IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

Matter No. P 59 of 2011

BETWEEN: NEWCREST MINING LIMITED (ACN 005 683 625)

Applicant

and

MICHAEL EMERY THORNTON

Respondent

RESPONDENT'S SUBMISSIONS

PART I – Internet publication

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1. These submissions are in a form suitable for publication on the Internet.

PART II - A concise statement of the issues the respondent contends that the appeal presents

2. The respondent agrees with the issue identified in paragraph 2 of the appellant's submissions.

3. The respondent is not entirely clear as to the issue or compendium of issues sought
20 to be identified in paragraph 3 of the appellant's submissions. If (and to the extent that) one issue sought to be argued is whether the court of appeal in Western Australia got it wrong by applying (as it did at [15]) *ASIC v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 [135], particularly having regard to Grounds 4 and 5 of the appellant's "draft" Notice of Appeal dated December 2011 and the reference to *Farah Constructions* during argument in the special leave application, then the respondent will provide some references at the end of these submissions

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relevant to that perceived issue (despite noting at the same that the appellant's written submissions do not address either *ASIC v Marlborough Gold Mines*, nor *Farah Constructions*).

PART III - Section 78B of the Judiciary Act 1903 (Cth)

4. The respondent has considered whether s.78B notice should be given but says that no such notice is necessary.

PART IV - Statement of contested material facts

5. There is a conflict between paragraph 6 of the appellant's submissions and the third entry in the appellant's chronology. The correct position is that the writ against Simon Engineering was both prepared and filed by SRB Legal, the solicitors for Simon Engineering (borrowing the name of the respondent's solicitors) in May 2007 and in pursuance of the agreement struck at the informal settlement conference in May 2007.

6. As to paragraph 7 of the appellant's submissions, the full consent judgment is included in the appeal book.

PART V - Applicable constitutional provisions, statutes and regulations

7. In addition to those identified by the appellant:
   Sections 3, 18 & 19(2)(f), Interpretation Act 1984 (WA);
   Parliamentary Debates (Second Reading Speech, WA Legislative Assembly), 25 September 1947, at page 951;
   s.37, Civil Liability Act 2002 (NSW);
   s.5AM, Civil Liability Act (WA).

PART VI - Respondent's answering argument

8. Notwithstanding paragraphs 15 & 18 of the appellant's submissions and the judicial gloom surrounding the construction of the section, the approach of McColl JA in *Nau*

v Kemp at 694 [21]- 695 [22], to the task of interpreting meaning and constructing the effect of s.7(1)(b), is the correct approach.

9. Contrary to paragraph 19 of the appellant's submissions:

(a) the decisions of both intermediate appellate courts (in WA and NSW) would not deprive the enforceability or effect of a consent judgment: see also Campbell JA at 733 [205] - 734 [206];

(b) the conclusion below is sound both at a textual and purposive level, and is specifically supported also by reference to extrinsic material. Furthermore, s.7(1)(a) and s.7(1)(c) have different functions and are directed towards different subject matter - "that damage" as it appears in each of the sub-sections refers to the "damage...suffered by any person as a result of a tort" in the opening words of s.7(1);

(c) During the second reading speech that introduced the WA provision, the relevant Minister (the Attorney General) referred to the determination of "actual damage" suffered by a claimant - Parliamentary Debates (Second Reading Speech, WA Legislative Assembly), 25 September 1947, at page 951. That, (i.e. the determination of actual damage), it is submitted, can only be ascertained by judicial deliberation. That interpretation, it is submitted, is also entirely consistent with modern proportionate liability statutes, of which legislative cognisance was also taken in the amendment to the section made in 2003 (by the addition in 2003, of the words "Subject to Part 1F of the Civil Liability Act 2002" in the opening words of the section) - see s.5AM, Civil Liability Act (WA); s.37, Civil Liability Act 2002 (NSW).

10. As to paragraph 20 of the appellant's submissions, Campbell JA at 730 [191]-[193] did not rely upon and in fact distinguished *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635. Nevertheless it was proper to at least reflect upon an approach to construction in a way which recognised judicial undercurrents at the highest level of the judicial hierarchy: Campbell JA at 738 [226]-[228].

