SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0052

THE ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (VICTORIA) — Applicant

v

JAMES MAXWELL HOLDSWORTH and HEATHER MUNRO ELLISON — Respondents

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JUDGES:	WARREN CJ, HANSEN and BEACH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	3 September 2015
DATE OF JUDGMENT:	10 September 2015
MEDIUM NEUTRAL CITATION:	[2015] VSCA 243
JUDGMENT APPEALED FROM:	[2015] VCC 653 (Judge Bowman)

TORT – Negligence – Negligent destruction of herd of cattle – Damages – Measure of damages – Assessment of damages – Damages for loss of anticipated profits – Time at which damages assessed – Discounted cash flows – Discount rate to be applied – Difficulties in assessing damages – Difficulties in estimating loss not permitted to defeat only remedy available – Application for leave to appeal refused.

DAMAGES – Assessment of damages – Application for leave to appeal – Appeal – Advantages enjoyed by the trial judge – Long trial – Complex interlocking questions of fact – Value judgments – Questions of fact and degree – Discretionary judgments – Witnesses – Judge not bound to accept particular witness – Judge entitled to reject evidence of particular witness – Time at which damages to be assessed – Discounted cash flows – Discount rate to be applied – Difficulties in assessing damages – Difficulties in estimating loss not permitted to defeat only remedy available – No real prospect of appeal succeeding – Application for leave to appeal refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr D J Christie	Corrs Chambers Westgarth
For the Respondent	Mr P G Nash QC with Mr S G Langslow	Maitland Lawyers

WARREN CJ
HANSEN JA
BEACH JA:

Introduction

1 In May 2003 the RSPCA negligently destroyed 131 cattle belonging to the respondents. Two months later, in July 2003, the respondents commenced a proceeding in the County Court claiming damages from the RSPCA. A little under 12 years later, following a trial conducted over some 68 sitting days, the trial judge gave judgment for the respondents against the RSPCA in the sum of $1,167,000.

2 We wish to say at the outset that the delays in this proceeding, and the length of the trial, were no fault of the trial judge. In a proceeding that he correctly categorised as an 'extremely vexed and relentlessly contested matter', with some issues being contested 'almost to the point of the absurd', the trial judge produced, if we may say with respect, detailed, high quality and timely, rulings and judgments attempting to quell the controversy between the parties, including a judgment on liability[1] and a judgment on quantum.[2]

3 At trial, the respondents claimed damages in the sum of $2,466,100.[3] The judge rejected that claim. The judge's assessment of $1,167,000 was made up of two components, each being a loss of profits the respondents contended they would have earned but for the negligence of the RSPCA in destroying their cattle. The first component was the sum of $992,000 for lost profit in relation to a stud enterprise. The second component was the sum of $175,000 for lost profit in relation to a proposed artificial insemination business.

4 The RSPCA now seeks leave to appeal against the judge's assessment of the

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1 *Holdsworth & Ellison v RSPCA* [2014] VCC 1186.

2 *Holdsworth & Ellison v RSPCA* [2015] VCC 653 ('Reasons').

3 Reasons [4] and [300]. Further, on 11 December 2014, in another detailed and timely judgment (*Holdsworth & Ellison v RSPCA* [2014] VCC 2056), the judge refused the respondents leave to amend their statement of claim to, amongst other amendments sought, increase their claim for compensatory damages to $7,833,831.

respondents' damages. The RSPCA's proposed grounds of appeal are as follows:

> 1 The learned trial judge erred in assessing the plaintiffs' damages at June 2012 rather than at the date of the wrongdoing, namely May 2003.
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> 2 The learned trial judge erred in failing to properly discount the plaintiffs' lost profits for risk.
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> 3 The learned trial judge erred in assessing damages on the basis of a notional sale of the plaintiffs' herd in June 2012, rather than assuming that the plaintiffs would have rebuilt the herd.
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> 4 The learned trial judge erred in assessing damages on the basis of supposed 'average stud prices'.
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> 5 The learned trial judge erred in not accepting the evidence of Mr Dicks on the bases that others from PPB Advisory had worked on the report but did not give evidence and that there were a number of errors in his reports.
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> 6 The learned trial judge erred in making any allowance at all for loss of profits from a potential Artificial Insemination (AI) business.
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> 7 The learned trial judge ought to have fixed damages for the stud business only at $436,966 as at 30 June 2014 with penalty interest applied from that date.
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> 8 In the alternative, the learned trial judge erred in discounting the plaintiffs' lost profits for risk by only 20% and ought to have applied a discount rate of 40%.

