



So, you're telling me there's a chance: the preparation and presentation of claims for loss of opportunity damages

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# >> You're telling me there's a chance?

- What must be pleaded?
- What can be proved?
- A focus on the practical

# >> Structure of the presentation

- Introduction to loss of opportunity claims
- Principles regarding the assessment of damages
- The distinction between past and future events
- The two-stage enquiry:
  - Is there a valuable opportunity at all?
  - What if there is a likelihood of a loss?

# >> Structure of the presentation

- Proof
  - Reliance on surrounding circumstances
  - How much detail is required?
  - Putting oneself in the position of the parties
- Dealing with multiple variables
- Is mathematical precision feasible?

## >> Introduction to loss of opportunity claims



## >> Core principles

- *Johnson v Perez* (1988) 166 CLR 351, 355 – compensatory ... fair and adequate compensation for the injury
- *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 116 – fair and adequate compensation for the conduct

## >> Core principles

*Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221 at [48]

- [48] Within that “philosophy”, a pleading must be as brief as the nature of the case permits, state the material facts as well as any matter that if not stated specifically might take another party by surprise, and state specifically any relief the party claims.<sup>23</sup> Every type of damage claimed must be specifically pleaded,<sup>24</sup> and the nature and amount of the damages claimed must be stated.<sup>25</sup> A party claiming general damages must include particulars of the nature of the loss suffered, the basis on which the amount claimed has been worked out or estimated and the circumstances in which the loss or damage was suffered.<sup>26</sup> A party claiming damages must specifically plead any matter relating to the assessment of damages that may take an opposing party by surprise, if not pleaded.<sup>27</sup>

## >> Core principles

*Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7)* [2019] QSC 241

- [17] It is a trite proposition of law that defendants are entitled to a direct and unambiguous identification of the material facts relied on to establish the causal link between the conduct which plaintiffs impugn and the loss they allegedly suffered, and which identification at least arguably establishes that link.



## >> Core principles – the performance interest



## >> Past and future events

*Malec v J C Hutton Pty Ltd* (1990)  
169 CLR 638

Past events are certain

51% is treated as a certainty

## >> Past and future events

*Malec v J C Hutton Pty Ltd* (1990)  
169 CLR 638

Future events are uncertain

Must deal with probabilities



# Two-stage enquiry



First stage: Was there a valuable opportunity at all?



Second stage: Assessment of damages

## >> Was there a valuable opportunity?

- *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1
- No better policy
- *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494
- No better loan terms

## >> What if there would have been a loss?

- *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2016] QSC 252
- *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club* [2017] QCA 254
- At [16]: “Consequently, the improbability of a profit from the pursuit of a commercial opportunity is no necessary bar to the recovery of substantial damages for the loss of that opportunity.”



## >> Proof – surrounding circumstances

- What evidence can an expert lead: *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd* (No 5) [2019] QSC 210
- When considering the hypothetical causation question, inferences from the surrounding circumstances, other objective facts, and the probabilities are a more reliable guide on questions of causation than *ex post facto* evidence from an interested party: *Cassis & Anor v Kalfus (No 2)* [2004] NSWCA 315 at [9]

## >> Proof – how much detail?

- There must at least arguably be a link on the face of the pleading between the conduct which the plaintiff impugns and the loss alleged to have been suffered: *Sanrus No 7* at [17]
- *Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd & Ors* [2018] QSC 3 at [37]: it is not necessary to prove the actual transaction and the actual counterparty





## ***Graham & Linda Huddy Nominees Pty Ltd v Byrne*** **[2016] QSC 221 at [50]**

[50] First, it is necessary for a plaintiff who alleges loss of a valuable commercial opportunity to plead that the loss it has suffered is a loss of a valuable commercial opportunity, identifying the opportunity with some particularity. Second, it is also necessary that the plaintiff pleads what it would have done, where what the plaintiff would have done if the defendant had not been in breach of duty is a necessary causal condition to deciding factual causation. Third, it is necessary for a plaintiff who alleges such a loss to plead the percentage or proportion of the opportunity that was lost, in assessing value on the possibilities, in order to plead the amount of the damages claimed, as is specifically required. Fourth, where a plaintiff alleges a loss of a 100 per cent possibility or the certainty that they would have obtained the hoped for or expected benefit under a transaction which did not occur, it is to be expected that the plaintiff will allege with some particularity the facts by which that certain outcome would have been achieved.



