HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M111 of 2020

BETWEEN: **JUDITH GAIL TALACKO**

Appellant

and

JAN TALACKO (AS EXECUTOR OF

THE ESTATE OF HELENA MARIE TALACKO)

& ORS (ACCORDING TO THE SCHEDULE)

Respondents

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Did the conspiracy to which the appellant was party cause the first to fifth respondents pecuniary damage sufficient to complete the cause of action in unlawful means conspiracy?

3. If so, did that damage comprise:

   a. the loss of a valuable opportunity to enforce the equitable compensation judgment against the properties divested under the donation agreement either:

      i. directly against the judgment debtor, the sixth respondent ('**Jan Emil**'); or

      ii. by way of a dividend in Jan Emil's bankruptcy?

   b. expenses incurred in connection with proceedings in the Czech Republic?

4. The first respondent contends that both forms of damage have been sustained and the cause of action has been perfected. The appeal should therefore be dismissed with costs. The cross appeal ought to be allowed, for the reasons advanced in these submissions, and the orders below varied in the manner set out in Part VI.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The appellant has not given any notices pursuant to section 78B of the *Judiciary Act 1903* (Cth). The first respondent agrees that no notices are required.

Part IV: Contested facts

6. The first respondent agrees with the statement of facts set out in the appellant's submissions at paragraphs 8 to 22, paragraph 24 and paragraphs 26 to 36.

7. The first respondent contends that the relief sought in the Czech donation proceeding is sought directly against the seventh and eighth respondents, and the words 'set aside' as they appear in paragraphs 23 and 25 of the appellant's submissions do not properly

describe the cause of action under section 42a of the Czech Civil Code. That proceeding does not involve 'enforcement' of the judgment debt.

Part V: Argument

A. Introduction

8. Actual pecuniary damage is the gist of the civil tort of conspiracy.[1] A lost opportunity, as a matter of law, answers the description of loss or damage which is then compensable.[2] There are three limbs to the first respondent's argument as to why a valuable opportunity has been lost and damage sufficient to perfect the cause of action has been sustained.

9. *First*, the crux of the appellant's argument is that the opportunity to "recover the judgment debt" cannot be lost until proceedings in the Czech Republic have been exhausted. Until that time, the appellant says, the loss is prospective and contingent and does not qualify as damage sufficient to perfect the cause of action.[3] The appellant seeks to advance this contention through the construct of 'reduction' in a chance not constituting a loss of a chance. For the reasons developed below, this construct is unsound and does not accommodate the facts of this case. It conflates two separate and distinct opportunities. Properly characterised, there is no single opportunity connecting what existed vis-à-vis Jan Emil before the donation agreement with what is now being pursued in the Czech Republic. The 'reduction' upon which the appellant's first ground of appeal rests is therefore illusory.

10. The entry into the donation agreement *destroyed* the valuable opportunity which existed to enforce the judgment debt against Jan Emil when the properties were held in *his* name. The opportunity, assessed as having a 75 per cent chance of being realised, was lost entirely.[4] Some time thereafter, the first to fifth respondents initiated an action which gave them a qualitatively different and less valuable "recovery" opportunity

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[1] *Lonrho v Shell Petroleum Co (No 2)* [1982] AC 173, 188 (Lord Diplock).
[2] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 ('***Sellars***'), 359. As Lord Hoffman said in *Barker v Corus (UK) Ltd* [2006] AC 572, [36]: '*the law treats the loss of a chance of a favourable outcome as compensable damage in itself*'.
[3] Appellants' Submissions, ('**AS**') [46]; See *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 ('***Wardley***'), 530-1 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[4] CAL, [108] and [111]; PJQ, [55]-[56].

