HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M111 of 2020

BETWEEN: **JUDITH GAIL TALACKO**
Appellant

and

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

SECOND TO FIFTH RESPONDENTS' SUBMISSIONS

Part I: Certification as to publication on the internet

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

Part II: Concise statement of issues presented

2. The following issues are presented upon this appeal.

3. First, have the first to fifth respondents ('Respondents') suffered damage sufficient to complete the tort of unlawful means conspiracy by either or both of:

   (a) the inability to enforce Kyrou J's orders against the sixth respondent ('Jan Emil'), which (in findings not challenged) would have proceeded via a dividend in Jan Emil's bankruptcy and resulted in a distribution to the Respondents by 30 September 2013, but was impossible after the Donation Agreement: PJQ [54]-[56]; CAB 149-151;

   (b) the costs and expenses incurred by the Respondents in trying to overcome the Donation Agreement and its consequences, including by legal action in the Czech Republic against the seventh and eighth respondents ('David and Paul'), found to be irrecoverable via a costs order: PJQ [100]; CAB 168.

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4. This issue is dealt with in **section V** below.

5. Secondly, whether the Respondents suffered loss and damage sufficient to complete the tort of unlawful means conspiracy by reason of the diminution in value of property held by them as at 12 May 2009, being the chose in action they possessed under the Terms of Settlement dated 23 February 2001 ('Terms') to have an order entered against Jan Emil for equitable compensation for his admitted breach of fiduciary duty. This issue is raised in paragraph 2 of the notice of contention, and is dealt with in **section VI.A** below.

6. Thirdly, whether the quantum of compensation awarded to the Respondents for the loss of the opportunity to enforce the Kyrou J orders against Jan Emil (via his trustee in bankruptcy) caused by the Donation Agreement should be the value of that lost opportunity, or whether the quantum should be reduced by the value of the chance that the Respondents may succeed against David and Paul in proceedings commenced in the Czech Republic over two years later, on 4 November 2011, to try to impeach the Donation Agreement. This issue is raised in paragraphs 2-3 of the notice of cross-appeal, and is dealt with in **section VI.B** below.

7. Fourthly, if the tort of unlawful means conspiracy is not made out for any reason, whether judgment for the Respondents, and orders for compensation, may be upheld as an award of equitable compensation for intentional conduct of the appellant ('Judith') that was fraudulent in equity, and which was intended to—and did—harm the Respondents. This issue is raised in paragraph 3 of the notice of contention, and is dealt with in **section VI.D**.

Part III: Section 78B notice

8. The second to fifth respondents consider that no notice is required to be given under s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Material facts not referred to by the appellant

9. Further to AS [20]-[21], on 11 June 2009, Mareva orders were made against Jan Emil restraining him from taking any further steps to alienate properties the subject of the Terms. On 24 July 2009 and 10 August 2009, Mareva-type orders were made against David and Paul restraining them from taking any further steps to register those properties in their names, and requiring them to take steps to undo the registration of the transfer of

the Czech properties to them: PJL [22], [30], [31]; CAB 17, 19.[1]

10. On 17 December 2009, arrest warrants were issued against David and Paul, pending contempt proceedings in respect of non-compliance with the Mareva-type orders, which remained extant when the matter came on for trial in 2015: PJL [31], [39]; CAB 19, 22. In March 2015, David and Paul sold one of the Czech properties, in further contravention of the Mareva orders made by Kyrou J: PJC2 [15], CAB 193. David and Paul were found to be fully aware of the proceedings below and to have deliberately refrained from participating in them: PJL [39]; CAB 22. Today, David and Paul remain outside the jurisdiction, the Mareva orders have not been complied with, and the arrest warrants remain unexecuted.

11. The second to fifth respondents also rely upon the chronology at Annexure A to the 2018 reasons of McDonald J (CAB 177-182).

Part V: Statement of argument in answer

A. Introduction

12. Judith asks this Court to perfect a course of fraudulent conduct that was intended to impede the processes of the Supreme Court of Victoria: an alienation (on 12 May 2009) of assets ('the Properties') from Jan Emil to David and Paul, in order to frustrate the Respondents' ability to execute (as judgment creditors) against Jan Emil the orders that he had consented to when admitting and compromising (on 23 February 2001) claims of breach of fiduciary duty that the Respondents had brought against him on 2 October 1998. Kyrou J made those orders against Jan Emil on 11 December 2009[2] ('the Kyrou J orders').

13. The trial judge found that Judith was party to an agreement with Jan Emil, David and Paul for Jan Emil to transfer ownership of the Properties to David and Paul by the vehicle of the Donation Agreement, and that this agreement was fraudulent in equity: PJL [85], [122], [157]-[159]; CAB 36, 48, 61-2. Judith does not appeal those findings in this Court.

14. In this Court, Judith argues that the law gives no remedy for her conduct and that of her co-conspirators, because it has caused no loss or damage to the Respondents. This is on

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[1] The 24 July 2009 orders restrained David and Paul from continuing to register the transfers of the properties. The 10 August 2009 orders extended those restraints, and also required them to execute a cancellation of deed and withdrawal of application forms filed with the Registry in Prague.

