# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Qantas Airways Limited & Anor v BMD Constructions Pty Limited* [2023] QSC 206 |
| PARTIES: | **QANTAS AIRWAYS LIMITED**<br>ACN 009 661 901<br>(first plaintiff)<br>**JETSTAR AIRWAYS PTY LIMITED**<br>ACN 069 720 243<br>(second plaintiff)<br>**v**<br>**BMD CONSTRUCTIONS PTY LIMITED**<br>ACN 010 126 100<br>(defendant) |
| FILE NO/S: | BS No 8964 of 2019 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 8 September 2023 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 March 2023 |
| JUDGE: | Brown J |
| ORDER: | **1. Paragraphs 21G and 22D of the 2FASOC be struck out with liberty to replead.**<br>**2. The defendant's application is otherwise dismissed.**<br>**3. If the parties cannot agree orders as to costs, they are to provide submissions by email to the Associate to Brown J for the question of costs to be determined on the papers within fourteen days.**<br>**4. The parties are to provide directions as to the filing and serving of a further statement of claim, further amended defence and a reply to the Associate to Brown J within fourteen days to be decided on the papers unless her Honour requires the matter to be listed for further directions.** |
| CATCHWORDS: | PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where an aircraft used as part of the first plaintiff's fleet was damaged – where the plaintiffs commenced proceedings in negligence against the defendant |

for loss and damage incurred in repairing the aircraft and general damages for the inability to use the aircraft until the completion of repairs – where the defendant applies to strike out amendments made in the plaintiffs' second further amended statement of claim – where the application is made pursuant to rule 171(1)(a), (b) and (e) of the *Uniform Civil Procedure Rules 1999* (Qld), on the basis that the pleaded case discloses no reasonable cause of action, has a tendency to prejudice or delay the fair trial of the proceeding or, alternatively, is an abuse of process of the Court – whether as a result of an internal restructure which occurred after the aircraft was damaged, the first plaintiff has lost its entitlement to claim damages arising out of the damage to the aircraft

*Uniform Civil Procedure Rules 1999* (Qld)

*Arsalan v Rixson* (2021) 96 ALJR 1
*BHP Coal Pty Ltd v O & K Orenstein & Koppel AG* (2008) QSC 141
*Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185
*Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* (1985) 3 NSWLR 159
*Director of War Service Homes v Harris* [1968] Qd R 275
*DMS Maritime Pty Ltd v Royal and Sun Alliance Insurance Plc* [2018] QSC 303
*Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433
*Gagner Pty Ltd v Canturi Corporation Pty Ltd* (2009) 262 ALR 691
*G.U.S Property Management Ltd v Littlewoods Mail Order Stores Ltd* [1982] SLT 533
*Haines v Bendall* (1991) 172 CLR 60
*Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq)* (2007) 18 VR 528
*Johnson v Perez* (1988) 166 CLR 35
*Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281
*Lawrance v Lord Norreys* (1890) 15 App Cas 210
*Liberty Mutual Insurance Company Australian Branch v Icon Co (NSW) Pty Ltd* (2021) 396 ALR 193
*Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141
*Mio Art Pty Ltd v Macequest Pty Ltd (No 2)* [2013] QSC 271
*Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (1991) 33 FCR 1
*National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569
*Newey v Westpac Banking Corporation* [2014] NSWCA 319
*Powercor Australia Ltd v Thomas* (2012) 43 VR 220
*Redding v Lee* (1983) 151 CLR 117

*Rider v Pix* (2019) 2 Qd R 205
*Rogers v The Queen* (1994) 181 CLR 251
*Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603
*SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* (2017) 345 ALR 633
*Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] 4 All ER 807
*Simic v NSW Land and Housing Corporation* (2016) 260 CLR 85
*Talacko v Talacko* (2021) 95 ALJR 417
*The London Corporation* [1935] P 70
*The Winkfield* [1902] P 42
*UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158
*Wollington v State Electricity Commission of Victoria (No 2)* [1980] VR 91
*Zheng v Cai* (2009) 239 CLR 446

COUNSEL: J McKenna KC with M Stunden for the plaintiffs
S Couper KC with S Parvez for the defendant

SOLICITORS: HWL Ebsworth Lawyers for the plaintiffs
Carter Newell Lawyers for the defendant

[1] On 13 November 2016, an aircraft which was part of a fleet of aircrafts used by Qantas Airways Ltd (**QAL**) was damaged. Proceedings were originally instituted by QAL. They were subsequently amended to add Eastern Australia Airlines Pty Ltd (**EAA**) as a plaintiff. In November 2022, the statement of claim was amended by the second further amended statement of claim (**2FASOC**), which removed EAA as a plaintiff, reinstated QAL as the plaintiff, and amended the basis upon which QAL claimed damages in respect of the damage to the aircraft. The defendant applies to strike out amendments made in November 2022 in the 2FASOC. The application is made pursuant to rule 171(1)(a), (b) and/or (e) of the *Uniform Civil Procedure Rules 1999* (Qld) (***UCPR***) or the inherent jurisdiction of the Court, on the basis that the pleaded case discloses no reasonable cause of action, has a tendency to prejudice or delay the fair trial of the proceeding or, alternatively, is an abuse of process of the Court.

[2] The question for this Court is whether there are questions of fact or law that merit a trial or not. The essential question is whether, as a result of an internal restructure

which occurred after the aircraft was damaged, QAL has lost its entitlement to claim damages arising out of the damage to the aircraft in question.

**Background**

[3] The first plaintiff, QAL, carries on business as an airline using wholly owned subsidiaries (**Qantas Group**), including EAA. QAL's business is carried out using aircraft owned or leased by QAL.

[4] The defendant, BMD Constructions Pty Ltd (**BMD**), was engaged by Brisbane Airport Corporation Pty Limited to perform certain civil and industrial construction works at and about Brisbane Airport. In the course of performing those works, BMD caused a large poly plastic water tank to be placed in a construction storage area at Brisbane Airport.

[5] On 13 November 2016, during a thunderstorm at Brisbane Airport, the water tank was blown across the airfield and collided with and pushed a set of passenger stairs across the tarmac until ultimately the stairs and the water tank collided with a Boeing aircraft bearing Australian registration number VH-VQU. BMD admits that the aircraft sustained substantial damage on that date (the **Damaged Aircraft**).

[6] At the time of the incident, QAL leased the Damaged Aircraft from Boeing. Under the lease, QAL had the right to possession and use of the Damaged Aircraft. It also had legal responsibility for repairs to the Damaged Aircraft. On 18 October 2016, QAL entered into an agreement to purchase the Damaged Aircraft and became its owner on 24 January 2017.

[7] QAL undertook steps to repair the damage to the Damaged Aircraft, which remained out of service from 13 November 2016 until completion of repairs on 14 April 2017.

[8] At the time of the incident and subsequent repairs, the Qantas Group was engaged in implementing an internal restructure unrelated to the incident involving the Damaged Aircraft. The purpose of the restructure was said to be to maintain the business of the airline and ownership of its aircraft in QAL's hands but to reassign operational responsibilities amongst its wholly owned subsidiaries.

[9] The restructure came into effect on 1 January 2017, with the effect that:

(a) management of the Qantas Group's Boeing 717-200 fleet was transferred from QAL to EAA pursuant to a master lease agreement dated 14 December 2016 (**Lease Agreement**);

(b) EAA sub-leased the Damaged Aircraft from QAL pursuant to a sub-lease agreement dated 14 December 2016 (**Sub-lease Agreement**); and

(c) EAA engaged National Jet Systems Pty Ltd (**NJS**) to operate the Boeing 717-200 fleet, including the Damaged Aircraft, pursuant to an operating agreement (**EAA Operating Agreement**).

[10] Significantly for the present application, the Sub-lease Agreement contained clause 5.2 which provided that:

> **5.2 Waiver and General Release in respect of the Aircraft**
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> The Aircraft, at Delivery, is delivered 'as is, where is' and Eastern unconditionally agrees and acknowledges that Qantas shall not be deemed to have made or given any covenants, warranties, conditions or representations express or implied as to, without limitation, the capacity, age, airworthiness, value, quality, durability, description, design, workmanship, materials, manufacture, construction, operation, state, merchantability, performance, fitness for any particular useful purpose or suitability of the aircraft … and Qantas shall not be liable for any loss, expenses, damages or claims … with respect to any of the matters set out in this clause 5.2 …".

[11] QAL submits that the practical consequences of the restructure were that:[1]

(a) NJS, as the authorised entity, was legally required to be involved in the repairs of the Damaged Aircraft;

(b) the most convenient way for NJS to be involved in the repairs was now through the new EAA Operating Agreement; and

(c) this had the consequence of involving EAA in this process.

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1 Outline of Submissions for the Plaintiffs at [36]. The effect is also pleaded in paragraph 21AK of the 2FASOC.

**Relevant History of the Pleadings**

[12] On 22 August 2019, QAL and Jetstar Airways Pty Ltd[2] commenced proceedings in negligence against the defendant by way of claim and statement of claim in respect of loss and damage incurred in repairing the Damaged Aircraft and general damages for the inability to use the Damaged Aircraft from the time of the incident until the completion of repairs.

[13] On 30 March 2021, the plaintiffs filed an amended statement of claim. BMD filed and served a defence to the amended statement of claim on 15 April 2021 and the plaintiffs subsequently filed and served a reply to that defence.

[14] On 3 September 2021, BMD filed a second further amended defence (**2FAD**). In paragraph 22A of the 2FAD, BMD alleged for the first time that QAL had failed to mitigate its loss by, inter alia, retaining the Damaged Aircraft's manufacturer to perform repairs rather than a third-party repairer. A reply to the 2FAD, including a pleading in answer to the allegations contained in paragraph 22A, was subsequently filed and served.

