

CAUSATION AND RELIANCE ISSUES
IN MISLEADING OR DECEPTIVE CONDUCT CASES

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1. Causation and reliance issues arise in misleading or deceptive conduct cases where the plaintiff seeks an award of damages in respect of loss and damage which it alleges that it has suffered caused by the defendant's wrongful conduct. Common law concepts of causation have been applied here, but it is fundamental that such a damages claim is a creature of statute. Ultimately the statutory language as applied by the Court in all the circumstances of the case determines whether the plaintiff establishes causation, and hence an entitlement to an award of damages. In a very different statutory context, namely whether for the purposes of s 10(1) of the *Damage by Aircraft Act 1999* (Cth) injury was "... caused by ... something that is a result of an impact", the High Court in *ACQ Pty Ltd v Cook*,¹ stated:

"The field of debate, causation, is one of the most difficult in the law, and one about which abstract discussion is seldom valuable for courts and those who practise in them."²

Hence statements of principle here are best understood in the context of the relevant factual circumstances of the case.

The statutory context

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¹ (2009) 237 CLR 656; [2009] HCA 28 at [14] per curiam.

² Edelman J cited this passage in the context of misleading or deceptive conduct claims in *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322; [2015] FCAFC 94 at [187].

2. Taking the *Australian Consumer Law*³ (the *ACL*) provisions as an example, sections 18(1) and 236(1) provide as follows:

“18(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

236(1) If:

(a) a person (the **claimant**) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 ...

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.”

3. It will be observed that the language of the former s 82(1) of the *Trade Practices Act 1974* (Cth) (the *TPA*) is different from s 236(1) of the *ACL*:

“82(1) ... a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part ... V ... may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.”

4. I suggest that no change of meaning was intended or effected as a result of the replacement of the words “by conduct” in s 82(1), with the words “because of the conduct” in s 236(1).
5. Section 18(1) of the *ACL* applies in relation to a very broad range of economic activity. Section 236(1) contains no limitation on the kinds or types of loss and damage to which it applies, does not indicate that compensable loss or damage must have been suffered by the plaintiff in any particular manner and provides no guidance as to what measure of loss and damage is intended. Hence applicable principles have emerged and evolved somewhat on a case by case basis.

³ *Competition and Consumer Act 2010* (Cth), Sch 2.

6. Section 18(1), and its predecessor, s 52(1) of the *TPA*, and analogous Federal and State statutory provisions,⁴ establish a standard of behaviour in trade or commerce⁵ by proscribing misleading or deceptive conduct. The damages provision, s 236(1), and its statutory analogues,⁶ reinforces⁷ s 18(1) by putting persons who engage in trade or commerce on notice that there could be pecuniary consequences to them if the statutory norm is not adhered to. An award of s 236(1) damages operates to ameliorate the adverse consequences of conduct in breach for a person who suffers loss and damage caused by that. The object of an award of damages here is to restore the plaintiff to the position that it would have been in had the contravening conduct by the defendant not occurred. That is to say, to compensate the plaintiff in respect of the loss and damage which the defendant's conduct caused it. Also, s 236(1) operates to further⁸ the stated object of the *Competition and Consumer Act 2010 (Cth)*,⁹ being:

“s 2 The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”

7. In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,¹⁰ Gleeson CJ said of the construction of s 82:

“When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the

⁴ *Corporations Act 2001 (Cth)* s 1041H; *Australian Investment Commission Act 2001 (Cth)* s 12DA; *ACL (Vic), (NSW), (Qld), (WA), (Tas), (SA), (ACT), (NT)*: s 18(1)

⁵ *Williams v Pisano* (2015) 90 NSWLR 342; [2015] NSWCA 177 at [100] per Emmett JA.

⁶ *Corporations Act* s 1041I; *ASIC Act* s 12GF; *ACL (Vic), (NSW), (Qld), (WA), (Tas), (SA), (ACT), (NT)*: s 236(1).

⁷ *HM & O Investments v Ingram* [2012] NSWSC 958 at [102] per McDougall J.

⁸ *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568; [2005] HCA 26 at [99]-[100] per Gummow, Hayne and Heydon JJ.

⁹ The *TPA*, by s 2 had the same stated object.

¹⁰ (2002) 210 CLR 109; [2002] HCA 41 at [26].

judge assessing damages, but by the judge’s concept of principle and of the statutory purpose.”

8. Accordingly, it can be useful to distinguish between factual causation, and legal causation.¹¹ As to legal causation, if the Court were to find factual causation and attribute legal liability in favour of the plaintiff and against the defendant, would that be consistent with and further the statutory subject, scope and purpose?¹² Or would that unnecessarily hinder commercial activity without serving or promoting the statutory proscription?¹³ The issue here is whether the scope of liability extends to the claimed losses in deciding whether or not to attribute legal responsibility for a given occurrence, and value judgments are made by the Court about the appropriate scope of liability.¹⁴

Some causation principles

9. A plaintiff which seeks a s 236(1) award of damages must demonstrate to the Court the existence of a sufficient causal link between the misleading or deceptive conduct of the defendant and the loss and damage which it alleges that it suffered.¹⁵ That this is so follows particularly from the statutory language “because of”, and the use of the word “by” in s 82(1) of the TPA.¹⁶
10. In *Henville v Walker*,¹⁷ McHugh J stated:

¹¹ *Cummins Generator Technologies Germany GmbH v Johnson Controls Australia Pty Ltd* (2015) 326 ALR 556; [2015] NSWCA 264 at [100], [101] per Beazley P.

¹² *Ibid* at paras [79]-[89].

¹³ *HM & O Investments v Ingram* [2012] NSWSC 958 at [102] per MacDougall J.

¹⁴ *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495; [2015] QCA 50 at [99]-[106] per Applegarth J.

¹⁵ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; [1992] HCA per Mason CJ, Dawson, Gaudron and McHugh JJ; *Marks v GIO Australia Holdings* (1998) 196 CLR 494; [1998] HCA 69 at [41]-[42] per McHugh, Hayne and Callinan JJ; *Henville v Walker* (2001) 206 CLR 459; [2001] HCA 52 at [95], [130] per McHugh J, [158] per Hayne J; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; [2004] HCA 60 at [37] per Gleeson CJ, Hayne and Heydon JJ

¹⁶ See generally *BHP v Steuler* [2014] VSCA 338 at [540]-[588] per Tate, Santamaria and Kyrou JJA.

¹⁷ (2001) 206 CLR 459; [2001] HCA 52 at [106].

If the defendant's breach has "materially contributed" to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage. In exceptional cases, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional [citations omitted].

11. In *Travel Compensation Fund v Tambree*,¹⁸ Gummow and Hayne JJ stated:

Misrepresentation will rarely be the sole cause of loss. If, in reliance on information, a person acts, or fails to act, in a certain manner, the loss or damage may flow directly from the act or omission, and only indirectly from the making of the representation. Where the reliance involves undertaking a risk, and information is provided for the purpose of inducing such reliance, then if misleading or deceptive conduct takes the form of participating in providing false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct [citations omitted].

12. It can be useful to ask: Is the relation between the impugned conduct and the claimed loss and damage one of cause and effect?¹⁹ The so-called "but for" test can determine whether or not causation is established in some cases, however that is not inevitably the case. The "but for" test is not a comprehensive test. It is of most use as a negative test because if it is not satisfied, it is unlikely that there is the necessary causal connexion.²⁰ Here a comparison is made between the position that the plaintiff is in, compared with the position it would have been in but for the contravening conduct. If the defendant had not engaged in such conduct and/or done something else, would the plaintiff have acted differently and as a result avoided the loss and damage which it suffered? Or would the plaintiff have engaged in the same loss-making action or inaction even if it had not been led into error by the defendant's contravening conduct? It would be an odd result for the defendant to be held to be legally responsible for the

¹⁸ (2005) 224 CLR 627; [2005] HCA 69 at [32].

