HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, AND HAYNE JJ

BRYAN SAMPSON HENVILLE & ANOR APPELLANTS

AND

GRAHAM GEOFFREY WALKER & ANOR RESPONDENTS

Henville v Walker
[2001] HCA 52
6 September 2001
P55/2000

ORDER

1. *Appeal allowed.*

2. *Set aside the Orders of the Full Court of the Supreme Court of Western Australia made on 24 August 1999 and in place thereof order that the appeal to that Court be dismissed.*

3. *The respondents to pay the costs of the appeal to this Court and of the appeal to the Full Court of the Supreme Court of Western Australia.*

On appeal from the Supreme Court of Western Australia

Representation:

P Mendelow with P J Hannan for the appellants (instructed by Bowen Buchbinder Vilensky)

C L Zelestis QC with C B Edmonds for the respondents (instructed by Phillips Fox)

CATCHWORDS

Henville v Walker

Trade Practices – Misleading or deceptive conduct – Real estate transaction – Home unit development – Misleading representation by land agent to developer as to price which could be obtained for residential home units – Incorrect estimate of likely costs of development made by developer – Quantification of damages where misleading or deceptive conduct is but one of a combination of circumstances bringing about the loss ultimately suffered.

Damages – Statutory – Trade Practices Act – Measure of damages – Relevance of common law analogies when quantifying damages – Identification of loss or damage required – Causation of loss or damage – Quantification of damage caused "by conduct of" person in breach of s 52.

Words and phrases – "by conduct of".

Trade Practices Act 1974 (Cth), ss 52, 82(1).

1 GLEESON CJ. This appeal raises a question concerning the extent of liability under s 82 of the *Trade Practices Act* 1974 (Cth) ("the Act") for a contravention of s 52. The misleading or deceptive conduct involved the giving of advice and information by a real estate agent, which induced a purchaser to buy land for the purpose of a development project and to undertake the project.

2 The appellants were contemplating the purchase of land in a residential area for the purpose of development by the construction of a small block of home units. In considering whether to buy the land for that purpose, they made a feasibility study which calculated the likely return from the project. The feasibility study was based upon estimates of construction and other costs, and anticipated selling prices of the units. The appellants relied upon their own expertise for the cost estimates. (The first appellant is an architect). They relied upon advice of the vendor's agent (the first respondent) as to selling prices and marketability for the purpose of estimating gross revenue. The costs were substantially under-estimated. The selling prices were substantially over-estimated. The state of the market for home units was misrepresented. The land was acquired and the project was undertaken. In addition to the faulty estimation of costs and returns, the project suffered reverses for other reasons. The respondents were held to have contravened s 52 of the Act (read together with s 51A). What is the extent of their liability under s 82? Is it the whole of the loss suffered on the development project; or some, and if so, what, part of that loss? Or is it to be determined on a different basis?

3 The appellants sued the respondents in the Supreme Court of Western Australia. In addition to the claim under the Act there was also a claim under the *Fair Trading Act* 1987 (WA) and a claim in tort for negligent misrepresentation. Because the claim under the Act succeeded, it was unnecessary for the trial judge, Anderson J, to deal with the other claims. Anderson J held that the respondents were liable, under s 82 of the Act, for part of the loss on the project. He excluded losses "which are really down to" matters he regarded as not attributable to the respondents' erroneous estimates of likely selling prices. Such matters included the lack of proper costing by the first appellant, lack of financial resources, and the failure to get the project finished in a reasonable time. He assessed the damages for which the respondents were liable by notionally capping the appellants' expenditure on the project at a certain level. It will be necessary to return in due course to the method of assessment adopted.

4 The Full Court of the Supreme Court of Western Australia did not find it necessary to decide the questions formulated above. That Court held that the necessary causal connection between the conduct of the respondents and the loss suffered by the appellants had not been established[1]. Rather, it concluded that

---

1 [1999] WASCA 117.

the first appellant "was the author of his own misfortune and his conduct in preparing and relying on the erroneous feasibility study is to be regarded as the sole cause of his decision to proceed with the development"[2]. That finding on causation also disposed of the alternative claims. For reasons that will appear, I consider that the appellants have made good a challenge to that finding. The appellants seek a restoration of the judgment of Anderson J. They did not cross-appeal to the Full Court, although they filed a notice of contention asserting that the damages to which they were entitled were "at least" those assessed by Anderson J. If this Court overrules the decision of the Full Court that the conduct which contravened s 52 was not a cause of the appellants' loss, it will be required to consider the principles relevant to assessment of damages.

5 There was an alternative basis upon which the Full Court set aside the judgment of Anderson J. It was connected with what were regarded as the extraneous reasons for the loss on the project, including cost overruns and delays having nothing to do with the original faulty estimates. This, the Full Court considered, confronted the appellants with "an evidentiary difficulty"[3]. Even if the appellants had been entitled otherwise to an award of damages under s 82, it was necessary for them to separate out the losses which were unconnected with the original faulty estimates, and this had not been done. The appellants, therefore, had failed to discharge the onus of establishing what losses were caused by the respondents' misleading conduct. It will be necessary to return to this matter as well. It will be noted that the reasoning involves an acceptance of the view of Anderson J that the respondents were not liable for the whole of the loss incurred as a result of the purchase of the land and the undertaking of the development project.

6 Two further points should be mentioned. First, at trial, and on appeal, both in the Full Court and this Court, argument proceeded on a basis that treated as immaterial, both the difference between the first appellant and the second appellant, a trust of which Mr Henville is trustee, and also the difference between the first respondent (Mr Walker, a real estate agent) and the first respondent's company. This, no doubt, was convenient. I will do the same. But it might have masked a possible issue that was never litigated. There was no claim for contribution by the respondents against the first appellant, upon the basis he owed a duty to the trust, and was therefore under a co-ordinate liability[4]. I express no opinion as to whether such a claim would have been available. The possibility was not the subject of argument in this Court.

---

2. [1999] WASCA 117 at [64] per Malcolm CJ, Ipp and Steytler JJ.

3 [1999] WASCA 117 at [73]. See also at [75] and [79].

4 cf *Burke v LFOT Pty Ltd* (2000) 178 ALR 161.

7 Secondly, although brief reference was made in argument in this Court to s 87(1) of the Act, no reliance was placed by either side upon the reference in that provision to compensating for *part* of the loss or damage suffered by a victim of a contravention of s 52[5]. I therefore express no opinion as to whether that provision might have been called in aid of the approach adopted by Anderson J.

8 The detailed facts of the case are set out in the judgment of McHugh J. I will make only such reference to them as is necessary to explain my reasons.

9 The respondents knew that the appellants were looking for an opportunity to enter into a land development project. They were considering buying land, borrowing the necessary development funds from a bank, and constructing home units. The respondents, who were the agents for the owner of the land, and who expected to be appointed agents for the sale of the home units, made representations as to the approximate market value of units on the site if they were built to a certain size and standard, and as to the likely time it would take to sell the units. The representations were misleading. The appellants relied upon their own experience and expertise to estimate the likely costs of development. That estimate was careless, and substantially under-estimated development costs. The combined effect of the cost estimates and the projections as to selling prices, reflected in the appellants' feasibility study, was to predict a reasonable profit if the development went ahead. If either the selling prices or the costs had been estimated with reasonable accuracy, the result would have been to show that the project would not be profitable, or at least would not have had a sufficient margin of profit to justify the risk, and the project would not have gone ahead.

10 The Full Court found that, even if the units had been able to be sold for an amount within the range of likely sale prices estimated by the respondents, the venture would have appeared unprofitable if appropriate cost estimates had been made by the appellant. It concluded that the appellants would never have embarked on the project but for Mr Henville's error in grossly under-estimating the building costs. The figures used for the purposes of the feasibility study, involving the combined effect of the erroneous cost estimates and the erroneous sales projections, produced an expected profit which was acceptable. But that profit would have been eliminated, or reduced below an acceptable level, whichever of the two erroneous figures had been corrected. (The anticipated profit was $176,000. The expected returns from sales were $750,000. The actual returns from sales were $545,000). Anderson J held that the representations as to likely sales prices were a substantial inducement to the appellants in deciding to buy the land and embark upon the development project. The reversal of that

---

5 cf *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2000) 179 ALR 89.

finding by the Full Court, and the conclusion that the erroneous cost estimates were the sole cause of the decision to proceed, was not justified. The feasibility study was based upon two integers: costs and returns. Each was erroneous. If either integer had been correct, the project would not have gone ahead. Neither error was the sole cause of the decision to undertake the project. Each was a cause.

11 Section 82(1) of the Act provided:

> "A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

12 In the present case, the contravention involved engaging in conduct that was misleading or deceptive, contrary to s 52 as read in the light of s 51A. The conduct concerned representations as to the state of the market for home units and as to likely selling prices.

13 It will commonly be the case that a person who is induced by a misleading or deceptive representation to undertake a course of action will have acted carelessly, or will have been otherwise at fault, in responding to the inducement. The purpose of the legislation is not restricted to the protection of the careful or the astute. Negligence on the part of the victim of a contravention is not a bar to an action under s 82 unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage. The respondents knew the purpose for which their representations were being relied upon by the appellants. The Full Court accepted that the making of the representations amounted to engaging in misleading or deceptive conduct in trade or commerce. There was no warrant for a conclusion that the negligence of the appellants in relation to the feasibility study was the sole cause of the decision to undertake the project.

14 For there to be the necessary causal relationship between a contravention of s 52, and loss or damage, so as to satisfy the requirements of s 82(1), it is not essential that the contravention be the sole cause of the loss or damage. As Brennan J pointed out in *Sellars v Adelaide Petroleum NL*[6], where the making of a false representation induces a person to act in a certain manner, loss or damage may flow directly from the act and only indirectly from the making of the representation; but in such a case the act "is a link – not a break – in the chain of causation". In the present case there were two concurrent causes of the imprudent decision to buy the land and undertake the development project. The conduct of the respondents was one of those causes. That is enough.

---

6 (1994) 179 CLR 332 at 356-357.

15 Having concluded correctly that the misrepresentations as to the state of the market and as to likely selling prices, which constituted the contravention of s 52, were a cause of the appellants' loss, Anderson J said:

> "A representation that a development will be worth a certain amount when completed has no capacity to cause losses at large. It is no warrant to design units that will end up costing more than the amount for which it was represented that they could be sold. Losses which are really down to extravagant design, to the lack of a proper costing of the proposed design, to the lack of financial resources to complete the development embarked on and to the failure to get the project finished in a reasonable time are not losses suffered by a misrepresentation as to the market value which the development will have on completion. Therefore in a case like this I do not think the amount which the units actually cost to build is an appropriate basis from which to measure the plaintiff's recoverable loss."

16 It is convenient to commence a consideration of the relevant principles by examining that proposition.

17 The appellants undertook a risky business venture, which resulted in a loss. The decision to embark upon the venture was made because of an expectation of a certain level of profit regarded as sufficient to justify taking the risk. That expectation was the consequence of the combined effect of two errors, one made directly by the appellants, and the other made as a result of their reliance upon misrepresentations made by the respondents in contravention of s 52 of the Act. The ultimate loss also resulted in part from factors which were unrelated to the contravention of s 52 in any sense except that they would not have come into play if the business venture had never been undertaken. Leaving aside, for the moment, the problem of measuring the extent to which the loss resulted from those factors, there arises a question of the causal relationship between the ultimate loss and the respondents' misrepresentations. Were they, to use the words of Lord Hoffmann in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*[7] "losses attributable to causes which negative the causal effect of the representation"?

18 Section 82 of the Act is the statutory source of the appellants' entitlement to damages. The only express guidance given as to the measure of those damages is to be found in the concept of causation in the word "by". The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case. The purpose of the statute, so far as presently relevant, is to establish a standard of behaviour in business by

---

7 [1997] AC 191 at 216.

proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages. The principles of common law, relevant to assessing damages in contract or tort, are not directly in point. But they may provide useful guidance, for the reason that they have had to respond to problems of the same nature as the problems which arise in the application of the Act. They are not controlling, but they represent an accumulation of valuable insight and experience which may well be useful in applying the Act.

19 The assessment of damages for deceit, or for negligent misstatement, has confronted courts with issues similar to those which arise in the present case.

20 In *Clark v Urquhart*[8] Lord Atkin said:

> "I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter. Whether he buys shares or buys sugar, whether he subscribes for shares, or agrees to enter into a partnership, or in any other way alters his position to his detriment, in principle, the measure of damages should be the same, and whether estimated by a jury or a judge. I should have thought it would be based on the actual damage directly flowing from the fraudulent inducement."

