

HIGH COURT OF AUSTRALIA

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

MICHAEL MARKS in a representative capacity
on behalf of nominated borrowers under the
Asset Accumulator Account (AAA) of
GIO AUSTRALIA HOLDINGS LIMITED FIRST APPELLANT

PAUL McCULLAGH SECOND APPELLANT

ALEXANDRA WILLIAMSON THIRD APPELLANT

AND

GIO AUSTRALIA HOLDINGS LIMITED FIRST RESPONDENT

GIO GENERAL LIMITED SECOND RESPONDENT

GIO FINANCE LIMITED THIRD RESPONDENT

GIO BUILDING SOCIETY LIMITED FOURTH RESPONDENT

Marks v GIO Australia Holdings Limited (S37-1997) [1998] HCA 69
11 November 1998

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

S G Finch SC for the appellants (instructed by Cashman & Partners)

D M J Bennett QC with S D Kalfas for the respondents (instructed by Phillips
Fox)

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

CATCHWORDS

Michael Marks & Ors v GIO Australia Holdings Limited & Ors

Trade Practices – Misleading or deceptive conduct – Damages – Measure of damages – Whether analogous with damages in tort or contract – Distinction between "expectation" and "reliance" loss – Whether loss or damage suffered or likely to be suffered – Whether damage caused "by conduct of" defendant.

Words and Phrases – "loss or damage", "injury", "likely to suffer".

Trade Practices Act 1974 (Cth) – ss 4K, 52, 82, 87.

1 GAUDRON J. The facts are set out in other judgments. I shall repeat them only to the extent necessary to make clear my reasons for concluding that this appeal should be dismissed.

2 The appellants entered into loan agreements with the respondents (collectively referred to as the "GIO") in the belief that interest was to be charged at a specified base rate plus a fixed margin of 1.25%, as the GIO had represented to them. The contracts provided for interest as represented, but allowed for variation of the margin. The margin was subsequently increased from 1.25% to 2.25%.

3 The loans were for various different terms as required by individual appellants. Provision was made for an establishment fee of \$4,600 which was to be deferred and, ultimately, waived if the loan was maintained for 10 years. In April 1992, the GIO notified the appellants that the margin would be increased from 1.25% to 2.25% with effect from 1 August 1992. At the same time, it informed them that, if they wished to refinance before 1 August 1992, they would not be penalised. They were also informed that the "10 year cost recovery [would] be waived" if they notified the GIO of their intention to refinance before 30 June 1992.

4 The appellants elected not to refinance. Instead, they commenced proceedings in the Federal Court seeking to hold the GIO to the margin of 1.25% as a matter of contract law or to obtain relief under the *Fair Trading Act* 1987 (NSW) or, in the case of the first appellant and the borrowers represented by him, the *Trade Practices Act* 1974 (Cth) ("the Act")¹. The appellants concede that, if the first appellant is not entitled to relief under the latter Act, the others are not entitled to relief under the equivalent provisions of the *Fair Trading Act*. Accordingly, no further reference will be made to that Act.

5 It is no longer in issue that the GIO's representation as to the interest rate payable under the loans was not a contractual representation. Nor is it now in issue that, by representing the interest rate in the way that it did, the GIO engaged in conduct that was misleading or deceptive and, thus, engaged in conduct in contravention of s 52 of the Act. Thus, the only question that now falls for decision is whether, by virtue of that contravention, the appellants are entitled to relief under the Act.

6 At first instance, Einfeld J held that the appellants were entitled to damages under s 82 of the Act because there was "a difference in the real value of what

1 Some appellants entered into arrangements with the GIO before it was a corporation to which the Act applied and, thus, had no claim under that Act. See (1996) 63 FCR 304 at 310.

[they] paid for and what it [was] worth."² In the result, his Honour awarded damages equivalent to the 1% difference in interest from 1 August 1992 until a period expiring six weeks after the date of judgment for those who opted to refinance, and, until the date of judgment for those who opted not to, together with interest³. The GIO appealed to the Full Court of the Federal Court and the appellants cross-appealed. The appeal was allowed. No order was made on the cross-appeal but the reasoning of the Full Court would result in its dismissal.

7 So far as is presently relevant, the Full Court held that damages could be awarded under s 82 of the Act and relief granted under s 87 only for "consequential" loss, not "expectation" loss. It was further held that the difference between the fixed margin of 1.25% and the variable margin was "expectation" loss⁴. The appellants now appeal, seeking orders under s 87 of the Act limiting the interest payable to the base rate plus a fixed margin of 1.25% for the life of the loans, damages under s 82 compensating them for the increased interest that they have paid or other appropriate orders under those sections.

8 Section 82 provides, in sub-s (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."

At the relevant time, s 87(1) provided:

" ... where, in a proceeding instituted under ... 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 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

2 (1996) 63 FCR 304 at 332.

3 (1996) 63 FCR 304 at 335. His Honour indicated in his judgment that he would also include an amount equivalent to the deferred establishment fee if the GIO were to insist upon payment in the case of an appellant electing to refinance: at 332. However, no order was made to that effect.

4 (1996) 70 FCR 559 at 560-561 per Wilcox and Tamberlin JJ, 578-579 per Foster J.

3.

compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage."

Section 52 is in Pt V of the Act and, thus, its contravention will ground orders under either or both of ss 82 and 87. The orders that may be made under s 87, as set out in sub-s (2) of that section, include orders avoiding, varying or refusing to enforce a contract or arrangement and orders directing a refund of money⁵.

9 Before turning to the argument, it is convenient to note two matters which are clear from the terms of ss 82 and 87. The first is that for a person to obtain relief under those sections he or she must have suffered loss or damage or, in the case of s 87, be likely to suffer loss or damage. The second is that there is no punitive aspect to these provisions, they being concerned solely to provide for recovery of "the amount of the loss or damage [suffered]" (s 82) or to "compensate" for or "prevent or reduce" loss or damage (s 87).

10 Section 82 of the Act was considered by this Court in *Gates v City Mutual Life Assurance Society Ltd*⁶. That, too, was a case involving a contract that did not incorporate the terms as represented. And as in this case, the representation was not contractual⁷. The question in *Gates* was identified as "the appropriate measure of damages recoverable by a plaintiff who suffers loss or damage by conduct done in contravention of [Pts IV and V of the Act]"⁸.

11 The Full Court's distinction between "expectation" loss and "consequential" loss for the purposes of ss 82 and 87 of the Act may be traced to the joint judgment of Mason, Wilson and Dawson JJ in *Gates*. Their Honours said:

" The Act does not prescribe the measure of damages recoverable by a plaintiff for contravention of the provisions of Pts IV and V. Accordingly, it is for the courts to determine what is the appropriate measure of damages recoverable by a plaintiff who suffers loss or damage by conduct done in contravention of the relevant provisions. Two established measures of damages, those applicable in contract and tort respectively, compete for acceptance. In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the

5 Sections 87(2)(a), (b), (ba) and (c).

6 (1986) 160 CLR 1.

7 (1986) 160 CLR 1 at 5-6 per Gibbs CJ, 10-11 per Mason, Wilson and Dawson JJ.

8 (1986) 160 CLR 1 at 11 per Mason, Wilson and Dawson JJ. See also at 6-7 per Gibbs CJ.

contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss)."⁹

Their Honours concluded that, although not bound to make a definitive choice, there was "much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements."¹⁰ Their Honours added that "[s]uch conduct is similar both in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement."¹¹

- 12 The distinction between "expectation" loss and "reliance" loss for the purposes of the law of contract is well recognised¹². However, it is a distinction that is apt to mislead if transposed into other contexts. Contrary to what might be thought, the term "expectation" loss does not indicate that damages are payable simply for thwarted expectations¹³. Rather, damages are payable for the loss involved in non-performance of the contract. Even if a contract is not susceptible of specific performance, the other party is legally entitled to expect its performance. Hence the expression "expectation loss"!¹⁴

9 (1986) 160 CLR 1 at 11-12.

10 (1986) 160 CLR 1 at 14.

11 (1986) 160 CLR 1 at 14.

12 The terms came into general usage following the publication in 1936 of Fuller and Perdue's well-known articles, "The Reliance Interest in Contract Damages", (1936-37) 46 *Yale Law Journal* 52 and 373; Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 7th Aust ed (1997) at 778-780. See also *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80-81 per Mason CJ and Dawson J, 104 per Brennan J, 134 per Toohey J. However, as Toohey J points out in that case (at 134):

"These expressions do not represent new principles; they are intended to reflect the loss which the party to a contract may have suffered by reason of a breach by the other party."

13 cf *Hill v Van Erp* (1997) 188 CLR 159 at 179-180 per Dawson J.

14 See *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 per Mason CJ and Dawson J where it is said:

" The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is
(Footnote continues on next page)

13 The matter may be put another way. Non-performance is, in effect, the loss of a contractual promise which, itself, is a valuable right. That loss must be compensated by an award of damages in the sum that represents the value of that right¹⁵. Moreover, other losses may be sustained in consequence of the breach and, if so, they, too, must be compensated by an award of damages. On the other hand, the law of tort confers no right over and above a right to recover damages for loss sustained in consequence of the wrongful act involved.

14 When regard is had to the different nature of contractual and tortious liability it is apparent that the so-called different "measure of damages" in contract and tort is no more than a convenient way of indicating that the wrong involved and, thus, the loss occasioned by a breach of contract is of a different kind from that involved in and occasioned by the commission of a tort. The position is explained in *McGregor on Damages*¹⁶:

"In contract ... the wrong consists not in the making but in the breaking of the contract and therefore the plaintiff is entitled to be put into the position he would have been in if the contract had never been broken, or in other words, if the contract had been performed.¹⁷ The plaintiff is entitled to recover damages for the loss of his bargain. In tort, on the other hand, no

created by the contract. Hence, damages for breach of contract are often described as 'expectation damages'."

15 See *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 134 per Toohey J.

16 16th ed (1997) at 543-544. See also *Hill v Van Erp* (1997) 188 CLR 159 at 211-212 per McHugh J where it was said:

"Speaking generally, damages for expectation losses are the province of contract law where an award of damages for the failure to secure a benefit results from the agreement of the defendant to subject himself or herself to an obligation to secure that benefit. Liability for an expectation loss in contract is voluntarily incurred. Tort law, on the other hand, typically imposes an obligation on a defendant independently of his or her agreement or wishes. But ordinarily in negligence cases, it imposes that obligation only in respect of some existing interest of the plaintiff (fn)."

(fn) Referring to *Bily v Arthur Young & Co* (1992) 834 P 2d 745 at 760, per Lucas CJ.

17 Referring to *Robinson v Harman* (1848) 1 Ex 850 at 855 per Parke B [154 ER 363 at 365].

question of loss of bargain can arise: the plaintiff is not complaining of failure to implement a promise but of failure to leave him alone."

15 Once it is appreciated that references to the "established measures of damages ... [for] contract and tort", as in *Gates*¹⁸, signify different kinds of loss and not different methods by which loss is measured, it is irrelevant to inquire as to the appropriate measure of damages for the purposes of ss 82 and 87 of the Act. Rather, the task is simply to identify the loss or damage suffered or likely to be suffered and, then, to make orders for recovery of that amount under s 82 or to compensate for or prevent or reduce that loss or damage under s 87 of the Act.

16 Moreover, once it is appreciated that, for the purposes of the law of contract "expectation" loss signifies the loss of a valuable right, namely, the contractual promise, it is irrelevant and quite misleading to ask whether, in the case of misleading and deceptive conduct under s 52 of the Act, ss 82 and 87 allow for "expectation" loss or "consequential" loss. It is irrelevant, because, if the misrepresentation is not contractual, there can be no loss of a contractual promise. It is misleading because it tends to suggest that if "expectation" loss is not recoverable, the claimant can never be compensated in an amount equivalent to that which would be payable if the representation were contractual.

17 Not only is it misleading to speak of "expectation" loss and "reliance" loss in the context of s 82, but there is no basis for thinking that relief under s 82 is to be confined by analogy either with actions in contract or in tort. With regard to that last matter, all members of the Court are agreed. We differ only in our approach to the question whether, in the circumstances, the appellants suffered or were likely to suffer loss or damage.

18 In the view taken by McHugh, Hayne and Callinan JJ, the appellants did not establish that they were worse off as a result of entering into loan agreements with the GIO. Gummow J is of the view that it may be assumed that they would or would likely have been worse off but for the GIO's allowing them to elect to refinance without penalty, while Kirby J is of the view that the appellants were worse off and are thereby entitled to recovery. For the reasons which follow, I am in substantial agreement with the approach taken by Gummow J.

19 There being nothing in the Act to suggest otherwise, it is for an applicant for relief under ss 82 or 87 to establish what he or she has lost or, in the case of s 87, what he or she is likely to lose. In a case such as the present, if an applicant can establish that, but for the misleading and deceptive conduct, he or she would have entered into a contract that would have returned the very benefit that was represented, damages will be the same as if the representation had been contractual. That was the situation in *Collings Construction Co Pty Ltd v*

18 (1986) 160 CLR 1 at 11 per Mason, Wilson and Dawson JJ.

*Australian Competition and Consumer Commission*¹⁹. In that situation, however, "it is for the [applicant] to establish that he could and would have entered into [that other] contract."²⁰

20 Moreover, there may be cases where an applicant establishes that, but for the contravention of s 52 of the Act, he or she would not have entered into the contract in question or into any other contract or arrangement of that kind. It is possible – although not inevitable – that, in that situation also, the loss will be the same in money terms as it would have been if the representation were contractual.

21 In this case, the appellants did not assert that, but for the contravention of s 52 of the Act, they would have entered into loan agreements which accorded with their understanding of their arrangement with the GIO. Indeed, there was no evidence that loan facilities of that kind were available. Nor did the appellants establish that, but for the contravention, they would have entered into loan agreements which were more beneficial than those entered into with the GIO. Again the evidence is that that was not possible. Nor did they claim that, but for the contravention, they would not have taken out loans at all. Rather, their case was simply that they suffered loss simply by variation of the margin.

22 There being no evidence of the kind to which I have referred, the appellants failed to establish that they had suffered any loss or damage and were, thus, not entitled to any remedy under s 82 of the Act. However, the appellants' entitlement to relief under s 87 does not depend on proof of actual loss or damage. Relief may be granted under that section if a person is "likely to suffer" loss or damage. And as a matter of ordinary language, the expression "likely to suffer" imports only that loss or damage is a real chance or possibility, not that it is more likely than not²¹.

