INSURANCE UPDATE

VELLA OVERTURNED BY HIGH COURT

HUNT & HUNT LAWYERS V MITCHELL MORGAN NOMINEES PTY LTD & ORS

SNAPSHOT

On 3 April 2013, the High Court of Australia handed down its decision in Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd¹. The decision related to an appeal by Hunt & Hunt Lawyers (Hunt & Hunt) from the judgment of the New South Wales Court of Appeal in Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors [2011] NSWCA 390.

A key issue in the judgment was the interpretation of several key proportionate liability provisions in the Civil Liability Act 2002 (NSW) (CLA) and equivalent provisions in other Australian jurisdictions.

To determine whether Hunt & Hunt was a concurrent wrongdoer, the court had regard to two questions:

1. What was the loss which was the subject of the claim (the starting point for this analysis being identification of the interest infringed by the negligent act)?
2. Secondly, whether there was a person, other than Hunt & Hunt, whose act(s) or omission(s) also caused the loss or damage.

By a narrow 3:2 majority, the High Court overturned the decision of the New South Wales Court of Appeal and reinstated the primary judge’s conclusion apportioning loss between the concurrent wrongdoers. The practical effect was that Hunt & Hunt (a firm of lawyers which negligently prepared the mortgage documentation) was held to be a concurrent wrongdoer together with each of the two "fraudsters" in the case. Therefore, Hunt & Hunt was held to be responsible for only 12.5% of the loss and not 100% (which would be the case if the proportionate liability provisions under the CLA did not to apply).

¹ [2013] HCA 10
In a majority judgment, the High Court has taken a broad approach to the interpretation of what constitutes a "concurrent wrongdoer" for the purpose of proportionate liability provisions under the CLA. Whilst specific to its facts, the decision should nonetheless provide some comfort to those seeking to rely on proportionate liability regimes in Australia.

This decision focuses attention upon the proper identification of the "damage or loss" as the harm to a plaintiff's economic interest rather than the underlying potential myriad of causes of the "damage or loss." This distinction is welcome news to defendants who had been subjected to an overly technical analysis of underlying facts and narrow characterisation of "loss or damage" under the Court of Appeal's reasoning.

The High Court's decision gives effect to the purpose of Part 4 of the CLA to give effect to a legislative policy that, in relation to certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility.

**BACKGROUND**

**Facts**

Allessio Vella and Angelo Caradonna were involved in a joint venture relating to a boxing event. As a result of this relationship, Mr Caradonna fraudulently obtained possession of certificates of title to properties owned by Mr Vella. Unbeknownst to Mr Vella yet with the assistance of Mr Caradonna's solicitor, Lorenzo Flammia, Mr Caradonna applied for mortgage finance in Mr Vella's name to, amongst others, Mitchell Morgan Nominees Pty Ltd (Mitchell Morgan).

Mr Flammia made misrepresentations to Mitchell Morgan's solicitors, Hunt & Hunt, that he had witnessed the relevant documents provided in support of the mortgage application. The mortgage was approved and registered. Mitchell Morgan paid over $1 million into Mr Caradonna and Mr Vella's joint account. Mr Caradonna then withdrew these funds, which were not repaid.

Although the mortgage was duly registered, it was worded (by Hunt & Hunt) so as to only secure money payable by Mr Vella to Mitchell Morgan.

**At first instance**

At first instance, in *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505, Young CJ in Eq of the Supreme Court of New South Wales held that Hunt & Hunt was a concurrent wrongdoer together with Mr Caradonna and Mr Flammia (Fraudsters) for the purposes of Part 4 of the CLA. Young CJ in Eq assessed Hunt and Hunt's responsibility at 12.5%, with the fraudsters being responsible for 87.5% (composed of 72.5% and 15% respectively).

**The New South Wales Court of Appeal**

In *Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors* [2011] NSWCA 390, the New South Wales Court of Appeal overturned the initial decision on the basis that the Fraudsters did not cause the same loss as Hunt & Hunt, as required by the relevant provisions of the CLA.

In reaching this decision, the Court of Appeal found that the damage caused by Mr Caradonna and Mr Flammia comprised of Mitchell Morgan advancing the loan funds when it would not otherwise have done so; whereas the damage caused by Hunt & Hunt's negligence was that Mitchell Morgan did not have the benefit of security for the money paid out.