21 The respondents' misleading representations, made in contravention of s 52 of the Act, induced the appellants to alter their position to their detriment, by purchasing land and proceeding with the home unit development. An assessment of "the actual damage directly flowing from the … inducement" accords with the language and purpose of s 82. But how is that assessment affected by the matters that were regarded by Anderson J as extraneous factors contributing to the ultimate loss suffered on the project? One possible answer is that those matters should have no effect on the assessment; that the whole financial loss suffered on the project was actual damage flowing from the contravention of s 52, and was therefore damage suffered "by" the contravention. If that answer be correct, then Anderson J under-estimated the amount to which the appellants were entitled and, because they seek no more than he awarded, his judgment must be restored. I am not persuaded that the position is so simple.

22 No one suggests that it is proper to regard the present as a case where the only relevant effect of the misleading conduct was to induce the purchase of an asset at an over-value, or that the damage is to be measured by comparing the price paid by the appellants for the real estate with the true value of the real estate

---

8 [1930] AC 28 at 67-68.

at the time of purchase[9]. The land was purchased for a specific purpose and, as the respondents' understood, the development project involved not only the acquisition of the land but also the building and marketing of units, and the borrowing of most of the money required for that purpose.

23 In assessing damages for deceit, where a person has been induced to enter into a business venture by the fraudulent misrepresentations of another, the courts have long had to deal with the problem of deciding whether all or only some of the losses incurred in the venture are properly to be regarded as damage caused by the deceit. If a defendant fraudulently induces a plaintiff to buy grazing land and undertake a pastoral business, the defendant does not thereby become an underwriter of all losses incurred by the plaintiff's business for so long as it continues to be carried on, whenever and however those losses may arise. That simple example states the problem; it does not solve it.

24 Although there has been some discontent with its apparent rigidity[10], a primary reason for the general principle that damages in deceit, where there has been a fraudulent inducement to acquire shares in a company, are measured by the difference in the value of the shares at the time of acquisition and the price paid for them, is the need to separate out losses resulting from extraneous factors in the later conduct of the company's business. *Peek v Derry*[11] was a case concerning shares in a tramway company that were taken up on the faith of a false prospectus. Cotton LJ said[12]:

> "Neither can the Plaintiff get the benefit of any loss or depreciation in the shares which was occasioned by subsequent acts. If the company at the time was a good company and the shares had an intrinsic value, then no fact which subsequently occurred, as for instance, some Act of Parliament being passed to prevent such tramways from using steam-power, or anything else, ought to add to the damages to be paid by the Defendants. And of course a plaintiff cannot aggravate the damages he is to get by acting unreasonably, and if here the Plaintiff had in any way acted unreasonably, then any loss which was the consequence of that would not be added to the damages which were to be paid by the Defendants."

---

9 cf *Potts v Miller* (1940) 64 CLR 282.

10 eg *Potts v Miller* (1940) 64 CLR 282 at 296-298 per Dixon J.

11 (1887) 37 Ch D 541.

12 (1887) 37 Ch D 541 at 592.

25 Later, his Lordship referred to "events injurious to the company, which occurred not from intrinsic defects in it, but from events which happened after the purchase", which "cannot be taken into account"[13].

26 Since we are not here concerned with a simple purchase of an asset, the refinements sometimes involved in seeking to distinguish between subsequent loss or deterioration in an asset which occurs as a result of the "normal nature and characteristics"[14] of the thing bought, and loss resulting from other causes, are not directly relevant. But a related problem arises.

27 Similarly, in the area of negligent misstatement, especially in cases involving business arrangements entered into in reliance upon faulty valuations of property, the problem of identifying losses resulting from the negligence as distinct from losses resulting from extraneous causes has emerged. In Australia, this is still seen as involving questions of causation[15].

28 In *Gould v Vaggelas*[16], a case of deceit which induced the purchase of a business, Gibbs CJ said[17]:

> "There is no reason in principle why the defrauded purchaser should not recover damages for all the loss that flowed directly from the fraudulent inducement (unless, possibly, the loss was not foreseeable). If the purchaser, besides paying more for the business than it was worth, has suffered additional losses which resulted directly from the fraud he ought to be compensated for them. Of course, the court must be satisfied that the loss did result directly from the fraud and not from some supervening cause such as the folly, error or misfortune of the purchaser himself …".

29 Dawson J said in the same case[18]:

---

13 (1887) 37 Ch D 541 at 593.

14 cf *Potts v Miller* (1940) 40 SR (NSW) 351 at 357 per Jordan CJ.

15 Kenny & Good Pty Ltd v MGICA (1992) Ltd (1999) 199 CLR 413; cf Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191.

16 (1985) 157 CLR 215.

17 (1985) 157 CLR 215 at 221-222.

18 (1985) 157 CLR 215 at 267.

> "Moreover, for a loss to be recoverable it must be clear that it is suffered as a direct consequence of the deceit and is not referable to something else such as the purchaser's ineptitude in the conduct of the business."

30 The principles concerning measuring damages for deceit resulting in the purchase of an asset, where there was consequential loss following the retention of the asset, were considered by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*[19]. In that case approval was given to *Doyle v Olby (Ironmongers) Ltd*[20], including a passage in the judgment of Winn LJ who said[21]:

> "It appears to me that in a case … where there has been a tortious wrong consisting of a fraudulent inducement, the proper starting-point for any court called upon to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence: it would be too remote not necessarily because it was not contemplated by the representor, but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense, or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated upon him."

31 The passages quoted from *Peek v Derry* and *Gould v Vaggelas* indicate that the qualification expressed by Winn LJ may not cover all cases where consequential loss would be regarded as too remote. Subject to that comment, similar principles are appropriate to the application of s 82 of the Act in a case such as the present, and they were the principles which Anderson J was seeking to apply.

32 Anderson J was responding, in his judgment, to the manner in which the appellants formulated their claim for damages. In order to understand that claim, and Anderson J's response, it is necessary to make some further reference to the facts.

33 There were three units in the development. In brief, the respondents represented that they could be sold, within about six months of commencement

---

19 [1997] AC 254.

20 [1969] 2 QB 158.

21 [1969] 2 QB 158 at 168.

of selling, at prices of between $250,000 and $280,000. The land was acquired in August 1995. An existing building on the site was demolished in September 1995. The new building (comprising home units) was not completed until December 1996. That delay was not the fault of the respondents. In the meantime, there had been some decline in the real estate market. The marketing of the three units gave rise to disputes between the appellants, and their bank. The asking price was originally $295,000 each. The respondents were advised to lower the price. There were recriminations as to the sales campaign. There was an unsuccessful auction. Ultimately, in June 1997, under pressure from the bank, the units were sold, at or following the auction. One was sold for $175,000. The other two were sold for $185,000 each.

34 At trial, the appellants claimed to recover the entire cost of the project, including the purchase price of the land, construction costs, interest on borrowings, and marketing expenses, less the net amount received on sale of the units. That claim was quantified at $319,846.51.

35 Anderson J was entitled, in principle, to reject the claim that the whole of an amount calculated in that manner represented loss that flowed directly from the contravention of s 52 or, to use the language of the statute, that it was, in whole, loss or damage suffered by conduct in contravention of s 52. When Anderson J said that part of that loss was "down to" other factors as well, he was expressing a finding as to causation which was open in the circumstances of the case. For reasons already given, the finding of the Full Court that none of the loss was causally related to the contravention went too far, and cannot be sustained; but Anderson J's refusal to treat the whole of the loss as so related was justified. Neither the purpose of the statute nor the justice of the case requires that, having made representations which, in combination with the erroneous cost estimates of the appellants, induced the appellants to enter into the development project, the respondents should be required to underwrite all the losses, regardless of how they came to be incurred. The representations were as to revenue; not profit. The costs were estimated by the appellants, and were completely beyond the control of the respondents. It was the conduct of the appellants, in part resulting from their problems with their bank, that resulted in those costs exceeding original estimates.

36 If the development project in question had involved the erection, not of a relatively small block of home units at Albany, but of a multi-storey office block in the central business district of Perth, the strong likelihood is that an assessment of the damage said to flow directly from the misrepresentation, if made by simply calculating the net financial outcome of the project, would be clearly inappropriate. That outcome would be likely to be affected by many factors unrelated to the misrepresentation in any sense except that, but for the representation, they would never have come into play. A claim for the total loss would invoke the "but for" test of causation in its most indiscriminate form. Although the present problem is less complex, the principles are the same. The

manner in which the appellants formulated their claim for damages directed attention to the reasons for the ultimate financial outcome of the project, and Anderson J examined those reasons in some detail. In particular, he examined the appellants' problems with their bank, which involved another project as well, the reasons for the construction delays and cost over-runs, and the wisdom of the marketing strategy that was employed. His conclusion that the loss did not wholly result directly from the contravention of s 52, (a conclusion accepted by the Full Court when it gave its second reason for allowing the appeal), was open as a matter of principle, and was warranted as a matter of fact.

37 It is necessary now to consider the method by which Anderson J sought to give effect to his findings on causation. As was noted earlier, the Full Court's disagreement with this method, and in particular the conclusion that there existed no evidentiary foundation for a proper calculation of damages, even assuming Anderson J to have been right in principle, was an additional reason given for reversing his decision.

38 Anderson J said:

> "I am satisfied that the plaintiff proceeded with this particular development because he had been told and believed that the three units would fetch at least $250,000 each. I find that he was willing to proceed with the project on the basis of that selling price, albeit in the hope that higher prices might be obtained. That being so, the upper limit of his primary loss should be calculated not on what the plaintiff ended up spending to complete the units but on $250,000 per unit. It seems to me that this approach brings properly to account in the defendants' favour all matters which the defendants say should go against an award of damages to the plaintiff, such as careless costings, inadequate planning, insufficient funding, inept project management, excessive delays and so on. In particular, it does, I think, place at the plaintiff's feet the losses occasioned by the weaknesses in the plaintiff's own feasibility study pursuant to which the plaintiff judged that the particular development which he designed could be undertaken profitably on a gross selling price of $250,000 per unit."

39 He concluded:

> "I am therefore of the opinion that the capital loss which should be included in the award of damages is the difference between $750,000 (being three times $250,000) and the aggregate sale prices achieved at auction; ie, $545,000."

40 The loss thus calculated was $205,000.

41 Having found that there were such supervening causes partly responsible for the ultimate loss suffered on the development project (which was alleged to be $319,846.51), Anderson J was neither obliged, nor able, to make a precise calculation of the extent of such responsibility. That is apparent from a consideration of the nature of the factors in question. But he was obliged to make a reasonable assessment. The appellants, as plaintiffs, established substantial financial loss flowing directly from the respondents' contravention of s 52. It was the respondents who (at this point of the case) were seeking to have the loss or damage attributed to their contravention of the Act diminished by reference to supervening causes. If there had been a failure of proof in that respect, it would have been to the disadvantage of the respondents.

42 Anderson J set out to make a reasonable assessment of the loss or damage suffered "by" the respondents' contravention of the Act, bearing in mind the supervening causes which contributed to the ultimate loss suffered on the development project, and bearing also in mind the nature and context of the contravention (a representation related primarily to gross revenue, made for use in conjunction with the appellants' own estimation of costs). He attempted to isolate the causative effect of the misleading conduct from that of extraneous factors.

43 Although he did not put his reasoning on this basis, the result produced by Anderson J appears to be the same as if he had set out to award expectation rather than reliance damages. What he was seeking to do was to measure the causative effect of the misleading representation made by the respondents; and the method he employed, in practical effect, bound the respondents to make good those representations by awarding the appellants the difference between what the units would have sold for if the representations were true and the amount for which the units were actually sold.

44 The question is whether the respondents have shown that the method used by Anderson J resulted in over-compensation of the appellants. The representation having been that the units would sell for between $250,000 and $280,000 each, he decided to award the appellants what he called their capital loss on the project, but to measure that loss on the basis of a notional, rather than the actual cost. He treated $250,000 per unit as the upper limit of the cost. The actual cost was substantially more, but he treated costs in excess of that amount as "down to" what he regarded as extraneous factors. This was not intended to be anything other than an expedient, albeit obviously inexact, method of isolating the causative effect of those factors from the entire loss. The respondents did not demonstrate any better way of doing it. And they have not shown, in this Court, that the appellants were over-compensated.

45 The appeal should be allowed with costs. The orders of the Full Court should be set aside. In place of those orders, the appeal to the Full Court should be dismissed with costs.