## ***Graham & Linda Huddy Nominees Pty Ltd v Byrne*** **[2016] QSC 221 at [51]**

similar vein, in my view, where a plaintiff alleges loss of a valuable commercial opportunity, the plaintiff should in most cases also allege the extent of the loss it says it suffered on the possibilities. It is not sufficient for a plaintiff simply to allege a 100 per cent possibility of obtaining the hoped for or expected benefit, leaving it open to contend that the issue to be decided by the court is the actual degree of likelihood anywhere between 100 per cent and 1 per cent. To require a plaintiff to formulate its case with all reasonable precision does not detract from the power of the court to grant relief generally other than that specified in the pleadings,<sup>29</sup>

# >> Proof – tracing the parties' conduct

*Amann* at CLR 94 per Mason CJ and Dawson J:

94

HIGH COURT

[1991.

H. C. OF A.  
1991.

THE  
COMMON-  
WEALTH  
v.  
AMANN  
AVIATION  
PTY. LTD.

—  
Mason C.J.  
Dawson J.

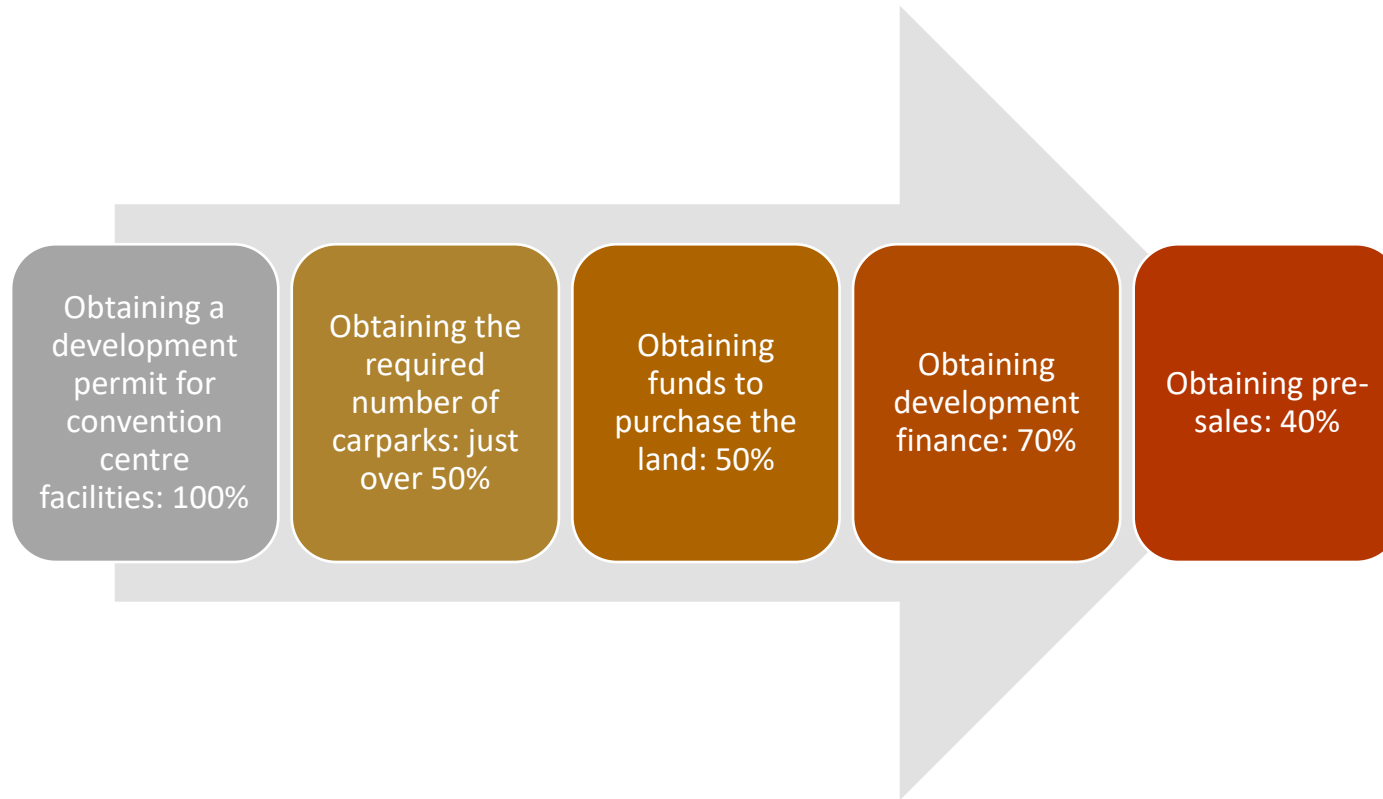
Commonwealth's liability in damages to Amann in the light of the events as they have actually fallen out. In assessing damages, the Court is necessarily engaged in a hypothetical exercise, that is, ascertaining how the contract would have turned out had it not been brought to an end by Amann's acceptance of the Commonwealth's wrongful repudiation. On the assumption that the contract would have proceeded to completion, it would have been to the Commonwealth's advantage to have agreed to a renewal, rather than to have negotiated a fresh contract with a third party who would have been in the position of starting from scratch and thus