5 In response to a concern raised by the Court that, consistently with the way the judge described the conduct of the trial before him, it did not appear from the voluminous appeal books and submissions that any great attention had been given by the RSPCA to the real issues now in dispute between the parties, the RSPCA identified the real issues in dispute on this application as:

> 1. Whether or not his Honour chose the right date for assessing damages.
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> 2. Whether or not the damages assessment methodology should have involved a notional sale of the cattle.
>
> 3. Whether or not his Honour used the appropriate discounting methodology.
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> 4. Whether or not the appropriate discount rate was applied by his Honour.

5. Whether or not there should have been any allowance for damages for artificial insemination.

The rejection by the judge of the RSPCA's financial expert

6 One of the principal complaints the RSPCA has about the judge's quantum judgment is his Honour's rejection of their financial expert, an accountant, Mr Dicks. The judge gave detailed reasons for rejecting Mr Dicks's evidence. These included:

(a) the fact that Mr Dicks's reports contained material derived from unidentified sources in his office;[4] and

(b) the number of mistakes made by Mr Dicks, including errors pointed out in cross-examination which had the effect of increasing a figure he put forward of $194,340 for lost profits to the figure of $436,966.[5] In fact, during Mr Dicks' cross-examination, Mr Dicks revised his figure of $194,340, first to $216,207, then to $397,240, before settling on $436,996.[6] As the judge said, this 'shook my confidence to some extent in relation to PPB Advisory [Mr Dicks's firm]'.[7]

7 By comparison with the trial judge's impression and findings with respect to Mr Dicks, in relation to the respondents' financial experts, Mr McGuckian and Mr Henderson (both of RMCG), the judge said that both of these witnesses struck him as well qualified witnesses who gave their evidence in a careful and measured manner, and who were both credible and impressive.[8] The judge, who was considerably better placed than this Court to make an assessment of the witnesses, having seen them and been imbued in the conduct of this very long trial, was well-entitled to form the views he formed in relation to the parties' expert financial witnesses.

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4 Reasons [223].

5 Ibid [224]. See further, Reasons [350] and [364]–[366].

6 Ibid [243].

7 Ibid [224].

8 Ibid [363].

8 In this Court, the RSPCA contended that the judge was wrong simply to disregard Mr Dicks's evidence once the judge had concluded that Mr Dicks was not a satisfactory witness and/or that there were difficulties with the bases upon which his opinions were expressed. We reject that submission. The judge was well entitled, for the reasons he gave, to reject Mr Dicks's evidence.

9 In arguing this application for leave to appeal, counsel for the RSPCA took us to a number of parts of Mr Dicks's evidence which it was said could (or should) have been used by the judge to temper the assessments of loss made by the respondents' experts. For example, we were taken to the table in paragraph 11 of Mr Dicks's supplementary report dated 13 March 2015. This table was said to contain a calculation based on an RMCG report with the RMCG figures discounted back to 2003 and then added to by the appropriate amount of prejudgment interest calculated on this figure from the day when the respondents' proceeding was issued. The RMCG figures discounted back to 2003 by Mr Dicks totalled $400,174. The prejudgment interest figure on this amount was asserted by counsel for the RSPCA to be $173,911. However, even limiting this calculation to June 2012 (as was done by Mr Dicks), one can see that the sum of $173,911 could not possibly be the prejudgment interest on $400,174 from July 2003. Properly calculated, the prejudgment interest would have been in excess of $360,000. We note for the sake of completeness that, in addition to this matter casting further doubt on the reliability of Mr Dicks generally, the addition of appropriately calculated prejudgment interest to RMCG's reworked figures discounted back to 2003 would, in any event, produce an assessment much closer to the trial judge's assessment than that contended for by the applicant in ground 7.

10 It follows that, to the extent the RSPCA's proposed grounds of appeal are premised upon the proposition that the judge was bound to accept all or some relevant part of the evidence of Mr Dicks, they must be rejected.

