SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**McLennan v Meyer Vandenberg**
Citation:	**[2020] ACTCA 7**
Hearing Date:	12 November 2019
Decision Date:	5 February 2020
Before:	Burns and Mossop JJ and Robinson AJ
Decision:	See [110]
Catchwords:	**APPEAL –** DAMAGES – Scope of liability – solicitors' negligent failure to advise on contract for sale of land – government buy-back scheme applied to appellants' asbestos affected property – whether scheme broke chain of causation – whether scheme fully restored the appellants – it did – further claim for economic loss – not established on the evidence **APPEAL** – DAMAGES – Disappointment and distress – no recognised psychiatric illness – whether s 35 of the *Civil Law (Wrongs) Act 2002* (ACT) applies to contract and tort – it does **APPEAL –** GENERAL PRINCIPLES – Award of interest – not including period after Calderbank offer made.
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT), ss 19, 24, 27, 32-36, 40, 41, 45, 46, 49 *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) *Civil Liability Act 1936* (SA), ss 51, 53 *Civil Liability Act 2002* (NSW), ss 27, 28, 31 *Court Procedures Rules 2006* (ACT), r 1619 *Fair Trading Act 1992* (ACT), ss 12, 46(1) *Law Reform (Miscellaneous Provisions) Act 1955* (ACT)
Cases Cited:	*ACCC v Top Snack Foods Pty Ltd* [1999] FCA 752; ATPR 41-708 *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 *Browne v Dunn* (1894) 6 R 67 (HL) *Coulton v Holcombe* (1986) 162 CLR 1 *Farley v Skinner* [2002] 2 AC 732 *Henville v Walker* [2001] HCA 52; 206 CLR 459 *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111 *I & L Securities Pty Ltd v HCW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 *Jarvis v Swan Tours* [1973] QB 233. *Johnson v Australian Casualty Co Ltd* (1992) 7 ANZ Insurance Cases 61-109 *Leitch v Reynolds* [2005] NSWCA 259; Aust Torts Reports 81-806

McLennan v Clapham & Ors [2019] ACTSC 1
McLennan v Clapham & Ors (No 2) [2019] ACTSC 100
Malec v JC Hutton Pty Ltd [1990] HCA 20; 169 CLR 638
Marks v GIO Australia Holdings Ltd [1998] HCA 69; 196 CLR 494
Medlin v State Government Insurance Commission (1995) 182 CLR 1
Monaghan v Australian Capital Territory (No 2) [2016] ACTSC 352; 315 FLR 305
Murphy v Overton Investments Pty Ltd [2004] HCA 3; 216 CLR 388
Nguyen v Cosmopolitan Homes (NSW) Pty Ltd [2008] NSWCA 246
NSW Lotteries v Kuzmanovski [2011] FCAFC 106; 195 FCR 234
Paul v Cooke [2013] NSWCA 311; 85 NSWLR 167
Perry v Sidney Phillips & Son [1982] 1 WLR 1297
Potts v Miller (1940) 64 CLR 282
Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL (1994) 179 CLR 332
State of NSW v Ibbett [2005] NSWCA 445; 65 NSWLR 168
Steiner v Magic Carpet Tours Pty Ltd [1984] ATPR 40-490
Thomson v Young [2013] NSWCA 300
Wallace v Kam [2013] HCA 19; 250 CLR 375
Walmsley v Cosentino [2001] NSWCA 403
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514
Zoneff v Elcom Credit Union Ltd (1990) 94 ALR 445; ATPR 41-058

Texts Cited:

Commonwealth of Australia, Review of the Law of Negligence: Final Report (2002)
Explanatory Memorandum, Civil Law (Wrongs) Amendment Bill 2003 (ACT)

Parties:

Karen McLennan (First Appellant)

Andrew Spong (Second Appellant)

The Partnership of RA Clapham & Ors t/as Meyer Vandenberg (Respondent)

Representation:

Counsel

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File Numbers:

AC 4 and 18 of 2019

Decisions under appeal:

Court/Tribunal:	Supreme Court of the ACT
Before:	McWilliam AsJ
Date of Decision:	29 January 2019
Case Title:	McLennan v Clapham & Ors

Citation:	[2019] ACTSC 1
Court/Tribunal:	Supreme Court of the ACT
Before:	McWilliam AsJ
Date of Decision:	18 April 2019
Case Title:	McLennan v Clapham & Ors (No 2)
Citation:	[2019] ACTSC 100

THE COURT:

Introduction

1. In 2009 the appellants purchased a house. Prior to doing so they received advice from an employee of the respondents, a partnership of solicitors. After a trial in the Supreme Court the primary judge found that the advice was negligent: see *McLennan v Clapham & Ors* [2019] ACTSC 1 (*McLennan*). There is no appeal in relation to that finding. This appeal concerns the extent of damages awarded for that negligence.

2. There is also a separate appeal by the respondents against the costs order in favour of the appellants made by the primary judge: see *McLennan v Clapham & Ors (No 2)* [2019] ACTSC 100 (*McLennan (No 2)*).

Facts

3. In 2008 and 2009 the appellants had searched for a family home to purchase. They identified a four bedroom house in Griffith as being suitable. They put in an 'expression of interest' in the property and consulted a firm of solicitors, the respondents. On 2 March 2009 they sent an unsigned contract to the respondents for advice. The period for expressions of interest closed on 11 March 2009. The appellants' offer, which appears to have been part of their 'expression of interest', was accepted. They signed a letter of engagement with the respondents on 18 March 2009 and on the same day attended at the offices of the respondents to go through the contract. They saw a conveyancing clerk. They did not see a qualified solicitor but they did not know that this was the case at the time. They received only very limited advice about the possible presence of asbestos on the premises.

4. Within the contract for sale there were a number of documents relating to the presence of asbestos, including a Certificate of Completion of Asbestos Removal Work dated 25 August 1993 and a document setting out the scope of work for removing loose asbestos fibres from the ceiling, wall cavities and subsurface of the residence. There was also a lease conveyancing inquiry which recorded that "ACT Planning and Land Authority records indicate that a form of Asbestos is or has been present on this land…".

5. In 2013 the appellants were informed by a tradesman that the house was a "Mr Fluffy house". It is now notorious in Canberra that a Mr Fluffy house is a house in which loose-fill asbestos insulation was installed by a company bearing that name. In February 2014 the appellants received a letter from the ACT government advising them to have the property tested by a licensed asbestos assessor to see whether loose-fill asbestos had come into the house. It was at this point that the appellants learned that

loose-fill asbestos was a significant health and safety risk and that it may still be present in their house.

6. The appellants received a report from an environmental consultant in June 2014 which indicated that there were asbestos fibres within the house.

7. On 28 October 2014 the ACT government announced a buy-back scheme for houses contaminated by loose-fill asbestos. This scheme involved the government purchasing contaminated houses from the owners at a market value assessed on the basis that the premises were not, in fact, contaminated. The date at which the market value was assessed was 28 October 2014, the date the scheme was announced. Following the announcement of the scheme, the appellants and their family moved out of the property as they did not consider the house to be safe. They moved into a rental property in Barton and subsequently to another rental property in Forrest.

8. On 9 January 2015 the appellants received from the ACT government a valuation of the property of $1,876,000. This was the average of two valuations commissioned by the government. The appellants had also commissioned their own valuation of $1,700,000. Each valuation was performed upon the assumption that the property was not affected by asbestos. The appellants accepted the government's buy-back offer and settled on the transfer on 30 June 2015.

9. The house was then demolished by the ACT government. Under the buy-back scheme owners were entitled to repurchase their block following the demolition and removal of the contaminated house. The appellants decided to do this and repurchased the site for $1,210,000. They then spent approximately $1,386,000 building a new home on the site. In August 2017 the property with the new house was valued at $2,450,000.

The primary judge's reasons

10. Her Honour identified that the claim pleaded was in negligence, breach of contract and as misleading and deceptive conduct contrary to s 12 of the *Fair Trading Act 1992* (ACT). She also identified that the claim referred to equitable relief, but that was not pursued at the hearing. Her Honour made factual findings consistent with the summary of the facts set out above.

Claim in negligence

Breach of duty

11. Her Honour then turned to consider whether or not there had been a breach of duty of care. It was uncontroversial that a duty of care was owed. Her Honour identified the content of the solicitor's duty of care. She then considered the reports of two solicitors who gave expert evidence as to what advice would have been given by a competent solicitor in 2009.

12. The expert evidence before her Honour identified that a competent solicitor or conveyancer ought to have advised a prospective buyer of the risk of discovery of asbestos in cavity walls in the property, that preventative measures and additional costs would be involved in any alteration of the structure, that there was no guarantee that asbestos removal had been undertaken properly and that there may be an effect on the market value of the house by reason of these matters. Neither expert solicitor considered that a solicitor would have advised potential purchasers to make further inquiries (unless planning substantial renovation) or to obtain an independent asbestos

assessment report. However, both recognised that it would be a matter for the client to determine how to proceed in light of the advice given.