¹⁹ *Chan v Macarthur Minerals Ltd* [2017] QSC 13 at [47] per Bond J.

²⁰ *Finishing Services Pty Ltd v Lactos Fresh Pty Ltd* [2006] FCAFC 177 at [34]-[36] per Kiefel J (as Kiefel CJ then was), Sundberg and Edmonds JJ.

plaintiff's loss and damage, if the plaintiff would have engaged in the same action or inaction if the defendant had not engaged in the contravening conduct.

13. In *Henville v Walker*²¹ McHugh J, in considering the situation in which "a person has acted to his or her detriment by reason of or following some conduct of the defendant", stated:

"[The conduct] will not be regarded as causally connected with the detriment if it provides no more than the reason why the person acted to his or her detriment. If the defendant intended the person suffering a detriment to act in the general way that he or she did, the common law will invariably hold that a causal connection existed between the conduct and the detriment. But if the conduct merely provides the reason why the person acted, it will not be sufficient to establish a causal connection unless the purpose of the legal norm that the defendant has breached is to prevent persons suffering detriment in circumstances of the kind that occurred.

14. McHugh J went on to provide the following example of the principle:

"If a broker negligently advises a client to retain shares because they are a good investment, the broker will be liable for the loss sustained in retaining those shares. But if, having received that advice, the client decides to buy more shares, the broker will not be liable for the further losses unless the terms of the original retainer imposed a duty on the broker to advise in respect of further purchases."

15. Where the plaintiff alleges reliance on the defendant's contravening conduct, that is one way in which it can seek to establish a cause and effect relation between the defendant's misleading or deceptive conduct and the plaintiff's claimed loss and damage. However, there are types of cases where the plaintiff can succeed in establishing causation even though the plaintiff did not act, or fail to act, in reliance on the defendant's contravening conduct.²² If the plaintiff's case is that it relied on a misrepresentation made by the defendant which induced it to enter into an agreement with the plaintiff, and the plaintiff suffered loss and damage as a result, then causation may be established. That will not always be the position. For example, where the

²¹ (2001) 206 CLR 494; [2001] HCA 52 at [103].

²² See below at paras [40]-[51].

plaintiff has purchased a business from the defendant, losses suffered by it from conducting the business may have had little or nothing to do with the misleading or deceptive conduct complained of. Hence legal causation may not be established in relation to those losses, even though the “but-for” test may have been satisfied because the defendant’s conduct induced the plaintiff to enter into the agreement and the losses would not have been suffered but for that. The policy of the statute is not to require the defendant to be a guarantor of the plaintiff’s business success, nor to require the defendant to assume financial responsibility for all the economic consequences for the plaintiff of its decision to purchase.²³ However, consequential losses can be recovered by the plaintiff if a sufficient chain of causation to them from the contravening conduct can be established.

16. Whether the conduct of the defendant complained of by the plaintiff was misleading or deceptive is essentially an objective matter: Was the relevant information conveyed to the defendant true or false, or a half-truth, or misleading because of a non-disclosure by the plaintiff of other information? However where the plaintiff seeks to prove causation by its reliance upon the impugned conduct, that is a subjective matter. The plaintiff must have been led into error by the objectively misleading information or communications from the defendant, if any detrimental actions or inactions by it in consequence of that will be found by the Court to have been caused by the plaintiff’s reliance upon them.
17. What did *the plaintiff* do with knowledge of the defendant’s conduct that changed what the plaintiff would have done otherwise? If the plaintiff’s causation case is based upon reliance, then that case will fail if the plaintiff did not read relevant documentation from the defendant upon which the plaintiff says it relied on; or if the plaintiff did not believe that the information communicated was true and correct; or if the plaintiff was indifferent as to the correctness of the information; or if the plaintiff’s actions or inactions were not materially altered to its detriment and the plaintiff would have done the same anyway.

²³ *HM & O Investments v Ingram* [2012] NSWSC 958 at [100]-[116] per McDougall J.

18. In *Shah v Hagemrad*,²⁴ the applicant purchased a Subway franchise for \$460,000. The vendors represented the weekly takings to be \$16,000, but Nicholas J found them to be \$12,000. On the question of reliance the Court was satisfied that had the purchaser been told the true position, then he would never have agreed to purchase the franchise. The judge stated:

“110. Damages arising from the purchase of a business as a result of a misleading or deceptive statement are assessed by reference to the difference between the value of the business at the date of purchase and the price paid for the business. Although the court values the business at the date when the applicants suffered the relevant loss, it must also consider subsequent events for the purpose of considering whether they also give a reliable indication or reflection of such loss: see *Kizbeau Pty Limited v WG & B Pty Limited* [1995] HCA 4; (1995) 184 CLR 281 at 296.

On the evidence, Nicholas J valued the business at the time of purchase to be \$160,000 and awarded damages of \$300,000, being the difference between the \$460,000 that the purchaser paid and the real or true value of \$160,000. That damages award was an application of the rule in *Potts v Miller*.²⁵ The value of property at the date of trial is not to the point.²⁶ No allowance was made for losses suffered after the purchase was completed. Different issues arise where a purchaser of a business seeks rescission of the purchase agreement.

Some pleading and evidential issues

19. For a plaintiff, it is fundamentally important that in its Statement of Claim the loss and damage complained of is identified, and the way that its causation case is put is articulated. It is likely to be insufficient for the plaintiff to allege that the defendant engaged in misleading or deceptive conduct, and then only go on to allege that as a result it suffered particular loss or damage.²⁷

²⁴ [2018] FCA 91.

²⁵ (1940) 64 CLR 282 at 297; [1940] HCA 43.

²⁶ *Makings Custodian Pty Ltd v Orchid Avenue Reality Pty Ltd* [2018] QCA 33 at [80], [81] per Gotterson JA.

²⁷ *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221 at [25]-[31] per Jackson J.

20. In *Barnes v Forty Two International Pty Ltd*,²⁸ the applicant alleged that the respondent had made misrepresentations prior to an agreement between them being made and then simply continued in its Statement of Claim that but for that conduct, they would not have entered into the agreement and performed certain acts. The Full Federal Court held that such a pleading was deficient. There was no positive plea of reliance, when the nature of the case put called for that. There was no express plea stating what it was that the applicants did, which was causally linked to the respondent's conduct.
21. In a misrepresentation/reliance case a plaintiff can establish causation where the defendant has made more than one misrepresentation. That follows from it being permissible for the plaintiff to demonstrate causation where there were multiple causes of the loss, and not only that there was a sole cause, provided that the misrepresentation materially contributed to the loss. As well, other factors may have contributed to the plaintiff being induced to enter into an agreement with the defendant. Further representations can be implied from the defendant's conduct in all the circumstances of the case, particularly because the question whether the plaintiff was led into error by the defendant's conduct depends upon, objectively considered, what was communicated to the plaintiff. It is perhaps fair to say that for the plaintiff to make out causation, the more misrepresentations that the plaintiff alleges that the defendant made, the more difficult its causation argument becomes. That these matters are so has ramifications for the way that the plaintiff's case must be pleaded, and ought be proven at trial.
22. Such issues arose in the decision of the New South Wales Court of Appeal in *Semantic Software Asia Pacific Ltd v Ebbsfleet Pty Ltd*.²⁹ Two plaintiff companies subscribed in shares of the first defendant, a private company. The plaintiffs alleged that the second defendant, a director of the company, made five pre-contractual representations which the plaintiffs relied upon in making their investments. One of those was that the director guaranteed a minimum threefold increase in the value of shares purchased in

²⁸ (2014) 316 ALR 408; [2014] FCAFC 152 at [88]-[93] per Beach J.

