

MISLEADING OR DECEPTIVE CONDUCT CASES -

REMEDIES

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1. The purpose of this paper is to provide an overview of the statutory remedies that are available to a plaintiff which has satisfied the court that the defendant has engaged in misleading or deceptive conduct in trade or commerce.
2. It is essential to observe in this connexion that the statutory prohibition on a person engaging in misleading or deceptive conduct, or conduct which is likely to mislead or deceive, provides a norm of commercial conduct in the sense of indicating what a person is obliged not to do. A minimum standard for commercial dealings is set. Where, contrary to the prohibition, the defendant has not observed that standard of conduct in its business dealings with the plaintiff, or others, but rather has engaged in misleading or deceptive conduct, it follows from the normative nature of the prohibition that so far as remedies are concerned, the court will seek:
 - (a) to correct and reverse the adverse impact of the defendant's contravening conduct on the plaintiff so that, as far as practicable, the plaintiff is re-instated to an "as you were" position; and/or
 - (b) to prevent the continuance of the contravening conduct, where continuing contravention would, or might well, occur if the court did not intervene.

Declarations

3. The Federal Court, the Supreme Court of Victoria and the Supreme Court of Western Australia each have power to grant declaratory relief where the plaintiff has proven to the Court that the defendant has engaged in misleading or deceptive conduct.¹ The Courts commonly make declaratory orders in misleading or deceptive conduct in the exercise of the Court's discretion

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¹ Section 21 *Federal Court Act 1976* (Cth); s 36 of the *Supreme Court Act 1986* (Vic); s 25(6) of the *Supreme Court Act 1935* (WA).

whether to do so. The principles which apply here are those stated by the High Court in *Ainsworth v Criminal Justice Commission*:²

“It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which “[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.” However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have “a real interest” and relief will not be granted if the question “is purely hypothetical”, if relief is “claimed in relation to circumstances that [have] not occurred and might never happen” or if “the Court’s declaration will produce no foreseeable consequences for the parties”. (Citations omitted)

4. In *Warramunda Village Inc v Pryde*,³ the Full Court stated:

“The remedy of a declaration of right is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment. This is even more strongly the case when the conclusion is not one from which any right or liability necessarily flows.”

5. As a practical matter, the question for the Court in exercising its discretion is whether there is utility in the circumstances of the case in making declaratory orders. That will likely be so where the declaratory orders made show the basis of the liability found and, in turn, of any other or consequential relief.⁴
6. In *Telstra Corporation Ltd v Singtel Optus Pty Ltd, (No 2)*,⁵ Elliott J, in a comparative advertising case, made declaratory orders for these reasons:

“In this case there has been a real controversy. The claims made by Telstra have been strenuously opposed. In my view, it is appropriate that declarations be made in circumstances where the court has found that Optus has deliberately engaged in conduct that significantly contravened the Australian Consumer Law for a material period of time. The declarations will clearly identify the contravening conduct, will publicise the type of advertising that constitutes a contravention and provide a warning to business not to engage in misleading or deceptive conduct, or make false or misleading representations. In particular, the declaratory relief will aid in consumers being protected from making ill-informed decisions concerning long-term contracts for mobile phone plans.” (Citations omitted)

² (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudrom JJ; see also Brennan J at 595-596.

³ (2000) 105 FCR 437 at 440 [8] per Gray Branson and North JJ.

⁴ *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 92 [95] per Gummow, Hayne and Heydon JJ; *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378 at 388 [35] per Greenwood, Logan and Yates JJ.

⁵ [2014] VSC 108; see also *Telstra Corporation Ltd v Singtel Optus Pty Ltd* [2014] VSC 35.

7. Provided that the declaratory orders proposed by the plaintiff are well drafted and in particular are quite specific as to the contravening conduct in which the defendant has engaged, as found by the Court, the defendant will typically not have any sound basis for contending that declaratory orders should not be made.

