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Assessing Loss of Chance

About Life Pty Ltd & Ors v Maddocks Lawyers [2021] NSWSC 1370

This case sets out important principles for assessing loss of chance in circumstances where causation between alleged professional negligence and corporate failure can be established.

Background Information

About Life Pty Ltd (**About Life**) operated a chain of wholefoods grocery stores having commenced operations as a single organic café, juice bar and grocery store in 1996.

In 2014, About Life entered into a deed of agreement with Woolworths, providing Woolworths with a first right of refusal in respect of About Life's leased store in Double Bay, Sydney (**Side Deed**).

By April 2017, About Life was experiencing significant financial difficulty and was looking to sell assets to reduce debt and provide working capital.

On 21 April 2017, About Life entered into a contract to sell its Double Bay store to Harris Farm for $10m, with settlement to take place on 30 June 2017. During a nine-day period to 21 April 2017 (inclusive of Easter), Maddocks Lawyers (**Maddocks**) was engaged to act for About Life in relation to the sale of its Double Bay store to Harris Farm. As part of the sale, About Life was to assign its leasehold interest in the Double Bay store to Harris Farms.

At the time of the transaction, the CEO of About Life (who the Court found was "under enormous pressure") had forgotten about the Side Deed with Woolworths. Thus, Maddocks was unaware of the Side Deed when it advised About Life on its contract with Harris Farm.

On or around 12 May 2017, About Life received a non-binding indicative offer from the Natural Grocery Co to acquire all of its shares for $13.5m (on a debt free basis and with a normal level of working capital). The offer was subject to due diligence and board approval and took into account the contracted sale of the Double Bay store to Harris Farm.

On 25 May 2017, a representative from Woolworths contacted About Life's CEO to enquire why it had sold its Double Bay store to Harris Farm without reference to Woolworths. At that point, About Life's CEO recalled the Side Deed.

On 30 May 2017, Woolworths commenced legal action against About Life and Harris Farm to restrain About Life from assigning the lease of the Double Bay store to Harris Farm.

Woolworths was successful and About Life was required to assign the leasehold interest in the Double Bay store to Woolworths for $10m (less $325k for Woolworths' legal costs), which was not received until December 2017.

Unfortunately, the net proceeds received from Woolworths proved to be "too little, too late", coming as they did in December 2017 (rather than June 2017, being the anticipated date of settlement with Harris Farm).

The takeover by Natural Grocery Co did not proceed and About Life went into external administration in December 2018 with net liabilities of $11.8m.

With regard to liability, Rees J found that Maddocks' performance of their retainer departed from the requisite standard (including making insufficient enquiry regarding the Double Bay store lease early in the transaction) and that the failure "was a necessary condition of the occurrence of harm, being the deprivation of an alleged commercial opportunity" [1].

The contributory negligence of About Life was assessed at 20% [2].

Loss of Chance Principles

This case reaffirms three steps involved in determining compensation for loss of chance to pursue a commercial opportunity [3].

Firstly, the Plaintiff must establish there was a lost commercial opportunity which, on the balance of probabilities, had some prospects of success.

Secondly, the Plaintiff must establish that it would have pursued the commercial opportunity.

Thirdly, the Court must value the lost commercial opportunity by reference to "the degree of probability that the events posited by the Plaintiff would have occurred".

When determining the value of a chance, Rees J noted that the Court ordinarily takes a "broad brush approach", which the author understands can involve applying 'Sellars Discounts' based on principles set out in *Sellars v Adelaide Petroleum*[4].

Loss of Chance Quantification

With regard to quantum, Rees J, found that [5]:

- About Life's loss of chance was the loss of its opportunity to complete the sale to Woolworths earlier and survive. The Court was satisfied that had Woolworths been aware of Harris Farm's interest in acquiring the Double Bay store, it would have exercised its first right of refusal under the Side Deed.

[1] *About Life Pty Ltd & Ors v Maddocks Lawyers* [2021] NSWSC 1370 [422]
[2] Ibid at 676
[3] Ibid at 505 - 512
[4] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4
[5] *About Life Pty Ltd & Ors v Maddocks Lawyers* [2021] NSWSC 1370 [517 – 519, 632 – 640, 675]

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- Having regard to expert evidence, "on the balance of probabilities, there was a chance that About Life would have stabilised and improved the profitability of its business with the injection of capital from the Double Bay sale and then expanded and increased the profitability of its businesses".

- There was "no doubt that About Life would have taken the chance if proffered".

- The chance had "real value because the prospect of a successful outcome was substantial rather than speculative".

- About Life's damages should be assessed as "the difference between the trajectory which the company took, being external administration, and the trajectory it would have taken if it had entered into a contract with Woolworths at the outset".

- About Life's loss of chance should be assessed as at 30 June 2017 (being on or around the date of the relevant breach or tort).

- The value of About Life's loss of chance, assessed as at 30 June 2017, was $12,716,800. Rees J also awarded various costs and pre-judgment interest from 1 July 2017. The author understands that the loss of chance was calculated using the methodology below:

Counterfactual Scenario	
Offer from Natural Grocery Co (implied Enterprise Value)	$13,500,000
Net debt (bank debt plus various surplus liabilities)	($7,360,000)
Equity value as at 30/6/17	$6,140,000
Less: Sellars Discount (10%)	($614,000)
Adjusted Equity Value as at 30/6/17	**$5,526,000**
Actual Scenario	
Net liabilities on Administration (17/12/18)	($11,800,000)
Less: Discounting back to date of assessment (at 3.5% pa being cash rate plus 2%)	$1,430,000
Actual Equity Value as at 30/6/17	**($10,370,000)**
Loss of Chance	
Difference between Actual and Counterfactual scenarios	$15,896,000
Less: Contributory negligence (20%)	($3,179,200)
Loss of Chance as at 30/6/17	**$12,716,800**

In this case, the Court applied a Sellars Discount of 10% when quantifying the above counterfactual scenario. This was on account of the fact that Natural Grocery Co's offer was subject to due diligence (and thus it was possible that the offer could have been withdrawn or a lower one substituted).

When assessing loss, the Court also had regard to expert evidence which assessed the counterfactual scenario with reference to, inter alia, equity values based on various earnings forecasts. These assessments were considered, to some extent "otiose" with the Court preferring to assess counterfactual equity value by reference to the conveniently timed takeover offer from Natural Grocery Co.

Quantification Takeaways

The most appropriate approach to assessing loss is ultimately a matter for the Court to determine based on the facts of each case and relevant legal principles.

This case however highlights that, where causation between negligence and corporate failure can be established, consideration should be given to quantifying damages based on a loss of chance.

The case also indicates that, where appropriate, a loss of chance can be quantified as the difference between an entity's counterfactual equity value as at the date of the negligence (after applying a 'Sellars Discount') and its deficiency in net assets upon entering external administration (discounted back to the date of negligence), plus pre-judgment interest from the date of negligence.

About the Author

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