



## Précis Paper

### Proportionate Liability

Clayton Utz Partners Frederick Hawke and David Gerber discuss proportionate liability, and what happens when a plaintiff claims the same loss under different statutory provisions, where some of those provisions give rise to apportionable claims and some do not.

#### **Discussion Includes**

- What is proportionate liability?
- The *Selig v Wealthsure* litigation
- The distinction between a claim and a cause of action
- Liability of non-parties to pay costs
- The ramifications of *Selig v Wealthsure*

# Précis Paper

## Proportionate Liability

1. In this edition of BenchTV, Fred Hawke and David Gerber present on the High Court (French CJ; Kiefel, Bell, Gageler & Keane JJ) decision in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 which involved the application of proportionate liability to claims of misleading and deceptive conduct. Mr Hawke and Mr Gerber are partners at Clayton Utz with extensive legal and practical experience in insurance law. Mr Hawke has been recognised as a leading insurance lawyer in Chambers Asia Pacific and Best Lawyers Australia. Mr Gerber was named a "Rising Star" for Insurance and Reinsurance by Expert Guide's Guide to the World's Leading Insurance and Reinsurance Lawyers.

### Proportionate v. Joint and Several Liability

2. Proportionate liability is contrasted with traditional, joint and several liability where more than one person can be held liable for the whole damage to a plaintiff if several people had combined to cause the injury. As a result, the plaintiff could sue all of them or any one of them to recover the damages suffered in full and the party sued could claim contributions from the other parties proportional to their role in causing the damage. The loss would be shared however the risk of one of those parties not being able to meet a judgment would fall upon the other defendants.
3. This problem with joint and several liability has been characterised as the 'deep pockets syndrome' where the party that is perhaps most responsible for the damage may not be the party the plaintiff targets with litigation, in circumstances where that party is not well-resourced. As a result, insurance premiums in areas such as professional indemnity skyrocketed in response to the number of claims principally pursued against policy holders protected by large insurance companies.
4. Proportionate liability describes the situation where each defendant that contributes to the damage to a plaintiff will only be liable for that part of the damage they caused. Therefore, the plaintiff must sue all parties causally responsible for their loss in order to fully recover. Proportionate liability has only recently been introduced via legislation as a result of pressure from defendant practitioners to civil claims and particularly insurance companies (brought to a head by the collapse of HIH Insurance in 2001).

### Background to *Selig v Wealthsure Pty Ltd* [2015] HCA 18

5. The plaintiffs invested substantial funds in Neovest on the advice of an authorised representative of Wealthsure. Neovest was subsequently discovered to be a Ponzi scheme

and the plaintiffs lost their substantial investment. As a result, they sued Wealthsure, the advertising agency that promoted Neovest and the law firm at which one of the directors of Neovest was a partner. The primary claim was brought for misleading and deceptive conduct. Such a claim has a low threshold of proof because it is not necessary that a plaintiff prove negligence, intention or any advertence on the part of the defendant in order to satisfy the base cause of action. However, it is necessary that the plaintiff demonstrate their reliance on the conduct and that this reliance caused their loss. The relevant provision in the *Corporations Act 2001* (Cth) that provides a cause of action for misleading and deceptive conduct is s 1041H although the section is essentially reproduced in other legislation including s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth).

#### **SECTION 1041H:**

##### ***Misleading or deceptive conduct (civil liability only)***

(1) *A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive...*

6. Sections 1041E-G of the *Corporations Act* provide causes of action for particular types of misleading and deceptive conduct in specific contexts. These provisions require more than just misleading and deceptive conduct to enliven their operation and often require the proof of intent, purpose or recklessness in undertaking the conduct. These provisions also formed the basis of claims in the dispute. Furthermore, the plaintiffs also argued a cause of action for breach of duty at common law.

#### **SECTION 1041F:**

##### ***Inducing persons to deal***

(1) *A person must not, in this jurisdiction, induce another person to deal in financial products:*

- (a) *by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or*
- (b) *by a dishonest concealment of material facts; ...*

7. Section 1041I creates a right of recovery for those that suffer damage as a result of breaches of ss 1041E-H. Section 1041L determines that claims under s 1041H are subject to proportionate liability. This construction would seem to imply that actions under ss 1041E-G would be jointly and severally determined.

## **SECTION 1041L:**

### ***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.*

## **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...*

8. The question for the High Court was whether a claim that involves causes of action under ss 1041E-G and also under s 1041H, on the basis of the same facts, was an apportionable claim given the breach of s 1041H, or not.

## **Resolution of the Legal Issues**

9. At first instance (*Selig v Wealthsure Pty Ltd* [2013] FCA 348), Lander J determined that the plaintiffs were entitled to orders that they recover in full (joint and several liability) from one of the defendants as they were successful in making out a claim under one of ss 1041E-G, aside from a claim under s 1041H. The defendants further asserted that the plaintiffs had been contributorily negligent in sustaining the relevant loss but contributory negligence was held to only apply to reduce damages awarded under s 1041H causes of action, and hence was not applied.
10. On appeal, a majority of the Full Federal Court (Mansfield and Besanko JJ, White J dissenting) reversed this decision: *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64; (2014) 221 FCR 1 at 4-5 [10] per Mansfield J, 19 [77] per Besanko J. However, shortly thereafter, a differently constituted Full Court of the Federal Court delivered reasons for judgment in *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 (Jacobson, Gilmour and Gordon JJ), in which the contrary view as to the application of s 1041L, that adopted by Lander and White JJ, was expressed. As a result, this question required resolution by the High Court.

