HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

RONALD SELIG & ANOR — APPELLANTS

AND

WEALTHSURE PTY LTD & ORS — RESPONDENTS

Selig v Wealthsure Pty Ltd
[2015] HCA 18
13 May 2015
A25/2014

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1, 2, 3 and 7 of the orders of the Full Court of the Federal Court of Australia made on 30 May 2014 and, in their place, order that:*

   (a) *order 2 of the orders of Lander J made on 18 April 2013 be varied by substituting "$1,716,680" in place of "$1,760,512"; and*

   (b) *the appeal and cross-appeal be otherwise dismissed.*

3. *Set aside orders 1 and 2 of the orders of the Full Court of the Federal Court of Australia made on 26 June 2014 and, in their place, order that QBE Insurance (Australia) Ltd pay the costs of the respondents, Mr and Mrs Selig, of the appeal to that Court.*

4. *QBE Insurance (Australia) Ltd pay the appellants' costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

P A Heywood-Smith QC with D G M Riggall for the appellants (instructed by Radbone and Associates)

R J Whitington QC with T W Cox SC for the first and second respondents (instructed by Cosoff Cudmore Knox)

No appearance for the third to ninth respondents

Submitting appearance for the tenth to thirteenth respondents

CATCHWORDS

Selig v Wealthsure Pty Ltd

Corporations – First and second respondents provided financial advice to appellants – First and second respondents found to have contravened various provisions of *Corporations Act* 2001 (Cth) ("Act") and *Australian Securities and Investments Commission Act* 2001 (Cth) – Whether liability should be limited to proportion of appellants' loss, having regard to comparative responsibility of other parties – Whether application of Div 2A of Pt 7.10 of Act limited to claims based on contravention of s 1041H of Act or also applies to other causes of action.

Procedure – Costs – Costs order against non-party – Where professional indemnity insurer had conduct of respondents' defence at trial and made decision to appeal – Where insurer acting in own interests by bringing appeal – Where respondents' cover under insurance policy was capped – Whether circumstances justified costs order against insurer who was a non-party to proceedings.

Words and phrases – "apportionable claim", "proportionate liability".

Corporations Act 2001 (Cth), ss 1041H, 1041I(1B), 1041L, 1041N(1); Pt 7.10, Div 2A.
Australian Securities and Investments Commission Act 2001 (Cth), ss 12DA, 12GP(1); Pt 2, Div 2, subdiv GA.

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. The appellants, Mr and Mrs Selig, invested in Neovest Limited ("Neovest") on the advice of the second respondent, David Bertram, who was an authorised representative of the first respondent, Wealthsure Pty Ltd ("Wealthsure"). Wealthsure was the holder of an Australian Financial Services Licence. The scheme proposed in the prospectus issued by Neovest was, in effect, a "Ponzi scheme". Neovest became insolvent. The appellants lost their investment and suffered consequential losses.

2 The first and second respondents, by their insurer, defended the proceedings brought by the appellants in the Federal Court against them and claimed, in the alternative, to be entitled to, inter alia, declarations as to the extent of their liabilities to the appellants, having regard to the comparative responsibility of each and all of Neovest, Norton Capital Pty Ltd ("Norton Capital") (a company which had participated in the promotion of the investment in Neovest), Mr Mark Norton and Mr Peter Townley, who were directors of Neovest, and two other directors of Neovest. As a result, the appellants joined these parties as defendants to the proceedings, together with the other partners of Mr Townley's law firm.

3 The appellants succeeded at trial in their claims against the first and second respondents and against Mr Townley and Mr Norton (the fifth and sixth respondents). The primary judge (Lander J) made findings against Neovest and Norton Capital and the two other directors of Neovest, but judgment was not entered against these parties on account of their liquidation and bankruptcy, respectively. His Honour dismissed the claims against Mr Townley's partners.

4 The appellants' claims against the first, second, fifth and sixth respondents were based upon contraventions of a number of provisions of the *Corporations Act* 2001 (Cth) and the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act"), including s 1041H of the *Corporations Act* 2001 and its analogue in the ASIC Act, s 12DA. Section 1041H(1) prohibits conduct, in relation to a financial product or service, that is misleading or deceptive, or is likely to mislead or deceive. Section 12DA of the ASIC Act prohibits conduct of the same kind, in trade or commerce, in relation to financial services. The appellants also alleged that the first and second respondents had breached their retainer and the duty of care they owed to the appellants as providers of financial advice.

