Aftermath of the *Selig* decision: proportionate liability in the context of claims with multiple causes of action

Ivan Griscti
Level 22 Chambers
22/52 Martin Place
igriscti@level22.com.au

Introduction

1. Proportionate liability has emerged as an important issue in respect of cases for damages since the relevant provisions were introduced in late 2004.
2. In some respects the law in relation to proportionate liability is still developing. One such area is the situation where there are more than 1 cause of action, in which there was a significant development last year, being the delivery by the High Court of the judgment in *Selig v Wealthsure Pty Ltd*.[1]
3. The Court unanimously held, in the context of claims under the *Corporations Act* and *ASIC Act*, that if a plaintiff succeeds on a cause of action that is subject to proportionate liability, it does not enliven proportionate liability in respect of other causes of action for the same damage that are not defined as apportionable claims.
4. Whilst the case concerned claims under the *Corporations Act* and *ASIC Act* the principles relied on will have wider application, including actions where the provisions of the *Civil Liability Act* (*CLA*) apply.

Background: Conflict In The Federal Court

5. In mid 2014, two separate benches of the Full Federal Court were required to consider whether proportionate liability provisions in Commonwealth legislation apply where a claimant has multiple causes of action against different parties for the same damage but where not all of

[1] [2015] HCA 18, (2015) 255 CLR 661

those causes of action are apportionable claims. Within a week of each other two conflicting decisions were handed down.

6. *Wealthsure Pty Ltd v Selig*[2] was delivered first, on 30 May 2014. The case concerned a failed investment scheme. The applicants had sued their financial advisors (Wealthsure), a representative of the advisors and the directors of the failed company (Neovest). The applicants were successful in establishing a number of breaches under the *Corporations Act* and *ASIC Act*, as well as breach of contract, misrepresentation and negligence. The provisions of the *Corporations Act* and *ASIC Act* breached included the prohibitions for misleading and deceptive conduct. These breaches are expressly subject to proportionate liability under the relevant Acts, however the other breaches of those Acts are not.
7. By a majority of 2/1 the Court held, reversing the decision at first instance, that the whole of the claim is to be treated as apportionable, even though some of the successful causes of action were not strictly apportionable claims.
8. The majority considered the words of section 1041L(2) of the *Corporations Act* and section 12GP(2) of the *ASIC Act*, which provide that "*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)*."
9. Mansfiled and Besanko JJ held that the effect of the above was that the proportionate liability provisions apply where the different causes of action cause the same loss or damage, irrespective of whether those causes of action are defined as apportionable claims.[3]
10. White J dissented, being of the view that the reference to causes of action was necessarily to ones which are apportionable claims.[4]
11. In *ABN AMRO Bank NV v Bathurst Regional Council*[5] a number of councils sought damages in respect of monies lost on certain structured

[2] [2014] FCAFC 64 (30 May 2014)
[3] at [10], [79]
[4] at [348]-[349]

financial products. The applicants were successful in establishing an entitlement to damages for breaches of section 1041E and 1041H of the *Corporations Act*. The latter of these sections relates to misleading and deceptive conduct and is apportionable under the Act. Section 1041E involves the making of an intentional or recklessly misleading statement in relation to a financial product. It is not defined as an apportionable claim.

12. A Full Court of Jacobson, Gilmour and Gordon JJ held, by reference to section 1041L of the *Corporations Act*, which states that proportionate liability applies to a claim for damages for economic loss or damage to property caused by conduct in contravention of section 1041H, that a claim for damages under section 1041E is not an apportionable claim.
13. The Court referred to the judgment in *Selig* delivered a week earlier, stating:

> *"With respect to Mansfield and Besanko JJ, for the reasons just stated we agree with the conclusion reached by White J in Wealthsure on appeal that the expression in s 1041L that "the claim for the loss and damage is based on more than one cause of action (whether or not of the same or a different kind)" refers only to causes of action which are themselves apportionable claims."*[6]

14. The practical result therefore, given that the two separate contraventions caused the same loss or damage, was that the applicants could elect the remedy they wished to enforce. In this instance they could enforce judgment for the total judgment against any of the respondents.

High Court Judgment in *Selig*

15. The High Court unanimously upheld the appeal and adopted reasoning consistent with the Full Court's judgment in *ABN AMRO v Bathurst Council*.

---

[5] [2014] FCAFC 65 (6 June 2014)
[6] at [1573]. Interestingly, the Court did not consider it necessary to determine that the decision of the majority of the Full Federal Court in *Selig* was "*plainly wrong*".