Corrective advertising

8. The Court has power to order corrective advertising where it finds that misleading or deceptive conduct by the defendant has occurred.⁶ Corrective advertising may be ordered in addition to injunctive relief, or in substitution therefor,⁷ as may be appropriate in all the circumstances of the case. The relevant principles were stated by Elliott J in *Telstra Corporation*,⁸ as follows:

The authorities make it plain there is no presumption that corrective advertising will be ordered if the public, or a section of the public, has been misled. Each case depends on its circumstances. A number of the relevant authorities on the issue of corrective advertising are referred to in the judgment of Stone J as a member of the Full Court of the Federal Court of Australia in *Medical Benefits Fund of Australia Ltd v Cassidy*.⁹ From the authorities referred to by her Honour, the following propositions may be stated:

- (1) The power to order corrective advertising is to be used protectively and not punitively.
- (2) The purpose of corrective advertising is to dispel incorrect or false impressions that may have been created as a result of misleading or deceptive conduct.
- (3) There is no period of time beyond which it is inappropriate to order corrective advertising. In determining the utility of any corrective advertising, the lapse of time is a relevant consideration, the significance of which will depend on the facts of the case.
- (4) In assessing whether or not corrective advertising is warranted, "the nature, extent and intensity of the advertising and the media in which it has been released" must be examined with a view to deciding whether there could reasonably be any current misapprehension as a result of the advertisement.

One of the purposes of corrective advertising is to educate the public, both consumers and competitors, as to the type of conduct that may contravene the Act. It is important that corrective advertising does more than merely announce the outcome of a particular case."

⁶ TPA s 80(1); ACL s 232(1), (2).

⁷ Eg. *Osgaig Pty Ltd v Ajisen (Melbourne) Pty Ltd* (2004) 63 IPR 156 at 179-183 [115]-[139].

⁸ [2014] VSC 108 at paras [41], [42].

⁹ (2003) 135 FCR 1 at 20-21 [48]-[50], 23 [58], Moore and Mansfield JJ agreeing.

In *Telstra Corporation*, the Court made declaratory orders and ordered that corrective advertising be published.

Injunctions

9. If the defendant's contravening conduct will, or may well, continue unless the Court grants an injunction to restrain that,¹⁰ the Court commonly will grant the plaintiff injunctive relief to prevent such continuance. The Court here takes into account a wide variety of discretionary considerations, including whether:

- (a) an award of damages would be an adequate remedy instead;
- (b) the contravening conduct by the defendant which the plaintiff seeks to enjoin can be described with the necessary particularity;
- (c) other remedies, such as corrective advertising, are more appropriate;
- (d) third party interests, or the public interest, tend to favour injunctions being granted.

10. The Court's powers here are broad. Section 232(4) of the *ACL* provides as follows:¹¹

- (4) **[Power to grant restraining junction]** The power of the court to grant an injunction under subsection (1) restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of a kind referred to in that subsection;
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind."

11. In *ICI Australia Operations Pty Ltd v Trade Practices Commission*,¹² French J after referring to s 80(4) of the *TPA*, stated as follows:

"There is room within the statutory framework and the policy that underlies it for an injunction which is intended not to restrain an apprehended repetition of contravening conduct but to deter an offender from repeating the offence. That deterrence is effected by attaching to the repetition of the contravention the range of sanctions available for contempt of court."

¹⁰ See *TPA* s 80(1); *ACL* s 232(1), (2); *Corporations Act ("CA")* s 1324(1); *ASIC Act* s 12GD.

¹¹ Section 80(4) of the *Trade Practices Act 1974* (Cth) was substantially the same.

¹² (1992) 38 FCR 248 at 268.

12. In *ACCC v Real Estate Institute of Western Australia*, French J stated:¹³

“I respectfully accept, as I did previously, the observations of Merkel J in *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd*¹⁴ ... that there must be a nexus between the conduct alleged or found to constitute the relevant contraventions and the injunctions granted. ... Whether there is sufficient nexus between the orders sought and the contravention alleged involves an evaluative judgment.”

13. The issue of nexus loomed large in the recent decisions of the Victorian Court of Appeal in *Murphy v State of Victoria*.¹⁵ The plaintiff complained that the State of Victoria and a Victorian statutory corporation had misled or deceived members of the public by publishing certain documents indicating benefits that would flow from the construction of a new tunnel and roads, the East West Link. According to the plaintiff, the documents contained representations which were not based on reasonable grounds. The trial judge decided separate questions concerning whether the defendants were carrying on a business, acting in trade or commerce and whether a final injunction should go. The judge decided “No” to each question,¹⁶ which provoked an appeal by the plaintiff. On the hearing of the appeal, the Court explained what happened as follows:¹⁷

“Pending our determination of the matter, however, the appellant seeks an interim injunction to restrain the respondents proceeding further with the motorway project the subject of the appeal, and in particular to restrain the Crown in right of the State of Victoria from entering into a contract with the successful tenderer for the construction of the motorway as a tollway in public private partnership. The exact terms of the relief sought are as follows:

The respondents be restrained from entering into any contract for the design, funding, developing, procuring or construction of the East West Link (Eastern Section) Project (Project), with the East West Connect consortium, the preferred bidder for the Project or with any other bidder for the Project.

