

Article Information

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Valuing Intellectual Property: Lessons Learned from Mitchell Asset Management Pty Ltd v Marissa Di Pasquale

The Victorian Supreme Court decision in *Mitchell Asset Management v Di Pasquale* highlights that intellectual property value must be assessed with reference to its practical commercial utility, adaptability and investor appeal, rather than simply equating it to historical research and development expenditure.

Introduction

The recent Victorian Supreme Court decision in *Mitchell Asset Management Pty Ltd v Marissa Di Pasquale*^[1] underscores a crucial principle: the value of intellectual property is not solely determined by the research and development cost invested in its creation. Instead, the Court emphasised that valuation should focus more holistically on the asset’s utility, adaptability, and appeal to potential investors or end-users within a specific commercial context.

The below analysis considers the difficulties in valuing intangibles such as intellectual property, particularly for the purpose of court proceedings, and common pitfalls to be aware of.

Background

The plaintiff, Mitchell Asset Management (**MAM**), is a financial services firm that offers investment services to clients. The defendant, Di Pasquale, is the sole director of Cashtivity Pty Ltd (**Cashtivity**).

Di Pasquale founded Cashtivity in 2011 to develop a software-based tool aimed at teaching children financial literacy. Di Pasquale was aware that the Commonwealth government offered research and development (**R&D**) rebates to eligible companies. If a business satisfied the criteria, then it would recover a rebate of 45 per cent of the R&D expenditure it incurred in the preceding financial year. In 2012, Di successfully applied for the rebate and continued to receive it in subsequent years through to 2018.

By early 2015, Di Pasquale had concluded that Australia’s highly regulated education sector presented little opportunity for the product Cashtivity was developing,^[2] leading her to consider winding up the company.

However, after receiving advice, Di Pasquale realised that greater potential lay in the American market for both education software and investor interest. To position the business accordingly, she incorporated Cashtivity Inc in the United States (as the parent of Cashtivity). Believing that investor appeal would be strengthened if the American company held ownership of the relevant intellectual property, Di Pasquale executed a transfer deed (**the 2015 transfer deed**), assigning all existing and future intellectual property from Cashtivity to Cashtivity Inc for \$1.

In late 2016, Cashtivity obtained a loan from MAM, which was repaid following receipt of that year’s R&D rebate. In February 2018, MAM issued a second loan to Cashtivity. As security, Cashtivity executed a general security deed in favour of MAM over all present and after-acquired property.

In September 2018, Di Pasquale changed the name of Cashtivity Inc to Mindsets Learning Inc.

The following month, Di Pasquale incorporated an Australian entity named Mindsets Learning, intended to serve as a subsidiary of Mindsets Learning Inc. She executed a further intellectual property transfer deed (**the 2018 Transfer Deed**), transferring any intellectual property developed by Cashtivity between 2015 and 2018 to the newly formed Australian company.

In February 2019, Cashtivity's 2018 application for a rebate was rejected and consequently failed to repay the loan to MAM.

In November 2022, Cashtivity's receivers assigned to MAM any potential claims the company may have had against Di Pasquale for alleged breaches of fiduciary duty. MAM contends that Di Pasquale breached her duties by transferring Cashtivity's intellectual property to third parties for a nominal sum of \$1 on each occasion, and by causing the company to continue incurring R&D expenses following those assignments.

Decision

The Supreme Court of Victoria found in favour of Di Pasquale, holding that she did not breach her fiduciary duties^[3] to Cashtivity in either 2015 or 2018 by arranging for the company's present and future intellectual property to be transferred to third parties for \$1.^[4] In reaching this decision, the Court considered whether the \$1 assignment in 2015 and 2018 reflected the fair market value of the financial literacy software.^[5]

Both MAM and Di Pasquale submitted expert valuation reports addressing the value of Cashtivity's intellectual property at the time of each transfer (31 December 2015 and 4 March 2018 respectively). Each valuation expert adopted a different valuation method:

Di relied on an expert report by Brian Jones, who opined that the intellectual property assigned under both the 2015 and 2018 deeds had zero value.^[6] He concluded, relying on the "income approach"^[7] that the product development had substantially failed, there was no meaningful third-party interest in the R&D outcomes, and therefore the intellectual property lacked recognisable business or commercial worth.^[8]

In contrast, MAM submitted a report by Campbell Jaski, who valued the intellectual property at a range of \$0 to \$2 million in 2015 and \$0 to \$4.5 million in 2018. This valuation was conducted using the "cost approach",^[9] with the higher figure in each case reflecting the company's total R&D expenditure recorded in its income statements up to that point.^[10]

When considering expert evidence, the Court is not required to accept the whole of one opinion to the exclusion of the other. *Per Challenger Property Asset Management Pty Ltd v Stonnington City Council*,^[11] the Court is permitted to accept the evidence on expert on one issue and the evidence of another on separate issue.