[2] On 16 September 2013, Kyrou J made an order quantifying the costs order against Jan Emil pronounced on 11 December 2009: PJQ [17], CAB 136.

the basis that it may be possible that—with extensive effort and expenditure of time and funds; and with good fortune; and over the active opposition of David and Paul, in continued and calculated contempt of the Supreme Court of Victoria—the Respondents might be able to put themselves into a position where they can commence new 'recovery' proceedings in the Czech courts against David and Paul in which, in six to eight years at the earliest, the Respondents might succeed.

15. In other words, Judith argues that victims of a conspiracy to impede the course of justice should be regarded as suffering no loss or damage unless they can show they are completely unable to unpick the effect of the unlawful conduct, and because the Respondents cannot now show that they will certainly fail in the 'Donation Proceeding' they brought in the Czech Republic on 4 November 2011 to try to impeach the Donation Agreement, or in a subsequent proceeding they must then bring if they are successful in the Donation Proceeding, the Respondents still have a 'chance' of recovering something, and therefore have suffered no loss.

16. It is submitted that no coherent system of justice would permit Judith to absolve herself of the consequences of her conduct on such a basis. Conspiring to defeat the process of execution strikes at the heart of the administration of justice, and focussing on the form of whether the victims may be able one day to obtain relief in respect of that unlawful conduct in a foreign proceeding ignores the substance that: (i) the Respondents cannot (as intended by the conspirators) recover against Jan Emil, as was their right; (ii) more than 11 years later, the Kyrou J orders remain almost entirely unsatisfied, whereas absent the unlawful conduct they would have been satisfied in full by 30 September 2013; and (iii) the Respondents have had to expend time and money prosecuting the Donation Proceeding in the Czech Republic, and will not receive a full indemnity for those expenses by an order for costs.

B. The tort of unlawful means conspiracy

17. The only element of the tort of unlawful means conspiracy said by Judith to be missing is loss or damage. It appears to be common ground that this element is established when the victim(s) of a conspiracy suffer 'injury' or 'damage' by reason of action taken pursuant to the conspirators' agreement: see *Williams v Hursey* (1959) 103 CLR 30 at 78 (Fullagar J, with whom Dixon CJ and Kitto J agreed), 108 (Taylor J) and 122, 127 (Menzies J). Such damage may include damage or harm to the 'economic interests' of the victim(s) (*Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014)

254 CLR 185 at 225 [121] (Crennan, Bell and Keane JJ)), which includes their 'economic expectations' (*OBG Ltd v Allan* [2008] 1 AC 1 at 20D-G [8], 23 [19]-[20] (Lord Hoffmann)).

C. Loss of opportunity: recovery against Jan Emil under the orders he consented to

18. The first basis upon which the Respondents succeeded in the Court of Appeal was that they had suffered damage from the Donation Agreement by loss of an opportunity. Judith's submissions do not properly identify that 'opportunity'; addressing that omission allows Judith's appeal to be dismissed shortly.

19. **The two opportunities.** The Court of Appeal identified two different ways in which the Respondents had put their loss of opportunity case: CAL [108]; CAB 295. The first was the loss of a chance to enforce the orders made by Kyrou J '*against the properties that were the subject of the donation agreement*', because Jan Emil had divested himself of them: CAL [106], [108], [111]; CAB 294-6. The second was the '*loss of opportunity to recover in any bankruptcy of Jan Emil … by resort to the Czech properties*': [108], [114]-[115]; CAB 295, 297.

20. **Choosing between the two opportunities.** On the remitter, the Respondents accepted that they could not recover for both lost opportunities, and submitted that, if the trial judge found that the Respondents would have bankrupted Jan Emil, then the appropriate lost opportunity was the loss of a chance to receive a dividend in that bankruptcy (ie the second alternative identified at CAL [108]): PJQ [10]; CAB 133. McDonald J accepted that submission, but also accepted Judith's submission that '*in assessing the value of the [Respondents'] loss of opportunity to receive a dividend in a future bankruptcy of [Jan Emil]*', it was necessary '*to have regard to the [Respondents'] prospects of success in the proceedings which are currently on foot in the Czech Republic seeking recognition and enforcement of the Kyrou J orders*': PJQ [11]-[14]; CAB 134-5. That latter proposition is the subject of paragraphs 2-3 of the notice of cross-appeal; see **section VI.B** below.

21. **Relevant findings.** McDonald J (at PJQ [54]; CAB 149-150) made findings about what would have occurred had the Donation Agreement not been entered into: in short, the Respondents would have made Jan Emil bankrupt, and the trustee in bankruptcy would have obtained orders in the Federal Court requiring transfer of the Properties to him. Jan Emil would have been present in Australia and amenable to the Court's compulsory processes, and would have transferred the Properties to the trustee, who would have sold the Properties in the second quarter of 2013, and distributed the proceeds to the

Respondents by 30 September 2013. Those proceeds would have been sufficient to satisfy the Kyrou J judgment debt: PJQ [97]; CAB 166.

