Counterfactuals in Commercial Cases:

What would have happened otherwise?

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1. A plaintiff claims an award of damages against a defendant as compensation for it having suffered, or sustained, loss and damage caused by the wrongful conduct of the defendant. There must have been a connexion between the defendant's wrongful conduct and the plaintiff's claimed loss. The connexion was causal in nature, or character, when the occurrence of the wrongful conduct was necessary for the occurrence of the loss. Proof by the plaintiff of the causal connexion, on the balance of probabilities, is one of the essential elements of the plaintiff making good its compensation claim.

2. How does the plaintiff prove the causal connexion? A counterfactual approach or analysis requires the Court to decide the question: What would have happened concerning the plaintiff's loss if the defendant had not engaged in the wrongful conduct? I will consider how counterfactual analysis has been applied in recent claims for damages in breach of contract, misleading or deceptive conduct and professional negligence cases.

3. The wrongful conduct in question will depend upon the legal nature of the cause of action relied upon by the plaintiff against the defendant. The answer to the question of causation generally requires an examination of the purpose of the cause of action, and the nature and scope of the defendant's obligation in the particular circumstances [1]. Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose [2].

4. In the application of a counterfactual analysis, much will depend upon how the plaintiff puts its loss or damage claim, both as a matter of law and fact. Logically, the identification of the damage or loss that is subject of the claim is anterior to the question of causation. The proper identification of the damage suffered usually points the way to the acts or omissions which were its cause [3].

5. Since at least *Lewis v Australian Capital Territory* [4] *(Lewis)* and *Berry v CCL Secure Pty Ltd* [5] *(Berry)*, both judgments of the High Court delivered on 5 August 2020, a counterfactual analysis is essential for the Court's decision on whether the plaintiff has proven causation against the defendant.

6. The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which so far as money can do, will put that party in the same position as it would have been in had the contract been performed or the tort not committed [6]. The Court must

assess what would have happened but for the breach.

Counterfactual Analysis

7. There is a fundamental distinction in claims for compensatory damages in tort, contract and in misleading or deceptive conduct cases, between the plaintiff suffering or sustaining (some) loss or damage, and the quantification or assessment of an award of monetary damages made by the Court. The question whether the plaintiff proves that the defendant's wrongful conduct was a necessary cause of the plaintiff's loss or damage, and the counterfactual analysis, relate to the former, the fact of loss (whether the plaintiff has actually suffered the claimed loss), rather than to the quantification of it. Loss or damage which the plaintiff has suffered caused by the breach is the phenomenon in respect of which an assessment of damages is made. For there to be compensatory damages, there first must be damage [7].

8. The language of the damages provision (s236) of the *Australian Consumer Law,* concerning the defendant engaging in misleading of deceptive conduct (s18), is clear:

s236 (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 or 3;

the claimant may recover the amount of the loss or damage by action against that person, or against any person involved in the contravention [8].

9. When the claimant has suffered (some) loss or damage because of, or caused by, the misleading or deceptive conduct of the respondent, then the claimant may recover the amount of the loss of damage against the respondent.

10. The distinction between the occurrence of some loss caused by the defendant and the quantification of an award of damages for that, is important particularly because there can be differing standards of proof. In *Sellars v Adelaide Petroleum NL* [9] *(Sellars)*, the applicant claimed an award of damages in respect of an alleged loss of a commercial opportunity because of misleading or deceptive conduct by the respondent. The applicant could not have established on the balance of probabilities that but for the wrongful conduct, it would have realised the prospective opportunity to contract. However, it succeeded in the Court awarding damages for loss of the opportunity to do so.

11. Relevantly for present purposes, in *Sellars* Mason CJ, Dawson, Toohey and Gaudron JJ stated [10]:

"The distinction between proof of causation and damages was emphasized in *Hotson v East Berkshire Area Health Authority*. There Lord Ackner stated that the first issue that fell to be determined was that of causation. This was to be determined on the balance of probabilities. Once liability was established, the assessment of the plaintiff's loss could proceed, taking into account any reductions arising from uncertain future events. 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."

"…the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities."
(citations omitted)

12. In *Sellars,* Brennan J stated [11]:

"But what is the standard of proof where the issue of causation depends on competing hypotheses? There is no reason why the balance of probabilities should not be the standard of proof required to establish both causation and the existence of a loss though that standard is inappropriate to the assessment of the amount to loss, where the assessment is merely an evaluation of the future possibilities." (citations omitted)

13. I turn to how the Court decides causation counterfactuals generally, with particular reference to *"but for"* counterfactuals. However, as I will seek to demonstrate, the Court sometimes must and does, decide causation counterfactuals in situations beyond, and different from, but for counterfactuals. The application of a but for counterfactual may not be sufficient for the plaintiff to establish causation.

14. In *Lewis*, the plaintiff sued in tort for damages for false imprisonment. Edelman J concerning causation stated:

"[151] Causation is a concept that establishes a link between a physical event and a physical outcome. Where a claim is brought for compensation for loss, the causal question asks whether the defendant's wrongful act was necessary for the loss: "did the defendant's act make a difference" to that outcome? That question is posed as a counterfactual: would the loss have lawfully occurred without the defendant's wrongful act? In other words, would the plaintiff have suffered the same loss but without a violation of their rights? If the loss would not otherwise have occurred then, subject to other legal issues including remoteness of damage, it is easy to see why the defendant should be responsible for the loss. Conversely, if the defendant's act made no difference to the outcome, because "but for" the act of the defendant the loss would have occurred lawfully, then the defendant's act was not a cause of the loss and the defendant's responsibility for that loss becomes more difficult to justify." …

"[178] As explained above, the test for causation of loss asks whether the wrongful act was necessary for the loss. The "but for" or counterfactual approach "directs us to change one thing at a time and see if the outcome changes". The change is the removal of the wrongful act. If the loss would lawfully have occurred but for the wrongful act then the wrongful act was not necessary for the loss. The counterfactual approach thus involves a hypothetical question where no other fact or circumstance is changed other than those which constituted the wrongful act."
(citations omitted)

15. In relation to claims for compensatory damages, but for causation and the use of counterfactuals to identify that are not new concepts. However, I suggest that these statements by Edelman J in *Lewis* are important for a number of reasons.

16. First, the defendant's wrongful conduct must have been necessary for the plaintiff's loss to have occurred. I understand Edelman J here to have decided that necessity, identified by the relevant counterfactual, is the only, or exclusive, test of but for causation. The judge, writing extra-judicially in a paper entitled *Unnecessary Causation*, published in Australian Law Journal in 2015 [13], outlined perceived difficulties with wider, or different, conceptions of causation other than necessity being the sole criterion of causation. Edelman J there drew attention to judicial and academic criticism of "common sense" causation, the use of "material contribution" as a test of causation separate from but for necessity, and the introduction in each Australian State and Territory in about 2002, following the lpp Report, of the *Civil Lability Acts* concerning negligence cases.

17. The relevant section of the Victorian Act, s 51 (1) of the *Wrongs Act 1958* (Vic), provides as follows:

"51 General principles

(1) A determination that negligence caused particular harm comprises the following elements –

(a) That the negligence was a necessary condition of the occurrence of the harm (factual causation); and

(b) That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

18. In *Strong v Woolworths* [14], a personal injuries case, the High Court considered the like New South Wales provision, s 5D (1) (a) of the *Civil Liability Act 2002* (NSW). French CJ, Gummow, Crennan and Bell JJ stated:

"[18] The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence. While the value of that test as a negative criterion of causation has long been recognised, two kinds of limitations have been identified. First, it produces anomalous results in particular cases, exemplified by those in which there is more than one sufficient condition of the plaintiff's harm. Secondly, it does not address the policy considerations that are bound up in the attribution of legal responsibility for harm."

19. The judges decided that:

"…[29] The causation issue presented by the appellant's claim has nothing to do with concepts of material harm, material increase in risk of harm, or any of the difficulties discussed by text writers in a "but for" analysis of the factual causation."

(citations omitted)

20. The second important matter that should be taken from Edelman J's statements in *Lewis* is that a but for counterfactual must be used by the Court to identify whether the necessary causal connexion between the defendant's wrong and the plaintiff's loss existed. The language of "counterfactuals" apparently emerged in Australian cases in the late 1990's and has since become part of the legal vernacular [15]. The word counterfactual of itself is not important, but it is a useful description of the means whereby the Court decides the necessary causal question: What would have happened concerning the plaintiff's loss if the defendant had not engaged in the wrongful conduct? Factual causation is decided by the Court by it hypothetically taking away the occurrence of the wrongful conduct of the defendant, contrary to the fact [16].

21. That the defendant's wrongful conduct must have been a necessary cause of the plaintiff's loss, does not mean that the conduct must have been the sole cause. That it was a cause is enough, provided that it was a necessary cause. The many cases that say that the impugned conduct of the defendant need only be a cause of the plaintiff's loss, and not the sole cause, do not mean that the question whether that was a cause, is a different causation test to the application of the but for necessary causation counterfactual test as held by Edelman J in *Lewis*. Where a plaintiff satisfies the Court on the counterfactual that the defendant's wrong was a necessary cause of the plaintiff's loss, that finding can be made where other matters were causally connected with the occurrence of the plaintiff's loss as well. In that sense, the defendant's wrong was a cause of the plaintiff's loss together with other causes. Once factual causation has been established, then issues can arise concerning the quantification or assessment of the loss or damage suffered. So too do normative issues about the scope or extent of the defendant's liability, decided by reference particularly to the nature and purpose of the cause of action concerned, and of the relevant statutory provisions where applicable. Proof by the plaintiff of factual causation may not be sufficient for the plaintiff to be awarded an assessment of damages, especially where multiple matters caused the plaintiff's loss.

22. Although *Lewis* was a claim for damages for wrongful imprisonment, I suggest that the statements of Edelman J to which I have referred, apply in Commercial Cases. A like approach was adopted by the High Court in *Berry*.

23. In *Young v Chief Executive (Housing)* [17], statutory provisions applied common law contractual principles. Gordon and Edelman JJ stated:

> "[60] Although causation was once described in this Court as a concept of 'common sense', it has since, and repeatedly, been emphasized that the concept of common sense should be eschewed when applying the principle of causation. In the law of contract, the principles related to causation begin with a counterfactual, or 'but for' test. Other general contract law rules that are related to causation include the rules concerning mitigation, remoteness of damage [18], and scope of duty." (citations omitted)

24. The Court in testing causation proceeds on the counterfactual on the basis, contrary to the fact, that the defendant had not engaged in the wrongful conduct that the plaintiff alleges against it. That is the opposite of what the plaintiff contends that the defendant actually did. The Court seeks thereby to isolate the causal effect, if any, of the defendant's actual

wrongful conduct, on the actual loss or damage suffered by the plaintiff.