5 The claims by each of the first, second, fifth and sixth respondents that any liability to the appellants should be limited to a proportion of the appellants' loss and damage relied upon the provisions of Div 2A of Pt 7.10 of the

Corporations Act 2001 ("Div 2A") and corresponding provisions of the ASIC Act[1].

6 The primary judge entered judgment in the sum of $1,760,512[2] against each of the first, second, fifth and sixth respondents on the basis that each of them was liable to the appellants for the whole of the damage suffered by them. His Honour did not enter judgment on the basis of those respondents' proportionate liability for the loss and damage. His Honour held[3] that Div 2A applies only where there has been a contravention of s 1041H and has no application where a plaintiff succeeds on other statutory and common law causes of action, in respect of which a defendant is liable for the whole of the damage. His Honour nevertheless made findings of apportionment and contributory negligence.

7 The only presently relevant issue on the appeal from his Honour's decision to a Full Court of the Federal Court was the applicability of Div 2A and the analogue provisions of the ASIC Act. By a majority, the Full Court (Mansfield and Besanko JJ, White J dissenting on the present issue)[4] allowed the appeal. Shortly after the Full Court's judgment was delivered in this matter, a differently constituted Full Court of the Federal Court delivered reasons for judgment in another matter[5], in which the contrary view as to the construction of Div 2A, that adopted by Lander and White JJ, was expressed.

Div 2A of Pt 7.10 of the *Corporations Act* 2001

8 The reasons for judgment in the Court below dealt with the provisions of Div 2A on the correct basis that the reasoning would apply equally to the provisions of the ASIC Act. There being no relevant distinction, that course will be followed here.

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1 *Australian Securities and Investments Commission Act* 2001 (Cth), Pt 2, Div 2, subdiv GA.

2 Reduced to $1,716,680 on appeal.

3 *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308 at 452 [1084].

4 *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1 at 4-5 [10] per Mansfield J, 19 [77] per Besanko J.

5 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 (Jacobson, Gilmour and Gordon JJ).

9 Section 1041L appears under the heading to Div 2A, "Proportionate liability for misleading and deceptive conduct", and provides:

> "(1) This Division applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 1041I for:
>
> (a) economic loss; or
>
> (b) damage to property;
>
> caused by conduct that was done in a contravention of section 1041H.
>
> (2) For the purposes of this Division, 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).
>
> (3) In this Division, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
>
> (4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).
>
> (5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died."

10 For a claim to be an apportionable claim, s 1041L(1) requires that it be a claim for damages made under s 1041I. That provision appears in Div 2 of Pt 7.10 and provides, by sub-s (1):

> "A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention."

11 Section 1041I(1) creates a cause of action for contraventions of each of ss 1041E, 1041F, 1041G and 1041H. However, s 1041L(1) nominates only

claims for loss or damage caused by conduct that was done in contravention of s 1041H to be apportionable claims.

12 Section 1041I also makes provision, in sub-s (1B), for the reduction of an award of damages by reason of a claimant's contributory negligence, but only with respect to a claim brought in relation to conduct done in contravention of s 1041H. Section 1041I(1B) provides:

> "Despite subsection (1), if:
>
> (a) a person (the ***claimant***) makes a claim under subsection (1) in relation to:
>
> (i) economic loss; or
>
> (ii) damage to property;
>
> caused by conduct of another person (the ***defendant***) that was done in contravention of section 1041H; and
>
> (b) the claimant suffered the loss or damage:
>
> (i) as a result partly of the claimant's failure to take reasonable care; and
>
> (ii) as a result partly of the conduct referred to in paragraph (a); and
>
> (c) the defendant:
>
> (i) did not intend to cause the loss or damage; and
>
> (ii) did not fraudulently cause the loss or damage;
>
> the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage."