## >> Proof – tracing the parties' conduct

*Amann* at CLR 103 per Brennan J:

the plaintiff would have been if the contract had been performed, nor would it lead to an award of damages which would place the plaintiff in that situation. The other commercial advantages must be evaluated, and evaluation may require consideration of the nature of the plaintiff's business, the opportunities available to the plaintiff to exploit the advantage and, if there be a market for a particular advantage, that market.

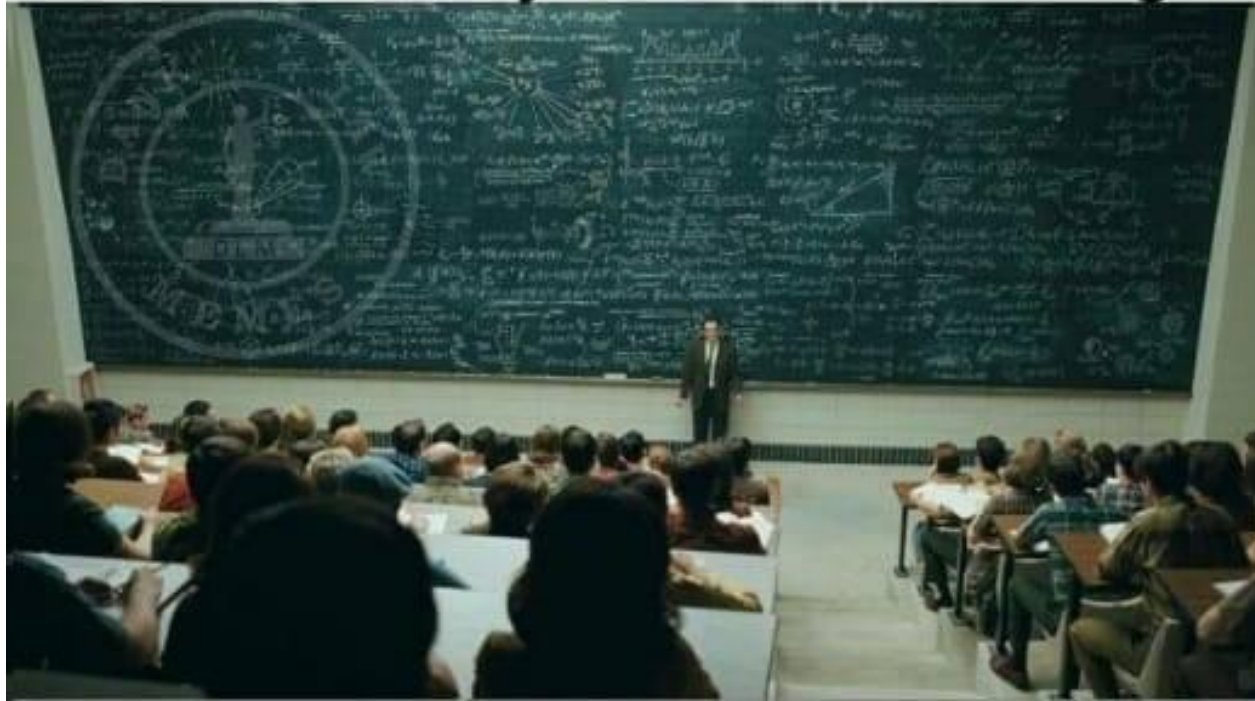
## >> Dealing with multiple variables



# >> The scope for mathematical analysis

**PROF:**

**And that's how you calculate damages!**



# >> Damages for loss of a commercial opportunity

## The challenge

\$ Quantitative

???

Subject to uncertainty

## Suggested approach



Apply valuation concepts



Be clear about the treatment of risk

# Observations on *Principal Properties*

1



## >> Comparison of loss assessments

\$	QSC	QCA
Potential gross profit	3,300,000	4,000,000
Obtaining development approval	50%	50%
Acquiring land	50%	50%
Achieving pre-sales	40%	40%
Combined probability “before discounting for other risks inc. financing and sales risks”	10%	10%
Obtaining finance	-	70%
Combined probability	10%	7%
<b>Value of profit opportunity</b>	<b>330,000</b>	<b>280,000</b>
Adjustment for chance of a loss		(30,000)
<b>Value of lost opportunity</b>	<b>330,000</b>	<b>250,000</b>

# >> Implications of the QCA's assessment

## NPV probability distribution implied by QCA damages award



\$	Profit (loss)	x	Probability	=	Value
Probability-weighted value of a profit	4,000,000	x	7%	=	<b>280,000</b>
Probability-weighted value of a loss	(32,258)	x	93%	=	<b>(30,000)</b>
<b>Value of lost opportunity</b>			<b>100%</b>		<b>250,000</b>

## >> The rational investor

“I would also accept that a commercial opportunity which **no rational investor would pursue**, having regard to the relative probabilities of a profit and a loss and the likely magnitude of each, **would be a valueless opportunity.**”