22. McDonald J also found at PJQ [55] (CAB 151) that this could no longer occur once the Donation Agreement was entered into, as, under Czech law, there was nothing that Jan Emil could do to pass title to his trustee. He found that the proceeding commenced by the Respondents against Jan Emil in the Czech Republic on 4 November 2011 seeking to enforce the Kyrou J order against Jan Emil (defined at PJQ [57], CAB 152 as the 'Enforcement Proceeding') was '*worthless*': PJQ [86]; CAB 163.

23. Thus, the operative finding as to liability was that the Donation Agreement caused the Respondents to lose completely the chance of recovering '*a dividend in a future bankruptcy of [Jan Emil]*': PJQ [9] and [14]; CAB 133 and 135.

24. That finding was upheld in the Court of Appeal. The Court observed at [59] (CAB 357) that the original opportunity to recover the judgment debt '*against the properties through Jan Emil's trustee in bankruptcy*' had been '*extinguished*', and at [61] (CAB 357-8) that the alternative opportunity to recover '*the judgment debt against the properties in the enforcement proceeding*' (ie against Jan Emil himself, but in the Czech Republic) had also been '*extinguished*'.

25. **The error in Judith's argument.** Had matters rested there, then there could be no dispute that the Respondents had suffered loss and damage as a result of the conspiracy. The opportunity they had to obtain, by 30 September 2013, a return from enforcing the Kyrou J orders against Jan Emil by bankrupting him and obtaining a dividend in his bankruptcy has been wiped out—precisely as intended by Judith and her co-conspirators.

26. However, Judith's argument is that this is not so because, several years after the Donation Agreement, the Respondents tried to undo—to some extent—the Donation Agreement and its effects in the Czech courts. Judith argues that, as a result of instituting the 'Donation Proceeding' against David and Paul, the Respondents might be able to obtain some recovery 'against the properties', albeit in the hands of David and Paul rather than Jan Emil. The trial judge found that (as a matter of Czech law) if the Respondents are successful against David and Paul in the Donation Proceeding, title to the Properties would not revert to Jan Emil's estate, but the Respondents could then commence a further new proceeding in the Czech courts, which the trial judge variously described as a

proceeding for the 'enforcement' of the Kyrou J orders against David and Paul, or against the Properties: PJQ [55] and [60], CAB 151 and 152-153.

27. Judith's argument is that the Respondents have not lost any opportunity, but have only suffered a 'mere reduction' (eg AS [37]) in it for so long as there is a chance that they may succeed in their Czech litigation against David and Paul. That argument elides two quite different opportunities. The new 'opportunity' is not the same as the opportunity the Respondents lost when the Donation Agreement was executed on 12 May 2009. It arose two and a half years later, on 4 November 2011, when the Respondents commenced the Donation Proceeding against David and Paul in the Czech Republic.

28. The new 'opportunity' is to enforce rights against David and Paul, and not the judgment debtor, Jan Emil. The rights against David and Paul arose under Czech law from their being knowingly involved in defeating the Respondents' rights as creditors,[3] whereas the right against Jan Emil was an accrued entitlement under Australian law arising no later than 2008[4] to a money judgment, which arose because Jan Emil had earlier refused to transfer certain real property to the Respondents in accordance with the Terms. The rights against David and Paul have been found to be unlikely to give any recovery (if there is to be recovery) until at least 2028,[5] whereas the right against Jan Emil was found to have been likely to have led to recovery by 30 September 2013.

29. Judith is therefore wrong to assert that there has been a 'mere reduction' in the original 'chance'. The original chance was wholly lost. It is notable that Judith's argument can only be made by describing an opportunity in the abstract—as being a '*chance of recovering the judgment debt*' (eg AS [37])—without reference to the person from whom that 'judgment debt' may be recovered. That abstraction means that Judith does not squarely address the basis on which she was unsuccessful below, where the opportunity was clearly identified as being the opportunity to recover *against Jan Emil*, under the

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3 See PJQ [55], [60], [65], CAB 151, 152-153, 154; Section 42a of Act No 40/1964 Sb of the Czech Republic (English translation).

4 Jan Emil was found in breach of the Terms by Osborn J in 2008: [2008] VSC 128 at [218]. He had leave to reagitate an attack on the Terms on the ground of alleged uncertainty, and an attack on this basis was made and dismissed by Kyrou J: [2009] VSC 533 at [295].

5 The trial judge observed (in 2018) that the Donation Proceeding against David and Paul had been on foot for six and a half years, with many objections having been taken by them, and that the Respondents' expert in Czech law estimated that there would be '*at least one to two years*' before the proceeding concluded, '*followed by two years, at a minimum, to resolve any appeals*': PJQ [60]-[61]; CAB 152-3. If the Respondents succeed in the Donation Proceeding, the separate enforcement proceeding against David and Paul could take up to six years to conclude: PJQ [61]; CAB 153. The trial judge's acceptance of that evidence is not challenged: PJQ [88]; CAB 163-4.

orders he had consented to in 2001. The issue identified by Judith does not arise, and her appeal must be dismissed. Further, all of Judith's submissions rest upon the premise that there is one chance that continues to exist, but which has been reduced; those submissions fall with the destruction of that premise.

