St George Bank Ltd v Quinerts Pty Ltd - [2009] VSCA 245

SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 3839 of 2008

ST GEORGE BANK LIMITED (ACN 097 263 048) Appellant

v

QUINERTS PTY LTD (ACN 067 715 584) Respondent

AND BETWEEN:

QUINERTS PTY LTD (ACN 067 715 584) Cross-Appellant

v

ST GEORGE BANK LIMITED (ACN 097 263 048) First Cross-Respondent

and

ALEXANDER TVARKOVSKI Second Cross-Respondent

JUDGES	NETTLE and MANDIE JJA and BEACH AJA
WHERE HELD	MELBOURNE
DATE OF HEARING	1 October 2009
DATE OF JUDGMENT	28 October 2009
MEDIUM NEUTRAL CITATION	[2009] VSCA 245
JUDGMENT APPEALED FROM	*St George Bank Limited v Quinerts Pty Ltd & Anor* (Unreported, County Court of Victoria, Judge Kennedy, 4 August 2008)

CONTRACT – Breach of contract – Professional negligence – Valuer retained by bank to value mortgaged premises – Negligent overvaluation causing bank to lend too much against security of mortgaged premises – Damages for breach of retainer – Quantum of damages required to place bank in position as if valuation had been competently performed – Whether bank would have entered into alternative transaction – Whether alternative transaction would have been productive of loss – Damages for loss of opportunity – Evidence required to prove value of lost opportunity – Contributory negligence – Whether bank at fault in failing adequately to assess borrower's capacity to repay loan – Whether bank's failure was causative of loss – Proportionate liability – Whether valuer's liability limited by Part IVAA of *Wrongs Act 1958* – Whether delinquent borrower and valuer were concurrent wrongdoers – *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109, *Royal Brompton Hospital NHS Trust v Hammon* [2002] 1 WLR 1397, considered; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505, distinguished – *Wrongs Act 1958* , Part IVAA, ss 23B, 24, 24AH and 24AI .

Appearances:	Counsel	Solicitors
For the Appellant/ First Cross-Respondent	Mr D G Collins SC with Mr S B Rosewarne	Middletons
For the Respondent/	Mr C M Caleo SC with	DLA Phillips

Cross-Appellant	Mr D V Aghion	Fox
For the Second Cross-Respondent	No Appearance	

NETTLE JA:

1. This is an appeal from a judgment given in the County Court following trial before judge alone. The appellant's ('the Bank's') claim below was for damages for breach of contract, negligence and misleading and deceptive conduct, the result of the respondent's ('Quinerts'') negligent overvaluation at $800,000 of the Unit 12, 410-412 Bay Street, Port Melbourne ('the property'). The Bank advanced $640,000 (being 80% of valuation) to Alexander Tvarkovski ('the Borrower') secured by mortgage over the property. The Borrower defaulted and the Bank, as mortgagee, sold the property by public auction. The highest price bid was only $495,000, leaving the Bank with a loss of more than $100,000 plus interest. The Bank contended that, if the property had been competently valued at its true worth of not more than $500,000 the Bank would not have entered into the transaction. On that basis, it claimed that it was entitled to damages calculated to put it in the position in which it would have been had it not made the loan.

2. Quinerts admitted that their valuation was incompetent and ultimately admitted that the true value of the property was no more than $500,000 at the time of valuation.[1] They alleged, however, that if the property had been competently valued at $500,000, the Bank would have lent the Borrower $450,000 ('the alternative transaction')[2] and, therefore, that the Bank's claim should be limited to the difference between its loss in fact and the loss which it would have incurred if it had entered into the alternative transaction. Quinerts also contended that the Bank was guilty of contributory negligence in failing properly to assess the Borrower's capacity to service the loan, and that the Bank's claim should be reduced accordingly. Further or alternatively, Quinerts argued that, by reason of the proportionate liability provisions of Part IVAA of the *Wrongs Act 1958* , Quinerts was not liable to the Bank for more than a proportion of the Bank's loss.

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[1] At the outset of the trial, they contended that it was worth $550,000, but eventually conceded that it was $500,000.

[2] Being 90 per cent of valuation, with mortgage insurance.

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3. The judge held that it was more likely than not that the Bank would have entered into the alternative transaction, and that the Borrower would have financed the remaining $60,000 needed for completion of the purchase of the property from his own resources, including those of companies with which he was associated.

4. The Bank now appeals against the judgment on grounds that the judge erred in finding that the Bank would have entered into the alternative transaction; and in refusing a claim by the Bank

for damages in the nature of interest for loss of use of the funds which it lent to the Borrower; and in refusing the Bank an order for all of its costs of the proceeding (on the basis of an offer of compromise made by Quinerts before trial).

5. Quinerts cross-appeals on grounds that the judge erred in refusing to reduce the damages payable to the Bank to allow for what Quinerts contended was the Bank's contributory negligence, and in refusing to apportion Quinerts' liability under Part IVAA of the *Wrongs Act 1958* . A further claim that the judge erred in failing to apportion liability under Part VIA of the *Trade Practices Act 1974* (Cth) was abandoned.

The appeal – The alternative transaction

6. Under cover of Grounds 1 and 2, the Bank contended that the judge erred in finding that the Bank would have entered into the alternative transaction and thus in finding that the damages for which Quinerts were liable excluded the loss[3] which the Bank would have suffered if it had done so. Counsel for the Bank submitted that it was clear from the Bank's lending guidelines that the Bank would not have lent 90 per cent of valuation of $500,000 unless the Borrower had been able to demonstrate that he had the additional $60,000 in hand, and that the Borrower's finance application and supporting materials, and the statements pertaining to the 'line of credit' account (on the basis of which the Bank advanced the $640,000 to the Borrower), strongly implied that the Borrower would not have had access to money in that amount.

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[3] Assuming there would have been a loss. In fact, as will be explained, the alternative transaction would not have resulted in a loss.

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7. In my view, there is force in that submission. The finance application and materials provided in support of it included details of the Borrower's assets, and they did not show any funds in bank accounts or other liquid assets. The application form noted that the Borrower owned three properties, but that they were all subject to existing mortgages and that the amount secured was increasing.[4] As at 27 November 2001, the loan the subject of 'the South Melbourne mortgage' had a balance of $847,284.92 and as at 25 February 2002, that had increased to $944,715.00 The balance noted on the finance application form was $945,000.00. As at 5 March 2002, the loan the subject of 'the Southbank mortgage' had a balance of $447,483.92 and as at 30 June 2002, that had increased to $447,606.62. The balance noted on the finance application form was $448,000.00.

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[4] These were relevantly the mortgage held by Bosise Pty Ltd, and two further mortgages held by Liberty Funding Pty Ltd over properties in South Melbourne and Southbank.

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8. The statements pertaining to the line of credit facility showed that, at settlement on 14 February 2003, the Borrower drew down the line of credit to the extent of $618,343.50. That included $500,960 to pay out the vendor of the property, Bosise Pty Ltd, a bank cheque to the Bank of Melbourne for the sum of $50,000, and a further cheque for $60,032.50 for purposes which the Borrower said in evidence he could no longer recall. One wonders why the Borrower would have drawn down more than the minimum necessary to complete the purchase if he had another $60,000 readily available. Additionally, although the Borrower thereafter occasionally deposited funds to the credit of the line of credit account, so as to reduce the account balance, the account rarely operated within agreed limits and the Borrower was frequently charged substantial penalties and accommodation fees for account excesses and other delinquencies.

9. In my view, the documentary evidence was not sufficient to sustain a conclusion that the Bank would have entered into the alternative transaction. The impression I derive from the documents is one of a Borrower who was fully extended and for the time being significantly short of liquidity. By itself that does not satisfy me that it was more likely than not that he could have come up with the additional $60,000 required in order to avail himself of the alternative facility.

10. It appears that the judge was mindful of the implications of the documentary evidence - particularly, the implications of the Borrower having drawn down almost all of the available balance of the facility at the time of completion - but her Honour said that she was persuaded by the Borrower's oral evidence that he would have been able to find the additional funds. Her Honour reasoned that:

> In terms of the ability to make up the difference between the amount lent and the amount required to discharge the loan to Boisise (sic), Mr Tvarkovski gave evidence that he was pretty sure that, at that time, he or his companies had $56,000 in cash or that he could obtain such funds through the sale of property. I accept this evidence although it was given in the context of requiring an extra $56,000. I am prepared to infer that he would have been able to find the extra if in fact more was necessary to cover the excess (in the order of approximately $60,000) in relation to a hypothetical loan of $450,000).[5]
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> …
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> [Counsel for the appellant] suggests that the fact that the [B]orrower drew down on the funds in excess of the amount necessary to discharge the mortgage to Boisise (sic) suggests that Mr Tvarkovski would have been unable to find the excess necessary to discharge the Boisise (sic) facility. However, Mr Tvarkovski gave evidence that he utilised this money in his property investment business. Simply because he utilised extra cash in a business does not mean that he would not have been able to access funds if he had wanted to.[6]

[5] Reasons, [32].

[6] Reasons, [35].

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11. With respect, I do not consider that was the effect of the Borrower's evidence. His evidence in chief on the point was at best equivocal:

> If St George only were prepared to give you $440,000 and you had a mortgage to Bosise for the purchase price, which you think is $495,000, you're $55,000 short. How would you make up the balance, that $55,000? - - - I would provide my own funds or I [would have] tried to borrow more money and pay mortgage insurance, that's commonsense.
>
> We'll take those one step at a time. Provide your own funds, did you have $55,000 to provide to pay out the mortgage? - - - *I'm pretty sure at the time I had money to raise – to pay $55,000 yes.*
>
> When you said 'I had', are you talking about you individually or you and all your companies together? - - - It's me. I was my company, so if company had some funds, company would lend me money or I would have money. So I can't remember 2003, I just can't remember, but definitely would try to settle. If I can't settle, I would probably easily sell this apartment for much more than $495,000.[7]
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> …
>
> If St George had offered you a loan with mortgage insurance, would you have accepted it, that is, that you'd have to pay mortgage insurance in order to get the loan? - - - It's [a] very hypothetical question.
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> It is a hypothetical question? - - - I would try probably go to another institution and borrow it from them first and if I can't raise money from other banks, I would probably take St George offer, yes.

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[7] Emphasis added.

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12. In cross-examination, it declined to being 'pretty sure' either that he could find the money or that he would have sold the property:

> You've indicated that if hypothetically, if you had been aware that this property was valued, in fact, at $550,000 at the time you went to St George, that you would

have still tried to borrow $440,000. Is that right? - - - I would love because the property definitely was worth more. I would just probably still borrow money from St George or any other institution. Because under an agreement I need to refinance this property.

You had a number of other institutions you could have gone to borrow money from as well? - - - I think like everybody else, you can go to any bank.

If in 2003 you had been told by St George, 'We'll only give you $440,000 because we don't think this apartment is worth as much as $550,000', I'm suggesting you would have tried with another lending institution to get more because you were strongly of the view it was worth a lot more than $550,000? - - - I think at the time it was very important because Jimmy Sui had another pressure from his partners from overseas, he had to pay some money. I don't think I had enough time to got to approach another bank. I probably would settle with St George and maybe refinance with another institution further down the track.

…

It wouldn't have taken much time to go and speak to one of the other institutions you were giving business to? - - - That's not true.

It would have taken a long time? - - - No, common situation with any application, it takes between four to six weeks to complete a transaction with any institution. If you have already applied to one bank, they've already done [valuation], already assessed your application, it takes four to six weeks, so you're talking about a delay of at least one month.

…

You've indicated that if you had to find another $56,000, I think you said you would have provided your own funds. You're pretty sure at the time you had that money, I think you said? - - - *I'm pretty sure I would find some money to settle or I would sell property again.*

13. Then it declined further, to being 'pretty sure' that he would have had some way to find the $56,000 or, if not, that he would have obtained a larger loan (with mortgage insurance) from St George:

Have you looked at what your financial position was in January 2003 recently? Have you looked back to have a look at what funds you actually had available or are you just remembering that you think generally you would have had that money? - - - As I said, I didn't remember anything about 2003 because it's very difficult to remember five years ago what actually your account was look like at the time when refinance happened, but *I'm pretty sure I would have had some way to find $56,000, or obtained St George loan with the mortgage insurance, absolutely.*

If you had obtained mortgage insurance you would, of course, have been lent a bit less money by St George, wouldn't you, because you would have had to pay for that mortgage insurance out of the money you were being nominally lent/ - - - I don't understand question, sorry?[8]

…

A bank officer has given evidence it would have been about $6,000 - - - My apologies. I don't know precise number. I can look in the book and tell you exactly amount, yes.

So that would be a sum that you would have to pay for, would it not, if you took out mortgage insurance? - - - No, you are not correct. If you borrow 95 per cent on an amount of $550,000 variation [sic][9] – hypothetically, as you' re saying – so 95 percent will give you an amount of $520,000 which will definitely cover all costs and leave me another $15,000 on top.

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[8] Emphasis added.

[9] At the stage of the trial at which the Borrower gave evidence, Quinerts was still contending that the true value of the property at the time of valuation was not less than $550,000. Later, Quinerts conceded that the true value was not more than $500,000.

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14. The judge had the benefit of seeing and hearing the Borrower give his evidence and, to that extent, her Honour was in a better position than this court to assess the Borrower's credibility. I should be slow, therefore, to depart from any of her Honour's findings based upon that considerable advantage. [10] But as Kirby J explained in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* ,[11] where a credibility determination leaves untouched other evidence which requires separate evaluation, and which renders the judge's conclusion improbable or contrary to compelling instances, an appellate court is bound to conduct a real review of the evidence itself and draw its own conclusions. [12]

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[10] See, for example, *Devries v. Australian National Railways Commission* (1993) 177 CLR 472, 479 (Brennan, Gaudron and McHugh JJ) (referring to *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842); and *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

[11] (1999) 160 ALR 588, 620.

[12] *Fox v Percy* (2003) 214 CLR 118, [24]–[27] ; *Waterways Authority v Fitzgibbon* [2005] HCA 57, [73] ; cf *Commissioner of Main Roads v Jones* [2005] HCA 27 ; (2005) 79 ALJR 1104, [73] .

15. As it seems to me, this case falls into that category. Taken at its highest, the Borrower's evidence as to the possibility of him entering into the alternative transaction went no further than that he was 'pretty sure' that he could have raised another $56,000 or that, if he could not raise it, he was 'pretty sure' that he would have obtained a loan of 95 per cent of valuation from the Bank to cover the whole purchase price of $495,000 plus the costs of the mortgage insurance.

16. The net effect of the Borrower's evidence was substantially less than that. He could not remember whether he or companies controlled by him had the money needed. He accepted that he had not gone back to look at what funds he had available in 2003, and that he did not remember anything about 2003. He had no recollection concerning the application of the $140,000 which was advanced in addition to the sum required to discharge the Bosise facility. He had no recollection of any account in which he had $56,000. He was unable or unwilling to say anything of the sources from which he supposed that such money would have come, and his suggestion that, failing all else, he could have completed the sale with a loan from the Bank of 95 per cent of valuation (which he put at $550,000) was plainly misconceived.

17. As was later conceded, the true value of the property was not more than $500,000. It was also not in issue that the Bank would not have lent more than 90 per cent of valuation in any circumstances (even with mortgage insurance), and would not have been prepared to lend at all unless and until satisfied that the Borrower had sufficient funds to discharge remaining encumbrances. Accordingly, if it is assumed that the Bank had lent $450,000 (being 90 per cent of the $500,000) and that the costs of the mortgage insurance (which were $6,000) were deducted from the loan advance, as the Borrower said in evidence they would be, the Borrower would have been left with only $444,000 or, in other words, $51,000 less than the amount required to complete the purchase.

18. It is true, as the judge observed, that an officer of the Bank (Mr Jones) said in his evidence on behalf of the Bank that it was 'likely that mortgage insurance would have been granted'.[13] But Mr Jones gave that evidence in response to a series of hypothetical questions which assumed that the property was correctly valued at $550,000 (as opposed to its true value of $500,000), and so upon the hypothetical basis that the Bank would have been prepared to lend 90 per cent of $550,000 with mortgage insurance:

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[13] Reasons, [34].

> How high could he [the Borrower] have gone with lenders mortgage insurance against the security of the property? - - - For investment purposes, the maximum would have been 90 per cent.
>
> So he could have had a 90 per cent loan with lenders mortgage insurance? - - - Yes.

…

So on this particular application, all other issues as to income and serviceability being equal and the only thing changing was that the valuation was returned at $550,000 rather than $800,000, would you have approved a loan to Mr Tvarkovski with lenders mortgage insurance at $496,000? - - - I could have. They have a matrix where some can be done, what they call under open policy, so if it fits a certain criteria.

…

On the basis of this particular application, is it likely that lenders mortgage insurance would have been granted? - - - I think so, yes.

Staying with the hypothetical again, that is, that the valuation of the property was returned at $550,000? - - - Mm'hm.

19. It was never put to Mr Jones, still less accepted, that the Bank would have been prepared to lend more than 90 per cent of valuation or, if it had been known that the true value of the property was only $500,000, that the Bank would have been prepared to lend $450,000 (being 90 per cent of valuation) unless the Borrower had been able to satisfy the Bank that he had in his account or otherwise available the remaining $45,000 plus costs necessary to complete the purchase. To the contrary, Mr Jones' evidence in chief was clear that any advance would have been conditional on production of a bank statement showing that the additional funds for completion were in the Borrower's account:

> Suppose that the property had been, in fact, valued at $550,000 and the borrower said, 'Well, I want to seek, therefore, $440,000, 80 per cent of that'? - - - Yes.
>
> Would the bank have automatically advanced that or are there other matters that the bank would have looked into? - - - We would have needed to verify whether he had had sufficient funds to make up the shortfall, to be able to pay out the first mortgage.
>
> So what sort of verification would you have wanted to see to ensure that that first mortgage could be paid out? - - - Just a bank statement showing the funds in the account.

20. Similarly, in cross-examination, he said that:

> Earlier today my learned friend asked you a question about if the valuation had returned a value for this property of $550,000. Do you recall that? - - - Yes.
>
> You said that St George would be prepared to lend up to 80 per cent of the value being $440,000, but it had a concern, the concern being that the Borrower must demonstrate that the loan to the previous financier must be discharged? - - - Yes. Well, that's part of the process anyway. That's right. Yes.

So in the case where St George agreed to lend $440,000, you indicated that St George would have to be satisfied that the borrower could discharge the rest of the loan? - - - Yes.

Of the previous loan to Bosise, the balance being $56,000? - - - Yes, he would need to verify that he had those funds available, yes.

21. I add that Mr Jones' evidence on that point was corroborated by the written special conditions of the loan, which included the following:

> 'Discharge existing loan commitments,' 'You must provide evidence that the following loan commitments have been discharged',

and under which was the following: Bosise Pty Ltd – Mortgage - $496,000.

22. **Following paragraph cited by:**

Howard Finance Pty Ltd v Yarra City Council (25 September 2020) (Kennedy J)

> 24. The result is that, in accordance with well-established principles, the plaintiffs bear the onus to prove that the lane is not a public highway or road. The only qualification to this is that, given the Council in this case positively asserted that a presumption of dedication arose by long use it may, as proponent of this issue, bear an evidential burden. [19] Nevertheless, if the presumption arises, the evidentiary focus will again then shift to whether there is evidence of rebuttal, consistent with *Anderson.*

via

[19] *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245, [22] .

United Petroleum Pty Ltd v Bonnie View Petroleum Pty Ltd (In Liquidation) (21 April 2017) (Kennedy J)

> 261. I do accept, however, that, BV was effectively the 'proponent' of the issue that the Landlords were entitled to, and would have, withheld consent. In such circumstances I consider that it bore, at least, the evidential burden of persuading the court to decide that issue in its favour. [71]

Resolution

via

[71] See *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666, [22] .

Lojies Pty Ltd v Wu, Xun (20 November 2009) (Her Honour Judge Kennedy)

63 As proponent of the issue (that a variation was made to the written agreement as alleged) Mr Wu bears the evidential burden of persuading the court to decide that issue in his favour. [4]

via

[4] *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 at [22]

As proponent of the issue (that the Bank would have entered into the alternative transaction if apprised of the true value of the property), Quinerts bore the evidential burden of persuading the judge to decide that issue in favour of Quinerts. [14] In my view, it failed to do so. Once tested by cross-examination, I consider that the Borrower's testimony on the point was exposed as so equivocal, and so lacking supporting documentary evidence, as to fall well short of the mark. Based on the evidence to which I have referred, I am not persuaded on the balance of probabilities that the Bank would have been prepared to enter into the alternative transaction.

