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WHO TO SUE AND WHO TO BLAME?

Proportionate liability in the Federal jurisdiction

In May 2015, the High Court of Australia delivered an important judgment clarifying the extent to which breaches of certain Federal legislation can be classified as apportionable claims to which the defence of proportionate liability is available. The judgment provides significant clarification and resolved competing and contradictory approaches at the intermediate appellate level.

Background

From around 2002/2003, at both a State and Federal level, Australia has implemented statutory schemes making a defence of proportionate liability available to concurrent wrongdoers in certain circumstances (in contrast to the traditional joint and several liability of wrongdoers). These schemes took the form of legislation such as the *Civil Liability Act 2002* (NSW) and amendments to the *Corporations Act 2001* (Cth) (***Corporations Act***).

Before the introduction of proportionate liability:

- claims were principally brought against 'deep pocket' defendants who may not be the principal wrongdoer (such as professional service providers and public authorities) with plaintiffs aware that these types of defendants would typically be covered by appropriate insurance policies including professional indemnity insurance; and
- any such defendants who wished to pass on or be indemnified for their liability were required to make cross-claims for contribution and/or indemnity against other concurrent wrongdoers.

These circumstances led to significantly increased insurance premiums and what was regarded as a disproportionate burden of claims against insured wrongdoers compared to uninsured concurrent wrongdoers. A consequential impact concerned the expansion of proceedings (and consequent costs) of defendants joining by way of cross-claim concurrent wrongdoers.

The proportionate liability schemes were intended to resolve these problems by placing the onus upon a claimant to join all prospective defendants (whether insured or not) or to run the risk that a claim involving multiple wrongdoers could be apportioned having regard to the comparative responsibility of each wrongdoer for the loss and thus not recovering the total loss.

The proportionate liability schemes have been arguably successful in substantially achieving the above goals. However, this has occurred notwithstanding some disquiet (including among some judges) that the outcome has been unfair to claimants in some instances.

In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*[1] (**Mitchell Morgan**), the High Court considered the proportionate scheme introduced by Part 4 of the *Civil Liability Act* 2002 (NSW) (which is consistent with similar schemes in each of the states). The proceedings in Mitchell Morgan resulted from the actions of two fraudsters who, using forged documents, secured mortgages over a number of properties. The mortgages were negligently drafted which resulted in them effectively being secured by nothing. The issue on appeal to the High Court was whether the drafters of the mortgages were concurrent wrongdoers alongside the fraudsters.[2] Ultimately the High Court found that the drafters of the mortgages were

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[1] [2013] HCA 10; (2013) 247 CLR 613

[2] See previous YPOL article analysing the NSW Court of Appeal decision (*Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors* [2011] NSWCA 390) at (*Proportionate Liability: Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors [2011] NSWCA 390*)

concurrent wrongdoers for the purposes of the legislation and held their liability to be at 12.5% of the total loss.

On 13 May 2015, the High Court of Australia delivered judgment in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 (**Wealthsure judgment**). In the Wealthsure judgment, the Court considered and determined one of Australia's statutory proportionate liability schemes for the second time and sought to settle the law after two conflicting decisions of the Full Court of the Federal Court of Australia.[3] The reasoning behind the two decisions of the Full Court is discussed below before the Wealthsure judgment is explained along with the potential wider consequences of that decision.

In the Wealthsure judgment, the High Court considered the scope of the proportionate liability scheme under the *Corporations Act* and *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) and in particular the extent to which claims brought pursuant to those Acts are 'apportionable claims'.[4]

The Wealthsure judgment was keenly anticipated by prospective defendants and their insurers (particularly those that had an exposure under the relevant legislation such as corporations, directors and officers and advisors and other professionals connected with financial advice and products) due the wide ranging consequences of the Court's interpretation of the legislation.

Relevant statutory framework

Division 2 of Part 7.10 of the *Corporations Act* contains provisions for prohibited conduct concerning financial products, financial services and financial markets other than insider trading provisions.

Under this division, ss 1041A, 1041B, 1041C, 1041D and 1041E proscribe conduct including market manipulation, false trading, market rigging, dissemination of information about illegal transactions and false or misleading statements. Failure to comply with any of these sections is an offence and, with the exception of s 1041E, each is also a civil penalty provision. Section 1041F prohibits a person from inducing another person to deal in financial products. Section 1041G prohibits dishonest conduct in relation to a financial product or a financial service. Contravention of either s 1041F or s 1041G is an offence.

Section 1041H proscribes conduct in relation to a financial product or financial service that is misleading or deceptive. Failure to comply with this provision is neither a criminal offence nor a civil liability provision.

