agreement with DWF, nor had it in fact acquired a right to purchase plot D17 from Prudentia. The terms of paras [2] and [3] further demonstrate the fictional character of the background described. What was contemplated was not that Sunland would acquire development rights but that Sunland would be placed in a position to negotiate the acquisition of plot D17 without interference from Prudentia. Further, the reference to an assignment from Sunland to Hanley exemplifies the confusion and artificiality of the recitals. The Hanley agreement was again relevantly expressed in the operative part as being that 'in consideration of the payment of consultancy fee, Hanley agrees to transfer to Sunland its right to negotiate and enter into a plot sale and purchase agreement for the acquisition of [plot D17] with [DWF].'

282 Once again, the agreement was one to give Sunland a right to negotiate a purchase, not one to transfer a right to purchase. It was a right to future dealing. Once again, it was supported by exclusivity provisions in like terms to the concluded Prudentia agreement.

283 In summary, following the initial draft implementation agreement forwarded on 23 August 2007:

(a) DWF officers made clear to Brown on 12 September that plot D17 might be sold on the open market to a party other than Prudentia or Sunland;

(b) Brown's 'put your foot on it' email makes clear that he understood neither Prudentia alone nor Prudentia and Sunland as joint venture partners had secured plot D17 and that to do so they needed to sign a SPA;

(c) there was no bar to Sunland making further enquiry of DWF as to the status of Prudentia;

(d) it was Sunland that terminated the joint venture negotiations and put

the proposal for the immediate payment of a fee to Prudentia upon Prudentia walking away from the deal;

(e) the fee payable was in substantial part based on a reduction negotiated by Reed in the price per square foot of plot D17;

(f) this component of the fee was offset by a collateral arrangement Brown negotiated with DWF for increased development rights;

(g) the fee was contemporaneously characterised by Brown as an 'introduction fee' and a 'consultancy fee' and by Sunland's in-house Dubai counsel as a 'spotter's fee';

(h) the 'Background' recitals of the Prudentia agreement and of the Hanley agreement are not to be read as representations that Prudentia had a right to acquire plot D17; and

(i) the iterations of the Prudentia agreement and of the Hanley agreement embody an agreement to transfer exclusive rights to negotiate and enter into a future purchase of plot D17. They do not reflect an agreement to transfer an existing right to acquire plot D17 to Sunland.

Conclusion on the representations

284 Our conclusion accords with that of the trial judge. Sunland's case at trial was that Joyce and Reed represented to it that Reed or Prudentia had a legally enforceable right to acquire the land. Yet the evidence Sunland adduced failed to establish any such representation. Nor did the evidence establish any representation that DWF could not, without the agreement of Reed or Prudentia, sell plot D17 to Sunland or that, if Sunland wished to purchase the plot, it first had to make a contract with Reed or Prudentia or both.

285 Accordingly, Sunland's statutory misleading and deceptive conduct and false

representation causes of action,[190] all founded upon proof that the pleaded representations were made, fell at the first hurdle. Similarly, Sunland's cause of action in deceit, founded upon proof of the same representations, also fell.

286 Those conclusions are enough to dispose of the appeal. But it is desirable to deal with the arguments on falsity and reliance for at least two reasons. First, as a matter of completeness and out of respect to Sunland's submissions on these points. Secondly, because doing so helps expose a wider, unpleaded case that Sunland sought to advance at trial and which the trial judge determined, albeit unnecessarily.

Were the representations false?

287 Sunland pleaded that the representations that it claimed had been made to it were false, as set out in para [21] of the SFASOC, in that:

> 21.1 neither Reed nor Prudentia had a right to acquire Plot D17 or the land on which Plot D17 was located;
>
> 21.2 Dubai Waterfront could (without the agreement of Reed and Prudentia or either of them) sell Plot D17 or the land on which Plot D17 was located, and the right to develop Plot D17, to Sunland or any other person; and
>
> 21.3 it was not necessary for Sunland to negotiate with or make a contract with either Reed or Prudentia in order for Sunland to purchase Plot D17 or the land on which Plot D17 was located, or to acquire rights in connection with the development of Plot D17.

288 Set out above[191] are the particulars which Sunland gave of the falsity of the alleged representations. We referred to those particulars earlier because they were a pointer to the true character of the 'right to acquire' the subject of Sunland's first pleaded representation.

289 As can be seen from the particulars, they purport to particularise a fact (namely, that neither Prudentia nor Reed owned plot D17, nor could they sell it) by reporting the oral assertions of various Dubai officials. No evidence was led at trial

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190 TPA ss 52, 53(aa), 53(g) and 53A and FTA ss 9, 12(b), 12(k) and 12(n).

191 See [101] above.

in support of the facts said to be asserted by those Dubai officials, either by calling them (assuming their evidence could have been admissible) or by any other means. Sunland argued it did not need to lead any evidence of the facts particularised, or otherwise, in relation to the falsity of its pleaded representations. That was because, so it said, it had the benefit of admissions made by the Prudentia parties, and by Joyce, which established falsity.

290 Once again, the need for precision as to what Sunland was asserting by its pleaded representations was exposed by this argument.

291 Prudentia and Reed answered Sunland's pleading of falsity in this way: they admitted each of paras [21.1], [21.2] and [21.3], subject to three qualifications. The first qualification was that, despite the admission, they denied there was any false representation made in respect of the matter alleged in each paragraph. Secondly, and specifically in respect of para [21.3], the admission was 'on the understanding that *what is therein referred to is a concept of strict legal necessity as opposed to commercial and/or practical reality*' (our emphasis). The third qualification was that each admission was made subject to para [21.4], which read as follows:

> 21.4. In further answer to the whole of paragraph 21, they say:
>
> (a) at no material time did they hold, nor did they represent that they held, an *enforceable right* in the nature of a conveyance or option or other legal interest in Plot D17;
>
> (b) at no material time did they hold, nor did they represent that they held, any right pursuant to an *executed SPA*;
>
> (c) at all material times, the final reconfiguration by Dubai Waterfront of an existing vacant plot known as Plot D8B leading to the creation of a new plot named Plot D17 was incomplete and unresolved, as was final approval of the development template and terms of contract of sale in respect of Plot D17;
>
> (d) at all material times, the fact was and Sunland Group knew, that Prudentia's *interest* in Plot D17 was *as a preferred negotiator* with Dubai Waterfront for the right to purchase and develop Plot D17.[192]

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192 Prudentia's and Reed's Defence [21.4] (our emphasis).

292 By para [21.4] of their defence, Reed and Prudentia emphasised that although they admitted they had *no right* to acquire the land, that DWF *could* sell it to Sunland without their agreement and that Sunland did *not* need to make a contract with them before purchasing the land, they never represented that they held any *enforceable legal interest* in the land. In other words, Reed's and Prudentia's pleading took the view of Sunland's pleading of the representations that we have affirmed to be correct.

293 On the analysis we have adopted, this defence was, until para [21.4(d)], directly responsive to the case brought by Sunland against them. That is, until para [21.4(d)] it responded only to the assertion that they had falsely held themselves out to have a legally enforceable right to acquire the land, one which constituted a legal impediment to DWF selling the land to Sunland without their prior agreement.

294 But because of the potential ambiguity in Sunland's pleading, Reed and Prudentia went further. Having denied that they held themselves out as having any legally enforceable right to acquire the land, they nevertheless asserted in para [21.4(d)] that Prudentia had an 'interest' in the land as 'preferred negotiator' with DWF for the right to purchase and develop it.

295 It is important to be clear about the status of this allegation. Reed's and Prudentia's denial of the representation that Sunland asserted was sufficient to put Sunland to its proof on that issue. Sunland has failed on that proof. Except by indirect means, the claim that Prudentia had the status of preferred negotiator did not bear upon the issue whether Prudentia held itself out to have a higher interest, or in fact held that higher interest. Reed's and Prudentia's admission of the propositions of falsity in para [21] of the SFASOC *would* have assisted Sunland had it been able to prove that the representations were in fact made. But those admissions were of no assistance given that Sunland did not prove the representations. And, as we have already noted,[193] Sunland itself argued that Reed's and Prudentia's asserted preferred negotiator status was simply not responsive to the claim that they held no

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193 See [106] above.

right to acquire the land. In that respect, Sunland was quite correct.

296 By 'indirect means' we refer to the use made of the probability that Prudentia *did* occupy a commercially valuable negotiating position with DWF for plot D17 when determining what representations were proven. As we have shown, it was rightly taken into account as one of a number of contextual circumstances when assessing the way in which the written and oral statements, pleaded by Sunland, were objectively to be understood.

297 Joyce's response to Sunland's pleading of falsity was, in substance, similar to Reed's and Prudentia's, although pleaded in a distinct manner. He responded (with our emphasis) :

> 21. As to paragraph 21, he:
>
> (a) admits that:
>
> (i) Dubai Waterfront wished to select the purchaser of Plot D17 based on whether the purchaser would facilitate construction activity on the site and it was, at all material times, a matter for Dubai Waterfront to decide to whom it wished to sell Plot D17;
>
> ...
>
> (ii) Dubai Waterfront could (without the agreement of Reed and Prudentia or either of them) sell Plot D17 or the land on which Plot D17 was located, and a right to develop Plot D17, to Sunland or any other person;
>
> (iii) he was not aware of any *legal necessity* for Sunland to negotiate with or make a contract with either Reed or Prudentia in order for Sunland to purchase Plot D17 or the land on which Plot D17 was located, or to acquire rights in connection with the development of D17.
>
> (b) says further, however, that Joyce and Dubai Waterfront were concerned as a matter of *ethical business practice and commerciality* to avoid:
>
> (i) 'gazumping' or the appearance of 'gazumping' by Dubai Waterfront and would rarely consider it appropriate for Dubai Waterfront to negotiate with another secondary developer once preliminary development and planning approval and a draft sale and purchase agreement had been given to a particular secondary developer; and

(ii) becoming embroiled in any dispute between Sunland and Prudentia that might arise if the joint venture negotiations between those parties, or their related parties, were to break down;

(c) otherwise denies the allegations therein.[194]

298 Once again, Joyce's pleading contains some qualified admissions of Sunland's propositions which it claimed showed that the pleaded representations were false. The main qualification is seen in para [21(a)(iii)] where Joyce admits he was not aware of any legal necessity for Sunland to first reach agreement with Reed or Prudentia before buying the land from DWF. But the balance of his pleading, again, points to something falling short of a legal impediment to dealing with Sunland, namely a commercial and policy restraint upon DWF dealing with another secondary developer (for example, Sunland) after preliminary development and planning approval had first been given to a different developer (namely, Prudentia).

299 The trial judge dealt with the question of falsity in a way that reflects the confusion created by the ambiguity and uncertainty in the case presented by Sunland. His Honour noted Sunland's submission that it did not have to prove falsity because of the admissions made by the defendants.[195] After setting out the qualified nature of the admission made by Reed and Prudentia, the judge continued:

> On this basis, and for the reasons discussed elsewhere, the Sunland submission that "it is uncontroversial that neither Reed nor Prudentia had any 'right' in relation to Plot D17" cannot be sustained. Additionally, the assertion that the defence and paragraph 21.4(d) " ... doesn't constitute a denial of the representations pleaded in paragraph 20" [of the Second Further Amended Statement of Claim] and that such representation were "not false" does not survive proper analysis of the pleadings.[196]

300 The judge's observation in the first sentence is, with respect, correct in answer to a submission that neither Reed nor Prudentia enjoyed any 'right', assuming that phrase could encompass something as broad as the status of preferred negotiator. There, the judge was responding to a submission about *any* 'right', rather than a

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194 Defence to the Further Amended Statement of Claim Dated 8 April 2010 ('Joyce's Defence').

195 Reasons [234].

196 Reasons [236].

'right to acquire'. The proposition in the second sentence is a little more difficult to follow, although the difficulty may be a consequence of the clumsiness of the submission his Honour was responding to. If the submission meant that *having* the status of preferred negotiator does not contradict the proposition that neither Reed nor Prudentia had a right to acquire the land, the submission was correct. And it was correct for the reasons we have explained before: the right to acquire was a legally enforceable right, not the mere status of preferred negotiator.

301 But the submission was expressed clumsily. And it is not so clear that his Honour understood it in the way we have just surmised.

302 As we have explained, we agree with his Honour's ultimate conclusion that it was necessary for Sunland to establish a representation with respect to a legally enforceable right to acquire plot D17.[197] Neither Joyce nor Prudentia themselves suggested that they had such a right; in fact, they admitted they did not. Thus, we do not think the judge was correct if he is to be taken as saying that the respondent's admissions were not sufficient to establish the falsity of the pleaded representations.

303 The trial judge then continued:

> It was for Sunland to prove that Prudentia or Reed had no "right" over Plot D17. ... Sunland has not demonstrated by evidence the falsity of the Representations, as best as the Representations as alleged by Sunland could be understood, that were, as Sunland contended, relied upon by its witnesses, Brown and Abedian.[198]

304 Although each of those statements is correct, it did not follow from them that Sunland had failed to establish the falsity of the representations. The pleaded representations, correctly understood, were admitted to be false so Sunland was not required to call evidence on that allegation. Sunland's real problem, as we have said, was that it failed to prove the representations at all.

305 However, despite his Honour's ultimate conclusion as to the narrow case to

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197 Reasons [243].

198 Reasons [239].

which Sunland was confined, he nevertheless did address a wider case. That is, he went on to consider whether Reed or Prudentia falsely held themselves out to have a 'right' in relation to plot D17 falling short of a legally enforceable right to acquire the land.[199] Some potential for confusion is introduced by this discussion. But we think the proper analysis is that his Honour was addressing the unpleaded, wider case in the event a different view could legitimately be taken of the case Sunland was advancing. So much appears clear from his view that 'for Sunland to establish its case it was necessary for it to establish the Representations with respect to a legally enforceable right', and then continuing that '*[i]n any event* the only non-enforceable "right" ("contractual" or otherwise) which Sunland's case conceivably established...was that of a "right" to negotiate or a "preferred negotiating position"'.[200]

306 In any event, as we have remarked, the question of whether Prudential occupied a commercially valuable negotiating position had some contextual relevance to the issue of what representations were made; and it was also relevant, as will be seen shortly, in the trial judge's reasoning on the question of reliance.

307 Thus, the trial judge:

(a) referred to Reed's and Prudentia's further and better particulars[201] which claimed that as 'preferred negotiator' Prudentia occupied a commercial position in negotiating for plot D17 in precedence to that occupied by Sunland;[202]

(b) adverted to the evidence called by Sunland from Duane Keighran, a solicitor admitted to practice in 2003 who began property law work in Dubai in March 2006. Keighran's opinion, which was admitted into evidence without cross-examination, was that 'There is no concept of a "preferred negotiator" under Dubai or UAE law, either as a matter of

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199 Reasons [236]-[240].

200 Reasons [243] (our emphasis).

201 See [291] above.

202 Reasons [236].

commercial practice or a matter of law';[203]

(c) set out Brown's evidence on the subject, namely 'I did not believe that Prudentia's interest in plot D17 was as 'preferred negotiator; I was not aware of any concept of a "preferred negotiator" in Dubai';[204]

(d) found that the general tenor of the 'put your foot on it' email of 12 September 2007 was 'entirely consistent' with the limited nature of the 'hold' Reed or Prudentia possessed, a reference it seems to their claimed 'preferred negotiator' position;[205]

(e) found that the only 'right' the evidence 'conceivably established' as the subject of any representation was a right to negotiate or a preferred negotiating position which, as anticipated in the Prudentia and Hanley agreements, Sunland ultimately availed itself of when it was able to negotiate the purchase of plot D17 from DWF;[206] and

(f) concluded that Sunland had 'failed to adduce evidence which casts doubt on the apparent preferred negotiation position enjoyed by Prudentia in relation to plot D17', but instead that its case 'evidences that Prudentia did hold such a position in relation to plot D17'.[207]

308 The first of his Honour's conclusions summarised in (f) above is, on its face, somewhat curious. The judge was certainly aware of the opinion of Keighran and the evidence of Brown on the subject; he had set it out only a few paragraphs earlier. Further, his Honour had previously set out Keighran's evidence on the subject more fully together with extracts from a letter written by another legal practitioner with which Keighran agreed, concluding:

> Thus, the evidence establishes that a master developer, such as DWF, might well choose not to negotiate with every person who expressed an interest in a particular piece of land and might generally try and negotiate instead with an interested party, such as Prudentia, if that party was an experienced

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203 Reasons [236].

204 Reasons [236].

205 Reasons [238].

206 Reasons [243].

207 Reasons [240].

developer which the master developer wanted in the project.[208]

309 His Honour may have intended to say that on the whole of the evidence, notwithstanding the opinion of Keighran or the evidence of Brown, he was persuaded that Prudentia did hold a position of a preferred negotiator in relation to plot D17. Such a finding, in our opinion, could have been readily justified. Indeed we ourselves concluded that what was passed under the terms of the Hanley agreement was a right to negotiate a purchase, not a right to purchase.[209]

310 Essentially, the question whether Prudentia occupied a negotiating position with respect to plot D17 in precedence to others was a question of fact for the trial judge to determine based upon all of the evidence. It is doubtful in our view whether Keighran's opinion[210] was either germane to that question or, if it was, that it contradicted Prudentia's claim. First, his proposition was initially couched in terms of 'under Dubai or UAE law', yet the negotiating position in question was not said to be one proceeding from any law. It is then not clear how the addition of the words 'either as a matter of commercial practice or as a matter of law' operates in conjunction with his first limitation. And his opinion is clouded further by his additional evidence. After referring to the 'very heated' property market in Dubai in 2007, and the problem of gazumping, Keighran continued :

> As a matter of commerciality, it may be that a master developer may elect not to negotiate with another party. However, in my experience, in that situation the master developer would require a security deposit to be paid for the plot.

311 Several things flow from those further statements. First, they logically undermine the apparent clarity of his earlier statement that there was no concept of 'preferred negotiator'. If a developer elects not to negotiate with other parties, the practical result is a preference for the party it will negotiate with. Secondly, it confirms that the opinion is confined by Keighran's particular experience. In the end, his opinion can only be a statement to the effect that, in his experience, he has

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208 Reasons [41].

209 See [282] above.

210 See [307(b)] above.

not observed or seen a preferred negotiating position without a payment of a security deposit.

312 Viewed in that way, it was not surprising that the trial judge assessed for himself, upon the evidence before him, the existence or non existence of a preference allowed by a particular seller to a particular suitor in the particular circumstances that existed, rather than have that issue determined or even largely influenced by an opinion of the kind given by Keighran. And as far as Brown's evidence was concerned,[211] it was at best evidence of his own conclusionary belief based upon the same facts that his Honour had before him. In those circumstances, although it would have been desirable that the trial judge explain how he was able to reach his conclusion despite the evidence of Keighran and Brown, we do not consider that his failure to do so amounts to error.

313 To summarise:

(a) although the respondents did admit the falsity of the representations that Sunland pleaded and tried to prove at trial, those representations were not proven to have been made;

(b) attention was given, out of an abundance of caution, to the proposition that Prudentia held a commercial position in precedence to Sunland as DWF's preferred negotiator for plot D17 in case the trial judge's the primary view of the meaning of Sunland's pleaded representation was not correct;

(c) as it turned out his Honour's primary view *was* correct;

(d) nevertheless the finding that it was not false to represent (had it been represented) that Prudentia held a right as preferred negotiator did not involve or disclose error.

314 We now turn to the issue of reliance and causation.

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211 See [307(c)] above.

Did Sunland rely upon any false representation when paying the fee to Hanley?

315 Logically, if Sunland has failed to prove the representations it alleged were made to induce it to enter the Hanley agreement and thereby suffer loss, then its case on causation of loss (namely, reliance) must also fail. That is, having failed to prove the misleading and deceptive conduct or misleading representations in contravention of any of the statutory provisions it relied upon, it cannot sustain an argument that it suffered any loss and damage 'by' such conduct.[212]

316 Nevertheless, although the characterisation of the conduct and the question of causation is logically distinct, in practice there is an overlap in the resolution of these questions.[213] In this matter, a consideration of Sunland's case on reliance demonstrates the interconnectedness between it and the findings made in relation to the character of the conduct itself.