13. Her Honour found that the respondents were simply shown the contract for sale and the pages of the document were turned over allowing the appellants the opportunity only to skim read each page. She found that this did not amount to the provision of competent legal advice. Her Honour found that the asbestos information in the contract required someone to properly explain to the appellants exactly what the risks and consequences were, so as to allow them to make an informed decision about whether to make further inquiries and ultimately whether to purchase the property. The primary judge found that the respondents breached their duty of care to the appellants. There is no appeal against this finding.

Causation

14. Her Honour then turned to consider causation. This required consideration of ss 45 and 46 of the *Civil Law (Wrongs) Act 2002* (ACT) (CLW Act). Her Honour rejected a submission that, even with proper advice, the appellants would have proceeded to purchase the property anyway. She referred to the first appellant's evidence that had there been any doubt about the safety of the house she would not have moved the family into it. Her Honour found that the appellants "would have had cause at least to pause for thought": *McLennan* at [87]. She found that the actions of the appellants were those of cautious people, having sought advice before signing the documents and being quite particular about the type of property that they were prepared to buy. She did not accept that they would have gone ahead regardless. She accepted the evidence of the first appellant that she would not have proceeded to purchase the property had she been given the requisite advice. Her Honour then found that the appellants "would have either been sufficiently concerned upon receiving the advice to seek a current asbestos assessment report for themselves, or made the contract subject to a satisfactory report as to the presence of asbestos, or refrained from purchasing the Griffith property altogether": *McLennan* at [88]. Her Honour was satisfied that although the lack of provision of adequate advice had not been the sole causative factor in the appellants purchasing the property, the advice reached the threshold of being a "necessary condition" of the happening of the harm and that it was appropriate for the scope of the defendant's liability to extend to the harm caused, subject to what she said subsequently about various heads of damage: *McLennan* at [89].

Damages

15. Her Honour then turned to consider the components of the damages claimed by the appellants. So far as relocation and holding costs were concerned her Honour awarded a total of $37,638.34. This comprised a number of different components:

    (a) $14,038.91 for asbestos assessment, independent valuation, compulsory house insurance, rates, utilities and interest on the mortgage;

    (b) $2,643 for moving costs;

    (c) $34,571.43 for rent of alternative accommodation from the date when the appellants moved out of the property until 30 June 2015; and

    (d) a reduction of $13,615 being the amount of a relocation assistance grant from the ACT government.

16. At [98] her Honour found that on 30 June 2015 "the ACT Government paid full current market value for the Griffith Property, valued on the basis that it was uncontaminated by asbestos". The judgment continued (at [99]):

> At that point, the plaintiffs were fully restored to the position they were in before buying the Griffith property. The buy-back of the Griffith property was a superseding event that broke the chain in causation from that date. The intervention of the ACT Government and the plaintiffs' acceptance of the offer had the effect of entirely mitigating any ongoing or further loss the plaintiffs may have suffered in entering into the initial conveyance.

17. In light of those findings her Honour then turned to consider "repurchase and building costs": *McLennan* at [101]-[105]. The findings of her Honour on this issue were as follows:

    (a) The subsequent costs of repurchasing the property and building a new house on it were not properly referrable to the negligence of the respondents.

    (b) The appellants had the money to buy whatever other property they saw fit and were not bound to repurchase the property.

    (c) There may have been sound reasons why the appellants chose to repurchase the property but "it is not a choice that they were locked into, nor can it be said that any negligent advice of the [respondents] had any continuing operative effect at that point… At the point when the [appellants] made the decision to repurchase the Griffith property site, they were in full possession of all the facts relevant to an asbestos affected property. The impact of any lack of advice on the part of the [respondents] had thus been reduced to zero": *McLennan* at [103];

    (d) The scope of the respondents' liability did not extend to losses resulting after the point in time when the appellants had been "fully restored to the position they were in before the conveyancing transaction that was the subject of the [respondents'] retainer": *McLennan* at [104].

    (e) For the same reasons, rental accommodation, internet and storage costs claimed after June 2015 were not referrable to the respondents' negligence.

18. Even if the above reasoning was wrong, her Honour found that the appellants now had an asset of $2,450,000 as at 24 August 2017. Some of the expenses incurred in constructing the house involved personal choices of the appellants beyond replacement of what was previously built, the details of which were not traversed by the parties. Having regard to the value of the asset in 2017, her Honour found that (at [108]):

> Even if I had accepted that the building costs were referrable to the negligence as found, I am unable to discern that the plaintiffs suffered any significant loss in building the house.

19. She then turned to address the claim of the first appellant for $800,000 in economic loss. This was based upon the proposition that, having been employed as a management consultant up until 2012, she would have been able to start a consulting business in February 2014, working full-time and earning $200,000 per year: *McLennan* at [29]. Her Honour identified a number of reasons why that claim failed. Firstly, the evidence of the plaintiff did not explain the reasons why she could not work full-time or part-time from 2014 to date. Secondly, because of the payment from the ACT government, any loss from 30 June 2015 was not caused by the respondents. In

relation to the period between 1 July 2014 and 30 June 2015, her Honour was not satisfied that the first appellant would have worked any more than the amount disclosed by her taxable income in that year. The evidence did not disclose that the first appellant had taken any steps towards establishing a consulting business as at June 2014: *McLennan* at [115]. Instead, her Honour found that at the time when the first appellant alleged that she would have been working, she had been out of the workforce for a year and was caring for her school aged children. Her Honour concluded: "That was a lifestyle choice she made completely unaffected by any negligence of the [respondents]": *McLennan* at [116]. That was consistent with the fact that as at the date of the hearing there was no evidence that the first appellant had commenced any consulting business "in any serious ongoing way, as opposed to casual sporadic jobs". Her Honour continued (at [118]):

> While I accept that there was a possibility that the first [appellant] could have been working during the period, that is insufficient to establish that on the balance of probabilities, 'but for' the negligence of the [respondents], the first [appellant] would have been both working and that the nature of the work would have been the operation of a consulting business in [the] 2014/2015 financial year.

20. Thirdly, the expert accounting evidence calculating the quantum of the loss alleged by the first appellant was based on factual assumptions which were not made out. Her Honour said: "There really was no evidentiary basis for those assumed figures whatsoever" and "none of the assumptions appeared to be based on anything more than speculation or guess work": *McLennan* at [123].

21. Her Honour then turned to the claim for disappointment and distress: *McLennan* at [125]-[129]. She identified that the appellants based their claim on the principle articulated in *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 (*Baltic Shipping*). That principle is that damages for disappointment and distress are not recoverable following a breach of contract that does not cause physical injury unless, relevantly, one of the following exceptions apply: the disappointment and distress arises from physical inconvenience caused by the breach or the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation. Her Honour found that the claim was misconceived. That was because in *Baltic Shipping* the contract was for a pleasure cruise, being a contract the object of which was to provide enjoyment and relaxation. Her Honour distinguished that from the contract in the present case, which was for the provision of legal advice. She said that the object of the legal advice "was not to guarantee that the [appellants] would enjoy living in their new home" but rather "to ensure that the [appellants] were aware of risks and consequences of buying the Griffith property": *McLennan* at [126].

22. She then referred to two New South Wales (NSW) cases in which modest amounts had been awarded for distress arising from a solicitor's negligence: *Walmsley v Cosentino* [2001] NSWCA 403; *Leitch v Reynolds* [2005] NSWCA 259; Aust Torts Reports 81-806. Her Honour noted that those cases had been decided prior to the introduction of s 31 of the *Civil Liability Act 2002* (NSW) which limited liability to pay damages for pure mental harm resulting from negligence unless the harm consisted of a recognised psychiatric illness. She accepted the submissions of the respondents which relied upon s 35 of the CLW Act (the equivalent in the Australian Capital Territory (ACT) of s 31 of the *Civil Liability Act*) and the decision in *Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352; 315 FLR 305 (*Monaghan*). She identified that the appellants had not claimed that there was any recognised psychiatric illness. She

found that even if there was a contractual breach, then having regard to ss 19 and 41 of the CLW Act the claim for damages would have been precluded by s 35: *McLennan* at [129].

Claim in contract

23. Her Honour then considered the claim in contract: *McLennan* at [130]-[136]. Her Honour had "little difficulty" in finding that the facts as found also constituted a breach of the respondents' retainer with the appellants: *McLennan* at [131]. Her Honour found that the damages arising from the appellants' reliance on the respondents' conduct caused them harm in the same manner as that established in the claim in negligence. She found that there were no additional damages arising from any loss of expectation, because had the contract been performed with the appropriate advice being given, the appellant would not have proceeded with the purchase of the property. As a consequence, the buy-back of the property put the appellants in the same position as if the contract had been performed. Similarly, for the reasons that she had given in relation to the negligence claim, damages for disappointment and distress were not recoverable.

