
Legal notes

Private action

Kenny & Good Pty Ltd & Anor v MGICA (1992) Ltd

*Federal Court of Australia, NG 814 of 1996
Wilcox, Branson, Sackville JJ
8 August 1997*

Subsection 82(1) of the Trade Practices Act states:

A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*, the Full Federal Court considered the calculation of 'loss or damage' under s. 82 arising from a breach of s. 52 of the Trade Practices Act.

Background

The second appellant (Mr Kenny) was the principal of the first appellant (Kenny & Good Pty Ltd) which carried on business as a real estate valuer and property consultant (the valuers). The respondent (MGICA (1992) Ltd) provided mortgage insurance.

Beca Developments Pty Ltd owned a waterfront property and sought a loan from Permanent Custodians Limited (PCL) on the security of a mortgage over the property. In March 1990, MGICA's agent instructed the valuers to carry out a valuation of Beca's property, and in April 1990 Mr Kenny prepared a report which valued the property at \$5.5 million on completion. In May 1990, PCL lent Beca \$3.575 million and MGICA provided mortgage insurance to PCL.

At the beginning of the second year of the loan, Beca defaulted, and in January 1992 the property was sold for \$2.65 million. As a consequence, MGICA incurred a liability of \$1.977 million.

The trial judge found that the true value of the property, as at 18 April 1990, on an 'as completed' basis was \$3.9–\$4.0 million. The value of the property subsequently declined due to a general downturn in the property market.

The trial judge awarded MGICA the sum of \$1.977 million plus interest on the grounds that the valuers had:

- breached the duty that they owed to MGICA by failing to exercise the standard of care and skill ordinarily exercised by professional valuers of residential property; and
- contravened s. 52 of the Trade Practices Act and s. 42 of the Fair Trading Act as the valuation of \$5.5 million was so far removed from the true value of the property as to be misleading and deceptive.

Kenny & Good Pty Ltd appealed on the grounds that damages should be limited to the difference between the valuation supplied and the correct value as at April 1990, and should not include the loss attributable to the general decline in the property market.

Decision

The Full Federal Court, in a joint judgment, confirmed the trial judge's assessment of damages and dismissed the appeal, with costs.

Causes of action

The Court outlined the elements for a cause of action in negligence and under s. 82 of the Trade Practices Act.

To succeed in an action for negligence, an applicant must show that:

- the respondent owed the applicant a duty;
- the respondent breached that duty;
- the applicant suffered loss;
- the loss was caused by the respondent's breach of duty; and
- the loss suffered by the applicant was not too remote, i.e. the injury complained of was of a class or character which was reasonably foreseeable as a possible result of the negligent act or omission (*Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388).

The issue of causation and remoteness is resolved in accordance with commonsense and experience.

To succeed in claiming damages under s. 82 of the Trade Practices Act, based on an infringement of s. 52, an applicant must show that:

- the respondent engaged in misleading or deceptive conduct, in contravention of s. 52;
- the applicant sustained loss or damage; and
- the loss or damage was sustained 'by' the contravening conduct.

The Court concluded that s. 82 adopts the common law practical or commonsense concept of causation.

Damages under the Trade Practices Act

The Court recognised the following general principles.

- The rules for assessing damages in tort (compared to contract) are appropriate guides in most assessments of damages under s. 82.

- The object of awarding damages in tort is to place the applicant in the position he or she would have been in had the tort not been committed. In general, damages under s. 82 are awarded on a 'reliance' rather than an 'expectation' basis (the position may not be the same under s. 87 of the Act).
- The principles governing the assessment of damages in deceit, rather than negligent misrepresentation, provide guidance in assessing damages under s. 82 of the Trade Practices Act (*Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514).

Measure of damages in deceit

The Court concluded that, although care must be taken to examine the facts of a particular action, case law supported the following propositions.

- Where something is purchased in consequence of a misrepresentation, the *prima facie* measure of damages awarded to the defrauded purchaser is the difference between the price paid and the true value of the thing.
- This is not an inflexible rule and is merely illustrative of a more general proposition, namely, that the purchaser is entitled to recover as damages a sum representing the prejudice or disadvantage he or she suffered in consequence of altering his or her position under the inducement of the respondent's misrepresentation.
- The loss must flow directly from the inducement. Where property acquired in a transaction induced by a misrepresentation subsequently declines in value, damages are not awarded in respect of that decline if it is attributable to an independent, extrinsic or supervening cause.

Application to case

The Court concluded that the losses attributable to the general downturn in the property market were caused by, and sufficiently related to, the valuer's misleading representations as:

- MGICA relied on the valuation to demonstrate that its loan to valuation ratio policy of 65 per cent was satisfied. Had the misrepresentations not been made, MGICA would not have provided mortgage insurance in respect of the property (i.e. it was a 'no transaction case'); and
- the valuers represented that the valuation was the product of due care and skill and that it was safe to rely on their valuation for the purpose of determining whether there was a sufficient margin or cushion to guard against risks, including a decline in the property market generally. The decline in the market which occurred was one of the events contemplated by the representations on which MGICA relied.

Damages for negligent misrepresentation

Although MGICA was awarded damages under s. 82, the Court considered whether the measure of damages in tort would lead to the same result.

The Court upheld the trial judge's decision not to follow *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, in which the House of Lords stated that the duty must be in respect of the kind of loss suffered. Where the duty is to provide a valuation as opposed to advice on a course of action, the House of Lords limited the scope of the valuer's duty of care to the consequences of the valuation being wrong. The House of Lords considered that this limited damages to the difference between the valuation supplied and the correct value of the property.

The Full Federal Court agreed with the trial judge that the House of Lords had 'redefined the duty of the valuers so as to foreclose questions of causation, remoteness and measure of damages', and stated that the measure of damages was the amount of money necessary to restore MGICA to the position it was in

before the statement was made, subject to the loss being foreseeable. Given that the decline in the property market was foreseeable and that the valuers were aware that MGICA had a loan to valuation rate of 65 per cent and that MGICA's decision would be based on the valuation, the Court concluded that damages in tort should include the losses attributable to the fall in the property market.

Note: The question of the appropriate measure of damages to be applied under s. 82 is the subject of an appeal to the High Court to be heard early next year (Marks v GIO).