was the loss "unrelated" to the bank's breaches, so that the bank should not be legally responsible for it?

[113] The bank argues that Mr Jamieson received largely what he expected, that the loss of principal interest of $1.125m was due to the poor performance of the MQ Gateway Trust and therefore this loss was "unrelated" to the bank's breaches. This argument requires:

- the identification of the loss that was suffered by Mr Jamieson and how it came about; and
- consideration of the bank's liability.

[114] As to the loss, it may be convenient to isolate it as the interest, given the capital protection on the original $5m investment. However, a more complete description of the loss and its causes is required. It is not as if the only transaction that Mr Jamieson entered was a loan of $5m, with a liability to repay it and to pay interest. The obligation to pay interest is only one part of the story of how Mr Jamieson came to sustain a loss. He was ultimately left with a large net loss because he entered a set of transactions, not just the loan agreements. Those transactions resulted in his not receiving the return on his investment that was needed to meet his interest obligations. It is artificial to isolate the interest obligations where:

(a) the interest obligations were only assumed because Mr Jamieson decided to invest as a result of the bank's breaches;

(b) the interest obligations only assumed practical significance because the recommended investment did not make a sufficient return to pay all or any of the interest.

[115] As to the nature of the bank's liability, it did not rest simply on a failure to disclose an obligation to pay interest on deferred interest (being the focus of the bank's submissions in this context). It rested on three separate and accumulating breaches. It

is true that the Jamiesons do not complain that the MQ Gateway Trust was an inherently unsuitable investment. Instead, their complaint is that the bank's negligent and misleading advice exposed them to the risk of losing more than ten per cent of their net wealth in circumstances in which they sought the bank's advice to avoid that outcome. The bank's breaches exposed them to a greater loss than they apprehended and more than they were prepared to tolerate.

[116] The bank was not sued as a stockbroker might be over a negligent recommendation to invest in a particular stock. Still, the bank was sued as a financial adviser in circumstances in which it knew that the Jamiesons wished to limit any potential loss to ten per cent or less of their net wealth. The risk of loss was one of the things the Jamiesons engaged the bank to advise them about. The ultimate loss of more than the \$1.125m was due to an obligation to pay interest which was not funded by a return on investment. The loss would have been higher if there had not been a capital protection provision as part of the relevant transactions. Mr Jamieson would not have entered the transactions, suffered the diminution in the value of his investment and made the interest payments which he did over a three year period, if the bank had done its duty and not misled him in contravention of a consumer protection statute.

[117] The ultimate loss which resulted from a fall in the market over a three year period should not be described as "unrelated" to the bank's breaches simply because the Jamiesons do not suggest that they were misled about the expected performance of the MQ Gateway Trust. The loss that arose from a fall in the market and the poor performance of the investment was related to the bank's breaches because:

1. the bank's breaches caused Mr Jamieson to enter the loss-making transactions in circumstances in which he would not have done so if the bank had acted with reasonable care; and

2. the risk of loss the Jamiesons sought to avoid, namely a loss of more than ten per cent of their net overall wealth, was the very thing about which the Jamiesons engaged the bank to advise.

[118] In circumstances in which the bank assumed a duty to act with reasonable care so as to limit the Jamiesons loss to this set amount, it seems appropriate that it should be held legally responsible for a loss which its breach directly caused. A loss caused by a fall in the market and a poor return on investment was a foreseeable risk, and one which the parties sought to limit. It was a loss which was the subject of the advice the Jamiesons bargained to obtain, and the bank gave advice on that topic which was wrong, careless and incomplete. The loss which would arise from a poor investment performance was something about which the bank proffered advice. In the circumstances it is hard to see why the bank should not have legal responsibility attributed to it for the loss which its breaches caused. There is no principle, and nothing in the justice or equity of the particular case, as to why responsibility for the harm which the bank's breaches caused should not be imposed on it.

The bank's Potts v Miller submission

[119] The rule in *Potts v Miller* has a number of attractions. The principal attraction of comparing the price paid for an asset with its true value at the date of the transaction is that it avoids the need to separate out losses resulting from "extraneous factors in the

later history of the asset".[36] However, as Lord Steyn observed, the date of transaction rule "is simply a second order rule applicable where the valuation method is employed".[37]

> "If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it."[38]

[120] The rule in *Potts v Miller* has been said to be a test which may well produce a fair result if the asset is "a readily marketable asset".[39] It does not normally apply when either the misrepresentation continues to operate after the date of the acquisition so as to induce the plaintiff to retain the asset or that the circumstances are such that the plaintiff is "locked into the property".[40]

[121] The bank's attempt to invoke the rule in *Potts v Miller* rests on the submission that the amount "paid" for the units in the MQ Gateway Trust was Mr Jamieson's obligation to pay interest on the $5m loan over three years. It seeks to ignore the "true value" of the units that were acquired (so as to permit a comparison between that amount and the $5m paid for them) because the capital amount was protected. However, it is artificial to treat the transactions as if the only thing which Mr Jamieson was acquiring was $5m, and that the price for doing so was the agreed interest. Mr Jamieson was not "buying" $5m for the simple pleasure of keeping it under his bed for three years. He agreed to borrow $5m in order to invest it on certain terms in a managed investment scheme. The loan and the investment were interlinked. The proper application of the rule in *Potts v Miller* to the whole transaction required an assessment of the "true value" of the units that were acquired and which were to be held for three years, so as to compare it with the price paid for borrowing $5m over the same period.

[122] No attempt was made by the bank to arrive at the "true value" of the units in the MQ Gateway Trust at the date of the transaction. It may have been less than the market value of the units at the date of their acquisition because the market made an inaccurate prediction of their likely future performance. Their inflated market value may have been due to the irrational exuberance of equity markets in early 2007 or any number of reasons. Any assessment of their "true value" in May 2007 would need to take account of the fact that Mr Jamieson was "locked in" to the transaction for three years. Their "true value" would take account of the risk that, even with the capital protection provision, the return on investment might be inadequate to meet the cost of borrowing. It would take account of the prospect of a return allowing interest costs to be funded and a profit derived from the investment.

[123] Because the "true value" of the units that were acquired (even taking account of the capital protection provision) was not addressed by the parties, it was inappropriate for the primary judge to apply the rule in *Potts v Miller* as a methodology to assess Mr Jamieson's loss.

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36 *Astonland* at 667 [65]; *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at 50 [254] – 51 [258].

37 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 284 ("*Smith New Court*").

38 Ibid.

39 *Astonland* at 668 [66] citing *Smith New Court* at 266.

40 Ibid at 267.

[124] The primary judge declined to assess Mr Jamieson's loss in accordance with *Potts v Miller*, and his reasons for doing so included the fact that Mr Jamieson did not acquire an investment in the MQ Gateway Trust and associated loans that could be sold on the market. It was an illiquid investment and there was no evidence of a secondary market for units in the trust.[41] The acquisition of the units could not be looked at separately from the associated loans, and it was "difficult to attempt an assessment of damages as at the date of the wrong because of the lack of an available market or information as to value".[42] Also, Mr Jamieson was unable to sell the thing acquired, and it could not be said that he should have done so at some date before the trial when the loss crystallised.[43] In the circumstances, a different approach to the rule in *Potts v Miller* was required to assess damages in this case.

[125] The primary judge was correct to decline to attempt to apply the rule in *Potts v Miller* for the reasons given by him. Mr Jamieson did not seek damages according to the *Potts v Miller* measure and the bank did not call evidence which permitted the benefits and burdens which Mr Jamieson acquired in May 2007 to be properly valued. It was invidious, if not impossible, on the evidence to assess the "true value" or the "fair value" of the bundle of rights and associated obligations which Mr Jamieson acquired at the date he entered the transactions.

[126] As with its principal submissions to the effect that the fall in the market was unrelated to the bank's breaches, the bank's *Potts v Miller* argument assumes that the only thing that was acquired, and therefore the only thing that fell to be valued, was the $5m in loan monies. However, for the reasons given above in relation to the bank's principal argument, it is artificial to treat the transaction as one in which Mr Jamieson simply acquired $5m, with the only "true value" to be assessed being the value of borrowing $5m. Incidentally, it is not apparent, even on the bank's argument, that the true or fair value of the units was what Mr Jamieson was prepared to pay by way of borrowing costs, being, according to the bank's submission, the known cost of borrowing, and excluding the capitalised interest payable on the Capitalised Interest Assistance Loan.