317 There is no real dispute about the principles applicable to the question of causation where the impugned conduct consists of a representation. The following principles apply:

(a) the representation need not be the sole inducement. It is sufficient so long as it plays some part, 'even if only a minor part', in contributing to the loss;[214]

(b) if the representee believes any part of the representation, the representor 'does not escape liability because the representee did not believe the representation in full';[215]

(c) if the representee's desire to own what was for sale leads to him discounting 'doubts and suspicions' that might otherwise hold him

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212 TPA, s 82; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319-20 [27]-[29] (French CJ).

213 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 318 [24].

214 *Gould v Vaggelas* (1985) 157 CLR 215, 235-239.

215 *Gould v Vaggelas* (1985) 157 CLR 215, 251-252.

back from acting, or giving some credence to the representation which would not otherwise have been given, the representee's self-induced gullibility is no defence to the representor;[216]

(d) it is no answer for the representor to establish that the representee acted carelessly or unreasonably in believing the truth of the representation,[217] or could have discovered the truth by making proper inquiries;[218]

(e) determination of the cause of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. For example, the representation may be disbelieved by the addressee;[219]

318 Sunland pleaded causation of its loss and damage in the following way:

(a) between 16 August 2007 and 12 September 2007, Brown relied upon the three pleaded representations to negotiate with Reed and Prudentia to undertake the joint venture to purchase and develop plot D17;[220]

(b) Brown relied upon the three pleaded representations and the telephone conversation preceding the 'put your foot on it' email (with Lee and Brearley) to negotiate with Reed the notion that Sunland would purchase plot D17 and hold it pending the joint venture agreement;[221]

(c) Brown relied on the three pleaded representations and his further telephone conversations with Reed on 16 and 17 September 2007 to agree with both Prudentia and DWF the necessary elements of the agreements they were soon to formalise;[222]

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216 *Gould v Vaggelas* (1985) 157 CLR 215, 251-252.

217 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 121 (Gleeson CJ).

218 *Butcher & Anor v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 [111] (McHugh J).

219 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 320 [28] (French CJ).

220 SFASOC [22].

221 SFASOC [25].

222 SFASOC [29].

(d) in reliance on the three pleaded representations, the two telephone conversations and the agreements just mentioned, Sunland executed the Prudentia agreement on 19 September 2007;[223] and

(e) in reliance on the three pleaded representations and the other matters referred to in the preceding sub-paragraph, on 26 September Sunland discharged the Prudentia agreement, entered the Hanley agreement and entered the agreement with DWF to purchase plot D17, and on 1 October 2007 paid the consultancy fee to Hanley.[224]

319 Without going through their defences point by point, Reed's and Prudentia's case in answer to Sunland's allegations was, first, to deny that Sunland relied upon any of the three pleaded representations to take any of the steps alleged. Secondly, they pleaded that the transferred 'right' for which Sunland paid the consultancy fee under the Hanley agreement, was, as Sunland well knew, Prudentia's interest in plot D17 as DWF's preferred negotiator, as pleaded by Reed and Prudentia.[225]

320 Joyce similarly denied that Sunland relied on any of the three pleaded representations in the manner alleged. Additionally, he alleged that at all relevant times Brown and Abedian knew that Prudentia had not purchased plot D17; that they were aware that Nakheel and/or DWF could sell plot D17 to a purchaser other than Prudentia; that by 29 August they were concerned that Nakheel or DWF might sell plot D17 to a party other than Sunland and Prudentia; and that at all relevant times Sunland could have checked the legal and/or ownership status of plot D17 by making inquiries of DWF or the Nakheel sales department.[226]

321 Critically, on the topic of reliance, the trial judge made the following findings:

(a) first, on some key points:

- Brown's 'put your foot on it' email of 12 September 2007

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223 SFASOC [30].

224 SFASOC [33].

225 Prudentia's and Reed's Defence [21.4(d)], [30.4].

226 Joyce's Defence [22].

contradicted his account that he believed that Reed or Prudentia held or controlled the site;[227]

- Sunland refrained from making enquiries of DWF about Reed or Prudentia's hold over plot D17;[228]
- Brown was aware no price had been fixed for the purchase of plot D17;[229]
- neither Brown nor Abedian was concerned about whether the payment was made to Hanley or to Prudentia;[230] and
- it appeared Brown thought that whatever priority existed regarding plot D17, that priority lay with Och-Ziff;[231]

(b) second, and having regard to those findings, neither Brown nor Abedian thought that Reed or Prudentia had any binding agreement or legal interest in respect of plot D17;[232] alternatively, it was not important to Brown or Abedian that Prudentia or Reed had any such right;[233]

(c) third, Sunland paid the money to remove the Prudentia parties from the deal so they would walk away from plot D17 and not compete with Sunland to acquire it;[234]

(d) fourth, given the profit potential of the development of plot D17, it remained an attractive commercial proposition even after the payment of the Prudentia/Hanley fee;[235] and

(e) fifth, Prudentia's negotiating position 'was important and of great value to Sunland, and it appears from the evidence that it was this, and

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227 Reasons [148], [273], [276], [302], [355], [361].

228 Reasons [180], [276], [356], [361].

229 Reasons [280].

230 Reasons [215], [220].

231 Reasons [227]-[230], [264].

232 Reasons [261]. See also [69], [208], [255]-[265], [272]-[275].

233 Reasons [272].

234 Reasons [208], [267], [282], [298]-[299], [303], [363].

235 Reasons [242], [303], [306].

nothing else, which they contracted to obtain'; [236] so that

(f) sixth, even if, contrary to his findings, the pleaded representations were made and were false, Sunland did not rely upon them to enter the agreements and pay the Hanley fee.

322 Sunland challenged his Honour's findings and reasoning in a number of ways. We have already affirmed a number of the trial judge's findings which meet some of Sunland's arguments: we affirmed the rejection of any continuing belief on the part of Brown, at 12 September 2007, that Prudentia had 'secured' the plot[237] or that, at 13 September 2007, Brown still believed Reed's consent was necessary for Sunland to enter into an SPA for the land;[238] and we endorsed the finding that at no relevant time did anyone at Sunland believe that Prudentia or Reed had a right to acquire or an enforceable interest in plot D17.[239]

323 We will list and briefly address a number of further specific arguments.

324 First, Sunland argued that the very fact of its entry into the Prudentia and Hanley agreements supported a finding that it relied, at least, upon the third pleaded representation, namely that if it wished to purchase plot D17 it first had to negotiate and make a contract with Reed or Prudentia, or both. It argued that no other plausible explanation for Sunland entering those agreements was advanced, nor was one accepted by the trial judge.

325 Allied to this, Sunland argued that the trial judge misconstrued the central clause in the Hanley agreement that stated that the consultancy fee was paid in consideration of Prudentia transferring to Sunland 'its right to negotiate *and* enter into a plot sale and purchase agreement' (our emphasis). Sunland argued that the trial judge's alleged misconstruction pervaded other aspects of his reasoning, such as his finding that the negotiating position of Prudentia with DWF was important and

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236 Reasons [259].

237 Above [244].

238 Above [248], [250].

239 Above [256], [270].

of great value to Sunland, and that it was that position, and nothing else, which Sunland contracted to obtain.

326 We reject these arguments. For reasons given above, we rejected the proposition that the third pleaded representation was ever made.[240] Further, contrary to Sunland's submission, the trial judge did advance reasons why Sunland entered the agreements other than under a belief that it could only purchase the plot by doing so. Those reasons are perhaps most succinctly expressed in a passage extracted above,[241] in which his Honour found that Sunland wanted the project for itself and was prepared to pay Prudentia simply to 'go away', driven by the prospect of a very substantial commercial return. We see nothing implausible in the explanation for the transaction as found by his Honour. And having already construed the central clause of the Hanley agreement as the transfer of a right to negotiate to purchase, and not a right to purchase,[242] we have disposed of the argument that the judge misconstrued the agreement.

327 Next, Sunland challenged the trial judge's characterisation that the consultancy fee was paid to Prudentia to secure Prudentia's (and Reed's) 'non competition' for the site. It argued that not only did that conclusion not reflect the plain language of the Hanley agreement, but it erroneously assumed that Prudentia was genuinely competing for the site. Sunland argued there was no evidence to support a conclusion that it was genuinely competing for the site; in fact there was evidence to the contrary which the trial judge failed to consider. That evidence consisted of the evidence of the money flow documents and of the forging of documents. A proper consideration of that evidence, so it was said, should have persuaded the judge that Prudentia's interest in the site was not genuine, but contrived to exact a payment from Sunland.

328 It can be seen that this argument takes issue with the finding just mentioned,

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240 Above [238(d)].

241 Above [276].

242 Above [282].

namely that the fee was paid for Prudentia to 'go away'. In large measure, the argument is addressed by the chronological survey we have undertaken of the negotiations between the parties, and what they were seeking to achieve. Briefly, DWF sent Prudentia a draft SPA on 14 August 2007. It entered negotiations with Sunland for a joint venture to develop the land, exchanging drafts of an agreement for that purpose. It was still negotiating with DWF around 12 September for a reduction in the price of the land, while the joint venture negotiations were still on foot. Prudentia ceased being involved in the purchase when Sunland volunteered to pay it money to desist. Without more, these facts suggest that Prudentia was genuinely interested in purchasing the land.

329 Sunland's real attack on the 'genuine' nature of Prudentia's interest seeks to revive and utilise the failed 'scheme' hypothesis. We have already rejected any reliance upon that argument, and consequently reject its arguments based upon suggestions that Prudentia was pretending an interest in the land.

330 Sunland similarly relied upon an argument that the trial judge was wrong not to tackle the money flow documents and the allegations of forgery, in support of a separate challenge to the judge's reasoning on the question of reliance. It drew upon the principle that a court might more readily infer that a person was induced to act in reliance upon a representation if it can be shown that the representor intended that person to so rely and act.[243] Sunland's argument was that when assessing the issue of reliance the judge should have taken account of the 'scheme' and forgery evidence as evidence of an intention on the part of Reed and Joyce to induce Sunland to do the very thing it did.

331 There is no need to address this argument further, having already considered it at length.[244] For the reasons we have given the judge did not err, on the issue of reliance, by disregarding the so called 'money flow' documents or documents alleged to have been forged. Alternatively, if there was any error, it had insignificant

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243 *Gould v Vaggelas* (1985) 157 CLR 215, 236.

244 Above [127] - [156].

consequence.[245]

332 In addition to the foregoing arguments, Sunland alleged that the trial judge's reasoning was infected by a number of errors:

(a) Sunland's inability to identify or articulate the nature of the right did not preclude a finding that it relied upon the representation as alleged;

(b) the importance to Sunland of a commercial return on its investment and the fact that it owned the adjoining plot to plot D17 did not negate a conclusion that it relied upon the representation;

(c) Sunland's failure to make independent enquiries about the nature of the right was both wrong in fact and misused by the trial judge in point of principle;

(d) the fact that Sunland knew there was no SPA and that no payment had been made by Prudentia or Reed on the plot did not preclude the possibility it may still have relied upon the existence of a 'right' — other legal rights existed in the absence of an SPA or payment, such as an option to purchase, a contractual right to negotiate or a promissory estoppel;

(e) the 12 September 2007 'put your foot on it' email did not dispel the effect of the later representation contained in the recitals to the Prudentia agreement;

(f) the substitution of Hanley for Prudentia as the contracting party did not dispose of the notion of Prudentia having control of or a right over plot D17; and

(g) a belief that Prudentia's control of plot D17 operated via Och-Ziff was consistent, not inconsistent, with the notion that Sunland relied upon the representations.

333 The judge considered the precise identification of the notion of control with respect to plot D17 to be an issue of critical importance. In turn, it was of 'the utmost importance for Sunland's case that Brown and Abedian give credible evidence about the 'control' they thought Prudentia or Reed had over Plot D17, and the basis on

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245 Above [154], [155].

which they held that belief'.[246] Yet, his Honour found, there was an inability on the part of Brown and Abedian to identify exactly what it was that Prudentia had that gave it that 'control' or to identify the nature of the interest it held.[247]

334 Whatever it was, as Sunland knew, it did not involve the holding of an SPA; no payment had been made by Prudentia to DWF; the plot was not even created; no document was sighted evidencing any control, nor was one ever sought; and, as at 12 September 2007, it was evident the land was not 'secured' to Prudentia. The oral evidence of Brown and Abedian led the judge to conclude that they did not know the precise terms of the 'control', but 'merely speculated as to the nature of any arrangement involving Prudentia or Reed with respect to Plot D17'.[248]

335 Adding to the confusion, as the judge recited,[249] various Sunland personnel described the thing for which the Hanley fee was paid as, possibly, 'some limited right of negotiation', and the fee itself as a 'spotter's fee' or an 'introduction fee'.

336 All the while, it is to be borne in mind, Sunland and its personnel were commercially sophisticated property developers, with ready access to legal advisors.[250]

337 In this context, his Honour found that the failure on the part of Brown or Abedian to ask any serious questions, when confronted with the news on or about 12 September 2007 that the marketing people at DWF might sell plot D17 with there being nothing that Prudentia could do about it, to be telling against their asserted belief of a control over the land held by Prudentia. He said:

> Brown did accept in cross-examination that a "general explanation" of having to put your foot on the plot would be that your foot was not yet on the plot. It would then follow that Brown would have been asking some very serious and pressing questions of Brearley, Lee and Reed about how such a sale could

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246 Reasons [249].

247 Reasons [250].

248 Reasons [265].

249 Reasons [266].

250 Reasons [43], [44].

> possibly occur if Reed or Prudentia had "control" or "rights" in respect of Plot D17 if he really believed that Reed or Prudentia (or, possibly more accurately, Och-Ziff) had any such "right" or "control". Brown did no such thing and responded, in cross-examination, that "I can't recall why I didn't ask that" when this was put to him. Instead of asking questions and making enquiries as one might have expected had Brown held the belief he claimed, he quickly prepared a draft email to Reed, for approval by Clyde-Smith, which recounted the conversation and referred to the advice that "we immediately 'put our foot on the Plot' to secure it". Clyde-Smith clearly regarded this draft email as appropriate, as it was, after being sent to her for approval, sent unaltered by Brown to Reed, copied to Abedian. Neither she nor Abedian apparently raised any issue or surprise about it the need to "put our foot on the Plot to secure it". Neither Brown nor Abedian could give any credible explanation as to why they did not raise any concern at this time about the message from Nakheel through DWF that neither Reed nor Prudentia had any "control" or "right" in respect of Plot D17. In my opinion, the only rational and reasonable explanation for this failure to act or inquire is that Brown and Abedian well understood that neither Prudentia, nor Reed, had secured Plot D17 in any enforceable sense and, consequently, did not therefore control it; and nor did they enjoy an "right" with respect to the land on any other basis.[251]

338 The position was this. An experienced property developer claimed to believe that another person's 'right' or 'control' over the land stood as an obstacle to it pursuing the land itself. Known, objective facts excluded the common forms of right or control over land. Yet it was unable to identify with any precision the nature of the right or control it claimed to believe existed. Nor did it make any serious enquiries about the nature or existence of that right, notwithstanding that it had the opportunity to do so, still less did it sight any document that evidenced the right. We see nothing wrong in logic, principle or good sense in the trial judge regarding each of those matters as capable of undermining the credibility of the asserted belief.

339 One of Sunland's arguments was a recapitulation of an argument we addressed earlier in the context of discussing whether the judge properly considered its case theory as advanced in the pleadings and at trial. That is, that it did not matter what the nature of the right that Prudentia represented itself to hold was, but simply that it held itself out to have *a right*. In this context Sunland argued, in effect, that the judge was wrong to regard Sunland's inability to identify the nature of the right or control as mitigating against a finding that it relied upon the representation

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251 Reasons [275] (citations omitted)

to pay the Hanley fee.

340 We disagree. What we said earlier is also apposite here.[252] But whereas earlier we were considering the objective issue of whether conduct was capable of inducing error, here we are considering findings of what actuated Sunland. Nevertheless in making a forensic judgment about what a party truly believed at a given time, it is legitimate for the trial judge, amongst other things, to examine closely the content of the asserted belief and to measure it against what was plausible and credible in all the circumstances. Those circumstances included the party's knowledge and experience; the consistency or otherwise of the terms in which they had expressed the belief; whether associated conduct was consistent with the asserted belief, etc. This the judge did. There was nothing wrong in his Honour's reasoning on this issue.

341 Sunland complains that the judge was wrong in concluding that it made no independent enquiries about the nature of the right, and misused that finding as a matter of reasoning. We have already addressed the reasoning process and find nothing wrong with the judge's use of the finding in principle. As to whether his Honour's finding was wrong, Sunland points to a paragraph in Brown's witness statement, apparently not challenged, to the effect that on 19 August 2007 Stringer informed him that she had telephoned Brearley to confirm that Prudentia had 'development rights' and that Brearley had confirmed it did.[253]

342 But it was Brown's and Abedian's failure to make enquiries on and around 12 September 2007 in respect of which the judge most particularly made his observations. And, at that time, Brown was dealing with the very officer (Brearley) who had apparently confirmed to Stringer Prudentia's 'development rights' two weeks earlier. Significantly, as the judge noted in the passage above, Stringer herself was involved in settling the 'put your foot on it' email. Still no enquiry was made. In our view, the judge did not err in first finding, and then having regard to,

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252 Above [114] – [116].

253 Witness statement of David Scott Brown (6 August 2010) [126].

Sunland's failure to make pertinent enquiries about the right or control they claimed to believe that Prudentia possessed.

343 Sunland's contention that its knowledge of there being no SPA or payment made for the land did not mean that it could not still believe in the existence of some other kind of right, such as proprietary estoppel etc, has a degree of artificiality about it. Of course, it goes without saying that none of its witnesses claimed to believe a right of the kind now suggested was a right that Prudentia held. So, in substance, this argument is another manifestation of the point we have already addressed, namely, the proposition that it did not matter that Sunland's witnesses could not precisely identify the nature of the right or control. It did matter, for the reasons we have explained.

344 We reject the premise in the argument that the state of mind of Sunland revealed in the 'put your foot on it' email was superseded by, and could not alter the meaning of, the Implementation Agreement. In our view the premise reverses the correct reasoning process. As we have shown, the representations inherent in the Implementation Agreement had to be understood against the background of facts mutually known by both parties at the time they made it, including that Prudentia did not have its 'foot on the plot'.[254]

345 The complaints made concerning the judge's use of the substitution of Hanley for Prudentia, without any evidence of any transfer of rights between them, and of the evidence that Sunland believed Prudentia's right was held through Och-Ziff, both deal at the margins of his Honour's reasoning process. But we see nothing wrong with the way his Honour treated these facts. It was inconsistent with Sunland's asserted belief that Reed or Prudentia held certain valuable rights in the land, to display no concern about the lack of any chain of transfer of those rights from the party who actually held them to Hanley. The judge did not err in having regard to those issues, amongst others, in his reasoning process.

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254 Above [270].

346 The judge did not rest his conclusion simply in the rejection of Sunland's claim that it was motivated by a belief that Prudentia or Reed held a right or control over the land when agreeing to pay the Hanley fee. His Honour delved further into what might have been the alternative motivation, addressing what was called 'the rhetorical question', posed by Sunland in submission:

> ... commercially why would - well there would be no sensible reason for Sunland to contemplate paying such a fee unless at the time Mr Brown believed that Reed or Prudentia did have some right to the plot ... [255]

347 The judge concluded:

> I am of the view that Sunland paid the fee to "remove them [the Prudentia Parties] from the deal", so that they would "walk away" and not compete to acquire Plot D17. That was Sunland's commercial imperative, so that it could enjoy the significant fruits of the Plot D17 development alone.[256]

348 He explained further the 'commercial imperative' as follows:

> The Plot D17 transaction also needs to be assessed by reference to the feverish state of the Dubai property market in 2007. Further, having regard to the feasibility analyses which Brown had prepared for Plot D17, Sunland knew that its return on this plot would be "phenomenal", even taking into account the fee to Hanley. That fee was small compared to the premium Sunland paid on Plot D5B and considerably less than fees it later negotiated to receive from Likeitalot Investments Pty Ltd on Plot D17. In my view, the evidence indicates that Brown and Abedian simply did not care about the legal basis for paying a fee to Hanley: they were merely intent upon removing Prudentia from a negotiating position with DWF for the acquisition of Plot D17. Sunland's commercial imperative to pay the fee to Hanley is, in these circumstances, quite clear. The prospect of a very significant return on the Plot D17 redevelopment is clearly the answer to the "why" of the "rhetorical question".[257]

349 Sunland argues that the lure of profit did not, logically, negate the proposition that it also relied upon the representation it pleads. That may be true as a generalised proposition. But the judge's finding was multifactorial. No single finding was decisive. The judge's analysis of the facts and arguments was wide ranging, thorough and comprehensive. Upon the whole mix of facts, with an

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255 Reasons [297]

256 Ibid [298] (citations omitted)

257 Ibid [299] (citations omitted)

understanding that Sunland likely believed that Prudential occupied a negotiating position with DWF ahead of Sunland, and having regard to the credibility of the alternative proposition put forward by Brown and Abedian, the finding that the prospect of phenomenal commercial return was *the* reason Sunland was prepared to pay Prudentia (or Hanley) to 'go away' was entirely open and reasonable. We find no error in the judge's reasoning.