²⁹ [2018] NSWCA 12.

the company within a two year period from the date of purchase. An Information Memorandum provided for that, but not precisely in those terms. At trial the director represented himself and the company. The primary judge made only one finding concerning the representations alleged, namely that the director represented to the plaintiffs that the shares would triple in value in two years. The judge found that the plaintiffs relied upon that representation and did not have to prove what would or might have happened in relation to any alternative investment they would have made if they had not agreed to purchase the shares. The representation was different from that pleaded and the judge made no finding that the plaintiffs relied on any of the five pleaded representations. The trial judge held that the director did not have any reasonable basis for making the representation as to the future value of the shares, and hence that the representation constituted misleading or deceptive conduct within the meaning of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*. Stevenson J held that the plaintiffs were entitled to damages the equivalent of the value of their investment as the shares at all times after their issuance were of negligible value or worthless.

23. Macfarlan JA and Sackville AJA allowed an appeal by the defendants, but White JA dissented. On the appeal the plaintiffs did not challenge the judge's finding concerning the representation. The trial was conducted on the basis that that finding was open to Stevenson J, notwithstanding its divergence from the pleading. The majority held that the representation found was not relied upon because the reliance evidence led by the plaintiffs, which the trial judge accepted, was not directed to nor did it relate to, the representation as found. The plaintiffs' evidence was not, as found by the judge, that the value of the shares would treble within two years. Rather the representation was to the effect that the director guaranteed that the shares would treble within two years. That representation was not misleading or deceptive because the director intended to and did provide a written guarantee that the shares would treble in value within two years. In short, the primary judge's reliance finding lacked an evidential basis. The appeal was allowed and hence the plaintiffs' claim here failed. White JA dissented. His Honour's view was that to allow the appeal on the ground that the plaintiffs did not give evidence of reliance on the representation found by the primary judge would

mean that their case that they were misled on the representations on which they said they did rely, would be dismissed without its having been addressed.

24. The decision in *Semantic Software* highlights the importance of accurate pleadings, of the necessity to keep one's case within the pleadings and that the evidence led must be relevant to the pleaded issues.³⁰ If the way that the evidence falls out at trial does not conform with the pleaded case, then that ought be attended to at trial by an amendment to the pleadings.

But-for, no transaction and alternative transaction cases

25. An inherent conceptual and evidential difficulty in a plaintiff demonstrating that the defendant's wrongful conduct was the cause of, and had the effect of, the plaintiff suffering loss and damage is that the Court typically decides a hypothetical question: What would have happened in all the circumstances if the defendant had *not* engaged in the contravening conduct? Yet the defendant engaged in that conduct, not different or other conduct. In many, if not most misleading or deceptive conduct cases, the plaintiff seeks to demonstrate that it has suffered detriment caused by the defendant's contravening conduct by showing the adverse difference between its economic position in the events that occurred, compared with the position that it would have been in otherwise. Does the plaintiff have to plead and prove the counterfactual: What would have happened otherwise? How does the plaintiff prove that? How far does the plaintiff have to go? Does the plaintiff have to run a "no transaction" case, or show what different or alternative transaction would have occurred? Two decisions of the New South Wales Court of Appeal assist here.
26. In *Cummins Generator Technologies Germany GmbH v Johnson Controls Australia Pty Ltd*,³¹ the plaintiff contracted to supply a generator to a third party to match existing ones. The winding pitch of the existing alternators was 2/3 and the alternator of the new generator had to match that. The defendant manufacturer represented that the

³⁰ See also *Makings Custodian Pty Ltd v Orchard Avenue Realty Pty Ltd* [2018] QCA 33 at [30]-[55] per Gotterson JA.

³¹ (2015) 326 ALR 556; [2015] NSWCA 264.

alternator had a 2/3 winding pitch to match the existing one. However the winding pitch of the alternator supplied and installed was 13/15. The trial judge upheld the plaintiff's misleading or deceptive conduct claim and awarded damages, being the cost of making good by ensuring that the new and the old alternators were compatible. On appeal the manufacturer argued that as a matter of law the plaintiff had not suffered any loss or damage as it did not allege or prove what it would have done if the misrepresentations had not been made. Nor did it advance a case that but for the misleading or deceptive conduct it would not have purchased an alternator with a winding pitch of 2/3: A no transaction case. The Court of Appeal agreed with the trial judge that there was no strict requirement to prove a no transaction case, or a different transaction case. Rather it was necessary for the plaintiff to prove that in reliance on the misrepresentation, it acted in a particular way that caused it loss and then to prove the quantum of that loss. It was sufficient for the plaintiff to prove that it relied upon the wrong information, that the new alternator did not match and that it incurred rectification costs in order that it fulfil its contractual obligations to the purchaser/third party.

27. Another useful illustration of how the Court decides causation without rigid adherence to a but-for test and with reference to the purpose of the statute applied to the circumstances of the case, is the decision of the New South Wales Court of Appeal in *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)*.³² The plaintiff building contractor entered into a lump sum building contract with its client, but was required to do extra work because the defendant/client had represented that there were no plans in relation to an outlet pipe, when there was such a plan. The contractor argued that if it had known of the existence of the plan, that would have revealed that rock levels in concept drawings were seriously flawed. It would not have entered into the lump sum contract, would have entered into the contract only on a provisional sum basis in relation to the extra work, or not entered into the contract at all. The client argued that the causation case should be decided on the basis of what would have happened had the misrepresentation not been made, and hence that nothing would or

³² (2006) 67 NSWLR 341; [2006] NSWCA 282.

ought to have been said about whether there was an outlet pipe plan. However, the Court of Appeal decided that the Court would ascertain what would have occurred had the client not engaged in the misleading conduct, which would have required that the existence of the plan be disclosed. The question was whether the plaintiff suffered loss by the defendant's contravening conduct, not what the plaintiff would have done "but for" the false representation. On that wrong approach a number of speculative possibilities would have arisen, which the Court held that it should not entertain when it was clear enough what would have happened if the plan had been disclosed, as it ought to have been.³³ The contractor's appeal succeeded and the matter was remitted below for an assessment of damages to be made.

28. In the different proportionate liability statutory context as to the correct characterisation of the plaintiff's loss or damage, the majority of the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*³⁴ stated:

"[43] The proper identification of damage should usually point the way to the acts or omissions which were its cause.

[19] Logically, the identification of the "damage or loss that is the subject of the claim" is anterior to the question of causation."

29. In the present context, the importance of these statements is this: The plaintiff at the outset should identify in its pleading what loss or damage is claimed, and then plead out how it put its causation case. As the cases to which I refer in this paper demonstrate, a plaintiff often has choices as to what loss and damage it claims and will attempt to prove at trial, and hence how to put its causation case.
30. In some cases the plaintiff will complain that the defendant's conduct deprived it of a commercial opportunity to enter into an alternative transaction. Issues as to what, and how, the plaintiff has to prove on the counterfactual loom large here.

