Some judgment writing essentials.

PREPARED BY KIM HARGRAVE.[1]

The giving of written reasons for judgment is central to a civil judge's function.

The purpose of this resource is to help judges prepare written judgments which are routinely structured in a way that the reasons for decision disclose the path of reasoning leading to the result on each issue in the case. The initial focus is on the overall structure of the judgment — requiring the judge to clearly identify the issues for determination and the logical order in which they should be considered. Next, the structure for setting out the reasoning process on each identified issue is considered. Finally, some guidance is provided as to ways in which judgments might be better expressed; with the aim of encouraging judges to write in a way which is accessible to the wide audience of interested persons and not just to lawyers.

This resource is aimed at judges of the Supreme and County Courts. But it can be applied in any court or tribunal where the decision-maker has reserved a decision and is preparing written reasons for decision. The resource is especially directed at recently appointed judges. But common sense and authoritative statements are to the effect that even experienced judges can and should continue to learn how to write more efficiently and better. This is because judgment writing is not an easy task and, as judges become more experienced, they deal with cases of ever-increasing complexity.

It is intended that this resource will be supplemented by a two-day seminar and workshop in August 2023, at which participating judges will have the opportunity to have one or more their judgments subject to review by experienced judgment writers.

1. How and when to define the issues

The first essential of writing a good judgment is to identify the issues for determination; and then prepare a logical structure as to the order in which the judgment will consider and decide each issue leading to the result in the case. If a judgment does not do that at a minimum, it may be set aside on appeal as inadequate. This is a very serious matter, as the case may have to be remitted to a different judge for a retrial — at great expense and inconvenience to the parties and the administration of justice. This is because failure to expose 'the path of reasoning' is an error of law.[2]

Some cases involve only one or two obvious issues. But in many cases, issue identification for the purposes of structuring a judgment involves distilling the many issues that have been formally raised in the pleadings and particulars into broadly stated principal issues, some of which might contain sub issues. Although good preparation should involve isolating the main issues, they cannot be finally identified until after opening submissions in the case, both written and oral, have finished. When the issues are settled, they should be listed in logical order.

Where questions of fact are in issue, the factual issues should usually be determined first, so that the facts as found can be applied to the applicable law. Where to position the facts in a judgment is discussed further below.

How to list the legal issues in a logical order should be readily apparent from the elements of the claim or defence at issue. For example, where the existence or relevant terms of the alleged contract is in issue, that issue should be considered first. In a negligence case where the existence or relevant content of a duty of care is in issue, that issue must be considered first. The remaining issues can then be dealt with in their logical order.

1 This resource was prepared by Kim Hargrave, a judge of the Supreme Court of Victoria from 2005 to 2017, a Judge of Appeal from 2017 to 2020, and currently a reserve judge.

2 Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, 279–80, 282; Hunter v Transport Accident Commission (2005) 43 MVR 130, 137 [21].

Where an issue may be dispositive of the result in the case, such as whether the court or tribunal has jurisdiction, that issue will be considered first.

In every case, discuss the issues and their order with counsel. Judges should also exercise flexibility during the trial, as issues may emerge or drop away. If so, the list of issues should be amended.

Judges should make it clear that the list of issues will form the structure of the judgment and govern the way in which final submissions must be made, and that counsel should address each issue or else abandon it.

How should the issues be defined?

Sometimes topic headings are acceptable in a judgment, for example when setting out uncontentious facts or legal principles, **but wherever possible the issues should be stated in the form of a simple question.** This is because questions have energy. They require an answer and engage the reader. Topics are merely a general indicator of the kind of discussion which follows.

Structuring a judgment according to a series of questions for determination, arranged in their logical order, should be a routine or default approach to writing a judgment. If the path of reasoning in respect of each question is clearly stated, a structured judgment in this form will ensure that the purpose of giving reasons is achieved and avoid the ultimate embarrassment of later having an appeal court hold that the reasons are inadequate.

2. How to introduce the issues

Of course, the issues in any case will arise in the context of the facts of the case. A brief summary of the facts which give rise to the issues for determination should be stated at the beginning of a judgment, as should a list of those issues in logical order — which will then be headings in the judgment.