Misleading and deceptive conduct

24. She then considered the misleading and deceptive conduct claim: *McLennan* at [137]-[155]. The relevant provision was s 12(1) of the *Fair Trading Act* which provided that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. The primary judge was satisfied that the conduct of a solicitor engaged in professional activities provided legal advice "in trade or commerce".

25. Her Honour identified that this aspect of the claim was poorly pleaded. The submission put by the appellants was that the representation made by the respondents was that they could provide competent legal advice in the contract for sale of the Griffith property. This took the claim no further than the claim based upon negligence or breach of contract, even though the appellants submitted that they were not alleging negligence in this aspect of the claim: *McLennan* at [146]. Instead, her Honour was prepared to assume, as the respondents had done, that the representation was that the history of asbestos contamination in the Griffith property did not pose a risk for the appellants if they purchased that property. She assumed that the representation was made by silence because the appellants were entitled to expect that the respondents would have advised them of any such risk: *McLennan* at [147]. Her Honour then identified the principles to be applied to the assessment of damages for misleading and deceptive conduct by reference to cases including *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 (*I & L Securities*); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Henville v Walker* [2001] HCA 52; 206 CLR 459 (*Henville*) and *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; 196 CLR 494.

26. Her Honour identified that in the case of a misrepresentation which induces a plaintiff to enter into a contract to purchase a property, the plaintiff's loss, apart from any question of consequential damages, is measured by the difference between the price paid or payable under the contract and the value of the property at the date of the contract: *McLennan* at [151]. However, she recognised that such principles are not prescriptive, and the court may take a variety of approaches in arriving at a measure of damages

appropriate to compensate a person who has altered his, her or its position by a misleading or deceptive representation: *McLennan* at [152].

27. The primary judge then found that whether the representation was that asserted by the appellants or as characterised by the respondents, it did not give rise to any separate or additional entitlement to damages beyond that applicable to the other causes of action. She referred to the terms of s 46(1) of the *Fair Trading Act* which required that the loss or damage be "by conduct" and said (at [155]):

> The question is whether the expenses incurred by the [appellants] after 30 June 2015 were 'by conduct' of the defendants. For the reasons given above in relation to the claims in negligence and breach of contract, I have found that there were no losses after that date that could properly be said to be attributable to the conduct of the defendants and that finding applies whether the conduct was classed as a breach of duty of care, a breach of contract, or a misrepresentation.

Result

28. The end result was that her Honour ordered that judgment be entered in favour of the appellants in the sum of $37,638.34 (see [15] above). She indicated that the parties would be heard in relation to costs. The issue of costs was the subject of subsequent orders for which reasons were given: *McLennan (No 2)*. These orders are challenged by the respondents in the costs appeal.

Grounds of Appeal

29. The grounds of appeal are as follows:

    1. The learned primary judge erred in determining that the plaintiffs were "fully restored" to the position they were in before the respondents' negligent conduct as a result [of] their participation in the ACT Government's buy-back scheme.

    2. The learned primary judge erred in determining that the buy-back of their property by the ACT Government was a superseding event that broke the chain in causation from 30 June 2015.

    3. The learned primary judge erred in holding that the appellants' participating in the buy-back scheme had the effect of entirely mitigating any ongoing or further loss that the appellants may have suffered as a result of the respondents' negligence.

    4. The learned primary judge erred in holding that, as a result of the buy-back scheme:

        a. The respondents' negligent advice ceased to have any operative effect;

        b. The impact of any lack of advice on the part of the respondents had been reduced to zero; and

        c. The fact that the appellants' property had been demolished and certified free from asbestos before they purchased the land meant that the lack of advice from the respondents about asbestos was irrelevant.

    5. The learned primary judge erred in holding that it was not appropriate to extend the scope of the respondents' liability to a point in time after they had been restored to the position they were in before the conveyancing transaction in which the respondents had acted for the appellants.

    6. The learned primary judge erred in holding that rental accommodation and other holding costs were not recoverable after 30 June 2015.

7. The learned primary judge erred in holding that the appellants did not suffer any significant loss in putting themselves back into the position they would have otherwise been in but for the respondents' negligence, namely by rebuilding a house which had to be demolished due to its contamination with asbestos.

8. The learned primary judge erred in holding that the value of the house re-built by the appellants had to be offset against the construction costs of that house.

9. The learned primary judge erred in holding that the appellants had not established their claim to repurchase and rebuilding costs.

10. The learned primary judge erred in failing to award any damages for the appellants' costs of repurchasing their land and rebuilding their home.

11. The learned primary judge erred in holding that the first appellant's claim for economic loss was not established on the evidence.

12. The learned primary judge erred in failing to award any damages for the first appellant's economic loss.

13. The learned primary judge erred in holding that a *Baltic Shipping Co v Dillon* clause was not or could not be implied into the retainer between the appellants and the respondents.

14. The learned primary judge erred in holding that the appellants' claim for damages for disappointment and distress was excluded by section 35 of the *Civil Law (Wrongs) Act 2002.*

15. The learned primary judge erred in failing to provide the appellants with procedural fairness by permitting the respondents to provide further written submissions beyond the time limited by her Honour's order without affording the appellants with the opportunity to respond to those submissions.

16. The learned primary judge erred in failing to award damages for disappointment and distress.

17. The learned primary judge erred in coming to the same conclusion on the appellants' claim for breach of contract as on their claim in negligence.

18. The learned primary judge erred in concluding that the appellants were not entitled to a different award of damages on their claim for misleading or deceptive conduct.

19. The learned primary judge erred in failing to award interest on damages.

30. The appellants seek judgment in their favour in the sum of $767,971.48 plus interest. They also seek orders requiring the respondents to pay the appellants' costs of the proceedings before McWilliam AsJ and of the current appeal.

31. The grounds of appeal may conveniently be grouped in the manner that the appellants addressed them as follows:

    (a) Grounds 1-10, 17 which address the consequences of the buy-back of the property in 2015 for the damages recoverable by the appellants;

    (b) Grounds 11-12 which address the first appellant's claim for economic loss;

    (c) Grounds 13-16 which address the appellants' claim for damages for disappointment and distress.

    (d) Ground 18 which addresses the appellants' claim in relation to misleading and deceptive conduct; and

(e) Ground 19 which address the primary judge's failure to award interest.

Effect of the sale of the property (Grounds 1-10, 17)

Appellants' submissions

32. The appellants contended that the receipt of $1,876,000 from the ACT government as part of the buy-back scheme did not break the chain of causation because it did not amount to a full restoration of the appellants to the position that they were in prior to receiving the negligent advice.

33. They placed significance upon the fact that there was an eight-month gap between the date of valuation (28 October 2014) and the payment of that amount (30 June 2015). They contended that there is a difference between "fair compensation" provided under the scheme and "full compensation" to which they claim to have been entitled. Consequently, they submitted that the finding that payment on 30 June 2015 represented full market value for the property was not open to her Honour. Because the payment did not represent full compensation, the appellants contended that it was not sufficient to break the chain of causation.

34. In order to support this contention the appellants pointed to the fact that they did not have a permanent residence after 30 June 2015, as they had sold their previous home in Narrabundah when they purchased the Griffith property. Although the primary judge had found that they were not "locked into" repurchasing and rebuilding on the Griffith property, the primary judge had not found that there was a suitable replacement residence in a similar area available for purchase as at 30 June 2015. They submitted that the decision to rebuild the property was not unreasonable and did not break the chain of causation. Rather, they submitted that the scheme mitigated the damages suffered.

Respondents' submissions

35. The respondents contended that it was not open to the appellants to submit that the amount paid to them on 30 June 2015 did not represent market value at that date on the basis that it had instead been assessed as at 28 October 2014. They contended that no such case was pleaded or run at trial. They submitted that the appellants were raising for the first time on appeal the submission that they did not receive fair market value for the Griffith property as part of that process. They pointed to the fact that the appellants did not at trial lead any evidence as to a different valuation of the Griffith property as at 30 June 2015.

36. Next, they contended that the appellants' case before the primary judge was that they would not have proceeded to purchase the Griffith property had appropriate advice been given. As a consequence, for the purposes of the assessment of damages in tort the position of the appellants would be that they would not have purchased the property for $1,375,000 in 2009 and should be restored to that position adjusted to present day value. They submitted, consistently with the findings of the primary judge, that the sale of the property for fair market value (assessed without reference to the defect) was sufficient to restore them to their pre-negligence position. It was the appellants' own decisions after accepting payment from the ACT government to repurchase the property that led to any losses after that date.

Decision

37. The fundamental issue for the assessment of damages for the respondents' negligence was whether or not the appellants could recover damages said to arise after 30 June 2015 in light of the surrender of their lease to the ACT government and the receipt of payment of $1,876,000 as part of the buy-back scheme. The primary judge proceeded on the basis that the payment represented "full current market value" for the property: *McLennan* at [98]. The submissions of the appellants challenge that conclusion and thereby seek to characterise the payment not as a novus actus interveniens which severed the causal link with subsequent costs incurred by the appellants, but instead as merely an item in mitigation of those losses.