23 It may be that the appellants could have put a case that, if held to their arrangements with the GIO, they either suffered or were likely to suffer loss or damage of a kind that should attract relief under s 87 of the Act. In this regard, it might have been put, for example, that it was likely that the margin might be increased so that interest was payable at a rate so much in excess of prevailing

19 (1998) 43 NSWLR 131.

20 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 13 per Mason, Wilson and Dawson JJ.

21 See as to the meaning of "likely" in s 45D of the Act, *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 380-382 per Deane J. In relation to s 87 of the Act, see *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 at 261; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 43 per Gummow J; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 364 per Mason P.

commercial rates that the appellants would then say that, had they appreciated that at the time, they would either have entered into more beneficial arrangements with other finance providers or, perhaps, not have entered into any loan arrangement at all.

24 It is apparent from its terms that s 87 allows for relief which is tailored to the particular case and is not confined by notions drawn from equity although, as Gummow J points out in this case, the principles which govern equitable remedies may provide guidance as to the appropriate order in a particular case²². Had the appellants been held to their contracts, s 87 may well have authorised orders preventing loss or damage in the event that the margins were to be varied so that the interest payable exceeded prevailing rates. However, save perhaps for the third appellant, Mrs Williamson, the appellants were given the opportunity to refinance without penalty. They elected not to. Not having been held to their contracts, they are not entitled to relief on the basis indicated. And as already pointed out, nor was it sought.

25 The third appellant, Mrs Williamson, is in a different position. It is not clear whether she was ever served with any notice increasing the margin or informing her that she could refinance without penalty. The Full Court ordered that the proceedings should be remitted to the primary judge for determination of that question and for consequential orders. That order should stand. And so, too, should the other orders of the Full Court, albeit for different reasons.

26 The appeal should be dismissed with costs.

22 [1998] HCA 69 at 116 referring to *Henjo Investments Pty Limited v Collins Marrickville Pty Limited (No 1)* (1988) 39 FCR 546 at 564; *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 282-283, 288; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 367.

9.

27 McHUGH, HAYNE AND CALLINAN JJ. Between February 1991 and April 1992 the appellants (and those whom the first appellant represented²³) borrowed money from one or other of the four members of the GIO group of companies that are the four respondents to this appeal. We need not distinguish between the respondents and it is convenient to refer to them all simply as "GIO". Nor is it necessary to distinguish, for the moment, between the appellants or between the appellants and those whom the first appellant represented. We will refer to them all as the "borrowers".

28 GIO called the loan facility an "Asset Accumulator Account". It told the borrowers (so the trial judge, Einfeld J, found²⁴) that it would charge interest at a rate calculated as a base rate plus a margin of 1.25%. The base rate was the average for the month of the daily 90 day bank bill rate. On 21 April 1992, the borrowers (except the third appellant) received a letter from GIO telling them that it proposed to increase the interest rate margin from 1.25% to 2.25% with effect from 1 August 1992.

29 The loan agreements which the borrowers had signed (it was held) permitted GIO to change the interest rate margin in this way. The trial judge found, however, that GIO had represented to the borrowers that the interest rate margin was set at 1.25% and would not be changed during the life of the loan²⁵ and that each of the borrowers had relied on this representation²⁶ and had been induced by it to take the loan²⁷. The trial judge found that GIO had engaged in misleading and deceptive conduct (contrary to s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act") and the equivalent provision of the *Fair Trading Act* 1987 (NSW))²⁸. He gave judgment for the borrowers for damages calculated as the difference between the amount of interest calculated with a margin of 1.25% over the average bank bill rate and the amount of interest calculated with a margin of 2.25% for the period between 1 August 1992 and the date of judgment in the case of borrowers who

23 Pursuant to the *Federal Court of Australia Act* 1976 (Cth), s 33C.

24 *Marks v GIO Australia Holdings* (1996) 63 FCR 304 at 321.

25 (1996) 63 FCR 304 at 321.

26 (1996) 63 FCR 304 at 324-327.

27 (1996) 63 FCR 304 at 327-328.

28 (1996) 63 FCR 304 at 335.

chose to continue their loans, or a date six weeks later for those borrowers who did not. He rejected the borrowers' claim for relief under s 87 of the Act²⁹.

30 Except in the case of one borrower, the GIO loan, even with the margin increased by 1% to 2.25%, was more beneficial to the borrowers than any other loan that was available³⁰. (The exceptional case of that one borrower may be put to one side. Nothing was now said to turn on it.)

31 GIO appealed to the Full Court of the Federal Court. It allowed the appeal³¹. All of the members of the Court (Wilcox, Foster and Tamberlin JJ) were of the view that neither s 82 nor s 87 of the Act permitted the awarding of damages calculated as the amount necessary to make good the representation that had been made by GIO - in this case the difference between interest calculated in the way represented to the borrowers and the interest charged in fact³². The decision of this Court in *Gates v City Mutual Life Assurance Society Ltd*³³ was seen by the judges in the Full Court as standing in the way of a contrary conclusion.

32 Consideration of the question must begin with the terms of the Act. At the time of this litigation it provided (so far as now relevant):

"82(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.

...

87(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

29 Argument in this Court focused only on the *Trade Practices Act*; no separate point was said to arise under the *Fair Trading Act*. We therefore will not clutter these reasons by reference to analogous provisions of the latter Act.

30 (1996) 63 FCR 304 at 330.

31 *GIO Australia v Marks* (1996) 70 FCR 559.

32 (1996) 70 FCR 559 at 560-561 per Wilcox and Tamberlin JJ, 583-584 per Foster J.

33 (1986) 160 CLR 1.

11.

provision of Part IV 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.

(1A) Without limiting the generality of section 80, the Court may, on the application of a person who 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 V or on the application of the Commission in accordance with subsection (1B) on behalf of such a person or 2 or more such persons, make such order or orders as the Court 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)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

...

- (2) The orders referred to in subsections (1) and (1A) are:
- (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
 - (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;
 - (ba) an order refusing to enforce any or all of the provisions of such a contract;

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- (c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;
- (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;
- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and
- (g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:
 - (i) varies, or has the effect of varying, the first-mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument."³⁴

Several features of these provisions should be noted.

33 First, s 82 applies in cases of contravention of any provision of Pts IV or V of the Act and s 87 in cases of contravention of any provision of Pts IV or V of the

34 Earlier forms of the provisions introduced by the *Trade Practices Amendment Act* 1977 (Cth) had been amended by the *Trade Practices Revision Act* 1986 (Cth), *Statute Law (Miscellaneous Provisions) Act (No 2)* 1986 (Cth), *Trade Practices Legislation Amendment Act* 1992 (Cth) and were later amended by the *Insurance Laws Amendment Act (No 2)* 1994 (Cth). Nothing turns on these changes.

Act (and more recently Pt IVA as well). Thus, both ss 82 and 87 can apply in many different kinds of case, not just the case where it is alleged that there has been misleading and deceptive conduct contrary to s 52. In particular, s 87 can apply not only to cases as diverse as misusing market power contrary to s 46 or s 46A or engaging in exclusive dealing contrary to s 47 but also, now, to engaging in conduct that is "unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories" contrary to s 51AA³⁵.

34 Secondly, s 82 provides, in effect, that the loss or damage that may be recovered by action is the amount of the loss or damage suffered "by conduct of" another person that was done in contravention of Pts IV or V. It contains no stated limitation of the kinds of loss or damage that may be recovered and contains no express indication that some kinds of loss or damage are to be regarded as too remote to be recovered. Indeed, s 4K may be seen as expanding the kinds of loss or damage that are dealt with in s 82 (and elsewhere in the Act) by its provisions that:

"In this Act:

- (a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and
- (b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury."

35 Thirdly, the power of the Court to make orders under s 87(1) is predicated upon the Court 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" engaged in the contravention of a provision of Pts IV, IVA or V. Leaving aside the case where the Commission is applicant, s 87(1A) is also predicated upon the applicant being "a person who has suffered, or is likely to suffer, loss or damage by conduct of another" engaged in the contravention (in this case) of Pts IVA or V.

36 Fourthly, the powers given under s 87(1) and (1A) are powers to make "such order or orders as the Court thinks appropriate ... if the Court considers that the order or orders concerned will compensate [the person wronged] in whole or in part for the loss or damage, or will prevent or reduce the loss or damage".

35 Part IVA (which includes s 51AA) came into operation on 21 January 1993, well after the events the subject of this proceeding.

37 Fifthly, among the many forms of order that can be made under s 87 is an order:

"directing the person who engaged in the conduct ... to pay to the person who suffered the loss or damage the amount of the loss or damage".³⁶

38 It can be seen, therefore, that both ss 82 and 87 require examination of whether a person has suffered (or, in the case of s 87, is likely to suffer) loss or damage "by conduct of another person" that was engaged in the contravention of one of the identified provisions of the Act. That inquiry is one that seeks to identify a causal connection between the loss or damage that it is alleged has been or is likely to be suffered and the contravening conduct. But once that causal connection is established, there is nothing in s 82 or s 87 (or elsewhere in the Act) which suggests either that the amount that may be recovered under s 82(1), or that the orders that may be made under s 87, should be limited by drawing some analogy with the law of contract, tort or equitable remedies. Indeed, the very fact that ss 82 and 87 may be applied to widely differing contraventions of the Act, some of which can be seen as inviting analogies with torts such as deceit³⁷ or with equity³⁸ but others of which find no ready analogies in the common law or equity, shows that it is wrong to limit the apparently clear words of the Act by reference to one or other of these analogies.

39 *Gates* did not hold to the contrary. In that case the appellant claimed that he had been misled by a misrepresentation about the circumstances in which benefits would be payable under a total disability clause which he had added to his existing superannuation policy issued by the respondent. In fact, the clause provided for payment of benefits only where the appellant was incapable of attending to any gainful occupation; he had been told it would apply if he could not attend to his occupation. It was found that "but for the statements, Mr Gates would have proceeded exactly as he did save that he would not have paid extra for total disability cover"³⁹. The majority in *Gates* went on to say⁴⁰:

36 s 87(2)(d).

37 For example, s 52.

38 For example, s 51AA.

39 (1986) 160 CLR 1 at 14 per Mason, Wilson and Dawson JJ quoting from the reasons for judgment of the Full Court of the Federal Court.

40 (1986) 160 CLR 1 at 14-15.

15.

"The question then is whether it is appropriate to apply the contract measure of damages to the contraventions found to have taken place. The courts are not bound to make a definitive choice between the two measures of damages so that one applies to all contraventions to the exclusion of the other. However, there is much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similar both in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement.

The disappointed expectations of a person induced by a misrepresentation to believe erroneously that his insurance policy entitles him to the payment of benefits on maturity or on the happening of a certain event are sometimes so great as to encourage the thought that compensation on the basis of lost expectations would be appropriate. However, neither authority nor principle offer support for adopting this approach. In all the cases in which a plaintiff has sought to recover damages on the footing that a representation amounts to a collateral contract, a fraudulent misrepresentation or a negligent misstatement, damages for expectation loss have only been awarded when the representation amounted to a collateral contract. Neither the fact that the representation induces entry into a contract nor the fact that it is a statement of the benefits to which the plaintiff will be entitled under that contract is enough to justify compensation for expectation loss. Just as it is impossible to suppose that there is any difference in the measure of damages in deceit depending upon the nature of the contract into which the plaintiff is induced to enter (*Clark v Urquhart*⁴¹), so there can be no variation in the measure of damages awarded under the Act for contraventions of ss 52 and 53(g) depending on the nature of the contract.

This conclusion involves no element of injustice to a plaintiff who is entitled to damages reflecting the loss of benefits he would have obtained under a contract which he could and would have entered into but for his reliance on the contravening conduct of the defendant. Of course he must prove such loss but there is nothing unfair in requiring him to do so.

The appellant's failure to prove this loss is fatal also to his claim for other consequential losses which arose out of additional expenses and losses which he sustained as a result of the respondent's non-payment of the benefits under the insurance policies."

41 [1930] AC 28 at 67-68.

Although Gibbs CJ held⁴² that the measure of damages in tort, not contract, should apply in the assessment of damages under s 82 where there has been a contravention of ss 52 and 53, the other members of the Court said expressly that "[t]he courts are not bound to make a definitive choice between the two measures of damages so that one applies to all contraventions to the exclusion of the other."⁴³ Further, none of the members of the Court in *Gates* considered the circumstances in which relief under s 87 should be granted.

40 Nor do the later decisions of this Court in *Wardley Australia Ltd v Western Australia*⁴⁴ or *Kizbeau Pty Ltd v W G & B Pty Ltd*⁴⁵ hold that the remedies provided by ss 82 and 87 are to be confined by analogies, whether with tort or otherwise.

41 This is not to say that no help can be had from the common law in deciding what damages may be allowed under s 82 in cases of conduct contravening s 52. Very often, the amount of the loss or damage caused by a contravention of s 52 will coincide with what would have been allowed in an action for deceit. But that is because the inquiry in both cases is to find out what damage flowed from (in the sense of being caused by) the deceit or contravention. Leaving aside questions of remoteness of damages in assessing damages for deceit (a question that was left unresolved in *Gould v Vaggelas*⁴⁶), the damages for deceit will be the sum representing the loss suffered by the plaintiff *because* the plaintiff altered its position in reliance on the defendant's misrepresentation⁴⁷. But the analogy cannot be pressed too far. It should not be pressed to the point of concluding that the only damages that may be allowed under s 82 are those that would be allowed in an action for deceit. The question presented by s 82 is not what would be allowed in

42 (1986) 160 CLR 1 at 6-7.

43 (1986) 160 CLR 1 at 14 per Mason, Wilson and Dawson JJ.

44 (1992) 175 CLR 514.

45 (1995) 184 CLR 281.

46 (1985) 157 CLR 215 at 223-224 per Gibbs CJ.