350 It follows from all of the foregoing that we reject Sunland's arguments on the issue of reliance.

Did Sunland suffer loss and damage in reliance upon the representations?

351 Sunland pleaded that as a result of entering the Prudentia agreement, then the Hanley agreement, and paying the fee of AED 44,105,780 it suffered loss and damage. That loss and damage was said to be the payment of the fee itself and 'loss of reputation by Sunland in Dubai for having been party to a transaction characterised by the Dubai authorities as illegal'.[258] Both heads of loss and damage were said to be the consequence of the statutory misconduct and false representations and the tort of deceit.

352 The grounds of appeal relating to loss and damage were broad:

> 61 The trial judge erred in holding that, if the appellants made out their allegations of misleading and deceptive conduct or deceit, they had failed to lead evidence that would enable the court to determine whether they had suffered any loss or damage.
>
> 61A The trial judge erred in finding that the appellants suffered no loss or damage by reason of the alleged misleading and deceptive conduct or deceit. The trial judge should have found that the appellants suffered loss or damage by reason of the alleged misleading and deceptive conduct or deceit.

353 His Honour held that Sunland had not established what its actual financial

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258 SFASOC [37.3]. By the further and better particulars (dated 16 April 2010) of the SFASOC 'loss of reputation' was expanded to loss of commercial reputation (damages for vindication of that reputation), loss of goodwill and consequential loss of custom.

position was as a result of entering into the transaction with respect to plot D17.[259] Merely claiming damages in the amount of the Hanley fee on the basis that it would have withdrawn from buying plot D17 if it knew the true position, was, he said, too simplistic. Such a claim ignored the need for the court to determine Sunland's actual net financial position as a result of having acquired the plot.[260] Moreover, the judge said, if Sunland's position was that it would have negotiated to buy the land itself, without paying the fee, it had not provided or pointed to evidence that demonstrated it was likely to be able to do so.[261] Further, there was no evidence to show that the land could have been obtained at a price, and with the additional BUA Sunland ultimately received, putting it in an overall better position in the hypothetical than in reality.[262] Alternatively, Sunland might have negotiated some form of joint venture that put it overall better off, but again, it failed to lead evidence of the terms of any joint venture it might otherwise have entered.[263]

354 His Honour also held that the appellants had led no evidence to prove loss of reputation or which would enable the court to assess damages for such a loss.[264] Finally, his Honour held that it was inappropriate to fix some general, global award for damages when, apart from loss of reputation, those damages were quite capable of being quantified had Sunland led proper evidence in that regard.

355 Sunland's argument on appeal regarding loss and damage was, in the end, quite narrow. It did not take issue with the judge's finding that no evidence was led in support of the loss of reputation head of damage. Neither did it challenge, except by way of an aside, the judge's criticisms of its evidence concerning the alternative scenario it would have followed (ie transaction or no transaction) had it known that neither Prudentia nor Reed had a right to acquire the land or that Sunland did not

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259 Reasons [427], [432].

260 Ibid [434]-[438].

261 Ibid [439].

262 Ibid [440].

263 Ibid [441].

264 Ibid [442], [443].

need to come to an arrangement with them to be able to buy it. On appeal Sunland argued that the judge unnecessarily addressed questions of whether it was a 'transaction case' or a 'no transaction case'.[265] So it is not necessary for us to consider whether his Honour was justified in concluding, as he did, that the evidence of Brown and Abedian was internally inconsistent on that topic.[266]

356 In its written submissions on appeal Sunland concentrated only upon the 'transaction case' scenario. In particular, it challenged the judge's reasoning leading to his conclusion that Sunland failed to establish that DWF would have sold plot D17 to it rather than to Prudentia. It argued, again, there was no evidence that Prudentia was, in reality, ever negotiating with DWF to acquire the land or that it had the capacity to acquire it. Secondly, it argued that the judge's reasoning assumed that Sunland would have paid Prudentia an equivalent premium (ie AED 44 million or AUD $14 million) when there was no evidentiary basis upon which to make that assumption. Third, Sunland argued his Honour erroneously speculated in favour of the wrongdoer, contrary to the remedial purposes of the statute.

357 In oral argument Sunland concentrated on a submission that the judge failed to deal with its simple and straightforward claim for $14 million loss. Sunland contended that it was irrelevant to consider what might have happened, commercially, after it paid Hanley the $14 million fee: its primary loss was suffered at the point of paying the fee. The judge focused, Sunland argued, on the wrong transaction. Its loss was suffered because of its entry into the Hanley agreement, and the payment of the fee due under that agreement; not because of its entry into the SPA for plot D17 with DWF. Put broadly, Sunland argued that whatever *other* transaction Sunland might have entered (ie a purchase of the land by itself, or a new joint venture, or no transaction at all) Sunland would have been $14 million better off had it not been wrongly induced to pay the Hanley fee.

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265 Although, in argument, Sunland did appear to confirm, as the judge thought was the position from its the pleadings (Reasons [428]), that it had never contended it would have withdrawn from pursuing the plot.

266 Reasons [429]-[431].

358 We will commence with Sunland's argument, made orally on appeal, that it ought to have succeeded on its claim for $14 million simply upon proving that it was induced by a misrepresentation to enter the Hanley agreement and pay the fee.

359 The judge's reasoning process was as follows:

(a) compensatory damages for tort are measured by the monetary sum necessary to put a wronged party into the position it would have occupied but for the wrongful conduct;[267]

(b) to measure that sum requires a comparison to be made between the position the wronged party is in as a result of the tortious conduct (its actual position) with the hypothetical position it would have been in but for the wrongful conduct (the counterfactual position);[268]

(c) a necessary element of that equation is the value of the actual position. In Sunland's case, that required it to prove, as the party bearing the onus of proof of loss and damage, the financial position in which it was placed as a result of being induced to enter the Hanley agreement and pay the fee;[269]

(d) Sunland's true financial position, as a result of entering the Hanley agreement and paying the fee, was not measured by having regard only to the fee paid (the expense) but also, in the circumstances, by taking into account the benefit it received as a result of paying that fee;[270]

(e) there was limited, albeit incomplete, evidence led by Sunland of some of the financial gain it made after acquiring plot D17, including the retention of $14 million received from a joint venturer who later defaulted after entry into a joint venture agreement to develop the plot.

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267 Ibid [432].

268 Ibid; although specifically referenced to the 'no transaction' scenario, the judge made it clear this method applied equally to the 'transaction' scenario; [438],[440]

269 Ibid [434]

270 Ibid [435]; the judge relied upon *Latrobe Capital & Mortgage Corporation Ltd v Hay Property Consultants* (2011) 190 FCR 299.

But its evidence was not sufficient to enable the court to determine its actual net financial position;[271]

(f) in those circumstances the court could not carry out the task of comparing Sunland's actual financial position with its counterfactual position so as to be satisfied it suffered a loss – therefore it must fail.

360 Sunland's challenge does not so much take issue with this reasoning process. Rather, it seems, it limits its attack to a denial of the premise in (d); that is, denying that *anything* should be 'netted off' from the payment of the $14 million to determine whether Sunland suffered a loss by the misleading and deceptive conduct or the deceit. The gravamen of its argument was that one could and should disconnect Sunland's entry into the Hanley agreement and payment of the fee, on the one hand, and its entry into the plot purchase agreement and any benefits that accrued or would have accrued from doing so, on the other.

361 In our opinion such an approach would not deal with reality and artificially limits the assessment of the consequences of the so-called inducement to only one element of its true consequences.

362 The Hanley fee was paid as consideration to allow Sunland to step into Prudentia's shoes and negotiate the acquisition of plot D17. The chronology leading up to those two events, which we have already traversed, demonstrates that the one was not going to occur without the other. Upon the execution by Sunland of the Hanley agreement on 26 September 2007, on the very same day, Sunland met with DWF to sign the SPA for the plot and pay the deposit under the contract. The relevant negotiation of price and conditions had been undertaken between Prudentia and DWF, and between Sunland and DWF, leading up to 26 September so that the outcome of the negotiation for the acquisition by Sunland for plot D17 was known when it became bound to pay the Hanley fee. The payment by Sunland to Hanley of AED 44,105,780 on 1 October 2007 was coordinated with the receipt of DWF's

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271 Reasons [437], [438].

executed part of the SPA. In short, Sunland's entry into the Hanley agreement and the SPA were logically, chronologically and commercially interlinked.

363 So understood, it was correct in our view for the judge to regard the relevant financial position of Sunland, as a consequence of the assumed wrongful conduct, to be the sum of both the expense paid and the benefit gained flowing from entering the Hanley agreement. And because the Hanley agreement and the SPA were linked in the way we have described, it was necessary for Sunland to establish what benefits it derived from purchasing the land. This it failed to do.

364 Accordingly we reject Sunland's argument that the judge misdirected himself or otherwise failed to deal appropriately with its 'simple' claim for $14 million loss. In our view the approach and method his Honour adopted was sound.

365 We then return to Sunland's arguments set out in its written submission.

366 Sunland's first argument concerned what it alleged was 'impermissible speculation' on the judge's part that, had there been no misrepresentation and inducement, Prudentia would nevertheless have bought the land and Sunland would have needed to pay a premium to purchase it from Prudentia.

367 Of course, any 'finding' concerning a hypothetical scenario involves the court deducing, as a matter of probability, what would have happened in circumstances that have not in fact occurred. One may accept that such an exercise could be called an exercise in speculation. But it is wrong in our view to describe that as 'impermissible' given the nature of the task. Moreover, it was not as if the judge in this case did not have a significant body of evidence from which to draw reasonable inferences as to what would probably have occurred if events had taken a different course.

368 So, taking each proposition in relation to which Sunland complains:

(a) first, that Prudentia would have negotiated to acquire plot D17. We have already found, contrary to Sunland's submission, that Prudentia

was genuinely interested in purchasing the land so we see no reason why that conclusion involved any erroneous speculation;

(b) second, that Prudentia would have entered a contract (ahead of Sunland) to acquire plot D17. We have already affirmed the judge's conclusion that Prudentia occupied the position of preferred negotiator, in precedence to Sunland, and see no reason why the judge's inference on this element involved any erroneous speculation;

(c) third, that Prudentia would have sold plot D17 to Sunland. History shows that Prudentia was amenable to either entering a joint venture agreement to develop the plot or making an immediate return from it. Had Sunland been interested in acquiring plot D17, as it showed itself to be, there is no reason to think that it would not have purchased the land from Prudentia in the altered scenario under consideration;

(d) fourth, that Prudentia would have been able to extract a premium from Sunland in doing so:

- There was unchallenged evidence, led by Sunland, of the practice in Dubai in 2006 and 2007 of secondary buyers acquiring the transfer to them of the contract to purchase land held by a primary buyer with the seller (eg a master developer). The primary buyer would extract a 'premium' from the secondary buyer, and the master developer would typically charge a 'transfer fee'.[272] The judge described this method of contract novation as 'the usual way' in Dubai.[273]
- Again there seems to be no reason why the same commercial imperatives that the judge found drove Sunland to pay the Hanley fee, in the circumstances before him, would not similarly have motivated it to pay a premium to Prudentia to obtain a transfer of Prudentia's SPA. Likewise there is no reason not to

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272 Witness statement of Duane Keighran (8 August 2010) [33]-[38].

273 Reasons [439], referring to the practice he had earlier outlined at [35]

assume that Prudentia would have been able to negotiate the same or similar terms for the purchase of plot D17, in the altered scenario, as it was able to negotiate with DWF shortly before Sunland offered to pay Prudentia a fee to 'go away'.

- Whether or not the premium paid in the hypothesised circumstances would have been the same amount as the Hanley fee of $14 million is, of course, difficult to say with any confidence. But that was the figure agreed upon by the parties in the actual transaction at hand, and the postulated transaction does not appear to involve significantly different commercial dynamics. Notably, Sunland did not produce any evidence to say what amount it would likely have paid by way of premium had Prudentia held an SPA. It did not give evidence that in those altered circumstances it would not pay $14 million, but something less, nor did it produce evidence to support the proposition that in those circumstances Prudentia would have accepted something less. Accordingly we think it was reasonable to regard Sunland as not having discharged an evidentiary onus to show that it would *not* have had to pay a similar amount as a premium for the transfer of an SPA as the amount it paid as a consultancy fee under the Hanley agreement.
- On appeal Sunland drew attention to one email from Jim Goldburg (of Prudentia) to Reed of 3 September 2007 as evidence suggesting that Prudentia could not have gone through with the transaction itself. The email in question contemplates the possibility of Prudentia not entering a joint venture with Sunland (because Reed did not trust Sunland) and queries what other partners Prudentia might approach. Some problems were identified with some of the potential partners

although the email does not suggest they were insoluble, nor that Prudentia would not move ahead to 'secure' the land in any event. Nevertheless the proposition was never put to the test. In our view that evidence does not establish that Prudentia was unable to proceed without Sunland.

369 In summary, we do not find any of the propositions of which Sunland complains to involve an inference that was not reasonably open to his Honour on the evidence, or one that otherwise involved error.

370 What we have said in addressing the first of the errors alleged by Sunland in its written submissions also addresses the second (which attacked the assumption that Sunland would have paid Prudentia a premium of $14 million in order to acquire the land from Prudentia if necessary).

371 The third and final error complained of in written submissions was that the trial judge did not have proper regard to the remedial purpose of the TPA and wrongly 'speculate[d] in favour of the wrongdoer'. It cited the High Court's decision in *Murphy v Overton Investments Pty Ltd*,[274] generally, in support of its argument. We do not read that decision as saying anything that would suggest a court is not to approach the drawing of inferences of fact concerning causation or loss, in a case concerning a claim for damages under Part VI the TPA, differently from any other case. It said nothing about preferring inferences of fact to favour or not favour one party or the other. What the court stressed was that it was wrong to approach the operation of the provisions of the TPA which deal with remedies for contravention of the Act by attempting to draw some analogy with any particular form of claim under the general law.[275] We do not think that principle has any significant application in this case. In any event, in our view, the trial judge did not 'speculate' in favour of the respondents as Sunland's argument implies.

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274 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388

275 Ibid 407 [44].

372 In conclusion we reject Sunland's argument that his Honour erred in making the findings he made on loss and damage.

Other alleged errors

Credit findings

373 A great many appeal grounds were directed at the trial judge's adverse credit findings concerning Brown and Abedian.[276]

374 His Honour did indeed make adverse findings regarding the credit of each witness. Regarding Brown he said:

> Brown's unreliability as a witness is, in my view, indicated by the evidence he gave in relation to a number of key issues:
>
> (a) The introduction of the Sunland parties (through Brown) to Plot D17;
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> (b) Brown's state of mind when he sent the 'put your foot on it' email to Reed;
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> (c) The failure of the Sunland parties to disclose to their potential joint venture partner the availability of the additional BUA; and
>
> (d) Brown's status within the Dubai authorities' investigation commenced in December 2008, that is, that he was under investigation for bribery.[277]

375 Likewise concerning Abedian, his Honour said:

> ...In short, Abedian presented as an unreliable witness and, as indicated previously and as explored further in relation to some corporate governance issues which arise with Sunland, could not be regarded as a reliable witness of truth. I accept that the key issues on which Abedian gave clearly unreliable evidence included evidence relating to the following:
>
> (a) Abedian's belief that Prudentia or Reed or Och-Ziff had a 'right' over Plot D17 (although because Abedian admitted that he was not party to any of the pleaded meetings or communications on which the Sunland parties rely for their claim, Abedian's evidence in this area is irrelevant);
>
> (b) Abedian's knowledge and understanding of Joyce's 16 August 2007 email;

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276 See n 26 above.

277 Reasons [307].

(c) Sunland's knowledge of the price at which Plot D17 could be acquired;

(d) Sunland's entitlement to additional BUA (and, in particular, when this first became known to Sunland and why it was not disclosed to the Prudentia parties);

(e) Abedian's reaction to the "second" call from Lee and Brearley to Brown on 12 September 2007 (leading to the "put your foot on it" email);

(f) the existence of a "reservation agreement" for Plot D17;

(g) the status of negotiations with Prudentia on 17 September 2007; and

(h) the investigation by the Dubai authorities commencing in December 2008, including the role of Brown in that investigation and Abedian's communications with the Dubai prosecutor.[278]

376 The trial judge's analysis and findings concerning the credit of Brown and Abedian are to be found in many places throughout the judgment, but his Honour collected much of it in the passages that follow each of the above extracts, discussing each of the listed topics in turn.[279] Elsewhere the judge also made adverse findings in relation to specific issues as he analysed them; for example in relation to their evidence about the 12 September 'put your foot on it' email.[280] We do not intend to refer to every place where his Honour discusses the witnesses' credit.

377 In *Fox v Percy*[281] the High Court's set out principles that guide an appellate court's approach to findings of a trial judge that depend, at least in part, on that judge's assessment of the credit of a witness. There, Gleeson CJ, Gummow and Kirby JJ, noted a series of decisions that reiterated:

> ..the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not.[282]

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278 Reasons [321].

279 Reasons [308]–[320] (Brown); Reasons [322]-[332] (Abedian); and Reasons [333]-[341] (in relation to certain corporate governance issues).

280 Reasons [138] (Brown); Reasons [139], [148] (Abedian).

281 *Fox v Percy* (2003) 214 CLR 118

282 Ibid [26].

Their Honours went on to say:

> If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.[283]
>
> ...In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.[284]
>
> ... In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case.[285]

378 Returning to the present case, the trial judge considered that Sunland's case failed even if he were to take the evidence of Brown and Abedian at face value, regardless of the veracity of their evidence.[286] Nevertheless it appears to us that his Honour's critical conclusions on issues such as reliance were at least influenced by his assessment of the credit of Brown and Abedian.

379 It is useful to set out some examples of passages from the cross-examination of Brown and Abedian, as extracted by the trial judge, which illustrate the kind of evidence that his Honour found discredited the witnesses. We bear in mind that an appellate court suffers 'natural limitations' compared to the trial judge in respect of the evaluation of witnesses' credibility and the 'feeling' of a case; limitations not fully overcome by reading the transcript.[287]

380 In relation to Brown, the trial judge extracted passages of cross-examination and made comments concerning Brown's participation in the Dubai investigation in 2008 and 2009, concluding that his evidence indicated he could not be taken to be a reliable witness of truth:

> Initially, Brown denied, quite explicitly, that he was the subject of a bribery

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283 Ibid [27].

284 Ibid [28] (citations omitted).

285 Ibid [29] (citations omitted).

286 Reasons [304].

287 *Fox v Percy* (2003) 214 CLR 118, [23].

allegation by the Dubai authorities. His explicit denial was as follows:

> "You see, at this time you were a person under investigation for paying a bribe, weren't you?---They were gathering the facts. The Ruler's Court was writing up a report.
>
> No, my question is: at this time, you were a person under investigation for paying a bribe?---They were certainly asking me questions. I don't know what their view of me was.
>
> Surely you looked at the search warrant that's been translated in relation to the approach of Dubai authorities to the Sunland offices?---I have.
>
> Do you remember the date of it?---The search?
>
> No the date of the warrant?---It would be around 26 January, around that time.
>
> Was the reason given in the warrant that you, David Scott Brown, were under investigation for paying a bribe of 45M Dirham?---There was bribery mentioned. I don't believe I was accused of that, but there was a bribery case being investigated."