³³ See also *BHP v Steuler* [2014] VSCA 338 at [590]-[611]; Cf *Downer EDI Rail Pty Ltd v John Holland Pty Ltd* [2018] NSWSC 326 at [418]-[449] per Stevenson J, where an alternative transaction case failed for want of evidence.

³⁴ (2013) 247 CLR 613; [2013] HCA 10 at paras [43], [19] per French CJ, Hayne and Kiefel JJ.

31. In *Sellars v Adelaide Petroleum NL*³⁵ the High Court held that a distinction is required to be drawn between, on the one hand, proof of causation and proof of loss and, on the other, proof of the value of the loss in respect of which an award of damages is sought. The former must be proven on the balance of probabilities. The plurality in *Sellars* stated:³⁶

“When the issue of causation turns on what the plaintiff would have done, there is no particular reason for departing from proof on the balance of probabilities notwithstanding that the question is hypothetical.”

32. However, once the plaintiff has proven on the balance of probabilities that it has suffered some loss, on an assessment of damages “the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability”.³⁷

Brennan J in *Sellars*, in a famous passage, explained as follows:³⁸

“Unless it can be predicated of an hypothesis in favour of causation of a loss that it is more probable than competing hypotheses denying causation, it cannot be said that the plaintiff has satisfied the court that the conduct of the defendant caused the loss. Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point when there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities. A constant standard of proof applies to the finding that a loss has been suffered and to the finding that that loss was caused by the defendant’s conduct, whether those findings depend on evidence of historical facts or on evidence giving rise to competing hypotheses. In any event, the standard is proof on the balance of probabilities.

Although the issue of a loss caused by the defendant’s conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the

³⁵ *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4.

³⁶ *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 353 (Mason CJ, Dawson, Toohey and Gaudron JJ).

³⁷ *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 643, applied by the plurality in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350-351; see also Brennan J at 367.

³⁸ *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 367-368.

amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation.” [citations omitted]

33. *Sellars* was applied by the Full Court of the Federal Court in *La Trobe Capital & Mortgage Corporation v Hay Property Consultants*.³⁹ In *La Trobe* the applicant made a loan to a customer based upon a valuation of the mortgaged property by the respondent, which substantially over-valued the property. The lender would not have made the loan on a proper valuation by the valuer/respondent. The lender led evidence at trial concerning alternative transactions that would have been available to it had it not proceeded with the subject loan, but not concerning any particular investment forgone as a result of entering into the loan. The valuer contended that the lender’s claim for damages based on the net opportunity cost forgone failed because there was no evidence that it had lost any particular loan opportunity. Finkelstein J held that on the lender’s evidence there was not only a chance of it lending the money to another borrower on the same terms and at the same rate as the subject loan, but that it was likely that another loan would have been made.⁴⁰ There were more potential borrowers than money available and the lender could not satisfy the demand of potential borrowers. That there was a loss suffered by the applicant caused by the respondent’s contravening conduct was proven. It was not necessary for the lender to point to a particular loan opportunity that it would have pursued otherwise. Finkelstein J would have reduced the damages awarded by 5%, allowing for the possibility that an alternative loan may not have been entered into, but the majority, Jacobson and Besanko JJ, reduced the damages by 15% for that reason.
34. On an application by the defendant to strike out the plaintiff’s Statement of Claim, in *Graham & Linda Huddy Nominees Pty Ltd v Byrne & Ors*,⁴¹ Jackson J summarised the

³⁹ *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4; (Finkelstein, Jacobson and Besanko JJ), followed in *Valcorp Australia Pty Ltd v Angas Securities Ltd* [2012] FCAFC 22 at [132]-[180] (Jacobson, Siopis and Nicholas JJ), and in *Orchard Holdings Pty Ltd v Paxhill Pty Ltd* [2012] WASC 271 at [381]-[383] (Allanson J); see also *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495; [2015] QCA 50 at [142]-[155] per Applegarth J.

⁴⁰ *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [96] see also at [113] (Jacobson and Besanko JJ to like effect).

⁴¹ [2016] QSC 221.

pleading and evidential requirements concerning a loss of opportunity claim as follows:

“[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.

[51] There are two additional points. In a number of recent cases, courts have considered the extent of the proof and pleading required by way of causation and loss where a plaintiff alleges that as a result of the defendant’s breach of contract, negligence or misleading conduct the plaintiff would not have entered into the actual transaction that was entered into. Where the plaintiff alleges that they would have entered into no transaction on the one hand, or a different transaction on the other hand, the pleading should clearly allege the counterfactual scenario. In a 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, subject to the application of rules of procedural fairness.” [citations omitted]

35. The decision of Tottle J in *Lockyer v Bermingham [No 3]*⁴² is instructive. The plaintiff sued his financial adviser and her company for misleading or deceptive conduct under s 12DA of the *ASIC Act* concerning tax and financial advice. The advice was that in the

⁴² [2018] WASC 61.

2007 and 2008 financial years he had a substantial liability to pay income tax arising from the exercise by his wife of Options to subscribe for shares in the capital of a listed company. The defendants advised him to make a number of negatively geared investments to enable him to set off the resulting tax deductions against his taxable income to reduce his tax liability. The premise on which the advice was given, namely that the plaintiff had a substantial liability to pay tax, was flawed.

36. Tottle J awarded the plaintiff damages in the sum of \$2,900,853 under s 12GF of the *ASIC Act*. The judge found that the plaintiff relied upon the contents of the 2007 and 2008 advices in deciding to make the loss-making investments which he did. The plaintiff did not seek an award of damages based upon a comparison between the price paid for the investments as at the date of acquisition and their real value. Instead he adopted a “net gains and losses” approach⁴³ by aggregating his expenditure in making the investments and the losses made on the investments, and then deducting income received and taxation benefits. Tottle J decided that such an approach was permissible under s 12GF, consistently with the decision of the High Court in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*.⁴⁴ The plaintiff’s claim did not involve a comparison between alternative transactions. He did not allege that he had forgone other investment opportunities. Rather he advanced a no transaction case, namely that had he not been misled as to the extent of his tax liabilities he would not have entered into the 2007 and 2008 investments. Perhaps unusually, the defendants rejected the no transaction contention by pointing to alternative transactions which were available. They pointed to expert evidence as to the profit the plaintiff’s wife would have made if she had funded the exercise of the Options by selling that portion of the shares acquired on the exercise as was required to meet the cost of exercising the Options.
37. Tottle J rejected that contention and accepted the no transaction premise of the plaintiff’s damages claim for two reasons. First, the plaintiff did not in fact have tax liabilities of the magnitude that required him to make the alternative investments

⁴³ *Jamieson v Westpac Banking Corporation* (2014) 283 FLR 286; [2014] QSC 32 at [181]; Appeal dismissed: *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495; [2015] QCA 50 at [46]-[50], [119]-[126] per Applegarth J.

⁴⁴ (2004) 217 CLR 640; [2004] HCA 54 at [64]-[65].

creating tax deductions. Secondly, the investments the plaintiff did make were not required to fund the exercise of the Options by his wife. The decision of the Court in *Lockyer* illustrates a principled approach applied in respect of causation/reliance issues in statutory damages claims, and the way in which the damages remedy can be moulded to meet the circumstances of the case.