The date of the assessment of the loss and the notional sale issues

11 The RSPCA contends that the judge erred in assessing the respondents' loss as at June 2012. The RSPCA contends that the loss should have been assessed as at May 2003 with all figures being discounted back to that date. However, it is then accepted by the RSPCA that the respondents would be entitled to prejudgment interest on that discounted amount from the time when the proceeding commenced. For the reasons just given, there may, however, be little in the point once one corrects (again) Mr Dicks's figures.

12 In submitting that the judge chose the wrong date to perform his assessment, counsel for the RSPCA referred to what he described as 'the well-recognised rule' that damages are assessed in cases of the present kind by discounting the hypothetical or projected cash flow back to the date of loss. It was then submitted that this rule could only yield in cases where a plaintiff proves that there is good reason for performing the assessment in some other way or at some other time. There are, of course, no such inflexible rules or principles.

13 The fact that in many cases, loss of profits claimed by plaintiffs have been (and are) assessed by reference to hypothetical or projected cash flows discounted back to the date of loss does not elevate such methods of assessment to the height of rules to be applied in all cases unless the injured plaintiff discharges some onus or burden. While there is a general rule that damages for torts or breach of contract are assessed as at the date of breach or when the cause of action arises, as has been said many times before, this rule is not universal; it must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him or her for the wrong suffered.[9]

14 The trial judge gave detailed reasons as to why he assessed the respondents' damages as at June 2012. Those reasons included a detailed analysis of the evidence given by the witnesses, including the respondents' financial expert witnesses,

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[9] See *Johnson v Perez* (1988) 166 CLR 351, 355–356; *Haviv Holdings Pty Ltd v Howards Storage World Pty Ltd* (2009) 254 ALR 273, 283 [27(12)].

Mr McGuckian and Mr Henderson. Having analysed the evidence, and then discussed the relevant authorities, the judge said:

> As stated, there was considerable argument concerning this in the present case, but some of that argument seems to me to have been not to the point and slightly confusing. The argument concerning the time of the assessment of damages, as such argument was presented, seems to me to, at least in part, also involve the issue of whether purely hypothetical or real figures and calculations should be used. There is the additional complication that this latter argument involves figures relating to matters both before and after the commission of the tort — that is, the intervention by the defendant.
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> It seems to me that, in accordance with the authorities to which reference has been made, if the assessment of damages were to be approached purely with regard to replacement value, the penalty interest rate being applied thereafter, the date of the commission of the tort is essentially the key date to be considered. Matters that occurred previously — including prices ascertained at stock sales, valuations and the like — are relevant. In addition, the prospects off future profits may also be informative in relation to the valuation of the animals as at the date of the intervention. However, if one looks at the value of the asset, namely the animals, as at the date of trial, some real figures can be introduced. What occurs thereafter remains a matter of looking at the future, and therefore hypothetical, probable or possible developments and events. Of course, some past hypothetical events may be relevant. In the present case, both sides have urged me not to assess loss on the basis of the replacement value of the animals as at late May 2003, being the time of the intervention, and using the penalty interest rates thereafter. This was also not the preferred option of the competing experts. It is not the method which I shall be adopting.
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> In advancing arguments based upon a loss of profits assessment, it seems to me that each side was adopting a type of hybrid approach. Assessments were urged which in part reflected the value of the cattle as at the date of intervention, but took into account both real and hypothetical developments thereafter. I shall return to this subsequently. That general approach seems to me to be consistent with what is said in *Haviv Holdings* and in other cases.
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> The competing methods advanced by the parties rely upon a mix of reality and the hypothetical. In broad terms, it seems to me that the authorities suggest that the more realism that is included, the better. However, any loss of profit or opportunity assessment in a case such as this will, of necessity, take into account the quality and value of the animals at the time of the intervention, which will in part be informed by the history of those animals, together with a mix of real and hypothetical events. In other words, following the assessment as at the intervention, actual occurrences, probabilities and possibilities, can be assessed, and, if necessary, appropriate discounts applied. The same applies to future developments, save for the obvious exclusion of real occurrences. I would refer to some of the decisions referred to above, including *Johnson v Perez*, where Dawson J referred to the advantage of being able to be aware of actual facts.[10]

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[10] Reasons [324]–[327].