(assessed at having a 20 per cent chance of being realised) in the form of fresh proceedings against the seventh ('**David**') and eighth ('**Paul**') respondents in a foreign jurisdiction.[5]

11. *Second*, on the remitter the trial judge misunderstood the trigger for, and relevance of, the donation proceeding when assessing the quantum of the loss. By ascribing an offsetting percentage value of 20 per cent to the donation proceeding, the primary judge fell into error. The Court of Appeal also erred in dismissing the second to fifth respondents' appeal against that finding. The trial judge ought to have compared the position the respondents were in before the donation agreement (75% prospect of recovery) with the position they were in immediately after the donation agreement was executed (zero chance of recovery). The donation proceedings were not instituted in the Czech Republic for some time after the donation agreement was entered into. The commencement of those proceedings by the respondents cannot, and did not, 'revive' an opportunity that had been extinguished by the conspirators successfully achieving their objective of divestment. Properly assessed, there is no 'reduction' in any chance; the conspiracy destroyed the opportunity to enforce the judgment debt because that opportunity, once the donation agreement had been executed, was zero. It follows that the sole basis on which the appellant challenges the lost opportunity – viz, a reduced not a lost chance – falls away because it has been extinguished, even on the appellant's premise of there being a single opportunity (ie, recovery of the judgment debt). It follows that damage, in the form of the complete loss of the chance to enforce the judgment debt, was suffered and the cause of action in conspiracy completed.

12. Further, even if the donation proceedings enjoy a 20% chance of success as the trial judge found, they should not have been taken into account in assessing the *quantum* of the loss suffered as a result of the destruction of the chance to enforce the judgment debt. No amounts have been recovered in the donation proceedings, and there are, therefore, no amounts to be brought to account in reduction of the respondents' losses.[6]

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[5] PJQ, [89].

[6] It would have been different if the donation proceedings had concluded before the trial judge's quantum assessment; any amounts recovered in those proceedings would have been liable to reduce the loss suffered by the respondents by virtue of the loss of their chance to recover the judgment debt. Conversely, amounts recovered by the respondents in these proceedings will presumably be brought to account in the donation proceedings if they succeed.

13. *Third*, even if this Court rejects the foregoing arguments and accepts the appellant's characterisation of 'recovery of the judgment' debt as a *single* opportunity which still stands a 20 per cent prospect of being realised, and therefore is only 'reduced' and not lost, a principled application of the law militates in favour of that 'reduction' still constituting, on the facts of this case, damage for the purposes of completing the cause of action in conspiracy.

14. As for the appellant's second ground of appeal, concerning expenses incurred in foreign proceedings, no error has been identified in the Court of Appeal's reasoning as to why those expenses constituted pecuniary loss, and for the reasons outlined in Section C below, the Court of Appeal's reasoning should be upheld.

B. Loss of opportunity

B1. There is no 'reduction' in an opportunity; a valuable opportunity has been lost

15. The Court of Appeal correctly identified the lost opportunities as follows:[7]

a. the opportunity to enforce the equitable compensation judgment directly against the properties divested under the donation agreement; and

b. the opportunity to receive a dividend in Jan Emil's bankruptcy.

16. Upon the entry into the donation agreement there was an immediate loss of the opportunity to recover the amount of the anticipated equitable compensation judgment.[8] Jan Emil was the judgment debtor. Neither David nor Paul was party to those proceedings, and the first to fifth respondents had no right to enforce or 'recover' the equitable compensation judgment against them. That right existed against Jan Emil and Jan Emil alone, as the sole defendant to those proceedings.[9] In Australia, a person

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[7] CAL, [108].
[8] CAL, [111].
[9] It is a mischaracterisation of the respondents' claims to articulate the proceedings being pursued in the Czech Republic as being *"a chance to recover the amount of the Kyrou J judgment"*. The recovery of the judgment could only have occurred in one of two ways, being enforcement against Jan Emil directly or his trustee in bankruptcy. The respondents did pursue a third way of "recovery" using the certificates issued by the Supreme Court Prothonotary in the Czech Republic, but it was held by this Court that such a means of recovery was not available to the respondents (*Bennett v Talacko* [2017] HCA 15, [2], [71]-[77] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ)). There is no fourth way to pursue "recovery" of the Kyrou J judgment debt.

in whose favour a judgment is given can only enforce a judgment against the person, or the property of the person, against whom the judgment is given.[10]

17. Contrary to the appellants' submissions, the chance of *"recovering the judgment debt"* does not *"remain to this day"*.[11] The judgment debt could only be recovered as against the judgment debtor, Jan Emil. An amount equal to the *value* of the equitable compensation judgment is still sought to be recovered, but through a more circuitous and complex route, and against parties against whom there is no direct right of enforcement as "judgment debtors".