13 Section 1041I(1B)(a) confines the application of the contributory negligence reduction for which it provides in terms relevantly identical with s 1041L(1). It was inserted in Div 2 at the same time as Div 2A was inserted in the *Corporations Act* 2001.

14 The appellants, by their Notice of Appeal, challenged that aspect of the Full Court's judgment which gave effect to a finding of contributory negligence against them under s 1041I(1B). In this Court, argument was not directed to any separate issue relating to the operation of s 1041I(1B), the parties evidently being content that success by the appellants on the issue of apportionability would result in the restoration in full of the judgment given by the primary judge in favour of the appellants.

15 As has been mentioned earlier in these reasons, s 1041H(1) prohibits misleading or deceptive conduct in relation to a financial product or service. Sub-section (2) of the same section provides a non-exclusive list of conduct which amounts to engaging in conduct in relation to a financial product. Sub-section (3) provides that conduct which contravenes s 670A or s 728 (which respectively concern misleading or deceptive takeover documents and fundraising documents) and conduct in relation to a disclosure statement or document within the meaning of s 953A or s 1022A does not contravene s 1041H(1).

16 Section 1041N(1) in Div 2A provides for the method of apportionment of responsibility to be applied by a court:

> "In any proceedings involving an apportionable claim:
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
>
> (b) the court may give judgment against the defendant for not more than that amount."

17 Sub-section (2) provides that:

> "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 Division; and
>
> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant."

It remains to mention sub-s (3), which deals with the topic of contributory negligence:

> "In apportioning responsibility between defendants in the proceedings:
>
> (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
>
> (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings."

It will be recalled that contributory negligence respecting a claim based on a contravention of s 1041H is provided for in s 1041I(1B), which is set out above.

18 Division 2A was inserted into the *Corporations Act* 2001 as part of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004 (Cth). The ASIC Act[6] and the *Trade Practices Act* 1974 (Cth) (now called the *Competition and Consumer Act* 2010 (Cth))[7] were amended at the same time to include relevantly identical provisions to those in Div 2A. The analogues to s 1041L(1)[8] each describe an apportionable claim by reference to conduct which is of a misleading and deceptive kind, albeit in different contexts[9].

19 At the time these statutes were amended to provide for proportionate liability with respect to apportionable claims, such provision had already been made with respect to actions of certain kinds in State and Territory legislation dealing with civil liability[10]. It was observed in *Hunt & Hunt Lawyers v Mitchell*

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6 Subdivision GA of Div 2 of Pt 2.

7 Part VIA.

8 *Australian Securities and Investments Commission Act* 2001, s 12GP(1); *Competition and Consumer Act* 2010 (Cth), s 87CB(1).

9 *Australian Securities and Investments Commission Act* 2001, s 12DA; *Competition and Consumer Act* 2010, Sched 2 (Australian Consumer Law), s 18.

10 See *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 626 [15], especially footnote 44; [2013] HCA 10.

Morgan Nominees Pty Ltd[11] that the background to the inquiry which led to the introduction of this legislation in the States and Territories was a perceived crisis regarding the cost of liability insurance. The Davis Report[12] had noted that people, such as professional people, who are usually insured against liability to clients are often the sole target of legal action when losses are suffered, despite the involvement of others. It was suggested[13] that, in actions of negligence involving claims for property damage or economic loss, a defendant's liability should be limited to his or her degree of fault.

20 Professor Davis also considered[14] that proportionate liability should extend to claims arising from contraventions of s 52 of the *Trade Practices Act* 1974 (Cth)[15] and s 995 of the Corporations Law[16]. Section 52 concerned misleading and deceptive conduct in the context of trade and commerce; s 995 concerned misleading and deceptive conduct in dealing in securities. In Professor Davis' view, there were similarities between the statutory liability for contraventions of those provisions and liability in negligence. However, if anything, it is the difference between them which makes the policy argument in favour of apportionment in respect of negligence more readily applicable to claims for damages for misleading or deceptive conduct. Such claims do not require the claimant to show a duty of care or breach thereof, nor foreseeability of outcome.