This introduction of the issues by a 'helicopter' overview of the case is an extremely important aspect of good judgment writing. The overview must be written in plain and accessible language without wasting words on unnecessary detail. Some colourful phrases which have been used to describe the simplicity of approach which is called for include —

"How would I say this to my next door neighbour?"

"Who did what to whom?"

"Whose arguing about what?"

An example of a helicopter overview appears in Schedule A below.

3. How and where to set out the facts

Of course, an overview of this kind will leave out much of the otherwise relevant factual detail of the case. There is no universal rule as to where to detail the necessary facts which must be recorded, or where to resolve relevant factual disputes. Some experts recommend dealing with the facts relevant to each question under that heading. In some cases, this will be possible; for example, where the facts relating to each issue are discrete. However, the facts nearly always overlap between issues and it is usually preferable to have a **relevant and chronological** "factual narrative" section of the judgment after the questions for determination are introduced. Any contested issues of fact can either be resolved during the course of the narrative, or the rival versions noted in the narrative and then resolved as separate issues or under the relevant question heading to which they relate.

4. How to structure the decision on each issue

There are a number of ways in which the decision on each issue can be analysed and decided or structured. The primary method recommended in this resource is the acronym IRAC —

> **IRAC — Issue, Rule, Application and Conclusion.**

Under this method; the **Issue** is stated; the governing statute or general law is stated or analysed (the **Rule**); the law is **Applied** to the facts by reasoning to a result; and the **Conclusion** on the issue is stated. Where the issue is one of contested facts, the Issue will be the rival facts, the law is the applicable standard of proof (which usually does not need to be stated), the reasoning will involve giving reasons why one version is more probable than the other, and the conclusion will follow.

How should the reasoning be set out or structured? Professor James Raymond[3] recommends use of the LOPP/FLOPP method as a useful default approach. Under this method —

> **LOPP (Losing Party's Position). First, set out the position (contention/s) of the party who loses on the issue.**
>
> **FLOPP (Flaw in Losing Party's Position). Then, give your reasons why the losing party's position (contention/s) are rejected — First, Second, etc … (In doing so, the contentions of the winning party which have been accepted should be acknowledged).**

Another commonly used structure, which can be used in combination with the above depending on the issue, involves: (1) stating the Issue, (2) stating or resolving the applicable law – the Rule, (3) summarising the contentions/Positions of the rival parties, (4) stating the Conclusion, and (5) reasoning why the losing party's position is rejected as justification for the Conclusion already announced. Under this method, the contentions of the winning party that have been accepted can be acknowledged, or will be apparent in any case. This method is often used to decide questions of fact.

If one or more of these structures is adopted, the parties — especially the losing party — will know clearly why the decision on the issue has been reached. An example of structuring a judgment using these methods appears in Schedule B below

3 For example, Professor James Raymond, The Architecture of Argument, The Judicial Review: Journal of The Judicial Commission of New South Wales, 7 September 2004, 39-56.

5. How to state the relevant law

In nearly all cases, trial judges don't need to analyse the law, trace its history or set out quotes from the leading authorities. Where the content of the applicable law is not in dispute, trial judges need do no more than state the governing principles in plain language, with a footnote to the governing legislation or authority on each principle. That is where a trial judge's role should begin and end. Appeal judges should follow a similar method on those issues where the law is not in contest.

Where the content of the applicable law is disputed, trial judges should resolve the issue by the application of the above structures

For trial judges, analysis of the development of the law is, almost invariably, unnecessary; as there will usually be a binding principle which has been stated by a superior court—or an applicable principle by a court of equivalent standing. Exceptions include the rare cases where a party contends the law should be extended beyond existing limits, or where there is a gap in the law requiring a new principle to be stated.

6. Summary of conclusions

Once each issue is decided and a conclusion on that issue has been stated, it is recommended that, under a heading "Conclusion and Orders", the judgment should end with a summary of the conclusions on each of the questions and the proposed orders which follow — or a statement that the court will hear submissions as to the appropriate orders to give effect to the conclusions. An example appears in Schedule C below.