[14] Heydon, *Cross on Evidence* , [1600] and [7055].

Claim for loss of use of funds

23. I turn to the Bank's contention that the judge erred in rejecting the Bank's claim for an amount of damages to compensate it for interest forgone by entering into the transaction. Following the decision of Giles J in *Bank of New South Wales v Yee* ,[15] her Honour held that, even if the Bank were entitled to be put in the position in which it would have been had it not entered into the transaction, it was not entitled as such to interest as if the Borrower had complied with the loan agreement. Nor was the Bank entitled to damages in the nature of an opportunity foregone unless it adduced evidence of the missed opportunity and the loss thereby suffered. In her Honour's view, it could not be assumed that the Bank would have lent the funds advanced to another borrower at the same rate as was charged to the Borrower.

[15] (1994) 33 NSWLR 618, 636 (Giles J).

24. Counsel for the Bank attacked the judge's conclusion. He submitted that it was obvious that the Bank was in the business of lending money on a regular and recurrent basis and, on that basis, that her Honour should have been prepared to assume that, if the Bank had not entered into the loan transaction with the Borrower, it would have entered into another comparable transaction at more or less the same contractual rate of return.

25. **Following paragraph cited by:**

Bacash and Aureus April Pty Ltd v Nelson and Blackney (09 June 2017) (Lewitan)

> 204 In *St George Bank Ltd v Quinerts Pty Ltd* [273] Nettle JA held that the value of the loss may have to be discounted heavily to "allow for the vicissitudes of chance".
>
> > …[I]n order to provide a truly accurate reflex of the damage actually incurred as a result of not entering into a more satisfactory transaction at an identified rate of return, the spread should ordinarily be discounted to allow for possibilities such as that the funds invested in the improvident transaction could not have been placed in another more acceptable transaction; and the risk that, even if so placed, the other borrower might still have defaulted.

via
[273] [2009] VSCA 245 , [25] and [27] .

Xpak Pty Ltd v Scibilia (04 October 2013) (His Honour Judge Anderson)

> 33 Nettle JA, delivering the primary judgment of the Court of Appeal in *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245; (2009) 25 VR 666 (" *St George Bank Limited v Quinerts* ") at paragraph 25 stated that, for the plaintiff to be placed in the same position, so far as money can do it, as if the contract had been performed, the incurring of such losses must be proved.

Balanced Securities Ltd v Bianco (21 May 2010) (J Forrest J)

> 10. Recently the Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* [8] dealt with an argument by a bank for *Hungerfords* damages said to flow from breach of contract, negligence and misleading and deceptive conduct on the part of a valuer engaged by it in relation to a mortgaged property. Nettle JA (with whom Mandie JA and Beach AJA agreed) said as follows:
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> …In my view the judge's analysis on this point was correct. The decision of the High Court in *Hungerford v Walker* established that expenses incurred and opportunity costs arising from money being paid away or withheld as a result of a negligent breach of contract are able to be recovered as pecuniary losses suffered by a plaintiff as a result of the defendant's conduct. But as the High Court later explained in *Commonwealth v Amann Aviation Pty Ltd*, such damages are simply manifestations of the principle that a party who has sustained loss by reason of a breach of contract is entitled to be placed in the same position, so far as money can do it, as if the contract had been performed.

> Consequently, the incurrence of such losses must be proved. It is not enough for a party like the Bank simply to assert that, because it is in the business of lending money, it must follow that it has suffered a loss equal to the return on funds which it might have achieved if it had entered into a successful transaction at the same rate of return as the failed transaction. *At best, the opportunity foregone represents a loss of a chance to invest in a more successful transaction and, depending on the facts of a case, the value of the loss may have to be discounted significantly to allow for the vicissitudes of chance*. [9] (emphasis added)
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> *via*
> [9] Ibid [25] .

I reject that submission. In my view the judge's analysis on this point was correct. The decision of the High Court in *Hungerfords v Walker* [16] established that expenses incurred and opportunity costs arising from money being paid away or withheld as a result of a negligent breach of contract are able to be recovered as pecuniary losses suffered by a plaintiff as a result of the defendant's conduct. But as the High Court later explained in *The Commonwealth v Amann Aviation Pty Ltd*, [17] such damages are simply manifestations of the principle that a party who has sustained loss by reason of a breach of contract is entitled to be placed in the same position, so far as money can do it, as if the contract had been performed. Consequently, the incurrence of such losses must be proved. It is not enough for a party like the Bank simply to assert that, because it is in the business of lending money, it must follow that it has suffered a loss equal to the return on funds which it might have achieved if it had entered into a successful transaction at the same rate of return as the failed transaction. At best, the opportunity foregone represents a loss of a chance to invest in a more successful transaction and, depending on the facts of a case, the value of the loss may have to be discounted significantly to allow for the vicissitudes of chance.

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[16] (1988) 171 CLR 125 .

[17] (1991) 174 CLR 64 .

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26. Admittedly, as Giles J observed in *Bank of New South Wales v Yee* , there have been some cases in which the courts have been prepared to assume an appropriate rate of return in the absence of evidence. For example, in *Trade Credits Limited v Baillieu Knight Frank (NSW) Pty L*td, [18] which was a case involving an advance of funds by a finance company on the faith of a negligent valuation, Clarke J held that:

> the proper manner of approach is to award interest at a rate which would place the plaintiff in the position it would have been in if the tortious conduct had not occurred. That is a rate reflecting the plaintiff's normal return from the investment of its funds. If it had invested moneys in December 1981 on first

mortgage security for a period of three to five years it would have obtained a return of 17 per cent and if on second mortgage security between 22 per cent and 23 per cent. It is impossible to be precise in this award for the plaintiff's lending policies undoubtedly covered a wide range or types of loans. In all the circumstances I believe it appropriate to assess the particular component of interest upon the losses flowing to the plaintiff, as opposed to the cost of buying out the first mortgage, at 20 per cent.

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[18] (1985) 12 NSWLR 670, 674.

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27. But with respect, I do not find that reasoning persuasive. Perhaps, it was the correct approach in the circumstances of that case. Evidently, Clarke J was satisfied on the evidence before him that the finance company in question could have and would have been able to place the subject funds elsewhere at an assured rate of return. But, in point of principle, such assumptions are bound to be speculative. Given the extent to which banking has been deregulated in this country, each case is likely to be different. Generally speaking, the value of the chance foregone by a lending institution as the result of entering into an improvident transaction (and thereby foregoing the opportunity of entering into a more beneficial transaction) is the net rate of return or spread which would have been generated upon the alternative transaction after bringing to account the cost of funds and other expenses which would have been incurred in connection with the alternative transaction. [19] In the absence of evidence, there is little reason to suppose that the cost of funds and expenses for one transaction is the same as for another. Moreover, in order to provide a truly accurate reflex of the damage actually incurred as a result of not entering into a more satisfactory transaction at an identified rate of return, the spread should ordinarily be discounted to allow for possibilities such as that the funds invested in the improvident transaction could not have been placed in another more acceptable transaction; and the risk that, even if so placed, the other borrower might still have defaulted.

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[19] See and compare *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 147 [123] (McHugh J).

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28. Maybe, in some cases, the evidence will be such as to permit of a broad brush technique of approximation like that adopted in *Trade Credits*. Usually, however, it is only by going through the steps that one can come to an accurate assessment of the value of the opportunity foregone. Otherwise, to adopt and adapt the language of Deane J in *Amann* ,[20] it is impossible to do more than speculate about the approximate proportionate chance of the Bank placing the money in a more satisfactory transaction and one can do no more than speculate about how advantageous to the Bank any such alternative transaction would have been.

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[20] (1991) 174 CLR 64, 130.

29. Counsel for the Bank complained that such punctiliousness would mean that lending institutions may henceforth need to lead expensive detailed evidence concerning their internal rates of return on sums available to them for lending and the likely application of the sums advanced, and he submitted that for the court to require inquiry and evidence of that order would be entirely disproportionate to the task in hand.

30. I reject that submission. It is difficult to conceive of a litigant better equipped or better qualified than a bank or other lending institution to produce at very short notice and with relative ease and economy its cost of funds for particular classes of transactions, percentage probabilities of placing funds at specified rates of return and default rates and profit consequences for given classes of business. Indeed, I should be surprised if that sort of information were not already produced or capable of being produced routinely as part of the Bank's own management accounting system. Given the documentary evidence provisions of the *Evidence Act 1958* , including the computer evidence provisions of s 55B, the work involved in converting that sort of material into a form admissible in evidence should be straightforward.

Costs orders

(i) The compromise offer

31. Before the trial of the action, Quinerts made an offer of compromise in accordance with Rule 26.02 of the Rules of the County Court in the amount of $175,000 plus costs. At the end of the trial, the amount of the judgment awarded in favour of the Bank of $145,000, plus interest of $25,428.70, was in total less than the amount of the offer. On that basis, the judge ordered that Quinerts pay the Bank's costs of the proceeding up to the date of the offer and that the Bank pay 80 per cent of Quinerts' costs of the proceeding from that date.

32. Under Ground 2 of the appeal, counsel for the Bank argued that, but for the finding that the Bank would have entered into the alternative transaction, the amount of the judgment awarded in favour of the Bank would have exceeded the amount of the offer and thus that there would have been no basis for the judge to order that the Bank pay any part of Quinerts' costs. It followed, it was contended, that the judge's order as to costs ought be set aside and that it should be ordered that Quinerts pay all of the Bank's costs of the proceeding.

33. I accept that submission. In view of what I have said about the improbability of the Bank entering into the alternative transaction, I consider that the Bank should have had its costs of the proceeding.

(ii) Costs of realisation

34. I add that, even if I had been persuaded that the Bank would have entered into the alternative transaction, it appears to me that the Bank would still have beaten the offer of compromise and so been entitled to an order for its costs of the proceeding.

35. As was earlier noted, the Bank's principal claim was for the sum of $145,000 (representing the difference between the amount of $640,000 advanced and the gross sales proceeds of $495,000 realised on sale of the property). In addition to that, the Bank claimed a further $28,638.96 as costs of realisation of the property. If the Bank had succeeded in that additional claim, the judgement awarded in favour of the Bank would have been greater than the amount of the offer. But the judge refused the additional claim, on the basis that:

> [Counsel for the Bank] did not formally abandon a claim for sales costs but did not pursue them *strongly*. This was an appropriate stance, since expenses for proceeding with a loan and/or from attempts to sell a property will generally not be available given these expenses would have been incurred in any event.[21] The plaintiff has not established that these costs would not have been incurred even on a smaller loan. [22]

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[21] The legal liability of valuers, Joyce and Norris, (2nd ed, 1994), 92.

[22] Reasons, [39] (emphasis added).

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36. With respect, that reasoning overlooks that, if the Bank had entered into the alternative transaction, and so advanced $450,000 (being 90 per cent of the true value of the mortgaged property), there would have been sufficient in the proceeds of sale of $495,000 to cover not only the principal of $450,000 but also the costs of realisation of $28,636.96. Perhaps, the judge was influenced by what her Honour characterised as the Bank's counsel not pursuing the claim for sales costs 'strongly'. But it is apparent from her Honour's reasons that she did not take the claim for costs of realisation to have been abandoned. Nor is it disputed that the Bank was entitled under the terms of its mortgage to treat the costs of realisation as part of the moneys secured by the mortgage and thus recoup itself for those costs out of the proceeds of sale.

37. It follows that, assuming the Bank would have entered into the alternative transaction, the Bank should have been awarded judgment in an amount of not less than $145,000 plus the $28,636.96 costs of realisation, plus interest, which in total would have been greater than the amount of the offer. Hence, Quinerts should have been ordered to pay the Bank's costs of the proceeding.

(iii) Change of defence

38. Finally, under the heading of Grounds 1 and 2, counsel for the appellant advanced a further alternative contention that, assuming the Bank had not been entitled to judgment for as much as the amount of the compromise offer, the Bank should still have had its costs, on the basis that the alternative transaction defence was not advanced until the second day of trial, which is to say some 18 months after the offer expired.

39. I do not accept that contention. Logic and commonsense compel the view that, when deciding whether a party has acted unreasonably in refusing an offer of compromise, one looks at the circumstances as they were at the time the offer was made; and pre-eminently in a proceeding like this, the circumstances include the issues between the parties as defined by the pleadings. [23]

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[23] See *Rolls Royce Industrial Power (Pacific) Ltd v James Haride & Coy Ltd* (2001) 43 NSWLR 626, 642 [94]–[96] (Stein JA) (reversed on appeal, sub nom *Amaca Pty Ltd* (formerly known as *James Hardie & Co Pty Ltd*) *v New South Wales* (2003) 199 ALR 596, but not on this point); *Castro v Hillery* [2003] 1 Qd R 651, 663 [72]–[75] (Williams JA); *Morrison v Hudson* [2006] 2 Qd R 465, [2] (Williams JA) and [36]–[37] (White J); *Simonovski v Bendigo Bank* [2003] VSC 139, [18] (Ashley J).

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40. **Following paragraph cited by:**

Woodhouse v Fitzgerald (09 April 2021) (Basten, Meagher and Payne JJA)

86. Mr Woodhouse submitted that the trial judge had misunderstood the reasoning in the High Court, which had not overturned intermediate courts of appeal which had found liability to be an essential characteristic of concurrent wrongdoers. Accordingly, he submitted, the trial judge had been wrong to refuse to follow this aspect of the reasoning of the Victorian Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* , [40] followed by a five judge bench of this Court in *Mitchell Morgan Nominees Pty Ltd v Vella* . [41]

Here, at the time when the compromise offer was open to be accepted, although Quinerts had not pleaded the alternative transaction, it had denied that it was negligent and it had denied that the Bank had suffered any loss. Assuming that the Bank had not been entitled to recover its costs of realisation, the offer of $175,000 would have been considerably more than the sum to which the Bank was entitled and, therefore, it would have been unreasonable for the Bank to reject. [24]

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[24] Cf *Hazeldine's Chicken Farm Pty Ltd v VWA* (2005) 13 VR 435, [23]–[25] and [30] .

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41. Consequently, if it be assumed that the Bank would have entered into the alternative transaction, my only reason for disturbing the judge's order as to costs would be because I consider that the Bank was entitled to its costs of realisation and so to succeed for more than the amount of the offer.

The cross-appeal

(i) Claim for surplus of realisation

42. Although not identified with any specificity in the Notice of Cross-Appeal, during the course of oral argument counsel for Quinerts submitted that, if the Bank had entered into the alternative transaction, [25] and sold the property for $495,000, there would have been an amount of $16,361.04 remaining in hand after satisfaction of the loan of $450,000 and the realisation costs of $28,638.96. He contended that since, in order to calculate the damages which the Bank was entitled to recover from Quinerts, it was necessary to compare the loss which the Bank suffered in fact with the loss which the Bank would have suffered if it had entered into the alternative transaction, one had to deduct from the loss suffered in fact not only the loss which would have been suffered under the alternative transaction but also the amount of $16,361.04 which it was said would have been left in hand at the end of the alternative transaction.

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[25] Scil, lent $450,000.

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43. In my view, that contention is untenable. If the Bank had entered into the alternative transaction it would not have suffered any loss. It would have advanced $450,000 and there would have been sufficient when the property was sold for $495,000 to cover both the outstanding loan of $450,000 and the costs of realisation of $28,638.96. The balance of $16,361.04 would have been due to the mortgagor. In fact, the Bank advanced $640,000, and the property was sold for $495,000, leaving a shortfall of $145,000 plus the costs of realisation of $28,638.96, which is to say a total loss of $173, 638.96.

(ii) Contributory negligence

44. Under Ground 1 of the cross-appeal, Quinerts contended that the judge erred in holding that the amount of damages recoverable by the Bank should not be reduced pursuant to s 26 of the *Wrongs Act 1958* . Counsel for Quinerts submitted that the evidence established that the Bank had been guilty of contributory negligence in failing to make inquiries of the Borrower's ability to service the loan and by shutting its eyes to unsatisfactory characteristics of the Borrower.

45. I do not think that there is anything in that point either. The judge undertook an extensive review of the evidence which it was contended bore upon the question of contributory negligence and her Honour concluded that she was not satisfied that:

> any contributory negligence is established in terms of the alleged failure to pay attention to the risk of redistribution [of moneys of trusts of which the Borrower was a beneficiary]; the relationship with Wealthlink [a mortgage broker with which the Borrower was associated]; the correct interest rate on the Liberty loan [another loan taken out by the Borrower]; or the assessment of rental income. Moreover the defendant has not established that the assessment of living expenses was made negligently despite my reservations as to its appropriateness.

46. Counsel for Quinerts identified four matters which, in his submission, demonstrated that the judge was in error in concluding as she did. The first was that the Bank had assumed that revenue and profit generated by the Borrower's company's development business would continue into the future without inquiring into the nature and type of developments in hand.

47. I do not accept that submission. I agree with the judge that, even if the Bank did not do as much as a prudent lender might have done by way of inquiry into the nature of the Borrower's development activities, there was no direct evidence or basis from which to infer that further inquiries would have led to the result being any different. [26]

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[26] Reasons, [62] and [63].

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48. The second matter was what were said to be 'calculation errors' made by Mr Jones of the Bank, whereby he mistakenly assessed one of the Borrower's existing loans as incurring interest at 8.6 per cent instead of 9.5 per cent.

49. I see nothing in that point either. As the judge observed, it equated to a difference of only $5,000 in the surplus available to the Borrower over a year of the loan after allowing for expenses including the costs of the loan. In the scheme of things, it was de minimis.

50. The third matter was a difference of opinion between Mr Jones of the Bank and Quinert's expert witness on banking practice, Mr Finn, as to whether the appropriate risk factor to apply to income to be derived from the property was 60 per cent or 80 per cent. As to that, I agree with the judge that:

> Given the divergence of opinions on a matter on which reasonable minds might differ, [Quinerts] has not discharged its burden of proof in demonstrating negligence. Additionally, given that the difference in serviceability is alleged by [Quinerts] to amount to approximately $5,000 and that the property was let in any event, any negligence is of no consequence.[27]

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[27] Reasons, [74].

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51. The final matter was that the Bank had assessed the Borrower's living expenses using a computer based finance application programme which adopted the Henderson poverty line as the default cost of living. It was contended that such an amount was likely to be very substantially less than the Borrower's cost of living in fact and therefore it was negligent to adopt it.

52. I reject that too. While the judge considered that it appeared to be an unsatisfactory basis on which to assess a Borrower's living costs, as her Honour said, there was no evidence that it was an imprudent lending practice.

(iii) Proportionate liability – Wrongs Act 1958

53. Under Ground 2 of the Cross-Appeal, Quinerts contended that the judge was in error in refusing to apportion Quinerts' liability pursuant to Part IVAA of the *Wrongs Act 1958*.

54. Counsel for Quinerts argued that, because the Bank's claim against Quinerts was for economic loss for breach of contract arising from failure to take reasonable care, it followed that the proceeding involved an 'apportionable claim' within the meaning of Part IVAA. It was also clear, he submitted, that the Borrower's and a guarantor's failure to repay the loan were independently causative of the loss and damage the subject of that claim, and that the Borrower and guarantor were capable of being held legally liable to the Bank for having 'committed the relevant legal wrong against' the Bank. Thus it followed, he submitted, that the Borrower and the guarantor were 'concurrent wrongdoers' within the meaning of Part IVAA of the *Wrongs Act* and, therefore, that the liability of Quinerts in relation to the Bank's claim was limited by s 24AI of *Wrongs Act 1958* to an amount reflecting the proportion of the loss or damage claimed that the court considered just having regard to the extent of Quinerts' responsibility for the loss and damage.

55. The judge's reason for rejecting that argument was that she considered that the provisions of Part IVAA are essentially directed to joint and several tortfeasors and not intended to apply to a case like the present. As her Honour expressed it:

> In my view, similarly the provisions should not be expanded to meet the current situation which goes beyond what is necessary to address the undesirable consequences of the joint and several rule. As a matter of policy, the provisions appear to be largely directed to joint and several tortfeasors.[28]
>
> …
>
> Even if the provisions should not be limited in the way described above, the quantum of loss recoverable against the valuer is different to that recoverable against either the borrower or guarantor.[29]
>
> …
>
> …'the loss or damage' that is the subject of the claim' is different to that recoverable against the borrower and guarantor in both nature and amount. Thus, as highlighted by [Counsel], the plaintiff would have a right to the

money lent, to interest and to bank charges as against both the borrower and guarantor. This may be contrasted with the valuer where the damages are calculated by a comparison of what was lent and would what would have been lent on the true value of the property. Not only are these two different methods of calculation, in the present case they are actually two different damages as I have previously determined.[30]

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[28] Reasons, [118].

