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Concepts of Loss and Proving Hypotheticals in Misleading or Deceptive Conduct – *Benjamin Teng and Andrew Simpson*

In modern commercial litigation, claims for damages to compensate loss caused by misleading or deceptive conduct have become ubiquitous. But litigants may frame their loss in different ways. In *Berry v CCL Secure Pty Ltd*, the High Court of Australia significantly increased the quantum of damages awarded for misleading or deceptive conduct from around \$1 million to \$27 million. In so doing, the Court instructively considered the pleading of counterfactuals, the arising of presumptions vis-à-vis wrongdoers and the shifting of evidentiary onuses. Though it was not pleaded, the Court also offered some consideration of the alternative possibility of damages for loss of opportunity, before casting doubt on another recent decision of the Full Federal Court, which had discerned a “qualification” to the general proposition that a claimant bears the onus of proving its damages on the balance of probabilities. This article analyses these aspects of the case. *Berry v CCL Secure Pty Ltd* clarifies many aspects of claiming damages for misleading or deceptive conduct, yet demonstrates that, still, different minds may arrive at significantly different outcomes in any given case. 152

Once Privileged, Always Privileged? An Exploration into the Applicability of Legal Professional Privilege to Inquisitorial Proceedings in New Zealand – *James Anson-Holland*

The purpose of this article is to explore the current uncertainty as to when and to what extent (if at all) litigation privilege and, to a lesser extent, legal advice privilege applies in the context of inquisitorial proceedings in New Zealand. The article draws on the historical underpinnings of legal professional privilege, the purpose of inquiries and investigations, and some conflicting authorities within the Commonwealth in the hopes of shining light into the often fraught relationship between inquisitorial proceedings (and the need to access as much relevant evidence as possible) and legal professional privilege. The article concludes that while litigation privilege has little utility in an inquisitorial setting an amendment to the *Inquiries Act 2013* (NZ) may help ensure that any potential adverse affects on future adversarial proceedings is limited. 161

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