

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

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JUDITH GAIL TALACKO

APPELLANT

AND

JAN TALACKO (AS EXECUTOR OF THE ESTATE  
OF HELENA MARIE TALACKO) & ORS

RESPONDENTS

*Talacko v Talacko*  
[2021] HCA 15  
*Date of Hearing: 10 March 2021*  
*Date of Judgment: 12 May 2021*  
M111/2020

## ORDER

1. *The grant of special leave to appeal on the second ground be revoked with costs.*
2. *The appeal be dismissed.*
3. *Special leave to cross-appeal be granted and the cross-appeals be allowed.*
4. *Set aside order 2 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 30 April 2020 and the orders of that Court made on 5 May 2020 and, in lieu of those orders, order that:*
  - (a) *the appeal be allowed;*
  - (b) *order 2 of the orders of the Supreme Court of Victoria made on 20 December 2018 be varied to replace the sum of \$5,900,227.92 with the sum of \$8,045,765.34 and the sum of \$3,101,822.56 with the sum of \$4,229,758.04;*



- (c) *order 4 of the orders of the Supreme Court of Victoria made on 20 December 2018 be varied to replace the sum of \$5,892,069.06 with the sum of \$8,034,639.62 and the sum of \$3,084,619.22 with the sum of \$4,223,909.11; and*
- (d) *the fourth respondent pay the appellants' costs of the application for leave to appeal and the appeal, to be taxed in default of agreement on the standard basis.*

5. *The appellant pay the costs of the appeal and the cross-appeals.*

On appeal from the Supreme Court of Victoria

**Representation**

B W Walker SC with J B Masters for the appellant (instructed by Strongman & Crouch Solicitors)

W A Harris QC with K A Loxley for the first respondent (instructed by Patrick & Associates)

D B O'Sullivan QC and B R Kremer with O M Ciolek for the second to fifth respondents (instructed by Brand Partners)

Submitting appearances for the ninth and tenth respondents

No appearance for the sixth, seventh, eighth and eleventh respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Talacko v Talacko**

Tort – Unlawful means conspiracy – Loss or damage – Loss of chance – Loss of value of rights or chose in action – Damages – Where conspiracy by unlawful means undertaken to deprive first to fifth respondents ("Respondents") of value of chose in action arising from judgment in their favour – Where conspiracy involved agreements by which valuable properties in Czech Republic were transferred to impede recovery by Respondents of anticipated judgment debt ("Donation Agreement") – Where Respondents commenced proceedings in Czech Republic against two conspirators to set aside Donation Agreement ("Donation Agreement Proceedings") – Where Respondents had 20% prospect of successfully recovering through Donation Agreement Proceedings – Whether loss or damage proved such that unlawful means conspiracy was actionable – Whether damages for unlawful means conspiracy should be discounted to reflect 20% prospect of separate recovery through Donation Agreement Proceedings.

Words and phrases – "actionable", "chance of recovery", "chose in action", "contingent", "damages", "diminution in value", "judgment debt", "loss of chance", "loss of opportunity", "loss or damage", "prospect of recovery", "quantification of damages", "unlawful means conspiracy", "value of a plaintiff's rights".



KIEFEL CJ, GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ.

## Introduction

1           This appeal is the culmination of a long, complex, and unfortunate tale of a family torn apart. In these reasons, for clarity only, and with no disrespect intended, the parties are described by their first names.

2           The appeal concerns a conspiracy by unlawful means that was undertaken by Jan Emil Talacko, together with his wife, Judith Talacko, and two of their sons, David and Paul. The conspiracy was directed at depriving Jan Emil's siblings, or those claiming through them – who are the first to fifth respondents to this appeal – of the value of their rights, namely a chose in action arising from a judgment in their favour which was subject to a hearing concerning quantum ("the chose in action against Jan Emil"). The conspiracy involved three agreements by which Jan Emil donated valuable assets that he held in the Czech Republic to David and Paul to impede recovery of the anticipated judgment debt (collectively, "the Donation Agreement").

3           The conspiracy achieved its object. But the judge of the conspiracy claim in the Supreme Court of Victoria held that the unlawful means conspiracy was not actionable because no loss or damage had been proved. The primary category of loss alleged by Jan Emil's siblings or their heirs was held to be only contingent since the value of the properties might yet be recovered from David and Paul through proceedings that had been commenced in the Czech Republic more than two years after the performance of the Donation Agreement ("the Donation Agreement Proceedings"). The Court of Appeal of the Supreme Court of Victoria allowed an appeal, concluding that loss had been suffered immediately upon entry into the Donation Agreement. The subsequent quantification of that loss by the Supreme Court of Victoria discounted the full value of the chose in action against Jan Emil by 25% for contingencies including the prospect that Jan Emil might have impeded recovery of the value of those rights even without the unlawful means conspiracy. The damages were then further reduced by 20% to account for a speculative prospect of separate recovery from David and Paul in the Donation Agreement Proceedings.

4           For the reasons below, the Court of Appeal was correct to conclude that the first to fifth respondents suffered loss or damage such that the unlawful means conspiracy was actionable. The appeal should be dismissed on the basis asserted

Kiefel CJ  
Gageler J  
Keane J  
Gordon J  
Edelman J  
Steward J  
Gleeson J

2.

in the first and second to fifth respondents' notices of contention: their damage is better described as the loss of the value of their rights or chose in action, rather than a loss of a chance or loss of opportunity. But, as the first and second to fifth respondents submitted on their cross-appeals, that loss has not been, and is not likely to be, ameliorated by the Donation Agreement Proceedings. The cross-appeals by the first and second to fifth respondents should be allowed and the award of damages set as 75% of the value of their chose in action.

### **The parties**

5 This dispute is between members of the Talacko family and their representatives. The origin of the numerous proceedings was a dispute between three siblings, the children of Alois and Anna Talacko: Helena and Peter on one side, and Jan Emil on the other. All three siblings are now deceased. Peter died in 1995. Helena died in 2012. And Jan Emil died in 2014. The dispute has continued to the next generation of the family.