The lurking issue of supervening or extraneous causes for the loss

[127] In contesting Mr Jamieson's contention that the fall in the market was "not a supervening event" and in its argument that the approach in *Potts v Miller* rather than the "net gains and losses" approach should have been applied, the bank raises an important issue. The issue is whether it should be liable for losses that occurred, in part, because of a decline in financial markets. The bank characterises these as losses from "extraneous events".

[128] In essence, the bank's argument is that it should not be legally responsible for the losses which its breaches in fact caused because the losses were also attributable to the poor performance of the investment in different market conditions. Considerable reliance is placed on the fact Mr Jamieson received largely what he expected and that there was "no exposure" to the market because of the capital protection. However, Mr Jamieson did not receive what he expected reasonable care by the bank to provide, namely an investment strategy which placed ten per cent or less of his and his wife's net assets at risk of loss. Moreover, he was exposed to the market. The capital protection simply

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41 *Jamieson* at [208] – [211].
42 At [212].
43 Ibid.

limited his exposure. The falling market meant that his investment and associated loan obligations resulted in a loss over a three year period. A fall in the market whereby there was no return on investment was one of the recognised risks, and one which Mr Jamieson sought the bank's advice to guard against.

[129] The fact that the market fell and a loss only crystallised well after the transaction was entered into does not mean that the loss that was caused, in part, by the market fall should be characterised as "supervening" or "extraneous". Such terms are often used in a conclusionary way to describe factors which contribute to a loss, but for which a defendant should not be made responsible. The decision to relieve a defendant from the financial consequences of a supervening or extraneous event may be based on some principle, such as remoteness. It may amount to a value judgment that, in the context of a particular legal norm, the plaintiff, rather than the defendant, should take responsibility for certain consequences.

[130] In this case, the losses were not too remote in point of time or in their nature. They were losses that were foreseeable if the investment performed poorly. Because of the bank's fault, Mr Jamieson entered into a loss-making transaction which he would not have undertaken if the bank had given reasonable advice and not engaged in misleading conduct. The bank's fault caused him to have obligations to pay interest which were unfunded by its recommended investment. The net loss that resulted at the end of three years cannot be fairly described as the result of "supervening" or "extraneous" causes in the sense that those words are used to describe causes for which a defendant should not be made responsible.

[131] Loss that resulted, in part, from the poor performance of the investment or a general market decline cannot be fairly described as "supervening" or "extraneous". It supervened only in the sense that the loss crystallised after the date of the transaction. This kind of loss was the very thing which both parties had in contemplation in agreeing that the loss to which Mr Jamieson should be exposed, in the event of a poor return on investment, should not exceed ten per cent of the Jamiesons' net overall wealth.

[132] It is preferable to avoid conclusionary labels such as "supervening" or "extraneous" and to simply conclude that a loss which was caused, in part, by the poor performance of the investment is a loss for which the bank, not Mr Jamieson, should be legally responsible in circumstances in which the bank's breaches and contravention of statute in fact caused the whole of the loss. There is no principle as to why responsibility for the harm which the bank's breaches caused should not be imposed upon it. The justice and equity of the case do not lead to the conclusion that the bank should not be responsible for the whole of the loss which resulted when the investment was unable to fund the interest obligations which Mr Jamieson undertook in reliance on the bank's advice. In the circumstances, legal responsibility for the loss should be attributed to the bank.

The fairness check against over-compensation

[133] The bank's submission that the amount of Mr Jamieson's loss should be restricted to no more than the unknown interest under the Capitalised Interest Assistance Loan ($107,774 before tax or $57,659 after tax deduction of that amount) was said to be supported by a qualification advanced by Gaudron J in *Kenny & Good v MGICA (1992) Ltd*.[44] In

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[44] (1999) 199 CLR 413 at 427 [26].

that case the risk of loss from a decline in the market was not a supervening cause. Gaudron J observed that, subject to one qualification, it was contrary to common sense to treat a factor contributing to the risk as a supervening cause of the loss if that risk eventuates. The qualification was stated to be that "a person who negligently provides information or advice should not be liable for loss that would have been suffered if the information or advice were correct".[45]

[134] A similar approach has been taken in another case to mould a remedy to compensate a claimant according to the loss that would have been suffered if the transactional document was amended to accord with a defendant's representations.[46] This approach may be said to reflect a broader principle to provide fair compensation, and to not relieve a party from the consequences of entering the kind of contract which he or she thought he or she was entering as a result of the defendant's representations.[47]

[135] Measuring compensation by such an approach may be said to compensate a claimant on the basis of non-contractual representations being given the force of contractual promises. Compensation for breach of contractual promises may take account of disappointed expectations. It differs from the conventional measure of compensation in tort and for contravention of provisions of the kind involved in this case, where damages are intended to place the claimant in the position it would have been in if the tort or contravention had not occurred. Compensation in tort is not awarded on the basis of placing the claimant in the position that would have existed if the representation had been true. It seeks to place the claimant in the position it would have been in if the false representation had not been made. This "tortious measure" has advantages for a plaintiff seeking to recover damages after entering a bad bargain in a "no transaction" case. As Treitel wrote:

> "If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure."[48]

[136] A plaintiff in a case such as this is not required to seek compensation measured according to the financial position he or she would have been in if the representations had been true. Even Mr Jamieson's contractual claim turns on what position he would have been in if reasonable care had been taken by the bank, and assumes that careless, untrue representations had not been made. It does not assume their truth. He did not claim damages in contract on the basis of a promise by the bank to limit his losses to less than ten per cent of net wealth. His contract damages claim was for reliance losses, rather than to compensate him for a broken promise that his loss would be less than $663,887.

[137] A court in awarding compensation may be minded to check the fairness of the compensation calculated according to a measure such as the *Potts v Miller* approach. This is because such measures are second order rules that must give way to the overriding principles of fair and not excessive compensation. As Lord Bingham said, the law should not be applied "mechanistically".[49] For example, a party may enter into

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45 Ibid.

46 *Coco v Westpac Banking Corporation* [2012] NSWSC 565 at [99].

47 See also *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1993) 118 ALR 565 at 575; *Akron Securities v Iliffe* (1997) 41 NSWLR 353.

48 G H Treitel, "Damages for Deceit" (1969) 32 MLR 556 at 558.

49 *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916 at 926.

a transaction as a result of negligent representations and suffer a loss which the party probably would have suffered if no tort had been committed, for instance by buying a different property in the same market which subsequently declines in value, or by acquiring the same property at a reduced price but which later loses value through a general market decline. In such a case if the plaintiff is compensated for a fall in the value of the property that it acquired that results from a general market decline then it may be compensated for a loss which it would have suffered if the defendant had not made a misrepresentation or committed some other tort. One means to check against the risk of overcompensation is to enquire what the position would have been if the represented or supposed facts were true. This is said to be a way to test the conclusion that the assessed loss was truly consequential upon the fault for which the other party is liable.[50]

[138] The bank seeks to invoke these principles to argue that Mr Jamieson:

- was not misled about the expected performance of the units;
- was misled only about the obligation to pay interest on the deferred interest;

and that Mr Jamieson would have suffered a loss represented by the loss of the principal interest if the state of affairs represented in the Statement of Advice had been true.

[139] If the bank's liability had rested only on its failure to mention the Capitalised Interest Assistance Loan and to state that interest would be payable on the capitalised interest, then its argument would have some traction. But the qualification identified by Gaudron J in *Kenny & Good* and the similar qualification discussed by Hobhouse LJ in *Downs v Chappell*[51] do not assist the bank in the present case because its liability does not rest only on a breach of duty or misstatement about Mr Jamieson's obligations to pay interest. It also rests on the ten per cent risk issue, and senior counsel for the bank fairly acknowledged that its argument on this aspect depended on overturning the finding of liability on that issue.

[140] Even if one assumes that the represented state of affairs about interest had been true and interest was not payable on capitalised interest, Mr Jamieson would not have entered the transactions if he had not been misled about the extent of his exposure to loss and that more than ten per cent of his wealth was at risk of loss. He would not have suffered loss as a result of making the investment and assuming obligations under loan agreements.

Conclusion on attribution of responsibility

[141] The bank's breaches and contravention of statute in fact caused loss as a result of Mr Jamieson entering the recommended transactions. There is no principle, and no consideration of justice and equity, why the bank should not be legally responsible for the loss which its breaches caused. There is no sound reason why responsibility for the financial harm which the bank caused should not be imposed upon it.