46 GAUDRON J. The first-named appellant, Bryan Sampson Henville, acting on his own behalf and in his capacity as trustee for the Henville Property Trust, purchased land in Albany, Western Australia. The land was purchased for home unit development. It was offered for sale and brought to the attention of Mr Henville by Walker Paddon Real Estate Pty Limited, the second respondent, as agent for the vendor. Graham Geoffrey Walker, the first respondent, is a director of that company and was the person who showed Mr Henville the property and dealt with him with respect to its purchase.

47 It is not now in issue that Mr Walker told Mr Henville that there was a market for "luxury top of the range units" in Albany and that if three units were to be built on the land which Mr Henville eventually purchased they would sell for between $250,000 and $280,000 each. Nor is it in issue that that information was misleading and that Mr Henville bought the property for $190,000 and constructed three home units upon it. The units did not sell for the anticipated price. Rather, they were sold for prices which in the aggregate amounted to $545,000. Mr Henville sustained a loss on the project which he quantified at $319,846.51.

48 Before proceeding with the purchase of the land on which the units were built, Mr Henville had prepared a feasibility study in which he estimated that the total cost of the project would be $551,900, of which $315,000 was referable to the cost of construction and $12,000 was referable to interest payments. With a projected selling price of at least $250,000 for each unit less agent's commission of $22,000, the project was expected to return a profit of at least $176,000. As events turned out, the construction costs were $461,170 and the interest charges were in excess of $160,000. Hence an overall loss in excess of $300,000.

49 Mr Henville brought proceedings against the respondents in the Supreme Court of Western Australia seeking, amongst other things, to recover his loss under s 82(1) of the *Trade Practices Act* 1974 (Cth) ("the Act"). That sub-section provided:

> " A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

So far as is presently relevant, the contravention asserted by Mr Henville against the respondents was a contravention of s 52(1), which is found in Pt V of the Act. By that sub-section:

> " A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

50 Mr Henville's action against the respondents came on for hearing before Anderson J. His Honour held that Mr Walker's statement as to the prices that could be achieved for the units to be constructed by Mr Henville was misleading and that it constituted a contravention of s 52(1) of the Act. On the question as to whether Mr Henville had been induced to proceed with the development project by reason of Mr Walker's misrepresentations as to the home unit market in Albany, or, by his own feasibility study which he undertook before purchasing the property, his Honour found that:

> "The dominant and real inducement to proceed with a development was the representation made by Mr Walker as to the market that existed for quality units. It was that representation that made a development worth doing and which gave the promise of a handsome profit. If Mr Henville and [his associate] chose a design that was too expensive and if (as to which I make no finding) they did not administer the project competently, those matters would not seem to deny the operative effect of Mr Walker's representation. They are matters relevant to the question of recoverable loss."

It is the question of "recoverable loss" that is in issue in this appeal.

51 Having found that the misrepresentations as to the prices which the units would fetch were a substantial inducement to Mr Henville's decision to proceed with the project, Anderson J held that they were causative of loss, but not the entire loss suffered. His Honour said:

> "Losses which are really down to extravagant design, to the lack of a proper costing of the proposed design, to the lack of financial resources to complete the development embarked on and to the failure to get the project finished in a reasonable time are not losses suffered by a misrepresentation as to the market value which the development will have on completion."

52 Without quantifying the losses said to arise from Mr Henville's own conduct, Anderson J identified the loss suffered by the appellant in consequence of the misrepresentations as to the selling price of the units as "capital loss". That loss was, in his Honour's view, "the difference between $750,000 (being three times $250,000) and the aggregate sale prices achieved at auction; ie, $545,000." Accordingly, judgment was entered for $205,000 together with pre-judgment interest amounting to $35,197.68.

53 The respondents appealed from the judgment and orders of Anderson J to the Full Court of the Supreme Court of Western Australia. Their appeal was allowed, the judgment and orders of Anderson J set aside and, in lieu, Mr Henville's claim against the respondents was dismissed.

54 In reaching its decision, the Full Court expressed itself to be "conscious of the fact that Mr Walker's misleading conduct continued to play a part in inducing Mr Henville to proceed with the development even after the feasibility study had been completed ... because Mr Henville continued to assume that the units would realise $750,000." However, applying what was said to be the common sense approach required by *March v Stramare (E & MH) Pty Ltd*[22], the Full Court held that, although "both Mr Walker's misleading conduct and Mr Henville's error in regard to the feasibility study were essential conditions of Mr Henville's loss ... Mr Walker's misleading conduct was not a cause of [that] loss". Rather, in the view of the Full Court, "that loss was the consequence of Mr Henville's independent and unreasonable action."

55 In addition to its finding that Mr Henville's loss was the consequence of his own unreasonable action, the Full Court was of the view that "Mr Henville was obliged to exclude [the losses caused by cost overruns and delays] from the damages he claimed, but the absence of evidence enabling such losses to be identified and assessed meant that this could not be done." Accordingly, he failed to "establish what losses were caused by Mr Walker's misleading conduct" and therefore "failed to prove his damages." The Full Court held that the respondents' appeal should also be upheld on this basis.

56 Mr Henville now appeals to this Court seeking restoration of the judgment and orders of Anderson J. The respondents argue not only that the Full Court was correct in holding that their misrepresentation did not cause Mr Henville's loss but, in the alternative, that this Court should determine "the amount of loss and damage suffered ... which amount ... should exclude ... loss resulting from the cost overruns and delays ... loss ... attributable to [Mr Henville's] independent unreasonable estimate of costs [and] ... the amount of loss that would have been suffered had the representations been true."

57 Before turning to the question of causation, it is convenient to note that, in reaching its decision that Mr Henville's loss was the consequence of his "independent and unreasonable action", the Full Court referred to what was said by Mason CJ in *March v Stramare (E & MH) Pty Ltd* with respect to the decision in *M'Kew v Holland & Hannen & Cubitts*[23]. His Honour said of that case:

> "The plaintiff would not have sustained his ultimate injury but for the defendant's negligence causing the earlier injury to his left leg. His subsequent action in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance resulted in a

---

22 (1991) 171 CLR 506.

23 [1970] SC (HL) 20.

> severe fracture of his ankle. This action was adjudged to be unreasonable and to sever the chain of causation. The decision may be explained by reference to a value judgment that it would be unjust to hold the defendant legally responsible for an injury which, though it could be traced back to the defendant's wrongful conduct, was the immediate result of unreasonable action on the part of the plaintiff. But in truth the decision proceeded from a conclusion that the plaintiff's injury was the consequence of his independent and unreasonable action."[24]

58 In that passage, Mason CJ was concerned to explain the unsatisfactory nature of the "but for" test of causation, including "in those cases in which a superseding cause, described as a novus actus interveniens, is said to break the chain of causation"[25]. In the present case, however, Mr Walker's misrepresentations were not merely an essential condition to which Mr Henville's loss could be traced. Rather, Mr Henville suffered loss because, as the Full Court noted, "he relied on the feasibility study, as well as on Mr Walker's misleading conduct."

59 There is nothing novel in the idea that, on occasions, loss or injury is the result of two or more events, neither of which is sufficient, of itself, to bring about that result. The events in question may be sequential or concurrent. *March v Stramare (E & MH) Pty Ltd* was a case involving an injury which resulted from the conjunction of two separate acts or events, the injury in question having resulted from the plaintiff, who was driving at excessive speed, running into a negligently parked vehicle.

60 For the purpose of the law of negligence, where two or more events combine to bring about the result in question, the issue of causation is resolved on the basis that an act is legally causative if it materially contributes to that result[26]. The same is true for the tort of deceit. Thus, in *Gould v Vaggelas*, Wilson J observed in relation to a representation leading to a person entering into a contract:

---

24 (1991) 171 CLR 506 at 517.

25 (1991) 171 CLR 506 at 517.

26 See *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 512-514 per Mason CJ applying the "modern approach" exemplified in the speech of Lord du Parcq in *Grant v Sun Shipping Co Ltd* [1948] AC 549. See also *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7 per Deane, Dawson, Toohey and Gaudron JJ. Similar conclusions have been reached in other jurisdictions: see *McGhee v National Coal Board* [1973] 1 WLR 1 at 4; [1972] 3 All ER 1008 at 1010; *Athey v Leonati* [1996] 3 SCR 458 at 467.

> "The representation need not be the sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract."[27]

61 It was held in *Wardley Australia Ltd v Western Australia* that "s 82(1) [of the Act] should be understood as taking up the common law practical or common-sense concept of causation ... discussed ... in *March v Stramare (E & MH) Pty Ltd* ... except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act."[28] As already indicated, that common-sense approach requires no more than that the act or event in question should have materially contributed to the loss or injury suffered. And there is nothing in the Act to suggest that any different approach should be taken in the case of a misrepresentation that constitutes a contravention of s 52(1).

62 On the trial judge's finding of facts and, indeed, on the findings of the Full Court, Mr Walker's misrepresentations materially contributed to the loss sustained by Mr Henville and, thus, caused his loss. The Full Court erred in holding otherwise. The question whether Mr Henville failed to prove his damages is a separate question which necessitates consideration of the precise terms of s 82(1) of the Act.

63 Sub-section (1) of s 82 of the Act allows "[a] person who suffers loss or damage by [contravening] conduct" to recover "the amount of the loss or damage". There is nothing to suggest that the sub-section does not entitle full recovery of the loss or damage suffered by the conduct in question. Nor is there anything in the Act to suggest that the loss or damage is to be calculated in any particular way – a matter which has led to questions being raised as to the "measure of damages" under s 82(1)[29].

64 For the purposes of the law of negligence, liability for an act or omission which materially contributed to loss or injury which would not have happened but for the occurrence of another event, may be limited by resort to considerations of foreseeability of damage and/or contributory negligence. And

---

27 (1985) 157 CLR 215 at 236. See also at 250-251 per Brennan J where his Honour said:

> "The relevant question ... is whether the misrepresentation ... was ... one of the real inducements to the plaintiff to do whatever caused his loss."

28 (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ.

29 See, for example, *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Marks v GIO Australia Holdings* (1998) 196 CLR 494.

questions have been raised as to whether foreseeability[30] and contributory negligence[31] have a role to play in determining the extent of a person's liability under s 82(1) of the Act, particularly where the contravening conduct also constitutes a negligent misstatement. A similar question may be asked in cases where the contravening conduct also constitutes deceit. As a general rule, damages for deceit are confined to those that "result directly from the fraud and not from some supervening cause such as the folly, error or misfortune of [the plaintiff]"[32].

65 Where loss or injury results from two or more acts or events, questions of "foreseeability" and "contributory negligence" have rendered nice questions of causation largely irrelevant to the exercise of determining the extent of a negligent defendant's liability. Indeed, the role of causation in that exercise was trenchantly criticised in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) (No 1)*[33]. However, the question asked in relation to damages for deceit, namely, whether "the loss ... result[ed] directly from the fraud and not from some supervening cause"[34], would seem to be one firmly based in causation.

---

30 See *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 428 [30] per Gaudron J, referring to the issue of foreseeability raised in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526 per Mason CJ, Dawson, Gaudron and McHugh JJ.

31 See *Blacker v National Australia Bank Ltd* [2000] FCA 681 at [261] per Katz J, following the approach adopted in relation to a claim brought under the *Misrepresentation Act* 1967 (UK) in *Gran Gelato Ltd v Richcliff Ltd* [1992] Ch 560 at 572-575 per Sir Donald Nicholls VC. See also *Sutton v AJ Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 240-241; *Henjo Investments v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 558-559 per Lockhart J (with whom Burchett and Foster JJ agreed at 568); French, "A Lawyer's Guide to Misleading or Deceptive Conduct", (1989) 63 *Australian Law Journal* 250 at 264-265; Campbell, "Contribution, Contributory Negligence and Section 52 of the Trade Practices Act – Pt II", (1993) 67 *Australian Law Journal* 177 at 187-190.

32 *Gould v Vaggelas* (1985) 157 CLR 215 at 222 per Gibbs CJ. See also at 220-224 per Gibbs CJ, 242-243 per Wilson J, 254-255 per Brennan J, 266-268 per Dawson J.

33 [1961] AC 388 at 422-426 where their Lordships sought to overcome the "palpable injustice" of the principle expressed in the case of *In re Polemis & Furness Withy & Co* [1921] 3 KB 560. Viscount Simonds, delivering the judgment on behalf of their Lordships, warned, at 419, against "being led astray by scholastic theories of causation and their ugly and barely intelligible jargon."

