Selig v Wealthsure Pty Ltd - [2015] HCA 18

HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

RONALD SELIG & ANOR APPELLANTS

AND

WEALTHSURE PTY LTD & ORS RESPONDENTS

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

ORDER

1. *Appeal allowed.*

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

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

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

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

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

On appeal from the Federal Court of Australia

Representation

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

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

No appearance for the third to ninth respondents

Submitting appearance for the tenth to thirteenth respondents

CATCHWORDS

Selig v Wealthsure Pty Ltd

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

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

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

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

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

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

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

4. **Following paragraph cited by:**

Australian Securities and Investments Commission v Macrolend Pty Ltd (No 3) (19 September 2025) (Sarah C Derrington J)

87. The principles applicable to these provisions are the same and are well settled: *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4] (French CJ, Kiefel, Bell and Keane JJ) . Nevertheless, Mr Hodgson's evidence was that he had not understood the normative prohibition on misleading or deceptive conduct until the mediation in this matter. I will return to that evidence. It is as well therefore to set out the useful summary of the principles by O'Bryan J in *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 at [98]-[101] :

98 The applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law , the Corporations Act and the ASIC Act are well known. The **central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error** (that is, to form an erroneous assumption or conclusion about some fact or matter): *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (*Puxu*) at 198 per Gibbs CJ; *Tac*

o Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177 (*Taco Bell*) at 200 ; *Campomar* at [98]; *ACCC v TPG Internet Pty Ltd* (20 13) 250 CLR 640 (*TPG Internet*) at [39] per French CJ, Crennan, Bell and Keane JJ; *Campbell* at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:

(a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (*Global Sportsman*) at 87 ; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).

(b) Second, **it is not necessary to prove an intention to mislead or deceive**: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ.

(c) Third, it is **unnecessary to prove that the conduct in question actually deceived or misled anyone**: *Puxu* at 198 per Gibbs CJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ.

(d) Fourth, it is not sufficient if the conduct merely causes confusion: *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Campomar* at [106].

99 In assessing whether conduct is likely to mislead or deceive, the **courts have distinguished between two broad categories of conduct, being conduct that is directed to the public generally or a section of the public, and conduct that is directed to an identified individual.** As explained by the High Court in *Campomar* , the question whether conduct in the former category is likely to mislead or deceive has to be approached at a level of abstraction, where the Court must consider the likely characteristics of the persons who comprise the relevant class of persons to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful (at [101]-[105]). In *G oogle Inc v ACCC* (2013) 249 CLR 435, French CJ and Crennan and Kiefel JJ (as her Honour then was) confirmed that, in assessing the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the **Court must consider**

whether the "ordinary" or "reasonable" members of that class would be misled or deceived (at [7]). In the case of conduct directed to an identified individual, it is unnecessary to approach the question at an abstract level; the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned. However, in both cases, the relevant question is objective: whether the conduct has a sufficient tendency to induce error. Even in the case of an express representation to an identified individual, it is not necessary (for the purposes of establishing liability) to show that the individual was in fact misled. …

100 The question **whether conduct is misleading or deceptive, and thereby contravenes the statutory prohibition, is logically anterior to the question whether any person has suffered loss** or damage by reason of the conduct: *Campbell* at [24] per French CJ; *T PG Internet* at [49]. As observed by French CJ in *Campbell* (at [28]):

> Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.

101 Similarly, **where proceedings are brought by an enforcement agency, the Court has frequently imposed pecuniary penalties and other forms of relief** for contraventions of the prohibition of misleading or deceptive conduct **while expressly recognising that the conduct may not have caused loss**: see for example *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [57] ; *ASIC v GE Capital Finance Australia* [2014] FCA 701 at [90] ; *ASIC v Huntley Management Ltd* (2017) 122 ACSR 163; [2017] 35 ACLC 17-035 ; FCA 770 at [36][39].

(Emphasis added.)

Australian Securities and Investments Commission v La Trobe Financial Asset Management Ltd (26 November 2021) (O'Bryan J)

10. Section 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act are in similar terms and the same principles apply to both provisions: *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at [4] . Further, although the language used in s 12DB(1) of the ASIC Act ("false or misleading") is not identical to that in s 12DA(1) and s 1041H(1) ("misleading or deceptive"), there is no material difference between those expressions in terms of their legal application: see *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14] per

Gordon J; *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 at [2263] per Beach J; *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; 147 ACSR 266 at [47] per Yates J.

Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3) (19 April 2021) (Anderson J)

342. Section 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* are in analogous terms and the same principles are applicable to both provisions: *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 (***Dover***) at [92] (citing *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4]).

Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2) (23 March 2021) (Anderson J)

29. Section 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* are in analogous terms and the same principles are applicable to both provisions: *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 (***Dover***) at [92] (citing *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4]).

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (22 November 2019) (O'Bryan J)

92. The two provisions are in analogous terms and the same principles are applicable to both provisions: *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at [4] .

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

5. The claims by each of the first, second, fifth and sixth respondents that any liability to the appellants should be limited to a proportion of the appellants' loss and damage relied upon the provisions of Div 2A of Pt 7.10 of the *Corporations Act* 2001 ("Div 2A") and corresponding provisions of the ASIC Act [1] .

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

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

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

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

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

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

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

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

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

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

"(1) This Division applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 1041I for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 1041H .

(2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Division, a ***concurrent wrongdoer*** , in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).

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

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

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

11. Section 1041I(1) creates a cause of action for contraventions of each of ss 1041E, 1041F, 1041G and 1041H. However, s 1041L(1) nominates only claims for loss or damage caused by conduct that was done in contravention of s 1041H to be apportionable claims.

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

"Despite subsection (1), if:

(a) a person (the ***claimant***) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the ***defendant***) that was done in contravention of section 1041H ; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage."

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

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

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

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

"In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion

of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

(b) the court may give judgment against the defendant for not more than that amount."

17. Sub-section (2) provides that:

"If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and

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

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

"In apportioning responsibility between defendants in the proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings."

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

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

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[6] Subdivision GA of Div 2 of Pt 2 .

[7] Part VIA.

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

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

19. At the time these statutes were amended to provide for proportionate liability with respect to apportionable claims, such provision had already been made with respect to actions of certain kinds in State and Territory legislation dealing with civil liability [10] . It was observed in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [11] that the background to the inquiry which led to the introduction of this legislation in the States and Territories was a perceived crisis regarding the cost of liability insurance. The Davis Report[12] had noted that people, such as professional people, who are usually insured against liability to clients are often the sole target of legal action when losses are suffered, despite the involvement of others. It was suggested[13] that, in actions of negligence involving claims for property damage or economic loss, a defendant's liability should be limited to his or her degree of fault.

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

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

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

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

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20. **Following paragraph cited by:**

Kumar v Sydney Western Realty Pty Ltd (No. 2) (31 August 2021) (Abadee DCJ)

> 120. Whether conduct is misleading or deceptive is to be determined by deciding whether the conduct, when viewed in all of the circumstances, could be characterised as misleading or deceptive. This is a question of fact, determined objectively. Thus, there is no fault element in proof of an action for misleading conduct. Further, and what makes the action even more attractive to a claimant in comparison to an action in negligence based upon a misrepresentation (or omission to disclose information), there is no requirement to prove any duty of care, nor the foreseeability of outcome [5] . Because of the objective nature of the inquiry, when characterising the advertisement, the question is not how the plaintiff interpreted it, but how a reasonable person in her position would have interpreted it; and, further, it matters not what the Agent's state of mind was when engaging in the conduct.

via

5. Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357 ("Miller") per French CJ and Kiefel J at [5] ; Selig v Wealthsure (2015) 255 CLR 661 at [20]

Dunn v Hanson Australasia Pty Ltd (12 July 2017) (Mossop J)

32. An inquiry and subsequent report by Professor Davis in 1995 ('the Davis Report') resulted over time in the Commonwealth States and Territories enacting legislation providing for regimes of proportionate liability for various types of claims: see *Hunt & Hunt Lawyers v Mitchell Morgan Nominess Pty Ltd* [2013] HCA 10; 247 CLR 613 at [10]-[14] ; *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [20] . In the present case there are three different regimes that potentially apply to different aspects of the plaintiffs claims. They involve the provisions of the *Buildin g Act* , *Civil Law (Wrongs) Act 2002* (' CLW Act ') and the TPA .

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

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

[15] Now Australian Consumer Law, s 18.

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

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21. **Following paragraph cited by:**

Williams v Pisano (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

Selig v Wealthsure at [21] .

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

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

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

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

An "apportionable claim"?

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

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

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

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

26. That the text of s 1041L(1) restricts an apportionable claim to one based on s 1041H does not mean, as the first and second respondents' submissions imply, that Div 2A would have an unduly limited application. It is well known that misleading and deceptive conduct may take many forms. It may involve a variety of forms of conduct by a number of persons. A number of instances of misleading and deceptive conduct, of different kinds, may combine to cause the loss and damage complained of.

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

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

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

29. **Following paragraph cited by:**

R v Jacobs Group (Australia) Pty Ltd (11 July 2022) (Bell CJ, Walton and Davies JJ)

84. The Crown also submitted that the word “benefit” in s 70.2(1)(a) and (b) of the *Criminal Code* simply refers, in the context of a monetary bribe, to the payment of money to the foreign official, irrespective of what it may have cost the foreign official to accept the payment. In the same way, it was submitted that the benefit to the corporation must simply mean or at least include any payment received. In making this submission, the Crown called in aid the principle that, where the same word is used in a statutory provision, it will ordinarily attract the same meaning, citing in this context *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4; (2016) 328 ALR 375 (**Tabcorp**) at [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; [2015] HCA 18 at [29] (French CJ, Kiefel, Bell and Keane JJ) ; and *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 381 ALR 601 at [95] (Edelman J).

Williams v Pisano (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

Selig v Wealthsure at [29] .

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

30. The first and second respondents acknowledge that their approach to what is an "apportionable claim" involves an extension of what s 1041L(1) identifies as a claim. It was put by them that s 1041L(1) should be regarded a contingent or partial definition, with the balance of the definition being supplied by s 1041L(2) . This submission is directly contradicted by s 1041L(4) , which expressly states that "apportionable claims are limited to those claims specified in subsection (1)."

31. **Following paragraph cited by:**

Williams v Pisano (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

Selig v Wealthsure at [31] .

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

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

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

34. **Following paragraph cited by:**

Shinwari v Anjoul by her tutor Therese Anjoul (07 April 2017) (McColl and Gleeson JJA, Emmett AJA)

Cf Selig at [34] .

Smart v AAI Ltd (22 May 2015) (Beech-Jones J)

162. During argument the Court was referred to s 35(3)(a) of the *Civil Liability Act* as the source of the power to reduce either of the plaintiff's claims on account of contributory negligence. Subsection 35(3)(c) is found within Part 6 of the *Civil Liability Act* dealing with proportionate liability. It provides that, in apportioning responsibility between defendants, there is to be an exclusion of the proportion of the damage or loss "in relation to which the plaintiff is contributorily negligent". However that is qualified by the words "under any relevant law". The "relevant law" referred to is some other law that enables a reduction in the plaintiff's claim for contributory negligence (such as s 8 of the *Law Reform (Miscellaneous Provisions) Act 1965*): *Selig* at [34] . As there is no "relevant law" applicable to the plaintiff's contract claim that allows a reduction for contributory negligence, it follows that s 35(3)(a) is not engaged even if the claim was otherwise an apportionable claim, which it is not.

