Proportionate liability under the Corporations Act and the ASIC Act

Chris Parkin reports on *Selig v Wealthsure Pty Limited* [2015] HCA 18.

In *Selig v Wealthsure Pty Limited* [2015] HCA 18, the High Court considered the circumstances in which the proportionate liability regimes under the *Corporations Act* 2001 (Cth) (Corporations Act) and the *Australian Securities and Investments Commission Act* 2001 (Cth) (ASIC Act) would apply to claims under those Acts. In doing so, the High Court resolved the confusion created by two contradictory Full Federal Court decisions, namely, *Wealthsure Pty Limited v Selig*[1] (the decision under appeal) and *ABN AMRO Bank NV v Bathurst Regional Council*.[2]

The two regimes are identical in all relevant respects and, accordingly, for convenience the provisions of the Corporations Act only will be referred to.

The claim

Mr and Mrs Selig invested in a scheme proposed by Neovest Limited (Neovest) which was, in effect, a Ponzi scheme. They did so on the advice of an authorised representative of Wealthsure Pty Limited (Wealthsure). The investment scheme failed.

The Seligs sought damages in tort and in contract against Wealthsure and its representative, as well against as a number of other defendants who did not participate in the appeal, including two directors of Neovest. In addition, the Seligs claimed damages under s 1041I(1) of the Corporations Act in respect of loss caused by a contravention of s 1041H. Section 1041H prohibited conduct, in relation to a financial product or service, that was misleading or deceptive, or was likely to mislead or deceive.

Proportionate liability

Division 2A of Part 7.10 of the Corporations Act creates a regime of 'proportionate liability'. Section 1041N provides that the liability of a defendant who was a 'concurrent wrongdoer' in relation to an 'apportionable claim' was limited to an amount reflecting that proportion of the damage or loss that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss.

Section 1041L of the Corporations Act defines 'apportionable claim' and 'concurrent wrongdoer'. Section 1041L provides, relevantly, as follows:

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

- economic loss; or
- damage to property;

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

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).

In this Division, 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.

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

First instance

At first instance, the Seligs succeeded in making out their claims in negligence, breach of contract and under the Corporations Act against Wealthsure and its representative. However, Lander J held that the proportionate liability regime applied only where there had been a contravention of s 1041H and had no application where the plaintiff succeeded on other statutory and common law causes of action.[3]

His Honour accordingly gave judgment for the full amount of the loss against Wealthsure and its representative and also against two directors of Neovest jointly – rather than limiting their liability to the extent of their respective contributions to the Seligs' loss.

Appeal to the Full Federal Court

On appeal, the full court of the Federal Court (Mansfield and Besanko JJ, White J dissenting) concluded that whether or not the proportionate liability scheme applied depended on the nature of the loss or damage suffered, rather than the nature of the cause(s) of action available.[4] Accordingly, the full court found that Lander J should have treated the claims in tort and contract – causing the same loss as that sued for as resulting from a contravention of s 1041H – as apportionable.

In reaching this conclusion the full court focussed on two aspects of s 1041L(2). The first was that the subsection required that the loss or damage the subject of the causes of action be the same. The second was the recognition within the subsection that there may be multiple causes of action of differing kinds.

The High Court's decision

The High Court reversed the decision of the full court. In a

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joint judgment, French CJ, Kiefel, Bell and Keane JJ (with whose reasoning Gageler J agreed[5]), held that an apportionable claim for the purposes of the proportionate liability regime was limited to a claim under s 1041I based upon a contravention of s 1041H.[6]

Their Honours found that the expression 'claim', as deployed in each of subsections (1) and (2) of s 1041L, should be given the same meaning. As such, the reference to a 'claim' in subsection (2) could only mean a claim for damages as described in subsection (1), which meant a claim under s 1041I for damage suffered by reason of a contravention of s 1041H.[7]

Their Honours stated that the function of s 1041L(2) was to explain that regardless of the various causes of action pleaded with respect to s 1041H, the responsibility of the defendants would be apportioned by reference to a notional single claim.[8] This position was reinforced by the fact that s 1041N(2) required that liability for an 'apportionable claim' was to be determined in accordance with the proportionate liability provisions, and liability for other claims were to be determined in accordance with the legal rules relevant to those claims.[9]

Finally, the court determined that any reduction in damages under s 1041I(1B), which allows the court to reduce the plaintiff's damages for contributory negligence, was to occur before any apportionment between concurrent wrongdoers.[10]

Endnotes

1. (2014) 221 FCR 1.
2. (2014) 224 FCR 1.
3. *Selig v Wealthsure Pty Ltd* [2013] FCA 348, [1084], [1097].
4. (2014) 221 FCR 1, [10], [77].
5. [2015] HCA 18, [50].
6. [2015] HCA 18, [37].
7. [2015] HCA 18, [29].
8. [2015] HCA 18, [31].
9. [2015] HCA 18, [32].
10. [2015] HCA 18, [33]–[34].

Verbatim

On 16 June 2015 Grahame Richardson SC spoke on behalf of the New South Wales Bar at the swearing-in of the Hon Justice Robert McClelland as a judge of the Family Court. As well as being highly complimentary of his Honour's suitability for the position, the chair of the Bar Association's Family Law Committee wished to say something about the Australian Government's funding for the Family Court.

Your Honour is a brave man in taking on this appointment. You know that this court is chronically under-resourced. You soon will be met by the looks of dismay from litigants whose families are often in turmoil and uncertainty whilst they grapple with the realisation that the court will not be able to provide them with a hearing for three years or more.

You will be struck by the irony and tragedy on occasion of awarding urgent financial relief to a mother with young children, who has waited 2–3 months and sometimes more to be able to have her urgent application listed, whilst we all will be embarrassed by knowledge that her application was every bit as urgent on the date it was filed as it is on the day months later when it is determined.

You will share in the anguish of litigants who wait months for a listing of a short and urgent matter in a duty to list to find that they are one of a dozen or more and only two or three can be heard. If they are lucky they are then given a short hearing fixture when the list co-ordinator can find a slot – a task which itself often involves weeks and months waiting for the phone call. It is just appalling.

You will feel embarrassed. You will feel stressed at being unable to ensure that members of the community are provided with a workable system of justice. These elements will place pressure on you – you will suffer the tension of finding time to write judgments as opposed to finding time to hear yet another from the never ending queue. You will do your best – your efforts will make a difference – but without resources the problem will not be resolved.

The heartache and tragedy faced by families sitting in limbo in a queue is appalling.

This is not a criticism of the court but the lack of resources to enable it to function as it should.

Whilst the attorney is to be congratulated on your appointment in the manner I have described, in circumstances where this court is stumbling and the community so desperately needs it to function, the delay between the retirement of Justice Fowler who your Honour replaces, in November 2013 is inexplicable.