25. For there to have been a causal connexion between the wrong and loss, the assumed non-occurrence of the wrong ought to have made a positive difference to the plaintiff concerning the occurrence of its loss. The plaintiff ought to have been in a better position without the occurrence of the defendant's wrongful conduct, than with that. If so then prima facie, the difference between the plaintiff's financial circumstances in the assumed non-breach position and in the actual breach position, ought reveal the nature, and extent, of the plaintiff's loss caused by the breach [19]. The plaintiff would have been better off to that extent, but for the breach.

26. Put the other way around, on the counterfactual, causation is proven between the defendant's conduct and the plaintiff's loss when the plaintiff is in a worse financial position with the wrongful conduct having occurred, than it would have been had the wrongful conduct not occurred. The plaintiff must have suffered a detrimental difference as a result. Causation demonstrates that the plaintiff suffered loss or damage [20].

27. In such circumstances, the Court will find that the defendant's wrongful conduct was necessary for the plaintiff's loss to have occurred.

28. Conversely if on the counterfactual of an assumed non-occurrence of the defendant's wrong, that would have made no difference to the plaintiff concerning the occurrence of its loss, then the wrongful conduct of the defendant that actually occurred is not taken to have caused the plaintiff's loss. If there was no difference to the plaintiff's financial circumstances between the assumed non-breach position and in the actual breach position, then it is difficult to see how, or why, the defendant's actual breach caused any loss to the plaintiff.

29. Put the other way around, on the counterfactual, causation is not proven between the defendant's conduct and the plaintiff's loss, when the plaintiff is not in a worse financial position with the wrongful conduct having occurred, than it would have been had the wrongful conduct not occurred. The plaintiff will not be shown to have suffered any loss necessarily caused by the defendant's conduct. The plaintiff would not have been worse off as a result. If the plaintiff suffered any loss, then that was caused by something other than the defendant's wrongful conduct. Indeed, the plaintiff here may have suffered no loss, or even been better off, on the counterfactual. Certainly, the plaintiff would have suffered no detrimental difference as a result. Hence, the plaintiff suffered or sustained no compensable loss against the defendant for want of proving causation.

30. On a counterfactual causation analysis, the wrongful conduct of the defendant is removed as the Court tests the causal potency of the wrongful conduct that actually occurred, on the plaintiff's actual loss. In some cases, that step can be problematic as it requires the Court to identify what conduct the defendant would have engaged in had it not engaged in the wrongful conduct. What would the defendant have done? It could be an unrealistic view of what would have happened, if the Court were to find that if the defendant had not made impugned misrepresentations, then the defendant ought be taken to have communicated nothing to the plaintiff. Would the defendant have stated something else which was not misleading or deceptive, and if so what? The answer to that question must be based upon the evidence led by the parties at trial, as a matter reasonable inference in all the

circumstances. The Court will not just speculate as to what the defendant would have done. The Court will consider what the defendant ought to have done. Connock J in *Selak v National Tiles Co Pty Ltd (No.4)* [21] revisited the principles regarding the drawing of inferences in civil cases.

31. As to what the plaintiff would have done absent the defendant's wrongful conduct, the inherently hypothetical nature of the inquiry can make it difficult for the Court to decide whether causation of the plaintiff's pleaded loss claim ought be found, or not. But for the defendant's wrongful conduct, would the plaintiff have made no transaction with the defendant, or an alternative transaction with the defendant or with someone else? Much depends on how the plaintiff pleads that it suffered loss or damage. Why did the defendant's impugned conduct cause that to occur? In turn, the defendant on a competing counterfactual may allege that the plaintiff would have suffered the same loss had the defendant not engaged in the impugned conduct.

32. In *Berry* [22], there was an agency agreement between the parties. The applicant agent terminated the agreement by letter, but was fraudulently induced to do so by misrepresentations of the respondent principal, in contravention of s 52 of the *Trade Practices* Act *1974* (Cth). At trial there was no dispute that the fraudulently induced termination letter agreed to by the agent was legally effective to bring the agency agreement to an end. The applicant claimed s 82 damages for loss of commission through to June 2010 when other agency agreements were terminated. The principal contended at trial that it would have lawfully terminated the agreement by 30 June 2008 in any event, as it was entitled to do under the agreement. The agent succeeded in the High Court for damages in relation to the claimed loss of commission. The principal failed in its defence of alternative early termination for want of proving that that was likely had the wrongful termination not occurred.

33. In *Berry,* relevantly for present purposes, Gageler and Edelman JJ stated:

"[65] Economic loss may take a variety of forms all of which involve the identification of some "prejudice or disadvantage" that has occurred. Plaintiffs pursuing the statutory action are initially responsible for formulating how such loss or damage as they claim to have suffered is to be identified. The initial question must always be: "what loss or damage does the plaintiff allege"? The plaintiff then bears the legal onus of proving that the identified loss or damage has been suffered by the contravention of which they complain and of establishing the amount of that loss or damage. The plaintiff bears, in other words, the ultimate burden of establishing both the required connection with the contravention and quantum by inferences drawn from the whole of the evidence. That legal onus is constant…

"[67] Dr Berry and GSC did not formulate the loss they claimed to have suffered by the misleading or deceptive conduct of Securency in terms of the loss of contractual rights under the Agency Agreement. Had they formulated their loss in that way, they would have proved that the misleading or deceptive conduct of Securency was sufficiently connected with the identified loss by proving nothing more than that Dr Berry signed the termination letter in reliance on the misleading or deceptive conduct. There being no dispute that the termination letter was effective to bring the Agency Agreement to an end, the amount of their loss would have been the value of the contractual rights under the Agency Agreement that they gave up at the date of termination. The value of those contractual rights would have been assessed at the date of termination of the Agency Agreement having regard to the degree of probability that the

Agency Agreement would have continued to exist into the future had it not been ended by the termination letter and having regard to the degree of probability that a future stream of commission would have been paid under it.

“[68] Dr Berry and GSC chose instead to formulate the loss they claimed to have suffered by the misleading or deceptive conduct of Securency exclusively in terms of the loss of commission they would have received under the Agency Agreement had the Agency Agreement not been brought to an end by the termination letter. It was common ground that the formulation of their loss in that way required them to prove that the misleading or deceptive conduct of Securency caused the loss by proving on the balance of probabilities the counterfactual that, but for Dr Berry having signed the termination letter in reliance on the misleading or deceptive conduct so as to bring the Agency Agreement to an end, the Agency Agreement would have continued in existence and commission would have been paid under it.”...

“[72] The function of pleadings is to state with sufficient clarity the case that must be met and thereby to "ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and ... to define the issues for decision". A plaintiff should be expected to plead all material facts on which the plaintiff relies to constitute the statutory cause of action, including any counterfactual on which that plaintiff relies to establish the requisite causal link between identified loss or damage and identified misleading or deceptive conduct. In the same way, a defendant resisting the statutory action should be expected to plead any different counterfactual on which that party might rely to deny the causal link. Unless and to the extent that the parties choose to depart from the pleadings in the way they go on to conduct the trial, choice between the competing pleaded counterfactuals on the balance of probabilities should then exhaust the fact-finding that is required to be undertaken by the court on the issue of causation.” (citations omitted)

34. In *Berry*, the counterfactual causation question was: If the agency agreement had not been wrongfully terminated when it was, would the agreement have been extended and operated until June 2010 as the agent contended, or instead been lawfully terminated by 30 June 2018 as the principal contended? Had the agreement not been terminated, contrary to the fact, it was not self-evident what would have happened, or what either the plaintiff or the defendant would have done. That was a matter of evidence on the competing contentions of the agent and the principal. The Court resolved that notwithstanding the hypothetical nature of the issue. In the result, the principal’s contention failed; the agent’s contention succeeded, and hence the agent established on the balance of probabilities the necessary causal connexion between the defendant’s misleading or deceptive conduct and the agent’s loss. The quantification or measurement of the damages to be awarded to compensate the agent for the loss followed from that.

35. In *Berry,* the Court did not discuss a but for causation counterfactual. It was plain that the fraudulent misleading or deceptive conduct of the principal was a necessary cause of the termination of the agreement, and that the agent’s loss of commission claim was based on the counterfactual that the agreement would have continued and not been terminated. The principal’s competing counterfactual was that the agreement would have been terminated lawfully by it even had it not engaged in misleading or deceptive conduct which caused that, because it would have invoked a clause in the agreement under which it could simply terminate by giving sufficient notice. The principal failed to persuade the Court of that on the evidence. The principal was not taken to have likely acted lawfully to terminate the agreement on its counterfactual, when in fact it had wrongfully acted to induce the agent to

give the termination notice.

Breach of Contract Claims

36. A plaintiff sues a defendant for damages for breach of a contract between them. On the counterfactual when the defendant's breach is assumed to have been taken away, in principle it is clear what the defendant would have done. The defendant is taken to have performed its contractual obligations to the plaintiff, instead of breaching them. What would have happened the concerning the plaintiff's loss could likewise be clear, but not necessarily so. The contract may have indicated with a greater or lesser degree of particularity what the defendant ought to have done in the circumstances, but did not do. The history of performance of contract by the plaintiff and the defendant before the breach ought provide some guidance to the Court in deciding what the causal effect of the defendant's breach was likely to have been on the plaintiff's loss.

37. Damages for breach of contract are assessed as at the date of the breach. However, subsequent events can be, and commonly enough are, taken into account by the Court in deciding on the counterfactual what the effect of the defendant's breach had on the plaintiff's claimed loss [23].

38. In *Honda Australia v Brighton Automotive (Honda Australia)* [24], there was a car dealer agreement between the parties for a five-year term from 1 July 2018 to 30 June 2023. Honda was required to give Brighton notice before the end of the term as to whether it intended to offer a further term. Brighton had no contractual entitlement to a further contract with Honda. On 23 March 2020, Honda gave Brighton notice purporting to terminate the agreement with effect from 30 June 2021, two years before the expiry of the five year term of the agreement. Honda had decided to change its business model in Australia by selling Honda cars through authorised agents, rather than dealers.

39. After Brighton commenced legal proceedings against Honda, Honda accepted that it had wrongfully repudiated the dealer agreement. Brighton then accepted the repudiation and terminated the agreement with effect from 29 January 2021. Brighton claimed loss of profits damages for Honda's breach of the agreement for the remaining contract period from 29 January 2021 to 30 June 2023. Honda at trial before Matthews J in the Supreme Court of Victoria admitted liability: *Brighton Automative Holdings Pty Ltd v Honda Automative Pty Ltd (No. 2)* [25]. The trial judge assessed damages for loss of profits in respect of the remaining contact period. The starting point of the assessment made by the judge was that had the dealership model remained in place concerning Brighton and Honda's Australian dealer network, Honda would have supplied 40,000 new vehicles per annum to the network. That was an annual target which on some of Honda's evidence, was necessary for it to have maintained the dealer network.