The respondents be restrained from compulsorily acquiring any of the properties the subject of a notice of intention to compulsorily acquire given.

...

The difficulty, however, as we see it, is that the preferred tenderer has not been misled by any of the impugned representations – to the contrary, it says that it knows all of the facts – and by its counsel, who was given leave to appear as representing a party likely to be affected by the injunction, has opposed the grant of injunction for anything longer than a few days.”

¹³ (1999) 95 FCR 114 at 131 [39].

¹⁴ (1997) 78 FCR 197 at 202.

¹⁵ [2014] VSCA 236; [2014] VSCA 238 per Nettle AP, Santamaria and Beach JJA.

¹⁶ *Murphy v State of Victoria (No 2)* [2014] VSC 404 per Croft J.

¹⁷ *Murphy v State of Victoria* [2014] VSCA 236 at paras [2], [7].

14. The Court rejected the plaintiff's application for an interim injunction. The Court accepted that the plaintiff had standing to complain about the alleged misleading or deceptive conduct, based on the decision of the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*.¹⁸

15. The Court, in the course of rejecting the interim injunction application, stated as follows:¹⁹

"Secondly, even if s 18 of the ACL establishes a new norm of honest dealing applicable to all forms of commercial and professional activities, it is not lightly to be supposed that it is directed to protecting any broader class of persons than those who do or may act to their detriment in reliance upon misleading or deceptive conduct or who may be affected directly or indirectly by those who do or may so act.

Thirdly, even if it is intended that the suggested norm of honest dealing has the object or effect of affording relief to a wider class of persons than that, there remains the need for the appellant to establish sufficient relevant connexion between the impugned conduct and the remedy which is sought, and thus sufficient relevant connexion between the impugned conduct and the prevention or eradication of the harm to which the remedy is directed. In this case, any connexion between the impugned conduct and such harm as it is alleged might be suffered by reason of the construction of the motorway is at best fortuitous and logically very tenuous.

Perhaps it may be, as counsel for the appellant contended, that, if the State were forced to publish corrective advertising before entering into a contact with the successful tenderer, the motorway might never be built. The delay and expense which would be involved in putting out corrective advertising, the loss to the State and the successful tenderer as a result of being delayed, the imminence of the coming State election, and the change in government policy which might result from it, imply the possibility that the grant of interim injunction would have that effect.

In our view, however, it cannot be that the ACL's conception of public interest protection goes as far as that. To grant an injunction to achieve that consequence, rather than to preserve interests which the legislation was designed to protect, would be an abuse of the legislation.

So to say is not intended to exclude the possibility of the appellant succeeding in obtaining the final relief which he seeks. On one view of the matter, the chance of establishing sufficient relevant connexion between the impugned conduct and the relief which is sought cannot be excluded unless and until there has been discovery and a final determination of the matters in issue on a conventional and regular basis. Nothing which we say in these reasons is intended to foreclose the issue if the matter is remitted for trial."

16. Five days later, on 29 September 2014, the Court of Appeal allowed the plaintiff's appeal as the procedure of deciding separate questions was inappropriate.²⁰ The Court in that context did not decide the final injunction question, but again doubted that the plaintiff could demonstrate that

¹⁸ (2000) 200 CLR 591.

¹⁹ *Murphy v State of Victoria* [2014] VSCA 236 at [13]-[17] per Nettle AP, Santamaria and Beach JJA.