47 *Holmes v Jones* (1907) 4 CLR 1692 at 1709 per O'Connor J; *Potts v Miller* (1940) 64 CLR 282 at 297 per Dixon J; *Toteff v Antonas* (1952) 87 CLR 647 at 650 per Dixon J; *Beim v Collins* (1954) 28 ALJ 331 at 332 per Dixon CJ, Webb, McTiernan, Fullagar and Kitto JJ; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 31 per Gibbs J; *Gould v Vaggelas* (1985) 157 CLR 215 at 220-221 per Gibbs CJ.

deceit, it is what loss or damage has been caused by the conduct contravening the Act.

42 It follows, then, that a comparison must be made between the position in which the party that allegedly has suffered loss or damage is and the position in which that party would have been but for the contravening conduct. And even this inquiry may not conclude the question. Analysing the question of causation only by reference to what is, in essence, a "but for" test has been found wanting in other contexts⁴⁸ and it may well be that it is not an exclusive test of causation in this area either. But that is not a question which we need to consider in this case. For the moment it is enough to say that s 82 requires identification of a causal link between loss or damage and conduct done in contravention of the Act⁴⁹.

43 If loss or damage is shown to have been suffered or to be likely to be suffered, orders of the kind prescribed by s 87 may be made. Proof of loss or damage (actual or potential) is therefore the gateway to the s 87 remedies. But the identification of loss or damage is important in the operation of s 87 not only for this reason but also because the power to make orders under s 87 is limited to making orders "if the Court considers that the order or orders concerned will compensate ... in whole or in part for the loss or damage or will prevent or reduce the loss or damage ..." ⁵⁰. That is, the Court can make orders under s 87 only in so far as those orders will compensate (or will prevent or reduce) the loss or damage that is identified.

44 In *Wardley* the majority of the Court held⁵¹ that "[u]nder s 82(1), as under the common law, a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage⁵²" although, as their Honours noted⁵³ "[t]he Act draws a clear distinction in Pt VI between loss or damage which may be recovered under s 82 and the likelihood of loss or damage

48 See *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506.

49 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ.

50 ss 87(1) and (1A).

51 (1992) 175 CLR 514 at 526 per Mason CJ, Dawson, Gaudron and McHugh JJ.

52 *Swingcastle Ltd v Gibson* [1990] 1 WLR 1223 at 1236; [1990] 3 All ER 463 at 473 per Sir John Megaw; see also [1991] 2 AC 223 at 232 per Lord Lowry, referring to the words of Sir John Megaw on the appeal to the House of Lords.

53 *Wardley* (1992) 175 CLR 514 at 527.

which may be prevented or, if not prevented, reduced by one of the remedies under s 87."

45 Thus, under s 87, actual loss or damage need not have been suffered before an order is made. Nevertheless, although "[s]87 of the Act confers a wide discretionary power on courts to make remedial orders in appropriate cases to ensure a fair result"⁵⁴, that power may be exercised only if a person has suffered or is likely to suffer loss or damage as a result of a contravention.

46 The loss or damage spoken of in ss 82 and 87 is not confined to economic loss. Section 4K makes that clear. But loss or damage caused by a contravention of the Act will often be economic loss. As was said in *Wardley*⁵⁵ "[e]conomic loss may take a variety of forms". But central to them all, when it is said that the loss was, or will probably be, caused by misleading or deceptive conduct, is that the plaintiff has sustained (or is likely to sustain) a prejudice or disadvantage as a result of altering his or her position under the inducement of the misleading conduct.

47 The bare fact that a contract has been made which confers rights or imposes obligations that are different from what one party represented to be the case does not demonstrate that the party that was misled has suffered loss or damage. The contrary view (which had been adopted by the Full Court of the Federal Court in

54 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 298 per Brennan, Deane, Dawson, Gaudron and McHugh JJ.

55 (1992) 175 CLR 514 at 527 per Mason CJ, Dawson, Gaudron and McHugh JJ.

*Jobbins v Capel Court Corp Ltd*⁵⁶) was rejected by the majority in *Wardley*⁵⁷.

48 A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted. Thus, the party that is misled will have suffered loss if a chose in action which was acquired was worth less than the amount paid for it. There may well be other ways in which it might suffer loss or damage. For example, consequential loss may be suffered. But no loss of that kind was alleged in this case and, putting that kind of loss to one side, we focus only on loss said to be suffered by the making of the contract.

49 It is necessary, then, to determine whether the value of what was acquired is less than what was paid. How is value to be assessed? It is to be assessed objectively, not according to what either or both of the parties to the contract believed that it would obtain from the contract. That is, the value of what in fact was acquired is to be identified according to what price freely contracting, fully informed parties would have offered and accepted for it⁵⁸. It is only by comparison with the value assessed in this way that there can be an assessment of whether the party that is misled could have obtained some greater benefit or incurred less detriment. What is important is what that party could have done, not what it might have hoped for or expected. Some examples may serve to illustrate the point.

50 If a person agrees to pay \$50,000 for goods which the vendor falsely represents are worth \$100,000 but which are, in fact, worth \$50,000, what loss has the purchaser who is misled suffered by agreeing to buy (assuming no more is known)? If a person agrees to pay interest at the rate of 10% for a loan which the lender falsely represents would ordinarily command interest at a rate of 15% but which, in fact, would ordinarily command interest at 12%, what loss has the borrower who is misled suffered by agreeing to borrow (again, assuming no more is known)? And so the examples could be multiplied.

51 The reason that neither of these persons suffers a loss is that viewed objectively each obtained rights having a value (a value determined objectively) at least equal to what it paid for those rights. It is only if some alternative (less detrimental or more beneficial course) were available, that it can be said that the

56 (1989) 25 FCR 226.

57 (1992) 175 CLR 514 at 528-532 per Mason CJ, Dawson, Gaudron and McHugh JJ.

58 cf *Spencer v The Commonwealth* (1907) 5 CLR 418 at 431-432 per Griffith CJ, 441 per Isaacs J.

contract which was made was less valuable to the party that was misled than had been represented - for it is only then that a comparison of value can be made.

52 The fact that each of the misled parties in the examples given may have thought that it was to obtain some advantage from the transaction is not to the point. The contravening conduct has left the party that was misled no worse off than it was before the contravention occurred.

53 Nor do we accept that the extension by s 4K of loss or damage to "injury" leads to any different conclusion. It may be that "injury" in s 4K is intended to refer to injury to the person but we do not need to decide if that is so. Even if "injury" is to be given some wider meaning than personal injury, we do not accept that a person suffers injury simply because a hoped for advantage does not materialise. The central inquiry is what consequence has the contravention of the Act had on the party in question. That requires comparison between the position in fact of the party which alleges loss and the position that would have obtained had there been no contravention.

54 This is not to be taken as confining the operation of s 87 to cases where loss or damage has been sustained. It is not confined in that way; it applies to cases in which it is shown that a person is likely to suffer loss or damage. But the inquiry remains an inquiry about whether it is likely that as a result of the contravention the party concerned will suffer some prejudice or disadvantage. If, as we consider to be the case, the bare fact that making a contract different from what was represented is not loss or damage, something more must be shown to be likely to occur in the future before it can be said that it is likely that loss or damage will be suffered.

55 Ordinarily this will present the plaintiff with no difficulty. It will be rare that the difference between what was represented and what was given will not be reflected in some difference in value or other manifestation of actual loss to the party that was misled either now or in the future. But if it does not, we consider that neither s 82 nor s 87 relief is available. To the extent that the contrary was held in *Demagogue Pty Ltd v Ramensky*⁵⁹, we consider it to be wrong.

56 In reaching the conclusion that we do, we are mindful that the object of the Act is said to be "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"⁶⁰. No narrow construction of the Act should be adopted. But neither should the words of the Act

59 (1992) 39 FCR 31.

60 s 2.

be stretched beyond their limit. It may be said, as a matter of abstract or intuitive assessment, that it is "wrong" if a party that has been found to have engaged in misleading or deceptive conduct does not "pay a price" for its misleading. But the question is what does the Act provide?

57 Contraventions of Pt V of the Act are not made subject to pecuniary penalties under s 76 and contravention of s 52 is not a criminal offence under s 79. That being so, we do not consider that it runs contrary to the object of the Act to conclude that the remedies given by ss 82 and 87 should be available only to those who are worse off as a result of a contravention of the relevant parts of the Act. Some contraventions invite pecuniary penalty, others invite criminal prosecution as well. Some invite neither pecuniary penalty nor criminal prosecution. If the intention of s 87 had been to provide any of the remedies mentioned on any and every contravention of the relevant parts of the Act, there would have been no reference to loss or damage as a condition of granting relief and as the limit of the relief granted.

58 It follows, therefore, that the borrowers' concession that, subject to the now immaterial exception of one borrower, the GIO loan at the increased margin was more beneficial to the borrowers than any other loan that was available is critical to the determination of these proceedings. It was not submitted (and there was no evidence to suggest) that any further increase in margin was to be considered. The matter was argued, at trial and on appeal both to the Full Court and to this Court, on the basis that the only relevant variation to the margin was the variation that was implemented on 1 August 1992, the borrowers having been given the opportunity to leave the arrangement without penalty.

59 Accordingly, the position of the borrowers is that they were misled into taking a loan which cost them more than was represented to them but which, even so, cost less than any other loan available to them in the market. They suffered and will suffer no loss or damage as a result of the misleading and deceptive conduct of the respondents. No order can be made under ss 82 or 87.

60 The appeal should be dismissed with costs.

61 GUMMOW J. This appeal is brought from a decision of the Full Court of the Federal Court of Australia (Wilcox, Foster and Tamberlin JJ)⁶¹. The Full Court allowed an appeal by the present respondents against orders made by a judge of that Court (Einfeld J). The orders were made on 9 February 1996 and 1 May 1996. They followed the delivery of reasons for judgment on 9 February 1996⁶². The second set of orders was not entered until 11 March 1998.

62 The Federal Court applied both the *Trade Practices Act* 1974 (Cth) ("the TP Act") and the *Fair Trading Act* 1987 (NSW) ("the Fair Trading Act").

63 Special leave was granted by this Court primarily to receive submissions as to the weight to be given, in construing the provision as to award of damages made in s 82 of the TP Act, to the reasoning in *Gates v City Mutual Life Assurance Society Ltd*⁶³. In that case, the appellant claimed damages under s 82 for contravention of two provisions of Pt V of the TP Act, namely ss 52 and 53(g)⁶⁴. In their joint judgment, Mason, Wilson and Dawson JJ said⁶⁵:

"[T]here is much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similar both in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement."

Earlier, their Honours had said⁶⁶:

"The Act does not prescribe the measure of damages recoverable by a plaintiff for contravention of the provisions of Pts IV and V. Accordingly, it is for the courts to determine what is the appropriate measure of damages recoverable by a plaintiff who suffers loss or damage by conduct done in contravention of the relevant provisions. Two established measures of damages, those applicable in contract and tort respectively, compete for acceptance. In contract, damages are awarded with the object of placing the

61 *GIO Australia Holdings Limited v Marks* (1996) 70 FCR 559.

62 *Marks v GIO Australia Holdings Limited* (1996) 63 FCR 304.

63 (1986) 160 CLR 1.

64 Sections 82, 52 and 53 provided the models respectively for ss 68, 42 and 44 of the Fair Trading Act.

65 (1986) 160 CLR 1 at 14. See also at 6-7 per Gibbs CJ and *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 290.

66 (1986) 160 CLR 1 at 11-12.

plaintiff in the position in which he would have been had the contract been performed - he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss)"

and had observed⁶⁷ that, because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it was necessary to determine what the plaintiff (Mr Gates) would have done had he not relied on the misrepresentation.

64 In the present litigation, the relief obtained by the appellants from the primary judge, which was countermanded by the Full Court, was an award of damages for contravention of s 52 of the TP Act (and s 42 of the Fair Trading Act). In the course of argument in this Court, it appeared that that had not been the preferred remedy which the appellants had sought and still seek. That remedy is an order under s 87 of the TP Act⁶⁸. However, the construction of s 82 may have a bearing upon that of s 87 and the construction of the latter provision is itself a matter of general importance.

65 I would dismiss the appeal but on grounds which differ from those which were adopted by the Full Court.

The parties

66 There are four respondents, GIO Australia Holdings Limited, GIO General Limited, GIO Finance Limited and GIO Building Society Limited. The first respondent, GIO Australia Holdings Limited, was formerly a body corporate which was established under s 3 of the *Government Insurance Act* 1927 (NSW) under the name "Government Insurance Office of New South Wales" and which conducted the insurance business authorised by that statute. Pursuant to Pt 3 (ss 10-19) of the *Government Insurance Office (Privatisation) Act* 1991 (NSW) ("the GIO Act") and with effect from 1 January 1992, the first respondent was converted from a statutory authority into a public company limited by shares. The second, third and fourth respondents are subsidiary corporations of the first respondent and carry on the business of insurers and financiers.

67 The second and third appellants, Mr P J McCullagh and Mrs A R Williamson, entered into contracts with the first respondent before the

67 (1986) 160 CLR 1 at 13.

68 Its analogue in the Fair Trading Act is s 72.

commencement of the GIO Act. In an interlocutory judgment⁶⁹, the primary judge held that, at that stage, the first respondent, as a New South Wales statutory authority, was not a corporation to whose conduct the federal legislation applied⁷⁰. The proceedings by the second and third appellants continued but on the footing that their case was made only under the Fair Trading Act.

68 The claim by the first appellant, Mr M R Marks, was brought as a representative party under Pt IVA (ss 33A-33ZJ) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act")⁷¹. Section 33Z(1)(e) empowered the Federal Court to make an award of damages for group members or individual group members. This was done by damages specified in a schedule to the order made on 1 May 1996 in favour of the first appellant and other group members. They were Mr G B Cory and Ms E B Knight jointly, Mr D Lucas and Mrs J C Lucas jointly⁷², and Mr B E Foy. In this Court, Mr Marks is a representative party of a group comprising himself and the other persons just mentioned⁷³.

69 In the judgment delivered on 9 February 1996, the primary judge concluded by saying that he would declare that the conduct of the respondents which he had identified was misleading and deceptive in contravention of both s 52 of the TP Act and s 42 of the Fair Trading Act. He said that, for the purposes of s 33ZB of the Federal Court Act, his decision applied to each of the borrowers represented by the first appellant as well as to the other individual appellants⁷⁴.