40. However, Honda relied on other evidence that before it had decided to change Australia-wide from a dealership to an agency model, Honda had a target of no more than 33,000 supplied vehicles per annum. The evidence was that during the remaining period, the actual number of vehicles supplied to was very substantially less than both figures. Under the dealer agreement, there was no term which prevented Honda from reducing vehicle supply.

41. On the appeal by Honda against the trial judge's decision that the starting point for Brighton's loss of profits was supply of 40,000 vehicles, Honda contended that the figure ought to have been no more than 33,000, but did not contend that the figure ought to have been lower than that. In the Court of Appeal, the counterfactual question was: If the dealer agreement had not been wrongfully terminated when it was, would that have caused loss of profits for the remaining period with a starting point of supply of 40,000 Australian Honda vehicles as Brighton contended, or 33,000 as Honda contended? On the counterfactual, had Honda performed the agreement rather than terminated it, the assumption was that the Australian dealer network would have continued to 30 June 2023.

42. After a detailed examination of the reasons for decision of the trial judge, and of the trial evidence, the Court of Appeal allowed Honda's appeal, reducing the loss of profits calculation starting point from 40,000 to 33,000 vehicles per annum. The Court held that Brighton had not established that the 40,000 target volume would have been set, or that if the agency model had not been adopted, the reduction to 33,000 vehicles would not have occurred. Honda's breach was not a necessary cause of the plaintiff's loss of profits claim based on the 40,000 vehicles figure, but only a necessary cause of the loss claim based on a 33,000 vehicles figure.

Sellars Loss of Opportunity Claims

43. At trial in *Honda Australia* [26], Brighton also claimed loss or damage resulting from Honda's repudiation of the dealer agreement, for loss of the opportunity to earn profit under a further contract with Honda as a dealer, or agent, after the expiration of the five year term of the dealer agreement on 30 June 2023. Brighton accepted that the amount of any damages here would require the Court to apply a *Sellars* discount to the value of the opportunity by reference to the risk or chance that there would have been no further contract between the parties. Brighton had no contractual entitlement under the dealer agreement for it to be extended.

44. Matthews J rejected this claim by Brighton as being merely speculative in nature. Brighton did not appeal that decision. The Court applied three questions derived from *Sellars* identified in the judgment in the Victorian Court of Appeal *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* [27]:

(a) was there a commercial opportunity of some value, which is more than speculative or legible?;

(b) would the plaintiff have pursued the lost opportunity?; and

(c) what is the amount that should be awarded, having regard to the prospects of success if the opportunity had been pursued?

45. Although on the counterfactual of Brighton's claim here the dealer agreement would not have been repudiated by Honda, and would have been continued until 30 June 2023, Matthews J considered what would have happened thereafter concerning the plaintiff's claimed loss of opportunity, on the basis that Honda by then would have made the decision to change from a dealership to an agency model, as it in fact did. The issue then was

whether Honda would have appointed Brighton as an agent, rather than a dealer, from 1 July 2023?

46. The judge found on the balance of probabilities that Honda would not have appointed Brighton as an agent from 1 July 2023, irrespective of whether it had repudiated the dealer agreement or not. The chance of Honda appointing Brighton as an agent from 1 July 2023 was so slight as to be neglible, and was merely speculative.

47. I suggest that it is significant that Matthews J here on the counterfactual, took account what actually happened concerning the factual basis for the plaintiff's loss of opportunity claim (the decision by Honda to change from a dealer to an agency model), rather than an unrealistic hypothetical (Honda maintaining a dealer model from 1 July 2023). There was no occasion for changing what actually happened.

48. Pleading a loss of opportunity claim can be challenging. The lost opportunity should be pleaded with as much particularity as the subject matter of the claim permits. The touchtone is procedural fairness [28]. In *United Petroleum Pty Ltd v Perth Pty Ltd (No.2)* [29], Anderson J refused to consider an applicant's loss of opportunity claim sought to be advanced in closing address, having regard to the pleadings, and the way the case was opened and run at trial.

49. Before turning to illustrative cases where the plaintiff succeeded in a *Sellars* loss of opportunity claim on causation and was awarded damages, it is instructive to have regard to the principles concerning assessment of damages issues in *Sellars*. Mason CJ, Dawson, Toohey and Gaudron JJ in *Sellars* decided [30]:

"…we consider that the acceptance of the principle communicated in *Malec* requires that damages for deprivation of a commercial opportunity occurred by reason of breach of contract, tort or contravention of s 52 (1), should be ascertained by reference to the Court's assessment of the prospects of success of that opportunity had it been pursued. The principle recognized in *Malec* was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind."

50. The principle in *Malec v JC Hutton Pty Ltd* [31] to which reference was made here in *Sellars* was stated by Deane, Gaudron and McHugh JJ in these terms:

"When liability has been established and a common law court has to assess damages, its approach to events that allegedly might occur is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than if not having occurred, the occurrence of the event is treated as certain; If the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take into account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those event occurring. The probability may be very high – 99.9 per cent – or very low – 0.1 per cent. But unless the chance is so low as to be regarded as speculative – say less than 1 per cent - or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, 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. The adjustment may increase or decrease the amount of damages otherwise to be awarded." (citations omitted).

51. In *Sellars,* Brennan J stated [32]:

"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 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).

52. In *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd (Principal Properties)* [33], the plaintiff developer claimed against the defendant landowner breach of contract loss of opportunity damages, to acquire and develop land for profit. Under a Call Option Deed, the defendant granted the plaintiff an option to purchase land for a three year period at a price of $1 million plus GST. The developer proposed to construct 54 apartments and other facilities on the land. The developer's entitlement to exercise the option was subject to the Brisbane City Council giving approval to the development. The defendant failed or refused to give its consent to the development. The plaintiff terminated the Call Option Deed, and the trial judge found that it was entitled to do so. However, the judge held that more probably than not the plaintiff would have lost money had the development proceeded, and hence awarded only nominal damages.

53. The Queensland Court of Appeal upheld an appeal by the developer. McMurdo JA held:

"[111] Undoubtedly this opportunity was affected by many contingencies, and the prospect that the development would proceed was small. But there was some prospect that it could have proceeded, and if so, there would have been a high probability that it would have been profitable. It was an opportunity which a rational businessperson might have pursed, although many would not have done so. It was an opportunity which had a value."

54. McMurdo JA reasoned as follows:

"[23] If a commercial opportunity has no chance of being profitable, it is an opportunity of no value and its loss could not be compensable. I would also accept that a commercial opportunity which no rational investor would pursue, having regard to the relative probabilities of a profit and a loss and the likely magnitude of each, would be a valueless opportunity.

"[24] However, I do not accept that the same may be said whenever it is more likely than not that the pursuit of the opportunity would have resulted in an investor's loss. Many investments are pursued with an appreciation that, more likely than not, they will not be profitable after money is spent pursuing them. They are pursued because the magnitude of the potential profit, considered against a relatively small amount of the potential loss, makes the risk, sometimes a high risk, of that loss is one which is worth taking. As the trial judge identified, examples of such cases are found in the mining exploration industry. His Honour said that in such cases, the commercial opportunity would be valuable because the investor's interest could be sold for a substantial sum, notwithstanding that in the balance of probabilities, it could not be said that the interest would have become a profitable mining operation. His Honour considered not be traded that a case such as the present one was different, because the appellant's opportunity could."

55. McMurdo JA noted [34] that under the Deed, had the option been exercised, the developer could have nominated another transferee of the land and considered that the question whether the opportunity was valuable did not depend on there being a market for the opportunity. McMurdo JA continued:

"[26] The relative probabilities of a profit and a loss, in a particular case, would be relevant in assessing whether the opportunity had a value. It is possible to imagine cases where both the likelihood of a profit and the magnitude of that profit if are so small that no rational investor would pursue the opportunity with the risk of thereby suffering a comparatively large loss.

"[27] But where, as in the present case, the provision of the opportunity was the subject of a contract, it will be unlikely that the opportunity will be a case of that kind." (citations omitted).

56. McMurdo JA considered on the findings of the trial judge, and the evidence, that had the development proceeded, there was a potential profit of the order of $4 million, and a potential loss of $2.75 million.

57. McMurdo JA found:

"[109] Had the number of pre-sales been achieved, the only substantial contingency, according to the judge's findings was a 30 per cent chance that the development finance would not have been obtained. Had the project reached the point where development finance was obtained, there would have been a high probability of achieving a profit of the order of $4 million. In other words, had this development been undertaken, more probably than not, it would have yielded a profit. More probably than not, the development would not have proceeded. But a loss from the development, if undertaken, would not have been probable'…

"[113] The prospects of achieving a profit of the order of $4 million were less than 10 per cent, on his Honour's findings. The "financing…risks" to which his Honour referred was the 30 per cent chance that the development finance would not have been obtained. Further, some allowance must be made for the prospect, although relatively small, that this project would have resulted in an overall loss. A project with, say, a 10 per cent chance of a substantial loss, would be a more valuable opportunity than the present one."

"[114] In my conclusion, the applicant should be awarded on amount of $250,000 as damages. There should be interest on that sum, calculated from 30 September 2017 which was the date of termination of the contract, to the date of the judgement."

58. The plaintiff in *Principal Properties* on the counterfactual proved on the balance of probabilities that the defendant's wrongful termination of Call Option Deed caused it the loss of the opportunity to develop the land and profit thereby, which was an opportunity of some, non-neglible value. However from the plaintiff's viewpoint, the Court of

Appeal's assessment of damages to which it was entitled for the deprivation of the development opportunity by the defendant's conduct was low. The $4 million potential profit was very substantially discounted to allow for the various possibilities that could have prevented that profit from being derived.

59. Perhaps by way of contrast, is the decision of the Victorian Court of Appeal in *Eastwood Retirement Pty Ltd v Joseph Finance and Investment Pty Ltd (Eastwood Retirement)* [35]. There the defendant in 2009/2010 became the registered proprietor of land with the intention of developing it into a retirement village consisting of 158 villas for residents, and other buildings and amenities. The purchase price of the land was $4,916,240. The plaintiff's predecessor on 3 June 2010 executed an Option Deed under which the developer would sell the land after the completion of the construction of the village, at a price set by a formula. The expiry date of the Option Deed was extended over time until 20 July 2020. The plaintiff under the Deed was to complete the purchase of the land 90 days after the option had been exercised. The developer used various forms of finance for the purchase of the land, and the building of the village. Under clause 5.1of the Option Deed, the developer was required to use reasonable endeavours to complete the development by the expiry date of the option. The developer had not completed construction of the last two villas by the expiration date of the Option Deed.