30. **Further illustration of error.** Because her argument rests upon conflating the original opportunity to recover against Jan Emil with the later 'opportunity' to recover against David and Paul, Judith has not grappled with the juristic effect of the proceedings brought against David and Paul in the Czech Republic. In particular, she has not addressed the question of whether the Respondents had suffered loss and damage in the period between the Donation Agreement on 12 May 2009 and the institution of the Donation Proceeding on 4 November 2011. Doing so reveals further error in Judith's argument.

31. If Judith's argument accepts that loss and damage *had been* suffered between May 2009 and November 2011 (the chance to recover against Jan Emil having been lost, and no chance to recover against David and Paul yet having been created), then somehow the bringing of the Donation Proceeding must have erased that loss and damage. That cannot be correct.

32. The only alternative for Judith's argument is that loss was never suffered because on and from May 2009 the Respondents had an ability to commence the Donation Proceeding, and that proceeding and a possible subsequent Czech proceeding had a 20% chance of success—and thus, so the argument goes, recovery may still occur against David and Paul, and no chance has been lost. But this analysis also cannot be correct. It entails an investigation into the hypothetical means by which the consequences of unlawful—and in this case fraudulent—conduct might be undone by the victim, and a conclusion that if any of these means has a non-negligible prospect of leading to recovery, the victim has suffered no loss at all, until such time as the victim has in fact taken the step of investigating the available options, and incurred the time and cost of pursuing recovery, and that attempt has failed.

33. As a matter of legal theory, the existence of a *spes* to undo unlawful conduct cannot mean that no loss or damage has been suffered. As a matter of policy, a legal and evidential burden would be imposed on the victims of unlawful acts, and timing, cost and insolvency risks would be thrown onto them. If a victim cannot afford to bring proceedings to undo the unlawful acts, then it would seem that they must accept they have been uninjured, as

they have not taken up a chance to undo the effects of the unlawful conduct. That cannot be right.

34. Judith's argument at AS [59] regarding the timing of bringing a claim for conspiracy rests upon the incorrect premise that the original opportunity remained after the Donation Agreement, but reduced in magnitude. However, it is also wrong on its own terms. Judith is silent as to: (i) whether the Respondents could have brought their conspiracy claim between 12 May 2009 and 11 November 2011 (ie whether damage was suffered before the Donation Proceeding was commenced); and (ii) why the law should be that no cause of action accrues to a victim of a conspiracy unless and until they have tried, and failed, in all possible legal proceedings to undo the effect of the conspirators' conduct, however tenuous their prospects of success. Judith's argument would mean that it would not be known whether a cause of action accrued under Australian law from her conduct in May 2009 until the conclusion of proceedings in the Czech Republic (actively resisted by co-conspirators) in 2028 at the earliest.

D. Costs and expenses of the Donation Proceeding

35. The second basis on which the Respondents succeeded in the Court of Appeal was that they had suffered damage by having to incur expense in identifying what the conspirators had done in relation to the Donation Agreement, in taking advice on how to try to 'set aside' the Donation Agreement, and in bringing and maintaining the Donation Proceeding in the Czech Republic to try to achieve that goal: CAL [99]-[100]; CAB 292.

36. Importantly, the evidence was that some of the costs of the Donation Proceeding were irrecoverable: from June 2011 to March 2018, the second to fifth respondents had incurred costs of €63,217.80 in connection with the Donation Proceeding, of which no more than €1,800 will be able to be recovered by them from David and Paul: PJQ [100]; CAB 168. The second to fifth plaintiffs also claimed an amount for future costs and expenses of litigating the Donation Proceeding, and a component for interest: PJQ [99]; CAB 167-8. Judith accepted that the second to fifth respondents were entitled to a round figure of €100,000 for those three amounts: PJQ [101]; CAB 168.

37. Thus, Judith is wrong to argue (AS [62]) that loss arising from '*expenses of the ongoing proceedings in the Czech Republic remains contingent on the outcome of those proceedings*'. There has been a finding to the contrary, which is not challenged. Judith's submissions ignore those findings in the trial judge's quantum judgment in favour of references to the earlier liability judgment: see AS [63]-[64].

38. Judith does not, at AS [62] and [65], explain how the 'reasonableness' of the Respondents' costs and expenses interacts with the question whether the Czech proceedings have been determined or concluded. Regardless, it is not open to Judith to argue in this Court that any of those costs and expenses were not (or may not have been) reasonably incurred. If that were a point that was open to have been taken, it should have been taken before the trial judge, where the Respondents could have adduced any necessary evidence. Judith did not do so. Further, Judith should not be heard to argue that no loss and damage has been suffered because there is a chance that the Czech proceedings may succeed, while also arguing that the irrecoverable costs of those proceedings will or may be unreasonable if those proceedings fail. The propositions are mutually exclusive.

39. More fundamentally, even if Judith could take this point in this Court, it could not succeed: AS [65] rests upon a premise that the Respondents are seeking to '*enforce a judgment debt against the property of a bankrupt*'. That premise is false. The conspiracy intended to, and did, achieve the transfer of title from Jan Emil to David and Paul, and the trial judge's explicit and unchallenged finding is that, even if the Respondents are successful in the Donation Proceeding, David and Paul will retain title to the Properties; what would then occur is that the Respondents would be able to bring fresh proceedings against David and Paul as owners of so many of the Properties as they have not dissipated: see PJQ [55]; CAB 151. Jan Emil is no longer the owner of the Properties, and there can be no question of the Respondents enforcing any judgment debt against his estate in the Donation Proceeding or any subsequent proceeding.