[29] Reasons, [130].

[30] Reasons, [132].

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56. In my view, the judge was right to conclude that Quinerts' liability to the Bank was not limited by Part IVAA of the *Wrongs Act* , although I get there by a different route.

57. **Following paragraph cited by:**

Goddard Elliott v Fritsch (14 March 2012) (Bell J)

1112. As has been explained fully in the authorities, [437] this marks a significant change from the previous common law position. In cases to which the provisions apply, the joint and several liability rule has been replaced with the proportionate liability rule. Whereas previously a plaintiff could recover all their loss from a single defendant among many who were liable, now the liability of each defendant is limited to their responsible share as determined by the court to be just.

via

[437] *Woods* [2007] VSC 177 (15 June 2007) [42] (Hollingworth J), cited with approval in *Tyrrell v Tyrrells Building Consultancy Pty Ltd* [2008] NSWSC 416 (7 May 2008) [10]-[12] (Austin J); *Gunston* (2008) 20 VR 33, 49 [60] (Byrne J); *Godfrey Spowers* (2008) 21 VR 84, 102 [94]-[95] (Ashley JA, Nettle and Neave JJA agreeing); *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245 (28 October 2009) [57] (Nettle JA) (' *St George Bank*').

Proportionate liability provisions of the kind prescribed by Part IVAA were adopted by the Commonwealth and by each of the States and Territories as in effect a national co-operative

scheme designed to overcome what were perceived to be undesirable consequences of the joint and several liability rule.[31] As Palmer J explained in *Yates v Mobile Marine Repairs Pty Ltd*: [32]

> The object of [the part] is remedial and it dramatically changes the previous law. Formerly, a plaintiff could choose to sue only one of several wrongdoers who caused the same loss and the Court could enter judgment for the whole of that loss against that defendant. Even if the defendant cross claimed in the proceedings for indemnity or contribution against the other wrongdoers, the plaintiff could enforce a judgment against the defendant alone for the whole of the loss, leaving the defendant to recover from the cross defendants, if it could. Sometimes the defendant obtained judgment against a cross defendant but could not recover the judgment because of the cross defendant's insolvency.
>
> [The Part] is designed to alleviate this perceived injustice. It is intended to visit on each concurrent wrongdoer only that amount of liability which the Court considers *'just'*, having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss. How the Court is to assess what is 'just' is not explained. The Court must exercise a large discretionary judgment founded upon the facts proved in each particular case. The principles upon which the Court will exercise this discretionary judgment will come to be developed on a case-by-case basis. However, it seems clear enough that the policy of [the Part] is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability. This calls for the exercise of the same kind of judgment as the Court exercises in apportioning responsibility as between a defendant sued in tort for negligence and a plaintiff who, by his or her own negligence, has been partly responsible for the injury.

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[31] See B McDonald, *Proportionate liability in Australia: The devil in the detail*, (2005) 26 Aust Bar Rev 29, 31–2; Byrne J, *Proportionate Liability, Some Creaking in the Superstructure*, Judicial College of Victoria 19 May 2006.

[32] [2007] NSWSC 1463, [93]–[94] , in relation to the comparable provisions of Part IV of the *Civil Liability Act 2002* (NSW) .

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58. **Following paragraph cited by:**

Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) (07 June 2022) (The Honourable Justice Delany, Acting Member)

75. The reference to a ‘concurrent wrongdoer’ being a person whose ‘acts or omissions caused’ the loss or damage has been repeatedly held to require that the concurrent wrongdoer be a person who is, or would be, legally liable to the plaintiff for the loss or damage that is the subject of the claim. [51] That is so even though Part IVAA and its analogues do not expressly specify that such causation involves legal liability.

via

[51] See *Shrimp v Landmark Operations Ltd* [2007] FCA 1468; (2007) 163 FCR 510, [59]-[62] (Besanko J); *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245; (2009) 25 VR 666 (*‘Quinerts’*), [58] , [64] (Nettle JA, with whom Mandie JA and Beach AJA agreed); *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880; (2014) 224 FCR 519, [16] (Mortimer J).

Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) (07 June 2022) (The Honourable Justice Delany, Acting Member)

The Owners Strata Plan v Brookfield Multiplex Limited (23 April 2010) (McDougall J)

4 The debate proceeded also on the basis that, for a person to be a concurrent wrongdoer under Part 4 of the *Civil Liability Act* , the person must be liable to the plaintiff: perhaps, an extended reading of the word "caused" in the definition of “concurrent wrongdoer” in s 34(2) of that Act. The reasons for that construction were given by Besanko J in *Shrimp v Landmark Operations Ltd* (20 07) 163 FCR 510 at 523 [62] . His Honour's analysis was adopted and applied by Nettle JA, with whom Mandie J and Beach AJA agreed, in *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 at [58] , [64] .

It is important to keep in mind, however, that the proportionate liability provisions were not designed to do any more than that. As Besanko J observed in *Shrimp v Landmark Operations Ltd,* [33] concerning the comparable provisions of Part VIA of the *Trade Practices Act 1974* (Cth) :

The above references [to extrinsic materials] suggest that the mischief to which the amendments were directed was a plaintiff being able to recover 100% of his damages from any one of several wrongdoer’s when that wrongdoer’s ‘fault’, when compared with the other wrongdoers, was less or far less than that. In other words, the amendment was directed to what were considered to be the undesirable consequences of the joint and several liability rule. *There is no suggestion that the mischief the amendments were designed to remedy was any wider than that. The definition of concurrent wrongdoer seems to be the critical subsection and, in my opinion, the word ‘caused’ in s 87CB(3)* [34] *should be read as meaning such as to give rise to a liability in the concurrent wrongdoer to the plaintiff or applicant*. [35]

[33] (2007) 163 FCR 510 .

[34] Scil, in Victoria, under s 24AH of the *Wrongs Act 1958* .

[35] Ibid [62] (emphasis added); see also *Sali & Anor v Metzke & Allen* [2009] VSC 48 [282] (Whelan J).

59. **Following paragraph cited by:**

Bingo Holdings Pty Ltd v GC Group Company Pty Ltd (23 August 2021) (Meagher, Payne and Brereton JJA)

28. This conclusion accords with the construction of the same or equivalent provisions by the Federal Court and the Victorian Court of Appeal: see for example *F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2)* [2019] FCA 419 (White J) where his Honour said:

> "[404] It is, however, important to note that s 87CD and its counterparts operate only in respect of wrongdoers, namely, persons who are themselves liable to the applicant: *Shrimp v Landmark Operations Ltd* [2007] FCA 1468, (2007) 163 FCR 510 at [59] ; *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245 at [59] ; *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880, (2014) 224 FCR 519 at [16] . In the last of these cases, Mortimer J referred to *Hunt & Hunt* in which, at [91] , Bell and Gageler JJ said:
>
> > 'To answer the description of "a person … whose acts or omissions (or act or omission) caused" that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to "acts or omissions (or act or omission)" is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having "caused … the damage or loss that is the subject of the claim" is not, as has correctly been held, merely to causation in fact. "Questions of causation are not answered in a legal vacuum" but "are answered in the legal framework in which they arise". The reference here is to causation that results, or would result, in *legal liability*.' (Emphasis in the original and citations omitted)
>
> [405] The authorities also indicate the importance of a proper pleading of a claim of proportionate liability. See, for example, *Ucak v Avante*

Developments Pty Ltd [2007] NSWSC 367 at [35] ; *Hart v JGC Accounting & Financial Services Pty Ltd* [2015] WASCA 22, (2015) 47 WAR 582 at [25]-[26] ."

F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2) (26 March 2019) (White J)
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd (22 August 2014) (Mortimer J)

In particular, there is no suggestion in Part IVAA that it was intended to do more by way of apportionment than in theory could previously be achieved by contribution under s 23B of the Act. As appears from the Second Reading Speech on the Commonwealth *Proportionate Liability Bill*, [36] the object of the apportionment legislation was to put a defendant in exactly the position it would have been if all other concurrent wrongdoers liable to make contribution under the Commonwealth equivalent to s 23B were before the court and of sufficient means to meet their obligations to make contribution according to their respective responsibilities for the loss and damage suffered by the plaintiff:

> This bill deals with issues arising where a court finds that more than one respondent has contributed to a claimant's loss. In such a case at common law, the law of negligence operates so that the principle of joint and several liability determines what damages are paid for the loss and damage caused.
>
> The effect of this general principle is that the claimant only needs to identify one respondent against whom a case can be proved. That respondent is then potentially liable for all the damages payable to the claimant. *Where all contributing respondents have sufficient assets or are insured and can be found, damages are apportioned according to each respondent's contribution to the loss. However, this usually only occurs when these respondents bring actions against each other. Problems arise where only one respondent can be located or where only one respondent is financially viable or insured.* That one respondent can be held liable for all the claimant' s loss regardless of how much he or she contributed to that loss. This common law principle protects claimants by allowing them to recover the total damage suffered from at least one of the respondents. [37]

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[36] On which Part IVAA is substantially modelled.

[37] (2007) 163 FCR 510 [66] (emphasis added).

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60. It is against that legislative background that the provisions of Part IVAA fall to be construed.

61. So far as is relevant for present purposes, ss 23B and 24 of the *Wrongs Act 1958* define the entitlement to contribution and prescribe the award of contribution as follows:

23B ***Entitlement to contribution***

(1) Subject to the following provisions of this section, a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the *same damage* (whether jointly with the first-mentioned person or otherwise). [38]

….

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[38] Emphasis added.

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24 ***Recovery of contribution***

(1) …

(2) Subject to subsections (2A) and (2B), in any proceedings for contribution under section 23B the amount of the contribution recoverable from any person shall be such as may be found by the jury or by the court if the trial is without a jury to be just and equitable having regard to the extent of that person's responsibility for the damage; and the jury or the court if the trial is without a jury shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

62. The comparable provisions of Part IVAA are ss 24AH and 24AI , which provide that:

24AH ***Who is a concurrent wrongdoer*****?**

(1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

(2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

24AI ***Proportionate liability for apportionable claims***

(1) In any proceeding 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 loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and

(b) judgment must not be given against the defendant for more than that amount in relation to that claim.

(2) If the proceeding involves 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 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.

(3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

63. **Following paragraph cited by:**

McClafferty v Greg Smith Pty Ltd (04 March 2019) (Senior Member M. Farrelly) that loss and damage. [2]

via

[2] [2009] VSCA 245 , at paragraphs 63 and 64

It will be observed that there are some differences between the language of s 23B and the language of the comparable provisions of Part IVAA. Whereas s 23B directs attention to 'the damage suffered [by the plaintiff]' for which a defendant is 'liable', and provides for the defendant to obtain contribution from another person 'being liable in respect of the *same damage*',[39] s 24AH refers to 'the loss or damage that is the subject of the [plaintiff's] claim', and provides for apportionment of the defendant's liability as against another 'person … whose acts or omissions caused … the loss or damage that is *the subject of the [plaintiff's] claim*'.[40] It might be thought that the differences were intended to signify that 'a person whose acts or omissions caused … the loss or damage that is the subject of the [plaintiff's] claim' within the meaning of s 24AH is something other than a 'person liable in respect of the same damage' within the meaning of s 23B .

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[39] Emphasis added.

[40] Emphasis added.

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64. **Following paragraph cited by:**

Woodhouse v Fitzgerald and McCoy (No 2) (27 April 2020) (Schmidt AJ)
McClafferty v Greg Smith Pty Ltd (04 March 2019) (Senior Member M. Farrelly)
Equal 54 Pty Ltd v Dennis Galimberti (17 November 2016) (Kennedy J)
Matthews v SPI Electricity Pty Ltd (Ruling No 6) (14 March 2012) (J Forrest J)

> 84. Returning to *Quinerts* , it is now established in this State that a concurrent wrongdoer must not only have caused the loss or damage but also have a legal liability for that loss. [58] That conclusion was reached by Nettle JA after an analysis of the Part IV provisions of the *Wrongs Act* , as well as the terms of s 24AH and s 24AI . Accordingly, I accept that there is authority for the proposition advanced by USC that s 24AH cannot be read in isolation from s 24AI . However, *Quinerts* is also authority for the proposition that s 24AH is not to be interpreted broadly but in a manner consistent with the legislative intention.

via

[58] *Quinerts* [64] . See also *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 [59]- [62].

Hamod v State of New South Wales (28 November 2011) (Campbell, Macfarlan and Young JJA)

In my view, however, that is not the case. [41] As Besanko J held in *Shrimp v Landmark Operations* ,[42] a 'concurrent wrongdoer' includes a person whose acts or omissions caused the damage or loss that is the subject of the plaintiff's claim only if the person is 'liable' to the plaintiff for that loss and damage. In light of s 24AI(3) , however, 'liable' in the sense identified by Besanko J must include both presently liable and liable in the sense of having been liable and, but for ceasing to exist, would still be liable. It would be inapposite to describe a person who was liable, but has ceased to be liable because they have ceased to exist, as being 'liable'. Hence, it appears to me that the drafter of s 24AH chose 'cause' rather than 'liable' to accommodate the possibility that apportionment may be ordered in relation to a concurrent wrongdoer who is not presently liable but who was liable and, but for ceasing to exist, would still be liable.

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[41] Cf *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579, 590 (Higgins J); *McGraw-Hinds (Aust) Pty Ltd v Smith* (1978) 144 CLR 633, 643 (Gibbs ACJ); *Murphy v Farmer* (1988) 165 CLR 19, 26–28 (Deane, Dawson and Gaudron JJ); and see Pearce & Geddes, *Statutory Interpretation in Australia*, (6th ed), [4.6]–[4.7].

[42] (2007) 163 FCR 510, 521 [59]–[62] .

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65. The use of ‘loss or damage the subject of [the plaintiff’s] claim’ in place of ‘the same damage’ appears also to have been the result of drafting necessity or convenience. It presents as having been adopted because of the way in which the operation of Part IVAA is limited by s 24AF to claims of a particular kind. Having so limited the operation of the Part, it was necessary to define a ‘concurrent wrongdoer’ in s 24AH in terms of a claim of the kind to which the application of the Part is limited - hence, the opening words of s 24AH : ‘A concurrent wrongdoer, in relation to a claim [of the specified kind]’ - and then to complete the definition in s 24AH by
describing a concurrent wrongdoer in relation to *the claim* as a person who caused [*scil* is liable for] the loss or damage that is the subject of that claim.

66. Arguably, it would have been possible to draft s 24AH along the following lines:

> A concurrent wrongdoer in relation to a claim is a person whose acts or omissions caused [*scil.* a person who is liable or but for ceasing to exist, would be liable in respect of] the same damage as the damage that is the subject of [the plaintiff’s] claim.

If the section had been so drafted, there could be little doubt that ‘same damage’ in s 24AH was equivalent to ‘same damage’ in s 23B .

67. Presumably, however, the drafter was keen to avoid the surplussage and other inelegances which that sort of drafting would have entailed, and so stripped them out. That left the section as enacted:

> A concurrent wrongdoer in relation to a claim is a person … whose acts or omissions caused … the loss or damage that is the subject of the claim.

68. Judged according to the plain and ordinary meaning of the terms of the section as enacted, it appears to have the same meaning as the earlier suggested draft. I conclude that the ‘loss or damage that is the subject of the claim’ in s 24AH has the same meaning as ‘the same damage’ in s 23B .

69. What then is meant by ‘the same damage’ in s 23B ? In *Alexander v Perpetual Trustees WA Ltd* [43] a statutory majority of the High Court referred with approval to the decision of the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond* [44] and, consistently with what decision, held that the ‘same damage’ in s 23B is a narrower concept than that of liabilities arising out of, or by reason of some transaction or related transactions. Their Honours reasoned that:

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[43] (2004) 216 CLR 109, 122 [26]–[27] .

[44] [2002] 1 WLR 1397 .

> The evident remedial purpose of the legislation has been relied upon, in both the United Kingdom and this country, to support what is said to be a wide or broad interpretation of the statutory right and remedy which it created. Such expressions mask the requirement that the legislation be given its proper construction having regard to its purpose and scope. The new statutory right and remedy do not operate at large. Rather, they are available only to a party who meets the criteria specified in Pt IV. In *Royal Brompton Hospital*, Lord Bingham of Cornhill said of the UK Act:
>
> > When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?
>
> Translated to the present appeal, A represents the plaintiffs, B the respondents, and C Minters.
>
> Where a person has suffered damage in connection with some transactions or events involving the wrongful conduct of others, the statutory creation of rights of contribution between the wrongdoers seeks to address the injustice that may result in some cases if the victim, by his or her selection of defendants, could throw the burden of liability on to one or some of the wrongdoers, to the exclusion of the others. A policy of preventing or limiting such injustice will require a legislature to make choices between different methods of giving effect to that policy. Those choices will be reflected in the terms of the legislation. The Act directs attention to a common liability by using in s 23B the expression 'in respect of the same damage'. This is a narrower concept than that of liabilities arising out of, or by reason of, the same transactions or related transactions. In resolving questions of construction of the legislation, it is not to be assumed that the legislative purpose is always to provide the widest possible sharing of liabilities, actual or potential, real or hypothetical.[45]

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[45] Citations omitted.

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70. The statutory majority in *Alexander* also referred with apparent approval to the conclusion of the House of Lords in *Royal Brompton Hospital* [46] that a claim by the hospital against a builder for damages for delay in the completion of a building project was not a claim for 'the same damage' as was sought by the hospital from the project architect for damages for negligence in certifying for time extensions and thus compromising the ability of the hospital to recover damages for delay from the builder. Their Honours said that:

> In *Royal Brompton Hospital* it was held that this requirement in the UK Act[47] was not satisfied. The hospital claimed damages against the architect it had engaged under a building contract in respect of, among other lapses, the negligent issue of extension certificates to the builder. The claim by the architect against

> the builder for contribution was struck out. This was because the claim by the hospital against the builder was for damages for delay in completion, whilst its claim against the architect was for the impairment of its ability to proceed against the builder. Thus, the Law Lords held that the statutory criterion that the claims be for 'the same damage' was not met. Lord Steyn said that the 'natural and ordinary meaning' of that phrase was controlling. Lord Bingham of Cornhill described that phrase as emphasising the need, which was 'a constant theme of the law of contribution', for the 'one loss to be apportioned among those liable'.[48]

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[46] [2002] 1 WLR 1397 .

[47] *Civil Liability (Contribution) Act 1978* (UK).

[48] Ibid [37], citations omitted.

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71. Given the High Court's apparent approval of the reasoning in *Royal Brompton* , it is instructive to examine it more closely. Lord Bingham of Cornhill, who agreed with Lord Steyn reasoned that:

> The employer's [hospital's] claim against the contractor [builder] would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost it incurred, the sums it overpaid and the liquidated damages to which it was entitled. Its claim against the architect, based on negligent advice and certification, would not lead to the same damage because it could not be suggested that the architect's negligence had led to delay in performing the contract. [49]

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[49] [2002] 1 WLR 1397, 1402 [7] .

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72. Lord Steyn, who delivered the principal speech, observed that the legislative context did not justify an expansive interpretation of 'the same damage'. He said that the concept was narrower than 'substantially or materially similar damage' and, thus understood, it followed that the damage suffered by reason of the builder's delay was not the same damage as was suffered by reason of the architect's negligence, because the latter did not cause the delay.

73. Lord Steyn also referred to the decision of the English Court of Appeal in *Howkins and Harrison v Tyler* [50] in which it was held that, where a lender advanced funds on the faith of a negligently overvalued security and then claimed the amount of its loss from the valuers as damages for their negligence, the valuers' liability to the lender was not 'the same damage' as

the Borrower's liability to the lender and, therefore, the valuers were not entitled to contribution from the Borrower under the *Civil Liability (Contribution) Act 1978*. [51] In that case, Sir Richard Scott, VC, who delivered the principal judgment, reasoned that:

> [I]t seems to me that a simple test should be applied to identify a claim capable of being one to which the 1978 Act can apply. That test is this: Suppose that A and B are the two parties who are said each to be liable to C in respect of 'the same damage' that has been suffered by C. So C must have a right of action of some sort against A and a right of action of some sort against B. There are two questions that should then be asked. If A pays C a sum of money in satisfaction, or on account, of A's liability to C, will that sum operate to reduce or extinguish, depending upon the amount, B's liability to C? Secondly, if B pays C a sum of money in satisfaction or on account of B's liability to C, would that operate to reduce or extinguish A's liability to C? It seems to me that unless both of those questions can be given an affirmative answer, the case is not one to which the 1978 Act can be applied. If the payment by A or B to C does not *pro tanto* relieve the other of his obligations to C, there cannot, it seems to me, possibly be a case for contending that the non-paying party, whose liability to C remains un-reduced, will also have an obligation under section 1(1) to contribute to the payment made by the paying party.
>
> The Act was intended to deal with cases where the damage suffered by the victim could be remedied by a claim against one or other of two or more possible defendants, and where the quantification of the damage to the victim for which a defendant would be liable would be affected by what the victim might recover or had recovered from one or other of the possible defendants …[52]

Lord Steyn commented that the Vice Chancellor's test may provide a practical test for determining whether two claims under consideration are for 'the same damage', but that it also had the potential to make questions of contribution unnecessarily complex. It was better, his Lordship said, simply to apply the statutory test.