15 We see no error in the judge's approach. Again, as has been said many times before, assessments of damages in cases like the present often involve a considerable number of questions of fact and degree. Value judgments of a discretionary kind fall to be made by the judge whose task it is to assess such damages. Again, of critical importance to the determination of these various issues is the trial judge's ability to see and hear the witnesses and to be fully immersed in the facts of the trial as they unfold over time. In this respect, the judge in the present case enjoyed an advantage that this Court simply does not possess when reviewing the voluminous record of this trial. That said, consistently with our obligation to conduct a real review of the evidence to see if the judge erred, we have considered the issues for ourselves and are unable to see any error in the judge's approach to assessing damages as at 2012.

16 Related to its complaint about the date at which the judge assessed the loss, is a complaint by the RSPCA that, in addition to assessing loss of profits from 2003 to 2012, the judge made an allowance for the notional sale of the respondents' herd as at 2012. The RSPCA contended that discounted cash flows should have just continued to the point where the herd was fully regenerated by the respondents. However, the respondents contended that they were not sufficiently pecunious to fully regenerate the herd at any time, and that their inability to regenerate the herd was a result of the RSPCA's negligence. The judge accepted the evidence upon which the respondents' submissions were made[11] and agreed with them.[12] We see no error in the judge's approach. Like his Honour, we think, in the context of the evidence and issues in this case, it was reasonable to assess the respondents' loss in respect of the claimed stud business by reference to the respondents' loss of profits for a period of years until a notional sale of their asset, at a point in time when its value remained diminished as a result of the negligence of the RSPCA.

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11 Ibid [178]–[205].

12 Ibid [357]–[358]. See also the evidence of Mr Henderson, accepted by the judge at Reasons [178], as to the equivalence between the value of an asset at sale and the present value of the stream of income that asset would have provided in future years.

Average stud prices

17 The RSPCA makes complaint about the judge's acceptance of calculations based upon average stud prices disclosed in three letters attached to RMCG's report of 8 June 2012. These letters were admitted as part of the material upon which Mr McGuckian and Mr Henderson based their opinions. Section 60 of the *Evidence Act 2008* thus came into play, in circumstances where no application was made to the trial judge under s 136 of the *Evidence Act* to limit the use of this evidence. In the circumstance of the way in which this trial was conducted, we are unable to see any basis for the RSPCA's complaint on this issue.

18 In any event, as to the appropriate stud prices upon which the respondents' loss fell to be calculated, the judge said:

> As stated, RMCG estimated the lost profit on two alternative bases. The average prices were derived from the average of Murray Grey stud sales around the time of the loss for both females and bulls. The end result of using the average stud prices as a base and applying a 10 per cent discount or 'grossing up' figure was, as stated, $1,141,742. That is also after allowing for the plaintiffs to commence fully-functioning stud operations in autumn, 2005. It is not entirely clear whether RMCG allowed for the fact that the three calves in question were destined to be commercial animals because of the inability to establish single sire mating. In the overall scheme of things, the difference that this would make to the figures is not great and is something which, amongst other matters, can be taken into account when some general discounting is being undertaken.
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> In short, the calculations done by Mr McGuckian and Mr Henderson on the basis of average prices for stud animals prevailing at the time of the loss and with a two-year delay prior to the commencement of stud operations and sales strikes me as a fair and reasonable, if not conservative, approach. I appreciate that Dr Webb Ware regarded the setting up of the stud enterprise as being somewhat optimistic, but then again Mr Peter Sutherland spoke in glowing terms of the bloodlines and of their marketability.
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> In this regard, RMCG adopted another approach based upon some average sales achieved by the plaintiffs over the five years prior to the loss. In their report of 28 September 2012, Mr McGuckian and Mr Henderson did not use such figures, as they seemed to be considerably higher than the industry averages. They thought that such prices probably reflected sales of the plaintiffs' best led stud animals, rather than of the overall herd. However, in their post-judgment report of 27 October 2014, they included an alternative valuation based upon the plaintiffs' sales. It is clear that the evidence of Mr Peter Sutherland, which had been provided to them, played a role in their thinking in this regard.