6 The parties in this proceeding who have represented the interests of Helena and Peter are, collectively, the first to fifth respondents to this appeal. Helena's interests have been, and continue to be, prosecuted by her son, and the executor of her estate, Jan. He is the first respondent. Peter's interests, and the interests of his heirs entitled under his will, have been prosecuted by: (i) his children, Alexandra, Martin, and Rowena; (ii) his widow and executor, Margaret; and (iii) upon Margaret's death, her executors. Alexandra, Martin, and Rowena are the second, third, and fourth respondents to this appeal. Margaret's executors are the fifth respondent to this appeal.

7 The parties with interests opposed to Helena and Peter, whom the trial judge, McDonald J, found to have conspired to harm Helena and Peter by unlawful means, were<sup>1</sup>: (i) Jan Emil; (ii) Jan Emil's wife, Judith; and (iii) two sons of Jan Emil and Judith, David and Paul. In the Court of Appeal and in this Court, no active part was played by the estate of Jan Emil, which is the sixth respondent to this appeal. Nor was any active part played by David and Paul, who are the seventh and eighth respondents to this appeal. The appellant, Judith, submits that no loss

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1 *Talacko v Talacko* [2015] VSC 287. The ninth and tenth respondents to this appeal were held not to have been parties to, nor liable for, the relevant conspiracy: [2015] VSC 287 at [156].



<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

3.

or damage was suffered by the unlawful means conspiracy, and hence denies that a complete cause of action for conspiracy has been established.

## Background

8           In 1948, Alois and Anna Talacko, and their children, Helena, Peter, and Jan Emil, left their home in Czechoslovakia and settled in Australia. At the time of their departure, Alois and Anna owned considerable property, including the following ("the Properties"): (i) five buildings in the historic centre of Prague ("the Prague properties"); (ii) approximately 17 hectares of agricultural land at Řepy, on the outskirts of Prague; (iii) approximately 0.8 hectares of agricultural land in Kbely, a suburb of Prague; (iv) a 368 hectare private forest plantation at Suchá in the north-east of what is now Slovakia; and (v) an apartment building and adjacent vacant land in Dresden, East Germany. Following the departure of the Talacko family, these properties were seized by Czechoslovakia and, in the case of (v), by East Germany. Alois and Anna died in Australia in 1964 and 1984 respectively.

9           Following the Velvet Revolution and the end of communist rule in Czechoslovakia in 1989, discussions took place between Jan Emil, Helena, and Peter concerning restitution of the Properties. In September 1991, Jan Emil applied for restitution of the Prague properties. At that time, Jan Emil, as a Czech citizen and resident, was the only sibling entitled to make such a claim. In March 1992, the Prague properties were restored to Jan Emil, either entirely or in part. And, later, Jan Emil also had restored to him the Řepy, the Kbely and the Suchá properties.

10           A dispute arose between Jan Emil, on the one hand, and Helena and Peter, on the other. Helena and Peter alleged that Jan Emil had agreed with them that any interest in the Properties that was recovered or obtained by any one or more of the siblings would be held for the benefit of all of them.

11           In 1998, a proceeding was commenced against Jan Emil by Helena and by Peter's executor and heirs. The plaintiffs' allegations included that Jan Emil had held all properties to which restitution had been made to him as a fiduciary and that he had breached his fiduciary duties by failing to share those properties and the income earned from them with the plaintiffs. The plaintiffs claimed an equitable interest in the title to the properties held by Jan Emil that were formerly owned by Alois and Anna. The hearing commenced on 21 February 2001, but the proceeding settled two days later. By clause 1 of the settlement agreement dated 23 February 2001, Jan Emil was required to transfer his title to particular properties

Kiefel CJ  
Gageler J  
Keane J  
Gordon J  
Edelman J  
Steward J  
Gleeson J

4.

to persons nominated by Helena and those claiming through Peter's will. The titles in clause 1 which Jan Emil was required to transfer were all the rights that he had to the properties described above in Řepy, Kbely, Suchá, and Dresden but not the Prague properties. Clause 2 required Jan Emil to take various necessary steps to give effect to the transfers. Clause 3 provided for the sale by Jan Emil of any of these properties, in the event the transfers could not be given effect, with the proceeds to be paid to Helena and the plaintiffs claiming through Peter's will.

12 Clause 6 provided for a money remedy if Jan Emil failed to comply with clause 1. The premise of clause 6 was held to be that upon failure to comply with clause 1, Jan Emil had "admitted that he had breached the fiduciary duty alleged" in the 1998 proceeding<sup>2</sup>. Clause 6 required Jan Emil to pay "equitable compensation for breach of fiduciary duty" in respect of a subset of the Properties. Clause 6 was held to be concerned only with those properties for which restitution had been made solely to Jan Emil by 23 February 2001, being the Prague properties, the Řepy property, and the Suchá property<sup>3</sup>.

13 The first to fifth respondents to this appeal instructed lawyers to draw up and deliver to Jan Emil the documents necessary for transfer of the clause 1 properties. But Jan Emil did not execute those documents. The first to fifth respondents did not seek specific performance of Jan Emil's duty to execute those documents. Nor did they seek damages comprised of the value of the promised performance of clause 1, including damages in lieu of specific performance of Jan Emil's duty to transfer the clause 1 properties. Instead, they applied for orders that the 1998 proceeding be reinstated and that they be granted leave to enter judgment against Jan Emil for equitable compensation under clause 6 of the settlement agreement. Jan Emil denied that his refusal to sign the documents was a breach of contract. He also relied upon defences including that clause 6 was void for uncertainty and that the relief in clause 6 was a penalty for reasons including that the entirety of the clause 1 properties were worth less than the Prague properties, which were included in clause 6.

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2 *Talacko v Talacko* [2009] VSC 533 at [259], [260], [274].

3 *Talacko v Talacko* [2009] VSC 533 at [77]-[88].

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14 In April 2008, following a trial in the Supreme Court of Victoria on issues of liability only, Osborn J held that Jan Emil had breached the terms of the settlement agreement dated 23 February 2001 and that clause 6 was not void for uncertainty<sup>4</sup>. Consequent upon this decision, the first to fifth respondents held valuable rights, as a chose in action, subject to the hearing on issues concerning quantum.