16. It held the majority of the Court below were wrong to treat sub-section (2) of s 1041L as part of the definition of what constitutes an apportionable claim – the definition is contained solely in sub-section (1). The purpose of sub-section (2) is to explain that, irrespective of the number of ways a plaintiff seeks to establish a claim for damages for breach of s 1041H, so long as the loss or damage is the same, apportionment is to be made on the basis that there is a single claim[7]. [for example there may be separate causes of action based a differing misrepresentations]
17. The High Court rejected the argument put by the respondents that it is unlikely that different assessments of claims for the same loss or damage could have been intended. It observed that this is specifically contemplated in s 1041N(2) which states that liability for an apportionable claim is to be determined in accordance with that division and liability for other, non-apportionable claims are "*to be determined by reference to the legal rules relevant to them*". That is to say, not in accordance with the division. The Court concludes on the issue, "*If the first and second respondents' submissions were correct, there would be no need for this provision*".[8]

Impact Of The Judgment

18. The particular sections of the *Corporations Act* and *ASIC Act* considered in *Selig* have a reasonably limited application. However, the relevant provisions are mirrored in the *Australian Consumer Law* (and its predecessor the *Trade Practices Act*). It follows that the reasoning in *Selig* should also therefore apply to actions brought under the *ACL*. As will be seen below, the NSW Court of Appeal reached an analogous outcome in respect of a case for damages brought under the ACL.
19. Similarly, the sections of the Commonwealth Acts that were considered by the High Court in *Selig* are also present in the *Civil Liability Act (CLA)*.

[7] Judgment of French CJ, Kiefel, Bell and Keane JJ, with whom Gageler J agreed, at [31].
[8] At [32]

20. Section 34 (1A) of the *CLA* states:

> *For the purposes of this Part, 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).*

21. Section 35 (2) of the *CLA* states:

> *If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:*
> *(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and*
> *(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.*

22. Accordingly, there is no reason why the High Court's reasoning does not also apply in cases under the *CLA* where there are multiple causes of action, giving rise to the same damage but where not all are apportionable claims.

***Williams v Pisano*[9]**

23. Soon after the judgment in *Selig* the NSW Court of Appeal was required to determine a comparable situation in *Williams v Pisano*.
24. This matter involved the development, marketing and sale of a residential property by two vendors, Ms Dandris and Mr Williams. Ms Dandris, an interior designer, obtained an owner-builder permit and engaged and supervised various contractors to redevelop the property.
25. The redeveloped property was sold to Mr and Mrs Pisano following a marketing campaign in which it was represented that the property had been redeveloped to a high standard.
26. Soon after purchase problems began to emerge and there was significant water damage following wet weather in April 2012. The cost of rectification was said to exceed $1 million.

[9] [2015] NSWCA 177, (2015) 90 NSWLR 342

27. The Pisanos sued both vendors. Ms Dandris was sued for breach of warranties under the *Home Building Act*. Both defendants were sued for breaches of s 18 and 30(1)(e) of the *ACL*.
28. S 18 relevantly provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 30 (1) (e) relevantly provides that a person must not, in trade or commerce, in connection with the sale or the possible sale of an interest in land, or in connection with the promotion by any means of the sale of an interest in land, make a false or misleading representation concerning the characteristics of the land.
29. The plaintiffs succeeded against both defendants at first instance. Mr Williams appealed, arguing that the representations attributed to him were not made in trade or commerce and, further, that if he was liable then he ought to have the benefit of the proportionate liability regime.[10]
30. Mr Williams was successful on the "*trade or commerce*" point and therefore was successful overall. However, the Court of Appeal went on to consider the applicability of the proportionate liability provisions. The relevant provision of the ACL dealing with apportionable claims is s 87CB(1). It defines an apportionable claim to be a claim for damages under s 236 of the ACL for economic loss or damage to property caused by conduct that was done in contravention of s 18 of the ACL. The issue to be detrmined was whether the proportionate liability provisions apply given there was breach of s 30(1)(e) as well as s 18 of the ACL.
31. Consistent with the outcome in *Selig*, Emmett JA, with whom Bathurst CJ and McColl JA agreed, held that application of the proportionate liability provisions of the ACL was limited to a claim for damages caused by conduct done in contravention only of s 18 of the ACL. As this case involved breach of s 30(1)(e) as well as s 18 Mr Williams would not (had he been liable) have had the benefit of s 87CD of the ACL.

[10] It was accepted that the representations were misleading or deceptive

Prior Decisions Under the Civil Liability Act

32. The decisions of the High Court in *Selig*, and the Court of Appeal in *Williams v Pisano* are broadly consistent with an emerging trend in cases brought in the Supreme Court of NSW in circumstances where defendants have sought to invoke the proportionate liability provisions in cases where there are more than one cause of action.

