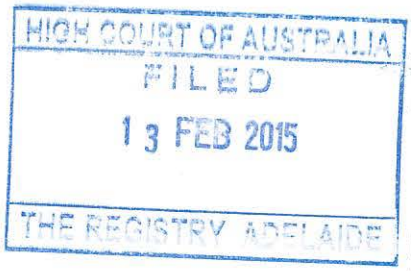
IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A25 of 2014

BETWEEN: RONALD SELIG AND JANNA SELIG

Appellants

AND:



WEALTHSURE PTY LTD (ABN 3097405108) and DAVID BERTRAM

First and Second Respondents

AND:

RICHARD WILLIAM SPENCER, SILVANA PEROVICH, and PETER MAURICE TOWNLEY

Third, Fourth and Fifth Respondents

AND:

MARK RICHARD NORTON

Sixth Respondent

AND:

NEOVEST LIMITED (IN LIQUIDATION) ACN 104 915 906

Seventh Respondent

AND:

NORTON CAPITAL PTY LTD (DEREGISTERED) ACN 086 207 169

Eighth Respondent

AND:

DANIEL GEOFFREY LILLEY

Ninth Respondent

AND:

DAMIEN BERNARD GREER, ROBERT NOEL GALLAGHER, STEVEN JAMES DICKENS, and MICHAEL JOSEPH CROUCH

Tenth, Eleventh, Twelfth and Thirteenth Respondents

APPELLANTS' REPLY

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APPELLANTS' REPLY

Part I:

1. The appellants' certify that these submissions are in a form suitable for publication on the internet.

Part II:

Reply to Argument of First and Second Respondents (the Respondents)

2. General Observation The Respondents' submissions do not address the stated objects of Part 7 of the Act and the public policy of encouraging economic investment by facilitating confidence in the system.[1] No consideration is given to the significance of particular claims being clearly intended to be non-apportionable, in this instance by reason of the special relationship between a licensed financial adviser and his/her client.

3. The complexity of the Respondents' "course of argument" suggests that it is not what Parliament intended. With respect, that "course of argument" is a narrative of the provisions and an attempt to make the narrative constitute an analysis which supports the Respondent's case. Contrary to para. [54] the reasons of Mansfield and Besanko JJ do not "essentially follow the (Respondents') course of argument". Both focus on the words "same loss or damage": [10], [11], [77], [79] and [83].

4. Additional Facts In response to para. [12] it should be noted that the 'plaintiffs' did not initially pursue the Third to Thirteenth Respondents. These were joined into the action by the Respondents and the Plaintiffs thereafter amended their claim to include claims against these remoter Respondents.[2]

5. Reply to Respondents' Part VI The Appellants acknowledge that Div. 2A came into the Act following the 2003 Amending Bill which followed CLERP 9. That amending Act in no way detracted from or qualified the objects of Chapter 7 (FRS Act 2001).

6. The Respondents focus on s.1041L. They do not however give due regard to the terms of s.1041L(1). Para. [26] is strained and tortuous. Mansfield J at [13] is not authority for the proposition footnoted at 48.

7. A point is sought to be made in para. [27] concerning the wording of the Explanatory Memoranda at [5.355] however it is ill made. A claim for breach of s.1041H can only be made pursuant to s.1041I. It is the recovery section.

8. Respondents' para. [30] must be turned on the Respondents. If Parliament had not wished to confine apportionable claims to cases where conduct was "done in contravention of s.1041H" the sub-section (s.1041L(1)) would have concluded with a full-stop after "(b) damage to property". The 'legislative device' is no doubt that identified in [23]. However the argument fails to consider that Parliament could (noting s.760A) have determined that certain conduct should not have the benefit of apportionment.

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1 Appellants' Submissions, paras. [17], [22]. Section 760A Corporations Act.