15 On 12 May 2009, Jan Emil executed three donation agreements, collectively the Donation Agreement, by which Jan Emil transferred to two of his sons, David and Paul, his interest in the Prague properties, the Řepy property, and the Kbely property ("the Donation Properties"). Two days later, an application was filed at the real estate registry in Prague for transfer of the ownership of those properties from Jan Emil to David and Paul.

16 On 24 November 2009, the quantum issues in relation to the breach of the settlement agreement were decided by the Supreme Court of Victoria. Kyrou J held that clause 6 was not a penalty and that equitable compensation was to be determined at the date of his judgment as two-thirds of the value of the clause 6 properties together with two-thirds of the net rental income of those properties from the date of restitution of them to Jan Emil<sup>5</sup>. The total equitable compensation held to be payable by Jan Emil to the first to fifth respondents was €8,955,016 for the value of the clause 6 properties, as at 24 September 2009, and Jan Emil's rent-free use of one of the Prague properties, and €881,017 as two-thirds of the net rental income from the Prague properties.

17 On 11 December 2009, after a further hearing, Kyrou J made final orders. The total equitable compensation, together with interest, was quantified at €10,073,818 and costs were ordered against Jan Emil on an indemnity basis. An appeal to the Court of Appeal, and a special leave application to this Court, were dismissed<sup>6</sup>.

18 In 2011 and 2012, the second to fifth respondents and the first respondent to this appeal, respectively, commenced proceedings in the District Court of the

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4 *Talacko v Talacko* [2008] VSC 128.

5 *Talacko v Talacko* [2009] VSC 533.

6 *Talacko v Talacko* (2011) 31 VR 340; *Talacko v Talacko* [2011] HCATrans 301.

Kiefel CJ  
Gageler J  
Keane J  
Gordon J  
Edelman J  
Steward J  
Gleeson J

6.

City of Prague 1. The proceeding by the first respondent was dismissed for failure to comply with an order for filing evidence. But the second to fifth respondents continued with their proceeding ("the enforcement proceeding") and sought to have the orders of Kyrou J recognised in the Czech Republic for the purposes of enforcement. The District Court approved the orders of Kyrou J for recognition and enforcement. An appeal by Jan Emil to the Municipal Court of Appeal in Prague was dismissed. On further appeal to the Supreme Court of the Czech Republic, that Court generally upheld the decision of the Municipal Court of Appeal but remitted the enforcement proceeding for further hearing because Jan Emil had not been given the opportunity to comment upon correspondence received by the Municipal Court of Appeal from an Australian official.

19 In the enforcement proceeding, the courts of the Czech Republic had relied upon a certificate issued on 4 July 2012 by the Prothonotary of the Supreme Court of Victoria certifying that the orders of Kyrou J were final and binding. But on 7 November 2011, Jan Emil had been declared bankrupt. In May 2015, in the Supreme Court of Victoria, Sloss J declared that a consequence of Jan Emil's bankruptcy was that the certificate was invalid<sup>7</sup>. Sloss J's decision was overturned by the Court of Appeal of the Supreme Court of Victoria<sup>8</sup>, but it was unanimously restored by this Court in 2017. This Court held that s 58(3)(a) of the *Bankruptcy Act 1966* (Cth), requiring leave of the court to commence, or take a step in, any proceeding against a bankrupt debtor, was a "stay of enforcement of the judgment" within the meaning of s 15(2) of the *Foreign Judgments Act 1991* (Cth), which "is expressed to operate, and does operate, as an absolute bar to an application for a certificate"<sup>9</sup>.

20 After Jan Emil's death, the enforcement proceeding was suspended and, since there is an absence of a representative of his estate, it is likely that the proceeding will be terminated. For that reason, it was not disputed in this Court

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7 *Talacko v Talacko* (2015) 305 FLR 353.

8 *Bennett v Talacko* (2016) 312 FLR 159.

9 *Talacko v Bennett* (2017) 260 CLR 124 at 147 [73].

7.

that the chance of the second to fifth respondents recovering the judgment debt against the estate of Jan Emil in the enforcement proceeding "is worthless"<sup>10</sup>.

21 A second set of proceedings, the Donation Agreement Proceedings, was commenced by the first respondent, and by the second to fifth respondents collectively, in the District Court of the City of Prague 1. Those proceedings sought to "set aside" the Donation Agreement.

22 The Donation Agreement Proceedings were brought against David and Paul under s 42a of *Act No 40 of 1964 of the Czech Republic* ("the Czech Civil Code"). The effect of an action under this provision was explained by McDonald J after hearing expert evidence on the foreign law<sup>11</sup>. If the Donation Agreement is "set aside", this will not affect the title to the properties transferred under it. They will remain registered in the names of David and Paul. Instead, s 42a would permit a claim to be made, and enforced, directly against David and Paul if three preconditions were met: (i) the legal act, namely the Donation Agreement, was done by Jan Emil in the three years before the proceeding; (ii) the legal act was done by Jan Emil "on purpose of curtailing his creditors"; and (iii) David and Paul must have known of that purpose.

**These proceedings: conspiracy and quantum**

23 On 17 July 2009, the proceeding which led to this appeal was commenced by the first to fifth respondents. This proceeding was commenced after each of: (i) the judgment of Osborn J, which established that the first to fifth respondents held rights as a chose in action for equitable compensation pursuant to clause 6 of the settlement agreement; and (ii) the execution of the Donation Agreement. But this proceeding was commenced prior to the decision of Kyrou J, which quantified the value of the rights that Osborn J had found the first to fifth respondents to have.

24 The initial four defendants were Jan Emil, Judith, David, and Paul. Four claims were made in relation to the Donation Agreement: conspiracy to injure; unlawful means conspiracy; knowing receipt of property in breach of,

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10 See *Talacko v Talacko* [2018] VSC 751 at [64], [86]. See also *Bennett v Estate of Talacko (Decd)* (*An undischarged bankrupt*) [2020] VSCA 99 at [31].

11 *Talacko v Talacko* [2018] VSC 751 at [60], [65].

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J

8.

respectively, an express and implied trust, said to have been created only by the settlement agreement, of the properties in clauses 1 and 6; and inducing breach of contract. McDonald J, deciding only the issues of liability, dismissed all of the claims. The appeal to the Court of Appeal on liability, and the further appeal to this Court, concerned only his Honour's dismissal of the claim for unlawful means conspiracy.