[15] On 10 March 2022, the plaintiffs filed an amended claim and further amended statement of claim (**FASOC**), which relevantly:

(a) joined EAA as an additional plaintiff;

(b) alleged that EAA, rather than QAL, suffered loss and damage in repairing the Damaged Aircraft; and

(c) altered the allegations relating to general damages for inability to use the Damaged Aircraft so that QAL claimed such damages up until 1 January 2017, and EAA claimed such damages from that date.

[16] On 14 April 2022, BMD filed and served its third further amended defence (**3FAD**), which relevantly alleged that:[3]

(a) BMD did not owe EAA a duty of care at the time of the incident because:

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2 Nothing arises out of Jetstar Airways Pty Ltd's claim for the purposes of this application.

3 These allegations were also raised in correspondence of 22 May 2022. See Exhibit MJL-1 to the Affidavit of MJ Latta filed 9 February 2023 at 203 (CFI 52).

(i) EAA was not the owner or lessee of the Damaged Aircraft at the time of the incident;

(ii) EAA voluntarily took a lease of the Damaged Aircraft and undertook an obligation to repair the Damaged Aircraft under the Sub-lease Agreement;

(b) EAA did not sustain loss and damage relating to the repair of the Damaged Aircraft because it chose to become lessee of the Damaged Aircraft and incur an obligation to repair the Damaged Aircraft; and

(c) for those same reasons, EAA was not entitled to damages for loss of use.

[17] On 3 November 2022, the plaintiffs filed the 2FASOC, which relevantly:

(a) removed EAA as the third plaintiff in the proceedings;

(b) pleads a factual background as to the manner in which the Qantas Group carried on business as a corporate group,[4] the subsequent events which gave rise to the internal restructure, and QAL paying for and remaining legally responsible for repairs to the Damaged Aircraft notwithstanding the agreements subsequently entered into with EAA;

(c) pleads in paragraph 21AM a common intention between QAL and EAA at the time of the restructure that QAL would remain responsible for repairs to the Damaged Aircraft;

(d) claims damages on behalf of QAL for direct loss and consequential loss in paragraphs 22 and 22A–22D respectively

(e) pleads in paragraph 22 that:

> 22. As a consequence of the damage caused to the Damaged Aircraft, the ~~Third~~ First Plaintiff has suffered loss and damage in repairing the Damaged Aircraft.
>
> **Particulars**
>
> (i) The loss or damage is measured by the diminution in value of the Damaged Aircraft or the cost of reasonable repairs;

4 Paragraph 1AA of the 2FASOC.

> (ii) These amounts are equal to the costs actually incurred and paid for by the First Plaintiff to repair the Damaged Aircraft as set out below;
> …

(f) pleads in paragraph 22AA that:

> 22A. The repair costs particularised in paragraph 22 above were paid for by the First Plaintiff, which was legally responsible for the cost of repairing the Boeing Aircraft.

(g) pleads in paragraph 22A that as "a consequence of the Boeing Damage, the Damaged Aircraft was rendered unairworthy throughout the period from 13 November 2016 to 14 April 2017"; and

(h) claims in paragraphs 22B and 22D that QAL by itself or as part of the Qantas Group was deprived of the use of the Damaged Aircraft for which QAL claims general damages for its inability to use the Damaged Aircraft and generate revenue.

[18] That amendment was made shortly before the expiry of the limitation period.

[19] The amendments in the 2FASOC were a considerable departure from the previous statement of claim, and in some respects were a contradiction of what had previously been pleaded, in claiming that EAA suffered loss and damage based on it being liable for the costs of repairs to the Damaged Aircraft. In particular, the 2FASOC removed references to EAA having the sole risk of the Damaged Aircraft under the Sub-lease Agreement and that it bore all risk of damage to or loss of the Damaged Aircraft, that it had paid for repairs, and that EAA was liable to pay rent under the Sub-lease Agreement equivalent to what QAL had paid Boeing which was paid.

**The Competing Contentions**

[20] BMD raises several grounds supporting its application to strike out the amendments, namely that:

(a) the amendments constitute an abuse of process given the contradictory nature of the amendments contained in the 2FASOC when compared to the previous FASOC, the different permutations of allegations contained in proposed draft

statements of claim, and the content of the agreements entered into as a result of the internal restructure;

(b) the pleading of common intention is irreconcilable with the terms of the agreements and unsupported by material facts, particulars given or the evidence and there is no basis for the pleaded right for rectification of the Lease and Sub-lease Agreements which it contends on the evidence QAL and EAA intended to enter into containing the clauses sought to be rectified;

(c) the claims for damages arising from the cost of repairs and being deprived of the use of the Damaged Aircraft are unsustainable as a matter of law given the agreements entered into as a result of the internal restructure;

(d) the pleading in paragraph 21G of the 2FASOC, that repairs carried out by NJS for or on behalf of QAL, is irreconcilable with the EAA Operating Agreement and unsupported by the particulars given;

(e) the pleading in paragraph 22 of the 2FASOC, that QAL suffered loss and damage in paying for repairs, is embarrassing because it pleads matters as particulars which are material facts and contradict what was previously pleaded and has an artificial and untenable basis; and

(f) the pleading in paragraph 22AA of the 2FASOC, that QAL paid for repairs is, uncertain and the particulars of the allegation that QAL is legally responsible to meet the cost of the repairs show the claim is unsustainable.

[21] QAL's response is that:

(a) the change in position in terms of the claim by QAL as opposed to EAA, and how that occurred, is explained in the Affidavit of Vicki Elizabeth Jenner sworn 22 February 2023 and by reference to legal authorities;

(b) the amendments in the 2FASOC are made in the context of the operations of how the Qantas Group carries on business and the fact that the internal restructure was unconnected with the incident involving the Damaged Aircraft, and where QAL had taken steps towards the repairs prior to the internal restructure being effected and where QAL's undertaking to carry out

repairs to the Damaged Aircraft was not intended to change in light of the internal restructure;

(c) its claim for damages is supported by facts, particularly having regard to how the Qantas Group operated, and legal authority. As a matter of fact, there is evidence to support QAL having paid for repairs. As a matter of law, it does not matter in any event whether or not QAL carried out the repairs after the internal restructure because it was entitled to recover damages measured by the cost of repairs and that was unaffected by the events which occurred subsequent to the Damaged Aircraft being damaged; and

(d) Ms Jenner's evidence supports the pleading as to QAL meeting the costs and being legally responsible for costs.

[22] One can understand that BMD is highly circumspect about the amendments given that the statements of claim produced by QAL have been like ever shifting sands. It is quite mystifying that an organisation like QAL who has engaged experienced lawyers could get it so wrong on a number of occasions. However, it is of little benefit to dwell on the answer to 'how could this be so' given experience tells us that even in the largest and most sophisticated organisations the left hand sometimes does not know what the right hand is doing and properly framing a legal case depends on being in a position to ask the right questions. In the present case, taking QAL's case at its highest, I am satisfied for the reasons set out below that the amendments have a legal and factual basis, albeit relying on an extrapolation of legal principles applying in a somewhat novel way, such that they should not be struck out. Whether the claim as now framed will ultimately be accepted is of course an entirely different matter.

**QAL's Explanation for the Amendments**

[23] According to QAL, upon proper analysis of the authorities, it became clear that:

(a) the subsequent involvement of EAA could not deprive QAL of its cause of action in tort;

(b) the subsequent involvement of EAA could not affect the amount of direct loss which was recoverable by QAL; and

(c) the subsequent involvement of EAA could not affect the amount of consequential loss which was recoverable by QAL, provided that this loss was claimed as general damages for loss of use of its chattel.[5]

[24] QAL contends it has a proper factual basis for the amendments made.

[25] QAL relied on the Affidavit of Ms Jenner to explain how it came to the position adopted in the amendments to the claim and the 2FASOC, given the contrary position previously pleaded in the FASOC. At all material times, Ms Jenner was the Special Counsel at HWL Ebsworth Lawyers who had carriage of the matter on behalf of the plaintiffs.

[26] In relation to the circumstances which resulted in the FASOC and the claim by EAA, Ms Jenner stated on oath that:

(a) two years after the claim and statement of claim were filed, she commenced inquiries into the allegation pleaded in paragraph 22A of the 2FAD, namely that QAL had failed to mitigate its loss by, inter alia, retaining the Damaged Aircraft's manufacturer to perform repairs rather than a third-party repairer;

(b) as part of those inquiries, and in an effort to understand the Damaged Aircraft repair process, Ms Jenner reviewed the relevant operating documents and internal lease and sub-lease agreements which came into effect before the Damaged Aircraft repairs were completed;

(c) based upon that review, and the fact that the new operating and lease agreements had come into effect between QAL and EAA prior to completion of repairs to the Damaged Aircraft, Ms Jenner presumed that EAA had commissioned and paid for the Damaged Aircraft repairs and was a proper plaintiff; and

(d) she therefore prepared a proposed amended pleading which joined EAA as an additional plaintiff, alleged that EAA suffered loss and damage in repairing the Damaged Aircraft, and altered the allegations relating to general damages. Those pleadings were subsequently filed and served as the amended claim and FASOC.

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5 As opposed to special damages for some specific loss of trading revenue from customers.

[27] After the 3FAD was filed, Ms Jenner stated that she formed the view that she would need to investigate the matters placed in issue in that defence and, most particularly, the pleadings pertaining to the effect of the operational restructure and internal leasing arrangements.