The AAA facilities

70 The borrowers (a term which I shall use to identify both the appellants and the group members) had obtained loan facilities identified as the "Asset

69 Referred to in (1996) 63 FCR 304 at 310.

70 cf *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

71 Part IVA was inserted by s 3 of the *Federal Court of Australia Amendment Act* 1991 (Cth) which commenced on 4 March 1992.

72 The schedule to the order identifies these parties simply as "Lucas".

73 Section 33ZD of the Federal Court Act provides that the other provisions of Pt IVA dealing with appeals (s 33ZC and s 33ZF) apply in relation to appeals to this Court from judgments of the Federal Court in the same way as they apply to appeals within the Federal Court itself.

74 (1996) 63 FCR 304 at 335. Section 33ZB requires that a judgment given in a representative proceeding describe or otherwise identify the group members who will be affected by it.

Accumulator Account" ("the AAA facility"). The interest rate on the AAA facility had two main components:

- (1) the "Base Rate", which was the average for the month of the daily 90 day Bank Bill Rate and which changed according to changes in the professional money market rate; and
- (2) a margin, added by the lender.

71 The contracts were formed by acceptance of Letters of Offer. The date of acceptance by the second and third appellants was 20 December 1991 and 18 December 1991 respectively. Neither of these appellants had drawn down any of the facility before 1 January 1992. On that date, there occurred the change in the nature and status of the first respondent pursuant to the GIO Act. Subsequently the assets of the first respondent were transferred under the GIO Act to subsidiary corporations, being the other respondents. The rights and obligations of the first respondent became those of one or other of the remaining respondents. The other borrowers accepted the Letter of Offer later in 1992.

72 There was no finding as to the particular maturity dates of the AAA facilities taken by each borrower. However, the periods of currency of the facilities appear to have been lengthy. In the course of his reasons, the primary judge observed that it was unlikely "that a fixed margin product would have been offered for 26 years regardless of the cost of funds to the lender"⁷⁵.

73 Apart from the change in the status and character of the first respondent on 1 January 1992, neither the primary judge nor Foster J, who gave the leading judgment in the Full Court, drew any distinction between the respondents when dealing with the lenders to the particular borrowers. The tenor of the awards of damages is that they were made against the respondents collectively. Accordingly, I shall use the term "GIO" without distinction between the various lenders.

74 When the borrowers entered into their respective loan contracts, the margin added to the base rate was 1.25 per cent. However, by letter dated 21 April 1992, GIO informed the borrowers that, by reason of an increase in GIO's costs of funds, GIO was increasing the interest rate margin by 1 per cent to 2.25 per cent with effect from 1 August 1992. The third appellant, Mrs Williamson, was a joint borrower with her husband who is not a party or group member. She claims not to have received notice of any increase in the margin. It was following this increase in the margin that the borrowers instituted proceedings alleging that GIO was contractually bound to a fixed margin of 1.25 per cent ("the contract claim") or, in the alternative, that GIO had misrepresented to them that the margin was

75 (1996) 63 FCR 304 at 332.

fixed ("the misrepresentation claim"). The contract claim was unsuccessful and is not re-agitated in this Court.

Section 52

75 The relief that was granted was consequential to a finding of misleading or deceptive conduct within the meaning of s 52 of the TP Act and its analogue, s 42 of the Fair Trading Act. Section 52 appears in Div 1 (ss 51A-65A) of Pt V of the TP Act. Section 52 states:

"(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)."

76 Section 52 establishes a norm of conduct but imposes no sanction and specifies no remedy⁷⁶. In *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*, the Full Court of the Federal Court analysed the legislation as follows⁷⁷:

"Section 52 does not purport to create liability, nor does it vest in any party any cause of action in the ordinary sense of that term; rather, s 52 establishes a norm of conduct, and failure, by the corporations and individuals to whom it is addressed in its various operations, to observe that norm has consequences provided for elsewhere in the Act⁷⁸. The consequences are provided for in a range of remedies found principally (but not exclusively - see s 163A) in Pt VI of the [TP] Act. The remedies include a declaration (s 163A); injunction (s 80); disclosure of information and publication of corrective advertisements (s 80A); recovery of the amount of loss or damage and prevention or reduction of loss or damage (ss 82, 87); and prohibition of payment or transfer of moneys or other property (s 87A).

The class of persons against whom these remedies lie is not limited to those who have engaged in conduct which contravenes, or is likely to contravene, s 52 in any one or more of its operations. Thus, for example, an injunction may be granted pursuant to s 80 against those who aid, abet,

76 In terms, the prohibition in s 52(1) is directed to a "corporation". This term is defined in s 4(1). However, the effect of s 6(3) and s 6(4) is that, in certain circumstances, the prohibition is applied to a non-corporate actor.

77 (1988) 19 FCR 469 at 473-474.

78 *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348.

counsel or procure a person to contravene a provision of Pt IV or Pt V of the [TP] Act (s 80(1)(c)), and the amount of loss or damage to which s 82 refers may be recovered against any person 'involved in the contravention', an expression defined in s 75B.

Further, between the particular remedies, there is variation as to the identity of those with standing to seek them from the court. Section 82 is directed solely to those persons who have suffered loss or damage. Sections 80A and 87A confer standing only on the Minister or the Commission. Proceedings for declaration may be instituted by 'a person' and the involvement of the Minister and the Commission are especially provided for: s 163A. As we have indicated, by s 80 standing to seek injunctive relief is conferred upon 'the Minister, the Commission or any other person'.

...

What follows from the conjunction between s 52 and remedial provisions such as s 80 is not simply the imposition of a duty upon particular individuals in respect of specified conduct, coupled with a right to enforce that duty, which right is vested in those individuals to whom the duty is owed⁷⁹. The legislation has as a primary objective the protection of perceived public interests. Hence the complex interrelation between s 52 and the provisions of Pt VI of the [TP] Act, as we have sought to indicate."

Contravention of s 52

77 GIO had circulated a brochure designed to promote the AAA facility. The brochure was not a contractual document. It dealt with interest rates in the following terms:

"The Prime Rate which is applicable to your 'AAA' facility for the initial period will be that being advertised at the time your application is received. After this period, the Prime Rate for each subsequent month will be determined at the end of that month and *will be set at a margin of 1.25%* above the professional money market rate for 90 day funds. This money market rate is defined as the Authorised Dealers' 90 day bank bill rate. The GIO AUSTRALIA Prime Rate for each month will be the daily average of these rates plus the margin." (emphasis added)

The brochure further indicated that, depending upon the type of security offered, the interest rate charged could exceed the prime rate. For example, where the security offered was GIO Australia Insurance Bonds, the interest rate would be the

79 See Finnis, *Natural Law and Natural Rights*, (1980) at 199-205.

prime rate plus 1 per cent. However, the brochure did not indicate that the margin itself could be varied.

- 78 Accompanying but not forming part of the contractual documents was a two page document entitled "Calculation of Prime Rate". This provided a summary of the facility and under the heading "Calculation of the Prime Rate" there was a statement that:

"[t]he Prime Rate which is applicable to Asset Accumulator Account facilities *is set at a margin of 1.25% pa* above the average of the Authorised Dealers' 90 day bank bill rates for the month." (emphasis added)

- 79 There was no finding of fraud against GIO on the misrepresentation claim. However, as evidence providing a "contextual framework" for the written representations, the primary judge admitted evidence of oral statements as to the fixed nature of the margin made by representatives of GIO to the borrowers in discussions preceding their entry into contracts with GIO⁸⁰. His Honour also admitted the evidence of a former GIO executive, Mr Peter Smith, that the sales "pitch" had been that the margin was fixed⁸¹. There was a finding that GIO sales staff were of the opinion that the margin was fixed⁸².

- 80 However, the Letter of Offer, a contractual document, included the following definition of "margin":

"1.25 per cent per annum, as it may vary from time to time in accordance with the Conditions of Use."

The Conditions of Use was a document in fairly small print of some 13 pages. Under the heading "Variations and Switching", there appeared the following provision of significance in the litigation:

"11.1 GIO may, on giving prior notice to the Customer, vary any of these terms and conditions as it thinks fit. Unless otherwise provided herein, any such variation shall take effect upon the expiration of ninety (90) days after such notice is served on the Customer."

It was this provision which permitted GIO to make the increase in the interest margin rate which gave rise to this litigation. It is important to note that this state of affairs came about only by reason of the exercise, subsequent to the

80 (1996) 63 FCR 304 at 318-319.

81 (1996) 63 FCR 304 at 321.

82 (1996) 63 FCR 304 at 328.

commencement of the contracts, of a power conferred thereby upon GIO. The disadvantageous operation of cl 11.1 upon the interests of the borrowers had, before 21 April 1992, been contingent or prospective in nature.

81 The primary judge found that, by the inclusion of the statement in the brochure that the margin was "set" at 1.25 per cent and of a similar expression in the Calculation of Prime Rate document, GIO had engaged in misleading or deceptive conduct. He held that these expressions clearly conveyed the meaning that the rate would not be altered during the currency of the respective facilities. The primary judge heard oral evidence from each of the borrowers and was satisfied that each had relied upon the terms of the brochure and the Calculation of Prime Rate document in entering into the facility. Notwithstanding the financial expertise of many of the borrowers, his Honour was satisfied that they were misled by what was said as to the fixing of the rate⁸³ and such conduct had induced their entry into the contracts⁸⁴.

82 Further, as Foster J pointed out in the Full Court⁸⁵, the fixed rate exercised "a continuing influence upon the minds of the [borrowers] in their appreciation of the terms of [their] contract[s]". Some had seen references to contractual variation but they did not appreciate that the power to vary the 1.25 per cent went beyond changes in the security or its value. This "continuing influence" is significant when it is recalled that, until GIO acted on 21 April 1992, any actual increase had been contingent or prospective.

83 However, in April 1992, GIO did not choose to exercise its power under cl 11.1 of the Conditions of Use in the unconditional manner to which it was contractually entitled. Rather, GIO provided to the borrowers what Foster J identified as "the opportunity of leaving the contract without penalty"⁸⁶. Those borrowers upon whom after 1 August 1992 the increased margin was imposed in a real sense suffered that state of affairs as a direct consequence of their election not to avail themselves of the opportunity provided by GIO. Their position thus differed significantly from that of the purchasers in *Demagogue Pty Ltd v Ramensky*⁸⁷, an authority referred to in the Full Court. There, even at the trial, the

83 (1996) 63 FCR 304 at 323-324.

84 (1996) 63 FCR 304 at 324-327.

85 (1996) 70 FCR 559 at 571.

86 (1996) 70 FCR 559 at 571.

87 (1992) 39 FCR 31.

vendor, by cross-claim, sought to hold the purchasers fully to their contractual obligations and sought specific performance against them⁸⁸.

- 84 The letter from GIO dated 21 April 1992 indicated that the new margin rate was to come into effect on 1 August 1992 but continued:

"If as a result of the increase in the Margin you decide to refinance your facility through another financial institution we will not penalise you. Under our existing agreement (Clause 6.4 of the Conditions of Use) you would normally have to pay a percentage of the deferred costs if you close your account prior to the end of the 10 year Cost Recovery Period.

The 10 year cost recovery will be waived if you notify us in writing before 30 June, 1992 of your intention to refinance. ...

You must have refinanced before 1 August, 1992 for this offer to apply.

If your facility has not settled, and you decide not to continue as a result of the Margin change, we will refund your initial application deposit." (emphasis added)

- 85 The Williamson facility had been drawn down in full on 22 January 1992 and the Marks facility on 25 January 1992⁸⁹. The facilities of Mr Foy, Mr Cory and Ms Knight, and Mr McCullagh had been, to varying degrees, drawn down before 21 April 1992⁹⁰. Mr and Mrs Lucas did not make any draw down until 22 April 1992⁹¹.

Relief granted by the Federal Court

- 86 Part VI (ss 75B-87C) of the TP Act is headed "ENFORCEMENT AND REMEDIES". The primary judge awarded damages under s 82 of the TP Act and s 68 of the Fair Trading Act on the basis that, notwithstanding the letter of 21 April 1992 which had provided the opportunity of leaving the contracts without penalty, each borrower was justified in refusing to take advantage of this opportunity and remaining in his or her contract, and in leaving the questions between the parties to be determined by litigation. His Honour awarded to those borrowers who

88 (1992) 39 FCR 31 at 36.

89 Mr Marks' credit limit was \$423,000 and that of the Williamson facility \$308,000.

90 The respective facilities and amounts drawn down were \$500,000 (\$274,326 on 7 April 1992), \$450,000 (\$445,882 on 16 April 1992), \$525,000 (\$400,000 on 7 February 1992).

91 The facility was \$140,000 and the initial draw down was \$100,818.

intended, as at the date of judgment, to remain within their contract, damages based on the difference between the two rates of margin up to the time of judgment. In respect of those borrowers who, the matter now having been decided, opted to leave their contract, a further period of damages was allowed of 60 days during which those parties could find other sources of finance⁹².

87 The Full Court accepted the submission that the primary judge had fallen into error in awarding damages to compensate the borrowers, in effect, for the loss of a bargain which would have produced for them an obligation to pay the lower rather than the increased rate of margin for the life of the facility, and held that damages could not be awarded on the footing of a "lost benefit" or "expectation loss". Rather, the proper method was to consider the difference, if any, which existed between the value of what was "paid" and what was received, namely a loan facility with a variable margin. On that footing, no loss had been proved. Nor could any loss be proved on the alternative basis that, had the borrowers not yielded to the representations made, they would have entered into another and more advantageous borrowing arrangement⁹³. In reaching these conclusions, the Full Court applied what it believed to follow from the decision in *Gates*⁹⁴.

88 In the Full Court, Foster J noted⁹⁵ that the "real demand" of the borrowers was that GIO should be required by order of the Court to adhere to the terms of its representation and be restrained from increasing the margin. His Honour said⁹⁶ that this would achieve the result of giving, for practical purposes, "contractual force" to the representations. However, the Full Court decided that it followed from the reasoning in *Gates* that s 87 of the TP Act cannot sustain an order designed to avoid "mere expectation loss".

89 Wilcox and Tamberlin JJ regarded the result as perhaps unfortunate "as allowing corporations sometimes to avoid being obliged to match their performance to their marketing"⁹⁷. Foster J observed⁹⁸:

92 (1996) 70 FCR 559 at 571-572.

93 (1996) 70 FCR 559 at 560, 578-579.

