Different but same

David Parish reports on *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10

If an insurance broker negligently fails to renew an insurance policy, when the bank is robbed and the policy does not respond, is the thief a concurrent wrongdoer in proceedings against the broker for negligence? That scenario never happened, yet eight appellate judges in NSW and Victoria and two High Court judges thought the answer was no. Three High Court judges said yes.

The hypothetical was tested in a case where a solicitor employed by Hunt & Hunt Lawyers prepared a mortgage for a lender, Mitchell Morgan Nominees. The mortgage was defective, the loan was a fraud, and when Mitchell Morgan came to call upon their security against the registered proprietor they were left with a mortgage that secured nothing.

The issue subject to the High Court's scrutiny in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [1] was whether the fraudsters were concurrent wrongdoers under s 34(2) of the *Civil Liability Act 2002* (NSW). To be concurrent wrongdoers, their acts or omissions must have caused, independently or jointly, the damage or loss the subject of the claim. With the abolition of solidary liability under Part IV of the Act, successfully apportioning liability to the fraudsters as concurrent wrongdoers significantly reduced the lawyers' liability.

Court of Appeal

In the NSW Court of Appeal a bench of five held that to be a concurrent wrongdoer the loss caused by the fraudsters had to be the same loss or damage the subject of the claim.[2] By examining that economic interest lost, the Court of Appeal held that the loss caused by the lawyers was the loss of a security and the loss caused by the fraudsters was the money paid away.[3] Being damage characterised differently than that the subject of the claim, the fraudsters were not concurrent wrongdoers.

In a fit of interstate efficiency, the Victorian Court of Appeal in *St George v Quinerts*[4] considered the Hunt & Hunt Lawyers decision at first instance and decided it hypothetically in the same manner as that of the NSW Court of Appeal. In this respect, the High Court was in some ways reviewing the reasoning of the Victorian Court of Appeal as well.

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Same loss or damage

The High Court majority[5] and minority[6] agreed the loss or damage caused by the fraudsters had to be the same as that caused by the lawyers. This was an issue in the Court of Appeal and in *St George v Quinerts* because of the absence of the word 'same' in s 34(2) of the Act and its Victorian equivalent. However, the High Court thought it uncontroversial that the harm had to be the same because, as the majority put it, 'It is difficult to see that, as between concurrent wrongdoers, the damage they have caused can be other than the same for the purposes of s 34(2), since it is identified in each case as that which is the subject of the plaintiff's claim.'[7]

Economic loss or damage is the harm suffered to a plaintiff's economic interests. On this, the majority and minority also agreed.[8]

The majority and minority parted ways over what the loss or damage the subject of the claim was that the lawyers caused and what was that which the fraudsters caused. The majority thought the harm the same, the minority different.

Identifying the loss or damage the subject of the claim (French CJ, Hayne and Kiefel JJ)

Mitchell Morgan had sued the lawyers for negligently drawing a mortgage that turned out to secure nothing in the event of fraud. Giles JA had held the harm to economic interest caused by the fraudsters was Mitchell Morgan paying out money when it otherwise would not have done so and the loss caused by the lawyers was not having the benefit of the security.[9] The second act only was the subject of the claim by Mitchell Morgan. The majority decided that the Court of Appeal's identification of the loss the subject of the claim as the loss of the security was incorrect. The analysis of Giles JA was criticised for identifying

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the immediate effects of the wrongdoer's conduct, important to causation but not to be equated with damage.[10] By way of illustration, the majority noted that a negligently drawn mortgage was not necessarily productive of loss. In a case involving the loan of money, damage would be sustained when the failure to recover the money became ascertainable. If it is recoverable from the person who obtains the money, the mortgage has no work to do.[11]

The majority then turned to the insurance broker analogy used by Nettle JA in *St George v Quinerts*[12] and referred to by the NSW Court of Appeal. Nettle JA drew a distinction between the damage caused by the thief stealing the money and the damage caused by the insurance broker in failing to ensure the bank could obtain indemnity from an insurance company. The majority found the analogy apt the opposite way; in both cases it was correct to describe the loss as the inability to recover the money: 'The harm at a certain point is the inability to recover the money from either source.' [13]

The majority drew parallels with *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[14] in holding that the economic interest lost by Mitchell Morgan was the loss of the recovery of the money lent.[15] Once this was found, it was inevitable that the fraudsters were concurrent wrongdoers: there were two necessary conditions to render the mortgage completely ineffective, a void loan agreement and a mortgage without a debt covenant. The fraudsters caused the former; the lawyers, the latter; both caused the money to be irrecoverable.[16]

Identifying the loss of damage the subject of the claim (Bell and Gageler JJ)

The minority proceeded upon the same framework as the majority of first identifying the damage or loss the subject of the claim. This is where the minority and majority differed.