34 *Gould v Vaggelas* (1985) 157 CLR 215 at 222 per Gibbs CJ.

66 It was held in *Marks v GIO Australia Holdings* that the relief available under s 82(1) of the Act is not to be confined by analogy either with actions in contract or in tort[35]. Rather, the task under that sub-section is to ascertain the loss suffered by the contravening conduct and to assess the amount necessary to compensate for that loss. Once that is accepted, it follows, in my view, that considerations of foreseeability and contributory negligence are irrelevant to the exercise required by s 82(1). However, that does not mean that, where the loss is the result of two or more acts or events, causation is irrelevant to the task of identifying the loss or the amount of the loss recoverable. To treat causation as irrelevant would be to ignore the requirement in s 82(1) that a person suffer loss or injury *by* contravening conduct.

67 The question posed by the Full Court's conclusion that Mr Henville failed to prove his damages is really a question as to who bears the onus of proof, and on what issue, in a case where contravening conduct is the cause of some but not all the loss in issue. The precise question is whether, in a case where loss results from two or more acts or events, s 82(1) requires a claimant to prove only the total loss that he or she suffered leaving it to the person whose conduct is in question to prove that some aspect of that loss is referable to other acts or events or whether, on the other hand, it requires a claimant to prove that a particular component or particular components of his or her loss are referable to the contravening conduct in question.

68 Just as the relief available under s 82(1) is not to be confined by analogy either with the actions in tort or in contract, it should not be confined by imposing an unduly strict burden of proof on the claimant. As already indicated, s 82 provides for the recovery of loss or damage that a person suffers by contravening conduct. To require a claimant to prove which component of his or her loss or damage is referable to the contravening conduct would be to impose limitations on relief which the terms of that sub-section do not require.

69 At the very least, to require that a claimant under s 82(1) of the Act prove which component of his loss or damage is referable to contravening conduct would be to confine recoverable loss to that *directly* resulting from that conduct, and, thus, to impose a gloss on the words of the sub-section. At the other extreme, it would be to deny any remedy at all in those cases where loss results from two or more acts or events but the claimant is unable to identify the precise component or components of the loss referable to contravening conduct. That consequence is inconsistent with the concept of causation upon which s 82(1) is

---

35 (1998) 196 CLR 494 at 503-504 [17] per Gaudron J, 510 [38] per McHugh, Hayne and Callinan JJ, 528-529 [100]-[103] per Gummow J, 549 [152] per Kirby J.

predicated, namely, that the contravening conduct should only have materially contributed to the loss or damage suffered.

70 It follows that, under s 82(1) of the Act, it is for the person whose contravening conduct materially contributed to the loss or damage to establish what component of that loss or damage is referable to some act or event other than his or her contravening conduct and not for the person who suffers loss or damage to establish the precise component or components referable to that conduct. The Full Court erred in holding otherwise.

71 The conclusion that it was for the respondents to identify what part of Mr Henville's loss was referable to conduct other than their own contravening conduct is also determinative of the matters raised by their notice of contention.

72 The respondents could have proved that particular components of Mr Henville's loss were directly referable to his own conduct. They did not. Alternatively, it was open to them to limit their liability on the basis that the loss or damage he suffered could not have been greater than would have been the case if their representations were true[36]. If their representations had been true, Mr Henville would have received $750,000 on sale of the units. In the result, he received only $545,000. Accordingly, the loss referable to the respondents' conduct could not have been more than $205,000. Having established that and no more, the respondents were not entitled to further limit their liability.

73 The appeal should be allowed with costs, the orders of the Full Court set aside and, in lieu, the appeal to that Court should be dismissed with costs.

---

36 See *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413.

74 McHUGH J. Bryan Sampson Henville in his personal capacity and as a trustee appeals against an order of the Full Court of the Supreme Court of Western Australia holding that he was not entitled to recover from the respondents any part of the loss sustained in building and selling home units. In an action brought in the Supreme Court of that State, Mr Henville claimed that the respondents' false and misleading statements concerning the expected selling price of the units had induced him to proceed with the loss-making project. His claim was based on ss 52 and 82 of the *Trade Practices Act* 1974 (Cth) ("the Act"). The Full Court accepted that the statements had induced Mr Henville to proceed with the project. But it held that, as a matter of common sense, the conduct of Mr Henville in carelessly estimating the cost of constructing the units was the sole cause of the loss.

75 In determining whether to proceed with the project, Mr Henville had prepared a "feasibility study" that estimated that the sales from building three home units on a particular block of land would show a profit of $176,000 after allowing for the cost of acquiring the land and building the units. The feasibility study was seriously flawed. It relied on the false and misleading statements, made by the respondents in breach of the Act, that the units could be sold for a minimum of $750,000. They were ultimately sold for $545,000. The study also relied on Mr Henville's erroneous estimate that the cost of the land and units would be $551,900. The eventual cost was $864,846.51. As a result, Mr Henville lost over $300,000 on the project.

76 Mr Henville would not have proceeded with the project unless he believed that it was likely to realise a minimum profit of $80,000. The Full Court held that, if the costs had not been grossly underestimated, Mr Henville would have realised that there was no prospect of a minimum profit of $80,000 being realised even if the units had sold for $750,000. The Full Court also held that, but for underestimating the costs, Mr Henville would have realised that there was a real risk that the project would sustain a loss. For these reasons, the Full Court held that the careless estimate of the costs of the project was the sole cause of the loss sustained by Mr Henville.

77 The respondents do not challenge the findings of the trial judge that their representations were misleading and deceptive and that the making of them constituted conduct in breach of s 52 of the Act. The principal issue in the appeal is whether the Full Court erred in holding that the loss sustained by Mr Henville was not suffered "by conduct of another person" within the meaning of s 82 of the Act.

78 In my opinion, the Full Court erred in holding that Mr Henville had not suffered loss by reason of the false and misleading statements of the respondents. The statements concerned the general demand for units of the kind being contemplated, the likely prices that such units would fetch and the time within which they could be sold for those prices. They were as inextricably linked with

Mr Henville's decision to proceed with the project, as they were at the heart of the profitability computation in the feasibility study. It was that computation that led Mr Henville to proceed with the project and incur the loss. That factors, other than a respondent's contravention of the Act, have operated to induce a person to act in a way that results in loss or damage does not prevent that person from recovering the amount of loss or damage under s 82 of the Act. The existence of other operative factors may be relevant in assessing the amount of the loss or damage, but it does not deny an applicant a remedy under s 82.

The material facts

79 In both judgments below, the appellants have been identified by reference to Mr Henville only, and the respondents by reference to the first respondent, Mr Walker, only. I will adopt the same convention.

80 In 1994, Mr Henville, an architect, set up a property development consultancy business. After hearing of favourable prospects for development in Albany, he visited that town in December 1994 where he met Mr Walker, an agent who had almost 19 years' experience of the Albany real estate market. Mr Walker was and is a director of the second respondent. Mr Henville told Mr Walker that he was interested in properties that were suitable for unit development. Mr Walker showed him a number of properties. Mr Henville was interested in purchasing one of them. In January 1995, Mr Walker wrote a letter to assist Mr Henville to obtain finance and to encourage him to proceed with the project. In the letter, Mr Walker stated that there was almost "a crisis situation in Albany with demand for quality units and town houses outstripping supply". Although Mr Henville did not ultimately proceed with the development – because he was unable to obtain the finance – he remained interested in the Albany market and maintained contact with Mr Walker.

The View Street property

81 In June 1995, Mr Walker showed Mr Henville and a colleague, Mr Waldock, the property at 36 View Street that is at the centre of this case. The View Street site was zoned R30, which meant that a development of up to four residential units was permitted.

82 Anderson J, who heard the matter at first instance, accepted the evidence of Mr Henville and Mr Waldock as to what was said during the course of their inspection of the site. Mr Walker told them that there was a "huge void" at the top end of the Albany market. He said that he was often getting inquiries from people asking for "luxury top of the range units for investment and retirement" but nothing of that kind was available. He told them that there was always a shortage of quality home units in prestige locations in Albany. Farmers with "million dollar wool cheques" were "unable to spend them". Pointing out the excellent views, Mr Walker expressed the opinion that it would be preferable to

build three larger high quality units on the site, rather than the maximum four. He said that, if three such units were built, they would fetch between $250,000 and $280,000 each.

83 After preparing sketches of the development and making preliminary profitability calculations, Mr Henville submitted an offer to purchase the property for $190,000, subject to finance. On 21 June 1995, Mr Walker told Mr Henville that the offer had been accepted and agreed to write a letter to assist in obtaining the required finance. The letter, dated 22 June 1995, included the following passage:

> "Having studied the plans for the three unit development, I am very excited with this project *and predict a very enthusiastic market reception*.
>
> *A large void of the Albany Real Estate market has been the availability of quality home units in prestige locations.* We are constantly frustrated with buyer demand for this product and being able to supply.
>
> A marketing plan will be to have *all units sold within 6 months of commencement at a price range of $250,000 to $280,000.*
>
> I am delighted with the responsibility of selling this project and am very confident of complete success." (emphasis added)

The misrepresentations

84 Accordingly, orally or in writing, Mr Walker made the following representations and predictions:

(a) there was a "huge void" at the top end of the market for home units in Albany;

(b) he often received inquiries from people asking for "luxury top of the range units for investment and retirement", and there were farmers coming to Albany with "million dollar wool cheques" who were "unable to spend them";

(c) if three spacious units were built, they would fetch between $250,000 and $280,000 each, and there would be a very enthusiastic reception for the proposed units at that price;

(d) with a marketing plan, all units would be sold within six months of commencement of marketing at a price range of $250,000 to $280,000.

85 The trial judge, Anderson J, found that at the time the representations were made, there was little or no unsatisfied demand in Albany for quality home units,

and no demand at all for units in the price range of $250,000 to $280,000. There was no shortage of quality home units in prestige locations and the represented void did not exist. His Honour also found that no reasonable grounds existed for the representations as to future matters:

- There had been no sales of comparable units at prices anywhere near the range of prices represented (although comparable units were on the market).

- No market research had been done by Mr Walker or was available to justify the representations made to Mr Henville.

- Mr Walker could not produce evidence substantiating the claimed level of inquiries from buyers or potential buyers.

- The valuation evidence put forward by Mr Walker strongly supported Mr Henville's claim that the representations were baseless and misleading.

The "feasibility study"

86 To finance the building of the units, Mr Henville applied to the Albany branch of BankWest (then known as the R & I Bank) for a loan of $542,000. He attached to the application the letter from Mr Walker and a document that came to be known in evidence as the "feasibility study". It provided:

---

36 VIEW STREET ALBANY

Feasibility (Site area 1366m²)
Three Unit Group Housing
Development

Land Purchase	190,000
Surveyor	1,400
Headworks	7,000
Stamp Duty	5,000
(Settlement	
(Ingoings/Outgoings	5,000
Interest	12,000
Driveway Landscape	15,000
Building	315,000

Insurance (Comprehensive)		1,500
Total		$551,900

See attached Letter from
Roy Weston Albany
Selling Price range 250 - $280,000

Say bottom range return	3 x 250	=	750,000
Less R E Sales Commission			22,000
		=	728,000
		Less	551,900
		Profit	$176,000

Shows 32% return

87 In evidence, Mr Henville conceded that, if he had thought the project would provide a profit of less than about $100,000 (or at a minimum, $80,000), he would not have gone ahead with it.

88 Anderson J found, and the Full Court agreed, that the feasibility study was an ill-considered exercise. The figures on which it was based were not satisfactorily explained. His Honour said:

> "On the basis that the whole of the funds for the development were to be borrowed, no hard-headed estimate of interest could have produced a figure of only $12,000. It does not appear from the evidence how they arrived at a figure of $315,000 for building costs. It was a figure which turned out to be far too low and … it is inconceivable that it could have been derived from any careful assessment of likely building costs for the high quality multi-level units which they planned."

The course of development

89 BankWest subsequently approved the loan. Settlement of the purchase took place on 7 August 1995. Soon after, demolition of the existing buildings on the View Street site commenced. The course of the development was far from smooth. Planning and engineering problems occurred that significantly increased construction costs. By April 1996 it was obvious that the amount of the loan would not be sufficient to finish the project. Mr Henville encountered difficulties in attempting to increase the overdraft. The consequent delay led to substantial expense by way of interest and bank charges for the facilities provided.