**THE HIGH COURT APPEAL**

A primary focus of the appeal was whether the Fraudsters were concurrent wrongdoers in Mitchell Morgan's claim against Hunt & Hunt. The answer to that question lies in the proper identification of Mitchell Morgan's loss or damage.

A key consideration in the appeal was the interpretation of section 34(2) of the CLA, which defines a "concurrent wrongdoer" to be "one of two or more persons whose act(s) or omission(s) caused, independently of each other or jointly, the damage or loss that is the subject of the claim." Whether Hunt & Hunt was a concurrent wrongdoer would ultimately determine whether it would shoulder responsibility for 100% of Mitchell Morgan's loss, or only its "proportionate" share of 12.5%.

It was not disputed by the parties that Mitchell Morgan's claim against Hunt & Hunt was an "apportionable claim" within the meaning of section 34(1)(a) of the CLA.
The majority judgment: French CJ, Hayne and Kieffel JJ

The majority judgment addressed the history of and the background to the implementation of the proportionate liability provisions found in Part 4 of the CLA (and equivalents in other Australian jurisdictions). By way of background, the court referred to the Second Reading Speech of the amendments to the CLA, which provided that the amendments were directed towards "not only problems regarding insurance" but also "to defining the limits which should be placed on personal responsibility" - a notion which is a strong theme of the judgment.

The CLA's proportionate liability provisions represent a departure from the liability regime for negligence at common law and shifts the insolvency risk to the plaintiff. The insolvency risk is particularly important in a case such as the present - where the lion's share of responsibility was found to rest with the Fraudsters (against whom prospects of recovery are often uncertain).

To determine whether Hunt & Hunt was a concurrent wrongdoer, the court had regard to two questions. Firstly, what was the loss which was the subject of the claim. Secondly, whether there was a person, other than the Hunt & Hunt, whose act(s) or omission(s) also caused the loss or damage.

Loss or damage the subject of the claim

The term "damage" is not defined in the CLA, albeit it is included in the definition of "harm" in section 5 of the CLA. This was consistent with Hunt & Hunt's submissions that it was appropriate to equate damage with the term "harm."

With respect to the words "the damage or loss that is the subject of the claim" the majority referred to and distanced itself from the approach taken by the Victorian Supreme Court in St George Bank Limited v Quinerts Pty Ltd (2009) 25 VR 666 in which the court held that for the purposes of identifying concurrent wrongdoers, the damage or loss caused must be the "same damage". The High Court majority took care to distinguish "damage or loss" for the purposes of the proportionate liability provisions and "damages" which a plaintiff claims by way of compensation. In the context of economic loss, the majority observed that loss or damage "can be understood as the harm suffered to a plaintiff's economic interests".

Sensibly in our view, the majority also noted that in order to determine the loss or damage suffered, you must start by identifying the interest infringed by the negligent act (as per Gaudron J in Hawkins v Clayton (1988) 164 CLR 539 at 601). Such a determination is necessary in order to properly understand the harm suffered, and what acts or omissions may have caused the loss or damage.

Mitchell Morgan's interest in this case (or that the harm it had suffered) was its inability to recover the loan funds advanced. Similarly, the loss or damage for the purposes of section 34(2) of the CLA was also Mitchell Morgan's inability to recover the loan funds. In making this assessment, the court referred to and endorsed Gaudron J's judgment in Kenny & Good Pty Ltd v MGICA Ltd (1999) 199 CLR 413 at 424, in which the plaintiff lender's interest was similarly identified as its inability to recover the loan funds advanced.

The High Court also distanced itself from the proposition in St George Bank Limited v Quinerts Pty Ltd (2009) 25 VR 666 that there is "some requirement that one wrongdoer contribute to the wrongful actions of the other wrongdoer in order that they cause the same damage." The majority held that there is no such requirement in the CLA's proportionate liability provisions. In doing so, the court appears to have embraced a more liberal interpretation as to the meaning of loss and damage in the context of Part 4 of the CLA.

Causation - did another concurrent wrongdoer also cause the loss?

