

High Court decision widens application of proportionate liability legislation

In the case of Hunt & Hunt Lawyers v Mitchell Nominees Pty Ltd [2013] HCA 10, the majority of the High Court strengthened the ability of defendants to apportion claims by adopting a wide construction of “concurrent wrongdoer” in considering the application of proportionate liability legislation for the first time.

Given the breadth of the potential application of proportionate liability regimes to construction disputes, the decision is of particular significance to the construction industry.

The facts

Mr Caradonna and Mr Vella entered into a joint venture to sell tickets to a boxing match in late 2005 and opened a joint account for that purpose. Without his business partner’s knowledge, Mr Caradonna obtained certificates of title for three of Mr Vella’s properties. Using one of those certificates of title, Mr Caradonna secured an advance of just over \$1m from Mitchell Morgan Nominees Pty Ltd and Mitchell Morgan Nominees (No 2) Pty Ltd (together referred to as “Mitchell Morgan”) by forging Mr Vella’s signature on loan and mortgage documents. Mr Caradonna’s cousin and solicitor, Mr Flammia, fraudulently witnessed Mr Vella’s signature on the documents.

Once the advance was paid into the joint account, Mr Caradonna withdrew the loan money from the joint account and used it for his own purposes. By the time the proceedings were instituted, Mr Flammia and Mr Caradonna (“the Fraudsters”) were bankrupt.

The mortgage and loan agreement were drafted by Hunt & Hunt Lawyers (“Hunt & Hunt”) who acted for Mitchell Morgan. It was not in dispute in the appeal that the loan agreement was void by reason of the fraud and Mr Vella was not liable to Mitchell Morgan under it. The mortgage, although also forged, had by registration gained the benefit of indefeasibility of title. However, the mortgage as drafted by Hunt & Hunt only secured the property by reference to the loan agreement and not by a separate covenant to repay the loaned amount.

Accordingly, the mortgage in effect secured nothing and was liable to be discharged.

By the proceedings, Mitchell Morgan sued Hunt & Hunt for its loss and damage. The appeal concerned the application of proportionate liability legislation to Mitchell Morgan’s claim.

Proportionate liability legislation

Historically at common law, where multiple parties were responsible in negligence for loss and damage suffered by a plaintiff, the plaintiff was able to sue any one of the parties for the entire amount of its loss. It then fell to the sued wrongdoer to recover a contribution from other wrongdoers. This led to a practice whereby a plaintiff would sue the wrongdoer with the “deepest pockets”, often the wrongdoer with insurance, who would have to bear the whole of the plaintiff’s loss.

Part 4 of the *Civil Liability Act 2002* (NSW) (“the Act”), and similar proportionate liability legislation in other states and at Commonwealth level, reverses this position in certain circumstances. Under Part 4 of the Act, the risk of a failure to recover the whole of a claim is shifted to the plaintiff where:

- the claim is an “apportionable claim” within the meaning of section 34(1), and
- the defendants are “concurrent wrongdoers” under section 34(2).

Section 34(1)(a) of the Act provides that an apportionable claim includes “a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care”. Section 34(2) of the Act provides that “a concurrent wrongdoer, in relation to a claim, is a person who is one of two 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”

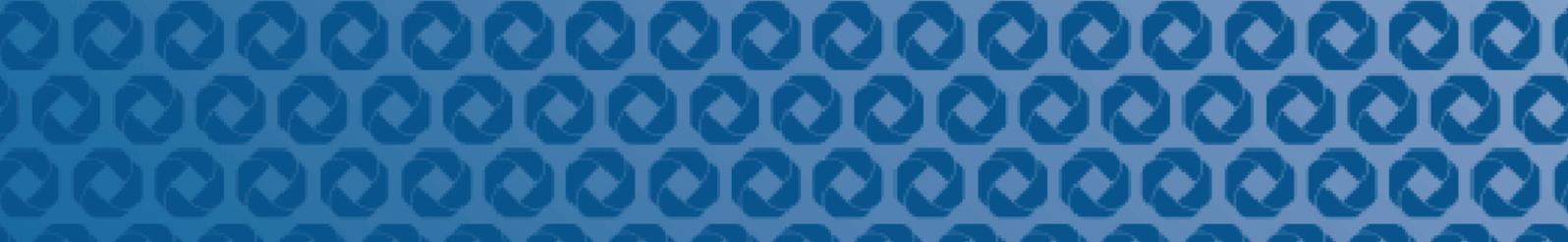
The decision at first instance and the Court of Appeal