²⁰ *Murphy v State of Victoria* [2014] VSCA 238 at paras [30]-[63].

there was a sufficient nexus between the alleged contraventions and the injunctions sought.²¹ The High Court rejected further interim injunction applications, pending the hearing of a special leave application concerning the first decision of the Court of Appeal, after both decisions of the Court.²² A special leave application by the plaintiff to the High Court concerning the initial decision by the Court not to grant an interim injunction was rejected by Crennan, Gagelar and Keane JJ.²³

Damages

17. Where the plaintiff satisfies the Court that it has suffered some loss or damage caused by the defendant's misleading or deceptive conduct, then the question arises on the basis of what principles the Court ought go on to decide what dollar award of damages should be made. Perhaps the two most helpful statements made by the High Court in this regard are the following.
18. In *Wardley Australia Ltd v Western Australia*, the plurality stated:²⁴

By virtue of s.82(2) of the Act, the period of limitation begins to run at the time when the cause of action under s.82(1) accrues. As loss or damage is the gist of the statutory cause of action for which s.82(1) provides, the cause of action does not accrue until actual loss or damage is sustained. The statutory cause of action arises when the plaintiff suffers loss or damage "by" contravening conduct of another person. "By" is a curious word to use. One might have expected "by means of", "by reason of", "in consequence of" or "as a result of". But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s.82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this Court in *March v. Stramare (E and M. H.) Pty. Ltd*,²⁵ except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had Parliament intended to say something else, it would have been natural and easy to have said so.

In the context of the Act, the concept of loss or damage, like the concept of causation, must be applied in a wide variety of situations because the contraventions of Pts IV and V which give rise to causes of action under s.82(1) are diverse. Here we are concerned with contraventions of s.52(1) in the form of misleading conduct constituted by misrepresentations. In this situation, as at common law, acts done by the representee in reliance upon the misrepresentation constitute a sufficient connection to satisfy the concept of causation. And, if those acts result in economic loss, that is, loss other than physical injury to person or property, that economic loss will ordinarily be recoverable under s.82(1). In the context of the area of commercial conduct in which the Act operates, the reference to "loss or damage" in s.82(1) plainly includes economic or financial loss.

²¹ Ibid at [93]-[105]. The Court of Appeal there cited with approval the decisions of French J referred to in paras 11 and 12 above.

²² See *Murphy v State of Victoria* [2014] HCA Trans 214, 26 September 2014 and [2014] HCA Trans 215, 29 September 2014.

²³ [2014] HCA Trans 230 (17 October 2014).

²⁴ (1992) 175 CLR 514 at 525-526, 527.

²⁵ [(1991) 171 CLR 506.

The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough.

...

When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of "loss or damage". And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust." (Citations omitted)

19. In *Marks v GIO Australia Holdings Ltd*, Gaudron J stated:²⁶

"Once it is appreciated that references to the "established measures of damages ... [for] contract and tort", as in *Gates*, signify different kinds of loss and not different methods by which loss is measured, it is irrelevant to inquire as to the appropriate measure of damages for the purposes of ss 82 and 87 of the Act. Rather, the task is simply to identify the loss or damage suffered or likely to be suffered and, then, to make orders for recovery of that amount under s 82 or to compensate for or prevent or reduce that loss or damage under s 87 of the Act.

Moreover, once it is appreciated that, for the purposes of the law of contract "expectation" loss signifies the loss of a valuable right, namely, the contractual promise, it is irrelevant and quite misleading to ask whether, in the case of misleading and deceptive conduct under s 52 of the Act, ss 82 and 87 allow for "expectation" loss or "consequential" loss. It is irrelevant, because, if the misrepresentation is not contractual, there can be no loss of a contractual promise. It is misleading because it tends to suggest that if "expectation" loss is not recoverable, the claimant can never be compensated in an amount equivalent to that which would be payable if the representation were contractual.

Not only is it misleading to speak of "expectation" loss and "reliance" loss in the context of s 82, but there is no basis for thinking that relief under s 82 is to be confined by analogy either with actions in contract or in tort. "

20. It is important to be mindful of the wide range of remedies available to a plaintiff where it has suffered loss and damage because of the defendant's contravening conduct. A monetary award of damages, analogous to common law damages in a tort case, pursuant to s 236(1) of the *ACL*²⁷ is obviously one remedy. Sections 237(1) and 238(1)²⁸ empower the Court to make compensation orders in favour of an injured person who has suffered loss or damage because of the conduct of

²⁶ (1998) 196 CLR 494 at 503 [15]-17].