90 In the second half of 1995 and throughout 1996, comparatively few properties in Albany were sold quickly for the asking price. The market was described as having "slowed dramatically" and being "flat" and "static". It had not improved by the time the View Street units were completed in December

1996. As the selling agent for the units, Mr Walker commenced a marketing campaign that the trial judge described as "singularly unsuccessful". The lack of success was not attributable to the units themselves. They were well designed, well constructed and well finished to a "high quality" standard. His Honour found that the initial asking price of $295,000 was a serious mistake that probably doomed the initial sales campaign to failure, or substantially contributed to that result. Both Mr Henville and Mr Walker were involved in the decision to start with so high a figure, and it was not suggested on appeal that it played any part in breaking the chain of causation.

91 Various campaigns were mounted to sell the units. Another agency was brought in to assist Mr Walker. Pressured by BankWest to reduce his liability to the bank, Mr Henville agreed to a sale by auction, which took place on 28 June 1997. One unit was knocked down for $175,000. The other two were sold soon after the auction for $185,000 each.

Section 82 and causation

92 Section 82(1) of the Act provided:

> "A person who suffers loss or damage *by* conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention." (emphasis added)

93 In the present case, the trial judge found that the representations of Mr Walker contravened s 52 of the Act, which is contained in Pt V of the Act.

94 What then was the loss or damage that Mr Henville claims that he suffered *by* the conduct of Mr Walker? In his pleading, Mr Henville claimed his loss as being every item of cost which he laid out on the project, including all bank charges, government duties and interest on borrowings, less only the net amount received on the sale of the units. He claimed the sum of $319,846.51, which included interest to 1 February 1998, and a claim for special damages interest at $3,500 per month thereafter. No loss of a commercial opportunity was pleaded. In substance, the loss claimed was the amount for which Mr Henville was worse off by embarking on the project. So the question that s 82 requires to be answered is whether that loss, or at all events some part of it, was suffered "by conduct of" Mr Walker. That is, was the loss suffered because Mr Walker made various misrepresentations to Mr Henville, in particular the misrepresentation that the units would fetch a minimum of $750,000?

95 This Court's decision in *Wardley Australia Ltd v Western Australia*[37] established that the term "by" in s 82 invokes the common law concept of causation. In *Wardley*, Mason CJ, Dawson and Gaudron JJ and I said[38]:

> "The statutory cause of action arises when the plaintiff suffers loss or damage 'by' contravening conduct of another person. 'By' is a curious word to use. … But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s 82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this Court in *March v Stramare (E & M H) Pty Ltd*[39], except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had Parliament intended to say something else, it would have been natural and easy to have said so."

96 But this does not mean that common law conceptions of causation should be rigidly applied without regard to the terms or objects of the Act. Section 82 now applies to the contravention of any provision of Pts IV, IVB or V, or s 51AC of the Act. In *Marks v GIO Australia Holdings Ltd*, Hayne and Callinan JJ and I pointed out that the section can apply to many different kinds of cases, not just those where a breach of s 52 is alleged[40]. Moreover, the objects of the Act indicate that a court should strive to apply s 82 in a way that promotes competition and fair trading and protects consumers[41]. The width of the potential application of s 82 and the objects of the Act tell against a narrow, inflexible construction of the section[42]. No doubt in most cases, applying common law conceptions of causation will be sufficient to answer the issues posed by s 82 in its application to contraventions of the Act. But care must be taken to avoid a

---

37 (1992) 175 CLR 514.

38 (1992) 175 CLR 514 at 525.

39 (1991) 171 CLR 506.

40 (1998) 196 CLR 494 at 509 [33]. See also at 528 [100] per Gummow J.

41 Section 2 of the Act states that the objective of the Act is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

42 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 515 [56] per McHugh, Hayne and Callinan JJ, 528-529 [101] per Gummow J, where his Honour referred to statements of Lockhart J in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 529-530, to the effect that there was a need for flexibility in the rules laid down regarding s 82.

mechanical application of those conceptions to issues arising under the section. In *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)*[43], Gummow J pointed out:

> "[I]t would be an error to translate automatically to the particular statute what appeared the closest analogue from the common law 'rules' as to causation. It is rather a question of statutory construction.
>
> ...
>
> Thus, in construing s 82 it is appropriate to bear in mind such matters as the scope and purpose of Pts IV and V ... [and] the wide range of subject-matters dealt with in Pts IV and V but all linked to s 82 ..."

97 The common law concept of causation recognises that conduct that infringes a legal norm may be causally connected with the sustaining of loss or damage even though other factors may have contributed to the loss or damage[44]. Every event is the product of a number of conditions that have combined to produce the event. Some philosophers draw a distinction between a *condition* that is necessary only and a *cause* that is both necessary and sufficient[45] to produce the event. The common law has avoided the technical controversies inherent in the logic of causation. Unlike science and philosophy, the common law is not concerned to discover universal connections between phenomena so as to enable predictions to be made. The common law concept of causation looks backward because its function is to determine whether a person should be held responsible for some past act or omission. Out of the many conditions that combine to produce loss or damage to a person, the common law is concerned with determining only whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage. As Lord Wright pointed out[46]:

---

43 (1987) 16 FCR 410 at 418-419.

44 *Grant v Sun Shipping Co Ltd* [1948] AC 549 at 563; *Gould v Vaggelas* (1985) 157 CLR 215 at 236, 250-251; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 513; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 7.

45 Anderson, *Studies in Empirical Philosophy* (1962), at 128-131.

46 *Liesbosch Dredger (Owners of) v Owners of SS Edison* [1933] AC 449 at 460; see also Windeyer J in *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 584: "Law must, for its purposes, extract one or more circumstances out of the whole complex of antecedent conditions of an event as its cause."

> "The law cannot take account of everything that follows a wrongful act …. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons."

98 More than once in recent years, judges have pointed out that the issue of causation cannot be divorced from the legal framework that gives rise to the cause of action[47]. In *Barnes v Hay*, Mahoney JA said[48]:

> "[T]he determination of a causal question involves, in my opinion, a normative decision as to whether, for the purposes of the case, the precedent act for which the defendant is responsible should be seen as causal of the plaintiff's loss. And, in my opinion, that evaluation is made, not by a 'test' or 'guide' such as the 'but for' test, but by a functional evaluation of the relationship and the purposes and policy of the relevant part of the law."

99 In *Environment Agency v Empress Car Co (Arbertillery) Ltd*[49], Lord Hoffmann pointed out that common sense answers to questions of causation will differ according to the purpose for which the question is asked. Furthermore, not only may there be different answers to questions regarding causation when attributing responsibility to different people under different rules, but there may be different answers when attributing responsibility to different people under the same rule[50]. In *Chappel v Hart*, Gummow J referred to his Lordship's statements in order to highlight the fact that the making of value judgments and the infusion of policy considerations may temper issues of causation[51].

---

47 *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22 at 29; *Chappel v Hart* (1998) 195 CLR 232 at 255 [62].

48 (1988) 12 NSWLR 337 at 353. See also *Liesbosch Dredger (Owners of) v Owners of SS Edison* [1933] AC 449 at 460 per Lord Wright; *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 592 per Windeyer J; *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 350-351 per McHugh JA; *Ricochet Pty Ltd v Equity Trustees Executors and Agency Co Ltd* (1993) 41 FCR 229 at 235.

49 [1999] 2 AC 22 at 29.

50 [1999] 2 AC 22 at 30.

51 (1998) 195 CLR 232 at 256 [63]; see also at 238 [7] per Gaudron J, 243 [24] per McHugh J, 269-270 [93] per Kirby J.

100 In some situations, the legal framework may require a finding that, despite a causal connection in a physical sense between the breach and damage, no causal connection exists for legal purposes. In other situations, the legal framework may require a finding that a causal connection exists even though no more appears than that the damage followed after breach of a legal norm.

101 In the first class of case, some act of the defendant may have set in train, or some omission of the defendant may have failed to set in train, a series of physical events that resulted in or could have avoided damage to another person or property. In this situation, the damage occurred because, given the act or omission, the laws of nature dictated the result. The physical connection between the defendant's act or omission and the damage suffered, and the materiality of the connection is usually apparent, although often enough it will require expert evidence to demonstrate the connection. In this situation, questions of causation usually present no difficulty, although questions of remoteness of damage may do so. Exceptionally, however, the policy or rationale of the legal norm that has been breached will require the court to disregard the physical connection and to make a finding of no causal connection.

102 Thus in *Gorris v Scott*[52], in the course of a voyage on the defendant's ship, the plaintiff's sheep were washed overboard because the defendant neglected his statutory duty to provide pens on the deck of the ship. The action was dismissed because the statute was aimed at preventing disease and was not directed to the events that had happened. Thus in spite of the existence of a breach of duty that resulted in damage to the plaintiff, there was no relevant causal connection because the damage was outside the contemplation of the statute. Similarly, in *Close v Steel Company of Wales Ltd*[53], the defendant, in breach of its duty, had failed to fence a dangerous drilling machine. The plaintiff was injured when the drill bit fragmented. His action failed because the House of Lords held that the duty to fence was limited to keeping the worker from coming into contact with the dangerous machinery and did not extend to protecting the worker from injury caused by ejected pieces of the machine[54].

103 In the second class of case, the damage will not have occurred because of the laws of nature but because a person has acted to his or her detriment by reason of or following some conduct of the defendant. The conduct may be an act, an omission, a statement or a suggestion. But it will not be regarded as

---

52 (1874) LR 9 Ex 125.

53 [1962] AC 367.

54 cf Lord Simonds in *Nicholls v F Austin (Leyton) Ltd* [1946] AC 493 at 505: "The fence is intended to keep the worker out, not to keep the machine or its product in."

causally connected with the detriment if it provides no more than the reason why the person acted to his or her detriment. If the defendant intended the person suffering a detriment to act in the general way that he or she did, the common law will invariably hold that a causal connection existed between the conduct and the detriment. But if the conduct merely provides the reason why the person acted, it will not be sufficient to establish a causal connection unless the purpose of the legal norm that the defendant has breached is to prevent persons suffering detriment in circumstances of the kind that occurred. If a broker negligently advises a client to retain shares because they are a good investment, the broker will be liable for the loss sustained in retaining those shares. But if, having received that advice, the client decides to buy more shares, the broker will not be liable for the further losses unless the terms of the original retainer imposed a duty on the broker to advise in respect of further purchases.

104 If Mr Henville had purchased the View Street land merely because he had heard that Mr Walker was claiming that there was a big demand for quality home units, a difficult question of causation would arise. Its answer would depend on the purpose of ss 52 and 82 of the Act. Are they intended to provide a remedy for any person who acts to his or her detriment after hearing of a false or misleading statement made in trade or commerce? Or are they directed to providing a remedy only in respect of conduct that is directed at individuals or a section of the public[55]?

105 The corollary of the "common sense" approach to causation, as Mahoney JA pointed out in *Barnes*, is that it is not reducible to a "test" that can be applied across the spectrum of factual situations that arise from case to case. Nevertheless, the course of judicial reasoning in this area has produced certain principles that assist tribunals of fact in deciding causation issues.

106 If the defendant's breach has "materially contributed"[56] to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage. In exceptional cases, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional.

---

55 cf *Peek v Gurney* (1873) LR 6 HL 377 at 412-413 per Lord Cairns; *Commercial Banking Co of Sydney Ltd v R H Brown & Co* (1972) 126 CLR 337 at 343 per Menzies J.

56 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620 per Lord Reid.

107 Of particular importance to the present case is the long-standing recognition of the possibility that two or more causes may jointly influence a person to undertake a course of conduct[57]. In separate judgments in *Gould v Vaggelas*[58], Wilson and Brennan JJ emphasised that a representation need not be the sole inducement in sustaining the loss. If "it plays some part even if only a minor part", in contributing to the course of action taken – in that case the formation of a contract – a causal connection will exist[59].

108 This principle has been applied in cases where a complicating factor is the intervention of some act or decision of the plaintiff or a third party that allegedly constitutes a more immediate cause of the loss or damage. Thus, in *Medlin v State Government Insurance Commission*[60] Deane, Dawson, Toohey and Gaudron JJ said:

> "The ultimate question must, however, always be whether, *notwithstanding the intervention of the subsequent decision*, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision." (emphasis added)

109 Similarly, in respect of claims under s 82, courts have accepted that loss or damage is causally connected to a contravention of the Act if a misrepresentation was one of the causes of the loss or damage sustained by the claimant[61]. As the

---

57 *Macleay v Tait* [1906] AC 24; *De la Bere v Pearson Ltd* [1908] 1 KB 280; *McGhee v National Coal Board* [1973] 1 WLR 1; [1972] 3 All ER 1008; *Gould v Vaggelas* (1985) 157 CLR 215; Hart & Honore, *Causation in the Law*, 2nd ed (1985) at 193.