Brown was then taken specifically to the translation of the search warrant:

> "So, 'Dubai Police General HQ General Department State Security, on 26 January 2009, to the Prosecutor General on Duty. David Scott Brown, Australian national, director of operations at Sunland,' Gold and Diamonds complex and the building. 'Further to the public prosecution's authorisation dated 22/1/2009 purporting that a group of employees working at Nakheel are rigging the sales process in return for bribes by using sham reservations of lots or selling them at lower than the market, and giving employees orders not to dispose of them and then selling them through brokers in return for obtaining sums of money, it has been decided to pass this information to the Financial Audit Department at the KK the Ruler's Court, who have found that an Australian national called David Scott Brown obtained Lot D17 at the Nakheel's Waterfront project in return for paying 45 million dirhams as a bribe to obtain this lot at a cost lower than its market price."

Brown was then asked:

> "You knew that, didn't you?---Yes, I knew the case was about bribery, yes."

Following this acknowledgment, the cross-examination continued:

> "Why couldn't you tell us that you were being investigated for bribe?---I'm not denying I was being asked many questions, yes.
>
> You've read that, haven't you [the search warrant]?---Yes.
>
> What it says that you were under investigation for bribery, doesn't it?-

--It does there, but---

And you knew that at the time I suggest, Mr Brown?---I can't recall that document when you are asking me the previous questions.

Are you saying to the court that you are unable to recall whether you were under investigations for bribery in January 2009?---What I recall is that the Ruler's Court were talking about bribery and commissions and I understood that they did not have the facts about what this transaction was based on. There was no bribe, there was no commission, there was a premium paid.

HIS HONOUR: Could you answer the question?---Can you repeat the question, please?

MR RUSH: Are you saying to the court that you are unable to recall whether you were under investigation for bribery in January 2009?---No, I'm not.

What is the position, do you recall or not recall---I do recall.

You do recall?---Yes.

That you were under investigation for bribery?---Yes.

Why didn't you tell us that five minutes ago?

HIS HONOUR: There's no doubt about it is there? I think one could infer the average person would be horrified to get a document like that in Dubai?---Yes.

MR RUSH: And you were horrified, weren't you---I was."[288]

381 Especially given that the trial judge has observed the witness's demeanour and tone, and had the benefit of the entirety of the evidence in which to place the evidence in context, answers of the kind set out in the foregoing passage seem to us to provide a foundation from which the judge might legitimately form an adverse impression of the witness.

382 Likewise in respect of Abedian, and given the same advantages enjoyed by the judge that we have just mentioned, the following passage seems to us to illustrate why an adverse view might legitimately be formed about that witness. Here the judge commented upon cross-examination of Abedian about the 16 August 2007 email in which Joyce had told Brown that the main issue was that he (Brown)

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[288] Reasons [314]-[316] (citations omitted).

come to an arrangement with Reed that allowed Sunland to deal directly with DWF:

> In spite of Brown's evidence, Abedian maintained his claim that a hard copy of the Joyce email was handed to him by Brown. According to Abedian, this email was of such importance to him that he kept it in his office drawer. Indeed, his evidence was that it was so important that from time to time he "showed [it] to some people that it was important to me". In spite of its claimed importance, Abedian's evidence was that he no longer has a copy of this email, having disposed of it in an office move around December 2006, September to December 2006, at the end of 2006. This, of course, could not have occurred, as the email was not in existence at this time, being an email in August 2007. As submitted against Sunland, I must conclude that Abedian's evidence of keeping this email was a complete fabrication, as is clear from the following part of his evidence in cross-examination:
>
> > "If you were showing this email to people like Mrs Joyce and Mr Bin Haider in early 2009, how could you have disposed of the email as part of an office move in December 2006? The email didn't even exist in 2006?---No, the move, we made it in the end of 2007, 2007.
> >
> > I see, before Christmas?---I think so. I could not give you exact date about the move of the office.
> >
> > Well, if it was before Christmas, then you didn't have that email at the time Mr Joyce was arrested, did you?---No, I had because I can vividly remember that David gave me the email, that is why I am telling you, when he was arrested. Shortly after, I showed it to Angela.
> >
> > Your evidence is you disposed of the email, the hard copy you kept in your drawer, at the time of the office move; correct?---That's correct.
> >
> > Your office move was at the end of 2007?---I don't know exactly the time. I can find out and let you know.
> >
> > It was well prior to the arrest of Mr Joyce?---It was, correct.
> >
> > Yes, so when you have your meeting with Mrs Joyce, you don't have that original email, do you?---With Mrs Joyce?
> >
> > Yes?---No, I had in my hand, I showed it to her.
> >
> > How could you have the original email that you kept in your drawer if you disposed of it at the end of 2007 as part of an office move?---Maybe it wasn't disposed, maybe I kept it, maybe I asked David to give me another copy. It was always there for me to access it. I didn't need to keep anything. I could have had a hundred copies of that." [289]

383 Reading the judgment as a whole, it is clear that his Honour's impression of the two primary witnesses for Sunland was the product of a combination of matters:

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289 Reasons [79] (citations omitted).

for example, exchanges in cross-examination, comparisons of different accounts given of the same incident or issue by the same witness, analysis of behaviour set against what might reasonably have been expected in the circumstances, conduct when under investigation by the Dubai authorities, etc. It is not possible to identify the one piece of evidence from which the judge formed his impression: certainly his Honour does not identify a single piece evidence. Rather, it is evident that his Honour's impression was gained from numerous matters, each reinforcing that impression to one degree or another. And that impression was gained whilst enjoying the kind of advantages available to a trial judge, which an appellate court does not share, referred to in *Fox v Percy*.

384 So it was an inherently difficult task for Sunland to undertake to persuade us that his Honour's impressions were wrongly formed. In our view, the two examples of cross examination of Brown and Abedian set out above[290] represent, at least, solid starting points for a reasonably formed adverse impression of the credit of each witness. A piece by piece analysis of each of the findings that contributed to his Honour's overall impression was an onerous task; Sunland did not attempt it. Rather it selected and attacked some particular findings with the hope that by showing that some were made in error, that the whole impression should be held to have been reached in error.

385 But even if it could be shown that a particular finding here or there was wrong, or was debatable, there was so much material upon which the judge based his impression that the undermining of individual conclusions was hardly likely to overwhelm the whole. Further, the challenge to selected findings ran into some difficulty. For example Sunland challenged the judge's finding that Brown's claim that he thought it was Prudentia which held the 'development rights' over plot D17 was discredited by his statement made to the Dubai prosecutor in January 2009. His Honour extracted a passage from Brown's statement to Mustafa dated 22 January 2009 in which Brown referred to his belief that Och-Ziff had the arrangement with

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290 Above [380], [382].

Nakheel for development rights:

> "We understood the company in the USA to be Och-Ziff (I have checked the internet for the spelling), and [Reed] said this company had high level connections with people in Nakheel ... The people at Nakheel said they knew that this plot [D17] was controlled by a group from the USA, and Matt Joyce said he had heard of the Och-Ziff Company, but they didn't know any details" [underlining added in Joyce submissions] [291]

386 The judge then concluded:[292]

> I accept the submissions on behalf of Joyce that this reference to Och-Ziff is completely contrary to Brown's assertion that he thought it was Prudentia which controlled Plot D17.

387 Sunland took us to the relevant statement and complained that his Honour simply overlooked the fact that Brown had also spoken, in the same statement, of Reed saying that 'his company' had the development rights over the plot; meaning, Sunland argued, that Prudentia had the rights. Sunland argued that the judge had misused the statement to make an erroneous finding, and thus to wrongly discredit Brown. Much of the force was taken out of this argument when it was seen that the trial judge prefaced his quotation of Brown's reference to Och-Ziff with these words:

> Additionally, in his statement to Mr Khalifa, of the Dubai Police dated 22 January 2009, Brown asserted that Reed had told him that Prudentia had "the development rights" over Plot D17, but he then said, in the same statement,...[then setting out the passage taken from Brown's statement quoted two paragraphs above].[293]

Thus, his Honour's remarks were not only made with express reference to Brown's mention that Reed had told him Prudentia held 'development rights', but they were also more specifically targeted to the issue of the entity that supposedly 'controlled' the plot.

388 Certain other arguments advanced by Sunland to demonstrate that the judge's findings on the credit of Brown and Abedian were not justified can be disposed of by reference to other findings we have already made. For example, it

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291 Reasons [228].

292 Reasons [228].

293 Reasons [228].

argued the findings were wrong because they were based upon:

(a) *an evaluation of their oral evidence against a misconstruction of the plain meaning of the contemporaneous documents.* The documents Sunland referred to were the 16 August email, the recitals in the Implementation Agreement and the recitals in the Prudentia and Hanley agreements. Our findings on the meaning of these documents accord with those of the trial judge, and not with Sunland's contentions.

(b) *an evaluation of their evidence against a case that Sunland was not required to meet.* Contrary to Sunland's submission, we held that the case it had to meet was to prove it relied upon a representation that Prudentia or Reed had an enforceable legal right to plot D17.

(c) *an evaluation of their evidence in circumstances where his Honour failed to consider internal documents of the respondents.* Here Sunland refers back to the documents said to support the 'scheme' which, as we have previously held, his Honour rightly refused to entertain.

389 In conclusion, and for the reasons we have given, we reject Sunland's contentions that the trial judge erred in making adverse findings concerning the credit of Brown and Abedian.

Alleged errors in applying the principles of Browne v Dunn and Jones v Dunkel

390 Grounds of appeal 50 and 51 were factually and conceptually related. By ground 50 Sunland contended the trial judge erred in rejecting its submission that the rule in *Browne v Dunne* applied to the failure of the respondents to put to Brown contrary versions of the conversations that Sunland pleaded that Brown had with Reed and Joyce. By ground 51 it contended that the trial judge misapplied the law expressed in the rule in *Jones v Dunkel* when holding that no inference adverse to the respondents was open to be drawn in circumstances where they called no witnesses.

391 Neither ground was pressed in either written or oral submissions and we take them to have been abandoned. We say nothing further about them.

392 Questions were raised at trial whether the prohibitions under Part V of the TPA, and like provisions under the FTA, applied to the conduct of Prudentia, Hanley, Reed or Joyce even assuming their conduct would otherwise have amounted to misleading or deceptive conduct or to have involved false representations. The issue was the territorial reach of the two statutes.[294]

393 Sunland alleged that Joyce made the representations that constituted the prohibited conduct in meetings in Dubai between March and September 2007,[295] a telephone call with Brown in Dubai on 15 August 2007,[296] an email to Brown (received in Dubai) on 16 August 2007,[297] and a telephone call with Brown in Dubai on 29 August 2007.[298] Hanley's conduct, on the other hand, was alleged to have been engaged in when it retained and instructed Freehills in Melbourne to prepare the Hanley agreement,[299] and when it caused Sinn (of Freehills) to email the Hanley agreement from Australia to Brown in Dubai.[300]

394 The conduct of both Hanley and Joyce was alleged to have contravened each of the following provisions of the TPA:[301]

> **52. Misleading or deceptive conduct**
>
> (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> **53. False or misleading representations**

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294 After extensive analysis it appears the trial judge found that the TPA and FTA applied to the conduct of Prudentia and Reed but not to that of Hanley or Joyce. In any case, although the amended grounds of appeal (grounds 50, 55, 56, 57 and 58) do not make it so clear, Sunland's written outline of submissions on appeal [67]-[71] clarify that it is only the findings with respect to Hanley and Joyce that are the subject of appeal.

295 SFASOC [9].

296 SFASOC [12].

297 SFASOC [14].

298 SFASOC [18].

299 ASOC [31].

300 ASOC [32].

301 ASOC [41], [57] (Joyce); [39], [55] (Hanley).

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

...

(aa) falsely represent that services are of a particular standard, quality, value or grade;

...

(g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

53A False representations and other misleading or offensive conduct in relation to land

(1) A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:

...

(b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; ...

395 It can be seen that each contravention, to be made out, requires that the conduct or the representation be engaged in or made 'in trade or commerce'. The expression 'trade or commerce' is defined in the TPA to mean ... 'trade or commerce within Australia or between Australia and places outside Australia'. It follows that conduct engaged in or representations made in trade or commerce that is neither within Australia or between Australia and places outside Australia will not fulfil an essential condition of each of the prohibitions relied upon.

396 Moreover, in addition to the territorial limitation inherent in the defined expression 'in trade or commerce', the trial judge rightly pointed to another principle of limitation:[302]

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302 Reasons [400] (citation in original).

> The Commonwealth Parliament has the power to pass legislation which operates extraterritorially provided it is "for the peace, order, and good government of the Commonwealth with respect to" one or more heads of power conferred by the *Commonwealth Constitution*. It is trite law that a statute will be presumed to apply only to the territory or nationals over which the legislature has jurisdiction, though the presumption may be displaced by a clear indication to the contrary.[303]

397 So, in summary, it can be seen that two separate principles of territorial limitation were under consideration: first, the requirement introduced by the condition 'in trade and commerce' that such trade or commerce be within Australia or between Australia and places outside Australia; and secondly, and separately, that unless there is clear indication to the contrary, the statute is presumed only to apply to conduct within Australia or to Australian nationals.

398 As to the second limiting principle, s 5 of the TPA does provide a clear indication to the contrary by providing:

> **5 Extended application of Parts IV, IVA, V, VB and VC**
>
> (1) Part IV, Part IVA, Part V (other than Division 1AA), Part VB and Part VC extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

399 In *Bright v Femcare*,[304] Lehane J brought together the two principles of territorial limitation, as extended by s 5(1), in this way:

> Conduct, then, gives rise to a liability under, for example, section 52 if two conditions are met: first, it is engaged in within Australia (by a corporation) or outside Australia (by a body referred to in section 5(1)); secondly, it is conduct in trade or commerce (including trade or commerce between Australia and a place outside Australia).[305]

400 The extended operation under s 5(1) is only available for a claim made under

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303 See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th ed, LBC, 2011), [5.9]-[5.11] and [6.38]; and see Bennion, *Statutory Interpretation* (4th ed, Butterworths, 2002), 315-322; and see *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR 1 at 12, [47]; [2002] FCA 243, (Merkel J) referring to *R v Jameson* [1896] 2 QB 425 (CA) at 430 (Lord Russell CJ).

304 [2000] FCA 742.

305 [2000] FCA 742 [77]-[78]; and see *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62 [172]-[174].

s 82 of the TPA with the consent of the Minister.[306] There is no dispute that the Sunland parties did obtain such consent. It follows that, subject to the conduct being 'in trade or commerce' as defined, the application of the relevant sections in Part V extend to conduct engaged in by Australian citizens (which would include Joyce) and bodies corporate carrying on business within Australia (which, Sunland contends, would include Hanley). Being a corporation registered in Singapore, Hanley did not qualify as an Australian body corporate.

401 His Honour first considered whether s 5(1) extended the operation of the TPA to Hanley's conduct. The critical question was whether Hanley was 'carrying on business within Australia'. His Honour found that Hanley was not, relevantly, carrying on business in Australia because:

- there was no evidence it engaged in any commercial activity in Australia on a continuous, repetitive or systematic basis;[307]
- there was no evidence it had engaged an Australian solicitor, or even if it had, the mere engagement of a local solicitor did not of itself mean that Hanley was carrying on business in Australia;[308] and
- the critical conduct, and aspects relevant to it, took place in or was located within Dubai and not Australia.[309]

402 Moreover, in relation to both Hanley and Joyce, his Honour found that the condition that the relevant conduct be 'in trade or commerce' was not satisfied. That is, he was not satisfied that the trade or commerce in the course of which their impugned conduct allegedly occurred, was trade or commerce between Australia and a place outside Australia.[310]

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306 TPA, s 5(3).

307 Reasons [382], applying *RT & YE Falls Investments Pty Ltd v New South Wales* [2001] NSWSC 1021 [78] (Palmer J).

308 Reasons [379], [382], applying *National Commercial Bank & Anor v Wimborne & Ors* (1979) 11 NSWLR 156 at 166 (Holland J).

309 Reasons [383].

310 Reasons [407].

403 The judge identified a list of transaction features that he considered important, both for deciding that Hanley was not carrying on business in Australia and that the transaction was not, in truth, between Australia and Dubai.[311] Those features included:

- plot D17 was land located in Dubai;
- the vendor of the land was a limited liability company incorporated in the Emirates of Dubai;
- the proposed joint venture between Prudentia and the Sunland parties concerned a development to be carried out in Dubai;
- Brown was the International Design Director and then the Chief Operating Officer for the Dubai branch of Sunland at the relevant times and was in Dubai at the time he received the Representations and Hanley representations;
- the agreement that was acted upon by the parties was the Hanley agreement;
- the parties to the Hanley agreement were SWB (incorporated in the British Virgin Islands) and Hanley (incorporated in Singapore);
- Hanley was the company to whom the fee was paid;
- a governing law of the Hanley agreement was the laws of the Emirates of Dubai and federal laws of the UAE;
- payment of the Hanley fee was from the Dubai account of the Sunland parties' Dubai based solicitors to Hanley via cheque with the exchange occurring in Dubai;
- the evidence of Sunland was that it considered there to be no 'recourse' from their Dubai operations back to Australia because the management of the Dubai operations is controlled outside Australia.

404 Sunland challenged both conclusions, namely the finding that Hanley was not carrying on business in Australia and that its conduct was not in trade or commerce

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311 Reasons [383], [406].

between Australia and Dubai.

405 In relation to the first, Sunland argued that the finding was wrong because:

- Hanley was the wholly owned subsidiary of an Australian company (Prudentia) that participated in a substantial transaction negotiated from Australia;
- The transaction was negotiated by Australian solicitors acting on its behalf and for its benefit;
- Hanley was, in effect, Prudentia's nominee and created for the purpose of receiving funds from Sunland;
- The conclusion that Hanley's commercial activities were not continuous, repetitive or systematic in Australia was not a proper basis upon which to support the finding.

406 We do not find Sunland's arguments on this issue persuasive. In deciding whether Hanley was a company carrying on business in Australia it is not to the point to categorise it as 'Prudentia's nominee' or simply attribute to it the limited purpose of 'receiving funds'. Hanley was incorporated to be the party that transacted with the vendor, to achieve taxation advantages on the basis that the sale and purchase between them was genuine and effective and occurred offshore from Australia.

407 Furthermore, even if Hanley itself retained Freehills to prepare and send the Hanley agreement – as to which we do not find it necessary to decide – we consider the trial judge was correct in not regarding that fact alone as being sufficient to show that Hanley was carrying on business in Australia.

408 Finally, the observation that the commercial activities of Hanley were neither continuous, repetitive or systematic in Australia was an appropriate finding and, in our view, a proper consideration, in combination with others, upon which to base the conclusion.

409 Turning then to the question whether the conduct involved trade and

commerce between Australia and a place outside Australia, Sunland's written submission listed facts which it argued ought lead to the conclusion in its favour:

> (a) Reed was ordinarily resident in Victoria; (b) Reed and Prudentia carried on business in Victoria; (c) Reed made misrepresentations in telephone calls that he made, and emails that he sent, from Australia; (d) Joyce was an Australian citizen; (e) Joyce made misrepresentations by emailing Brown through Sunland's email server located on the Gold Coast; (f) Joyce's communications with Reed in order to carry out their joint purpose were largely, if not entirely, conducted with Reed in Australia; (g) Melbourne solicitors, Freehills acted on behalf of Prudentia and Hanley; (h) the Prudentia parties made misrepresentations through documents prepared by solicitors in Australia; (i) Sunland's head office was in Australia, and its board members approved entry into the impugned transaction, in Australia; and (j) most of the funds paid to Hanley were funds sent from Australia.

410 It is evident from the foregoing list that Sunland seeks to assimilate Hanley's conduct with that of Reed and Prudentia for the purpose of its argument. In truth the Hanley representations (and thus its conduct) were of more limited compass.

