IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S270 of 2012

BETWEEN: **HUNT & HUNT LAWYERS**
Appellant

and

MITCHELL MORGAN NOMINEES PTY LIMITED
First Respondent

MITCHELL MORGAN NOMINEES (NO. 2) PTY LIMITED
Second Respondent

ALESSIO EMANUEL VELLA
Third Respondent

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD
Fourth Respondent

APPELLANT'S REPLY

PART I: PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II: REPLY

2. **Re Respondents' Submissions ("RS") [9]:** This submission is incorrect. The Court of Appeal affirmed[1] the primary judge's finding that "because nothing was owing by Mr Vella to Mitchell Morgan the mortgage was indefeasible as to nothing". The distinction sought to be drawn by the respondents is, in any event, immaterial for present purposes.

3. **RS [17] – [18]:** The third "step" asserted to be necessary in the process of applying s.34(2) is superfluous. If Caradonna and Flammia's wrongful acts or omissions "caused" (materially contributed to) the damage or loss the subject of the respondents' claim against the appellant, then the appellant, on the one hand, and Caradonna and Flammia on the other, are liable to the respondents "in respect of the same damage".

4. By asserting the need for such third step, the respondents add a requirement not found in the plain words of s.34(2). That distracts from the real inquiry and, as this case demonstrates, is liable to lead to error[2]. The legislative purpose referred to at

---

[1] at CA [16].

[2] see AS [71].

Filed on behalf of the Appellant Dated: 31 October 2012

King & Wood Mallesons
Governor Phillip Tower, 1 Farrer Place
Sydney NSW 2000
Contact: Peter Mumford Stockdale

DX 113 SYDNEY
Tel: (02) 9296 2000
Fax: (02) 9296 3999
Ref: 02-5165-5685

RS [19] – [23] is achieved by application of the first two steps referred to, which reflect the language of the statute.

5. **RS [24] – [36]:** The appellant agrees – indeed, relies upon – the survey of the authorities for the purpose of precisely identifying "the damage or loss the subject of the claim"[3]. It is submitted, however, that the respondents have not had sufficient regard to them.

6. In particular, the respondents have not referred to that part of the reasons in *Wardley Australia Ltd v State of Western Australia*[4] which discusses the position as to when a plaintiff incurs actual – rather than merely prospective – loss or damage in circumstances where the plaintiff has entered into a transaction by reason of the defendant's wrongful conduct, where that transaction has both potential benefits and burdens. In such a case, the Court stated[5] that the plaintiff does not suffer actual loss or damage until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is worse off than if it had not entered into the transaction.

7. It is for this reason that a mortgage lender's "interest" is its ability to recoup the advance, and not the loss of the advance itself. Payment away of the advance is an inherent part of the loan transaction, intended by the lender. So is the borrower's covenant to repay and the security for that covenant. The loan and mortgage are therefore, for the purposes of assessing whether and when damage occurs, to be assessed as a single transaction with a burden (the advance paid away) and potential benefits (the covenant and the security), and loss is only actually suffered as soon as it is ascertainable that the latter will be insufficient.

8. **RS [38] – [43]:** The respondent defines the nature of the respondents' interest too narrowly. The appellant was not retained solely to ensure that the Mortgage would be effective in the event that the loan application was fraudulent, "in circumstances where [the respondents] had no personal right to recoup that amount against the mortgagor" (RS [38]). The appellant was retained for the purpose of drafting documents for the entire transaction to ensure, as far as possible, that both the loan agreement and the Mortgage would be effective. Unlike the position with respect to the valuer under consideration in *Kenny & Good Pty Ltd v MGICA (1999) Ltd*[6], the interest sought to be protected by the respondents' retainer of the appellant concerned both the borrower's covenant to repay, and ability to repay, and the validity of the security.

9. It is noteworthy that although the Court of Appeal[7] identified the "damage or loss the subject of the claim" as "not having the benefit of the security for the money paid out", the respondents (at RS [38]) narrow the "interest" to the ability to recoup from the Enmore property "a sum certain identified in the Mortgage". No doubt this is to suggest that the Mortgage, the purpose of which is to secure recoupment

---

[3] see AS [31] – [38].

[4] (1992) 175 CLR 514.

[5] at 527 per Mason CJ, Dawson, Gaudron & McHugh JJ and at 536 – 538 per Brennan J.

[6] (1999) 199 CLR 413 at [16] per Gaudron J, extracted at AS [38] and RS [36].

[7] at CA [41].

of the respondents' advance, was a matter entirely separate from the advance itself. It may be noted that even if, contrary to the authorities relied on by both parties, the advance could be viewed in isolation from the security, the advance was only made once the appellant assured the respondents that the Mortgage was registered[8]. This assurance carried with it the implied representation the Mortgage was effective, which representation, it is submitted, must also have been a breach of duty.

10. The appellant has addressed RS [40] at AS [80]. The respondents do not cite any authority for their assertion in RS [40]. Breach, causation and loss or damage (harm) are distinct concepts. The fact that the plaintiff's loss or damage must have been caused by the defendant's breaches of duty or obligation does not have the consequence that the acts and/or omissions constituting breach and the steps in the chain of causation between breach and loss or damage are to be relied on to identify that loss or damage.

11. The submission at RS [42] should not be accepted. Both the appellant and Caradonna and Flammia are liable to the respondents for their inability to recoup the advance made on 19 January 2006, that inability being "the damage or loss the subject of the claim".

12. **RS [44] – [48]:** This "step" in the purported application of s.34(2), as submitted earlier, is unnecessary. Despite the fact that the respondents did not enter into an agreement with Vella, they did enter into a single transaction which had both a burden (the loss of the advance) and a benefit (the security). That this is so is evident by considering what loss or damage the respondents would have suffered if the appellant had drafted the Mortgage to be effective despite the forgery. The answer would have been none, unless and until it was reasonably ascertainable that the value of the Enmore property was insufficient to recover the entire advance, and then only to that extent. The suggestion in RS [48] that the effectiveness of the Mortgage only affects the quantum of damage misunderstands *Wardley*.