The majority cited with approval the decision of March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506 at 512, stating that:

"Courts today usually recognise that there may be wrongdoers whose acts or omissions occur successively rather than simultaneously, and who may be liable for the same damage, even though

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2 Ibid [15]
3 Ibid [19]
one may be liable for only part of the damage for which the other is liable."

The majority further held that "the relevant enquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss." 7

It was clear from the judgment at first instance that Hunt & Hunt was a wrongdoer which was responsible, or had contributed to Mitchell Morgan's inability to recover the loan funds that it had advanced. The next question was whether the Fraudsters' acts, independently of Hunt & Hunt, also caused that damage (ie the inability to recover the loan funds advanced). Whilst not defined in the CLA, the majority observed that for practical purposes "caused" could be taken to mean "the legal liability of a wrongdoer to the plaintiff".

The court then focused its attention on the ineffectiveness of the mortgage as security against the (security) property. The majority endorsed the approach taken by Hunt & Hunt in its submissions, namely that the mortgage was ineffective for two reasons:

1. The loan agreement was void (for which the Fraudsters were responsible).
2. The mortgage instrument was inappropriately drafted (for which Hunt & Hunt was responsible).

The majority approach held that both of these causes contributed to Mitchell Morgan's inability to recover the loan funds it had advanced, and accordingly that Hunt & Hunt and the Fraudsters were concurrent wrongdoers. Given that it was clear that the Fraudsters' conduct had induced Mitchell Morgan to enter into the transaction, it was held to be entirely foreseeable that a mortgage being entered into would follow. Importantly, the court clarified that for the purposes of proportionate liability, there is no requirement as such that the "actions of one independent concurrent wrongdoer contribute to the negligence of another" 8. Instead, the majority held that the key question is "whether each of them, separately, materially contributed to the loss or damage suffered" 9. Importantly, this emphasises the distinction between the wrongdoers contributing to the loss as opposed to wrongdoers contributing to each other's respective negligence.

**The minority judgment: Bell & Gageler JJ**

The minority concluded that if the proportionate liability provisions were interpreted in the way for which Hunt and Hunt contended in the circumstances of this case, the impact of proportionate liability would be to create a regime where rather than only transferring to the innocent party some of the risk that a wrongdoer may be impecunious, insolvent or untraceable, it would transfer some or all of the very risk against which it was the duty of Hunt & Hunt to protect Mitchell Morgan. It was this alteration of rights and responsibilities which the minority did not agree was the proper construction of the regime.

**Interest - sting in the tail**

The Court of Appeal held that Hunt & Hunt should pay interest at the rates specified in the loan agreement - the rate charged under the mortgage was 78% per annum, reduced to 54% for prompt payment. The Court of Appeal reasoned that Hunt & Hunt had prepared the loan agreement and mortgage and was fully aware of its terms. Hunt & Hunt sought special leave to appeal this finding, however the High Court could not identify any error in the reasoning of the Court of Appeal. The loan was for a little over $1 million. Hunt & Hunt's relatively modest one-eighth of that amount is massively increased by the interest accruing over seven years.

**CONCLUSIONS**

The decision provides much needed guidance to those seeking to rely on proportionate liability protections throughout Australia. Importantly, the High Court has articulated a framework for determining whether a defendant is a concurrent wrongdoer for the purposes of Part 4 of CLA (and in other proportionate liability regimes).

The majority of the High Court held that in addressing questions of loss and damage, the necessary starting point is identifying the interest which has been infringed by the negligent act - in this case, the inability of Mitchell Morgan to recover the loan funds which had been advanced. Once the interest has been identified, it is then necessary to consider the nature of the loss which was the subject of the claim, and then, whether

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7 Ibid [45]
8 Ibid [94]
9 Ibid [94]
there are any other additional people whose acts or omissions caused the loss or damage. In doing so, the High Court has provided useful and practical guidance as to the applicability of the proportionate liability scheme.

Importantly, the High Court has also given weight to the purpose and intent of the proportionate liability scheme and referred to placing limits on personal responsibility. The decision is a pleasing result for insurers, with the court appearing to acknowledge that whilst professional people are often insured against liability to clients, they often end up the sole target of legal action when losses are suffered, despite the involvement of others. ¹⁰

For further legal updates and commentary, please visit our insurance blog at insuranceflashlight.com.

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