11. The High Court unanimously (French CJ; Kiefel, Bell & Keane JJ with Gageler J concurring) allowed an appeal against the decision of the Full Court of the Federal Court and held that the proportionate liability regime in Div 2A of Pt 7.10 of the *Corporations Act* only applied to contraventions of s 1041H and not to claims successfully asserted on the basis of that section and the other causes of action under ss 1041E-G. This followed from the wording of s 1041L(1) which defines an "apportionable claim" as a claim for loss or damage "caused by conduct that was done in a contravention of section 1041H" and not other sections. The court further held that the same reasoning applied equally to the analogous provisions of the *ASIC Act*.
12. Nonetheless, Mr Hawke notes that the wording of s 1041L "could be clearer." The provision specifically provides that "a claim," rather than a cause of action, is apportionable. The distinction is significant in that a cause of action is a right to recover whereas a claim is what you are seeking to recover. Gageler J (in his concurring judgment) noted that where multiple sets of different facts all breach s 1041H then they give rise to a single apportionable claim. This did not mean that a claim which arose from causes of action under other provisions of the *Corporations Act*, *ASIC Act* or at common law and also a cause of action under s 1041H was rendered a single apportionable claim.

### Costs

13. Furthermore, the High Court unusually awarded costs against a non-party to the proceedings, the first respondent's insurer. The first respondent's coverage under the policy was capped and hence the decision to appeal meant that monies which the insurer would otherwise be obliged to pay in damages would be diverted to meet the insurer's legal costs. Critically, it was the insurer that had conduct of the defence at trial and made the decision to appeal to the Court below. As the insurer was acting for itself in seeking to better its position by bringing the appeal, the Court determined there was no reason that it would be immune from costs.

### Significance

14. The decision in *Selig* clarifies the application of proportionate liability to causes of action under the *Corporations Act* and other analogous legislation. Relevantly, if a claim involves causes of action under s 1041H in addition to causes under ss 1041E-G, then the claim does not become a single apportionable claim. Mr Gerber suggests that this might influence plaintiff's lawyers to ground their claims in those actions under ss 1041E-G in order to avoid the application of proportionate liability. However, Mr Hawke notes that the need to prove a mental element of dishonesty or recklessness means that claims under those provisions will not necessarily be simple to mount. Furthermore, Mr Hawke argues that many insurance contracts will have exclusionary clauses that render the cover inoperative where the holder

engages in fraudulent actions. The critical advantage from non-apportionable claims is the need to only find one, deep pocketed defendant and claim the entire loss from them. A usual target are the deep pockets that tend to flow from such an insurance contract. Therefore, where non-apportionable claims only result from proving mental elements including fraud, this would undermine the benefit where in so doing, the relevant deep pocket you are targeting simultaneously disappears. That said, there are provisions that do not require proof of fraud, including s 1041F that relates to the use of misleading prospectuses, and a non-apportionable claim remains a powerful incentive under such a cause of action.

## **BIOGRAPHY**

### Fred Hawke

Fred Hawke has extensive legal and practical experience in insurance law, claims management and insurance company operations. Before joining Clayton Utz, he was directly employed in the insurance industry for more than 20 years and was responsible for negotiating and settling insurance and reinsurance disputes involving some of Australia's largest liability losses.

### David Gerber

Partner, Clayton Utz, Sydney

He graduated with a Bachelor of Laws from the University of Natal, South Africa. David was an advocate and attorney of the High Court of South Africa. He was admitted to practice in NSW in 2008. David is experienced in corporate insurance, litigation and dispute resolution, financial services, construction and major projects, product development and distribution, regulatory issues and insurance and reinsurance. He has advised on both a local and international scale including for companies such as ANZ, Boral, HSBC and Sompo Japan. David is a member of the NSW Committee of the Australian Insurance Law Association. In 2014, he was named 'Rising Star' for insurance and reinsurance by the Expert Guides Guide to the World's Leading Insurance and Reinsurance Lawyers. David has an extensive amount of publications including the Insurance and Reinsurance Review 2015.

## **BIBLIOGRAPHY**

### Focus Case

*Selig v Wealthsure Pty Ltd* [2015] HCA 18

### Benchmark Link

[http://benchmarkinc.com.au/newslettercms/webversion/benchmark\\_14-05-2015\\_insurance.html](http://benchmarkinc.com.au/newslettercms/webversion/benchmark_14-05-2015_insurance.html)

### Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2015/18.html>

### Cases

*Steigrad v BFSL 2007 Limited* [2012] NZCA 604

### Legislation

*Australian Securities and Investments Commission Act 2001* (Cth)  
*Competition and Consumer Act 2010* (Cth), Sch 2 (Australian Consumer Law)  
*Corporations Act 2001* (Cth)

### Miscellaneous

Byrne, Justice David, "Paper - Proportionate Liability: Some Creaking in the Superstructure" (VSC) [2006] VicJSchol 8