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[50] [2001] Lloyd's Rep PN 27.

[51] The equivalent of s 23B of the *Wrongs Act 1958* .

[52] (2001) 92 Lloyd's Rep PN 1, 4 [17]–[18].

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74. Lord Steyn referred with approval, however, to the decision of the Alberta Court of Appeal in *Wallace v Litwiniuk*, [53] in which it was held that damage suffered by a motor accident victim by reason of a driver's negligent driving of a motor car was not the 'same damage'[54] as that which she suffered by reason of her solicitor's negligent failure to institute proceedings on her behalf against the driver before the expiration of the limitation period. The Alberta Court of Appeal reasoned that:

> The compensation which [the plaintiff] presently seeks from [her solicitors] is not damages for her physical injuries, but damages for what she would have obtained had the original claim been brought …
>
> The distinct nature of the original claim and the professional negligence claim is recognised by the need to estimate the value of the original claim, and then discount for the costs of pursuing the original litigation, and allow for any chance that the original claim might not have succeeded.[55]

Lord Steyn said that the same reasoning would apply in England. [56]

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[53] (2001) 92 Alta LR (3d) 249.

[54] Within the meaning of s 3(1) of the Canadian Tort Feasors Act 1980, which is relevantly the same as s 23A.

[55] (2001) 92 Alta LR (3d) 249, 257 [32] and [34].

[56] [2002] 1 WLR 1397, 1412 [29] .

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75. **Following paragraph cited by:**

TCM Builders Pty Ltd v Nikou & Ors (Domestic Building) (13 March 2012) (Senior Member E. Riegler)

Finally, in *Royal Brompton* , Lord Hope of Craighead said that he did not see anything in the UK Act suggesting an intention to depart from the assumption which had always been made in contribution cases that contribution is available only where two or more persons have contributed, albeit in different ways, to the same damage and that the 'mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage'. [57]

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[57] Ibid 1417 [47] .

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76. **Following paragraph cited by:**

Peck v Eade (Building and Property) (27 January 2023) (Senior Member S. Kirton)
McClafferty v Greg Smith Pty Ltd (04 March 2019) (Senior Member M. Farrelly)

concurrent wrongdoers in relation to that claim. [4]

via

[4] *Quinerts* at [76] and [77]

Hunt & Hunt Lawyers v Mitchell Morgan Nominees (12 December 2012) (French CJ, Hayne J, Kiefel J, Bell J, Gageler J)
Mitchell Morgan Nominees Pty Ltd v Vella (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

68. Nettle JA also saw different arrival at damages as an indication of different damage, in *St George Bank Ltd v Quinerts Pty Ltd* at [76] and in relation to the present case at [83] . In the present case the different damage caused by Hunt & Hunt's negligence, or in the language of the definition of "concurrent wrongdoer" the damage or loss the subject of the claim against Hunt & Hunt, is indicated by the fact that the damages recoverable from Hunt & Hunt are the lost value of the mortgage of the Enmore property, not the amount paid out by Mitchell Morgan on the fraudulent loan transaction. As it happens the money amount may be the same, but if they are that is identity of damages rather than identity of damage.

Hunt & Hunt's submissions

Mitchell Morgan Nominees Pty Ltd v Vella (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

67. The definition of "concurrent wrongdoer" includes causation "independently of each other", and one wrongdoer's acts or omissions can independently cause the same damage or loss as another wrongdoer's acts or omissions; nor is it necessary that one wrongdoer's acts or omissions cause the other wrongdoer's acts or omissions to have effect or could have prevented them from having effect. The damage or loss, however, must first be identified, as was done in *St George Bank Ltd v Quinerts Pty Ltd* at [76] and in relation to the theft analogy and the present case at [82] and [83] respectively. Put in the language of economic interest which I have earlier used, in *Royal Brompton Hotel NHS Trust v Hammond* there were the different interests of timely completion and unchanged contractual rights; in *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Limited* the different interests of knowledge of the site and indemnity against risk of unexpected site conditions; and in *St George Bank Ltd v Quinerts Pty Ltd* the different interests of repayment by the borrower or guarantor and holding adequate security. In my opinion, *St George Bank Ltd v Quinerts Pty Ltd* and its reliance on the prior decisions supports the earlier analysis of the loss the subject of Mitchell Morgan's claim for economic loss against Hunt & Hunt.

Metzke and Allen v Sali (15 October 2010) (Warren CJ, Neave JA, Beach AJA)

Consistently with reasoning in *Royal Brompton* , I do not consider that the Borrower or the guarantor in this case could be said to have caused or be liable for 'the same damage' as Quinerts. The loss or damage caused by the Borrower and the guarantor was their failure to repay the loan. Nothing which Quinerts did or failed to do caused the Borrower or the lender to fail to repay the loan. The damage caused by Quinerts was to cause the Bank to accept inadequate security from which to recover the amount of the loan. Nothing which the Borrower or the lender did or failed to do caused the Bank to accept inadequate security for the loan. Furthermore, just as in *Wallace v Litwiniuk*, the distinct nature of the damage caused by Quinerts is demonstrated by the need to estimate the damage which the Bank would have suffered if Quinerts had not acted negligently in the preparation of the valuation and then to calculate the difference between that and the damage which the Bank has suffered by reason of the Borrower's and guarantor's failure to repay the loan.

77. I conclude that the Borrower and the guarantor were not persons whose acts or omissions caused the loss or damage the subject of the Bank's claim against Quinerts and, therefore, that they were not concurrent wrongdoers in relation to that claim.

78. Counsel for Quinerts submitted that so to conclude would run counter to the reasoning of Young CJ in Eq in *Vella v Permanent Mortgages Pty Ltd.* [58] In that case, a fraudster forged the execution of a mortgage against which Permanent Mortgages lent funds which later proved irrecoverable. Permanent Mortgages' solicitors were guilty of negligence in failing to draw the mortgage in a form which, despite the fraud, would have rendered the mortgage effective upon registration. Young CJ in Eq held that the fraudster was a concurrent wrongdoer in relation to Permanent Mortgages' claim against the solicitors.

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[58] [2008] NSWSC 505; 13 BPR 25,343.

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79. I accept that his Honour's conclusion is at odds with my conclusion. I am not persuaded by it, however, that I should come to a different conclusion. His Honour likened the fraudster in the case before him to a wrongdoer who shoots a victim, and likened Permanent Mortgages' solicitors to the manufacturer of a bullet proof vest worn by the victim which, because of negligent manufacture, fails to prevent the bullet passing through. His Honour appears to have reasoned that, although the bullet proof vest might have been acquired for the very purpose of preventing the shooter's bullet passing into the victim's body, the High Court's decision *Astley v Austrust Ltd* [59] implied that the shooter caused the same damage as was caused by the negligent manufacturer of the bullet proof vest. [60] In turn, that led his Honour to conclude that the shooter (*scil* the fraudster in the case before him) was a concurrent wrongdoer in relation to the victim's claim against the manufacturer of the bullet proof vest (*scil* Permanent Mortgages' claim against its solicitors).

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[59] (1999) 197 CLR 1 .

[60] [2008] NSWSC 505, [583]–[589] .

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80. With respect, it appears to me that the shooting analogy was misplaced. In *Astley v Austrust* the High Court was concerned with a question of contributory negligence under the equivalent to s 26 of the *Wrongs Act 1958* . Among other things, the Court decided that a company which retained auditors who negligently failed to detect irregularities in the company's accounts could be guilty of contributory negligence in relation to the loss thereby suffered. More precisely, the Court rejected the notion, which until then was supported by a body of English and Australian authority, that a plaintiff could not be guilty of contributory negligence in relation to the very risk that the defendant had been retained to guard against. It was possible, the court held, that the company suffered or may have suffered loss partly as a result of its own failure to take care and partly as a result of the auditor's negligence.

81. Translating that to the language of s 24AH , one might say that *Astley v Austrust* decided that both the company and the auditors caused or may have caused the loss or damage which was the subject of the company's claim against the auditors. Transposing that to the case before Young CJ in Eq, one might say that *Astley v Austrust* was capable of supporting a conclusion that both Permanent Mortgages and its solicitors caused or may have caused the loss which was the subject of Permanent Mortgages' claim against it solicitors. But, with respect, that says nothing as to whether the fraudster caused the loss or damage the subject of Permanent Mortgages' claim against its solicitors.

82. **Following paragraph cited by:**

Hunt & Hunt Lawyers v Mitchell Morgan Nominees (12 December 2012) (French CJ, Hayne J, Kiefel J, Bell J, Gageler J)

> Now, your Honours, could I go then to paragraph 82 of the judgment in *Quinerts* ? His Honour in preceding paragraphs had referred to what may or may not have been an apt analogy about the failure of the bulletproof vest. Your Honour, leaving aside observations of that kind, at paragraph 82 his Honour referred to an analogy of negligence by insurance brokers and your Honours will see in paragraph 83 that he applied that analogy to this case. Your Honours will have seen that when I say "to this case" the judgment at first instance had been given and was referred to the Victorian Court of Appeal and, of course, the Court of Appeal dealt with it.

A more appropriate analogy to the facts in *Permanent Mortgages* would be a case in which a thief steals money from a bank and, because of negligence on the part of the bank's insurance brokers, the bank finds that the risk of the theft is not covered by insurance. In such a case, the damage caused by the thief would be the loss of the bank's money. Nothing, however, which the insurance brokers did or failed to do in effecting appropriate insurance cover would have caused the theft of the bank's money. Contrastingly, the loss or damage caused by the insurance brokers would be the bank's inability to obtain indemnity from an insurance

company for the loss suffered by reason of the theft. But nothing done by the thief would have caused the bank's insurance cover to be inadequate. It would follow that the thief would *not* be a concurrent wrongdoer in relation to any claim which

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[61] See and compare Lord Steyn's criticism of the decision in *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Ltd* [2001] EWCA Civ 1785, in *Royal Brompton NHS Trust v Hammond* [2002] 1 WLR, 1413 [33].

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the bank might make against its insurance brokers for failing to arrange appropriate insurance cover. [61]

83. Applying that analogy to the *Permanent Mortgages Case*, the fraudster by his acts and omissions induced Permanent Mortgages to believe that the mortgage was effective, and so to advance funds on the faith of the mortgage. The loss or damage caused by the fraudster was, therefore, the loss constituted of Permanent Mortgages parting with its money. Nothing done or omitted to be done by Permanent Mortgages' solicitors caused Permanent Mortgages to believe that the mortgage was genuine. Contrastingly, the loss or damage caused by the solicitors was the loss and damage occasioned by their failure to take reasonable care to ensure that the mortgage was so drawn that, despite the fraud, the mortgage was rendered effective upon registration. Nothing done or omitted to be done by the fraudster caused the solicitors to fail to draw the mortgage so that upon registration the mortgage was rendered effective despite the fraud. Further, just as in *Wallace v Litwiniuk* and *Royal Brompton Hospital*, the distinct nature of the damage caused by the solicitors was demonstrated by the need to estimate the damage which Permanent Mortgages would have suffered if the mortgage had been rendered effective by registration and then to calculate the difference between that amount and the damage suffered by Permanent Mortgages by paying away its money to a thief.

84. Counsel for Quinerts referred to the decision of Williams J in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,[62] and a number of other decisions which his Honour considered, [63] to the effect that a lender is capable of being guilty of contributory negligence vis-à-vis a valuer whose negligence results in the lender accepting inadequate security for a loan. Although counsel did not say so in terms, I took it to be implicit in his submission that, if a lender can be so guilty of contributory negligence, it must be upon the basis that the damage caused by the lender making the loan is the same damage as is caused by the valuer's negligence in overvaluing the security; that parity of reasoning implied that the damage caused Quinerts' negligence must have been the same damage as the damage suffered by the Bank by reason of the loan; and that, since that was the same damage as was caused by the Borrower's and guarantor's failure to repay the loan, the Borrower and the guarantor were concurrent wrongdoers in relation to the Bank's claim against Quinerts.

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[62] Supreme Court of Queensland, (Unreported, 22 October 1999).

[63] Ibid [45].

85. I reject the argument. In *I & L Securities* the point was that, but for the lender's negligence and the valuer's negligence, the loan would not have been made. It followed that the lender's negligence in making the loan caused the same damage as was caused by the valuer's negligence in permitting the lender to make the loan. Here, it is different. Although Quinerts' negligence caused the Bank to make the loan, or at least caused it to lend more than it would otherwise have been prepared to lend, neither the Borrower nor the guarantor did or failed to do anything actionable (in the sense of rendering them liable to the Bank) which caused the Bank to lend or to lend more than it would otherwise have been prepared to lend. On the facts of this case, the only actionable acts and omissions of the Borrower and guarantor were their failures to repay the loan and, axiomatically, their failures to repay the loan did not cause the Bank to make the loan or to lend more than it would otherwise have been prepared to lend. As in *Wallace v Litwiniuk* and *Royal Brompton Hospital*, the distinct nature of the damage caused by Quinerts is demonstrated by the need to estimate the damage which the Bank would have suffered if Quinerts had not been negligent in valuing the property and then to calculate the difference between that amount and the damage suffered by the Bank by reason of the Borrower's and guarantor's failure to repay the loan.

86. Finally, on this aspect of the matter, counsel for Quinerts referred to a decision of Bryson AJ, sitting as a judge of the Equity Division, in *Chandra v Perpetual Trustees Victoria Ltd*, [64] in which a solicitor's negligent breach of duty resulted in a fraudster obtaining a new duplicate certificate of title and the lender advancing funds on the faith of a fraudulent mortgage. The fraudster was held to be a concurrent wrongdoer in relation to the lender's claim against the solicitor.

[64] [2007] NSWSC 694; 13 BPR 24, 675; (2007) Aust Torts Rep 81–896.

87. In my view, there is nothing in Bryson AJ's reasoning or conclusion which is inconsistent with the conclusion to which I have come in this case. The facts in *Chandra* were that, but for the solicitor's negligence, the fraudster would not have got his hands on the duplicate certificate of title and so would not have been able to deceive the lender. But for that, there would not have been any loan. [65] Consequently, the damage which the solicitor caused was the damage which resulted from bank making a loan which it would not otherwise have made. Similarly, but for the fraud, the bank would not have made the loan. In the result, the damage caused by the fraudster was the same damage as resulted from the bank making a loan which it otherwise would not have made. It followed that the damage caused by the fraudster was the same damage as was the subject of the lender's claim against the solicitor and, therefore, the fraudster was a concurrent wrongdoer in relation to the lender's claim against the solicitor.

[65] Ibid [106] .

88. That stands in contrast to the facts of this case, where the damage caused by the Borrower and the guarantor by their failure to repay the loan was different to the damage caused by Quinerts' negligence in the valuation of the property. Here, the Borrower and the guarantor are not liable in respect of the loss which is the subject of the Bank's claim against Quinerts and so in my view are not concurrent wrongdoers.

89. Another way of looking at the matter is to consider the time at which the damage caused by Quinerts' negligence was suffered and to compare that with the time at which the damage caused by the Borrower's and guarantor's failure to repay the loan was suffered.

90. As it appears to me, the loss and damage caused by Quinerts' negligence was similar to the loss and damage suffered by a plaintiff who purchases property at an excessive price on the faith of a negligent overvaluation of the property. In effect, the Bank outlaid excessive funds by way of loan in consideration of an under-secured chose in action and, because the chose in action was so under-secured, it was less valuable than if it had been adequately secured. At that point, the loss and damage caused by Quinerts' negligence was ascertained or ascertainable and the time in which to institute proceedings for the recovery of damages began to run. [66]

[66] *Gould & Anor v Vaggelas & Ors* (1985) 157 CLR 215, 255 (Brennan J); *HTW Valuers v Astonland Pty Ltd* (2004) 217 CLR 640, 655 [28]–[33] ; *Christie v Purves* [2007] NSWCA 182 [35]–[41] ; cf *Commonwealth v Cornwell* (2007) 81 ALJR 933, 941 [36]–[38] .

91. Contrastingly, the loss and damage caused by the Borrower's and guarantor's failure to repay the loan was like the loss and damage suffered by a plaintiff who, having purchased property at an overvalue on the faith of a negligent valuation, and then entered into a sub-contract to re-sell the property at the overvalue, is unable to procure the sub-purchaser to complete the sub-contract at that inflated price. In effect, the Bank, having outlaid excessive funds by way of loan in consideration of the under-secured chose in action might still have avoided a loss if the Borrower and guarantor had repaid the loan in full. Thus, it was not until the Borrower and the guarantor defaulted in the performance of their payment obligations that the loss caused by their default was ascertained or ascertainable, and so it was not until then that the time in which to institute a proceeding for the recovery of that loss and damage began to run.

92. If that is so, the fact that the loss or damage caused by Quinerts was incurred before the loss or damage caused by the Borrower's and guarantor's failure to repay the loan is a further indication that the loss or damage caused by Quinerts was not the same loss or damage as was caused by the Borrower and guarantor. And that is so even though the Bank might never have felt the effects of the loss and damage caused by Quinerts' negligence if the Borrower and guarantor had repaid the loan.[67]

[67] See and compare *Howkins & Harrison v Tyler* (2001) 92 Lloyd's Rep PN 1, 5 [24] –[25] (Sedley LJ).

93. **Following paragraph cited by:**

Kenxue Pty Ltd ATF The Susan Investment Trust v Westpro Finance Pty Ltd (10 July 2020) (Rein J)

136. Finkelstein J referred to *Quinerts* noting at [93] that "It seems that the bank did not lead evidence of what it would have done had it not lent any money on the negligent valuation." The plurality referred to *Sellars* and said:

> "[110] Their Honours said that the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue of whether the applicant has sustained loss or damage. It follows that the applicant must prove on the balance of probabilities that he or she has suffered some loss or damage. In a case such as *Sellars* , an applicant established that some loss or damage was sustained "by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value)". The value of the lost opportunity was then to be determined "by reference to the degrees of probabilities or possibilities": at CLR 355; ALR 30.
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> [111] Brennan J wrote separate reasons for judgment. On the point presently under consideration we do not think that his Honour's approach differed in any material respect from that of the plurality. His Honour said (at CLR 368; ALR 40):
>
> > Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point where there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities.
> >
> > Although the issue of a loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation. [Citations omitted.]

> [112] It seems to us that the question is whether an applicant has established on the balance of probabilities that there was another commercial opportunity of some value or there were other commercial opportunities of some value. An applicant who is able to establish a particular opportunity which has been lost as a result of contravening conduct will no doubt have an easier path to establishing what is necessary for the purposes of recovery. At the same time, an applicant in a case such as this who can do no more than point to the fact that he or she is in the business of lending money and was making loans at the time of the improvident loan is likely to fail to establish the loss of a commercial opportunity of some value.
>
> [113] However, in our respectful opinion it is an error to proceed on the basis that unless an applicant can establish a particular alternative transaction he or she cannot establish a lost commercial opportunity of some value. We think that this is where the primary judge erred. His Honour said (at [37]):
>
> > [37] The above analysis is persuasive. In the current case I am not satisfied that La Trobe has proved, on a balance of probabilities, that there was a particular loan or loans that were not entered into by reason of La Trobe entering into a loan agreement with Jet. Mr Gidman's evidence is vague and imprecise and an insufficient foundation for this aspect of La Trobe's case. As counsel for Hay submits, there is no evidence that there ever existed a particular loan application which was acceptable on all terms to La Trobe, but which La Trobe did not accept due to insufficient funds by reason of the Jet loan. (*La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* [2010] FCA 250.)
>
> [114] The analysis to which his Honour refers in this passage is the analysis by Nettle JA in *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245. We do not think that there is any inconsistency between what we have said and what was said by Nettle JA. We do not read his Honour's reasons as suggesting that a particular alternative transaction must be proved before recovery is allowed. The fact is that the evidence in the case before Nettle JA was insufficient to satisfy his Honour that there was a lost commercial opportunity of some value."