Alternative investment – the point of principle

[142] In his cross-appeal, Mr Jamieson contends that the primary judge erred by:

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50 *Downs v Chappell* [1997] 1 WLR 426 at 444.

51 Subsequent decisions have questioned whether the qualification applies in deceit cases: see note 55 below.

(a) rejecting the proposition of law advanced by him that once it was determined that he would not have invested in the MQ Gateway Trust it is irrelevant to have regard to what he would or might have done instead;[52] and

(b) considering that it was reasonably likely that he would have sought out an alternative investment that had the effect of substantially reducing his liability to income tax.[53]

Consideration of such an alternative transaction is submitted to be irrelevant to the quantification of his loss. Reliance is placed by Mr Jamieson on a passage in *Downs v Chappell*[54] that in general it is irrelevant to inquire what other transactions the representee might have entered if he or she had not entered into the transaction in question because such matters are "irrelevant speculations".

[143] For the reasons which follow I do not accept the unqualified proposition that it is irrelevant to inquire into what a claimant in a case such as this would have done if the negligent and misleading advice had not been given and the claimant had not entered into the loss-making transaction in reliance upon it. A claimant is not necessarily required to plead and prove an alternative transaction in order to establish loss. A defendant may seek to demonstrate that a different, loss-making transaction probably would have been undertaken. In a particular case a court may determine that an award of compensation should take into account a hypothetical, alternative transaction which probably would have resulted in a loss. In doing so the court is not engaging in impermissible speculation.

[144] If it is apparent that the claimant would have entered into a different, loss-making transaction, then this fact can hardly be irrelevant. Its relevance follows from the basic compensatory principle that the object of compensation is to place the claimant in the position he or she would have been in if the contract had been performed, the defendant not been negligent or the relevant statute not been contravened. The present case does not concern differences between compensation for breach of contract based upon disappointed expectations and the usual measure of damages in tort. Proper performance of the contract required the bank to exercise reasonable care. Both Mr Jamieson's contract claim and his negligence claim involve an inquiry into the position he would have been in if reasonable care had been taken. Also, in this case one is not concerned with different approaches to compensation in respect of intentional wrongdoers and merely careless defendants, including the policy considerations which may apply in cases of deceit.[55] However, even in deceit cases, "it is a question of determining how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter than he would have been had the transaction not taken place".[56]

[145] A plaintiff can claim damages on the basis of a lost opportunity to profit on an alternative investment that probably would have been made if the plaintiff had not been induced to make the subject investment. In such a case, reliance upon the defendant

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52 *Jamieson* at [232].

53 At [239].

54 [1997] 1 WLR 426 at 441.

55 See *Smith New Court* at 283 which overruled *Downs v Chappell* as to whether the qualification suggested by Hobhouse LJ applies in deceit cases; see also *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 CLC 662 at 712 [204] – 713 [207]; [2013] EWHC 111 ("*Yam Seng*").

56 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 12 citing *Toteff v Antonas* (1952) 87 CLR 647 at 650 – 651.

deprived the plaintiff of the opportunity to enter into a different transaction, and the plaintiff can seek to establish what that transaction would have been.[57] If it is relevant to consider an alternative, profitable transaction, it is hard to see why, in principle, a defendant in a different case cannot contend that by entering into the subject transaction, the plaintiff did not make an alternative, loss-making investment, and thereby avoided that loss.

[146] Any difference between the position of a plaintiff who seeks damages on the basis of a lost opportunity to profit and the position of a defendant who seeks to have an award of damages take account of the lost opportunity to make a loss is not based in principle. In neither case can it be said to be irrelevant to consider what the plaintiff would or might have done instead of entering into the subject transaction. This is not to say that a plaintiff in a so-called "no transaction" case[58] must prove what alternative transaction would have been undertaken. It may be sufficient for the plaintiff to simply prove that he or she would not have entered into the subject transaction. Policy or pragmatic considerations suggest that a plaintiff should not necessarily be required to prove what else he or she would have done. A requirement for such proof increases the complexity and costs of litigation by exploring alternative transactions, including investments, which were not seriously considered.

[147] No principle or policy justifies parties and courts simply speculating about what might have been. For example, a plaintiff while passing a shop may be induced by an advertisement to part with $1,000 on the basis of a negligent and misleading statement that the item for sale is a diamond ring. The plaintiff in such a case is not required to prove as part of a "no transaction" case that if he or she had not paid $1,000 for the ring the $1,000 would have been used in some other way. The plaintiff is not required to prove whether, in the absence of the negligent and misleading advertisement, the $1,000 would have been invested wisely, saved or used to meet the ordinary costs of living. It is unnecessary to speculate about what the plaintiff would have done and it would be a costly distraction to require the plaintiff to prove what would have been done with the money in a case in which the plaintiff had no alternative transaction in mind.

[148] The position may be different in a case in which a plaintiff is induced by negligent investment advice to buy shares in Company A and, absent that advice, the plaintiff would have bought shares in Company B. It is hard to see why, in point of principle, a court in assessing the appropriate measure of compensation for loss caused by the negligent and misleading advice should be required to ignore the fact that, absent the negligent advice about Company A, the plaintiff would have bought shares in Company B, and suffered loss on that investment in a declining share market.

[149] In discussing the object of damages in tort, the High Court in *Gates* stated that if reliance on a representation has deprived the plaintiff of the opportunity of entering into a different contract that would have made a profit, then the plaintiff may recover that profit because it is part of the loss that has been suffered. The lost benefit is "referrable to opportunities foregone by reason of reliance on the representation".[59] By parity of

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[57] *Gates* at 13.

[58] The term "no transaction" has the potential to mislead. I use it to describe a case such as this where, absent breach, "the transaction which actually happened would not have happened": *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 218 per Lord Hoffmann ("*Bank Bruxelles*").

[59] *Gates* at 13.

reasoning, it should be open to a defendant to have loss assessed on the basis that, but for its breach, the plaintiff would have entered into a different transaction and suffered a loss. Rather than the plaintiff establishing that it could and would have entered into a different transaction that would have yielded a profit, loss is assessed on the basis that it would have entered into a different transaction and suffered a loss.

[150] This proposition derives support from the speech of Lord Hoffmann (with whom the other members of the House of Lords agreed) in *South Australia Asset Management Corporation v York Montague Ltd*.[60] In principle, there is no reason why a defendant should not be entitled to prove that the plaintiff has suffered no loss because "he would have used his money in some altogether different but equally disastrous venture".[61] As Lord Hoffmann observes, every transaction induced by negligent representation is a "no-transaction" case in the sense that *ex hypothesi* the transaction which actually happened would not have happened. In some "no-transaction" cases the court is able to find that a different transaction "which would have been somewhat less disastrous" would have occurred in the absence of the negligent representation.[62] The court may find that, on the balance of probability, some other transaction would have happened instead.

[151] Mr Jamieson places particular reliance upon the following passage from the judgment of Hobhouse LJ in *Downs v Chappell*:

> "In general, it is irrelevant to inquire what the representee would have done if some different representation had been made to him or what other transactions he might have entered into if he had not entered onto the transaction in question. Such matters are irrelevant speculations ..."[63]

This passage has been followed in later cases.[64] Mr Jamieson submits that there is nothing in this case which would take it outside of the general case referred to by Hobhouse LJ. *Downs v Chappell* and later authorities were considered by Leggatt J in *Yam Seng*.[65] His Honour noted that because the dictum of Hobhouse LJ begins with the words "in general", it cannot have been intended to state a rule of law that it is irrelevant to inquire into alternative transactions. That there are exceptions to the general position stated by Hobhouse LJ had been established in *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd*[66] in which Simon Brown LJ concluded:

> "... there will be particular cases, of which this is one, where to give effect to the overriding compensatory rule it will be both possible on the facts, and appropriate in law, to hypothesise. Not every hypothesis involves irrelevant speculation."

[152] I respectfully adopt the conclusion of Leggatt J that, in circumstances where it is established that the claimant can recover a profit that would have been obtained from entering into some other transaction, it must in principle be equally relevant to take account of any loss.[67]

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60 [1997] AC 191 at 218, also reported as *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*.
61 Ibid.
62 Ibid.
63 [1997] 1 WLR 426 at 441.
64 See for example *Slough Estates Plc v Welwyn Hatfield District Council* [1996] 2 PLR 50 at 116.
65 At 716 – 717 [217].
66 [2003] 3 All ER 493; [2001] QB 488 at 500.
67 *Yam Seng* at 716 [217].