George v Webb & Ors[11]

33. This is a decision of Ward J of the Supreme Court of NSW.
34. The plaintiff's claim concerned moneys that had been paid out of a solicitors' trust account. The plaintiff claimed the moneys were in the trust account for a particular purpose and were paid out of the account improperly at the direction of the third defendant, Mr George. The plaintiff sued the solicitors for breach of trust as well as in negligence. She also sued Mr George as an accessory to the alleged breach of trust.
35. The plaintiff succeeded against the solicitors for breach of trust. As to negligence, her Honour noted that the principal claim was for equitable compensation for breach of trust. The plaintiff is free to elect which cause of action is to be pursued and it was implicit that the plaintiff had elected to pursue that based on breach of trust.
36. That way, there was effectively only one cause of action under consideration, being the breach of trust. That gave rise to the separate but related issue of whether the breach of trust (which necessarily on the facts involved a failure to take reasonable care) was an apportionable claim.
37. Ward J held that the claim was not an apportionable one because it was not a claim for economic loss arising from a failure to take reasonable care. Ward J held that the principal liability was for breach of trust, irrespective of whether a failure to take reasonable care caused or contributed to the breach. As the liability for breach of trust would have

[11] [2011] NSWSC 1608 (20 December 2011)

occurred whether or not the solicitors were negligent it was held that the proportionate liability regime did not apply.

Perpetual Trustee Company Ltd v Ishak[12]

38. This is a decision of Brereton J. The case concerned a loan made by Perpetual of $1.6 million for the stated purpose of the purchase of particular property. The loan was fraudulently obtained and the funds were otherwise disbursed. Perpetual did not obtain any security for the loan, relying on a title insurance policy. Perpetual and the title insurer sued the conveyancer involved in the transaction, alleging breaches of the Fair Trading Act, namely s 42 (misleading and deceptive conduct) and s 45 (false representations regarding an interest in land).
39. His Honour found that there had been a representation by the conveyancer that was a breach of both s 42 and s 45 of the Fair Trading Act. He held,

> *"As I have concluded that the conduct that constituted the First Representation was a contravention of s 45 as well as of s 42, neither Perpetual's nor First Title's damages are liable to be reduced by reference to the proportionate liability regime."*[13]

40. His Honour proceeded on the assumption that as the plaintiff was entitled to recovery pursuant to breach of section 45, which is not subject to the proportionate liability regime, then it would pursue this remedy and, accordingly, proportionate liability did not apply.

Permanent Custodians Limited v Geagea (No 3)

41. This decision was subsequently followed by Rothman J in *Permanent Custodians Limited v Geagea (No 3)*[14].

[12] [2012] NSWSC 697
[13] at [189]
[14] [2014] NSWCA 1489

42. In this case solicitors were sued by the plaintiff in various causes of action: negligence, breach of warranty of authority and misleading and deceptive conduct.
43. In a judgment addressing liability the solicitors were found to be liable both for breach of warranty of authority and also misleading and deceptive conduct[15]. Rothman J did not consider it necessary to determine the action in negligence.
44. There was a separate judgment addressing proportionate liability. His Honour held that proportionate liability did not apply. In doing so he relied heavily on the words of s 35(2) which provides that where proceedings involve an apportionable claim and a non apportionable claim liability for the non apportionable claim is determined to the legal rules that apply apart from Part 4.[16]
45. Rothman J was "*comforted*" by the decision of Brereton J in *Perpetual v Ishak*. He also accepted as "*compelling*" the reasoning of the full federal Court in *ABN AMRO v Bathurst Regional Council*.[17]

Discussion: An Alternative Approach?

46. The mood of the Courts is that where a plaintiff succeeds on a number of causes of action it is entitled to the benefit of the cause of action that suits it best and if that basis of liability is not an apportionable claim, the fact that there is another basis giving rise to the same damage that is, does not render the entire claim as an apportionable one.
47. A potential way around this problem, at least in respect of claims where the *CLA* applies, is to argue that where failure to take reasonable care is not a component of the cause of action, the claim is an apportionable one if, on the facts, there has been a failure to take reasonable care. If all the relevant causes of action on which the plaintiff relies are held to be apportionable then the problem does not arise.