²⁷ See also *TPA* s 82(1); *Fair Trading Act 1987* (WA) s 79(1); *CA* s 1041H, 1325 and *ASIC Act* s 12GF.

²⁸ See also the *TPA* s 87(1), (1A) and the *Fair Trading Act 1987* (WA) s 77(1), (2).

another person, "... as the court thinks appropriate against the person who engaged in the conduct ...". Sections 237(2) and 238(2) provide that such orders must compensate the injured person in whole or in part for the loss or damage, or prevent or reduce the loss or damage suffered. The Court also has wide powers under ss 237(1) and 238(1), by reason of s 243, to declare a contract void, vary a contract, refuse to enforce a contract, order the relevant person to pay the injured party the amount of the loss and damage and to make other like orders.²⁹

21. These matters are well illustrated by the decision of Le Miere J in a *Fair Trading Act 1987* (WA) misleading or deceptive conduct case, *Grande Enterprises Ltd v Pramoko*.³⁰ The plaintiff purchased shares in a company for \$2.25 million. The Letter of Offer by the vendor provided that if the subject company was not taken over by a company listed on the ASX or was not itself listed on a major stock exchange within two years, then the vendor would buy back the shares from the plaintiff at the same price. The defendant orally represented to the plaintiff that if the vendor company was not in a position to buy back the shares, then he would do so. The company was not taken over by an ASX listed company and it was not listed on a major stock exchange, within two years. Neither the vendor company nor the individual defendant bought the shares back from the plaintiff. The plaintiff alleged that the defendant's oral representation led it to purchase the shares, that the defendant's future matters representation had no reasonable grounds, and claimed loss of \$2.25 m as the shares in the company were worthless. Le Miere J held that the defendant had engaged in misleading or deceptive conduct. The plaintiff's damages claim was that it was entitled to the difference between the amount it paid for the shares and the (nil) value of the shares at the date of trial, in reliance upon the decision of the High Court in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*.³¹ There was a lack of evidence before the Court as to the value of the shares, due to the lack of financial statements of the company, which was registered in the British Virgin Islands. The Court did not make any award of damages under FTA s 79, but rather made a compensation order under s 77.
22. Le Miere J decided the plaintiff's loss and damage claim as follows:

"In this case Grande is locked into its investment. There is no market for Zen Resources shares. There is no buyer for such shares. The intrinsic value of Zen Resources shares, if any, is derived from the tenements held by its subsidiaries. The mineral resources in the tenements have not been established to be economically feasible for extraction. The resources may have some value but that cannot be calculated. The plaintiff has suffered loss or damage because whilst the Zen Resources shares may have some value derived from the tenements held by its subsidiaries, the shares are worth much less than \$2.25 million. In all the circumstances the appropriate order is that Tjandra pay to Grande \$2.25

²⁹ See also the *TPA* s 87(2) and the *Fair Trading Act 1987* (WA) s 77(3).

³⁰ [2014] WASC 294.

³¹ (2004) 217 CLR 640.

million and Grande transfer to Tjandra its Zen Resources shares within 28 days of receiving a written request. Such written request may only be sent by Tjandra within 28 days of payment of the amount of \$2.25 million referred to.”

Contributory Negligence

23. Section 82(1B) of the *TPA* introduced apportionment of liability for misleading or deceptive loss or damage between the plaintiff and the defendant to overcome the decision of the High Court in *I&L Securities v HTW Valuers (Central Qld) Pty Ltd*.³² The successor provision in the *Competition and Consumer Act 2010 (Cth)* (“the *CCA*”) in respect of s 236(1) *ACL* damages claims is s 137B. Section 137B³³ provides that where the claimant’s loss and damage resulted partly of the claimant’s failure to take reasonable care and partly of the conduct of the other person, the amount of the loss and damage that the claimant may recover under s 236(1) is to be reduced to the extent to which a court thinks just an equitable, having regard to the claimant’s share in the responsibility for the loss or damage.
24. The Full Court in *Valcorp Australia Pty Ltd v Angas Securities Ltd*,³⁴ per Jacobson, Siopis and Nicholas JJ, in applying s 82(1B) of the *TPA* followed the common law contributory negligence authorities in the High Court. However, the Court noted that some adjustment may be required in the circumstances of the case because a party may engage in misleading or deceptive conduct even in the absence of negligence.³⁵
25. The High Court in *Pennington v Norris*³⁶ observed:
- “What has to be done is to arrive at a “just and equitable” apportionment as between the plaintiff and the defendant of the “responsibility” for the damage. It seems clear that this must of necessity involve a comparison of culpability. By culpability, we do not mean moral blameworthiness but the degree of departure from the standard of care of the reasonable man.”
26. In *Podrebersek v Australian Iron and Steel Pty Ltd*³⁷ the High Court stated:
- “The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man *Pennington v Norris* and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd*; *Smith v McIntyre* and *Broadhurst v Millman*, and

³² (2002) 210 CLR 109.

