

PROPORTIONATE LIABILITY

***Mitchell Morgan Nominees Pty Limited & Anor v Vella & Ors* [2011] NSWCA 390**

Liability by two or more tortfeasors for similar losses in respect of the same transaction does not mean that they are necessarily concurrent wrongdoers for the purposes of Part 4 of the *Civil Liability Act 2002 (Act)*. So held the New South Wales Court of Appeal in *Mitchell Morgan Nominees Pty Limited & Anor v Vella & Ors* [2011] NSWCA 390.

Mitchell Morgan (**lender**) advanced funds by way of loan procured by the fraud of Messrs Caradonna and Flammia. The lender retained Hunt & Hunt solicitors (**solicitors**) to secure the advance by registered mortgage. The mortgage was found to be negligently drawn and unenforceable. Had it not been negligently drawn it would have provided valuable security for the loan.

The lender sued the solicitors alleging it had suffered loss as a result of the solicitors' negligence. It was common ground that Caradonna and Flammia were liable to Mitchell Morgan in fraud. At first instance, Young CJ in Equity had held that Caradonna, Flammia and the solicitors were concurrent wrongdoers, but that the fraudsters were culpable for the significant proportion of the loss. The solicitors were held liable for only 12.5% of the total loss of \$1,001,748.85.

The issue before the Court of Appeal was whether the solicitors and the fraudsters were concurrent wrongdoers for the purposes of section 34 of the Act, such that the solicitors' liability could be apportioned and thereby limited.

The lender contended that the solicitors were not concurrent wrongdoers with Caradonna and Flammia, and accordingly that their liability was not limited. It contended that section 34 of the Act required liability in respect of the same loss or damage in order to operate. It said its claim against the solicitors was in respect of damage caused by the failure to obtain valuable and effective security. This was to be contrasted with the loss suffered as a result of the fraud of Caradonna and Flammia, which was their liability for the total amount of the advance. The lender argued that, had the solicitors not been negligent, it would not have suffered a loss of the amount intended to be secured, which was not necessarily the same as the loss sustained by the full advance. The Court of Appeal agreed, and found that the two types of damage were different. It followed that the solicitors' liability was not limited at all.

The decision accords with the Victoria Court of Appeal's judgment in *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 involving similar considerations in relation to a valuation resulting in inadequate security for an advance. In *Quinerts*, the Victorian Court of Appeal considered and disagreed with the first instance reasoning in *Mitchell Morgan*.

Proportionate liability is routinely pleaded in answer to claims in respect of property damage and against professionals. Whether parties have contributed to the same damage in property claims is in most cases self evident. However, those involved in professional indemnity claims will now need to scrutinise the losses claimed against prospective concurrent wrongdoers more carefully, particularly in claims involving allegations that professional advisers were retained, but failed, to protect their client from a specific loss. Existing pleadings will need to be examined with a view to whether they are liable to be struck out as a result of the decision.

It should be noted that the Standing Committee of Attorneys General released draft model proportionate liability provisions and a Regulation Impact Statement in September 2011. One change proposed is that a concurrent wrongdoer will not be defined by reference to whether two or more people have caused the same loss or damage, but:

'loss or damage the subject of the claim or substantially or materially similar loss or damage'.

The Regulation Impact Statement observes that the change in definition is intended to avoid '*legalistic, technical disputes on this issue*', and notes *Quinerts* to be an example of such an approach.

December 2011

This article was prepared by Simon Lusk, Director. Simon Lusk can be contacted on 9231 7017 or at slusk@ypol.com.au

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LEVEL 2, 39 MARTIN PLACE
SYDNEY NSW 2000

DX 162 SYDNEY

T: +61 2 9231 7000

F: +61 2 9231 7005

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