[28] Ms Jenner swore that she undertook inquiries with various senior personnel within the Qantas Group as well as EAA's Head of Contracts and Commercial, Mr Mark Rodwell. Ms Jenner swore that she had only previously spoken to Mr Rodwell. As a result of her inquiries, Ms Jenner states that she became aware for the first time that the presumptions she had formerly made were incorrect and that:

(a) QAL and EAA were aware of the damage to the Damaged Aircraft at the time the Sub-lease Agreement was entered into by QAL and EAA;

(b) the agreements entered into between QAL and EAA were proforma documents adopted from standard form precedents previously used within the Qantas Group for other internal leasing arrangements, such that the leases and sub-leases put in place across the Boeing 717 fleet as a consequence of the restructure were substantially identical;

(c) the dominant purposes of the Lease and Sub-lease Agreements were to ensure that the new operating agreement between EAA and NJS could be given effect and EAA's interest in the Damaged Aircraft registered;

(d) the existence of such damage was considered immaterial to all concerned because both QAL and EAA were aware, and understood, that:

(i) QAL had already commenced the process of having the damage to the Damaged Aircraft assessed and repaired;

(ii) QAL (along with its insurer) was funding the cost of those repairs;

(iii) the repair process that was already underway would continue unaffected by the internal sub-lease that was to be entered into by QAL and EAA to give effect to the operational restructure;

(iv) the sub-lease would not, and did not, in any way alter QAL's financial and practical responsibility to repair the Aircraft; and

(v) any clause in the relevant sub-lease which was inconsistent with the foregoing would not be enforced by either QAL or EAA; and

(e) a number of the clauses in the Lease and Sub-lease Agreements for the purposes of the internal structure were understood by both QAL and EAA to be clauses which would not be acted upon or enforced, which apparently is consistent with the ordinary functioning of the closely integrated Qantas Group where QAL routinely centrally managed and funded operational decisions across the group.

[29] Having appreciated that the previous presumptions underlying the amended claim and FASOC were incorrect, particularly the presumption that EAA had commissioned and paid for the repairs to the Damaged Aircraft, Ms Jenner then took steps to seek leave to file and serve a further amended claim removing EAA as the third plaintiff in the proceeding and the 2FASOC which properly reflected her new understanding of the position.

[30] Ms Jenner was cross-examined during the application on the basis it was relevant to BMD's contention that the 2FASOC amendments constituted an abuse of process. Ms Jenner stated that on the basis of what she was informed by the various witnesses, there was a decision and agreement made prior to the entry into the Lease and Sub-lease Agreements that the provisions as to EAA being liable for repairs and the 'as is, where is' clause would not be enforced and it was not a matter of election by QAL as to whether it enforced the provisions or not. While Ms Jenner candidly admitted that she did not ask each of those from QAL and EAA from whom she obtained instructions whether they had the authority to make such a decision to enter into the Lease and Sub-lease Agreements on the basis that the clauses would not be enforced, she understood that they did have such authority on behalf of EAA and QAL. She further stated that the particulars and the reference to QAL having paid for repairs was based on evidence that QAL had paid for the repairs.

[31] While BMD was critical of Ms Jenner's failure to explain how the previous statement of claim and draft statement of claim were formulated, the claim by EAA abandoned, and how the change in instructions occurred, I do not accept that the silence in those respects should lead the Court to conclude that QAL was "coming up with a story" to avoid the consequence of QAL and EAA having entered into the

Lease, Sub-lease and EAA Operating Agreements, nor was that put to her. Ms Jenner stated in cross-examination that her change in understanding of the facts occurred as a result of an accumulation of facts which indicated that her presumptions as to what occurred upon the restructure were incorrect. I found Ms Jenner's evidence to be candid, and although her evidence in some respects lacked precision, I accept her evidence. While the cross-examination of Ms Jenner and criticisms made by BMD of the strength of evidence raise potential fact and credit issues which may be fertile ground for cross-examination at trial, there is no proper basis on the evidence before me to find that the amendments made in the 2FASOC were contrived.

**Can QAL Claim Damages for the Cost of Repairs to the Damaged Aircraft?**

[32] According to QAL, the principles which govern a cause of action in negligence to recover damages for physical injury to a chattel can be summarised as establishing that:[6]

> "(a) a valid cause of action in tort arises upon the physical injury occurring to a chattel.
>
> (b) the cause of action vests in a party, such as QAL, which is the lessee of the chattel;
>
> (c) a party such as QAL has an immediate right to recover damages to compensate it for the injury, which are ordinarily measured by the reasonable cost of repair;
>
> (d) that cause of action is not lost or diminished in quantum if the repair is carried out internally by QAL or by a related party (or at the cost of an insurer);
>
> (e) QAL is entitled to recover general damages for the loss of use of the chattel, which can be measured by reference to an interest rate applied to its capital value;
>
> (f) that cause of action is not lost or diminished in quantum if the chattel was still to be used in QAL's business, although through the operation of a subsidiary."

[33] QAL contends that at the time the damage was caused to the Damaged Aircraft, it was the lessee of the Damaged Aircraft and by reason of its leasehold interest had an entitlement to sue in respect of the injury to the Damaged Aircraft, relying upon *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* (***Candlewood***

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6 Outline of Submissions for the Plaintiffs at [51].

***Navigation***).[7] At that time, EAA had no interest in the Damaged Aircraft and no right to sue.

[34] QAL summarises the relevant principles upon which it relies for its claim as follows.

[35] While the general principle for the assessment of compensatory damages is that the injured party should receive compensation in a sum which so far as money can do will put that party in the same position as if the tort had not been committed, the usual measure of damages for loss where there is damage to a chattel is the costs of repair and for consequential loss.[8] In that regard, the High Court in *Arsalan v Rixson* (***Arsalan***)[9] approved the statement of the United Kingdom's Supreme Court that if a claimant suffers damage to property "it can claim as damages the diminution in value of the damaged property, usually measured by the cost of repairing the property, and consequential loss, such as the loss of use of the property while it was being repaired, without having to show that that expenditure diminished its overall profitability".[10]

[36] As to the claim for direct loss by reference to the cost of repairs, QAL asserts that the cost of repairs is the measure of the diminution of the chattel's value and that remains recoverable despite subsequent events which may result in the repairs not being ultimately undertaken by the plaintiff.[11] That is similarly the case where gratuitous assistance is given to carry out repairs. In *Powercor Australia Ltd v Thomas* (***Powercor***),[12] the Victorian Court of Appeal found that the actions of the plaintiffs and volunteers in repairing the property in question was immaterial to the measure of loss, stating that:[13]

> "… in general, the measure of tortious damage to fixtures such as fencing, sheds and stockyards is the reasonable commercial cost of repairing and/or reinstating them.
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> …

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7 (1985) 3 NSWLR 159 at 162.
8 *Arsalan v Rixson* (2021) 96 ALJR 1 at [18].
9 (2021) 96 ALJR 1 at [18].
10 *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] 4 All ER 807 at [200]. See also *Talacko v Talacko* (2021) 95 ALJR 417 at [45].
11 *The London Corporation* [1935] P 70 at 78.
12 (2012) 43 VR 220.
13 *Powercor Australia Ltd v Thomas* (2012) 43 VR 220 at [25] and [27].

> His Honour was further correct to recognise the underlying principle as being that when goods are damaged by the negligence of a tortfeasor, the owner of the goods suffers immediate loss represented by the diminution in the value of the goods. The principle that the measure of this damage is ordinarily the reasonable cost of repair, will ordinarily apply to fixtures unless reinstatement is not practicable or sensible." (footnotes omitted)

[37] QAL acknowledges, however, that there may be circumstances where the same conduct causes both losses and countervailing benefits, each of which should be taken into account to properly apply the compensation principle. However, QAL contends that will not occur if the benefit was not caused by the tort but was provided subsequently by a party with the intention of benefitting the plaintiff, not the tortfeasor.[14] Related to that characterisation is the pleading as to common intention justifying rectification, which is considered below. On this basis, QAL submits that its claim for damages cannot be affected by the fact that the chattel, namely the Damaged Aircraft, has been the subject of internal restructure within the corporate group, particularly when the loss remains suffered by the group as it submits is the case here. It contends, therefore, that the subsequent transactions are legally irrelevant to the direct loss suffered.

[38] According to QAL, relying upon *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (***Monroe Schneider***),[15] BMD bears the legal onus of proving that QAL has suffered no loss. QAL contends that the critical question is whether the lease to EAA was independent of the negligently caused loss. It contends that, in the present case, that was not the case in relation to the Lease, Sub-lease and EAA Operating Agreements with the restructure being unrelated to the loss caused to the Damaged Aircraft. According to QAL, it was not intended to transfer QAL's loss to EAA to reduce BMD's liability for the negligently caused damage.

[39] The general principles as to compensatory damages and the usual measure of loss where there is damage to a chattel was accepted by BMD. However, BMD contends that they do not apply in the present case.

[40] BMD contends that QAL pleaded in the 2FASOC that it was liable to pay the repair costs and that it paid for the cost of repairs. As to the allegation that QAL paid the

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14 *Powercor Australia Ltd v Thomas* (2012) 43 VR 220 at [74].
15 (1991) 33 FCR 1.

costs, BMD contends that QAL has raised no factual basis which supports that proposition. As to that allegation, the complaint can be easily disposed of given Ms Jenner stated in evidence that there was evidence that QAL paid for the repairs.

[41] As to the contention that QAL is entitled to damages despite subsequent events, BMD submits that cannot be sustained in light of the terms of the Lease, Sub-lease and EAA Operating Agreements which place liability for repairs upon EAA and under which EAA pays QAL rent.