³³ See also *CA* s 1041H(1) (1B); *ASIC Act* s 129GF(1), (1B).

³⁴ [2012] FCAFC 22

³⁵ *Ibid* at para [109].

³⁶ (1956) 96 CLR 10 at 16, per Dixon CJ, Webb, Fullagar and Kitto JJ.

³⁷ (1985) 59 ALR 529 at 532-533.

cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance." (Citations omitted)

27. The Full Court in *Valcorp* accordingly considered the relative culpability of the plaintiffs and the defendant, and the relative causative potency of the impugned conduct of each of the parties. The Court held that each of the parties should be found equally responsible for the loss suffered by the plaintiffs.³⁸ The plaintiffs' award of damages was accordingly reduced by 50 per cent from the damages that would have been ordered had the Court made no apportionment. The Full Court disagreed with trial judge, who had apportioned liability between the plaintiffs and the defendant 25 to 75 per cent.
28. The point which emerges is that although the plaintiff must only prove that the defendant's contravening conduct was a cause of its loss or damage, not the cause so that other factors may have contributed, as against the defendant, the plaintiff's award of damages can be reduced by reason of its own failure to take reasonable care to avoid the loss or damage.
29. It should be noted that s 137B of the CCA relates, and relates only, to s 236(1) ACL damages claims. Accordingly, s 137B does not apply in respect of compensation orders under s 237(1) or s 238(1) of the ACL referred to above.³⁹ It may or may not be that the width of the Court's power under those sections to decide the appropriateness of making a compensation order, means that the plaintiff's contributory negligence is taken into account nevertheless.⁴⁰

Proportionate Liability

30. It is fair to say that the law as to what an apportionable claim is for the purposes of the Proportionate Liability provisions of the TPA, in respect of the ACL and of the Corporations Act, and the ASIC Act is presently unclear. The reason for this is conflicting decisions of the Full Federal Court. In *ABN AMRO Bank NV v Bathurst Regional Council*,⁴¹ Jacobson, Gilmour and Gordon JJ on 6 June 2014 disagreed with the majority decision of Mansfield and Besanko JJ, White J dissenting, on 30 May 2014, in *Wealthsure Pty Ltd v Selig*.⁴² A special leave application to

³⁸ [2012] FCAFC 22 at paras [114]-[117], [121]-[128].

³⁹ Cf. *Corporations Act* ss 1041I(1), (1B).

⁴⁰ *Rivercity Motorway Finance Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713 at paras [26], [40] per Nicholas J.

⁴¹ [2014] FCAFC 65.

⁴² [2014] FCAFC 64.

the High Court in respect of the latter decision⁴³ will be heard on 14 November 2014. In order to explain the point of disagreement, it is necessary first to refer to the statutory provisions, which are not materially different as between the TPA, in respect of the *ACL*, under the *Corporations Act* and under the *ASIC Act*.⁴⁴

31. (a) An apportionable claim is one where the claim is for damages for economic loss caused by misleading or deceptive conduct: *TPA*: the damages claim is under s 82, the liability claim is under s 52; see s 87CB(1); *CCA 2010*: the damages claim is under s 236 of the *ACL*, the liability claim is under s 18 of the *ACL*; see s 87CB(1); *CA*: the damages claim is under s 1041 and the liability claim is under s 1041H; see s 1041L; *ASIC Act*: the damages claim is under s 12GF and the liability claim is under s 12DA; see s 12GP1.
- (b) There is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind): *TPA* s 87CB(2); *CCA* s 87CB(2); *CA* s 1041L(2); *ASIC Act* s 12GP(2).
- (c) A concurrent wrongdoer in relation to a claim is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim: *TPA* s 87CB(3); *CCA* s 87CB(3); *CA* s 1041L(3); *ASIC Act* s 12GP(3).
- (d) In any proceedings involving an apportionable claim:
- (i) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
- (ii) the court may give judgment against the defendant for not more than that amount: *TPA* s 87CD(1); *CCA* s 87CD(1); *CA* s 1041N(1); *ASIC Act* s 12GR(1).
- (e) In apportioning responsibility between the defendants in the proceedings:
- (i) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

⁴³ *Selig* is the applicant.