18. Regardless of the challenges which stood in the way of recovering the equitable compensation judgment as at 12 May 2009, the donation agreement was calculated to put the properties against which that judgment could be enforced out of the reach of Jan Emil's judgment creditors. This was plainly the intention of the parties to the conspiracy.[12]

19. Once the donation agreement was entered into, and the properties divested, the opportunity that the first to fifth respondents had as judgment creditors to enforce against valuable properties held by the judgment debtor was destroyed.[13] Through actions taken by *the respondents* several years after the donation agreement destroyed this opportunity,[14] a different opportunity was pursued, being the recovery of some or all of the sums to which the first to fifth respondents were entitled through proceedings against David and Paul in the Czech Republic. That chance of those proceedings succeeding was assessed by the trial judge as being considerably less likely than the original opportunity.

20. The question of damage, for the purposes of perfecting the cause of action, is not to be viewed, as the appellant would have it, as if there was a single opportunity which

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[10] See: s 77M(1) of the *Judiciary Act 1903* (Cth); r 66 of the *Supreme Court (General Civil Procedure Rules) 2015* (Vic). See also *FDR Fund Administration v Chickaboo* [2019] VSCA 314.
[11] AS, [53].
[12] CAL, [112].
[13] See: PJQ, [55]–[56]; CAL, [108]-[111].
[14] On 4 November 2011, Jan Emil was made bankrupt pursuant to sequestration orders in which the second to fifth respondents were petitioning creditors. On 20 April 2012, the first respondent commenced a proceeding in the District Court of Prague 1 seeking to have the Kyrou judgment decision and a costs order recognised in the Czech Republic for the purposes of enforcement (the first respondent's donation proceeding).

enjoyed different prospects of realisation before and after entry into the donation agreement, respectively. The first opportunity, which had a 75 per cent prospect of being realised,[15] was *lost* by virtue of entering into the donation agreement. This gave rise to pecuniary damage, and did so regardless of the later initiation of proceedings against Paul and David in the Czech Republic. No question about 'reduction' in a chance arises because they were *different chances*. The chance of enforcement against properties held by Jan Emil and later his trustee was destroyed altogether by divestment of the properties pursuant to the donation agreement. The chance of recovery against persons other than the judgment debtor (or his trustee) is a chance which exists by virtue of a cause of action under Czech law.

21. In this regard, clause 42a(2) of the Czech *Civil Code* affords the respondents a cause of action akin to a *Barnes v Addy* claim. It is available against third parties (Paul and David) to the acts of a debtor (Jan Emil) undertaken with the purpose of curtailing satisfaction of an enforceable claim against the debtor, in circumstances where the third parties must have known of the purpose. In those circumstances, the claims of the creditors may be satisfied against the debtor's property which has passed to the third parties or by an order for compensation against those third parties: clause 42a(4).

22. The 'opportunity' the first to fifth respondents now have is therefore a separate and distinct cause of action, being prosecuted via a separate and distinct proceeding in a separate and distinct jurisdiction, against separate and distinct defendants that may, if successful, give rise to recover against Paul and David amounts equivalent to that which were the subject of the judgment debt owed by Jan Emil.[16]

23. The foregoing demonstrates that the donation agreement occasioned a lost chance rather than a 'chance of loss' (cf {AS, [57]}). The reason that is so is neatly exposed by the judgment of Hodgson JA in *Segal v Fleming* ('***Segal***'):[17]

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[15] PJQ, [89].

[16] The donation proceeding has served a critical purpose: it has prevented Paul and David from transferring the properties to third parties or selling them. It would be a perverse outcome if the prudent step of commencing litigation in the Czech Republic to secure the properties (as part of a separate proceeding seeking ultimate relief against the properties) somehow disentitled the respondents to relief in Australia. Further, it is not for an Australian court to assess the likelihood of a foreign proceeding succeeding before that foreign proceeding has concluded: see, eg, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559.

[17] [2002] NSWCA 262 ('***Segal***'), [25].