94 (1986) 160 CLR 1.

95 (1996) 70 FCR 559 at 578.

96 (1996) 70 FCR 559 at 579.

97 (1996) 70 FCR 559 at 561.

98 (1996) 70 FCR 559 at 584.

"If it be accepted that a major underlying purpose of the TP Act and the [Fair Trading] Act is the maintenance of appropriate levels of commercial propriety then it would appear to be consonant with that purpose that in cases of this kind the representor be held to the representation as though it were, in fact, a binding contractual term."

90 In my view, *Gates* does not determine that the measure of compensation under s 82, in Pt V cases or otherwise, is that in tort, in particular in the tort of deceit. I agree with the analysis by Gaudron J in her reasons for judgment on this appeal with respect to what was said in *Gates*⁹⁹ as to the distinction between "expectation" loss and "reliance" loss, and to the confusion which would be encouraged by the transposition of that distinction into the construction of s 82 and s 87. Further, and in any event, s 87, upon which the borrowers primarily rely, goes beyond the provision of pecuniary remedies as understood in tort.

91 It follows that the appellants' case should not have failed for the reasons which the Full Court believed it was obliged to accept. Nevertheless, on other grounds, the appellants' case was bound to fail. To these I now turn. In short, (a) the liability of the borrowers for any additional margin which was payable after 1 August 1992 was the consequence of their failure to exercise the choice given them by GIO in April 1992; and (b) an appropriate exercise of the discretionary powers conferred by s 87(1A) would have been an order obliging GIO to provide the borrowers with an election to the effect of that in fact provided by the letter dated 21 April 1992 but not taken up by them.

The construction of s 82

92 For the primary judge to find contravention of s 52 of the TP Act and of its State counterpart was one thing. To award damages under s 82 and its State counterpart was another.

93 Section 82 of the TP Act states:

"(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.

(2) An action under subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued."

Assistance in the construction of s 82 is provided by s 4K which was inserted by s 6 of the *Trade Practices Amendment Act 1977* (Cth) ("the 1977 Act"). It was

99 (1986) 160 CLR 1 at 11-12, 14-15.

suggested in argument that s 4K was concerned with the inclusion of damages for personal injury, thereby apparently providing some ground for the controversy which eventually was resolved in *Wright v TNT Management Pty Ltd*¹⁰⁰ and *Concrete Constructions (NSW) Pty Ltd v Nelson*¹⁰¹. There is nothing in its text to indicate that "injury" is so confined. Section 4K performs quite a different function in disentangling the various elements compounded in the concise language of s 82. "Injury" is used in s 4K in the sense of "actionable wrong"¹⁰².

94 Section 4K provides:

"In this Act:

- (a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and
- (b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury."

95 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.

96 Section 4K indicates that the phrase "loss or damage" performs two functions in s 82. It refers to the injury which constitutes the wrong and, as a component of the phrase "the amount of any loss or damage", it identifies the measure of compensation. *Gates* was concerned with the latter not the former. The analogy in respect of tort was expressed in terms of "measure of damages"¹⁰³. And, as will appear, in s 87(1A) the phrase "loss or damage" is used first to identify injury and then the measure of compensation for it. Failure to appreciate these distinctions may be conducive to imprecise analysis of the operation of s 82 and s 87 in a given case.

¹⁰⁰ (1989) 15 NSWLR 679.

¹⁰¹ (1990) 169 CLR 594.

¹⁰² See *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435 at 442; see also *Cable v Rogers* (1625) 3 Bulstrode 311 at 312 [81 ER 259 at 259].

¹⁰³ (1986) 160 CLR 1 at 6-7, 14-15.

97 Section 82 provides a remedy not only against a defendant who contravened Pt IV or Pt V but also against those "involved" in that contravention. The reference is to s 75B which requires that the party with alleged accessorial liability have intentionally aided, abetted, counselled or procured the contravention by the principal¹⁰⁴.

98 Section 82 is attracted only if there be "conduct" of another person that was done in contravention of a provision of Pt IV or Pt V. In its original form, s 82 spoke of persons suffering loss or damage "by an act of another person". Section 82(1) in its present form was substituted by s 50 of the 1977 Act. Sections 52 and 55 and other provisions of Pt VI dealing with remedies, such as ss 80 and 87, have been drawn from the introduction of the legislation so as to refer to "conduct". The term appears in various provisions in Pt IV which were added or amended by the 1977 Act¹⁰⁵. Section 4(2) was substituted by s 5 of the 1977 Act. As a result, the term "conduct" embraces the refraining (otherwise than inadvertently) from doing an act and the making it known that that act will not be done¹⁰⁶.

104 *Yorke v Lucas* (1985) 158 CLR 661.

105 Examples are found in ss 45(6), 45B(2) and 45D. The 1977 Act also introduced s 55A into Pt V.

106 The sub-section states:

"In this Act:

- (a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;
- (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), shall be read as a reference to the doing of or the refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;
- (c) a reference to refusing to do an act includes a reference to:
 - (i) refraining (otherwise than inadvertently) from doing that act; or
 - (ii) making it known that that act will not be done; and
- (d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the

(Footnote continues on next page)

The place of s 82 in the TP Act

99 The TP Act is a fundamental piece of remedial and protective legislation which gives effect to "matters of high public policy"¹⁰⁷. It is to be construed so as "to give the fullest relief which the fair meaning of its language will allow"¹⁰⁸.

100 Section 82 applies across a spectrum of diverse legal norms created by Pts IV and V. A number of these will have no direct analogue in the general law. Given the objective of the legislation that is not surprising. However, it does emphasise the need for caution against treating a provision such as s 82 "as a mere supplement to or eking out of" pre-existing law¹⁰⁹. To the contrary, as Mason P put it, the courts should not be "fearing to move far from the familiar coastline of traditional common law and equitable approaches"¹¹⁰.

101 In *Janssen-Cilag Pty Limited v Pfizer Pty Limited*, Lockhart J said¹¹¹:

"Section 82 is the vehicle for the recovery of loss or damage for multifarious forms of contravention of the provisions of Pts IV and V of the [TP] Act. It is important that rules laid down by the courts to govern entitlement to damages under s 82 are not unduly rigid, since the ambit of activities that may cause contravention of the diverse provisions of Pts IV and V is large and the circumstances in which damage therefrom may arise will vary considerably from case to case.

What emerges from an analysis of the cases (and there are many of them) is that they do not impose some general requirement that damage can be recovered only where the applicant himself relies upon the conduct of the respondent constituting the contravention of the relevant provision.

person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be."

107 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 256.

108 *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384; *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44; *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

109 Pound, "Common Law and Legislation", (1908) 21 *Harvard Law Review* 383 at 388. See also *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213 at 231-233.

110 *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 364.

111 (1992) 37 FCR 526 at 529-530.

Also, a perusal of the provisions of Pts IV and V, the contravention of which gives rise to an entitlement to an applicant for compensation for loss or damage, points to the conclusion that applicants may claim compensation when the contravener's conduct caused other persons to act in a way that led to loss or damage to the applicant. Examples are s 46 which concerns the misuse of market power by corporations; s 47 relating to the practice of exclusive dealing; also s 48 which is concerned with resale price maintenance. As to s 47(1) and (6) relating to third line forcing see *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd*¹¹². See *Hubbards Pty Ltd v Simpson Ltd*¹¹³ with respect to s 48. See also *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*¹¹⁴ where contraventions of s 45 of the [TP] Act were involved and they concerned contracts, arrangements or understandings or restrictive dealings which adversely affected competition. Also in Pt IV are sections such as s 60 and s 63A. Section 60 prohibits corporations from using physical force or undue harassment or coercion in connection with the supply of goods or services to consumers or the payment therefor. Section 63A prohibits corporations from sending unsolicited credit cards to persons."

102 These considerations, reflecting the apparent scope and purpose of the statute, militate against the presence of any legislative intention that before the court comes to assess the amount for which applicants are to be compensated under s 82 it first must identify any relevant general common law rules or analogies, understand the reasons that led to their development, and then seek to adapt or adopt them consistently with the scope and purpose of the legislation.

103 As I have indicated earlier in these reasons, what was said by this Court in *Gates*¹¹⁵ (and *Kizbeau Pty Ltd v W G & B Pty Ltd*¹¹⁶) does not determine that the measure of compensation which is recoverable in an action under s 82 is confined by analogies with tort or otherwise. The measure of damages recoverable in actions of a varied nature for which s 82 provides is not to be determined on the basis that the appropriate guide in most cases will be found by asking what would have been the measure if the common law did what it does not do, namely treat as a tort any facts which happen to give rise to an action under s 82. Analogy, like the rules of procedure, is a servant not a master.

112 (1986) 162 CLR 395 (High Court) and (1985) 7 FCR 509 (Full Federal Court).

113 (1982) 60 FLR 430 and (1982) 69 FLR 392 (on appeal).

114 (1987) 18 IR 355.

115 (1986) 160 CLR 1 at 11-12, 14-15.

116 (1995) 184 CLR 281 at 290.

Section 82: the accrual of the causes of action

104 There was obvious difficulty in classifying entry into the contracts themselves as "loss or damage" sustained at that stage by the borrowers and in providing monetary compensation for that injury as if there had been the loss of a bargain. At the times when the contracts were made, there was no cheaper financing on the market¹¹⁷. None of the borrowers suggested that he or she would not have borrowed at all if the AAA facility had been other than as represented¹¹⁸. None said that, had the truth of the matter been told, he or she would have entered into alternative financial arrangements. At this factual level, the present case thus is to be distinguished from the situation in authorities such as *Demagogue Pty Ltd v Ramensky*¹¹⁹ and *Akron Securities Ltd v Iliffe*¹²⁰. In those cases (where relief was obtained under s 87, not s 82), there had been a finding that, if prior to their entry into the transactions in question the applicants had been aware of the true situation, they would not have entered into the transactions¹²¹.

105 Further, in the present litigation, it was conceded that, even with the increase in the margin, the AAA facility was more beneficial to the borrowers than any other available loan facility¹²². Nevertheless, the focus of the borrowers' complaints with respect to the contractual terms of the AAA facility was the presence of cl 11.1 in the Conditions of Use. This did not immediately subject them to any contractual liability to pay more than a margin of 1.25 per cent. Such a liability would arise, and did in fact arise, only upon the expiration of 90 days after a notice had been served consequent upon the exercise of the power given by cl 11.1 to GIO. No doubt the contravention of s 52 occurred before entry by the borrowers into their respective contracts. But any injury which would found their actions under s 82, and for which it would provide a measure of compensation, was contingent or prospective until GIO acted to increase the margin rate and that

117 (1996) 63 FCR 304 at 330.

118 (1996) 63 FCR 304 at 330.

119 (1992) 39 FCR 31.

120 (1997) 41 NSWLR 353.

121 (1992) 39 FCR 31 at 35, 43; (1997) 41 NSWLR 353 at 363 respectively. These authorities may be compared with the position in partnership law where, in order to render a defendant liable as having been held out as a partner, it is not necessary that the plaintiff who has given credit to the firm on the faith of the representation to show that, had it not been for the holding out, the plaintiff would not have given credit: *Lynch v Stiff* (1943) 68 CLR 428 at 434-435; *Nationwide Building Society v Lewis* [1998] 2 WLR 915 at 920; [1998] 3 All ER 143 at 147-148.

122 (1996) 70 FCR 559 at 571.

increase became legally binding upon the borrowers to expand what previously had been their contractual liabilities to GIO. It follows that, on any footing, the expanded liabilities would not have crystallised until 1 August 1992 when the increased 2.25 per cent became effective.

- 106 This understanding of the situation is indicated by the reasoning in *Wardley Australia Ltd v Western Australia*¹²³. It was said in that case, in the joint judgment of four members of this Court¹²⁴:

"By virtue of s 82(2) of the [TP] Act, the period of limitation begins to run at the time when the cause of action under s 82(1) accrues. As loss or damage is the gist of the statutory cause of action for which s 82(1) provides¹²⁵, the cause of action does not accrue until actual loss or damage is sustained. The statutory cause of action arises when the plaintiff suffers loss or damage 'by' contravening conduct of another person. 'By' is a curious word to use. One might have expected 'by means of', 'by reason of', 'in consequence of' or 'as a result of'. But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s 82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this Court in *March v Stramare (E & M H) Pty Ltd*¹²⁶, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the [TP] Act. Had Parliament intended to say something else, it would have been natural and easy to have said so."

A sufficient causal connection between two events would not be established merely because one contributed to the occurrence of the other, unless the terms of the statute clearly indicated that this was so¹²⁷.

- 107 In *Wardley*, their Honours went on to point out that (a) under s 82(1), "a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage" and that, with economic loss, as with other forms of damage, there has to be some actual damage so that "[p]respective

123 (1992) 175 CLR 514.

124 (1992) 175 CLR 514 at 525; cf *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1998] 2 WLR 350 at 356-358; [1998] 1 All ER 481 at 487-488.

125 *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd (No 2)* (1987) 16 FCR 410 at 418.

126 (1991) 171 CLR 506.

127 *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 540-541.

loss is not enough"¹²⁸; and (b) detriment occasioned in a general sense by entry into a disadvantageous contract induced by conduct involving a misrepresentation was not universally to be equated with the legal concept of "loss or damage". Their Honours said¹²⁹:

"In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of undercompensation or overcompensation, the risk of the former being the greater."

It followed that, if the agreement in question generates an executory and contingent liability on the part of the plaintiff, the plaintiff suffers no loss until the contingency is fulfilled and time does not begin to run until that event¹³⁰. *Wardley* itself was determined on the footing that where, as the result of misleading or deceptive conduct, a person grants an indemnity requiring a payment when the loss of the recipient is ascertained and quantified, the indemnifier suffers no loss until the contingency is fulfilled and time does not begin to run under s 82(2) until that event occurs¹³¹.

108 In the present case, a cause of action under s 82 would not have accrued in favour of the borrowers before 1 August 1992. However, before that date, they had been given by GIO an opportunity to escape the imposition of what otherwise would have been an increased contractual liability upon them by taking the steps specified in the GIO letter dated 21 April 1992. As a practical matter, the imposition of the higher rate upon the borrowers was the sequel to their exercise of choice not to accept the proposal made by GIO.

128 (1992) 175 CLR 514 at 526, 527.