⁴⁴ It may be noted that these provisions are materially different from the *Sate Wrongs Act* provisions, such as were considered by the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613.

- (ii) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings: *TPA s 87CD(3); CCA s 87CD(3); CA s 1041N(3); ASIC Act s 12GR(3)*.
 - (f) Proportionate liability for apportionable claims applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceeding: *TPA s 87CD(4); CCA s 87CD(4); CA s 1041N(4); ASIC Act s 12GR(4)*.
 - (g) A defendant against whom judgment is given as a concurrent wrongdoer in relation to an apportionable claim:
 - (i) cannot be required to contribute to any damages or contribution recovered from another concurrent wrong doer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
 - (ii) cannot be required to indemnify any such wrongdoer: *TPA s 87CF; CCA s 87CF; CA s 1041P; ASIC Act s 12GT*.
32. An example may assist. The plaintiff claims \$100,000 damages against the defendant under s 236(1) of the *ACL*, in respect of misleading or deceptive conduct in contravention of s 18 of the *ACL*. The defendant contends that if it is liable, then the plaintiff has been guilty of contributory negligence. The defendant also contends that another party, whom neither the plaintiff sues as a defendant, nor the defendant sues as a third party/cross-respondent, is partly responsible for the plaintiff's loss and damage. The Court finds for the plaintiff on liability, and prima facie for \$100,000 damages against the defendant. However, the Court reduces the award to \$80,000 because the plaintiff was guilty of contributory negligence to the extent of 20%. If the plaintiff's claim is an apportionable claim and the other party is a concurrent wrongdoer with the defendant, the Court may go on to find that as between the defendant and the non-party, those two parties were each 50 per cent responsible for the plaintiff's loss and damage. The plaintiff then would only succeed against the defendant for \$40,000, not for \$80,000. As the plaintiff has not joined the partially responsible non-party as a defendant, it obtains no judgment against that person. The non-party is not obliged to pay the defendant anything either. However, the defendant's liability to the plaintiff has been reduced by half to \$40,000. If the plaintiff had joined the other party as a defendant, and the Court apportioned liability for the plaintiff's loss and damage 50/50 between the defendants, the plaintiff would only succeed against each of the defendants for \$40,000. The plaintiff would have to execute against both defendants to obtain its \$80,000.

33. By contrast, before the contributory negligence and proportionate liability provisions were introduced, the plaintiff would have succeeded against the defendant for \$100,000, whether or not the defendant had successfully claimed contribution from the other party. If the defendant had joined the other party as a third party or cross-respondent and obtained contribution from that party to the extent of 50 per cent, and the plaintiff did not sue that party, the plaintiff would still have been entitled to judgment against the defendant for \$100,000. It would be a matter for the defendant to execute against the third party/cross-respondent for \$50,000. If the plaintiff had also sued the other party as a defendant, it would have also obtained judgment against each defendant for \$100,000, then because the conduct of each defendant was a cause of the defendant's loss or damage. The plaintiff would not have obtained more than \$100,000, but could have chosen to execute only against the first defendant/plaintiff on its counter-claim or cross-claim. If that defendant paid the \$100,000, then it would have been its problem to execute against the third party/cross-claimant to collect its \$50,000. The plaintiff would not be concerned about the solvency of the other party, having obtained its \$100,000 from the first defendant.
34. Accordingly, where a plaintiff sues multiple defendants in respect of misleading or deceptive loss and damage suffered by it, it will be in the interests of the plaintiff to avoid the Proportionate Liability regimes under the various statutes, if possible. The plaintiffs were unsuccessful in doing so in the earlier Full Court decision, *Wealthsure Pty Ltd v Selig*,⁴⁵ but successful in the later Full Court decision *ABN AMRO Bank NV v Bathurst Regional Council*.⁴⁶ The contentious issue of statutory construction arises where the plaintiff sues multiple defendants claiming damages in respect of loss and damage caused by misleading or deceptive conduct, but the plaintiff succeeds against more than one defendant, based upon more than one of the statutory damages claims in respect of the same or essentially the same, conduct and loss and damage. More particularly, the source of the problem which divided the two Full Courts is that under each of the Proportionate Liability regimes, the definition of apportionable claim is tied back to a single statutory damages claim, but other statutory damages claims can apply as well.
35. In the decision of the Full Court in *Wealthsure*,⁴⁷ per Mansfield and Besanko JJ, White J dissenting, the plaintiff's sued twelve defendants in respect of financial advice which they alleged was misleading or deceptive. The trial judge,⁴⁸ in relation to a company and its representative, found that the plaintiffs were entitled to damages pursuant to s 935B of the CA in respect of contraventions of ss 945A and 945B; pursuant to s 1041I in respect of contraventions of ss 1041E