411 But, in any event, the task for the judge was to decide as a matter of *substance* where the trade and commerce was occurring. In the context of considering the 'trade and commerce' constitutional head of power, the High Court said in *W & A Macarthur Limited v Qld*:[312]

> But all the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State are also parts of the concept, because they are essential for accomplishing the acknowledged end. Commercial transactions are multiform, and each transaction that is said to be interstate must be *judged of by its substantial nature* in order to ascertain whether and how far it is or is not of the character predicated.[313]

412 Further, in *ACCC v Global Prepaid Communications*, Gyles J said:[314]

> The mere fact that parties to dealings are in different States or that an international party may be involved is not sufficient to establish the necessary connection. The conduct must take place in the course of interstate or international trade or commerce.

413 Each party sought to characterise the transaction by highlighting a list of

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312 (1920) 28 CLR 530.

313 Ibid 549 (our emphasis).

314 [2006] FCA 146 [50].

features designed to lead to the conclusion for which it contended. In our view, the character of the commercial activity in which the conduct of Hanley and Joyce occurred fell to be judged by its substantial nature and not simply by the enumeration of features, no matter how significant or insignificant, that bore a particular territorial connection. We are persuaded that the attributes upon which the trial judge relied demonstrated, as his Honour found, that the substantial nature of the trade and commerce in which the parties were engaged was trade and commerce *in* Dubai, not *between* Australia and Dubai.

414 Sunland also challenged his Honour's findings that the FTA also did not extend to the conduct of Hanley and Joyce. Sections 9, 12(b), 12(k) and 12(n) of that Act - each said to have been breached - proscribed the same or similar conduct as did ss 52, 53(aa) and 53(g) of the TPA. 'Trade or commerce' was not defined in the FTA in the same way as it was in the TPA; it merely provided that it included business not carried out for profit.

415 Section 6 of the FTA provided for its extraterritorial operation:

> **6. Extra-territorial application of this Act**
>
> (1) This Act applies within and outside Victoria.
>
> (2) This Act applies outside Victoria to the full extent of the extra-territorial legislative power of the Parliament.[315]

416 Essentially, Sunland relied upon the same factual arguments that it advanced with respect to the TPA to contend that his Honour was wrong in finding that the conduct of Hanley and Joyce lacked the requisite connection with Victoria. We agree

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315 The judge set out a version of the section which included sub-s (3), viz:

> (3) Without limiting sub-section (1) or (2), this Act applies to -
>
> (a) the engaging in conduct in Victoria by persons outside Victoria;
>
> (b) the engaging in conduct outside Victoria by persons in Victoria.

That subsection was not in operation in 2007, the time of the relevant conduct. No party took issue on this point. It is not evident that any consideration of those particular words featured in the trial judge's analysis or his conclusion. Even if it did we do not think such consideration would lead to a conclusion different from one reached by an analysis that ignored those words.

with his Honour that although the provisions of the FTA do not mirror those of the TPA in terms of extraterritorial operation, the factual findings made in determining the question under the TPA were highly pertinent in resolving the related issue under the FTA.[316] Indeed, as we have said, Sunland essentially repeated the same factual arguments it put forward in relation to the TPA provisions to support its position under the FTA.

417 We find no reason for arriving at any different conclusion, as a matter of substance, in respect of the judge's findings under the FTA as we did in respect of his conclusions under the TPA. Accordingly we reject Sunland's grounds of appeal concerning the judge's findings on the application of the two Acts to the conduct of Hanley and Joyce.

Conclusion on the substantive appeal

418 In the result, Sunland has failed to persuade us that the trial judge erred by dismissing its claims for damages against the respondents, whether for breach of the various statutory provisions or in deceit. It follows that the substantive appeal must be dismissed.

The Anti-Suit Injunction Appeal

419 In addition to pursuing its claims for misrepresentation and deceit at trial and on appeal in this Court, Sunland has also pursued what are in substance the same claims against Prudentia, Reed and Joyce in Dubai. Both proceedings arise out of the same factual matrix; both are based on misrepresentation and deceit; and both seek substantially the same relief. In this appeal, Sunland Group, the second appellant in the substantive appeal and sole appellant in this appeal,[317] appeals the decision of

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316 Reasons [413].

317 Both Sunland Waterfront (BVI) Ltd and Sunland Group Limited were parties to the applications for anti-suit injunctions made before Logan J and before the trial judge, though it is only Sunland Group Limited that is restrained by the anti-suit injunction. We continue to use 'Sunland' to refer to the relevant Sunland party or parties, as appropriate.

the trial judge granting an anti-suit injunction to restrain it from continuing proceedings against Prudentia, Reed and Joyce in Dubai.

Background

420 Sunland's claim was filed in the Federal Court on 10 August 2009 and was initially managed by Logan J, a judge of that court. On 3 November 2011, Logan J cross-vested the proceedings to the Supreme Court of Victoria pursuant to an application made by Joyce. The trial of the substantive proceedings commenced in the Supreme Court of Victoria on 29 November 2011.

421 On 16 July 2009, Reed (in absentia), Joyce and two other Australian citizens were charged with criminal offences under Dubai law arising from the transaction in relation to plot D17. Those charges proceeded in the Dubai Court of First Instance as penal proceedings 2130/2009 ('Dubai penal proceedings'). In those proceedings it was alleged, inter alia, that Reed and Joyce defrauded Sunland by falsely representing that they had a right to acquire plot D17.

The proceedings in Dubai

422 After the commencement of the Dubai penal proceedings, Sunland filed a 'civil right' claim in Dubai against Reed and Joyce and others, and subsequently applied to join Prudentia to that claim. The claim was filed in August 2009 and the relevant court fees paid in November 2009.

423 This kind of claim attaches to, and is heard in conjunction with, a penal proceeding. The claim was filed pursuant to art 22 of the UAE Criminal Procedure Code, issued under Federal Law No. 35 of 1992, which provides:

> [w]hoever sustained a direct personal prejudice from the crime is entitled to claim from the accused his civil rights during the gathering of evidence, proceeding with the investigation or before the court examining the criminal case, at any stage of the trial up to the close of oral pleadings.

424 Also relevant is art 269 of the UAE Criminal Procedure Code, which provides

that:

> the conclusive criminal judgment rendered on the merits of a criminal action declaring innocence or guilt has res judicata and is binding on the civil courts in matters not yet settled by a conclusive judgement.

425 In the first of two applications brought by the respondents seeking anti-suit injunctions to prevent Sunland from bringing its claim in Dubai, Logan J heard expert evidence on how civil right claims are heard and determined. His Honour held that:

> Strictly, a person who makes a civil right claim pursuant to Art 22 in a criminal proceeding is entitled actively to participate in that proceeding only in relation to that civil [right] claim. However, in practice, the distinction between the civil right claim and the criminal charge in the proceeding is often unclear such that a civil right claimant may be permitted, by the judge, to ask questions at the criminal trial and to liaise with and supply material to the public prosecutor. If there is a finding of guilt the judge can enter a finding as to interim compensation and then refer the civil right claim to the civil courts for final determination. Alternatively, the judge in the criminal proceeding could simply dismiss the civil right claim if the judge considers that course to be appropriate.[318]

426 In his reasons for granting the anti-suit injunction, the trial judge in the Supreme Court drew on Logan J's discussion of the nature and procedural aspects of the civil right claim.[319] In addition, his Honour examined the expert evidence on the application of UAE law filed in the application before Logan J and also the evidence of Diana Hamade, an expert retained by Sunland, filed in the proceedings before the trial judge. His Honour accepted the evidence of Abdulraham Juma, an expert retained by Sunland, that in determining a civil right claim, the criminal court may itself make an award of damages for all or part of the amount claimed, or may refer the assessment of the quantum of the civil right claim to the civil courts.[320] His Honour concluded that:

> Consequently, it does seem a fair generalisation in relation to the Dubai proceedings that a civil claim made in the circumstances of the present Dubai proceedings will, in effect, rely on the fact-finding in the criminal

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318 *Sunland Waterfront (BVI) Ltd & Anor v Prudentia Investments Pty Ltd & Ors (No 2)* [2010] FCA 312 [12] ('Federal Court Reasons').

319 Anti-suit Reasons [7].

320 Ibid [28].

> proceedings. In spite of some of the expert evidence before the Federal Court suggesting that Sunland would be constrained in its ability to participate in the criminal proceedings, this is contrary to evidence heard during the trial of this matter, which indicates that Sunland has the ability, and has, taken a more than merely passive role.[321]

The Dubai World proceeding

427 On 15 June 2010, approximately 10 months after proceedings were commenced in the Federal Court, Dubai World (the government-owned parent company of Nakheel and DWF) filed its own civil right claim in the Dubai penal proceedings against Sunland and various other parties including the respondents in this appeal. Dubai World claimed damages of AED 151,600,000.

The applications for injunctive relief

428 In December 2009, Reed and Prudentia applied to Logan J to restrain Sunland from pursuing its civil right claim in the Dubai penal proceedings. On 31 March 2010, Logan J dismissed the application.[322] It was conceded before Logan J that the mere fact that there was duplication of proceedings was insufficient to warrant granting the relief sought.[323] Critically, his Honour held that Sunland had a legitimate interest in pursuing its claim in Dubai:

> That there may be forensic advantages in terms of law and practice in Dubai in the making of the civil right claim emerges from the expert evidence. The Sunland parties may well benefit from the amalgam of their own resources and those of the public authorities in Dubai in demonstrating that Mr Reed has committed fraud there.
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> ...
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> All in all, the civil right claim in Dubai is "an obvious step to take in the circumstances" for the Sunland parties to protect their interests.[324]

429 On 13 and 14 December 2010, at the conclusion of the plaintiffs' evidence in

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321 Ibid [28], referring to the cross examination of Soheil Abedian.

322 Federal Court Reasons.

323 Ibid [23].

324 Ibid [32] and [40].

the trial of the substantive proceedings in the Supreme Court, Prudentia, and separately Reed and Joyce, made further applications to prevent Sunland from pursuing its claim in Dubai. These applications were heard on 19 December 2011 and judgment was delivered on 25 January 2012.

430 The trial judge held that 'there is no suggestion that complete relief against the applicants is not available to Sunland in these "local" proceedings'[325] and held that Sunland did not have a legitimate interest in pursuing its claim in Dubai.[326] His Honour further held that in the absence of such an interest, commencing proceedings in the Supreme Court and pursuing them to near completion amounted to an election to pursue its claim in Australia rather than in Dubai.[327] His Honour concluded that 'in all the circumstances there is nothing to balance the vexation and oppression arising from the maintenance of the foreign proceedings.'[328]

431 On 27 January 2012 the trial judge granted the injunction, ordering that Sunland Group not:

1. prosecute the civil claim for compensation or civil remedy commenced by notice filed by the Second Plaintiff in Dubai criminal proceeding number 2130/2009 against the Third Defendant (civil proceeding);

2. press its application to join the First Defendant in the proceeding as a defendant in the civil proceeding; and

3. commence or take any step in relation to any other civil proceeding or proceedings against the First, Second or Third Defendants arising out of or in relation to the matters pleaded in the second further amended statement of claim filed in the proceeding herein and sought against the First to Third Defendants in this proceeding.

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325 Anti-suit Reasons [25].

326 Ibid [29]-[36].

327 Ibid [17].

328 Ibid [54].

432 On 31 January 2012, Sunland withdrew its civil right claim.

Grounds of appeal

433 The appeal against the decision granting the injunction was heard together with the appeal against the substantive judgment of the trial judge.

434 Sunland's notice of appeal lists 24 grounds of appeal. In its written submissions, Sunland submitted that the appeal should be allowed and the injunction dissolved for six reasons:

1. It is not prima facie vexatious or oppressive for a plaintiff to bring two sets of proceedings in respect of the same controversy in different countries;

2. The onus is on the applicant for an anti-suit injunction to show that there is vexation in point of fact;

3. There was no evidence to support a finding that Sunland had 'elected' to pursue its proceedings in Australia to the exclusion of Dubai;

4. There was no evidence to support a finding that Joyce, Reed and Prudentia were subject to oppression or vexation;

5. The finding that Sunland had no legitimate juridical advantage and no sensible commercial purpose in bringing its claim in Dubai was wrong; and

6. Sunland's claim in Dubai did not undermine the integrity of the processes of the Supreme Court of Victoria.

435 As well as relying on its written submissions, counsel for Sunland submitted that this was not an appropriate case in which to order an injunction for the reasons set out in the judgment of Logan J.

436 It may be noted that Sunland did not challenge the finding of Logan J that 'the substratum of facts in respect of the proceedings in this Court, the criminal proceedings in Dubai and the civil right claim in those proceedings are substantially the same.'[329] Nor did Sunland join issue with the trial judge's finding that there is no suggestion that complete relief against the respondents is not available to Sunland in these 'local' proceedings.[330]

437 For completeness we note that in terms of potential legal remedies this remained true despite the subsequent finding of lack of jurisdiction in respect of the misleading and deceptive conduct claims against Joyce and Hanley.[331] If the facts alleged by it were made out then Sunland was entitled to succeed in its claims for deceit. Both the claims in this Court and the criminal proceedings in Dubai involved allegations that the respondents knowingly deceived Sunland by way of false misrepresentations.

Applicable principles

438 The authorities regarding the granting of anti-suit injunctions are well established and are discussed in detail in the reasons of the trial judge. The primary Australian authority is the High Court's decision in *CSR Ltd v Cigna Insurance Australia Ltd.*[332] In that case, the majority[333] identified two broad bases upon which the court may grant an anti-suit injunction.

439 The first is grounded in the court's inherent power to prevent its processes being abused and the correlative power to protect the integrity of those processes once set in motion.[334] The second is grounded in the court's equitable jurisdiction to make orders in restraint of unconscionable conduct or the unconscientious exercise

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329 Federal Court Reasons [10].

330 Anti-suit Reasons [25].

331 See [417] above.

332 (1997) 189 CLR 345 ('CSR').

333 Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

334 (1997) 189 CLR 345, 391.

of legal rights. The majority in *CSR* held:

> One well established category of case in which an injunction may be granted in the exercise of equitable jurisdiction is that involving proceedings in another court, including in a foreign court, which are, according to the principles of equity, vexatious or oppressive. Thus, it was said in *Carron Iron Company v Maclaren* that '[w]here [there is] ... pending a litigation here, in which complete relief may be had, [and] a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings.'[335]

440 The majority cited with approval the statement of Robert Goff LJ in *Bank of Tokyo Ltd v Karoon*[336] that 'foreign proceedings are to be viewed as vexatious or oppressive only if there is nothing which can be gained by them over and above what may be gained in local proceedings'[337] and agreed that 'they are vexatious or oppressive if there is a complete correspondence between the proceedings or, in terms used in *Carron Iron Company*, if "complete relief" is available in the local proceedings.'[338]

441 In England, the principles upon which anti-suit injunctions are now granted were authoritatively stated by the Privy Council in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak*.[339] The leading speech was given by Lord Goff who set out the following test:

> In the opinion of their Lordships, in a case such as the present where remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei Court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei Court must conclude that it provides the natural forum for the trial of the action; and further, since the Court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the Court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to

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335 (1997) 189 CLR 345, 393.

336 [1987] AC 45.

337 (1997) 189 CLR 345, 393.

338 Ibid 393-394.

339 [1987] AC 871 ('Aerospatiale').

deprive him.[340]

442 As the learned authors of *Nygh's Conflict of Laws in Australia*[341] observe, the proposition set out in *CSR* that foreign proceedings are to be viewed as vexatious or oppressive *only* if there is nothing which can be gained by them over and above what may be gained in the local proceedings is framed in absolute terms, which is surprising given that the power to grant injunctions in respect of foreign proceedings which are vexatious or oppressive derives from equity. In our view, it would not be appropriate to interpret this statement of the court as laying down a strict rule; rather, as the majority affirms later in *CSR*, the limits of the jurisdiction are determined by the dictates of equity and good conscience.[342] This requires that both the injustice to the respondents if Sunland is allowed to pursue the foreign proceedings, and the injustice to Sunland if it is not allowed to do so, be taken into account.

Prima facie oppression and vexation

443 In the trial judge's discussion of the nature of the vexatiousness or oppressiveness of parallel proceedings[343] his Honour drew on the High Court's decision in *Henry v Henry*.[344] This was not an anti-suit injunction case, but rather a case where parallel divorce proceedings had been commenced in Monaco and Australia and the wife applied to have the Australian proceedings stayed on grounds which included *forum non conveniens*. In that case, the majority held that:

> It is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue. And although there are cases in which it has been held that it is not prima facie vexatious, in the strict sense of that word, to bring proceedings in different countries, the problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction with respect to the

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340 Ibid 896.

341 (2010, 8th ed), 198.

342 (1997) 189 CLR 345, 394.

343 See Anti-suit Reasons [16]-[17].

344 (1996) 185 CLR 571 ('Henry').

matter are such, in our view, that, prima facie, the continuation of one or the other should be seen as vexatious or oppressive within the *Voth* sense of those words.[345]

444 The trial judge, after setting out this passage from *Henry*, observed that:

> On a more general level, it [*Henry*] affirms the notion that *prima facie* to have two proceedings in respect of the same controversy in different countries is vexatious and oppressive and that the court should do what it can to avoid that situation, for all the reasons to which reference has been made.[346]

445 Sunland submits that the trial judge erred in holding that it was prima facie vexatious or oppressive for a party to bring two proceedings in respect of the same controversy in different countries. It submits that the majority judgment in *Henry*, which predates the High Court's decision in *CSR*, is distinguishable and is not authority for the proposition put forward by the trial judge.

446 In our view, these submissions are based on a misreading of his Honour's reasons.

447 When read in isolation, the trial judge's statement suggests that his Honour held that the existence of two sets of proceedings in respect of the same controversy was sufficient, prima facie, to constitute vexation or oppression. However, consideration of his Honour's reasons as a whole shows that this is not case.

448 The trial judge accepted that, inter alia, the following principles can be derived from *CSR*:

> ...
>
> (iv) foreign proceedings are to be regarded as vexatious and oppressive if, and perhaps only if, there is nothing which can be gained by a party conducting those proceedings over and above that which that party may gain in conducting local proceedings;
>
> (v) the mere coincident or co-existence of proceedings in different countries is not, of itself, vexation or oppression;[347]

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345 Ibid 590-1 (Dawson, Gaudron, McHugh and Gummow JJ).

346 Anti-suit Reasons [17].

347 Anti-suit Reasons [14]

449 In addition, the trial judge cited the decision of Finklestein J in *TS Production LLC v Drew Pictures Pty Ltd*[348] as authority for the proposition that 'the existence of simultaneous proceedings does not, of itself, establish that an action is vexatious.'[349]

450 Furthermore, his Honour stated:

> First, it was submitted that it is vexatious and oppressive, as a starting point, for a plaintiff to maintain two civil proceedings seeking the same relief in two jurisdictions. This position is sufficient to establish vexation and oppression on a *prima facie* basis, thus shifting the onus to the party maintaining the proceedings to justify its position. It was common ground that mere co-incidence of proceedings in different countries is not, of itself, vexatious or oppressive.[350]

451 These passages from his Honour's reasons are inconsistent with the view that the mere existence of parallel proceedings in respect of the same controversy in different countries is prima facie vexatious and oppressive. Rather, they make clear that the existence of two sets of proceedings would be prima facie vexatious or oppressive only in circumstances where both proceedings seek the same relief.

452 In his discussion of *Henry*, his Honour accepted that the power to stay proceedings and the power to grant an anti-suit injunction are governed by separate considerations, though they are related and draw on similar concepts. The trial judge was careful to distinguish *Henry* on its facts.[351]

453 His Honour observed:

> At the outset of its consideration of the authorities, the High Court emphasised the distinction between the power of a court to stay proceedings and the power to grant anti-suit injunctions, noting, nevertheless, that in some cases the power to stay a court's own proceedings includes, as an aspect of that power, the power to grant an anti-suit injunction.[352]

454 Although the decision to refuse to stay local proceedings and the decision to

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348 (2008) 172 FCR 433 ('TS Production').

349 Anti-suit Reasons [21].

350 Ibid [39] (citations omitted).

351 Ibid [16].

352 Ibid [8] citing *CSR* (1997) 189 CLR 345, 390.

injunct foreign proceedings fall to be determined on the basis of discrete factors,[353] the concepts of vexation and oppression are the touchstone of both. As the first and second respondents submit, it would be erroneous to argue that these concepts carry different meanings in these different contexts.