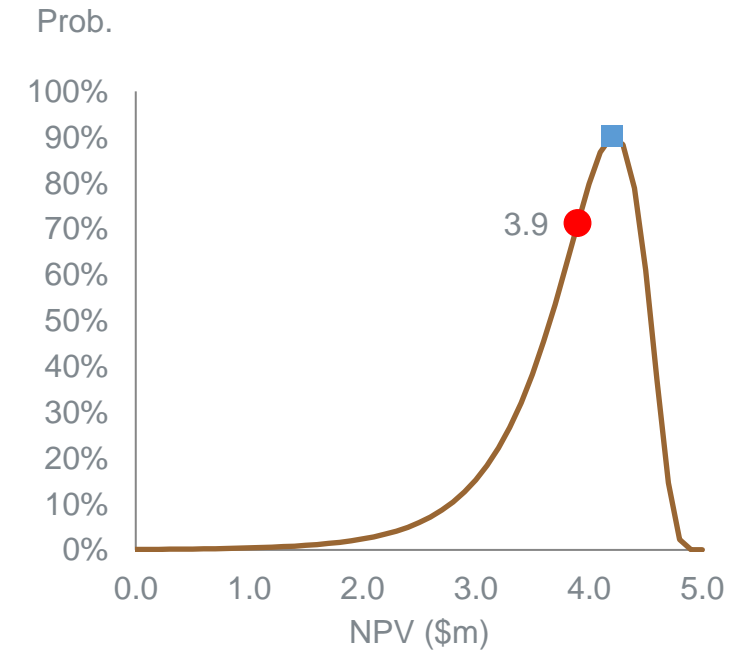
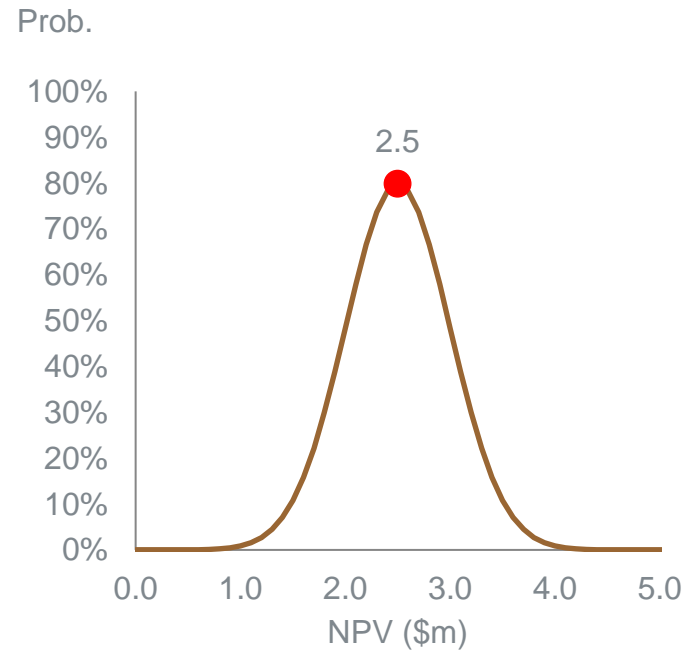
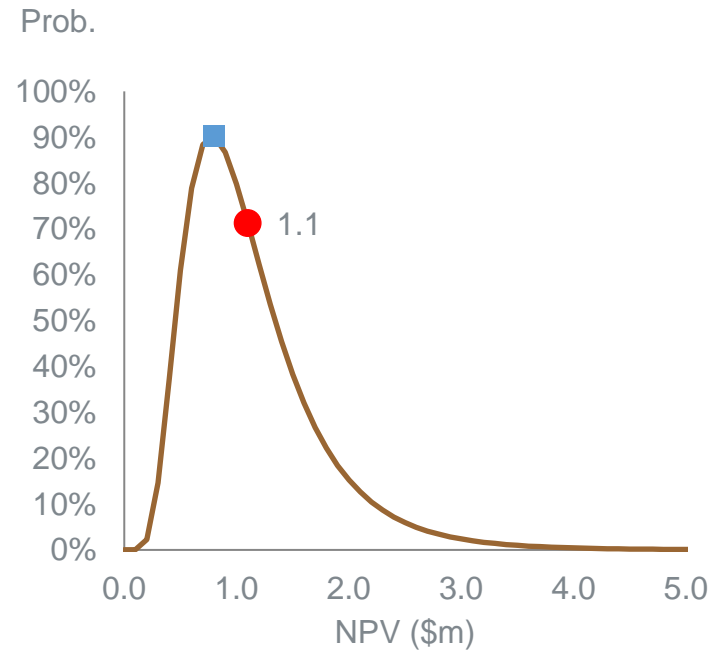
*Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2017] QCA 254  
per McMurdo JA at [23]

# Valuation concepts

2

# >> Value

- The value of an asset is equal to the net present value of its future cash flows.
- An 'expected value' is the probability-weighted average of all possible outcomes.