11. As to the alleged mischief mentioned in paragraph 22 of the appellant's submissions:

(a) the same or a similar criticism can be levelled against the proportionate liability provisions of the various Civil Liability Acts across Australia. Yet that is what modern Australian legislatures see fit to promote - namely, a proper distribution of tortfeasor accountability for losses inflicted (as least in the area of pure economic loss). Bringing tortfeasors to account is what also underlay the very enactment of s.7(1)(a) in 1947;

(b) the construction in the intermediate appellate courts below also promotes the settlement of disputes, inasmuch as the contrary proposition (as advanced by the appellant) would discourage settlements by plaintiffs against any single tortfeasors. The construction contended for by the appellant would also encourage some concurrent tortfeasors to "hold out" in negotiations or take unreasonable stances, in the knowledge that they could escape proper accountability;

(c) the construction contended for by the appellant would also lengthen the duration and complexity of trials (by compelling a plaintiff to proceed to trial against all concurrent tortfeasors - even those who take a reasonable stance in settlement negotiations);

(d) the costs sanction in s.7(1)(b) and practical dimunition of settlement funds derived from the first settlement should a plaintiff take a "scatter gun approach to litigation" makes such a fear unrealistic;

(e) the reference to plaintiffs "*improving* their position with each defendant" overlooks the function of tort law (which is corrective justice, restoration of the status quo ante and the avoidance of windfall gains) - a plaintiff is never enriched by being the victim of a tort.

12. As to paragraphs 24, 32 & 33 of the appellant's submissions, it is important to approach the task of statutory interpretation not just textually, but also contextually. References to other decided cases for textual assistance only is of little help, especially since all justices in the intermediate appellate courts below did specifically

consider the textual alternatives ascribable to the relevant words "damages awarded".

13. As to paragraphs 21, 25 & 34 of the appellant's submissions:

(a) the interpretation contended for by the appellant would not be curative of the mischief complained of. Take for instance a situation where an injured plaintiff first enters consent judgment against his employer (D1) for say $x, but only recovers say $(x - 200,000), and then proceeds to sue a concurrent tortfeasor (D2) in respect of that same damage, with or without D1's knowledge. Assume that the interpretation of s.7(1)(b) contended for by the appellant is correct with the result that the plaintiff can only theoretically recover at best $200,000 from D2. But assume that in fact the action against D2 is then (confidentially or otherwise) dismissed by consent without any payment to the plaintiff, and that D1 later seeks contribution from D2 for a portion of the sum that D1 has actually paid out [i.e. a portion of the $(x - 200,000)]. D2 would still be able to rely upon *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 as an absolute defence to those contribution proceedings: *Amaca Pty Ltd v New South Wales* (2003) 199 ALR 596 at 600 [17]. The greater the nominal amount assigned to "*x*", the greater will be the perceived monetary injustice to D1. This outcome is not a function or consequence of *Nau v Kemp* and it is therefore not a logical argument in support of interference with *Nau v Kemp*;

(b) It is neither necessary nor appropriate to consider or reconsider the correctness of *James Hardie v Seltsam* in this appeal;

(c) McColl JA was, at 704 [75], inclined to take the "better view" - not the only view open (as were all other intermediate appellate court justices who sat on, or subsequently reflected upon the correctness of *Nau*). It is open to the legislature to intervene if it believes that its (sometimes obscure) intentions in this area have been misconstrued by unanimities across two intermediate appellate courts;

(d) in this case the plaintiff is giving full faith and credit (in respect of the earlier consent judgment), to the benefit of the appellant, to the full extent of the damages recovered from the first tortfeasor - see the Particulars of Damages dated 31 March 2009 (filed at first instance below) wherein the respondent volunteered the relevant information to the appellant. A decision of the High Court of Australia creating such an (equitable or common law) obligation upon plaintiffs to do so, or alternatively equivalent legislative intervention and compulsion, would cure any mischief complained of by the appellant. Prudent litigants in the position of the appellant may also interrogate plaintiffs as to the fact and content of previous settlements.