455 In our view, it was clearly open to his Honour to view the High Court's observations in *Henry* as informative of the concepts of oppression and vexation in the context of anti-suit injunctions. In light of the passages in the trial judge's reasons already referred to, Sunland's submission cannot be maintained. Rather, consistently with the High Court authority in *Henry* and *CSR* to which his Honour referred, his Honour held that proceedings would be prima facie vexatious or oppressive if a party sought the same relief in both proceedings.

456 There is no error in the trial judge's reasoning on this ground.

Onus and evidence required to establish oppression and vexation

457 The trial judge accepted that the onus is on the party seeking injunctive relief to establish prima facie vexation or oppression in terms of there being nothing to be gained by the party pursuing the foreign proceedings.[354] It is then for the party resisting such relief to establish that there is some juridical advantage to be gained or legitimate interest in bringing and pursuing the foreign proceeding.[355]

458 Sunland, relying on Finkelstein J's judgment in *TS Production*, submits that the onus is on the applicant to 'shew that there is vexation in point of fact.'[356] Sunland further submits that the respondents have failed to discharge the onus upon them since there was no evidence that Joyce had been put to any additional cost, expense or harassment beyond that involved in defending the criminal charges brought

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353 See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; cf *CSR* (1997) 189 CLR 345.

354 Anti-suit Reasons [14] n 17.

355 Ibid, citing *TS Production* (2008) 172 FCR 433, 443 (Finkelstein J); 448 (Gordon J); see also, *Bank of Tokyo v Karoon* [1987] AC 45, 60 (Goff LJ); Federal Court Reasons [26] (Logan J).

356 Ibid [8].

against him by the Dubai prosecutor. It submits that neither Reed nor Prudentia, having chosen not to appear in the Dubai penal proceedings, can be vexed by proceedings in which they not participating.[357]

459 It is true that existence of simultaneous proceedings alone does not establish vexation and oppression. Something more is needed. The passage from of Finkelstein J's reasons upon which Sunland relies states that the applicant must 'shew that there is vexation in point of fact that is to say, *that there is no necessity for harassing the Defendant by double litigation*'.[358]

460 Justice Gordon (with whom Stone J agreed) in her reasons in *TS Production*, also discussed what, in addition to the mere co-existence of proceedings, was required to constitute vexation or oppression. Her Honour observed:

> In this case, the only "something more" to which the appellant could point to was the inefficiency and additional cost that would be incurred if both proceedings were allowed to go ahead. The presiding judge appears to have accepted this submission (see reasons of Finkelstein J at [35]-[37]); however, I cannot. It is not enough to observe that prosecution of the two proceedings may be, even would be, burdensome. The references to "unjustified" and "unfairly" are important. When it is understood that the rights and relief in issue in the two proceedings are different, and that "something ... can be gained by [the foreign proceedings] over and above what may be gained" in this Court, it is not arguable that it is either unjustified or unfair to maintain claims based on the US rights in the Illinois proceedings simultaneously with claims based on the Australian rights in the Federal Court.[359]

461 These passages support the view that the focus of the inquiry as to whether proceedings are vexatious or oppressive is not primarily on the additional expense and cost to the defendant, but rather on whether the bringing of a second proceeding in respect of the same controversy is unnecessary, 'unjustified' or 'unfair'. The authorities indicate that what is to be established in evidence is not primarily that the duplication of proceedings will lead to additional cost, expense, or harassment, but rather that there is nothing to be gained from the parallel proceeding; alternatively,

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357 Sunland Group's Outline of Submissions [10].

358 *TS Production* (2008) 172 FCR 433, 443 (emphasis added), citing *Peruvian Guano Company v Bockwold* (1883) 23 Ch D 225, 232.

359 *TS Production* (2008) 172 FCR 433, 448.

that complete relief is available in a single proceeding. If there is a legitimate advantage that can be gained, the fact that the defendant will suffer additional cost and harassment is easily outweighed.[360] The authorities show that what is required is not a straightforward balancing exercise that weighs the cost and harassment incurred by an applicant (and presumably their ability to bear that cost and harassment) against the advantage gained by the party bringing the proceeding. Rather, as follows from the majority's reasoning in *CSR*, the balance is skewed heavily in favour of allowing a party to proceed when there is something substantial that may be gained in the foreign proceedings and is skewed heavily against so allowing when there is not.[361]

462 In our view, his Honour was correct in holding that once the applicant has established that a party is seeking to maintain two proceedings that seek substantially the same relief in two jurisdictions, the onus shifts to that party to show that maintaining the two proceedings is justified.[362]

463 The fact that there was no evidence that Joyce will be subject to extra expense and harassment given that he will defend himself in the Dubai penal proceedings in any event, and the fact that Reed and Prudentia have elected not to participate in the Dubai penal proceedings, does not preclude a finding that Sunland's pursuit of its claim in Dubai is vexatious or oppressive.

464 As was submitted before the trial judge, it is an important principle of civil litigation that once parties have had their contest they are generally entitled to

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360 See eg *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch. D. 225, 230: 'It may be put, as regards this case, shortly in this way: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? It is very unpleasant, no doubt, to be sued twice — it is unpleasant to many people to be sued once — but still that does not make it vexatious where the plaintiff seeks to get a real substantial advantage.' (Jessel MR)

361 Ibid. See also, *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* [1996] FCA 1199 [120]: 'In no case of which I am aware has the burden of effort and cost alone been found to constitute vexation and oppression.' (Lindgren J)

362 See *TS Production* (2008) 172 FCR 433, 443; see also Dicey & Morris, *Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) 589.

assume that that is the end of the matter. Certainty is essential. This is supported by the principles that underpin *Anshun* estoppel[363] and *res judicata*. To deprive a party of this finality, without justification, will typically be sufficient to constitute oppression or vexation. Such oppression or vexation may be found in the extra cost and inconvenience, even harassment incurred by the duplication of proceedings, but may also be found if the additional proceeding undermines, without justification, the value of the cost and effort expended in the original proceeding by denying the defendant the opportunity to finally resolve the issues in dispute.

465 In our view, his Honour did not err in finding that it was prima facie vexatious or oppressive for Sunland to pursue its civil right claim notwithstanding that evidence of extra cost and harassment was not put before his Honour.

Election

466 The trial judge held:

> Sunland has not only commenced the present proceedings in Australia, but has pursued them to completion short of closing submissions, as indicated previously. As discussed further, below, the first, third and fourth defendants submit that this amounts to an election on Sunland's part to pursue proceedings in relation to the same subject matter in Australia, rather than Dubai. In the absence of some juridical or other advantage or "legitimate interest" for or in taking and pursuing the Dubai civil proceedings, as I have found and discussed below, I accept that Sunland has made such an election.[364]

467 The trial judge cited Lord Browne-Wilkinson VC, sitting in the Chancery Division in *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd*,[365] as authority for the proposition that where a plaintiff seeks to pursue the same defendant in two jurisdictions in relation to the same subject matter, 'the plaintiff is required to elect which set of proceedings it wishes to pursue'.[366]

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363 See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

364 Anti-suit Reasons [17].

365 [1989] 3 All ER 65, 69-70.

366 Ibid 70.

468 It is clear that if a party has made an election as to the forum in which they will proceed, equity may intervene to prevent them pursuing proceedings in relation to the same subject matter in another. In *CSR*, the majority held:

> Thus, for example, it may be that the bringing of proceedings with respect to one claim is properly to be seen, in the circumstances of the case, as an election either not to proceed on another claim or not to proceed in another jurisdiction, thus giving rise to an estoppel by conduct such that it would be unconscionable for that other claim to be pursued or for proceedings to be commenced in another jurisdiction. In cases of that kind an injunction may issue in restraint of the subsequent proceedings.[367]

469 In *Aerospatiale*, Lord Goff held:

> Another important category of case in which injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed.[368]

470 Whilst an injunction may issue to prevent a party who has elected in which jurisdiction they will proceed from proceeding in another, it is important to bear in mind that the question of whether a plaintiff is required to make an election depends on the prior question of whether the plaintiff gains a legitimate juridical advantage by persisting with parallel proceedings. We accept the submission of Sunland that if there is such an advantage, no scope for an election arises.

471 We are not persuaded that it was open to the trial judge to find that, prior to 25 January 2011 (when judgment granting the anti-suit injunction was delivered), Sunland had made, or been compelled to make, an election. Though an application had been made in the Federal Court to injunct the Dubai proceedings, that application was refused on the basis that Sunland had a legitimate interest in pursuing its claims in both Australia and in Dubai. By making the application for an injunction in the Federal Court, it may be said that the applicants asked the Court to compel Sunland to elect the jurisdiction in which it would proceed. By holding that Sunland gained a legitimate juridical advantage by pursuing its claim in both

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367 (1997) 189 CLR 345, 394.

368 [1987] AC 871, 893.

jurisdictions, Logan J found that it was not required to make such an election. The fact that Sunland continued to pursue the Australian proceedings does not, without more, provide a basis for departing from the position determined by the Logan J that it was permissible for Sunland to pursue its claim in both jurisdictions. The observation in *CSR* suggests that the circumstances of the case may give rise to an estoppel by conduct such that it would be unconscionable to maintain a second proceeding. Given that Logan J dismissed the application, it could not be said, prior to the trial judge delivering the Anti-suit Reasons, that it was unconscionable for Sunland to maintain its claim on the basis that circumstances required it to make an election.

472 Nor, in our view, can it be said that circumstances after the trial judge delivered the Anti-suit Reasons required Sunland to make an election. The anti-suit injunction expressly prohibited Sunland from proceeding in Dubai, meaning that while the injunction was in force, Australia was the only jurisdiction in which it could proceed with its claim. Whilst Sunland could have abandoned its Victorian proceeding in favour of proceeding in Dubai at any time prior to and arguably after the issue of the injunction, but chose not to do so, the respondents' submission that Sunland's closing of its case and taking judgment in Victoria can be viewed as nothing less than an election overstates the case. It is, however, unnecessary for us to decide whether Sunland's conduct amounts to an election to proceed in Victoria to the exclusion of Dubai to dispose of the appeal.

No legitimate juridical advantage

473 Sunland submits it will obtain the following juridical advantages by proceeding in Dubai:

1. The benefit of obtaining a judgment enforceable in places where an Australian judgment is not enforceable;

2. The Dubai Court has documentary evidence and witness testimony

available to it that was not available to the Supreme Court of Victoria at trial;

3. Sunland could obtain what Logan J described as 'inchoate benefits', including advantages for its reputation in Dubai, from bringing proceedings in Dubai; and

4. Sunland is itself a defendant to a civil right claim brought in the Dubai penal proceedings by Dubai World, the government owned parent company of Nakheel and Dubai Waterfront, for whom Joyce worked and from whom Sunland purchased plot D17.

474 The first three of these juridical advantages, Sunland submits, demonstrate that Sunland could not obtain complete relief in the Supreme Court of Victoria.

Benefit of obtaining a UAE judgment

475 The trial judge held that whilst it was common ground that an Australian judgment would not be enforceable in the UAE, the fact that the evidence indicated that neither Prudentia, Reed nor Joyce had any assets in the UAE meant there was no sensible commercial purpose in continuing proceedings against them in Dubai.[369] On this basis, his Honour found that Sunland gained no juridical advantage from, and had no legitimate interest in, obtaining such a judgment.[370]

476 In the absence of any assets in the UAE (or it appears in any of the jurisdictions which such a judgment could reach) any benefit that such a judgment could confer would be insubstantial. Though Sunland submits that this may change if assets are brought into the jurisdiction, we agree with the trial judge that this submission is entirely speculative. Beyond stating that a UAE judgment would enable it to recover in the event that assets were brought into a jurisdiction in which a UAE judgment may be enforced, Sunland did not, in its submissions, articulate

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369 Anti-suit Reasons [29].

370 Ibid.

what the advantage to it consists in.

477 In our view, given the absence of any assets against which such a judgment may be enforced and the consequent lack of any practical advantage to Sunland, this advantage is of little weight.

Evidence available to the Dubai Court

478 Sunland notes that the respondents did not dispute that the Dubai Court has received evidence obtained from search warrants executed in Dubai and from police interviews in Dubai, including interviews with Joyce. In addition, it submits that because Joyce and Reed both chose not to give evidence at trial and thus avoided exposing themselves to cross examination, further evidence may be available to it in the Dubai proceedings.

479 Justice Logan, in determining the application in the Federal Court, held that:

> The Sunland parties may well benefit from the amalgam of their own resources and those of the public authorities in Dubai in demonstrating that Mr Reed has committed fraud there. If so, a guilty verdict will, at the very least, be of singular advantage in terms of assisting their establishing liability in their civil right claim. That advantage will be retained even if, as appears likely, the criminal court were, in the event of a finding of guilt, to decide, given the quantum of the claim, to refer it to a civil court.
>
> Any such advantage would be lost in the event that a restraining order is made and it transpires that the Dubai criminal proceeding is completed before this proceeding is concluded.[371]

480 However, notwithstanding this, the trial judge held that any procedural or evidentiary advantage that may flow from proceeding in Dubai 'is illusory and valueless where the defendants have no assets in the jurisdiction of the court in which the litigation is being conducted or otherwise within reach of its judgments.'[372] To reiterate, Reed deposed that neither he nor Prudentia had any assets in the UAE. Joyce's lawyer deposed that Joyce had approximately AED 103,000 worth of assets in the UAE. More recently Joyce's lawyer deposed that

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371 Federal Court Reasons [32]-[33].

372 Anti-suit Reasons [36].

Joyce and his wife had approximately AED 65,594 worth of assets in the UAE.

481 We agree with the trial judge's reasoning. Given our view that obtaining a UAE judgment does not, in the circumstances, constitute any substantial advantage, the availability of further evidence to the Dubai Court does not constitute such advantage.

Other inchoate benefits

482 Justice Logan held that:

> There may well be inchoate benefits for the Sunland parties, in the UAE, from being seen there to have instituted a civil right claim against, materially, Mr Reed and to be seen actively to be participating in the criminal proceeding in cooperation with the public authorities.[373]

483 The trial judge held that:

> In my opinion the "inchoate benefits" referred to by Logan J are, at best, somewhat nebulous, not relevant and, in any event, of insignificant weight in the present circumstances where the trial in this Court is substantially completed and, consequently, in the face of the type of oppression and vexation identified in the authorities to which reference has been made against which a court ought properly intervene to enjoin pursuit of the foreign proceedings and thereby protect its own processes.[374]

484 For present purposes Sunland bore the onus of establishing that civil proceedings in Dubai would somehow advance its reputation in a way or ways that resolution of the Dubai criminal proceedings would not. Whilst it is feasible that Sunland will gain advantages from continuing with its proceedings in Dubai, including benefits to its reputation, any such advantage is insubstantial and speculative. No evidence was led that substantiated these benefits. Further, were benefits of this kind found to constitute legitimate juridical advantages, this would provide a basis for bringing multiple proceedings seeking the same relief in any jurisdiction in which a company had a reputation it considered would be enhanced by the bringing of proceedings. The Court was not taken to any authority

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373 Federal Court Reasons [39].

374 Anti-suit Reasons [35].

supporting such a position.

485 We agree with the trial judge that these inchoate benefits are of insignificant weight.

Defending the Dubai World proceedings

486 The trial judge considered the evidence given by Ms Hamade that Sunland could not fully defend itself against the civil right claim of Dubai World without, at the same time, pursuing its own civil right claim.[375] Ms Hamade's evidence was that in defending itself against Dubai World's civil right claim, Sunland could do one of three things:

1. Sunland could avoid liability by showing the court that one or more of the other defendants caused all of the damage to Dubai World, and that Sunland was not responsible for any of the damage.

2. Sunland can ask the court to divide the liability between the defendants, with each defendant paying a share that is fair, depending on how much of Dubai World's damage they are responsible for.

3. If the court finds that Sunland and the defendants are each liable to Dubai World for all Dubai World's damage, Sunland can ask the court to allow Sunland to recover some of the money that Sunland has to pay to Dubai World from the other defendants, depending on how much of the damage those other defendants are responsible for.

487 Ms Hamade opined that if Sunland did not pursue its own civil right claim, it could not ask the Dubai court to make any order allowing it to recover money it may be ordered to pay to Dubai World from another defendant.[376]

488 The trial judge was critical of aspects of the evidence of Ms Hamade. In particular, it appears that she only had access to a translation of the first two pages of the Dubai World claim.[377] His Honour held:

> In this respect Mr Rush QC submitted that Ms Hamade has offered an opinion without seeing the entirety of the translation of the document and has left unexplained the inclusion of entities that are not defendants in the civil

375 See ibid [44]-[46].

376 Ibid [28].

377 See Anti-suit Reasons [47].

> proceeding. In my view the latter omission tends to detract from her opinion on Dubai criminal and civil procedure in favour of the opinions of others, particularly Mr Juma, because only the provision of a complete English translation would provide an essential factual base for the Court to consider itself and thus be in a position to properly assess her opinion evidence.[378]

489 The trial judge did not accept that Ms Hamade's evidence supported the claim that Sunland could not defend itself against Dubai World or would be prevented from seeking contribution against parties other than Joyce and Reed if it did not pursue its own civil right claim. The trial judge held that:

> Ms Hamade's evidence does not indicate that Sunland would, if the relief sought by Reed and Joyce were granted, be inhibited from defending its position in the Dubai World proceedings or that it would be precluded from seeking indemnity or contribution from defendants in those proceedings other than Reed or Joyce. Any suggestion that Sunland would be prejudiced as a result of the inhibition from seeking indemnity or contribution from Prudentia, Reed or Joyce is, in my view, without foundation as any such claim or claims are of no value in Dubai proceedings in the absence of any assets of Prudentia, Reed or Joyce in that jurisdiction or those in reach of its judgments, for the reasons already indicated.[379]

490 This Court was not referred to any authority in support of the proposition that the possibility of improving one's prospects of successfully defending a claim by a party can constitute a legitimate advantage for the purposes of pursuing a separate claim against a different set of parties. Even assuming this did constitute a legitimate juridical advantage, we are not persuaded that Sunland has established that pursuing their civil right claim was necessary for them to adequately defend themselves against the Dubai World proceeding.

491 The evidence of Mr Juma was that a civil right claim cannot be issued against a person who is not an accused in the primary criminal proceedings. It does not appear that Sunland is an accused in the Dubai penal proceedings. In these circumstances, it appears Dubai World's claim against Sunland is unsustainable.

492 It follows that we find that the trial judge did not err in finding that Sunland will not gain a legitimate juridical advantage by pursuing its civil right claim in

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378 Ibid.

379 Ibid [46].

Dubai. In our view, the juridical advantages contended for are insubstantial and of little significance; in the circumstances, it would not be unjust, if it came to it, for Sunland to be deprived of them.

Sunland's claim in Dubai undermines the processes of this Court

493 Before the trial judge, and on appeal, it was submitted that the injunction should also be maintained on the basis that it is necessary for the Court to protect the integrity of its own processes. It was submitted that this consideration was particularly significant in this case as it was one that involved Australian companies and Australian citizens.[380]

494 The trial judge held that the fact that Sunland had closed its case in the Supreme Court meant that the issues arising at the time of the application before the trial judge were different to those before Logan J. The trial judge held:

> The present situation is now significantly different from that confronting Logan J as the Australian proceedings are well advanced and the Sunland case closed pending closing submissions as the final step in the trial. In these circumstances, I am of the opinion that the overriding considerations now relevant to the application are considerations of vexation and oppression flowing from the foreign proceedings and the effect of those proceedings on the integrity of the processes of this Court - including res judicata, issue estoppel and the like, matters to which reference is made below.[381]

495 It was submitted on appeal that allowing Sunland to pursue its proceeding in Dubai, having now received a judgment of the Trial Division, is an abuse of the Court's process and that to allow Sunland to re-litigate these claims in another forum would undermine the decision of the trial judge.

496 In support of this submission, Prudentia and Reed relied on *Beckkett Pte Ltd v Deutsche Bank AG*.[382] In that case, Beckkett, a Singaporean company, commenced proceedings against Deutsche Bank in Singapore in respect of a loan provided to it

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380 Anti-suit Reasons [42].

381 Ibid [31].

382 [2010] SGCA 50.

by Deutsche Bank. The trial judge awarded nominal damages against the bank. Beckkett appealed to the Court of Appeal and also commenced proceedings in Indonesia in relation to the same issues in dispute in the Singapore proceedings. The Singapore Court of Appeal issued an injunction to restrain Beckkett from proceeding in Indonesia.