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

35. **Following paragraph cited by:**

Re Earth Civil Australia Pty Ltd (06 August 2021) (Ward CJ in Eq)
Williams v Pisano (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

See Selig v Wealthsure at [35] .

It must be inferred that the construction for which the first and second respondents contend assumes the existence of some overarching legislative policy to the effect that liability for all claims to which the *Corporations Act* 2001 applies should be the subject of apportionment as

between wrongdoers, yet no such intention may be discerned from the provisions of Div 2A or the text of s 1041L .

36. **Following paragraph cited by:**

Davis v Wilson (21 February 2025) (Shariff J)

1320. The most important (but not the only) distinction between ss 1041H and 1041E is the fault element in s 1041E(1)(c) : *Kumova* at [121] (Lee J). In this regard, it has been observed that s 1041E involves "a higher level of moral culpability than the conduct referred to in s 1041H " and unlike s 1041H , "contravention of any of ss 1041E–1041G constitut[e] an offence, an element of which is knowledge or recklessness": *Selig v Wealthsure Pty Ltd* [2015] HCA 18; (2015) 255 CLR 661 at [36] .

Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm) (No 3) (26 July 2018) (Moshinsky J)

Contravention of s 1041E constitutes an offence under s 1311(1) . The current penalty for contravention of s 1041E(1) in the case of an individual is: (1) imprisonment for 10 years; and/or (2) a fine the greater of (a) 4,500 penalty units, or (b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence – three times that total value: *Corporations Act* , Sch 3 . The serious nature of a contravention of s 1041E was recognised by the High Court in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, where a plurality observed it "involve[s] a higher level of moral culpability than the conduct referred to in s 1041H. Unlike s 1041H, contravention of any of ss 1041E-1041G constitutes an offence, an element of which is knowledge or recklessness": at [36] per French CJ, Kiefel, Bell and Keane JJ .

Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq) (14 October 2015) (Gleeson J)

157. These proposed amendments raise serious allegations against the various defendants in connection with events that occurred over seven years ago. In particular, a contravention of s 1041E is an offence, involving an element of knowledge or recklessness: see s 1311 of the Corporations Act and *Selig* at [36] .

Williams v Pisano (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

It was observed by the Full Court in *ABN AMRO Bank NV v Bathurst Regional Council* [20] th at contraventions of the other provisions referred to in s 1041I, which were not chosen as being capable of being the subjects of an apportionable claim, involve a higher level of moral culpability than the conduct referred to in s 1041H . Unlike s 1041H , contravention of any of ss 1041E-1041G constitutes an offence, an element of which is knowledge or recklessness.

The fact that apportionment is of benefit to wrongdoers may have weighed in the decision to limit apportionable claims to those involving conduct of the kind to which s 1041L refers.

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

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37. **Following paragraph cited by:**

Prestage v Barrett (02 July 2021) (Estcourt J)

766. Further, the plaintiffs submit, the result in *Tanah Merah* was also suggested by and is consistent with analogous High Court authority. The position concerning the candidate circumstance of a claim under federal (or, by parity of reasoning, State or Territory Fair Trading) legislation for contravention of s 18 of the *Australian Consumer Law* was resolved by the High Court in *Selig v Wealthsure Pty Ltd* [2015] HCA 18, 255 CLR 661 at [37] . That case held that a claim under one statutory provision having as one element a requirement of misleading conduct (*Corporation s Act* s 1041H) was apportionable, but claims under other provisions were not, even though the causes of action under the other provisions also required an element of misleading conduct.

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

38. The appeal should be allowed.

Costs against the insurer?

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

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

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

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

43. **Following paragraph cited by:**

Secatore, in the matter of Last Lap Pty Ltd (in liq) (No 2) (28 May 2020) (Anderson J)

> 42. This Court has power under s 43 of the *FCA Act* to make costs awards against non-parties: *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* [2012] FCAFC 50; 200 FCR 154 (***Dunghutti***) at [84] per Keane CJ, Lander and Foster JJ. An order for costs should be made against a non-party if the interests of justice require that it be made: *Selig v Weathsure* [2015] HCA 18; 255 CLR 661 at [43] per French CJ, Kiefel, Bell and Keane JJ , citing *Knight v FP Special Assets Ltd* [1992] HCA 28; 174 CLR 178 at 193 per Mason CJ and Deane J.

Trustee for The MTGI Trust v Johnston (No 2) (23 December 2016) (Siopis, Collier and Katzmann JJ)

> 30. Principles guiding the exercise of the discretion of the Court to award costs against a non-party were set out by Mason CJ and Deane J in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178. As more recently explained by French CJ, Kiefel, Bell and Keane JJ in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [43] :
>
> > In *Knight v FP Special Assets Ltd* , this Court held that its discretionary power to make orders against non-parties extends to the circumstance "where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party ... has an interest in the subject of the litigation." There is, however, no rule that where a non-party falls into this category an order for costs will necessarily follow. Rather, as Mason CJ and Deane J said, "an order for costs should be made against the non-party if the interests of justice require that it be made."

(Footnotes omitted.)

Sinergia Construction Project Management Pty Ltd v Clear Interiors Pty Ltd (No 2) (07 November 2016) (Charlesworth J)

4. This Court has the power to award costs against a non-party: s 43(1) of the *Federal Court of Australia Act 1976* (Cth) (FC Act). In respect of an equivalent power conferred upon the High Court, Gageler J said in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 (at [43]):

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

Yu v Cao (14 September 2015) (McColl JA, Sackville AJA and Adamson J)

> 68. Knight v FP Special Assets Ltd [1992] HCA 28; (1992) 174 CLR 178 ("Knight") (at 192 – 193) per Mason CJ and Deane J (Gaudron J agreeing); Selig v Wealthsure Pty Ltd [2015] HCA 18 ; (2015) 89 ALJR 572 (at [43]) per French CJ, Kiefel, Bell and Keane JJ (Gageler J agreeing).

Yu v Cao (14 September 2015) (McColl JA, Sackville AJA and Adamson J)
In the matter of Vangory Holdings Pty Ltd (22 June 2015) (Black J)

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

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

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

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44. **Following paragraph cited by:**

PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM (03 August 2018) (McColl, Basten and Leeming JJA)

> 55. The applicants maintained that the primary judge erred in "refusing to find ... that it was unnecessary to characterise Mr Finnerty's conduct as unreasonable before a non-party costs order can be made against him in the present case". The sense is clear enough, although there seems to be an additional negative in the ground as formulated. The challenge was to the fact that his Honour had found it unnecessary to decide whether it was necessary to characterise Mr Finnerty's conduct as unreasonable. This was said practically to have had the effect of causing the refusal of the order. It was said that:
>
> > "57. This practical effect is supported by his Honour having explicitly stated (in his five paragraphs of reasons for refusing the non-party costs order sought) that evidence of Mr Finnerty having acted unreasonably would '*prov ide the undoubted power*' to make the order sought. The applicants submit that for the reasons set out above with respect to Grounds 1 and 2, the power undoubtedly existed even absent a finding of unreasonableness (see *Selig* at [44]).
> >
> > 58. The policy argument that making a non-party costs order in this case would result in opening the floodgates to lift the corporate veil more broadly in future cases, is an irrelevant or extraneous factor or alternatively, it may be *a* factor but should not be the primary or determinative consideration and in finding it so, the Primary Judge fell into error." (emphasis in original)

It might be suggested that the insurer's actions in bringing the appeal against the decision of the primary judge could not be said to have been entirely unreasonable, given its success in the Full Court. In *Chapman Ltd v Christopher* [23] , the Court of Appeal of England and Wales upheld an order for costs which had been awarded against a non-party insurer that pursued a defence of a claim in order to defend its interests. In doing so, the Court rejected the contention that such an order should only be made where the insurer had acted unreasonably in causing its insured to defend the claim [24] .

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

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

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45. At the time the insurer's decision to appeal the judgment of the primary judge was made it could not be said that the first and second respondents continued to have an interest in the outcome of the litigation. The insurer acted for itself in seeking to better its position. It took a chance, as litigants do, that if its argument as to the application of Div 2A succeeded, the

liability of the first and second respondents would be reduced to 60 per cent of the judgment sum, as the primary judge had found. In these circumstances, why should it be regarded as immune from the risk of an order for costs?

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

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

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

Orders

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

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

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

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

imposed by State and Territory laws, and under the common law, was left to be implemented by State and Territory legislation.

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

[26] Section 82(1B) and Pt VIA.

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

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

54. Section 1041N(2) similarly serves to make clear that the subsequent apportionment required to achieve proportionate liability under s 1041N(1) and (3) has no operation in respect of any liability that is not the subject of such a "claim". Section 1041L(2) 's reference to the treatment of more than one "cause of action" for the "same loss or damage" as a "single apportionable claim" is to be read as a reference to the treatment of more than one "fact or combination of facts which gives rise to a right to sue"[28] for that loss or damage. The significance of s 1041 L(1) and (4) to s 1041L(2) is that each such right to sue must itself be a "claim" specified in s 1 041L(1) : only those claims that are themselves "apportionable claims" are aggregated by s 10 41L(2) into a "single apportionable claim".

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

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

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

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

Cited by:

Australian Securities and Investments Commission v Macrolend Pty Ltd (No 3) [2025] FCA 1158 (19 September 2025) (Sarah C Derrington J)

87. The principles applicable to these provisions are the same and are well settled: *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4] (French CJ, Kiefel, Bell and Keane JJ) . Nevertheless, Mr Hodgson's evidence was that he had not understood the normative prohibition on misleading or deceptive conduct until the mediation in this matter. I will return to that evidence. It is as well therefore to set out the useful summary of the principles by O'Bryan J in *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 at [98]-[101] :

> 98 The applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law , the Corporations Act and the ASIC Act are well known. The **central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error** (that is, to form an erroneous assumption or conclusion about some fact or matter): *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (*Puxu*) at 198 per Gibbs CJ; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (*Taco Bell*) at 200 ; *Campomar* at [98]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (*TPG Internet*) at [39] per French CJ, Crennan, Bell and Keane JJ; *Campbell* at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:
>
> > (a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (*Global Sportsman*) at 87 ; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).
> >
> > (b) Second, **it is not necessary to prove an intention to mislead or deceive:** *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140

CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ.

(c) Third, it is **unnecessary to prove that the conduct in question actually deceived or misled anyone**: *Puxu* at 198 per Gibbs CJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ.

(d) Fourth, it is not sufficient if the conduct merely causes confusion: *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Camp omar* at [106].

