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Insurance law update

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HIGH COURT CLARIFICATION PENDING

Proportionate liability update

In our July 2014 update entitled "Uncertainty Continues for the Proportionate Liability Regime in Australia", we addressed to the two competing Full Federal Court judgements of *Wealthsure Pty Ltd v Selig [2014] FCAFC 64* ("**Selig Case**") and *ABN Amro Bank NV v Bathurst Regional Council [2014] FCAFC 65* ("**Amro Case**").

These judgements considered whether the proportionate liability provisions in the Corporations Act 2001 (Cth) ("the Act") apply in circumstances where a plaintiff has a number of causes of action under the Act against two or more defendants for the same loss or damage, yet not all of those causes of action are apportionable claims.

Below we consider the submissions made by the parties in the Selig Case following the recent appeal by the Seligs to the High Court.

BACKGROUND

Selig Case

In the Selig Case, the majority held that the whole of the claim against Wealthsure and Mr Bertram should be apportioned, notwithstanding that the Seligs' had also succeeded in other causes of action which were non-apportionable. The basis for this finding in simple terms was the provisions of section 1041L(2) which read:

"…there is a single apportionable claim in the proceeding 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 a same or different kind)."

The majority found that the above provision evidenced a legislative intention that the proportionate liability provisions are enlivened, so long as one successful cause of action is apportionable notwithstanding the balance are not. The only pre-requisite is that the loss and damage for each cause of action be the same. It was common ground amongst all parties at trial that each of the plaintiffs' claims were in respect of the same economic loss which flowed from the plaintiffs' investment in Neovest Limited.

As such, the claims against each of Wealthsure, Mr Bertram and the other "liquid" respondents (namely the directors and promoters of the investment scheme) were apportionable. It was found to be irrelevant that the claims fell outside section1041H and involved breaches of what were in effect strict liability provisions and/or provisions constituting an offence or attracting a penalty.

Amro Case

A different view was reached by the Full Federal Court in the Amro Case where by a unanimous verdict it was held that the proportionate liability provisions in the Act apply only in respect of conduct that contravenes section1041H (the misleading and deceptive conduct provision attracting a civil liability only). In reaching this verdict the Court made a distinction between sections relating to conduct which was misleading and deceptive but neither a criminal offence nor a civil penalty applies; and sections relating to conduct which was criminal or which incurred a civil penalty. The Court was of the view that the intention of the legislature is to exclude the latter from the benefit of the proportionate liability regime. In that context it followed that as conduct done in contravention of sections 1041E, 1041F and 1041G constitutes an offence, this provides sufficient reason for confining apportionment under section1041L to conduct done in contravention of section1041H.

APPEAL TO THE HIGH COURT

Leave to appeal to the High Court was granted to the Selig's in November 2014. In January 2015, the Appellants' and Respondents' written submissions were filed.

The Appellants' Submissions

Much of the argument put before the High Court on behalf of the Appellants mirrors the arguments raised before the inferior Courts and the finding of the majority in the Amro Case. The Appellants contended that the proportionate liability regime contemplated by Division 2A – "Proportionate liability for misleading and deceptive conduct" of the Act, is as follows:

- Whether or not the claim is apportionable is determined by section1041L.
- Under that section only a claim for economic loss or damage to property caused by conduct by the defendant in contravention of section1041H is apportionable. Claims for loss and damage in contravention of sections1041E, 1041F and 1041G are not apportionable notwithstanding a civil claim for loss and damage flowing from contravention of these provisions may also be made under section 1041I.
- That this is intended by the Act is evidenced by reference to other provisions of Part 7, in particular the express limitation of provisions concerning contribution and apportionment to conduct that does not constitute an offence or attract a civil penalty. In particular:
    - section 1041I(1B) expressly provides for a reduction for contributory negligence on the part of an applicant in respect of conduct contrary to section1041H only. There is no such provision in relation to claims for contravention of sections1041E, 1041F or 1041G; and
    - section 1041H(3) expressly excises claims under the sections relating to disclosure documents (including the strict liability provisions of sections 670A and 728) from section 1041H, by providing that conduct in contravention of these sections does not contravene section1041H(1).
- The above interpretation:
    - gives meaning to section 1041N(2) which provides that proceedings may involve both an apportionable claim and a claim that is not an apportionable claim; and

- is consistent with the findings of the Trial Judge and White J on appeal, that the reference in section1041L(2) to "the same loss and damage" should be read as referring to the damage caused by a concurrent wrongdoer and not the damages the Court may ultimately award.