58 (1985) 157 CLR 215.

59 (1985) 157 CLR 215 at 236 per Wilson J, 250-251 per Brennan J. See also *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 366 per Brennan J.

60 (1995) 182 CLR 1 at 6-7.

61 *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; *Ricochet Pty Ltd v Equity Trustees Executors and Agency Co Ltd* (1993) 41 FCR 229 at 235; *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1993) 118 ALR 565 at 575 per Hodgson J; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 356-357 per

(Footnote continues on next page)

Full Federal Court pointed out in *Como Investments Pty Ltd (In Liq) v Yenald Nominees Pty Ltd*[62]:

> "The law does not consider cause and effect in mathematical or in philosophical terms. The law looks at what influences the actions of the parties. Acknowledging that people are often swayed by several considerations, influencing them to varying extents, the law attributes causality to a single one of those considerations, provided it had some substantial rather than negligible effect."

Mr Henville suffered loss by reason of Mr Walker's conduct

110 In evidence, Mr Henville admitted that, if he had believed that the project would make a profit of less than about $100,000, he probably would not have gone ahead with it because "it wouldn't have been worth it, risk or anything else". His belief that the project would make a profit of more than $100,000 was the product of two errors. First, he erroneously miscalculated the cost of constructing the units. Secondly, he was induced by Mr Walker's misrepresentations to believe erroneously that the units would be sold reasonably quickly for not less than $750,000. Both errors were fundamental to his belief that the project would return a handsome profit. Mr Walker's misrepresentations, therefore, directly induced Mr Henville to proceed with the project and its resultant loss. Without them, the project would not have gone ahead. In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[63], Gaudron J pointed out:

> "When a person claims to have taken, or refrained from taking, a particular course of action in reliance upon another's representation, the critical question, assuming the representation is one that might reasonably be relied upon, is whether, but for that representation, he or she would have taken that action. In that context, 'but for' does not signify a sine qua non or causative factor which, although necessary, is not sufficient to produce the result in question. Rather, it signifies the decisive consideration or one of the decisive considerations for taking the course of action in question."

111 The fact that Mr Henville chose a design that was ultimately too expensive did not deny or neutralise the operative effect of Mr Walker's misrepresentations. The misrepresentations remained operative at all material times. Indeed, they

---

Brennan J; *Como Investments Pty Ltd (In Liq) v Yenald Nominees Pty Ltd* (1997) 19 ATPR ¶41-550 at 43,619.

62 (1997) 19 ATPR ¶41-550 at 43,619.

63 (1999) 199 CLR 413 at 425-426 [19].

were obviously operating after the units had been completed and played a decisive part in the initial price for which the units were marketed.

112 Contrary to the conclusion of the Full Court, Mr Walker's misrepresentations were causally connected with the loss sustained by Mr Henville.

The Full Court's reasoning

113 The Full Court agreed with the trial judge that Mr Walker's misleading conduct continued to play a part in inducing Mr Henville to proceed with the development of the View Street property even after he and Mr Waldock had completed the feasibility study. Yet it allowed Mr Walker's appeal on the basis that the feasibility study was the sole inducement of Mr Henville's decision to go ahead. The Full Court's decision therefore appears to contain a logical inconsistency between the facts as found and its ultimate conclusion.

114 A clue as to the reason for the error that the Full Court made in this case is revealed early on in its judgment where the Court expressed the nature of the inquiry involved in this case as:

> "whether Mr Henville's conduct in preparing and relying on the defective feasibility study is to be regarded as a supervening cause that broke the chain of causation linking the misleading conduct to the loss, or to employ what may nowadays be regarded as more appropriate terminology, whether Mr Walker's conduct, as between himself and Mr Henville, and as a matter of common sense and experience, is properly to be seen as having caused the relevant loss."

115 These two formulations are not strict equivalents. The subtle differences between the two reflect the Full Court's erroneous approach and conclusion. The first formulation focuses on whether Mr Henville's conduct broke the chain of causation that may have existed as between the parties. On the other hand, the "more appropriate terminology" sees the focus of the inquiry as Mr Walker's conduct, and whether *it*, notwithstanding other operative factors, was a cause of the loss. The latter formulation is in line with the course that courts have taken, both at common law and with respect to s 82, in resolving questions of causation[64]. A study of the substance of the Full Court's reasoning suggests, however, that it applied the first and not the second formulation.

---

64 The issue is not *what* caused the loss, but whether the defendant's conduct can properly be said to be *a* cause of the loss: *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22 at 30 per Lord Hoffmann. See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 356-357 per Brennan J; and Hart & Honore, *Causation in the Law*, 2nd ed (1985) at 193.

116 The Full Court said that the "question of causation in the present case is complicated because the causes (in law) contributing to Mr Henville's loss fall into two categories". The first category comprised those acts that were properly to be seen as having caused Mr Henville to develop the property. Mr Walker's misleading conduct and Mr Henville's preparation of and reliance on his defective feasibility study "arguably" fell into this category. The Full Court said that each of these acts "arguably, played a part in inducing Mr Henville to develop the property". The Court said that it was "not possible to separate and calculate the loss resulting from the misleading conduct and the loss resulting from the defective feasibility study". The second category of causes contributing to the loss were "the cost overruns and delays". The Full Court said:

> "These matters fall into a different category as they did not induce the development and, importantly, it was feasible, in practice, to establish, by way of evidence, what amount of the overall loss is to be attributed to each. The separate losses so quantified would be independent heads of loss which do not form part of the indivisible loss caused by the first category of causes."

117 The Full Court then referred to the statement of Gibbs CJ in *Gould v Vaggelas*[65] that, where fraud is proved, "the court must be satisfied that the loss did result directly from the fraud and not from some supervening cause such as the folly, error or misfortune of the purchaser". It then said that "the question to be addressed when considering the first category of causes is: Did Mr Henville's loss result directly from the misleading conduct and not from a supervening cause being the folly, error or misfortune of Mr Henville himself in relying on the defective feasibility study?"

118 In order to determine whether Mr Walker's conduct was a cause of the losses claimed, the Full Court looked at what Mr Henville would have done had the true position in regard to the market for the units been conveyed to him. The Full Court thought that, in this situation, Mr Walker would not have told Mr Henville that there was a "huge void" at the top end of the market in Albany. To the contrary, as the trial judge found, an accurate report would have conveyed that there was "little or no unsatisfied demand in Albany for top quality group residential units and no demand at all for units in the price range in question, that is $250,000 to $280,000". So far as price was concerned, the Full Court inferred that an accurate opinion would have put the potentially obtainable amount in the range of $210,000 to $230,000. Taking these matters into account, the Full Court concluded that but for Mr Walker's misleading conduct Mr Henville would not have proceeded with the development.

---

65 (1985) 157 CLR 215 at 222.

119 The Full Court effectively found, therefore, that Mr Walker's misrepresentations were at least one of the decisive considerations for Mr Henville's proceeding with the development. Yet it felt bound to embark upon a further inquiry as to whether Mr Walker's conduct, albeit an "essential condition" of Mr Henville's loss, was nevertheless "a cause" of it. The impetus for this further inquiry was the statement in *March*[66] that the mere fact that something constitutes an essential condition of an occurrence does not mean that it is properly to be seen as a "cause" of it. But that statement was made in the context of the Court's rejection of the "but for" test as the sole criterion of causation. The statement has no application in a case where a misrepresentation has induced a person to embark on a course of conduct – to enter into a contract or to buy land for the purpose of building units, for example. The issue with which the Court was dealing in *March* has nothing to do with a situation where a person makes misrepresentations that are intended to play a critical role, and do play that role, in another person's deciding whether or not to proceed with a course of action. As Gaudron J pointed out in *Kenny & Good*[67], in that situation the reliance of the representee is either "the decisive consideration or one of the decisive considerations for taking the course of action in question". Because it is decisive, the misrepresentation is correctly seen as causally connected with the course of action that follows.

120 The Full Court also relied on *M'Kew v Holland & Hannen & Cubitts (Scotland) Ltd*[68], a decision of the House of Lords to which Mason CJ referred in *March*. But the decision and the reasoning in *M'Kew* are far removed from the present case. In *M'Kew*, the plaintiff injured his left leg in an accident for which the defendant was at fault. As a result of the accident, the plaintiff's leg had a tendency to go numb, and he consequently lost control of it for short periods. The plaintiff sustained further injuries when he attempted to descend a steep staircase without a handrail or adult assistance, in the course of which his leg went numb and he had to take ten stairs in one leap. Although these injuries would not have occurred but for the original injury, the House of Lords refused to award the plaintiff damages, stating that a person "cannot hold the defendant liable for injury caused by his own unreasonable conduct"[69]. In *March*, Mason CJ viewed their Lordships' decision as denying recovery in situations

---

66 See for example the judgment of Mason CJ (1991) 171 CLR 506 at 517, where his Honour discusses the decision in *M'Kew v Holland & Hannen & Cubitts (Scotland) Ltd* [1970] SC (HL) 20.

67 (1999) 199 CLR 413 at 426 [19].

68 [1970] SC (HL) 20.

69 [1970] SC (HL) 20 at 25 per Lord Reid.

where "the plaintiff's injury was the consequence of his *independent and unreasonable* action"[70] (emphasis added). In *M'Kew*, the actions of the defendant did not directly contribute to the plaintiff's decision to put himself on that staircase, although they contributed to the injuries he sustained as a result.

121 In contrast to *M'Kew*, where the unreasonable conduct of the plaintiff was characterised as neutralising the effect of the defendant's negligence, Mr Walker's misrepresentations remained operative until the completion of the project that gave rise to the loss. Mr Henville relied on Mr Walker's statements about the demand for the proposed units and their likely selling price in preparing the very feasibility study that Mr Walker relies upon as negating causation. Furthermore, as the Full Court acknowledged, Mr Henville continued to rely on Mr Walker's misrepresentations even after the feasibility study had been completed, because "Mr Henville continued to assume that the units would realise $750,000".

122 However, the Full Court isolated Mr Henville's conduct in relation to the feasibility study in an attempt to identify whether it was the cause of the losses claimed. As this Court pointed out in *Medlin*[71], in the passage quoted earlier, such an approach is potentially misleading, particularly where the wrongful conduct was itself a direct or indirect contributing cause of the intervening act or decision. Asking itself the wrong question at this point led to an awkward chain of reasoning that was not only out of step with prevailing authority, but also obscured the integral part that Mr Walker's misrepresentations played in the preparation of the feasibility study.

123 The Full Court relied heavily upon the evidence of a quantity surveyor that indicated that the feasibility study understated the building costs by about $130,000. In assessing, "on a common sense basis", whether or not the feasibility study was properly to be regarded as a cause of the loss, the Full Court said:

> "[I]t has to be borne in mind that Mr Walker's misleading conduct said nothing about the design of the units (save that they were to be 'quality home units'), their method of construction, the project management, or the financing arrangements. All these factors were relevant to the ultimate result in which costs far exceeded the *expected* gross return of $750,000. Mr Walker would have been entitled to expect that his representations would not be acted upon without Mr Henville first satisfying himself that the likely costs of constructing the units would be such that the

---

70 (1991) 171 CLR 506 at 517.

71 (1995) 182 CLR 1 at 6-7.

> development would be profitable (*taking into account the represented return*)." (emphasis added)

124 The comments in this passage show that the Full Court looked at the issue of causation from the perspective of the appellant's conduct alone and applied the first of the two formulations to which it referred in the passage I have earlier set out. This focus obscured the Full Court's all but admission – in the parenthetical comment that I have emphasised – that Mr Walker's misrepresentations were at the very heart of Mr Henville's satisfying himself that the unit development would be profitable. Although Mr Henville carelessly prepared the cost side of the feasibility study, he relied on the prediction of $750,000 as the revenue the project would generate and the represented demand for the units[72]. If Mr Walker was entitled to expect that his misrepresentations would not be acted upon without Mr Henville first satisfying himself that the project would be profitable, why, with respect, was Mr Henville not equally entitled to expect that he could spend up to $750,000 without incurring a loss?