7. Some comments on writing style and editing

By the time judges are appointed they will have developed their own writing style. To a certain extent, that default style will continue to govern the way in which they express their judgments. However, some writing styles require adjustment to fulfil the essential requirement that the decision be expressed in clear and accessible language so that it may be understood by those with a legitimate interest. Of course, the parties must be able to understand the result in their case — in particular, the losing party. Other interested parties may include professionals other than lawyers, whose conduct is considered by the court; teachers and students in various disciplines; parliamentarians; journalists; and relevant trade or industry participants such as company directors and other management personnel.

So just a few tips to make judgments more accessible.

1. Don't use Latin words or phrases. If reference to Latin is unavoidable, explain the Latin in ordinary language. For example, ultra vires means a lack of legal power or authority to do something — a tribunal may lack power to decide disputes of the kind in question etc.
2. Don't use legal terms without explaining them in ordinary language. For example, the legal concept of estoppel is easily explained as a doctrine preventing a party from asserting a fact, contention or claim which is inconsistent with a position they previously demonstrated
3. Don't use arcane or rare language which would cause most people to consult a dictionary. Although such language may be appropriate in some literary settings, or in academic publications aimed at lawyers — which is debateable — it has no place in judgments; where it obscures rather than reveals the clear meaning of what is said. Using ordinary language may take a few more words, or even sentences, to get the point across but that doesn't matter — as accessibility is the main aim.

4. Avoid definitions unless necessary for clarity. In particular avoid using initialisms and acronyms to define persons and events. Instead, use readily comprehensible nicknames. Of course, some initialisms and acronyms are so well known as to be part of everyday language; such as ABC for Australian Broadcasting Corporation. But even well-known initialisms may be better avoided in some cases. An example of overuse of definitions, together with a suggested re-write avoiding them, appears in Schedule D below.
5. Avoid - or at least reduce the size - of block quotes of evidence or law wherever possible. While some block quotes will be useful, it is usually best to paraphrase. Many readers skip or give only cursory attention to the material in block quotes. It is best to minimise the amount and length of block quotes and, especially in longer quotes, to emphasise the key bits in italics or bold face text. Use an ellipsis and delete those words which are irrelevant to the reason for the quote and add nothing to the reasoning. Use added words in square brackets where necessary, to assist the reader understand what may otherwise make the quote difficult to comprehend without quoting a whole slab more.
6. Edit the judgment carefully and ruthlessly once you have finished a full draft. In editing, pay attention to the above tips and make sure to avoid repetition and the inclusion of material which, upon completing the judgment, can be seen as irrelevant to the reasoning. For example, irrelevant factual findings or legal analysis.
7. Once a judgment is edited, it should be published promptly. There is always another case to hear and another judgment to write. Which leads to the final topic of this resource — **"Perfect is the enemy of the good".**

8. Perfect is the enemy of the good.

All judges would like the luxury of more time to improve their judgments. But judges who constantly search for perfection either fail to do their share of the heavy caseload facing the court, or unnecessarily intrude into their leisure time. This adversely affects their health and makes them less productive. So, the search for perfection can be seen as a failure to co-operate with your judicial colleagues in the common aim to provide timely judgments to the parties and hasten other parties having their cases heard. There is never enough time. Some judgments will be better than others. Some cases will deserve more of your time than others. Exercise judgment.

9. Conclusion

Structure in judgment writing must be routine. The structure should be set before you start writing.

A common complaint of judges is that counsel take every point, every permutation of fact and law, and often present them in a chaotic fashion. How do you write effectively and more expeditiously in this context? The answer is structure. Structure, especially where it is settled with the parties before the evidence commences, will help you stop wasting time and words on collateral points or, even worse, becoming repetitive and perhaps giving inconsistent conclusions. Without structure, the judgment writing process is more likely to lead to error, including the risk that reasons may be held inadequate on appeal.