21 Under the statutory regime of proportionate liability, liability is apportioned for each wrongdoer according to the court's assessment of the extent of their responsibility. As was also observed in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*[17], it is necessary for a plaintiff to sue all of the

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11 (2013) 247 CLR 613 at 625-626 [13]-[15].

12 Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 11.

13 Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 4, 36.

14 Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, (1995) at 39.

15 Now Australian Consumer Law, s 18.

16 Which was contained in *Corporations Act* 1989 (Cth), s 82.

17 (2013) 247 CLR 613 at 624 [10].

wrongdoers in order to recover the total loss. There is an obvious benefit to wrongdoers from this kind of proportionate liability regime. Further, in such a regime, proportionate liability applies regardless of whether a concurrent wrongdoer is insolvent or is being wound up[18]. The risk of a failure to recover from a particular wrongdoer shifts entirely to the plaintiff.

An "apportionable claim"?

22 The loss and damage alleged to have been suffered by the appellants as a result of each of the various contraventions of the *Corporations Act* 2001 or the ASIC Act, or breach of contract or of duty of care, was the same. The question is whether Div 2A applies so that this loss and damage is to be apportioned between the first, second, fifth and sixth respondents in respect of all of those claims or whether Div 2A is limited in its application to the claims based on contraventions of s 1041H. The answer to that question lies in the meaning given by the provisions of Div 2A to an "apportionable claim".

23 Section 1041N(1) provides that a court must apportion liability for loss and damage having regard to the extent of a defendant's responsibility for it, where proceedings involve an "apportionable claim". Attention is thereby directed to s 1041L(1), the purpose of which, clearly enough, is to define what is an "apportionable claim" to which Div 2A applies.

24 The first requirement for a claim to be an apportionable claim, according to s 1041L(1), is that it be one brought for damages under s 1041I. Section 1041I permits claims for damages to be brought with respect to conduct which contravenes any of four provisions of Div 2 of Pt 7.10. However, s 1041L(1) refers only to conduct in contravention of one of them. For the purposes of s 1041L(1), the damages claimed under s 1041I must be caused by conduct done in contravention of s 1041H.

25 The approach for which the first and second respondents contend would have the effect that, contrary to the express terms of s 1041L(1), the other claims referred to in s 1041I, of contraventions of ss 1041E, 1041F and 1041G, would all be apportionable claims. Likewise, conduct which is excluded from the scope of s 1041H(1) by s 1041H(3) may qualify as founding apportionable claims.

26 That the text of s 1041L(1) restricts an apportionable claim to one based on s 1041H does not mean, as the first and second respondents' submissions imply, that Div 2A would have an unduly limited application. It is well known

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18 *Corporations Act* 2001 (Cth), s 1041L(5).

that misleading and deceptive conduct may take many forms. It may involve a variety of forms of conduct by a number of persons. A number of instances of misleading and deceptive conduct, of different kinds, may combine to cause the loss and damage complained of.

27 In determining what is an "apportionable claim" for the purposes of Div 2A, the reasons of the majority in the Full Court did not focus upon s 1041L(1), but rather s 1041L(2). The two aspects of sub-s (2) which were considered to be critical to an understanding of what constitutes an "apportionable claim" were (i) the requirement that the loss or damage the subject of the causes of action be the same; and (ii) the acknowledgment that there may be more than one cause of action and that they may be of different kinds[19].

28 Consistently with the approach of the majority, the first and second respondents submitted before this Court that the effect of s 1041L(2) is to disregard the legal basis for the claim, leaving any claim for the same loss and damage as the basis for apportionment. The underlying assumption to the approach for which the first and second respondents contend is that the "cause[s] of action" referred to in s 1041L(2) are to be equated with "the claim for the loss or damage". On this view each cause of action pleaded is to be treated as an apportionable claim.

29 Applying well-settled rules of construction, the same meaning should be given to the word "claim" where it appears in sub-ss (1) and (2). The first and second respondents' construction of s 1041L(2) results in an inconsistency between the meaning given to the word "claim" in sub-ss (1) and (2). The "claim" in s 1041L(1) is a claim for damages under s 1041I for damage caused by conduct in contravention of s 1041H. When s 1041L(2) speaks of a claim based on more than one cause of action, it cannot be speaking of a claim liability for which arises due to contravention of a norm of conduct different from that which creates liability to a claim for damages described in s 1041L(1), namely s 1041H.

