

## Tort and Contract Compensation in Property

Real property – land, doesn't extend to some statutory leases such as mines

Compensation – not the only remedy available, there's also s. performance of contract, injunction etc.

**CASE** – Kyogle Shire Council v Francis 1988 – F purchased land from K, F intended to subdivide for profit, K claimed F has negligently issued certificates which stated incorrectly that the property was zoned to permit sub division, F claimed he purchased the land in reliance of that statement, F was awarded \$13,000, worked out by the difference between the value of the property and the value if it was subdivided, also took into account the lost opportunity of making profits being a foreseeable consequential loss, K appealed arguing F should only get the difference between the property and subdivided:

- **Clarke JA (majority)** – F claimed if he was told he couldn't subdivide he wouldn't have bought it, misrepresentation did not deprive him of the ability to subdivide it just induced him to buy the land, awarding loss of profits which couldn't have come from subdivision is against the principle, he was worse off because he paid \$1,500 too much for the land and incurred legal costs, **negligent misstatement is a tort, not contract**, put P in position had the tort not been committed, if no misrep. **he wouldn't have bought the land, therefore he wouldn't have earned profits, so cannot receive them in an award of damages**
- **Kirby CJ (dissenting)** – two ways to quantify damages:
  1. Reinstatement – damages to put P in the position they would have been in had the damage or injury not occurred
  2. Diminution in value – the purchase price of sub-divisible property and the property which was purchased

P entered into contract on the basis of a misrepresentation, he should be allowed to recover the profit as **his position changed due to the misrepresentation** – this is available when a **P can establish he could and would have entered into a different contract and would have made profit (torts only)**

### **Two Possible Measures of Damage:**

- Cost of restoration or repairs
- Diminution in value difference between the value of property before it was damaged and the value after it was damaged

e.g. worth \$80, due to breach/injury now worth \$20 – you would get \$60 in damages

**CASE** – Evans v Balog 1976 – Mr and Mrs E bought family home, demolition work started on an adjacent property and damaged the Evans' home, injunction ignored, D subsequently agreed to repair damage but this was not done, E's were forced to leave house, house was damaged and uninhabitable, D admitted liability but the extent of damages were still an issue, on appeal D argued **measure of damages is the value of the house diminished by the wrongful conduct**, held – land was zoned for high rise

therefore the house had no value so its value couldn't further diminish, **E awarded sum to the effect of r. repairs (restoration value)**, important fact that the house was a dwelling and was occupied by the owner, two ways discussed:

- **Measure of damages in contract** – put P in position had the contract been performed, builder promised to repair – compensation – reinstatement value
- **Measure of damages in tort** – put P in position had the tort not been committed – faulty building – causation is negligence, maybe nuisance – loss of family home – compensation is to giveback what they had before

#### **Damage to Land:**

- Compensation for actual damage to land can be calculated by way of negligence, nuisance or trespass – cost of repair is amount needed to put back in previous state
- Diminution in value is the value now and its value prior to the damage
- Court is not concerned about being no intent to have the land repaired – except where the repair is impossible and the land has been sold in its damaged state
- Where repair is possible and the P has kept or repaired and sold the land – if diminution in value is greater than the cost of repairs, cost of repairs is usually awarded

**CASE** – Hansen v Gloucester Developments Pty Ltd 1991 – P purchased land from D, P was aware of construction of roadways but not aware it would require removal of part of the surface of P's block, excavation removed soil and significantly eroded the plot, \$60,000 was awarded to build a retaining wall and restore soil levels, D appealed as damage caused by excavation reduced price of land by only \$16K, court held unreasonable to award \$60K

**CASE** – Belgrove v Eldridge 1953 – appellant (builder) entered into a contract with the respondent to build a house, by the time of the dispute the respondent has paid £3,100 out of the £3,500, appellant claimed to recover the £400, respondent claimed damages for departure from plans which made the building unstable, respondent awarded £4,950, appealed, departure so great that the only remedy that would place the respondent in the same position would be damages to allow demolition and re-erection, minus the demolition value of the house and moneys unpaid under the contract

**Hypothetical Calculation Formula:** Profit under transaction + Money expected under actual transaction – Profit made on the actual transaction – Money that would have been expected on the transaction

**s18 ACL** – Misleading and Deceptive Conduct – a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive

**CASE** – Gates v City Mutual Life Assurance Society Ltd 1986 – courts determine the appropriate measure of damages, not the ACL

**CASE** – Murphy v Overton Investments Pty Ltd 2004 – wrong to approach ACL which by drawing an analogy with any particular form of claim under general law, however, analogies may be helpful