Again, to return to the analogy of a purchaser of land, if the purchaser is induced by a negligent overvaluation to pay above market price for real property, the purchaser suffers loss and damage immediately upon completion of the purchase and the time in which to bring proceedings to recover damages from the negligent valuer begins to run from that point. It does not detract from that conclusion that the purchaser might prefer to defer the institution of proceedings against the valuer and hold the land in the hope of finding a sub-purchaser willing to take the property off the purchaser's hands at the same inflated value. If the purchaser is able to re-sell the property to a sub-purchaser at a price sufficient to cover the purchaser's original outlay, plus the opportunity cost of the purchaser's overpayment, the loss and damage first suffered on completion of the original purchase will be eliminated. In that event, there will be no proceedings against the valuer or, if there are, they will fail.[68] But if the sub-

purchaser defaulted in the performance of the sub-contract, with the result that the property was once again thrown back on the purchaser's hands and unable to be re-sold at a price sufficient to re-coup the loss and damage first suffered, an action would still lie against the valuer for damages equal to the shortfall.[69]

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[68] Except, perhaps, for nominal damages for breach of contract.

[69] Assuming the limitation period had not expired.

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94. Certainly, the sub-purchaser's default would be a *causa sine qua non* of the purchaser's ultimate loss. But judged according to common sense conceptions of fact, [70] that would be an insufficient basis to conclude that the sub-purchaser thereby caused the same loss and damage as was caused by the valuer's negligence. If what I have said is correct, the essence of the loss and damage caused by the valuer was the purchaser paying more for the property than it was worth - and nothing which the sub-purchaser later did or failed to do could be said to have caused that. Contrastingly, the loss and damage caused by the sub-purchaser's default inhered in the purchaser failing to realise the property for more than it was worth - and nothing which the valuer had previously done or failed to do in valuing the property could be said to have caused that.

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[70] *March v E & M H Stramere Pty Ltd* (1991) 170 CLR 507, 515–6 (Mason CJ), 524 (Deane J), 530–533 (McHugh J).

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95. It is the same with the Bank. The loss and damage caused by Quinerts was the result of the Bank outlaying too much by way of loan in consideration of an over-valued security. Nothing which the Borrower or guarantor did or failed to do caused the Bank to incur that loss and damage. Contrastingly, the loss and damage caused by the Borrower's and guarantor's default inhered in the Bank failing to realise the under-secured chose in action for more than it was worth. And nothing which the Quinerts did or failed to do in valuing the property caused the Bank to fail to realise the chose in action for more than the security was worth.

96. Either way in my view, neither the Borrower nor the guarantor was a concurrent wrongdoer with Quinerts within the meaning of Part IVAA of the Act.

(iv) Proportionate Liability –Trade Practices Act

97. As was earlier noted, the claim for apportionment under Part VIA of the *Trade Practices Act 1974* (Cth) was abandoned. That came about because, during the course of argument, the parties realised that there may be some inconsistency between Part IVAA of the *Wrongs Act* 1958 and Part VIA of the *Trade Practices Act 1974* , and wished to avoid the need to give notice under s 78B of the *Judiciary Act 1901* (Cth).

98. It may be observed, however, that ss 82(1B) and 87CD of the *Trade Practices Act 1974* only apply to causes of action accruing on or after 26 July 2004. [71] If I am correct that the Bank's cause of action against Quinerts accrued when the Bank entered into the loan transaction, which was on 10 February 2003, Part VIA of the *Trade Practices Act 1974* did not apply.

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[71] See *Corporations Act 2001* (Cth), s 466 and *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) , s 2.

Conclusion

99. For the reasons I have given, I would allow the appeal and dismiss the cross-appeal. I would set aside the judgment below and in lieu thereof give judgment for the Bank in the sum of $173,638.96 (being the $145,000 awarded by the judge plus the recovery costs of $28,638.96) and interest thereon of $29,628.04 calculated in accordance with the *Penalty Interest Rates Act 1983* and computed from the date of issue of the writ until judgment.

100. The respondent should pay the appellant's costs of the proceeding below and the appellant's costs of the appeal, and the respondent should have a Certificate under s 4 of the *Appeal Costs Act 1998* .

MANDIE JA:

101. I have had the advantage of reading in draft the reasons for judgment of Nettle JA and I agree with those reasons and with the orders that his Honour proposes.

BEACH AJA:

102. I also agree with Nettle JA.

- - -

Cited by:

Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 -
Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 -

Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 -
Peck v Eade (Building and Property) [2023] VCAT 80 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 (10 November 2022) (Sifris, Kennedy and Walker JJA)

143. I note that Bell and Gageler JJ were in dissent in *Hunt and Hunt* . Furthermore, while their Honours considered Nettle JA's decision in *St George Bank Ltd v Quinerts Pty Ltd* [94] to be correct, it does not appear that the majority in *Hunt and Hunt* held the same view. [95] Nor does it appear that the majority in *Hunt and Hunt* necessarily adopted the same approach to the reference to causation in the definition of 'concurrent wrongdoer':

> The word 'caused', in a statutory provision in terms similar to s 34(2), has been read as connoting the legal liability of a wrongdoer to the plaintiff. The language of liability is used in contribution legislation, but not in Pt 4 of the *Civil Liability Act* . Nevertheless, it would usually be the case that a person who is found to have caused another's loss or damage is liable for it. References to the liability of a wrongdoer should not, however, distract attention from the essential nature of the enquiry at this point, which is one of fact.
>
> In determining the question of causation, it is necessary to keep clearly in mind the harm suffered by [the respondent company]: its inability to recover the moneys advanced. Merely to then state the obvious facts — that the moneys were advanced under the loan agreement and on the security of the mortgage — is to acknowledge that the harm suffered has more than one cause. [96]

via

[94] (2009) 25 VR 666; [2009] VSCA 245 .

Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 -
D.J. & M.A. Hose Pty Ltd ATF the Hose Family Trust ACN 010 999 210 v Wide Bay Insurance Broking Pty Ltd ATF the Wide Bay Business Trust ACN 130 391 301 [2022] QSC 191 -
D.J. & M.A. Hose Pty Ltd ATF the Hose Family Trust ACN 010 999 210 v Wide Bay Insurance Broking Pty Ltd ATF the Wide Bay Business Trust ACN 130 391 301 [2022] QSC 191 -
Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) [2022] VCAT 633 (07 June 2022) (The Honourable Justice Delany, Acting Member)

75. The reference to a 'concurrent wrongdoer' being a person whose 'acts or omissions caused' the loss or damage has been repeatedly held to require that the concurrent wrongdoer be a person who is, or would be, legally liable to the plaintiff for the loss or damage that is the subject of the claim. [51] That is so even though Part IVAA and its analogues do not expressly specify that such causation involves legal liability.

via

[51] See *Shrimp v Landmark Operations Ltd* [2007] FCA 1468; (2007) 163 FCR 510, [59]-[62] (Besanko J); *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245; (2009) 25 VR 666 (*'Quinerts'*), [58] , [64] (Nettle JA, with whom Mandie JA and Beach AJA agreed); *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880; (2014) 224 FCR 519, [16] (Mortimer J).

Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) [2022] VCAT 633 -
Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) [2022] VCAT 633 -

Bingo Holdings Pty Ltd v GC Group Company Pty Ltd [2021] NSWCA 184 (23 August 2021) (Meagher, Payne and Brereton JJA)

28. This conclusion accords with the construction of the same or equivalent provisions by the Federal Court and the Victorian Court of Appeal: see for example *F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2)* [2019] FCA 419 (White J) where his Honour said:

> "[404] It is, however, important to note that s 87CD and its counterparts operate only in respect of wrongdoers, namely, persons who are themselves liable to the applicant: *Shrimp v Landmark Operations Ltd* [2007] FCA 1468, (2007) 163 FCR 510 at [59] ; *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245 at [59] ; *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880, (2014) 224 FCR 519 at [16] . In the last of these cases, Mortimer J referred to *Hunt & Hunt* in which, at [91] , Bell and Gageler JJ said:
>
> > 'To answer the description of "a person ... whose acts or omissions (or act or omission) caused" that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to "acts or omissions (or act or omission)" is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having "caused ... the damage or loss that is the subject of the claim" is not, as has correctly been held, merely to causation in fact. "Questions of causation are not answered in a legal vacuum" but "are answered in the legal framework in which they arise". The reference here is to causation that results, or would result, in *legal liability*.' (Emphasis in the original and citations omitted)
>
> [405] The authorities also indicate the importance of a proper pleading of a claim of proportionate liability. See, for example, *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [35] ; *Hart v JGC Accounting & Financial Services Pty Ltd* [2015] WASCA 22, (2015) 47 WAR 582 at [25]-[26] ."

Woodhouse v Fitzgerald [2021] NSWCA 54 (09 April 2021) (Basten, Meagher and Payne JJA)

40. (2009) 25 VR 666; [2009] VSCA 245 (Nettle JA, Mandie JA and Beech AJA agreeing).

Woodhouse v Fitzgerald [2021] NSWCA 54 (09 April 2021) (Basten, Meagher and Payne JJA)

86. Mr Woodhouse submitted that the trial judge had misunderstood the reasoning in the High Court, which had not overturned intermediate courts of appeal which had found liability to be an essential characteristic of concurrent wrongdoers. Accordingly, he submitted, the trial judge had been wrong to refuse to follow this aspect of the reasoning of the Victorian Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* , [40] followed by a five judge bench of this Court in *Mitchell Morgan Nominees Pty Ltd v Vella* . [41]

Woodhouse v Fitzgerald [2021] NSWCA 54 -
Extension Builders Australia Pty Ltd v Bowman (Building and Property) [2020] VCAT 1311 (20 November 2020) (Deputy President C Aird)

12. In addition to the matters set out in s 60 of the VCAT Act my comments in *Owners Corporation 1 Plan No PS63800J v Equiset Construction Melbourne Pty Ltd [3]* at [33] set out the requirements for a successful joinder application for the purposes of a Part IVAA defence:

> As Senior Member Farrelly recently determined in *McClafferty v Greg Smith Pty Ltd* [4] for a respondent to rely on a Part IVAA defence it must identify and articulate the legal cause of action the applicant has against the proposed party

(or would have had but for the proposed party being dead or in the case of a corporation 'wound up') which the respondent alleges is a concurrent wrongdoer. It is not enough to simply assert that the proposed party contributed to or caused the applicant's loss and damage...

Further, I note that Senior Member Farrelly made this decision after discussing *St George Bank Ltd v Quinerts Pty Ltd* [5] and commenting at paragraph 52:

> Accordingly, in my view *Quinerts* remains authority for the proposition that, under the Act, for a person to be a concurrent wrongdoer sharing responsibility in respect of a plaintiff's claim, the person must be liable (by way of cause of action known to law) for the damage that is the subject of the plaintiff's claim (or in the case of a person who is dead or a company that has been wound up, that person or company would have been liable for the damage if not dead or wound up).

via

[5] [2009] VSCA 245

Extension Builders Australia Pty Ltd v Bowman (Building and Property) [2020] VCAT 1311 - Extension Builders Australia Pty Ltd v Bowman (Building and Property) [2020] VCAT 1311 - Howard Finance Pty Ltd v Yarra City Council [2020] VSC 610 (25 September 2020) (Kennedy J)

24. The result is that, in accordance with well-established principles, the plaintiffs bear the onus to prove that the lane is not a public highway or road. The only qualification to this is that, given the Council in this case positively asserted that a presumption of dedication arose by long use it may, as proponent of this issue, bear an evidential burden. [19] Nevertheless, if the presumption arises, the evidentiary focus will again then shift to whether there is evidence of rebuttal, consistent with *Anderson.*

via

[19] *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245, [22] .

Kenxue Pty Ltd ATF The Susan Investment Trust v Westpro Finance Pty Ltd [2020] NSWSC 1146 (10 July 2020) (Rein J)

136. Finkelstein J referred to *Quinerts* noting at [93] that "It seems that the bank did not lead evidence of what it would have done had it not lent any money on the negligent valuation." The plurality referred to *Sellars* and said:

> "[110] Their Honours said that the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue of whether the applicant has sustained loss or damage. It follows that the applicant must prove on the balance of probabilities that he or she has suffered some loss or damage. In a case such as *Sellars* , an applicant established that some loss or damage was sustained "by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value)". The value of the lost opportunity was then to be determined "by reference to the degrees of probabilities or possibilities": at CLR 355; ALR 30.
>
> [111] Brennan J wrote separate reasons for judgment. On the point presently under consideration we do not think that his Honour's approach differed in any material respect from that of the plurality. His Honour said (at CLR 368; ALR 40):

> Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point where there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities.
>
> Although the issue of a loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation. [Citations omitted.]

[112] It seems to us that the question is whether an applicant has established on the balance of probabilities that there was another commercial opportunity of some value or there were other commercial opportunities of some value. An applicant who is able to establish a particular opportunity which has been lost as a result of contravening conduct will no doubt have an easier path to establishing what is necessary for the purposes of recovery. At the same time, an applicant in a case such as this who can do no more than point to the fact that he or she is in the business of lending money and was making loans at the time of the improvident loan is likely to fail to establish the loss of a commercial opportunity of some value.

[113] However, in our respectful opinion it is an error to proceed on the basis that unless an applicant can establish a particular alternative transaction he or she cannot establish a lost commercial opportunity of some value. We think that this is where the primary judge erred. His Honour said (at [37]):

> [37] The above analysis is persuasive. In the current case I am not satisfied that La Trobe has proved, on a balance of probabilities, that there was a particular loan or loans that were not entered into by reason of La Trobe entering into a loan agreement with Jet. Mr Gidman's evidence is vague and imprecise and an insufficient foundation for this aspect of La Trobe's case. As counsel for Hay submits, there is no evidence that there ever existed a particular loan application which was acceptable on all terms to La Trobe, but which La Trobe did not accept due to insufficient funds by reason of the Jet loan. (*La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* [2010] FCA 250.)

[114] The analysis to which his Honour refers in this passage is the analysis by Nettle JA in *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245. We do not think that there is any inconsistency between what we have said and what was said by Nettle JA. We do not read his Honour's reasons as suggesting that a particular alternative transaction must be proved before recovery is allowed. The fact is that the evidence in the case before Nettle JA was insufficient to satisfy his Honour that there was a lost commercial opportunity of some value."

Kenxue Pty Ltd ATF The Susan Investment Trust v Westpro Finance Pty Ltd [2020] NSWSC 1146 (10 July 2020) (Rein J)

132. The DCS focused on ***Sellars*** (supra), ***La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd*** [2011] FCAFC 4; (2011) 190 FCR 299, ***Mal Owen Consulting Pty Ltd v Ashcroft*** [2018] NSWCA 135; (2018) 97 NSWLR 1163 at [100] , and ***St George Bank Ltd v Quinerts Pty Ltd*** [2009] VSCA 245; (2009) 25 VR 666 . In short the Defendants' point is that the Plaintiff must establish that there were "particular properties in the Western Sydney area

that he would have invested in" and the fact that Ms Hamilton does not identify any particular commercial properties that Mr Campbell had in mind in 2010-2011 and could have purchased.

Kenxue Pty Ltd ATF The Susan Investment Trust v Westpro Finance Pty Ltd [2020] NSWSC 1146 -
Woodhouse v Fitzgerald and McCoy (No 2) [2020] NSWSC 450 -
Liang v Chen [2020] VSC 106 (10 March 2020) (Lyons J)

70. I have no evidence before me that this rate of return (in substance, 15% interest per annum) is a 'reasonable' rate of return which the plaintiff would have obtained had she not entered into the agreement and advanced or invested the Principal elsewhere. It is generally necessary to call evidence to establish what return would have been obtained in order to determine the quantum of damages sought or other evidence that show that the return claimed was a reasonable assessment of loss. [31] I consider that such principles apply when proving the quantum of loss under s 236 of the *ACL* .

via

[31] See, eg, *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 [26]–[28] (Nettle JA; Mandie JA and Beach AJA agreeing). I note this was a case for breach of contract and professional negligence where the plaintiff asserted it was entitled to be put in the position it would have been in had it not made a loan. The Court held that evidence was required of the return that the plaintiff would have obtained on the loan funds if it had not made the loan.

McCann v Shangri-la Construction Pty Ltd [2020] VCAT 80 (23 January 2020) (Deputy President C Aird)

14. In addition to the matters set out in s 60 of the VCAT Act my comments in *Equiset* at [33] set out the requirements for a successful joinder application for the purposes of a Part IVAA defence :

> As Senior Member Farrelly recently determined in *McClafferty v Greg Smith Pty Ltd* [2] for a respondent to rely on a Part IVAA defence it must identify and articulate the legal cause of action the applicant has against the proposed party (or would have had but for the proposed party being dead or in the case of a corporation 'wound up') which the respondent alleges is a concurrent wrongdoer. It is not enough to simply assert that the proposed party contributed to or caused the applicant's loss and damage...

Further, I note that Senior Member Farrelly made this decision after discussing *St George Bank Ltd v Quinerts Pty Ltd* [3] and commenting at paragraph 52:

> Accordingly, in my view *Quinerts* remains authority for the proposition that, under the Act , for a person to be a concurrent wrongdoer sharing responsibility in respect of a plaintiff's claim, the person must be liable (by way of cause of action known to law) for the damage that is the subject of the plaintiff's claim (or in the case of a person who is dead or a company that has been wound up, that person or company would have been liable for the damage if not dead or wound up).

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via

[3] [2009] VSCA 245

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Trani v Trani [2019] VSC 723 (26 November 2019) (Forbes J)

> 36 The Quinerts analysis tested the damage identified by reference to causation. The High Court said there is no such requirement that one wrongdoer contribute to the wrongful actions of the other wrongdoer in order that they cause the same damage. Referring to the analysis in Quinerts , the Court said:

Trani v Trani [2019] VSC 723 (26 November 2019) (Forbes J)

> 36 The Quinerts analysis tested the damage identified by reference to causation. The High Court said there is no such requirement that one wrongdoer contribute to the wrongful actions of the other wrongdoer in order that they cause the same damage. Referring to the analysis in Quinerts , the Court said:

Trani v Trani [2019] VSC 723 (26 November 2019) (Forbes J)

(2009) 25 VR 666 (Quinerts).

Trani v Trani [2019] VSC 723 -
AVWest Aircraft Pty Ltd as trustee for AVWest Aircraft Trust v Clayton UTZ (A firm) (No 2) [2019] WASC 306 (28 August 2019) (Vaughan J)

730. Where one is concerned with a *specific* hypothetical investment it will often be proper to: (1) assess what is most likely to have been the return on that investment; (2) deduct the return actually achieved; and (3) depending on the circumstances, make an allowance for contingencies. [783] However, the claimant must establish how its capital would have been used if it had the opportunity. [784] What is required depends on the circumstances of the case. A rate of return cannot be assumed. For example, in the absence of evidence there is little reason to suppose that the cost of funds and expenses for one transaction is the same as for another.[785]

via

[784] ***St George Bank Ltd v Quinerts Pty Ltd*** [2009] VSCA 245; (2009) 25 VR 666 [23] - [25].

AVWest Aircraft Pty Ltd as trustee for AVWest Aircraft Trust v Clayton UTZ (A firm) (No 2) [2019] WASC 306 (28 August 2019) (Vaughan J)

St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245 ; (2009) 25 VR 666

Owners Corporation 1 PS538430Y v H Building Pty Ltd (ACN 091 236 912) (under external administration) [2019] VCAT 680 (10 May 2019) (Deputy President C Aird)

59. Mr Andrew relies on the decision of the Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* [17] in submitting that the architect must have a legal liability to the OCs for the breach of any such duty (which he contends is not owed in any event) for joinder of a respondent as an alleged concurrent wrongdoer. He submitted that the architect cannot owe any legal liability to the OCs: first because the architect does not owe them a duty of care and second, because any claim the OCs may have had against the architect is statute barred by virtue of s 134 of the *Building Act 1993* .

Owners Corporation 1 PS538430Y v H Building Pty Ltd (ACN 091 236 912) (under external administration) [2019] VCAT 680 -
Owners Corporation 1 PS538430Y v H Building Pty Ltd (ACN 091 236 912) (under external administration) [2019] VCAT 680 -
F.Y.D. Investments Pty Ltd v Promptair Pty Ltd (No 2) [2019] FCA 419 -
Babscay Pty Ltd v Pitcher Partners (a Firm) [2019] FCA 480 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)

(2009) 25 VR 666 .

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)

37 The builder says that *Quinerts* has been rejected or overturned by the High Court in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* [5] .