38. The difficulty with the submissions now put on behalf of the appellants is that this was not the case that was run at trial. There was no attempt at trial to draw a distinction between the value of the property as at the valuation date of 28 October 2014 and the date of payment, 30 June 2015. As a consequence, there was no attempt by the appellants to prove (and there was no evidence) that the value of the property as at 30 June 2015 was different to the value of the property as at 28 October 2014. Similarly, there was no claim that the appellants were entitled to interest upon the valued amount from the valuation date until the payment date. Rather, the case was conducted on the basis that the amount paid to the appellants represented the market value of the property but that nevertheless the appellants were entitled to losses that extended beyond the payment date.

39. In our view, the appellants cannot demonstrate any error in the finding made by her Honour at [98] (set out at [16] above) that the appellants were paid full current market value for their property on 30 June 2015. That is for two reasons. Firstly, and most importantly, it is because there is no evidence that establishes that the market value as at 30 June 2015 was different to that as at 28 October 2014. That is fatal to the present submission. The second reason is related to the first. Clearly enough, had the issue been one in contention below, some evidence of value at 30 June 2015 would have been necessary. That evidence may have been the subject of contest. It is clearly a case where "evidence could have been given which by any possibility could have prevented the point from succeeding". In those circumstances the point cannot be taken on appeal: *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

40. The question is then, whether having received the payment of market value in June 2015, that was sufficient to sever the chain of causation. We consider that her Honour correctly concluded that it did. That is for three reasons. First, the contention before the primary judge was that had proper advice been given, the property would not have been purchased. Had the respondents not been negligent the appellants would have had to find a house elsewhere. The case was properly analysed as a 'no transaction' case. Therefore, damages should not be assessed on the basis that the appellants were to end up in the Griffith property.

41. Second, the property was an asset acquired at a value greater than its true value. A common but not invariable starting point for the assessment of loss in those circumstances is the difference between the price paid and true value: *Potts v Miller* (1940) 64 CLR 282. If the claiming party has been compensated for the price paid then that will largely remove the consequences of the tort. In a case, such as this one, where the asset is held for a period and appreciated in value along with the market in the same way as an alternative property might have, then the payment of market value

of the asset assessed without regard to the relevant defect will largely remove the consequences of the tort. Clearly enough there may be ancillary expenses which need to be compensated. However, the starting point is that the difference between the amount paid and value received represents the loss incurred. Because under the buy-back scheme the purchase at market value was assessed without regard to the asbestos contamination, the difference between the amount paid and value received was, in this case, zero.

42. Third, it was not a case in which the circumstances rendered the assessment of losses in this manner inappropriate. Given that it was a no transaction case, the starting point was not that the appellants were entitled to end up in the Griffith house. The circumstances were not such that having purchased the house the appellants were stuck with it in the same way that a person who purchased a business on the basis of a misrepresentation may be. The evidence of the first appellant as to the searches undertaken for another property to purchase demonstrated some scarcity in the area where they wished to purchase, but was not sufficient to establish that the full market value received from the Territory could not be deployed in 2015 in the same manner as their original purchase price could have been deployed in 2009 to purchase another property. No contention was put forward on appeal that there was some financial impediment to the appellants using the amount received from the ACT government to purchase another house. There were therefore no factual circumstances which rendered it inappropriate to treat the receipt of market value as full compensation for the purchased asset and the subsequent decision to repurchase the land from the Territory as being unrelated to the negligence of the respondents.

43. Analysed within the framework of s 45 of the CLW Act, the reasoning is as follows. Factual causation is established because but for the negligence of the respondents the appellants would never have purchased the Griffith property, never lived in it, never been subject to the buy-back scheme and never had the opportunity to repurchase it from the government and redevelop it. The relatively accommodating test in s 45(1)(a) is therefore satisfied.

44. However, it is s 45(1)(b) that has real work to do in this case. Unlike s 45(1)(a), s 45(1)(b) is a normative question: *Wallace v Kam* [2013] HCA 19; 250 CLR 375 at [14]. It is in this limb of the test for causation that matters such as novus actus interviens must be considered, as they incorporate unexpressed value judgments*:* see *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 at [69]; *Thomson v Young* [2013] NSWCA 300 at [12]; *Paul v Cooke* [2013] NSWCA 311; 85 NSWLR 167 at [86]; Commonwealth of Australia, Review of the Law of Negligence: Final Report (2002) (Ipp Report) at [7.43]. In determining the scope of liability the court is obliged to consider whether or not, and why, responsibility for harm should be imposed upon the negligent party: s 45(3).

45. In our view each of the three reasons outlined above, taken in combination, indicate that it is appropriate that the scope of the respondents' liability not extend beyond the point at which the appellants surrendered and were paid the market value for their property. Their subsequent conduct in repurchasing the property, redeveloping it and the associated rental and holding costs, involved voluntary acts on their part which they chose to engage in and go beyond an appropriate scope of liability for the negligent advice in relation to the purchase of the property. The conclusion of the primary judge at [104] that the scope of the respondents' liability did not extend beyond the buy-back was therefore correct.

46. The appellants' submissions did not address ground 17 which asserted error on the part of the primary judge in coming to the same conclusion on the appellants claim in contract as in the claim in negligence. Although not codified, the principles to be applied to the scope of damages recoverable in the contractual claim are not so different as to require the effect of the buy-back to be ignored or demonstrate any error in the primary judge's approach.

First appellant's claim for economic loss (grounds 11, 12)

Appellants' submissions

47. The appellants submitted that there was "ample evidence" to support the first appellant's statement that she could not work because of "asbestos issues". The submissions identified that the family moved multiple times between 31 October 2014 and the completion of the rebuild of their house. They referred to evidence that the first appellant had made submissions to the Heritage Council for permission to demolish the property and had been involved in lobbying government on her own part as well as part of an affected owners group known as Fluffy Owners and Residents' Action Group (FORAG). They also referred to the evidence that she was upset that she had exposed her family and friends to asbestos. The submissions contended that there was a failure to comply with the rule in *Browne v Dunn* (1893) 6 R 67. The first appellant was asked about her contention that she was unable to work between 2014 and the date of the trial because of asbestos issues. She answered "largely unable to work, yes" but was not further challenged in cross-examination on that issue. It was not suggested to her that her inability to work was, as her Honour found, a lifestyle choice. The appellants referred to the evidence that even if she had not started her own business she could have acted as a subcontracted consultant and that the "asbestos issues" first arose in February 2014. The submission also referred to the approach to damages identified in *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638 (*Malec*) at 642-643. In oral submissions counsel emphasised the decision in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 (*Medlin*).

Respondents' submissions

48. The respondents submitted that the reasoning and factual findings of the primary judge were sound and without error. They submitted that the economic loss claim was founded upon assumptions provided to the accounting expert but that evidence was not advanced to allow the primary judge to find that those assumptions were made out. They identified that no *Browne v Dunn* point was taken at trial in circumstances where the closing submissions of the respondents made it clear that they challenged the factual foundation for the claim. They further referred to the decision of the High Court in *Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL* (1994) 179 CLR 332 for the proposition that it is first necessary to prove on the balance of probabilities that the claimant has suffered some loss or damage and then the value of the opportunity may be ascertained by reference to the degree of probabilities or possibilities. They pointed to the fact that the claim of loss through the 2015 buy-back was precluded by the finding of her Honour that liability of the respondents did not extend beyond this date. In relation to the period prior to June 2015, they contended that the conclusions of the primary judge were correct.

Decision

49. The most relevant portions of her Honour's decision are [29]-[31] and [110]-[114]. Those passages are as follows:

> 29. In relation to the claim for lost income, the first plaintiff was a management consultant and had finished employment with Courage Partners at the end of 2012 with a view to commencing her own business in the future. At that time, she took long service leave. The first plaintiff believes she would have been able to start a consulting business in February 2014, working full time and earning $200,000 per year. She based that figure on the fact that her time had previously been charged out by Courage Partners at anywhere between an average of $1,600 and $1,800 a day.
>
> 30. The first plaintiff thought she would have incurred only $10,000 of costs in earning that income, a figure that she had estimated based on the professional indemnity costs of a former colleague who had set up his own consulting business. She had not factored in any other business expenses.
>
> 31. The first plaintiff had not worked full time in the five-year period between 2012 and 2016. She had undertaken some limited casual work as a business analyst during that period. She was not working as at the date of the hearing.
>
> …
>
> 110. The first plaintiff claims $800,000 for economic loss over the period July 2014 to 30 June 2017. However, there are a number of reasons why this aspect of the claim fails.
>
> 111. First, the evidence of the first plaintiff did not touch upon the reasons why she apparently could not work full time or even part time from 2014 to date. That was a significant issue given that as at the beginning of 2013, the plaintiff was not working at all. She had taken a year's leave and then she intended to start her own business at some point. Her evidence was that as at 2014 she was either going to continue working as an employee or set up her own business.
>
> 112. The first plaintiff was asked whether the financial information that she provided to the expert accountant was true and correct, and confirmed that it was. However, the first plaintiff gave no evidence about why she could not work or follow either of her contemplated paths.
>
> 113. In cross-examination, the first plaintiff was asked a question about being largely unable to work from 2014 to date 'because of asbestos issues', and she confirmed that was correct. That is the highest the evidence rises. Such evidence is not sufficient to establish that on the balance of probabilities, but for the negligence of the defendants, the first plaintiff would have been employed or working as a self-employed consultant earning up to $200,000 per year over the period 2014 to 2018. The case for economic loss was simply not proved on the evidence.
>
> 114. Second, for the reasons already given above in relation to the plaintiffs being fully restored to the position they were in prior to engaging the defendants at the point where they were paid $1.876 million for the asset, I do not accept that any economic loss was caused by the defendants from 30 June 2015 onwards.