> On balance, I prefer the valuation founded upon average stud prices. This was based upon information provided by three studs in different parts of Australia and from the National Sale conducted during April 2003. This seems to me to provide a more reliable foundation than the somewhat patchy information relating to sales by the plaintiffs. I appreciate that the plaintiffs had some support, in general terms, from Mr Peter Sutherland. However, the average price approach adopted by RMCG seems to me to be more reliable. It also seems to be the approach which Mr Henderson, and presumably Mr McGuckian, preferred.
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> Furthermore, as it is possibilities that are to be considered in relation to hypothetical events, the chance that the plaintiffs may have achieved some higher sales prices is something that can be taken into account when percentage adjustments are made in the final calculation. Of course, the possibility also exists that they would not have achieved average stud prices, and the herd would have been sold on a commercial basis. However, bearing in mind the evidence about the quality of the bloodlines and the existence of at least some market for cattle with them, I consider that the possibility that the cattle would only ever have achieved commercial prices is less than the chance that they would have achieved above average stud prices.[13]

19 Again, in the context of a trial involving complex interlocking factual questions, the resolution of which required value judgments to be made by the trial judge, we see no error in the judge's approach on this issue. As the judge said, it was open on the evidence to rely upon higher values, just as it was open (as the RSPCA contends) to rely upon lower values. In the end, this was a judgment call for the trial judge. Our own view is that the judge's approach was reasonable.

The discount factor used by the judge

20 In the event that its submissions about assessing damages on the basis of discounted cash flows back to the time of loss are not accepted, the RSPCA contends that the ultimate discount factor of 20 per cent applied by the judge was inadequate. The judge assessed the loss of profit on the stud business in the sum of $1,240,000. He then applied a discounting factor of 20 per cent to produce a figure for lost profit on the stud business of $992,000. The judge said:

> Reference has been made earlier to the approach adopted by courts in relation to percentage adjustments which can be made so as to allow for various contingencies or vicissitudes. Such adjustments can be either by way of an increase or a decrease of the figures involved — see, for example, what was

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13 Reasons [380]–[384].

said in *Burger King Corporation* and referred to above. This is consistent with the 'doing the best I can' and 'broad brush' approach described in *Falls Investments*. Further, obviously the application of such percentage adjustments will vary from case to case. Again, I would refer to what was said in *Burger King Corporation*.

Adopting this approach, which, of necessity, involves a combination of findings in relation to past alleged facts on the balance of probabilities and a consideration of past and future hypothetical developments as possibilities, I have reached the conclusion that an overall discounting factor of 20 per cent should be applied. That would result in a primary figure for lost profit of $992,000.

In arriving at such a discount percentage, I have tried to balance the various competing figures based upon hypothetical events, some of which could indicate a percentage increase in the basic assessment, whilst others would suggest that a discount should be applied. Dr Webb Ware seemed to be of the view that it was optimistic on the part of the plaintiffs to think that a successful stud enterprise could have been operating within a couple of years of the intervention. The potential loss of market share associated with the cattle not being registered with Breedplan, at least in the short term, must also be borne in mind. There are then the hazards generally associated with commencing any business against established competitors and particularly when the fortunes associated with this particular product — Murray Grey cattle — seem to have been fluctuating. Further, as was clearly evident from 2001 to 2003, this is an industry which is at the mercy of the elements. In addition, it is to be remembered that there was the 'second intervention' — that is, the loss of the missing cattle for which the defendant is not liable. This may also have had a negative or delaying effect upon the stud enterprise. On the other hand, there is evidence to suggest that this particular herd had carefully selected bloodlines and offspring may have been in demand, selling at prices above average Murray Grey stud prices. The potential existed that these cattle may have fetched the prices described by Mr Peter Sutherland. They may have fetched prices equivalent to those which formed the foundation for the calculations done by RMCG on the basis of the 'plaintiffs' sales'. That would have the potential to take the figure for lost profit well above the agreed maximum amount of damages for this action, the RMCG assessment on such a basis being in excess of $4,000,000.

The above is not a list of all the factors involved. Other factors would include a small adjustment in relation to the three calves that were sold on a commercial basis and for the somewhat uncertain matter of possible damage to one of the bulls. The RMCG figures have allowed for expenses, but it may be that some greater or unforeseen expense could occur. On the other hand, whilst the stud operation was not to commence until 2005, the partnership business was one that was 'up and running'. The taxation material referred to by Mr Dicks and subsequently put in evidence indicates that sales were being effected and income produced. In addition, various items of documentary evidence and the oral evidence of Mr Peter Sutherland would indicate that a certain amount of goodwill was attached to the names of both Mr Holdsworth and Ms Ellison. The stud enterprise aspect of the partnership may have taken off more rapidly and become more successful than foreshadowed, with figures exceeding the more conservative estimates of RMCG.