129 (1992) 175 CLR 514 at 527.

130 (1992) 175 CLR 514 at 534.

131 See also the observations by Lord Nicholls of Birkenhead upon *Wardley* in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 at 1634; [1998] 1 All ER 305 at 312.

109 The "common sense" answer to the question of causation which arises under a provision such as s 82 cannot be given, as Lord Hoffmann recently has stated¹³², "without knowing the purpose and scope of the rule" enacted by s 82. The borrowers appear to have approached the matter upon the footing that, there having been contravention of s 52 which induced their entry into the AAA facilities, the remedial provisions of the TP Act might be utilised to put them in the same position as if the representations were terms of the facilities. It is true that the discretionary remedies provided by s 87 are of sufficient width that, in an appropriate case, contractual terms themselves may be varied. Section 82 stands in a different light. It confers a right of action not a discretionary remedy. The purpose and scope of s 82 is to provide compensation for the injuries sustained by contravention, in the present case, of s 52. The measure of compensation will not necessarily reflect that which would have been the position of the borrowers if the AAA facility had not included the broad power of variation conferred by cl 11.1.

110 The primary judge fell into error in (a) applying s 82 to the facts of the present case on the footing that the borrowers had been justified in refusing to take advantage of the opportunity provided by GIO; and (b) providing a remedy, the effect of which was, up to the time of judgment and notwithstanding the intervening events, to treat GIO as obliged to make good its representations.

111 In reaching these conclusions, I have assumed that, in an appropriate case, the exercise by one party of a contractual power to increase the legal obligations of another may be an injury to the second party, which answers the description of "loss or damage" in the first sense in which that phrase is used in s 82. It will be for the second party, as an applicant under s 82, to establish the necessary causal link with a contravention of Pts IV or V and to prove the measure of compensation. In the present case, that causal link could not be demonstrated.

Section 87

112 The appellants seek an order pursuant to s 87(2)(b) of the TP Act varying each of the borrowers' contracts by adding a term to the effect that, notwithstanding any other contractual term, the margin applicable to the AAA facility is "fixed at 1.25 per cent for the life of [that] facility", together with an order that this variation take effect as and from the date of entry by each borrower into the relevant contract. They also seek an order remitting the proceedings to the primary judge to ascertain the amounts, if any, to be refunded under an order to be made under s 87(2)(c).

132 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1998] 2 WLR 350 at 356-358; [1998] 1 All ER 481 at 487-488. See also *Chappel v Hart* (1998) 156 ALR 517 at 534-535, 550-551.

113 Section 87(2) identifies those orders which may be made under the powers conferred by sub-ss (1) and (1A) of s 87. Orders in respect of contraventions of Pt IV may be made only under s 87(1). Contraventions of Pt IVA or Pt V (which includes s 52) attract both sub-sections. However, although the exercise of the power to grant relief under sub-s (1) is not dependent upon the actual grant of relief under other provisions of Pt VI, the power is enlivened only by the institution of a proceeding seeking relief beyond that under s 87(1)¹³³. On the other hand, an application may be made under s 87(1A) in relation to a contravention of Pt IVA or Pt V notwithstanding that no proceeding has been instituted under any other provision of Pt VI in relation to that contravention. Section 87(1C) expressly so provides. In the present litigation, reliance is placed upon s 87(1A).

114 As is the case with s 82, s 87(1A) uses the phrase "loss or damage" in several senses and is to be read with s 4K. Section 87(1A) states¹³⁴:

"Without limiting the generality of section 80, the Court may, on the application of a person who 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 IVA or V or on the application of the Commission in accordance with subsection (1B) on behalf of such a person or 2 or more such persons, make such order or orders as the Court 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)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person."

Section 87(1B) empowers the Australian Competition and Consumer Commission in certain circumstances to apply under s 87(1A) in a representative capacity.

115 The orders provided for in s 87(2) which are particularly relevant in consideration of the issues which arise in the present litigation are those in pars (a), (b), (ba), (c) and (d). These state:

"The orders referred to in subsection[s] (1) and (1A) are:

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

134 The reference in s 87(1A) to Pt IVA was added, with effect from 21 January 1993, by s 19 of the *Trade Practices Legislation Amendment Act 1992* (Cth).

- (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
- (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;
- (ba) an order refusing to enforce any or all of the provisions of such a contract;
- (c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage".

116 These paragraphs of s 87(2), including par (b), upon which the appellants place primary reliance, create new remedies which have an affinity to the equitable remedies of rescission and rectification. This is consistent with the scheme of s 87. Both s 87(1) and s 87(1A) are expressed not to limit "the generality of section 80". Section 80 confers powers to grant remedies identified as "injunctions" but which differ from the injunctions traditionally granted by courts of equity¹³⁵. The principles regulating the administration of equitable remedies afford guidance for, but do not dictate, the exercise of the statutory discretion conferred by s 87¹³⁶. Orders under provisions of s 87(2) which vary the contracts or declare them void

135 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 254-257, 263-264, 266-267; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 369-370.

136 *Henjo Investments Pty Limited v Collins Marrickville Pty Limited (No 1)* (1988) 39 FCR 546 at 564; *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 282-283, 288; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 367.

ab initio may be granted on terms¹³⁷. Such remedies, like their equitable analogues, are not directed to providing a measure of damages by way of monetary compensation. Statements in authorities such as *Gates* with respect to measure of damages thus stand quite apart.

117 In *Redgrave v Hurd*¹³⁸, Sir George Jessel MR explained how it was that equity would not uphold a contract entry into which had been induced by innocent misrepresentation practised upon the defendant. His Lordship's reasoning is indicative of an appropriate response to the claim of the borrowers for relief by an order under s 87(2)(b) of the TP Act. In particular, before granting such a remedy the circumstances which are to be considered include the conduct of the parties after they have knowledge of the misleading conduct¹³⁹. The Master of the Rolls said¹⁴⁰:

"According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.' The other way of putting it was this: 'Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements.'"

118 The application of s 87 to the present case may be approached on the footing that, as indicated earlier in these reasons, the borrowers would have sustained loss or damage when the increased margin came into operation on 1 August 1992. However, in giving notice by letter dated 21 April 1992, GIO did not, in Sir George Jessel's words, "seek to take advantage of [its] own false statements" nor, having obtained the contracts by misleading and deceptive conduct, did GIO insist upon keeping the borrowers to those contracts. Moreover, even with the increase in the

137 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) 27 FCR 492 at 498-507.

138 (1881) 20 Ch D 1.

139 *Henjo Investments Pty Limited v Collins Marrickville Pty Limited* (1988) 39 FCR 546 at 564.

140 (1881) 20 Ch D 1 at 12-13.

margin, the AAA facility was more beneficial to the borrowers than any other available loan facility.

119 In those circumstances, in respect of borrowers who declined the GIO offer, an order adding a term to their AAA facilities to the effect that the margin was fixed at 1.25 per cent for the life thereof would not be a proper exercise of the discretion conferred upon the court by s 87(1A). It would not be an appropriate measure to prevent or reduce loss or damage suffered or likely to be suffered by the borrowers by reason of the increase of the margin to 2.25 per cent with effect from 1 August 1992. The increased contractual liability of the borrowers would be the product of their own exercise of choice, not the taking by GIO of advantage of its misleading or deceptive conduct by insisting upon keeping the borrowers to the terms of their facilities.

Conclusion

120 The borrowers did not make out a case for relief, whether under s 82 or s 87(1A) of the TP Act or the corresponding provisions of the Fair Trading Act.

121 As indicated earlier in these reasons, the third appellant, Mrs Williamson, is in a different position. There was an issue at the trial as to whether the letter dated 21 April 1992 was served on her. In their joint judgment, Wilcox and Tamberlin JJ said¹⁴¹:

"So far as we can discern, that issue was not resolved by the [primary] judge. If the letter was not served on Mrs Williamson earlier than 90 days before 1 August 1992, it was, of course, ineffective to increase from that date the interest rate payable by her."

In the result, the Full Court remitted the proceeding to the primary judge "for determination of the issue concerning service of the letter of 21 April 1992 on Mrs Williamson and for the making of such orders, consequential on that finding, as are appropriate"¹⁴².

122 That order should stand, together with the other orders made by the Full Court. The result is that the appeal to this Court should be dismissed with costs.

141 (1996) 70 FCR 559 at 562.

142 (1996) 70 FCR 559 at 562.

123 KIRBY J. Once again this Court has before it federal legislation which is said to be ambiguous. Depending upon the construction adopted, the appellants or the respondents will succeed¹⁴³. Once again the function of the Court, in resolving the ambiguity, is to reflect upon the purposes and objects of the legislation and to adopt a construction which is most likely to advance those underlying goals.

124 In construing legislation enacted to secure significant national economic objectives¹⁴⁴, such as the provision of important remedial protection for consumers, the Court should resist attempts to divert it into a construction which would frustrate and defeat those objectives¹⁴⁵. This is particularly the case when the construction proposed involves the use of analogies discovered by rummaging amongst the common law and equitable remedies which long preceded the enactment of the legislation and which often fail to reflect the full complexity of the applicable legislative purpose. That is what happened, in my respectful opinion, when these proceedings were before the Federal Court of Australia¹⁴⁶. Part of the blame for this has been ascribed to passing observations in this Court in an earlier case concerned with the legislation¹⁴⁷. However, those observations have been taken out of context. They have been blown out of all proportion. They have distorted fidelity to the purposes and objects of the legislation. The time has come to return to the statutory language and to construe it so as to achieve its intended results.

143 Other recent cases include *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 140; *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 441; *Cannane v J Cannane Pty Ltd (in liq)* (1998) 72 ALJR 794 at 811-812; 153 ALR 163 at 186-187.

144 In s 2 of the *Trade Practices Act* 1974 (Cth), it is declared that the object of the Act is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

145 In *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, apprvd in *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41, Lockhart and Gummow JJ stated at 503: "As is the case with Pt IV of the ... Act, the evident purpose and policy underlying Pt V ... recommends a broad construction of its constituent provisions, the legislation being of a remedial character so that it should be construed so as to give the fullest relief which the fair meaning of its language will allow".

146 *GIO Australia Holdings Ltd v Marks* (1996) 70 FCR 559.

147 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 14-15 per Mason, Wilson and Dawson JJ. See also at 6 per Gibbs CJ.

The facts, applicable legislation and issues for decision

125 The facts are stated in the reasons of the other members of the Court. The legislation in question is the *Trade Practices Act* 1974 (Cth) ("the TP Act"). There are counterpart provisions of the *Fair Trading Act* 1987 (NSW) which were also relied on. However, it was common ground that nothing turned on the later Act and that the solution to the appeal could be found by concentrating exclusively on the TP Act. Similarly, although there was a factual nuance distinguishing the position of one of the borrower appellants (Mrs Alexandra Williamson), it seems appropriate to put her position to one side and to confirm, for the reasons which Gummow J gives, the special order made in her case by the Full Federal Court¹⁴⁸. This permits me, as the other members of this Court have done, to look generically at the position of the borrowers (who are the appellants) and the lenders (who are the respondents). I shall describe the lenders without differentiation as "GIO".

126 At first instance, the borrowers sued GIO both for breach of contract and for breach of s 52 of the TP Act (and s 42 of the *Fair Trading Act*). Initially, the borrowers sought relief on four grounds: by the common law of contract; by reliance on the TP Act (and the *Fair Trading Act*); by reliance on the *Contracts Review Act* 1980 (NSW); and by reference to equitable principles. Of these four grounds, three were variously disposed of before reaching this Court. First to go were the claims for equitable relief, apparently abandoned as part of an agreement to confine the issues in order to secure an early hearing in the Federal Court. Next, the claims for relief under the *Contracts Review Act* fell away. The final claim disposed of was that in contract. That claim was initially dismissed by the primary judge (Einfeld J)¹⁴⁹, but subsequently challenged in the Full Court. One judge (Foster J) would have upheld the claim in contract¹⁵⁰. He considered that the attempt by GIO on 21 April 1992 to alter the marginal rate of interest was ineffective. For that reason, although on grounds different from those given by the primary judge, Foster J would have dismissed the appeal. However, the majority in the Full Court (Wilcox and Tamberlin JJ)¹⁵¹ confirmed the rejection of the contract claim. That claim has not been reagitated in this Court. It is in this way that the issues before us were narrowed to one claim for relief, being the claim under the TP Act.

148 (1996) 70 FCR 559 at 562.

149 *Marks v GIO Australia Holdings Limited* (1996) 63 FCR 304 at 319-320.

150 (1996) 70 FCR 559 at 584.

151 (1996) 70 FCR 559 at 561.

The borrowers and lenders make concessions

127 The most important common ground about the facts affected both the borrowers and GIO. The borrowers agreed that, on the evidence, none of them could suggest that, if there had been no misrepresentation by or on behalf of GIO, they would not have borrowed from GIO at all. GIO was offering a particular financial "product", ie a contract which was unique in the market¹⁵². Consequently, it was not claimed that, by entry into that contract, the borrowers had lost an opportunity of securing (whether at the time of the initial agreement or at any time thereafter) an equivalent or better financial arrangement than GIO represented, even when the margin was altered. This was because no other credit provider was offering an equivalent or better "product". In that sense, if the ultimate question is whether the borrowers could prove that, had there been no misrepresentation, they could have secured an equivalent or better contract elsewhere than with GIO, the answer is that they could not. This consideration distinguishes the present case from most cases based on breach of s 52. So does the fact that GIO offered to release the borrowers on beneficial terms. It did not seek to hold them to the contract found to have been binding although procured by misleading conduct.

128 For the lenders, there was no challenge in this Court to the findings of the primary judge that GIO had engaged in misleading and deceptive conduct in breach of s 52 of the TP Act¹⁵³. Specifically, the primary judge found, and it was uncontested, that GIO had represented to the borrowers that by entering into their respective contracts the margin, constituting part of the interest rate, was "set" at 1.25%. It was found that this representation clearly conveyed the meaning that the rate would not be altered during the currency of each contract; that each of the borrowers relied on that representation; that each was misled by it; and that it was a factor in inducing them to enter into their contracts with GIO.

