HIGH COURT OF AUSTRALIA

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

I & L SECURITIES PTY LTD APPELLANT

AND

HTW VALUERS (BRISBANE) PTY LTD RESPONDENT

I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd
[2002] HCA 41
2 October 2002
B48/2001

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of Queensland dated 22 September 2000 and, in its place, order that the appeal to that Court be allowed, that the judgment entered by Williams J on 22 October 1999 and the order of Williams J made on 8 November 1999 be set aside, and that there be judgment for the plaintiff for $661,481.53.*

3. *Respondent to pay the appellant's costs at first instance, in the Court of Appeal and in this Court.*

On appeal from the Supreme Court of Queensland

Representation:

P A Keane QC with J D McKenna for the appellant (instructed by Deacons Lawyers)

D F Jackson QC with P D T Applegarth SC for the respondent (instructed by Thynne & Macartney)

CATCHWORDS

I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd

Trade practices – Misleading or deceptive conduct – Enforcement and remedies – Loan transaction – Mortgage over land – Misleading and deceptive valuation of land by valuer – Failure by lender to make reasonable inquiries as to borrower's capacity to meet interest payments – Default on loan by borrower – Proceeds of sale by mortgagee insufficient to meet borrower's obligation – Liability of valuer for loss and damage suffered by lender – Causal connection between contravention of *Trade Practices Act* 1974 (Cth) and loss and damage suffered – Whether damages awarded under s 82 of the *Trade Practices Act* 1974 (Cth) to be reduced for lender's failure to take reasonable care to protect its own interests.

Trade Practices Act 1974 (Cth), ss 52, 82, 87.

1 GLEESON CJ. The issue in this appeal concerns the extent of the respondent's liability to the appellant, which suffered loss or damage by conduct of the respondent which contravened s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act"). The misleading or deceptive conduct involved an erroneous valuation of real estate over which a mortgage was to be given as security for a loan by the appellant. Relying upon the valuation, the appellant made the loan. The borrower defaulted, and the security, when realised, was insufficient to meet the borrower's liability. The appellant sued for the deficiency and related losses. The appellant was found to have failed to exercise reasonable care to protect its own interests, in that it did not take proper steps to investigate the credit-worthiness of the borrower. The principal question is whether the amount of the respondent's liability to the appellant should be reduced on that account. As the case was argued, and as it was decided in the Supreme Court of Queensland, the answer to that question depends upon the meaning and effect of ss 82 and 87 of the Act.

The appellant's claim

2 The borrower, Camworth Pty Ltd, owned land at Acacia Ridge, in Queensland, which it proposed to subdivide and develop. It owed money to a financier and to a construction company. During 1995, it sought re-financing. On 2 March 1995, the borrower obtained, from the respondent, a valuer, a valuation of its land at $1.576m. In July 1995, it sought a loan from the appellant of $950,000 on the security of a first mortgage over the land, and supplied the valuation report in support of its application. The respondent wrote to the appellant advising that the valuation report could be relied upon in connection with the proposed loan. On that basis, the appellant approved the loan, and it was made.

3 The term of the loan was 12 months from the date of settlement (28 July 1995). The rate of interest was 19.5% per annum, payable monthly, reducible to 13.5% if payments of interest were met as they fell due.

4 The borrower defaulted when the first interest payment fell due. The appellant took all reasonable steps to realise the security. The mortgaged land was ultimately sold on 8 January 1997. The net proceeds of sale amounted to $592,367. There was no suggestion that the appellant acted other than prudently in the exercise of its power of sale. The borrower was put into liquidation, which yielded nothing.

5 The appellant's claim, with the figures adjusted in accordance with the findings of the trial judge, was as follows:

1.	Difference between amount of loan and proceeds of sale	$357,632.31
2.	Lost interest for period 1.8.95 - 31.7.96	$120,650.00
3.	Expenses connected with exercise of power of sale	$34,103.35
4.	Interest on amount in item 3	$7,302.66
5.	Interest pursuant to *Supreme Court Act* 1995 (Q)	$135,441.90
6.	Legal costs	$6,351.31
	Total	$661,481.53

The decisions in the Supreme Court of Queensland

6 The appellant's claim was for breach of contract, negligence, and contravention of Pt V (specifically, s 52) of the Act. The action in contract failed, and may be disregarded. The respondent admitted both negligence and misleading and deceptive conduct.

7 The trial judge, Williams J, found that the appellant had contributed to the loss by failing to take reasonable steps to assess the ability of the borrower to repay and failing to perform any proper risk assessment with respect to the borrower. He found that there would have been no loan, regardless of the value placed on the land, if the appellant had made proper enquiries about the borrower's capacity to service the loan. On the claim in negligence, he reduced the amount of damages by one-third on account of contributory negligence, applying the relevant apportionment legislation. That aspect of the decision is not in issue in this appeal.

8 The present appeal arises out of the manner in which the Supreme Court dealt with the claim under the Act. In brief, the trial judge dealt with it in the same way as he dealt with the claim in negligence. He held that, in assessing the amount to be awarded under s 82 of the Act, it was appropriate to reduce the appellant's claim by one-third. There were, he reasoned, "two independent causes of the loss sustained by the [appellant]." The first was the misleading and deceptive conduct of the respondent in the representation made as to the value of the land. The second was the conduct of the appellant in failing to make reasonable enquiries as to the financial capacity of the borrower. In applying s 82, Williams J held that he was entitled to adopt an approach "broadly similar to that which would apply in determining apportionment of negligence." There was judgment for the appellant for $440,987.68.

9 The appellant appealed to the Court of Appeal of the Supreme Court of Queensland, challenging the trial judge's decision as to the amount to be awarded under the Act. There was, the appellant contended, no justification for reducing the amount by reference to the appellant's failure to take reasonable care to protect its own interests in the manner found.

10 The Court of Appeal (McPherson, Pincus and Thomas JJA, Moynihan SJA and Atkinson J) upheld the decision of the primary judge, but on a different basis[1]. Whereas Williams J had applied s 82 according to what he regarded as its legal effect in a case such as the present, the Court of Appeal based its reasoning upon s 87 of the Act. As will appear, that involved a difference of opinion as to the operation of s 82.

11 In this Court, the respondent relies, in the alternative, upon each approach. It is convenient to deal first with the reasoning of the Court of Appeal and then that of Williams J.

The statutory provisions

12 Sections 82 and 87 of the Act are in Pt VI, which deals with enforcement and remedies. It is important to bear in mind, when considering their operation, that they have potential application to a wide range of conduct proscribed by the Act and, in the case of s 87, to remedies that may be sought in a wide range of circumstances. We are at present concerned with their operation in the case of a claim for damages incurred by reason of a carelessly made false and misleading representation. It would be wrong to regard that as the paradigm case in which the sections were intended to apply. It is simply one of a number of different circumstances in which each provision might be invoked.

13 Section 82 provided, relevantly:

> "(1) 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."

14 The section has since been amended to refer to additional statutory provisions, but the amendments are presently immaterial.

15 It is only necessary to read the provisions of Pt IV and Pt V to observe the extent of the kinds of conduct that could amount to a contravention. And it is not only the contravener who may be liable under s 82; it may be another person "involved" in the contravention. The possible conduct of a defendant may cover the entire spectrum of degrees of fault. It may be conduct that, apart from the statute, would not be regarded as involving any kind of fault at all. In the case of a misrepresentation, the defendant's conduct might be fraudulent, or (as here) careless, or innocent.

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

16 The section has nothing explicit to say about the conduct of a plaintiff, except that the plaintiff has suffered loss or damage by contravening conduct of another person. And it has nothing to say, except in one pregnant preposition, "by", about the significance, in measuring the extent of a defendant's liability, of factors other than the contravening conduct which may have contributed to a plaintiff's loss or damage. Such factors, of course, could include the plaintiff's own conduct, the conduct of third parties, or events or circumstances outside the control of anyone.

17 Section 87 follows a series of provisions dealing with various forms of relief available in the case of actual or threatened conduct of a kind proscribed by the Act. Those provisions relate to such matters as pecuniary penalties (ss 76, 77), injunctions (s 80), orders for disclosure of information or publication of advertisements (s 80A), orders for divestiture of assets (s 81), and actions for damages (s 82). Section 87 is headed: "Other orders". It is an extensive provision, and while the portion of direct present relevance is quoted below, it has to be read in the context of the entire section. Sub-section (1) of s 87 provided:

> "Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage."

18 It is the reference, in the concluding words of that provision, to compensating a person "in whole or in part for the loss or damage" that formed the basis of the reasoning of the Court of Appeal. Those words, the Court of Appeal said, have the effect that an order may be made requiring a defendant to compensate a plaintiff for part only of a loss which is causally connected with the contravention complained of[2]. In that respect the Court of Appeal was following an earlier decision of Pincus J in *S & U Constructions Pty Ltd v Westworld Property Holdings Pty Ltd*[3], a decision which Hodgson J in the Supreme Court of

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2 (2000) 179 ALR 89 at 94 [22].

3 (1988) ATPR ¶40-854.

New South Wales had declined to follow in *Tefbao Pty Ltd v Stannic Securities Pty Ltd*[4]. I consider that Hodgson J was correct.

Section 87

19 Section 87 confers discretionary powers which may be exercised in the context of applications for many other forms of relief. The reference to an order compensating a person in part for loss or damage suffered, or likely to be suffered, by contravening conduct contemplates the possibility that such partial compensation may be sufficient to do justice to a plaintiff. That may be, for example, because other relief has been granted which makes full financial compensation unnecessary or inappropriate. But the critical question is whether the discretionary power conferred by s 87 may, in a given case, qualify what appears to be a right of recovery conferred by s 82.

20 As the facts in *Henville v Walker*[5] appeared to me to illustrate, where a person has suffered loss or damage *following* conduct of another person in contravention of Pt IV or V of the Act, there may be a serious question for judgment as to the amount of the loss or damage that was suffered *by* the contravening conduct. It will be necessary to return to such a question in relation to the operation of s 82 in the present case. However, once the amount of the loss or damage suffered by contravening conduct is established, then that is the amount which, pursuant to s 82, a plaintiff has a right to recover. That right is not made subject to s 87, either expressly or by implication. There is no warrant for reading s 87 as conferring upon a court a discretionary power to take away, or modify, the right conferred by s 82. And, when regard is had to the wide range of circumstances to which s 87 might apply, it is not necessary to treat the power in s 87 to make an order for part compensation as qualifying s 82 in order to give that power ample scope for practical application.

21 This conclusion does not involve giving s 87 a restrictive interpretation[6]. Rather, it involves giving s 87 an interpretation consistent with s 82. That s 82 confers a right to compensation was accepted by this Court in *Sent v Jet Corp of Australia Pty Ltd*[7]. It appears from the language of the section itself. The amendment to the Act following *Sent* did not alter that aspect of s 82.

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4 (1993) 118 ALR 565 at 575.

5 (2001) 206 CLR 459.

6 cf *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 364 per Mason P.

7 (1986) 160 CLR 540 at 544.

22 The conclusion is supported by a comparison of ss 82 and 87 with the provisions of s 75AN, which introduce concepts of apportionment in a special and limited context.

23 The respondent's reliance upon s 87 is misplaced. That section did not empower the Supreme Court of Queensland to award judgment for less than the amount of the loss or damage suffered by the appellant by the contravening conduct of the respondent. By hypothesis, since the Court of Appeal considered that, in upholding the judgment at first instance, it was compensating the appellant for only part of the loss or damage suffered by the conduct of the respondent, it disagreed with the trial judge as to how the amount of that loss or damage was to be assessed. The Court of Appeal obviously decided that the amount of the loss or damage suffered by the conduct of the respondent in contravention of s 52 was $661,481.53, of which it was only prepared, in its discretion, to award part ($440,987.68). It remains to be considered whether the trial judge was justified in his approach to the assessment of the whole amount of the loss or damage at $440,987.68, or whether the Court of Appeal was right in concluding that the amount, for the purposes of s 82, was $661,481.53.

Section 82

24 The amount claimed by the appellant was the whole of the loss it suffered in the loan transaction. The case is not complicated by reason of the effect upon the ultimate financial outcome of factors of the kind that were described in *Henville v Walker*[8] as "extraneous". For example, that outcome was not made worse by reason of any unreasonable delay, or want of prudence, on the part of the appellant in the steps it took to realise the security following the borrower's default. There was no problem, of the kind considered in *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[9], arising out of abnormal fluctuations in the market value of land. This was not a case in which, in reliance upon a misrepresentation, a party entered into a complex business venture, with adverse consequences unrelated to the falsity of the misrepresentation in any sense other than that, but for the misrepresentation, the venture would not have been undertaken[10].

25 Even so, the possible existence, in different circumstances, of those and other complications directs attention to the kinds of problem inherent in the word "by" in s 82. Where the kind of contravention of s 52 of the Act that is involved

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8 (2001) 206 CLR 459.

9 (1999) 199 CLR 413.

10 cf *Henville v Walker* (2001) 206 CLR 459 at 474-475 [36].

is a misrepresentation, including the expression of an erroneous opinion, which induces a person to enter into a transaction which results in financial loss then, depending upon the way in which a claim for loss or damage under s 82 is formulated, it will be common for the amount of the loss or damage as claimed to be affected by factors in addition to the particular factor that was the subject of the misrepresentation. The misrepresentation will rarely be the sole cause of the loss. In statements of principle concerning the common law of contract or tort, additional factors which affect loss or damage are often discussed under the rubrics of remoteness, mitigation, or contributory negligence. Here we are concerned, not with common law principles, but with statutory rights and liabilities. However, the same problems arise, and must be dealt with in conformity with the statute.

26 The relationship between conduct of a person that is in contravention of the statute, and loss or damage suffered, expressed in the word "by", is one of legal responsibility. Such responsibility is vindicated by an award of damages. When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose.

27 Leaving to one side a particular argument as to lost interest relied upon by the respondent, which will be dealt with below, neither party, and none of the judges in the Supreme Court of Queensland, suggested that it is possible to identify part of the loss or damage suffered by the appellant that was attributable to a separate cause for which the respondent could not be held legally responsible. An example might be a case in which there had been grossly unreasonable conduct on the part of a lender in realising a security; conduct that in a common law context may be regarded as a supervening cause of part of the ultimate loss. This was not said to be such a case. Nor was there any act of a third party, or the influence of any external event or circumstance (except, of course, the insolvency of the borrower, which was the very risk against which the security was taken), that contributed to the financial outcome of the loan transaction.

28 In *Henville v Walker*[11] reference was made to losses resulting from factors, other than the misrepresentation, which might be regarded as "losses attributable

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11 (2001) 206 CLR 459 at 469-470 [17].

to causes which negative the causal effect of the misrepresentation"[12], for which a defendant could not be held legally responsible.

29 An example of a case in which the measure of loss or damage under s 82 was affected in that way is found in the decision of Hodgson J, earlier mentioned, in *Tefbao Pty Ltd v Stannic Securities Pty Ltd*[13]. A purchaser of land believed it to be at least 12 acres, when in fact it was only 10.75 acres. This belief resulted from misleading conduct by the vendor's agent. The purchaser had been willing to pay around $50,000 per acre. Hodgson J said[14]:

> "It is clear that the contravention need not be the only cause of the loss or damage … However, if some other cause is properly to be treated as 'the real, essential, substantial, direct, appreciable or effective cause' of the damage, the fact that the damage would not have occurred but for the contravention need not be enough for liability. If *some part of the damage* would not have occurred but for negligent conduct of the claimant, or failure to mitigate, then it may be appropriate to apply notions of reasonableness in assessing how much was in truth caused by the contravention …
>
> In the present case … it may be possible to identify a part of that damage which can be regarded as the result of something other than the misleading conduct: the cross-claimants were willing to pay around $50,000 per acre, and were prepared to go ahead, when they had reason to believe merely that the lot was at least about 12 acres, with 12.5 acres being merely a possibility. In so far as their damage arises from willingness to pay around $50,000 per acre overall, and willingness to contract for around 12 acres, I do not think this should be regarded as caused by the misleading conduct. That is, I think their damages should be no greater than an amount calculated at $50,000 per acre on the difference between 12 acres and 10.75 acres." (emphasis added)

30 What Hodgson J meant by the first paragraph is made plain by what he did in assessing damages under s 82, as explained in the second paragraph. Such reasoning conforms to the statute. But the present is not a case where there is some part of the damage of which the respondent's conduct was not a cause.

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12 The quoted words are those of Lord Hoffmann in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 216.

13 (1993) 118 ALR 565.

14 (1993) 118 ALR 565 at 575.

31 The respondent's misleading conduct was *a* cause of the whole of the appellant's loss. And that was so not merely in the sense that, but for the misleading conduct, there would have been no loan, and therefore no loss. It was so in a more direct sense. The entire purpose of the mortgage was to provide the lender with security to which it could have recourse in the event of the borrower's default. There was never any question of the making of an unsecured advance. Of course, the lender relied in part upon the borrower's covenant to pay principal and interest, but it was depending upon the security to protect it from financial loss in the event of the failure to honour that covenant. It entered into the loan transaction in reliance upon a representation, made (or made available) for the express purpose of inducing it to do so, concerning the value of the land to be mortgaged. The whole of the loss on the transaction was a consequence of the fact that the mortgaged land was substantially less valuable than was represented.

32 Why, in those circumstances, is not the respondent, under s 82, legally responsible for the whole of the loss? Why is not the whole of the loss the amount of the loss suffered by the contravening conduct? The answer given by the respondent, and accepted by the trial judge, is that there was another "independent" cause of the same loss: the appellant's own carelessness in assessing the credit-worthiness of the borrower. This, it was emphasised, is not a case in which it is being suggested that a victim of a misrepresentation was careless in believing the representation. It seems to be common ground that it would not conform to the remedial purpose of the statute to deny, or reduce, damages under s 82 on that account[15]. This is a case of a different kind. Presumably that is what Williams J meant by "independent". The appellant's carelessness lay, not in accepting the respondent's valuation, but in deciding to do business with the borrower in the first place. There were two concurrent factors which resulted in the making of the loan; and the presence of one is said to reduce the extent of the respondent's responsibility for the loss suffered on the transaction.