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)

Quinerts . In their view, acts or omissions causing the damage that is the

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)

had referenced *Quinerts* with approval. As to Nettle JA's reasoning that *the*

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)
disturb the reasoning in *Quinerts* as to the requirement of legal liability of a

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)
the reasoning in *Quinerts* .

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)

concurrent wrongdoers in relation to that claim. [4]

via

[4] *Quinerts* at [76] and [77]

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 (04 March 2019) (Senior Member M. Farrelly)

that loss and damage. [2]

via

[2] [2009] VSCA 245 , at paragraphs 63 and 64

McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
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McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
McClafferty v Greg Smith Pty Ltd [2019] VCAT 299 -
Michelangelo Alfredo Mascarello v Registrar-General of New South Wales [2018] NSWSC 284 -
Bacash and Aureus April Pty Ltd v Nelson and Blackney [2017] VCC 714 (09 June 2017) (Lewitan)

> 204 In *St George Bank Ltd v Quinerts Pty Ltd* [273] Nettle JA held that the value of the loss may have to be discounted heavily to "allow for the vicissitudes of chance".
>
> > ...[I]n order to provide a truly accurate reflex of the damage actually incurred as a result of not entering into a more satisfactory transaction at an identified rate of return, the spread should ordinarily be discounted to allow for possibilities such as that the funds invested in the improvident transaction could not have been placed in another more acceptable transaction; and the risk that, even if so placed, the other borrower might still have defaulted.

Bacash and Aureus April Pty Ltd v Nelson and Blackney [2017] VCC 714 (09 June 2017) (Lewitan)

> 204 In *St George Bank Ltd v Quinerts Pty Ltd* [273] Nettle JA held that the value of the loss may have to be discounted heavily to "allow for the vicissitudes of chance".

> ...[I]n order to provide a truly accurate reflex of the damage actually incurred as a result of not entering into a more satisfactory transaction at an identified rate of return, the spread should ordinarily be discounted to allow for possibilities such as that the funds invested in the improvident transaction could not have been placed in another more acceptable transaction; and the risk that, even if so placed, the other borrower might still have defaulted.

via

[273] [2009] VSCA 245 , [25] and [27] .

United Petroleum Pty Ltd v Bonnie View Petroleum Pty Ltd (In Liquidation) [2017] VSC 185 (21 April 2017) (Kennedy J)

261. I do accept, however, that, BV was effectively the 'proponent' of the issue that the Landlords were entitled to, and would have, withheld consent. In such circumstances I consider that it bore, at least, the evidential burden of persuading the court to decide that issue in its favour. [71]

Resolution

via

[71] See *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666, [22] .

Equal 54 Pty Ltd v Dennis Galimberti [2016] VSC 588 -
Adams v Clark Homes Pty Ltd [2015] VCAT 1658 (27 October 2015) (Judge Jenkins, Vice President)

87. The following selected extracts canvass similar issues which have been raised in this application:[60]

> In my view, the decisions of superior courts, both in Victoria and in other states where there is similar legislation, have made it clear that the legislative provisions relating to proportionate liability are to be interpreted widely and are not to be constrained by the actual pleading of causes of action by a plaintiff against a defendant. The definitive factor is rather the nature of the claim itself and what is critical is whether the plaintiff's claim arises from a failure by the defendant to take reasonable care. In my view, there is little doubt in the present case that, as pleaded, the plaintiff's claim against the defendants is an apportionable claim, because of the nature of the complaint made against the defendants, both in relation to the plainting of the trees and their later refusal to remove the trees.
>
> The issue of whether the further parties might be regarded as concurrent wrongdoers depends upon whether the actions of those parties caused the loss and damage that is the subject of the present claim. The leading Victorian authority on this point is the decision of the Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 , a judgment of Nettle JA, with whom Mandie JA and Beach AJA agreed.
>
> The plaintiffs say that if the defendants are granted leave to amend their defence to effectively raise Part IVAA of the *Wrongs Act* , the plaintiff will be unable to join those parties as defendants to the proceeding. This will mean that if those parties are regarded as concurrent wrongdoers and the liability of the present defendants is limited, then the plaintiffs will be unable to recover the balance of their loss against the further parties. The

reason for this is that the certificate of occupancy in respect of the units on the plaintiffs' property was issued on 6 February 2001. By reason of s. 134 of the *Building Act 1993* , "*a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work*".

The provision is stated to be "*despite anything to the contrary in the Limitation of Actions Act 1958 or in any other Act or law*". In the present case, it is alleged that the damage arising from the defendants' conduct did not manifest itself until late 2006. Ordinarily, therefore, if the only limitation period was that set out in the *Limitation of Actions Act 1958* , the plaintiffs may have had until late 2012 to join other parties, including the four other parties referred to by the defendants. It appears, however, that by the operation of s.134, the plaintiffs' right of action against those parties did not subsist beyond 6 February 2011.

The plaintiffs now say that their position should be looked at as at today to determine the effect of permitting the defendants to raise the issue of proportionate liability. The plaintiffs say that because, as at today's date, potential claims against the four further parties are statute barred, that therefore the proposed amendment should not be permitted, because to allow the amendment would result in prejudice to the plaintiffs for which they could not be otherwise compensated.

The defendants, on the other hand, submit that any prejudice arises as a result of the delays by the plaintiffs in making an application at an appropriate time to join those parties as defendants to the Magistrates' Court proceeding. Each of the four further parties was joined as a party to the Magistrates' Court proceeding in June or July 2010. Although, at that stage, no attempt was made by the defendants to amend their defence or to have the further parties joined as defendants to the plaintiffs' claim, the third party proceedings against each of the four further parties made it clear that what the defendants wanted to do in those further proceedings was to make an apportionable claim against each of those parties under Part IVAA of the *Wrongs Act* , on the basis that each of those parties was a concurrent wrongdoer.

In my view, it is clear that the plaintiff's now have no possibility of making claims against the four further parties because any application to join those parties as defendants would be met with the Limitation defence under the *Building Act* . However, that prejudice has arisen as a consequence of the plaintiffs' own failure to make application to join those parties to their proceeding at an earlier time, particularly, in circumstances where they were alerted to the desirability of them joining those parties some months before the limitation period expired.

However, before there can be an apportionment pursuant to the *Wrongs Act* , it is necessary for those parties to be joined as defendants to the present proceeding, either by the plaintiffs or by the defendants. The plaintiffs cannot do so because the claims that they would wish to make against those parties are statute barred. In my view the present defendants should be permitted to join those parties as defendants to the plaintiffs' proceeding, provided they are able to properly articulate in a draft pleading the matters the authorities require in such a pleading...

Adams v Clark Homes Pty Ltd [2015] VCAT 1658 (27 October 2015) (Judge Jenkins, Vice President)

69. The majority then focussed upon the 'interest infringed by the negligent act' and emphasised that a concurrent wrongdoer's acts may be independent of the other wrongdoer, and yet cause the same damage. [42] This was a much broader approach than previously applicable under *Quinerts* . These considerations may have further relevance in the context of the final hearing in this proceeding.

Adams v Clark Homes Pty Ltd [2015] VCAT 1658 -
Adams v Clark Homes Pty Ltd [2015] VCAT 1658 -
Cosmetic Laser Clinic Pty Ltd v Pirintji [2015] NSWSC 983 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd [2014] FCA 880 -
Polon v Dorian [2014] NSWSC 571 -

White v Noble trading as WR and Em Noble (Domestic Building) [2014] VCAT 413 (11 April 2014) (Member M. Farrelly)

120. In my view, it is a prerequisite to a finding that a person is a *concurrent wrongdoer* under s 24AH of the *Wrongs Act* that the person is, without reference to s 24AH , legally liable to the Applicant. That is, if the person was the only defendant against whom the proceeding was brought, the person would be found liable [2] .

via

[2] See St. George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245 , Nettle JA at [58] to [64]

Jamieson v Westpac Banking Corporation [2014] QSC 32 (07 March 2014) (Jackson J)

241. There is no reason, as a matter of law, why it is not relevant to consider that fact in assessing Mr Jamieson's loss. As previously mentioned, in a "no transaction" case, a plaintiff may claim a loss of profit based on a hypothetical alternative transaction. Damages of that kind may be recovered without establishing the particular alternative transaction. A regular example occurs where the plaintiff carries on business as a moneylender and claims that if it had not invested in the loss making loan transaction, it would instead have lent on another similar transaction which would have been profitable. In that context, intermediate appellate courts in Australia have assessed the loss of profit having regard to the possibility that the alternative transaction would have been unprofitable or less profitable than claimed. [72]

via

[72] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 ; *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299.

Xpak Pty Ltd v Scibilia [2013] VCC 1260 (04 October 2013) (His Honour Judge Anderson)

> 33 Nettle JA, delivering the primary judgment of the Court of Appeal in *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245; (2009) 25 VR 666 ("*St George Bank Limited v Quinerts* ") at paragraph 25 stated that, for the plaintiff to be placed in the same position, so far as money can do it, as if the contract had been performed, the incurring of such losses must be proved.

Jew v Holloway [2013] VSCA 260 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 (03 April 2013) (French CJ, Hayne, Kiefel, Bell and Gageler JJ)

39. The judgment at first instance in this case was delivered prior to the decision in *Quinerts*. Ho wever, Nettle JA was unable to agree with the conclusion reached by the primary judge in this case [57] . To explain the difference Nettle JA saw in the damage caused by the fraudsters and that caused by Hunt & Hunt, his Honour provided the following hypothetical case, which he considered to be analogous to the facts of this case. A thief steals money from a bank. Because of negligence on the part of its insurance brokers, the bank finds that the risk of theft is not covered by its insurance. Nettle JA opined that "the damage caused by the thief would be the loss of the bank's money". However, the insurance brokers did not cause the theft. Nettle JA considered that "the loss or damage caused by the insurance brokers

would be the bank's inability to obtain indemnity from an insurance company for the loss suffered by reason of the theft. But nothing done by the thief would have caused the bank's insurance cover to be inadequate." [58]

via

[57] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 688 [79].

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 (03 April 2013) (French CJ, Hayne, Kiefel, Bell and Gageler JJ)

91. To answer the description of "a person ... whose acts or omissions (or act or omission) caused" that damage or loss or harm, C (in common with B) must be (or have been) legally liable to A for the damage or loss that is the subject of the claim. The reference in the definition to "acts or omissions (or act or omission)" is to one or more *legally actionable* acts or omissions. The reference in the definition to acts or omissions having "caused ... the damage or loss that is the subject of the claim" is not, as has correctly been held [142], merely to causation in fact. "Questions of causation are not answered in a legal vacuum" but "are answered in the legal framework in which they arise" [143]. The reference here is to causation that results, or would result, in *legal liability*.

via

[142] *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 at 521-523 [59]-[62]. See also *Quinerts* (2009) 25 VR 666 at 682 [58], 684 [64].

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 (03 April 2013) (French CJ, Hayne, Kiefel, Bell and Gageler JJ)

20. Something more needs to be said concerning the words "the damage or loss that is the subject of the claim" in s 34(2). Similar words appear in s 35(1). It is necessary because it was the view of the Court of Appeal [27], following a decision of the Victorian Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* [28] ("*Quinerts*"), that, so far as concerns concurrent wrongdoers, the loss or damage they caused must be "the same damage". This would be consistent with the requirement in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) [29], with respect to contribution as between joint tortfeasors, that a tortfeasor would if sued have been liable in respect of the same damage.

via

[28] (2009) 25 VR 666.

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 (03 April 2013) (French CJ, Hayne, Kiefel, Bell and Gageler JJ)

73. That result, as Giles JA pointed out [97], was consistent with the reasoning of the Court of Appeal of the Supreme Court of Victoria (Nettle and Mandie JJA and Beach AJA) in *St George Bank Ltd v Quinerts Pty Ltd* [98], which concerned the construction and application of equivalent proportionate civil liability provisions in Victoria [99]. There a bank had lent on a negligent valuation of mortgaged property. The bank claimed against the valuer after the borrower and guarantor defaulted on the loan and after the mortgaged property realised less than the valuation. The Court of Appeal held that the valuer was not a concurrent wrongdoer with the borrower and the guarantor. According to Nettle JA, with whom the other members agreed, that was because the borrower and the guarantor could not be said

"to have caused or be liable for 'the same damage' as [the valuer]": "[t]he loss or damage caused by the borrower and the guarantor was their failure to repay the loan" but "[n]othing which [the valuer] did or failed to do caused the borrower or the lender to fail to repay the loan" [100] ; conversely "[t]he damage caused by [the valuer] was to cause the bank to accept inadequate security from which to recover the amount of the loan" but "[n]othing which the borrower or the lender did or failed to do caused the bank to accept inadequate security for the loan" [101] .

via

[100] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 687 [76] .

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 (03 April 2013) (French CJ, Hayne, Kiefel, Bell and Gageler JJ)

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via

[98] (2009) 25 VR 666 .

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 -
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Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 -
Rednual Holdings Pty Ltd v Loule Pty Ltd [2013] VCC 328 (28 March 2013) (His Honour Judge Ginnane)

5 The phrase “the loss or damage that is the subject of the claim” is equivalent to the “same damage” in s 23AB of the *Act* : *St George Bank Ltd v Quinerts Pty Ltd*. [1]

via

[1] (2009) 25 VR 666 [68]

Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 (12 December 2012) (French CJ, Hayne J, Kiefel J, Bell J, Gageler J)

> Now, your Honours, could I go then to paragraph 82 of the judgment in *Quinerts* ? His Honour in preceding paragraphs had referred to what may or may not have been an apt analogy about the failure of the bulletproof vest. Your Honour, leaving aside observations of that kind, at paragraph 82 his Honour referred to an analogy of negligence by insurance brokers and your Honours will see in paragraph 83 that he applied that analogy to this case. Your Honours will have seen that when I say "to this case" the judgment at first instance had been given and was referred to the Victorian Court of Appeal and, of course, the Court of Appeal dealt with it.

Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 (12 December 2012) (French CJ, Hayne J, Kiefel J, Bell J, Gageler J)

> **BELL J:** Just before you leave *Quinerts* , you touch on some of the reasoning in your paragraph 54 in relation to the view taken by the Court of Appeal of Victoria that "the damage or loss the subject of the claim" for the purpose of the proportionate liability provisions mirrored "the same damage" in the Victorian equivalent to the New South Wales contribution provisions. It is not quite clear to me what your submission is respecting the significance, if any, of the relationship between contribution under the Miscellaneous Provisions Act and the proportionate liability provisions.

Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 (12 December 2012) (French CJ, Hayne J, Kiefel J, Bell J, Gageler J)

> Your Honours, could I move from that to the decision of the Victorian Court of Appeal in *St George Bank Ltd v Quinerts* (2009) 25 VR 666. I will come to it in a little more detail in a moment but could I just say that we have dealt with *Quinerts* in our written submissions in paragraphs 53 to73 but may I deal with a number of aspects of it orally.

Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 (12 December 2012) (French CJ, Hayne J, Kiefel J, Bell J, Gageler J)

> Your Honour, his Honour's reasons were agreed in by Justices Toohey and Gaudron and you will see to the same effect is Justice Deane at page 521 in about the last 12 lines on that page. Your Honours, I am just about to go to the decision of the Victorian Court of Appeal in *Quiner ts* , which was relied upon, but before doing that could I just take your Honours to our written submissions inchief for a moment and to paragraphs 43 to 52 and I just wish to point to three matters there.

Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees [2012] HCATrans 344 -
Glibanovic, Adnan v Iacovino, Anthony John [2012] VCC 1754 -
Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200 (05 November 2012) (JAGOT J)

> In respect of the damage suffered by each of the councils, LGFS, S&P and ABN Amro are wrongdoers liable for the same loss consistent with the reasoning in *Mitchell Morgan Nominees Pty Limited v Vella* (2011) 16 BPR 30,189; [2011] NSWCA 390 and *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; [2009] VSCA 245 . If this submission is intended to mean that LGFS can otherwise claim indemnity from S&P and ABN Amro for LGFS's share of liability of the councils' damages I do not accept it. If the submission is intended to mean something else its meaning remains obscure.

Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200 -
Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200 -

Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [2012] FCA 1028 (21 September 2012) (Rares J)

1083. Grange accepted that it had to establish that any alleged concurrent wrongdoer was "responsible" for the economic loss claimed. In *Shrimp v Landmark Operations Pty Ltd* (2007) 163 FCR 510 at 520-521 [53]-[59] , Besanko J held that each concurrent wrongdoer had itself to be liable to the applicant or plaintiff for the economic loss claimed, for the defence to be available. He said, in a passage cited with approval by Nettle JA, with the concurrence of Mandie JA and Beach AJA in *St George Bank Ltd v Quinerts* (2009) 25 VR 666 at 682 [58] , (163 FCR at 522 [62]):

> "The above references suggest that the mischief to which the amendments were directed was a plaintiff being able to recover 100% of his damages from any one of several wrongdoers when that wrongdoer's "fault", when compared with the other wrongdoers, was less or far less than that. In other words, the amendment was directed to what were considered to be the undesirable consequences of the joint and several liability rule. There is no suggestion that the mischief the amendments were designed to remedy was any wider than that. The definition of concurrent wrongdoer seems to be the critical subsection and, in my opinion, the word "caused" in [s12GP(3)] should be read as meaning such as to give rise to a liability in the concurrent wrongdoer to the plaintiff or applicant."

Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [2012] FCA 1028 (21 September 2012) (Rares J)

St George Bank Ltd v Quinerts (2009) 25 VR 666 referred to

Orchard Holdings Pty Ltd v Paxhill Pty Ltd as Trustee for Paxhill Trust trading as Property People [2012] WASC 271 (17 September 2012) (Allanson J)

St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245 ; (2009) 25 VR 666

Orchard Holdings Pty Ltd v Paxhill Pty Ltd as Trustee for Paxhill Trust trading as Property People [2012] WASC 271 -
Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

37. Nettle JA in *Quinerts* [21] examined the differences in language between Part IV and Part IVAA (s 23B and s 24AH), stating:

> It might be thought that the differences were intended to signify that 'a person whose acts or omissions caused ... the loss or damage that is the subject of the [plaintiff's] claim' within the meaning of s 24AH is something other than a 'person liable in respect of the same damage' within the meaning of s 23B. In my view, however, that is not the case. As Besanko J held in Shrimp v Landmark Operations, a 'concurrent wrongdoer' includes a person whose acts or omissions caused the damage or loss that is the subject of the plaintiff's claim only if the person is 'liable' to the plaintiff for that loss and damage. In light of s 24AI(3), however, 'liable' in the sense identified by Besanko J must include both presently liable and liable in the sense of having been liable and, but for ceasing to exist, would still be liable. It would be inapposite to describe a person who was liable, but has ceased to be liable because they have ceased to exist, as being 'liable'. Hence, it appears to me that the drafter of s 24AH chose 'cause' rather than 'liable' to accommodate the possibility that apportionment may be ordered in relation to a concurrent wrongdoer who is not presently liable but who was liable and, but for ceasing to exist, would still be liable. (citations omitted) [22]

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

38. I agree, with respect, with Nettle JA's view that a concurrent wrongdoer is not someone other than a person liable in respect of the same damage. The reasoning explained in *Quinerts* does not address the allegations that USC wishes to make. SEC and ESV, the actors, have not literally ceased to exist. Each has ceased to be 'liable' for such conduct, but the question is not whether SEC and ESV are persons 'liable for the same damage'. On the assumed facts, that cannot be. SEC and ESV are alleged not to be legally responsible for their past conduct from a time well before it caused the plaintiff's damage. The amendments raise a converse proposition to that of the wrongdoer who has ceased to exist: can a defendant have caused the plaintiff's claimed damage and be 'liable', in the sense identified by Besanko J, when that defendant is presently liable for another's causative conduct only because responsibility for the causative conduct has been transferred or novated to the defendant. The original actor has not ceased to exist or become insolvent but has no liability for its conduct. In my view, this converse proposition is answered in the same way.