30 The first and second respondents acknowledge that their approach to what is an "apportionable claim" involves an extension of what s 1041L(1) identifies as a claim. It was put by them that s 1041L(1) should be regarded a contingent or partial definition, with the balance of the definition being supplied by

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19 *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1 at 4 [9]-[10] per Mansfield J, 19 [77] per Besanko J.

s 1041L(2). This submission is directly contradicted by s 1041L(4), which expressly states that "apportionable claims are limited to those claims specified in subsection (1)."

31 The function of s 1041L(2) is not to complete the definition of an apportionable claim. That has already been provided by s 1041L(1). Its purpose is to explain that, regardless of the number of ways in which a plaintiff seeks to substantiate a claim for damages based upon a contravention of s 1041H, so long as the loss or damage claimed is the same, apportionment is to be made on the basis that there is a single claim. Regardless of the various causes of action pleaded with respect to s 1041H, the responsibility of the defendants will be apportioned by reference to a notional single claim.

32 In support of a more universal application of Div 2A, the first and second respondents submitted that it is unlikely that different assessments of claims for the same loss or damage could have been intended, yet Div 2A clearly accepts that this will be the case. Section 1041N(2) explains that liability for an apportionable claim is to be determined in accordance with Div 2A and liability for other, non-apportionable, claims is to be determined by reference to the legal rules relevant to them and therefore not in accordance with Div 2A. If the first and second respondents' submissions were correct, there would be no need for this provision.

33 Then there is the matter of the place of contributory negligence in the provisions for apportionment. Section 1041N(3)(a) provides that the court is to exclude that proportion of the damage or loss to which the plaintiff had contributed, by his or her negligence, before proceeding to apportion responsibility. Sub-section (3)(a) directs that this process applies to the issue of contributory negligence as dealt with "under any relevant law".

34 There was some discussion in the course of argument about these words. It may be that their generality is explained by their being contained in template provisions for use in more than one statute. Clearly enough the words assume the existence of a law which provides for the determination of contributory negligence on the part of a plaintiff with respect to an apportionable claim. In the context of Div 2A they may be taken to refer to s 1041I(1B), which allows for the determination of the issue of contributory negligence in respect of a claim referable to s 1041H. It could hardly be said that s 1041N(3) assumes the existence of a law providing for a finding of contributory negligence in the case of any and every statutory contravention of the *Corporations Act* 2001 or breach of any norm of conduct that may be associated with it.

35 It must be inferred that the construction for which the first and second respondents contend assumes the existence of some overarching legislative policy to the effect that liability for all claims to which the *Corporations Act* 2001 applies should be the subject of apportionment as between wrongdoers, yet no such intention may be discerned from the provisions of Div 2A or the text of s 1041L.

36 It was observed by the Full Court in *ABN AMRO Bank NV v Bathurst Regional Council*[20] that contraventions of the other provisions referred to in s 1041I, which were not chosen as being capable of being the subjects of an apportionable claim, involve a higher level of moral culpability than the conduct referred to in s 1041H. Unlike s 1041H, contravention of any of ss 1041E-1041G constitutes an offence, an element of which is knowledge or recklessness. The fact that apportionment is of benefit to wrongdoers may have weighed in the decision to limit apportionable claims to those involving conduct of the kind to which s 1041L refers.

37 However, it is not necessary to resort to legislative purpose to explain the selection of only s 1041H. The terms of the relevant provisions of Div 2A are clear. An "apportionable claim" for the purposes of Div 2A is, relevantly, a claim based upon a contravention of s 1041H. The term does not extend to claims based upon conduct of a different kind.

38 The appeal should be allowed.

Costs against the insurer?

39 The appellants seek an order that the professional indemnity insurer of the first respondent, QBE Insurance (Australia) Ltd ("the insurer"), a non-party to the proceedings, pay the costs of this appeal and the costs of the appeal in the Federal Court.