60. The plaintiff commenced proceedings alleging breach by the defendant, inter alia, of clause 5.1, and sought a declaration that the Option Deed was still on foot, alternatively loss of opportunity damages. The declaration was not pressed at trial. The main claim for damages was the difference between the purchase price under the option formula, and the value of the constructed village at the relevant time. The developer contended that the Option Deed had expired on 20 July 2020. The trial judge upheld the plaintiff's claim for damages in sum of $9,872,719.11, plus statutory interest of $238,027.20. At trial the developer contended that the plaintiff had to establish on the balance of probabilities that it had the funds to complete the purchase at the relevant time, but did not do so on the evidence.

61. The trial judge found [36] that causation was established between the defendant's wrongful termination and the plaintiff's loss. The developer contended that the plaintiff's claim was for a loss of an opportunity, and that the quantification of its alleged loss should take into account a discount to reflect the risk that the transaction would not have eventuated because the plaintiff would not have been able to secure finance to complete the purchase in October 2020 had it had the opportunity to do so. The developer contended that the appropriate *Sellars* discount was around 80 – 90 per cent. On the counterfactual, the plaintiff submitted that the chances of it completing the transaction were at least 90 per cent, if not 100 per cent. The judge accepted that damages ought to be assessed on a loss of opportunity basis, and made a *Sellars* discount of 10 per cent to the award of damages made. The judge referred to the decision in *Principal Properties*. The plaintiff relied on the fact that the price payable was around half the value of the village, making it a very attractive loan proposition and thus it was highly probable that the necessary finance would have been obtained. The developer relied particularly on the fact that a loan application had not been made by plaintiff at the time.

62. The trial judge found that a loan facility at a loan to value ratio of 60% on a valuation of at least $15 million, would have provided the plaintiff with the full purchase price of $9

million. The plaintiff led some evidence about possible prospective sources of finance at the time. A possible Bank of Queensland facility did not proceed as far as a valuation of the village as the plaintiff did not have the opportunity to exercise the option.

63. Before the Court of Appeal concerning the 10% extent of the *Sellars* discount against the plaintiff's damages claim, the developer did not advocate a 80 – 90 per cent discount, contending rather that the contingency was somewhere in the middle of the range. The Court of Appeal dismissed the application for leave to appeal, in these terms:

> "[89] Here, there was only one relevant contingency, which was relatively straightforward in nature: what were Joseph's chances of obtaining external finance in order to complete the purchase of the Retirement Business in October 2020? The trial judge clearly evaluated those chances as being very high, but was unwilling to treat them as 100 per cent certain and therefore applied a modest discount of 10 per cent to cater for that eventuality. He considered that the difference between the market value and the Price at that time was such that Joseph would have been highly motivated to complete the purchase and, more importantly, that this differential would have made a loan an attractive proposition for a lender. Indeed, he found that Joseph would have been able to borrow the entirety of the purchase price based on a LVR of 60 per cent. The trial judge accepted the evidence regarding BOQ's preparedness to provide finance to Joseph, noting that short term finance from Curry Securities was also likely available.
>
> "[90] In these circumstances, we do not accept that the trial judge fell into error when assessing the *Sellars* discount. The figure arrived at by his Honour was open on the evidence, such that it cannot be said that it was manifestly wrong or inadequate, and it is therefore not one with which we should or would interfere."

64. As the decisions in *Principal Properties* and *Eastwood Retirement* show, although the assessment of loss of opportunity damages involves future hypothetical matters that can never be proven with certainty and is a matter of judicial estimation, that must be informed by the evidence led by the parties, and their contentions in the circumstances of the case.

65. *Sellars* was applied by the Full Court of the Federal Court in *La Trobe Capital & Mortgage Corporation v Hay Property Consultants* [37] *(La Trobe).* 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 have not made the loan on a proper valuation. 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 lost as a result of entering into the loan. The lender claimed damages for the difference between the loan to the defendant and a loan to someone else. The valuer contended that the lender's claim for damages failed because there was no loss of any particular alternative 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 rate as the subject loan, but that it was likely that another loan would have been made. 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 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.

Misleading or Deceptive Conduct Claims

66. The common law purpose of an award of breach of contract damages in favour of the plaintiff against the defendant, is to seek to ensure that the plaintiff received the financial benefit of the performance of the contract by the defendant which it had promised, but which the plaintiff did not receive because of the breach. It is a means of enforcing performance of the contract. The plaintiff is not to be placed by an award of damages in a better position than that which the plaintiff would have been in had the contract been performed [38]. The statutory purpose of a plaintiff's damages award against the defendant who has engaged in misleading or deceptive conduct in contravention of s 18 the *Australian Consumer Law (ACL)*, is to seek to enforce compliance with that statutory norm where the defendant's non-compliance has caused the claimant loss or damage. That is a means of reversing the effects of the contravention.

67. The statutory proscription of misleading or deceptive conduct applies in relation to a very wide range of commercial situations in trade or commerce. It does not depend upon there having been a prior contractual relationship between the plaintiff and the defendant when the impugned conduct of the defendant occurred, or upon a contract having come into existence as a result of that conduct. However many misleading or deceptive conduct claims are made by one contracting party against the other, such as in the circumstances in *Berry*. Commonly enough the plaintiff complains that the impugned conduct by the defendant was relied upon by it in entering into a loss-making contract with the defendant, or with someone else.

68. As has been observed, the terms of the damages provision of the *ACL,* s 236*,* requires that the conduct of the defendant in breach of s18 (1) must cause the claimant loss and damage, in respect of which the claimant may recover damages against the defendant. The loss or damage must have been suffered because of the infringing conduct. The claimant must show that but for the impugned conduct, it could have acted in some other way, or refrained from acting in some other way, which would have been of greater benefit or less detriment than the course in fact adopted. If the claimant does not show that it is or is likely to be worse off, it will not have established loss, or likely loss, for the purpose of s 236 [39].

69. In a misrepresentation case, the impugned conduct can take a variety of forms, such as a positive misrepresentation which was untrue, a statement of fact or opinion or as to future matters, where there was a failure to disclose matters which ought to have disclosed in all the circumstances to correct or justify those, or a statement which was in the nature of a half-truth. The misleading or deceptive conduct need not have been deliberate or intentional conduct by the defendant. Reliance by the claimant to its detriment upon the misleading or deceptive conduct by the defendant often enough establishes the necessary causal connexion between the breach and the claimant's loss. Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact [40]. However reliance is not a substitute for causation, but rather is a means whereby that can be established.

70. Third party or indirect causation, in some circumstances, can ground a s 236 loss or damage claim by the claimant. That can occur when the defendant's impugned conduct was directed to, and acted upon, by a person other than the claimant, but to the detriment of the claimant nevertheless. The claimant may not have personally been aware of or relied upon such conduct. At least two categories of such indirect causation have been identified. First, where the misleading conduct induced some reaction in X, and the claimant would have acted differently but for that reaction from X. Second, where the defendant's conduct induces some reaction in the third party and that reaction by X itself causes loss to the claimant without any requirement of a reaction by the claimant [41].

71. In relation to some misleading or deceptive conduct damages cases, a but for counterfactual analysis will not determine whether or not the claimant suffered loss or damage by, or because of, the defendant's wrongful conduct. If the impugned conduct is notionally taken away, or excised, to test what would happened then concerning the claimant's loss, that may not identify the correct starting point for a counterfactual analysis. On the counterfactual, the Court may assume not only that the defendant had not engaged in the impugned conduct, but also that it would have engaged in different conduct instead. The decision of the New South Wales Court of Appeal in *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No.3)* [42] *(Abigroup)* is illustrative.

72. In *Abigroup,* 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 contended that if it had known of the existence of the plan, that would have revealed that rock levels in concept drawings were seriously flawed. The contractor claimed loss or damage on the basis that had the plan had been revealed, it would have entered into a lump sum contract, would have entered into a contract only on a provisional sum basis in relation to the necessary extra work, or would not have entered into the contract at all. On the plaintiff's counterfactual, had the client not made the misrepresentation about the non-existence of the plans, it would instead have revealed their existence. However on the defendant's counterfactual, had the misrepresentation not been made, it ought be taken to have communicated nothing about whether there was an outlet pipe. According to the defendant, the contractor would have entered into the contract in any event and hence would not have been worse off than it was.

73. Beazley JA, delivering the judgment of the Court, rejected the defendant's contentions.

> "[58] In this case, the respondent made a misleading negative representation upon which the appellant relied in entering into the contract…the question for determination is whether the appellant suffered loss by the respondent's contravening conduct. That question is not answered in this case by the application of a "but for" test: viz, what would the appellant have done "but for" the representation. That test would involve excising the contravening conduct in a way which in this case I consider to be impermissible.

> "[59] Rather, what has to be done is to ascertain what would have occurred for the respondent not to have engaged in conduct which was misleading. In my opinion that would require that the existence of the plan be disclosed. This can be tested, in my opinion, by contrasting that response with the response argued for by the respondent – namely, saying nothing about the plan. In the latter case, a number of possibilities emerge, including that the appellant might have had a claim for non-disclosure, or there being no statement about plans in the tender

document, might have insisted upon undertaking its own investigations. But the Court does not need to, not should it engage in, speculation as to the possibilities…"

As there was a plan, and as it contained material information, its existence should have been disclosed to the appellant." (citations omitted)

The contractor's appeal in *Abigroup* succeeded, and the matter was remitted below for an assessment of damages.

74. In relation to paragraphs [58] and [59] of the judgment of Beazley JA in *Abigroup* to which I have referred, Derrington J in the Full Court of the Federal Court of Australia in *Watts v Chopsonion Pty Ltd (Contractors Appointed)* [43] *(Watts)* explained:

"[515] Importantly, as her Honour identified, the correct approach when undertaking a counterfactual analysis is to identify what would have occurred for the respondent not to have engaged in misleading conduct. In other words, it will not be sufficient in some cases to simply assume that, had the impugned representation not been made, nothing would have been said between the parties on the topic the subject of the misrepresentation. In *Abigroup*, it was appropriate for that "blank space" in the parties' negotiations to be supplanted with a positive representation as to the truth of the relevant matter. This approach is sound as it prevents the use of counterfactuals in a manner which obscures the underlying question of causation."