> However, as stated, on balance I am of the view that a discount, rather than a percentage increase, should be applied. This was a stud enterprise which, whilst possessing well-bred Murray Grey cattle, as well as possessing property and yards, had not actually commenced such stud operations. The partnership may have had the potential to create profits far in excess of the figure at which I have arrived. However, it also faced the prospect of not achieving that figure. After weighing up the competing possibilities and doing the best I can, I am of the view that the figure at which I arrived should be reduced by 20 per cent. This would mean that my finding in relation to lost profit associated with running the stud enterprise is $992,000, as set out above.[14]

21 The RSPCA contends that, if the judge's approach was otherwise correct, the discount factor should have been 40 per cent. In making that submission, the RSPCA took the Court to what might be described as all of the 'negative' opinions and aspects of the evidence that suggested that the respondents' proposed stud venture was considerably more speculative and problematic than their evidence would suggest. It is not necessary to rehearse all of those matters. It is sufficient for us to once again say that we see no error in either the judge's approach or his ultimate conclusion. With respect, the judge's conclusion has plainly been arrived at after a detailed consideration of the evidence that was tendered before him (which evidence was perhaps more voluminous than was necessary for the purpose of fairly resolving the issues between the parties).

The damages for artificial insemination

22 The primary question that arose in respect of the judge's allowance of damages in the sum of $175,000 for lost profit in relation to the respondents' proposed artificial insemination business was whether there was probative evidence that supported this award of damages. The RSPCA submitted that the proposed artificial insemination business was nothing more than a speculative venture or 'pipe dream' and, accordingly, that the claim must have failed entirely for want of an evidentiary basis. In our view, it was open to the judge to find a loss and to assess that loss as he did.

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14 Ibid [388]–[392].

23 The RSPCA relied, among other things, on the fact that the respondents had not conducted an artificial insemination business; had not, in the seven year period preceding the RSPCA's wrongdoing, extracted semen from their bulls or impregnated cows — and thus had no established customers; veterinarians (Dr Webb Ware and Dr Byrne) called by the RSPCA deposed that the respondents would not have been able to successfully develop an artificial insemination business using semen from the two euthanised bulls; apart from evidence about Ms Ellison's single semen tank, there was no evidence that the respondents had the plant and equipment to support the business; and the respondents failed to lead evidence of a business plan to establish the business including estimated costs and profits.

24 The judge arrived at the figure of $175,000 by allowing sales of 1,500 straws of semen at $17.50 per straw over 10 years, discounted by one-third.[15]

25 The RSPCA acknowledged evidence that a price between $10 and $25 could be achieved for Murray Grey semen straws, but submitted that there was no basis for finding that 1,500 straws of semen per annum could or would be sold by the respondents. The RSPCA further submitted that there was no probative evidence to support the figure of $175,000; in short, the figure was 'plucked from the air', and should be set aside in toto. Reliance was placed on *Origin Energy LPG Ltd v BestCare Foods Ltd*.[16]

26 We reject these submissions. In the first place, the judge's findings as to the probability of the respondents establishing an artificial insemination business, of the existence of a relevant market, and as to the price of straws and a volume of sales, were based on a careful consideration of the evidence called by both parties. The consideration was lengthy, dealt with all the witnesses, and involved a series of findings and observations: see in particular the judge's reasons at [126]–[150] dealing with the respondents and their witnesses, David Ellison (the son of the second respondent, who gave evidence about the second respondent having

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15 Ibid [398].

16 [2013] NSWCA 90, [30] and [84]–[86].

artificially inseminated cattle), Mr Sutherland (a pre-eminent Murray Grey breeder), and Mr Wagstaff (a witness with experience in the field of artificial insemination) whose evidence included that the price of Murray Grey beef bull semen ranged from between $5 to $100 per straw, and as to which in cross-examination he referred to a range of $10–$25. Also considered by the judge was the evidence given for the RSPCA by the veterinarians, Dr Webb Ware and Dr Byrne.