[153] In *Yam Seng* Leggatt J stated:

> "(4) There is no difference in principle between an alternative transaction which would have been more profitable and one which would have been less profitable than the actual transaction such that it can be relevant to take account of the former but not the latter.
>
> (5) The evidential burden will be on the defendant, however, to show that if the misrepresentation had not been made the claimant would have incurred a loss. In seeking to discharge this burden, the defendant (unlike the claimant) does not have the benefit of the principle that if the financial outcome of the alternative transaction is uncertain the court will make reasonable assumptions in its favour (for example by allowing damages to be calculated on a loss of a chance basis) to assist in the proof of loss.
>
> (6) Unless the defendant can demonstrate with a reasonable degree of certainty, therefore, both the fact that the claimant would probably have suffered a loss from entering into an alternative transaction and the amount of that loss, the damages will not be reduced on that account. In this respect there is a disparity, but a principled one, between hypothetical transactions which would have made the claimant worse off and those which would have made the claimant better off."[68]

[154] The dictum of Hobhouse LJ in *Downs v Chappell* was cited with approval by Beazley JA (with whom Ipp and Tobias JJA agreed) in *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)*.[69] However, it was only cited in support of the proposition that a court should not engage in speculation as to possibilities. Mr Jamieson submits that the dictum of Hobhouse LJ in *Downs v Chappell* has support in a particular paragraph in *Murphy v Overton Investments Pty Ltd*.[70] However, that paragraph is not directed to the issue presently under consideration.

[155] I conclude that the primary judge was correct to reject the proposition that it was irrelevant to have regard to what Mr Jamieson would or might have done instead of investing in the MQ Gateway Trust. It was open to the bank to seek a finding that Mr Jamieson would have entered into an alternative investment by borrowing substantial amounts of money and suffered loss. It was open to the trial judge to consider whether Mr Jamieson would have sought out an alternative investment that had the effect of substantially reducing his liability to income tax.

Alternative investment: factual findings

[156] Mr Jamieson's cross-appeal contends that the primary judge erred in finding that it was more likely than not that he would have made another or other agribusiness investments similar to those he had made in prior years for the purpose of reducing or eliminating his liability to pay tax for the 2007 tax year, and that the amount of such investment would have been $200,000.[71] It also contends that the bank did not discharge the

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68 Ibid at 716 – 717 [217].

69 (2006) 67 NSWLR 341 at 354 [59].

70 (2004) 216 CLR 388 at 413 [66].

71 *Jamieson* at [240] and [243].

evidential burden of demonstrating that he probably would have suffered a loss from entering into an alternative transaction and the amount of that loss.

[157] In oral submissions, Mr Jamieson's counsel argued that the alternative investment contended for by the bank had not been pleaded with sufficient precision. However, the relevant plea was sufficient. It alleged that Mr Jamieson would have adopted an aggressive investment strategy which involved borrowing significant funds to invest in growth products, with high levels of leverage. It particularised his history of investments in agribusiness schemes as part of an "on-going strategy to provide tax minimisation or deferment through the borrowing of funds and gearing". It pleaded that he would have pursued such an investment strategy by borrowing substantial sums of money in the financial year ended 30 June 2007 and in subsequent years, and suffered losses as a result.

[158] The bank's case was conducted along these lines. It was put to Mr Jamieson that he would have sought to reduce his taxable income to close to zero, and would have made further investments in such managed investment schemes so as to obtain the tax advantages that they offered. Mr Jamieson disagreed with those propositions. But the primary judge was not required to accept his evidence in that regard. He did not accept many aspects of Mr Jamieson's evidence. In circumstances in which Mr Jamieson did not accept under cross-examination that he would have made further investments in such managed investment schemes, it was not necessary, in fairness, to put to him in cross-examination a specific figure that would have been so invested.

[159] The primary judge found that if Mr Jamieson had not invested in the MQ Gateway Trust and associated loans, he would have sought out an alternative investment with the effect of substantially reducing his liability to income tax. He also found that "it is more likely [than] not that he would have made another or other agribusiness investments similar to those he had made in prior years for the purpose of reducing or eliminating his liability to pay tax for the 2007 tax year".[72] These findings were amply supported by the evidence. For several years prior to 2007, Mr Jamieson organised his affairs to ensure that each year he paid little or no income tax. In the financial year ending 30 June 2006, he invested $315,000 in agribusiness schemes, which, along with other deductions, reduced his taxable income to below zero. In the year ended 30 June 2007 he reduced his investment in agribusiness to $182,990, an amount which, combined with other deductions including a deduction of $375,000 in respect of the MQ Gateway Trust investment, reduced his taxable income for that year to nil, even though his salary in that year went from $374,276 to $655,304. The attraction of investment in agribusiness schemes was that there was no limit on the amount that could be invested in them, and, for reasons that were explained in the evidence, the amount invested was wholly deductible in that financial year.

[160] It was argued on behalf of Mr Jamieson that the primary judge fell into error by not having regard to the fact that in the hypothetical scenario of there having been no investment in the MQ Gateway Trust and associated loans, the bank's representative, Mr Tindall, would still have attended on Mr and Mrs Jamieson as a financial planner. Mr Jamieson contended that, since Mr Tindall did not give evidence that he would have recommended one of the agribusiness investments, it was inappropriate to assume that Mr Jamieson would have sought out such an investment, made it and lost it.

[72] At [240].

[161] This submission does not give proper account to three matters. First, Mr Jamieson's association with Mr Danny Matson, the person who advised him about agribusiness investments, continued throughout 2007, 2008 and beyond. Second, the relationship with Mr Tindall was not a long-standing one. Third, and most importantly, the submission overlooks the contemporaneous documentary evidence that Mr Jamieson was being advised by Mr Matson in May 2007 about investment in agribusiness managed investment schemes, and an important letter which Mr Jamieson wrote to his accountant on 22 May 2007 about his proposed investments. He told his accountant, Mr Lynch, that he intended to proceed with the offshore investment through Westpac for $5m and that the interest of $375,000 was fully deductible. He wrote:

> "I may not invest in [Managed Investment Schemes] this year as I will require no further deductions unless the APN takeover occurs. Appreciate your views on this as Danny is sending info on trees, grapes and almonds."

[162] The bank did not contend that, absent the breaches found by the primary judge, it would have recommended some smaller-sized investment in the MQ Gateway Trust and associated loans, which would have exposed Mr and Mrs Jamieson to a reduced loss if there was no return on investment. Mr Jamieson did not suggest that he would have embarked upon such an alternative investment. In the circumstances, if he had not invested in the MQ Gateway Trust and associated loans, it is likely that he would have decided to invest in managed investment schemes in the year ended 30 June 2007. These would have been the agribusiness schemes about which he obtained advice from Mr Matson, and about which he wrote to this accountant on 22 May 2007.

[163] Mr Jamieson's history of investing in agribusiness managed investment schemes in order to derive their tax benefits, the information and advice which he had received from Mr Matson in May 2007 and the terms of his 22 May 2007 letter support the findings which the primary judge made about an alternative investment in the 2007 tax year. The conclusion that Mr Jamieson probably would have made such an investment did not involve impermissible speculation.

[164] The bank discharged what Leggatt J described in *Yam Seng* as the evidential burden to show that the claimant would have incurred a loss. The bank demonstrated with a reasonable degree of persuasion that if the MQ Gateway Trust and associated loans had not been entered into Mr Jamieson would have sought out and made an agribusiness investment by borrowing money in order to reduce or eliminate his liability to tax for the 2007 tax year. As matters transpired, such an investment would have been lost. Mr Jamieson's cross-appeal in this regard should be rejected.

The quantum of an agribusiness investment in 2007

[165] The primary judge found that an alternative investment in agribusiness in 2007 should result in the claimed loss being reduced in the global amount of $200,000. Mr Jamieson cross-appeals and contends that the bank did not discharge the onus of proving that the amount of the investment would have been $200,000. The bank appeals and submits that the primary judge should have found that had Mr Jamieson not entered into the MQ Gateway Trust he would have made tax deductible investments in agribusiness for the financial year ended 30 June 2007 of $375,000. This equates to the deductions achieved from the MQ Gateway Trust. Mr Jamieson responds that, at the time of entry into the MQ Gateway Trust investment, he had negatively geared rental

property and a working farm which meant that his taxable income, even without the agribusiness investments, was not of the highest marginal rate.