⁴⁵ [2014] FCAFC 64.

⁴⁶ [2014] FCAFC 65.

⁴⁷ [2014] FCAFC 64.

⁴⁸ *Selig v Wealthsure* [2013] FCA 348 per Lander J.

and 1041H; pursuant to s 1325 and in respect of breach of s 769C and pursuant to s 12GF of the *ASIC Act* in respect of breaches of ss 12DA, 12DB, 12ED and s 12BB. In relation to some of the other defendants, the trial judge found that the plaintiffs had established contraventions of ss 728, 1041E, 1041F, 1041H of the *CA* and s 12DA of the *ASIC Act*.⁴⁹ At trial, the Court held that the contributory negligence claims by the defendant were only available under s 1041I(1B) of the *CA* and s 12GF(1B) of the *ASIC Act*. The trial judge also held that apart from s 1041H, the plaintiffs' claims were not apportionable claims. Accordingly, the Court entered judgment against each of the various defendants for \$1,760,512. The judge found that had contributory negligence been open and the claims apportionable, he would have found the plaintiffs contributorily negligent to the extent of 15% and would have apportioned 60% of the liability to two defendants, 25% to two other defendants and 15% to another group of defendants.⁵⁰

36. The plaintiffs did not claim that the various contraventions that they alleged had caused different loss or damage.⁵¹ The issue which divided the Full Court in *Wealthsure* was whether the expression "the claim for the loss and damage is based on more than one cause of action (whether or not of the same or different kind)" in s 1041L(2) of the *CA*, referred only to causes of action which are themselves apportionable claims, or alternatively to causes of action more generally. The dissentient, White J, preferred the former construction, but Mansfield and Besanko JJ disagreed.⁵² Accordingly, the majority held that the proportionate liability provisions, including the allowance for contributory negligence, applied in relation to the plaintiff's claims.
37. In *ABN AMRO*⁵³ Jacobson, Gilmour and Gordon JJ disagreed with the majority decision in *Wealthsure*.
38. Subsequent to both decisions on a pleadings application concerning the like *TPA* provisions, Nicholas J pertinently stated:⁵⁴

"It does seem odd that a claim for damages for conduct in contravention of s 52 brought under s 82 might be an apportionable claim, but that a claim that relies upon precisely the same contravention of s 52, and giving rise to precisely the same loss and damage, would not also be an apportionable claim if brought under s 87".

⁴⁹ See [2014] FCAFC 64 at paras [318], [319] per White J.

⁵⁰ *Ibid* at paras [130], [131] per White J.

⁵¹ *Ibid* at para [328] per White J.

⁵² *Ibid* per White J at paras [345]-[370]; cf Mansfield J at paras [6]-[18]; and Besanko J at paras [45]-[85].

⁵³ [2014] FCAFC 65.

⁵⁴ *Rivercity Motorway Finance Pty Lt (Administrators Appointed) (Receivers and Managers Appointed) v AECOM Australia Pty Ltd (No 2)*.

39. It is to be hoped that the High Court will grant special leave to appeal in *Selig v Wealthsure Pty Ltd* so that the issue here can be resolved.

Conclusion

40. What emerges is that both plaintiffs and defendants are well advised to pay close attention at the outset of proceedings to issues concerning misleading or deceptive conduct remedies, as well as to liability issues.

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