13. As to RS [47], it may be accepted that "but for" the conduct of Caradonna and Flammia there would have been no mortgage transaction, and that therefore their conduct created "the occasion" for the conduct of the appellant, and hence the respondents' loss. But that is also to state that the wrongful conduct of Caradonna and Flammia was an essential condition for the loss. To deny causation on the basis that that wrongful conduct was merely part of the occasion for the loss is in substance to hold that the appellant's conduct constituted a *novus actus interveniens*[9]. It must have been readily foreseeable to Caradonna and Flammia that a possible result of their conduct was that the respondents would not be able to recoup their advance. The appellant's conduct did not sever the chain of causation.

14. **RS [49]:** This paragraph contains the heart of the respondents' case. It also illustrates the error there found. Neither the appellant's drafting of the Mortgage nor the fraudulent inducements of Caradonna and Flammia are capable of being the respondents' "damage or loss". In both cases, they are part of the conduct

---

[8] AS [15].

[9] see the discussion of *novus actus interveniens* by Mason CJ in *March v E & MH Stramare Pty Limited* (1991) 171 CLR 506 at 517.

constituting the parties' breach of duty or obligation to the respondents. As stated in AS [73], the consequence of defining loss or damage by reference to the acts and omissions of the parties, rather than the respondents' harm, is that the defence provided by s.35(1) is not available where the causes of action of the alleged concurrent wrongdoers are truly independent.

15. **RS [46] & [50]:** In truth, although the money paid into the Joint Account may have been held on trust for the respondents[10], it was held jointly by Vella and Caradonna. In *James v Oxley*[11], Dixon J stated that where one partner fraudulently obtains money and then withdraws that money without the other partner's knowledge "the technical 'receipt' by the firm may be considered as insufficient to make payment into the account a receipt to the use of the plaintiff unless the other partners knew or ought to have known of the credit and its nature". The fact that Vella did not receive the money "to his own use", for the purpose of establishing liability in an action for moneys had and received – a rule based on "justice and equity"[12] – does not mean that the money was not "received" at all.

16. **RS [52] – [53]:** The decisions in *Howkins and Harrison v Tyler*[13], *St George Bank Ltd v Quinerts Pty Ltd*[14] and *Ashbrooke Institute Pty Ltd v Bartone Biomedical Pty Ltd*[15] may be supported on the basis that a debt is not "damage or loss": see AS [55]. The decisions in *Royal Brompton Hospital NHS Trust v Hammond*[16] and *Wallace v Litwiniuk*[17] should be supported on the basis that the claim against the architect/solicitor was predicated on the plaintiff's claim against the builder/driver being extinguished and hence the architect/solicitor could never be concurrently liable to the plaintiff[18]. *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Ltd*[19] was wrongly decided because insurance is *res inter alios acta* the damage suffered by the plaintiff/insured: see AS [64].

17. **RS [54]:** This argument is addressed at AS [69]. In any event, the apparent difference in determination of the recoverable compensation flows entirely from the identification of two sets of damage.

---

[10] *Black v S Freedman & Co* (1910) 12 CLR 105 at 110 per O'Connor J.

[11] (1939) 61 CLR 433 at 456. This reasoning was expressly endorsed by this Court in *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251 at 268 per Gibbs CJ (with whom Wilson & Dawson JJ agreed), see also at 270 – 271 per Wilson J and at 280 per Brennan J.

[12] *Batty* at 268.

[13] [2001] Lloyd's Rep PN 27.

[14] (2009) 25 VR 666.

[15] [2010] VSC 579.

[16] [2002] 1 WLR 1397.

[17] (2001) 92 Alta LR (3d) 249.

[18] as explained in *Wallace v Litwiniuk* at [32] per Fraser CJA, Côté & Wittmann JJA.

[19] [2001] EWCA Civ 1785.

18. **RS [59]:** The submission as to time of loss is incorrect. That a plaintiff can suffer loss of which it is unaware in now well established[20]. As the Mortgage was ineffective as soon as it was registered, the respondents suffered their loss as soon as they paid the advance to the Joint Account on faith of an ineffective mortgage because from that time forward "the situation ceased to be remedial at the hands of [the respondents]"[21].

19. **RS [61]:** The appellant's awareness of the interest rates in the Mortgage is immaterial. The real question is what the Court should do on the question of interest as damages, which question is governed by the application of s.5D.

10 20. **RS [62]:** Vella could have raised a defence of unconscionability, both in equity and pursuant to ss.12CA, 12CB and/or 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth): see AS [95][22].

Dated: 31 October 2012

20

D F Jackson QC
Tel: (02) 8224 3009
Fax: (02) 9223 1850
jacksonqc@sevenwentworth.com.au

N Kabilafkas
Tel: (02) 8224 3038
30 Fax: (02) 9223 1850
kabilafkas@sevenwentworth.com.au

Counsel for the Appellant

[20] *Commonwealth v Cornwell* (2007) 229 CLR 519 at [6] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ.

[21] *Di Sante v Camando Nominees Pty Ltd* [2000] VSC 211 at [22] per Warren J (as her Honour then was).

[22] see also, specifically in relation to the question of the impact of interest rates on the question of whether a loan is unconscionable: *Starceavich v Swart and Associates Pty Ltd* [2006] NSWSC 960 at [54] – [58] per White J and *Lopwell v Clarke* [2009] NSWCA 165 at [47] per Macfarlan JA, Ipp & Campbell JJA agreeing.