497 The Court held that Beckkett's commencement and pursuit of the Indonesian action 'amounted to an attempt to undermine the judgment of Kan J who had already decided the dispute between Beckkett and DB [Deutsche Bank] on the merits.'[383]

498 Counsel for Reed and Prudentia submitted that this was the only known authority where an injunction was issued consequent upon a judgment being obtained. It was acknowledged that the present circumstances are distinguishable since the Dubai proceedings were issued well before the conclusion of the trial. Nevertheless, counsel submitted that the fact that there is now a judgment in the proceeding means that the matter ceases to be one that involves only the competing interests of the parties but also involves a public interest in ensuring that the Court's processes are not abused.[384]

499 We accept that submission. In our view, *Anshun* estoppel and *res judicata* are principles upon which the respondents should be entitled to rely. These principles would be undermined if Sunland were permitted to relitigate its claim in another jurisdiction. The decision to grant the injunction may also be upheld on the basis that it is necessary to protect the integrity of the processes of this Court.

Other grounds of appeal

500 In addition to the grounds already considered, Sunland's Notice of Appeal asserted that the trial judge failed to give sufficient weight to the issue of comity and

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383 Ibid [22].

384 See ibid [19].

the need to exercise the power to grant an anti suit injunction with caution. In addition, it asserts that the trial judge erred in failing to conclude that it was premature to consider the grant of an anti-suit injunction until the outcome of the Dubai penal proceedings were known.

501 In our view, no error is disclosed in the trial judge's consideration of comity. Quite properly, there was no suggestion in his Honour's reasoning of any lack of confidence in the Dubai Court's ability to do justice between the parties. His Honour observed that the authorities emphasised that a degree of caution is required of a court in relation to the exercise of the power to grant an anti-suit injunction.[385] However, he concluded that:

> Finally, it was submitted on behalf of Reed and Joyce that the caution which authorities indicate should be applied by a court considering an application for an anti-suit injunction and the importance of comity are relevant but, in the present circumstances, are overwhelmed by the circumstance of vexation and oppression involved in the maintenance of the civil proceedings in Dubai by Sunland and its consequent undermining of the integrity of the processes of this court. In my view this is correct and, further, comity issues do not weigh heavily given the issues of vexation and oppression arising from the maintenance of the foreign proceedings, as discussed and because the effect of the grant of the relief sought in the Dubai civil proceedings will be minimised, going only to an aspect of the part played by one of many parties, Sunland, and then only with respect to its claim or claims.
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> ...
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> In concluding these reasons I do stress that nothing contained in them is intended as any comment or reflection on the courts of Dubai, their practices and procedures or in any other respect, comparatively or otherwise – nor, of course, on the laws of Dubai or, more broadly, the UAE. Any such comment or reflection would be quite impertinent and entirely inappropriate.[386]

502 Given that Sunland chose to pursue its claims against the respondents in the Victorian Supreme Court, and that it is vexatious or oppressive for it to continue to pursue those claims in Dubai, Sunland's submission that it was premature to consider the grant of an anti-suit injunction until the outcome of the Dubai penal

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385 See *McHenry v Lewis* (1882) 22 Ch.D 397, 403 (Jessel MR), 406-7 (Cotton LJ) and 408 (Bowen LJ); and cf *CSR* (1997) 189 CLR 345, 372 (Brennan CJ, dissenting); and see *Aerospatiale* [1987] 1 AC 871.

386 Anti-suit Reasons [52], [54].

proceedings is ill-founded.

Application to adduce fresh evidence

503 On 20 May 2013, the Dubai Court delivered judgment in the Dubai penal proceedings. The Dubai Court convicted Reed and Joyce of fraudulently misappropriating a sum of money from Sunland and sentenced them to ten years' imprisonment, ordered them to jointly return the sum of AED 44,105,780 and fined them an additional sum of AED 44,105,780.[387]

504 Assuming that the money to be returned is to be returned to Sunland, the judgment of the Dubai Court in effect awards Sunland a civil remedy notwithstanding that Sunland withdrew its civil right claim.[388]

505 The evidence of Diana Hamade is that after Reed and Joyce have exhausted their rights of appeal, Sunland is entitled to enforce the Court's order for payment directly without the need to file a civil claim. Ms Hamade opines that:

> Following the judgment is [sic] rendered final and enforceable when the 15 days of grace period for filing before the court of cassation expires without the plaintiffs filing their appeal or following the court of cassation passing its judgment and upholding the court of appeal decision, Sunland will be able to proceed with executing the judgment through an execution judgment directly and without the need to file a civil claim with the civil court for the sum referred to in the judgment.

506 Ms Hamade further opines that it is not necessary for any court to make further factual or other findings in order for Sunland to enforce the judgment. This evidence was the only evidence as to the process by which Sunland could execute the Dubai judgment.

507 By summons dated 12 July 2013, Sunland Group brought an application pursuant to r 64.22(3) of the *Supreme Court (General Civil Procedure) Rules 2005* to

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387 Affidavit of Joshua Henderson 12 July 2013 [4]. The court also referred the civil case, which appears to refer to Dubai World's civil right claim, to the Civil Court for determination.

388 A letter from the appellant's lawyers sent 5 July 2013 affirms that because of the injunction, the appellant has not taken further steps in relation to any civil claim.

adduce further evidence in the appeal. The further evidence sought to be adduced was of two kinds. First, evidence that Reed and Joyce had been convicted by the Dubai Court, along with expert evidence as to the impact of the Dubai Court's judgment on Sunland's prospects of civil recovery in Dubai.[389] Secondly, evidence Sunland submits establishes that Reed and Joyce are impecunious in Australia as well as in the UAE.

508 Sunland sought to rely upon the further evidence to have the injunction dissolved. Upon inquiry by this Court, Sunland expressly declared that it took an all or nothing approach: either the injunction should be fully dissolved or it should not. It was not seeking to vary the terms of the injunction. Although the evidence was that Sunland was not required to pursue a civil claim in order to enforce the judgment, the application proceeded on the basis that executing the judgment in order to obtain this civil remedy would be in violation of the terms of the injunction.

509 In essence, Sunland submitted that the fresh evidence should lead to the injunction being dissolved for the following reasons:

1. As a result of the Dubai Court's judgment, Sunland now has a valuable right in Dubai which constitutes a legitimate juridical advantage.

2. Considerations of comity support the submission that this Court should not prevent it from enforcing the right granted to it by the Dubai Court.

3. If the respondents are impecunious in Australia as well as in Dubai, it cannot be said that complete relief is available in Australia, or that it is an abuse of process for it to pursue its claim in both jurisdictions.

510 Sunland submits that the judgment of the Dubai Court reveals that, contrary to the findings of the trial judge, the advantages to Sunland in pursuing its claim in

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389 The affidavit of Joshua Henderson 12 July 2013 exhibited a translation of the judgment of the Dubai Court. In addition, a further affidavit of Diana Hamade providing her opinion as to the means by which Sunland may enforce the judgment was filed in support of the application.

Dubai are not 'inchoate' or 'nebulous' but rather, that the advantages relied on by Sunland below have now crystallised.

511 That the Dubai Court has made findings which are inconsistent with those made by the trial judge, and appears to have had regard to evidence that was not considered by the trial judge raises, in Sunland's submission, the issue of comity. There is no suggestion that the Dubai Court's decision was not the result of a thorough decision making process. In these circumstances, Sunland submits, considerations of comity weigh in favour of allowing Sunland to enforce its right.

512 Sunland further submits that the respondents' failure to respond to Sunland's request that they state whether they have assets, either in Australia or elsewhere, means that the Court should assume that they have no assets in Australia. Given this assumption, Sunland submits that the lack of assets in the UAE cannot form a basis for preventing it from pursuing its claim in Dubai since it would be unfair to use the lack of assets in UAE to compel Sunland to pursue its claim in Australia, only for it to be met with the same assertion of impecuniosity in this jurisdiction.

513 The respondents oppose the application on multiple bases. The respondents submit that translation of the judgment is ambiguous is many respects, and in particular does not expressly state to whom Reed and Joyce must return the sum. They further submit that significant aspects of Sunland's submissions and the expert opinion of Ms Hamade are inadmissible by reason of s 91 of the *Evidence Act 2008* (Vic), which prohibits the use of a judgment of a foreign court to prove the existence of a fact that was in issue in that proceeding.

514 The respondents deny that considerations of comity mean that Sunland should be allowed to enforce its rights under the judgment in Dubai. The respondents submit that Sunland asks the court to permit it to enforce a civil claim in Dubai, which has been found to be groundless by a Trial Division judge of this Court, in circumstances where a significant body of evidence apparently relied upon by the Dubai court was found by the trial division judge to lack credibility. The

respondents submit that these significant considerations cannot be overcome by considerations of comity and that in any case, the injunction does not impact the criminal jurisdiction of the Dubai Court but rather restrains the conduct of Sunland as a condition of its rights to litigate in Australia.

515 The respondents submit that the new evidence is not capable of undermining the reasoning of the trial judge. They submit that, for reasons of public importance, this Court should not allow Sunland to use the processes of this Court to have what is in effect a 'second bite of the cherry.'

516 Finally, the respondents submit that there is no evidence of an assertion of impecuniosity in Australia by the respondents. Sunland's submission depends on the Court drawing an inference from correspondence between the parties in relation to a gross sum costs assessment before an associate justice. In this correspondence, Sunland's lawyers expressed their concern that any payment to the respondents in relation to costs would be dissipated and not able to be repaid in the event that Sunland succeeded on some or all of its appeals and sought an assurance that this would not occur. Sunland's lawyers also inquired whether the respondents held any beneficial interest in real property or interests in other property of value. The following day, at the gross sum costs assessment hearing, the lawyers for the third respondent provided Sunland's counsel with a draft form of order which provided, inter alia, that any interim costs paid to Joyce would be held in trust pending the determination of the appeals. On 7 June 2013 the associate justice ordered that the costs paid to Joyce and the costs paid to Reed and Prudentia be held in trust pending the determination of the appeals.[390]

517 In our view, each of Sunland's submissions must be rejected.

518 Notwithstanding the uncertainty in relation to the terms of Sunland's right under the judgment, we accept that it may be said that the advantage to Sunland of proceeding in Dubai has now 'crystallised'. However, Sunland has never articulated

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390 Orders 2 and 4 of the orders made by Associate Justice Wood on 7 June 2013.

what, in the absence of any assets held in Dubai by the respondents, this advantage to them consists in. The fact that this previously speculative advantage has 'crystallised' may mean that it is no longer speculative, however it does not mean it is of greater weight than was previously contemplated. In the absence of assets against which such a right can be enforced, this advantage cannot be given any significant weight.

519 Considerations of comity, though important, are not decisive in this case. Considerations of comity may result in a court refraining from exercising its jurisdiction to issue an injunction where one might otherwise be available. Significant in this case is that there is a previous judgment of the Trial Division of this Court, which, unless and until overturned on appeal, renders the cause of action between the parties *res judicata*. The extent to which the decision of the trial judge was considered by the Dubai Court in arriving at its judgment is unknown. An affidavit from Prudentia and Reed's lawyer deposes that the trial judge's reasons were translated and provided to the Dubai Court although there is no evidence that they were considered in the Dubai Court's reasons. Although maintaining the injunction will restrain Sunland from exercising, in a foreign country, a right conferred upon it by the courts of that foreign country, in our view, considerations of comity are outweighed by the considerations that support the injunction as set out in these reasons. The injunction restrains Sunland from proceeding in Dubai as a condition of its pursuing its claims before the trial judge, and on appeal, in this Court. In addition, we note that the judgment of the trial judge was delivered first in time. We would think that if any interest in comity arose it would lie with this Court as a starting point.

520 Finally, we are not persuaded that the correspondence in relation to the a costs hearing can ground the inference of impecuniosity. Sunland's request was made in relation to a hearing before an associate justice to address the its concerns about the possible dissipation of costs. These concerns were resolved by further correspondence and the making of appropriate orders by the associate justice. The

evidence adduced by Sunland is insufficient to establish that the respondents are impecunious in Australia.

The fresh evidence should not be admitted

521 Having set out the evidence sought to be adduced, it remains to determine whether such evidence should be admitted as fresh evidence in the appeal.

522 The principles applicable to the question of whether the Court will grant leave to allow fresh evidence in an appeal were not in contest between the parties. Leave should be given only if three prerequisites are satisfied. First, if by the exercise of reasonable diligence such evidence could not have been discovered in time to be used in the original trial. Secondly, if it is reasonably clear that if the evidence had been available at the trial, and had been adduced, an opposite result would have been produced. Thirdly, if the evidence proposed to be adduced is reasonably credible.[391]

523 All parties referred to the Court of Appeal decision in *Apostolidis v Kalenik*,[392] which cited with approval the judgment of Chernov JA in *Foody v Horewood*:[393]

> the question of whether to admit fresh evidence is largely one of discretion and degree bearing in mind the public interest in finality of litigation and, at the same time, the requirements of justice of the case in hand. Generally speaking, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty in which the trial judge's estimate has previously been made. Exceptionally, however, it may be admitted, if some basic assumption, common to both sides, has been falsified by a subsequent event. More precisely, as Lord Wilberforce observed in *Mulholland v Mitchell*, courts will allow fresh evidence where to refuse it would affront common sense, or a sense of justice, always keeping in mind that it should be an exceptional event.[394]

524 After considering the evidence sought to be adduced, we are not persuaded that it satisfies the test of exceptional circumstances, nor that it falsifies a common

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391 *Clarke v Stringel* [2007] VSCA 292 [25].

392 [2011] VSCA 307.

393 (2007) ACSR 576.

394 [2011] VSCA 307 [56].

assumption upon which the proceedings below were based, or that to refuse it would affront common sense.

525 Sunland submits that a basic assumption upon which the parties proceeded was that Sunland would not be able to enforce the criminal court's order directly in order to obtain a civil remedy, but rather would have to initiate proceedings in the civil courts.

526 No expert directly addressed the question of whether the criminal court could, or was likely to provide a civil remedy in the absence of a civil right claim, although the possibility of the criminal court making an award of damages was foreshadowed by Mr Juma, albeit in the context of a civil right claim.[395] We are not persuaded that this was a basic assumption upon which the parties proceeded. Nor in our view can it be said that the fact that the Dubai Court appears to have had regard to evidence not considered relevant by the trial judge, and appears to have taken a different view of the evidence of Brown, undermines a common assumption upon which the Victorian proceedings were conducted. Indeed, given that the claims proceeded separately in the criminal court of Dubai and as a civil claim in the Trial Division of this Court on a different evidentiary basis, the possibility of inconsistent findings was likely, if not inevitable.

527 In the circumstances, we reject the admission of the fresh evidence on the ordinary principles. Even if it were received, we would nonetheless hold that admitting the evidence would not have altered our decision.

528 For the reasons set out above, we would dismiss the application and dismiss the appeal against the grant of the anti-suit injunction.

The Costs Appeal

529 Following the publication of the trial judge's reasons for judgment on 8 June 2012 Prudentia, Reed and Joyce made application for orders for costs. By separate

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395 See [426] above.

judgment dated 14 September 2012 the trial judge determined that it was appropriate in the circumstances of the case to make a special costs order in the form of an indemnity costs order against Sunland in favour of the defendants. That decision and the orders made in consequence of it are the subject of grounds 62 to 80 of the Amended Notice of Appeal.

530 Having failed in its appeal on the merits, Sunland must first confront the provisions of s 17A(1) of the *Supreme Court Act 1986* in order to prosecute its appeal against the cost orders made by his Honour:

> (1) An order made by the Trial Division constituted by a Judge of the Court—
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> (a) by consent of the parties; or
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> (b) as to costs which are in the discretion of the Trial Division—
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> is not subject to appeal to the Court of Appeal except by leave of the Court of Appeal or by leave of the Judge of the Court constituting the Trial Division which made the order.

531 Section 17A is the successor to a provision which formally provided that:

> No order made by the Court or any judge ... as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making the order.

532 No leave to appeal the question of costs has been granted by the trial judge and for the reasons which follow we would refuse such leave.

533 Since *Wolfe v Alsop*[396] the Court has taken the view that the jurisdiction with respect to costs orders on appeal is dependent upon the grant of leave in cases such as the present where an appeal brought on the merits as of right fails.[397] Because an order for costs where the court below has a discretion is a matter of practice and procedure it seems to us that the grant of leave should be subject to the considerations which affect the grant of leave with respect to interlocutory decisions. Leave should only be granted where:

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396 (1886) 12 VLR 887.

397 *Critchley v Australian Urban Investments Limited* [1979] VR 374, 380; *Thorne v Doug Wade Consultants Pty Ltd* [1985] VR 433, 497, not following *Wheeler v Summerfield* (1966) 2 QB 94.

(a) the decision was wrong, or at least attended with sufficient doubt to justify granting leave; and in addition

(b) substantial injustice would be done by leaving the decision unreversed.[398]

534 In our view the exercise of the trial judge's discretion with respect to costs was not attended by sufficient doubt to justify the grant of leave.

535 In *Transport Accident Commission v O'Reilly*[399] Ormiston JA observed that it has been accepted for many years that it is extraordinarily difficult to show that a court of first instance or a tribunal with wide discretionary powers has erred in the exercise of its power to award costs, if there be some basis for making an order other than the conventional order in favour of the successful party.[400]

536 In *Peet Ltd v Richard*[401] Nettle JA (with whom Neave JA agreed) stated the principles governing appellate interference with the relevant discretion as follows:[402]

> [A]n appellate court will not overturn a judge's decision on costs unless the judge is seen to have failed to exercise his or her discretion on reasonable grounds or has applied wrong principle or taken a manifestly erroneous view of the facts.

537 The test to be applied is not whether the Court of Appeal would have made the same order, but whether it was reasonably open to the trial judge to do so.[403]

Principles governing a special award of costs

538 It cannot be disputed that the successful respondents are entitled to maintain an award of costs consequential upon their success on the merits of the proceeding.

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398 *Nieman v Electronic Industries Limited* [1978] VR 431.

399 [1999] 2 VR 436.

400 Ibid 457 [46].

401 [2010] VSCA 71 [3]-[4].

402 Ibid [4].

403 *Spotless Group Ltd v Northern Suburban Properties Pty Ltd* [2008] VSCA 115 [10]-[11] (Redlich JA, citing relevantly *Hanlon v Brookes* (1997) 15 ACLC 1626, 1632 (Callaway JA); *ETNA v ARIF* [1999] 2 VR 353, 378 (Batt JA).

What is now in issue is whether such order should have been made on a special basis.

539 The notice of appeal does not identify any relevant error of underlying principle in his Honour's approach to the question of costs. This is not surprising. His Honour's explanation of the principles relating to the relevant discretion was both careful and correct.

540 More particularly, his Honour identified the foundation of his discretion in s 24(1) of the *Supreme Court Act 1986*:

> Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.

541 His Honour then acknowledged that the usual order as to costs is an award to the successful party on a party and party basis. This position is reflected in r 63.31 of *Supreme Court (General Civil Procedure) Rules 2005*.

542 In turn, as his Honour said, guidance is given by previous decisions of the courts as to circumstances that would warrant the making of a special costs order. His Honour referred to the identification by Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd*[404] of some categories of circumstances which may warrant a special costs order:[405]

> [T]he making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud; evidence of particular misconduct that causes loss of time to the Court and to other parties; the fact that the proceedings were commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions; an imprudent refusal of an offer to compromise and an award of costs on an indemnity basis against a contemnor.

543 His Honour also cited the observations of French J in J-Corp Pty Ltd v

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404 (1993) 46 FCR 225.