129 The primary judge also found that the representation, especially as contained in GIO's brochure, exerted a continuing influence on the minds of the borrowers in their appreciation of the terms of their contracts. It was unchallenged that employees and agents of GIO had made oral representations accompanying the written ones to the effect that the marginal rate was "set" for the life of the facility. The Full Court confirmed these findings. In argument, GIO made a passing reference to the fact that the respective GIO corporations were not themselves engaged in misleading the borrowers. However, as GIO, in its various manifestations, could only act through its employees and agents, this consideration is irrelevant. The finding of a breach of s 52 of the TP Act is the starting point from which the inquiry as to the relief (if any) which follows under the Act must

152 (1996) 63 FCR 304 at 320.

153 (1996) 63 FCR 304 at 321-322.

proceed. As has been observed, proved contravention of the section is a "passport to ... extensive relief"¹⁵⁴.

The lenders dispute relief under s 87

130 It was always the case for the borrowers that the relief appropriate to their claims, if misleading and deceptive conduct under s 52 of the TP Act were established, was to be found in s 87 rather than in s 82 of that Act. Their position was that because of the many difficulties in accurately calculating, for the future, the "amount of the loss or damage" contemplated by s 82, they were pointed from the start in the direction of s 87. Accordingly, it was their case that the practical relief to which they were entitled, once breach was proved, was an order varying the contracts between the borrowers and GIO "in such manner as [the Court] specified in the order"¹⁵⁵.

131 The borrowers acknowledged that it would be possible to make an order under s 82 to the date of judgment (giving rise to a readily calculable sum) and thereafter varying the contracts between the borrowers and GIO to hold the latter to the terms of a contract without the misleading and deceptive element. However, in the courts below, and in this Court, the borrowers suggested that the neatest and most appropriate relief was an order varying the contracts between them and GIO on and from the date on which GIO had purported to depart from the set marginal rate, increasing that rate by one percentage point. Such an order would have practical consequences for a refund to the borrowers of any sums paid by them over and above the "set" marginal rate. The borrowers claimed that this order could be accommodated by a provision of s 87, namely, s 87(2)(c).

132 For its part, GIO contested the availability of relief under s 87. Its submissions were upheld both at first instance¹⁵⁶ and in the Full Court¹⁵⁷.

¹⁵⁴ *Farrow Mortgage Services Pty Ltd (in liq) v Edgar* (1993) 114 ALR 1 at 6.

¹⁵⁵ TP Act, s 87(2)(b).

¹⁵⁶ (1996) 63 FCR 304 at 329-330, 332.

¹⁵⁷ (1996) 70 FCR 559 at 560, 584.

A cross-appeal by the borrowers is not disposed of

133 There was before the Full Court both an appeal by GIO and a cross-appeal by the borrowers. The cross-appeal relevantly challenged the orders of Einfeld J, suggesting that they were incorrectly circumscribed. The borrowers sought orders allowing the cross-appeal and substituting for the orders of the primary judge a declaration that the margin in the contract between the borrowers and GIO "be set at 1.25% as from 1 August 1992 for the term of each facility". The orders of the Full Court, whilst allowing the appeal and making orders in favour of GIO, made no provision for the disposal of the cross-appeal save for an order that the borrowers pay GIO's costs thereof¹⁵⁸. By inference, the Full Court must have rejected the cross-appeal, although it did not say so specifically or so provide by order. Inherent in the reasoning of all of the judges was a conclusion that provision of relief to the borrowers was unavailable under the TP Act. Hence, the judges in the majority seem to have treated disposal of the appeal as determinative of the cross-appeal.

134 In this Court the borrowers did not seek a restoration of the orders of Einfeld J. They ultimately submitted that the correct order was to return the proceedings to the Full Court so that it might dispose of their cross-appeal to that Court, with the benefit of the guidance of this Court on the operation of the TP Act. It would then be freed from the shackles by which the Full Court had felt itself bound. In my view, this is the correct order. But before I propose it, I must explain how I arrive at it.

The borrowers and lenders invoke analogies to aid construction

135 Although there was much debate before this Court about the use of analogies to elicit the meaning and intended operation of the remedial provisions of ss 82 and 87 of the TP Act, there was no real dispute (nor could there be) that the duty of the Court was to give effect to the purpose of the TP Act as discovered, in the normal way, from its language and apparent objectives. All parties indulged in analogous reasoning. GIO suggested that the Court should adhere to the dicta of Gibbs CJ¹⁵⁹ and Mason, Wilson and Dawson JJ¹⁶⁰ in *Gates v City Mutual Life Assurance Society Ltd* ("*Gates*"). Their Honours there held, at least in the context of the assessment of damages under s 82 of the TP Act, that "the measure of

158 (1996) 70 FCR 559 at 562.

159 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 6.

160 (1986) 160 CLR 1 at 14.

damages in tort" was an appropriate standard for courts to use, by analogy¹⁶¹. GIO urged that this Court should adhere to that analogy, including in relation to relief under s 87. It should do so on the basis that it was simple to apply, of long standing and "plainly correct"¹⁶².

136 The borrowers contested this analogy. They conceded that, in the application of novel legislative provisions affording remedies, it was natural for courts to look for analogies to guide them in deciding the measure of damages or the provision of other relief. But for their part, the borrowers urged an analogy with the relief available in the event that they could establish an entitlement to an injunction addressed to GIO to restrain it from purporting to amend the marginal rate of interest contrary to the representation found to have been made¹⁶³. The borrowers conceded that the relief given by equity would be discretionary and that they would ordinarily have to show detriment of some kind to secure a discretionary order.

137 It can be seen, then, that both sides played with analogies, encouraged to do so by the early observations of this Court when first confronted by the novel provisions of the TP Act and the even more novel "remedial smorgasbord"¹⁶⁴ for which that Act provides.

The resulting issues

138 Although there were several attempts to state the essential issues in the appeal in ways favourable to the interests of the respective parties, two ultimate issues emerged from the argument. They were:

- (1) The meaning of "loss or damage" when used in the TP Act, both in ss 82 and 87 and whether those words incorporate by analogy the so-called "contract

161 In *Gates* (1986) 160 CLR 1 at 14, Mason, Wilson and Dawson JJ remarked that "there is much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similar both in fraudulent misrepresentation and negligent misstatement."

162 (1986) 160 CLR 1 at 7 per Gibbs CJ.

163 Various other arguments were advanced based on analogy with estoppel. It was also suggested that the rigid differences in the approaches previously adopted by the compartments of the law of obligation relating to tort and contract were eroding. See *Hill v Van Erp* (1997) 188 CLR 159 at 232-233; *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410 at 419, 420-421 ["Tort and contract today are separated by rather less than clear bright lines"] per Gummow J.

164 *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 366 per Mason P.

approach" or "torts approach" or some other approach derived by analogy from equity or elsewhere. Specifically, the question was presented as to whether the words, when read in their context and elaborated by the inclusion of the notion of "injury"¹⁶⁵, extended to include loss of the expectation of profits as the borrowers urged and as GIO denied. (The loss or damage point); and

- (2) The meaning and purport of the word "by", also appearing in both ss 82 and 87 of the TP Act, where it is declared necessary for the person seeking relief under the Act to show "loss or damage *by* conduct of another person ... in contravention of a provision of Part IV ... or V" of the Act. GIO submitted that this word imported notions of causation. It limited the provision of relief to a case where the person suffering loss or damage could show that the conduct of another person in contravention of the relevant parts of the Act, was the cause of loss or damage and that it did not derive from some other, different and separate cause. The borrowers accepted that a causal link to conduct contravening the Act had to be shown. But they contested that this imported a comparison (in the manner of the torts approach) between what the position would have been without the contravening conduct and what it was, the conduct having occurred. (The causation point).

The perceived constraints of *Gates*

- 139 It is some time since I have read so many utterances of reluctant judicial obedience to conceived authority as appear in the treatment by the Federal Court of this Court's decision in *Gates*¹⁶⁶ and how the Federal Court understood that decision to require a conclusion viewed as both uncongenial and unjust¹⁶⁷. Einfeld J, noting the possible approaches to the provision of relief upon the basis of the misleading and deceptive conduct which he had found, identified as the primary and most obvious possibility the application of s 87 of the TP Act: adjusting each borrower's contract so that it provided a 1.25% set margin for the life of the facility. His Honour acknowledged that "[t]his option would give the applicants what they thought they were getting at the time they signed the contract"¹⁶⁸. Only the requirement of conceived authority diverted Einfeld J from providing such relief.

¹⁶⁵ Incorporated by TP Act, s 4K.

¹⁶⁶ (1986) 160 CLR 1.

¹⁶⁷ Another example may be the *cri de coeur* in *Warburton v Whiteley* [1989] NSW Conv R ¶55-453 at 58,286. See also *Garcia v National Australia Bank Limited* (1998) 72 ALJR 1292; 155 ALR 614.

¹⁶⁸ (1996) 63 FCR 304 at 330.

140 In the Full Court, the judges were even more vocal. They were unanimous in their expressions of reluctance. Wilcox and Tamberlin JJ pointed out that an order under s 87, such as was primarily sought by the borrowers, "would have the effect of preventing disappointment of the expectation induced in the [borrowers] by GIO's misleading brochure"¹⁶⁹. However, their Honours concluded that *Gates* "expressly holds that damages are not available to compensate a misrepresentee for mere disappointed expectations". Their Honours went on¹⁷⁰:

"The *Gates* limitation might be thought unfortunate, as allowing corporations sometimes to avoid being obliged to match their performance to their marketing. But any review of the limitation must be for the High Court to undertake. While it remains, it precludes relief in respect of the respondents' mere expectation loss, whether by way of damages or a s 87 order."

141 The third judge was still more emphatic when he came to the provision of relief under the TP Act. Referring to *Gates*, Foster J stated that the opinion there expressed¹⁷¹:

"gives scant encouragement to the introduction of more extensive remedies flowing from a misrepresentation or breach of s 52".

His Honour recognised that relief under s 87 had not been sought in *Gates*¹⁷². Thus the passages in the reasoning in that case did not relate to a claim under s 87. But he found, nonetheless, that the reasoning was equally applicable to s 87. He concluded¹⁷³:

"[W]ere it not for this, I should be most attracted to the granting of that relief. The misrepresentation in the present case was, in my view, a serious one and was ... persisted in, even when it was known that there was an intention on the part of GIO to raise the margin. If it be accepted that a major underlying purpose of the TP Act and the FT Act is the maintenance of appropriate levels of commercial propriety then it would appear to be consonant with that purpose that in cases of this kind the representor be held to the representation as though it were, in fact, a binding contractual term."

169 (1996) 70 FCR 559 at 560.

170 (1996) 70 FCR 559 at 561.

171 (1996) 70 FCR 559 at 583.

172 (1996) 70 FCR 559 at 583.

173 (1996) 70 FCR 559 at 584.

142 One of the principal reasons for the grant of special leave in this case was obviously to permit a reconsideration of such uncongenial authority. After the present case was decided in the Full Federal Court, an opinion was expressed that the reasoning in *Gates* did not have the dire consequences which the Full Court itself felt constrained to apply. In *Akron Securities Ltd v Iliffe*¹⁷⁴, Mason P, in the New South Wales Court of Appeal, reviewing the scope of s 87, disagreed with the opinions of the Full Federal Court. He said that, even if *Gates* applied to control the remedies that were available under s 82 of the TP Act¹⁷⁵:

"[I]t simply does not follow that s 87 could not be pressed into service according to its terms. That appears to me to be expressly what s 87(1) provides (cf 'whether or not it ... makes an order under section ... 82') and expressly what was decided in *Demagogue [Pty Ltd v Ramensky]*¹⁷⁶. Foster J recognised this in *GIO* when he said that 'the borrowers' inability in the present case to demonstrate any financial loss resulting from the misrepresentation is no bar to their seeking relief under s 87' Section 87(2)(d) speaks in terms of 'an order ... to pay ... the amount of the loss or damages' I find it difficult to see that *Gates* stands in the way, because relief under s 87 was not sought in that case, and because the passages cited by the Full Court from *Gates* ... do not, in my respectful opinion, establish that s 87 offers nothing but rescission in cases such as the present."

143 This, then, is the controversy. Did *Gates* require the result to which the Federal Court was so obediently but reluctantly driven? If not, should this Court provide the relief under s 87 which the majority judges of the Full Court, at least, would have provided had they not felt themselves prevented from doing so by the authority of *Gates*?

There is no conclusive holding on the scope of s 87

144 It is appropriate to make a few general observations about s 87 of the TP Act upon which the borrowers principally relied. As was recognised in the Full Court, *Gates* was not a case which could provide a binding rule on the application of s 87. Although reference was made in passing to that section, its scope was not before this Court in *Gates*. This was because relief had not been sought under its provisions. Therefore, as a matter of binding authority, the point in issue in these proceedings was not decided in a way binding on the Federal Court. Accordingly, it fell to the Federal Court to reach its own conclusion, doubtless drawing by analogy upon any treatment of issues common to s 82 (there in issue) and s 87 and

174 (1997) 41 NSWLR 353.

175 (1997) 41 NSWLR 353 at 365.

176 (1992) 39 FCR 31.

seeking to draw any available inferences from the treatment of one for the meaning of the other. For the elucidation of the present appeal, it is not necessary for this Court to overrule *Gates* if it considers that the appropriate relief available to the borrowers is, as they claim, under s 87, not s 82 of the TP Act.

The operation of s 87 is much broader than s 82

145 There are material differences between the relatively narrow provisions for the relief in s 82 of the TP Act and those provided under s 87. In terms, s 87 is expressed much more broadly than s 82. Section 82 is confined to the recovery of "the amount of the loss or damage". That phrase postulates that an amount is ascertainable. The section contemplates that "loss or damage" has already been suffered. It is concerned with conduct in contravention of a provision of Part IV or V. Section 87, on the other hand, in both sub-ss (1) and (1A), provides for orders as the court thinks appropriate. It does so not only where a person who is a party to the proceedings "has suffered" the requisite "loss or damage" but where it is found that that person "is likely to suffer" such loss or damage. In the case of both sub-sections, reference is made to contraventions of a provision of Pt V of the TP Act. This is the Part of the Act dealing with consumer protection, within which s 52 appears amongst the various "Unfair Practices" which the Act is designed to sanction and remedy. Whereas s 87(1) also refers to Pts IV and IVA, s 87(1A) only refers to contravention of a provision of Part IVA and not Pt IV¹⁷⁷.