99 In assessing whether conduct is likely to mislead or deceive, the **courts have distinguished between two broad categories of conduct, being conduct that is directed to the public generally or a section of the public, and conduct that is directed to an identified individual.** As explained by the High Court in *Campomar*, the question whether conduct in the former category is likely to mislead or deceive has to be approached at a level of abstraction, where the Court must consider the likely characteristics of the persons who comprise the relevant class of persons to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful (at [101]-[105]). In *Google Inc v ACCC* (2013) 249 CLR 435, French CJ and Crennan and Kiefel JJ (as her Honour then was) confirmed that, in assessing the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the **Court must consider whether the "ordinary" or "reasonable" members of that class would be misled or deceived** (at [7]). In the case of conduct directed to an identified individual, it is unnecessary to approach the question at an abstract level; the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned. However, in both cases, the relevant question is objective: whether the conduct has a sufficient tendency to induce error. Even in the case of an express representation to an identified individual, it is not necessary (for the purposes of establishing liability) to show that the individual was in fact misled. ...

100 The question **whether conduct is misleading or deceptive, and thereby contravenes the statutory prohibition, is logically anterior to the question whether any person has suffered loss** or damage by reason of the conduct: *Campbell* at [24] per French CJ; *TPG Internet* at [49]. As observed by French CJ in *Campbell* (at [28]):

> Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to

> lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.
>
> 101 Similarly, **where proceedings are brought by an enforcement agency, the Court has frequently imposed pecuniary penalties and other forms of relief** for contraventions of the prohibition of misleading or deceptive conduct **while expressly recognising that the conduct may not have caused loss**: see for example *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [57] ; *ASIC v GE Capital Finance Australia* [2014] FCA 701 at [90] ; *ASIC v Huntley Management Ltd* (2017) 122 ACSR 163; [2017] 35 ACLC 17-035 ; FCA 770 at [36][39].
>
> (Emphasis added.)

Gehrke v Noumi Ltd [2025] VSC 373 (25 June 2025) (Delany J)

92. On the approval application Noumi referred to *Selig v Wealthsure Pty Ltd* ,[14] where the High Court unanimously found that the proportionate liability regime in Div 2A of the *Corporations Act* applied only to claims of misleading or deceptive conduct based upon a contravention of s 1041H. Noumi submitted that it may be inferred that that authority is why Third Party Notices were issued in respect of the s 674 continuous disclosure allegations. How s 674 would operate in the circumstances of this case cannot be easily predicted at this stage in the proceeding. This is but one element of the uncertainties that exist concerning the likely outcome in the litigation because of the competing positions adopted by the two defendants.

via

[14] [2015] HCA 18 ; (2015) 225 CLR 661; (2015) 320 ALR 47 .

Gehrke v Noumi Ltd [2025] VSC 373 (25 June 2025) (Delany J)

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Xie v Moshav Financial Wholesale Pty Ltd [2025] FCA 250 (26 March 2025) (Markovic J)

260. Moshav relies on s 12GF of the ASIC Act and s 1041L of the Corporations Act (see [152] and [176] above) as those sections respectively apply to findings of contravention of s 12DA of the ASIC Act and s 1041H of the Corporations Act ; *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; [2015] HCA 18 at [24]-[25] , [37] .

Davis v Wilson [2025] FCA 108 (21 February 2025) (Shariff J)
Selig v Wealthsure Pty Ltd [2015] HCA 18; (2015) 255 CLR 661
Seltsam Pty Ltd v McGuiness

Davis v Wilson [2025] FCA 108 (21 February 2025) (Shariff J)

1320. The most important (but not the only) distinction between ss 1041H and 1041E is the fault element in s 1041E(1)(c) : *Kumova* at [121] (Lee J). In this regard, it has been observed that s 1041E involves "a higher level of moral culpability than the conduct referred to in s 1041H " and unlike s 1041H , "contravention of any of ss 1041E–1041G constitut[e] an offence, an element of which is knowledge or recklessness": *Selig v Wealthsure Pty Ltd* [2015] HCA 18; (2015) 255 CLR 661 at [36] .

Mantzaris v Smith Construction Group Pty Ltd (Security for Costs) [2023] VCC 2424 (22 December 2023) (Kirton J)

33 Next, although in *Nylex* , the option for the defendant to seek a costs order directly against the insurer was considered of itself insufficient, there are other authorities which support the Court's unfettered discretion to order costs against the non-party insurer. For example in *Selig v Wealthsure Pty Ltd* , the High Court ordered QBE insurance, a non-party insurer, to pay the costs of the appeal to the Full Court and the High Court. [19]

via

[19] *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 .

Mantzaris v Smith Construction Group Pty Ltd (Security for Costs) [2023] VCC 2424 (22 December 2023) (Kirton J)

33 Next, although in *Nylex* , the option for the defendant to seek a costs order directly against the insurer was considered of itself insufficient, there are other authorities which support the Court's unfettered discretion to order costs against the non-party insurer. For example in *Selig v Wealthsure Pty Ltd* , the High Court ordered QBE insurance, a non-party insurer, to pay the costs of the appeal to the Full Court and the High Court. [19]

Mantzaris v Smith Construction Group Pty Ltd (Security for Costs) [2023] VCC 2424 -
Ramadan v ACN 098 408 176 Pty Ltd [2023] SASCA 91 (31 August 2023) (Livesey P; Doyle and Bleby JJ)

133. The first way in which liability for damages under s 12GF of the ASIC Act may be reduced is by a form of contributory negligence, whereby s 12GF(1B) allows the Court to take into account contributory negligence, that is a failure by the claimant "to take reasonable care". That issue was not pleaded and did not feature at the trial. In any event, the application of that sub-section is limited to losses arising from a contravention of the prohibition on misleading and deceptive conduct under s 12DA of the ASIC Act . [65] Accordingly, contributory negligence cannot be relied on to reduce the payments made under the 2008 Loan which were incurred by reason of unconscionable conduct.

via

[65] ASIC Act, s 12GF(1B)(a) ; *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 309 ALR 445, [1576]-[1579], [1582]-[1590] (the Court) approved in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 .

Ramadan v ACN 098 408 176 Pty Ltd [2023] SASCA 91 (31 August 2023) (Livesey P; Doyle and Bleby JJ)
ABN AMRO Bank NV v Bathurst Regional Council (2014) 309 ALR 445; *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2022) 97 ALJR 1; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568; *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300; *Bank of South Australia Limited v Ferguson* (1998) 192 CLR 248; *Banque Commerciale SA, En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279; *Bebonis v Angelis* (2003) 56 NSWLR 127; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408; *Comcare v Martin* (2016) 258 CLR 467; *Commonwealth Bank v Amadio* (1983) 151 CLR 447; *Coulton v Holcombe* (1986) 162 CLR 1; *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 244 ALR 552; *De Pasquale v ASCF Managed Investments Pty Ltd* [2021] SASC 21; *Elkofairi v Permanent*

Trustee Co Ltd (2002) 11 BPR 20,841; *Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486; *Fitzgerald v Penn* (1954) 91 CLR 268; *Forrest v ASIC* (2012) 247 CLR 486; *Friend v Brooker* (2009) 239 CLR 129; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Gould v Mount Oxide Mines Ltd (In liq)* (1916) 22 CLR 490; *Hall v The Nominal Defendant* (1966) 117 CLR 423; *Harlow & Jones v Panex International* [1967] 2 Lloyd's Reports 509; *Harrison v Schipp* [2001] NSWCA 13; *Henjo Investments v Collins Marrickville (No 2)* (1989) 40 FCR 76; *Henville v Walker* (2001) 206 CLR 459; *Hunt & Hunt v Mitchell Morgan Pty Ltd* (2013) 247 CLR 613; *I & L Securities Pty Limited v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *In re Pavlou* [1993] 1 WLR 1046; *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 ; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493; *Maestrale v Aspite* (2014) 13 ASTLR 262; *March v Stramare (E and MH) Pty Ltd* (1991) 171 CLR 506; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1; *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23; *Montesa Investments Pty Ltd v Certane Ct Pty Ltd* [2022] SASC 43; *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338; *Ramadan v ACN 098 408 176 Pty Ltd* (2018) 129 SASR 584; *Ramadan v ACN 098 408 176 Pty Ltd* (Supreme Court of South Australia, Judge Dart, 10 December 2020); *Ramadan v ACN 098 408 176 Pty Ltd* (Supreme Court of South Australia, Judge Dart, 11 May 2021); *Ramadan v ACN 098 408 176 Pty Ltd* [2017] SASC 63; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *Segenhoe Ltd v Akins* (1990) 29 NSWLR 569; *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 ; *Singh v Kaur Bal (No 2)* [2014] WASCA 88; *Steamship Enterprises of Panama Inc, Liverpool (Owners) v Ousel (Owners) & Ors (The Liverpool (No 2))* [1963] P 64; *Stone v Chappel* (2017) 128 SASR 165; *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *The National Insurance Company of New Zealand Limited v Espagne* (1961) 105 CLR 569; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 ; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Water Board v Moustakas* (1988) 180 CLR 491; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598; *Wollington v State Electricity Commission of Victoria (No 2)* [1980] VR 91; *Wright v Gibbons* (1949) 78 CLR 313, considered.

Ramadan v ACN 098 408 176 Pty Ltd [2023] SASCA 91 -
R v Jacobs Group (Australia) Pty Ltd [2022] NSWCCA 152 (11 July 2022) (Bell CJ, Walton and Davies JJ)

Tabcorp Holdings Ltd v Victoria [2016] HCA 4; (2016) 328 ALR 375; *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; [2015] HCA 18 ; *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 381 ALR 601; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645; [2013] HCA 52; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611; [1975] HCA 41, considered.

R v Jacobs Group (Australia) Pty Ltd [2022] NSWCCA 152 (11 July 2022) (Bell CJ, Walton and Davies JJ)

84. The Crown also submitted that the word "benefit" in s 70.2(1)(a) and (b) of the *Criminal Code* simply refers, in the context of a monetary bribe, to the payment of money to the foreign official, irrespective of what it may have cost the foreign official to accept the payment. In the same way, it was submitted that the benefit to the corporation must simply mean or at least include any payment received. In making this submission, the Crown called in aid the principle that, where the same word is used in a statutory provision, it will ordinarily attract the same meaning, citing in this context *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4; (2016) 328 ALR 375 (**Tabcorp**) at [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; [2015] HCA 18 at [29] (French CJ, Kiefel, Bell and Keane JJ) ; and *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 381 ALR 601 at [95] (Edelman J).

In the matter of Mediation & Online Dispute Resolution Operating Network Pty Ltd [2022] NSWSC 5 -
Australian Securities and Investments Commission v La Trobe Financial Asset Management Ltd [2021] FCA 1417 (26 November 2021) (O'Bryan J)

10. Section 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act are in similar terms and the same principles apply to both provisions: *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at [4] . Further, although the language used in s 12DB(1) of the ASIC Act ("false or

misleading") is not identical to that in s 12DA(1) and s 1041H(1) ("misleading or deceptive"), there is no material difference between those expressions in terms of their legal application: see *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14] per Gordon J; *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 at [2263] per Beach J; *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; 147 ACSR 266 at [47] per Yates J.