> … where a chance is lost, it will never be known how things would have turned out if the chance had not been lost, so that the only possible compensation a plaintiff can obtain is compensation for the value of the chance itself.

24. Here it will never be known how things would have turned out had the properties remained vested in Jan Emil's name. It will never be known because the chance to enforce against the properties in the hands of the judgment debtor was lost. And it was lost because of the conspiracy to enter into the donation agreement. It is therefore necessary to compensate the second to fifth respondents for the value of that loss chance, as has occurred. Indeed, compensation for the value of that chance is the "only possible compensation" that the respondents can obtain.

25. The appellant's contention at {AS, [58]} to the effect that the upshot of the Court of Appeal's reasoning is that *any* reduction in a chance, as long as it is not negligible, would constitute actual loss sufficient to perfect the cause of action is wrong. The Court of Appeal did not find there to be any 'reduction' in a chance, but rather held that the 'additional impediment to recovery' imposed by the donation agreement constituted the loss of the opportunity to recover the fruits of the anticipated judgment.[18] That conclusion is plainly correct and is of itself sufficient to dispose of this appeal in the first to fourth respondents' favour.

B2. The prospect of successfully pursuing proceedings in the Czech Republic should not have been taken into account

26. For the purposes of assessing the quantum of the respondents' loss, the trial judge sought to compare the position the respondents were in before the donation agreement was entered into with the position that the respondents find themselves in now, by making an assessment as to the prospect of the donation proceedings being successfully pursued in the Czech Republic and the respondents gaining recourse to the properties through those means.

27. This, with respect, was the wrong approach. Both the trial judge and the Court of Appeal erred in holding that the prospects of recovery through legal proceedings in the Czech Republic was a matter to be taken into account in assessing the value of the

[18] CAL, [112].

opportunity available to the respondents. Those Czech Proceedings were and are irrelevant to assessing the opportunity to recover the judgment debt. A comparison of the position the respondents were in before the donation agreement was executed with that which existed after execution involves a comparison of a 75 per cent chance with a zero per cent chance. The divestment of the properties through the donation agreement made the *recovery* of the *judgment debt* impossible. Thus, there was no 'reduction' in the chance to successfully recover that debt. The chance was destroyed by the donation agreement, and the subsequent decision by the first to fifth respondents to commence proceedings in the Czech Republic (which have prevented the further divestment or dissipation of the assets) is of no relevance to the assessment of whether *damage* has been suffered.

28. Moreover, the donation proceedings have not given rise to any recoveries which could, in a principled way, been brought to account in assessing the quantum of the loss suffered as the result of the elimination of the foregoing chance. While it may be accepted that, if the respondents had recovered amounts in the donation proceedings which had reduced the loss caused by the conspiracy, those amounts would have been liable to be brought to account in reducing the sums recoverable against the conspirators,[19] no authority has been identified – whether by the trial judge or the appellant – which could require the value of an *unrealised* chance of recovery to be set off against the value of the chance lost. Of course, recovery in these proceedings might affect the value of the claim being pursued by the respondents in the Czech Republic; indeed, it might mean that those proceedings no longer need to be pursued at all. But these matters have nothing to do with the value of loss which was suffered when entry into the donation agreement destroyed the prospect of satisfying the judgment debt against the properties.

B3. Even if it is a single opportunity to recover the judgment debt, loss has been suffered

29. The distinction between 'damage' and 'damages' differentiates between harm sufficient to ground an action in tort, and harms for which recovery is permitted once

[19] See *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.

a cause of action has been established.[20] Damage involves interference with a right or 'interest' recognised as capable[21] of protection by law. In this context, damage means some detrimental difference to the first to fifth respondents, between the state of affairs with, and without, the unlawful conspiracy taking place.

30. This distinction is important to keep in mind in evaluating the appellant's reliance on *Gregg v Scott,* ('***Gregg***')[22] *Tabet v Gett* ('***Tabet***')[23] and *Segal*.[24] As noted above, the purported reliance on the distinction between a 'lost chance' and a 'chance of a loss' in *Segal* is misplaced. But even if the Court accepts the appellant's argument that we are dealing with a 'reduced' rather than 'lost' chance, *Gregg* and *Tabet* are to be distinguished on their facts.