Non-disclosure cases

38. Where the plaintiff's case is that the failure by the defendant to disclose particular information caused it loss and damage, it is perhaps difficult to say that the plaintiff relied upon the non-disclosure by the defendant. If the plaintiff did not know of the relevant information, then it cannot have relied upon that information.⁴⁵ Further had it known of the non-disclosed information, the plaintiff's case would be that it would have acted differently from the way that it did. It could be said that the plaintiff relied upon the defendant's misleading conduct in that it acted to its detriment because, in all the circumstances, it reasonably expected that any information of the kind complained of which was not disclosed, would be disclosed. However it is unnecessary, and unhelpful I suggest, to seek to apply a reliance analysis in a non-disclosure case in the way that a reliance case can readily be made in a positive misrepresentation case. In a non-disclosure case, causation between the misleading or deceptive conduct and the loss and damage complained of must be established, but not reliance in the way that applies in a positive misrepresentation case.
39. The way in which the statutory proscription applies in a non-disclosure case is helpfully stated by Sackville AJA in the following passages in *Fabcot Pty Ltd v Port Macquarie Hastings Council*:⁴⁶

“(iii) The question in a case of alleged misleading or deceptive conduct as a result of non-disclosure is whether in the light of all relevant circumstances, there has been conduct which is misleading or deceptive: *Demagogue Pty Ltd v Ramensky* [1992] FCA 557; (1992) 39 FCR

⁴⁵ Beach QC (as Beach J then was) *Class actions: Some causation questions* (2011) 85 ALJ 579, 584.

⁴⁶ [2011] NSWCA 167 at [[109], approved in *Skinner v Redmond Family Holdings Pty Ltd* [2017] NSWCA 329 at [89] per Gleeson JA.

31, at 41, per Gummow J (with whom Black CJ and Cooper J agreed). While the circumstances in which silence can be characterised as misleading or deceptive cannot be exhaustively defined, unless they give rise to a reasonable expectation that if some relevant fact exists it will be disclosed, mere silence will not support the inference that the fact does exist: *Kimberley NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 46-054, at 53,195, per French J, approved in *Demagogue v Ramensky*, at 41; *Miller v BMW*,⁴⁷ at [18].

- (iv) In commercial dealings between individual entities, the characterisation of conduct must be undertaken by reference to circumstances and context; *Miller v BMW*, at [20]. The relevant circumstances include the knowledge of the person who claims to have been misled and any common assumptions or practices established between the parties or in the particular activity or business in which they are engaged: *Miller v BMW*, at [20].
- (v) The language of reasonable expectation is not statutory but is an aid to characterising non-disclosure as misleading or deceptive. The judgment as to whether there is such a reasonable expectation is objective: *Miller v BMW*, at [19]-[20].
- (vi) The invocation of a reasonable expectation that if a fact exists it will be disclosed, directs attention to the effect or likely effect of non-disclosure unmediated by antecedent erroneous assumptions or beliefs, or high moral expectations that exceed the requirements of the general law or of the prohibition imposed by s 42 of the *FT Act* : *Miller v BMW*, at [21].
- (vii) In general, s 42 of the *FT Act* does not require a party to commercial negotiations to volunteer information which will assist the decision-making of the other party. A fortiori, s 42 does not require a party to volunteer information in order to avoid the careless disregard of its own interests of a party of equal bargaining power and competence: *Miller v BMW*, at [22]."

Indirect causation/reliance

40. It is clear enough now, at least at intermediate appellate level, that as a matter of principle, it is not essential that the plaintiff relied upon the defendant's misleading or deceptive conduct for the plaintiff to demonstrate that that conduct caused the plaintiff loss and damage. A third party may have relied upon the plaintiff's misleading

⁴⁷ *Miller & Associates Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; [2010] HCA 31.

communication, which in turn caused the plaintiff loss and damage.⁴⁸ The general principle is that the essential issue is causation, not reliance,⁴⁹ but that reliance may demonstrate causation. However, that principle is most starkly demonstrated by cases where, on the evidence before the Court, the plaintiff has not relied upon the impugned conduct but rather a third party has, but yet the plaintiff has succeeded in demonstrating that the defendant's conduct sufficiently caused the plaintiff loss and damage nonetheless, such as to found an attribution of legal responsibility against the defendant. These cases can be described as indirect causation cases, or third party causation cases. Case examples illustrate the point.

41. In *Janssen-Glag Pty Ltd v Pfizer Pty Ltd*,⁵⁰ the respondent made misleading and deceptive representations to consumers through an advertising campaign. The applicant competitor claimed that it suffered loss and damage because, as a result of the misrepresentations, sales to the public had been diverted to the respondent at the expense of the applicant. The applicant's case was not that it had been misled by the respondent's conduct but only that members of the public had. The applicant's claim succeeded before Lockhart J because its entitlement to recover damages was not confined to cases in which it had relied upon or personally been influenced by the contravening conduct. Such a holding gave effect to the statutory purpose of the proscription of misleading or deceptive conduct. Otherwise a trade competitor of the applicant could mislead the public without sanction.
42. In *Australian Breeders Co-Operative Society Ltd v Jones*,⁵¹ a Full Court of the Federal Court upheld a finding that causation was established where, but for a misleading valuation

⁴⁸ *Chowder Bay Pty Ltd v Paganin* [2018] FCAFC 25 at [60]-[61] per Besanko, Markovic and Lee JJ; *P. Value Pty Ltd v William McNee* [2016] VSCA 223 at [114]-[117] per Hansen, Osborn and Beach JJA; *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 at [1376] per Jacobson, Gilmour and Gordon JJ; *Finishing Services Pty Ltd v Lactos Fresh Pty Ltd* [2006] FCAFC 177 at [3]-[32] per Kiefel J (as Kiefel CJ then was), Sundberg and Edmonds JJ; *McCarthy v McIntyne* [1999] FCA 784 at [47]-[51] per Hill, Sackville and Katz JJ.

⁴⁹ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25 at [143] per Gummow, Hayne, Heydon and Kiefel JJ.

⁵⁰ (1992) 37 FCR 526; [1992] FCA 437.

⁵¹ [1997] FCA 1405; (1997) 150 ALR 488 at 529-530.

a third party would not have completed a transaction with the consequence that the applicant investors would not have made the investments that caused their claimed loss. That was so notwithstanding that there was no evidence that they relied upon the misleading valuation.

43. The decision of the full Court of the Federal Court in *ABN AMRO Bank NV v Bathurst Regional Council*⁵² regarding indirect causation is important and illustrative.

“1375 ABN Amro misstates the applicable legal principles and, in any event, the contentions fail on the facts. First, the legal principles. There is no bright-line principle that it is insufficient for a plaintiff to prove that some other person relied on the alleged misleading conduct and that that person’s reliance led to the plaintiff suffering loss does not stand for that proposition. *Ingot Capital Investments*⁵³ is authority for the proposition that where misleading and deceptive conduct provides the opportunity for an investor to enter into a transaction, that investor will not be entitled to recover where the investor knows the truth of the underlying misrepresentation or was indifferent to its truth and proceeded nonetheless: *Ingot Capital Investments* at 661-662 [19]-[22] and 731-732 [612]-[619]; see also, *Digi-Tech (Australia) Pty Ltd v Brand* [2004] NSWCA 58; (2004) 62 IPR 184 at 212 [159].

1376 Next, the entitlement to recover loss or damage in a case of misleading and deceptive conduct is not confined to persons who relied on the conduct: *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* [1992] FCA 437; (1992) 37 FCR 526. Indeed, a plaintiff need not establish that the plaintiff directly received and relied upon the misrepresentation made by a defendant: see, by way of example, *Hampic Pty Ltd v Adams* [1999] NSWCA 455; (2000) ATPR 41-737. The causation inquiry required to be undertaken for the purposes of s 82(1) of the TPA (and for s 5D of the *Civil Liability Act*) entails a determination of whether the loss or damage is the “real or direct or effective cause of the applicant’s loss”; “it must have been ‘brought about by virtue of’ the conduct which is in contravention of s 52”: *Janssen-Cilag* at 530. The inquiry is whether the plaintiff suffered loss or damage by reason of, or as a result of, the contravention: *Janssen-Cilag* at 531.