Kumar v Sydney Western Realty Pty Ltd (No. 2) [2021] NSWDC 446 (31 August 2021) (Abadee DCJ)

263. Notwithstanding the wording of s 87CB of the *Competition and Consumer Act 2010 (Cth)*, arguably proportionate liability would not be available for the Agent to the extent that the claim for damages under s 236 of the ACL was for economic loss caused by conduct in contravention of any or all of ss 20, 21 or 22 of the ACL [32]. However, as I indicated earlier, the plaintiff ultimately abandoned an action of unconscionable conduct.

via

32. Selig v Wealthsure (2015) 255 CLR 661

Kumar v Sydney Western Realty Pty Ltd (No. 2) [2021] NSWDC 446 (31 August 2021) (Abadee DCJ)

120. Whether conduct is misleading or deceptive is to be determined by deciding whether the conduct, when viewed in all of the circumstances, could be characterised as misleading or deceptive. This is a question of fact, determined objectively. Thus, there is no fault element in proof of an action for misleading conduct. Further, and what makes the action even more attractive to a claimant in comparison to an action in negligence based upon a misrepresentation (or omission to disclose information), there is no requirement to prove any duty of care, nor the foreseeability of outcome [5]. Because of the objective nature of the inquiry, when characterising the advertisement, the question is not how the plaintiff interpreted it, but how a reasonable person in her position would have interpreted it; and, further, it matters not what the Agent's state of mind was when engaging in the conduct.

via

5. Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357 ("Miller") per French CJ and Kiefel J at [5]; Selig v Wealthsure (2015) 255 CLR 661 at [20]

Re Earth Civil Australia Pty Ltd [2021] NSWSC 966 (06 August 2021) (Ward CJ in Eq)

Selig v Wealthsure Pty Ltd (2015) 255 CLR 661; [2015] HCA 18

Re Earth Civil Australia Pty Ltd [2021] NSWSC 966 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

Selig v Wealthsure Pty Ltd [2015] HCA 18; (2015) 255 CLR 661

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

332. Senior counsel for the Herridge Parties also referred to the decision of the High Court in ***Selig v Wealthsure Pty Ltd***. [302] That case was concerned with s 1041L of the *Corporations Act 2001 (Cth)*, which is a proportionate liability provision. While the language of s 1041L was similar

in some respects to that used in s 5AI of the *Civil Liability Act* , a critical difference was that an 'apportionable claim' was defined as a claim for damages made under s 1041I of the *Corporations Act* for loss or damage caused by conduct contravening s 1041H of that Act. Understandably, in that context subsequent references to a 'claim' were construed as being to a claim of that kind. [303] This decision is of no assistance in construing the meaning of the term 'claim' as it appears in s 5AI of the *Civil Liability Act* .

via

[302] ***Selig v Wealthsure Pty Ltd*** [2015] HCA 18; (2015) 255 CLR 661 , referred to at appeal ts 118.

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Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

766. Further, the plaintiffs submit, the result in *Tanah Merah* was also suggested by and is consistent with analogous High Court authority. The position concerning the candidate circumstance of a claim under federal (or, by parity of reasoning, State or Territory Fair Trading) legislation for contravention of s 18 of the *Australian Consumer Law* was resolved by the High Court in *Selig v Wealthsure Pty Ltd* [2015] HCA 18, 255 CLR 661 at [37] . That case held that a claim under one statutory provision having as one element a requirement of misleading conduct (*Corporations Act* s 1041H) was apportionable, but claims under other provisions were not, even though the causes of action under the other provisions also required an element of misleading conduct.

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

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via

[303] ***Selig*** [28] - [31] .

Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3) [2021] FCA 354 (19 April 2021) (Anderson J)

342. Section 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* are in analogous terms and the same principles are applicable to both provisions: *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 (***Dover***) at [92] (cit ing *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4]).

Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 (26 March 2021) (Beach and Osborn JJA; Stynes AJA)

BUILDING AND CONSTRUCTION – Leave to appeal refused with respect to proposed grounds of appeal advanced on behalf of the fire engineer and architect – Leave to appeal granted with respect to proposed ground 3 of the building surveyor's proposed grounds of appeal concerning the Tribunal's findings with respect to causation of loss consequent upon negligence with respect to the fifth fire engineering report – Leave to appeal otherwise refused with respect to the further grounds advanced by the building surveyor – Appeal allowed with respect to proposed ground 3 of the building surveyor's proposed grounds of appeal – *Domestic Building Contracts Act 1995* s 8 – *Buildi ng Act 1993* s 16 – *Building Code of Australia* cl C1.12(f) – *Victorian Civil and Administrative Tribunal Act 1998* s 148 – *Wrongs Act 1958* pt IV AA, ss 24AE–24AI, 59 – *Toomey v Scolaro's Concrete Constructions Pty Ltd [No 2]* [2001] VSC 279 considered – *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 applied – *Hu nt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 applied – *Brookfield Multiplex Ltd v Owners — Strata Plan No 61288* (2014) 254 CLR 185 considered – *Reinhold v NSW Lotteries Corporation [No 2]* (2008) 82 NSWLR 762 considered – *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (20 07) 164 FCR 450 considered – *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84 considered – *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]* [2013] NSWCA 58 considered – *Permanent Custodians Ltd v Geagea (No 4)* [2016] NSWSC 934 considered – *Bolitho v City and Hackney Health Authority* [1998] AC 232 considered – *Jones v South Tyneside Health Authority* [2001] EWCA Civ 1701 considered.

Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 (26 March 2021) (Beach and Osborn JJA; Stynes AJA)

106. Immediately we should say that, by applying well settled rules of construction, the word 'claim' in each of these provisions (ss 24AF, 24AH and 24AI) is to be given the same meaning. [57]

via

[57] Cf *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, 673 [29] .

Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2) [2021] FCA 247 (23 March 2021) (Anderson J)

29. Section 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* are in analogous terms and the same principles are applicable to both provisions: *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 (***Dover***) at [92] (cit ing *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4]).

Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2020] HCA 29 (13 August 2020) (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ)

95. The duty of courts is to give effect to the meaning of statutory words as intended by Parliament. In common with how all speech acts are understood, the meaning is that which a reasonable person would understand to have been intended by the words used in their context. One presumption, or inference based on common experience of legislative acts [104] , is that when Parliament uses words with a common or ordinary meaning then the words are intended to bear that ordinary meaning [105] . That presumption also reflects the

expressed goal of parliamentary drafting for clarity and familiarity in order to ensure the transparency and intelligibility of statute law [106] . That presumption can be further reinforced by another presumption, that words repeated in a statute are used with the same meaning [107] .

via

[107] *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 387 [65]; 328 ALR 375 at 389, citing *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618, *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32] and *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at 673 [29] .

Secatore, in the matter of Last Lap Pty Ltd (in liq) (No 2) [2020] FCA 735 (28 May 2020) (Anderson J)

42. This Court has power under s 43 of the *FCA Act* to make costs awards against non-parties: *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* [2012] FCAFC 50; 200 FCR 154 (***Dunghutti***) at [84] per Keane CJ, Lander and Foster JJ. An order for costs should be made against a non-party if the interests of justice require that it be made: *Selig v Weathsure* [2015] HCA 18; 255 CLR 661 at [43] per French CJ, Kiefel, Bell and Keane JJ , citing *Knight v FP Special Assets Ltd* [1992] HCA 28; 174 CLR 178 at 193 per Mason CJ and Deane J.

Hopkins v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 33 (06 March 2020) (Logan, Wigney and Gleeson JJ)

33. The Minister identified the following additional difficulties with the appellants' construction of ss 501(3A) and 501CA(4) :

(1) The appellants' construction depends on the term "person" being understood to mean "a person other than a person whose 'own country' for the purposes of Art 12(4) of the ICCPR is Australia". These words to be inserted are so specific, and so much at variance from the words in fact used, that it cannot be concluded that the words were inadvertently overlooked in the drafting of the provision. Nor, as explained by Perry J, are the words necessary to achieve the apparent purpose of the Act : *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [38]-[40] .

(2) The appellants' proposed construction sits uncomfortably when read in the context of the Act as a whole. A fundamental principle of statutory construction is that, ordinarily, consistent meaning should be given to a particular term wherever it appears in a suite of statutory provisions: *Tabcorp Holdings Limited v Victoria* [2016] HCA 4; (2016) 90 ALJR 376 at [65] , citing *Registrar of Titles (WA) v Franzon* [1975] HCA 41; (1975) 132 CLR 611 at 618 ; *Kline v Official Secretary to the Governor-General* [2013] HCA 52; (2013) 249 CLR 645 at 660 [32] ; *Selig v Wealthsure Pty Ltd* [2015] HCA 18; (2015) 89 ALJR 572 at 578 [29] ; 320 ALR 47 at 55. The appellants' contention would have the term "person" mean one thing for the purposes of s 501CA (and possibly s 501(3A)) , but something else where the term is used elsewhere in the Act . Specifically, the appellants each accept that he is a non-citizen to whom a visa could be granted. The appellants' submissions, therefore, assume in each case that, incongruously, each of them is a "person" for the purposes of ss 5, 29 and 65 of the Act , and for the purpose of applying for a visa (s 45 of the Act) but not a person for the purposes of either ss 501 or 501CA .

(3) Numerous authorities have established that the visa cancellation power in s 501 of the Act can be used in respect of non-citizens who have significant personal attachment to Australia, including because of their presence in

Australia since childhood: *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28 (***Shaw***); *Cayzer v Minister for Immigration and Border Protection* [2016] FCAFC 176; (2016) 249 FCR 250 at [7]- [12] ; *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177; (2016) 246 FCR 146 at [197]-[203] . The decision in *Shaw* pre-dates the introduction of s 501CA, which was introduced by *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) . Parliament may be presumed to have been aware of the scope of the power to cancel a visa, including the fact that it extends to visa holders with longstanding connections to Australia.

Hopkins v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 33 (06 March 2020) (Logan, Wigney and Gleeson JJ)

Selig v Wealthsure Pty Ltd [2015] HCA 18; (2015) 89 ALJR 572 at 578 [29] ; [2015] HCA 18

Hopkins v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 33 (06 March 2020) (Logan, Wigney and Gleeson JJ)

Selig v Wealthsure Pty Ltd [2015] HCA 18; (2015) 89 ALJR 572 at 578 [29] ; [2015] HCA 18

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd [2019] FCA 1932 (22 November 2019) (O'Bryan J)

92. The two provisions are in analogous terms and the same principles are applicable to both provisions: *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at [4] .

LM Investment Management Limited (in liq) v EY (also known as Ernst & Young) [2019] QSC 246 (04 October 2019) (Jackson J)

Selig v Wealthsure Pty Ltd & Ors (2015) 255 CLR 661 , cited

LM Investment Management Limited (in liq) v EY (also known as Ernst & Young) [2019] QSC 246 (04 October 2019) (Jackson J)

37. In my view, the distinction the defendants seek to make between the order refused in *Selig* and the present case is not one of substance. It should be mentioned that the decision in *Selig* at first instance was appealed to the Full Court of the Federal Court and then to the High Court which restored the judgment of the court at first instance, without adverse comment or reasoning upon the present question. [37] Accordingly, it is sufficient to dispose of this question that this court follow the court in *Selig*, which it should do, unless persuaded that the decision in *Selig* is wrong.

via

[37] *Selig v Wealthsure Pty Ltd & Ors* (2015) 255 CLR 661 .