Bell and Gageler JJ agreed with the Court of Appeal that the economic interest lost by Mitchell Morgan was an effective security.[17] That was the subject of the claim and no act or omission of the fraudsters caused the security to be ineffective.

Conclusion

In establishing what the economic interest lost is, the majority may be criticised for taking an overly reductionist approach. By deciding that at a certain point the harm is the loss of money may well be so generally applicable as to render the need for an identification of the damage moot. Is not all civil litigation 'at a certain point' about the loss of money? Does this get too close to conflating damage with damages as the Court of Appeal warned? On the other hand, the majority decision may be seen as no more than an application of well-established principles of determining the economic harm to the proportionate liability provisions. Either way it highlights the importance of considering what precisely the economic interest lost is when preparing cases involving economic loss.

Because the purpose of the proportionate liability provisions was to abolish the solidary liability of tortfeasors, the simplest way to test the High Court decision is to ask whether the lawyers could have recovered against the fraudsters for the same loss or damage under s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*. It is difficult to answer by reference to any authority as the contribution legislation does not extend to liability for breach of contract and it appears few insured tortfeasors bothered to seek contribution against impecunious fraudsters.

It seems unusual that the effect of the proportionate liability provisions is that persons retained to protect clients from harm – valuers, brokers, solicitors – can be held only 12.5 per cent liable when they fail to protect from the very harm they were paid to

prevent. Was this the intention of the proportionate liability provisions? Perhaps it was, when it is remembered that the mischief the provisions were intended to remedy was the deep pocket litigation against insurers indemnifying against economic loss.

Putting aside the policy behind the legislation, the ascertainment of the economic harm does not appear to be an exact science and well-reasoned arguments can be made for either conclusion. After the scrutiny of fourteen judges[18] in which ten decided the fraudsters were not concurrent wrongdoers and four decided they were, it is clear that how loss is characterised is a matter over which reasonable minds can differ.

Endnotes

1. [2013] HCA 10.
2. *Mitchell Morgan v Vella* [2011] NSWCA 390 at [48] and [49].
3. Ibid at [41].
4. (2009) VR 666.
5. French CJ, Hayne and Kiefel JJ.
6. Bell and Gageler JJ.
7. *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (supra) at [21] and [92].
8. Ibid [24] and [100]
9. Ibid at [41].
10. Ibid at [30].
11. Ibid at [31] and [32].
12. Ibid at [39]
13. Ibid at [40].
14. [1999] HCA 25; (1999) 199 CLR 413.
15. Ibid at [28].
16. Ibid at [49] and [50].
17. Ibid at [100].
18. Young CJ in Eq (as he then was) at first instance; Bathhurst CJ, Giles, Campbell and MacFarlan JJA, and Sackville AJA in the NSW Court of Appeal; French CJ, Hayne, Kiefel, Bell and Gageler JJ in the High Court; and analysed by the Victorian Court of Appeal in *St George Pty Ltd v Quinerts Pty Ltd* [2009] VR 666.

When is a share a preference share?

James Hutton reports on *Beck v Weinstock* [2013] HCA 15

The High Court, dismissing an appeal from the New South Wales Court of Appeal,[1] has confirmed that a share may be a 'preference share' for the purposes of the *Corporations Act 2001* (Cth) (Act) irrespective of whether there are any other shares on issue against which its rights are to be preferred. Accordingly, a company may issue 'redeemable preference shares' within s 254A(1) of the Act, and redeem them pursuant to s 254J(1) of the Act, without ever issuing any other shares over which the issued shares have preferential rights.

Background

As previously noted,[2] the dispute concerned whether a closely held family company, LW Furniture Consolidated (Aust) Pty Ltd (LW), had effectively redeemed, at par, eight shares styled 'redeemable preference shares' that it had issued to a Ms Hedy Weinstock. One of Ms Weinstock's executors commenced proceedings challenging the effectiveness of the purported redemption. The par value of Ms Weinstock's shares was $8 whereas the executor claimed that the true value of her shares on winding up would be over $7 million.

LW's Memorandum and Articles of Association provided for its authorised share capital to be designated into four classes of preference shares classified 'A' to 'D' and ten classes of ordinary shares. The only shares ever allotted were 'A', 'C' and 'D' class preference shares. The 'C' class shares did not carry any right to vote, ranked equally as regards return of capital after the 'A' class shares but equally with the 'D' class shares and in priority to ordinary shares and ranked equally with both the 'D' class shares and ordinary shares as regards dividends. Accordingly, at no time were there any shares on issue carrying rights subordinate to the rights of the 'C' class shares. The 'C' class shares were liable to be redeemed at par upon the death of the holder.