405 Ibid 233-4 (citations omitted).

Australian Builders Labourers' Federated Union of Workers (WA Branch) (No 2):[406]

> Although there is said to be a presumption in such cases that the action was commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law, it is not a necessary condition of the power to award such costs that a collateral purpose or some species of fraud be established. It is sufficient, in my opinion, to enliven the discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case ...[407]

544 He further referred to the summary of authorities undertaken by Harper J in *Ugly Tribe Co Pty Ltd v Sikola*:[408]

> In seeking costs on an indemnity basis, the first defendant is asking the Court to depart from its usual course: *Spencer v Dowling*.[409] Special circumstances must be present to justify such a departure: *Australian Electoral Commission v. Towney (No 2)*.[410] These include:
>
> (i) The making of an allegation, known to be false, that the opposite party is guilty of fraud: *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397.
>
> (ii) The making of an irrelevant allegation of fraud: *Thors v Weekes* (1989) 92 ALR 131.
>
> (iii) Conduct which causes loss of time to the Court and to other parties: *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* (unreported, Federal Court, French J, 3 May 1991).
>
> (iv) The commencement or continuation of proceedings for an ulterior motive: *Ragata Developments Pty Ltd v Westpac Banking Corporation* (unreported, Federal Court, Davies J, 5 March 1993).
>
> (v) Conduct which amounts to a contempt of court: *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59.
>
> (vi) The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law: *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA) Branch (No 2)* (1993) 46 IR 301.
>
> (vii) The failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial: *National Australia Bank v Petit-Breuilh (No 2)* (unreported, [1990]

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406 (1993) 46 IR 301, 303.

407 Ibid (emphasis in original).

408 [2001] VSC 189 [7]-[8].

409 [1997] 2 VR 127, 147 (Winneke P) and 163 (Callaway JA).

410 (1994) 54 FCR 383, 388 (Foster J).

VSC 395, 18 October 1999).

> The categories of special circumstances are not closed: *Tetijo Holdings*, supra. The cases must not, therefore, be read 'in an endeavour to establish a set of inflexible guidelines which should thereafter be determinative of the manner in which the Court's discretion is to be exercised [for this] would be to fetter the Court's discretion': *National Australia Bank v Petit-Breuilh*, supra.

545 As his Honour concluded, authority establishes that the circumstances in which a special costs order may be justified include cases in which a proceeding is commenced or continued either for some ulterior motive or in wilful disregard of the facts or clearly established law.

546 In turn his Honour cited the decision of Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*[411] that a special costs order may be warranted where:

> [I]t appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established laws.[412]

547 His Honour also referred to the decision of this Court in *Macedon Ranges v Thompson*,[413] which reiterated the principles stated in *J-Corp Pty Ltd v Australian Builders Labourers' Federated Union of Workers (WA Branch) (No 2)*[414] and *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*.[415]

548 Next, his Honour cited the judgment of Lindgren J in *NMFM Property Pty Ltd v Citibank Limited (No 11)*[416] as authority for the proposition that the knowledge of a party in relation to past conduct may be relevant to assessment of the conduct of that party as a litigant and that it is the conduct of the party that ultimately falls to be assessed and not that of its legal advisors.

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411 (1988) 81 ALR 397, 401.

412 Ibid.

413 [2009] VSCA 209 [15] (Redlich JA and Beach AJA) (citations in original).

414 (1993) 46 IR 301.

415 (1988) 81 ALR 397.

416 (2001) 187 ALR 654, 668-9 [54]-[58].

549 His Honour also cited Dal Pont[417] with respect to the potential inference that may be drawn from the prosecution of a hopeless action with respect to ulterior motive or wilful disregard of known facts and law:[418]

> A special costs order may ensue where it appears to the court 'that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success', in which case the action 'must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law'.[419] Despite this 'presumption', it is not a prerequisite to the power to award special costs that a collateral purpose or a species of fraud be established. It is sufficient to enliven the discretion that, for whatever reason, a litigant, whether as plaintiff or defendant,[420] persists in what on proper consideration should be seen to be a hopeless case.[421] As explained by BW Ambrose J in Re SCA Properties Pty Ltd (in liq):[422]
>
> > In some cases it is appropriate to make an order for indemnity costs to make it known that the court will not readily accept that its time and the successful litigant's money can be wasted on totally frivolous and thoroughly unjustified proceeding. If it appears it is not for the bona fide purpose of protecting and enforcing a legal right but to achieve an ulterior or extraneous purpose that in itself is justification for the making of an indemnity order.

550 His Honour also considered the provisions of the *Civil Procedure Act 2010* and summarised significant aspects of the relevant provisions as follows:[423]

> (1) among other things, the object of the *Civil Procedure Act*, is to reform and modernise the practice, procedure and processes relating to civil

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417 Gino Evan Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) 539-40 [16.51].

418 Ibid (citations in original).

419 *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, 401 (Woodward J) (FCA) (emphasis supplied).

420 See, for example, *Sheahan v Northern Australia Land Agency Co Ltd* (SC (SA), 4 November 1993, unreported), [13] (Perry J) (ruling that the defence, including the prosecution of the counterclaim, was so unmeritorious and lacking in credibility that the defendants should be ordered to pay costs on a solicitor and client basis); *Westpac Banking Corporation v Ollis* [2007] NSWSC 1008, [13], [14] (Einstein J).

421 *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers, Western Australian Branch (No 2)* (1993) 46 IR 301, 303 (French J (as he then was)) (FCA); *Blueseas Investments Pty Ltd v Mitchell and McGillivray* [1999] FamCA 745; (1999) FLC ¶92-856 at ¶86, 130 (FC) (Nicholson CJ, Lindenmayer and O'Ryan JJ); *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] CA 26; (2001) 179 ALR 406, 415 (Callinan J); *Krix and Krix v Citrus Board of South Australia* [2003] SASC 387; (2003) 87 SASR 229 (FC) (Mullighan, Debelle and Gray JJ); *De Alwis v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 77, [7]-[9] (Tamberlin, R D Nicholson and Emmett JJ).

422 [1999] QSC 180; (1999) 17 ACLC 1611, [70] (Ambrose J).

423 Costs Reasons [19] (citations in original).

proceedings in the Supreme Court, and other courts. Importantly, provision is made for an overarching purpose in relation to the conduct of civil proceedings which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute in those proceedings;[424]

(2) in the exercise of its powers, the Court must seek to give effect to the overarching purpose, whether these powers arise from the procedural rules or practices of the Court or otherwise;[425]

(3) an overarching obligation is cast upon parties and legal practitioners representing or acting on behalf of a party, whether they be barristers or solicitors, to act honestly at all times in relation to a civil proceeding and not to make any claim or make a response to any claim in a civil proceeding that is frivolous, vexatious, an abuse of process or does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, have a proper basis;[426]

(4) an overarching obligation applies to the persons referred to in the preceding paragraph to disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control of which the person is aware and which the person considers, or ought reasonably consider, are critical to the resolution of dispute. Disclosure must occur at the earliest reasonable time after the person becomes aware of the existence of the document or at such other time as the Court may direct. These provisions do not apply to any document which is protected from disclosure on the grounds that privilege which has not been expressly or impliedly waived or under any other Act (including any Commonwealth Act) or other law;[427] and

(5) in exercising any power in relation to a civil proceeding, including the exercise of the discretion as to costs, the Court may take into account any contravention of the overarching obligations.[428]

551 His Honour further noted that notions of abuse of process may inform a decision as to costs, including that the notion that if a collateral purpose is the predominate purpose of a moving party in a proceeding the proceeding will be improper and constitute an abuse of process.[429]

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424 See *Civil Procedure Act* 2010, s 1.

425 See *Civil Procedure Act* 2010, s 8.

426 See *Civil Procedure Act* 2010, ss 10, 17 and 18.

427 See *Civil Procedure Act* 2010, s 26.

428 See *Civil Procedure Act* 2010, s 28.

429 *Williams v Spautz* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ).

The application for costs

552 Prudentia, Reed and Joyce sought special costs orders at trial on the following broad bases:

(a) the proceedings were commenced or continued in wilful disregard of known facts or clearly established law, thus in circumstances where Sunland, properly advised, should have known that it had no chance of success; and

(b) where, in all the circumstances, the proceedings must be presumed to have been commenced or continued for a collateral purpose or ulterior motive.

553 Ultimately, his Honour concluded that special costs orders were warranted on these bases and further concluded that the award of such costs was consistent with the *Civil Procedure Act* because there had been a series of incidental breaches of Sunland's obligations under that Act in the course of the prosecution of the proceeding. After summarising the relevant portions of the *Civil Procedure Act* his Honour observed:

> For the reasons which follow it is not necessary to discuss the application of these provisions specifically. Nevertheless, as indicated in detail in these reasons, there has clearly been contravention of the overarching obligations on the part of Sunland. Accordingly the Court's discretion as to costs has been exercised in accordance with these provisions and having regard to the nature and extent of these contraventions, on the bases and the manner set out below.[430]

554 In our view his Honour did not err in the principles which he applied to consideration of the respondents' application. The bases articulated in principle were properly capable of founding the exercise of the relevant discretion as to costs.

The factual basis of his Honour's costs order

555 The notice of appeal takes issue with a series of his Honour's specific findings of fact in his judgment on costs.[431] The basis of these grounds fails with the appeal

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430 Costs Reasons [19].

431 ANOA [63]-[71] state:

on the merits. Our reasons with respect to such appeal demonstrate that none of the impugned findings was manifestly wrong. In particular our findings with respect to the making of the representations alleged, falsity, reliance, and damage are fatal to Sunland's case on the contested issues of fact raised by these grounds.

556 Likewise any appeal on costs must fail insofar as it is founded upon an attack upon his Honour's overall conclusions of fact. Grounds 72 and 74 are as follows:

> 72 The trial judge erred in finding that inconsistencies in Sunland's evidence and aspects of Sunland's submissions at trial supported the position that Sunland commenced or continued the proceedings with

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> 63 The trial judge erred in finding that each of Brown and Abedian understood that neither Reed nor Prudentia had any binding agreement in respect of Plot D17 and no legal interest in the Plot.
>
> 64 The trial judge erred in finding that Sunland was unable to articulate the nature or content of the alleged representations.
>
> 65 The trial judge erred in finding that the pleaded claim of 'right' was wholly contrived and artificial and was contrary to facts known and understood by Brown and Abedian.
>
> 66 The trial judge erred in finding that it was the fact that, and further that Sunland knew that at the time Sunland became aware of the possibility-of acquiring Plot D17, Plot D17 was not capable of being dealt with in any way, and was not capable of being the subject of separate rights.
>
> 67 The trial judge erred in finding that it was not plausible that Brown and Abedian could have thought that there was any representation upon which Sunland relied.
>
> 68 The trial judge erred in finding that at the time Brown sent the 'put your foot on it' email, Brown believed that neither Reed nor Prudentia held a contractual right or any other right to acquire Plot D17.
>
> 69 The trial judge erred in finding that having regard to Brown's conversation with Lee and Brearley on 12 September 2007 and the 'put your foot on it' email, Sunland properly advised should have known that the misrepresentation case had no prospects of success.
>
> 70 The trial judge erred in finding that the introduction of Hanley as a new contracting party in place of Prudentia, using a contract in exactly the same form as the contract with Prudentia, was completely inconsistent with Sunland believing that Prudentia or Reed had any legally enforceable rights to Plot D17 or any 'right' or 'control' with respect to that land.
>
> 71 The trial judge erred in finding that it was always a hopeless case for Sunland to advance the so-called 'Transaction' case (namely the case that had the representations not been made, Sunland would have successfully negotiated with Dubai Waterfront to purchase Plot D17 in its own right and would not have had to pay the fee to Hanley), and that to Sunland it must have been evidently hopeless, in particular because such findings:
>
> 71.1 ignore the evidence that Sunland had previously purchased Plot D5B in its own right from Dubai Waterfront; and
>
> 71.2 assume that Joyce would have acted dishonestly in ensuring that Dubai Waterfront sold Plot D17 to his friend Reed or an entity associated with Reed, instead of selling it to Sunland which, unlike Reed, Prudentia and Hanley, was a developer established in Dubai with major projects already in progress in Dubai.

wilful disregard for known facts and law.

...

74 The trial judge erred in finding that Sunland could not have had any basis for believing:

74.1 that it could establish the representations said to have been made;

74.2 that it relied upon the representations; and

74.3 that it suffered loss and damage.

557 Once again our conclusions with respect to the appeal on the merits demonstrate that none of these findings were manifestly wrong.

558 Ground 73 alleges an error in approach with respect to the assessment of the strengths and weaknesses of Sunland's case:

73 The trial judge erred in exercising his discretion to make a special costs order by making an ex post facto assessment of the strengths and weaknesses of Sunland's case that relied on hindsight.

559 His Honour dealt with this issue at [39]-[43] of his decision. As his Honour held, it does not lie in the mouth of Sunland to say its legal advisors were entitled to take portions of the evidence of its own officers Brown and Abedian at face value in the framing and conduct of its case without regard to the fundamental inadequacies of Sunland's case. In turn he stated in part:

> In this case, Sunland relied principally upon the evidence of two of its most senior officers, Brown and Abedian. They are senior officers of a public company, clearly with access to high level legal advice. Brown, and less so Abedian, were the prime participants in relation to the Plot D17 transaction on behalf of Sunland. They, particularly Brown, know exactly what happened, or did not happen, in the course of that transaction and they must have known that, in a case of the type which Sunland brought, it would be necessary to establish with a high degree of clarity and particularity the representations said to have been made, that Sunland relied upon the representations and that loss and damage followed. To the extent that elements of the case Sunland sought to pursue may not have been clear to intelligent and relevantly experienced non-lawyers such as Brown and Abedian, there can be no doubt that they have had the benefit of high level legal advice being available at all relevant times. Ms Julianne Stringer (Clyde-Smith) and Eames immediately come to mind in connection with events as they unfolded in the course of the Plot D17 transaction. In the preparation of its case in the Federal Court of Australia and this Court, Sunland has availed itself of the advice of Senior Counsel, junior counsel and a substantial law

> firm. Sunland was well experienced and, in my view, it is implausible to think that it did not fully avail itself of its experience in property development in Dubai and Australia and take advantage of the legal resources available to it.[432]

560 There was no error manifest in this approach.

561 The notice of appeal also attacks his Honour's findings of fact with respect to the conduct of the proceedings. Ground 62 of appeal states as follows:

> 62 The trial judge erred in finding that Sunland had contravened its overarching obligations under the *Civil Procedure Act 2010* (Vic), and in finding that the nature and extent of those contraventions justified making a special order as to costs.

562 We do not accept that his Honour's decision was founded on the basis of breach of Sunland's obligations under the *Civil Procedure Act*. His Honour's findings went no further than findings that the award of special costs on the grounds advanced by Prudentia, Reed and Joyce were consistent with the *Civil Procedure Act* by reason of the breaches of the Act he identified.

563 In turn each of these breaches involved findings of fact with respect to the provision of proper discovery which were plainly open to his Honour and ground 62 must be rejected. A further breach of Sunland's discovery obligations was also demonstrated in the course of the hearing of the appeal but we will say nothing further about this aspect of the matter because as we read his Honour's reasons this aspect was not central to the exercise of his discretion.

564 Lastly, Sunland challenges the trial judge's findings as to ulterior purpose:

> 75 The trial judge erred in finding that Sunland commenced the proceedings for an ulterior purpose, including that it commenced the proceedings:
>
> 75.1 to protect Sunland's, and Brown's position in Dubai, including to protect them from being charged with criminal offences in Dubai; and
>
> 75.2 to create a basis for requesting the return of Brown's passport from the Dubai authorities.

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[432] Costs Reasons [42].

76 The trial judge erred in finding that:

76.1 Abedian and Brown invented allegations that falsely implicated Joyce in a nonexistent fraud;

76.2 Brown fabricated his version of events from the outset in order to protect his own personal safety; and

76.3 The Dubai authorities regarded the fee paid to Prudentia/Hanley as a bribe, and that Brown knew this.

565 For present purposes it is sufficient to say first that, as his Honour makes clear, the exercise of his discretion was warranted by the finding that Sunland commenced and continued the proceeding in wilful disregard of known facts and the law without any finding of ulterior purpose.

566 Secondly, his Honour's findings of fact as to ulterior purpose were made in part with the benefit of observations of the oral evidence of Brown and Abedian and this must cause an appellate court to exercise restraint.[433]

567 Thirdly, the specific findings attacked in ground 76 were plainly open to the judge having regard to the evidence as to the content and context of statements made by Brown and Abedian to the Dubai authorities to which we have already referred.

568 Fourthly, his Honour's findings of fact with respect to ulterior purpose were open to him. In particular in our view it could not be said that there was manifest error in concluding that Sunland commenced and continued the proceeding with a view to achieving the collateral purpose of defending its commercial reputation and protecting the position of Brown.

569 Sunland must go further than persuading this Court that the trial judge 'erred' in the sense that the Court would not itself have made findings of ulterior purpose. Once it is accepted that the findings were open then this Court should not interfere.

570 In the present case the evidence was replete with instances of conduct by

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433 *Fox v Percy* (2003) 214 CLR 118, referred to and quoted at [377] above.

Brown, Abedian and Sunland which was consistent with a motivation of ulterior purpose. We instance Brown's initial untruthful exaggeration of the roles of Reed and Joyce to the investigating authorities; the changes in Brown's version of events over time; the direct discussion of the desirability of instituting legal proceedings in Australia with the Dubai prosecutor; the circumstances in which Brown's passport was released; and the terms of the statement made to the Australian Stock Exchange by Sunland at that time. It was for the judge to evaluate the whole of such evidence in conjunction with his finding that Sunland's case was hopeless and to draw such inferences as to ulterior purpose from the whole of the evidence as he was persuaded of. In our view it was open for him to conclude:

> Any of the facts and circumstances relied upon by the defendants in support of Sunland's alleged ulterior purpose in commencing and continuing these proceedings would not, in themselves, necessarily lead to or provide a basis for drawing this inference. Nevertheless, I am of the view that all these facts and circumstances, including the way in which Sunland's case was pleaded, the extent to which it failed in respect of all essential elements and Sunland's dealing with the Dubai authorities provides a strong basis for a finding of ulterior purpose on Sunland's part.[434]

571 Fifthly, insofar as the claim in deceit was in substance one for fraud, the finding that the claim was made in wilful disregard of the facts and law carried with it the necessary implication that Sunland had made allegations of fraud which it knew or ought to have known were false.[435] In our view his Honour was correct to recognise that this aspect of the matter provided a further potential basis for the exercise of his Honour's discretion.[436]

Conclusion on costs

572 In our view Sunland has not discharged the onus which it bears to establish that his Honour's exercise of discretion was not reasonably open to him. Leave to appeal against the special costs order must be refused.

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434 Costs Reasons [78].

435 *Colgate Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225; *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 [7]-[8].

436 Costs Reasons [79].

Schedule

NAME	DESCRIPTION
SUNLAND	
Sunland Group Ltd	An Australian property development company listed on the ASX The second appellant in the substantive appeal and the appellant in the anti-suit injunction appeal
Sunland Waterfront BVI Ltd (**SWB**)	A British Virgin Islands company owned and controlled by Sunland Group The first appellant in the substantive appeal
Soheil **Abedian**	Chairman of Sunland Group; former Managing Director of Sunland's Dubai Branch
Sahba Abedian	Managing Director of Sunland Group
David **Brown**	Former International Design Director of Sunland Group (2006); former Chief Operating Officer of Sunland's Dubai Branch (2007)
Julianne **Stringer** (later Clyde-Smith)	Former General Counsel of Sunland's Dubai branch
DUBAI WATERFRONT	
Nakheel PJSC	A major Dubai government development entity, creating large scale projects and establishing the master developer entity for each.
Dubai Waterfront LLC (**DWF**)	Master developer entity created by Nakheel for the Dubai Waterfront project
Matthew **Joyce**	Former Managing Director of DWF (2007) The fourth respondent in the substantive appeal and the third respondent in the anti-suit appeal
Jeff **Austin**	Former Town Planning Director of DWF
Anthony **Brearley**	Former Senior Legal Counsel of DWF
Marcus **Lee**	Former Director of Commercial Operations of DWF
PRUDENTIA	
Prudentia Investments Pty Ltd	An Australian investment company, formerly controlled by Angus Reed The first respondent in both appeals.
Hanley Investments Pte Ltd	A Singaporean company owned and controlled by Prudentia The second respondent in the substantive appeal
Angus **Reed**	Former Managing Director of Prudentia The third respondent in the substantive appeal and the second respondent in the anti-suit injunction appeal
Och-Ziff	US Hedge fund associated with Prudentia
David **Sinn**	Partner at Freehills, Prudentia's solicitors
Clyde & Co	Solicitors for Prudentia in Dubai (as agents for Freehills)