33 I am unable to accept the respondent's argument. The relevant purpose of the statute was to proscribe misleading and deceptive conduct in circumstances which included those of the present case. In aid of that purpose, the statute provided for compensation, by an award of damages, to a victim of such conduct. The measure of damages stipulated was the loss or damage of which the conduct was a cause. It was not limited to loss or damage of which such conduct was the sole cause. In most business transactions resulting in financial loss there are multiple causes of the loss. The statutory purpose would be defeated if the remedy under s 82 were restricted to loss of which the contravening conduct was the sole cause. What is there, then, in the justice and equity of the particular case that might lead to a conclusion that the respondent should not be regarded as

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15 See *Henville v Walker* (2001) 206 CLR 459 at 468-469 [13].

legally responsible for the whole of the loss, even though the contravention was a cause of the whole of the loss? Upon what principle might such responsibility be diminished? In a financing transaction, a lender takes security to protect itself against the risk of default by the borrower. One aspect of that risk is that the lender might have failed adequately to assess the borrower's capacity to service the debt. I cannot see why, as a matter of principle, such failure by a lender should be treated, in the application of s 82, as a factor which diminishes the legal responsibility of a valuer by negativing in part the causal effect of the valuer's misleading conduct. The statutory rule of conduct found in s 52, when applied to the relationship between a valuer and a prospective lender, gives rise to a legal responsibility in a case such as the present which extends to the whole of the loss of which the valuer's misleading conduct is a direct cause.

The interest claim

34 The respondent contended that, at least in respect of the lost interest, the appellant's loss or damage should be regarded as caused by the appellant's failure to take reasonable care to assess the credit-worthiness of the borrower rather than by the respondent's misleading conduct. This contention must fail. There is no reason to distinguish between principal and interest in considering the loss to the appellant. The mortgage was taken to secure the totality of the borrower's obligations and the appellant, as a financier, lost both capital and income.

Conclusion

35 The appeal should be allowed with costs. The orders of Williams J and the Court of Appeal should be set aside. There should be judgment in the action for the appellant for $661,481.53. The respondent should pay the appellant's costs, of the proceedings at first instance and in the Court of Appeal.

36 GAUDRON, GUMMOW AND HAYNE JJ. This appeal concerns the operation of Pt VI of the *Trade Practices Act* 1974 (Cth) ("the Act") which deals with enforcement and remedies. The principal issue is whether the liability of a person who has contravened a provision of Pt V of the Act to pay damages to a person who suffered loss or damage by that conduct is affected if the latter person did not take reasonable care to protect his or her own interests. There is another, subsidiary question about the calculation of the loss suffered in this case by the appellant. The facts which give rise to the principal issue are simply stated.

37 On 28 July 1995, the appellant, a money lender, lent $950,000 to Camworth Pty Ltd. The loan was secured by a mortgage. The respondent, a valuer, valued the land which was mortgaged at $1.576m and wrote to the appellant telling it that the valuation report the respondent had prepared was "suitable for your mortgage security purposes". The respondent acknowledged that the appellant intended to lend $950,000 relying on the valuation.

38 The borrower did not make the first payment of interest due on the loan on 1 September 1995. That is, it defaulted in performance of its obligations barely more than one month after it had taken the loan. The appellant exercised its power to sell the mortgaged land. The land was sold for $610,000 and, after meeting the expenses of sale, the appellant recovered $592,367.69.

39 It was not disputed that the valuation of $1.576m was arrived at negligently. The market value of the land at the time of valuation was much less than the value stated by the respondent and relied on by the appellant. The appellant would not have lent to the borrower had the valuation not stated a value of the land at least 50% larger than the amount to be lent. In addition, however, the appellant did not take reasonable care for its own protection. It was found at trial, and it is not now disputed, that the appellant did not make the inquiries about the borrower's capacity to meet interest payments which a reasonably prudent lender would have made.

40 The appellant sued the respondent in the Supreme Court of Queensland alleging negligence, breach of contract and contravention of Pt V of the Act. The claim for breach of contract failed. The trial judge (Williams J) concluded that there had been two causes of the appellant's loss – the respondent's admitted negligence in preparing its valuation, the tender of which to the appellant, the respondent accepted, was misleading and deceptive conduct, and the appellant's (careless) conduct in approving the loan without adequate inquiry. The trial judge considered the negligent valuation to be the "major cause" of the appellant's loss and by an approach his Honour described as "broadly similar to that which would apply in determining apportionment of negligence" assessed

the loss occasioned by the respondent's misleading and deceptive conduct as being two-thirds of the appellant's total loss.

41 The Court of Appeal of Queensland (McPherson, Pincus and Thomas JJA, Moynihan SJA and Atkinson J) dismissed the appellant's appeal against the judgment entered at trial. The Court reached that conclusion largely, if not entirely, by reference to what their Honours saw as the operation of s 87(1) of the Act. The Court of Appeal concluded that s 87(1) permitted a court to order that the respondent pay only part of the loss which had been caused by the contravening conduct. Their Honours said that[16]:

> "s 87(1) should be given the effect which its terms appear to require, namely that an order may be made requiring that the [respondent] compensate the [appellant] for part only of a loss which is causally connected with the contravention complained of."

The Court concluded that an award of only part of the loss causally connected with the contravention could be made where, as in this case, the appellant's conduct (in failing to make sufficient inquiries about the borrower's capacity to pay) was "quite independent" of the respondent's contravention of the Act[17]. What exactly was meant, in this context, by "quite independent" was not elucidated. Because the premise stated is that the award compensates for part only of the loss causally connected with the contravention, it cannot be intended to mean that the loss for which no compensation is to be allowed was caused *only* by the appellant's want of care.

42 It is necessary to approach the principal issue in this case with some basic propositions well in mind. First, Pt VI of the Act, and, in particular, ss 82 and 87(1), have operation in many different kinds of case. Section 82 entitles a person who suffers loss or damage by conduct of another that was done in a contravention of any of a very large number of provisions – ranging from contravention of any of the restrictive trade practices provisions of Pt IV to the so-called consumer protection provisions of Pt V – to recover the amount of that loss and damage. Section 82 can, therefore, be engaged in cases in which the contravener's conduct is intentional or even directed at harming the person who suffers loss and damage[18]. It can be engaged in cases, like the present[19], in which

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16 (2000) 179 ALR 89 at 94 [22].

17 (2000) 179 ALR 89 at 95 [27].

18 See, for example, s 46 and misuse of market power.

19 A contravention of s 52.

the contravener can be said to have fallen short of a standard of reasonable care as well as contravene the Act, and in cases in which there was neither want of care nor intention to harm[20], but still a contravention of the Act.

43 Secondly, s 82 entitles a person who suffers loss or damage by conduct done in contravention of a relevant provision, to recover not only from the contravener but also from any person involved in the contravention. Persons involved may have acted intentionally or carelessly; they may have acted with or without intention to harm.

44 Thirdly, orders may be made for injunction under s 80, or for any of the several kinds of order mentioned in s 87(2), not only where there is a contravention of any of the provisions mentioned in s 82 but also where there is a contravention of certain other provisions of the Act. There is, therefore, a difference between the area for operation of s 82 and s 87. (The Act has been amended from time to time and the difference has not been constant, but what is important is the fact of difference, not its content.)

45 Fourthly, s 82 is concerned only with the position of a person who *has suffered* loss or damage and only that person may rely on the section. By contrast, s 87 is concerned not only with cases where loss or damage *has been* suffered but also with cases where it is likely that it *will be*.

46 Fifthly, unlike s 82, the remedies in s 87 (and s 80) can be sought not only in proceedings brought by a person who has suffered or is likely to suffer loss or damage but also in proceedings brought by the Australian Competition and Consumer Commission. Nonetheless, it must be recognised that orders may be made under s 87 only upon the court finding that a *party* to the proceeding has suffered, or is likely to suffer, loss or damage.

47 In the light of these considerations, it is evident that to approach the construction of s 82 or s 87 as if they were concerned principally with cases of negligent misrepresentation would be an invitation to error.

48 In particular, issues which arise in the determination of contravention of s 52 do not control the construction and application of remedial provisions such as ss 82 and 87. These assume the contravention of norms of conduct laid down in other provisions of the statute.

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20 See, for example, s 50 and acquisitions that would result in a substantial lessening of competition.

49 The consideration in *Campomar Sociedad, Limitada v Nike International Ltd*[21] of the so-called doctrine of "erroneous assumption" furnishes an example of the distinction between determination of contravention and administration of remedy. Where the alleged contravention of s 52 involves representations made not to particular individuals but to the public at large or a section thereof, the nexus between the representations and the misleading or deception of the public is judged by the responses attributed to a hypothetical person with particular characteristics. The characteristics are those attributed to the ordinary and reasonable member of the classes concerned[22]. But the determination of the issue of contravention is anterior to, and to be distinguished from, the administration of remedy (whether under s 82 or s 87 or otherwise) for that contravention.

50 Neither s 82 nor s 87 is cast in terms that immediately present any difficult question of construction. At all times s 82(1) has provided that:

> "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."

(In 1998, the section was amended to add reference to contraventions of Pt IVB and s 51AC.) Section 82 provides a cause of action to those who have suffered loss or damage by conduct contravening a relevant provision of the Act[23]. It does not merely provide a remedy which may be granted or withheld according to the exercise of discretion. As Gummow J pointed out in *Marks v GIO Australia Holdings Ltd*[24]:

> "Section 82 has at least five discrete elements. First, it identifies the legal norms for contravention of which the action under the section is given. Secondly, it identifies those by and against whom that action lies. Thirdly, the section specifies the injury for which the action lies as the suffering of loss or damage. Fourthly, it stipulates a causal requirement that the plaintiff's injury must be sustained 'by' the contravention. Finally, the measure of compensation is 'the amount of' the loss or damage sustained."

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21 (2000) 202 CLR 45 at 83-88 [98]-[107].

22 (2000) 202 CLR 45 at 86-87 [105].

23 *Sent v Jet Corp of Australia Pty Ltd* (1986) 160 CLR 540 at 543-544.

24 (1998) 196 CLR 494 at 526-527 [95].

Of these elements, it is the fourth and fifth that are of principal relevance to the present question. If the causal link between injury and contravention is established, the measure of the compensation for which the section provides, and to which the person bringing the action is entitled, is the amount of the loss or damage sustained, not some lesser amount. In particular, it follows from the decision in *Henville v Walker*[25] that there is nothing in s 82(1), in other provisions of the Act, or in the policy of the Act, to suggest that a claimant's carelessness may be taken into account to reduce the amount of the loss or damage which the claimant is entitled to recover under s 82(1).

51 It will be necessary to return to the question of causation which arises under s 82 (and s 87) but, before doing that, it is convenient to notice some aspects of s 87. Section 87(1) provided that:

> "Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage."

(Again, reference to contravention of Pt IVB was added in 1998.)

52 Section 87 may be engaged where there is a proceeding instituted under, or for an offence against, Pt VI of the Act. It may, therefore, be engaged where there is a proceeding instituted under s 82. It requires that there be a finding that a person who is a party to the proceeding has suffered or is likely to suffer loss or damage by conduct of another person that was engaged in in contravention of a provision of the specified parts of the Act. It is in those circumstances that the court may make "such order or orders as it thinks appropriate" against the contravener or a person who was involved in the contravention, whether or not

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25 (2001) 206 CLR 459 at 482 [66] per Gaudron J, 505 [140] per McHugh J, 507 [153] per Gummow J, 510 [166] per Hayne J.

the court grants an injunction under s 80, or makes an order under s 80A or s 82. The orders that may be made include, but are not limited to, the orders set out in s 87(2). A court may make an order under s 87(1) only "if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage".

53 The reference to compensating "in whole or in part" for the loss or damage requires consideration of the compensatory effect that "the order or orders *concerned*" will have. Will the *particular* order that is made under s 87 (such, for example, as an order varying a contract[26]) compensate for part of the loss or damage that has been sustained? Will that order prevent or reduce loss or damage that otherwise would likely be suffered? But the words "in whole or in part" do not suggest that the *combination* of orders that a court makes should do less than provide for full compensation for all loss and damage that is not prevented by the making of the court's orders.

54 Like s 82, s 87 speaks of loss or damage suffered or likely to be suffered "*by* conduct of another person that was engaged in … in contravention of a provision" of specified parts of the Act. Section 87, like s 82, therefore requires the identification of a causal connection between loss or damage and contravention. What is the connection that must be demonstrated?

55 If there is a contravention of the Act and, following that contravention, a person suffers loss or damage, it may be possible to identify several features of the history of events as having contributed to the person suffering loss. To take the simple example of a person who suffers loss or damage following a person making a misleading or deceptive statement, the loss may be said to have been caused by the combined effect of the making of the statement *and* the reliance on it by the person who suffers loss. Sometimes it will be open to say that the person who relied on the statement was foolish to do so or, at least, did not take reasonable care to protect his or her own interests. Similarly, to take a further example, if there is a contravention of s 46 of the Act by a corporation having a substantial degree of market power deterring a person from engaging in competitive conduct in that market, it may, in some circumstances, be open to say that the person deterred could, or even should reasonably, have made some competitive response different from the response it did. In those cases it may well be that the loss or damage which has been suffered would not have been suffered but for each of the persons who suffered loss acting, or omitting to act, as they did.

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26 s 87(2)(b).

56 There may be many acts or omissions that could be said to have contributed to the happening of an event. As has often been mentioned[27] in learned articles on the subject of causation, the decision of a tortfeasor's great-great grandmother to have children can be identified as one factual cause for an event which is the subject of litigation. To search for the single cause of an event is, therefore, to pursue an illusion. And, much more often than not, to speak of the "effective cause" or the "proximate cause" (or to use some similar expression) is to hide important assumptions that are made, or conclusions that are reached, about the attribution of responsibility for particular kinds of act or omission. That is why it is necessary to understand the purpose for making some inquiry about causation[28]. Only when the purpose of the inquiry is known is it possible to identify and articulate how and why some circumstances are extracted "out of the whole complex of antecedent conditions of an event" and identified by the law as a cause of it[29].

57 In light of these considerations, it is hardly surprising that it is now well established that the question presented by s 82 of the Act is not what was the (sole) cause of the loss or damage which has allegedly been sustained[30]. It is enough to demonstrate that contravention of a relevant provision of the Act was *a* cause of the loss or damage sustained[31].

58 In the present case, there were two events to which particular attention must be given – the contravention of the Act constituted by giving a misleading valuation of the land, and the lender's failure to act prudently by omitting to make adequate inquiries about the borrower's capacity to pay interest. It can be said of

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27 For example, Stapleton, "Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences", (2001) 54 *Vanderbilt Law Review* 941 at 961.

28 *Chappel v Hart* (1998) 195 CLR 232 at 256 [63] per Gummow J; *Henville v Walker* (2001) 206 CLR 459 at 491 [98]-[99] per McHugh J; *Environment Agency v Empress Car Co Ltd* [1999] 2 AC 22 at 31 per Lord Hoffmann; *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 at 124-126 [50]-[58] per Lord Hoffmann; [2002] 3 All ER 305 at 339-340.

29 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 584 per Windeyer J.

30 *Henville v Walker* (2001) 206 CLR 459 at 496 [115] per McHugh J.

31 *Gould v Vaggelas* (1985) 157 CLR 215; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Henville v Walker* (2001) 206 CLR 459.

each of those events that, had it not happened, the loan would not have been made and the lender would, therefore, have suffered no loss. That is, it can be said of both events that, but for it happening, there would have been no loss. If the valuation had not been misleading, there would have been no loan. Likewise, if the lender had made adequate inquiries, there would have been no loan. But to show that, if *either* of two events had not occurred, a loss which has been suffered would not have been suffered, does *not* demonstrate that one rather than the other event was *the* cause of the loss, any more than it demonstrates that neither was *a* cause of that loss. But the fact is that both did happen and both contributed to the decision to make the loan.

59 Because the respondent's valuation was, in this case, made negligently, and the appellant's failure to make proper inquiries was careless, it is possible to compare the two faults by looking at the degree to which each represented a departure from the requisite duty of care to another or expected regard for one's own safety[32]. But that will not always be so in cases in which s 82 is engaged. If the valuation proffered to the lender had not been made negligently but had been made deliberately and deceitfully, how would the comparison between culpability be made? If a deliberate act and a careless omission each played a part in the history of events, on what basis could it be said that one had greater causative significance than the other (except as a matter of bare assertion)?

60 Most important of all, even if a useful comparison could be made in a case of the kind just mentioned, there is no reason why the Act should be understood as requiring or permitting inquiry and comparison of that kind. The Act creates certain norms of behaviour. It prescribes what constitutes a contravention of those norms. There is nothing in the terms in which those norms are prescribed, or in the terms in which remedies for contravention are provided, that warrants injecting into the inquiry some a priori assumption about distributing responsibility for loss or damage suffered between those who have contravened the Act and those who have not. In the light of what was held in *Henville v Walker* about the operation of s 82, it would at least be anomalous if s 87 were to be read in such a way as would permit the claimant's carelessness (*not* in contravention of the Act) to be taken into account to reduce the amount of the loss or damage caused by the contravener's conduct which is to be compensated or prevented by the making of orders under s 87. Yet in essence that is the unstated premise for the respondent's contention that it would be "unfair" or "unjust" if the appellant, having been careless for its own safety, were to recover

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32 See, for example, *Pennington v Norris* (1956) 96 CLR 10 at 16; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492; 59 ALR 529.

from the respondent all the loss or damage which it has suffered, and for the occurrence of which the respondent's contravention was a cause.

61 Nothing in the words of ss 82 or 87 requires or permits a court to make orders which will compensate a person who has suffered loss or damage by conduct in contravention of a relevant provision of the Act for only part of the loss or damage which has been suffered by that person by that conduct and which will not be, or has not been, remedied by the making of some other order under s 87. That conclusion is sufficient to determine the principal issue in the present matter but it is as well to say something further, first, about one aspect of causation of loss, and second, about the Court of Appeal's statement that the appellant's conduct was quite independent of the respondent's contravention of the Act.