[166] His argument has some attraction. The amount which Mr Jamieson invested in agribusiness schemes in previous years does not determine the amount which he would have invested in such schemes in the 2007 financial year. His decision to proceed with the MQ Gateway Trust investment, which provided a tax deduction of $375,000, did not compel the conclusion that he would have necessarily invested $375,000 in an agribusiness scheme in the 2007 financial year. It was open to the primary judge to make the conclusion which he did about the quantum of an alternative investment in agribusiness for the 2007 tax year.

Alternative investment: 2008 and thereafter

[167] The primary judge found that it is questionable whether Mr Jamieson would have made a similar investment in the year ending 30 June 2008, by which time "there were significant tremors in equity markets consequent upon the dislocation which spread through credit markets in the second half of 2007".[73] The evidence was that such an investment in agribusiness would have been unprofitable and would have been lost, because of the "universal or almost universal collapse of those schemes in the global financial crisis".[74] The primary judge found that beyond the 2007 tax year it was a matter of speculation whether Mr Jamieson would have made any other investment and what the other investment might have been. As a result, he declined to find what Mr Jamieson would have done in either 2008 or 2009 if he had not invested in the MQ Gateway Trust and associated loans for those years. The bank appeals against these findings, and submits that the primary judge erred in failing to find that an alternative investment in agribusiness would have been made in the 2008 financial year.

[168] Mr Jamieson, in defending the primary judge's findings, notes that the bank did not call Mr Matson to give evidence about whether he would have continued to recommend such investments to Mr Jamieson. Mr Tindall would not have recommended such an investment, and he gave evidence that the agribusiness managed investment schemes which allowed very large upfront deductions "pretty well blew up". When asked when the schemes collapsed or went into administration he answered that it was probably "late 2007 – so probably 2008, 2009". Mr Jamieson relies upon this evidence to submit that these schemes collapsed in late 2007 and it would be extraordinary to assume that he would have made such an investment prior to 30 June 2008. In reply the bank submits that it is an incorrect reading of Mr Tindall's evidence that the agribusiness schemes "blew up" in late 2007. It suggests that his evidence is that they blew up in 2008 or 2009. However, the primary judge had the advantage of hearing Mr Tindall's evidence. A fair reading of the transcript suggests that the schemes collapsed in late 2007 so that investments would not have been made in May-June 2008 when the time arose to consider what investments should be made and borrowing undertaken to achieve a sizeable tax deduction for the year ended 30 June 2008.

[169] The primary judge's conclusions on this aspect should not be disturbed. It was inappropriate for him to speculate, in the light of the evidence, that Mr Jamieson would have made a further investment in an agribusiness managed investment scheme in the 2008 financial year.

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73 At [243].

74 Ibid.

Alternative investment and losses that reflect a general decline in the market

[170] Recognition that principles of compensation permit, or even require, alternative transactions to be taken into account in the assessment of loss allow a reconciliation between:

1. the bank's prima facie liability for the loss that was suffered as a result of making the investment, including those parts of the loss that resulted from a general market decline; and

2. the scope to bring into account a general decline in the market that would have been reflected in the value of a proven alternative investment.

[171] The principles which permit an alternative investment which would have been made to be brought into account in the assessment of damages provide an answer to the bank's complaint that it should not be responsible for that part of the loss which reflect a general decline in the market.

[172] It was open to the bank to allege, in accordance with the foregoing principles and if the evidence supported this conclusion, that instead of investing in the MQ Gateway Trust, Mr Jamieson would have invested in equity markets and suffered a loss as a result of the GFC and the general decline in the market. In that way, it might have brought into account in reduction of damages the effect of the general decline in the market for which the bank claimed it should not be held responsible. But the evidence did not support the conclusion that the alternative investment would have been in Australian equities, Asian equities or some other asset class other than "agribusiness" managed investment schemes.

[173] If it had been the case that, absent the impugned advice, Mr Jamieson would not have made an alternative investment which exposed him to the effects of the GFC and a general decline in the market, then it is hard to identify a principled reason why he should not recover the whole of the loss the bank's advice caused him, including losses that reflected a general decline in the market.

[174] If, instead, he would have made an alternative investment which exposed him to loss as a result of a general decline in the market, for example shares in a managed fund which closely followed movement in the share market, then this would be accommodated by principles governing alternative investments. If he would have invested in shares that did not fall as much as the market in general, then the loss on the alternative investment would be less, and it would be inappropriate to assess damages on the basis of bringing into account a loss based on the average loss experienced by the stock market. Likewise, if the alternative investment would have been in shares which performed disastrously, and lost all of their value, then the required adjustment would be the actual loss that would have been suffered on the alternative investment, not a loss based on the experience of the market in general.

[175] In some instances a defendant may not be able to prove that the plaintiff would have made an investment in a specific asset, such as shares in Company B, but will convincingly prove that an alternative investment would have been in a certain class of asset which would have experienced a loss in value due to market conditions. For example, the provider of a negligent pest inspection report which the plaintiff relied upon to unwittingly buy a termite-infested house may be able to prove that had the plaintiff not bought that house, it would have bought another house in the same property market and experienced the general decline in property values that affected that market. The compensation for loss on the basis of net gains and losses as at the

date of trial[75] would bring into account the loss the plaintiff would have experienced on such an alternative investment over the same period due to a general market decline, despite the defendant not being able to identify the specific house which the defendant would have purchased.

[176] Where, as here, a specific kind of investment is proven on the evidence, it is inappropriate to adjust by reference to the decline in investments in general, or to attempt to isolate that part of the loss that is attributed to the GFC, general movements in the market or some other factor. As in the Company B example, it is appropriate to bring into account the loss that would have been suffered on the specific alternative investment that is proven by the evidence.

[177] Rather than regard losses caused by the impact of the GFC and the general market decline as something extraneous for which the bank should not have legal responsibility, the preferable approach is to regard their consequences as something to which the bank's negligent and misleading advice exposed Mr Jamieson. Subject to one qualification, the bank should be responsible for those consequences and a resultant loss. The qualification is if Mr Jamieson would have been exposed to those consequences by reason of an alternative investment that he would have made. The compensable loss will not include loss that would have been incurred as a result of the poor performance of a proven alternative investment, including the impact of the GFC and general market conditions on that alternative investment.

[178] In summary, there is scope to prove in an appropriate case that the plaintiff would have suffered loss on an alternative investment (whether that loss would have been due to factors affecting markets in general, factors specific to that investment or a combination of both). This provides an additional reason to *prima facie* make a defendant in a case such as this legally responsible for the whole of the loss that was caused when negligent and misleading advice causes a client to make a loss-making transaction. Absent proof that an alternative investment that would have exposed the plaintiff to losses attributable to the GFC and a general decline in the market, there is nothing unjust in requiring a party in the bank's position to be responsible for the plaintiff's actual loss, including loss which was suffered in part as a consequence of the GFC and a general decline in the market.

Superannuation investment

[179] The issues in relation to the bank's advice to borrow $600,000 to make undeducted contributions to superannuation have been previewed earlier.[76] The bank's essential point on appeal is that the Jamiesons were given all the information necessary to make an informed choice about the risks of the proposed strategy and understood that they should pay down non-deductible debt as soon as possible.

[180] The bank is correct that Mr Jamieson was aware of the importance of paying down the superannuation debt as soon as possible. He wrote to his accountant at the time, "I intend to pay the $700k down and convert it to deductible debt as soon as possible". The relevant issue, however, is not whether Mr Jamieson understood the advice he was given. It is whether the advice should have been given in the first place.

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75 As to which see *Rentokil Pty Ltd v Channon* (1990) 19 NSWLR 417.

76 See [51] – [57].

[181] The primary judge's finding that the bank gave "little or no consideration to from where the cash flow to repay that debt as soon as possible might come"[77] is not challenged. The conclusion that the advice was flawed is supported by a number of facts. First, and as the primary judge found, Mr and Mrs Jamieson were "relatively highly geared before this borrowing".[78] Second, the bank did not identify in the Statement of Advice or otherwise a source from which the borrowing should be repaid. Third, the bank in fact advised the Jamiesons to use a possible source of repayment to make additional contributions to superannuation. Its advice was to exercise Mr Jamieson's existing APN employee options and contribute the net proceeds of approximately $329,500 to superannuation as an undeducted contribution. The bank did not identify this as a potential source of cash to pay down the debt incurred as a result of the superannuation investment.