25 In *Williams v Hursey*<sup>12</sup>, Menzies J said that "[i]f two or more persons agree to effect an unlawful purpose, whether as an end or a means to an end, and in the carrying out of that agreement damage is caused to another, then those who have agreed are parties to a tortious conspiracy". The agreement or common design between the parties is necessary for them to be jointly liable for the unlawful means<sup>13</sup>. However, if the conspiracy is merely aimed "at the public, the damage sustained by a member of the public is too remote to give a right of action"<sup>14</sup>. The agreement which is carried out must be "aimed or directed"<sup>15</sup> at the plaintiff.

26 McDonald J held that, with the exception of the requirement of loss or damage, all of these requirements were established for the tort of unlawful means conspiracy. Jan Emil, Judith, David, and Paul were parties to an agreement to deny the first to fifth respondents access to properties which could satisfy any judgment obtained by the first to fifth respondents against Jan Emil. These properties included the Donation Properties, given as restitution to Jan Emil.

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12 (1959) 103 CLR 30 at 122. See also Fullagar J at 78: "a combination to do unlawful acts necessarily involving injury".

13 See also *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581.

14 *Vickery v Taylor* (1910) 11 SR (NSW) 119 at 130. See also *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at 435 [137].

15 *Dresna Pty Ltd v Misu Nominees Pty Ltd* (2004) ATPR ¶42-013 at 48,885 [9]-[11]; *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678 at 681 [13]. See also *Lonrho Plc v Fayed* [1992] 1 AC 448 at 467 and *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] Com LR 74 at 75.

27 The unlawful means was argued as, and held to be, "equitable fraud". But although the fraud was described as "equitable", the findings amounted to actual deceit. The Donation Agreement was executed the day after Jan Emil had been legally advised of the potential for criminal liability arising from transfer of the properties owned by him in Slovakia and Germany. It was executed in "brazen disregard" of affidavit assurances that "there was no risk that [Jan Emil] would take any steps to dispose of the properties" and contrary to similar representations made to the Supreme Court of Victoria which caused the first to fifth respondents to refrain from proceeding with an application for Mareva relief<sup>16</sup>. In *Peek v Gurney*<sup>17</sup>, Lord Chelmsford said of a Bill alleging actual fraud in equity that it was "precisely analogous to the common law action for deceit" and that the "same principles applicable to them must prevail both at Law and in Equity". As senior counsel for Judith rightly accepted in this Court, the "equitable fraud" unlawful means was no different from common law "*Derry v Peek* fraud"<sup>18</sup>.

28 The only reason that McDonald J dismissed the first to fifth respondents' claim for unlawful means conspiracy was his conclusion that they had not proved loss or damage. He did not accept that the first to fifth respondents had suffered any of the various categories of loss and damage which they alleged. Two of those categories are relevant to this appeal: (i) being prevented from recovering the 11 December 2009 judgment debt because the Donation Properties were transferred; and (ii) costs and losses in seeking to enforce the 11 December 2009 judgment debt in the Czech Republic.

*The first category of alleged loss or damage*

29 The first category of alleged loss or damage – being prevented from recovering the 11 December 2009 judgment debt because the Donation Properties were transferred – was not expressed by the first to fifth respondents before McDonald J as a claim based upon loss of opportunity to recover or loss of a chance of recovery of the judgment debt<sup>19</sup>. Instead, their claim was pleaded as an

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16 *Talacko v Talacko* [2015] VSC 287 at [69]-[75].

17 (1873) LR 6 HL 377 at 390. See also at 392-393.

18 *Derry v Peek* (1889) 14 App Cas 337.

19 *Bennett v Estate of Talacko (Decd)* [2017] VSCA 163 at [106].

Kiefel CJ  
Gageler J  
Keane J  
Gordon J  
Edelman J  
Steward J  
Gleeson J

10.

immediate loss upon entry into the Donation Agreement by the denial to them of the fruits of the chose in action for equitable compensation arising from the judgment of Osborn J.

30 This category was not accepted by McDonald J. His Honour held that any loss attributable to the Donation Agreement was contingent and had not yet been established. McDonald J held that the first to fifth respondents could only be said to have suffered loss caused by entry into the Donation Agreement if the Czech courts were to recognise the judgment debt and the first to fifth respondents were unable to set aside the Donation Agreement in the Donation Agreement Proceedings. In other words, the Donation Agreement might turn out not to have made any difference to the financial position of the first to fifth respondents. Until the Czech proceedings were decided this could not be known<sup>20</sup>.

31 The Court of Appeal allowed the grounds of appeal concerning this category of alleged damage. The Court accepted that there was an immediate loss to the first to fifth respondents upon the entry by Jan Emil into the Donation Agreement because that agreement had impeded the prospect of enforcement of an anticipated money judgment based on the cause of action recognised by Osborn J. The Court of Appeal characterised that loss as loss of an opportunity and held that the value of that opportunity, and the impact of the Donation Agreement upon it, were matters for quantification of damages, not the existence of damage<sup>21</sup>.

32 In the subsequent trial on quantum, McDonald J concluded that prior to the Donation Agreement the first to fifth respondents had a 75% chance of recovering the judgment debt, including by resort to the Donation Properties, which were transferred pursuant to the Donation Agreement. His Honour considered that prior to the Donation Agreement the first to fifth respondents would have expected to take a series of steps including obtaining a sequestration order against Jan Emil and when, as would be likely, Jan Emil refused to transfer his title to the Donation Properties to his trustee in bankruptcy, the first to fifth respondents would have obtained orders under s 77(1)(e) of the *Bankruptcy Act* compelling the transfer,

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20 *Talacko v Talacko* [2015] VSC 287 at [164]-[168].

21 *Bennett v Estate of Talacko (Decd)* [2017] VSCA 163 at [111]-[112].



following which the trustee in bankruptcy would have sold the Donation Properties<sup>22</sup>.