1377 The PA Councils are entitled to rely upon ABN Amro’s conduct in disseminating and promoting the rating to LGFS as a step in the chain

⁵² (2014) 224 FCR 1; [2014] FCAFC 65.

⁵³ *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653; [2008] NSWCA 206.

of causation that led to their losses. Part of that chain of causation was the PA Councils' reliance upon the AAA rating, which they would never have received had it not been provided by ABN Amro to LGFS, which would not have happened if LGFS had not relied upon the ABN Representations: see [923] ff above. Here, unlike the position in *Ingot Capital Investments*, there was no suggestion that the PA Councils actually knew that the AAA rating was not based on reasonable grounds and was not the product of the exercise of reasonable care and skill or that they were indifferent to the rating.

- 1378 That brings us to the facts. They have been addressed at Part 2, Sections 6 and 7, and [813] above.
- 1379 In this context, it must be recalled that ABN Amro represented to LGFS that the rating could be relied upon and that the rating meant that the CPDO had an extremely strong capacity to meet its obligations (see [881]-[905] above) and that LGFS relied on those representations: see [923]ff above and J[3098]. The ABN Representations were "decisive considerations" in LGFS' decision to purchase the Rembrandt notes from ABN Amro and to sell them to the PA Councils on the basis of the AAA rating: see [919]-[933] above and J[3171]-J[3174]. The rating carried with it the S&P Representations: see [723] above. That was a decisive consideration for the PA Councils in acquiring the Rembrandt notes: see Part 2, Sections 1 and 7 and Part 8, Section 2.2 above.
- 1380 The primary judge did not find that the PA Councils knew that ABN Amro made the ABN Representations. Instead, it was LGFS' reliance on those representations which, in turn, caused the PA Councils to rely on the rating. Therefore, the ABN Representations to LGFS, and LGFS' reliance upon them, were a material cause of the PA Councils' decision to invest in the Rembrandt notes: *Ingot Capital Investments* at 659-660 [12]. Consistent with the earlier principles, there did not need to be a direct inducement by ABN Amro it was sufficient that ABN Amro's representation was material to the decision of the PA Councils to invest, in the sense that "the representation was a link in the causal chain": *Ingot Capital Investments* at 660 [13]. It was: see Part 2, Sections 1 and 7 and Part 8, Section 2.2 above."

Market based causation

44. What is market based causation? In *Caason Investments Pty Ltd v Cao*,⁵⁴ the principal issue before the Full Court of the Federal Court, on an application for leave to appeal

⁵⁴ (2015) 236 FCR 322; [2015] FCAFC 94.

from a refusal at first instance to allow an application for leave to amend the Statement of Claim, was whether, as a matter of principle, it was arguable that reliance is not a required element of a claim of loss suffered under s 729(1) of the *Corporations Act*, and that a plaintiff could rely upon market based causation instead. The Full Court held that it is arguable that an applicant can rely upon market based causation.⁵⁵ Section 729(1) provides that a person who suffers loss and damage because an offer of securities under a disclosure document contravenes s 728(1) may recover the amount of the loss and damage from certain persons. Section 728(1) provides, inter alia, that a person must not offer securities under a disclosure document if there is a misleading or deceptive statement in the disclosure document or related documents, and if there is an omission from the disclosure document of material required by other *Corporations Act* provisions.⁵⁶ *Caason Investments* was a class action.⁵⁷ Edelman J described the issue in these terms:

“[93] The point concerning causation, about which the appellants incorrectly assumed the primary judge had erred, relates to what was described as “market based causation”. A market based causation case is not a special sub-category of causation. It is, simply put, an example of indirect causation. One circumstance of market based causation, albeit inadequately pleaded before the primary judge, involves an alleged disclosure of misleading information to the market in a disclosure statement. That misleading information causes the listed price of securities being inflated which, in turn, causes an alleged loss because the investor purchases the securities at a higher price than he or she would otherwise have paid. The primary judge’s reasons, properly understood, did not exclude the possibility of a claim based on market based causation.

[94] The respondents initially sought to draw a bright line between (i) market based causation, and (ii) a circumstance described as “reliance

⁵⁵ See too other interlocutory decisions to the effect that market based causation is arguable: *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2014] VSC 357 at [28]-[61] per Sifris J; *Bolitho v Banksia Securities Ltd* [2014] VSC 8 at [23]-[40] per Ferguson J (as Ferguson CJ then was); *Melbourne City Investments Pty Ltd v UGL Ltd* [2015] VSC 540 at [139]-[156] per Robson J; and see *Grant-Taylor v Babcock & Brown Ltd (In Liquidation)* (2015) 322 ALR 723; [2015] FCA 149 at [219]-[220] per Perram J (obiter dicta). An appeal was dismissed without consideration of causation issues: *Grant-Taylor v Babcock & Brown Ltd (In Liquidation)* (2016) 245 FCR 402; [2016] FCAFC 60 at [88] per Allsop CJ, Gilmour and Beach JJ.

⁵⁶ Ss. 710, 711, 712, 713, 713C, 713D, 713E, 714 or 715.

⁵⁷ A representative proceeding pursuant to Pt IVA of the *Federal Court of Australia 1976* (Cth).

based causation". They submitted that a claim for loss suffered under s 729(1) of the *Corporations Act* 2001 (Cth) was only possible by proof of reliance based on allegedly "direct" causation. In the example above, reliance based causation could involve the investor relying directly on the false information to purchase securities that he or she would otherwise not have purchased.

[95] There is no sharp contrast between these two examples of causation. Both types of causation might be indirect. For instance, it might be an investor's financial advisor, rather than the investor, who relies on the false information when advising the investor to invest. More fundamentally, in the "reliance" based causation case, the investor's reliance on the information is the reason why (i) he or she purchases the securities which, in turn, will indirectly be the reason why (ii) when the market falls, the loss is suffered.

[154] The concept of market based causation involves a causal relationship albeit one without reliance by the plaintiff investor on a disclosure document. The plea is that a misleading statement or omission in a disclosure document causes the market price for the securities to be inflated so that the investor purchases securities at a price which is greater than the investor would otherwise have paid. The investor then suffers loss including when the release of the omitted information or the correction of the misleading statements causes the market price of the securities to fall. None of these causal links requires the investor to rely on the disclosure document."

45. In relation to ASX traded shares, where an investor purchases shares but does not personally read or rely upon the contents of the misleading or deceptive disclosure statement in doing so, at first blush it is perhaps an odd concept that the market was misled but that that caused *the plaintiff* loss and damage, when it decided to purchase the shares without relying on the misleading information. Who is "the market" for this purpose? How is the market misled when a myriad of factors determine the price at which the shares are traded, not just the misleading or deceptive aspects of the disclosure statement? To what extent was the share price inflated? When did the plaintiff suffer loss and damage?

46. On the other hand, it would be odd if those responsible for disclosure documents could mislead the market by misleading or deceptive contents with no pecuniary sanction in

relation to purchasers who paid too much for their shares as a result.⁵⁸ Certainly problems of proof as to causation will arise in this context, but the market value of incorporeal property is a familiar concept in the law. The market in relation to ASX traded shares is real. More generally, as a matter of principle, the question whether particular conduct is misleading or deceptive is an objective matter to be decided by the Court as a matter of fact.