62 As was recognised in *Henville v Walker*[33], there may be cases where it will be possible to say that some of the damage suffered by a person following contravention of the Act was not caused by the contravention. But because the relevant question is whether the contravention was *a* cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare. Further, it is only in a case where it is found that the alleged contravention did not materially contribute to some part of the loss claimed that it will be useful to speak of what caused that separate part of the loss as being "independent" of the contravention. Although the respondent submitted to the contrary, for the reasons given earlier, there is no basis in this case for concluding that some identifiable part of the loss suffered by the appellant was caused by the appellant's carelessness and not by the respondent's contravention. Indeed, the division of responsibility made by the primary judge (attributing two-thirds of the "fault" to the respondent and one-third to the appellant) reveals that this is so. Subject to one qualification, no attempt was made, whether at trial or on appeal to the Court of Appeal or this Court, to identify particular elements of the overall loss as attributable to particular causes.

63 The qualification to which we have referred concerns what we earlier described as the subsidiary question about calculation of the appellant's loss. In assessing the damages to be awarded to the appellant, the trial judge allowed an amount of $120,650, described as "Lost interest for period 01.08.95-31.07.96", for the amount of interest the appellant could have earned on $950,000 for the

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33 (2001) 206 CLR 459 at 474 [35] per Gleeson CJ, 481-483 [65]-[72] per Gaudron J, 493 [106] per McHugh J, 507 [153] per Gummow J, 510 [166] per Hayne J.

duration of the loan (one year) had it been lent at the average rate which the appellant charged for lending money at that time. The period of the loan was taken as the relevant period because there was no evidence sufficient to enable a finding that the money would have been re-lent at the end of that term. Because the sale of the land was not completed until after the end of the loan period it was not necessary to allow any sum for the amount that was, or should have been, earned on that part of the principal sum recouped on sale.

64 The respondent contended that the lost interest was a particular component of the appellant's loss directly referable to its own conduct[34]. There is, however, no basis for distinguishing between the loss of the balance of the loan principal not recouped on sale, and loss as a result of the respondent's contravention of the Act, and the loss of the interest that otherwise would have been earned on that money during the period of the loan. The loss of interest on the principal sum lent in this transaction was part of the loss suffered by the appellant by the respondent's conduct in contravention of the Act. The respondent's contention on this subsidiary question should be rejected.

65 The appeal to this Court should be allowed with costs and the order of the Court of Appeal of the Supreme Court of Queensland made on 22 September 2000 set aside. In place of the order of the Court of Appeal there should be orders allowing the appeal to that Court with costs, setting aside both the judgment entered by Williams J on 22 October 1999 and the order of Williams J made on 8 November 1999 and in place ordering that there be judgment for the plaintiff for $661,481.53 together with costs.

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34 cf *Henville v Walker* (2001) 206 CLR 459 at 483 [72] per Gaudron J.

66 McHUGH J. Section 82 of the *Trade Practices Act* 1974 (Cth) provides that a person who suffers loss or damage as the result of another person's breach of Pt V or other parts of the Act "may recover the amount of the loss or damage by action against that other person". Included in Pt V is s 52, which prohibits conduct in commerce that is false or misleading. Section 87 of the Act provides further remedies for breach of Pt V and other parts of the Act. It empowers the court to make such order or orders as it thinks fit, if it "considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage".

67 HTW Valuers (Brisbane) Pty Ltd ("HTW") breached s 52 of the Act by preparing a valuation containing statements that overvalued a property. As a result, I & L Securities Pty Ltd ("I & L") suffered loss when it relied on the valuation to lend money on the security of the property. In proceedings, heard in the Supreme Court of Queensland, both the trial judge and the Court of Appeal held that the failure of I & L to make inquiries into the borrower's solvency was also a cause of the loss.

68 The principal issue in this appeal, brought by I & L, is whether the Supreme Court erred in holding that s 87 of the Act conferred a discretionary power to reduce the damages that a claimant would otherwise be able to recover under s 82. HTW's Notice of Contention raises a further issue. Does s 82 permit a division of responsibility between an applicant and a respondent on the ground that the applicant's failure to take reasonable care of its own interests was also a cause of its loss?

69 In my opinion, the appeal should be allowed. Section 87 does not confer any discretion to reduce the damages to which an applicant would otherwise be entitled under s 82. Nor does s 82 permit a court to divide the responsibility for a loss that is causally connected in the common law sense with a respondent's breach of Pts IV or V of the Act[35]. In *Henville v Walker*[36], this Court held that, in awarding damages under s 82, a court cannot reduce the amount of an applicant's damages because of the applicant's contributory negligence. For the purpose of s 82, it is irrelevant that the conduct of an applicant was a cause of its loss unless

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35 After these proceedings were commenced in the Supreme Court of Queensland, s 82 was amended by the *Trade Practices Amendment (Fair Trading) Act* 1998 (Cth), Sched 1(5) and Sched 2(3) to include a breach of Pt IVB and s 51AC and by the *Trade Practices Amendment Act (No 1)* 2001 (Cth), Sched 1(18) to include a breach of Pt IVA. While for the purposes of this appeal the relevant version of the Act is that prior to these amendments, what is said in this judgment is equally applicable to the Act as amended.

36 (2001) 206 CLR 459.

the court can find that the loss or damage suffered is divisible into parts, and the respondent's conduct did not cause one or more of those parts. I & L's conduct undoubtedly contributed to its loss. But this Court's decision in *Henville* necessarily denies that under s 82 a court can apportion the loss or damage suffered by the applicant in accordance with the parties' culpability. That is not an approach that accords with the policy of the legislation.

The material facts

70 I & L conducted a money lending enterprise using trust monies obtained from clients of a firm of solicitors who carried out the legal work on the loan transactions. The solicitors were directors of I & L.

71 On 3 July 1995, I & L received an application from a broker on behalf of Camworth Pty Ltd ("Camworth"), a trustee company for the Didar Mohammed Family Trust. The broker sought a loan of $950,000 to re-finance an existing loan that would not be renewed when its term expired. The loan was to be secured over land of which Camworth was the registered proprietor. Brisbane City Council had approved the land being subdivided into 36 lots, and Camworth was in the course of carrying out a three-stage subdivision. The first stage involved the registration of 19 residential allotments. According to a letter from the company's chartered accountants that accompanied the application, however, neither the company nor the Trust had traded since the Trust was established on 20 December 1989[37].

72 Accompanying the application was a statement of assets and liabilities of Mr Mohammed. He disclosed his "share" in Camworth as an asset, which he valued at $1.576 million. He recorded that the company was indebted to the holders of first and second mortgages over the subject land in the sum of $938,000 and that he owed MasterCard $1,000. Mr Mohammed's statement did not disclose whether he had any source of income or any employment. Also attached to the application were two valuations by HTW. The first valuation, and the one in issue at the trial, was dated 2 March 1995.

73 Sometime before making the application to I & L – in or around August 1994 – Mr Mohammed had instructed HTW to assess the market value of the land with a view to using it as security for financing the development of the land. In August 1994, HTW prepared a valuation that declared that "a reasonable assessment of the proposed residential sub division and townhouse development site for mortgage security purposes … is considered to be $950,000". On 2 September 1994, a lender advanced $650,000 to Camworth and took a first

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37 The letter was transmitted to I & L by the broker acting as intermediary between it and Camworth.

mortgage over the property, with interest payable in advance[38]. As at the date of the application to I & L, Camworth also owed Moggill Constructions Pty Ltd ("Moggill") $300,105.59 for engineering works carried out on the development. As of July 1995, Moggill held a second mortgage over the land.

74 By early 1995, Lots 1 to 19 had been registered and were on the market for sale. In a valuation dated 2 March 1995, HTW declared that the market value of those lots was $1.026 million. It valued the entire subdivision at $1.576 million with the remaining lots being valued at $550,000. HTW predicted that, with a value of $54,000 per lot and with adequate marketing, reasonable average sales would be at the rate of two allotments per month. But by 28 July 1995, no lots had been sold.

75 Shortly after receiving the application, I & L indicated its in-principle approval of the loan. However, before it would lend any money, it required an assignment of the valuations prepared by HTW[39]. After some correspondence, HTW wrote to I & L on 12 July 1995 stating:

> "We refer to the abovementioned full valuation dated 18 August, 1994 ... and updated *valuation undertaken on 2 March, 1995* …
>
> We wish to advise that the valuation report is suitable for your mortgage security purposes and acknowledge that you intend to loan $950,000 (60% thereof) in reliance on our valuation, secured by a registered first mortgage on the above property." (emphasis added)

76 Relying on the valuation of 2 March 1995, I & L approved a loan for a period of 12 months. However, HTW had prepared the valuation negligently. The true market value of the subdivision at the relevant date was substantially below the $1.576 million figure. The trial judge, Williams J, found that:

> "given [I & L's] clear policy of lending to a maximum of 66.6% of the value of the property (here 60%), the loan of $950,000 would never have been approved or made if [HTW] had furnished [I & L] with the correct market value."

77 The loan agreement provided for an interest rate of 19.5 per cent per annum, payable monthly in arrears, with a reduction to 13.5 per cent per annum if all payments were strictly met. Williams J thought it was significant that the borrower had to spend almost all of the loan paying out existing loans. His

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38 In fact the interest was initially deducted from the loan funds.

39 I & L also requested a statement of Camworth's assets and liabilities. No such statement was ever obtained.

Honour thought that Camworth's lack of funds to develop the project further and its inability to increase its capital should have alerted I & L to Camworth's "precarious" financial position. Williams J held that I & L had failed to take reasonable care to satisfy itself that the borrower could meet the repayments of both principal and interest.

78 On 1 September 1995, Camworth defaulted on the first payment of interest. I & L, as mortgagee, took all reasonable steps to effect a sale of the property, but could not sell it until 8 January 1997, when it did so at a price of $610,000. I & L recovered only the nett proceeds of sale, $592,367.69. It recovered nothing from Camworth or the guarantors of the loan. In June 1997, Camworth was wound up.

79 The solicitor handling the transaction for I & L conceded at the trial that it would not have lent the money if it had known that the borrower did not have the capacity to meet the interest payments. Against that background, Williams J held that I & L was guilty of contributory negligence by reason of its failure to ascertain the borrower's cash flow problems, to appreciate its lack of capital and income, and to assess the likelihood of it selling two allotments per month. His Honour thought that, regardless of the value placed on the land, I & L would not have lent to Camworth if it had made further and appropriate inquiries about Camworth's capacity to service the loan.

80 Although Williams J found I & L negligent, he thought that HTW's negligence was the major cause of the loss, saying:

> "If a valuation of $1.[5]76M had not been presented to [I & L] undoubtedly more detailed enquiries would have been made. In those circumstances the negligent valuation was the major cause of [I & L's] loss."

81 His Honour held that I & L should be regarded as responsible for one third of its loss. He made an order under s 82 of the Act giving effect to his conclusion that HTW was responsible for two-thirds of the loss suffered by I & L.

82 The findings of Williams J were not challenged on appeal. However, the Queensland Court of Appeal upheld his Honour's decision on a different basis. It held that s 87(1) gave power to make an order requiring a defendant to compensate a claimant for part only of a loss causally connected with the contravention of the Act.

Section 82 of the Act and the decision of Williams J

83 Section 82 of the Act provided:

> "(1) 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."

84 The statutory nature of the right of action under s 82 necessarily distinguishes it from actions at common law in tort or contract. Section 82 contains no express limitation on the kinds of loss or damage that may be recovered under the section. Nor does it contain any express indication that some kinds of loss or damage are to be regarded as too remote to be compensated[40]. Because the Act does not state the principles applicable in determining an award under s 82[41], courts have used the principles applied in awarding damages in tort and contract cases as a guide to awarding compensation for loss or damage falling within s 82. In many cases, the application of tort or contract principles leads to a just result. But while analogies with the law of tort and contract are useful aids, they cannot be substituted automatically for the flexible and general language of s 82[42]. Focusing on the similarity of the circumstances involved in s 82 cases with those involved in tort and contract cases may sometimes result in the section being treated "as a mere supplement to or eking out of" pre-existing law[43]. Too much emphasis on tort and contract analogies also overlooks that s 82 provides a remedy for breach of a range of provisions different in kind from that provided by s 52[44].

85 Just as s 82 is free from the restraint of common law rules regarding measure of damages, so also is it free from doctrines that reduce those damages

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40 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 509 [34] per McHugh, Hayne and Callinan JJ.

41 See *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11 per Mason, Wilson and Dawson JJ.

42 cf *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 529 [103] per Gummow J: "Analogy, like the rules of procedure, is a servant not a master."

43 Pound, "Common Law and Legislation", (1908) 21 *Harvard Law Review* 383 at 388 cited by Gummow J in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 528 [100]; see also at 503 [15] per Gaudron J, 510 [38] per McHugh, Hayne and Callinan JJ, 549 [152] per Kirby J. See also *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 290.

44 See *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd [No 2]* (1987) 16 FCR 410 at 418-419 per Gummow J, to which I referred in *Henville v Walker* (2001) 206 CLR 459 at 503-504 [135].

at common law. In *Pavich v Bobra Nominees Pty Ltd*[45], French J held that the primacy of the causation principle in s 82 seemed to exclude reliance upon concepts such as mitigation or contributory negligence. His Honour thought that contributory negligence was irrelevant unless it could be shown that the applicant's carelessness or disregard for their interest was *the* cause of all *or some part* of the claimed loss. He also correctly held that, although the contravening conduct may be the *sine qua non* of the loss claimed, there may come a point where the applicant's own conduct was "so dominant" in the causal chain as to constitute a *novus actus interveniens*[46].

86 In a number of cases, courts have been able to find that part of the loss sustained by an applicant was not attributable to the contravening conduct of the respondent, but to some other cause. In *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd*[47], the applicant sustained losses in purchasing a restaurant because of the respondent's misrepresentations. Wilcox J held that trading losses suffered by the applicant, subsequent to the purchase, were not sufficiently connected with the contravening conduct of the respondent for the loss to be characterised as caused "by" the respondent's conduct. His Honour held that those trading losses were occasioned by factors that were not "directly attributable" to the misrepresentations[48].

87 Similarly, in *Mehta v Commonwealth Bank of Australia*[49], the Supreme Court of New South Wales held that the applicants were not entitled to recover in respect of losses they sustained in managing a foreign currency loan after the defendant had refused to manage the loan. Although the loan had been induced by the misrepresentations of the defendant, Rogers CJ Comm D said that once one of the applicants had assumed the task of managing the loan, he was thereafter obliged to bear the losses and entitled to pocket the gains[50].

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45 (1988) ATPR (Digest) ¶46-039.

46 This approach of French J was referred to with approval by Fisher, Gummow and Lee JJ in *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 286-287.

47 (1987) ATPR ¶40-822.

48 (1987) ATPR ¶40-822 at 48,904. See also *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79 at 88 per Fox J; *Mehta v Commonwealth Bank of Australia* (1990) Aust Torts Reports ¶81-046 at 68,142 per Rogers CJ Comm D; *Kewside Pty Ltd v Warman International Ltd* (1990) ASC ¶55-964 at 58,823 per French J; *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1993) 118 ALR 565 at 575-576 per Hodgson J.

49 (1990) Aust Torts Reports ¶81-046.

50 (1990) Aust Torts Reports ¶81-046 at 68,142.

88 In *Tefbao Pty Ltd v Stannic Securities Pty Ltd*[51], the Supreme Court of New South Wales held that, although the misleading conduct of the respondent had induced the claimant to purchase land, the claimant could only recover that part of its loss that was attributable to the respondent's conduct. In *Tefbao*, the respondent had misled the claimant into believing that the area of the land was 12 acres when in fact it was 10.75 acres. Hodgson J awarded damages of $50,000 per acre in respect of the 1.25 acres difference. His Honour said:

> "If *some part* of the damage would not have occurred but for negligent conduct of the claimant, or failure to mitigate, then it may be appropriate to apply notions of reasonableness in assessing how much was in truth caused by the contravention." (emphasis added)

89 The italicised phrase illustrates the crucial distinction, when considering s 82, between *part* of the loss, in the sense of a distinct and separate portion of the whole loss, and playing *a part* in the sustaining of the entire loss. All members of this Court recognised that distinction in *Henville*[52], although the majority and minority Justices differed as to whether part of the loss was in fact caused by the respondent in that case.

90 In *Henville*, Walker made several misrepresentations to Henville in the course of advising him about a property that would be suitable for development. Those misrepresentations induced Henville to purchase the property and build a block of units, which he could not sell either at the price or within the time frame that Walker had represented. All members of this Court held that under s 82 Henville was entitled to recover for his loss, notwithstanding that he had negligently prepared a feasibility study that underestimated the cost of the development and contributed to his decision to undertake the project. The Court held that, for the purposes of s 82, it was sufficient that the contravening conduct of Walker was *a* cause of the loss sustained by Henville[53]. The difference between the majority and the minority Justices concerned whether certain expenditure was causally connected to Walker's conduct. The minority Justices

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51 (1993) 118 ALR 565 at 575.

52 (2001) 206 CLR 459 at 474-475 [36], 475 [41] per Gleeson CJ, 482 [66]-[67], 483 [70] per Gaudron J, 488-489 [94], 493 [106], 498 [121] per McHugh J, 507 [153] per Gummow J, 510 [166] per Hayne J.

53 (2001) 206 CLR 459 at 469 [14] per Gleeson CJ, 482 [66] per Gaudron J, 493 [107] per McHugh J, 509 [163] per Hayne J. The Court arrived at this decision following the common law concept of causation, established in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 and applied by this Court in the context of s 82 in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

thought that on the evidence the trial judge was correct in holding that a discrete part of the loss was not causally connected with Walker's contravention of the Act.