In the matter of Reed Constructions Australia Pty Ltd (in Liquidation) - Walley v Chubb Insurance Australia Ltd [2019] NSWSC 1007 (08 August 2019) (Leeming JA)

32. If the insurers are not joined to the proceedings, it might be possible for the liquidators to seek and obtain a costs order against Chubb, which in those circumstances will have been funding Mr Reed's unsuccessful defence: see *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; [2015] HCA 18 at [39]-[48] . I do not express any view as to the merits of such a claim.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

58. From my own research, there are a small number of cases since *Selig* and *ABN Amro* which may be relevant. Most cases referring to those decisions in respect of proportionate liability do so in the context of Commonwealth legislation and are of limited utility on this question. [38]

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

41. The defendant disagrees with the plaintiffs' submission that the debate is foreclosed by *Selig*, as she submits that the sections of *Selig* relied upon by the plaintiffs do not resolve the question. The defendant says that s 1041L(1) of the *Corporations Act* is equivalent to s 24AF(1)(b) of the *Wrongs Act*, which is not relied on here, and is not equivalent to s 24AF(1)(a), which is relied on here. The defendant says that the construction of "arising from a failure to take reasonable care" does not arise in the context of the *Corporations Act* provisions and hence was not considered in *Selig*.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

53. The plaintiffs submitted that these various regimes were all part of a series of legislative provisions involving template provisions for use in more than one statute, relying on *Selig* for that proposition.[29] However, I do not read that portion of *Selig* in that way: it cannot be read as meaning that all of the proportionate liability regimes conform to a template and should be interpreted in the same way.

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28. The High Court concluded that the terms of Division 2A of Part 7.10 of the *Corporations Act* are clear: an apportionable claim for the purposes of that division is 'a claim based upon a contravention of s 1041H. The term does not extend to claims based upon conduct of a different kind.' [11]

via

[11] *Selig* (n 4) [37].

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

25. The plaintiffs submit that in addressing the question I have summarised in paragraph 23(d) above, the High Court said that the answer lay in the meaning of 'apportionable claim', observing that: [7]

> the [defendants] submitted before this court that the effect of s 1041L(2) is to disregard the legal basis for the claim, leaving any claim for the same loss and damage as the basis for apportionment. The underlying assumption to the approach for which the [defendants] contend is that the "cause[s] of action" referred to in s 1041L(2) are to be equated with "the claim for the loss or damage". On this view each cause of action pleaded is to be treated as an apportionable claim. [8]

via

[7] *Selig* (n 4) [28].

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

20. The defendant submitted that this remains a debatable point of law and that the prevailing view in Victoria tends to the conclusion that the Factual Construction is available. The plaintiffs submitted that the Factual Construction is precluded by the High Court's decision in *Selig v Wealthsure Pty Ltd* , [4] which concerned the proportionate liability regime in the *Corporations Act 2001* (Cth) (' ***Corporations Act*** ').

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23. As noted above, the plaintiffs relied heavily on *Selig* to contend that the Factual Construction was not available. Stating the facts in that case as simply as I can, a financial advisor had recommended to the applicants that they invest in what was effectively a Ponzi scheme. Counsel for the plaintiffs helpfully summarised this case as follows:

> (a) The applicants sued the advisor and the authorised representative, and joined the investment company, its directors, and a promoter. The applicants succeeded on many of their grounds and the trial judge refused to apportion the damages between the various respondents. On appeal to the Full Federal Court, apportionment had been allowed. [5]
>
> (b) The applicants sued on the following causes of action:
>
> (iv)Breach of the contractual retainer to advise;
>
> (v) Breach of the respondents' duty of care;
>
> (vi)Breach of the prohibition on engaging in misleading or deceptive conduct in relation to a financial service or product in s 1041H of the *Corporations Act* ;
>
> (vii) Breach of the prohibition on engaging in misleading or deceptive conduct in trade or commerce in relation to financial services in s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (' ***ASIC Act*** ').
>
> (c) The loss and damage alleged to have been suffered by the applicants as a result of these causes of action was the same.
>
> (d) The question was whether the proportionate liability regime in the Corporations Act applied so that the loss and damage was to be apportioned between the relevant respondents in respect of all of those claims, or whether it was limited to the claims based on contraventions of s 1041H of the *Corporations Act* .

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

49. I have carefully considered the parties' detailed submissions and have concluded that it is arguable that the decision of the High Court in *Selig* does not foreclose an argument that the Factual Construction is open. In my view, the language of s 1041L(1) of the *Corporations Act* confines apportionable claims to those for a certain type of loss or damage caused by a contravention of s 1041H , which is very specific. It is not the same type of language as used in s 24AF of the *Wrongs Act* .

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56. The Full Federal Court in *ABN Amro* went on to say that (citations omitted): [36]

> Nothing stated by Middleton J in *Dartberg* is contrary to the views we have expressed as to the meaning and effect of the proportionate liability provisions in the *Corporations Act* . [37] Indeed, when referring to these in passing at [18]-[19] his Honour appears to have accepted, as we do, that the regime applies to causes of action pleaded. This gives meaning to the words 'claim for damages made' found in s 1041L(1) . This is to be distinguished from his Honour's analysis of Pt IVAA of the *Wrongs Act* , which was relevantly involved. As was observed by Middleton J at [29] -[31]:
>
> > [29] As the respondents observed, in drafting the provisions of Pt VIAA of the *Wrongs Act* , the legislature deliberately chose to define "apportionable claim" by reference to an action for damages arising from a failure to take reasonable care. The provisions do not require that the claim itself be a claim in negligence or for a breach of duty — it only requires that the claim arise from a failure to take reasonable care. The expressions "arising from" or "arising out of" are of wide import.
> >
> > [30] In my view, Pt IVAA could apply in the circumstances of this proceeding according to its own terms. Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.
> >
> > [31] In these circumstances, where a respondent desires to rely upon Pt IVAA of the *Wrongs Act* , it will need to plead and prove each of the statutory elements, including the failure to take reasonable care. In a proceeding where the applicant does not rely upon any such failure, then the need for a particularised plea by a respondent may be particularly important for the proper case management of the proceedings. It would be desirable at an early stage of proceedings for a respondent to put forward the facts upon which it relies in support of the allocation of responsibility it contends should be ordered. If a respondent calls in aid the benefit of the limitation on liability provided for in Pt IVAA of the *Wrongs Act* , then the respondent has the onus of pleading and proving the required elements. The court, after hearing all the evidence, will then need to determine, as a matter of fact, whether the relevant claim brought by the applicant is a claim arising from a failure to take reasonable care.

These observations concerning the *Wrongs Act* have no application to the relevant provisions of the *Corporations Act* or the other Commonwealth legislation we have considered.

via

[37] That is, the view which ultimately obtained in the High Court in *Selig* (n 4).

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

29. The plaintiffs submit that although *Selig* concerned the provisions of the *Corporations Act* , the High Court recognised that these provisions were part of a series of legislative provisions which involved 'template provisions for use in more than one statute'. [12]

via

[12] *Selig* (n 4) [18]-[21], [34].

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

53. The plaintiffs submitted that these various regimes were all part of a series of legislative provisions involving template provisions for use in more than one statute, relying on *Selig* for that proposition. [29] However, I do not read that portion of *Selig* in that way: it cannot be read as meaning that all of the proportionate liability regimes conform to a template and should be interpreted in the same way.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

52. I note that in *Selig* , the High Court did not refer at all to cases such as *Reinhold* and *Dartberg* . The High Court reached its decision on whether the claims other than those for a contravention of s 1041H were apportionable claims by means of construing the statute, and not by reference to the issues as analysed in *Reinhold* , *Dartberg* and the others I have referred to, which concerned the proportionate liability regimes in state statutes in New South Wales and Victoria, and not the Commonwealth statutes.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

41. The defendant disagrees with the plaintiffs' submission that the debate is foreclosed by *Selig* , as she submits that the sections of *Selig* relied upon by the plaintiffs do not resolve the question. The defendant says that s 1041L(1) of the *Corporations Act* is equivalent to s 24AF(1)(b) of the *Wrongs Act* , which is not relied on here, and is not equivalent to s 24AF(1)(a) , which is relied on here. The defendant says that the construction of "arising from a failure to take reasonable care" does not arise in the context of the *Corporations Act* provisions and hence was not considered in *Selig* .

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

62. In circumstances where the High Court in *Selig* did not refer to *Reinhold* , *Dartberg* or any other like case and where the language in the text of the *Corporations Act* is different to that of the *Wrongs Act* , and in light of discussions in appellate cases such as *ABN Amro* , I do not consider the question posed by the defendant to be definitively closed to her. Therefore, I have concluded that it is arguable that *Selig* does not foreclose an argument that the Factual Construction of cases where Part IVAA of the *Wrongs Act* may be applicable is open.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

PRACTICE AND PROCEDURE – Application to dismiss or strike out defendant's proportionate liability defence – Trespass – Whether 'failure to take reasonable care' has to be an element of the cause of action for the claim to be apportionable – Unsettled point of law – Inappropriate to summarily dismiss or strike out – Rules 23.01 and 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* – *Wrongs Act 1958* (Vic) , Part IVAA – *Corporations Act 2001* (Cth), s 1041L – *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 – *ABN AMRO Bank NV v Bathurst Council* (2014) 309 ALR 445 – *P*

erpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2) [2013] NSWCA 58 – *Reinhold v New South Wales Lotteries Corp (No 2)* (2008) 82 NSWLR 762 – *Dartberg Pty Ltd v Wealthcare Financial Planning Ltd* (200 7) 164 FCR 450.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

63. My conclusion is consistent with recent commentary on this question, which certainly does not regard the position as settled (at least in the context of the state based legislation), be it by an application of *Selig* or otherwise. There are several journal articles where the authors refer to the conflicting approaches and see the question as requiring resolution, be it by the High Court or the legislature. [43]

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

54. The High Court noted in *Selig* *[30]* that shortly after the decision of the Full Federal Court in *Wealthsure* was handed down, a differently constituted Full Federal Court delivered reasons for decision in another matter, in which a view of the construction of Division 2A was expressed which was contrary to that of the majority in *Wealthsure* , referring to *ABN AMRO Bank NV v Bathurst Regional Council*. [31]

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

41. The defendant disagrees with the plaintiffs' submission that the debate is foreclosed by *Selig* , as she submits that the sections of *Selig* relied upon by the plaintiffs do not resolve the question. The defendant says that s 1041L(1) of the *Corporations Act* is equivalent to s 24AF(1)(b) of the *Wrongs Act* , which is not relied on here, and is not equivalent to s 24AF(1)(a) , which is relied on here. The defendant says that the construction of "arising from a failure to take reasonable care" does not arise in the context of the *Corporations Act* provisions and hence was not considered in *Selig* .

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62. In circumstances where the High Court in *Selig* did not refer to *Reinhold* , *Dartberg* or any other like case and where the language in the text of the *Corporations Act* is different to that of the *Wrongs Act* , and in light of discussions in appellate cases such as *ABN Amro* , I do not consider the question posed by the defendant to be definitively closed to her. Therefore, I have concluded that it is arguable that *Selig* does not foreclose an argument that the Factual Construction of cases where Part IVAA of the *Wrongs Act* may be applicable is open.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

29. The plaintiffs submit that although *Selig* concerned the provisions of the *Corporations Act* , the High Court recognised that these provisions were part of a series of legislative provisions which involved 'template provisions for use in more than one statute'. [12]

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

57. Counsel for the parties indicated during the course of argument that they were not aware of cases since the High Court decision in *Selig* which had considered the question.