"[516] That aside, the elementary point underpinning her Honour's reasons in *Abigroup* is that the relevant counterfactual is one in which the impugned misleading or other conduct did not occur. "

75. In the circumstances in *Abigroup,* the causal counterfactual question was: What would have happened concerning the plaintiff's loss had the defendant positively stated that there was a plan rather than, and instead of, it misleading the plaintiff by failing to disclose the existence of the plan? Causation here is tested by taking away the negative misrepresentation but replacing it with the correct positive representation, and then assessing the impact that that would have had on the plaintiff's loss. What would the plaintiff have done in those circumstances, compared with those that actually occurred? What if any loss would the plaintiff have suffered as a result of the positive representation not having been made? In the result, the contractor would not have suffered the losses that it did had the plan been disclosed.

76. In *Watts*, the appellants were Mr Watts and his company WMM. WMM had agreed to purchase a NZ abattoir business for re-sale. An Australian company, Chopsonion, agreed to purchase the business and needed finance for that. Ms Sharpe and then Mr Sharpe, were sole directors of Chopsonion. In order to assist Chopsonion to do that, Ms Sharpe produced false documents to the lenders. They included an invoice from the vendor of the business to WMM that showed a purchase price of $850,000, with a balance due of $760,000. Emails supported the payment of the deposit. Contrary to those documents, the purchase price was $528,000 and no deposit had been paid. The lenders relied on these documents provided to them by Ms Sharpe in agreeing to finance the purchase by Chopsonion. The total of the loan facility was an advance of $1,175,000, which included finance for matters other than the (supposed) $760,000 to settle the purchase, such as for the cost of dismantling and packing up the chattels of the abattoir, transportation, containers, freight

and other costs. The transaction was settled and the facility was drawn down. The purchaser defaulted. Chopsonion became subject to an external controller. The lenders sued Chopsonion for the balance owing under loan. Chopsonion sued Mr Watts and WMM in relation to the amount of the lenders' losses, alleging that they were involved in breaches of fiduciary duties owed by Mr and Ms Sharpe to the company, and in the misleading or deceptive conduct by them. There were no proceedings against the Sharpes. Ms Sharpe was bankrupt. At trial, the lenders and Chopsonion alleged that Mr Watts and WMM provided the false documents to Ms Sharpe, for them to be provided to the lenders.

77. An appeal to the Full Court by Mr Watts and WMM was allowed because, on the evidence, neither Mr Watts nor WMM produced the false documents that Ms Sharpe had provided to the lenders. Rather they were produced by Ms Sharpe. Mr Watts and WMM accordingly were not involved in Ms Sharpe's dishonest design.

78. However, the Full Court went on to decide an alternative appeal on causation on an assumption if that Mr. Watts and WMM's appeal concerning their lack of involvement in Ms Sharpe's dishonest design were to be dismissed, rather than allowed as the Full Court had decided on ground 1 of the appeal [44]. It was not necessary for the Court to have done so. In other words, the Full Court decided the obiter causation appeal on the basis that Chopsonion succeeded against Mr Watts and WMM, rather than failed, and that they were in fact involved in Ms Sharpe's dishonest design. Mr Watts and WMM, on that assumption as to their conduct, contended before the Full Court that had they not engaged in the wrongful conduct, the lenders would have proceeded to fund the transaction nevertheless. Accordingly on such a causation counterfactual, the lenders were in the same position whether or not Mr Watts and WMM had engaged in the impugned conduct. Such a finding would be the opposite of what the trial judge held, namely that the lenders would not have entered into the transaction but for the impugned conduct. Mr Watts and WMM argued that the funding of the facility was attractive to the lenders and that having regard to matters which they relied upon other than the wrongful conduct, the transaction would have proceeded in any event.

79. In those circumstances, a number of questions arose. Had Mr Watts and WMM not engaged in the wrongful conduct of Ms. Sharpe in falsifying the documents upon which the lenders relied, what would those defendants have communicated to the lenders about the prospective transaction instead? Once that was answered, what would the lenders have done upon receipt of such "non-wrongful" communications? In such circumstances, would the lenders have avoided the transaction, or proceeded with it?

80. The trial judge on the counterfactual had decided that the lenders would not have entered into the transaction had the wrongful conduct concerning the falsified documents not occurred [45]:

> "[531] Further, I entertain no doubt that had the true position been disclosed, then faced with the knowledge of a false invoice and a false representation of payment of a deposit against that invoice as part of its overall conduct, no party would have engaged in the transaction."

81. Derrington J in the Full Court found that the trial judge had used an incorrect causation counterfactual. The judge had decided that the counterfactual involved the lenders knowing that the invoice and deposit representations were false. Derrington J reasoned:

"[517]…That approach to the extent that if fails to consider what would have occurred had the impugned conduct not taken place, is inconsistent with the accepted approach to counterfactual analysis, as illustrated by *Abigroup*."

"[518] As the appellants correctly submit, the primary judge should instead have formulated the counterfactual by reference to what would have occurred had the positive representation been made – in place of those actually made – which explained the transaction involving the claim in their entire."…

"[521] Firstly, as has been discussed, the purpose of a counterfactual is for the plaintiff to establish that they suffered loss by acting or refraining to act on the faith of the defendant's conduct. It is used to show what the plaintiff would have done had the misrepresentation not occurred, which, by way of comparison with what actually occurred, demonstrates the causal connection between the loss and the defendant's conduct. It would be wholly incongruent with that purpose to apply a counterfactual in which the impugned conduct nonetheless occurred. It is irrelevant what the plaintiff would have done in some other hypothetical scenario in which the misrepresentation was still made but then revealed. That would be an example of a counterfactual that is prone to obscure and over-complicate the simple question of whether the defendant's conduct caused the plaintiff's loss."

82. Derrington J in *Watts* decided that the counterfactual to be applied was one where the purchase price for the NZ business was $528,000 not $850,000, and where no deposit had been paid. The wrongful conduct of Ms Sharpe, in which Mr Watts and WMM were assumed to have been involved, was to be taken away and instead the lenders would have decided whether or not to proceed based on a true and correct statement of the transaction, rather than one based on false information. Would the lenders then have proceeded with that different transaction, or not?

83. Derrington J concluded, after a detailed examination of the evidence:

"[601] The primary judge should have found that the applicants had failed to establish, on the balance of probabilities, their "no transaction" case for the purposes of causation. The evidence did not support a finding that Ms How and the Lenders would not have proceeded with the loan in the event that the impugned conduct of Mr Watts and WMM had not occurred. Fundamentally, this error emanated from the primary judge's adoption of the incorrect counterfactual which the respondents had advanced. Had he applied the correct one, the deficiencies in the applicants' case would have become clear. Those deficiencies lay in the commercial attractiveness of the loan to Ms How and the Lenders, particularly given the existence of multiple exit strategies. In the end, this case should serve as an illustration of how the misapplication of a counterfactual can obscure and distort the proper assessment of causation."

84. Accordingly, Derrington J found that the lenders would have proceeded with the different transaction. It would seem to follow that the lenders in that event would have suffered the same loss that they in fact did, and hence Chopsonion would have had no claim against Mr Watts and WMM for that additional causation reason (as well as for the reason that they were not involved in Ms Sharpe's wrongful conduct).

85. It may be noted that before the Full Court, the respondents objected to the causation appeal because Mr Watts and WMM had not pleaded what would have constituted the different

transaction, had the truth been stated [46]. The trial judge made no findings about that. It is perhaps unlikely that the lenders would have suffered the same loss under the alternative transaction based on a true and complete disclosure of the transaction, unless under that they would have provided the same loan facility.

86. Where a claimant alleges that it entered into a loss-making contact in reliance upon misleading or deceptive conduct of the defendant, the claimant on the counterfactual may seek damages on the basis that it would not have entered into any transaction if the impugned conduct had not misled it, and in that event would have been in a better off financial position as a result of that compared to the position that it was in fact in. Or it could go further and seek to claim and prove that it would have entered into an alternative profit-making transaction the benefit of which it was denied by entering into the impugned contract, and claim the difference. However, the defendant on a counterfactual may plead and seek to prove that the plaintiff would have entered into a different, alternative transaction that would also have been loss-making, so that the claimant was not worse off because of it entering into the defendant's impugned conduct.

87. In *Davis v Perry O'Brien Engineering Pty Ltd (Davis)* [47], in the Supreme Court of Queensland, the sellers of shares in a business sued the buyers to seek to enforce the sale agreement. The buyers contended that they were entitled to avoid the agreement as the sellers had provided inaccurate financial information, failed to disclose other relevant information and breached a contractual warranty that all information given by the sellers to the buyers was true and accurate in all material respects. The buyers sought to prove that but for the contravening conduct, they would not have proceeded with the sale agreement and the transaction. The sellers did not plead a counterfactual of what would have occurred if the misrepresentations had not been made, or had been corrected prior to settlement.

88. Applegarth J in *Davis* made the following statements of principle concerning causation:

> "[260] If the claimant's case that, absent the contravening conduct, it would not have entered into or proceeded with the relevant transaction is proven on the balance of probabilities by reference to objective factors and proof by inferences, drawn from the whole of the evidence, then it will discharge its onus of proof on causation. Its claim is not defeated by conjecture or speculation that it may have entered into an alternative transaction."
>
> [261] The parties' competing hypotheses or counterfactuals, like any other conclusion, depend on inferences drawn from reliable evidence that is accepted. The Court must be satisfied that the evidence enables it to draw a reasonable and definite inference from the circumstances."
>
> [262] The inference urged by the claimant that it would not have entered into or proceeded with the relevant transaction in the absence of the contravening conduct must be more probable than not."
>
> [263] Any competing hypothesis that the claimant would have completed the transaction or would have entered a different transaction that resulted in its suffering loss must also be a reasonable inference, rather than mere conjecture, guesswork or surmise."
>
> [264] To adopt what was said by Leggatt J in *Yam Seng* and approved in *Jamieson*, unless the

defendant "can demonstrate with a reasonable degree of certainty ... both the fact that the claimant would probably have suffered a loss from entering into an alternative transaction and the amount of that loss, the damages will not be reduced". This is not to reverse the legal onus of proof on causation which remains on the claimant. It simply recognises that proof of causation based on all of the evidence does not require the claimant to exclude unproven competing hypotheses. In such a case the defendant has a so-called "evidentiary onus" or practical burden to adduce evidence in circumstances in which the claimant will have otherwise discharged the legal onus of proof."

