



Hall & Wilcox
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insurable interest

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Sharing the blame

The 'new' apportionment of liability laws continue to throw up interesting outcomes. A NSW Supreme Court Judge had to consider the position of solicitors who were found to have negligently failed to ensure that loan and mortgage documents were properly executed. In fact, the signatures on the documents were forgeries, and as a result two fraudsters ended up with the money.

The case was considered under the NSW legislation which is different to the Victorian legislation in that a NSW court may have regard to the comparative responsibility of a concurrent wrongdoer who is *not* a party to the relevant proceeding.

The judge decided that the claim against the solicitors was an apportionable claim and that the fraudsters were concurrent wrongdoers for the purposes of the legislation. He considered the conduct of each party and apportioned 72.5% liability to one fraudster, 15% liability to the other fraudster and 12.5% liability to the solicitors.

The solicitors had a cross-claim against one of the fraudsters to seek reimbursement of the amount which the solicitors had to pay to the plaintiff. That claim had three bases:

- ♦ contribution (under traditional contribution legislation);
- ♦ damages under the *Fair Trading Act* for false and misleading conduct; and
- ♦ damages under the *Australian Securities and Investments Commission Act* for misleading or deceptive conduct.

The solicitors succeeded on all three grounds. However, that was probably cold comfort because the fraudster was bankrupt.

Ordinarily the apportionment legislation would prevent one defendant from obtaining contribution from another defendant when liability has already been apportioned between them. However, an exception to that rule is where the conduct of one of the defendants is found to have been fraudulent.

From one point of view, the decision is 'unfair' to the solicitors in the sense that they found themselves sharing liability with two defendants who had engaged in a deliberate fraud. On the other hand, if not for the apportionment legislation, the solicitors could have been held to be independently liable for the full amount of the plaintiff's loss and, given that the fraudsters were both bankrupt, there is no prize for guessing who the plaintiff would have demanded full payment from.

So while the solicitors ended up with a useless order for contribution from a bankrupt defendant, the good news was that their liability was limited to 12.5% in circumstances where, but for the apportionment legislation, they would have been liable for 100%. But perhaps not such good news for the plaintiff: *Vella v Permanent Mortgages*.

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