40. Finally, at AS [66], Judith asserts that it would be 'anomalous' if the Respondents could obtain 'a damages award against' her, but not her 'joint tortfeasors' for 'costs of the Czech proceedings'. That assertion is wrong. It confuses two things:

    (a) the Respondents' inability as a matter of Czech procedural law to recover certain costs and expenses in a Czech court from David and Paul, for proceedings commenced against them to try to impeach the Donation Agreement;

    (b) whether, as a matter of Australian law, those irrecoverable costs constitute loss and damage for the purposes of the tort of unlawful means conspiracy.

41. The simple response is that the fact that the Respondents cannot recover certain costs and expenses of the Donation Proceeding in the Czech courts means that they have suffered

loss and damage for the purposes of the Australian tort of unlawful means conspiracy. That completes the cause of action.

42. Judith also ignores that the award below is not just against her, but also against her co-conspirators and joint tortfeasors David, Paul and Jan Emil—who do not appeal the award against them. No question of differential treatment of joint tortfeasors thus arises. All four have rightly been made liable for their unlawful conduct, in the same extent. Judith's reliance on *De Reus v Gray* (2003) 9 VR 432 is thus misplaced.

E. No 'overcompensation'

43. Judith advances—faintly—an argument that the trial judge's decision is 'anomalous' because it may result in 'overcompensation': see AS [59], fn 12. That argument should be rejected.

44. First, once it is accepted that the Respondents have lost the opportunity to recover a dividend in a notional bankruptcy of Jan Emil, there is nothing objectionable in assessing the value of that lost opportunity and compensating the Respondents for it. The common law often proceeds by reference to loss and damage quantified by reference to future chances or probabilities: eg *Johnson v Perez* (1988) 166 CLR 351; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

45. This is done against the accepted rule that in actions for breach of contract and negligence, damages are awarded as a lump sum on a 'once and for all' basis, even if a contingency might never come about (*Bellgrove v Eldridge* (1954) 90 CLR 613 at 620; *Todorovic v Waller* (1981) 150 CLR 402 at 412). Thus a plaintiff cannot subsequently seek additional damages upon a further injury or contingency emerging, and a defendant cannot seek to set aside damages awarded for a contingency if later events show that the probabilities actually turned out differently: *Djordjevic v Australian Iron & Steel Pty Ltd* (1964) 82 WN (Pt 1) (NSW) 218.

46. It lies ill in the mouth of a wrongdoer to complain that this rule of the common law, applicable since at least *Fitter v Veal* (1701) 12 Mod 543; 88 ER 1506, should prevent the victims of a conspiracy recovering before the result is known of whether they are successful in Czech courts in their attempts to undo the wrongdoing.

47. Secondly, Judith's argument overlooks the fact that Australian courts have the power to control their processes to prevent overcompensation (see eg *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732 at [27]-[28]) and it must be presumed

(absent proof to the contrary) that foreign courts can do the same. Judith has not attempted to demonstrate to the contrary. Thus, the appropriate response to the argument raised by Judith at AS [58] is for the award of damages for conspiracy to stand and to deal with the avoidance of any potential overcompensation if and when the Respondents succeed in the Donation Proceeding and any subsequent enforcement proceeding—noting of course that the accepted evidence is that that process is unlikely to conclude before the year 2028.

48. Judith's argument also overlooks the fact that if she is successful in the present proceeding on the basis that the Donation Proceeding might still succeed, but then the Respondents fail in that proceeding, or the subsequent enforcement proceeding, or David and Paul cannot satisfy any judgment in whole or part (eg because they have further dissipated the Properties), then the Respondents will recover nothing, Judith will pay nothing, and David and Paul will receive a windfall to the full value of the Properties for their fraudulent conduct and persistent contempt of court. It is of note that the trial judge assessed that there was an 80% chance that the Donation Proceeding and any subsequent enforcement proceeding would not succeed.

49. Finally, and in the alternative, if it be necessary, the Respondents could be required to undertake to Australian courts that they will not seek to enforce verdicts in Czech courts to the extent it would result in overcompensation.

Part VI: Arguments on the notice of contention and notice of cross-appeal

A. Notice of Contention 1st Ground (para 2): Damage to property is sufficient to found an action in conspiracy

50. Judgment for the Respondents below may be supported on a different basis: the intended aim, and the effect, of the Donation Agreement and the conspiracy to procure and execute it was to sterilise the Respondents' right to have judgment entered against Jan Emil in accordance with clause 6 of the Terms for his conduct in refusing to transfer the properties listed in clause 1.[6] At the time of the Donation Agreement, that right was a chose in action, and therefore property. Its value was significantly reduced by the conspirators' conduct, and that reduction in value constituted loss and damage that completed the cause of action for unlawful means conspiracy.

51. This may be shown as follows. The Terms were an accord and satisfaction; they created rights and obligations in substitution for the Respondents' claims: [2009] VSC 533 at

[6] The Terms were reproduced by the trial judge at PJL [14], CAB 14-15.