91 I was one of the majority Justices in *Henville*. I thought that the remedial purposes of the Act – which include promoting fair trading and protecting consumers – were more readily achieved by ensuring that consumers recovered the *actual* losses they suffered as a result of contraventions of the Act. In my judgment, with which Gummow J agreed, I said[54]:

> "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."

92 If Walker had not made the misrepresentations, the loss that Henville suffered would not have occurred. I thought that the entire loss was directly attributable to a contravention of the Act, even though other factors – specifically the conduct of Henville – played a part in bringing it about. I held that there was no basis for reading into s 82 doctrines of contributory negligence and apportionment of damages[55]. Hayne J also held that nothing in s 82(1) suggested that the carelessness of the person who suffered loss or damage as the result of a contravention of the Act should be taken into account in deciding what was the amount of loss or damage actually suffered. His Honour said[56]:

> "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."

93 The minority Justices did not disagree with the proposition that a person who has contravened s 52 is liable for *all* the loss that is attributable to the contravention. But, as I have indicated, they thought that the trial judge was correct in holding that a discrete part of the loss was not causally connected with Walker's contravention of the Act.

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54 (2001) 206 CLR 459 at 503 [135].

55 (2001) 206 CLR 459 at 505 [140].

56 (2001) 206 CLR 459 at 509-510 [165].

The trial judge erred in his approach to s 82

94 HTW filed a Notice of Contention asserting that s 82 of the Act permits a division of responsibility between a claimant and a defendant in an appropriate case. The Notice raises the question of the propriety of the approach taken by Williams J, who thought that s 82 could be applied so as to divide the responsibility for the loss between I & L and HTW. In my opinion, I & L is correct in asserting that this Court's decision in *Henville* is decisive of this issue.

95 Williams J found that, as a result of advancing the funds to Camworth, I & L sustained a loss in the order of $661,481.53. That sum included $120,650, which was the interest lost on the loan for the period 1 August 1995 to 31 July 1996. As I have indicated, his Honour found that the conduct of both HTW and I & L contributed to I & L's entry into the transaction. His Honour acknowledged that but for the valuation of HTW, I & L would probably have made more detailed inquiries before making the loan. But he said that, "*independently* of [HTW's] misleading statement", I & L would not have approved the loan to Camworth if it had made its own inquiries.

96 The learned trial judge recognised that it was not appropriate to deal with the case as if it was one of common law contributory negligence. Nevertheless, his Honour ultimately approached the issues in this case in a manner closely resembling the approach adopted in negligence cases that call for apportionment of damages by reason of a plaintiff's contributory negligence. In fact, in his concluding paragraph on this issue, his Honour said:

> "In deciding how the consequences of how those two causes should be divided I am of the view that the approach that should be adopted *is broadly similar* to that which would apply in determining apportionment of negligence." (emphasis added)

97 His Honour acknowledged that decisions of the Federal Court of Australia hold that contributory negligence does not affect the right of recovery under s 82[57]. However, his Honour considered those cases did not apply to the present case because I & L's conduct constituted a wholly "independent cause of the loss". In his Honour's opinion, an award of damages under s 82 could accommodate situations where there was a divided responsibility for the loss, saying:

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57 *Sutton v A J Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 240 per Forster, Woodward and Wilcox JJ; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 558-559 per Lockhart J; *Henderson v Amadio Pty Ltd [No 1]* (1995) 62 FCR 1; *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149.

> "Experience shows that many, perhaps most, commercial losses have a number of causes which would satisfy the *March v Stramare* test. It seems abundantly clear that the legislature did not intend to deprive someone who suffered loss as a result of deceptive and misleading conduct of the right to recover at all if there was some other demonstrable cause of that loss. Equally, in my view, the legislature did not intend that the total loss should always be recoverable regardless of the number or significance of established causes other than the misleading or deceptive conduct in question."

98 Williams J thought that the decision of Gummow J in *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd [No 2]*[58] supported the view that a court could allow recovery for only some part of a loss if there were two separate and distinct causes of the loss. However, the relevant statement of Gummow J in that case was not concerned with a *divided responsibility* for a total loss, but with *respective responsibilities* for *different* parts of the loss. The comments of Gummow J in *Elna* do not suggest that, where there are causes operating concurrently with the contravening conduct, the applicant can or should recover only a portion of the loss. In fact, Gummow J concluded that, where there are other causes, "the court might treat those other causes *as the essential or effective cause of the loss or damage and hold there was no right to damages under s 82*"[59]. (emphasis added)

99 Williams J thought that the facts of the present case were similar to those in *S & U Constructions Pty Ltd v Westworld Property Holdings Pty Ltd*[60]. His Honour thought that *S & U* concerned "two separate and distinct" causes of the applicant's loss. Subsequent authority in the Federal Court has not been enamoured of the reasoning in *S & U*[61]. But in any event, the factual situations in *S & U* and this case are not similar.

100 In *S & U*, the respondent made misrepresentations, regarding the progress of building plans for a shopping centre. The representations induced the applicant to enter into a contract to purchase the land on which the centre was to

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58 (1987) 16 FCR 410.

59 (1987) 16 FCR 410 at 419.

60 (1988) ATPR ¶40-854.

61 See *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1993) 118 ALR 565 at 575-576 per Hodgson J; *Kinlace Pty Ltd v Mortgage Finance Australia Ltd (in liq)* unreported, Federal Court of Australia, 14 October 1994 per Lockhart J. See also *Calleby Pty Ltd v Leros Pty Ltd* unreported, Supreme Court of Western Australia, 13 May 1997 per Steytler J.

be built. Following settlement, the applicant did little to resolve the difficulties with the development, difficulties of which it became aware after the purchase. Pincus J considered that "the applicant's lack of activity in its own interests helped to turn what may have been an avoidable loss into a definite one"[62]. Thus, the facts in *S & U* more closely resemble the "divisible loss" cases that Williams J considered inapplicable to the present case. Unlike *S & U*, where the applicant's conduct subsequent to entering the transaction contributed to the ultimate loss it sustained, here the conduct of both parties contributed to I & L's entry into the transaction. It was the entry into the transaction that brought about the loss that I & L suffered.

101 The assessment by Williams J of the appropriate apportionment of damages in this case highlights the extent to which notions of contributory negligence and apportionment of responsibility under modern statute law played a role in his Honour's findings. After referring to his finding that I & L's negligent conduct accounted for one third of the loss it sustained, his Honour said:

> "Those considerations satisfy me that the loss occasioned by the deceptive and misleading conduct should be assessed as two thirds of the total loss. *To that extent, and to that extent alone, the deceptive and misleading conduct of [HTW] caused loss to [I & L]*." (emphasis added)

102 But there was one indivisible loss in this case. It might be just and equitable to hold that HTW should be held responsible for only two-thirds of that loss. But in terms of causation doctrine and in the absence of a statutory power of apportionment, it is liable for the whole loss. The approach of Williams J accords with apportionment cases involving contributory negligence. But, in the absence of any power in the Act to apportion responsibility for loss or damage under s 82, it is not open to a court to make such an apportionment in making an award under s 82.

103 HTW contends that, unless the approach of Williams J is adopted, the policy of the Act to control smart practices and encourage fair trading would be frustrated. It submits that the construction for which I & L contends would encourage a sophisticated, commercial lender, to treat the Act as providing a form of mortgage guarantee insurance.

104 However, as I said in *Henville*, the policy behind the legislation is furthered if the party whose conduct contravenes the legislation bears the entire loss. Moreover, relief under s 82 is available not only for breaches of s 52 but for breaches of other provisions in Pt V as well as those in Pt IV of the Act and

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62 (1988) ATPR ¶40-854 at 49,217.

Pts IVA, IVB and s 51AC after the amendments. The reasoning adopted by Williams J would be likely to lead to inconsistencies in applying s 82 across such a broad spectrum of regulatory provisions. Moreover, it is unlikely that rejecting the construction that Williams J placed on s 82 will have the consequences predicted by HTW. Intentionally refusing to make proper inquiries when advancing loan funds will usually be held to be a voluntary act that breaks the chain of causation between the breach of the Act and the lender's loss. A loss caused by the intentional conduct of the applicant will not ordinarily be characterised as a loss caused "by" the contravening conduct of the respondent.

Section 87 and the decision of the Court of Appeal

105 Section 87 of the Act provided[63]:

> "(1) Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in … in contravention of a provision of Part IV, IVA or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention … if the Court considers that *the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage* or will prevent or reduce the loss or damage." (emphasis added)

106 Unlike s 82, which provides a right of action, the remedies under s 87 are discretionary[64]. As Ipp J pointed out in *Reg Russell & Sons Pty Ltd v Buxton Meats Pty Ltd*[65], the nature of the court's discretion under s 87(1) is very wide. It enables orders to be made that could not be made at common law or in equity. In *Akron Securities Ltd v Iliffe*[66], misrepresentations concerning a minimum receipts

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63 As with s 82, s 87 was amended by the *Trade Practices Amendment (Fair Trading) Act* 1998 (Cth), Sched 1(10) to include a breach of Pt IVB.

64 For this reason, analogy with the equivalent case law in New Zealand is not particularly useful. Unlike the *Trade Practices Act*, which contains both s 82 and s 87, the *Fair Trading Act* 1986 (NZ) contains only an equivalent of s 87. As Cooke P stated in *Goldsbro v Walker* [1993] 1 NZLR 394 at 399, the discretionary nature of the relief under s 43 marks it out from relief under s 82 in a "significant" respect. See also *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 at 34 per Tipping J.

65 (1994) ATPR (Digest) ¶46-127 at 53,614.

66 (1997) 41 NSWLR 353.

guarantee had induced the claimants to enter into a series of agreements. However, the claimants' "only 'loss or damage' … was being locked into an otherwise proper set of contractual arrangements that lacked the promised minimum receipts 'guarantee'"[67]. They were not entitled to any damages under s 82. Only s 87 could provide them with a remedy. Although the agreements would have been set aside in equity, the Court of Appeal of New South Wales held that rescission is not an automatic remedy under s 87, a section that gave the Court a wide discretion as to the orders that it might make. The Court of Appeal said that, subject to a specified condition, it would set aside the order of the trial judge declaring the agreements void *ab initio*. The condition was that "Akron tenders to [the claimants] (or otherwise secures payment to them of) the monetary equivalent of the 'guarantee' represented"[68] to them. Mason P, who gave the leading judgment, said[69]:

> "This would put both sets of parties in the position they would have been – no more, no less – had the misleading or deceptive conduct not taken place. To pull the whole transaction down would relieve the [claimants] from all risks attendant upon a venture freely entered into which had failed in circumstances held by Rolfe J to embody no fault on Akron's part."

107 Mason P pointed out that, unlike s 82, which is concerned with compensation for actual loss or damage, s 87 extends to the prevention and reduction of loss or damage that is *likely* to be suffered. Thus, it "goes beyond permitting orders for pecuniary recovery as understood in the law of tort"[70]. The President said that s 87 authorised remedies dismantling a series of interlocking contractual arrangements. Orders could be made not only against the immediate parties to the s 52 breach but against third parties who were involved in the contravention which ultimately brought about the contractual arrangements[71].

108 *Akron* illustrates that cases will arise where a monetary remedy under s 82 is not available or appropriate. In those cases, the "remedial smorgasbord"[72] provided by the orders in s 87 will assist the court in obtaining a just result. In

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67 (1997) 41 NSWLR 353 at 370 per Mason P.

68 (1997) 41 NSWLR 353 at 369 per Mason P.

69 (1997) 41 NSWLR 353 at 369.

70 (1997) 41 NSWLR 353 at 364 per Mason P. See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 543-544 per Deane J.

71 (1997) 41 NSWLR 353 at 366.

72 (1997) 41 NSWLR 353 at 364 per Mason P.

some cases, an order under s 87 as well as an award of damages under s 82 may be necessary to compensate the claimant for its loss or damage. In *Kizbeau Pty Ltd v W G & B Pty Ltd*[73], this Court supplemented an award of damages under s 82 with an order under s 87 varying the commencing rent of a lease. Similarly in *Pavich*[74], French J awarded damages for the losses the applicants sustained when the respondent's misrepresentations induced them to enter into a lease but also used the power conferred by s 87 to order that the lease be varied.

109 *Reg Russell*[75] provides another example of a fact situation where s 87 can apply although no remedy is available under s 82. There, the claimants sought an order under s 87 giving their debenture priority over a charge executed by the respondents. Although the claimants were unsuccessful on the facts, in principle such an order is clearly within the scope of s 87.

110 The present form of s 87 is the result of recommendations by the Swanson Committee. The Committee's Report expressed the view that "[i]n most instances the remedies under section 87 would be the more appropriate remedy"[76]. But nothing in the Report suggests that the Committee or the Parliament intended s 87 to override any remedy available in s 82. Although the Parliament may have contemplated more than a merely ancillary role for s 87, it is highly unlikely that it contemplated the possibility of s 87 denying a right of action otherwise available under s 82.

The Court of Appeal erred in its construction of ss 82 and 87

111 The Court of Appeal concluded that:

> "[Section] 87(1) should be given the effect which its terms appear to require, namely that an order may be made requiring that the defendant compensate the plaintiff *for part only of a loss which is causally connected* with the contravention complained of." (emphasis added)

As was the case with the judgment of Williams J, the italicised phrase highlights the conceptual difficulties which the Court of Appeal faced in this case in using s 87 to reduce I & L's damages.

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73 (1995) 184 CLR 281.

74 (1988) ATPR (Digest) ¶46-039.

75 (1994) ATPR (Digest) ¶46-127.

76 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, August 1976 at 82.

112 I & L suffered a single, indivisible loss. It was negligent in failing to inquire into the solvency of the borrower. But, as the trial judge found, HTW's negligent conduct was also a – indeed the "major" – cause of that loss. In line with the principles of causation adopted by this Court in relation to the *Trade Practices Act*, particularly in its recent decision in *Henville*, that finding is sufficient to hold HTW liable under s 82 for the *entire* amount of the loss.

113 The contrary conclusion of the Court of Appeal that s 87 permitted a different result was based on the following matters:

- No sufficient reason appeared to do such violence to the language as appeared to be necessary, in order to achieve the result for which the appellant contended;
- To hold that s 87(1) meant what it said may contribute to the resolution of a problem which was now "lamentably old"[77];
- The solution was in accordance with the position reached by the New Zealand Court of Appeal in *Goldsbro v Walker*[78];
- The liberal approach accorded with that recommended in recent years by this Court, and with that suggested by the Swanson Committee[79];
- It appeared to be difficult to construct any plausible limitation to read into s 87(1), so far as it dealt with a part-loss order, "in order to achieve the neutering of that provision which [I & L] advocates".

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77 The Court of Appeal adopted a similar attitude to the correctness of *S & U*. In its opinion, if I & L's submission was correct and the decision in *S & U* was wrong, "then one still awaits, after 23 years, the case in which it will be appropriate to make such an order under s 87(1)".

78 [1993] 1 NZLR 394. The facts of that case are far removed from those in the present appeal. There the solicitors against whom a claim had been made pursuant to s 43 of the *Fair Trading Act* 1986 (NZ) (essentially equivalent to s 87) were seeking a reduction in damages to be awarded against them on the basis that *they too* had been misled by their client. No "apportionment" was sought in that case as between the claimant and the contravener.

79 In the course of its judgment, the Court referred to *Sent v Jet Corp of Australia Pty Ltd* (1986) 160 CLR 540 at 544; *Wenpac Pty Ltd v Allied Westralian Finance Ltd* (1992) 67 ALJR 165; *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 298; and *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494.

114 With respect, it is an error to conclude that s 87 would be "neutered", if the construction for which I & L contends were accepted. As I have pointed out, s 87 provides a broad spectrum of remedies, some of which are monetary (as in *Akron*) and some of which are not. *Akron* illustrates that there are cases where an award may be made although a monetary award of damages under s 82 is not available. In cases of that nature, s 87 will perform a crucial role in providing relief for a breach of the Act. There may also be cases in which an order awarding monetary damages under s 82 will not of itself be sufficient to achieve a just result. In those cases, as in *Kizbeau* and *Pavich*, s 87 has an important role to play. To say that s 87 will have no role to play if the construction contended for by I & L is accepted overstates the importance of monetary awards in the "smorgasbord" of remedies available under the section.

115 Furthermore, even if the Court of Appeal was correct in asserting that I & L's proposed construction would do "violence" to the language of s 87(1), the Court does equivalent violence to the language of s 82. As this Court pointed out in *Marks v GIO Australia Holdings Ltd*[80], s 82 contains no limitation concerning the kinds of loss or damage that may be recovered. Nor does it contain any express indication that some kinds of loss or damage are not compensable under s 82. Making an order under s 87 that reduces the damages otherwise recoverable under s 82 necessarily limits the right of recoverability under that section, a limitation that is not apparent from the wording of either s 82 or s 87.

116 In *Project Blue Sky Inc v Australian Broadcasting Authority*[81], this Court pointed out that "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute". Because that is so[82]:

> "Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions."

117 Section 82 gives a specific remedy. On the other hand, s 87 is couched in general terms and gives a "smorgasbord" of remedies. Section 87 cannot be regarded as the dominant provision to which s 82 is subject. Nor does s 87 provide the conceptual framework in which the power conferred by s 82 must be exercised. Sections 82 and 87 provide complementary but independent powers.

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80 (1998) 196 CLR 494 at 509 [34] per McHugh, Hayne and Callinan JJ.

81 (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

82 (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

If there is any conflict between the two sections – and I do not think that there is – that conflict is best resolved by giving full effect to the specific provisions of s 82 when they apply. The conflict is then alleviated by treating the general provisions of s 87 as a supplementary power to be used when an award under s 82 will not properly compensate the applicant for its loss or damage. Of course, there is nothing to stop a court going directly to s 87 and including in the applicant's relief all the compensation that it could recover under s 82. But the terms of s 87 provide no warrant for depriving an applicant of the right that s 82 gives it.