[42] As a starting point, QAL's Outline of Submissions proceeds on the basis that QAL has a right to damages equivalent to the cost of repairs whether or not it has paid for those repairs. In relation to the latter proposition, BMD contends that QAL's case relies on *Candlewood Navigation*[16] as authority for the proposition that a lessee of chattels having a right to possession has the equivalent cause of action to an owner of chattels in respect of damage caused to those chattels by negligence. BMD contends that reliance on that authority has set QAL on a wrong path as to the legal basis of its claim for direct loss. In that case, the question was whether a time charterer could claim damages for economic loss. The Court determined that the time charterer did not have a right to recover for pecuniary loss because it had a contractual right not a proprietary or possessory right. The case states that the principle that a bailee in possession of goods can recover damages for the loss of the thing bailed can be traced back to principle established by *The Winkfield.*[17] Hutley JA in *Maynegrain Pty Ltd v Compafina Bank* (***Maynegrain***),[18] however, stated that *The Winkfield* does not provide for a universal rule for the assessment of damages for conversion in light of the High Court decision of *Butler v Egg and Egg Pulp Marketing Board* (***Butler***).[19]

[43] In *Butler*, Taylor and Owen JJ held:[20]

> "That principle is that the injured party should receive compensation in a sum which, so far as money can do so, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed: *Livingstone v. Rawyards Coal Co*. And this

16 (1985) 3 NSWLR 159 at 162.
17 [1902] P 42.
18 [1982] 2 NSWLR 141 at 156.
19 (1966) 114 CLR 185.
20 (1966) 114 CLR 185 at 191.

> principle is as much applicable to actions of conversion as it is to the case of other actionable wrongs. In most cases of conversion it is, of course, obvious that its application will result in the injured plaintiff recovering the full value of the property converted since that will usually represent the loss that he has sustained by the defendant's wrongful act. Hence the statement which appears so often in the books that the general rule is that the plaintiff in an action of conversion is entitled to recover the full value of the goods converted, but this statement should not be allowed to obscure the broad principle that damages are awarded by way of compensation." (footnote omitted)

[44] Menzies J stated:[21]

> "There is no hard and fast rule that the value of the goods at the time of a conversion is always the measure of the damages to be assessed for the conversion. Often the application of such a rule would produce an obviously unjust result—for example, if goods converted by a defendant had since been recovered by the plaintiff-owner."

[45] In *Maynegrain*, the Court held that the trial judge had erred in assessing damages of the respondent as the whole value of the converted barley when the respondent only had a special interest in the barley as pledgee. Hutley JA (with whom Hope and Mahoney JJA agreed) stated that the damages had to be assessed having regard to the fact that the respondent was a pledgee and that "the situation under which the pledgee, in effect, exercises its power of sale and appropriates to itself the proceeds of the realization of the pledge, insofar as it was possible to do so in the light of the wrong doing of the appellant and BTE, makes the rule that the damages are the full value of the goods converted a quite inappropriate measure of damages. The respondent is entitled to be put back in the position that it would have been in if there had been no conversion of its pledge by the appellant".[22]

[46] According to BMD, *Butler* establishes that a plaintiff is only entitled to be compensated for the loss that it actually suffered and that general rules will not be applied where their application would produce an obviously unjust result. It contends that that colours the general propositions stated in QAL's submissions that where the chattel is damaged by negligence the loss is suffered as soon as the

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21 *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 192.

22 *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141 at 157.

chattel is damaged and that the notion that there is an accrued right to damages calculated in a particular way cannot be supported, as was stated by Campbell JA in *Gagner Pty Ltd v Canturi Corporation Pty Ltd* (***Gagner***).[23]

[47] In *Gagner*, Campbell JA (with whom Macfarlan JJA and Sackville AJA agreed) referred to a decision of the Queensland Court of Appeal in *Director of War Service Homes v Harris* (***War Service Homes***)[24] and stated that the principle that an innocent party to a breach of contract had an accrued right to receive damages as soon as the breach had occurred had eroded. Having referred to the High Court decisions of *Kizbeau Pty Ltd v WG & B Pty Ltd*[25] and *Johnson v Perez*[26] (where the majority particularly relied upon the decision of *Dodd Properties (Kent) Ltd v Canterbury City Council*[27] in relation to when tortious damages should be assessed), Campbell JA stated:[28]

> "It follows that, even though a cause of action for breach of contract has accrued at the time the breach occurs, it cannot now be said that there is an accrued right at that time to receive any particular sum of damages. That is because it must await the trial to decide what is the most appropriate way, in light of events then known, to give effect to the compensatory principle of damages."

[48] BMD also places reliance upon the fact that in *Gagner*, Campbell JA referred to the authorities which applied similar approaches with respect to damages for tortious damage to property to the authorities which applied to cases for breach of contract and damages for defective works.

[49] BMD contends that the most relevant authority to the present case is *UI International Pty Ltd v Interworks Architects Pty Ltd* (***UI International***),[29] where it was held that the plaintiff was not entitled to claim damages for breach of contract which sought the costs of rectification when the building was sold for a value unaffected by the defects. In BMD's submission, that recognition supports the relevance of *UI International* to the present case.

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23 (2009) 262 ALR 691.
24 [1968] Qd R 275.
25 (1995) 184 CLR 281.
26 (1988) 166 CLR 35.
27 [1980] 1 WLR 433.
28 *Gagner Pty Ltd v Canturi Corporation Pty Ltd* (2009) 262 ALR 691 at [54].
29 [2008] 2 Qd R 158.

[50] In *UI International*, there was an appeal from a decision striking out paragraphs of a statement of claim where the plaintiff sought damages for breach of contract for the cost of demolition and reconstruction of defective buildings and the diminished value of the development. In that case, the development had been sold by UI International for prices not alleged to be less than market value if the defects were not present. The claim was based on the cost of rectification works for defects. Keane JA (as his Honour then was and with whom Holmes JA agreed) noted that UI International contended amongst other things that it would be liable to carry out rectification works in circumstances where it could not rectify the alleged defects in construction as a result of the transfer of the land and buildings into the community titles scheme.

[51] Keane JA stated:[30]

> "The fundamental principle in this field of discourse is, of course, that the plaintiff is entitled to be put in the same position, so far as an award of money can do it, that it would have been in had the contract been performed. It is this principle which controls the measure of damages applicable to any particular case. In cases like *Bellgrove v. Eldridge*, where the owner's expectation interest protected by the contract is not defined interms of the construction of an asset to be sold in the market, the rectification cost measure of damages is the appropriate measure of damages to give effect to the fundamental principle. But where the terms of the bargain between claimant and defendant define the defendant's obligation and the claimant's expectation under the contract in terms of the marketability of that which is to be delivered to the plaintiff by the defendant, the cost of rectification is not, in the language of *Bellgrove v. Eldridge*, "*prima facie*, the only measure" of the adverse impact of the defendant's breach upon the plaintiff's expectation interest." (footnotes omitted) (emphasis added)

[52] Keane JA identified the fundamental question as whether the law permits an owner to realise the market value of an asset produced for commercial realisation and then to recover the cost of repairing defects in the asset which have not affected the owner's return from the realisation of the asset and where the buyer has neither required nor consented to the rectification work.[31]

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30 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [87].

31 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [92].

[53] His Honour concluded that the plaintiff's case was not one supported by the authorities as there was "nothing 'accidental' about the plaintiff's commercial realisation of the development, and any damage to its expectation under the contract is susceptible of commercial measurement".[32] Keane JA stated that *War Service Homes* did not refer to the case where the building is sold for a value unaffected by the defects and the rectification work cannot be done, as was the case in *UI International*.[33] Notably, his Honour did not cavil with the correctness of the authority.

[54] His Honour stated that:[34]

> "Where, by reason of the ownership of a property by a third party, the repairs **cannot** be carried out by the claimant, the claimant cannot claim the cost of repairs. In such a case, it is not a matter of the claimant being entitled to do what he or she pleases with his or her property or the damages due to him or her; rather, it is simply that the damage to the claimant's interest in the performance of his or her contract with the builder cannot reasonably be measured by the cost of repair which cannot occur.
>
> In such a case, there is no reason to doubt the application of the observations of Giles J.A., with whom McColl J.A. and Campbell J.A. agreed, in *Westpoint Management Ltd v. Chocolate Factory Apartments Ltd:*
>
> > '**So if supervening events mean that the rectification work can not be carried out, it can hardly be found that the rectification work is reasonable in order to achieve the contractual objective: achievement of the contractual objective is no longer relevant. If sale of the property to a contented purchaser means that the plaintiff did not think and the purchaser does not think the rectification work needs to be carried out, it may well be found to be unreasonable to carry out, the rectification work.** An intention not to carry out the rectification work will not of itself make carrying out the work unreasonable, but it may be evidentiary of unreasonableness; if the reason for the intention is that the property is perfectly functional and aesthetically pleasing despite the non-complying work, for example, it may well be found that rectification is out of all proportion to achievement of the contractual objective or to the benefit to be thereby obtained.'"

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32 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [95].
33 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [104].
34 *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [106]–[108].

(footnotes omitted, emphasis per original)

[55] BMD states that like *UI International*, the Damaged Aircraft was leased to EAA on terms not said to be uncommercial or terms any worse because of the damage to the Damaged Aircraft. Under the Lease and Sub-lease Agreements, EAA accepted the Damaged Aircraft as is, where is, and undertook the obligations of repair. Thus, it was not only the case that QAL did not repair the Damaged Aircraft, but that QAL would never repair the Damaged Aircraft because it was unnecessary for it to do so given the terms of the agreements. BMD contends that the fact that the lease was with a subsidiary did not matter given it is a separate corporate identity.

[56] BMD therefore contends that QAL is not entitled to claim damages nor any diminution of value because there has been none. Unlike the cases relied upon by QAL which look at loss where work is done by volunteers, BMD contends that the present case involves the antecedent question of whether the loss said to have been suffered by QAL should be quantified by reference to the cost of repairs.