[15] *Permanent Custodians Limited v Geagea (No 2),* [2014] NSWSC 562
[16] at [16]-[17]
[17] at [18]

48. In my opinion this position is in keeping with the judgment of Barrett J in *Reinhold v New South Wales Lotteries Corporation (No 2)*[18]*.* Barrett J (as he then was) considered the nature of a "*claim*", for the purposes of section 34(1), and apparently advocating a "*substance over form*" approach, his Honour held that *""claim" refers to a claim as proved and established, not a claim as made or advanced*"[19].
49. This approach is also arguably supported by the words of section 34(1) of the CLA which refer to the possibility of an action in "*contract*" or "*otherwise*", although against this it can be contended that the application is limited to contractual terms or other actions requiring a failure to take reasonable care.
50. As noted above, Ward J in *George v Webb* held that despite there being clear negligence, based on her factual findings, proportionate liability did not apply because failure to take reasonable care was not a component of breach of trust.
51. This issue was also considered in *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)*[20]*,* and it is fair to say the Court did not express a uniform view on the matter. The consideration was strictly *obiter* as the Court determined the parties had contracted out of the proportionate liability regime.
52. Like many cases in which proportionate liability is being considered this case concerned a financier that suffered a loss as a result of a loan that was fraudulently procured.
53. CTC, a mortgage originator, sought to argue that the proportionate liability regime applied, contending this was an apportionable claim and there were a number of concurrent wrongdoers, such as the fraudster who procured the loan, justices of the peace who witnessed certain documents and Resimac, in their role as manager for the financier, Perpetual.

[18] [2008] NSWSC 187 at [20]-[30]
[19] at [30]
[20] [2013] NSWCA 58

54. Perpetual argued that whilst its claim against CTC was partially based on a failure to take reasonable care, other bases of its claim were not so founded and it was entitled to rely on the bases of claim most favourable to it. This argument found favour with Macfarlan JA, who stated that in order for an action in damages to arise from a failure to take reasonable care it is necessary that the absence of reasonable care is an element of the cause of action upon which the plaintiff succeeds.[21]
55. Acknowledging that his reasoning may differ from that expressed by Barratt J in *Reinhold v New South Wales Lotteries Corporation (No 2)*[22], his Honour stated that in his view "*the application of Part 4 turns not on the facts that happen to be found but on the essential character of the plaintiff's successful cause of action*".[23]
56. His Honour Meagher JA stated that he preferred not to express a view on this issue.[24]
57. Barrett JA commented that the point made in *Reinhold* is that the quality of a "*claim*" for the purpose of s 34 cannot be determined without taking into account the Court's decision on the claim. He states,

> *"It cannot be suggested (nor do I think it has been suggested in any decided case) that the nature or quality of a "claim" is, for relevant purposes, to be determined solely by looking at the court's decision in relation to it. Nor is the nature or quality of a "claim" to be determined solely by looking at the terms in which it is framed. Rather, it is a combination of the terms in which the claim is framed (or pleaded) and relevant findings of the court in relation to it that must be assessed in order to decide whether it is a claim "in an action for damages . . . arising from a failure to take reasonable*

[21] At [22]
[22] [2008] NSWSC 187 at [20]-[30]
[23] at [23]. It also appears to be contrary to the observations of Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning P/L* [2007] FCA 1216 at [29]-[31], which were relied upon and followed by Barrett J in *Reinhold*, and were more recently cited by Mortimer J in *Latteria Holdings P/L v Corcoran Parker P/L (no 2)* [2014] FCA 1378
[24] at [36]

care" and has the other attributes of an "apportionable claim" under s 34(1)(a).”

58. His Honour goes on to say that “*subject to the foregoing*” he agrees with the reasoning of Macfarlan J. It is difficult to discern precisely what position his Honour adopts from this judgment. The comments above appear to be a slight shift from the position adopted in *Reinhold*, however it stops short of adopting a “*form over substance*” position, which is arguably what the position is if there is reliance solely on the plaintiff’s successful cause of action.

Conclusion

59. There is High Court authority in respect of the provisions of the *Corporations Act* and *ASIC Act* that if there are causes of action which include apportionable and non apportionable claims then proportionate liability will not apply. There is also Court of Appeal authority arriving at the same conclusion in respect of the provisions of the *ACL*.
60. The outcome will be the same in respect of claims subject to the *CLA*, however such claims offer a potential point of distinction in respect of the threshold question of whether a claim is characterised as an apportionable one in the first place.
61. I consider it remains open to argue, in cases where the *CLA* applies, that proportionate liability ought to apply where the facts disclose a failure to take reasonable care, despite such failure not being a component of the successful cause of action. There is support for both sides of this argument although the more recent authority is tending towards the other way. Nevertheless, the matter awaits a definitive ruling at the appellate level.

20 September 2016
Ivan Griscti