118 To hold that s 87 entitles a court to avoid awarding or to reduce an amount of compensation otherwise recoverable under s 82 reads too much into the words "compensate ... in whole or in part" in s 87. There is no ground for concluding that the affirmative grant of power that these words confer contains the negative implication that the court must or can refuse to award an amount under s 82 because the applicant's lack of care was a concurrent cause of its loss or damage.

119 In commenting on the argument of I & L that s 87(1) can not cut down the right to an award under s 82, the Court of Appeal said:

> "If that is so, then s 87(1) is a dead letter insofar as it gives power to order *a compensatory payment in respect of part of the loss*." (emphasis added)

120 With respect, this statement illustrates the gloss that must be placed on s 87 to empower a court to refuse to make or to effectively reduce an award under s 82. Section 87 does not give a court the power to award damages compensating a claimant for *part of the loss* that it suffers. It gives a court the power to make orders that compensate the claimant "*in whole or in part for the loss or damage*". Those two formulations are not equivalents. As I & L submits, nothing in s 87 suggests that the amount of a compensable loss may be reduced. Nor does anything in the section suggest the grounds upon which such a reduction might be made. Rather, the insertion of the words "in whole or in part for the loss" emphasises the availability of the remedies under s 87 in situations where those available under ss 80 and 82 are not appropriate, or are not sufficient, to remedy the loss or damage brought about or that may be brought about by the contravening conduct.

121 While the Court of Appeal correctly asserted that the Act has important functions beyond helping those applicants whose circumstances cry out for legal protection, the fundamental purpose of the Act is consumer protection. As I said in *Henville*[83]:

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83 (2001) 206 CLR 459 at 503 [135].

> "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."

122 None of the decisions of this Court to which the Court of Appeal referred supports the conclusion of that Court[84]. As counsel for I & L pointed out, no support can be found in any High Court decision for the proposition that the right conferred by s 82 may be taken away or modified by the exercise of the discretionary power conferred on the court by s 87.

Interest

123 HTW also contended that its breach of the Act was not causally connected with the lost interest awarded by Williams J for the 12 month period of the loan. As a matter of common sense, so it contended, the cause of that part of the loss was the failure of I & L to assess the financial capacity of the borrower. However, no distinction can or should be drawn between I & L's loss of principal and its loss of income arising from the failure to pay interest on that principal. The lost interest was as much a part of I & L's loss or damage as the lost principal. The opportunity cost of lending the principal sum to Camworth was the interest that it was deprived of in not being able to lend that principal to another borrower. It may be that the sum awarded by Williams J for lost interest – which reflected the interest payable by Camworth – was not identical with the opportunity cost of the loan. And it was the opportunity cost, not the interest that Camworth failed to pay, that was the relevant loss for the purpose of s 82. But HTW made no point about this distinction. Its point was that the loss of income (interest) claimed by I & L was not its responsibility. That submission must be rejected.

Conclusion

124 For the above reasons, the appeal should be allowed. I agree with the orders proposed in the joint reasons of Gaudron, Gummow and Hayne JJ. Although I have discussed the reasons of Williams J and the Court of Appeal and perhaps the case law on ss 82 and 87 in greater detail than in their Honours'

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84 The Court of Appeal referred to *Sent v Jet Corp of Australia Pty Ltd* (1986) 160 CLR 540 at 544; *Wenpac Pty Ltd v Allied Westralian Finance Ltd* (1992) 67 ALJR 165; *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 298; and *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494.

judgment, I do not see any inconsistency between the *ratio decidendi* of their Honours' judgment and the *ratio decidendi* of this judgment.

125 KIRBY J. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Queensland[85]. That Court dismissed an appeal from a judgment of Williams J[86]. As I approach it, the appeal primarily concerns the meaning and operation of s 82(1) of the *Trade Practices Act* 1974 (Cth) ("the Act").

Upholding just outcomes under the *Trade Practices Act*

126 The other members of this Court would allow the appeal. They reject a contention by which the respondent attempted to sustain the judgment below on a basis different from that adopted by the Court of Appeal. Substantially, the respondent's notice of contention seeks to return the case to the way in which the primary judge reached his conclusions as to the respective responsibilities of the parties for the loss or damage in question. In the opinion of Callinan J (and in my opinion) the contention relied on by the respondent is "attractive". Its acceptance "produce[s] a fair and just result"[87].

127 In his reasons, Callinan J explains why he feels unable to accept the contention. The outcome will now burden a party (the respondent) with the total loss or damage suffered by another (the appellant) although the evidence shows (and the primary judge accepted) that part only of such loss or damage was caused by the conduct of the other. Does the law require such an outcome?

128 The Act is a major enactment of the Parliament. Its objects include the provision of remedies for the consumer protection provisions contained in Pt V of the Act. Specifically, that Part includes a prohibition upon corporations engaging in conduct that is misleading or deceptive[88]. It would be a curious interpretation of the Act that would turn such objectives, in such remedial legislation, to work unfair and unjust outcomes[89]. Sometimes statutory language proves intractable and obliges such a result. In the present case, neither the primary judge nor the Court of Appeal thought that such an outcome was

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

86 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* unreported, Supreme Court of Queensland, 22 October 1999 ("Reasons of the primary judge").

87 Reasons of Callinan J at [216].

88 The Act, s 52.

89 *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43 at 60-61; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 537 [124], 546-548 [148]-[150]; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 35-37 [90]-[92]; cf *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 at 42.

necessary. Nor do I. In my opinion, the primary judge was substantially correct in his approach. It was one consistent with the language and purposes of the Act. It was compatible with a line of judicial authority on the point. And it is productive of a just outcome which this Court should not disturb.

The facts and the course of the proceedings

129 *Origins of the dispute*: Most of the relevant facts, necessary to an understanding of my approach to this appeal, are set out in the reasons of the other members of the Court[90]. So are the applicable provisions of the Act. I & L Securities Pty Ltd (the appellant) was a corporation in the business of lending funds to approved borrowers. A third party ("the borrower") owned land and sought to borrow money upon the security of such land. A valuation of the land was obtained from HTW Valuers (Brisbane) Pty Ltd (the respondent). It was conceded that the respondent was negligent in making the valuation and that its conduct constituted misleading or deceptive conduct within the meaning of the Act[91]. It was also accepted that, in consequence of such conduct, the appellant had suffered loss and damage. However, the quantification of such loss or damage and the attribution of liability for it under the Act were left to be determined.

130 The complication in the case arose from the fact that a number of concessions were made at the trial by the principal witness for the appellant. These included that the appellant "would not have lent [to the borrower] if it had concluded that the borrower did not have the capacity to meet interest payments"[92]. Furthermore, it was conceded that "the financial capacity of the borrower to service the loan was an important consideration in deciding to lend in any case, and that was the position here. As a general proposition a prudent lender would always have regard to the financial capacity of the borrower to service the loan"[93].

131 *Conclusions of the primary judge*: On the basis of the evidence accepted by him, the primary judge concluded[94]:

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90 Reasons of Gleeson CJ at [2]-[4]; reasons of Gaudron, Gummow and Hayne JJ at [37]-[39]; reasons of McHugh J at [70]-[79]; reasons of Callinan J at [187]-[196].

91 Reasons of the primary judge at [2].

92 Reasons of the primary judge at [47].

93 Reasons of the primary judge at [44] referring to *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 455-456 [114]-[117].

94 Reasons of the primary judge at [47]-[49].

> "[T]he failure on the part of the [appellant] to ascertain the borrower's cash flow problems, to appreciate its lack of capital and income, and to assess the viability of its regularly selling two allotments per month is significant. …
>
> I am satisfied on the evidence the [appellant], through its directors, was aware of the importance of the borrower's capacity to meet its obligations under the loan agreement. Given the facts as found I am also satisfied that the [appellant] failed to act as a reasonably prudent lender. [The borrower] was in a precarious financial situation, it had no realistic chance of regularly meeting interest payments, and those matters would have become obvious if the [appellant] had carried out the enquiries and made the assessments which a prudent lender ordinarily would have conducted. It failed to meet the standard it set for itself in its advertising material. The failure of the [appellant] was more than what could be described as a mere difference of opinion between businessmen as to commercial risks. … The facts here indicated to a prudent lender that the borrower would have difficulty in meeting interest payments and further investigations would have been made by any prudent lender before approving the loan if it did so at all."

132 In the opinion of the primary judge, confirmation of the seriousness of the borrower's predicament was demonstrated by the speed with which default on the part of the borrower occurred following the making of the loan[95]:

> "The fact that the default in this case occurred in making the first monthly payment of interest demonstrates the degree to which the [appellant] departed from the norm and indicates the seriousness of its fault. Default at a later point in time could well have had less serious consequences for the [appellant]. There would have been no loan, regardless of the value placed on the land, if the [appellant] had made further and appropriate enquiries about the companies [sic] capacity to service the loan."

133 The foregoing additional observations were offered by the primary judge in the context of deciding a defence of contributory negligence pleaded in answer to the appellant's cause of action against the respondent based on negligence. However, many of those remarks were seen by the primary judge as equally relevant to the claim brought under the Act.

134 Three further passages in his reasons explain the primary judge's approach:

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95 Reasons of the primary judge at [53].

> "As found above, the [appellant] would not have approved the loan, regardless of the valuation represented by the [respondent], if it had made the appropriate enquiries as to the borrower's capacity to service the loan."[96]
>
> "[A]s this cause of action is created by statute, and embraces situations which would not give rise to a cause of action in tort, it is not appropriate to speak of the [respondent's] establishing contributory negligence."[97]
>
> "[No] High Court judgments preclude a court from determining that there were two causes of the [appellant's] loss, in other words a divided responsibility for that loss, and in consequence only allowing the [appellant] to recover by way of damages pursuant to s 82 that part of the loss which is attributable to the conduct in breach of s 52. … It seems abundantly clear that the legislature did not intend to deprive someone who suffered loss as a result of deceptive and misleading conduct of the right to recover at all if there was some other demonstrable cause of that loss. Equally, in my view, the legislature did not intend that the total loss should always be recoverable regardless of the number or significance of established causes other than the misleading or deceptive conduct in question."[98]

135 It was on the basis of such reasoning that the primary judge reached his decision that, under s 82 of the Act, the appellant was only entitled to recover two-thirds of its established loss from the respondent[99].

136 *Decision of the Court of Appeal*: When the appellant appealed to the Court of Appeal, that Court approached the matter differently. It considered that the result reached by the primary judge could be sustained by the application of s 87(1) of the Act[100]. Under that sub-section, a court, giving relief to a party who has suffered "loss or damage by conduct of another person … in contravention of [the Act]", is empowered to fashion its orders "as it thinks appropriate" against the person involved in the contravention. It is empowered to make orders that "will compensate the first-mentioned person in whole *or in part*" or "prevent or reduce the loss or damage".

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96 Reasons of the primary judge at [54].

97 Reasons of the primary judge at [55].

98 Reasons of the primary judge at [62].

99 Reasons of the primary judge at [65]-[66] cited by Callinan J at [202].

100 (2000) 179 ALR 89 at 94-96 [22]-[28] cited by Callinan J at [203].

137 The Court of Appeal's approach to this case raises a question, still surprisingly unresolved, as to the relationship between s 87(1) and s 82 of the Act[101]. If indeed s 87(1) applied to the case it would appear to afford power to the primary judge to enter the judgment that he did[102]. However, the appellant contested the applicability of s 87(1) to such a case. That contest was the basis of its appeal to this Court. In defence of the primary judge, the respondent contended that his judgment could be sustained on the reasoning offered at first instance, without resort to s 87(1). Alternatively, the respondent suggested that, if it were unsuccessful under s 82 of the Act, the judgment of the primary judge could be upheld based on s 87 of the Act. As a fall-back position, the respondent contended that it was entitled to be relieved from "particular components"[103] of the appellant's loss that were "directly referable" to the appellant's own conduct, namely the interest lost by the appellant during the period of its loan to the borrower.

The issues

138 From the foregoing description of the arguments of the parties, the following issues arise for decision:

(1) *The s 82 issue*: Upon its true construction, does s 82 of the Act permit a division of responsibility between the appellant and the respondent as the primary judge found? This question may, in turn, be considered by reference to a number of subordinate questions, namely whether the construction of s 82 adopted by the primary judge:

- Is compatible with the terms of s 82 itself.
- Is consistent with judicial authority on the meaning of s 82.
- Is compatible with the provisions of s 75AN of the Act.
- Can be reconciled with the binding rule established by this Court's recent decision in *Henville v Walker*[104].

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101 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 544-545 [142]-[144]; cf *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353.

102 cf *S & U Constructions Pty Ltd v Westworld Property Holdings Pty Ltd* (1988) ATPR ¶40-854 at 49,216-49,217.

103 *Henville v Walker* (2001) 206 CLR 459 at 483 [72].

104 (2001) 206 CLR 459.

- Otherwise produces a sensible and just construction of s 82.

(2) *The s 87 issue*: If it is shown that a party's careless business conduct caused it to enter a loss-making transaction, may that party be precluded from recovery under s 82 of the Act of the whole of the loss sustained by it and, instead, may it be awarded damages under s 87 of the Act, such damages being subject to reduction to the extent to which its own conduct was the cause of the loss?

(3) *The interest issue*: In the event that (1) and (2) are answered unfavourably to the respondent, is it entitled to relief from the "particular component" of the judgment sought by the appellant, comprising the interest claimed by the appellant and lost during the period of the loan?

139 The s 87 question (issue (2)) and the argument relating to interest (issue (3)) do not arise if the s 82 question (issue (1)) is resolved in favour of the respondent.

The terms of the Act

140 The starting point for any task of statutory interpretation is the statute itself[105]. In the present case, this elementary rule requires an examination of the language of s 82, read in its context, for the purpose of achieving the objectives of the Act.

141 On the face of things, because the Act is designed to provide redress, relevantly for consumers who suffer from "misleading or deceptive conduct" on the part of a corporation in trade or commerce[106], the purpose of s 82(1) of the Act is to recompense the "person who suffers loss or damage". It is not designed to do more. Thus, it is not enacted to provide a windfall that travels beyond the purpose of redress for a contravention of the Act. Nor does it exist to over-compensate a person who suffers loss or damage. On the face of the sub-section, the amount of the recovery contemplated by s 82(1) is designed to achieve that statutory object, namely the reimbursement for the "loss or damage" suffered through contravention. It is by the provision of this means of civil redress that a sanction is afforded to the consumer to ensure that the larger objects of the Act accrue to the benefit of society. Those larger objects envisage proportionality between the "loss or damage" suffered by the consumer and the contravention of

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105 cf *Conway v The Queen* (2002) 76 ALJR 358 at 371 [65]; 186 ALR 328 at 345 and cases there cited.

106 The Act, 52(1) referred to in s 82(1) by the reference in that sub-section to Pt V of the Act.

the Act that caused such "loss or damage". Where the Act intends to add punishment beyond the just civil remedies for which it provides, it says so[107].

142 The foregoing remarks have a specific textual foundation in the preposition "by" appearing in s 82(1) of the Act. This point was made by the Federal Court in several early cases about s 82, including *Munchies Management Pty Ltd v Belperio*[108]:

> "Section 82 serves to identify the classes of applicants and respondents in the action, to identify loss or damage as the gist of the action, and to mark out the measure of damages as the amount of that loss or damage. The measure of damages hangs on the words 'by conduct'; the preposition 'by' has been interpreted to mean 'by reason of' or 'as a result of'."

143 It follows that the language of the Act, reinforced by a consideration of its objects and policy, both specific and general, suggest that a court should approach the calculation of the "loss or damage" that the consumer may recover by action against the party in contravention of the Act, having regard to that aspect of the "loss or damage" that can fairly be attributable to the conduct of the party in contravention. To provide a greater recovery would go beyond the language and apparent purposes of s 82. It would exceed the boundary marked out by the preposition "by".

144 The importation of a causative link between the "contravention" of the Act and the "loss or damage" claimed is unsurprising. As other cases involving the contentious notion of causation demonstrate, where (as is not infrequently the case) there are several causative factors for a legally relevant event, it is not sufficient simply to point to a temporal sequence of happenings and call them the cause. To mark the limits of the consequences that can fairly be attributed by the law to the contravention said to give rise to legal liability, both common sense and a policy judgment are invoked[109]. This point was well made by French J in

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107 See eg the Act, s 79 ("Offences against Part V").

108 (1988) 58 FCR 274 at 286; cf *Shepherd v Noyes Bros Pty Ltd* (1985) ATPR ¶40-588 at 46,750.

109 cf *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 516; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; *Chappel v Hart* (1998) 195 CLR 232 at 238 [7], 243 [24], 258 [70], 269-270 [93]; *Rosenberg v Percival* (2001) 205 CLR 434 at 449 [45], 463-464 [91], 487 [160]-[161], 504-505 [221]-[223]; Stapleton, "Perspectives on Causation", in Horder (ed), *Oxford Essays in Jurisprudence*, Fourth Series (2000) 61 at 77.

Pavich v Bobra Nominees Pty Ltd in the context of s 82 of the Act[110]. His Honour said that the selection of a sufficient cause "is [properly] influenced by policy and not merely logic". He went on[111]:

> "The primacy of the causation principle in s 82 would seem to exclude reliance upon such concepts as mitigation or contributory negligence, unless it can be shown that the applicant's own carelessness or disregard for his or her interest is the cause of all *or some part of* the claimed loss. … The criteria for such selection may import concepts analogous to remoteness, mitigation or contributory negligence."

145 The primary judge in this case had the advantage of considering the evidence of witnesses who had been involved in the making of the loan by the appellant to the borrower. He was in a good position to evaluate the respective parts that the conduct of those persons had played in relation to the conduct of the respondent in the events leading to the entry into the loan. As his Honour observed, cases commonly arise (of which this was one) where it is shown that several distinct aspects of "conduct" contributed to (ie caused) the loss or damage suffered by a consumer. In its claim for recovery for contravention of the Act, the consumer is only entitled to recover the loss or damage caused "by" the conduct of the contravener. Thus, it is not entitled, for example, to recover from the respondent that part of the total "loss or damage" that was caused "by" its own conduct or "by" the conduct of others. In delineating the causative factors, and in distinguishing between them, a judgment is invoked. Such judgment is to be exercised judicially. However, its existence is fully warranted by the language and objects of the Act. There is an inescapable artificiality in labelling a causative factor as a "particular component" and separating it as such from other causes. Such distinctions have no apparent foundation either in the language of the Act or in a common sense approach to causation repeatedly endorsed by decisions of this Court.

