SELIG & ANOR v WEALTHSURE PTY LTD & ORS (A25/2014)

Court appealed from:	Full Court, Federal Court of Australia[2014] FCAFC 64; [2014] FCAFC 76
Date of judgment:	30 May 2014; 26 June 2014
Date special leave granted:	14 November 2014

In 2004 and 2005, the appellants ('the Seligs') acted on the financial advice of the second respondent, David Bertram ('Bertram'), and invested $450,000 in Neovest Ltd. The investment failed. At the time the advice was given, Bertram was an authorised representative of the first respondent ('Wealthsure'). The Seligs claimed damages for the loss of their investment and consequential losses against a number of defendants including Wealthsure and Bertram. They relied on statutory and common law causes of action including breaches of ss 945A and 945B of the *Corporations Act* 2001(Cth); misleading and deceptive conduct in relation to a financial product or a financial service, contrary to s 1041H of the *Corporations Act*; false or misleading statements to induce a person to apply for, acquire or dispose of financial products, contrary to s 1041E of that Act; and breaches of the contract of retainer and negligence.

The primary judge (Lander J) entered judgment for the Seligs against Wealthsure, Bertram and two other defendants in the sum of $1,760,512. His Honour found that the Seligs had been contributorily negligent to the extent of 15%, but he held that the damages should not be reduced for contributory negligence. The judge also held that the proportionate liability provisions in ss 1041L and 1041N of the *Corporations Act* applied only to the claim brought by the Seligs under s 1041H. As they had succeeded on other claims, he made no declarations as to apportionment.

Wealthsure and Bertram appealed to the Full Court of the Federal Court (Mansfield, Besanko and White JJ). They contended, inter alia, that all of the Seligs' claims in respect of the same loss and damage comprised "a single apportionable claim" as contemplated by s 1041L(2) of the Corporations Act and, accordingly, were "apportionable" for the purposes of s 1041N of the Act; therefore the primary judge should have entered judgment against them only to the extent of their proportionate responsibility.

Mansfield J (with whom Besanko J concurred on this issue) noted that s 1041L(4) confines apportionable claims to claims for that type of loss caused by conduct in contravention of s 1041H. Section 1041N then provides that in any proceedings involving an apportionable claim, the liability of a defendant who is a concurrent wrongdoer in relation to that claim is to be apportioned. His Honour considered that those provisions tended to indicate that the appropriate focus is upon whether the claim or claims made in a particular matter are in respect of the same loss or damage. The focus is upon the nature of the loss or damage for which relief is sought, rather than upon the nature of the cause of action or causes of action which give rise to the entitlement to that loss or damage. The combination of ss 1041L(2) & (3) indicates a legislative intention that an apportionable claim is one where a claim for damages for economic loss caused by a contravention of s 1041H succeeds. Even if there is a separate cause or other causes of action which has or have

caused the same damage, the claim maintains its character as an apportionable claim. In the present case, the findings that each group of defendants at trial contravened s 1041H, and that each group of defendants' conduct contributed to the same loss and damage suffered by the Seligs, was sufficient to determine that the claim or claims against them each was an apportionable claim notwithstanding that the causes of action giving rise to that loss and damage extended beyond the contraventions of s 1041H(1).

White J (dissenting on this point) found the issue was really that of whether the expression "the claim for the loss and damage is based on more than one cause of action (whether or not of the same or a different kind)" in s 1041L(2) refers only to causes of action which are themselves apportionable claims or, alternatively, to causes of action more generally. His Honour concluded that the former was the proper construction. The text of the subsection was suggestive of a legislative intention that claims which are themselves apportionable claims are, in the stipulated circumstance, to be regarded as a single claim. This construction of subs (2) was confirmed by s 1041L(4) which expressly limits apportionable claims to those claims specified in subs (1).

A number of respondents have either filed no appearance or a submitting appearance. The only active respondents are Wealthsure and Bertram and the 3rd to 5th respondents.

The grounds of appeal are:

- The Full Court erred in law as to the interpretation and application of ss 1041H-1041S of the *Corporations Act* and as a result wrongly held that the plaintiffs' claims were apportionable.

- The Full Court erred in its interpretation of ss 1041I (1B). The subsection provides that damages are to be reduced by reference to the claimants' share in the responsibility for the loss or damage in respect of claims brought under s 1041H but not otherwise. The Full Court should have held that the appellants' claims were not to be reduced by reference to contributory negligence.