31. In *Gregg*, the claimant brought an action in negligence alleging that had the defendant correctly diagnosed his cancer there would have been a high likelihood of cure whereas by the time treatment commenced his chances of recovery, defined as surviving for a period of ten years, had fallen to below 50%. However, the evidence at trial was that the claimant only had a 42% chance of survival for ten years even if treated promptly. The chances of the plaintiff, as a person having suffered two relapses, surviving for the remainder of the ten-year period was then assessed at 25%. The judge found that the defendant had been negligent but, on the question of whether that negligence had been the cause of the claimant being unlikely to survive ten years, held that since the claimant would on the balance of probabilities have failed to survive the ten-year period even if treated promptly, he had failed to show that the outcome for him would have been materially different and the claim was dismissed.

32. That can be contrasted with the facts here. The opportunity which existed before the execution of the donation agreement has been assessed as having a 75 per cent chance of being realised. With a more probable than not chance of the judgment being successfully recovered before, and a less probable than not chance after, the first to

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[20] Donal Nolan, 'Rights, Damage and Loss' (2017) 37(2) *Oxford Journal of Legal Studies* 255, 270–4.
[21] Justice Susan Kiefel, 'Developments in the Law Relating to Medical Negligence in the Last 30 Years' (2016) 19 *International Trade and Business Law Review* 1, 15.
[22] [2005] 2 AC 176.
[23] (2010) 240 CLR 537 ('***Tabet***').
[24] *Segal* (n 17).

fourth respondents have established the requisite causal link between the interference and the damage. In cases such as *Tabet* and *Gregg*, the problem facing the plaintiffs is that they were already unwell and could not establish, on the balance of probabilities, that they would have been well, or been cured, but for the defendant's negligence. As Hayne and Bell JJ said in *Tabet*:[25]

> It need only be observed that the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was more probably than not a cause of damage (in the sense of detrimental difference). The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so.

33. Here, the adverse outcome – not being able to recover the judgment sum – has 'more probably than not' come home by reason of the donation agreement. Moreover, the compensable damage under contemplation in this passage – 'detrimental difference' – is precisely that which has been sustained by the first to fifth respondents. This notion of detrimental difference carries with it the need to compare the position before the wrong with the position after. As already observed, the entry into the donation agreement occasioned a real and detrimental difference to the position in which the first to fifth respondents found themselves.

34. That causing a 'detrimental difference' on the balance of probabilities is sufficient to constitute actionable damage as loss of a valuable opportunity (cf. contingent loss) is evident in another paragraph of Hodgson JA's reasoning in *Segal*.[26] His Honour distinguishes this Court's decision in *Wardley*[27] and explains, by reference to the decision of *Forster v Outred & Co*[28] that:

> Their Honours in *Wardley* at 529 explained *Forster* by reference to the immediate effect of the plaintiff's execution of the mortgage, namely, an immediate reduction in the value of the plaintiff's "equity of redemption". I think it might be more accurate to say that the effect was a reduction in the value of the plaintiff's property: prior to the granting of the mortgage, the

[25] *Tabet* (n 23), [69].
[26] *Segal* (n 17).
[27] *Wardley* (n 3).
[28] [1982] 1 WLR 86; *Segal* (n 17), [23].

> plaintiff owned the property unencumbered, so at that stage there was no "equity of redemption". By executing the mortgage, she made the property more difficult to sell, irrespective of whether or not her son ultimately defaulted on his debts: a purchaser would pay less for the property with a mortgage still on the title, and the plaintiff would have to come to some arrangement with the mortgagee in order to remove it from the title. As I understand it, that is the immediate loss that arose in *Forster*.