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Schedule A – Introductory overview of complex case[4]

1. The plaintiff, Fenridge Pty Ltd, is a company owned and controlled by Dr Mark Santini, a general medical practitioner and businessman. In 1991, Fenridge purchased [land in] Preston ('the premises'), subject to an existing lease dated 3 December 1990…
2. The improvements on the land included a purpose built nursing home building known as 'Preston & Districts Nursing Home'….
3. During the term of the lease, following assignments with Fenridge's consent, [the lease was assigned] to the first defendant, Retirement Care Australia (Preston) Pty Ltd ('RCA')….RCA was the lessee of the premises when the lease ended ….
4. By the terms of the lease, the lessee covenanted: (1) to keep the premises continuously open for business as a private nursing home during the currency of the lease (the 'continuous business obligation'); and (2) to deliver up the premises to the lessor at the end of the lease in as good repair, order and condition as they were at the commencement of the lease, 'fair wear and tear' excepted (the 'make good obligation').
5. Fenridge claims that RCA breached these covenants by ceasing its nursing home business about four months before the lease ended, and by failing to make good the premises at the end of the lease. Further, Fenridge claims that the breach of the continuous business obligation was intentionally induced by the fifth defendant, Regis Group Pty Ltd, with knowledge of the terms of the lease. Regis had by then merged with RCA.
6. Fenridge also contends that there were implied terms of the lease, to the effect that: (1) during the term of the lease, the lessee was required to do all things necessary to maintain and preserve 'the approval of the premises' as a nursing home under applicable legislation; (2) at the end of the lease, the lessee was required to do all things necessary to enable the lessor or its nominee to continue the nursing home business at the premises; and (3) at the end of the lease, the lessee was required to do all things necessary to transfer its 'allocated places' at the premises to Fenridge at the end of the lease. Fenridge claims that RCA breached those implied terms.
7. Next, Fenridge claims that RCA engaged in misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth), by misleading it about RCA's intention to close the nursing home prior to the end of the lease; and that both RCA and Regis misled the residents and staff of the nursing home, by failing to disclose that Fenridge intended to continue operating the nursing home after the lease ended.

4 Schedules A, B, and C are extracted from *Fenridge Pty Ltd v Retirement Care Australia(Preston) Pty Ltd* [2013] VSC 464 and use the same paragraph numbers as that judgment as an aid to those who may wish to consult the judgment in full to see more detail as to how the issues are dealt with.

8. Fenridge claims damages for breach of the continuous business obligation, for breach of the implied terms, and by reason of the alleged misleading conduct. Damages are claimed on the basis of diminution in value of the premises and, further, for loss of the opportunity to continue operating the nursing home profitably after the lease ended. Further, Fenridge claims exemplary damages from Regis. The defendants deny the claims. They contend that: (1) there were no implied terms; (2) RCA was not in breach of the continuous business obligation, because the lease should be 'construed on the footing that' its obligations to the residents of the nursing home were paramount - and an orderly cessation of business over a six month period was accordingly permitted under the lease notwithstanding the express words of the continuous business obligation; (3) the alleged opportunity had no value; or (4) if the opportunity had some value, Fenridge's claim is exaggerated and Fenridge must, in any event, bring to account any profit which it has made from re-developing the premises as apartments.
9. Fenridge also claims damages for breach of the make good obligation, equal to the amount required to reinstate the premises to the state in which RCA was required to deliver up the premises at the end of the lease. The defendants contend that the make good claim should fail because: (1) Fenridge has not undertaken any of the claimed make good works, as it has redeveloped the premises as an apartment complex; and (2) the make good claim is in any event grossly exaggerated for a number of reasons, including that Fenridge has failed to make proper allowance for the condition of the premises at the commencement of the lease and for fair wear and tear.
10. Based on the above summary, the issues for determination in the proceeding are:
    (1) Was RCA entitled to cease operating the nursing home before the end of the lease?
    (2) Were there implied terms of the lease?
    (3) Did Regis induce RCA's breaches of the lease?
    (4) Did RCA mislead Fenridge?
    (5) Did RCA and Regis mislead residents and staff?
    (6) Has Fenridge lost a valuable opportunity?
    (7) If Fenridge has lost a valuable opportunity, what was the opportunity worth?
    (8) In calculating damages, must Fenridge give credit for any profit from the apartment development?
    (9) Has Fenridge suffered recoverable loss for breach of the make good obligation? If so, in what amount?
11. As there is some overlap between the issues for determination, it is convenient to set out the factual narrative in more detail before considering each issue separately.

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PREPARED BY KIM HARGRAVE.