50. In light of the conclusion above that the primary judge was correct in declining to award damages after the surrender of the property on 30 June 2015, there was no error on her part in refusing to award damages for economic loss incurred by the first appellant during this period. The claim of the first appellant was quantified as commencing on 18 February 2014 based on either an average daily rate of $900 or $1500.

51. There was evidence that in June or July 2014 FORAG was formed. The first appellant and her husband prepared "an impact statement" in August 2014 which described in their own words the effect of the "fluffy situation" upon them. In her oral evidence she recorded that she met with a Mr Andrew Hibberd who was at that time the head of the Asbestos Response Taskforce which was contemplating a pilot program of remediation in relation to heritage homes such as the appellants' at that stage. In September 2014 she started speaking to builders and architects about the cost of replacing their home. She recorded that between October 2014 and November 2015 she was looking at houses within their area that were available and some outside the area. She described the history of moving houses while the property was being redeveloped.

52. She was asked whether the "financial information" that she provided to the expert accountant was "true and correct to the best of your knowledge and belief" and she said that it was. The answer suggested to give rise to a *Browne v Dunn* point was given in passing in cross-examination which explored the fact that her claim was based on earning $200,000 a year, when she had never in fact earned that amount at any time prior to 2013. Following the conclusion of the cross-examination the primary judge asked some questions relevant to the employment claim. The first appellant identified that after completing a job in 2012 she was completely burnt out. She said that there "were a lot of issues associated with it so that is why I took the leave off". She said she had worked for 25 years without having any long service leave and took time off. She was then asked about the estimates of expenses that she had made and indicated that they were limited to the costs of insurance. In re-examination she said that "in the absence of not having the whole asbestos issue" she would have been able to work three or four days a week for either 38, 42 or 44 weeks per year and that $800-$1000 per day would be a reasonable estimate of the rates that might have been available to her. She was never specifically asked why it was that she was unable to return to her consulting activities in a more substantial way.

53. The evidence disclosed modest and variable income in 2014 ($44,272), 2015 ($11,531), 2016 ($11,244) and 2017 ($19,292).

54. Unfortunately, the evidence as it was led from the first appellant was sparse and provided no substantial explanation of the connection between the "asbestos issues" and the failure to engage in the way alleged in consulting work either as a subcontractor or in her own business.

55. There was no good evidence of the first appellant having taken steps towards consultancy. There was very little evidence that would suggest that the "asbestos issues" took up so much time as to be inconsistent with carrying out consulting work on a part-time basis. That was even more so where at least some of her involvement was assisting other owners of Mr Fluffy properties rather than addressing her own circumstances.

56. The onus on the appellants was to demonstrate that she would have returned to consulting in the manner alleged. In circumstances where the evidence in support of that contention was slender it was well open to the primary judge to have concluded, as she did, that the claim for economic loss had not been substantiated.

57. Neither the decision in *Malec*, nor that in *Medlin* assist the appellants. The principle in *Malec* applies to the assessment of damages after liability is established. Past events which might have occurred and future or hypothetical events are assessed by reference to the degree of their likelihood, rather than being treated as certain to occur

or not occur if there is a better than even chance in favour of either proposition. The *Malec* principle would have been applicable if the first appellant had established the reason that she did not return to consulting was because of the asbestos in her house or the consequences of it. If that had been proved then the hypothetical future scenarios would have had to have been assessed by reference to their respective likelihoods. However, whether there was any loss in this category was dependent upon the first appellant proving on the balance of probabilities that the reason that she did not work more than she in fact did was because of the asbestos in the Griffith property. She did not do that in relation to the periods before or after 30 June 2015. Had Mr Malec failed to prove on the balance of probabilities that the reason he was not working was his neurotic condition then the issues about how to assess hypothetical future events would not have arisen. So too here.

58. Similarly, *Medlin* does not assist the appellants. It requires that the loss of earning *capacity* be reflected in an *actual* financial loss. In the present case the first appellant did not assert any loss of capacity in a mental or physical sense, as in a personal injury case. She did suggest that "asbestos issues" took up so much of her time that she was unable to work more than she did. The principle in *Medlin* had no application in the present case because the first appellant did not establish any loss of earning capacity in the relevant sense.

Damages for disappointment and distress (Grounds 13-16)

Appellants' submissions

59. At trial the appellants had claimed a total of $150,000 for "disappointment and distress experienced by each Plaintiff caused by the physical inconvenience (being the loss of the family home)". The figure of $75,000 per appellant that was claimed at trial was not selected by reference to any particular principle or precedent, but rather because, as senior counsel for the appellants explained it: "It's as good as any other, your Honour".

60. The appellants submitted that at the conclusion of the hearing before the primary judge, her Honour had given the respondents leave to provide further cases with pinpoint references on the subject of the claim made pursuant to *Baltic Shipping*. The appellants complain that what was in fact provided was a further submission attaching six cases which raised new issues including the operation of the CLW Act. They submitted that had they been afforded the opportunity they would have made the following submissions:

    (a) *Baltic Shipping* recognised that damages for anxiety or distress may be recoverable where the purpose of the contract was to provide pleasure or enjoyment of the contracting party and that in this case "the contract had a purpose of providing security and assurance for a purchaser who was buying the family home in which to live".

    (b) While the provisions of the CLW Act did postdate the decision in *Baltic Shipping* they were based upon the provisions of the *Law Reform Miscellaneous Provisions Act 1955* (ACT) (LRMP Act) and, as provisions analogous to these did not preclude the decision in *Baltic Shipping*, nor should the provisions of the CLW Act.

    (c) The CLW Act is not coextensive with a breach of contract as a breach of a contractual promise might not involve negligence.

(d) The decision in *Monaghan* referred to by her Honour did not involve a claim in contract, only a claim in negligence.

61. Although any defence based on s 35 of the CLW Act was not pleaded in the respondents' defence, the grounds of appeal in this court did not raise any pleading point, only a substantive denial of procedural fairness arising from the manner in which her Honour dealt with the provision of supplementary authorities.

Respondents' submissions

62. The respondent submitted:

(a) Having regard to the transcript of proceedings before the primary judge there was no denial of procedural fairness.

(b) *Baltic Shipping* was clearly distinguishable as it was a contract for a pleasure cruise, the object of which was to provide enjoyment and relaxation. The object of the retainer in the present case was not enjoyment or relaxation in the *Baltic Shipping* sense.

(c) The trial judge was correct in holding that a claim for disappointment and distress was excluded by s 35 of the CLW Act in circumstances where the appellants did not suffer from a "recognised psychiatric illness". Counsel for the respondents identified that s 32 defines the term "negligence" in the same terms as in s 40, which falls within Ch 4 of the CLW Act entitled "Negligence". That chapter includes s 41 which provides that the chapter "applies to all claims for damages for harm resulting from negligence, whether the claim is brought in tort, in contract, under statute or otherwise." He submitted that given that s 32 contains the same definition of negligence it should be interpreted as applying to any case where a failure to exercise reasonable care and skill was relied upon, whatever the formal cause of action was. As a result, he submitted that s 35 should be interpreted as extending to a claim in contract.

(d) Contrary to the appellants' submissions, s 35 was not derived from the LRMP Act and hence involved a clear change in the law which post-dated the decision in *Baltic Shipping*.

(e) If a contract that had "a purpose of providing security and assurance for a purchaser who was buying the family home in which to live" was sufficient to give rise to a claim for damages and distress then this would raise policy issues and would represent a significant departure from the existing law throughout Australia.

Decision

63. The appellants' contention that they were denied procedural fairness is only as significant as the submissions that they say would have been made had they been given an opportunity to make them. If those submissions as to the law are good ones then they will succeed on the substantive grounds of appeal that raise those issues. If the submissions are not good ones then, as the points were limited to questions of law, any denial of procedural fairness has been cured by the opportunity to make submissions on appeal. It is therefore appropriate to examine the merits of those

submissions before returning to whether or not there was, in fact, a denial of procedural fairness.