125 Furthermore, in assessing the feasibility study on the basis that the "expected" return on the units would be at least $750,000, the Full Court effectively dealt with the misrepresentations as if they were true. The adoption of this approach is clear in the terms of its conclusion that:

> "Were it not for Mr Henville's error in grossly underestimating the building costs, he would have realised that there was no prospect of the development realising his minimum profit expectations, *even if the units were sold for $750,000* and, indeed, there was a good prospect of a loss being incurred. He would then never have embarked on the project. On this basis, it seems to us, according to the criterion of common sense, Mr Henville was the author of his own misfortune and his conduct in preparing and relying on the erroneous feasibility study is to be regarded as the sole cause of his decision to proceed with the development." (emphasis added)

126 As Hayne J pointed out in *Chappel v Hart*[73] the search for a causal connection between damage and the breach of a legal norm requires consideration of the events that have happened and what would have happened if

---

72 Mr Henville stated in his examination in chief that if Mr Walker had told him there were no comparable sales of quality units in Albany, he would be one of the last persons, if not the last, to attempt to market units at this price. He certainly would not have proceeded to build them. Likewise, if Mr Walker had told him the units would only achieve a sale price with a lower range, he would not have proceeded.

73 (1998) 195 CLR 232 at 282 [113].

there had been no breach[74]. The Full Court took this approach earlier in its judgment when it determined that Mr Henville's loss would not have occurred but for Mr Walker's conduct. Only by changing the nature of the hypothetical inquiry, from one assuming the non-existence of the contravening conduct to one assuming its truth, could the Full Court have found that Mr Henville went ahead solely on the basis of the prospective profits that he had negligently calculated.

127 Moreover, the Full Court's approach ignores the fact that revenue is an indispensable factor in any calculation of profit. The Full Court said that profit was "the paramount factor" that led Mr Henville to embark upon the construction of the units. Yet while it emphasised that profit could not be calculated without estimating the costs, it glossed over the equal importance of estimating the revenue the project would generate[75]. Instead of acknowledging the interrelationship of revenue and cost in determining profit, the Full Court viewed them as completely separate causes:

> "In assuming that the profits would be at least between $80,000 and $100,000, he relied on the feasibility study, *as well as on Mr Walker's misleading conduct*." (emphasis added)

128 This reasoning led the Full Court to hold that the operation of the feasibility study was a "subsequent, separate, entirely independent inducing factor". It distinguished the present case from *Argy v Blunts & Lane Cove Real Estate Pty Ltd*[76] and *Sharp v Ramage*[77] where the losses could have been avoided but for the claimants' carelessness. In *Argy v Blunts*, the claimant, a solicitor, failed to give adequate attention to a planning certificate attached to a contract of sale[78]. In *Sharp v Ramage*, the claimants failed to make an inquiry as to the terms of a Crown Grant and the reservation contained therein. Had Mr Argy

---

74 See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 535 per Brennan J; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 457 [119] per Kirby and Callinan JJ.

75 The Full Court framed their expressions of the critical factors in terms such as "[a]part from the likely selling price, the cost of construction and related costs of developing the units were critical to the calculation of the expected profit".

76 (1990) 26 FCR 112.

77 (1995) 12 WAR 325.

78 Hill J found that a careful reading of the document would have revealed that it was defective, duplicating one page and omitting another that contained information negating the respondent's misrepresentations as to the water-frontage of the property: (1990) 26 FCR 112 at 134-135.

been more careful, and had Mr and Mrs Ramage made the inquiry, they would have found that the representations made to them were false. Yet in neither case did the Federal Court regard the claimants' behaviour as denying them a remedy. That was because the relevant misrepresentations remained operative factors inducing the claimants to act[79]. There is no logical reason why the same should not hold in this case, particularly when one accepts that, contrary to the opinion of the Full Court, even if Mr Henville had been more careful he would still not have realised the falsity of Mr Walker's representations.

129 Having found that Mr Walker's conduct was a cause of Mr Henville's proceeding with the development, and given that it played a vital role in the preparation of the defective feasibility study, the Full Court should have held Mr Walker liable for the losses sustained. Its emphasis on the feasibility study was the product of the Full Court's belief that the feasibility study was an intervening act, divorced from Mr Walker's contravention of the Act.

Damages

130 This Court has addressed the question of assessment of damages under s 82 on several occasions[80]. The Court has concluded that in most cases the measure of damages in tort is the appropriate guide in determining an award of damages under s 82[81]. However, in assessing damages under s 82, courts are not bound to choose between the measure of damages in deceit or other torts or contract[82]. In *Marks v GIO Australia Holdings Ltd*[83], the Court said that the central issue under s 82 is to establish a causal connection between the loss claimed and the contravening conduct[84]. Once such a connection is found to exist, nothing in s 82 suggests that the recoverable amount should be limited by drawing an analogy with contract, tort or equitable remedies although they will

---

79 *Argy v Blunts* (1990) 26 FCR 112 at 138 per Hill J; *Sharp v Ramage* (1995) 12 WAR 325 at 328 per Ipp J.

80 See for example *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494.

81 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 290.

82 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 14.

83 (1998) 196 CLR 494.

84 See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525.

usually be of great assistance[85]. As Gummow J said in *Marks*[86], "[a]nalogy, like the rules of procedure, is a servant not a master".

131 Indeed, general principles for assessing damages may have to give way altogether in particular cases to solutions best adapted to give the injured claimant an amount which will most fairly compensate for the wrong suffered[87].

132 In this case, the most appropriate approach is to identify what Mr Henville has suffered by way of prejudice or disadvantage in consequence of altering his position by reason of the breach of the Act[88]. The measure of that loss is not determined by reference to what he would have received if Mr Walker's representations had been true. As the New Zealand Court of Appeal pointed out in *Cox & Coxon Ltd v Leipst*[89], a case concerned with s 43(1) of the *Fair Trading Act* 1986 (NZ), a representation can give rise to a claim for a lost benefit or loss of expectation only where there is an obligation to perform the representation. The Court of Appeal held that s 43(1) was directed against the making of a false representation, as opposed to the failure to perform it. Similarly, the wrong which s 52 of the Act prohibits is the making of, not the failure to honour, the false representation. By entering upon the project, Mr Henville has lost $319,846.51. If Mr Walker had not made representations in breach of the Act, none of this loss would have occurred. The loss suffered is therefore directly attributable to a contravention of the Act even though other factors played their part in bringing about the loss.

133 If the action were one of deceit at common law, I see no reason why, subject to the issue of remoteness, the whole of the loss of $319,846.51 would not be recoverable. At common law, the established rule is that in an action for deceit, the plaintiff "is entitled to recover as damages a sum representing the prejudice or disadvantage he [or she] has suffered in consequence of his [or her] altering his [or her] position under the inducement of the fraudulent misrepresentations"[90]. In an action for damages for deceit, the damages are

---

85 (1998) 196 CLR 494 at 503-504 [17] per Gaudron J, 510 [38] per McHugh, Hayne and Callinan JJ, 529 [103] per Gummow J, 549 [152] per Kirby J.

86 (1998) 196 CLR 494 at 529 [103].

87 *Johnson v Perez* (1988) 166 CLR 351 at 355-356 per Mason CJ.

88 *Toteff v Antonas* (1952) 87 CLR 647 at 650; referred to, *inter alia*, in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 512 [41].

89 [1999] 2 NZLR 15.

90 *Toteff v Antonas* (1952) 87 CLR 647 at 650.

measured by reference to how much worse off the plaintiff is as a result of being fraudulently induced to take the course of action that he or she did[91]. The loss that the plaintiff can recover includes consequential losses flowing directly from the misrepresentation[92] including losses from opportunities forgone[93].

134 Here the misrepresentations induced Mr Henville to enter into a contract and to construct units under the belief that the project would produce a substantial profit. If there had been no misrepresentations, Mr Henville would not have embarked on the course that he did and the loss that he suffered would have been avoided. That being so, his loss was a direct result of the misrepresentations and would have been recoverable in an action for damages for deceit. Moreover, I think that in a general way the loss was a reasonably foreseeable consequence of the misrepresentations. Although Mr Henville badly underestimated the cost of constructing the units, nothing in the findings of Anderson J or the Full Court demonstrates that any of the costs were unreasonably incurred. Matters such as the project being delayed with a consequential increase in costs and interest rates rising are matters that in the ordinary course of a development are reasonably foreseeable.

135 Nor do I see any reason why the principles applicable in an action for deceit at common law should not be applied in the present case. The purposes of the Act include promoting fair trading and protecting consumers from contraventions of the Act. Those purposes are more readily achieved by ensuring that consumers recover the actual losses they have suffered as the result of contraventions of the Act. Where a person contravenes the Act and induces a person to enter upon a course of conduct that results in loss or damage, an award of damages that compensates for the actual losses incurred in embarking on that course of conduct best serves the purposes of the Act and should ordinarily be awarded. In *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)*[94], Gummow J said, correctly in my opinion:

---

91 *Toteff v Antonas* (1952) 87 CLR 647 at 650; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 12.

92 *Potts v Miller* (1940) 64 CLR 282 at 297-298; see also *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 167; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 12.

93 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 167; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 at 820-821, 828-829; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 13.

94 (1987) 16 FCR 410 at 418-419.

> "Wrapped up within s 82 are ... concepts the common law would describe by the terms 'causation' and 'remoteness' and 'measure of damages'. ... [I]t would be an error to translate automatically to the particular statute what appeared the closest analogue from the common law 'rules' as to causation. It is rather a question of statutory construction. ... Thus, in construing s 82 it is appropriate to bear in mind such matters as the scope and purpose of Pts IV and V ... the wide range of subject-matters dealt with in Pts IV and V but all linked to s 82 ... the absence of any direct provision to apportion responsibility for loss or damage ... and the apparent telescoping of what to the common law would be issues of causation, remoteness and measure of damages."

136 Given the long history of the common law's recognition of the concept of remoteness in assessing damages in contract and tort and its relationship with the issue of causation, it seems proper to read the term "by" in s 82 as including the concept of remoteness. By remoteness, I mean that the loss or damage was not reasonably foreseeable even in a general way by the contravener. Remoteness in this sense is very different from the concept of remoteness formulated by Winn LJ in *Doyle v Olby (Ironmongers) Ltd*[95] and cited and apparently approved by Lord Browne-Wilkinson in *Smith New Court Securities Ltd v Citibank NA*[96]. In *Doyle*, Winn LJ said[97] that in an action for fraud "no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence". But he then went on to say[98]:

> "[I]t will be too remote not necessarily because it was not contemplated by the representor, but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense, or can in any true sense be said to have been the author of his own misfortune."

137 With great respect, this passage with its references to "reasonable prudence" and "reasonable common sense" confuses remoteness with contributory negligence and causation.

138 There was a time in the common law when contributory negligence was seen as negativing the causal connection between the breach of duty and the damage suffered. That is why, at common law before the enactment of the Hilary Term Rules of 1834, contributory negligence could be raised under the

---

95 [1969] 2 QB 158 at 168.

96 [1997] AC 254 at 264.

97 [1969] 2 QB 158 at 168.

98 [1969] 2 QB 158 at 168.

plea of not guilty[99]. Moreover, until the enactment of the apportionment statutes, the common law illogically, and for no justifiable reason in legal principle or policy, treated contributory negligence as a complete defence to some actions in tort. Despite that rule, it has long been established that "contributory negligence is concerned with the failure of the plaintiff to protect his or her person or property against damage and not with whether the failure contributed to the *accident*"[100]. There may, of course, be cases where the injured person's failure to take care is such that it can be characterised as the sole cause of the loss or damage suffered. In that event, there will be no causal connection between the breach of the Act and the "loss or damage" to which s 82 refers. But it has nothing to do with remoteness of damage.

139 In my opinion, the remarks of Winn LJ in *Doyle* are wrong in principle. They should not be followed even in actions for fraud, the class of action with which *Doyle* was concerned. And they certainly should not be regarded as having any authority in respect of actions concerned with s 82 of the Act.

140 Nothing in the common law, in ss 52 or 82 or in the policy of the Act supports the conclusion that a claimant's damages under s 82 should be reduced because the loss or damage could have been avoided by the exercise of reasonable care on the claimant's part. There is no ground for reading into s 82 doctrines of contributory negligence and apportionment of damages. No doubt, if part of the loss or damage would not have occurred but for the unreasonable conduct of the claimant, it will be appropriate in assessing damages under s 82 to apply notions of reasonableness in assessing how much of the loss was caused by the contravention of the Act[101]. But that proposition is concerned with the items that go to the computation of the loss. As I have pointed out, nothing in the judgments of the courts below shows that there was any unreasonable conduct on the part of Mr Henville in incurring costs or raising revenue.