[265] Any competing counterfactuals about what would have happened in the absence of the contravening conduct should be pleaded and the subject of proof. The principles in *Jamieson* should be applied including its statement that:
"No principle or policy justifies parties and courts simply speculating about what might have been." (citations omitted)

89. I emphasise the objective nature of the causation fact-finding process undertaken by the Court. Whether the defendant engaged in misleading or deceptive conduct is an objective matter. However where the claimant seeks to establish causation based upon reliance, it must have been subjectively, or actually, misled by the impugned conduct of the defendant. In *Davis*, the judge found that the buyers relied upon the misrepresentations. Applegarth J found the buyers' no transaction case was proven objectively, on the evidence and in all the circumstances of the case. However in doing so, the judge put little weight upon the evidence of the principal witness of the buyers, explaining as follows:

"[270] As noted, Mr O'Brien gave evidence that supported the no transaction counterfactual. I accept the honesty of his evidence in that and other respects. However, I accept the Sellers' submission that little weight should be placed upon such evidence since it is a reconstruction of what the witness thinks would have occurred. That reconstruction is greatly affected by the litigant's actual experience. The term is hindsight bias."

"[271] Many authorities in different areas of the law have identified that most plaintiffs will generally believe that, given an alternative that would have avoided injury or loss, that alternative would have been taken. The reliability of a party's evidence that an alternative would have been taken can only be assessed by reference to objective factors, including the attitude and conduct of the party at or about the time when the breach of duty or contravention occurred."

"[272] Therefore, I place little weight upon Mr O'Brien's evidence that the SSA would have not proceeded to completion. The Buyers' no transaction counterfactual depends upon an assessment of the probabilities of that outcome having regard to the circumstances and attitudes of the parties at the relevant time."

90. In *Commonwealth of Australia v Sanofi* [48], Sanofi held a patent for a drug which was listed on the Pharmaceutical Benefits Scheme (PBS). Apotex developed a generic version of the same drug. A Federal Court judge granted an interlocutory injunction to Sanofi against Apotex preventing it from competing with Sanofi by manufacturing and selling its generic drug. Sanofi gave the usual undertaking as to damages. The Full Federal Court ordered that Sanofi's patent be revoked. The Commonwealth then sought compensation from Sanofi on the undertaking as to damages for loss it contended that it suffered as a result of Apotex being prevented from selling its generic product and obtaining PBS listing. The counterfactual question at trial concerned whether Apotex would have sought

and obtained listing of its generic product on the PBS on 1 April 2008, and hence launched its product, if it had not been subject to the interlocutory injunction. A majority of the High Court concluded that the Commonwealth had overwhelmingly demonstrated that had the injunction been refused, Apotex would have sought and obtained a PBS listing for its product with effect from 1 April 2008, and launched at risk.

91. Keifel J dissented in the result. However, I suggest that the following statements of principle concerning the hypothetical nature of evidence on the counterfactual, are important:

"Reconstructive hypothetical evidence

The problems with this kind of evidence

"[276] The fundamental problem with any witness giving hypothetical evidence of what they would have done in a past hypothetical situation is the human condition. In the ordinary course witnesses give evidence of what they in fact perceived or thought in the past. They also routinely give evidence of the intentions they held in the past. Giving hypothetical evidence of what they say they would have done in a past hypothetical situation is different. In such a case, the mere state of being human has significant consequences because the witness is not being asked to *recollect* anything, they are being asked to *reconstruct* something. It is impossible for the witness to unknow what has happened or undo the life experiences they have had between the time in the past and the time of giving evidence. If the time in the past is many years ago, the witness is unlikely to be able to recall all (or even most of) the things they knew then that would have been relevant to their actions or understandings at that time, nor to accurately reconstruct the significance of each of those things in the actual circumstances at that time (particularly if those circumstances were complex and rapidly evolving), let alone in an hypothesised circumstance."

"[277] These problems exist even before the unconscious or conscious pull of self-interest is considered. Self-interest is not merely confined to a party who stands to gain some benefit from a particular event or circumstance. To be interested in appearing to be the best version of oneself is to be human. This kind of interest is likely to affect reconstructive evidence a witness gives in ways as various as human nature itself."

"[278] These issues do not mean that the party bearing the onus of proof in a complex case, even one involving past hypothetical reconstruction, must be unsuccessful. Rather, they mean that contemporaneous documentary and circumstantial evidence relating to actual circumstances before the critical event (in this case, the grant of the interlocutory injunction) that must be hypothesised out of existence is far more likely to be a reliable source of evidence upon which a court may determine the probabilities or possibilities of the reconstructive hypothetical past. This is why close attention to that contemporaneous documentary evidence is essential."

"[279] Judges also need to be mindful of these issues when considering whether any witness could or should have been called to give reconstructive hypothetical evidence. The past in question in this case was a decade before the hearing and was complex. Further, ample contemporaneous documentary and other contextual evidence was available in this case to inform the assessment of the possibilities and the probabilities relevant to the ultimate question." (citations omitted)

92. In *Westpac Banking Corporation v Jamieson* [49] *(Jamieson),* in the Queensland Court of Appeal, the defendant bank was found to have engaged in contravening conduct which induced the plaintiff to enter into recommended transactions. The plaintiff sought compensation for the losses suffered from it entering into the transactions on the basis that but for the bank's impugned conduct, it would not have entered into the loss-making transaction. However the bank alleged, and proved, that the plaintiff would have entered into a different loss-making transaction had it not relied on the bank's misleading recommendations. The necessary causal connexion between the bank's wrongful conduct and the plaintiff loss, was not proven.

93. Applegarth J in *Jamieson* stated and found as follows:

"[145] A plaintiff can claim damages on the basis of a lost opportunity to profit on an alternative investment that probably would have been made if the plaintiff had not been induced to make the subject investment. In such a case, reliance upon the defendant deprived the plaintiff of the opportunity to enter into a different transaction, and the plaintiff can seek to establish what that transaction would have been. If it is relevant to consider an alternative, profitable transaction, it is hard to see why, in principle, a defendant in a different case cannot contend that by entering into the subject transaction, the plaintiff made an alternative, loss-making investment, and thereby avoided that loss."

"[146] Any difference between the position of a plaintiff who seeks damages on the basis of a lost opportunity to profit and the position of a defendant who seeks to have an award of damages take account of the lost opportunity to make a loss is not based in principle. In neither case can it be said to be irrelevant to consider what the plaintiff would or might have done instead of entering into the subject transaction. This is not to say that a plaintiff in a so-called "no transaction" case must prove what alternative transaction would have been undertaken. It may be sufficient for the plaintiff to simply prove that he or she would not have entered into the subject transaction. Policy or pragmatic considerations suggest that a plaintiff should not necessarily be required to prove what else he or she would have done. A requirement for such proof increases the complexity and costs of litigation by exploring alternative transactions, including investments, which were not seriously considered."
"[149] In discussing the object of damages in tort, the High Court in *Gates* stated that if reliance on a representation has deprived the plaintiff of the opportunity of entering into a different contract that would have made a profit, then the plaintiff may recover that profit because it is part of the loss that has been suffered. The lost benefit is "referrable to opportunities foregone by reason of reliance on the representation". By parity of reasoning, it should be open to a defendant to have loss assessed on the basis that, but for its breach, the plaintiff would have entered into a different transaction and suffered a loss. Rather than the plaintiff establishing that it could and would have entered into a different transaction that would have yielded a profit, loss is assessed on the basis that it would have entered into a different transaction and suffered a loss."

"[150] This proposition derives support from the speech of Lord Hoffmann (with whom the other members of the House of Lords agreed) in *South Australia Asset Management Corporation v York Montague Ltd*. In principle, there is no reason why a defendant should not be entitled to prove that the plaintiff has suffered no loss because "he would have used his money in some altogether different but equally disastrous venture". As Lord Hoffmann observes, every transaction induced by negligent representation is a "notransaction" case in the sense that *ex hypothesi* the transaction which actually happened would not have happened. In some "no-transaction" cases the court is able to find that a different transaction "which would have been somewhat less disastrous" would have occurred in the absence of the negligent representation. The court may find that, on the balance of probability, some other transaction would have happened instead."

"[157] In oral submissions, Mr Jamieson's counsel argued that the alternative investment contended for by the bank had not been pleaded with sufficient precision. However, the relevant plea was sufficient. It alleged that Mr Jamieson would have adopted an aggressive investment strategy which involved borrowing significant funds to invest in growth products, with high levels of leverage. It particularised his history of investments in agribusiness schemes as part of an "on-going strategy to provide tax minimisation or deferment through the borrowing of funds and gearing". It pleaded that he would have pursued such an investment strategy by borrowing substantial sums of money in the financial year ended 30 June 2007 and in subsequent years, and suffered losses as a result."

"[164] The bank discharged what Leggatt J described in *Yam Seng* as the evidential burden to show that the claimant would have incurred a loss. The bank demonstrated with a reasonable degree of persuasion that if the MQ Gateway Trust and associated loans had not been entered into Mr Jamieson would have sought out and made an agribusiness investment by borrowing money in order to reduce or eliminate his liability to tax for the 2007 tax year. As matters transpired, such an investment would have been lost. Mr Jamieson's cross-appeal in this regard should be rejected." (citations omitted)

Professional Negligence Claims

94. In *R Lawyers v Mr Daily* [50], Gordon and Edelman JJ stated causation principles that apply in case of claim for loss or damage for negligence by a solicitor:

"[145] There are several ways in which a client may suffer and then prove loss or damage as a result of the negligent conduct of a solicitor."

"[146] On the one hand, the client may have incurred loss by reference to events that allegedly would have occurred but for the solicitor's negligence – that is, a past hypothetical. In such a case, there are two ways in which the client might formulate their claim. First, the client might claim to have lost an identified benefit or interest that they would have obtained but for the solicitor's negligence. As a matter of causation, the client would need to prove, on the balance of probabilities, that they would have obtained the identified benefit or interest but for the solicitor's negligence. This might be described as a case based on the loss of a particular outcome. So, for example, if a solicitor failed to ensure that a financial agreement was signed by all parties, or failed to record the agreement of the parties to a financial agreement with sufficient certainty, the client might contend that, but for the solicitor's negligence, they would have had an enforceable financial agreement and thereby obtained a more favourable property settlement."

"[147] In the case of a client's claim for loss of a particular outcome caused by negligent drafting of a financial agreement, the client would need to prove, on the balance of probabilities, that (a) the financial agreement, including the substance of the terms of that agreement, *would* have been agreed; (b) that agreement *would not* have been set aside; and (c) that agreement *would* have secured for the client a better outcome than that which they in fact achieved. It would be necessary for the client to prove the amount of the loss, but they would be entitled to recover the loss in full."

"[148] Alternatively, the client might claim that, as a result of the solicitor's negligence, they "lost the chance or opportunity" to enter into a *different* agreement and thereby secure a more favourable property settlement, and recover damages "by reference to the court's assessment of the prospects of success of that opportunity had it been pursued". This might be described as a case based on the loss of a chance. As a matter of causation, the client would need to prove, on the balance of probabilities, that the solicitor's negligence caused them to suffer the loss of a chance or opportunity to secure a better outcome, and that that chance or opportunity was a "significant chance" or a "substantial prospect" and had "*some* value (not being a negligible value)". In a loss of chance case, therefore, the client is usually required to plead at least that the loss they have suffered is a loss of a valuable opportunity, identifying that opportunity with some particularity, as well as what the client might have done but for the solicitor's negligence where that is necessary to prove causation."