35. The same position obtains here. The immediate loss, or detrimental difference, can be characterised as the substitution of a substantial chance of recovering the amounts to which the respondents are entitled with a much lower chance of doing so; the respondents are clearly worse off because of entry into the donation agreement. The principle from *Forster* (and distinguished in *Wardley*) also coheres with the Court of Appeal's reasoning in the present case:[29]

> However difficult it might already have been to recover against Jan Emil, the donation agreement was calculated to make it harder, as the parties to the conspiracy plainly intended. The **additional impediment to recovery** was both the loss of an opportunity to recover the fruits of the anticipated judgment and the occasion for pecuniary loss consisting of expenses incurred in seeking to undo the donation agreement. (Emphasis added)

36. There is also a limit to which an analogy can be drawn to medical negligence cases.[30] This is a case of a loss or, on the appellant's case, a substantial 'reduction' in the value, of a commercial opportunity. The more direct and immediate analogy is therefore to *Sellars v Adelaide Petroleum NL* ('***Sellars***')[31] In *Sellars*, there was a *reduction* in the value of the commercial opportunity because the contract the plaintiff in fact obtained was, by reason of the defendant's conduct, a less valuable contract than the counterfactual contract with Pagini. The defendant's conduct caused a diminution in the value of that commercial opportunity, which was sufficient to constitute damage. The plurality in *Sellars* said as follows:

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[29] CAL, [112].

[30] The damage claimed was for the loss of a better medical outcome, which this Court was not willing to recognise as compensable loss for reasons that were specific to the medical negligence context, including policy reasons (*Tabet* (n 23), 554 [27] (Gummow ACJ)). The policy considerations raised by the High Court in *Tabet* with respect to personal injury cases – which were critical to the outcomes – do not prevent the loss of chance doctrine from being applied here. The judgment in *Tabet* did not exclude the loss of chance doctrine from being applied in the other circumstances (*Tabet* (n 23), 562-3 [59] (Gummow ACJ), 564 [69] (Hayne and Bell JJ)) and this case presents another example of such appropriate circumstances.

[31] *Sellars* (n 2).

> … the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities.[32]

37. Thus, different standards apply to proof of damage from those that are involved in the assessment of damages.[33] Proof of damage is on the balance of probabilities.[34] Assessment of damage reflects the degree of probabilities because it requires evaluation of hypothetical (past and future) events.[35] If the appellant's contention about a *single* opportunity of recovering the judgment debt is accepted (and the 20% prospect of recovery in the Czech Republic is deemed relevant), then the conspiracy which achieved its intended objective of divesting Jan Emil of valuable properties against which that debt could have been enforced converted that opportunity from one that was probably going to be realised to one that is now improbable. That, on the balance of probabilities, constitutes the loss of a valuable opportunity.

38. Finally, the fact that the donation agreement constituted an equitable fraud cannot be overlooked in the analysis as to whether pecuniary loss has been suffered. As Denning LJ said in *Lazarus Estates Ltd v Beasley*,[36] the law does not allow a person to keep an advantage which he or she has obtained by fraud. If the trial judge is correct in his finding that no pecuniary loss has been suffered and the cause of action has not crystallised, then the wrongdoers stand to profit from their fraud and deprive the first to fourth respondents of a benefit which, but for the commission of the equitable fraud, they would more probably than not have recovered by reason of the properties still being in Jan Emil's name.

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[32] Ibid, 339-340 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[33] *Tabet* (n 23), 585 [136] (Kiefel J).
[34] *Sellars* (n 2), 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), 367 (Brennan J).
[35] Ibid, 368 (Brennan J).
[36] [1956] 1 QB 702, 712.

C. Expenses incurred in connection with foreign proceedings

39. The asserted error identified in the appellant's second ground of appeal is concerned only with the Court of Appeal's holding in relation to the expenses of *foreign proceedings* constituting pecuniary loss sufficient to complete the cause of action (in circumstances where the foreign proceedings are ongoing, and costs are yet to be determined). Central to the Court of Appeal's reasoning on the issue of expenses and distinguishing the decision in *Lonrho Plc v Fayed (No 5)*[37] was the fact that the expenses incurred in setting aside the donation agreement in this case went beyond investigating what happened and extended to "*attempting to remove the obstacle to recovery which the donation agreement placed in the plaintiffs' path*".[38] The Court of Appeal also found that those expenses went beyond costs incurred in various legal proceedings.

40. The attenuated challenge which the appellant makes to this aspect of the Court of Appeal's judgment, being confined to legal proceedings in the Czech Republic, is untenable. The appellant's argument lacks merit in two primary respects.