[42], [48], [49]. However, in entering into the Terms, Jan Emil admitted that he '*owed the fiduciary duty as alleged in the amended statement of claim*', '*committed the breach of the fiduciary duty as alleged in the amended statement of claim*' and all facts necessary to support those conclusions: [2009] VSC 533 at [11] and [31]; see also [45] and [49].

52. The primary obligation on Jan Emil under the Terms was to transfer nominated properties to the Respondents: cl 1. If he was unable to do so within 12 months, Jan Emil was to sell them at the Respondents' direction and cost, and pay them the net proceeds of sale: cl 2. If Jan Emil breached any term of the agreement, the Respondents were entitled '*to enter judgment for an order that [Jan Emil] pay equitable compensation for breach of fiduciary duty in respect of each of the Properties and interests in the Properties*', plus costs: cl 6.

53. The Respondents asserted their cl 6 right upon reinstating the 1998 proceeding: PJL [16], CAB 15. Jan Emil was found in breach of the Terms by Osborn J in 2008: PJL [17], CAB 16. Thus, as at 12 May 2009, when Jan Emil entered into the Donation Agreement, the Respondents had the accrued right to have the Supreme Court enter an order that Jan Emil pay them equitable compensation for breach of fiduciary duty, with only the quantum to be determined. The Kyrou J orders, which fixed the quantum of equitable compensation (€9,481,660 plus €592,158 interest), were made on 11 December 2009 via the exercise of that right.

54. That right was a chose in action held by the Respondents, and was a species of property: *Smith v ANL Ltd* (2000) 204 CLR 493 at 500 [7], 504 [20], 521-2 [79]-[80], 533 [121], 546 [165]; *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 at 133 (Brennan CJ, Gaudron and McHugh JJ), citing *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304, 312, 325.

55. That chose in action could be valued by reference to Jan Emil's assets and liabilities, and the difficulty and cost of enforcing the order against him. If enforcement was straightforward and Jan Emil held sufficient assets (relevantly, the properties the subject of the Terms),[7] the right would be worth the face value of the equitable compensation orders; but it would be worth close to zero if Jan Emil had no assets at all and/or enforcement was otherwise not practical.

[7] The properties the subject of the Donation Agreement would have been sufficient to discharge the judgment debt if taken in execution, having a value of €13.4 million in 2013 when they would have been sold, had the conspiracy not occurred: PJQ [2](iii), [97]; CAB 129-130, 165-6.

56. The trial judge's valuation process, upheld on appeal, was that of valuing a piece of property by reference to the future contingencies affecting its present value (the likelihood, cost and difficulty of enforcement of the chose in action). Prior to the Donation Agreement, the right was worth 75% of the prospective judgment debt: PJQ [54]; CAB 149. After the Donation Agreement, reflecting the need to succeed in the Donation Proceeding and then subsequent enforcement proceedings against David and Paul, the right was worth 20% of the prospective judgment debt: PJQ [89]; CAB 164.

57. The trial judge's findings thus support a contention that the effect of the Donation Agreement was to reduce the value of the Respondents' chose in action by 55% of the value of the prospective judgment debt (which was a reduction of 73.3% in its value).

58. It is submitted that damage to the value of property is loss and damage that completes the tort of unlawful means conspiracy. It is economic loss, suitable for protection by the economic torts, of which conspiracy is one. It is not necessary that the property be fully destroyed or stripped of all value for the owner to suffer economic loss. Any loss of value that is more than *de minimis* suffices (cf AS [58]).

59. Statements of this Court in negligence cases support the conclusion that economic loss was suffered. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, French CJ, Hayne and Kiefel JJ at 629 [25] identified that in an action for negligence causing economic loss '*it will almost always be necessary to identify, with some precision, the interest infringed by the negligent act*', and then said at 629-630 [26] (omitting footnotes):

> *An interest which is the subject of economic loss need not be derived from proprietary rights or obligations governed by the general law. The interest infringed may be in the value of property or its physical condition. Thus in* The Commonwealth v Cornwell*, the respondent's interest was an entitlement conferred by federal statute to participate in a Commonwealth superannuation fund. An economic interest must be something the loss or invasion of which is compensable by a sum of money. One such interest identified in the cases is a lender's interest in the recovery of moneys advanced.*

60. The interests of the Respondents infringed by Judith's conduct are 'in the value of property', comprising a chose in action, and are analogous to the interest of a lender in the recovery of moneys advanced. Similarly, in *Perre v Apand Pty Ltd* (1999) 198 CLR

180 at 226-7 [121] and 240 [167], McHugh and Gummow JJ each cited with apparent approval a statement by Judge Posner that it '*would be better to call*' economic loss a '*commercial loss*', because '*personal injuries and especially property losses are economic losses, too — they destroy values which can be and are monetised*'.

B. Cross-Appeal 1st Ground (paras 2-3): The lost chance and its valuation

61. As noted in paragraph 20 above, the trial judge accepted Judith's submission that '*in assessing the value of the [Respondents'] loss of opportunity to receive a dividend in a future bankruptcy of [Jan Emil]*', it was necessary '*to have regard to the [Respondents'] prospects of success in the proceedings which are currently on foot in the Czech Republic seeking recognition and enforcement of the Kyrou J orders*': PJQ [11]-[14]; CAB 134-5.