Factual Narrative

Schedule A – structure and reasoning[5]

Was RCA entitled to cease operating the nursing home before the end of the lease?

129 The first issue for determination is whether RCA was entitled to cease operating the nursing home before the end of the lease. On its face, the continuous business obligation in cl 2.16 of the lease states plainly that RCA had no such entitlement:

> 2.16 [The Lessee covenants] to keep the demised premises continuously open for business during lawful business hours and conduct the Lessee's business therein in good faith and in accordance with the best methods and in a reputable manner.

130 The lease must be construed in accordance with ordinary principles of contractual interpretation, by asking: What would reasonable persons in the position of the parties have understood the words to mean by reference to the text of the lease, the admissible surrounding circumstances known to the parties and the purpose or object of the transaction?[6] Further, the provisions of the lease must be construed in a harmonious manner, and so as to ensure the congruent operation of the various components of the lease as a whole.[7]

133 Against that background, I proceed to consider the relevant terms of the lease as a whole:

> (1) Clause 2.14 of the lease requires the lessee to use the premises for the purpose of conducting a nursing home business and no other purpose.
> (2) [Other relevant terms set out]...

135 In my opinion, these extra requirements reinforce the fundamental nature of the continuous business obligation in cl 2.16. Putting to one side standard lease provisions, the most important provisions in the lease are directed towards this very issue – the continued operation of the nursing home business in accordance with the highest standards for the whole of the term of the lease.

136 The only answer which RCA and Regis mount to justify their conduct in closing the nursing home prior to the end of the lease is that …[138]…. it was not possible for RCA to both comply with its legislative obligations and to continue the nursing home business until the end of the lease. Counsel contended …

…

139 I reject RCA and Regis's submissions in this regard. In my opinion, clause 2.16 of the lease means what it plainly says …

5 A selection of the issues in the case are set out in this schedule.

6 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40].

7 ABC *v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109; Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522, [16].

[Submissions rejected]

145 I conclude that RCA was not entitled to close the nursing home when it did. Closure of the nursing home more than four months before the end of the lease was a clear breach of the continuous business obligation. …

…

Were there implied terms of the lease?

147 In summary, Fenridge contends that [a term] should be implied in the lease, to the effect that: … ('the allocated places term').

148 The test for implication of a term in a contract is not in doubt. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[8], the Privy Council said that the following conditions (which may overlap) must be satisfied before a term will be implied in a particular contract: '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'.[9]

149 In considering whether a term should be implied into an agreement, the Court should consider the terms of the agreement as a whole in the context of admissible evidence of background facts known to the parties at or before the date of the contract, including evidence of the genesis and objective aim of the contract.[10]

171 RCA contends…

173 The issue for determination is whether a term should be implied in circumstances where the legislative changes have raised a number of hurdles in the way of Fenridge obtaining the benefits intended by the continuing business obligation and related terms. In my opinion, it is necessary to imply a term to the effect of the allocated places term in order to deal with this eventuality. Such a term meets the requirements of the test stated in BP Refinery. [Reasons given]

174 I conclude that it was an implied term of the lease that, at the end of the lease, the lessee must transfer its allocated places at the premises to Fenridge. The precise content of that implied term is as follows: …

Did RCA mislead Fenridge?

200 Fenridge alleges that Mr Stephenson's email dated 6 September 2007 to Dr Santini was misleading and deceptive, because….

202 … RCA contends that Mr Stephenson's statements in the 6 September email were true, because…

203 I do not accept RCA's contentions. In my opinion [the email was false and misleading, for the following reasons].

204 First, … [reasons given]

8 (1977) 180 CLR 266.

9 Ibid 283.

10 Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, 348, 353.

Some judgment writing essentials.

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Has Fenridge lost a valuable opportunity?

214 The legal principles to be applied in determining whether a loss of commercial opportunity is compensable were stated by the High Court in *Sellars v Adelaide Petroleum NL & Ors*.[11] Mason CJ, Dawson, Toohey and Gaudron JJ distinguished between proof of causation and proof of damages, stating that proof of causation is to be determined on the balance of probabilities as to whether a plaintiff has sustained some loss or damage[12], and, if that hurdle is crossed, that the amount of that loss or damage is to be ascertained by reference to the Court's assessment of the degree of probabilities or possibilities.[13]

217 I will deal first with the claim for breach of contract.

218 Applying these principles to this case, Fenridge was required to prove two elements on the balance of probabilities. First, that if the opportunity had been offered (ie, if RCA had complied with the continuing business obligation and the implied terms, in particular the allocated places term) it would have acted to secure the benefit of the opportunity. Second, that the opportunity had some value, as distinct from a negligible prospect of value.