"[149] In the case of a defective and negligently drawn financial agreement entered into under the FLA, proof of causation of the loss of a *chance* of obtaining a different financial agreement might depend on proof, on the balance of probabilities, of matters such as whether there was a substantial and valuable chance that the client and the other party would have agreed to a different financial agreement, including the substance of the terms of that agreement. Once the client has proved that there was a substantial and valuable chance that they and the other party would have entered into a different agreement, their loss is then valued by reference to "the degree of probabilities or possibilities", often expressed as a percentage, of the chance or opportunity succeeding. That assessment would take into account matters such as the likelihood that the different agreement would not have been set aside and that it would have secured a better outcome for the client than that which they in fact achieved."

"[150] Of course, a client also may have incurred loss that may be proved by reference to actual past events. For example, the client may have expended money in litigating against a third party with respect to the loss or damage suffered due to the solicitor's negligence. The costs of litigation that are reasonably incurred in an attempt to reduce losses caused by wrongdoing are recoverable. In such a case, provided that the client can prove, on the balance of probabilities, that the solicitor's negligence caused the actual past loss, the client will be entitled to recover the full amount of that loss (subject to defences and limits including remoteness and mitigation)." (citations omitted)

95. In *Mulcahy & Co Accounting Services Pty Ltd v Porter* [51] *(Mulcahy)*, at trial a former client of an accounting firm successfully sued the firm and its principal for loss of opportunity damages in relation to a prospective purchase by the client of a business, where he had engaged the accountants to assist with the purchase. The retainer was made on 29 June 2017 and was terminated on 15 November 2017, when the client put negotiations for the acquisition on hold. There had been negotiations and offers made in which the accountants were involved. The client wished to finance the share purchase completely with debt, which he was unable to arrange. At a meeting on 18 December 2017, the principal of the accountants made a cash purchase offer to a representative of the vendor. A formal offer was put on 25 January 2018, which was accepted. A share purchase agreement between a company controlled by the accountants and the vendors was dated 30 June 2018. It provided for a sale of 66.67 per cent of the shares in the business at a price of $8 million, based on a total valuation of $12 million. The sale was settled shortly thereafter. The principal did not tell the former client of these matters, nor did he tell a different client of the firm who also was a pursuing a purchase of the business through to April 2018.

96. The alleged breach of retainer, which the trial judge accepted [52], was the use by the accountants of a letter of offer dated 14 September 2017 by the client to the vendor, in

making the 18 December 2017 offer and the written offer of 25 January 2018 to like effect. The judge found that the client's letter of offer was confidential information that was wrongly used to formulate the oral and written offers put by the accountants to the vendors. The judge found that when it came to causation, it was sufficient for the client to establish that the breach was a cause of the loss, even if there may have been other concurrent causes. The damages awarded in favour of the client for loss of the commercial opportunity to purchase 40 per cent of the shares in the business, were in the sum of $4,832,445.50, together with interest of $812,910.01.

97. However, an appeal by the accountants to the Victorian Court of Appeal against the trial judge's decision on causation was upheld [53]. The accountants contended there that a counterfactual but for analysis applied. The question was whether their wrongful conduct was a necessary condition of the client's loss? They contended that there was no basis for concluding that the use of the client's 14 September 2017 offer by the accountants was a necessary condition of the client's loss, and that the judge did not so find. The trial judge had found that the accountants' misuse of the client's the letter was a cause of his loss of opportunity. The accountants submitted that the test of causation posed the question whether the plaintiff's loss would not have been suffered but for the defendants' default.

98. The respondent/plaintiff submitted that the appellants/defendants overstated what was required by their contention that unless an act was a necessary condition of a plaintiff's loss, causation was not established. It was sufficient for a plaintiff to establish that the breach was a cause of the loss, even if there may have been other concurrent causes. A test of material contribution was appropriate, according to the respondent.

99. The Court of Appeal accepted the appellants' submissions on causation.

> "[109] Subject to certain qualifications, the common law 'but for' test continues to have an important role to play, at least as a 'negative criterion' of causation. In other words, it may be said to be necessary, but not always sufficient, for a plaintiff to prove that the plaintiff's loss would not have been suffered 'but for' the defendant's breach of duty." (citations omitted)

100. The Court stated that the remarks of the High Court in *Young* and *Lewis*, to which I have referred [54], were apposite.

101. On the evidence, the Court of Appeal decided:

> "[130] There is an insurmountable hurdle to a finding of causation in such circumstances. This is because the judge did not positively find that the Porter offer was provided to Mr Mulcahy prior to the 18 December 2017 meeting. Instead, he expressly acknowledged that it might have been provided 'after that meeting'. In such circumstances, it cannot be said that any misuse of the form or contents of the Porter offer made any contribution (material or otherwise) to the relevant actions of Mr Mulcahy in making the 'cash' offer on 18 December 2017 that secured a controlling interest in the Business. For this reason alone, the breach of the 29 June 2017 Retainer could not have caused the relevant loss." (citations omitted)

102. The Court went on to hold [55] that even if the Porter offer was provided to Mr Mulcahy prior to 18 December 2017, the result did not change. The accountants had much information otherwise available to them relevant to them putting an offer. Six matters in particular were identified which the Court of Appeal considered were highly significant

and which undoubtedly contributed to the decision by the accountants to make the successful cash offer in December 2017, formalised in January 2018, and then 30 June 2018.

103. The Court was not satisfied that, absent misuse of the form and contents of the Porter offer, the result would have been any different and observed that the trial judge made no such finding. The Court on causation concluded:

> "[134]…When consideration is given all the further information available to Mr Mulcahy, we are in fact well satisfied that he would have proceeded in the same way even without misusing such information." (citations omitted)

104. The Court of Appeal in *Mulcahy* applied a but for counterfactual: But for the accountants' use of the client's 14 September 2017 offer in formulating their offer, would the accountants have proceeded with, and been successful in, their offer? The answer was: Yes. Accordingly, that conduct did not cause the client's loss of the opportunity to purchase the business. I suggest that the Court of Appeal in so holding, implicitly rejected the client's contrary contention that causation was established as the accountants' use of the 14 September 2017 offer was a cause of the accountants' offer being made and successful. That was insufficient to establish the necessary causal connexion between the accountants' wrong and the client's loss.

105. It may be noted that in *Willmot v Queensland* [56], Edelman J stated that in cases of multiple matters having causal effect, the description of matters having made a "material contribution" was somewhat confusing. Edelman J there cited with apparent approval an article by Associate Professor Neil Foster, the thesis of which was that properly understood, "material contribution" was an example of, not an exception to, but for causation [57].

106. The decision of the Victorian Court of Appeal in *Leakes Road Property Development Pty Ltd v Brasse* [58] *(Leakes)* is instructive as to the identification of causation counterfactuals. A vendor agreed to sell land to a purchaser for $17.55 million. The purchaser paid a ten per cent deposit. The vendor's solicitor in the preparation of the contract of sale failed to include in the s 32 *Sale Of Land Act 1962* (Vic) statement a liability, payable under the contract by the purchaser, of a State Government Growth Area Infrastructure Contribution (GAIC) of over $1.6 million. The purchaser sued the vendor to avoid the contract, and for the return of the deposit contending that it would not have entered into the contract had the GAIC liability been disclosed. The vendor joined its solicitor as a third party, claiming negligence in the preparation of the s 32 statement. During the trial, the vendor and the purchaser reached a settlement by which the vendor repaid the purchaser $815,881 of the $1.755 million deposit, and retained the balance of $939,119. The vendor amended its case against the solicitor to claim the $815,881.

107. At trial [59], the solicitor admitted negligence in failing to disclose the GAIC liability in the s 32 statement. However he disputed liability for the partial loss of the deposit, pleading that the purchaser would not have entered into the contract of sale and hence would not have paid the deposit, had it been aware of the GAIC liability. At trial, the solicitor as defendant to the vendor's third-party claim, also contended that for the client to prove that his negligence caused the claimed loss, the vendor had to prove that without his

negligence, the purchaser would still have entered into the contract. The trial judge accepted that submission, but held that the vendor had failed to prove that. The vendor did not call the purchaser as a witness at trial.

108. On the vendor's appeal to the Court of Appeal, a majority of the Court held that the trial judge did not err in requiring the vendor to prove that the purchaser would have entered into the contract of sale in the absence of the solicitor's negligence [60]. However, the Court unanimously held that, contrary to the finding of the trial judge, the purchaser would have entered into the contract in any event had the GAIC liability been disclosed [61]. The documentary evidence of the contractual negotiations that took place showed that. It was not necessary for the vendor to have called the principal of the purchaser to give evidence at trial. Judgment was ordered for the vendor against the solicitor on the third party claim for $815,881 (plus interest). Had the purchaser proceeded with the purchase with disclosure the GAIC liability, there would have been no basis for it claiming back any part of the deposit paid to the vendor if the purchaser had defaulted, as it did.

109. In *Leakes* there were competing counterfactuals. Without a failure by the solicitor to disclose the GAIC liability, would the purchaser have still entered into the contract? Or would the purchaser then not have entered into the contract at all? The Court found for the vendor against the solicitor in accepting the former counterfactual. It is striking that each of the competing counterfactuals depended upon what the purchaser, who was not a party to the third party proceeding, would have done had the solicitor not failed to disclose the GAIC liability.

110. The difference between the majority Emerton P and Kennedy JA, and the dissenting judge Niall JA, as to the correct counterfactual analysis should observed. All of the judges referred to the passage of the judgment of Edelman J in *Lewis* referred to above concerning the removal of the wrongful conduct, and the counterfactual approach, involving a hypothetical question where no other act or circumstance is changed other than those which established the wrongful conduct.

111. Emerton P and Kennedy JJA held:

> "[142] In this case, then, the counterfactual approach involves removing the wrongful act — the act of omitting to include the GAIC certificate in the section 32 statement — to see if the outcome changes. The counterfactual involves Leakes providing to the purchaser a section 32 statement with a GAIC certificate showing the deferred GAIC liability. By law, this was bound to occur before the purchaser executed the contract of sale (remembering that the contract of sale required the purchaser to pay the outstanding GAIC liability). Accordingly, the counterfactual in this case is that the purchaser was given the compliant section 32 statement prior to executing the contract of sale. The counterfactual is based on the purchaser then executing the contract and paying the deposit, having been provided with the GAIC certificate showing the deferred liability."