146 If, in the construction of s 82 of the Act, a choice arises between the foregoing construction and one that would allow the appellant to recover the entirety of its "loss or damage" from the respondent, regardless of the contribution of the acts and omissions of others, and of its own contribution, the former construction should, in my view, be preferred. It produces an outcome that is fair and reasonable. It avoids an unjust or capricious result. It fulfils the just and equitable consequence that would ordinarily be attributed to the Parliament. In particular, it does so in the context of remedial legislation having large social objectives. It flows naturally from the language of s 82, unless that

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110 (1988) ATPR (Digest) ¶46-039.

111 (1988) ATPR (Digest) ¶46-039 at 53,124 (emphasis added).

section is read with spectacles whose focus derives from the common law rule in *Merryweather v Nixan*[112] with all its injustices. That rule should be confined to its common law provenance. It has no part to play in deriving the meaning and operation of s 82 of the Act.

147 The primary judge was therefore entitled, on the evidence that he accepted and in accordance with the terms of s 82 of the Act, to conclude that the only "loss or damage" that had been "suffered" by the appellant, "*by conduct of*" the respondent, was that part of the "loss or damage" that his Honour found. It being open to him to ascribe the other part of the "loss or damage" to the conduct of the appellant itself, there was no error in the primary judge's decision that, under s 82(1) of the Act, the appellant could not recover from the respondent in that respect.

148 The foregoing involves nothing more than the application of the words of s 82, read in context, to the facts of the case as found by the primary judge. A question is therefore presented whether this outcome is forbidden by existing judicial authority, by some other provisions of the Act that oblige a different outcome or by the holding of this Court in *Henville*.

The trend of authority on s 82 of the Act

149 *A series of court decisions*: In *Kewside Pty Ltd v Warman International Ltd*[113] in the Federal Court, French J remarked that the damages recoverable under s 82 of the Act for contravention of s 52 were "measured by the loss or damage suffered by reason of the contravention". After referring to the "common sense concepts" imported by this notion of causation, French J repeated a view that he had earlier expressed in *Pavich*[114], namely that notions analogous to contributory negligence and mitigation might apply to decide whether or not a claimed loss was "*truly* caused by the contravention in question".

150 In *Argy v Blunts & Lane Cove Real Estate Pty Ltd*[115], Hill J, in the same Court, referred, without apparent disagreement, to the foregoing passage in the reasons of French J. So, at the same time, did Rogers CJ Comm D in the

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112 (1799) 8 TR 186 [101 ER 1337].

113 (1990) ASC ¶55-964 at 58,824 (emphasis added).

114 (1988) ATPR (Digest) ¶46-039.

115 (1990) 26 FCR 112 at 138.

Supreme Court of New South Wales[116]. In the last-mentioned case the notion of severable causes, and of confining recovery under s 82 to that part of the loss or damage attributable to the contravener, received endorsement[117]. Rogers CJ Comm D said:

> "I do not accept that the plaintiffs should be relieved beyond the measure I have indicated. They could have brought the loan back onshore on any rollover. There was no good reason given why they did not do so and rely on their rights against the defendant."

151 In *Tefbao Pty Ltd v Stannic Securities Pty Ltd*[118], Hodgson J in the Supreme Court of New South Wales also expressed opinions consistent with the approach to s 82 of the Act adopted by the primary judge in this case. His Honour said:

> "It is clear that the contravention need not be the only cause of the loss or damage … However, if some other cause is properly to be treated as 'the real, essential, substantial, direct, appreciable or effective cause' of the damage, the fact that the damage would not have occurred but for the contravention need not be enough for liability. If some part of the damage would not have occurred but for negligent conduct of the claimant, or failure to mitigate, then it may be appropriate to apply notions of reasonableness in assessing how much was in truth *caused by* the contravention".

152 It is inherent in this analysis that if "in truth" the loss or damage could not be said to have been "caused" by the contravention, it will not be recoverable from the contravener under s 82 of the Act.

153 Other decisions (although generally expressed in the course of considering the relief available under s 87) also contain judicial language consistent with the foregoing recognition of the unsurprising propositions that the loss or damage may, in a particular case, have multiple causes and that in such cases the only amount recoverable from the contravener of the Act is that which can fairly be attributable to (or caused "by") the contravention. According to these decisions, the remaining loss or damage is attributable to the other party whose conduct has

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116 *Mehta v Commonwealth Bank of Australia* (1990) Aust Torts Reports ¶81-046 at 68,142.

117 (1990) Aust Torts Reports ¶81-046 at 68,142.

118 (1993) 118 ALR 565 at 575 (emphasis added).

caused the loss or damage or (in a case such as the present) to the claimant itself[119]. It is not attributable to the contravener of the Act.

154 *Academic and other support*: In addition to this judicial authority, expressions of academic[120] and other[121] opinion are, I believe, consistent with the foregoing view as to how s 82 of the Act operates. Thus Mr Seddon, in stating what he describes as the "case for proportionality", argues that ss 52 and 82 do not preclude the foregoing approach[122]:

> "Under s 82 the plaintiff must show that damage was suffered 'by conduct of another that was done in contravention of' s 52. The court's task is therefore to ask, in a commonsense way: what damage was caused to [the applicant] by [the contravener's] conduct? The answer may well be: not all for which [the applicant] is claiming."

155 As Mr Seddon points out, only this construction of s 82 produces a fair result and avoids the injustice of imposing full liability on a contravener of the Act "when the misleading conduct was a minor inducement to the other party".

156 In the light of such a long, consistent, sensible and just interpretation of s 82, both in judicial authority and other writings, and in the face of the language and purpose of the section, why should this Court now impose a construction that produces unfair and unjust results? Why should such an outcome be attributed to the Parliament? At least, why should such a construction be attributed where the provision fairly yields a meaning by which such unfairness and injustice can be avoided?

157 The provisions of the Act by which the determination of the recovery of "loss or damage" is assigned to courts of the Australian Judicature afford an additional reason why it should be assumed that an operation of s 82 that produces fair and just outcomes is to be preferred to one apt, in a particular case, to produce disproportionate and unjust outcomes. Only the clearest statutory

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119 See eg *Reg Russell & Sons Pty Ltd v Buxton Meats Pty Ltd* (1994) ATPR (Digest) ¶46-127 at 53,614; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 366.

120 Seddon, "Misleading Conduct: The Case for Proportionality", (1997) 71 *Australian Law Journal* 146; cf Heydon, *Trade Practices Law*, (2001) at 9353-9354 [18.1740].

121 Campbell, "Contribution, Contributory Negligence and Section 52 of the Trade Practices Act – Part 1", (1993) 67 *Australian Law Journal* 87.

122 Seddon, "Misleading Conduct: The Case for Proportionality", (1997) 71 *Australian Law Journal* 146 at 150 (footnote omitted).

language would force me to adopt such an approach. Along with the judges who have gone before, I feel no such compulsion. Where there are multiple causes of "loss or damage" the only part of such loss or damage that is recoverable from the contravener of the Act under s 82 is that part which fairly or truly represents the loss or damage caused *by* such contravention. No more; no less.

158 For completeness, it is perhaps as well to say that, in this case, no claim was made as between the parties for an order for contribution in equity[123], assuming that to be available[124]. Nor did the respondent argue that any other statutory provisions for contribution were available to it in the claim based on the Act[125].

Consistency with other provisions of the Act

159 *Absence of express power to apportion*: In resistance to this conclusion, the appellant relied on what it said were indications elsewhere in the Act that such an approach to s 82 was impermissible. Three points were made:

(1) That if it had been intended that such an apportionment was to be available under s 82(1), the Parliament would have made its purpose clear, eg by providing expressly for such a division of responsibility;

(2) That s 87, in terms, contemplates the fashioning of an appropriate order and the provision to the claimant of relief "in part for the loss or damage". Such words are missing from s 82; and

(3) That s 75AN of the Act was enacted some time after the principal Act[126]. It expressly permits the loss there provided for to be "reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in causing the loss". Having regard to this provision, and to the well-established precedent in the familiar language of template

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123 cf *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350; Campbell, "Contribution, Contributory Negligence and Section 52 of the Trade Practices Act – Part 1", (1993) 67 *Australian Law Journal* 87 at 92.

124 cf *Burke v LFOT Pty Ltd* (2002) 76 ALJR 749 at 765 [85]; 187 ALR 612 at 634-635.

125 cf Campbell, "Contribution, Contributory Negligence and Section 52 of the Trade Practices Act – Part 1", (1993) 67 *Australian Law Journal* 87 at 93. In the case of Queensland the applicable statute is the *Law Reform Act* 1995 (Q), Pt 3; Heydon, *Trade Practices Law*, (2001) at 9355 [18.1740].

126 The section was inserted by the *Trade Practices Amendment Act* 1992 (Cth), s 4.

legislation providing for apportionment and contribution between tortfeasors[127], the appellant argued that, had the Parliament intended such apportionments to be performed, it had ample precedents to follow at the time of the enactment of the principal Act. It also had ample opportunity to introduce in s 82 a notion in harmony with, or similar to, s 75AN, but had refrained from doing so.

160 These arguments must be given weight in the task of interpretation. However, the primary duty of a court faced with a problem such as the present is to construe the words enacted. It is not to attempt to find significance in words that were not enacted. In a large and complex piece of legislation, such as the Act, it is erroneous to assume perfect symmetry and consistency among all of its provisions. Even more is it a mistake to draw inferences from later particular, limited amendments to the Act such as s 75AN, for the meaning of the more general provisions of the Act, untouched by such amendments[128].

161 *The terms of ss 82 and 87 of the Act*: It is true that the Parliament could have enacted language in s 82 that would have removed the problem of construction now presented to this Court. But that is true of virtually every contested question of statutory interpretation. If only the Parliament always made its meaning completely clear, there would be no need for appeals such as the present. Much of the business of the courts in construing legislation would then disappear, to the great satisfaction of many judges[129].

162 If the language of s 82(1) is sufficiently clear, the duty of a court is to give effect to it. It is not to pine after clearer language. The appellant's argument, based on the terms of s 87(1), is unavailing. The appellant itself presented ss 82 and 87(1) as involving separate categories entailing separate remedies and consequences. Upon the appellant's own argument, it should not be surprising that the provisions of ss 82 and 87 are differently expressed. Yet this much is common. Both sections appear in a remedial statute designed to provide for recovery of loss or damage caused by contravention of protective provisions of the Act. Equally, they each commit the determination of the loss or damage recoverable to a court. Such a body may ordinarily be expected to give effect to fair and just outcomes, not those that are offensive to notions of fairness and justice and disproportionate to the contravention of the Act proved.

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127 Acts following the *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK), s 6(1). See *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635.

128 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329 per Toohey, McHugh and Gummow JJ, 350-351 of my reasons.

129 cf *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 172 [43].

163 *The terms of s 75AN of the Act*: So far as s 75AN is concerned, it is true that that section refers expressly to a concept akin to contributory negligence. It is found in Pt VA, which was inserted in 1992. The Part relates to the liability of manufacturers and importers for defective goods. It establishes a regime of strict liability by which a person, who is injured or suffers property damage as a result of a defective product, has a right to compensation against the manufacturer of the product without a need to prove negligence on its part. It is limited in operation to the reduction of recovery in respect of certain highly specific proceedings. These include proceedings taken under s 75AD (which imposes liability on the manufacturer of goods that have a defect if such defect causes death or injury); s 75AE (which imposes liability on the manufacturer of goods for a defect causing loss because another person suffers death or injury); s 75AF (which imposes liability for a defect in the like case where it causes other goods to be destroyed or damaged and the person who used or intended to use them to suffer loss or damage); and s 75AG (which imposes liability in such a case where, because of the defect, land, buildings or fixtures are destroyed and damaged and the person who used or intended to use them suffers loss or damage as a result).

164 Part VA is thus a highly particular, self-contained segment of the Act that includes specific provisions that have a readily traceable origin. To read into the enactment of such particular provisions inferences concerning the meaning of s 82 of the Act, enacted earlier, is to draw conclusions that go well beyond the premises. By way of contrast, when the Parliament enacted Pt VI of the Act, including s 82, it obviously contemplated that, in appropriate cases, courts could take into account certain kinds of conduct which, in common law parlance, would be described as mitigation, relief for remoteness, responsibility for causation and calculation of the measure of damages. Whilst a point can fairly be made that, in its original form, s 82 could have been enacted with language similar to s 75AN had the Parliament been of such a mind, the absence of such language (and the later passage of s 75AN) do not expel the meaning that follows from the language in which s 82 of the Act is actually expressed.

165 The meaning of s 82 of the Act that secures the fair, just and proportionate outcome is therefore not inconsistent with other provisions of the Act. On the contrary, the construction urged by the respondent involves giving to s 82 of the Act its literal meaning. That is reinforced when regard is had to the purposes of consumer protection envisaged by the Act and to the judicial character of the bodies to whom, relevantly, the achievement of those purposes is committed[130].

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130 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 547-548 [150].

The decision in *Henville v Walker*

166 *The issue decided in Henville*: This leaves only the question of whether the respondent's construction of s 82 is incompatible with the decision of this Court in *Henville v Walker*[131]. The appellant argued that it was. In my view it is not.

167 In *Henville*, the primary judge had reduced the damages claimed because of the claimant's own conduct in under-estimating the cost of a development. The Full Court of the Supreme Court of Western Australia held that the claimant's conduct had amounted to a break in the "chain of causation" so that it was entitled to recover nothing. This Court held that the Full Court had erred in concluding that conduct that contravened s 52 of the Act was not a cause of the loss. The orders of this Court therefore set aside the orders of the Full Court and substituted an order dismissing the appeal to the Full Court, thereby restoring the judgment of the primary judge.

168 It follows that, as a matter of legal authority, *Henville* stands for the propositions that sustain this Court's conclusion about the Full Court's foregoing error. That is to say, the decision stands for correcting the Full Court's erroneous conclusion that an intervening act had occurred that snapped the chain of causation. As a matter of proper analysis, anything else said by this Court, beyond the ruling that was necessary to correct the identified error, is not part of the binding rule of *Henville*. The appellant in this Court in *Henville* had not filed a cross-appeal to the Full Court[132]. Accordingly, neither that Court, nor this, was free to embark upon any consideration of the appellant's damages if the Full Court's intervention was found to be erroneous, as it was.

169 The respondent accepted fully the judicial remarks in *Henville* to the effect that "[t]he purpose of the legislation is not restricted to the protection of the careful or the astute"[133]. It accepted that, consistently with *Henville*, it would not be entitled to rebut a claim for loss or damage by a person in the position of the appellant simply because the appellant had not checked the respondent's conduct[134]. The respondent also accepted that carelessness and omission to

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131 (2001) 206 CLR 459.

132 (2001) 206 CLR 459 at 466 [4].

133 (2001) 206 CLR 459 at 468 [13].

134 (2001) 206 CLR 459 at 471 [23]; cf *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302 at 309; *Sutton v A J Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 239-241; *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 at 341.

detect the error of the misleading conduct itself would not constitute a separate cause of loss or damage, distinguishable from that caused by the contravention. The respondent agreed that it would not be entitled to diminish the damages to which a party such as the appellant was entitled under s 82 of the Act by showing that a cause was something for which neither party was legally responsible. It endorsed the conclusion that s 82 posed the question of recovery as between the parties to the proceedings. It also acknowledged that whilst a party such as the appellant bore the ultimate burden of demonstrating what loss or damage had been sustained, once a contravention was shown, a forensic burden at least was borne by a party (such as itself) to demonstrate that some other, independent, cause of the loss or damage existed.

170 In the respondent's submission, nothing for which *Henville* stands as legal authority (or could stand having regard to the issues decided in that case) contradicts the commonplace notions that s 82 requires identification of the cause of the loss or damage; that sometimes more than one such cause will exist; and that, in such cases, it will then be open to the judge on the evidence to ascribe part only of the loss or damage to the cause constituting the contravention of the Act for which alone the Act provides for recovery against the contravener.

171 *Judicial remarks in Henville*: A number of the remarks of those judges who participated in *Henville* appear to support this approach. Thus, Gleeson CJ pointed out[135] that:

> "The only express guidance … 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."

172 Later, by reference to what the primary judge had ordered in that case, consistently with the line of judicial authority traced above, Gleeson CJ said that the primary judge in that case had been[136]:

> "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".

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135 (2001) 206 CLR 459 at 470 [18].

136 (2001) 206 CLR 459 at 474 [35].

It was in this way that Gleeson CJ concluded that the finding made by the primary judge "as to causation" had been open to him "in the circumstances of the case"[137].

173 In her reasons in *Henville*, Gaudron J pointed out that there was nothing in the Act to suggest "that the loss or damage is to be calculated in any particular way"[138]. Her Honour said that the relief available under s 82 of the Act is not to be confined by analogy either with actions in contract or tort. It is *sui generis*: a statutory remedy. The task of the court deciding the claim for recovery is[139]:

> "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 … 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."

And her Honour went on[140]:

> "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*".

174 In the reasons of McHugh J, his Honour pointed out that there was no basis for reading into s 82 doctrines of contributory negligence and apportionment. He went on[141]:

> "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."

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137 (2001) 206 CLR 459 at 474 [35].

138 (2001) 206 CLR 459 at 481 [63].

139 (2001) 206 CLR 459 at 482 [66] (original emphasis).

140 (2001) 206 CLR 459 at 483 [70] (emphasis added).

141 (2001) 206 CLR 459 at 505 [140].