2 TJ [2] – [8].

9. There is nothing unusual about the sort of 'choice' envisaged in [31]. A claim might be brought in the alternative (as occurred here) with the plaintiff expecting that if he/she failed in one claim he/she may be left with one where apportionment must be faced.

10. The Respondents' para. [35] does not give due weight to the fact that failure to comply with s.1041H(1) is not an offence. If no claim was made, for example, pursuant to s.953A, there would be no need for the respondent to have to concern himself with an available defence to a claim pursuant to that section.

11. Paras. [36] – [39] fail to address the reasoning of the Full Court in *ABN Amro*. If the Commonwealth legislation carves out certain claims under the Corporations Act and renders them non-apportionable that is what the Commonwealth legislation does. That legislation will not be construed by reference to what a State might do in some other area outside the corporations power. Moreover, the passages from the majority decisions in footnote 50 do not stand for what is suggested.

12. Paras. [44] – [45] are unnecessarily confusing. There is no good reason why Parliament would choose such difficult mechanisms to arrive at the objects of Chapter 7 and Part 7.10. An apportionable claim does not need any concurrent wrongdoers to be defendants. For a non-apportionable claim it is irrelevant that there are other bodies which might have been a party to the cause of loss. The Appellants repeat that it was the Respondents who belatedly introduced the remoter respondents (para. 4 supra).

13. As to [51] there is nothing 'critical' about the wording of s.1041N(3). The choice of wording reflects the contemplation of a 'different kind' of cause of action foreshadowed by s.1041L(2).

14. Reasons of Full Court below Paragraph 3 hereof is repeated. The difficulty in attaching too much significance to the "same loss or damage" (given by Mansfield and Besanko JJ, and the Respondents) is that whilst different conduct, by different parties, might contribute to particular loss or damage it will sometimes not be precisely the 'same'.

15. Para. [55] fails to acknowledge the significance that White J. gives to s.1041L(4)[3].

16. Para. [56] does not correctly analyse the position. The 'claim' in s.1041L(2) is ***a claim*** against, potentially, one wrongdoer only. If there are others, who might be liable in tort, or contract, or indeed misleading or deceptive conduct, apportionment may arise even though those others might not be joined to the proceeding. The Respondents fail however to address the effect of a claim pursuant to a section such as s.953A. Such is a non-apportionable claim. When made out apportionment is not to occur.

17. In the examples posed by the Respondents in [56] and [57] no problems arise. If the plaintiff succeeds in both claims he may obtain orders against both defendants. The orders will however be apportioned against the defendant against whom an apportionable claim is made. Where the claim is in respect of a non-apportionable claim under the Corporations Act there will be no apportionment.

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[3] FCJ [349]

18. The criticisms of White J's reasoning in para. [58] are unwarranted. To the contrary, White J. has clear regard to the policy and objectives of the FSR Act 2001as enhanced by the 2004 amendment. That amending Act seeks to re-enforce the objects of the FSR Act 2001 as reflected in Part 7.1 and s.760A: refer the Explanatory Memorandum under the topics "Informed Market" [4.171] – [4.176] and "Fundraising", [4.181] – [4.183].

19. Reasons of trial judge Para. [66] does not follow and it is not what Lander J. is asserting. There is only ***one*** apportionable claim, against the Respondent who is in breach of s.1041H. There may be no other respondents, there may be other respondents but in respect of them their liability might arise other than by breach of s.1041H. Liability might arise at common law. S.1041L(2) makes it clear that it is not relevant that a s.1041H claim might be joined with another claim at common law, or, indeed, pursuant to statute. One example might be a claim against a non-corporate party pursuant to State legislation duplicating the Trade Practices Act, s.52, viz. Fair Trading Act 1987 (SA).