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

27. The plaintiffs note that the High Court drew attention to s 1041N(2) of the *Corporations Act* , the equivalent of s 24AI(1) of the *Wrongs Act* , and rejected a 'more universal application' of the proportionate liability regime because the section clearly contemplated that claims for the same loss and damage and may involve apportioned and non-apportioned causes of action. [10]

via

[10] *Selig* (n 4) [32].

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

26. The High Court rejected that assumption, that is, the Factual Construction, and determined that the operation of s 1041L(2) did not incorporate causes of action other than those under s 1041H . The High Court stated: [9]

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

via

[9] *Selig* (n 4) [31].

Demetrios v Lehmann [2019] VSC 301 (10 May 2019)

51. The only decision referred to by the parties in respect of the key question which was decided after *Selig* is that of *Lacrosse* , which does not refer to it at all. In *Lacrosse* , Judge Woodward's preference for the approach of Middleton J in *Dartberg* and Barrett J in *Reinhold* , which his Honour says found favour with the Victorian Court of Appeal in *Godfrey Spowers*, was in respect of whether he needed to engage with the question of whether a finding that conduct arose from a failure to take reasonable care involves a factual or legal inquiry – in *Lacrosse* , his Honour had found that the factual and legal inquiry align and Part X of the *Wrongs Act* wa s engaged. [28] This comment was not made in respect of the proportionate liability regime. That regime was dealt with in *Lacrosse* , but this question was not addressed in that context: quite likely because it does not appear that the meaning of apportionable claim arose for consideration, at least in respect of the competing approaches of the Legal Construction and the Factual Construction.

Demetrios v Lehmann [2019] VSC 301 -
Demetrios v Lehmann [2019] VSC 301 -
Demetrios v Lehmann [2019] VSC 301 -
PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM [2018] NSWCA 168 (03 August 2018) (McColl, Basten and Leeming JJA)

29. As will be seen below, the language of "real party" has continued in some of the modern Australian decisions on non-party costs orders. Most recently, the Victorian Court of Appeal described the threshold issue in an application for a non-party costs order as being whether the non-party is "a real party" to the litigation: *Gdanski v Palms Court Management Pty Ltd* [2017] VSCA 348 at [69] . The distinction may be helpful including in cases where litigation is controlled by and conducted for the benefit of an insurer (for example, *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661; [2015] HCA 18) or a litigation funder (for example, *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*).

PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM [2018] NSWCA 168 (03 August 2018) (McColl, Basten and Leeming JJA)

57. Next, the mode of reasoning adopted by the primary judge is familiar, and understandable in light of the way the issues had been framed by the parties' submissions. In their submissions in reply, the applicants denied that there was a requirement of unreasonableness, relying upon what had been said in *Selig v Wealthsure Pty Ltd* at [44]-[45] . The judgment of French CJ, Kiefel, Bell and Keane JJ referred to the decision of the English Court of Appeal in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12; [1998] 2 All ER 873 which rejected a requirement of unreasonableness. I think the better view is that the decision of the High Court (whose judgment ordered the non-party QBE Insurance (Australia) Ltd to pay the appellants' costs) is inconsistent with a requirement of unreasonableness, because there was no finding that the insurer's conduct of the litigation had been unreasonable. This view is consistent with the statement of principle from *Shin Kobe Maru* referred to above. However, because the issue came before the primary judge only in submissions in reply, the respondents had no opportunity to be heard against what was said to flow from *Selig v Wealthsure Pty Ltd.* In such circumstances it was entirely appropriate, as well as being consistent with the incremental nature of curial decision-making, for the primary judge to decline to decide that question of law, on the basis that even if it were resolved favourably to the applicants, in its application to the facts of this case, they would not be entitled to the relief they sought.

PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM [2018] NSWCA 168 (03 August 2018) (McColl, Basten and Leeming JJA)

55. The applicants maintained that the primary judge erred in "refusing to find ... that it was unnecessary to characterise Mr Finnerty's conduct as unreasonable before a non-party costs order can be made against him in the present case". The sense is clear enough, although there seems to be an additional negative in the ground as formulated. The challenge was to the fact that his Honour had found it unnecessary to decide whether it was necessary to characterise Mr Finnerty's conduct as unreasonable. This was said practically to have had the effect of causing the refusal of the order. It was said that:

> "57. This practical effect is supported by his Honour having explicitly stated (in his five paragraphs of reasons for refusing the non-party costs order sought) that evidence of Mr Finnerty having acted unreasonably would '*provide the undoubted power*' to make the order sought. The applicants submit that for the reasons set out above with respect to Grounds 1 and 2, the power undoubtedly existed even absent a finding of unreasonableness (see *Selig* at [44]).
>
> 58. The policy argument that making a non-party costs order in this case would result in opening the floodgates to lift the corporate veil more broadly in future cases, is an irrelevant or extraneous factor or alternatively, it may be *a* factor but should not be the primary or determinative consideration and in finding it so, the Primary Judge fell into error." (emphasis in original)

PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM [2018] NSWCA 168 (03 August 2018) (McColl, Basten and Leeming JJA)

57. Next, the mode of reasoning adopted by the primary judge is familiar, and understandable in light of the way the issues had been framed by the parties' submissions. In their submissions in reply, the applicants denied that there was a requirement of unreasonableness, relying upon what had been said in *Selig v Wealthsure Pty Ltd* at [44]-[45] . The judgment of French CJ, Kiefel, Bell and Keane JJ referred to the decision of the English Court of Appeal in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12; [1998] 2 All ER 873 which rejected a requirement

of unreasonableness. I think the better view is that the decision of the High Court (whose judgment ordered the non-party QBE Insurance (Australia) Ltd to pay the appellants' costs) is inconsistent with a requirement of unreasonableness, because there was no finding that the insurer's conduct of the litigation had been unreasonable. This view is consistent with the statement of principle from *Shin Kobe Maru* referred to above. However, because the issue came before the primary judge only in submissions in reply, the respondents had no opportunity to be heard against what was said to flow from *Selig v Wealthsure Pty Ltd.* In such circumstances it was entirely appropriate, as well as being consistent with the incremental nature of curial decision-making, for the primary judge to decline to decide that question of law, on the basis that even if it were resolved favourably to the applicants, in its application to the facts of this case, they would not be entitled to the relief they sought.

Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm) (No 3) [2018] FCA 1107 (26 July 2018) (Moshinsky J)

Contravention of s 1041E constitutes an offence under s 1311(1) . The current penalty for contravention of s 1041E(1) in the case of an individual is: (1) imprisonment for 10 years; and/or (2) a fine the greater of (a) 4,500 penalty units, or (b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence – three times that total value: *Corporations Act* , Sch 3 . The serious nature of a contravention of s 1041E was recognised by the High Court in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, where a plurality observed it "involve[s] a higher level of moral culpability than the conduct referred to in s 1041H. Unlike s 1041H, contravention of any of ss 1041E-1041G constitutes an offence, an element of which is knowledge or recklessness": at [36] per French CJ, Kiefel, Bell and Keane JJ .

Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) (Responsible Entity) v Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) [2018] FCA 11 (17 January 2018) (Foster J)

139. Ms Banton placed little emphasis upon the fact that the decision of the High Court in *Selig* ha d been handed down on 13 May 2015. It will be remembered that, in that case, the High Court found that a claim under s 1041E was not apportionable thereby overruling a decision to the opposite effect given by the Full Court of this Court.

Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) (Responsible Entity) v Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) [2018] FCA 11 (17 January 2018) (Foster J)

119. Equititrust countered these submissions concerning potential cross-claims by emphasising that the evidence of Mr Harris, the solicitor for the auditors, did not go so far as to prove that the auditors definitely would bring any particular cross-claim. Mr Harris simply said that the auditors would have little choice but to consider bringing cross-claims to ventilate any issues of wrongdoing by other parties because the s 1041E cause of action now sought to be raised by Equititrust was not apportionable (as to which, see *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661) (*Selig*). During the hearing, Senior Counsel for the auditors handed up to me a list of persons against whom cross-claims might potentially be brought by the auditors. Potential cross-defendants were Equititrust, in its own capacity, and as RE of the EIF and as RE of the Equititrust Premium Fund, Mark McIvor, Wayne McIvor and Mr Haney. Other persons were also listed in that list.

Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) (Responsible Entity) v Equititrust Limited (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) [2018] FCA 11 -

Prime Capital Securities Pty Ltd v Elizabeth Ann Calleja; Caleja PJC Furniture Freighters Pty Ltd v Prime Capital Securities; Elizabeth Ann Calleja v Prime Capital Securities Pty Ltd (Costs) [2017] NSWSC 1801 (19 December 2017) (Wilson J)

20. The Court has the power to make an order of the nature sought, pursuant to s 98(1)(b) of the *Civil Procedure Act 2005* (NSW) : *Knight v FP Special Assets Ltd* [1992] 174 CLR 178; *Selig & Another v Wealthshure Pty Ltd & Others* (2015) 255 CLR 661 .

Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd [2017] QSC 219 (09 October 2017) (Jackson J)

169. But the causal question in the present case is not answered fully by asking whether the alleged representation played some part in the decision to enter into a contract that was loss making. It extends to the additional question of whether, had the representation not been made, the plaintiff would not have entered into the guarantee and thereby avoided any liability under it. This is a "but for" question of causation. It is akin to the question of causation considered in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* . [58]

via

[58] (1999) 199 CLR 413, 426 [19], 428 [30], 433 [72], 447 [86], 457 [119] and 461 [130] . Compare also *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1, [221]-[232] . The decision of the Full Court of the Federal Court of Australia was reversed but not on this question in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 .

Dunn v Hanson Australasia Pty Ltd [2017] ACTSC 169 (12 July 2017) (Mossop J)

32. An inquiry and subsequent report by Professor Davis in 1995 ('the Davis Report') resulted over time in the Commonwealth States and Territories enacting legislation providing for regimes of proportionate liability for various types of claims: see *Hunt & Hunt Lawyers v Mitchell Morgan Nominess Pty Ltd* [2013] HCA 10; 247 CLR 613 at [10]-[14] ; *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [20] . In the present case there are three different regimes that potentially apply to different aspects of the plaintiffs claims. They involve the provisions of the *Building Act* , *Civil Law (Wrongs) Act 2002* (' CLW Act ') and the TPA .

Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 (07 April 2017) (McColl and Gleeson JJA, Emmett AJA)

14. JLR Davis, (Commonwealth of Australia, 1995) (Davis Report); the inquiry was announced following a resolution of the Standing Committee of Attorneys General (SCAG); see text to the Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability (July 1996) (Draft Model Provisions) which reflected the recommendations of the Davis Report; see also Selig v Wealthsure Pty Ltd (2015) 255 CLR 661; [2015] HCA 18 (Selig) (at [19] – [21]) per French CJ, Kiefel, Bell and Keane JJ.