175 In his reasons, Gummow J agreed with the reasons of McHugh J[142].

176 *Conclusion: compatible with Henville*: In these circumstances, quite apart from the limited legal issue that was before this Court in *Henville*, I do not see any common principle in the *obiter dicta* that stands in the way of the conclusion that the primary judge reached in the present case. It is possible that the conclusion of Williams J in this case might have been expressed in different language. It might, for example, have omitted references to apportionment and contribution and adhered to the limited recovery that could be made by the appellant under the Act, confined as it was to the loss or damage caused *by* the conduct of the respondent. But the function of this Court is not to correct the expression of judicial reasons. In accordance with the Constitution[143], this Court corrects the judgments and orders that are brought on appeal. If, as here, the actual judgment of the primary judge is correct, and the reasons are clear enough and are sustained by the true meaning of s 82 of the Act, the judgment should be confirmed with the consequence that the appeal should be dismissed.

The primary judge made no error on s 82

177 *Visceral responses and principle*: I respectfully disagree with the opinion of the majority in this Court regarding s 82 of the Act. In answer to the suggestion that my view relies upon nothing more than a "visceral response"[144] on the part of the judge assessing the damage, and not the judge's concept of "principle and of the statutory purpose"[145], I would answer that it all depends upon one's opinion of what the "principle" and "purpose" are and what the statute means.

178 If the view is taken, as Callinan J puts it (correctly in my opinion), that the outcome favoured by the majority is "unfair … [and] unlikely to have been intended by the legislature"[146], the mind of a judge naturally searches for an alternative construction that avoids such an affront to justice. Where alternative constructions are available, conventional rules of statutory interpretation encourage judges to attribute to Parliament a purpose to produce a just outcome rather than one that causes unfairness and unjust over-compensation at the price

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142 (2001) 206 CLR 459 at 507 [153]. He also agreed with Hayne J. See (2001) 206 CLR 459 at 509-510 [165].

143 Constitution, s 73.

144 Reasons of Gleeson CJ at [26].

145 Reasons of Gleeson CJ at [26].

146 Reasons of Callinan J at [211].

of another. The principle of consumer protection reflected in the Act is one of fairness to consumers. Except to the extent expressly provided in terms of penalties and punishments, it is not one of over-compensation and unjust excess. Providing windfall gains to litigants is not part of the scheme of the legislation. That scheme contemplates that all should be responsible, but only responsible, for the damage that they cause.

179 Care must be taken in adopting too narrow a view of what is involved in a "discrete", wholly severable and "independent"[147] cause. A narrow view would hardly be "principled". Why would such an arbitrary basis of disentitlement be adopted by the Parliament? Classifying a cause or causes of events as "discrete" or "independent" obviously involves elements of judgment. One person might consider the view that the borrower's default in the present case was an "independent" cause and the assessment of the consequential loss or damage to be a matter of "common sense". That, after all, is the ordinary touchstone adopted by this Court for judging issues of causation[148]. Others might describe it as "visceral" or a "bare assertion"[149]. I am of the former school because its approach promotes a just operation of the Act. It avoids manifest unfairness. And it achieves the policy of the Act as I perceive it.

180 *Rewarding or not unfairly burdening?* The argument that the construction that I favour turns the statute into a medium for impermissibly compensating a third party[150] involves the paradox of the half empty/half full glass. I do not perceive the primary judge's approach as "compensating" or "rewarding" the respondent financially in a way not provided for in the Act. Instead, I see it as burdening the respondent with no more than the loss or damage caused by the conduct of the respondent. The former course would indeed be impermissible. The latter is the very requirement of the Act. The difference between them is that no payment is made to the respondent for the appellant's default. The appellant owed the respondent nothing. It is the respondent who must pay the appellant. But it must pay only to the extent that the language of the Act obliges. And this

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147 Reasons of Gaudron, Gummow and Hayne JJ at [62].

148 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515, 522-523 applying *Fitzgerald v Penn* (1954) 91 CLR 268 at 277-278; *Chappel v Hart* (1998) 195 CLR 232 at 243 [24], 256 [63], 269 [93], 290 [148]; *Rosenberg v Percival* (2001) 205 CLR 434 at 460 [85], 464-465 [95], 500-501 [211].

149 Reasons of Gaudron, Gummow and Hayne JJ at [59].

150 Reasons of Gaudron, Gummow and Hayne JJ at [60].

limits its burden to the measure *caused by* its conduct, as distinct from that share of the burden *caused by* other conduct (here that of the appellant)[151].

181 Finally, I do not see that my construction undermines the policy of the Act at all[152]. Obviously, it depends on what that policy is. The policy is not that of working unjust and unfair outcomes or arbitrarily burdening a contravener of the Act with loss or damage judged to have been caused by conduct of others. True, there is "one indivisible loss in this case"[153]. But the search is for what the recoverable loss is in the singular facts of each matter.

182 The result would have been different if the supposed separate cause of the appellant's loss or damage had been its failure to detect and correct the negligent valuation of the respondent. For such causes of loss, s 82 of the Act contemplates no diminution in the consumer's recovery from the party in contravention of the Act that has caused its loss or damage. The contravener is forbidden from asserting "You should not have believed me when I misled you"[154]. However, that is not the present case. Here, on evidence that fully sustained his conclusion, the primary judge expressed the view that there were distinct, separate, later and effective causes of the appellant's loss or damage severable from the cause provided by the respondent's contravention of the Act. Most importantly, those causes included the appellant's own failure to make reasonable enquiries about the capacity of the borrower to meet its obligations under the loan agreement.

183 *Conclusion: finding on s 82 was available*: On the basis of the finding that there was a cause of the loss or damage separate from the respondent's contravention of the Act, it was open to the primary judge (as, earlier, to the primary judge in *Henville* and the judges in the other cases that I have cited) to conclude that, in circumstances of two independent causes, the only "loss or damage" for which the respondent, as contravener of the Act, was liable under s 82 of the Act was that caused "by" its conduct. It was not liable for so much of

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151 Analogous problems arise in sentencing where courts are enjoined to make provision for certain conduct but forbidden to penalise the prisoner for the opposite conduct; cf *Siganto v The Queen* (1998) 194 CLR 656. The problem is described as "metaphysical": *R v Reiner* (1974) 8 SASR 102 at 105 per Bray CJ; *JCW* (2000) 112 A Crim R 466 at 468 [16].

152 cf reasons of McHugh J at [104].

153 Reasons of McHugh J at [102].

154 *Sutton v A J Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 239 cited by the Court of Appeal: *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2000) 179 ALR 89 at 95-96 [27].

the loss or damage that was caused "by" the appellant's own conduct. The evaluation of these separate causes admittedly involved judgment, evaluation and opinion. But no one was in a better position to make such assessments than the primary judge. Upon the evidence that he accepted, no error has been shown in the conclusion that he reached.

Remaining issues and order

184 Having arrived at this conclusion, it is unnecessary for me to consider the correctness of the Court of Appeal's alternative approach, involving the suggested application of s 87(1) of the Act[155]. In the light of past authority, there are difficulties in that approach[156]. Similarly, it is unnecessary for me to consider the separate argument concerning the "particular component" of interest. It was only raised by the respondent defensively, should both the first and second issues be decided against it.

185 The appeal should be dismissed with costs.

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155 cf *Goldsbro v Walker* [1993] 1 NZLR 394 at 404.

156 cf *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 513 [43], 527 [96], 532 [109].

186 CALLINAN J. The question that this appeal raises is whether ss 82 and 87 of the *Trade Practices Act* 1974 (Cth) ("the Act") confer a power upon a court to reduce a plaintiff's damages recoverable pursuant to s 82 of the Act by reason of contributory negligence on the part of that plaintiff.

Facts

187 The appellant is a money lender. Its directors were practising solicitors. The money that it lent was largely the money clients entrusted to it for that purpose. The solicitors acted as solicitors for the appellant and earned additional fees payable by borrowers on account of the appellant's legal costs as mortgagee. The respondent is a valuer.

188 Camworth Pty Ltd ("Camworth") owned land approved for subdivision at Acacia Ridge in Brisbane. It sought, in August 1994, a valuation of the land with a view to using it, as evidence of value, to borrow money from another money lender, to develop part of the land. At that time Camworth already owed to another lender approximately $300,000, later secured by a second mortgage. The respondent valued the land "for mortgage security purposes" on 18 August 1994 at $950,000. That other money lender then lent Camworth $650,000.

189 The partial subdivision proceeded. On 2 March 1995 the respondent revalued the whole of the land at $1.576 million provided that the subdivided lots were "adequate[ly] market[ed]".

190 Camworth sought a further loan, this time from the appellant. Among the documents submitted by a broker on behalf of Camworth to the appellant was a statement of assets and liabilities of Camworth's principal shareholder and controller dated 29 June 1995. It showed that he owned a house valued at $207,500 and encumbered to the extent of $150,000; cash of $20,000; furniture valued at $20,000; two motor vehicles worth $27,000; and his "share" in Camworth which he assessed at $1.576 million in accordance with the respondent's valuation. He disclosed as a liability Camworth's indebtedness to the holders of the first and second mortgages over the subject land, in the total sum of $938,000. The only other liability disclosed was $1,000 owing on account of credit card usage. The document did not disclose, and the appellant made no inquiries to ascertain, whether he was in receipt of income or in employment.

191 Two valuations by the respondent were attached to Camworth's application to the appellant for a loan. One was that dated 2 March 1995 and the second 13 June 1995.

192 By a letter dated 11 July 1995 the appellant informed Camworth that it "conditionally approved [the] loan application"; subject to these conditions: an assignment of the valuation(s), the payment of a commitment fee of $5,000, and

the submission of various other (non-relevant) documents. A further requirement was that Camworth provide a "Statement of the Borrower's Assets and Liabilities signed by the Borrowers". The $5,000 was duly paid, but no statement of assets or liabilities of the borrower was ever submitted.

193 In response to a request for more information from the appellant the respondent wrote to the appellant in July 1995 as follows:

> "We refer to the abovementioned full valuation dated 18 August, 1994 of $950,000 prepared for PJB Mortgage Management Pty Ltd and updated valuation undertaken on 2 March, 1995 for $1,026,000 for Stage 1 comprising 19 subdivided and sealed green street allotments together with balance englobo lands valued at $550,000 for Stage 2 and 3.
>
> We wish to advise that the valuation report is suitable for your mortgage security purposes and acknowledge that you intend to loan $950,000 (60% thereof) in reliance on our valuation, secured by a registered first mortgage on the above property.
>
> In the case of a mortgagee sale for the above property we recommend that a selling period of six months should be allowed to achieve the above valuation price."

194 The loan (of $950,000) was approved, and the funds made available on 28 July 1995 to redeem the existing first and second mortgages and to pay the legal costs of the parties involved.

195 The first payment of interest due to the appellant was required to be made on 1 September 1995. The only means by which Camworth could meet its liability to meet this payment was by selling and being paid for at least one of the subdivided lots by that date. Not surprisingly, Camworth defaulted in making the first payment of interest.

196 Although the appellant as mortgagee took reasonable steps to effect a sale of the mortgaged property, no sale was made until 8 January 1997 when the land realised $610,000 gross, which, after expenses, netted $592,367.69 only to the appellant. Camworth was wound up on 4 June 1997. The appellant was unable to recover any further money from Camworth or its guarantors.

The Supreme Court of Queensland

197 The appellant sued the respondent in the Supreme Court of Queensland for damages for breach of contract, negligence and breach of s 52 of the Act. The primary judge rejected the appellant's claim in contract but no complaint is made about that in this Court. The particulars of the claim in negligence were as follows:

"[The respondent negligently:]

(a) provided a valuation which substantially overstated the value of the property …

(b) provided an updated valuation which substantially overstated the value of the property …"

198 The respondent pleaded that the appellant's loss was caused or contributed to by the appellant's negligence as follows:

"(a) failing to competently assess the ability of the mortgagor and registered proprietors of the property to re-pay the sum of $950,000.00 prior to the moneys being advanced;

[The inability of the mortgagor and registered proprietor to re-pay the loan was evidenced by the fact that the [appellant] alleges it advanced the loan on 1 August 1995 and the mortgagor is alleged to have defaulted in the loan repayments on 1 September 1995];

(b) failing to obtain for valuable consideration a full valuation of the land within a reasonable period prior to assessing the loan application and making the advance having regard to the state of development of the property at the time of valuation and at the time the loan was under consideration;

(c) failing to seek a report as to the probable marketing period required to sell the property in the case of default and the likely holding costs that may be involved and future expenditure;

(d) lending with an unsafe loan to land value ratio and without additional collateral security having regard to the borrower's financial circumstances and ability to repay the loan and the extent of investigations carried out by the [appellant] for such a high risk loan at the time;

(e) failing to perform a proper and reasonable risk rating assessment of the borrower or to implement appropriate loan application assessment criteria for such a large loan of a high risk category in order to establish a safe loan to land value ratio for the loan risk in question or to impose conditions requiring additional collateral security especially taking into account the evidence of slow sales in Stage 1 at the time the loan was considered and advanced;

(f) allowing persons to assess the borrower's risk rating and loan application for such a high risk loan who were inexperienced on high risk loan assessment;

(g) failing to allow sufficiently for the contingency of a reduction in market value of the land; a protracted mortgagee forced sale selling period; or for the downward impact on the sale price (for individual lots or as a whole) of the property due to a mortgagee forced sale, at the time the loan was approved;

(h) selling the property for $592,367.69 which was under its reasonable market value at the time of the sale;

(i) failing to effect mortgage insurance for the loan in question in circumstances where a reasonably prudent mortgagee would have done so;

(j) inadequately marketing the property for sale and failing to adequately monitor the mortgagee sale process and, in marketing the property for re-sale, failing to take reasonable steps to present the property appropriately for inspection, auction and sale by not:

(i) undertaking a general clean-up of the property prior to its marketing auction/sale;

(ii) repairing fencing to ensure a tidy appearance from a pre-sale marketing point of view;

(iii) removing graffiti from fencing and electrical transmission units in order to enhance the marketability of the property;

(iv) providing clear signage on site or along nearby thoroughfares;

(v) personally inspecting the property and its condition in order to determine what should be done to market the property for sale;

(k) failing to act promptly to sell the property following the borrower's default especially in a market which was widely known to be falling;

(l) failing to take prompt and effective debt recovery action against the borrower in order to promptly recover the balance of the loan said to be still due and owing to the [appellant]."

199 The action was tried by Williams J. His Honour made these findings:

"With hindsight it is clear that Camworth never had any realistic opportunity of meeting monthly interest payment pursuant to the loan. In my view if reasonable inquiries had been made prior to loan approval that would have been obvious to the [appellant].

The only chance Camworth ever had of paying the interest each month was by regularly selling two blocks of land per month. To meet the first interest repayment it would have been necessary for the contract of sale with respect to those lots to have been settled within the first month of the loan being made. The [appellant] was alerted to the fact that the lots were difficult to sell because all had been on the market since the beginning of 1995 and none had been sold by the end of July when the loan was made. Though the valuation report referred to the auction and the advertising campaign, no inquiries at all were made by the [appellant] with respect to that. Given that the advertisement referred to a 'bidding guide' of $55,000 it cannot be said that the [appellant] believed that the lots were over priced and that is why they were not selling. The valuation was based on a lot value of $54,000.

It is not without significance in my view that the whole of the loan in question was to be expended in paying out existing loans; there was nothing available to Camworth from the subject loan to permit some further development or increase its capital. That should have alerted the [appellant] to the precarious financial position of the borrower.

In all of those circumstances I am satisfied that the [appellant] made insufficient inquiries as to [Camworth's] financial position, particularly having regard to the fact that it was trust monies which were being lent and that this transaction was not one which came within the category of a borrowing of 'last resort'. In my view, and this was recognised by Parer [the appellant's representative] in his oral evidence, it is always important for a lender to be reasonably satisfied that the borrower can meet repayments of both principal and interest. That test was not satisfied here."

200 It was unnecessary for his Honour to determine any issue of negligence or misleading or deceptive conduct on the part of the respondent as these were conceded. His Honour accordingly identified the real issues in the case as being whether contributory negligence, effectively in failing to make inquiries of the credit worthiness of Camworth and its guarantors, could and did operate to reduce the appellant's damages, and the appropriate measure of damages.

201 His Honour undertook a review of the authorities touching on the former of these issues[157] including the decisions of this Court in *Marks v GIO Australia Holdings Ltd*[158] and *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[159]. After quoting passages from the reasons in these cases, his Honour concluded that neither of them nor other authority precluded him from holding that both a breach of s 52 of the Act by the respondent and contributory negligence on the part of the appellant might together be causative of the appellant's loss, and that, consequentially, the appellant's damages recoverable under the Act could, and should, be reduced to reflect the appellant's contribution to its own loss. His Honour said:

> "Experience shows that many, perhaps most, commercial losses have a number of causes which would satisfy the *March v Stramare* test. It seems abundantly clear that the legislature did not intend to deprive someone who suffered loss as a result of deceptive [or] misleading conduct of the right to recover at all if there was some other demonstrable cause of that loss. Equally, in my view, the legislature did not intend that the total loss should always be recoverable regardless of the number or significance of established causes other than the misleading or deceptive conduct in question."

202 Later his Honour concluded:

> "I have come to the conclusion that here there were two independent causes of the loss sustained by the [appellant]. Firstly, the misleading and deceptive conduct of the [respondent] in representing that the market value of the land was $1.576M, that the valuation was suitable for mortgage security purposes involving a loan of $950,000, and that in the case of a mortgagee sale the property could be sold within a 6 month period. Secondly, the conduct of the [appellant] in failing to make reasonable inquiries as to the financial position of the borrower and specifically its capacity to meet its obligations pursuant to the loan agreement. In deciding how the consequences of those two causes should be divided I am of the view that the approach that should be adopted is broadly similar to that which would apply in determining apportionment of negligence. I will not repeat here the considerations stated above which

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157 *Sutton v A J Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 240; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 558-559; *Henderson v Amadio Pty Ltd [No 1]* (1995) 62 FCR 1 (Heerey J); *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 (Full Court).