14. As to paragraph 26 of the appellant's submissions, this is incorrect. Section 7(1)(a) was enacted to enable a plaintiff to sue multiple tortfeasors. Secondly, the legislation has not "removed" or created a "bar" to the right to pursue "actions against other concurrent tortfeasors". Given the correct interpretation in the courts below, all the legislation has done is to cap the damages that is recoverable in a subsequent action, so that no more is obtained than the judgment first given by judicial deliberation, or to use the words in the second reading speech in WA in 1947, to cap the damages that is recoverable in the subsequent action, so that in the aggregate, no more is achieved than the "actual damage... sustained".

15. As to paragraph 27 of the appellant's submissions, the work performed by s.7(1)(b) is entirely different from the work performed by s.7(1)(c) and s.7(1)(a). This is recognised by the appellant itself (for instance at paragraph 20 of the appellant's submissions). Secondly, it is the phrase "damages awarded in the judgment first given" that appears in s.7(1)(b) that textually and contextually distinguishes that subsection from s.7(1)(c) and s.7(1)(a).

16. As to paragraph 28 of the appellant's submissions, *Nau* is fortified by independent judicial consideration manifest within each of the reasons for decision of each member of the Court. There is no disparity, just differences in emphases. This is a

feature of most unanimous decisions where each justice delivers separate reasons for coming to the same conclusion. The fact that the honourable Court of Appeal of Western Australia got it wrong at [25], when it held (without reasoning, let alone argument during the hearing of the appeal) that it was difficult to see how an alternate construction would discourage settlement, neither makes it a correct conclusion nor does it invalidate what the appellant cleverly (but not necessarily correctly) describes as a "central plank" of the reasoning in *Nau*. It is contended by the respondent, that *Nau* clearly incentivises plaintiffs to, as far as possible, settle actions against tortfeasors; and that before *Nau*, there was an incentive for concurrent tortfeasors to "hold out" on conducting reasonable negotiations, all against a continuing backdrop of legislative bias supporting multiple actions [see s.7(1)(a) in 1947; amendments to s.7 in 2003 referred to above; and notions of corrective justice - *Imbree v McNeilly* [2000] HCA 40 at [160]; (2008) 236 CLR 510].

17. As to paragraph 29 of the appellant's submissions, whilst it is accepted that "consequences cannot alter statutes, but may help fix its meaning" [per Benjamin Cardozo J in *Re Rouss* 221 N.Y. 81, 84 (N.Y., 1917)], it is an oversimplification to the point of being inaccurate to suggest (as the appellant does) that "properly advised parties will not be discouraged from settling". That statement also carries too many inherent assumptions as to be unhelpful to the exercise of statutory construction.

18. As to paragraph 30 of the appellant's submissions, the respondent repeats paragraphs 9(a) and 17 above.

19. As to paragraph 31 of the appellant's submissions, lower courts within the judicial hierarchy (even if said to be specialist tribunals) do not have a mortgage over the correct approach to statutory interpretation. Two intermediate appellate courts have now determined that the practice (if there ever was one), was wrong.

20. As to *ASIC v Marlborough Gold Mines; Farah Constructions*, it is notable that *Nau* has been relevantly (if not synchronously) applied in *Morris v Riverwild Management Pty Ltd* [2011] VSCA 283 at [54], [55].