62. The trial judge made the following findings at PJQ [89]; CAB 164:

> *I have concluded that the value of the plaintiffs' opportunity prior to the Donation Agreement to enforce the judgment debt against the Properties represents 75 per cent of the Kyrou J judgment and the plaintiffs' respective share of the costs order made in September 2013. I assess the plaintiffs' chance of successfully pursuing the Donation Proceedings and any subsequent enforcement proceedings against the second and third defendants at 20 per cent. The respective share of the first plaintiff, and the second to fifth plaintiffs of the costs order is assessed at 50 per cent: $1,340,119. After making allowance for the 20 per cent chance of successfully pursuing the Donation Proceedings, the value of the plaintiffs' chance to enforce the judgment debt against the Properties which was lost by reason of the Donation Agreement is 55 per cent.*

63. Judith's submission thus introduced into the quantification process a false equivalence between the original lost opportunity to obtain a dividend against Jan Emil, and the later 'opportunity' to enforce the Kyrou J orders against the Properties, which underlies Judith's argument on this appeal. The trial judge erred in accepting Judith's submission, and in conflating two distinct and different 'opportunities'.

64. The opportunity lost as a result of the conspiracy was the chance to obtain a dividend from the notional trustee of Jan Emil by 30 September 2013, pursuant to the chose in action held by the Respondents under cl 6 of the Terms. That was valued by the trial judge at 75% of the amount of the equitable compensation and costs orders in the Kyrou J

orders. That should have been the measure of damages awarded to the Respondents: it was the value of the opportunity that was wholly lost by the conspiracy.

65. The trial judge was wrong to 'take account of' the possible outcome of the Donation Proceeding and any subsequent enforcement proceeding against David and Paul for three reasons.

66. First, the new 'opportunity' is not properly an opportunity in the sense used in the discourse of lost opportunity. It is, in reality, an assessment of the possibility that the Respondents may be able to undo (in part) some of the effects of the conspiracy—in this case, to be able to convince a Czech court to treat the registrations of the Properties in David and Paul's names as a fraud on creditors, and to allow recovery against them. It is submitted that what Judith's submission (and the trial judge) treated as a 'new opportunity' is in reality the prospects of the Respondents being able to partly undo, in law, some of the effects of the Donation Agreement by later legal proceedings in a foreign court.

67. The reason that the word 'partly' is used is because success in the Donation Proceeding would not fully restore the *status quo ante*: the Properties would remain in David and Paul's name, with the attendant possibility that they may further dissipate them; and the enforcement of the orders of the Supreme Court of Victoria would then be attempted in the Czech courts, rather than in Australian courts.

68. It is submitted that the chance of potential success in legal proceedings to try to undo some of the deleterious conduct should not be considered an 'opportunity' whose value is to be taken into account when valuing the different, lost opportunity that was in the nature of an accrued right to payment. Victims of a conspiracy should not suffer if they take action in foreign courts in response to the impotency of an Australian court, caused by the wrongdoer's decision to remain outside the jurisdiction, to ignore and breach Mareva-type orders made by that Court, and to evade arrest warrants issued by it.

69. The correct approach was for the trial judge to have awarded damages for conspiracy reflecting the value of the opportunity that was destroyed by the conspirators' conduct: that is, 75% of the Kyrou J orders. The value of any recovery for conspiracy would then be brought into account if the Respondents were later successful in the Czech Republic against David and Paul, something that has not occurred and is not at all likely.

70. Secondly, reducing the quantum of compensation in this way introduces absurdities that the law ought to turn its face against, and which were noted earlier. If there would have been no reduction in quantum had the Respondents not commenced the Donation Proceeding, then the result is to introduce a powerful disincentive for victims to try to take action to reverse the effects of unlawful means conspiracies: the Respondents will have been penalised for doing so—they would have done better to sit on their hands.

71. If, on the other hand, a deduction of 20% is to be made whether or not the Donation Proceedings were in fact instituted, then the result is equally unacceptable. The practical effect is that the Respondents must undertake the costly, lengthy, difficult and time-consuming activities of instituting and prosecuting the Donation Proceeding, and then (if successful) a subsequent proceeding—because that is the only way in which they can ever recover the whole of the loss they have suffered. On this approach, a conspirator can always say that no damage has been suffered until all available legal avenues are exhausted without complete success, no matter how long that may take and how expensive the process may be.

72. Thirdly, it lies ill in the mouth of a conspirator, who has procured an alienation of assets to defeat the processes of the Supreme Court, to point out to the innocent party various legal means that might be pursued to try to undo the alienation. Judith indeed made such submissions, pointing out ways in which she contended the Respondents would succeed in setting aside the consequences of her conduct: eg PJQ [65] CAB 154, [78] CAB 160. The conspirator is rewarded if permitted to argue that the loss and damage caused by the conspiracy is not as bad as intended by them because some legal redress, vehemently opposed, might be available to the victim.