[182] The bank makes the point that the strategy of making significant undeducted contributions from borrowed funds in that particular financial year was not uncommon. There was soon to be a limit on the amount that might be invested in superannuation. But this fact did not necessarily make it reasonable to advise individuals who were already highly geared to borrow more. To state that debt repayment should be focused towards eliminating the new loan was to state the obvious, since interest on that loan was not tax deductible. But the bank gave no thought to, and no advice about, the source of the cash flow to pay down that loan. Selling other assets was likely to attract tax liabilities associated with their sale and incur sale costs.

[183] The bank's duty required it to consider the source of the cash flow to implement its strategy and to advise about this. It failed to do so. It was therefore open to the primary judge to find that the absence of an identified source of cash flow made the strategy of borrowing such a large amount flawed. Its flawed advice constituted a breach of its contractual and general law duties. The bank's appeal against the finding of liability in respect of the superannuation investment should be dismissed.

The Jamiesons' cross-appeal against the decision to limit damages in relation to the superannuation fund loan to two years' interest payments

[184] In their cross-appeal, the Jamiesons contend that the primary judge should have awarded damages calculated by reference to interest on the $700,000 loan from the date of the loan to the date of judgment. They contend that the primary judge's findings[79] were against the evidence or the weight of the evidence. In their oral submissions the Jamiesons add that the primary judge erred because a pleaded basis for some of those findings was disallowed after objection was taken to an amendment made by the bank. The bank had amended to positively plead that the Jamiesons did not act in accordance with the advice within a reasonable period after 30 June 2007 and in any event by 30 June 2008, that it was reasonable for them to mitigate any loss and that, in the circumstances, they failed to take proper care to reduce the loss suffered and contributed to their loss. Particular reliance was to be placed upon a failure to sell shares in order to repay the debt by 30 June 2008 and a continuing failure to do so. The bank's late pleading of this issue was disallowed because of the possibility of prejudice in the event expert evidence was to be adduced on the point. Such a course had the potential to disrupt the conduct of the trial.

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77 *Jamieson* at [288].
78 Ibid.
79 At [325] – [327].

[185] Disallowance of the bank's plea that the Jamiesons failed to mitigate their loss and thereby contributed to it did not remove the need for the primary judge to make a principled and practical determination of what loss should be treated as having been caused by the bank's conduct, so as to not make the bank legally liable for loss which might be described as too remote or simply unreasonable in terms of its quantum. Disallowance of the bank's amendment did not remove the need for the Jamiesons to prove factual causation and also the "causation in law" or scope of liability issue that the bank should bear legal responsibility for the claimed ongoing loss.

[186] The Jamiesons did not establish why in point of principle they should be compensated for interest payments made over the several years between the date the $700,000 loan was taken out and the date of judgment. The primary judge made a practical assessment of what loss was not too remote in the circumstances. His finding that it was "reasonable in the circumstances to treat the interest payable for two years as caused by and as not too remote for the purpose of assessing damages"[80] was supported by the evidence. Notwithstanding the bank's failure to identify in the Statement of Advice a source from which the borrowing should be paid down, the Jamiesons took no steps to follow the recommended strategy. In fact, for reasons that were not adequately explained by the Jamiesons, the loan of $700,000 was changed in late 2007 from a variable loan to a fixed loan. The fact that the bank agreed with Mr Jamieson to fix the loan for three years (without Mr Tindall being made aware of this) does not alter the fact that Mr Jamieson chose to take that course: a course inconsistent with the bank's original advice. By mid-2009 at the latest, and notwithstanding the cash flow demands that had arisen as a result of entry into the MQ Gateway Trust, the Jamiesons might have realised assets to reduce or eliminate the $700,000 loan. The primary judge's determination of what was a reasonable period over which to assess the loss caused by the bank's conduct was open on the evidence, and should not be disturbed.

Mr Jamieson's cross-appeal about the methodology to gross-up his net loss

[187] This aspect of the cross appeal raises the question of whether or not the entirety of a judgment sum in Mr Jamieson's favour, including a component awarded because of a potential tax liability, is subject to taxation.

[188] The primary judge heard the parties' submissions on the quantum of damages and took issue with the method by which the accounting experts had calculated the grossed-up component of the award. The first expert to undertake the calculation engaged in the process of continuing to gross-up the grossed-up component. The second expert adopted that approach. Neither expert claimed expertise in the tax treatment of an award of loss in a case such as this. The primary judge rejected their approach and determined that the amount assessed as Mr Jamieson's net loss should be grossed-up by 46.5 per cent because the award of damages for this loss would be a recoupment for the purposes of s 20-20 of the *Income Tax Assessment Act* 1997 (Cth) ("*ITAA*").[81] The amount would be grossed-up by that amount in order to ensure the assessed loss was actually received after taxation.

The* parties' *submissions

[189] Mr Jamieson challenged this approach in his cross-appeal. He criticised the primary judge's methodology on the basis that the tax consequences of the award must be

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[80] At [327].

[81] Following *Tomasetti v Brailey* (2012) 274 FLR 248 at 253 [149].

assessed from the point of view of the recipient of the award. If part of the award is a recoupment but the entirety of the award is received as a lump sum then there is no reason why, when assessed from the position of the recipient, the entirety of the award would not be characterised as a recoupment. If the award is to be assessed on that basis then it would be appropriate to gross-up the entirety of the judgment; that is, to gross-up the grossed-up component of the judgment. The primary judge was said to have fallen into error by failing to adopt this approach.

[190] The bank contends that Mr Jamieson's submission is "wrong in principle and contrary to the object and purpose of grossing up an award of damages and unsupported by any authority or evidence." The bank accepted that Mr Jamieson's award should be grossed-up. However it challenged the proposition that the amount by which the award is to be grossed up should itself be grossed-up. Such an approach was said to stretch the meaning of the word "recoupment" beyond any acceptable limit and to lead to the problem of being required to gross-up awards *ad infinitum*.

[191] In reply Mr Jamieson argued that:

1. There is no basis under s 20-20 of the *ITAA* to dissect the judgment sum into the net loss amount and the grossed-up component since both components are capable of being taxed in his hands.
2. "Recoupment" is defined broadly under s 20-25 of the *ITAA* as "any kind of recoupment, reimbursement, refund, insurance, indemnity or recovery however described, and a grant in respect of the loss or outgoing". That definition is broad enough to encompass an amount received on account of anticipated future tax that will be payable on the judgment.
3. There is authority for the proposition that the grossed-up component of the award should itself be grossed-up.

[192] Mr Jamieson's oral submissions started with the proposition that the entirety of the lump sum award, that is the award including its gross-up component, will be assessable in his hands. On this assumption Mr Jamieson would be undercompensated unless one continued to gross-up the grossed-up component *ad infinitum*; or at least to the point that the amount is reduced to cents.

[193] Counsel for Mr Jamieson later submitted that the purpose of grossing-up the grossed-up component of the judgment was to compensate for *the risk* that the Australian Taxation Office would treat the whole of the award, including the grossed-up component, as a recoupment for the purposes of taxation. That risk was said to be a real one, evidenced by the fact that both of the experts proceeded on the basis that the entirety of the award would be the subject of taxation.

[194] The bank responded to this point by referring to the words of the relevant sections of the *ITAA*. No case was said to support Mr Jamieson's proposition that under s 20-20 the grossed-up component of an award would be assessable. In addition, no evidence was led about the likelihood of that risk.

The issue

[195] This aspect of the appeal turns on a fairly narrow point: for the purposes of s 20-20 of the *ITAA* is the entirety of judgment, which has been grossed-up for tax, taxable as an "assessable recoupment".