33 Although McDonald J concluded that after the Donation Agreement this 75% chance had entirely ceased to exist because "there was no prospect of the trustee in bankruptcy getting in and realising the [Donation] Properties"<sup>23</sup>, he did not accept that the first to fifth respondents were entitled to recover the full 75% value of the "opportunity" that they lost as a result of the unlawful means conspiracy. McDonald J held that, after the Donation Agreement, the first to fifth respondents still had a 20% chance of recovery by successfully pursuing the Donation Agreement Proceedings and subsequent enforcement proceedings against David and Paul. For this reason, his Honour concluded, the 75% value of the first to fifth respondents' opportunity of recovering the judgment debt had been reduced to 20% rather than extinguished<sup>24</sup>. The value of the opportunity to enforce the judgment debt against the Donation Properties that was lost by the unlawful means conspiracy was therefore 55% of the value of the judgment debt.

34 His Honour's conclusion that the first to fifth respondents had a 20% chance of recovery after the Donation Agreement was informed by three factors<sup>25</sup>. First, the Donation Agreement Proceedings could take up to ten years before they are concluded. Secondly, although it was likely that the elements of s 42a of the Czech Civil Code would be satisfied, the Donation Agreement Proceedings could not advance without proof of the finality and enforceability of the judgment of Kyrou J. This created a number of obstacles, particularly where, at the time of his Honour's decision, Jan Emil's bankruptcy had been extended to operate until 22 November 2019: the need to establish reciprocity between the Australian courts and the courts of the Czech Republic where a judgment debt has been stayed by operation of s 58(3) of the *Bankruptcy Act*; the need to demonstrate the ongoing insolvency of Jan Emil in Australia; and the lack of a certificate from a "relevant public authority" that confirmed the finality and enforceability of the judgment of

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22 *Talacko v Talacko* [2018] VSC 751 at [54].

23 *Talacko v Talacko* [2018] VSC 751 at [56].

24 *Talacko v Talacko* [2018] VSC 751 at [89].

25 *Talacko v Talacko* [2018] VSC 751 at [66]-[67], [75], [80], [85], [88].

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J

12.

Kyrou J, which had been stayed. Thirdly, and irrespective of the outcome of the Donation Agreement Proceedings, David and Paul might successfully transfer the properties to a third party. There is presently no legal impediment to them doing so. And, since May 2009, they have already alienated part of the properties the subject of the Donation Agreement.

35 An appeal to the Court of Appeal (Beach, McLeish and Niall JJA) was brought by the first to fifth respondents on the ground that the 20% assessment was excessive<sup>26</sup>. The Court of Appeal dismissed the appeal, finding that this assessment was open. As Brennan and Dawson JJ said in *Malec v J C Hutton Pty Ltd*<sup>27</sup>, "[d]amages founded on hypothetical evaluations defy precise calculation". The Court of Appeal observed that the assessment of 20% prospect of success emphasised the "very low" prospect of successful recovery<sup>28</sup>. In this Court, the first to fifth respondents did not press their ground of cross-appeal which would have again challenged this 20% assessment as excessive.

*The second category of alleged loss or damage*

36 The second category of loss or damage alleged by the first to fifth respondents to have been suffered included expenses described as costs of undoing a transaction where a defendant formerly of substance was rendered impecunious, namely: (i) the expense involved in ascertaining the steps taken by the parties to the conspiracy in relation to the Donation Agreement; (ii) the costs of advice as to how to set the Donation Agreement aside; and (iii) the expense of steps to recover against parties to the Donation Agreement in the Czech Republic<sup>29</sup>.

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26 *Bennett v Estate of Talacko (Decd) (An undischarged bankrupt)* [2020] VSCA 99.

27 (1990) 169 CLR 638 at 640.

28 *Bennett v Estate of Talacko (Decd) (An undischarged bankrupt)* [2020] VSCA 99 at [107].

29 *Bennett v Estate of Talacko (Decd)* [2017] VSCA 163 at [99].

37 McDonald J concluded that these expenses were not loss or damage for two reasons<sup>30</sup>. First, if it ultimately turned out that the judgment debt recognised by Kyrou J could not be enforced in the Czech Republic in any event, then the Donation Agreement "could not have caused any loss". Secondly, the costs of the Donation Agreement Proceedings were contingent because the Czech courts might ultimately order payment of full indemnity costs.

38 The Court of Appeal also allowed the appeal on this issue and recognised the expenses of undoing the transaction to be a loss<sup>31</sup>. As to the causation issue, the Court of Appeal held that this was a matter which went to quantification of the loss, not to whether it had been suffered at all. By this, the Court of Appeal must have meant that the extent to which the costs and expenses to undo the Donation Agreement were futile and should be disregarded is only a matter for quantification of the extent of the loss. As to the alleged contingent nature of the costs, the Court of Appeal held that the expenses incurred in the Donation Agreement Proceedings were not contingent. The expenses had actually been incurred already and any recovery of them on an indemnity basis in the Donation Agreement Proceedings was only a mere possibility. Moreover, recovery would not be from Jan Emil, by whose conduct the loss was suffered. It would be from David and Paul.

39 Upon remitter for assessment of loss, McDonald J assessed the expenses of the Donation Agreement Proceedings to be: (i) €63,217.80 for the second to fifth respondents, of which no more than €1,800 would be recoverable from David and Paul; and (ii) \$107,991.20 for the first respondent<sup>32</sup>.

### **The first category of alleged damage: loss of the value of rights**

40 Judith's first ground of appeal in this Court was that the Court of Appeal erred by holding that the Donation Agreement had caused the loss of a chance to recover a judgment debt in circumstances in which that chance to recover was only reduced and the judgment debt may yet be recovered. The parties' submissions on this issue focused heavily on the law relating to damages for the loss of a chance and for loss of an opportunity. But the language of loss of a chance or loss of an

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30 *Talacko v Talacko* [2015] VSC 287 at [171]-[173].

31 *Bennett v Estate of Talacko (Decd)* [2017] VSCA 163 at [102]-[104], [112].

32 *Talacko v Talacko* [2018] VSC 751 at [100]-[103].

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J

14.

opportunity does not always distinguish between two categories: (i) instances where a defendant's tortious act deprives a plaintiff of an opportunity or chance to which the plaintiff was not entitled but where such deprivation constitutes an immediate loss; and (ii) instances where a defendant's tortious act reduces or extinguishes the value of a plaintiff's existing right, where the value might be quantified by reference to the likelihood of future events.