It is important to note that whilst intention is an essential element of most of the provisions contained in Division 2 of Part 7.10, this requirement is absent from s 1041H ie. it does not require proof of a mental element.[5]

Section 1041I provides a cause of action to a person who has suffered loss or damage by conduct of another in contravention of ss 1041E, 1041F, 1041G or 1041H and reads as follows:

> Civil action for loss or damage for contravention of sections 1041E to 1041H
>
> (1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.
>
> (1A) Subsection (1) has effect subject to section 1044B.
>
> Note: Section 1044B may limit the amount that the person may recover for a contravention of section 1041H (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

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[3] *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64; (2014) 221 FCR 1 and *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1

[4] The Court noted at [8] that the reasoning applicable to the relevant *Corporations Act* provisions applied equally to the *ASIC Act* provisions. As such we will focus our analysis on the *Corporations Act*.

[5] *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630 (2012) 205 FCR 120

(1B) Despite subsection (1), if:

(a) a person (the claimant) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the defendant) that was done in contravention of section 1041H; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Division 2A of Part 7.10 of the *Corporations Act* implements a proportionate liability regime. Section 1041L prescribes the application of the division and reads as follows:

Section 1041L

Application of Division

(1) This Division applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 1041I for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 1041H.

(2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Division, a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).

(5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

The implementation of these provisions caused significant change for those matters affected by them. Joint and several liability was removed and the application of the proportionate liability provisions is mandatory (s 1041N(1)).

Around the same time that the *Corporations Act* was amended, changes were made to the *ASIC Act* and *Trade Practices Act 1974* (Cth) (***TPA***) (which was subsequently replaced by the *Competition and Consumer Act* 2010 (Cth)) implementing similar proportionate liability regimes. As with the *Corporations Act*, the proportionate liability regimes in the *ASIC Act* and *TPA* were to apply to conduct which breached the misleading or deceptive conduct provisions of the relevant act (both the *ASIC Act* and *TPA* excluded behaviour that involved deliberate wrongdoing or unconscionable behaviour from the proportionate liability regime).

Wealthsure, Full Court of the Federal Court of Australia

A bench consisting of Mansfield, Besanko and White JJ delivered judgment in *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64; (2014) 221 FCR 1 (**Wealthsure FFC**) on 30 May 2014.

The proceedings at first instance involved a claim by a husband and wife for losses alleged to have arisen from conduct relating to investment advice.[6] It was claimed that the conduct of the defendants was misleading or deceptive in that it contained misrepresentations, breached contractual obligations, and was negligent. The defendants included both corporate entities and relevant directors.

After several amendments to the pleading, the plaintiffs' claim settled on one for damages against the first and second defendants:

- under ss 953B(2)(b) and (c), 1041I (for alleged breaches of ss 1041H and 1041E) and 1325(1) of the *Corporations Act*;
- under s 12GF of the *ASIC Act*; and
- for negligence, misrepresentation, and breach of contract.

In the alternative, the plaintiffs sought damages from each of the third to thirteenth defendants:

- under ss 1041I and 1325(1) of the *Corporations Act*;
- under s 12GF of the *ASIC Act*; and
- for negligence and misrepresentation.

The plaintiffs' claim against the third to the thirteenth defendants (comprising directors of the company invested in by the plaintiff, corporate entities and lawyers in partnership with one of the directors) was only brought because the first and second defendants, in their Fourth Amended Defence and Second Cross-claim not only denied that the plaintiffs were entitled to any relief against them but asserted that they were entitled to the benefit of the proportionate liability regimes of the relevant legislation.

The trial judge (Lander J) found that the proportionate liability regime did not apply and, as a result, delivered judgment against the first, second, fifth and sixth defendants (jointly and severally).

The first and second defendants subsequently appealed to the Full Court of the Federal Court. It was argued that s 1041L of the *Corporations Act* applied to the claim and that the claim was therefore apportionable as between the defendants.

In dealing with the construction of s 1041L of the *Corporations Act*, the majority (Mansfield and Besanko JJ - White J in dissent) found that when determining if proportionate liability applies, the focus should be upon the nature of the loss or damage for which relief is sought, rather than upon the nature of the causes of action that give rise to the entitlement to that loss or damage.[7] Put another way – in determining whether a claim is apportionable, their Honours took the view that if one looks at the loss/damage claimed and then, working backwards, determines that the loss/damage is based on a breach of s 1041H and another cause of action, then the entire claim is apportionable. In summarising his view, Besanko J stated at [84]:

> In conclusion, it is not easy to discern Parliament's intention in resolving the construction issue raised in this case. On the one hand, it is not surprising that the proportionate liability provisions would not be restricted to the one cause of action (i.e., a contravention of s 1041H(1)) because it is quite common for a particular set of facts to give rise to a number of causes of action, and it would seem artificial that the proportionate liability provisions could be avoided by a different legal characterisation of the facts. On the other hand, it might be considered surprising if the proportionate liability provisions applied to causes of action far removed from a general proscription on misleading or deceptive conduct, and, in particular, causes of action having different elements and a different rationale. These considerations might have led to a provision bringing within the proportionate liability provisions contraventions of s 1041H(1) and other similar causes of action or causes of action of the same kind. <u>However, I think Parliament has gone further than this in enacting s 1041L(2). Parliament used the concept of the same loss or damage and made it clear that different kinds of causes of action are also included.</u>
>
> [emphasis added]

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[6] *Selig v Wealthsure Pty Ltd* [2013] FCA 348

[7] *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64; (2014) 221 FCR 1 per Mansfield J at [10] and Besanko J at [77]

In his dissenting judgment, White J relevantly stated at [348] to [349]:

> 'The text of s 1041L(2) is significant. Having defined an "apportionable claim" in subs (1), subs (2) specifies a circumstance in which there will be a single apportionable claim. That is suggestive, to my mind, of a legislative intention that claims which are themselves apportionable claims are, in the stipulated circumstance, to be regarded as a single claim. It seems improbable that a claim which is not, by definition, an apportionable claim should be regarded as part of a single apportionable claim. Had that been intended, one would have expected subs (1) to have expressly been made subject to subs (2).
>
> I consider that this construction of subs (2) is confirmed by s 1041L(4). Effect must be given to that subsection. It expressly limits apportionable claims to those claims specified in subs (1). In other words, whatever an apportionable claim may be, it is limited to claims pursuant to s 1041I in respect of contraventions of s 1041H. A construction of subs (2) which has the effect of including in an apportionable claim any claim at all, whether made under s 1041H or otherwise, providing that it is in respect of the same loss or damage, is inconsistent with subs (4). The submissions of Wealthsure and Mr Bertram did not reconcile that inconsistency.'
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> [emphasis added]

ABN AMRO, Full Court of the Federal Court of Australia

In *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, (2014) 224 FCR 1 (**ABN AMRO**), a bench consisting of Jacobson, Gilmour and Gordon JJ delivered a unanimous judgment on 6 June 2014.

The proceedings involved a dispute between a group of local councils and ABN AMRO bank and others for alleged misleading or deceptive conduct and negligence in relation to the marketing of a financial product known as a CPDO. Part of the claim brought by the councils alleged breaches of ss 1041E and 1041H of the *Corporations Act* and the corresponding *ASIC Act* provisions.

At first instance,[8] Jagot J held that whole of the claim was apportionable and accordingly apportioned the claims between a number of the defendants. Relevantly, at [3485] her Honour stated:

> 'I accept [the second respondent's] submission that although damages for contravention of s 1041E of the Corporations Act are not apportionable, in this case, those claims arise from the same facts as the contraventions of s 1041H which are apportionable. I adopt [the second respondent's] submission as follows in this regard:
>
> > [T]he reasoning of Barrett J in *Reinhold v New South Wales Lotteries Corp (No 2)* [[2008] NSWSC 187] suggests that because the s.1041E cause of action arises from the same facts and relates to the same loss as the s.1041H cause of action then it too is apportionable (as the whole claim becomes apportionable). That has the somewhat unlikely consequence that a s.1041E claim will almost invariably become an apportionable claim because to establish a contravention of s.1041E a plaintiff will almost necessarily also establish a contravention of s.1041H. Nonetheless, Barrett J's reasoning has been repeatedly applied.'
>
> [emphasis added]

In a unanimous decision, the Full Court overturned Jagot J's decision and held that the claims against the defendants were not apportionable.

In arriving at that conclusion, the Court offered the following analysis at [1562]:

> 'Section 1041L does not apply merely to a claim alleging misleading or deceptive conduct and which might point to contravention of a number of provisions answering that general rubric ranging from s 1041A through to s 1041H. Rather, it specifically requires that the claim be a claim for damages made under s 1041I for relevant loss or damage caused by conduct "that was done in a contravention of section 1041H". It is this expressly identified conduct which is the subject of a claim made that meets the statutory definition of an "apportionable claim". No other conduct meets the definition.'
>
> [emphasis added]

[8] *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200

The Court went on at [1565]:

> 'There are evident policy considerations why the proportionate liability scheme is limited to claims for damages made under s 1041I for loss or damage caused by conduct in contravention of s 1041H. As we have explained, conduct done in contravention of any of ss 1041E, 1041F and 1041G, which are each expressly identified in s 1041I, constitutes an offence. That is not the case with conduct done in contravention of s 1041H. This alone provides sufficient reason to understand why s 1041L is confined to conduct done in contravention of s 1041H.'
>
> [emphasis added]

The Court noted at [1568] that the aim of the proportionate liability regime 'evidently is to exclude conduct involving particular moral culpability.' This statement highlights the friction between the need for a regime that is effective and efficient (i.e. protecting defendants' rights) and yet still ensures that justice is provided for wronged parties (ie. protecting plaintiffs' rights).