[57] Even if that submission is not accepted, BMD contends that the correct approach is that identified by Ashley JA in *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq)* (***Insurance Australia***),[35] not by Osborn JA in *Powercor.* In *Insurance Australia*, his Honour identified the question as being the proper characterisation of the moneys paid and stated:[36]

> "In the present case, I consider that the circumstances, however they are considered, lead to a conclusion that what was paid was an indemnity which was not to be equated with a merciful subvention of the Commonwealth Government, or as something resembling social security payments, bushfire relief payments or the like."

[58] BMD contends that a similar test should be applied in this case. It contends that while there was not in fact a payment by EAA to QAL, there was an assumption of liability to carry out repairs. As a result of EAA's assumption of liability, QAL was completely relieved of the cost of repairs. BMD contends an agreement was freely entered into by QAL and EAA pursuant to which QAL no longer had to pay for repairs to the Damaged Aircraft and, in those circumstances, QAL cannot claim the cost of repairs as damages.

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35 (2007) 18 VR 528 at [160].
36 (2007) 18 VR 528 at [170].

[59] QAL contends that cases such as *UI International* are concerned with claims for damages that would result in a windfall. It contends that is unlike the present case, where the Damaged Aircraft was damaged when it was a part of the Qantas Group fleet and, on the face of it, QAL suffered immediate loss in the value of the Damaged Aircraft and was deprived of the use of Damaged Aircraft until repaired. It is not a case where QAL has sold the Damaged Aircraft for market value regardless of the defects. The change in this position while QAL was taking steps to repair the Damaged Aircraft is the result of an internal restructure with the subsidiary being within QAL's control.

[60] QAL particularly relies on *Powercor*, which in turn relied upon two High Court decisions. In *Powercor*, Osborn JA in considering the question of whether the plaintiff could recover for damage to fences or other fixtures where the damage was fixed by volunteers had regard to a number of decisions including that of Ashley JA in *Insurance Australia*,[37] *Wollington v State Electricity Commission of Victoria (No 2)*,[38] and the High Court authorities of *National Insurance Co of New Zealand v Espagne* (***Espagne***)[39] and *Zheng v Cai* (***Zheng***).[40] On the basis of the analysis of those authorities, Osborn JA considered that the "question is simply whether the benefit received was conferred independently of any right of redress against Powercor and not by reference to that right."[41] His Honour concluded that there was no evidence that the labour of volunteers was intended to benefit Powercor and it was inherently improbable that it was.[42] He concluded that the benefit conferred upon the plaintiff was conferred independently of any right or redress against others and so he might enjoy the benefit even if he enforced the right to claim damages.[43] The use of voluntary labour including by the plaintiff did not displace the ordinary measure of loss resulting from direct damage to chattels, namely the diminution in the value of the goods usually measured by reference to the reasonable cost of repair.[44]

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37 (2007) 18 VR 528 at [160].
38 [1980] VR 91 at 98.
39 (1961) 105 CLR 569 at 573.
40 (2009) 239 CLR 446, particularly at [18]–[20] and [29].
41 *Powercor Australia Ltd v Thomas* (2012) 43 VR 220 at [81].
42 *Powercor Australia Ltd v Thomas* (2012) 43 VR 220 at [87].
43 *Powercor Australia Ltd v Thomas* (2012) 43 VR 220 at [89].
44 *Powercor Australia Ltd v Thomas* (2012) 43 VR 220 at [25]–[27].

[61] While the "benefit" conferred upon QAL through the Sub-lease Agreement could not be described as benevolent, QAL contends that it is analogous because the internal restructure was contemplated before the damage to the Damaged Aircraft occurred, was unrelated to the present case, and entered into independently without contemplating that it could affect any claim QAL had for the cost of repairs. That is supported by the instructions given to Ms Jenner. According to QAL, while the Damaged Aircraft was one of the fleet of aircraft leased by QAL to EAA and was the subject of the Sub-lease Agreement, the context of the transaction shows that it was not intended by EAA to confer a benefit upon the alleged tortfeasor, namely BMD, and remove the loss.

[62] QAL contends that the above principles have been extended to commercial payments. In *Monroe Schneider*, Burchett J (with whom O'Loughlin J agreed) rejected an argument that the decisions of *Espagne* and *Redding v Lee*[45] were peculiar to personal injuries cases, noting that the reasons given by Dixon CJ and Windeyer J in *Espagne* "stand upon a broader ground than this."[46] Burchett J found that the principles in *Espagne* applied more generally and rejected the argument that damages payable by the appellant to the respondent should be reduced by a payment made by a third-party supplier in the context of a claim for damages for fraud. In particular, Burchett J considered that no part of the payment made by the third party supplier for the benefit of the injured party was intended to be provided in relief of any liability of the appellant to compensate the respondent and reduce the liability of the party who had created the loss by fraud or that the respondent had received it in that character.[47] To the extent that the transaction between the third party and the respondent was to be accounted for by normal commercial considerations, the consequence was again that the payment should not be deducted from the damages.[48]

[63] QAL contends that while the decision in *Insurance Australia* considered the principles in *Espagne*, the key question in that case was whether bailout payments were an indemnity in fact.

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45 (1983) 151 CLR 117.
46 (1991) 33 FCR 1 at 24.
47 (1991) 33 FCR 1 at 26.
48 (1991) 33 FCR 1 at 26–27.

[64] The submission by QAL that the fact that the Damaged Aircraft was sub-leased to EAA as part of an internal restructure using pro forma documents suffers the difficulty of overcoming the fact that while EAA is a wholly owned subsidiary it is a separate corporate identity. QAL's contention, however, does receive some limited support, albeit from a Scottish decision of *G.U.S Property Management Ltd v Littlewoods Mail Order Stores Ltd* (***G.U.S Property***)[49] in the context of law of delict and damages not the common law. A building was damaged in the course of building operations being carried out on a neighbouring property and the building was subsequently transferred to a wholly owned subsidiary. It was contended that no loss was suffered because the building was assigned for full book value. That was, however, rejected by the House of Lords, with Lord Keith stating that the transfer of ownership did not result in the original owner losing his title and interest to pursue a claim for damages against the wrongdoer. Lord Keith held that:[50]

> "In the present case I am of the opinion that the price for which, in pursuance of group policy, Rest conveyed the damaged building to the pursuers is entirely irrelevant for the purpose of measuring the loss suffered by Rest through the defenders' negligence, and is quite incapable of founding an argument that Rest suffered no loss at all. The figure of the price was fixed, in an internal group transaction and for accounting purposes only, without any reference to the true value of the building."

[65] That case of course did not involve a common law claim for damages and whether it has any weight in such a common law claim will depend upon a proper analysis of delict as opposed to negligence. Nevertheless, it cannot simply be sidelined as irrelevant on the basis that it concerns a case of delict given it rejected the argument that no loss was suffered because the building was assigned for full book value fixed in an internal group transaction.

[66] The general principle that applies in the assessment of compensatory damages, whether in actions in tort or contract, is that the injured party should receive compensation in a sum which, insofar as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed.[51] However, as pointed out by Campbell J in

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49 [1982] SLT 533.
50 *G.U.S Property Management Ltd v Littlewoods Mail Order Stores Ltd* [1982] SLT 533 at 538.
51 *Haines v Bendall* (1991) 172 CLR 60 at 63.

*Gagner*, "[w]hile the law has developed some conventional practices about the ways one applies that compensatory principle in particular fact situations, those conventional practices must yield if the facts of the instant case require some different method to be adopted for assessing the appropriate amount of compensation."[52]

[67] However, it has been accepted by the High Court in decisions such as *Arsalan* and *Talacko v Talacko* (***Talacko***)[53] that the usual measure of damages where a chattel is negligently damaged is the diminution in the value of goods and consequential loss. In that regard, the majority in *Talacko* referred with approval to paragraphs [25]–[27] of *Powercor.*[54] At paragraph [27] of *Powercor*, Osborn JA referred to the trial judge being "correct to recognise the underlying principle as being that when goods are damaged by the negligence of the tortfeasor, the owner of the goods suffers immediate loss represented by the diminution in the value of goods." Thus, QAL in its submissions accurately sets out the prima facie position as to when a cause of action accrues and I accept that prima facie it suffered loss at the time the Damaged Aircraft was damaged.

[68] However, as *Gagner*, *Butler*, *Powercor*, *Monroe Schneider* and *Insurance Australia* demonstrate, there is no absolute right for damages to be measured according to the cost of repairs and subsequent events after the action accrues can affect the quantification of loss and, in particular, the question of whether the cost of repairs is the proper measure of direct loss in a particular case. Similarly, as *Maynegrain* demonstrates, the extent of a claimant's interest in the goods concerned may affect the level of its recovery.

[69] On QAL's case, it remained obliged to carry out those repairs and did carry out those repairs, but even if that was not, it claims it was entitled to claim damages by the usual measure of the diminution of value being the cost of repairs. I have accepted that there is evidence to support the fact that QAL did carry out those repairs. It claims it remained obliged to do so notwithstanding the internal restructure. However, as to its contention that its right to recover for damages remained, in any event, based on legal principles as to whether the right to recover

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52 (2009) 262 ALR 691 at [31].
53 (2021) 95 ALJR 417.
54 (2021) 95 ALJR 417 at [45].

damages is affected by subsequent events, the question is whether in light of the subsequent agreements entered into by QAL with EAA, QAL has lost any right to seek damages for the damaged caused to the Damaged Aircraft as result of the internal restructure based on the cost of repairs and cases such as *Powercor* and *Monroe Schneider* are inapplicable.