The Respondents' Submissions

Conversely, the submissions put before the High Court on behalf of the Respondents were to the following effect:

» For Division 2A of the Act to apply there must be an apportionable claim within the terms of section1041L.

» Although this section provides that a claim is apportionable if it is a claim for damages under section 1041I for economic loss or damage to property caused by *conduct done in a contravention of s1041H*, (our emphasis) it is not a precursor to apportioning liability that a claim be made under section1041H, nor is it the case that apportionment will only apply to damages awarded for a breach of this section.

» It is simply a requirement that the claim:

- be made under or by reference to secton1041I which contemplates claims for civil damages under sections1041E, s1041F, s1041G or s1041H; and
- that if made under sectons1041E, s1041F or s1041G, it have the "character" of conduct which would also satisfy a breach of section1041H.

» In many cases the same conduct will contravene each section, albeit sections1041E to 1041G also require an element of intent, in the most part amounting to dishonesty or fraud.

» Further, the fact that section1041M specifically excludes "concurrent wrongdoers" from the benefit apportionment if they caused the damage intentionally or fraudulently is irrelevant and should not be indicative of an intention to confine the application of section 1041L(1) to claims under section 1041H. This is largely because the practical effect of this interpretation would be to force a plaintiff to weight up the risk of:

- running a claim under sections1041E to 1041G without the possibility of apportionment but with the need to prove the relevant state of mind; or
- framing their claim as a contravention of section1041H and pleading in response to a defence to apportionment, that the defendant intended to or fraudulently caused the loss and is therefore an excluded concurrent wrongdoer for the purpose of section1041M.

» Conversely, this interpretation also avoids plaintiffs seeking to "frustrate" the apportionment regime by pleading other causes of action in addition to a claim for damages under section1041I. Such an approach has been adopted by State Courts (see *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613).*

» Consistent with the finding of the majority in the Full Federal Court, section1041L(2) emphasises that the enlivening criteria of Division 2A is the existence of claims for the same loss and damage, not the legal basis for those claims. Subsection (2) expressly provides that a claim will be deemed a single apportionable claim even if the causes of action forming the basis of the claim for loss and damage in the proceedings differ. This is further supported by the definition of "concurrent wrongdoer" in section1041L(3) which is reference solely to having caused the damage or loss claimed not the cause of action giving rise to that loss.

» It is irrelevant that certain claims are in effect excluded by the "carve out " provisions of section 1041H(3) from the definition of "apportionable claim" in section1041L(1) and this should not indicate an intention on the part of the legislature to confine apportionable claims to this section. Section 1041H was included in the Act prior to the introduction of Division 2A. The intention of the "carve out" provision, when enacted, was to maintain the availability of the statutory

defences otherwise available to a defendant under those provisions. Further, it should not therefore be interpreted as preventing a cause of action under those "excluded" provisions forming the basis of a single apportionable claim within the meaning of section 1041L(2).

» It is conceivable that the concept of a "single apportionable claim" as contemplated by section 1041L(2) would pick up not only Commonwealth causes of action involving claims under section 1041I but could pick up common law or state or territory based causes of action so long as those claims relate to the same loss and damage. A Federal Court has jurisdiction to adjudicate such causes of action and is obligated to apply Commonwealth law to the extent of any inconsistency with State and Territory laws. It follows that Division 2A will apply to the extent of any inconsistency in State or Territory counterparts when determined in a Federal jurisdiction.

» This further supports the conclusion that the distinction made in section 1041N (2) between determining liability for apportionable as opposed to non-apportionable claims in a proceeding, focusses not on the right of action pleaded under section 1041I, but claims for the same loss and damage.

» Likewise, the requirement of the Court under section 1041N(3) to take into account the plaintiff's contributory negligence before an apportionment is made, should not be construed as applying only to section 1041H which is the only section referenced under section 1041I that contemplates contributory negligence. This is because section 1041N(3) refers broadly to contributory negligence "under any relevant law", again supporting the view that the regime may apply to any cause of action (if it can be characterised as part of a single apportionable claim) including those to which a common law defence of contributory negligence may apply.

DISCUSSION

The Respondent's submissions as to the intended regime of Division 2A are far reaching and, if accepted, will significantly widen the scope currently afforded. Specifically, the position is likely to be that so long as a plaintiff commences proceedings seeking damages under or by reference to section 1041I, then any claim in that proceeding made under a counterpart State or Territory statute and any common law claim (for example in negligence or for breach of contract), may be deemed to be a "single apportionable claim", and subject to the operation of Division 2A if the claims have resulted in the same economic loss or damage to property.

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