41 In both categories, once the lost opportunity or diminution in value of a right is proved, a separate and sometimes difficult issue is the quantification of the value of the lost opportunity or the extent of the diminution of value of the right<sup>33</sup>. In both categories, these issues of quantification can depend upon "estimating the significance of events which are, or may be, yet to come"<sup>34</sup>. But the existence of a loss is often more easily identified in the second category where the plaintiff has an existing right, although it must be shown that there has been a permanent impairment of the value of the plaintiff's existing right.

42 In the first category, where the wrongful act "does not amount to interference with or impairment of an existing right", it is necessary to identify "the interest said to have been harmed by the defendant"<sup>35</sup>. That interest, whether described as a chance or as an opportunity, must be lost: the chance of a loss is not the same as the loss of a chance<sup>36</sup>. As Kiefel J said in *Tabet v Gett*<sup>37</sup>, an example of such a loss is "a commercial interest of value which is no longer available to be pursued because of the defendant's negligence". An illustration is *Sellars v Adelaide Petroleum NL*<sup>38</sup>, where this Court held that "loss or damage" in s 82 of

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33 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355, 364.

34 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 656 [32].

35 *Tabet v Gett* (2010) 240 CLR 537 at 561 [53].

36 *Segal v Fleming* [2002] NSWCA 262 at [25]-[26].

37 (2010) 240 CLR 537 at 585 [137]. See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355.

38 (1994) 179 CLR 332.

the *Trade Practices Act 1974* (Cth) included the loss of an opportunity to have entered into an agreement with a third party on the more favourable terms that would have been achieved but for the defendant's wrongdoing.

43 In the second category, the existence of a loss is sufficiently shown by proving that the tort caused a permanent impairment of the value of the plaintiff's existing right. It is enough that the right is "something of value" and that its value is diminished or lost<sup>39</sup>. An example of loss in this category, given by Brennan J in *Sellars*<sup>40</sup>, is a plaintiff's cause of action which becomes statute barred by reason of the negligence of a solicitor. The right may not have been lost<sup>41</sup> but its value has declined, often to nothing, by the expiry of the limitation period. Damages are assessed as the amount by which the value of the right has diminished from the value it would have had if the acts comprising the tort had not been committed. This quantification of loss, by reference to events which did not happen, has been said to have "nothing to do with loss of chance as such. It is simply the judge making a realistic and reasoned assessment of a variety of circumstances in order to determine what the level of loss has been."<sup>42</sup>

44 The notices of contention in this appeal asserted that the type of loss suffered by the first to fifth respondents was in the second category: "economic loss in the form of diminution of the value of property", being the chose in action against Jan Emil. The chose in action held by the first to fifth respondents arose from the judgment and orders of Osborn J, which recognised their rights under clause 6 of the settlement agreement. At the time of the Donation Agreement, the value of those rights was unliquidated. Their value was later quantified by Kyrou J at €10,073,818<sup>43</sup>. There was no issue on this appeal concerning whether the relevant date for quantification, by reference to values of the Donation Properties,

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39 *Chaplin v Hicks* [1911] 2 KB 786 at 796. See also at 793.

40 (1994) 179 CLR 332 at 362.

41 See, eg, *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535; *Brisbane City Council v Amos* (2019) 266 CLR 593 at 599 [7], 613-614 [40], 616 [49].

42 *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475 at [25].

43 *Talacko v Talacko* [2009] VSC 579.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J

16.

was, as Kyrou J concluded, 24 September 2009 or whether it should have been the date of the Donation Agreement, 12 May 2009.

45 Where a defendant's tort impairs the value of a plaintiff's rights to tangible property, this will constitute loss or damage. The normal measure of damages in such cases is the diminution in the value to the plaintiff of their rights to tangible property, usually measured by the cost of repair, where it is reasonable to repair, or the cost of replacement<sup>44</sup>. As the Supreme Court of the United Kingdom recently said<sup>45</sup>:

"If a claimant suffers damage to property, such as a vehicle or a ship, as a result of the tortious actions of a defendant, it can claim as damages the diminution in value of the damaged property, usually measured by the cost of repairing the property, and consequential loss".

46 The same rules apply to a diminution in the value of a plaintiff's rights to intangible property. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*<sup>46</sup>, French CJ, Hayne and Kiefel JJ said that "[a]n interest which is the subject of economic loss need not be derived from proprietary rights or obligations governed by the general law". Their Honours gave examples of rights to intangible property including a statutory right to participate in a Commonwealth superannuation fund<sup>47</sup> and a lender's right to recover money that had been lent<sup>48</sup>. The diminution of the value of those rights might be difficult to assess but "the

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44 *Evans v Balog* [1976] 1 NSWLR 36 at 39-40; *Powercor Australia Ltd v Thomas* (2012) 43 VR 220 at 227 [25]-[27].

45 *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] 4 All ER 807 at 861 [200].

46 (2013) 247 CLR 613 at 629-630 [26].

47 Citing *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 526 [18].

48 Citing *Hawkins v Clayton* (1988) 164 CLR 539 at 601; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 425 [16]; *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 525 [16].

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

17.

common law does not permit difficulties of estimating the loss in money to defeat an award of damages"<sup>49</sup>.

47 In this Court, Judith correctly submitted that the mere risk of future loss does not count as loss or damage, relying upon the decision of this Court in *Wardley Australia Ltd v Western Australia*<sup>50</sup>. In *Wardley*, the appellants' wrongful conduct led to the grant of an indemnity by the State of Western Australia against the contingency of loss. This indemnity was held not to occasion loss or damage within s 82 of the *Trade Practices Act* until the contingency was fulfilled and the indemnity was called upon. The critical distinction between this case and *Wardley* is that, in *Wardley*, the State of Western Australia had no existing right that was impaired. Nor did it have any new existing liability to pay money until the indemnity was called upon<sup>51</sup>. As a mere risk of loss, the contingent liability did not constitute loss or damage<sup>52</sup>.

48 By contrast with *Wardley*, the unlawful means conspiracy in this case diminished the value of existing rights held by the first to fifth respondents. Indeed, as Mason CJ, Dawson, Gaudron and McHugh JJ observed in *Wardley*, there will be immediate loss or damage upon the execution of a mortgage over property in reliance on negligent advice which has the immediate effect of reducing the value of the plaintiff's equity of redemption, "the value of her interest in the property"<sup>53</sup>. Likewise, this appeal involves a wrongful act which decreased the value of the victims' rights, namely the chose in action against Jan Emil.