141 Underlying the notion that Mr Henville should not recover the actual loss that he incurred by reason of Mr Walker's contravention of the Act seems to be the assumption that he was partly to blame for his misfortune. Given that assumption, Anderson J appears to have concluded that Mr Henville should not recover all the actual loss because, even if the representation had been true, he would still have sustained loss. Rather than compensate Mr Henville for his

---

99 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 33 [76]-[77].

100 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 11 [21] (original emphasis).

101 *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1993) 118 ALR 565 at 575 per Hodgson J.

actual loss, Anderson J assessed the "loss" as if the claim was one for breach of warranty. His Honour said:

> "A representation that a development will be worth a certain amount when completed has no capacity to cause losses at large. ... Losses which are really down to extravagant design, to the lack of a proper costing of the proposed design, to the lack of financial resources to complete the development embarked on and to the failure to get the project finished in a reasonable time are not losses suffered by a misrepresentation as to the market value which the development will have on completion."

142 His Honour ruled out the amount that the units actually cost to build as an appropriate basis on which to measure Mr Henville's recoverable loss. Instead, his Honour found that the upper limit of the primary loss should be calculated by reference to a price of $250,000 per unit. Mr Henville had proceeded with the development because he had been told, and believed, that the units would each fetch at least that amount. His Honour thought that limiting the primary loss in this way brought to account in Mr Walker's favour matters such as careless costing, inadequate planning, insufficient funding and excessive delays. It also placed at Mr Henville's feet:

> "the losses occasioned by the weaknesses in the plaintiff's own feasibility study pursuant to which the plaintiff judged that the particular development which he designed could be undertaken profitably on a gross selling price of $250,000 per unit."

143 Anderson J, therefore, awarded damages against Mr Walker of $205,000, being the difference between $750,000 and the aggregate sale prices achieved at auction ($545,000). His Honour also awarded interest to be calculated only from 1 June 1997 in order to allow a reasonable period for the sale of the units at the represented price to elapse.

144 Given its findings as to causation, it was strictly unnecessary for the Full Court to address the issue of damages. Nevertheless, it held that the approach of Anderson J had no justifiable basis in law. In my opinion, the Full Court was correct in so holding. With respect, the approach of Anderson J overlooks one of the fundamental purposes of the Act – which is to protect consumers from being induced to enter into agreements and transactions by false or misleading conduct. The loss to a consumer from acting on such an inducement will usually be greater than the amount recoverable by treating the representation as a warranty. An award of damages under s 82 will therefore ordinarily be inadequate to achieve one of the main purposes of the Act unless the claimant is compensated

for what he or she has "suffered in consequence of his [or her] altering his [or her] position under the inducement of the fraudulent misrepresentations"[102].

145 Mr Henville's loss was not confined to the difference between what was represented as the selling prices of the units and their sale prices. Mr Walker's contravention of the Act induced Mr Henville to enter upon a course of conduct that resulted in a greater loss than that difference. To fail to compensate him for that loss does not accord with the purposes of the Act.

146 However, the approach of the Full Court was also erroneous. Their Honours said that the cost overruns and delays were cumulative causes of Mr Henville's overall loss in the sense that each independently contributed thereto. Since it was not impossible to segregate the effect of those losses, it was necessary for Mr Henville to prove their quantum. In the absence of evidence enabling such losses to be identified and assessed, there was no way to establish the amount of the loss that was attributable to Mr Walker's misleading conduct. Mr Henville had therefore failed to prove any entitlement to damages.

147 However, in the absence of evidence that the cost overruns and delays were unreasonable or reasonably unforeseeable, the lack of evidence enabling these costs to be identified could not affect Mr Henville's right to be compensated for his *actual* loss. It is unnecessary, therefore, to determine whether Mr Henville was correct in contending that in any event Mr Walker bore at least an evidentiary onus of proving the costs of the overruns and delays[103].

148 Arguably, once a plaintiff demonstrates that a breach of duty has occurred that is closely followed by damage, a prima facie causal connection will be established. It is then for the defendant to show that the plaintiff should not recover damages. In the words of Dixon CJ in *Watts v Rake*[104], it is the defendant who must disentangle, so far as possible, the various contributing factors.

149 In this Court, Mr Walker has put forward two amounts as representing the damages to which Mr Henville was entitled if he succeeded on the causation issue – (1) $125,000 and (2) $200,512.51. It is unnecessary to refer to the details

---

102 *Toteff v Antonas* (1952) 87 CLR 647 at 650.

103 *Vyner v Waldenberg Bros Ltd* (1945) 61 TLR 545 at 546; *Betts v Whittingslowe* (1945) 71 CLR 637 at 648-649; *Watts v Rake* (1960) 108 CLR 158 at 160; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 22; *Chappel v Hart* (1998) 195 CLR 232 at 273 [93].

104 (1960) 108 CLR 158 at 160.

of these claims. Both of them were variations of the general approach of the trial judge and the reasoning that gave rise to each figure was incorrect in principle.

150 In my opinion, Mr Henville was entitled to damages for his actual loss. However in this Court, he sought no more than that the award of damages made by Anderson J should be reinstated. Since that was a lesser sum than that to which I think he was entitled, it is proper to reinstate his Honour's award.

Order

151 The appeal should be allowed and the orders of Anderson J reinstated.

152 GUMMOW J. I would allow the appeal with costs. The orders of the Full Court should be set aside and in place thereof the appeal to that Court should be dismissed with costs.

153 I agree with the reasons for judgment of McHugh J and Hayne J.

154 HAYNE J. The facts which give rise to this appeal are set out in the reasons of other members of the Court. I do not repeat them.

155 It is now not disputed that, by giving a wrong estimate of the likely selling price of the home units which the appellants were considering building, the respondents misled or deceived the appellants in contravention of Pt V of the *Trade Practices Act* 1974 (Cth) ("the Act"). (As the reasons of other members of the Court reveal, it is not necessary to distinguish between the corporate and the individual parties.) It is equally clear that, by making a wrong estimate of the likely costs of the development, the appellants miscalculated the probable financial outcome of their proceeding with it. Both of these events, the wrong estimate of price and the wrong estimate of costs, form part of, and played a role in, the history that lies behind the fact that the appellants lost more than $300,000 on the project. The question is to what extent, if any, did the appellants suffer loss "by" (that is, caused by) the respondents' misleading conduct?

156 If the traditional "but for" test, the test of necessity, is applied to the history I have described, neither the overestimation of the selling price, nor the underestimation of the costs, will be seen as the single cause of the *whole* of the loss that the appellants sustained. It cannot be said of either of these steps that, but for its occurrence, the appellants would not have sustained the amount of loss that they did suffer. Yet it can be said of each step that it was a necessary element of the set of circumstances that, together, were sufficient to bring about the loss that was sustained. Each played its part in the history of the events; each was *a* cause of what happened. Moreover, the two steps were *concurrent* causes of what happened. It cannot be said of either estimate that it was, in any sense, an intervening event.

157 The question which is presented in this case then becomes whether s 82(1) of the Act requires some limiting of the consequences for which the respondents are to be held liable. Is it enough for the appellants to demonstrate that the respondents' contravention of the Act was *a* cause of the appellants' suffering the loss they did? Does s 82 require only that the contravention played a role in the history of the events connecting the contravening conduct and the loss sustained? That is, is s 82 concerned only with establishing that the contravening conduct played a role in the history of the events that culminated in the loss sustained? Are there some limits to the recovery that is permitted, or are the respondents to be liable for all of the loss that the appellants sustained?

158 It is clear that s 82 requires that the contravening conduct have played a role in the history of the events and that the role required is one of causation. Section 82(1) of the Act speaks of "[a] person who suffers loss or damage *by* conduct of another person that was done in contravention" (among other things) of Pt V of the Act being entitled to recover "the amount of the loss or damage". That is, s 82 provides that a person may recover the amount of the loss or damage *caused* by the conduct in question, here a contravention of Pt V.

159 In the present case, the respondents' contravention of the Act can be seen to have caused the appellants' damage because the appellants relied on the respondents' misleading or deceptive conduct in deciding to proceed with the project. The amount of the loss ultimately suffered by the appellants was, however, brought about by the combination of circumstances of which the respondents' misleading and deceptive conduct was only one factor. The appellants' mistaken estimate of costs was another. How is s 82(1) of the Act to operate in such a case?

160 First, it is necessary to identify the loss sustained by the appellants. The loss which the appellants suffered is a single sum. It is the amount by which their expenditures exceeded their receipts. Several different items must be taken into account in computing the amount expended and the amount received, but the loss is the single sum remaining after receipts are subtracted from expenditures. Further, the whole of that loss was brought about by the decision to proceed with the project, a decision which was, as I say, made in reliance upon the wrong estimates of both costs and likely receipts. (Other considerations may well intrude if, for example, the amount of the loss had been inflated by a decision to change the plans in the course of construction.)

161 Both the estimate of likely receipts and the estimate of likely expenditures were wrong. That does not mean, however, that, in this case, attention can be confined to one side of the profit and loss account in determining what loss and damage was caused by the respondents' misleading and deceptive conduct. The question presented by the statute is what loss was suffered by the appellants that was caused by the relevant contravention?

162 The conclusion that the appellants suffered loss requires comparison between the position in which the appellants found themselves after the project was finished, and the position in which they would have been if, instead of relying on what they were told by the respondents, they had not undertaken the project. It does not invite attention to what would have been their position if an accurate estimate of selling price had been given by the respondents[105]. Moreover, the conclusion that the appellants suffered loss neither requires nor permits consideration of some third or intermediate position in which the appellants undertook some project or transaction other than the one they did. It is, therefore, not relevant to consider what the loss might have been if costs had been estimated properly.

163 Secondly, seldom, if ever, will contravening conduct be the *sole* cause of a person suffering loss. Other factors will always be capable of identification as a

---

105 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 514-515 [48]-[52].

cause of the person suffering loss. In a case like the present, the appellants' *relying* on the respondents' estimate of likely receipts can be seen to be a cause of their loss. What the Act directs attention to is whether the contravening conduct was *a* cause. It does not require, or permit, the attribution of some qualification such as "solely" or "principally" to the word "by".

164 Thirdly, it is necessary to recognise that, on its face, the section permits recovery of the whole of the loss sustained by a person who demonstrates that a contravention of Pt V of the Act was a cause of that loss. Neither the words of s 82(1) nor anything in the intended scope and context of the Act suggest some narrower conclusion.

165 In particular, nothing in the text of s 82(1) (or any of the other provisions of the Act) suggests that the carelessness of the person who suffers loss or damage as the result of contravention of the Act should be taken into account in deciding what was the amount of loss or damage actually suffered. Nor is some such limitation to be derived from considering the intended purposes of the Act. The very simplicity of the language used in s 82(1) appears to confine attention to the limited question of the historical relevance of the contravening conduct to the loss or damage sustained. It does not provide a basis for concluding that notions of contributory fault are to be given a place in its operation.

166 There may be cases where some of the loss suffered by a person following – and I use the word "following" in a neutral sense – the conduct of another in contravention of the Act may not be loss suffered by that person by the contravening conduct. Had the appellants chosen, for wholly extraneous reasons, to change the design of the units, part way through their construction, in such a way as to waste some costs of construction already incurred, it might be said that the extra costs incurred were not caused by the respondents' contravention. Whether, as Gaudron J suggests[106], it would be for the contravener to demonstrate in such a case that part of the loss suffered was not attributable to the contravention is a point I need not decide. For the moment, it is enough to say that it seems to me that such questions must find their answers within the Act rather than in analogies with common law. Thus, if notions of remoteness of damage or reasonableness are to find reflection in s 82(1) it seems probable that they may do so only through consideration of the causation question which the sub-section poses. As Professor Stapleton has pointed out[107], questions of remoteness of damage in tort can be seen in terms of causation. Likewise, asking what is "reasonable" in assessing how much of the loss was caused by the

---

106 Reasons of Gaudron J at [70].

107 Stapleton, "Perspectives on Causation", in Horder (ed), *Oxford Essays in Jurisprudence* (2000) 61 at 72, 75-76, 78-80.

contravention may invite attention to the nature and extent of the causal connection between the loss and contravening conduct. This case does not present such questions and it is not necessary to decide them.

167 I agree with McHugh J that the appellants were entitled to recover the whole amount lost. Nevertheless, the appellants having limited their claim as they have, the appeal should be allowed with costs, the orders of the Full Court of the Supreme Court of Western Australia set aside, and in lieu it be ordered that the appeal to that Court be dismissed with costs.