40 The insurer had the conduct of the defence of this matter at trial and made the decision to appeal from the judgment of the primary judge. At a time shortly after the Notice of Appeal was filed in the Federal Court the second respondent was declared bankrupt. At this time, by its own account, the first respondent's ability to meet the judgment sum and costs was uncertain. In their written submissions, the appellants assert that the first respondent could not have paid the judgment sum from the trial and the first and second respondents do not dispute this.

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20 (2014) 224 FCR 1 at 307 [1565], 307-308 [1568]-[1570].

41 The professional indemnity policy issued by the insurer to the first respondent provided cover to a maximum of $3 million on "any one Claim inclusive of Costs & Expenses". At around the time the Notice of Appeal was filed in the Federal Court, the legal costs and expenses incurred by the insurer in the conduct of the first and second respondents' defence were of the order of $1.35 million. There is no evidence as to the amount of legal costs which has since been incurred by the insurer on the appeals, but it may reasonably be assumed that a considerable portion of the sum representing the balance of the insurer's liability under the policy has been spent and that, from the appellants' perspective, there is likely to be a significant shortfall in the amount they will be able to recover from the respondents.

42 The second respondent's trustee in bankruptcy elected to discontinue the appeal to the Federal Court. Thereafter, the insurer asserted an entitlement to conduct the appeal on behalf of both the first and second respondents. The Full Court accepted that the insurer had the right to do so under the policy, although it made no formal order to that effect.

43 In *Knight v FP Special Assets Ltd*[21], this Court held that its discretionary power to make orders against non-parties extends to the circumstance "where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party ... has an interest in the subject of the litigation." There is, however, no rule that where a non-party falls into this category an order for costs will necessarily follow. Rather, as Mason CJ and Deane J said[22], "an order for costs should be made against the non-party if the interests of justice require that it be made."

44 It might be suggested that the insurer's actions in bringing the appeal against the decision of the primary judge could not be said to have been entirely unreasonable, given its success in the Full Court. In *Chapman Ltd v Christopher*[23], the Court of Appeal of England and Wales upheld an order for costs which had been awarded against a non-party insurer that pursued a defence of a claim in order to defend its interests. In doing so, the Court rejected the

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21 (1992) 174 CLR 178 at 192-193, 205; [1992] HCA 28.

22 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 193.

23 [1998] 1 WLR 12; [1998] 2 All ER 873.

contention that such an order should only be made where the insurer had acted unreasonably in causing its insured to defend the claim[24].

45 At the time the insurer's decision to appeal the judgment of the primary judge was made it could not be said that the first and second respondents continued to have an interest in the outcome of the litigation. The insurer acted for itself in seeking to better its position. It took a chance, as litigants do, that if its argument as to the application of Div 2A succeeded, the liability of the first and second respondents would be reduced to 60 per cent of the judgment sum, as the primary judge had found. In these circumstances, why should it be regarded as immune from the risk of an order for costs?

46 The insurer's decision to incur the costs of an appeal was one which would mean that monies which it would otherwise have been obliged to pay the appellants would be diverted to meet its legal costs. It put the appellants to further significant legal expense. It was obvious that the insurer incurring further legal costs would reduce the amount available to meet the extant order for costs in the appellants' favour and any order that might be made on future appeals.

47 It was not suggested that account ought to be taken of the position of the fifth respondent with regard to costs. The sixth respondent does not appear to have participated in the appeal below and the fifth respondent did so to an extent, but only after the insurer instituted the appeal. Neither participated in this appeal.

48 The insurer ought to pay the appellants' costs of this appeal and of the appeal to the Full Court.

Orders

49 The appeal should be allowed and orders 1, 2, 3 and 7 made on 30 May 2014 and orders 1 and 2 made on 26 June 2014 by the Full Court of the Federal Court set aside. In lieu it should be ordered that the second order made by the primary judge on 18 April 2013 be varied by substituting "$1,716,680" in place of "$1,760,512", that the appeal and cross-appeal to that Court be otherwise dismissed and that QBE Insurance (Australia) Ltd pay the costs of the respondents to that appeal. It is also ordered that QBE Insurance (Australia) Ltd pay the costs of the appellants in this appeal.

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24 *Chapman Ltd v Christopher* [1998] 1 WLR 12 at 22; [1998] 2 All ER 873 at 883.