21. Further, where there is no contrary binding decision of the High Court of Australia, there is nothing wrong with the approach taken by the court of appeal below at [15], within the limits of horizontal stare decisis but also recognising the need to synthesise as far as coherently possible, the one common law of Australia: *Tegel v Madden* (1985) 2 NSWLR 591; *Wild v Eves* [1970] 2 NSWR 326; Lockhart, "*The Doctrine of Precedent - Today and Tomorrow*" (1987) 3 Aust Bar Rev 1, 2; Brenner, Saul, Spaeth, Harold, "*Stare indecisis: the alteration of precedent in the Supreme Court, 1946-1992*", Cambridge University Press (1995) at p.1; Young v Bristol Aeroplane Co Ltd [1944] KB 17; *Davis v Johnson* (1979) AC 264, 328; *Galley v Lee* [1969] 2 Ch 17, 37; Kidd, "*Stare decisis in intermediate appellate courts: Practice in the English Court of Appeal, the Australian State courts and the New Zealand Court of Appeal* (1978) 52 ALJ 274-276; Prott, Lyndel, "*When will a Superior Court overrule its own decisions?*" (1978) 52 ALJ 304, 308, 314; *Chamberlain R* (1983) 46 ALR 493, 498; *Bennett & Wood v Orange City Council* (1967) 1 NSWLR 502, 503-504; *Nguyen v Nguyen* (1990) 169 CLR 245, 269; *Forster v Forster* (1907) VLR 159, 161; *R v Gassman* (1961) Qd R 381, 385; *R v Johnson* [1964] Qd R 1, 18; *R v Scott-Hogarth* [1965] QWN 17; *Cavanagh v Claudius* [1906] WAR 33.

PART VII - Respondent's argument on notice of contention

22. Not applicable.

DATED 27th January 2011.

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Western Australia

Interpretation Act 1984

Part I — Preliminary

1. Short title

This Act may be cited as the *Interpretation Act 1984* [1].

2. Commencement

This Act shall come into operation on 1 July 1984.

3. Application

(1) The provisions of this Act apply to every written law, whether the law was enacted, passed, made, or issued before or after the commencement of this Act, unless in relation to a particular written law —

(a) express provision is made to the contrary; or

(b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application; or

(c) in the case of subsidiary legislation, the intent and object of the Act under which that subsidiary legislation is made is inconsistent with such application.

(2) The provisions of this Act apply to this Act as they apply to an Act passed after this Act commences.

(3) A reference in section 17, 25, 43(6), 45, 50 or 64 to an Act, written law, enactment, or subsidiary legislation passed or made after the commencement of this Act shall be construed so as not to include any enactment which continues or directly amends, but does not repeal entirely, the text of an existing written law [2].

4. Act binds Crown

This Act binds the Crown.

15A. Reference to paragraph

(1) In this section —

paragraph includes a subparagraph, item, subitem and any other similar provision.

(2) A reference in a written law to a paragraph includes a reference to a conjunction after it connecting it to another paragraph.

[Section 15A inserted by No. 31 of 2010 s. 6.]

16. Reference to written law is to written law as amended

(1) A reference in a written law to a written law shall be deemed to include a reference to such written law as it may from time to time be amended.

(2) A reference in a written law to a provision of a written law shall be construed as a reference to such provision as it may from time to time be amended.

(3) A reference in a written law to an Imperial Act or a Commonwealth Act, or to a provision of an Imperial Act or a Commonwealth Act, shall be construed so as to include a reference to such Act or provision as it may from time to time be amended.

17. Disjunctive construction of "or"

In relation to a written law passed or made after the commencement of this Act, but subject to section 3(3), ***or***, ***other***, and ***otherwise*** shall be construed disjunctively and not as implying similarity unless the word "similar" or some other word of like meaning is added.

18. Purpose or object of written law, use of in interpretation

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is

expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

19. Extrinsic material, use of in interpretation

(1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or

(b) to determine the meaning of the provision when —

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes —

(a) all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer; and

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of Parliament before the time when the provision was enacted; and

(c) any relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the time when the provision was enacted; and

(d) any treaty or other international agreement that is referred to in the written law; and

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted; and

(f) the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House; and

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the written law to be a relevant document for the purposes of this section; and

(h) any relevant material in any official record of proceedings in either House of Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

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ions to the cause of the accident. This
is of law was adopted in England in
t of 1845. I will read from the Eng-
t known as the Law Reform (Con-
ry Negligence) Act, 1945—