Relevant provisions

[196] Section 20-20 of the *ITAA* provides:

> "**20-20 Assessable recoupments**
>
> *Exclusion*
>
> (1) An amount is *not* an ***assessable recoupment*** to the extent that it is ordinary income, or it is statutory income because of a provision outside this Subdivision.
>
> *Insurance or indemnity*
>
> (2) An amount you have received as recoupment of a loss or outgoing is an ***assessable recoupment*** if:
>
> (a) you received the amount by way of insurance or indemnity; and
>
> (b) you can deduct an amount for the loss or outgoing for the current year, or you have deducted or can deduct an amount for it for an earlier income year, under any provision of this Act.
>
> *Other recoupment*
>
> (3) An amount you have received as recoupment of a loss or outgoing (*except* by way of insurance or indemnity) is an ***assessable recoupment*** if:
>
> (a) you can deduct an amount for the loss or outgoing for the current year; or
>
> (b) you have deducted or can deduct an amount for the loss or outgoing for an earlier income year;
>
> under a provision listed in section 20-30."

[197] "Recoupment" is defined in s 20-25 as:

> **"20-25 What is *recoupment*?**
>
> *General*
>
> (1) ***Recoupment*** of a loss or outgoing includes:
>
> (a) any kind of recoupment, reimbursement, refund, insurance, indemnity or recovery, however described; and
>
> (b) a grant in respect of the loss or outgoing."

Authorities

[198] Mr Jamieson cites *Atlas Titles Ltd v Briers*[82] in which Stephen J (in dissent) observed that:

> "Throughout the process of assessment it is to be kept clearly in mind that substantial fairness rather than precise accuracy must be the aim. For example, the effect of adding into the award the tax which will be payable upon the taxable five per cent of the award will, by increasing the damages awarded, necessarily slightly increase the amount of tax

[82] (1978) 144 CLR 202.

> payable; to seek to engage in further adjustments so as to take account of this effect will be to add undesirable complexity without worthwhile result. Accordingly it may be disregarded".[83]

That passage points to the mathematical difficulty of grossing-up a grossed-up amount. The decision related to very different facts and does not address how s 20-20 of the *ITAA* should be interpreted. The controversy surrounding the decision in *Atlas Titles* was laid to rest a few years later where the majority of the High Court in *Cullen v Trappell*[84] followed the dissenting opinions of Gibbs and Stephen JJ. That personal injuries case also did not address s 20-20 of the *ITAA*.

[199] In *Gill v Australian Wheat Board* Rogers J held that "[t]he whole essence of the decision in *Cullen's* case is that the reality of the impact of taxation must be recognized and allowed for."[85] Justice Rogers held that the net amount of losses should be calculated and the tax liability payable by the plaintiff should also be awarded so that after paying that liability the amount of compensation received by the plaintiff is equal to his net losses. This approach accords with the approach taken by the primary judge: namely to assess an amount of net loss, calculate the tax payable on that amount and increase the net amount by that figure to arrive at a judgment amount.

[200] Justice Rogers, while discussing this methodology, commented that "I recognize as a matter of pure mathematics, that objective is impossible to attain completely, but I am of the view that it constitutes the nearest approximation of a just verdict".[86] These observations are not authority for the proposition that the grossed-up component should itself be grossed-up, and the case was not concerned with the assessment of "statutory income" under s 20-20 (as distinct income according to ordinary concepts).

[201] In *New South Wales Cancer Council v Sarfaty*[87] Gleeson CJ and Handley JA adopted the approach of Stephen and Gibbs JJ, as followed by Rogers J in *Gill v Wheat Board*, that allowance should be made for the impact of taxation on the damages award so as to allow that compensation to remain in the hands of the plaintiff after its receipt has been subject to tax. However, this does not establish that the grossed-up component of the award is required to be grossed up further because of the operation of s 20-20 of the *ITAA*.

[202] In the same case Mahoney JA observed that:

> "there is a difficulty in principle arising from the award of damages to reimburse the plaintiff in respect of income tax. On one view, an award of a single sum to represent the plaintiff's loss from the breach of the contract plus income tax calculated, not upon the loss but upon the loss plus the amount of the income tax reimbursement. And, on the principle referred to, it is arguable that there should then have to be awarded an additional sum to reimburse the plaintiff for that additional income tax."[88]

This recognises the kind of argument advanced by Mr Jamieson. However, two observations should be made about that passage. First, the comments were strictly obiter. As Mahoney

83 (1978) 144 CLR 202 at 236 – 237.
84 (1980) 146 CLR 1.
85 [1980] 2 NSWLR 795 at 807.
86 Ibid.
87 (1992) 28 NSWLR 68 at 79 – 80.
88 At 96.

JA noted, the point had not been argued. Secondly, the argument seems to proceed on the assumption the entirety of the award, including the grossed-up component, would be taxable. The basis for that assumption was not explained by Mahoney JA.

[203] The word "recoupment" extends to an indemnity under the definition in s 20-25. The term "indemnity" is to be interpreted broadly.[89]

Characterisation of the components of the award

[204] I am unable to accept Mr Jamieson's submission that the component of the lump sum award that is added to the assessed compensation so as to gross it up is a "recoupment of a loss or outgoing" for the purposes of s 20-20 of the *ITAA*. While recoupment is defined broadly under the *ITAA* it still incorporates the idea of recouping a loss or outgoing. It is hard to understand how the amount by which an assessed figure is grossed-up for the purpose of compensating the claimant against a future tax liability can be viewed as a "recoupment" of a loss or outgoing.

[205] Counsel for Mr Jamieson argued that his submissions were supported by the fact that both experts appeared to adopt the assumption that the entirety of the award would be the subject of taxation. However, neither expert purported to explain the basis of that assumption. The experts may simply have adopted that assumption. They did not purport to express an expert opinion about the relevant tax law. In any event, the question is one of law which the opinion of the experts could not resolve. They did not purport to describe any practice of the ATO in dealing with damages awards in cases like this.

[206] Counsel for Mr Jamieson also contended that, in his hands, there was only one award for a lump sum and there is no reason why the ATO would dissect such an award. It is correct that there is only one lump sum paid. However, the primary judge's reasons make it clear that he awarded an amount as compensation for a loss and a further amount to reflect the tax that would be payable on that compensation. This fact distinguishes this case from older cases dealing with the issue of dissection of payments for taxation purposes such as *McLaurin v Federal Commissioner of Taxation*[90] and *Allsop v Federal Commissioner of Taxation*.[91] In a case such as this, identified parts of a lump sum award may be separately characterised for the purpose of applying s 20-20.[92]

[207] In practice and in light of the primary judge's reasons it may be supposed that Mr Jamieson will declare only the compensatory amount as an assessable recoupment, with the amount awarded by way of grossing-up remaining to meet the expected tax on the assessable recoupment. One would not expect in the face of the primary judge's ruling that the ATO would treat the entire amount, including the grossed-up component, as subject to tax.

[208] As was pointed out in the course of argument, if the ATO took the position for which counsel for Mr Jamieson contended then it is odd that such a position has not been

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[89] *Batchelor v Commissioner of Taxation* (2014) 219 FCR 453 at 458 [10].

[90] (1961) 104 CLR 381 at 392.

[91] (1965) 113 CLR 341 at 351.

[92] *Tomasetti v Brailey* (2012) 274 FLR 248 at 253 [148].

challenged in the courts at some point. Neither party was able to point to a decision where this issue had been directly raised.

[209] As to the suggested risk of the ATO taking a different view and extending the definition of recoupment to include the grossed-up component of the award, there was no evidence led below, and no evidence was sought to be led in this Court, to establish what the likelihood of that risk eventuating was. It would be inappropriate and unfair to subject the bank to a liability to compensate for the risk that the ATO would adopt a view of the operation of s 20-20 of the *ITAA* which is at odds with the primary judge's conclusion about the application of that section to the facts at hand. The primary judge was correct to adopt the methodology he did to grossing-up the net amount he assessed, which was a recoupment of the net loss Mr Jamieson suffered as a result of investing in the MQ Gateway Trust on the basis of the banks' advice.

Mr Jamieson's cross-appeal about the figure used to calculate his net loss

[210] Mr Jamieson contends that the primary judge adopted an incorrect net loss figure of $489,129 before calculating the amount by which that figure would need to be grossed up to reflect the income tax payable on it. Mr Jamieson's contention depends upon his being given leave to adduce an accounting report dated 18 July 2014, which was finalised and served on the bank well after judgment was given on 9 March 2014. The bank notes that this report (and an earlier version of it dated 29 March 2014) were not part of the evidence at the trial and submits that they should not be received in evidence on the appeal. Mr Green's report dated 18 July 2014 criticises calculations made by the other accounting expert, Mr Richards. The bank contends that those criticisms could and should have been made to the primary judge. Finally, it contends that criticisms of Mr Richards' calculations are incorrect.