50 GAGELER J. I concur, and add some brief observations about the limited operation of s 1041I(1B) and of Div 2A within the scheme of Pt 7.10 of the *Corporations Act* 2001 (Cth).

51 Section 1041I(1B) (concerning the contributory negligence of a claimant) and Div 2A (concerning the proportionate liability of concurrent wrongdoers) each operate solely to reduce the civil liability imposed by s 1041I(1) for contravention of s 1041H. Neither operates to reduce civil liability imposed by s 1041I(1) for contravention of s 1041E, s 1041F or s 1041G. Neither operates to reduce liability imposed by any other Commonwealth law, by any State or Territory law, or under any rule of the common law.

52 That limited operation of s 1041I(1B) and Div 2A can best be appreciated when their introduction (contemporaneously with the introduction of similar provisions in the *Australian Securities and Investments Commission Act* 2001 (Cth)[25] and the *Trade Practices Act* 1974 (Cth)[26]), by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004 (Cth) ("the 2004 Amendment Act"), is set against the background of the agreement of the Commonwealth, State and Territory Governments in 2003 for a nationally consistent model of proportionate liability for economic loss or property damage to be implemented by complementary legislation in each of those jurisdictions[27]. Nothing in the extrinsic material accompanying the Bill for the 2004 Amendment Act suggests a Commonwealth legislative intention to alter any liability other than liability imposed by the three Commonwealth Acts specifically amended. Any corresponding reduction of liability imposed by State and Territory laws, and under the common law, was left to be implemented by State and Territory legislation.

53 Section 1041I(1B) and Div 2A are expressed, by s 1041I(1B)(a) and by the definition of "apportionable claim" in s 1041L(1) respectively, to apply only to a "claim" made "under" s 1041I "in relation to", or "for", economic loss or property damage caused by conduct done in contravention of s 1041H. Section 1041I(3) serves to make clear that the reduction of liability for contributory negligence effected by s 1041I(1B) has no operation in respect of any liability that the person against whom such a "claim" is made might additionally and concurrently have under any other law.

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25 Section 12GF(1B) and subdiv GA of Div 2 of Pt 2.

26 Section 82(1B) and Pt VIA.

27 Australia, House of Representatives, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, Explanatory Memorandum at [4.125], [5.348], [5.351]-[5.353].

54 Section 1041N(2) similarly serves to make clear that the subsequent apportionment required to achieve proportionate liability under s 1041N(1) and (3) has no operation in respect of any liability that is not the subject of such a "claim". Section 1041L(2)'s reference to the treatment of more than one "cause of action" for the "same loss or damage" as a "single apportionable claim" is to be read as a reference to the treatment of more than one "fact or combination of facts which gives rise to a right to sue"[28] for that loss or damage. The significance of s 1041L(1) and (4) to s 1041L(2) is that each such right to sue must itself be a "claim" specified in s 1041L(1): only those claims that are themselves "apportionable claims" are aggregated by s 1041L(2) into a "single apportionable claim".

55 The word "claim" in that context cannot be read as referring simply to the economic loss or property damage for which a claimant seeks to recover. Nor can it be read as referring to a mere assertion that the economic loss or property damage for which the claimant seeks to recover is the result of conduct which has the character of a contravention of s 1041H.

56 The word "claim" in s 1041I(1B)(a) and in s 1041L(1) must rather be read as referring specifically and exclusively to a claimant's assertion that a liability for economic loss or property damage has arisen under s 1041I(1) as a result of particular conduct which the claimant asserts contravenes s 1041H. It is that liability, if found, which alone is reduced by operation of s 1041I(1B) and s 1041N(1) and (3) respectively.

57 Any assertion made by the same claimant that liability for the same economic loss or property damage has arisen by reason of the same conduct breaching some other statutory norm, or that liability for the same economic loss or property damage has arisen through the application to the same conduct of some other statutory or common law rule, does not form part of the same "claim" even if it is made in the same proceeding. That assertion, and any finding of liability to which it might lead, is left untouched by the operation of each of s 1041I(1B) and Div 2A.

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28 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 245; [1984] HCA 17.