158 (1998) 196 CLR 494.

159 (1999) 199 CLR 413.

were material to my assessment that the [appellant] was contributually negligent to the extent of one third. Those considerations satisfy me that the loss occasioned by the deceptive and misleading conduct should be assessed as two thirds of the total loss. To that extent, and to that extent alone, the deceptive and misleading conduct of the [respondent] caused loss to the [appellant].

It follows that under s 82 of the [Act], the [appellant] is entitled to recover two thirds of its established loss."

The appeal to the Court of Appeal of Queensland

203 A Court of Appeal of five judges (McPherson, Pincus and Thomas JJA, Moynihan SJA and Atkinson J) was convened to hear the appellant's appeal against the primary judge's decision that the appellant's damages should be reduced by a third. That Court unanimously dismissed the appeal. It reasoned as follows[160]:

"No appellate court has ever, having considered the interrelationship between ss 82 and 87 with respect to pecuniary orders, decided that s 87 must be read down so as to have, in this respect, no practical effect. We do not so decide, but think rather that s 87(1) should be given the effect which its terms appear to require, namely that an order may be made requiring that the defendant compensate the plaintiff for part only of a loss which is causally connected with the contravention complained of.

Considerations which have encouraged us to adopt this view are: firstly, that no sufficient reason appears to do such violence to the language as appears to be necessary, in order to achieve the result for which the appellant contends; secondly, to hold that s 87(1) means, if we may so express it, what it says may contribute to the resolution of a problem which is now lamentably old; thirdly, the solution we propose is in accordance with the position which has been reached by the New Zealand Court of Appeal in *Goldsbro v Walker*[161]; we refer especially to the reasons of Cooke P (as his Lordship then was)[162], of Richardson J[163]

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160 (2000) 179 ALR 89 at 94-96.

161 [1993] 1 NZLR 394.

162 [1993] 1 NZLR 394 at 399.

163 [1993] 1 NZLR 394 at 404.

and to Hardie Boys J[164]; fourthly, the liberal approach we favour accords with that recommended in recent years by the High Court of Australia and with that suggested by the Swanson Committee; lastly, it appears to be difficult to construct any plausible limitation to be read into s 87(1), so far as it deals with a part-loss order, in order to achieve the neutering of that provision which the appellant advocates.

Further discussion of the last point is, perhaps, warranted. Mr Keane QC, who led Mr McKenna for the appellant, suggested that s 87(1) should be confined to supplementary relief – relief ancillary to some other kind of relief. There is nothing, in our view, in s 87(1) to justify that construction. In particular, there can be no doubt that a s 87(1) order compensating for part of the loss may be made when no order is obtained under s 82. A submission which was, we thought, pressed more strongly was that the power to order payment of part only of the loss could only be exercised at the plaintiff's election; that seems to involve requiring the court to apply the 'all or nothing' rule to indivisible losses unless the plaintiff could be advantaged by its not doing so.

We would think that adoption of this limitation would lead to some manoeuvring on a plaintiff's part; if during the course of the trial it emerged that there was solid ground for holding that the plaintiff, perhaps by positive wrongdoing, contributed to the happening of an indivisible loss, then the plaintiff would be wise to press a s 87 claim. If the evidence appeared to tend in the opposite direction, the s 87 claim would be dropped, in the hope of recovering all of the loss on the basis that the defendant's misleading conduct was a cause or a substantial cause of it.

We incline to the view that once a proceeding of a kind mentioned in s 87(1) is before the court, it has vested in it all the powers which s 87 encompasses, whether or not the plaintiff presses for a section 87 order (to avoid being a victim rather than a beneficiary of the 'all or nothing' rule). The court is not confined to giving such relief as is contended for by counsel. Subject to giving the parties the opportunity to comment upon what the court has in mind, the court may properly mould the relief granted in such a way as to achieve a fair result for both sides.

We agree with the view of Williams J that under s 87(1) the court may award only part of the loss causally connected with the contravention found; we think it may do so in the circumstances of the present kind, where the plaintiff's conduct of which the defendant complains is quite independent of the defendant's breach. We are aware that views of varying degrees of strength have been expressed, in the cases, in support

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164 [1993] 1 NZLR 394 at 406.

of the proposition that the 'gullible plaintiff' defence is never open – that the defendant can never defeat the plaintiff by asserting that 'you should not have believed me when I misled you'[165]. We do not think it necessary to venture into this field which, although important, has no direct relevance to the point we have to consider."

The appeal to this Court

204 The appellant now appeals to this Court on one ground only:

"The Court of Appeal erred in construing section 87 of [the Act] as conferring upon the Courts a general discretion to reduce the measure of damages otherwise recoverable by the Plaintiff pursuant to section 82 of [the Act]."

Statutory causes of action and contributory negligence

205 There is no reason why a plaintiff might not, as the appellant has here, claim in contract, negligence and for breach of s 52 of the Act. As *Astley v Austrust Ltd* holds, a plaintiff who has more than one cause of action available to him may invoke and pursue the one most favourable to him[166]. In *Astley*, it was also held that the plaintiff's damages for breach of contract could not be reduced by reason of the plaintiff's own contributory negligence even though the conduct in breach also constituted, and was the subject of, an alternative claim in negligence: that the apportionment legislation making provision for a reduction in damages by reason of a plaintiff's own negligence had no operation in cases of breach of contract. This was held to be so notwithstanding that contributory negligence had been held to defeat a plaintiff's claim for breach of a safety statute imposing apparently absolute liability in *Piro v W Foster & Co Ltd*. There, Latham CJ explained the nature of the obligations imposed by safety legislation for the protection of workers in this way[167]:

"A statutory duty is absolute in the relevant sense when it requires that a particular thing be done, without reference to any questions of intent or negligence, as distinct from requiring only that the person subject to the statute shall do his best to do a particular thing."

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165 *Sutton v A J Thompson Pty Ltd* (1987) 73 ALR 233 at 239; but see *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 241 per Gummow J, and the other authorities discussed in *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at 136.

166 (1999) 197 CLR 1 at 22 [46]-[47].

167 (1943) 68 CLR 313 at 319.

206 No different view of the relevance of contributory negligence was taken by this Court after the enactment of apportionment legislation. In *Forrest v John Mills Himself Pty Ltd*, a case of breach of statutory duty on the part of the defendant employer, and of contributory negligence on the part of the plaintiff, the Court (McTiernan, Menzies and Owen JJ) said[168]:

> "It follows that, although we think that the respondent is liable in damages, we consider that the damages *must* be apportioned because of the contributory negligence of the appellant: *The Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of* 1952 (Q). The task of apportioning is always difficult, but, in this case, we think that a proper apportionment of responsibility would be 60% to the respondent and *40% to the appellant*." (emphasis added)

207 Although s 52 of the Act[169] is expressed in negative terms to proscribe conduct of a certain kind, equally it is absolute in the sense described by Latham CJ in *Piro*. The distinction between the Act and safety legislation may lie in the fact that the former, by ss 82 and 87, actually prescribes the range of remedies available for breach, whilst the latter gives rise to civil remedies by the combined operation of the safety legislation (which in terms provides for quasi-criminal sanctions only) and the common law, which recognises a civil cause of action if the legislation is discernibly for the protection of an identified class or group of people.

Section 82 of the Act

208 The appellant's argument in this case is that the issue is to be resolved as a matter of statutory construction and that on the proper construction of ss 82 and 87 of the Act, in the context of the Act as a whole, especially ss 75AN, 75AD, 75AE, 75AF and 75AG, contributory negligence may not operate to reduce its damages.

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168 (1970) 121 CLR 149 at 153.

169 Section 52 provides:

> "(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1)."

209 It is necessary to examine each of the sections to which reference is made. At the relevant time s 82(1) of the Act provided as follows:

> "**82 Actions for damages**
>
> (1) 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."

210 The words upon which the argument in this case focused are "by conduct". The appellant's argument assumed that the test of causation posed by the words "by conduct" was a similar test to that which has been adopted from time to time at common law, and, for that matter on occasions, in criminal law[170]: a material contribution[171]; a significant contributing factor[172]; a "but for" test[173]; and, a test which acknowledges that a value judgment based upon commonsense and experience will usually be involved in a decision that conduct was causative. Any one of these would suffice, it was submitted, for the appellant's purposes: it was certainly not necessary to prove, in order to recover under s 82 of the Act, that the respondent's conduct was the sole cause of the appellant's loss in making the loan. The appellant's argument assumed, consistently with modern common law notions of causation to which I have referred, that loss sustained *in part* by conduct should be regarded as loss suffered *by conduct*.

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170 See McHugh J in *Royall v The Queen* (1991) 172 CLR 378 at 441 referred to in *Osland v The Queen* (1998) 197 CLR 316 at 404 [224]:

> "In most criminal cases, the issue of causation is not controversial. If an accused's act or omission is causally linked with the event or occurrence, it is always only one of the conditions which were jointly necessary to produce the event or occurrence. Ordinarily, however, the application of the commonsense test of causation is enough to determine whether the accused's act or omission was sufficiently significant to make him or her 'causally responsible' for the event or occurrence in question."

171 *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 417 per Gibbs J; 1 ALR 125 at 138; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 514 per Mason CJ.

172 In a criminal context, *Royall v The Queen* (1991) 172 CLR 378 at 398 per Brennan J, 441 per McHugh J; *Osland v The Queen* (1998) 197 CLR 316 at 403 [221] per Callinan J.

173 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515-516 per Mason CJ.

211 For reasons which will appear, the appellant's argument in this regard has to be accepted despite that it produces a result which is unfair and seems rather unlikely to have been intended by the legislature. It is not surprising therefore, that six judges of the Supreme Court of Queensland sought to construe the Act to avoid this result. The acceptance of the appellant's argument is productive of the same kind of unfair result as the non-application of apportionment legislation produced in *Astley*[174]. This regrettably inescapable reading of s 82 has the capacity to cause a grave injustice in a case, for example, in which a defendant's conduct has played a relatively minor part only in the production of a plaintiff's loss, and the plaintiff's own conduct has been a major contributing factor in causing the loss[175]. Such a reading of the Act has the tendency to erode even further what I consider to be the already artificial and attenuated notion of causation that the modern law seems to have come to accept uncritically[176]. The decision of this Court in *Astley* was followed by almost universal initiatives by the legislatures of Australia to prevent the recurrence of the unfair results to which the non-application of the existing apportionment legislation led there[177]. In my respectful opinion, urgent steps should be taken to amend the Act to prevent a recurrence of the unjust result that the application of the Act similarly dictates here. That this may relatively easily be done can be demonstrated by s 75AN to which I now refer.

212 Section 75AN which is in Pt VA of the Act provides as follows:

> "**75AN Contributory acts or omissions to reduce compensation**
>
> (1) If the loss in a liability action under section 75AD or 75AE was caused by both:

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174 (1999) 197 CLR 1.

175 (1999) 197 CLR 1 at 47 [132].

176 See *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 637-638 [190].

177 *Law Reform (Miscellaneous Provisions) Amendment Act* 2001 (ACT); *Law Reform (Miscellaneous Provisions) Amendment Act* 2001 (NT); *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW); *Law Reform (Contributory Negligence) Amendment Act* 2001 (Q); *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA); *Tortfeasors and Contributory Negligence Amendment Act* 2000 (Tas); *Wrongs (Amendment) Act* 2000 (Vic).

(a) an act or omission of the individual who suffers the injuries concerned; and

(b) a defect of the action goods;

the amount of the loss is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in causing the loss.

(2) If the loss in a liability action under section 75AF or 75AG was caused by both:

(a) an act or omission of the person who suffered the loss; and

(b) a defect of the action goods;

the amount of the loss is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to the person's share in causing the loss.

(3) For the purposes of this section, the acts and omissions of a person who is responsible for another person include the acts and omissions of that other person."

213 Its presence in the Act, and confined application to defective goods gives rise to a strong negative implication that contributory acts by a claimant are irrelevant to other causes of action arising under the Act. It is significant, as the appellant points out, that s 75AN was added to the Act in 1992 by which year there had already been a number of decisions holding that an injured party's share in causing the loss did not provide a basis for reducing the damages recoverable under s 82 of the Act, and yet no provision was made in relation to this.

The respondent's Notice of Contention

214 It is convenient at this point to deal with the respondent's Notice of Contention that the decision of the Court of Appeal should be affirmed on further grounds as follows:

"1. Section 82 of [the Act] permits a division of responsibility between plaintiff and defendant in an appropriate case.

2. In circumstances where the findings of the trial judge:

(a) that the Appellant was seriously at fault and its conduct involved an extreme departure from the norm to be expected of a commercial lender;

(b) there would have been no loan, regardless of the value placed on the land by the Respondent, if the Appellant had made appropriate inquiries about the borrower's capacity to service the loan;

were not challenged in the Court of Appeal, that Court should have dismissed the appeal to it on the ground that s 82 of the Act permitted the division of responsibility found by the trial judge."

215 The Notice of Contention was directed not only to the issue of the relevance of contributory negligence, but also to the extent of the appellant's lost interest or income forgone on the shortfall in the money yielded by sale of the land.

216 In support of the contention, the respondent sought to rely upon the decision of this Court in *Henville v Walker*[178]. Whilst the respondent accepted that that case holds, indeed reiterates, that the contravening deceptive conduct need not be the sole cause of loss for the claimant to recover, it argued that if there has been another quite independent cause for which the claimant itself is responsible, it becomes appropriate to inquire what is the amount of loss or damage resulting directly from the contravention. The respondent referred in particular to what was said by Gaudron J in *Henville*[179], that such an inquiry can sometimes be answered by establishing that the plaintiff's conduct actually produced particular, that is to say, severable, components of the loss. The respondent argued that a similar approach should, by analogy, be adopted in a case of this kind, by attributing a proportion or percentage of the loss only to the contravening conduct, and that in substance this is what the trial judge properly set out to do. The argument is attractive. Its acceptance would produce a fair and just result. It cannot, in my opinion however, be accepted. The types of situations to which Gaudron J was referring, and to which McHugh J (with whom Gummow J agreed) also referred in *Henville*[180], were quite different from this one. Their Honours' observations were directed to cases in which discrete amounts, or indeed discrete types of loss, were caused by, and could readily be attributed to, discrete acts or omissions by or on the part of the parties. More than a hint of such an approach had been given by Gummow J in an earlier case, *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* in which his Honour said[181]:

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178 (2001) 206 CLR 459.

179 (2001) 206 CLR 459 at 483 [70]-[72].

180 (2001) 206 CLR 459 at 506-507 [145]-[148].

181 (1987) 16 FCR 410 at 419.

> "It is clear that the conduct in contravention of a provision of Pt IV or Pt V of [the Act] need not be the only cause of the 'loss or damage' (within the meaning of s 82(1)) which may be recovered: *Milner v Delita Pty Ltd*[182]. The presence of other operative causes thus is not necessarily fatal to the applicant's claim. However, it may be that, whilst the facts constituting the contravention of a provision of Pt IV or Pt V of [the Act] are, with other causes, necessary preconditions of the 'loss or damage', in the circumstances of the particular case it is those other causes which are properly to be treated as the real, essential, substantial, direct, or effective cause of the loss or damage[183]. Such a case might arise for consideration where those other causes involved acts or omissions on the part of the applicant, which were in breach of a legal, equitable or other statutory duty owed by the applicant to the respondent or to third parties. In such a case the court might treat those other causes as the essential or effective cause of the loss or damage and hold there was no right to damages under s 82. A question might then arise as to whether some more limited relief under some other provision of Pt VI was appropriate."

217 This is not however a case in which another cause, the appellant's own utter irresponsibility as a lender, could be treated as the essential or effective cause of the loss or damage or a discrete part of it such as to disqualify the appellant from recovering, or recovering its damages in full.

218 The respondent's contention also gave rise to an alternative submission that, in any event, one or two identifiable components of the loss assessed by the trial judge could, and should be regarded as being directly referable to the appellant's own conduct. The losses identified were $120,650, being interest lost for the period between 1 August 1995 and 31 July 1996, and $29,253 for the further period from 1 August 1996 to 25 October 1999, calculated at 7.5 per cent per annum. What I have already said in relation to the appellant's argument based on the other aspect of the contention applies with equal force to the submission that the damages should be so reduced. This is not a case in which the loss calculated by reference to lost income by way of interest can be separately attributed to particular conduct of the appellant only.

Section 87 of the Act

219 In this Court the respondent placed weight upon s 87(1) of the Act which provided as follows:

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182 (1985) 61 ALR 557 at 572.

183 cf *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 681-682, 687-688.

"**87 Other orders**

(1) Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage."

220 In the Court of Appeal, their Honours said that if s 87 does not empower a judge to order payment of part only of the loss in such a case as the present, it is difficult to think of any instance in which the power conferred by the section could be exercised. With respect, that is not so. Section 87(1), on its ordinary reading, can be seen to be in expansion, and not in any way in diminution, of s 82. This is apparent from the words "whether or not … [the court] makes an order under section … 82". That section is concerned with the recovery of the *amount* of loss or damage, that is, with the recovery of money and not any other remedies. What s 87 contemplates, however, is the making of orders, either in substitution of a mere monetary judgment, or in addition to, or in supplement of, a money judgment, moulded and appropriate to the circumstances of the particular case. It was intended, obviously, to give the court more flexibility than courts have in giving relief in conventional common law, and indeed even equitable forms. The use of the words "in whole or in part" in s 87(1) is not for the purpose of reducing a plaintiff's damages by reason of contributory conduct, but to ensure that the court has power to grant, if appropriate, a mixture of remedies to compensate a plaintiff in full[184]. The respondent's argument which effectively adopted the reasoning of the Court of Appeal must therefore be rejected.

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184 Compare *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 513 [43] per McHugh, Hayne and Callinan JJ, 532 [109] per Gummow J; *Sent v Jet Corp of Australia Pty Ltd* (1986) 160 CLR 540 at 543-544 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

221 I would allow the appeal with costs.