73. Using the prospects of possible success of unravelling a conspiracy to reduce the value of the damage suffered caps the conspirators' liability *ex ante*: in this case, their liability was reduced from 75% of the face value of the relevant orders to 55%. By making the difference only recoverable in the Donation Proceeding, the risk of recovering the shortfall is cast upon the Respondents. The law should not require the victim of a conspiracy to take on that additional recovery risk, *a fortiori* where the risk is to recover from persons who have kept the Properties against which execution is hoped for in defiance of orders of the Supreme Court of Victoria (see paragraph 10 above).

74. Judith should instead remain liable for the full extent of the loss caused by her conduct. If, subsequently, the Respondents can recover from David and Paul, what Judith has paid

them (if anything) can be brought to account. If Judith considers she has overpaid her share of the loss, she should be left to her rights of contribution against her co-tortfeasors, which can and should be exercised without the involvement of the Respondents.

C. Cross-Appeal 2nd Ground (paras 4-5): Chance of success in 'Donation Proceedings'

75. The second to fifth respondents do not press the proposed ground of cross-appeal in paragraphs 4 to 5 of their notice of cross-appeal.

D. Notice of Contention 2nd Ground (para 3): Equitable fraud

76. The second to fifth respondents contend that the orders for payment of compensation, interest and costs (but not aggravated or exemplary damages) may be sustained on a basis in the further alternative: as equitable compensation for equitable fraud.

77. The trial judge held that the Donation Agreement constituted an equitable fraud, on the basis that it was '*in bad faith in respect of other persons who stand in such a relation to the parties to the transaction as to be affected by the agreement*' PJL [158]-[159]; CAB 62. The trial judge cited *Re Ledir Enterprises Pty Ltd* (2013) 96 ACSR 1, in which Black J located the principle within *Chesterfield v Janssen* [1750] 2 Ves Sen 125 at 156 [28 ER 82 at 100]. That, as the majority said in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 187 [37], is the '*fourth kind of equitable fraud identified by Lord Hardwicke*', where *'the nature and circumstances of the transaction reveal it to be "an imposition and deceit on the other persons not parties to the fraudulent agreement"*'.

78. Research has not located any authority of this Court regarding the award of equitable compensation for cases of this kind. However, in *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 55-56, Handley JA (with whom Mason P and Beazley JA agreed) spoke of the award of equitable compensation for equitable fraud that did not involve breach of trust or fiduciary duty in terms which seem to cover the present case, relying on the observations of Lord Haldane in *Nocton v Lord Ashburton* [1914] AC 932 at 951-953 '*and following*'. The second to fifth respondents rely in particular on Lord Haldane's observation at 954 that '*If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage*.' As described, such damage is broad enough to contemplate the effect on the Respondents' right against Jan Emil (considered as property) and also their loss of opportunity to enforce that right against him (via a dividend in his bankruptcy).

79. The second to fifth respondents further rely upon two facts. One is that the conduct was intentionally fraudulent in the strict sense ('dolus malus', as Lord Hardwicke put it); the trial judge noted that Judith treated the case as an allegation of true fraud, and applied the appropriate principles when considering and making the finding: PJL [40] and [65]; CAB 22 and 30. Judith did not resist the conclusion that the Donation Agreement constituted an equitable fraud; her defence was limited to asserting that she was not party to an agreement with Jan Emil, David and Paul to take the property out of reach of the Respondents: PJL [157]; CAB 61. That submission was rightly and roundly rejected: PJL [2] and [124]; CAB 11, 49. Prior to the Respondents' appeal, Judith was denied her costs on that basis (as well as her joint conduct with Jan Emil in proposing to Jan Emil's solicitor that he prepare an affidavit giving a false explanation for the Donation Agreements): PJC1 at [25], [28]-[30]; CAB 106, 107-108. The Court of Appeal rejected Judith's attempt to avoid liability by notice of contention arguing that she was not a party to the agreement: CAL [68]-[72]; CAB 279-280.

80. The second fact relied upon is that Judith's conduct is analogous to involvement in dishonest and fraudulent designs comprising breaches of fiduciary duty within *Barnes v Addy*, as explained in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 164 [179]. As noted above, Kyrou J held that, in executing the Terms, Jan Emil admitted the fiduciary duty and breach pleaded against him, and all necessary facts supporting that conclusion. He also held that '*for the purposes of cl 6, the defendant is a defaulting fiduciary and is liable to pay equitable compensation to the plaintiffs for the breach of fiduciary duty set out in the 2000 ASC. For the purposes of this Court assessing equitable compensation, the defendant is taken to remain a defaulting fiduciary until the time of judgment.*': [2009] VSC 533 at [49]. Judith assisted a defaulting fiduciary to make himself unable to meet the order for equitable compensation, and she did so by a secret and dishonest agreement calculated to injure the Respondents and to impede the course of justice. That conduct should be equivalent, in equity's eyes, to assisting a fiduciary to commit a breach of fiduciary duty.

81. To uphold the judgment for compensation (and interest and costs) on this basis would involve no prejudice to Judith. All facts necessary for such a determination were adduced and proved at trial, and no new fact is sought to be or needs to be raised: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [31].

Part VII: Time estimate

82. The second to fifth respondents estimate that they will require between 1.5 and 2 hours for oral argument.

Dated: 15 January 2021

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