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

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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 SUBMISSIONS

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PART I: PUBLICATION

1. The appellants certify that this submission is in a form suitable for publication on the internet.

PART II: ISSUES ON THE APPEAL

2. Two issues arise. The first is whether it is permissible and appropriate to use the acts and omissions constituting breach and/or the steps in the chain of causation between breach and loss to identify "the damage or loss that is the subject of the
30 claim" within the meaning of s.34(2) of the *Civil Liability Act 2002* (NSW)?

3. The application for special leave in respect of the second issue has been referred to the Full Court. That issue is whether the Court of Appeal's decision that damages payable by the appellant included amounts referable to interest at the rate provided for in the forged mortgage is consistent with s.5D(1)(b) of the *Civil Liability Act*?

PART III: SECTION 78B, *JUDICIARY ACT 1903* (CTH)

4. The appellant is of the view that notice in accordance with section 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: REPORTS

5. The reasons of the primary judge are only reported as (2008) 13 BPR 25,343 ("**J**").
40 The internet citation is [2008] NSWSC 505.

Filed on behalf of the Appellant Dated: 2 October 2012

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6. The primary judge's second reasons disposed of the claims and cross-claims in the plaintiff's proceedings concerning the present appellant and respondents in accordance with the first reasons. Those reasons are not reported. The internet citation is [2008] NSWSC 511.

7. The primary judge issued two further sets of reasons on the issues of costs and final orders. Neither is reported. The third reasons were delivered on 6 March 2009. The internet citation is [2009] NSWSC 123. The fourth reasons were delivered on 23 June 2009 and have yet to be published.

8. In so far as the appellant and the active[1] (first and second) respondents are concerned, the third and fourth reasons dealt solely with costs. Reference to the primary judge's reasons will therefore be to the first reasons, and reference to "the respondents" will be limited to the first and second respondents.

9. The Court of Appeal delivered two sets of reasons for judgment. The first reasons were delivered on 15 December 2011 by a court consisting of Bathurst CJ, Giles JA, Campbell JA, Macfarlan JA and Sackville AJA ("**CA**") and concerned the first issue in this appeal. Those reasons are only reported as (2011) 16 BPR 30,189. The internet citation is [2011] NSWCA 390.

10. The second reasons were delivered, on behalf of the Court of Appeal, and by the consent of the parties, by Macfarlan JA and Sackville AJA on 15 March 2012. They concerned the second issue in this appeal ("**CA2**"). Those reasons are not reported. The internet citation is [2012] NSWCA 38.

PART V: FACTS

11. Alessio Vella and Angelo Caradonna in December 2005 agreed to participate in a joint venture to promote a boxing match to be held in April 2006. As part of that venture they opened a joint account at the Liverpool, Sydney branch of the ANZ Bank on 21 December 2005 (CA [6] – [7]) ("**the Joint Account**").

12. On the day the Joint Account was opened, Caradonna – without Vella's knowledge – obtained certificates of title to three properties owned by Vella including one at Enmore (CA [10]) and then used the certificates of title to borrow money for his own purposes unconnected to the joint venture.

13. One loan was from the respondents. Caradonna caused an application for finance to be made to them through a mortgage broker. In support of the application, he forged Vella's signatures on a number of documents, including the loan application and a mortgage over the Enmore property (CA [11]). In doing so, he was assisted by a solicitor named Lorenzo Flammia, Caradonna's cousin.

14. The respondents retained the appellant to draw the loan and mortgage documentation on 16 January 2006 (J [39]). The term of the loan was expressed to

[1] Between the hearing of the appeal and the delivery by the Court of Appeal of its first reasons, the first and second respondents had privately resolved their appeal against the third and fourth respondents. The appellant seeks no orders against the third and fourth respondents, who have been joined solely because they were parties to the appeal and who have since filed submitting appearances in this Court.

be two months from the date of the advance, with interest at 6.5% per month (78% per annum) reduced to 4.5% per month (54% per annum) if payment was made in a timely fashion. The next day, Flammia sent to the appellant the loan and mortgage documentation purportedly executed by Vella and copies of identity documentation which had been falsely certified by Flammia (J [46], CA [11]). Flammia, purporting to act as Vella's solicitor, also gave the appellant a confirmation that the person identified in the documents was the borrower (J [48]).

15. The respondents gave the appellant instructions to proceed with the transaction and on 19 January 2006 the appellant registered the mortgage (J [54] – [56]) ("**the Mortgage**"). Shortly thereafter on the same day, after the appellant confirmed registration, the respondents paid out $1,001,748.85 into the Joint Account. Later in the day, Caradonna forged Vella's signature as co-signatory of the Joint Account, and withdrew approximately $1,000,000 (CA [13]).

16. Caradonna subsequently forged a further loan application to Permanent Mortgages Pty Limited. That transaction was settled on 24 February 2006, and on that day Permanent registered mortgages over other properties and disbursed $1,111,124.10 into the Joint Account (CA [12]). By 27 February 2006, Caradonna had cleared that account of funds and it was closed on that day (CA [13]).

17. The mortgages fraudulently procured by Caradonna and purportedly granted by Vella over the three properties were in each case "all monies" mortgages which purported to secure debts solely by reference to separate loan documents (J [264] & [265]). Vella discovered the existence of the mortgages and the withdrawals from the Joint Account only in May 2006 (CA [14]). He subsequently commenced a number of proceedings against various parties in respect of the mortgages and the lost moneys, including the respondents, Permanent Mortgages and the ANZ Bank. By the time the proceedings were heard, Caradonna and Flammia were declared bankrupt and the amounts appropriated by Caradonna from the Joint Account could not be recovered (CA [18]).