Background

[211] Reasons for judgment were delivered on 7 March 2014, with a direction to the parties to submit a calculation or further submissions as to the amount of the judgment on or before 14 March 2014. The parties requested further time, and this was granted. The matter was relisted for 24 March 2014. In the period prior to 24 March 2014 the parties provided calculations to each other. On 12 March 2014 the Jamiesons provided to the bank a draft calculation prepared by Mr Green. On 13 March 2014 the bank provided to the Jamiesons a draft calculation prepared by Mr Richards. On 18 March 2014 the Jamiesons provided to the bank two revised calculations performed by Mr Green. On 21 March 2014 the bank provided to the Jamiesons a revised calculation prepared by Mr Richards, along with submissions.

[212] The accountants' calculations differed in certain respects. One aspect was that Mr Green's calculations were on the basis that the award should be by reference to the amount of interest incurred whereas Mr Richards preferred to adopt the amounts in fact paid. The primary judge adopted Mr Richards' approach and Mr Jamieson does not take issue with that finding. The primary judge heard further submissions on the issue of methodology and the calculation of the judgment sum on 24 March 2014. Reasons and judgment were given that day.

[213] It was only after judgment was given that the Jamiesons' solicitors requested Mr Green to prepare a report about the calculations. Mr Green prepared a preliminary report dated 29 March 2014, but this was not finalised since soon after the bank filed a notice of appeal. Mr Green was asked to consider other matters and his draft preliminary

report was not provided to the Jamiesons' solicitors until July 2014. It was provided to the bank's solicitors on 18 July 2014.

Alleged errors in calculation

[214] Mr Richards' calculations are said to be in error because:

(a) they were based on estimates of Mr Jamieson's tax position rather than actual tax returns for the relevant years;

(b) amounts of $44,750 and $15,000 received by Mr Jamieson as rebates were included to increase the tax benefits obtained by him (and thereby reduce his award of damages). However, according to Mr Jamieson's submission those amounts were assessable income and he paid income tax on them. Accordingly, they should have been factored into any calculation, and the total tax benefits should have been reduced by 46.5 per cent of each of those figures.

Mr Green has reported that using actual tax returns results in a tax benefit of $549,576, rather than the figure of $595,922.

[215] Mr Jamieson's written submissions on appeal also contended that there was a double count in respect of the Capitalised Interest Assistance Loan interest, when those tax benefits were already included in the calculation of tax benefits. However, the bank's submissions responded to this contention by reference to notes in Mr Richards' spreadsheet so as to establish there was no double counting. No submission was made in reply on this point.

Principles governing an application for leave to adduce further evidence

[216] Rule 766(1)(c) of the *Uniform Civil Procedure Rules* 1999 (Qld) permits this Court to receive further evidence as to questions of fact on "special grounds". The following statement of principle has been applied of the present kind:

> "… first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."[93]

Application of these principles

[217] These principles fall to be applied in the context of evidence criticising calculations. A substantial part of Mr Jamieson's submissions on the application to adduce evidence on the appeal related to the impact on the result of the case if he succeeded on the other aspect of his cross-appeal concerning the methodology used in grossing up the net loss. Mr Green's report addressed different scenarios in that regard. The financial implications of the alleged calculation errors are less significant.

[218] The threshold issue is whether Mr Green's evidence about alleged errors in calculation could have been obtained with reasonable diligence for use at the hearing on 24 March 2014.

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93 *Langdale v Danby* [1982] 1 WLR 1123 at 1133 followed in, *inter alia, Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408, and *Jamieson v Chiropractic Board of Australia* [2011] QCA 56.

[219] The calculations of Mr Richards which have become the subject of Mr Green's 18 July 2014 report were served on the Jamiesons prior to the hearing. The spreadsheet of the calculations that were sent on the morning of 13 March 2014 to the Jamiesons' solicitors was largely in the form of the final spreadsheet. An additional note was added to a footnote concerning interest, but the spreadsheet was essentially the same. The Jamiesons had an opportunity to criticise Mr Richards' calculations. The tax returns of Mr Jamieson which have been referred to in Mr Green's later report were in evidence at the trial. The Jamiesons might have criticised Mr Richards' calculations on the basis which they now do and sought to advance competing calculations based upon Mr Jamieson's tax returns.

[220] As to the rebates, they were taken into account in reaching the agreed figure of $1,219,158 as the amount of the total loss suffered by Mr Jamieson before account was taken of tax benefits. They were included in Mr Richards' spreadsheet. The notes to his calculations stated when the amounts were paid and stated that they "should be off-sets against interest and would therefore be taxable, however as I have been unable to identify them in personal tax returns, I have assumed they were not treated as taxable income." The Jamiesons had an opportunity to address that issue. At the hearing on 24 March 2014 reference was made to the "different tax treatment" given by Mr Richards. The Jamiesons and their legal advisers were aware of the issue, but did not put forward competing figures or call evidence about whether the amounts were treated as taxable income and income tax paid on their receipt. The primary judge referred to this issue in his reasons on 24 March 2014. In the absence of evidence and argument about what adjustment should be made the primary judge concluded that it was inappropriate to determine whether an adjustment was required.

[221] I consider that the criticisms of Mr Richards' calculations could and should have been made at or prior to the hearing on 24 March 2014 and that, if the Jamiesons sought further time to advance those criticisms and to adduce evidence on the point then an application should have been made. A request to consult the accountants that day related to the issue of methodology, not the correctness of Mr Richards' calculations.

[222] In my view, Mr Jamieson has not shown that the evidence upon which he seeks to rely in relation to the correctness of Mr Richards' calculations could not have been obtained with reasonable diligence for use at the final hearing in relation to the calculation of loss. He has not established the "special grounds" required by r 766(1)(c) to adduce the report of Mr Green dated 18 July 2014 in the cross-appeal.

[223] This makes it unnecessary to address the bank's alternative submission that the criticisms are misplaced. For completeness I will briefly do so. The bank points to notes in Mr Richards' calculations which make it clear that he had reference to tax returns and notices of assessment. However, that does not seem to answer the point made in Mr Green's report as to how the tax benefits calculated by him were derived. Mr Green's report and paragraph 4 of the Jamiesons' submissions in reply on the cross-appeal suggest that the benefits were calculated by Mr Richards based on assumptions about the costs of the MQ Gateway Trust loan and the application of the top marginal rate of tax. His calculations differ from Mr Green's calculations. The latter are said to have been based on income tax returns filed in each of the relevant years.

[224] As to the rebate issue, Mr Jamieson's submission asserts that he included those amounts as assessable income and paid income tax on them. There is no satisfactory evidence that those amounts were returned as taxable income. That is not to say that

they were not. The simple point is that Mr Richards said that he was unable to identify their inclusion in tax returns. There was no proper proof that they had been. In the absence of evidence that they had been it was appropriate for the primary judge to adopt Mr Richards' calculations. Mr Green's 18 July 2014 report does not clearly address the issue. It assumes that the receipts were included but there remains inadequate proof of this.

[225] In conclusion, Mr Jamieson has not established the grounds for his cross-appeal. He has not established that the methodology used by the primary judge to gross up the loss was erroneous. He has not established that the primary judge was in error in adopting Mr Richards' calculations. He also has not established that the primary judge erred in having regard to the alternative agribusiness investment which would have been made in the year ended 30 June 2007 and subsequently lost.

Conclusion and orders

[226] The bank's appeal, Mr Jamieson's cross-appeal and Mr and Mrs Jamieson's cross-appeal should each be dismissed. This makes it unnecessary to address the Jamiesons' notice of contention. Mr Jamieson's application filed on 10 September 2014 to adduce evidence on the appeal should be dismissed.

[227] The starting point on costs, and subject to further submissions, would be for the costs of the appeal and the costs of the cross-appeals to follow the event. The unnecessary costs and complications of having more than one assessment of costs should be avoided, if possible. The parties should be encouraged to resolve the issue of costs.

[228] I would order:

1. The appeal filed 4 April 2014 be dismissed.
2. The cross-appeals filed 22 April 2014 be dismissed.
3. The first respondent's/cross-appellant's application filed 10 September 2014 be dismissed.
4. The parties have leave to make submissions as to costs in accordance with Practice Direction 3 of 2013.