The manner in which the claim was argued below

64. Before the trial judge, paragraph 45(g) of the Further Amended Statement of Claim (FASOC) identified the relevant head of damages for the purposes of the claim in negligence, breach of contract and breach of the *Fair Trading Act* as follows:

> Damages for disappointment and distress experienced by each Plaintiff caused by the physical inconvenience (being the loss of the family home) arising from the Defendant's breach of the Retainer Contract, including the clause pleaded at paragraph 21A above;

65. Paragraph 21A of the FASOC pleaded that it was a term and the object of the retainer agreement with the respondents that the respondents would provide the appellants with all reasonable and necessary advice to ensure that the house and the property were free from known or discoverable defects and fit for occupation and use as a family home.

66. A wide range of damages were listed in paragraph 45 of the FASOC. The damages identified in paragraph 45 were picked up by the separate claims for relief in the form of damages for negligence, breach of contract and under the *Fair Trading Act*. The reference to physical inconvenience in paragraph 45(g) of the FASOC may be explicable by the fact that this is one of the categories of exception to the general rule that damages for distress and disappointment are not recoverable in a claim in contract. Although counsel put submissions to the primary judge and to this court in more general terms, no attempt was made to amend the pleadings to broaden the scope of the claim for distress and disappointment. As a consequence, the scope of the appellants' claim remained at all times limited by the fact that it related to distress and disappointment caused by the *physical* inconvenience of losing the family home.

67. In oral submissions the primary judge was taken to the decision of the High Court in *Baltic Shipping*. Her Honour pointed out that the whole point of the decision in *Baltic Shipping* was that damages for distress and disappointment could be awarded when the purpose of the contract was to provide "some sort of enjoyment". Senior counsel for the appellants appeared to put the submission that it was sufficient that the appellants were planning on purchasing a property that they would normally enjoy. He then moved on to make reference to a portion of the decision of Brennan J in *Baltic Shipping* (at 369) in which his Honour emphasised the availability of such damages in tort. Senior counsel said: "So while I may not persuade your Honour in contract, in tort the situation, in my submission, is entirely different and it's an ordinary consequence of it." Having referred to some other portions of the judgment, he referred to the judgment of McHugh J which he said emphasised that "the tortious aspect is clear and that damages are recoverable".

68. In written submissions provided to the primary judge reference was made to the decision in *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297, although the facts of the case summarised in the submissions appear to have been confused with those of *Farley v Skinner* [2002] 2 AC 732 (*Farley*). *Farley* was a case in which a surveyor had, in addition to his usual tasks in relation to a property that was going to be purchased, been asked to express an opinion as to whether or not the property would be affected by aircraft noise. He negligently reported that he thought it unlikely that the property would suffer greatly from aircraft noise. The House of Lords held that although general

damages could not be awarded for the plaintiff's state of mind caused by the mere fact of the contract being broken, general damages could be awarded in circumstances where the provision of amenity had been a major or important part of the contract (rather than its sole object). This was an evolution of the "holiday cases" exemplified by *Jarvis v Swan Tours* [1973] QB 233. The decision in *Farley* is therefore consistent with the limited exceptions identified in *Baltic Shipping*. It is distinguishable from the present circumstances in that freedom from aircraft noise was a specific object of the contract. It recognises the capacity to award damages for physical inconvenience in the sense of sensory impacts upon the claimant.

69. When referring to the quantum of the claim senior counsel for the appellants made clear to the primary judge the nature of the claim, submitting that:

> I perhaps unnecessarily remind your Honour of the distress that was palpable on [the first appellants] face and when she broke down, considering what the effect of all this might be on her children.
>
> …
>
> For a mother to be subject to the thought and possibility that her children might later in life suffer the symptoms resulting from exposure to asbestos is, in my submission, something that sounds considerably in damages and not something like $5000 for the interruption to a pleasure cruise in New Zealand. It is a significant aspect of damages, and in my submission, $75,000 for each [appellant] is in the circumstances a modest and a reasonable assessment.

70. Thus, although pleaded as a claim arising from physical inconvenience, the manner in which it was put at trial was as a claim for what might be referred to as pure distress.

71. No reference was made in the appellants' submissions to the primary judge concerning the possible application of s 35 of the CLW Act to this aspect of the claim, whether framed in tort or contract.

Section 35 of the CLW Act

72. Section 35 of the CLW Act provides:

> **35 Mental harm – damages**
>
> (1) Damages must not be awarded for pure mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.
>
> (2) Damages must not be awarded for economic loss for consequential mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.

73. Section 32 provides the following definitions relevant to the interpretation of s 35(1):

> ***consequential mental harm***, to a person, means mental harm to the person that is a consequence of bodily injury to the person.
>
> …
>
> ***mental harm***, to a person, means impairment of the person's mental condition.
>
> ***negligence*** means failure to exercise reasonable care and skill.
>
> …

pure mental harm, to a person, means mental harm to the person other than consequential mental harm.

74. It is clear that in the present case only s 35(1) could be applicable. What was involved was "pure mental harm" because it was mental harm other than mental harm that was a consequence of bodily injury to the person. We consider that distress or disappointment is "mental harm" within the definition because it is an impairment of the person's mental condition: *State of NSW v Ibbett* [2005] NSWCA 445; 65 NSWLR 168 at [124]; see also the reference to 'mere sadness' in the Explanatory Statement for the *Civil Law (Wrongs) Amendment Bill 2003* (ACT) at 5.

75. The operation of s 35 is, therefore, as follows. Where there is "bodily injury", general damages may be awarded which may include compensation for mental harm falling short of recognised psychiatric illness. The limitation in s 35(2) precludes an award of damages for economic loss (i.e. special damages) unless there is a recognised psychiatric illness. In contrast, where, as here, there is no "bodily injury", the prohibition in s 35(1) precludes any damages being awarded, special or general, unless there is a recognisable psychiatric illness.

76. In the present case the respondents seek to rely upon s 35 in answer to both the appellants' claim in tort as well as their claim in contract. Whether the section can apply to claims in contract as well as claims in tort depends upon the application of the definition of "negligence" in s 32 of the CLW Act. For the reasons that follow, the reference in the definition of "negligence" in s 32 of the CLW Act to "failure to exercise reasonable care and skill" is one which applies whether the cause of action relied upon is in tort or contract.

77. Chapter 3 of the CLW Act is entitled "Liability for death or injury". In Pt 3.2 (which contains ss 32-36) there is no specific statement that the part applies to any cause of action which alleges a failure to exercise reasonable care and skill whether in contract or in tort. Negligence is defined as "failure to exercise reasonable care and skill", an expression which is neutral as to the cause of action relied upon.

78. The absence in s 32 of an express statement as to the causes of action to which it applies contrasts with a number of other provisions in the CLW Act which expressly state that provisions in the Act apply whether the claim is made in tort or contract. In Ch 4 (entitled "Negligence") the application provision, s 41, makes it clear that the chapter "applies to all claims for damages for harm resulting from negligence, whether the claim is brought in tort, in contract, under statute or otherwise". In Ch 5, the provisions relating to pre-court procedures turn upon the definition of "claim" in s 49 which makes express that the references to "claim" in the chapter cover all claims for liability for personal injury "whether the liability is based in tort or contract or on another form of action…" These provisions are of particular significance because they were introduced at the same time as Pt 3.2 by the *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) and one would expect a degree of drafting coherence amongst the new provisions that were being introduced. The contrast between Pt 3.2 and the manner in which the legislature has dealt with the issue in Chs 4 and 5 may be considered to give rise to a negative implication that, notwithstanding the generality of the language in the definition of "negligence" in s 32, s 35 is only intended to apply to a claim in tort of negligence and not intended to apply to a contractual failure to exercise reasonable care and skill.

79. We do not accept that such a negative implication should be drawn.

80. First, as pointed out above, the definition of "negligence" which is expressed to mean "failure to exercise reasonable care and skill" is not confined to a tortious failure. The generality of its language is apt to include any failure to exercise reasonable care and skill, whether that is the subject of a tortious or contractual duty.

81. Second, the explanatory material indicates an intention, when introducing the provisions of Pt 3.2, to implement the recommendations of the Ipp Report. The explanatory statement for the bill which became the *Civil Law (Wrongs) Amendment Act* made it clear that it was intended to implement recommendations 33-38 of the Ipp Report: see Explanatory Statement at 5. Relevantly, recommendation 34 of the Ipp Report provided that there should be no liability for mental harm that was not a consequence of physical harm unless the mental harm consisted of a recognised psychiatric illness. The report included recommendation 2, that the legislation proposed by the report apply to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim was brought in tort, contract, under statute or any other cause of action. Similarly, recommendation 35, which addressed that part of recommendation 34 going to the scope of a duty of care (not directly in issue in this case), was that the recommendation should apply regardless of whether the claim for pure mental harm was brought in tort, contract, under statute or any other cause of action. Interpretation of ss 32 and 35 in a manner consistent with the Ipp Report would be consistent with the legislative intention as disclosed in the explanatory statement.