219 As to the first element, Dr Santini's clear evidence was that he intended to cause Fenridge to exploit any realistic opportunity available to it to conduct a profitable nursing home business at the premises after the lease ended. His evidence was supported by…

220 [Evidence reviewed and conclusion reached that, if the express and implied terms had been complied with, Fenridge would doubtless have exploited the additional opportunities they provided.]

221 I turn to consider whether it has been established on the balance of probabilities that the opportunity had some value.

222 It was contended on behalf of RCA and Regis that the opportunity had no value, … [submissions set out].

[RCA and Regis submissions dealt with in turn and rejected. Conclusion reached that the lost opportunity was of some value.]

271 I turn to consider the value of that opportunity.

If Fenridge has lost a valuable opportunity, what was the opportunity worth?

272 In my opinion, the opportunity had significant value. My reasons follow…

278 A lost opportunity may be so certain that it should be valued at 100 per cent of its full value.[14] Fenridge contends that the opportunity was such an opportunity. RCA and Regis contend that there were so many contingencies in Fenridge's way that the opportunity was valueless, and the claim therefore falls at the first hurdle.

279 In order to determine the rival submissions, it is necessary to again consider the various hurdles which Fenridge had to cross in order to avail itself of the opportunity:

11 (1994) 179 CLR 332.
12 Ibid 355.
13 Ibid.
14 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 350.

[Various hurdles listed.]

[Facts reviewed and RCA contentions on first hurdle stated and rejected.]

284 For the above reasons, I reject RCA and Regis's contention that the opportunity would have failed at the first hurdle. I accept that Fenridge would have faced some risks in dealing with the Department, but do not think that they were significant risks in all the circumstances. ...

285 The second and third aspects of the opportunity would have presented challenges for Fenridge, but I see no significant risk that they could not have been achieved. [Reasons given]

287 I turn to consider the full value of that opportunity…[Evidence reviewed and a conclusion reached that further evidence required to finalise valuation].

In calculating damages, must Fenridge give credit for any profit from the apartment development?

305 RCA and Regis contend that any award of damages which the Court might otherwise have made in Fenridge's favour for breach of the continuous business obligation should take account of Fenridge's profit from the apartment development. …

307 In general terms, RCA and Regis contend …. that the apartment development was undertaken by Fenridge as part of its duty to mitigate its loss arising from any damage which it may establish, and that the apartment development formed part of a continuous process of evaluation of commercial opportunities for dealing with the premises after Fenridge found itself in the position that it was not economically viable for a nursing home business to be conducted at the premises.

308 I turn to consider the relevant authorities concerning this issue. The starting point is the statement of the plurality judgment of the High Court in *Haines v Bendall*[12], that: …

[Relevant law and rival contentions of law reviewed.]

320 The … central plank in Fenridge's submissions on this issue … was that its actions in undertaking the apartment development were not taken with the object of avoiding its loss arising from RCA's breaches of the lease and were not part of a continuous dealing with the situation caused by RCA's breach, but should be characterised as involving 'an independent or disconnected transaction'. I do not accept those submissions, which take no account of the other emphasised words in the above quotations. In my opinion, the apartment development arose directly from and was necessitated by RCA's breaches of the lease, involved conduct designed to avoid Fenridge's losses flowing from those breaches, was the natural response of a property owner such as Fenridge to the circumstances in which it found itself, and formed part of a continuous dealing with the premises which were the subject of the lease. The apartment development was not an independent or disconnected transaction.

15 (1991) 172 CLR 60 per Mason CJ, Dawson, Toohey and Gaudron JJ (with the agreement of Brennan J).