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

That is the principle embodied in this Bill and it follows the reform in the English law adopted in 1945. The second part of the Bill relates to a still more technical subject, from the point of view of wording, and that is a contribution between tortfeasors, who are wrongdoers. The second part of this Bill is practically identical with a part of the Law Reform (Miscellaneous Provisions) Act, No. 29 of 1941, passed by this House in that year. That measure contained a section dealing with contributions between the wrongdoers or tortfeasors. With a minor amendment, this Bill lifts that part of the Act of 1941, already passed by this Parliament, and incorporates it in this Bill for the sake of having two related matters brought together in the same Act of Parliament. This part deals with people who jointly commit a wrong against some other person. It may be that they jointly light a fire that burns him out or jointly conspire to defraud him. They commit a wrong against some other person and, as the law now stands, if he sues one of the two, who wronged him, and recovers judgment, he is debarred from suing the other, even though he may not be able to recover compensation from the one he has obtained judgment against, because that one has no money. He is not able to pursue his remedy against the other one or more who wronged him.

This measure alters that and makes provision that if there are two or more wrongdoers and one only is sued, or one or two out of those who committed the wrong, and judgment is obtained, it will not be a bar to suing any other or others of the wrongdoers, if the sufferer desires to do so, provided, of course, that he cannot recover more than the actual damage he has sustained. By a further rule of the existing law, where there are two or more wrongdoers who jointly commit a wrong to somebody's injury, and if one of them pays compensation to the sufferer, or is compelled to do so, he cannot recover any compensation from any other wrongdoer or wrongdoers because it was held that they were all in the wrong together, and the law will not help one to recover from the others. If the sufferer sustains damage to the extent of say £1,000, and one wrongdoer pays up, he cannot go to the other and say, "You should pay £500 to me so as to make it an equality of liability on the part of both of us, because we were both equally liable."

This Bill rectifies that position and ensures that if there are two or more wrongdoers and one pays up to the sufferer, he can recover a contribution from the other or others associated with him in the commission of the wrong, the judge deciding whether the other, or others, shall pay up the full proportionate share. Furthermore, the judge has power if he thinks fit to say, "Well, in the circumstances, although you may have paid the full amount to the sufferer, I will not enable you to recover anything from anyone else." He might hold it was not equitable in the circumstances. These are the main provisions in this law reform Bill. First of all, it provides means by which, if two parties are negligent, the responsibility for damage they, or either of them, incur may be spread in proportion to the degree of negligence exhibited that caused the accident.

The other part will deal with people who jointly cause an injury to a third person and will enable the injured person to recover fully from the wrongdoers, and for any wrongdoer who has paid more than his share to recover a contribution from any others who may have been responsible with him in the commission of the wrong. With that, I will leave any further explanation, if members will be good enough to pass the second reading, till the Committee stage, when I will be pleased to discuss the provisions in the several clauses and to give any explanation I can as to the need for them and the operation they will have. This is a reform of the law that will be well worth-while. There has been much criticism of this particular weakness in our law regarding collisions on land for many years. Owing to that criticism, the British House of Commons corrected the position in 1945, and that reform we now seek to adopt here. I move—

That the Bill be now read a second time.

On motion by Mr. Smith, debate adjourned.

House adjourned at 9.13 p.m.

New South Wales

Civil Liability Act 2002 No 22

Status information

Currency of version

Current version for 6 January 2012 to date (generated 9 January 2012 at 11:14).
Legislation on the NSW legislation website is usually updated within 3 working days.

Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes.

(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the ***other person***) may be a concurrent wrongdoer in relation to the claim, and

(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:

(i) the identity of the other person, and

(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

36 Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and

(b) cannot be required to indemnify any such wrongdoer.

37 Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

Western Australia

Civil Liability Act 2002

same proceedings in which judgment is given against the defendant); and

(b) cannot be required to indemnify any such wrongdoer.

(2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.

[Section 5AL inserted by No. 58 of 2003 s. 9; amended by No. 43 of 2004 s. 10.]

5AM. Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) In any proceedings in respect of any action referred to in subsection (1) the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

[Section 5AM inserted by No. 58 of 2003 s. 9.]

5AN. Joining non-party concurrent wrongdoers in the action

(1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

[Section 5AN inserted by No. 58 of 2003 s. 9.]