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

33. The purposes of Part IVAA are readily discernable. In *St George Bank v Quinerts,* [17] this court explained the legislative background against which Part IVAA falls to be construed. After referring to Palmer J's description in *Yates v Mobile Marine Repairs Pty Ltd* [18] of the perceived injustices from undesirable consequences of the joint and several liability rule, which the national co-operative proportionate liability scheme was designed to overcome, [19] Nettle JA remarked that it is important to keep in mind that the proportionate liability provisions were not designed to do any more than that. Nettle JA said:

> In particular, there is no suggestion in Part IVAA that it was intended to do more by way of apportionment than in theory could previously be achieved by contribution under s 23B of the Act. As appears from the Second Reading Speech on the Commonwealth Proportionate Liability Bill, the object of the apportionment legislation was to put a defendant in exactly the position it would have been if all other concurrent wrongdoers liable to make contribution under the Commonwealth equivalent to s 23B were before the court and of sufficient means to meet their obligations to make contribution according to their respective responsibilities for the loss and damage suffered by the plaintiff. [20]

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

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> Bill, the object of the apportionment legislation was to put a defendant in exactly the position it would have been if all other concurrent wrongdoers liable to make contribution under the Commonwealth equivalent to s 23B were before the court and of sufficient means to meet their obligations to make contribution according to their respective responsibilities for the loss and damage suffered by the plaintiff. [20]

via

[20] (citations omitted), with Mandie JA and Beach AJA agreeing. When in *Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors* [2011] NSWCA 390 (15 December 2011), a five member bench on the NSW Court of Appeal convened to consider whether the decision of this court in *Quinerts* , that the decision of the primary judge in that appeal was wrong, was correct, the court agreed with the reasoning in *Quinerts* .

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

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via

[17] [2009] VSCA 245 ; (2009) 25 VR 666, at 682 [59] .

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

47. Finally, the applicant submitted that s 24AF (2) somehow informs the construction and operation of section 24AH (1). This submission is misconceived. The s 24AH inquiry is 'in relation to a claim'. Section 24AF refers to determining liability for multiple apportionable claims. When responsibility is compared and damages apportioned under s 24AI, multiple claims are determined as if the claims were a single claim because the concurrent wrongdoers are liable for the same damage. The analysis in *Quinerts* of the phrase 'loss or damage that is the subject of the plaintiff's claim' in s 24AH explains why that is so.

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

34. If that is so, why are there differences in the language of Part IVAA when compared with Part IV? Does not the use of the word 'caused' in s 24AH(1), rather than the word 'liable' which is used in s 23B on contribution questions, bear the consequences identified by the primary judge: that the wording of s 24AH(1) stands in contrast to s 23B; on its face, demanding direct causation? This court in *Quinerts* did not think so.

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

37. Nettle JA in *Quinerts* [21] examined the differences in language between Part IV and Part IVAA (s 23B and s 24AH), stating:

> It might be thought that the differences were intended to signify that 'a person whose acts or omissions caused ... the loss or damage that is the subject of the [plaintiff's] claim' within the meaning of s 24AH is something other than a 'person liable in respect of the same damage' within the meaning of s 23B. In my view, however, that is not the case. As Besanko J held in Shrimp v Landmark Operations, a 'concurrent wrongdoer' includes a person whose acts or omissions caused the damage or loss that is the subject of the plaintiff's claim only if the person is 'liable' to the plaintiff for that loss and damage. In light of s 24AI(3), however, 'liable' in the sense identified by Besanko J must include both presently liable and liable in the sense of having been liable and, but for ceasing to exist, would still be liable. It would be inapposite to describe a person who was liable, but has ceased to be liable because they have ceased to exist, as being 'liable'. Hence, it appears to me that the drafter of s 24AH chose 'cause' rather than 'liable' to accommodate the possibility that apportionment may be ordered in relation to a concurrent wrongdoer who is not presently liable but who was liable and, but for ceasing to exist, would still be liable. (citations omitted) [22]

via

[21] [2009] VSCA 245 ; (2009) 25 VR 666 .

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 (24 July 2012) (Bongiorno JA, Beach and Dixon Ajja)

33. The purposes of Part IVAA are readily discernable. In *St George Bank v Quinerts,* [17] this court explained the legislative background against which Part IVAA falls to be construed. After referring to Palmer J's description in *Yates v Mobile Marine Repairs Pty Ltd* [18] of the perceived injustices from undesirable consequences of the joint and several liability rule, which the national co-operative proportionate liability scheme was designed to overcome, [19] Nettle JA remarked that it is important to keep in mind that the proportionate liability provisions were not designed to do any more than that. Nettle JA said:

> In particular, there is no suggestion in Part IVAA that it was intended to do more by way of apportionment than in theory could previously be achieved by contribution under s 23B of the Act. As appears from the Second Reading Speech on the Commonwealth Proportionate Liability Bill, the object of the apportionment legislation was to put a defendant in exactly the position it would have been if all other concurrent wrongdoers

liable to make contribution under the Commonwealth equivalent to s 23B were before the court and of sufficient means to meet their obligations to make contribution according to their respective responsibilities for the loss and damage suffered by the plaintiff. [20]

via

[20] (citations omitted), with Mandie JA and Beach AJA agreeing. When in *Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors* [2011] NSWCA 390 (15 December 2011), a five member bench on the NSW Court of Appeal convened to consider whether the decision of this court in *Quinerts* , that the decision of the primary judge in that appeal was wrong, was correct, the court agreed with the reasoning in *Quinerts* .

Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 -
Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 -
Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 -
Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 -
Utility Services Corporation Ltd v SPI Electricity Pty Ltd [2012] VSCA 158 -
Hiss v Galea [2012] VCC 740 -
Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 (14 March 2012) (J Forrest J)

84. Returning to *Quinerts* , it is now established in this State that a concurrent wrongdoer must not only have caused the loss or damage but also have a legal liability for that loss. [58] That conclusion was reached by Nettle JA after an analysis of the Part IV provisions of the *Wrongs Act* , as well as the terms of s 24AH and s 24AI . Accordingly, I accept that there is authority for the proposition advanced by USC that s 24AH cannot be read in isolation from s 24AI . However, *Quinerts* is also authority for the proposition that s 24AH is not to be interpreted broadly but in a manner consistent with the legislative intention.

via

[58] *Quinerts* [64] . See also *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 [59]- [62].

Goddard Elliott v Fritsch [2012] VSC 87 (14 March 2012) (Bell J)

1112. As has been explained fully in the authorities, [437] this marks a significant change from the previous common law position. In cases to which the provisions apply, the joint and several liability rule has been replaced with the proportionate liability rule. Whereas previously a plaintiff could recover all their loss from a single defendant among many who were liable, now the liability of each defendant is limited to their responsible share as determined by the court to be just.

via

[437] *Woods* [2007] VSC 177 (15 June 2007) [42] (Hollingworth J), cited with approval in *Tyrrell v Tyrrells Building Consultancy Pty Ltd* [2008] NSWSC 416 (7 May 2008) [10]-[12] (Austin J); *Gunston* (20 08) 20 VR 33, 49 [60] (Byrne J); *Godfrey Spowers* (2008) 21 VR 84, 102 [94]-[95] (Ashley JA, Nettle and Neave JJA agreeing); *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245 (28 October 2009) [57] (N ettle JA) (' *St George Bank*').

Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 (14 March 2012) (J Forrest J)

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Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 (14 March 2012) (J Forrest J)

78. The background to the proportionate liability legislation enacted in all Australian jurisdictions was set out by Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [48] and need not be repeated here. The end result was the incorporation of the proportionate liability provisions within the Act in 2003. [49] The purpose of the proportionate liability provisions was identified by Nettle JA (with whom Mandie JA and Beach AJA agreed) in *St George Bank Ltd v Quinerts Pty Ltd*. [50] His Honour initially referred to what was said by Palmer J in *Yates v Mobile Marine Repairs Pty Ltd & Anor:* [51]

> [The Part] is designed to alleviate this perceived injustice [of the previous law as to contribution]. It is intended to visit on each concurrent wrongdoer only that amount of liability which the Court considers *'just'*, having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss. How the Court is to assess what is 'just' is not explained. The Court must exercise a large discretionary judgment founded upon the facts proved in each particular case. The principles upon which the Court will exercise this discretionary judgment will come to be developed on a case-by-case basis. However, it seems clear enough that the policy of [the Part] is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability. This calls for the exercise of the same kind of judgment as the Court exercises in apportioning responsibility as between a defendant sued in tort for negligence and a plaintiff who, by his or her own negligence, has been partly responsible for the injury. [52]

Nettle JA then went on to say of the statutory intention underlying the provisions:

> It is important to keep in mind, however, that the proportionate liability provisions were not designed to do any more than that. As Besanko J observed in *Shrimp v Landmark Operations Ltd*, concerning the comparable provisions of Part VIA of the *Trade Practices Act 1974* (Cth) :
>
> > The above references [to extrinsic materials] suggest that the mischief to which the amendments were directed was a plaintiff being able to recover 100% of his damages from any one of several wrongdoer's when that wrongdoer's 'fault', when compared with the other wrongdoers, was less or far less than that. In other words, the amendment was directed to what were considered to be the undesirable consequences of the joint and several liability rule. *There is no suggestion that the mischief the amendments were designed to remedy was any wider than that. The definition of concurrent wrongdoer seems to be the critical subsection and, in my opinion, the word 'caused' in s 87CB(3) should be read as meaning such as to give rise to a liability in the concurrent wrongdoer to the plaintiff or applicant.*
>
> In particular, there is no suggestion in Part IVAA that it was intended to do more by way of apportionment than in theory could previously be achieved by contribution under s 23B of the Act. As appears from the Second Reading Speech on the Commonwealth Proportionate Liability Bill, the object of the

apportionment legislation was to put a defendant in exactly the position it would have been if all other concurrent wrongdoers liable to make contribution under the Commonwealth equivalent to s 23B were before the court and of sufficient means to meet their obligations to make contribution according to their respective responsibilities for the loss and damage suffered by the plaintiff. [53] (emphasis original)

via

[51] [2007] NSWSC 1463 ; *Quinerts* , 57.

Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 (14 March 2012) (J Forrest J)

78. The background to the proportionate liability legislation enacted in all Australian jurisdictions was set out by Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [48] and need not be repeated here. The end result was the incorporation of the proportionate liability provisions within the Act in 2003. [49] The purpose of the proportionate liability provisions was identified by Nettle JA (with whom Mandie JA and Beach AJA agreed) in *St George Bank Ltd v Quinerts Pty Ltd*. [50] His Honour initially referred to what was said by Palmer J in *Yates v Mobile Marine Repairs Pty Ltd & Anor:* [51]

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> Speech on the Commonwealth Proportionate Liability Bill, the object of the apportionment legislation was to put a defendant in exactly the position it would have been if all other concurrent wrongdoers liable to make contribution under the Commonwealth equivalent to s 23B were before the court and of sufficient means to meet their obligations to make contribution according to their respective responsibilities for the loss and damage suffered by the plaintiff. [53] (emphasis original)

via

[50] (2009) 25 VR 666 ("*Quinerts*").

Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 -
Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 -
Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 -
Matthews v SPI Electricity Pty Ltd (Ruling No 6) [2012] VSC 70 -
TCM Builders Pty Ltd v Nikou & Ors (Domestic Building) [2012] VCAT 277 (13 March 2012) (Senior Member E. Riegler)

146. Mr Mitchell referred me to the Victorian Supreme Court of Appeal decision in *St George Bank Limited v Quinerts Pty Ltd,* [36] in support of the proposition that the *mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage*. [37]

via

[36] (2009) 25 VR 666 .

TCM Builders Pty Ltd v Nikou & Ors (Domestic Building) [2012] VCAT 277 -
Valcorp Australia Pty Ltd v Angas Securities Ltd [2012] FCAFC 22 (09 March 2012) (Jacobson, Siopis and Nicholas JJ)

166. In support of ground 3 of the notice of appeal, Valcorp contended that the primary judge had erred in finding that the evidence advanced by the respondents discharged the burden of proving, on a balance of probabilities, that there were eligible applicants for loans whose loan applications were refused by reason of insufficient funds being available to Angas, or the other two respondents. Valcorp, also, contended that the primary judge had erred in assessing the evidence, by applying the "approach" in *La Trobe* , when he should have applied the "approach" adopted in *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 (*Quinerts*).

Valcorp Australia Pty Ltd v Angas Securities Ltd [2012] FCAFC 22 (09 March 2012) (Jacobson, Siopis and Nicholas JJ)

169. First, we do not accept that there is any inconsistency in the "approach" adopted by the Full Court in *La Trobe* , to that adopted by the Victorian Court of Appeal in *Quinerts* . That was recognised specifically in the joint judgment of Jacobson and Besanko JJ in *La Trobe* at [114] . Neither of these cases seek to prescribe a universally applicable means by which a party is to prove a loss of opportunity of some value. The nature of the evidence which will discharge the burden of proving a loss of opportunity, will vary from case to case. At [112] in *La Trobe* , Jacobson and Besanko JJ observed:

> It seems to us that the question is whether an applicant has established on the balance of probabilities that there was another commercial opportunity of some value or there were other commercial opportunities of some value. An applicant who is able to establish a particular opportunity which has been lost as a result of

contravening conduct will no doubt have an easier path to establishing what is necessary for the purposes of recovery. At the same time, an applicant in a case such as this who can do no more than point to the fact that he or she is in the business of lending money and was making loans at the time of the improvident loan is likely to fail to establish the loss of a commercial opportunity of some value.

Valcorp Australia Pty Ltd v Angas Securities Ltd [2012] FCAFC 22 -
Valcorp Australia Pty Ltd v Angas Securities Ltd [2012] FCAFC 22 -
Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

67. The definition of "concurrent wrongdoer" includes causation "independently of each other", and one wrongdoer's acts or omissions can independently cause the same damage or loss as another wrongdoer's acts or omissions; nor is it necessary that one wrongdoer's acts or omissions cause the other wrongdoer's acts or omissions to have effect or could have prevented them from having effect. The damage or loss, however, must first be identified, as was done in *St George Bank Ltd v Quinerts Pty Ltd* at [76] and in relation to the theft analogy and the present case at [82] and [83] respectively. Put in the language of economic interest which I have earlier used, in *Royal Brompton Hotel NHS Trust v Hammond* there were the different interests of timely completion and unchanged contractual rights; in *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Limited* the different interests of knowledge of the site and indemnity against risk of unexpected site conditions; and in *St George Bank Ltd v Quinerts Pty Ltd* the different interests of repayment by the borrower or guarantor and holding adequate security. In my opinion, *St George Bank Ltd v Quinerts Pty Ltd* and its reliance on the prior decisions supports the earlier analysis of the loss the subject of Mitchell Morgan's claim for economic loss against Hunt & Hunt.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

81. It is not necessary to address whether, because of its different facts or otherwise, *St George Bank Ltd v Quinerts Pty Ltd* is outside the comity, or perhaps more, of following the decision of another intermediate Court of Appeal unless persuaded that it is plainly wrong: *Farah Constructions Pty Ltd v Say-dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at [135] ; *Tillman v Attorney-General for the State of New South Wales* [2007] NSWCA 327; (2007) 70 NSWLR 448 at [88], [96]-[110] . If there were occasion to consider whether their Honours' construction and application of the equivalent to Pt 4 of the *Civil Liability Act* was plainly wrong, it will be evident that I would not be persuaded that it is. In my opinion it provides strong guidance to the conclusion to which I have come in the present case.

The proportional limitation

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

50. *St George Bank Ltd v Quinerts Pty Ltd* is the decision occasioning the constitution of a Bench of five. The Court in that case found assistance in the decisions of the House of Lords in *Royal Brompton Hotel NHS Trust v Hammond* (2002) 1 WLR 1397 and the Court of Appeal of Alberta in *Wallace v Litwiniuk* [2001] ABCA 118. I go first to those cases.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

66. Some of the cases are factually distinguishable. In *Wallace v Litwiniuk* , and it would seem also in *Royal Brompton Hotel NHS Trust v Hammond* , causation of one "damage" involved loss

of the claim to the other "damage"; that is, the plaintiff's complaint was that the defendant's wrongdoing meant that there was no longer an enforceable claim against the other wrongdoer. That was not so in *St George Bank Ltd v Quinerts Pty Ltd* , nor had it been so in *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Limited* , and it did not inform the reasoning in *Royal Brompton Hotel NHS Trust v Hammond.* The decisions turned on identification of the damage, and the identification was by regard to the nature of the harm suffered in respect of which the claim was made. In *St George Bank Ltd v Quinerts Pty Ltd* the loss the subject of the bank's claims against the borrower and guarantor was their failure to repay the loan, the loss the subject of the bank's claim against the valuer was absence of adequate security, and they were different losses. The Court regarded the loss the subject of Mitchell Morgan's claims against the fraudsters as parting with its money and the loss the subject of its claim against the solicitors as not having an effective mortgage.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

69. Hunt & Hunt submitted that, while the decision in *St George Bank Ltd v Quinerts Pty Ltd* was correct, the Court's construction and application of the proportionate liability provisions was incorrect. The submissions were detailed, and I intend no disrespect in seeking to capture their substance.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

PROPORTIONATE LIABILITY - loan and mortgage transaction - fraudsters forged signatures of purported borrower/mortgagor - mortgage registered but lender's interest not indefeasible as security for loan amount - fraudsters liable to lender for fraud - lender's solicitors liable to lender for negligence in failing to word mortgage so as to be indefeasible as security for loan amount - whether solicitors concurrent wrongdoer together with fraudsters within Pt 4 of Civil Liability Act 2002 - whether fraudsters' acts or omissions caused the damage or loss the subject of lender's claim against solicitors - lender's claim a claim for economic loss - difference between damage and damages - identification of economic interest harmed - "mutual discharge test"- same loss not caused by respective wrongdoings- consideration of St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245 ; (2009) 25 VR 666 - solicitors not concurrent wrongdoer.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

68. Nettle JA also saw different arrival at damages as an indication of different damage, in *St George Bank Ltd v Quinerts Pty Ltd* at [76] and in relation to the present case at [83] . In the present case the different damage caused by Hunt & Hunt's negligence, or in the language of the definition of "concurrent wrongdoer" the damage or loss the subject of the claim against Hunt & Hunt, is indicated by the fact that the damages recoverable from Hunt & Hunt are the lost value of the mortgage of the Enmore property, not the amount paid out by Mitchell Morgan on the fraudulent loan transaction. As it happens the money amount may be the same, but if they are that is identity of damages rather than identity of damage.

Hunt & Hunt's submissions

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

67. The definition of "concurrent wrongdoer" includes causation "independently of each other", and one wrongdoer's acts or omissions can independently cause the same damage or loss as another wrongdoer's acts or omissions; nor is it necessary that one wrongdoer's acts or omissions cause the other wrongdoer's acts or omissions to have effect or could have

prevented them from having effect. The damage or loss, however, must first be identified, as was done in *St George Bank Ltd v Quinerts Pty Ltd* at [76] and in relation to the theft analogy and the present case at [82] and [83] respectively. Put in the language of economic interest which I have earlier used, in *Royal Brompton Hotel NHS Trust v Hammond* there were the different interests of timely completion and unchanged contractual rights; in *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Limited* the different interests of knowledge of the site and indemnity against risk of unexpected site conditions; and in *St George Bank Ltd v Quinerts Pty Ltd* the different interests of repayment by the borrower or guarantor and holding adequate security. In my opinion, *St George Bank Ltd v Quinerts Pty Ltd* and its reliance on the prior decisions supports the earlier analysis of the loss the subject of Mitchell Morgan's claim for economic loss against Hunt & Hunt.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

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Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

65. In *Ashbrooke Institute Pty Ltd v Bartone Biomedical Pty Ltd* [2010] VSC 579 solicitors negligently failed to advise that a guarantee should be obtained from directors of the company purchasing a business. The company failed to pay. With a footnoted reference to *St George Bank Ltd v Quinerts Pty Ltd* , Hargrave J held that the company was not a concurrent wrongdoer in relation to the claim against the solicitors, saying (at [126]) -

"The loss or damage caused by the purchaser was its failure to pay the balance of the purchase price due under the contract of sale. Nothing which Holding Redlich did or failed to do caused the purchaser to fail to pay that amount. The damage caused by Holding Redlich was to deprive the plaintiff of the opportunity to obtain security for the purchaser's obligations under the contract, by requesting a guarantee from Dr and Mrs Bartone. Nothing which the purchaser did or failed to do caused the plaintiff to accept inadequate security for the purchaser's obligation to pay the price."