49 Judith submitted that the decrease in the value of the first to fifth respondents' rights might only be a "fluctuating or temporary" decrease and, for that reason, could not be recognised as loss or damage. She drew an analogy with

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49 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 349.

50 (1992) 175 CLR 514.

51 (1992) 175 CLR 514 at 534, 538, 543, 558.

52 (1992) 175 CLR 514 at 527.

53 (1992) 175 CLR 514 at 528-529, explaining *Forster v Outred & Co* [1982] 1 WLR 86 at 98; [1982] 2 All ER 753 at 764.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J

18.

a negligently drawn mortgage to secure a loan of money where, in general terms, damage would be sustained only when recovery "can be said, with some certainty, to be impossible"<sup>54</sup>. But in that scenario, where the interest of the lender is to recover upon default the amount owing under the mortgage by sale of the property, the damage to the lender's interest is contingent upon the borrower's default<sup>55</sup>. It would be "unjust to compel [the lender] to commence proceedings before the existence of his or her loss is ascertainable"<sup>56</sup>. By contrast, the first to fifth respondents suffered an immediate loss in the value of their rights against Jan Emil when the Donation Agreement was executed. The chose in action against Jan Emil for equitable compensation then became worthless. That loss was permanent precisely because Jan Emil had stripped himself of his valuable assets and it was not suggested that there was any prospect that Jan Emil might recover his assets, or acquire other valuable assets, in the future. It would be unjust to compel the first to fifth respondents to commence speculative proceedings in the Czech Republic when the existence of this loss was already ascertainable.

50 The Court of Appeal was therefore correct to conclude that the Donation Agreement caused the first to fifth respondents to suffer an immediate loss. The reason for this was that the value of their rights, the chose in action against Jan Emil, was reduced by Jan Emil's entry into the Donation Agreement, his implementing of the unlawful means conspiracy. That was the very intention of Jan Emil, who entered the Donation Agreement to reduce, by unlawful means, his available assets to meet an anticipated judgment debt.

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54 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 631 [32], citing *Hawkins v Clayton* (1988) 164 CLR 539 at 601, *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533, and *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 425 [16].

55 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 630 [27], explaining *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 425 [16].

56 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 631 [32]. See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527.



51 There was, however, no dispute in this Court concerning the correctness of the assessment that the value of the first to fifth respondents' rights, as assessed by Kyrou J, should be reduced by 25% to allow for any hypothetical conduct by Jan Emil that could have impeded recovery, although McDonald J correctly accepted that hypothetical unlawful conduct by Jan Emil could not be taken into account<sup>57</sup>. The focus of the cross-appeals was instead upon the conclusion of McDonald J and of the Court of Appeal that the first to fifth respondents' damages should be additionally reduced by reference to the 20% prospect of them succeeding in the Donation Agreement Proceedings in the Czech Republic.

*The Donation Agreement Proceedings should not reduce the loss*

52 The Court of Appeal upheld the conclusion of McDonald J that after the Donation Agreement was executed the first to fifth respondents still had a 20% chance of recovering the value of their anticipated judgment debt against Jan Emil. That chance was said to exist by successfully pursuing the Donation Agreement Proceedings and any subsequent enforcement proceedings against David and Paul. Judith's submissions on the cross-appeals in support of this conclusion reduced essentially to two points.

53 Judith's first point was that the first to fifth respondents' cause of action against David and Paul under s 42a of the Czech Civil Code would render ineffective the transfer of title as a barrier to the enforcement of Jan Emil's obligations to pay the 11 December 2009 judgment debt. In effect, Judith's argument was that this claim was an extension of the first to fifth respondents' rights against Jan Emil and involved enforcing his obligations. The value of their rights prior to the Donation Agreement – quantified as the value of a 75% prospect of recovery upon enforcement – had, on that approach, not been entirely extinguished by the Donation Agreement, but rather had been reduced to the value of a 20% prospect of recovery.

54 Judith's second point was that since the bringing of the Donation Agreement Proceedings was caused by Jan Emil's unlawful conduct, the prospect of success in those proceedings was a valuable benefit to the first to fifth respondents which should be brought into account in the assessment of their loss.

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57 *Talacko v Talacko* [2018] VSC 751 at [49]-[50]. See *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at 775 [151]; 381 ALR 375 at 413-414.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J

20.

55 As to the first point, the short answer is that the first to fifth respondents' right of action in the Donation Agreement Proceedings under s 42a of the Czech Civil Code was not a remaining value of their rights against Jan Emil, which had been extinguished by the unlawful means conspiracy. The first to fifth respondents' rights against Jan Emil were recognised by Osborn J as rights to equitable compensation for a breach of the fiduciary duty admitted by clause 6 of the settlement agreement. Those rights became a judgment debt when quantified by Kyrou J. As the Court of Appeal rightly said, approving the reasoning of McDonald J on this point, the Donation Agreement "extinguished any possibility of recovering the judgment debt against the properties through Jan Emil's trustee in bankruptcy"<sup>58</sup>. The value of the first to fifth respondents' rights to equitable compensation against Jan Emil was reduced to zero by the Donation Agreement.

56 By contrast, the Donation Agreement Proceedings involved a speculative prospect of recovery in different proceedings, for a different breach (concerning s 42a, not breach of fiduciary duty), against different persons (David and Paul), in relation to a different subject matter (the value of the Donation Properties). Hence, McDonald J, who heard expert evidence about the meaning of s 42a of the Czech Civil Code, described the provision as concerned with recovery against David and Paul, which would need to be enforced directly against them in yet another "separate proceeding"<sup>59</sup>.

57 As to the second point, a defendant's liability to compensate for loss is usually reduced where a plaintiff takes successful action consequent upon the defendant's wrong to reduce their loss. In some cases, this principle is described as one of the rules of mitigation, being the usual principle that the claimant cannot recover for avoided loss<sup>60</sup>, even in some cases where a benefit is acquired and the steps taken were not mitigation measures that were reasonably required. In other

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58 *Bennett v Estate of Talacko (Decd) (An undischarged bankrupt)* [2020] VSCA 99 at [59].