47. In passing-off type misleading or deceptive conduct cases, the plaintiff must prove that it enjoys a particular reputation in the marketplace based on its trade indicia. It is against that reputation that the defendant's market conduct of which the plaintiff complains, typically including trade diversion, is to be tested. In relation to alleged misrepresentations made by the defendant to members of the public, the Court decides the objective question of whether the public have been misled by reference to the hypothetical ordinary or reasonable member of the class of prospective purchasers.⁵⁹ I suggest that market based causation is no more than the application of the statutory proscription of misleading or deceptive in a context which gives rise to challenging issues, especially as to what evidence is necessary.
48. To date there has only been one market based causation case that has proceeded to final judgment. In *Re HIH Insurance*,⁶⁰ Brereton J upheld a plaintiff's market based causation case, and assessed the damages in a separate judgment. *HIH Insurance* is a seminal decision in the law that warrants close attention. In *HIH Insurance*, the plaintiffs were shareholders in HIH who acquired the shares on the ASX during particular periods. The proceeding was not a class action, but an appeal from the liquidator's rejection of proofs of debt. The defendants admitted that the FY 1999, FY 2000 interim results and the FY 2000 final results contained and conveyed misleading

⁵⁸ See generally Andrew Watson and Jacob Varghese: *The case for Market-Based Causation* (2009) 32 UNSW Law Journal 948.

⁵⁹ *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, [2000] HCA 12 at [100]-[105] per Gleeson CJ, Gaudron, McHugh, Kirby, Hayne and Callinan JJ.

⁶⁰ (2016) 335 ALR 320; [2016] NSWSC 482; [2017] NSWSC 380. There has been no appeal in this proceeding. However, it can be expected that in a different case where the facts are analogous, Brereton J's decision will be subjected to intense scrutiny.

or deceptive representations. The plaintiff's case was a "positive misrepresentation" case, rather than a non-disclosure case. In FY 1999, the operating profit of the group companies and their net assets were overstated by \$92.4 million, and by \$61.9 million in FY 2000.

49. In *Re HIH Insurance Ltd (in Liquidation)*,⁶¹ Brereton J stated as follows:

"[38] The plaintiffs did not essay to prove that they were induced to acquire their shareholdings in HIH by the contravening conduct, or that they did so in direct reliance on the contravening conduct. Rather, the plaintiffs contended that they acquired HIH shares on the ASX at the then prevailing market price, and that that market price was artificially inflated by reason of the overstated reported financial results – which conveyed to the market an overoptimistic impression of HIH's financial position and prospects. Thus, it is said that the contravening conduct resulted in the prices at which HIH shares traded on the ASX being higher than those which would otherwise have obtained, and that a person who acquired shares in that inflated market suffered loss because he or she paid more than would otherwise have been paid for the subject shares. In other words, it is said that loss was incurred because the contravening conduct – the release of the overstated accounts – distorted the market on which HIH shares were traded, and the causation requirement is satisfied by the facts that (1) the contravening conduct misled the market into attributing an inflated value to HIH shares, (2) the plaintiffs acquired their shares in that inflated market, and (3) the plaintiffs thus paid more than they would otherwise have paid for the same shares. This has been described as "indirect causation." The plaintiffs contend that the law does not preclude such a claim.

[39] Against that, the defendants contended that, on the authority of the decisions of the Court of Appeal in *Digi-Tech (Australia) Ltd v Brand*⁶² and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd*⁶³ and of the Full Court of the Federal Court in *Ford Motor Company of Australia Limited v Arrowcrest Group Pty Ltd*,⁶⁴ where a person claims to have suffered loss by reason of entry into a transaction, they must establish reliance. They argue that "indirect causation" is available only in cases where the applicant is passive and a third party has been

⁶¹ (2016) 335 ALR 320; [2016] NSWSC 482.

⁶² (2004) 62 IPR 184; [2004] NSWCA 58.

⁶³ (2008) 73 NSWLR 653; [2008] NSWCA 206.

⁶⁴ (2003) 134 FCR 522; [2003] FCAFC 313.

induced by the misleading or deceptive conduct to act to the applicant's prejudice; whereas in this case, the plaintiffs are seeking to mount an indirect causation case where the third party is "the market" rather than an identifiable individual, and where they have not been passive but have themselves actively entered into the transactions by which they claim to have suffered loss. In such circumstances, the defendants submitted, it is necessary for the plaintiffs to establish that they relied on (or would have acted differently but for) the contravening conduct, and that absent such reliance there is no "causative bridge" between the contravening conduct and the loss. In this case, that would mean that in order to demonstrate a relevant causal connection between the contravening conduct and the alleged loss, each plaintiff would have to establish that he, she or it was induced by the contravening conduct to enter into the transactions whereby he, she or it acquired HIH shares, in the sense that he, she or it relied upon the overstated financial results when making a decision to acquire those shares, or would have acted differently but for those overstated results.

- [40] Two questions arise from these competing positions of the parties. The first is whether, as the defendants contend is dictated by authority, "indirect causation" is not available in a case such as the present, and reliance must be established. The second is whether – if indirect causation is available – it has been established; as will be seen in the context of this case, that second question is intertwined with the quantification of the plaintiffs' damages. ...
- [56] What that case⁶⁵ establishes is not that the applicant must necessarily prove that it relied on the contravening conduct, but that the applicant must establish that somewhere in the chain of causation someone relied on the contravening conduct – in other words, that someone was misled or deceived, and that such deception brought about prejudice to the applicant. Unless someone in the chain of causation is deceived, it cannot be said that the ultimate loss to the applicant is "by conduct of" the respondent, because the conduct would be immaterial to the ultimate loss unless it impacted somehow on the causative process. ...
- [73] This is not a case in which, on the relevant hypotheses, no-one was misled: while the contravening conduct did not directly mislead the plaintiffs, it deceived the market (constituted by investors, informed by analysts and advisors) in which the shares traded and in which the plaintiffs acquired their shares. Investors who acquire shares on the share market do so at the market price. In that way, they are induced to enter the transaction (in this case, to their prejudice) on the terms on which they do by the state of the market. Investors who acquire shares

⁶⁵ *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* (2003) 134 FCR 552; [2013] FCAFC 313.

on the ASX may reasonably assume that the market reflects an informed appreciation of a company's position and prospects, based on proper disclosure. The notion that a market may be deceived, manipulated and distorted by misrepresentation is well established: in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*,⁶⁶ the High Court spoke of a distinction which is "sometimes difficult to draw, but...is old and fundamental" between 'real', 'true' or 'intrinsic' value on the one hand, and 'market value' on the other, and said that 'market values' that "are 'delusive or fictitious' because they are the result of 'a fraudulent prospectus, manipulation of the market or some other improper practice on the part of the defendant'" may be disregarded in ascertaining true value. ...