[70] None of the authorities to which I have been referred are on all fours with the present case, nor do I accept that *UI International* is necessarily determinative of the present case, although there are some similarities with the present case given the terms of the Lease and Sub-lease Agreements entered into between QAL and EAA. In *UI International*, the sales were arm's length sales and for market value unaffected by the defects, which accorded with UI International's expectation under the building contract. There was no diminution in value as a result of the defects. The recovery for the cost of repairs would have compensated UI International for more than the loss it suffered where it could never be liable to carry out repairs. In contrast, there was a diminution in the value of the Damaged Aircraft as a result of the damage in November 2016. The Damaged Aircraft remained within the corporate group, and repairs remained to be done within the corporate group even if the terms of the Lease and Sub-lease Agreements are fully enforceable. QAL remained the sub-lessor of the Damaged Aircraft. There is some support, however, for the fact it is relevant to the basis of the loss claimed by QAL that the Lease and Sub-lease Agreements have been entered into with a wholly owned subsidiary in *G.U.S Property* discussed above. Given that I am not satisfied the present case is unsustainable consistent with the decision in *UI International*, the decisions of *Powercor* and *Monroe Schneider* would arguably be relevant in determining the effect of the internal restructure upon the claim for direct loss by QAL and the intention with which the benefit provided to QAL under the agreements entered into by EAA as part of the restructure will be relevant as part of the characterisation test.

[71] Given the principles of *Espagne* have been applied to not only tortious claims but to payments which cannot merely be characterised as benevolent but where the intention of the parties is not to confer a benefit upon the wrongdoer, it is at least arguable that QAL's claim is unaffected by the agreements entered into as part of the internal restructure. Whether that is the case or not will depend upon the proper

characterisation of the facts and intention of QAL and EAA when the Sub-lease and EAA Operating Agreements were entered into.

[72] Further, while BMD argues that *Powercor* does not create an arguable case because the correct approach is that identified in *Insurance Australia*, *Insurance Australia* was dealing with an indemnity question where the payment was found to be an indemnity.

[73] While BMD contends, having regard to *Insurance Australia*,[55] that it is the character of the receipt that is relevant in the hands of the recipient rather than purpose of the person conferring the benefit, *Insurance Australia* did not determine that "purpose" was irrelevant but noted the difficulties that can arise. It does not establish that the question in *Powercor* was the wrong question or limited to merciful intervention. The question of intention was regarded as remaining relevant in the subsequent case of *Powercor* after careful consideration of the authorities including by reference to the High Court cases of *Espagne* and particularly *Zheng*, where *Insurance Australia* had also been considered. As QAL submits, while *Insurance Australia* also considered the principles in *Espagne*, it was in the context of whether bailout payments were in fact an indemnity, unlike the present. That is supported by the passages in *Insurance Australia* where Ashely JA (with whom Chernov and Redlich JJA) identified the significance of the dispute, namely "… if the payments were an indemnification, it would not seem to matter whether they had been paid under a contract of indemnity insurance, a contract of indemnity otherwise, or simply constituted an indemnity in fact. In any of those situations, the relevant consideration would be Steele that was entitled to one (full) indemnity, but no more."[56] Ashley JA concluded that:[57]

> "In the present case, I consider that the circumstances, however they are considered, lead to a conclusion that what was paid was an indemnity which was not to be equated with a merciful subvention of the Commonwealth Government, or as something resembling social security payments, bushfire relief payments or the like. By that I mean that such a conclusion flows from application of the *Rodocanachi* line of authority; and that it flows from the *Espagne* line of authority, assuming it to be any different."

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55 (2007) 18 VR 528 at [169].
56 (2007) 18 VR 528 at [151]. See also at [154].
57 (2007) 18 VR 528 at [170].

[74] *Insurance Australia* does not dictate that the authorities in *Powercor* or *Monroe Schneider* are necessarily inapplicable to the present case. While BMD contends that *Monroe Schneider* was a situation where there was either a benevolent response by the third party or a commercial arrangement of mutual benefit as a result of normal commercial considerations and general policy, the restructure in the present case is arguably the result of a general policy applied to effect an internal restructure rather than, as BMD seek to characterise it, namely as a direct agreement that payment would be made by EAA which removed the need for QAL to make the payment.

[75] While there is a real issue as to whether QAL will be successful in its claim at the end of the day, I am not satisfied that QAL has no reasonable cause of action as a matter of law in negligence to claim damages based on the diminution of the value of the Damaged Aircraft measured by the cost of repairs and that it is inarguable it has suffered loss notwithstanding the subsequent agreements entered into by QAL and its wholly owned subsidiary EAA. That said, QAL's case will have to overcome a number of difficulties, both legally and factually, to succeed in establishing it has suffered a loss and that the cost of repairs is an appropriate measure to place it in the position it would have been in had the negligence not occurred.

**Claim for Rectification**

[76] Paragraphs [21AM]–[21AO] of the 2FASOC plead that:

> "21AM. The common intention of both the First Plaintiff and EAA at the time of the Restructure was that the First Plaintiff would be responsible for the repairs to the Damaged Aircraft that were required as a result of the Incident.
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> 21AN. The QAL/EAA Lease Agreement and the Damaged Aircraft Sublease Agreement were entered into against a factual background known to both the First Plaintiff and EAA where:
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> (a) the First Plaintiff was already taking steps at its own expense to repair the damage caused to the Damaged Aircraft as a result of the Incident;

(b) there was no suggestion that EAA would be required to repair the damage to the Damaged Aircraft resulting from the Incident.

21AO. Further and alternatively to paragraph 21AE above, to the extent there is any provision in the QAL/EAA Lease Agreement or Damaged Aircraft Sublease Agreement that is inconsistent with the common intention pleaded in paragraph 21AE above, at all material times such provision was not one which was legally enforceable, or would in fact be enforced, as it was subject to being rectified (by agreement or otherwise) to provide that the First Plaintiff would pay for repairs in respect of any pre-existing damage to the Damaged Aircraft."

[77] BMD contends that the pleading that the Lease and Sub-lease Agreements were liable to rectification has no legal basis. BMD contends it fails because:

(a) the common intention pleaded is not the common intention which could establish a basis for rectification, which requires a common intention that the agreement would include a particular term;

(b) the Particulars of the 2FASOC (**Particulars**) do not support a common intention as required by r 150(1)(k) of the *UCPR*; and

(c) the parties intended to enter into the agreements with an "as is, where is" clause and the evidence that relevant employees from QAL assumed that QAL would not enforce the obligation which had been deliberately included does not provide any basis for rectification.

[78] BMD contends that the Sub-lease Agreement means what it says, having been inserted by a mutual agreement. On that premise, if QAL chose not to enforce it, then that is a voluntary act of QAL not to enforce a right to cause a third party to pay for repairs.

[79] QAL contends that the intention with which any benefit is provided is relevant to the characterisation test in relation to whether subsequent events affect or displace the loss claimed. In particular, it contends that the intention with which the parties entered into the agreements pursuant to the restructure should be taken into account in deciding whether damages are affected in accordance with the line of authorities contained in *Powercor*. It contends that the pleading has been particularised and

explained in Ms Jenner's affidavit, although further particulars may be required to be provided in the future. According to QAL, its primary case is that within the corporate group the actual common intention would always have overridden any apparently inconsistent contractual terms which were the result of using a proforma agreement because the parties would have agreed to this occurring. The common intention is based on an actual intent held.

[80] In *Simic v NSW Land and Housing Corporation* (***Simic***), the majority observed that:[58]

> "Rectification is an equitable remedy, the purpose of which is to make a written instrument "conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately". For relief by rectification, it must be demonstrated that, at the time of the execution of the written instrument sought to be rectified, there was an "agreement" between the parties in the sense that the parties had a "common intention", and that the written instrument was to conform to that agreement. Critically, it must also be demonstrated that the written instrument does not reflect the "agreement" because of a common mistake. Unless those elements are established, the "hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties" cannot be displaced.
>
> The issue may be approached by asking — what was the actual or true common intention of the parties? There is no requirement for communication of that common intention by express statement, but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party." (footnotes omitted)

[81] In *Simic*, Kiefel J (as her Honour then was) stated in relation to the proof of actual intention that:[59]

> "… A court, in determining whether the burden of proof is discharged, may be said to view the evidence of intention objectively, in the sense that it does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention. It is in this sense that statements such as that of Hodgson J in *Bush v National Australia Bank Ltd*, that common continuing intention 'must be objectively apparent from the words or actions' of each party, may be understood.

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58 (2016) 260 CLR 85 at [103]–[104].
59 (2016) 260 CLR 85 at [42]–[45].

> It is not to be expected that parties to contractual negotiations will express themselves in terms of their intentions. It is therefore to be expected that proof to the necessary standard will usually require some manifestation of the intention of each party by their words or conduct and that the requisite common intention will be a matter of inference for the court from that evidence. As Yeldham J pointed out in *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd*, it would not be sufficient for proof of intention to refer to a party's state of mind which remained undisclosed in the course of negotiations.
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> Yeldham J also observed that there was some divergence of judicial and academic opinion as to whether more was required for proof of intention and, in particular, whether intention must be evidenced by 'some outward expression of accord', as was suggested in *Joscelyne v Nissen*. Further, in *Maralinga Pty Ltd v Major Enterprises Pty Ltd*, Mason J referred to what had been said by Buckley LJ in *Lovell and Christmas Ltd v Wall*, namely that it was necessary for rectification to find that intention 'was communicated by one side to the other'.
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> In *Pukallus* it was not necessary to resolve the question as to what was required to prove intention, but Wilson J was moved to suggest that, notwithstanding the views expressed in *Joscelyne* and *Maralinga*, it may not be necessary to prove an outward expression of accord. His Honour appears to have preferred the view expressed in an article, that the requirement of an outward expression of accord was not justified by principle or authority. On this view, the absence of an outward expression of accord may go to whether the burden of proof can be discharged, but an outward expression of accord is not itself a requirement of rectification." (footnotes omitted)

[82] The onus is acknowledged in the authorities to be a heavy one. In *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd*,[60] McColl JA, after discussing *Simic*, referred with approval to Gleeson JA in *Newey v Westpac Banking Corporation*[61] who noted the high standard that must be met. Gleeson JA referred to the decision of *Ryledar Pty Ltd v Euphoric Pty Ltd* (***Ryledar***),[62] where Tobias JA (with whom Mason P and Campbell JA agreed) stated that:

> "first, the common intention which must be established by clear and convincing proof to justify rectification must be the actual or true common intention of the parties. Second, evidence of that intention may be ascertained not only from the external or outward expressions of the parties manifested by

60 (2017) 345 ALR 633 at [116].
61 [2014] NSWCA 319.
62 (2007) 69 NSWLR 603 at [182].