Shinwari v Anjoul by her tutor Therese Anjoul [2017] NSWCA 74 (07 April 2017) (McColl and Gleeson JJA, Emmett AJA)

Cf Selig at [34] .

Trustee for The MTGI Trust v Johnston (No 2) [2016] FCAFC 190 (23 December 2016) (Siopis, Collier and Katzmann JJ)

30. Principles guiding the exercise of the discretion of the Court to award costs against a non-party were set out by Mason CJ and Deane J in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

As more recently explained by French CJ, Kiefel, Bell and Keane JJ in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [43] :

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

Australian Securities and Investments Commission, in the matter of Sino Australia Oil and Gas Limited (in liq) v Sino Australia Oil and Gas Limited (in liq) [2016] FCA 1488 (08 December 2016) (Davies J)

35. The relevant principles to apply were considered in *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64; (2014) 221 FCR 1. At [254]–[256], White J stated:

> Sections 729, 1041I and 1325 of the Corporations Act , and s 12GF of the ASIC Act , which entitled the Seligs to recover damages for the respective contraventions are expressed in similar, but not identical, terms. Section 729 allows a person who suffers loss or damage "because" an offer of securities under a disclosure document contravenes s 728(1) to recover the amount of the loss or damage from the contravener. Section 1325 is expressed in (relevantly) similar terms. Section 1041I perm its a person who suffers loss and damage "by" conduct of another which contravenes identified provisions, including ss 1041E and 1041H, to recover the amount of loss and damage from the contravener. Section 12GF is expressed in similar terms. These provisions are, in turn, similar to s 82 of the former *Trade Practices Act 1974* (Cth) (the T PA) and s 236 of the *Australian Consumer Law* .
>
> The words "because" and "by" indicate the requirement for a causal connection between the contravention in question and an applicant's loss and damage.
>
> As is well-established, causation is essentially a question of fact to be determined in a practical way having regard to common experience: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; 99 ALR 423; *Henville v Walker*. In that determination, policy considerations, value judgments and the concepts of remoteness and reasonable foreseeability may all play a role.

(*Wealthsure Pty Ltd v Selig* was appealed to the High Court but not on this point: *Selig v Wealthsure Pty Ltd* [2015] HCA 18 .) In other cases, causation under these provisions has been put in terms of a "but for" test: see eg *Agricultural Land v Jackson (No 2)* [2014] WASC 102 at [451]–[452] . However expressed, it is necessary that there be a causal nexus between Sino's loss and damage (if proven) and Mr Shao's contraventions if the liquidator is to succeed on his compensation claim.

Sinergia Construction Project Management Pty Ltd v Clear Interiors Pty Ltd (No 2) [2016] FCA 1308 (07 November 2016) (Charlesworth J)

4. This Court has the power to award costs against a non-party: s 43(1) of the *Federal Court of Australia Act 1976* (Cth) (FC Act). In respect of an equivalent power conferred upon the High Court, Gageler J said in *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 (at [43]):

> In *Knight v FP Special Assets Ltd*, this Court held that its discretionary power to make orders against non-parties extends to the circumstance 'where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party ...

has an interest in the subject of the litigation'. There is, however, no rule that where a non-party falls into this category an order for costs will necessarily follow. Rather, as Mason CJ and Deane J said, 'an order for costs should be made against the non-party if the interests of justice require that it be made'.

(footnotes omitted)

Murray v MyDomaine Pty Ltd [2016] WADC 109 (S) (28 July 2016) (Levy DCJ)
Selig v Wealthsure Pty Ltd (2015) 255 CLR 661
SMEC Testing Services Pty Ltd v Campbelltown City Council

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Murray v MyDomaine Pty Ltd [2016] WADC 109 (S) -
HFPS Pty Limited (Trustee) v Tamaya Resources Limited (In Liq) (No 2) [2016] FCA 446 (28 April 2016) (Foster J)

30. The plaintiffs also submitted that they were not really in a position to bring forward the new claim under s 1041E of the *Corporations Act 2001* (Cth) until the High Court delivered its decision in *Selig v Wealthsure Pty Ltd* (2015) 320 ALR 47 on 13 May 2015. While that proposition has some superficial attraction, the issue of proportionate liability in this context had been the subject of lively debate ever since the trial judge delivered his decision in *Selig* , which, of course, was some years before 2015. More importantly, in *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, the Full Court of this Court had expressed the contrary view to that which had been expressed by the Full Court of this Court in *Selig* . The *ABN AMRO* decision was handed down on 6 June 2014. It is fair to say that, until the High Court delivered its judgment, the controversy concerning proportionate liability in this context was well and truly alive. However, it is not the case that the High Court's judgment was the first occasion that a competent lawyer dealing with a case such as the present could have and should have turned his or her mind to the question of proportionate liability.

HFPS Pty Limited (Trustee) v Tamaya Resources Limited (In Liq) (No 2) [2016] FCA 446 (28 April 2016) (Foster J)

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HFPS Pty Limited (Trustee) v Tamaya Resources Limited (In Liq) (No 2) [2016] FCA 446 (28 April 2016) (Foster J)

40. On 19 May 2015, at a case management hearing held on that day, Counsel then appearing for the plaintiffs informed the Court that the plaintiffs would seek leave to amend the Amended Statement of Claim in order to include a claim based upon the High Court's decision in *Selig* . It was not suggested that any other amendments would be required or sought. Despite the

impression given by the terms in which that indication was conveyed to the Court, there is no doubt that consideration had been given well before the delivery of the decision in *Selig* as to whether or not leave to amend to include a claim under s 1041E of the Corporations Act should be included in the plaintiffs' pleadings.

HFPS Pty Limited (Trustee) v Tamaya Resources Limited (In Liq) (No 2) [2016] FCA 446 -
HFPS Pty Limited (Trustee) v Tamaya Resources Limited (In Liq) (No 2) [2016] FCA 446 -
Kojic v Commonwealth Bank of Australia [2016] FCA 368 (15 April 2016) (Mansfield J)

219. The Kojics in response made the points that in respect of non-tortious liability, such as liability for statutory unconscionable conduct, no issue of contribution arises as the Contribution Act does not apply at all. They also noted that neither the CBA nor McDonald has sought to enliven the proportionate liability provisions under Div 2A of Pt 7.10 of the *Corporations Act 2001* (Cth) or its analogue in Pt 2 Div 2, Subdiv GA of the ASIC Act . As to the latter enactments, see *Selig v Wealthsure Pty Ltd* (2015) 320 ALR 47 .

Tabcorp Holdings Ltd v Victoria [2016] HCA 4 (02 March 2016) (French CJ, Kiefel, Bell, Keane and Gordon JJ)

65. The matter may be tested this way. Tabcorp's contention that the phrase "grant of new licences" in s 4.3.12 was generic (and was capable of extending to and intended to extend to the allotment of GMEs) would require the Court to accept that, in a single section, and for the first and only time in Pt 3 of Ch 4 of the 2003 Act, Parliament adopted a generic and ambulatory meaning of the term "licences" in circumstances where the term had been, and continued to be, consistently used in a confined and defined way throughout the Part. In fact, Tabcorp's construction of "new licences" would impermissibly involve giving the term "licences" a different meaning within a single section (s 4.3.12) and, indeed, within a single sub-section (s 4.3.12(1)). There is nothing in the text or context of s 4.3.12 that supports Tabcorp's construction. A consistent meaning should ordinarily be given to a particular term wherever it appears in a suite of statutory provisions [52] .

via

[52] *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; [1975] HCA 41; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32]; [2013] HCA 52; *Selig v Wealthsure Pty Ltd* (2015) 89 ALJR 572 at 578 [29] ; 320 ALR 47 at 55 ; [2015] HCA 18 .

Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm) [2016] FCAFC 2 (15 January 2016) (Gilmour, Perram & Beach JJ)

62. On 13 May 2015 there was a development when the High Court delivered its reasons for judgement in *Selig v Wealthsure Pty Ltd* (2015) 320 ALR 47 (' *Selig*'). That case concerned the question of whether claims under, inter alia, s 1041E of the *Corporations Act 2001* (Cth) could be apportioned under Div 2A of Pt 7.10 of that Act. The Court held that they could not.

Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm) [2016] FCAFC 2 (15 January 2016) (Gilmour, Perram & Beach JJ)

74. There were two aspects to this difficulty:

(a) the new claim advanced under s 1041E could not be met in time. This claim, it will be recalled, became more valuable against Deloitte after the High Court's decision in *Selig* on 13 May 2015. However, s 1041E involves an allegation of misrepresentation which has a mental element to it. Until the appearance of that new allegation, Deloitte had decided it did not need to call any members of the audit team and were proposing to meet the case on the basis that what was

involved was, in effect, a battle between audit experts. Now that the s 1041E claim was raised this required that position to be revisited;

(b) complaint was made about Tamaya's attempt to render irrelevant the Shareholder Class Action issue by the device of each shareholder lodging instead a proof of debt for the same amount with the liquidator.

Latol Pty Limited v Gersbeck [2015] NSWSC 1631 (18 November 2015) (Hamill J)

54. However, I doubt that s 12GR is applicable in the circumstances. Section 12GP defines the terms "apportionable claim" and "concurrent wrongdoer" for the purpose of Sub-division GA and, relevantly, s 12GR. An apportionable claim is one for economic loss caused by conduct in contravention of s 12DA . Section 12DA proscribes conduct that is misleading or deceptive. A concurrent wrongdoer is a person who, independently or jointly, caused the damage or loss that is the subject of the claim. In *Selig v Wealthsure Pty Ltd* [2015] HCA 18 the High Court considered similar provisions in the *Corporations Act 2001 (Cth)* . It was held that the "claim" referred to in each sub-section must be constituted by a breach of the relevant provision. French CJ, Kiefel, Bell and Keane JJ said at [29]:

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

Latol Pty Limited v Gersbeck [2015] NSWSC 1631 -
Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq) [2015] FCA 1098 (14 October 2015) (Gleeson J)

92. In Tamaya's written submissions, the following two matters are said to explain the timing of the applications for leave to amend:

(1) At the directions hearing on 13 March 2015, some of the defendants pointed out that the plaintiffs' evidence served on 11 March 2015 was not within the scope of the case currently pleaded;

(2) the High Court's decision in *Selig v Wealthsure Pty Ltd* [2015] HCA 18; (2015) 320 ALR 47 (" *Selig*") on 13 May 2015.

Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq) [2015] FCA 1098 (14 October 2015) (Gleeson J)
Selig v Wealthsure Pty Ltd [2015] HCA 18; (2015) 320 ALR 47
Suzlon Energy Ltd v Bangad

Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq) [2015] FCA 1098 (14 October 2015) (Gleeson J)

114. Ms Palmer gave the following evidence:

> In mid-May, in view of the *Selig* decision and the complaints made earlier by the Deloitte Defendants, our agreement to reconsider the issue of amendments after the

mediation and the complaints of those director defendants represented by JWS on 15 May 2015, Ms Banton, my colleague Paul Springthorpe and I considered whether to amend the Tamaya Proceedings.

After the consideration referred to above, instructions were provided to Counsel to assist with the drafting of amended pleadings in each of the Tamaya Proceedings in May 2015.

Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq) [2015] FCA 1098 (14 October 2015) (Gleeson J)

157. These proposed amendments raise serious allegations against the various defendants in connection with events that occurred over seven years ago. In particular, a contravention of s 1041E is an offence, involving an element of knowledge or recklessness: see s 1311 of the Corporations Act and *Selig* at [36] .

Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq) [2015] FCA 1098 -
Yu v Cao [2015] NSWCA 276 (14 September 2015) (McColl JA, Sackville AJA and Adamson J)

Knight v FP Special Assets Ltd [1992] HCA 28; (1992) 174 CLR 178; *Selig v Wealthsure Pty Ltd* [2015] HCA 18; (2015) 89 ALJR 572 applied.

Yu v Cao [2015] NSWCA 276 (14 September 2015) (McColl JA, Sackville AJA and Adamson J)

68. Knight v FP Special Assets Ltd [1992] HCA 28; (1992) 174 CLR 178 ("Knight") (at 192 – 193) per Mason CJ and Deane J (Gaudron J agreeing); Selig v Wealthsure Pty Ltd [2015] HCA 18 ; (2015) 89 ALJR 572 (at [43]) per French CJ, Kiefel, Bell and Keane JJ (Gageler J agreeing).

Yu v Cao [2015] NSWCA 276 (14 September 2015) (McColl JA, Sackville AJA and Adamson J)
Aiden Shipping Co Ltd v Interbulk Ltd [1986] 1 AC 965 Almeida v Universal Dye Works Pty Ltd (No 2) [2001] NSWCA 156 Arena Management Pty Ltd (rec and mgr apptd) v Campbell Street Theatre Pty Ltd (2011) 80 NSWLR 652 ; [2011] NSWCA 128 Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation (2001) 179 ALR 406 ; [2001] HCA 26 Barton v Armstrong [1976] AC 104 Bullock v London General Omnibus Company [1907] 1 KB 264 Cao v Liu [2013] NSWDC 8 Cao v Liu [2013] NSWDC 172 Cao v Liu (District Court (NSW), Walmsley SC ADCJ, 20 March 2014, unrep) Capital Securities (Aust) Pty Ltd v Perpetual Trustees Victoria Ltd [2009] VSCA 259 Central Queensland Development Corporation Pty Ltd v Sunstruct Pty Ltd (2015) 106 ACSR 127 ; [2015] FCAFC 63 Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389 Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4) (2012) 200 FCR 154 ; [2012] FCAFC 50 Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2005] 1 NZLR 145 ; [2004] UKPC 39 Edgington v Fitzmaurice (1885) 29 Ch D 459 Flinn v Flinn [1999] VSCA 134 FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340 Gore v Justice Corporation Pty Ltd (2002) 119 FCR 429 ; [2002] FCAFC 83 ; [2002] FCA 354 Harley v McDonald [2001] 2 AC 678 ; [2001] UKPC 18 House v The King (1936) 55 CLR 499 Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 239 CLR 75 ; [2009] HCA 43 Kebaro Pty Ltd v Saunders [2003] FCAFC 5 Knight v FP Special Assets Ltd (1992) 174 CLR 178 Links Golf Tasmania Pty Ltd v Sattler (No 2) (2012) 213 FCR 239 ; [2012] FCA 1271 March v E & MH Stramare Pty Ltd (1991) 171 CLR 506 May v Christodoulou (2011) 80 NSWLR 462 ; [2011] NSWCA 75 Medcalf v Mardell [2003] 1 AC 120 ; [2002] UKHL 27 Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388 ; [2001] HCA 69 Perpetual Trustees Victoria Ltd v Capital Securities (Aust) Pty Ltd [2009] VCC 34 Ridehalgh v Horsefield [1994] Ch 205 Selig v Wealthsure Pty Ltd (2015) 89 ALJR 572 ; [2015] HCA 18 Shah v Karanjia [1993] 4 All ER 792 Sved v Council of the Municipality of Woollahra (1998) NSW ConvR 55842 Symphony Group plc v Hodgson [1994] QB 179 Vestris v Cashman (1998) 72 SASR 449 Webb v Bloch (1928) 41 CLR 331 Wentworth v Wentworth (1999) 46 NSWLR 300 ; [1999] NSWSC 317 Wentworth v Wentworth (2001) 52 NSWLR 602 ; [2000] NSWCA 350

Yu v Cao [2015] NSWCA 276 -

Pirie Street Stage 1 P/L v Trotman & Anor and Stewart & Ors [2015] SADC 123 (26 August 2015) (Beazley J)
FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45 ; *Perpetual Trustee Co Ltd v Burniston (No2)* [2012] WASC 389; *Lintrose Nominees Pty Ltd v King* [1995] 1 VR 574; *King v Lintrose Nominees* [2001] VSCA 140; *Quickfund (Aust) Pty Ltd v Prosperity Group International Pty Ltd* [2013] FCAFC 5; *Perpetual Trustees Victoria Ltd v Burns* [2015] WASC 234; *Gel Custodians Pty Ltd v Dewar* [2014] WASC 177; *Mirvac (Docklands) Pty Ltd v La Rocca* [2006] VSC 48; *Price v Powers* [2005] WASC 154; *HSBC Bank Australia Ltd v Mavaddat* [2015] WASC 153; *Selig v Wealthsure Pty Ltd* [2015] HCA 18 , and [2013] FCA 348 ; *Molinara v Perre Bros Lock 4 Pty Ltd* [2014] SASCFC 115; *Vetesse v Kemp* (2000) 77 SASR 53 at 64 ; *NMFM Property Ltd v Citibank (No 10)* (2000) 107 FCR 270; *Campbell v Backoffice* (2009) 238 CLR 304; *Pappas v Soulac* (1983) 50 ALR 231; *Garcia v National Australia Bank* (1998) 194 CLR 395; *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; *Micarone v Perpetual Trustee* (1999) 75 SASR 1; *Secure Funding Pty Ltd v Egan* (2015) NSWSC 340; *Tonto Home Loans Aust Pty Ltd v Tavares* [2011] NSWCA 389; *Landa v Perpetual Trustees Victoria* [2013] NSWSC 1685; *Petersen v Moloney* [1951] 84 CLR 91; *Perpetual Trustees Victoria Ltd v Xiao* [2015] VSC 21; *International Harvester Co of Australia Pty Ltd v Carrigans Hazeldene Pastoral Co* (1958) 100 CLR 644; *Violet Home Loans Pty Ltd v Schmidt* [2013] VSCA 56; *Prosperity Group International Pty Ltd v Queensland Communication Co Pty Ltd* [2003]; *General Newspaper Pty Ltd v Telstra Group* [1993] FCA 473; *Google Inc v ACCC* [2013] HCA 1; *Toll v Alphapharm* [2004] 219 CLR 165; *Mark Bain Constructions Pty Ltd v Avis* [2012] QCA 100; *Chew v Amanatidis* [2009] SASC 334, considered.

Casaclang v WealthSure Pty Ltd [2015] FCA 761 (27 July 2015) (Buchanan J)
Selig v Wealthsure Pty Ltd [2015] HCA 18
Selig v Wealthsure Pty Ltd

Casaclang v WealthSure Pty Ltd [2015] FCA 761 -
Dean v Phung [2015] NSWSC 816 (21 July 2015) (Beech-Jones J)

10. In *HRX Pty Ltd v Scott* [2013] NSWSC 451 at [56] Bergin CJ in Eq nominated that one circumstance in which a costs order might be made against a third party was "that the non-party had been the cause of the proceedings in that such proceedings would not have been undertaken had it not been for the non-party's intervention". Thus in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 (" *Selig*") an insurer who initiated and conducted an appeal in the name of an insured that was ultimately unsuccessful was ordered to pay the successful party's costs even though the cover provided by the policy of insurance was not sufficient to meet the insured's liability to pay those costs (*Selig* at [44] to [46]).

Dean v Phung [2015] NSWSC 816 -
Williams v Pisano [2015] NSWCA 177 (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

Selig v Wealthsure at [21] .

Williams v Pisano [2015] NSWCA 177 (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

Selig v Wealthsure at [31] .

Williams v Pisano [2015] NSWCA 177 (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

See Selig v Wealthsure at [35] .

Williams v Pisano [2015] NSWCA 177 (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

Selig v Wealthsure at [29] .

Williams v Pisano [2015] NSWCA 177 (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

Selig v Wealthsure Pty Ltd [2015] HCA 18; 89 ALJR 572 .

Williams v Pisano [2015] NSWCA 177 (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

11. Selig v Wealthsure Pty Ltd [2015] HCA 18 .

Williams v Pisano [2015] NSWCA 177 (29 June 2015) (Bathurst CJ, McColl and Emmett JJA)

ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 ; 224 FCR 1 Alcan Australia Ltd, Re; Ex parte Federation of Industrial, Manufacturing and Engineering Employees (1994) 181 CLR 96 Argy v Blunts & Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112 Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 Commonwealth v Baume (1905) 2 CLR 405 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 Franich v Swannell (1993) 10 WAR 459 Hadgelias Holdings Pty Ltd v Seirlis [2014] QCA 177 ; [2015] 1 Qd R 337 Henville v Walker [2001] HCA 52 ; 206 CLR 459 Houghton v Arms [2006] HCA 59 ; 225 CLR 553 Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 ; 247 CLR 613 Ku-ring-gai Co-Operative Building Society (No 12) Ltd, Re (1978) 22 ALR 621 Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579 Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290 O'Brien v Smolonogov (1983) 53 ALR 107 Pisano v Dandris [2014] NSWSC 1070 ; 17 BPR 33,583 Robinson v Harman (1848) 1 Ex 850 ; 154 ER 363 Saeed v Minister for Immigration and Citizenship [2010] HCA 23 ; 241 CLR 252 Sanderson Motors Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2014] NSWSC 846 Selig v Wealthsure Pty Ltd [2015] HCA 18 ; 89 ALJR 572 Tomasetti v Brailey [2012] NSWCA 399 ; 91 ATR 531

Williams v Pisano [2015] NSWCA 177 -
In the matter of Vangory Holdings Pty Ltd [2015] NSWSC 801 -
Smart v AAI Ltd [2015] NSWSC 392 (22 May 2015) (Beech-Jones J)

162. During argument the Court was referred to s 35(3)(a) of the *Civil Liability Act* as the source of the power to reduce either of the plaintiff's claims on account of contributory negligence. Subsection 35(3)(c) is found within Part 6 of the *Civil Liability Act* dealing with proportionate liability. It provides that, in apportioning responsibility between defendants, there is to be an exclusion of the proportion of the damage or loss "in relation to which the plaintiff is contributorily negligent". However that is qualified by the words "under any relevant law". The "relevant law" referred to is some other law that enables a reduction in the plaintiff's claim for contributory negligence (such as s 8 of the *Law Reform (Miscellaneous Provisions) Act 1965*): *Selig* at [34] . As there is no "relevant law" applicable to the plaintiff's contract claim that allows a reduction for contributory negligence, it follows that s 35(3)(a) is not engaged even if the claim was otherwise an apportionable claim, which it is not.

Smart v AAI Ltd [2015] NSWSC 392 -