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

49. In *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245; (2009) 25 VR 666 Nettle JA, with whom Mandie JA and Beach AJA agreed, explained the drafting of s 24AH in Pt IV AA of the *Wrongs Act* 1958 (Vic) in relation to s 23B of the *Wrongs Act* , corresponding to ss 35 and 5(1)(c) . His Honour concluded (at [68]) that "the loss or damage that is the subject of the claim" in s 24

AH has the same meaning as "the same damage" in s 23B . The language differs slightly between the States, but his Honour's conclusion is applicable to ss 35 and 5(1)(c) and I respectfully agree with it.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

59. I go then to *St George Bank Ltd v Quinerts Pty Ltd* . The bank lent $640,000 on a negligent valuation. The borrower and his guarantor defaulted, the property realised less than the amount of the loan (and considerably less than the valuation), and the bank claimed damages from the valuer. One issue on appeal was whether the valuer's liability should be limited pursuant to Pt IVAA of the *Wrongs Act* because the borrower and guarantor were concurrent wrongdoers whose failure to repay the money was independently causative of the loss the subject of the claim against the valuer.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

74. Hunt & Hunt then invited attention to the mutual discharge test considered by Lord Steyn, with reference to *Howkins & Harrison v Tyler* (2001) Lloyd's Rep PN I, in *Royal Brompton Hotel NHS Trust v Hammond* . The facts in *Howkins & Harrison v Tyler* were similar to those in *St George Bank Ltd v Quinerts Pty Ltd* . The test there suggested postulated that A and B were both said to be liable to C, and was that they were liable in respect of the same damage only if payment by A to C would satisfy or reduce B's liability to C and vice versa. The thrust of Hunt & Hunt's submission was that it would be overcompensated if it could have judgment against both Messrs Caradonna and Flammia and Hunt & Hunt, that payment by one ought to satisfy or reduce the liability of the other, and so that Messrs Caradonna and Flammia caused the same damage as Hunt & Hunt.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 (15 December 2011) (Bathurst CJ, Giles, Campbell and Macfarlan JJA, Sackville AJA)

67. The definition of "concurrent wrongdoer" includes causation "independently of each other", and one wrongdoer's acts or omissions can independently cause the same damage or loss as another wrongdoer's acts or omissions; nor is it necessary that one wrongdoer's acts or omissions cause the other wrongdoer's acts or omissions to have effect or could have prevented them from having effect. The damage or loss, however, must first be identified, as was done in *St George Bank Ltd v Quinerts Pty Ltd* at [76] and in relation to the theft analogy and the present case at [82] and [83] respectively. Put in the language of economic interest which I have earlier used, in *Royal Brompton Hotel NHS Trust v Hammond* there were the different interests of timely completion and unchanged contractual rights; in *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Limited* the different interests of knowledge of the site and indemnity against risk of unexpected site conditions; and in *St George Bank Ltd v Quinerts Pty Ltd* the different interests of repayment by the borrower or guarantor and holding adequate security. In my opinion, *St George Bank Ltd v Quinerts Pty Ltd* and its reliance on the prior decisions supports the earlier analysis of the loss the subject of Mitchell Morgan's claim for economic loss against Hunt & Hunt.

Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 -
Mitchell Morgan Nominees Pty Ltd v Vella [2011] NSWCA 390 -
Hamod v State of New South Wales [2011] NSWCA 367 (28 November 2011) (Campbell, Macfarlan and Young JJA)
St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245; (2009) 25 VR 666
Suttor v Gundowda Pty Ltd

Hamod v State of New South Wales [2011] NSWCA 367 (28 November 2011) (Campbell, Macfarlan and Young JJA)

134. This submission (Orange 129 [41]) is based on *Shrimp v Landmark Operations Ltd* [2007] FCA 1468; 163 FCR 510 and *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245; 25 VR 666 .

Hamod v State of New South Wales [2011] NSWCA 367 -
Peachbulk Pty Ltd v R T Edgar Pty Ltd [2011] VCC 1370 (20 October 2011) (His Honour Judge Ginnane)

> 396 The vendors claimed that R T Edgar and Mr Herman were concurrent wrongdoers within the meaning of s.87CB(3) of the *Australian Competition and Consumer Act* 2010 (the *Trade Practices Act* 1974) and s. 24AH of the *Wrongs Act* 1958 in relation to the claims by Peachbulk against the vendors. They claimed that if the vendors were liable to Peachbulk, that liability was limited to an amount reflecting that proportion of the loss or claim that the Court considers just having regard to R T Edgar Toorak and Mr Herman's responsibility and the vendors' responsibility for the loss and damage suffered. They submitted that the appropriate apportionment to them whose "contribution to the ultimate loss is insignificant in [the] case" was 0 per cent. [170]

via

> [170] Citing *Tarik Solak v Bank of Western Australia Ltd* [2009] VSC 82; however an appeal from that judgment was allowed: see *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* [2010] VSCA 355; and see also *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245

Major Media Pty Ltd v Hays Specialist Recruitment [2011] VCC 1362 (14 October 2011) (His Honour Judge Anderson)

> *Act 1958* – *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666

Major Media Pty Ltd v Hays Specialist Recruitment [2011] VCC 1362 -
Major Media Pty Ltd v Hays Specialist Recruitment [2011] VCC 1362 -
Gunnersen v Henwood [2011] VSC 440 -
Bosi Security Services Limited v Australia and New Zealand Banking Group Limited [2011] VSC 255 (15 June 2011) (Davies J)

95. The growers' case on valuation depended on them showing on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the projects restructured and continued to full term. In order to value that lost opportunity the Court then makes an assessment of the probability or possibility of a viable restructure occurring, based on a consideration of the evidence. [103] The value is ascertained by reference to the degree of probability or possibility of the event happening so that to have value, the possibility must be more than a mere hope or speculation. [104] Thus the growers' case required some evidentiary basis from which the Court could evaluate the likelihood of the restructure counterfactual eventuating had the growers' rights not been extinguished. [105]

via

> [105] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 ; *Tabet v Gett* (2010) 240 CLR 537.

Bosi Security Services Limited v Australia and New Zealand Banking Group Limited [2011] VSC 255 -
Bosi Security Services Limited v Australia and New Zealand Banking Group Limited [2011] VSC 255 -
La Trobe Capital & Mortgage Corporation Ltd v Hay property Consultants Pty Ltd [2011] FCAFC 4 (19 January 2011) (Finkelstein, Jacobson and Besanko JJ)

93. In reaching the conclusion that La Trobe had not proved its claim, the judge placed much reliance on *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245 . The facts of that case are remarkably similar to this case. St George Bank claimed damages (lost capital and foregone interest) resulting from an overvaluation of an apartment that was given as security for a

loan. The valuation was established to be negligently carried out. The Bank alleged that it would not have entered into the loan but for the negligent valuation. A County Court judge rejected the claim. The Court of Appeal upheld that finding. It seems that the bank did not lead evidence of what it would have done had it not lent any money on the negligent valuation. Counsel for the bank submitted that it was obvious the bank was in the business of lending money and the judge should have assumed that the bank would have entered into a profitable transaction on comparable terms.

La Trobe Capital & Mortgage Corporation Ltd v Hay property Consultants Pty Ltd [2011] FCAFC 4 (19 January 2011) (Finkelstein, Jacobson and Besanko JJ)

St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245

Swingcastle Ltd v Gibson

La Trobe Capital & Mortgage Corporation Ltd v Hay property Consultants Pty Ltd [2011] FCAFC 4 (19 January 2011) (Finkelstein, Jacobson and Besanko JJ)

114. The analysis to which his Honour refers in this passage is the analysis by Nettle JA in *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 . We do not think that there is any inconsistency between what we have said and what was said by Nettle JA. We do not read his Honour's reasons as suggesting that a particular alternative transaction *must* be proved before recovery is allowed. The fact is that the evidence in the case before Nettle JA was insufficient to satisfy his Honour that there was a lost commercial opportunity of some value.

Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd [2010] VSCA 355 (20 December 2010) (Maxwell P, Tate JA and Habersberger AJA)

89. The decision of this Court in *St George Bank Limited v Quinerts Pty Ltd* [64] made clear that the purpose of the proportionate liability legislation is to avoid the perceived injustice of the joint and several liability rule. In that case, the Court (Nettle JA) said:

> Proportionate liability provisions of the kind prescribed by Part IVAA were adopted by the Commonwealth and each of the States and Territories as in effect a national co-operative scheme designed to overcome what were perceived to be undesirable consequences of the joint and several liability rule. As Palmer J explained in *Yates v Mobile Marine Repairs Pty Ltd*: [65]
>
> > The object of [the Part] is remedial and it dramatically changes the previous law. Formerly, a plaintiff could choose to sue only one of several wrongdoers who caused the same loss and the Court could enter judgment for the whole of that loss against that defendant. Even if the defendant cross claimed in the proceedings for indemnity or contribution against the other wrongdoers, the plaintiff could enforce a judgment against the defendant alone for the whole of the loss, leaving the defendant to recover from the cross defendants, if it could. Sometimes the defendant obtained judgment against a cross defendant but could not recover the judgment because of the cross defendant's insolvency.
> >
> > [The Part] is designed to alleviate this perceived injustice. It is intended to visit on each concurrent wrongdoer only that amount of liability which the Court considers 'just', having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss. How the Court is to assess what is 'just' is not explained. The Court must exercise a large discretionary judgment founded upon the facts proved in each particular case. The principles upon which the Court will exercise this discretionary judgment will come to be developed on a case-by-case basis. However, it seems clear enough that the policy of [the

> Part] is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability. This calls for the exercise of the same kind of judgment as the Court exercises in apportioning responsibility as between a defendant sued in tort for negligence and a plaintiff who, by his or her own negligence, has been partly responsible for the injury.
>
> It is important to keep in mind, however, that the proportionate liability provisions were not designed to do any more than that. [66]

Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd [2010] VSCA 355 -
Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd [2010] VSCA 355 -
Ashbrooke Institute Pty Ltd v Holding Redlich [2010] VSC 579 (13 December 2010) (Hargrave J)

126. It was submitted by Holding Redlich that the plaintiff's claim against it is an apportionable claim under Part IVAA of the *Wrongs Act 1958* (Vic) , because the purchaser is a concurrent wrongdoer within the meaning of s 24AH of that Act. On this basis, it was submitted that the liability of Holding Redlich should be reduced under s 24AI of the Act to reflect the proportion of its responsibility for the plaintiff's loss. I do not accept that submission. The purchaser is not a concurrent wrongdoer in relation to the plaintiff's claim against Holding Redlich. The loss or damage caused by the purchaser was its failure to pay the balance of the purchase price due under the contract of sale. Nothing which Holding Redlich did or failed to do caused the purchaser to fail to pay that amount. The damage caused by Holding Redlich was to deprive the plaintiff of the opportunity to obtain security for the purchaser's obligations under the contract, by requesting a guarantee from Dr and Mrs Bartone. Nothing which the purchaser did or failed to do caused the plaintiff to accept inadequate security for the purchaser's obligation to pay the price. [16]

via

[16] *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245, [56]-[77] .

Metzke and Allen v Sali [2010] VSCA 267 (15 October 2010) (Warren CJ, Neave JA, Beach AJA)

68. Thirdly, Senior Counsel for the Sali parties submitted that the loss suffered as a result of Mr Allen's breach of his duty of care was not 'the same loss' as the loss caused by Mr Blizzard' s breach of duty. Thus, on the authority of *Quinerts* , [39] Mr Blizzard was not a concurrent wrongdoer and the loss or damage attributable to Metzke & Allen's breach of duty was not apportionable.

via

[39] Ibid .

Metzke and Allen v Sali [2010] VSCA 267 (15 October 2010) (Warren CJ, Neave JA, Beach AJA)

67. Secondly, at the hearing of the appeal, Senior Counsel for the Sali parties contended that, even if it was open to the judge to conclude that Mr Blizzard owed a *Hedley Byrne* duty to S Sali & Sons, s 24AH of the *Wrongs Act 1958* did not apply. This was because the provision applied only where the acts of one wrongdoer had caused the loss arising from the acts of the other wrongdoer and vice versa. In this case there was no relationship between the loss caused by Mr Blizzard's negligence and the loss caused by Mr Allen's negligence. Senior Counsel relied on the decision of this Court in *St George Bank Limited v Quinerts Pty Ltd* [38] in support of that submission.

Metzke and Allen v Sali [2010] VSCA 267 (15 October 2010) (Warren CJ, Neave JA, Beach AJA)

> APPORTIONMENT - Concurrent wrongdoer – Whether trial judge erred in finding of concurrent wrongdoer – Whether error in calculation of apportionment - *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 - *Spies v The Queen* (2000) 201 CLR 603 - *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 - *Wrongs Act* 1958 ss 24AH(1), 26(1)(b) – Appeal allowed in part – Cross appeal dismissed.

Metzke and Allen v Sali [2010] VSCA 267 -
Metzke and Allen v Sali [2010] VSCA 267 -
Metzke and Allen v Sali [2010] VSCA 267 -
Metzke and Allen v Sali [2010] VSCA 267 -
Metzke and Allen v Sali [2010] VSCA 267 -
Metzke and Allen v Sali [2010] VSCA 267 -
Metzke and Allen v Sali [2010] VSCA 267 -
Bevendale Pty Ltd v Equiset Construction (Epping) Pty Ltd [2010] VCC 805 (09 June 2010) (His Honour Judge Shelton)

> Catchwords: *Part IVAA Wrongs Act* 1958 – in normal proceeding by proprietor against contractor, sub-contractor is not concurrent wrongdoer – Rule 9.06(b) of the *County Court Civil Procedure Rules* 2008 – *Atkins v Interprac Financial Planning Pty Ltd & Crole (No 2)* [2008] VSC 99 – *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245 – *Woolcock Street Investments Pty Ltd v CFG Pty Ltd* (2004) 216 CLR 515.

Bevendale Pty Ltd v Equiset Construction (Epping) Pty Ltd [2010] VCC 805 -
Balanced Securities Ltd v Bianco [2010] VSC 201 (21 May 2010) (J Forrest J)

10. Recently the Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* [8] dealt with an argument by a bank for *Hungerfords* damages said to flow from breach of contract, negligence and misleading and deceptive conduct on the part of a valuer engaged by it in relation to a mortgaged property. Nettle JA (with whom Mandie JA and Beach AJA agreed) said as follows:

> > ...In my view the judge's analysis on this point was correct. The decision of the High Court in *Hungerford v Walker* established that expenses incurred and opportunity costs arising from money being paid away or withheld as a result of a negligent breach of contract are able to be recovered as pecuniary losses suffered by a plaintiff as a result of the defendant's conduct. But as the High Court later explained in *Commonwealth v Amann Aviation Pty Ltd*, such damages are simply manifestations of the principle that a party who has sustained loss by reason of a breach of contract is entitled to be placed in the same position, so far as money can do it, as if the contract had been performed. Consequently, the incurrence of such losses must be proved. It is not enough for a party like the Bank simply to assert that, because it is in the business of lending money, it must follow that it has suffered a loss equal to the return on funds which it might have achieved if it had entered into a successful transaction at the same rate of return as the failed transaction. *At best, the opportunity foregone represents a loss of a chance to invest in a more successful transaction and, depending on the facts of a case, the value of the loss may have to be discounted significantly to allow for the vicissitudes of chance.* [9] (emphasis added)

via

[9] Ibid [25] .

Balanced Securities Ltd v Bianco [2010] VSC 201 -
Balanced Securities Ltd v Bianco [2010] VSC 201 -
The Owners Strata Plan v Brookfield Multiplex Limited [2010] NSWSC 360 (23 April 2010) (McDougall J)

> 4 The debate proceeded also on the basis that, for a person to be a concurrent wrongdoer under Part 4 of the *Civil Liability Act* , the person must be liable to the plaintiff: perhaps, an extended reading of the word "caused" in the definition of "concurrent wrongdoer" in s 34(2) of that Act. The reasons for that construction were given by Besanko J in *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 at 523 [62] . His Honour's analysis was adopted and applied by Nettle JA, with whom Mandie J and Beach AJA agreed, in *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 at [58] , [64] .

Legal Services Board v Werden [2010] VSC 105 -
Legal Services Board v Werden [2010] VSC 105 -
Legal Services Board v Werden [2010] VSC 105 -
Legal Services Board v Werden [2010] VSC 105 -
Legal Services Board v Werden [2010] VSC 105 -
La Trobe Capital and Mortgage Corporation Limited v Hay Property Consultants Pty Ltd [2010] FCA 250 (18 March 2010) (Marshall J)

> 31. A similar issue was recently the subject of discussion in the Victorian Court of Appeal by Nettle JA, with whom Mandie JJA and Beach AJA concurred. In *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 , the Court of Appeal considered a claim for damages by a bank as a result of a negligent over-valuation. After selling the subject property the bank lost $100,000 plus interest. It claimed the right to be put in the position which it would have been in but for the loan. The valuer claimed that if the valuation had been $500,000, the bank would have lent less to the borrower and therefore the bank's claim should be limited to, the difference between its loss and that which it would have incurred on the supported "alternative transaction".

La Trobe Capital and Mortgage Corporation Limited v Hay Property Consultants Pty Ltd [2010] FCA 250 -
Dymocks Book Arcade Pty Ltd v Capral Ltd [2010] NSWSC 195 (11 March 2010) (McDougall J)

> 13 However, matters did not stop there. The plaintiff sought and was granted leave to amend so as to introduce its own claims under the *Trade Practices Act* . The architect has now propounded yet another version of its cross-claim, in which it seeks contribution or indemnity in respect of that aspect of the plaintiff's claim only. It was common ground, at least for the purposes of the hearing before me today, that the plaintiff's claim under the *Trade Practices Act* was not an apportionable claim, because it was based on a cause of action which arose prior to the commencement of Part VIA of the *Trade Practices Act* . The decisions that establish that point include *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 . On that basis, it appeared to be common ground, the limited cross-claim that was propounded should be permitted to proceed.

AED Oil Ltd v Back (No 2) [2010] VSC 43 (25 February 2010) (Judd J)

> 22. In *St George Bank Ltd v Quinerts Pty Ltd* [8] Nettle JA undertook a brief review of what he described as, in effect, the national cooperative scheme to overcome what were perceived to be undesirable consequences of the joint and several liability rule. His Honour referred to *Al exander v Perpetual Trustees WA Ltd* ,[9] setting out the following passage in which the High Court referred with approval to the decision of the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond*: [10]
>
> > The evident remedial purpose of the legislation has been relied upon, in both the United Kingdom and this country, to support what is said to be a wide or broad interpretation of the statutory right and remedy which it created. Such expressions mask the requirement that the legislation be given its proper

construction having regard to its purpose and scope. The new statutory right and remedy do not operate at large. Rather, they are available only to a party who meets the criteria specified in Pt IV. In *Royal Brompton Hospital*, Lord Bingham of Cornhill said of the UK Act:

> When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?

[Translated to the present appeal, A represents the plaintiffs, B the respondents, and C Minter Ellison.]

Where a person has suffered damage in connection with some transactions or events involving the wrongful conduct of others, the statutory creation of rights of contribution between the wrongdoers seeks to address the injustice that may result in some cases if the victim, by his or her selection of defendants, could throw the burden of liability on to one or some of the wrongdoers, to the exclusion of the others. A policy of preventing or limiting such injustice will require a legislature to make choices between different methods of giving effect to that policy. Those choices will be reflected in the terms of the legislation. The Act directs attention to a common liability by using in s 23B the expression 'in respect of the same damage'. This is a narrower concept than that of liabilities arising out of, or by reason of, the same transactions or related transactions. In resolving questions of construction of the legislation, it is not to be assumed that the legislative purpose is always to provide the widest possible sharing of liabilities, actual or potential, real or hypothetical.[11]

via

[8] [2009] VSCA 245 .

AED Oil Ltd v Back (No 2) [2010] VSC 43 -
Main Road Property Group Pty Ltd & Ors v Pelligra & Sons Pty Ltd & Ors [2010] VSC 5 (15 January 2010) (Croft J)

10. As was emphasised by Middleton J in *Dartberg* the assessment of the application or otherwise of Part IVAA of the *Wrongs Act* at a preliminary stage of the proceedings does not pre-empt the further consideration and final determination of the issue in the course of the trial, in light of a full hearing of the evidence and submissions. This process at trial will involve the determination whether or not a claim is an "apportionable claim" under Part IVAA and, if so, the consequences in the particular circumstances with respect to the apportionment of liability among each of the defendants subject to such a claim. In my view the final determination of the issue at an earlier stage of proceedings carries a significant risk of injustice when the result is to preclude the reduction of proportionate liability of a defendant or defendants as a result.

St George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245 is an example of an aspect of the process of final determination of the question whether a claim is an apportionable claim as a result of the process of trial and, in that instance, an appeal.

Main Road Property Group Pty Ltd & Ors v Pelligra & Sons Pty Ltd & Ors [2010] VSC 5 -
Main Road Property Group Pty Ltd & Ors v Pelligra & Sons Pty Ltd & Ors [2010] VSC 5 -
Lojies Pty Ltd v Wu, Xun [2009] VCC 1395 (20 November 2009) (Her Honour Judge Kennedy)

63 As proponent of the issue (that a variation was made to the written agreement as alleged) Mr Wu bears the evidential burden of persuading the court to decide that issue in his favour. [4]

via

[4] *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245 at [22]