82. Third, the explanatory statement indicated that the changes proposed in the provisions which became s 35 were "based on" the provisions of the *Civil Liability Act 2002* (NSW) and those proposed in the Law Reform (Ipp Recommendations) Bill 2003 (SA): see Explanatory Statement at 8. So far as the NSW legislation was concerned, s 31 of the *Civil Liability Act* provided "There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness." "Negligence" was defined in s 27 to be a failure to exercise reasonable care and skill and s 28 provided, consistent with the Ipp recommendations, that the provisions that included s 31 applied to "any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise". The provisions that were inserted into the *Wrongs Act 1936* (SA) (which became the *Civil Liability Act 1936* (SA)) by the South Australian bill referred to in the explanatory statement made express that they were confined to "accidents", but covered claims in negligence, an unintentional tort or a breach of a contractual duty of care: ss 51, 53.

83. Fourth, the provisions of the CLW Act outside Chs 4 and 5 are not strongly suggestive that the provisions of the Act would otherwise be confined to causes of action in tort. Chapter 2, Pts 2.1, 2.2 and 2.2A relating to good samaritans, volunteers and food donors apply to "civil liability" rather than any particular form of action. For the purposes of contributions between wrongdoers in Pt 2.5, 'wrong' is defined in s 19 to include "breach of a contractual duty of care that is concurrent and coextensive with a duty of care in tort". Other provisions in Ch 3 such as s 24 apply generally to "wrongful act[s] or omissions" which would give rise to an entitlement to recover damages. Section 27, which is also within Ch 3, turns on the definition of "wrong" which includes an act or omission that gives rise to a liability in tort as well as a contractual duty of care that is concurrent and coextensive with a duty of care in tort. These provisions do not

demonstrate any clear policy that would suggest that the generalised language in the definition of negligence in s 32 should be confined to a cause of action in tort.

84. In light of the above it is, in our view, appropriate to interpret the reference to "failure to exercise reasonable care and skill" in the definition of negligence in s 32 as covering any cause of action which contains as an element such a failure, and not limiting it to the tortious cause of action of negligence. The consequence of this is that the reference to negligence in s 35(1) includes a claim in contract for a failure to exercise reasonable care and skill. It is therefore apt to cover a failure by the respondents to comply with the implied obligation in their retainer to exercise reasonable care and skill. It precludes recovery by the appellants of damages for disappointment and distress in the present case because the appellants did not claim to suffer a recognised psychiatric illness. It leaves unaffected causes of action in contract not asserting a failure to exercise reasonable care and skill, leaving the exceptions to the general contractual rule discussed in *Baltic Shipping* still available in such claims.

85. The above is enough to dispose of grounds 13, 14 and 16. However, two further points should be noted:

    (a) The pleaded claim was for "damages for disappointment and distress… caused by the physical inconvenience… arising from the Defendant's breach of the Retainer Contract". A claim based upon physical inconvenience is a recognised exception to the unavailablilty of damages for disappointment and distress in contract: *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111; *Baltic Shipping* at 362-363; *Johnson v Australian Casualty Co Ltd* (1992) 7 ANZ Insurance Cases 61-109 at 77, 521). Section 35 would preclude such damages if it was the mental consequences of that physical inconvenience for which damages were awarded. Given the pleading in the present case was in terms confined to distress and disappointment, it was not necessary to address the possibility (which was not argued) that physical inconvenience is compensable in itself and not merely by reason of the mental harm that flows from.

    (b) The submission made by the appellants that the relevant provisions of the CLW Act were a restatement of the provisions of the LRMP Act and hence were in force at the time of the decision *Baltic Shippping* was clearly misconceived. While some of the provisions of the CLW Act were re-enactments of the LRMP Act, the provisions of Pt 3.2, including ss 32 and 35 were not. They were clearly new provisions introduced as an amendment to the CLW Act in 2003 to implement some of the recommendations of the Ipp Report. They therefore clearly post-dated *Baltic Shipping* and that case cannot be seen to have been decided in the context of such provisions.

Procedural Fairness

86. The rejection of the appellants' substantive submissions means that there could be little, if any, substance to the denial of procedural fairness point (Ground 15). However, for the reasons that follow, there was no denial of procedural fairness.

87. During his submissions to the primary judge senior counsel for the appellants submitted that the claim for $800,000 for loss of earnings was not a matter of all or nothing. He said "I've been racking my brains to think of the authority in tort that says that where there's a possibility of loss of income, then that possibility has to be

compensated for". He asked for leave to send the reference to the primary judge's associate but subsequently during later submissions identified the authority as *Medlin*. (Given the proposition for which he was citing it, the authority should probably have been *Malec*.) Towards the end of his oral submissions to the primary judge counsel for the respondents sought leave to address the authority to which the appellants had referred. The discussion with the primary judge was to the effect that references to cases would be provided. There was then a discussion about the claim for distress and inconvenience and the primary judge said that "if you want to put an authority on response to *Baltic Shipping*, then my direction covers that".

88. The email ultimately provided to her Honour's associate was more than a bare list of authorities. It explained the propositions for which the authorities were given, identifying authorities in two categories: authorities for the proposition that damages for distress and disappointment were not available where the claimant has not established that they suffer from a "recognised psychiatric illness" and authorities relating to the quantum of damages awarded for disappointment and distress in two solicitor's negligence cases, both of which were identified as predating the *Civil Liability Act*. In other words, the additional authorities addressed the *Baltic Shipping* issue rather than the *Medlin/Malec* issue. So far as its subject matter was concerned, it was clearly within the scope of the leave granted by her Honour. Although the communication involved more than a bare list of authorities it did not add much more. It was copied to the solicitors for the appellants. No complaint was made at the time that the communication went beyond that which was permitted by the primary judge. Nor was there any application by the appellants to provide any additional references or submissions in response at any time in the six months after 27 July 2018 and prior to the delivery of the primary judge's decision on 29 January 2019.

89. While it is true to say that the reference to the operation of the CLW Act was significant, and not a matter addressed by the appellants in their submissions, in the circumstances there was no denial of procedural fairness to the appellants.

Misleading and deceptive conduct (Ground 18)

Appellants' submissions

90. The appellants submitted that the term "loss or damage" referred to in s 46 of the *Fair Trading Act* was not to be given a narrow meaning and it was not appropriate to apply the measure of damages recoverable under analogous torts such as deceit or negligent misrepresentation. They submitted, by reference to authorities such as *I & L Securities* and *Henville,* that it would be appropriate to permit the appellants to recover the cost of repurchasing and rebuilding a house on the property and other consequential losses. Further, they referred to the decision in *ACCC v Top Snack Foods Pty Ltd* [1999] FCA 752; ATPR 41-708 (*Top Snack Foods*) at [92]-[94] for the proposition that the range of damages available in an action for misleading and deceptive conduct extended to include damages for anxiety even where there was no medical or psychological evidence to support such an award. The appellants submitted that the primary judge had erred in taking the same approach to damages for misleading and deceptive conduct as she had for negligence and contract.

Respondents' submissions

91. The respondents repeated their submissions in relation to the claim for damages in negligence and contract, namely that upon the sale of their property the appellants were restored to the position they would have been in the absence of that conduct, with the consequence that the claim could not give rise to any additional entitlement to damages.

Decision

92. Although the claim based upon the *Fair Trading Act* was identified as being badly pleaded, the primary judge proceeded, as the defendant did, on the basis that the representation was "broadly that the history of asbestos contamination in the Griffith property did not pose a risk for the plaintiffs if they purchased the Griffith property": *McLennan* at [147]. Neither party contended that her Honour was wrong to proceed in this way.

93. The primary judge recognised that where a misrepresentation induces a plaintiff to enter into a contract to purchase property, the starting point for the measure of damages is the difference between the price paid or payable under the contract and the value of the property as at the date of the contract. Her Honour recognised that consequential damage may also be recovered. She also recognised that this principle on assessing damages was not prescriptive and the court may take a variety of approaches in arriving at a measure of damages appropriate to compensate the person who has altered his, her or its position by a misleading or deceptive representation.