> their objective words or conduct but also from evidence of their subjective states of mind."

[83] Tobias JA commented that evidence of a person's intention "being unexpressed and uncommunicated, is unlikely to trump his or her expressed intention. But this is because that party is unlikely to be believed."[63]

[84] The latter observation of Tobias JA in *Ryledar* supports QAL's argument that the fact that it cannot particularise any particular discussions or correspondence evidencing what it alleges constitutes a common intention does not mean that a party has no arguable case as a matter of law. That is further supported by the Full Federal Court's decision in *Liberty Mutual Insurance Company Australian Branch v Icon Co (NSW) Pty Ltd*,[64] where the Full Federal Court rejected a ground of appeal challenging the trial judge's conclusions as to common intention due to the absence of clearly expressed communication beyond one conversation, finding that it paid insufficient regard to the expression of principle by Campbell JA in *Ryledar*. In *Ryledar*, Campbell JA stated that parties "might come to know of each other's intentions … through those intentions being directly stated, or they might come to know of them through various other means by which one person's intention can become known to another person. Those means can sometimes involve a process of conscious and deliberate inference. Those means can sometimes involve simply perceiving a gestalt in a series of events."[65] His Honour gave the example that:[66]

> "… Negotiation of any contract takes place in a context in which various facts are known or assumed by the negotiating parties. Sometimes, for example, if a contract is negotiated in a context where there are well understood business practices and conventions, and nothing is said about those practices and conventions not applying, it can be legitimate to conclude that both parties to the contract intended to act in accordance with those practices and conventions, even if they did not expressly communicate to each other that they intended to act in accordance with those practices and conventions. This view of what is needed before an intention is a common intention, accords, it seems to me, with the Australian case law since *Joscelyne*."

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63 *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [185].
64 (2021) 396 ALR 193 at [313].
65 (2007) 69 NSWLR 603 at [281].
66 (2007) 69 NSWLR 603 at [281].

[85] QAL's Particulars rely on the subjective intention of various people. While BMD challenges the relevance of those people on the basis that it was not established that they had relevant authority, I consider for the purposes of this application that there is a sufficient basis to infer they do hold such authority, particularly given that two of those informing Ms Jenner signed the agreements. Mr Daws signed the Lease and Sub-lease Agreements. Mr Daws did not consider that the Sub-lease Agreement could or did effect QAL's obligation to carry out and pay for the repairs, which he understood were being met by QAL's insurer. He informed Ms Jenner that no one suggested that the internal leasing arrangements would make EAA responsible for the damage and relieve QAL of its responsibilities to carry out repairs. Nor was it his intention. Mr Rodwell, the Head of Contracts and Commercial for EAA, signed the EAA Operating Agreement. He stated that the Qantas group set-up was that there was no distinction in the work he performs for EAA or QAL as it is all for the benefit of QAL. He understood that the internal restructure was to give EAA the legal interest in each of the Boeing aircrafts to permit it to carry out its obligations with NJS, and that once entered into, it was more logical for EAA to manage the repairs to the Damaged Aircraft but it was never suggested that the Sub-Lease Agreement altered the repair of the Damaged Aircraft or QAL's insurer's obligation to fund those repairs or that the 'as is, where is' clause was going to be acted upon. Ms Khoo, a senior legal officer for QAL, supported the fact that in her experience there has been no circumstance where an "as is, where is" clause has been enforced against a member of the Qantas Group, although she still prepared the Lease and Sub-lease Agreements using the proforma documents which included clauses which were included in arm's length agreements. Based on her experience, Ms Khoo considers that the enforcement of such a clause within the Qantas Group would be contrary to the way the Qantas Group operates internally.

[86] QAL relies on the fact the relevant people were in the office working together knew that the Damaged Aircraft had been damaged, that QAL had taken steps towards repair, that the purpose of the restructure was to effect efficiencies, and that the restructure would not alter the pre-existing position that QAL was responsible for repairs and that Qantas legal had prepared the Lease and Sub-lease Agreements utilising proforma agreements used in arm's length transactions and did not alter the proforma repair obligations because the restructure was an intra-group

arrangement.[67] According to Counsel for QAL, "the gestalt that existed was everybody in the room had this common knowledge and they all shared this common understanding of what was going on",[68] namely that QAL would be responsible for the repairs to the Damaged Aircraft,[69] which supports the inference of common intention. Given the observations of Campbell JA in *Ryledar*, the pleading in paragraph 21AN(b) of the 2FASOC is relevant in terms of the relevant background to the entry into the Lease and Sub-lease Agreements. The particulars of that "informal" arrangement are in paragraph 3 of the Particulars. According to QAL's Counsel, they reflect the informality of the arrangement. While scant, the Particulars do support the common intention alleged to have been actually held, which has been further supported by the factual evidence, although as properly conceded by QAL's Counsel more particulars will have to ultimately be provided.

[87] The fact it does not plead the existence of any communication between QAL and EAA is not fatal to its case. The matters of which Ms Jenner was informed support an inference that there was an understanding between QAL and EAA prior to entry into the Sub-Lease whereby QAL would continue to be responsible for the repairs and the cost of repairs, that the Sub-Lease Agreement would not impact upon that, that the "as is, where is" clause and QAL's to pay for were was never intended to be enforced in the internal arrangement, and as such ,there was a disconnect between the Sub-lease Agreement and the parties' intention in respect of the inclusion of the "as is, where is" clause and EAA's obligation to carry out the repairs. While not the subject of any explicit communication there is a sufficient factual basis supporting the fact that the common intention held was prior to entry into the agreement that the relevant clauses in the Sub-Lease would not affect the status quo whereby QAL was to continue to be the responsible party for the repairs and the costs of repairs for the Damaged Aircraft and be enforced as opposed to QAL having a discretion as to whether or not it enforced the clause or it being merely a matter of historically such clauses not being enforced. There is an arguable case in fact and in law, although whether it can meet the high threshold is another matter. At present, the case is sufficiently pleaded consistent with authority.

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67 Particulars at paragraph 3(b)(ii).
68 T1-57-T1-58.
69 Particulars at paragraph 3(b)(ii).

**Consequential Loss**

[88] The 2FASOC pleads that QAL:

(a) carried on its business as an airline using aircraft owned or leased by it, including the Damaged Aircraft;[70] and

(b) was deprived of the use of the Damaged Aircraft during both periods for which consequential loss was claimed.[71]

[89] The Particulars[72] do not add significantly to what has already been pleaded in the 2FASOC. QAL does rely on paragraphs 2, 3 and 6 of the Particulars which particularise the arrangements between QAL and EAA, being that QAL was to remain responsible for the repairs to the Damaged Aircraft and the fact that payments made to NJS in respect of the repairs was for and on behalf of QAL or pursuant to a prior arrangement between EAA and QAL. Nor is it further clarified in Ms Jenner's affidavit.

[90] QAL seeks consequential loss for the period between 13 November 2016 and 31 December 2016, which is the period prior to the agreements being entered into between QAL and EAA, and then for the period from 1 January 2017 to 14 April 2017.

[91] BMD contends that the amendments made to the pleading demonstrate that there is no loss because, for the first period, the pleading has now been changed to refer to "the inability to use the aircraft" as opposed to "its inability to use the aircraft", such that there is now no allegation that QAL itself would otherwise have used the Damaged Aircraft.

[92] As to the second period, BMD contends that QAL did not suffer loss given QAL had leased the Damaged Aircraft to EAA in that period and EAA was obliged to make rental payments without deduction to QAL and it cannot claim more on the basis of a vague loss of profit due to loss of use.

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70 At paragraph 1AA(c).
71 At paragraph 22D.
72 At paragraph 9.

[93] BMD contends that the owner of a profit earning chattel is entitled to general damages for loss of use calculated by either the rental cost of the chattel or interest on the depreciated value, as reiterated recently in *DMS Maritime Pty Ltd v Royal and Sun Alliance Insurance Plc.*[73] That, however, is subject to an exception identified by McMurdo J (as his Honour then when) in *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG* (***BHP Coal***), which BMD contends would apply.[74] His Honour stated:[75]

> "… In my view, that does not follow. In a case where a loss would have been made, or a direct or indirect contribution to profit would not have been made, general damages would be denied because there would have been no loss from the deprivation of a chattel. As Lord Devlin said in the passage which is set out above, general damages will not be awarded where:
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> > 'the facts … show that before the casualty occurred the owner was already saddled with the liability to maintain an idle vessel from which he could get no profit or pleasure or other form of service.'"

[94] BMD contends that QAL has not pleaded it had the chattel or the use of it in order to claim loss from the deprivation of the chattel. It contends that there is no pleading that rather than EAA having sole possession of the Damaged Aircraft pursuant to the Sub-lease Agreement and operating the Damaged Aircraft through NJS, QAL may have at some stage used the Damaged Aircraft.