> "[143] In this hypothetical circumstance, there would have been a non-defective (binding) agreement for the sale of the land, the ground for rescission would have fallen away and Leakes would have been entitled to retain the deposit. But for the wrongful act, Leakes would not have suffered the loss that it claimed."

> "[144] Leakes bore the burden of proving that the wrongful act caused the loss of the deposit. In

order to do so, Leakes had to prove that the purchaser would have entered into the contract absent Brasse's negligence." (citations omitted)

112. Accordingly, the balance of the deposit was lost to the vendor as a result of the solicitor's negligence because but for that, the purchaser nevertheless would have entered into the contract, paid the deposit and the vendor would have been entitled to retain that on default by the purchaser. The purchaser then would have had no basis then for contending that it would could lawfully avoided the contract, as it in fact sought to do, because the GAIC liability had not been disclosed.

113. However, Niall JA would have decided differently:

"[219] The essential inquiry is whether the wrongdoer's breach of duty caused the identified loss. In this case it is the partial return of the deposit. A counterfactual is a tool of analysis that enables the loss to be identified and assists in the establishment of a causal link. That is because, if the loss would have occurred despite the breach of duty, it could not be said that the wrongdoing was an essential factual cause of the loss. While it is true that the absence of the contract might mean that the vendor would never have received the deposit, the inquiry as to causation is not concerned with how Leakes obtained the deposit in the first place. Once the loss is identified, the task is to determine the cause of that loss, not to answer some anterior question as to why Leakes was put in the position to incur the loss in the first place. That is because the counterfactual analysis involves asking the hypothetical question where no other fact or circumstance (such as entry into the contract) is changed other than those which constituted the wrongful act. Further, as the cases referred to above on economic loss make clear, the loss only arose after the purchaser sought to rescind the contract."
(citations omitted)

114. In *Mulchay*, had the GAIC liability not wrongly failed to have been disclosed by the solicitor, it would (and should) have have been disclosed by him. On the counterfactual that would have removed the wrongful act. What would have happened concerning the vendor's loss as a result depended upon what the purchaser would have done. The Court of Appeal, unanimously, held that the purchaser would have proceeded with the contract despite knowing of the GAIC liability. On the counterfactual, what did not change was the purchaser's attempt to avoid the contract in any event. The vendor thus lost the ten percent deposit of $1.755 million, less the sum retained by it under settlement of $939,119, in the sum of $815,881. That loss was caused by the solicitor's negligence.

Conclusion

115. Counterfactual causation analysis can be difficult to apply. The analysis tests whether the necessary causal connexion is proven by the plaintiff on the balance of probabilities between the defendant's wrongful conduct and the plaintiff's loss suffered. On the plaintiff's case, those matters actually occurred. However the causal connexion is proven, or not, by reference to events that did not actually happen, and counter to the occurrence of the wrongful conduct of which the plaintiff complains. On the counterfactual, the defendant's wrongful conduct is taken away to reveal what would have happened then concerning the plaintiff's loss.

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Footnotes:

[1] *Travel Compensation Fund v Robert Tambree t/as Tambree and Associates* (2005) 224 CLR 627; [2005] HCA 69 at [45] Per Gummow and Hayne JJ.

[2] *Crowley v Worley Ltd* [2006] FCAFC 78 at [364] Per Markovic Halley and Owens JJ.

[3] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [19], [43] per French CJ, Hayne and Kiefel JJ.

[4] (2020) 271 CLR 192; [2020] HCA 26. See Samuel Castan Blashki: *What world are we imagining? Counterfactual reasoning and the 'But For' test in Lewis v ACT* [2021] UNSW Law Journal Forum 1; Cameron J, Charnley: *Compensatory damages and the role of 'loss' in actions for tort and breach of contract* (2022) 51 Australian Bar Review 320.

[5] (2020) 271 CLR 151; [2020] HCA 27.

[6] *Haines v Bendall* (1991) 172 CLR 60 at 63; [1991] HCA 15 per Mason CJ, Dawson, Toohey and Gaudron JJ.

[7] *Cessnock Ltd Council v 123 259 932 Pty Ltd* (2024) 281 CLR 39; [2024] HCA 17 at [7] per Gageler CJ.

[8] See too ss 1041 I and 1317 of the *Corporation Act* and s 12GF of the *ASIC Act*.

[9] (1994) 179 CLR 332; [1994] HCA 4.

[10] (1994) 179 CLR 332; 353; 355 at; [1994] HCA 4.

[11] (1994) 179 CLR 332; 367 at [1994] HCA 4.

[12] (2020) 271 CLR 192 at [2020] HCA 26.

[13] (2015) 89 ALJ 20. See too Justice Jackson *Some thoughts* on *causation and loss of a valuable commercial opportunity*, Judicial papers sclqld.org.au 27 July 2017.

[14] (2012) 246 CLR 182; [2012] HCA 5. See too *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48 at [55] per French CJ, Gummow, Hayne, Heydon and Crennan JJ.

[15] Justice Bond, *Pleading Causation* [2022] LdJSchol 14 at para [29] The different philosophical meaning of counterfactual causation is discussed in on a 2001 paper *Counterfactual Theories of Causation,* in the Standford Encyclopedia of Philosophy.

[16] Edelman J in *Lewis* (2020) 271 CLR 192; [2020] HCA 26 at [178].

[17] (2023) 278 CLR 208; [2023] HCA 31.

[18] As to recent cases considering remoteness principles, see *European Bank Ltd v Robb Evans & Associates* (2010) 240 CLR 432; [2010] HCA 6 at [10] – [13] per French CJ, Gummow, Hayne, Heydon and Keifel JJ; *Elisha v Vision Australia Ltd* (2024) 421 ALR 184; [2024] HCA at [60] – [73] per Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ.

[19] The language of comparing the breach position with the non-breach position was introduced by Adam Kramer KC, *The Law of Contract Damages (Hart Publishing, 2nd ed 2017)* 14-15; approved by Justice Elisabeth Peden, Daniel Reede in *Expectation, reliance and restitution: one measure of damages under multiple names,* 4 Commercial Law Quarterly March- May 2025.

[20] Sandy Steel: *Damages Without Loss* (2023) 139 LQR 219 at 219-220.

[21] [2024] VSC 438 at [407] – [410].

[22] (2020) 271 CLR 151; [2020] HCA 27.

[23] *Flynn v PPK Mining Equipment Pty Ltd* (No. 3) [2024] NSWSC 663 at [87]-[90] per Rees J.

[24] [2026] VSCA 142 per Emerton P, McLeish and Donaghue JJA.

[25] [2024] VSC 262.

[26] [2024] VSC 262 at [221]-[252].

[27] (2017) 372 ALR 440; [2017] VSCA 88 at [411] per Santamaria, Ferguson and Kaye JJA.

[28] *Singh v Singh Homes Pty Ltd* [2026] VSCA 191 at [68]-[80], per McLeish, Walker and Donaghue JJA.

[29] [2026] FCA 620 at [557]-[568].

[30] (1994) 179 CLR 332 at 355; [1994] HCA 4.

[31] (1990) 169 CLR 638 at 642-643; [1990] HCA 20.

[32] (1994) 179 CLR 332 at 368; [1994] HCA 4.

[33] [2018] 2 Qd R 584; [2017] QCA 254. Philippides and Boddice J agreed with the judgment of McMurdo JA.

[34] [2018] 2 Qd R 584; [2017] QCA 254 at [25]

[35] [2025] VSCA 30 per Beach and Orr JJA, Matthews AJA.

[36] *Joseph Finance and Investment Pty Ltd v Eastwood Retirement Pty Ltd* [2023] VSC 731 at per Croft J.

[37] (2011) 190 FCR 299; [2011] FCAFC 4. See also Banks-Smith J in *Ezy-Fit Engineering Group Pty Ltd V Microm Nominees Pty Ltd* [2024] FCA 441 at [969]-[977].

[38] *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 281 CLR 39; [2024] HCA 17 at [6] per Gageler CJ.

[39] *United Petroleum Pty Ltd v Perth Airport Pty Ltd* (No 2) [2026] FCA 620 at [555] per Anderson J and the authorities there cited.

[40] *Sidhu v Van Dyke* (2014) 251 CLR 50; [2014] HCA 19 at [58] per French CJ, Kiefel, Bell and Keane JJ.

[41] *Gall v Domino's Pizza Enterprises Ltd* (No. 4) [2026] FCA 967 at [1415] per Murphy J at [1415], [1416], [1418] and the authorities there cited.

[42] *Abigroup Contractors Pty Ltd v Sydney Catchment Authority* (No.3) (2006) 67 NSWLR 341; [2006] NSWCA 282.

[43] [2026] FCAFC 99.

[44] *Watts v Chopsonion Pty* (*Controller Appointed*) [2026] FCAFC 99 at [436]-[439], [453]-[458] per Derrington J; Charlesworth and Jackson JJ agreed with Derrington J in relation to the so-called Second causation error see paragraph [6].

[45] *Chopsonion Pty Ltd (Controllers Appointed) v Watts Meat Machinery Pty Ltd* (No 2) [2025] FCA 4 at [531] per Sullivan J.

[46] [2026] FCAFC 99 at [467].

[47] [2023] QSC 243.

[48] (2024) 282 CLR 30; [2024] HCA 47.

[49] [2016] 1 Qd R 495, per Applegarth J, Margaret McMurdo P and Morrison JA agreeing.

[50] (2025) 99 ALJR 1504; [2025] HCA 41.

[51] [2025] VSCA 261 per Kennedy, Orr and Richards JJA.

[52] [2021] VSC 572; [2024] VSC 6; [2024] VSC 171 per Delaney J.

[53] [2025] VSCA 261.

[54] Above at paragraph 23; and paragraph 14 [178].

[55] [2025] VSCA 261 at [131]- [134].

[56] (2024) 419 ALR 623; [2024] HCA 42 at [133], and footnotes 173 and 174.

[57] *Material Contribution in Bonnington: Not an exception to 'But For' causation* (2022) 49 University of Western Australia Law Review 404.

[58] *Leakes Road Property Development Pty Ltd v Brasse* (2024) 73 VR 441; [2024] VSCA 34 per Emerton P, Niall and Kennedy JJA. Samuel Castan Blashki, *Untangling counterfactuals: guidance from the Court of Appeal in Leakes Road Property Development Pty Ltd v Brasse* (2024) 73 VR 441, Commercial Bar Association 18 November 2024.

[59] *Leakes Property Development Pty Ltd* [2022] VSC 440, per McDonald J.

[60] [2024] VSCA 34 at [87]-[151] per Emerton P and Kennedy JA; cf Niall JA at [200]-[221].

[61] [2024] VSCA 34 at [152]-[169] per Emerton P and Kennedy JA; Niall JA at [222].