# >> Risk

## Additional risk considerations

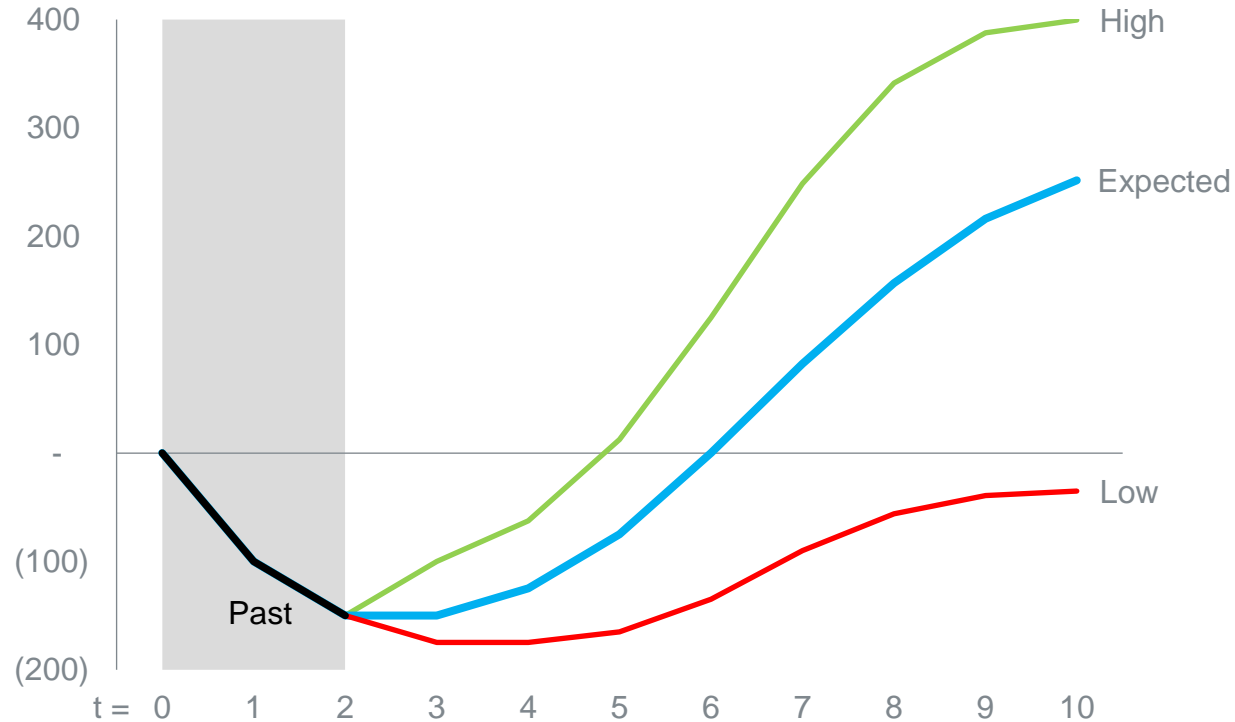
- Whether the plaintiff would have pursued the opportunity
- Dependencies on the actions of third parties
- Lack of historical financial performance
- Lack of an active market

“Capture all of it once and none of it twice.”

- Cash flows
- Discount rate
- *Sellers* discount

# >> Other loss issues

Cumulative cash flows (\$'000)



## Date of assessment

- 'Investment' decision to pursue
- Discounting to a present value
- Sunk costs, wasted costs?

## Hindsight

- 'Investment' decision to pursue
- Impact on hypothetical cash flows
- Hypothetical sale price

# Practical considerations for quantifying loss

3



'Correct'  
value

## Valuation of a lost opportunity

Ambit  
claim

Attempt to account for all risks.	<b>Summary</b>	Leave it to the Court to apply a global <i>Sellars</i> discount.
Probability-weighted average of all possible outcomes.	<b>Cash flows</b>	Best case scenario.
Weighted average cost of capital (or other appropriate discount rate).	<b>Discount rate</b>	Ignore risk and time value of money.
Accounted for in cash flows / use of probability weighted scenarios.	<b>'Threshold' risks</b>	Not accounted for.
NPV will indicate: (a) whether a rational investor would have pursued; (b) the value of the lost opportunity.	<b>Advantages</b>	For a plaintiff, puts it's highest case.
Many inputs and assumptions to support. Court may make different assessments.	<b>Disadvantages</b>	Should not represent an expert's opinion of loss. Merely a calculation for one scenario.

Consider a 'middle ground' approach

# >> Financial models and measuring risk

- Abstract representation of a real world financial situation
- Reflects the chosen method (e.g. DCF)
- Sensitivity analysis
- Scenario analysis





# >> Damages for loss of a commercial opportunity

## The challenge

- \$ Quantitative
- ???
- Subject to uncertainty

## Suggested approach

-  Apply valuation concepts
-  Be clear about the treatment of risk

# Conclusion and questions



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