Relevantly, Cosgrave J rejected both valuations. However, his Honour found that the true value of the intellectual property was low, significantly nearer to zero than millions of dollars.^[12]

The Court held that Cashtivity's valuation undervalued the intellectual property by saying it had zero worth. Cosgrave J held that "it is too absolute a position to say that Cashtivity's accumulative R&D expenditure and its product have no value whatever".^[13] While the R&D outcomes may carry some value for a buyer whose objectives align with the work undertaken,^[14] the Court did accept that a low valuation is realistic given the prolonged lack of a viable product, customers, or revenue.^[15]

Conversely, the Court held that MAM's valuation was exaggerated.^[16] The expert's assumption that a buyer might pay the total sunk cost of Cashtivity's accumulated R&D figures to obtain its intellectual property was deemed implausible, particularly in light of the product's commercial failure and lack of market success.^[17] The Court underlined this point by noting that MAM had not provided any empirical evidence of a potential purchaser willing to pay that sum or any similar sum (at all),^[18] nor were there any cited instances where a buyer actually bought a company's intellectual property for the price of its R&D expenditure.^[19] Cosgrave J also observed that the broad valuation range offered (e.g., \$0 to \$4.5 million in 2018) in lieu of a specific figure, coupled with no guidance as to the critical factors which could affect the valuation, suggested that the estimate appeared to be driven more by "guesswork and speculation rather than expert professional opinion".^[20]

On that basis, the Court found that the assignments for \$1 were not merely nominal, but justified given the limited commercial value of the intellectual property.^[21] Additionally, the strategic intent behind these transfers supported the conclusion that Di Pasquale did not breach her fiduciary duties.^[22] In any event, the 2018 Transfer Deed had no operative effect, as all software (both existing in 2015 and developed thereafter) had already been assigned to Cashtivity Inc under the 2015 deed.^[23]

Cosgrave J also found there was no breach of director duties in allowing Cashtivity to continue incurring R&D expenditure, despite the execution of the 2015 and 2018 Transfer Deeds assigning its intellectual property to Cashtivity Inc and Mindsets Learning, respectively.^[24] In reaching this conclusion, the Court rejected MAM's argument that Di Pasquale breached her duties by causing Cashtivity to undertake R&D without securing a direct benefit from that work.^[25]

The Court held that Cashtivity did derive a benefit: the company remained operational rather than being liquidated, and the ongoing R&D efforts enabled the creation of Cashtivity Inc, which in turn attracted investors and provided greater financial security. These were positive developments aligned with Cashtivity's best interests.^[26]

Conclusion

This decision reiterates the difficulties with valuing intellectual property. Unlike tangible property, such as cars or real estate, intellectual property is intangible and more difficult to define its worth in the market, particularly in the absence of readily identifiable buyers. Normally, valuing property can typically be undertaken by identifying the market and similar transactions, which helps to determine the value of a comparable asset.

To be able to value intellectual property, at least for the purpose of expert evidence, the Court considered it preferable to take a more comprehensive approach such as whether the intellectual property is easily identifiable, whether it is registered, and whether there are, or have been, commercial agreements (such as licences) that can be objectively used to form a feasible valuation. Simply pointing to substantial amounts invested in the property's development is not sufficient.

Piper Alderman has a nationally recognised intellectual property team. Please contact [Tim O'Callaghan](#), Partner, if you require legal advice.

^[1] [2025] VSC 307.

^[2] Ibid [28].

^[3] Ibid [205].

^[4] Ibid [191].

^[5] Ibid [150].

^[6] Ibid [152].

^[7] Ibid [166].

^[8] Ibid [162]-[163].

^[9] Ibid [166].

^[10] Ibid [156], [183].

^[11] (2011) 34 VR 445, [17]-[18].

^[12] *Mitchell Asset Management Pty Ltd v Marissa Di Pasquale* [2025] VSC 307, [190].

^[13] Ibid [184].

^[14] Ibid.

^[15] Ibid [299].

^[16] Ibid [220].

^[17] Ibid [301].

^[18] Ibid [186], [220].

^[19] Ibid [186].

^[20] Ibid [300].

[\[21\]](#) Ibid [222].

[\[22\]](#) Ibid [139].

[\[23\]](#) Ibid [226].

[\[24\]](#) Ibid [198].

[\[25\]](#) Ibid [204].

[\[26\]](#) Ibid.