- [75] The chain of causation was (1) HIIH released overstated financial results to the market, (2) the market was deceived into a misapprehension that HIIH was trading more profitably than it really was and had greater net assets than it really had, (3) HIIH shares traded on the market at an inflated price, and (4) investors paid that inflated price to acquire their shares, and thereby suffered loss. Thus, the contravening conduct materially contributed to that outcome.
- [76] This can be tested by a counterfactual inquiry: what would have happened if each contravention had not occurred? On relevant assumptions, the answer is that the market price of the HIIH shares would have been lower, and the plaintiffs would have paid less for the shares they acquired.
- [77] In those circumstances, I do not see how the absence of direct reliance by the plaintiffs on the overstated accounts denies that the publication of those accounts caused them loss, if they purchased shares at a price set by a market which was inflated by the contravening conduct: the contravening conduct caused the market on which the shares traded to be distorted, which in turn caused loss to investors who acquired the shares in that market at the distorted price. In the absence of any suggestion that any of the plaintiffs knew the truth about, or were indifferent to, the contravening conduct, but proceeded to buy the shares nevertheless. I conclude that "indirect causation" is available and direct reliance need not be established.
- [78] As Edelman J pointed out in *Caason v Cao*,⁶⁷ that does not mean that indirect causation has been established. The above reasoning proceeds on the assumption that the contravening conduct caused the market to

⁶⁶ (2014) 217 CLR 640; [2014] HCA 54 at [36], [37] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ.

⁶⁷ (2015) 236 FCR 322; [2015] FCAFC 94.

be inflated. The plaintiffs must establish, by evidence and/or inference, that the contravening conduct distorted the market price so as to cause the shares to trade at an inflated price. In this case, whether the contravening conduct had the effect of inflating the market price of HIH shares is intertwined with the quantification of the plaintiffs' damages, if any.

- [79] The loss and damage which the plaintiffs are entitled to recover is that which the contravening conduct caused. Thus, the measure of the plaintiffs' damages is closely related to their causation case. On the plaintiffs' theory of causation, which I have held is open, this is not a simple "no transaction" case – that is to say, it is not a case in which the contravening conduct caused the plaintiffs to acquire (or retain) shares which they would otherwise not have acquired; rather, it caused them to pay, for shares which they would have acquired in any event, a price which was inflated above that which would otherwise have obtained. On this approach, the measure of the plaintiffs' damages is not the difference between the price paid and the "true value" of their shares, but the difference between the price they paid and the price they would have paid had the contravening conduct not occurred but all other factors remained constant. This necessitates determining the quantum of the impact, if any, of the contravening conduct, on the price at which HIH shares traded. In that context, "true value" is not necessarily a proxy for what the market price would have been absent the contravening conduct, because there may have been other factors which also influenced (and distorted) the market price. ...
- [94] The plaintiffs submitted that from not later than January 2001 HIH was insolvent, and that its shares should be regarded as valueless after that date. There is some evidence to the effect that HIH was by then insolvent. However, even assuming that it is established that HIH was in fact insolvent from January 2001, and that in truth its shares were valueless, that would not inform the assessment of the impact of the contravening conduct on the price at which HIH shares traded. The damages to which the plaintiffs are entitled correspond with the impact of the contravening conduct on the market price – not on the difference between price and "true value", nor on how other matters might have affected the market price. ...
- [99] Mere difficulty in assessing damages does not relieve a court from the responsibility of estimating them as best it can. In the assessment of damages, particularly where hypothetical scenarios are involved, precision is rarely attainable, and speculation is sometimes unavoidable. The defendants rightly suggest that there is a distinction between cases in which sufficient evidence of loss can be but is not adduced, from cases in which the nature of the loss is such that precise

evidence cannot be adduced. However, they wrongly submit that the present case is in the former and not the latter category. Precisely how the market would have responded had the Hannover Re contracts been properly accounted for cannot realistically be the subject of precise proof, and necessarily involves hypothesis and a degree of speculation.

...

- [114] Accordingly, I conclude that the contravening conduct did inflate the price for HIH shares, and that indirect causation in fact is established. In my judgment, doing the best one can with the available material, the impact of the contravening conduct is represented by the difference between the price at which HIH shares actually traded on the market, and the hypothetical price achieved by applying the price to book value at which they traded to an adjusted book (adjusting for the Hannover Re arrangements). The difference can be calculated for each period from the ratio of “adjusted” book value (adjusted for the Hannover Re transactions) to reported book value, as shown in Table 3:

Table 3	30 Jun 99	31 Dec 99	30 Jun 00
Reported \$m	946.400	962.600	939.100
Adjusted \$m	887.264	871.592	816.220
Adjusted/Reported %	93.75	90.54	86.90

- [118] Accordingly, in principle, plaintiffs who acquired their shares when the FY1999 results were in circulation are entitled to damages equivalent to 6.25% of the price they paid; those who acquired their shares when the FY2000 interim results were in circulation, to 9.5% of the price paid, and those who acquired their shares when the FY2000 final results were in circulation, to 13% of the price paid.” (citations omitted)

50. In a subsequent judgment, *Re HIH Insurance Ltd (in Liquidation)*,⁶⁸ Brereton J decided the question whether the sales of shares during the relevant periods of time should be taken into account. His Honour held as follows:

“[15] Nonetheless the authority of *Dura*⁶⁹ plainly supports the appropriateness of taking into account sales of shares acquired during the inflationary period. Accordingly, in my judgment sales are to be taken into account in that a plaintiff who, having acquired shares during the inflationary period, sold those shares during the inflationary period, must give credit against the damages to which it is entitled for that

⁶⁸ [2017] NSWSC 380.

⁶⁹ *Dura Pharmaceuticals Inc v Broudo* [2005] USSC 3253; 544 US 336 (2005).

percentage of the selling price which reflects the inflationary factor applicable at the time of the sale. In other words, where shares were sold during the period 25 August 1999 to 2 March 2000, the plaintiff must give credit for 6.25% of the selling price; where shares were sold during the period 3 March 2000 to 17 October 2000, the plaintiff must give credit for 9.5% of the selling price; and where shares were sold during the period after 17 October 2000, the plaintiff must give credit for 13% of the selling price.”

51. Although in this context there is no distinction in principle between a non-disclosure and a positive misrepresentation case, a plaintiff in a non-disclosure case faces an inherently difficult evidential task. If a belated disclosure to the market is made by the defendant which adversely affects the price of the shares, and which the plaintiff contends ought to have been made before the plaintiff purchased its shares, at least the plaintiff will know what the disclosure was. However, as a practical matter the plaintiff will need to prove which person or persons within the defendant company had the relevant knowledge of the non-disclosed matters, why that was, when that was, and why at the relevant earlier time it ought to have been reasonably apparent to such person/s that the disclosure ought to have been made so as to prevent the market being misled.⁷⁰ To date, no market based causation case based on non-disclosure has been finally decided after a trial.

Conclusion

52. The Courts apply a principled but flexible approach to the question whether the plaintiff has established a relation of cause and effect between the defendant’s misleading or deceptive conduct, and the loss and damage which it claims that it has suffered as a result. It is for the plaintiff to identify with particularity what the loss and damage claimed is, and how the causal chain from the defendant’s impugned conduct links with that loss and damage such as to persuade the Court to attribute legal responsibility against the defendant. It is for the Court in application of the relevant

⁷⁰ See generally *Crowley v Worley Parsons Ltd* [2017] FCA 3 per Foster J. That was an unsuccessful attack by a respondent on the applicant’s Statement of Claim in a class action, which involved both positive and non-disclosure allegations. This decision merits close attention by pleaders.

statutory provisions in all the circumstances of the cases, to decide whether if factual causation is demonstrated, legal causation is found and hence whether an award of damages against the defendant in favour of the plaintiff follows.⁷¹

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⁷¹ Further causation issues concerning proportionate liability and contributory negligence are considered in a paper by the author: *Proportionate Liability in Misleading or Deceptive Conduct Cases*, June 2017. Wider relevant issues are also considered in the author's article: *Misleading or deceptive conduct cases in the Supreme Court of Victoria* (2015) 89 ALJ 397. Copies can be downloaded from the author's entry at www.vicbar.com.au and www.barristers.com.au.