Grant of special leave in Wealthsure

Following the judgment of the Full Court in the ABN AMRO there were (within a period of one week) two competing judgments at that level as to whether or not the relevant proportionate liability regime applied only to claims for misleading or deceptive conduct or had a wider application. Unsurprisingly, this important tension demanded the attention of the High Court and on 14 November 2014 the Court granted special leave in respect of the Wealthsure FFC .

Wealthsure judgment

The Wealthsure judgment comprised of the joint reasons of French CJ, Kiefel, Bell, and Keane JJ and separate but concurring reasons of Gageler J. The Court was unanimous in allowing the appeal and in doing so limiting the application of proportionate liability to claims brought under s 1041I of the *Corporations Act* pursuant to a breach of s 1041H.

In determining the appeal, the Court found:

- that according to 'well-settled rules of statutory construction, the same meaning should be given to the word 'claim' where it appears in sub-ss (1) and (2) [of s 1041L]'; and
- as the claim in s 1041L(1) is a claim for damages under s 1041I for damage caused by conduct in contravention of s 1041H, the claim referred to in s 1041(2) cannot be speaking of a claim which arises due to a contravention of a norm of conduct different from that referred to in s 1041L(1).[9]

In other words, it was found that s 1041L(1) is clear in defining the scope of the section and the words in s 1041L(2) do not expand the scope. As a result, it is now settled law in Australia that:

- a defendant who is sued for misleading or deceptive conduct under the relevant sections of the *Corporations Act* can take advantage of the applicable proportionate liability scheme and have its liability reduced in circumstances where the defendant 'is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim';[10]
- a defendant who is sued for other breaches of the *Corporations Act* such as market manipulation or breach of director's duties cannot take advantage of the applicable proportionate liability scheme and in those circumstances may have no alternative but to join other concurrent wrongdoers to pass on any liability;
- a defendant who is sued for conduct falling within both of the above categories can only take advantage of the applicable proportionate liability scheme to the extent it has a liability in the first category (and where the loss/damage caused by conduct the subject first category is not the same loss/damage caused by the conduct the subject of the second category) and will have to consider joining other concurrent wrongdoers to pass on any liability.

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[9] See *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [29] per French CJ, Kiefel, Bell and Keane JJ

[10] See definition of concurrent wrongdoer found at s 1041L(3) of the *Corporations Act*

Implications

The Wealthsure judgment has clarified the scope of the proportionate liability regime provided for by the *Corporations Act* and the *ASIC Act* as being limited to claims brought under s 1041I of the *Corporations Act* pursuant to a breach of s 1041H ie. only claims for misleading or deceptive conduct are apportionable.

As a result of the Wealthsure judgment it is likely that plaintiffs will continue to pursue multiple claims knowing that proportionate liability is only available to defendants on claims alleging misleading or deceptive conduct with joint and several liability applying to any other claims filed under Part 7.10 of the *Corporations Act*.

The fact that the High Court has confirmed that the proportionate liability scheme is confined to certain conduct in breach of the *Corporations Act* is not surprising when consideration is given to the policy of the scheme and the policy and purpose of those sections of the *Corporations Act* to which the proportionate liability scheme is not available. Misleading or deceptive conduct is within the scope of wrongdoing contemplated by the scheme whereas breaches of statutory obligations (such as director's duties) arguably contain obligations which ought not to be 'reduced' by the conduct of others.

Now that the law has been clarified and because of the above the prospects of legislative intervention are unlikely, the following issues and considerations remain:

- parties claiming loss for alleged wrongful conduct falling in both categories need to be mindful that all wrongdoers may need to be joined as defendants because the proportionate liability scheme may be at least partly in play;
- defendants to claims for loss for alleged wrongful conduct falling in the category to which the proportionate liability scheme does not apply are in a similar position to that which existed to all defendants prior to the introduction of the scheme. That is they will have to consider the joinder of any concurrent wrongdoers;
- the costs and expenses associated with the conduct of these classes of claims will continue to be significant because of the necessity for the joinder of all relevant parties;
- there is likely to be a greater requirement on the courts to ensure that findings of any wrongful conduct are made with the necessary precision so that the application of any proportionate liability defences or the passing on of any loss to cross-defendants can be clearly determined. This in turn is likely to increase the costs and expenses (and court time) of these classes of claims; and
- the ultimate result in some claims (where the loss is found to have been caused by wrongful conduct falling within both categories) may render proportionate liability defences academic such that they have no impact on the ultimate outcome.

April 2016

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