27 It is to be noted that both RMCG and Mr Dicks did not deal with the artificial insemination claim.

28 In the second place, on the matter of assessment, the judge was left to do the best he could in the light of the relevant facts and circumstances and in accordance with relevant principle.[17] While the RSPCA criticized the judge for calculating the respondents' damages by reference to the price of semen straws, it should be noted that the price range used by the judge was conservative, and (on the evidence) also conservative as a measure of profit when one factored in any additional expenses that may have been incurred in running an artificial insemination business in addition to a stud enterprise.

29 Immediately following consideration of the evidence, the judge stated conclusions as to the possible viability of the partnership conducting an artificial insemination business: see the judge's reasons at [151]–[195]. These conclusions are important. The judge:

(a) found that there is a market for Murray Grey semen straws; as to this, he accepted Mr Sutherland's evidence.[18] The RSPCA accepts this finding.

(b) accepted Mr Wagstaff's evidence, and found that the artificial insemination business is a viable industry.[19] The RSPCA accepts this finding.

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17 Reasons [309]–[322]. See *Haviv Holdings Pty Ltd v Howards Storage World Pty Ltd* (2009) 254 ALR 273; *RT & YE Falls Investments Pty Ltd v State of New South Wales* [2007] NSWCA 18.

18 Reasons [151].

19 Ibid [153].

(c) then found:

> When the evidence of Mr Wagstaff is combined with that of Mr Peter Sutherland, I have every reason to believe that opportunities exist for the sale of suitable Murray Grey semen. Further, I accept the evidence of Mr Sutherland that, given the bloodlines of the partnership cattle, there would be a market and prospective purchasers for semen straws from the partnership bulls. However, his evidence concerning the size of that market was confusing and my overall impression, bearing in mind the evidence of Dr Webb Ware, is that the export market is not particularly large. Further, the evidence of Mr Wagstaff concerning the normal price range for the sale of straws struck me as a more likely scenario than some of the very high prices that may have been obtained for straws from some of Mr Sutherland's prize animals.[20]

The RSPCA accepts these findings.

(d) then found:

> In my view this was not just some 'pie in the sky' notion. As a starting point, some consideration should be given to the fact that it was the intention of the partners to take the partnership into the business of artificial insemination and that the loss of stock resulting from the intervention by the defendant has had at least an inhibiting effect upon this intention, if not destroying it, at least in the short term.
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> As stated by Mr Holdsworth, the partnership had lost its breeders, its stud, two bulls and, effectively, its sperm bank. Such a statement may be too sweeping, and the fact that one of the two bulls may have been damaged must be borne in mind. However, as stated, in my view the concept of an entitlement to damages for losses associated with the proposed artificial insemination business is not one which can simply be dismissed out of hand. It requires consideration as part of the assessment of damages process.[21]

As to this, the RSPCA submitted that there was no evidence that the respondents' proposed venture would have made a profit of the magnitude awarded.

(e) concluded that the question of damages required consideration.[22]

30 Upon this foundation the judge later turned to consider whether any damages should be awarded.[23] The judge first noted that the hypothetical range was zero to more than $6,000,000, the latter proposed by Mr Tol, a financial expert called by the

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20 Ibid [154].

21 Ibid [155]–[156].

22 Ibid [159].

23 Ibid [393]–[398].

respondents. The judge accepted 'that there is a loss associated with the proposed artificial insemination business',[24] but his Honour did not accept Mr Tol's assessment; it was 'unrealistically high'.[25]