59 *Talacko v Talacko* [2018] VSC 751 at [65]-[66].

60 *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2016] 1 All ER (Comm) 675 at 684-685 [32]. See also *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* (2005) 12 BPR 23,923 at 23,930 [40]; *Clark v Macourt* (2013) 253 CLR 1 at 9 [17].

cases, the principle is described simply as part of the principle of compensation that generally requires compensating advantages that are sufficiently connected to the wrongdoing to be deducted from the damages awarded for consequential loss<sup>61</sup>.

58       The second to fifth respondents accepted that if they had recovered money from David or Paul as a result of the Donation Agreement Proceedings then that recovery would need to be brought into account<sup>62</sup>. Even assuming this to be correct, where, as here, those speculative proceedings were not required as a step in mitigation<sup>63</sup>, the difficulty with taking into account the 20% prospect of success arising from the Donation Agreement Proceedings in the assessment of loss is that this unlikely prospect cannot be said to be a benefit to the first to fifth respondents that has reduced their loss. It was not shown that there is any real value to the first to fifth respondents in the existence of a cause of action in a foreign court, with a very low prospect of recovery, which, if it occurs at all, may take up to ten years to achieve, and which no doubt will require considerable additional expense. It was not suggested, for instance, that there was any prospect of an assignment of this cause of action for value, even if a person with a legitimate interest in taking such assignment could be identified. If the 20% prospect of success were to reduce the damages of the first to fifth respondents this would therefore amount to an unjustifiable shift of the risk of those speculative proceedings from the wrongdoers to the victims.

59       The cross-appeals should be allowed and orders made in the terms set out in the notices of cross-appeal, which were not the subject of dispute. In light of this conclusion, it is unnecessary to consider the second to fifth respondents' alternative

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61   *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* (2005) 12 BPR 23,923 at 23,932-23,934 [44]-[51]; *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2016] NSWCA 123 at [228]-[229]. See also Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 147.

62   *cf Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2017] 1 WLR 2581; [2018] 1 All ER 45.

63   See *Dhaliwal v Pade* [2003] NSWCA 16 at [36], citing *Pilkington v Wood* [1953] Ch 770.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gordon J  
 Edelman J  
 Steward J  
 Gleeson J

22.

ground of contention that the orders for payment of compensation, interest, and costs could be upheld as equitable compensation for equitable fraud.

### **The second category of alleged damage: expenses incurred**

60 In written submissions before this Court, Judith reiterated the reasoning of McDonald J that the expenses of the Donation Agreement Proceedings remained a contingent, as opposed to an actual, loss because they might ultimately be recovered. The difficulty with that submission, as senior counsel for Judith correctly and properly conceded in this Court, is that, as a matter of principle, costs of litigation that are reasonably incurred in an attempt to reduce losses caused by wrongdoing are a head of loss<sup>64</sup>. In his decision concerning quantum, McDonald J said that the second to fifth respondents had already incurred €63,217.80 in connection with the Donation Agreement Proceedings of which no more than €1,800 would be recoverable from David and Paul<sup>65</sup>.

61 In this Court, Judith advanced a new submission. She submitted that the expenses of the Donation Agreement Proceedings were irrecoverable because the Donation Agreement Proceedings might "fail for reasons that have nothing to do with the conspiracy" such as some particular "aspect of Czech law". This was not the same causation submission that had been advanced before McDonald J or in the Court of Appeal. The causation submission in those courts had been that the expenses of the Donation Agreement Proceedings were not caused by the unlawful means conspiracy because the proceedings might ultimately turn out to have been futile if the judgment debt could not be enforced. The obvious flaw in that causation submission was that but for the unlawful means conspiracy, the Donation Agreement Proceedings would never have been commenced and the expenses, a substantial amount of which is irrecoverable, would never have been incurred.

62 The new submission in this Court was not based upon the lack of a causal link and thus was not subject to the same flaw. It was effectively a submission that until the Donation Agreement Proceedings are concluded, it could not be known whether the expenses of the Donation Agreement Proceedings were beyond the scope of liability for the consequences of the unlawful means conspiracy. The new

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<sup>64</sup> *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at 11 [24], [26], quoting *Berry v British Transport Commission* [1962] 1 QB 306 at 321.

<sup>65</sup> *Talacko v Talacko* [2018] VSC 751 at [100]-[101].

23.

submission also was not clear from the second ground of appeal, which was said to support it. That ground relied only upon the ongoing nature of the Donation Agreement Proceedings and the possibility that a Czech court might order that the legal expenses be borne by the first to fifth respondents. There was no suggestion that the expenses might be irrecoverable because the reasons of the Czech court might put those expenses beyond the scope of liability for the unlawful means conspiracy. More fundamentally, as the second to fifth respondents submitted and Judith properly did not dispute, if this submission had been made in the courts below, it might have been met with expert evidence about the approach that the Czech courts might take. The point should not be taken on appeal to this Court when it might have been met by calling evidence below<sup>66</sup>. The grant of special leave on this ground should be revoked.

## Conclusion

63 Orders should be made as follows:

1. The grant of special leave to appeal on the second ground be revoked with costs.
2. The appeal be dismissed.
3. Special leave to cross-appeal be granted and the cross-appeals be allowed.
4. Set aside order 2 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 30 April 2020 and the orders of that Court made on 5 May 2020 and, in lieu of those orders, order that:
  - (a) the appeal be allowed;
  - (b) order 2 of the orders of the Supreme Court of Victoria made on 20 December 2018 be varied to replace the sum of \$5,900,227.92 with the sum of \$8,045,765.34 and the sum of \$3,101,822.56 with the sum of \$4,229,758.04;

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<sup>66</sup> *Water Board v Moustakas* (1988) 180 CLR 491 at 497. See also *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

24.

- (c) order 4 of the orders of the Supreme Court of Victoria made on 20 December 2018 be varied to replace the sum of \$5,892,069.06 with the sum of \$8,034,639.62 and the sum of \$3,084,619.22 with the sum of \$4,223,909.11; and
  - (d) the fourth respondent pay the appellants' costs of the application for leave to appeal and the appeal, to be taxed in default of agreement on the standard basis.
- 5. The appellant pay the costs of the appeal and the cross-appeals.