335 In my opinion, the Court in this case should simply assess the loss flowing directly from the breaches of contract in accordance with the overriding compensatory rule. This involves valuing Fenridge's lost opportunity and taking account of the net benefits which it received from the apartment development; a development which was 'a reasonable and prudent course quite naturally arising out of the circumstances in which [Fenridge] was placed by [RCA's] breach'.[16] In these circumstances, it is in my opinion just for the Court to 'look at what actually happened, and to balance loss and gain'.[17] It is only by that method that over-compensation can be avoided and a fair and reasonable result achieved.

Schedule C – example conclusion.

Conclusion

389 For the above reasons, Fenridge has established its case in the following respects.

390 First, that RCA breached the continuous business obligation and the implied terms, and that Regis wrongfully induced those breaches. RCA and Regis are jointly and severally liable to Fenridge for damages to be finally assessed by reference to the following components:

(1) 75 per cent of the value of Fenridge's lost opportunity to earn income in the period 29 February 2008 to 31 December 2009 from a nursing home business at the premises;

(2) 80 per cent of the value of Fenridge's lost opportunity to own the premises on 1 January 2010, together with the attached right to operate, lease or sell the redeveloped nursing home with 60 allocated places. I have assessed this aspect of Fenridge's loss, subject to adjustment for the profits of the apartment development, at $3,956,000;

(3) interest under the express terms of the lease; and

(4) an adjustment for the net profit of the apartment development.

391 The final calculation of the damages which both RCA and Regis must pay in accordance with sub-paragraphs (1) to (4) above will involve consideration of issues which have not yet been argued, or fully argued. For example:

(1) For what period should interest run?

(2) How should the net profit of the apartment development be adjusted? … I will hear submissions on that issue.

(3) When should the net profit of the apartment development be brought to account?

392 Second, that RCA engaged in misleading conduct. Fenridge has not, however, established any loss caused by that conduct.

393 Third, that Regis's conduct is sufficiently reprehensible to justify an award of exemplary damages. The amount of the award will be fixed once Fenridge's compensatory damages for breach of the continuous business obligation are finally assessed.

394 Fourth, that RCA breached the make good obligation and that it has suffered loss as a result. The amount of that loss will be referred to an expert or special referee for assessment.

395 When the above assessments have been concluded, I will hear the parties as to interest and costs.

Schedule D — Overuse of definitions and rewrite.

OVERUSE

This case concerns the construction and validity of pre-emptive rights clauses ('PERs') in three joint venture agreements for the operation of mines in Western Australia. The mines are the Mount Redon Gold Mine near Derby (the 'MRG Mine'), the Lucky Strike Iron Ore Mine near Esperance (the 'LSIO Mine') and the Bright Sparkles Diamond Mine near Karratha (the 'BSD Mine').

The first defendant, Penny Dreadful Mining Group NL ('PDMG') is the owner of the MRG Mine, the LSIO Mine and the BSD Mine. It arranged for the mines to be developed and exploited by wholly-owned subsidiaries: the second defendant ('PD (MR)'), the third defendant ('PD (LS)') and the fourth defendant ('BS (No.2) PL'). On 26 January 2000, the subsidiaries entered into joint venture arrangements to conduct mining operations with the second, third and fourth plaintiffs (respectively, 'MRP', 'EIOM' and 'BS(K) PL'). Each of the second, third and fourth plaintiffs is a wholly-owned subsidiary of the first plaintiff, Filthy Rich Prospecting Group Ltd ('FRPG').

Each of the joint venture agreements is in identical terms ('JVA1', 'JVA2' and 'JVA3' respectively: collectively the 'JVAs').
…

REWRITE

This case concerns the construction and validity of pre-emptive rights clauses in three joint venture agreements for the operation of mines in Western Australia. The mines are the Mount Redon Gold Mine near Derby, the Lucky Strike Iron Ore Mine near Esperance and the Bright Sparkles Diamond Mine near Karratha.

The first defendant, Penny Dreadful Mining Group NL owns the three mines. It arranged for the mines to be developed and exploited by wholly-owned subsidiaries, who are also defendants. On 26 January 2000, the subsidiaries entered into joint venture arrangements to conduct mining operations with wholly-owned subsidiaries of the first plaintiff, Filthy Rich Prospecting Group Ltd.

Each of the joint venture agreements is in identical terms.