The primary judge held that Mitchell Morgan’s claim against Hunt & Hunt was an apportionable claim and that Hunt & Hunt’s liability should be limited to 12.5% of Mitchell Morgan’s loss.

On appeal, the Court of Appeal overturned the primary judge’s decision on the basis that Hunt & Hunt was not a concurrent wrongdoer because the loss or damage claimed by Mitchell Morgan against Hunt & Hunt was in no way caused by the Fraudsters’ conduct. The Court of Appeal held that in the case of the Fraudsters’ conduct, Mitchell Morgan’s loss was “paying out money it would not otherwise have done so”. Whereas the loss caused by Hunt & Hunt’s conduct was “not having the benefit of security for the money it paid out”. That is, the loss claimed against Hunt & Hunt and the Fraudsters was different. The flow on being that Hunt & Hunt’s liability was not able to be proportionally reduced under the Act.

The previous approach in Victoria

The majority of the High Court noted that the Court of Appeal’s approach to the question of Mitchell Morgan’s loss or damage was influenced by that taken by the Victorian Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 (“*Quinerts*”), with which the NSW Court of Appeal expressed general agreement. *Quinerts* also concerned a loan by a bank secured by a mortgage. In that case, Quinerts Pty Ltd (“the Valuer”) had negligently overvalued the property the subject of the mortgage. The borrower defaulted and the property fetched less than the amount of the advance at sale. The Victorian Court of Appeal held that the Valuer was not a concurrent wrongdoer with the borrower and the guarantor because the damage they had caused was not the same. Nettle JA (with whom Mandie JA and Beach AJA agreed) held that the damage caused by the borrower and the guarantor was the failure to repay the loan. In contrast, the damage caused by the Valuer was to cause the bank to accept inadequate security from which to recover the amount of the loan. The Victorian Court of Appeal reasoned that nothing done by the Valuer caused the borrower and the guarantor to fail to repay the loan. Similarly, nothing done by the borrower and the guarantor caused the Valuer’s negligent conduct.



The decision of the High Court majority

In a 3:2 decision, the majority identified the principle issue on appeal as the proper identification of Mitchell Morgan's loss or damage. The majority accepted Hunt & Hunt's argument that the damage or loss of Mitchell Morgan was properly characterised as the inability to recover the loaned amount. In doing so, the High Court held that the Court of Appeal did not correctly identify Mitchell Morgan's loss but rather identified the immediate effect of the Fraudsters' conduct and Hunt & Hunt's negligence.

The majority accepted that there were two contributing factors which resulted in Mitchell Morgan's inability to recover the loaned amount. The first was that the loan agreement was void. The second was that the mortgage document itself did not contain the debt covenant but solely referred to the loan agreement. The Fraudsters were responsible for the first condition. Hunt & Hunt were responsible for the second.

The majority rejected the approach of the Victorian and New South Wales Court of Appeals wherein those courts required one wrongdoer to contribute to the wrongful action of the other wrongdoer in order for them to have caused the same damage.

As such, to be an apportionable claim, the claims against the wrongdoers do not need to be based on the same cause of action, provided the damage caused (in this case inability to recover loaned amount) is the same.

Their Honours concluded that, consistent with the policy of Part 4 of the Act, Mitchell Morgan should not recover from Hunt & Hunt more than that for which Hunt & Hunt is responsible as found by the primary judge i.e. 12.5%.

Conclusion

The 3:2 split in the High Court demonstrates the pitfalls and complexities posed by proportionate liability legislation. The majority decision signals a broader approach to applying proportionate liability legislation than previously adopted by the New South Wales and Victorian Courts of Appeal.

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