[95] QAL states that it has pleaded that in running the airline it utilised the Damaged Aircraft as part of the Boeing fleet and that, as a consequence of the damage and repairs, it was deprived of its use during the first and second period.[76]

[96] QAL contends that it is entitled to claim consequential loss in the manner it has according to the principles discussed by Flanagan J in *Rider v Pix.*[77] In that case, Flanagan J (as his Honour then was) stated:[78]

> "As the learned Chief Justice observed, it is a settled principle that an owner of a chattel is entitled to general, and not

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73 [2018] QSC 303.
74 (2008) QSC 141.
75 (2008) QSC 141 at [938].
76 Paragraphs 22A and 22D of the 2FASOC.
77 (2019) 2 Qd R 205 at [34] and [35].
78 (2019) 2 Qd R 205 at [34]–[35].

> nominal, damages when he or she is deprived of the use of his or her chattel for a period of time because of another's wrongful conduct. The breadth of this principle is broad. Damages for loss of use do not depend on the form of action. Nor does it depend on what the chattel is used for: it can be used to make a profit, to discharge a public function, or simply for enjoyment. There is also no need to show specific financial loss; what is being compensated is the deprivation of the use of the chattel per se. Of course, if there is evidence of specific financial loss then that may result in a greater award of damages.
>
> The question that then arises is how such a loss is quantified. The difficulty here is that the owner's loss of use is incapable of precise calculation where there is no specific financial loss beyond being deprived of the use of his or her chattel. Recognising this difficulty, the courts have not laid down a definitive measure of loss: "There is no special sanctity about any particular method of arriving at the appropriate sum". (footnotes omitted)

[97] In *BHP Coal*, McMurdo J observed that general damages for loss of use of a chattel are "an available remedy where the use of the chattel is beneficial in a profit making venture but where the plaintiff cannot or has not proved a certain loss of profit".[79]

[98] QAL contends that in the first period it was using the Damaged Aircraft as part of its fleet and lost the use of it for this purpose, which supports the claim for general damages for loss of use.

[99] As to the second period, QAL contends that while EAA had the formal right to possession and use of the Damaged Aircraft, that does not negate its claim because:

(a) EAA was a wholly owned subsidiary of QAL and under its effective control;

(b) the Damaged Aircraft was part of a fleet of aircraft used to operate a commercial airline by the Qantas Group, such that the inability of any company in the group to use the Damaged Aircraft "was inherently to the detriment of QAL as the holding company of the group";[80]

(c) any payment obligation incurred by a wholly owned subsidiary to a holding company by the payment of rent is a neutral transaction because the value of the gain to QAL was matched by the diminished value of the subsidiary; and

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79 (2008) QSC 141 at [938].

80 Outline of Submissions of the Plaintiffs at [87].

(d) the governing principle of compensation is to be applied, which requires a sum so far as money can do to put the party in the same position as he or she would have been in if the tort had not been committed but without overcompensation,[81] which in the present case would take into account that but for the tort having been committed, QAL would have had use of the Damaged Aircraft. If QAL does not recover, it contends that it would be undercompensated as the right to lease payments from a subsidiary is a financially neutral transaction and EAA has no right to recover compensation for its direct loss of use of the Damaged Aircraft so QAL does not benefit indirectly.

[100] The fact that EAA paid QAL rent for the Damaged Aircraft under the Sub-lease Agreement, which was not disputed, does not necessarily disbar QAL from claiming damages for loss of use of the Damaged Aircraft if in fact it was to continue to use the Damaged Aircraft after it sub-leased it to EAA. It will be for QAL to prove that it is worse off from not having the Damaged Aircraft. I accept, however, that the entry into the Sub-lease Agreement does not exclude QAL being able to claim consequential loss if it can show that the Damaged Aircraft would have been utilised by or on behalf of QAL in the second period. It does not, with respect, logically flow that it is only by disregarding the existence of different legal entities and treating the Sub-lease Agreement as nothing, that it can be said that QAL lost the use of the Damaged Aircraft. The way that QAL and the Qantas Group operate the business of the airline is not irrelevant to assessing whether consequential loss can be claimed. I do not consider that the basis of QAL's claim for consequential loss is inarguable, although for the reasons below I consider the pleading is deficient.

[101] QAL, however, contends that the present case bears similarity to the bucketwheel in the case of *BHP Coal* because it is impossible to try and isolate what difference to the profitability of the Qantas Group the Damaged Aircraft made, however, it is the loss of use of a chattel in a profit-making enterprise which is ordinarily remedied by general damages reflecting the capital value or interest on a capital value.[82] In contrast to the passage in *BHP Coal* relied upon by BMD, QAL contends that there

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81 Flanagan J referred to the overriding principle in *Rider v Pix* (2019) 2 QR 205 at [39] as being a matter which must be borne in mind.

82 As to which see *Rider v Pix* (2019) 2 QR 205 at [37].

is an available remedy where the use of the chattel is beneficial in a profit-making venture but where the plaintiff cannot or has not proved a certain loss of profit. That is made clear by McMurdo J at paragraph [938] of *BHP Coal* in the quote to which I have referred above.

[102] Even accepting that it may not be possible to discern how the Damaged Aircraft contributed to QAL's profit, there is in my view a deficiency in the claiming of consequential loss insofar as the 2FASOC does not plead sufficient material facts in paragraph 1AA to support the basis upon which QAL was deprived of the use of the Damaged Aircraft after the internal restructure, albeit that QAL does not need to prove financial loss consistent with the principles in *Rider v Pix*. As it stands, the pleading in paragraph 22D of the 2FASOC is vague and embarrassing. Paragraph 22D should be struck out with liberty to replead.

**Other Complaints with the 2FASOC**

[103] BMD complains that paragraph 21G of the 2FASOC does not provide any basis to support the proposition that money paid into a pool of funds by EAA ceased to be EAA's money not that EAA paid NJS "on behalf of [QAL]" or pursuant to a prior arrangement with QAL. According to what Mr Daws told Ms Jenner after the EAA Operating Agreement was entered into, it made more logical sense for EAA to manage it. To the extent that paragraph 21G pleads that the agreement was entered into for and on behalf of QAL or pursuant to a prior arrangement between the QAL, it has a factual basis.

[104] However, that the payment of valuable consideration by EAA to NJS for and on behalf of QAL is not borne out by the particulars that have been provided. The notion that because payments were made from a pool of funds by QAL does not, without more, support the allegation. The allegation is also potentially inconsistent with paragraph 22AA of the 2FASOC, which Ms Jenner says is supported by evidence that QAL made the payments. Ms Jenner's affidavit refers to QAL's insurer funding the repaid costs rather than them being funded by EAA. While the evidence of Ms Jenner based on what she had been told supports the fact that the insurer was funding the repairs, there is no evidence as to how that arrangement was put into effect, namely whether it was by reimbursement or the insurer paying the costs directly. Mr Collins, the Qantas Group Head of Insurance, informed her both

occurred. I am not satisfied that the particulars are an invention, but they do not support the allegation as to payments by EAA. Paragraph 21G should be struck out with liberty to replead.

[105] As to paragraph 22AA of the 2FASOC, by which it is pleaded that the cost of repairs were paid for by QAL, the particulars rely on the common intention of QAL and EAA. In submissions, Mr McKenna KC maintained the correctness of the pleading. It is supported, although barely so, by the evidence of Ms Jenner and what she was told by Mr Collins. Paragraph 22AA will have to be further particularised in order for BMD to understand the basis of the allegation made, but BMD has not established a basis upon which it should be struck out.

[106] As to paragraph 22 of the 2FASOC, I do not consider that the pleading is unsubstantiated. I do not consider that the particulars in sub-paragraphs (i) and (ii) should have been pleaded as material facts.

**Abuse of Process**

[107] BMD understandably complains about the backflip that has been made between the previous statement of claim and the 2FASOC. As I have stated above, that may bring in issues of credit at the trial. It does not, however, support the contention that the pleading should be struck out on the basis of an abuse of process. Ms Jenner has provided evidence to demonstrate that there is a factual basis for the case now pleaded, albeit somewhat mystifying that such incomplete instructions could have been provided in the first place including by people now relied upon to support the pleading. It is not a case which falls within the principles of *Lawrance v Lord Norreys*,[83] nor is it a case in which the Court's procedures are being deployed for illegitimate purposes.[84] Ms Jenner has explained how the presumptions upon which the previous statement of claim was based were misconceived. She maintained that position in cross-examination and I considered her evidence credible. It has not been demonstrated that the case pleaded now is an artificial construct or vexatious.

[108] I am satisfied that QAL has established it has an arguable case in law and in fact, albeit that it has a number of hurdles to overcome. The circumstances of the case are

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83 (1890) 15 App Cas 210.

84 *Rogers v The Queen* (1994) 181 CLR 251 at 286.

unusual and raise matters not directly addressed in the authorities, but QAL has identified a sufficient legal basis justifying its pleading albeit success will depend on the characterisation of the facts and the Court being satisfied that the legal principles should be extrapolated to grant QAL damages. I am not satisfied that the amendments are a mere distraction from the real issues in this proceeding. The high threshold for striking out the amendments made has not been met.[85]

[109] However, I am satisfied that paragraph 22D of the 2FASOC should be struck out with liberty to replead for the reasons set out above.

**Orders**

[110] The Orders of the Court are as follows:

1. **Paragraphs 21G and 22D of the 2FASOC be struck out with liberty to replead.**
2. **The defendant's application is otherwise dismissed.**
3. **If the parties cannot agree orders as to costs, they are to provide submissions by email to the Associate to Brown J for the question of costs to be determined on the papers within fourteen days.**
4. **The parties are to provide directions as to the filing and serving of a further statement of claim, further amended defence and a reply to the Associate to Brown J within fourteen days to be decided on the papers unless her Honour requires the matter to be listed for further directions.**

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85 *Mio Art Pty Ltd v Macequest Pty Ltd (No 2)* [2013] QSC 271 at [36].