94. In this case there was no error on the part of the primary judge in proceeding on the basis that the starting point for the assessment of damages was that the appellants were fully compensated by the acquisition of their property at full market value. Clearly the scope of loss and damage for the purposes of the *Fair Trading Act* is not confined in a way that limits the loss and damage arising from the acquisition of an asset to the difference between the price paid in its true value. To confine an award of damages by analogy to the damages recoverable in a common-law cause of action for deceit would be to fail to give effect to the language of statute: *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; 216 CLR 388 at [44]. Her Honour did not adopt such a confined approach. That damages are not so confined did not compel the court to award all losses subsequent to the purchase. In this case the purchase of the property by the Territory in 2015 gave to the appellants not only the price paid at purchase but also the full increase in the value that would have occurred had the property been unaffected by asbestos. In that way, notwithstanding the passage of time since the acquisition, the appellants were compensated for their investment in the property. They were also compensated for losses consequential upon the discovery of asbestos contamination up until the point when the purchase by the Territory was completed. So far as their conduct after that point was concerned, their repurchase of the property arose from a voluntary decision on their part which was not caused by the respondents' negligence. It was not a case where for financial or other reasons the appellants were stuck with an asset which they could not readily dispose of. In light of the voluntary decision of the appellants, it is insufficient to establish a causal connection to subsequent losses that had they never lived on the block they would not have chosen to repurchase and rebuild.

95. So far as the claim for disappointment and distress due to inconvenience is concerned, at trial the appellants made no submissions specifically addressed to this aspect of

their claim. They did not refer the primary judge to the decision in *Top Snack Foods*. That case involved misrepresentations as to the profitability of a franchise agreement which led to the claimants and their families being committed to a losing venture over substantial periods, involving far more work than they would reasonably have foreseen. Tamberlin J said (at [92]-[94]):

> 92. In addition to the above figures the claimants seek an award for anxiety or disappointment occasioned by their exposure to the stress of being involved in the franchises.
>
> 93. The authorities indicate that in an appropriate case damages can be awarded for vexation or anxiety arising from losses suffered through misrepresentation: see *Collings Construction Co Pty Ltd v Australian Competition and Consumer Commission* (1998) 152 ALR 510 at 511, and *Humphries v TWT Ltd* (1993) 120 ALR 693.
>
> 94. I am satisfied in each of the matters that a small award should be made under this head. There is no specific evidence as to medically established anxiety but it would be quite unrealistic to proceed on the basis that substantial distress was not caused to the claimants as a consequence of the misrepresentations. The claimants and their families were committed to a losing venture over substantial periods involving far more work than they could have reasonably foreseen. In my view, it is self-evident that such situations produced a significant degree of distress and anxiety which would not have occurred if the claimants had not acted on the misleading conduct of the respondents. There is no way of calculating an appropriate figure, but I consider that in each case a figure of $2,500 in respect of each claim would reasonably recognise and compensate the [distribution agents] for the extra stress and anxiety occasioned. In awarding this figure, of course, I have treated it as compensatory in nature and not punitive.

96. Awards of damages for mental stress have been awarded under trade practices legislation in *Steiner v Magic Carpet Tours Pty Ltd* [1984] ATPR 40-490 at 45,642-45,643; *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445 at 468; ATPR 41-058 at 51,747; *NSW Lotteries v Kuzmanovski* [2011] FCAFC 106; 195 FCR 234 at [119]-[123]. Although Hill J in *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at 151 declined to make an award for stress and inconvenience, his Honour did recognise that "it is open in an appropriate case to award such damages".

97. At trial senior counsel for the appellants made no separate reference to the claim for disappointment and distress under the *Fair Trading Act* as opposed to the claims in negligence and contract. That was consistent with the way in which the claim for damages was pleaded. Although the chapeau to paragraph 45 of the FASOC made reference to losses being caused by breach of the retainer contract, breach of duty and breach of the *Fair Trading Act*, paragraph 45(g) used language which confined the claim to breach of the retainer contract. It provided:

> Damages for disappointment and distress experienced by each Plaintiff caused by the physical inconvenience (being the loss of the family home) arising from the Defendant's breach of the Retainer Contract, including the clause pleaded at paragraph 21A.

98. Thus the paragraph by its terms confined the claim to damages arising from the breach of the retainer contract. That was consistent with its drafting, being targeted at the well recognised physical inconvenience exception to the rule that damages for distress or disappointment are not awarded for breach of contract.

99. In circumstances where the head of damages is, by its terms, confined to damages arising from breach of the retainer contract rather than negligence or misleading and deceptive conduct and no reference was made in oral or written submissions to the primary judge to this aspect of the claim, except in the context of the contractual case of *Baltic Shipping*, has the primary judge erred in failing to make an award of damages?

100. In our view the primary judge did not err. While in most cases it would not be appropriate to adopt too strict an analysis of the terms of pleadings, the combination of the limited terms of the pleaded head of damages and the failure in submissions to address the claim mean that the appellants have not established any error on the part of the primary judge in failing to make an award in response to this aspect of the claim.

101. Had the pleadings or approach at trial been different, any award under this head would have been modest as it would have been confined to the disappointment and distress associated with the physical inconvenience of having been required to move from the family home in October 2014.

Failure to award interest (Ground 19)

Appellants' submissions

102. The appellants submitted that they had claimed interest in their Amended Originating Claim and in their FASOC. The trial judge failed to award interest on the damages that had been awarded. The appellants submitted that there was no reason why interest should not have been awarded and that the failure to award interest was an error. Counsel for the appellants provided calculations of interest at Court Procedures Rules rates in relation to the components of the judgment awarded by her Honour. The total amount of interest so calculated was $8122.96. This was said to be the minimum award of interest appropriate because, for ease of calculation, interest on progressively accruing rental expenses was only calculated from the end of the period for which the award was made rather than when each rental payment was made.

Respondents' submissions

103. The respondents contended that interest was not awarded because at the hearing the appellants were silent as to any claim for interest, any basis for an entitlement to interest, any appropriate rate and any period relevant to the award of interest.

104. They also point to their Calderbank letter dated 19 July 2018 in which they offered to settle the proceedings on the basis that the appellants obtain a judgment of $100,000 and the respondents pay the appellants' costs. Given that the appellants were awarded a lesser amount the respondents identified that under rule 1619 the court could only award interest for a period after that offer if special circumstances justify the making of such an order.

Decision

105. The fact that the appellants may have made no reference to interest in their submissions to the primary judge does not mean that the claim for interest was abandoned. Pre-trial orders routinely made in personal injury proceedings in the Supreme Court impose a requirement that a party provide a schedule of damages which includes each component of damages claimed including any claim for interest

and directs that any head of damage or claim for interest not included in the schedule will be treated as having been abandoned. No such directions were made in the present case.

106. The reasons of the primary judge do not disclose any consideration of the award of interest. It appears to have been an oversight contributed to by the inadequacy of the submissions made on behalf of the appellants. It is appropriate that an award of interest be made. The calculations of interest provided by counsel for the appellant included interest up until the date that judgment was given (29 January 2019). The effect of rule 1619(7)-(8) is that if a plaintiff does not receive a judgment that is more than 110% of the settlement amount offered, then the court must not order the payment of interest for a period after that settlement amount is offered, unless there are special circumstances to justify the making of the order. There are no special circumstances that warrant a departure from this rule. The respondents made their offer to settle proceedings on 19 July 2018, shortly before the commencement of the trial on 23 July 2018. It is therefore appropriate to limit the award of interest to the period up until 19 July 2018 and not make any award of interest in relation to the period after that. Calculated to that date but otherwise in accordance with the methodology proposed by the appellants and Sch 2 Pt 2.1 of the Court Procedures Rules, the appropriate award is $7022.68.

Conclusion

107. The primary judge ordered that judgment be entered in favour of the appellants in the sum of $37,638.34. This judgment must be varied by adding to it the amount for interest referred to at [106] above, being $7022.68.

108. The judgment entered by the primary judge will be varied so that the judgment sum is increased from $37,638.34 to $44,661.02.

109. Having allowed the substantive appeal and varied the judgment in favour of the appellants it is appropriate to receive further submissions on the costs of the appeal, the costs of the trial and the disposition of the costs appeal (including the costs of that appeal).

110. The orders of the court are:

    1. Order 1 made on 29 January 2019 is set aside and in its place the order of the court is:

        "Judgment is entered for the plaintiffs in the sum of $44,661.02."

    2. The appellants in proceedings ACTCA 4 of 2019 are to file and serve written submissions limited to not more than five pages in relation to the costs of the appeal, the costs of the trial and the appropriate disposition of the appeal in ACTCA 18 of 2019 (including the costs of that appeal) by 12 February 2020.

    3. The respondents in proceedings ACTCA 4 of 2019 are to file and serve written submissions limited to not more than five pages in relation to the costs of the appeal, the costs of the trial and the appropriate disposition of the appeal in ACTCA 18 of 2019 (including the costs of that appeal) by 19 February 2020.

4. The appellants in proceedings ACTCA 4 of 2019 are to file and serve written submissions limited to not more than four pages in reply to the submissions filed and served under the preceding order by 26 February 2020.

I certify that the preceding one hundred and ten [110] numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate:

Date: 6 February 2020

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Amendments

6 February 2020	Replace [2019] ACTCA 35 with [2020] ACTCA 7	Cover page