41. *First*, the appellant is not a party to the Czech proceedings.[39] As the Court of Appeal correctly held, this means that, even if the parties to the donation agreement were ordered to pay the first to fifth respondents' costs, this would not serve to answer any liability of the appellant to pay those same costs.[40]

42. *Second*, whether or not the amounts expended by the first to fifth respondents in seeking to set aside the donation agreement might stand to be recovered, in whole or in part, by some other means is a matter for the assessment of damages. So much was expressly contemplated by the Court of Appeal's reasons.[41] But whether or not the expenses incurred in seeking to set aside the donation agreement through proceedings in the Czech Republic might be recovered, and therefore accounted for in the

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[37] [1993] 1 WLR 1489.
[38] CAL, [101].
[39] CAL, [102].
[40] See *Berry v British Transport Commission* [1962] 1 QV 306 cited in *Gray v Sirtex Medical Limited* [2011] FCAFC 4, [24]: "*It follows that if the result of a breach of contract or a tort a person brings unsuccessfully an action against a third party or loses an action brought by a third party he may recover against the wrongdoer who has broken his contract or committed the tort the costs of the suit*."
[41] CAL, [102]. See also PJQ, [98(d)].

quantification of damages, does not undermine the force of the Court of Appeal's conclusion that pecuniary loss, sufficient to complete a cause of action in conspiracy, was suffered upon the incurring of those expenses.

43. The Court of Appeal's reasoning as to why those expenses were not contingent until such as time as the Czech proceedings have been determined is compelling:[42]

> … While it was always going to be necessary to have the Victorian judgment recognised in the Czech Republic, the donation agreement created an additional barrier to enforcement which was **from the outset going to cost the plaintiff's money to overcome**.
>
> … However difficult it might already have been to recover against Jan Emil the donation agreement was calculated to make it harder, as the parties to the conspiracy plainly intended. The additional impediment to recovery was both the loss of an opportunity to recover the fruits of the anticipated judgment and the **occasion for pecuniary loss consisting of expenses incurred in seeking to undo the donation agreement**.
>
> (Emphasis added)

44. The appellant's submissions do not grapple with this reasoning in any meaningful way. While the appellant asserts that *"until the proceedings in the Czech Republic have been concluded it is too early to say whether the first to fifth respondents' expenses of the proceedings … were legally caused by the tort"*,[43] no attempt is made to engage with, or expose the error in, the Court of Appeal's analysis as to why the tort was directly causative of those expenses being incurred. *Real money* has been spent. And the only reason that money has been spent is because of the conspiracy to put the properties beyond the respondents' reach via the donation agreement.

45. That the conspiracy created the additional barrier to enforcement identified by the Court of Appeal is incontestable. There can also be no serious doubt that erecting this additional barrier directly caused the plaintiffs to incur expenses in seeking to overcome it, including in connection with proceedings in the Czech Republic. Those

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[42] CAL, [111]-[112].
[43] AS, [65].

two propositions suffice to establish pecuniary loss and dispose of the second ground of appeal.

Part VI: Orders sought pursuant to notices of contention and cross-appeal

46. The first respondent does not press the proposed ground of cross-appeal in paragraphs 4 to 5 of its notice of cross-appeal.

47. The first respondent respectfully submits that the following orders should be made:

a. The appeal be dismissed.

b. The cross-appeal be allowed.

c. Paragraph 2 of the orders of the Court of Appeal of the Supreme Court of Victoria given and pronounced on 30 April 2020, and the orders given and pronounced on 5 May 2020 be set aside.

d. In lieu thereof paragraph 4 of the orders of the Supreme Court of Victoria given and pronounced on 20 December 2018 in proceeding S CI 2009 7819 be varied by replacing the sum of AUD$5,900,227.92 with the sum of AUD$8,045,765.34 and replacing the sum of AUD$3,101,822.56 with the sum of AUD$4,229,758.04.

e. The appellant pay the first respondent's costs of and incidental to this appeal and cross-appeal.

Part VII: Time estimate

48. The first respondent seeks no more than two hours for the presentation of his oral argument.

Dated: 15 January 2021

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