31 The judge then stated:

> I am satisfied that the plaintiffs have discharged the onus of establishing that some loss resulted from interference with, or postponement of, the proposed artificial insemination business. That loss is attributable to the intervention, although, of course, the loss of only two of the four bulls is the responsibility of the defendant. I am also bearing in mind that one of the bulls may have been in a damaged condition, although if this was the case, the degree of interference with the extraction of semen, as opposed to normal stud duties, is not entirely clear.
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> In any event, I am satisfied that it was the intention of the plaintiffs to set up an artificial insemination business and that the two bulls, for the death of which the defendant is responsible, were to be part of this business. Yards had been purchased. I am satisfied that there is a market for semen straws. I refer in particular to the evidence of Mr Wagstaff. Amongst other things, he said that there were some seven firms supplying the market. I am satisfied that the breeding of the bulls was such that some sales could have been achieved. I should add that I do not take into account any prospective sales of semen from the tank owned by Ms Ellison. Whether or not it was the intention of the partnership to use some of this semen to impregnate the partnership cows, such semen was destroyed for reasons unassociated with the intervention by the defendant.
>
> Thus, it would seem to me that the partnership has suffered a loss in this regard. It is a loss resulting not only from the destruction of the two bulls, but also from the financial stress placed upon the partnership. I would refer to the evidence of Mr Holdsworth and Ms Ellison in this regard, and would point out that, as stated by Mr Holdsworth, it is only recently that a higher quality bull has been purchased. Whether it not it will be satisfactory is still unknown.
>
> I would refer again to what was said by Jagot J in *Haviv Holdings* to the effect that, where there has been a loss of some sort, the common law does not permit difficulties of estimating a loss to defeat the only remedy, namely an award of damages. I would also refer again to the approach of Ipp JA in *Falls Investments*. Doing the best I can, I am allowing $175,000 for losses relating to artificial insemination. This permits a few years — perhaps five — for the setting up of the project, advertising, the attraction of customers and the like. It allows for sales thereafter to date and for a few years into the future. Mr Wagstaff, who is in the business, said that essentially the price range for straws of semen from Murray Grey bulls was $10 to $25. If the average price of $17.50 was selected and sales of 1,500 straws per year allowed for 10 years, the end result would be $262,500. However, whilst some discounting has

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24 Ibid [394].

25 Ibid.

> already been built into the above figures by reason of using an average price, modest sales and a period before a suitable replacement bull or bulls could be found and afforded and the business set up, it seems to me that some further discounting is required. This is a prospective enterprise, the success of which could certainly not be guaranteed. Some overheads would exist. Doing the best I can and adopting a broad brush approach, I am further discounting the figure of $262,500 by one-third. The result is that, in relation to lost profits from the intended artificial insemination business, I allow the sum of $175,000.[26]

32 It is at the last point of the exercise that the RSPCA primarily directs criticism. The criticism is that, notwithstanding all the preceding evidentiary building blocks, the exercise fell at the last hurdle of assessing the loss. Thus, it was said, there was no evidence to establish the figure of $175,000, or the matters behind it of the period of 10 years, the figure of $262,500 ('plucked from the air'), and one-third as a discount. Nor, as mentioned, had the respondents had a business plan with projections or forecasts of the future of the proposed business.

33 The assessment of lost profit in circumstances such as these is difficult. So much is axiomatic. However, as has been said before, where there has been actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provides.[27] Being satisfied that loss had been suffered as a result of the RSPCA's negligent actions, the judge had to do the best that he could in the light of the evidence. Provided there was sufficient basis for doing so, in the light of the evidence it would not have been just that no allowance was made. That does not mean that the judge was free to make something out of nothing or to find loss established where there was an insufficient basis upon which to do so in the evidence. Of course, mathematical precision was not possible, but the price range of semen straws was based on the evidence, the allowance of straws per year was surely open, and the period of 10 years was an allowance of a reasonable period of time over which to recover. Then, the discount of one-third is the judge's estimation of that which is reasonable in the circumstances. The extent of such a discount is a matter upon which minds could differ and as to this, and the exercise

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26 Ibid [395]–[398].

27 See for example, *Fink v Fink* (1946) 74 CLR 127, 142 (Dixon and McTiernan JJ).

generally, allowance must be made for the judge's consideration of that which was reasonable and appropriate in the circumstances. There were no hard and fast figures. The judge was in the area of discretion. We do not overlook the RSPCA's criticisms, just as the judge did not; he took into account the need for caution and to guard against over-optimism. We are satisfied that the judge took into account the aspects of the evidence upon which the RSPCA now relies. In addition, we consider that while the judge began his calculation with an estimation of likely sales, he properly understood his ultimate task to be one of assessing the lost profits. Contrary to the RSPCA's submission, he did not neglect to factor in the likely costs of the prospective business; indeed, he specifically acknowledged that 'overheads would exist' and he allowed for them in determining the appropriate discount. In our view, the judge was cautious and conservative in his assessment. We do not see error in his Honour's approach. In our view, it was open to the judge to conclude as he did.

Conclusion

34 The RSPCA's appeal does not have a real prospect of success. Accordingly, leave to appeal must be refused.

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