20. Appellants' Contention It is wrong to submit (at [70]) that the Appellants assert an "exception ... for consumer claims". The Appellants acknowledge that no specific regard to consumers is raised in Division 2A but neither did the implementation of CLERP 9 in 2004 seek to qualify in any way the objects of the FSR Act as reflected in Part 7.1 and s.760A.[4]

21. Appendix A – The Respondents' Summons The appeal is not moot.

22. This appeal and the payment pursuant to Order 3 (i) of the Full Federal Court do not give rise to alternative or mutually inconsistent rights. Faced with cumulative remedies a plaintiff is not required to choose.[5]

23. The appellants having taken some steps towards the satisfaction of one of their rights does not mean that the other is unavailable.[6]

24. The Respondents *elected* to make the payment after the Appellants had advised the Respondents that satisfaction of Order 3 (i) was subject to an application for special leave, resolution of costs, and a continuing Supreme Court action.

25. There has not been an election by the Appellants. The situation is otherwise analogous to the situation of settlement with one joint and several tortfeasor.[7]

26. Turning to the submissions in Appendix A the premise or premises upon which para. [2] is or are based are challenged in the appeal. The Appellants seek restoration of the orders of the trial judge.

27. The reference to *O'Connor v S P Bray Limited* is misconceived. That was a case of an election between alternative remedies pursuant to common law and under the Workers Compensation Act.[8] The case on appeal does not raise an election between inconsistent alternatives[9].

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4 Note para. 18 hereof.

5 *Baxter v Obacelo and another* 184 ALR 616 [39].

6 *O'Connor –v- SP Bray Limited* (1936) 36 SR (NSW) 248 at 258

7 *Baxter v Obacelo* Supra, at [49]

8 Supra, at 252, 255-6.

9 See also *Baxter v Obacelo* Supra, at [45]

PART III: Costs

28. The Appellants filed a summons on 3 February 2015 seeking costs from a non-party. The Summons is supported by the affidavit of John Douglas Radbone sworn and filed the same day. The Appellants also rely upon both parties' Summaries of Argument and the Facts as to question 2 as asserted by both parties in the leave application (No.A11 of 2014).

29. The essential facts are that the Second Respondent was declared bankrupt after the orders of the trial judge and shortly after the appeal was lodged on his behalf.

30. The Second Respondent had the benefit of a professional indemnity policy issued by QBE Insurance (Australia) Ltd. ("QBE") subject however to a limit of liability of $3,000,000 for any one claim inclusive of costs.

31. As at the time following the filing of the notice of appeal to the Full Federal Court costs and expenses had been incurred of approximately $1,350,000. The policy was insufficient to meet the judgment and costs and was exhausted. Bertram was bankrupt and had no further relevant interest. Wealthsure was grossly underinsured in the context of the judgment. QBE had the conduct of the defence and had a relevant interest in the litigation in the sense contemplated in: *TGA Chapman Ltd v Christopher* [1998] 2 All ER 873.

32. QBE requested the trustee in bankruptcy to elect to prosecute the appeal to the Full Federal Court. On QBE refusing to indemnify the trustee beyond the limits of the policy the trustee elected to abandon the appeal. The trustee applied to the Federal Circuit Court for directions as to whether to discontinue the appeal.

33. The Federal Circuit Court gave judgment on that application ([2013] FCCA 1610) on 2 October 2013 ruling that subject to QBE making application to be joined to the appeal proceedings the trustee was entitled to discontinue. The Court noted that the Federal Court Rules would permit such application.

34. At the commencement of the appeal QBE asserted a right to conduct the appeal on behalf of the Second Respondent. Alternatively QBE had filed an interlocutory application seeking leave to intervene but QBE did not press that application at that time asking that the Court 'let it lie'. As the Full Court accepted the asserted right to conduct the appeal the application to intervene was never determined but rather adjourned: refer FCJ [137] – [151].

35. The Appellants say that if their appeal is successful a discretion to make a costs order against QBE arises pursuant to the principles recognized in *Knight v F.P. Special Assets Ltd.* [1992] 174 CLR 178 at 192-3.

Dated:

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