146 The range of orders which may be made, as contemplated by sub-ss (1) and (1A) of s 87 includes the payment "to the person who suffered the loss or damage" of the "amount of the loss or damage": language which exactly parallels that in s 82(1). The interrelationship between the two remedies, and the possibility that orders will be made both under s 82 and s 87, is made clear by the express language of s 87(1). But the other remedies, contemplated in s 87(2), travel far beyond those available by the law of tort to whose analogy *Gates* referred in the context of s 82. Not only do the remedies (apart from that in s 87(2)(d) and perhaps (c)) proceed much further than the traditional tort remedy of damages, but the variety of persons who might be affected by the orders exceeds even the extended ambit provided by s 82(1) which, in its turn, expanded the reach of a traditional action in tort. Thus, the power by order to declare that a contract or collateral arrangement was void ab initio¹⁷⁸ or to vary such a contract or arrangement¹⁷⁹ clearly has the potential to affect strangers to the contravention of the TP Act which enlivens the discretion to

177 Pt IVA was added to s 87(1A), with effect from 21 January 1993, by s 19 of the *Trade Practices Legislation Amendment Act 1992* (Cth).

178 TP Act, s 87(2)(a).

179 TP Act, s 87(2)(b).

make orders under s 87. At this stage of the analysis, the analogy of s 87 to the traditional remedies in tort is looking rather thin.

The wide ambit of s 87 suggests large remedial powers

147 When the blinkers of analogy are removed and the terms of s 87 are examined, purely as a task of statutory construction, it is easy to recognise the very large range of contraventions to which orders under s 87 must be moulded. These include contraventions of provisions, in the case of sub-s (1) of Pts IV, IVA and V and, in the case of sub-s (1A) of Pts IVA and V. There is no doubt that contravention of s 52, which is the section here in question, enlivens both sub-sections and the range of orders provided for in sub-s (2).

148 More relevant to the present point is the need to examine the kinds of contraventions contemplated by the several Parts of the TP Act which enliven s 87, and the range of conduct which is thereby invoked, as potentially giving rise to loss or damage for which relief may, in a particular case, be appropriate. For example, Part IV of the TP Act includes s 46 of the Act. That section provides for contraventions of the Act in the nature of misuse of market power. It forbids a corporation which has a substantial degree of power in a market from taking advantage of that power, inter alia to prevent the entry of a person into the market or to deter a person from engaging in competitive conduct. Obviously, in such a case, any "loss or damage" to which s 87(1) would apply would have to include loss of expectations of profit. By definition, no relevant profit would have accrued to the person kept out of the market. This is just one illustration of many, which arise from the diverse and varied contraventions to which the relief provided by s 87 must be adapted. It indicates why it is erroneous to define "loss or damage" in isolation or by reference only to tort concepts thought analogous to the particular case of contravention of s 52 of the TP Act. Because the words "loss or damage" must be given a meaning wide enough to embrace loss of the expectation of profits under s 46, the phrase in s 87 must, it seems to me, carry the same meaning when referring to any other contravention to which the section applies, including a contravention of s 52. By parity of reasoning (although Pt IV is not expressly mentioned), the same conclusion must be reached in respect of the phrase "loss or damage" when appearing in s 87(1A).

The words "loss", "damage" and "injury" confirm a broad approach

149 There is a further textual consideration. I have already mentioned that s 4K of the TP Act extends the definition of "loss or damage" throughout the Act to include "a reference to injury". In effect, this means that wherever "loss or damage" appears in the TP Act, one can add the words "or injury". The precise differentiation between "loss", "damage" and "injury" is not made clear. There is no authority on the point. But it is plain that the legislature has provided for the widest possible definition of adverse consequences flowing from ("by") conduct in contravention of provisions of the TP Act. Clearly, therefore, by adding the

words "damage" and "injury", the Parliament had a purpose to stress the notion of harm beyond any narrow concept of "loss". This is a further reason for rejecting the argument of GIO that, inherent in the idea of "loss or damage" was a detriment falling short of the damage consequent upon the deprivation of the expectation of profits which would have accrued if the contravention of a relevant provision of the TP Act had not occurred.

The TP Act should be construed to achieve its remedial purposes

- 150 Several other features of the TP Act as a whole, and of s 87 in particular, reinforce the foregoing reasoning which supports the borrowers' submission that their loss of expectation of a fixed marginal rate of interest is the kind of "loss or damage" (or "injury") to which s 87 may be directed. The TP Act is a significant measure of legislative reform¹⁸⁰. Its purposes, at least where it provides for consumer protection and remedies, must therefore be given effect by the courts in a wholehearted way¹⁸¹. It would be quite wrong to defeat the achievement of the policy of the TP Act, and specifically of the remedies provided by the Parliament

180 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 256. See also Second Reading Speech in Australia, Senate, *Parliamentary Debates (Hansard)* 27 September 1973 at 1013, where the Minister (Senator Murphy) said at 1013-1014: "In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor - meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection."

181 See, for example, Second Reading Speech, *ibid*, at 1015: "I now refer to some features of the drafting of the Bill. Legislation of this kind is concerned with economic considerations. There is a limit to the extent to which such considerations can be treated in legislation as legal concepts capable of being expressed with absolute precision. ... The present Bill recognises the futility of such drafting. ... The Courts will be afforded an opportunity to apply the law in a realistic manner in the exercise of their traditional judicial role." These comments apply equally to the consumer protection provisions as to the restrictive trade practice provisions, and must be seen as encouraging judges to uphold the underlying purposes of the Act. See also French, "Judicial Approaches to Economic Analysis in Australia", in Round (ed), *The Australian Trade Practices Act 1974: proscriptions and prescriptions for a more competitive economy*, (1994) at 89.

for its enforcement¹⁸², by construing the remedies narrowly by reference to supposed analogies developed in different times and for different purposes by the general law¹⁸³. Experienced judges have declined to don a "strait-jacket" proffered by reference to historical analogies¹⁸⁴. They have been right to do so.

- 151 The broad ambit of "loss or damage" has already been the subject of comment in this Court¹⁸⁵. This case provides a further reminder that an ample approach for the provision of relief under s 87 is that which conforms to the policy of the TP Act¹⁸⁶. In granting relief under s 87 courts are not restricted by the limits which were conventionally applied under the general law, for example, in actions of tort to recover damages for misrepresentation¹⁸⁷. Thus, not only is the language which enlivens the application of the section very broad, but the discretion conferred when the section attaches could not be expressed in more generous terms¹⁸⁸. And while the discretion which is enlivened must be exercised judicially¹⁸⁹, there is nevertheless an unusually wide range of powers extending well beyond those available in courts of the common law or of equity. Judges should not narrow or confine what the Parliament has so amply provided.

182 *Mister Figgins Pty Ltd v Centrepont Freeholds Pty Ltd* (1981) 36 ALR 23 at 56.

183 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 37-39; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 364.

184 *Trade Practices Commission v Collings Construction Co Pty Ltd* (1996) 142 ALR 43 at 73, confirmed *Collings Construction Co Pty Ltd v Australian Competition and Consumer Commission* (1998) 43 NSWLR 131 at 144-150 per Cole JA; cf *Holt v Biroka Pty Ltd* (1988) 13 NSWLR 629 at 637.

185 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 543; cf *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 at 261.

186 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 299; cf *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 365.

187 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 43; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 366.

188 TP Act, ss 87(1) and 87(1A) ["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 ..."].

189 *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144 at 168.

The supposed constraints of *Gates* should be removed

152 At some future occasion it may be necessary for this Court to return to what was said in *Gates*, relevant to the provision of relief under s 82 of the TP Act. It will be clear, I hope, that I consider that, even under that section, the analogy to common law damages in tort is a most imperfect one. That section, like s 87, appears in an Act which has obvious national and economic objectives and which, in part at least, depends for its effective implementation upon the initiative of individuals who claim to have suffered¹⁹⁰, or who are likely to suffer¹⁹¹, loss or damage of the kind described as conduct in contravention of provisions of the TP Act. They must come forward and institute their own civil proceedings despite the many practical impediments to doing so. In the case of contravention of s 52 of the TP Act, civil action by an individual is the mode of enforcement which the Parliament has contemplated will ordinarily be pursued. Criminal proceedings are excluded¹⁹². Injunctions on the application of the Australian Competition and Consumer Commission¹⁹³ to restrain contraventions of Part V, will, for practical and financial reasons, be exceptional and relatively rare. From this structure and scheme of the legislation it would be wrong to attribute to the Parliament a cynical intention to undermine its own high objectives (in s 52) by the provision of narrow and ineffectual remedies for contraventions (relevantly in s 87). I agree with what was said by Black CJ in this regard in *Demagogue Pty Ltd v Ramensky*¹⁹⁴: that it is inherent in the scheme of s 87(1) of the TP Act "that an order under that subsection may be made whether or not the court 'grants an injunction under section 80 or makes an order under section 80A or 82'". Thus, even where there is no entitlement to damages under s 80, remedies under s 87 may yet be appropriate¹⁹⁵. In *Demagogue*, Gummow J pointed to the fact that the terms of s 87(2) deny a construction which would "limit the loss or damage suffered or likely to be suffered to pecuniary loss or damage"¹⁹⁶. In his Honour's view, the phrase meant "no more than the disadvantage which is suffered by a person as the result of the act or default of another ... in the circumstances provided for in the

190 TP Act, ss 82, 87.

191 TP Act, s 87.

192 TP Act, s 79(1).

193 TP Act, s 80(1).

194 (1992) 39 FCR 31 at 32.

195 (1992) 39 FCR 31 at 42-44 per Gummow J.

196 (1992) 39 FCR 31 at 47.

section"¹⁹⁷. He suggested that this was an important point of distinction between s 87 and s 82. I agree.

- 153 Once this distinction is appreciated, whatever the failure of the analogy drawn in *Gates* between the approach to relief under s 82 and the approach of the common law of torts, the same step can certainly not apply to proceedings for relief under s 87. The barrier which the judges of the Federal Court felt stood in the way of the provision of the relief, which they would otherwise have granted, collapses. The borrowers at all times sought relief under s 87. They have never had a proper application of the section to their case. It was denied at first instance. Their cross-appeal demanding it was not determined. Subject to what follows, the proceedings should therefore be returned to the Full Court of the Federal Court to decide the cross-appeal. The supposed veil, felt to be occasioned by *Gates*, should be lifted from judicial eyes.

Discretionary arguments to deny relief should be rejected

- 154 GIO, however, contended that it would be futile to return the matter to the Federal Court on the ground that any proper exercise of discretion by that Court would be bound to result in the refusal of relief under s 87. It is here that I part company with Gaudron and Gummow JJ. I am far from convinced that refusal of relief was the only "proper exercise of the discretion" conferred by s 87 in this case. With every respect, I consider that that conclusion again falls into the trap of analogous reasoning from equitable principles¹⁹⁸. It pays insufficient attention to the way in which the Parliament has provided for the machinery of s 87 of this Act to be the means of enforcing its will expressed (relevantly) in s 52.
- 155 It would be an extremely odd result for such proceedings to have been brought successfully and an unchallenged "serious" misrepresentation¹⁹⁹ solemnly found, yet the contraveners walk away scot-free. Those upon whom the contraventions were perpetrated would then be left bereft of statutory remedy. This would be specially puzzling given the character of the contravener as a group of major financial organisations, the gravity of the contravention found, the wide variety of the remedies provided by the Parliament together with the public as well as private purposes which the TP Act is designed to uphold. Such a result could perhaps be tolerated in the context of purely private litigation between parties in a court of equity. But it seems scarcely likely that it was the result envisaged by the Parliament when it enacted the consumer protection provisions of the TP Act and

¹⁹⁷ (1992) 39 FCR 31 at 47.

¹⁹⁸ For example *Redgrave v Hurd* (1881) 20 Ch D 1.

¹⁹⁹ (1996) 70 FCR 559 at 584.

afforded the remarkable variety of remedies available under s 87 to uphold those protections.

The causation point should be rejected

- 156 GIO suggested a further reason for refusing an order under s 87, even if its narrow view of "loss or damage" were rejected. This involved an appeal to the causation point. GIO's final argument was that such loss or damage as occurred was not "by" conduct of another person who was engaged in contravention of the TP Act but "by" reason of the contractual liability of the borrowers under their several contracts with GIO. I disagree. Once it is accepted that "loss or damage" (or "injury") extends to loss of expectation of profits, the loss, damage or injury suffered by the borrowers in this case extends to the loss of the contractual terms which GIO misleadingly and deceptively represented to the borrowers would be "fixed" for the duration of their contracts. The result is scarcely surprising, given the purposes of the TP Act. Only that result breathes life into ss 52 and 87, where otherwise, a serious breach of s 52 would face a toothless s 87 and find no sanction or remedy there.

The discretion to afford relief should be exercised

- 157 There remain serious questions of a discretionary kind as to the precise remedy which should be afforded to the borrowers in the circumstances. The care which must be taken in fashioning such remedies is illustrated by many cases, most recently *Akron*²⁰⁰. But the exercise of that discretion has not been attempted until now because the remedies of s 87 have been regarded as unavailable to the borrowers. That conclusion, as I have shown, was erroneous.
- 158 The ultimate relief to the borrowers may well fall considerably short of the variation of their contracts and restoration of the "set" margin for the entire duration thereof. That might indeed involve a "windfall" to the borrowers of which GIO repeatedly complained. But relief is available. To uphold the terms and purposes of the TP Act it should be provided. The proceedings should be returned to the Full Court for the purpose of fashioning an appropriate order. Such an order should accommodate, as well, the special order made by the Full Court in the case of Mrs Williamson. It would leave it open to the Full Court, if it considered it necessary or appropriate, to return defined matters for retrial so as to permit the provision to the borrowers of relief under s 87 to be determined free from the supposed shackles of *Gates*.

200 *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 365.

Orders

- 159 The appeal should be allowed with costs. The judgment of the Full Court of the Federal Court of Australia, save in so far as it provided for the remittal of a matter concerning the appellant Mrs Alexandra Williamson, should be set aside. In lieu thereof, it should be ordered that the Full Court hear and determine the cross-appeal of the appellants other than Mrs Alexandra Williamson before that Court and otherwise dispose of the appeal and cross-appeal to it conformably with the decision of this Court.