18. These proceedings (and their various cross-claims) were heard together. In respect of the claim made by Vella against the respondents, and the cross-claim by the respondents against the appellant, the primary judge held that (CA [15] – [17]):

    a. Vella was not liable to the respondents on the personal covenant because the loan agreement was void by reason of the forgery;

    b. the Mortgage over the Enmore property, also forged, secured nothing because it purported to secure Vella's indebtedness by reference to the void loan agreement;

    c. as it secured nothing, it did not gain the benefit of indefeasibility from s.42 of the *Real Property Act 1900* (NSW) and was liable to be discharged;

    d. the appellant breached its duty of care to the respondents by drafting the Mortgage in an "all monies" form rather than by having the Mortgage instrument itself contain the covenant to repay a specified sum;

e. as a result, the respondents paid away $1,001,748.85 in circumstances where they could not recover those monies from Vella (by enforcing the mortgage against the Enmore property);

f. Caradonna and Flammia were also liable to the respondents for this loss by reason of their dishonest conduct;

g. Caradonna and Flammia were therefore "concurrent wrongdoers" within the meaning of Part 4 of the *Civil Liability Act 2002* (NSW); and

h. the appellant's share of the responsibility, as between it and Mr Caradonna and Mr Flammia, was 12.5%, and judgment against it should be limited to that proportion of the lost $1,001,748.85.

19. Both the respondents and Permanent Mortgages appealed against his Honour's orders. The respondents joined the appellant, Vella and the ANZ Bank as respondents to its appeal. By the time of the delivery of the Court of Appeal's first reasons on 15 December 2011, however, the various claims had been resolved by agreement, with only the appeal by the respondents against the appellant remaining (CA [31]).

20. The Court of Appeal had earlier ordered that the respondents' grounds of appeal which pertained to its claim against the appellant be heard by a specially constituted bench of five on the basis that the appellant proposed to submit that the Court ought not follow *St George Bank Ltd v Quinerts Pty Ltd*[2], which was decided subsequent to the primary judge's determination and which, on the issues in this application, did not accept his reasoning and his findings.

21. The Court of Appeal unanimously upheld the respondents' appeal on the central question of whether Mr Caradonna and Mr Flammia were "concurrent wrongdoers" with the appellant. The Court of Appeal later held that the primary judge erred in his calculation of damages, holding that the respondents' damage included not only the money actually paid away on 19 January 2006, but also the "contractual" rate of interest that would have accrued on the amount outstanding up until the date of the notional exercise of the power of sale (in the event that the Mortgage had been drafted so as to be effective despite the forgery) on 5 September 2006.

PART VI: ARGUMENT

Issue 1: "the damage or loss the subject of the claim"

Applying the proportionate liability provisions to this case

22. The proportionate liability provisions are found in Part IV of the *Civil Liability Act 2002* (NSW) ("**the Act**")[3]. The terms of the relevant provisions in the Act are set out in Annexure A.

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[2] (2009) 25 VR 666.

[3] Very similar provisions may be found in Part VIA of the *Competition and Consumer Act 2010* (Cth); Part IVAA of the *Wrongs Act 1958* (Vic); Chapter 2, Part 2 of the *Civil Liability Act 2003* (Qld); Part 1F of the

23. The provisions operate by providing an affirmative defence to certain actions (defined as "apportionable claims" by s.34(1)) which limits the liability of a defendant who establishes that other parties are liable to the plaintiff in respect of "the damage or loss that is the subject of the [plaintiff's] claim [against the defendant]": s.35(1)(a).

24. For a party to have the benefit of the limitation of liability provided for by s.35(1):

    a. the relevant claim must be an "apportionable claim", being "a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care": s.34(1); and

    b. the other party (or parties) must be a "concurrent wrongdoer", being "a person who is one of two 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": s.34(2).

25. Importantly, s.34(1A) provides that "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)".

26. The respondents' claim against the applicant was a claim for economic loss in an action for damages arising from the failure of the applicants to take reasonable care. The primary judge found that, in the circumstances of the case, the appellant was negligent in drafting the Mortgage as an "all monies mortgage" – ie a mortgage which defined the extent of the security by reference to a separate document (the loan agreement) – and not as an "old fashioned mortgage", which itself recorded the extent of the mortgagor's indebtedness (J [534] & [558] – [562]).

27. If the Mortgage had been drafted as an "old fashioned mortgage", then, on the present state of the authorities in NSW, the respondents would have been able to enforce the Mortgage against the Enmore property despite the fact that both the loan agreement and the Mortgage were forged (and that the forgery made the loan covenant itself unenforceable): *Perpetual Trustees Victoria Ltd v English*[4].

28. That the respondents' claim against the appellant is an "apportionable claim" is not contested: it was a claim "for economic loss … in an action for damages (… in contract [and] tort …) arising from a failure to take reasonable care": CA [27]. The question was then whether Caradonna and Flammia were "concurrent wrongdoers" with the appellant.

Civil Liability Act 2002 (WA); Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); Part 9A of the *Civil Liability Act 2002* (Tas); Chapter 7A of the *Civil Law (Wrongs) Act 2002* (ACT) and the *Proportionate Liability Act* (NT). In *Quinerts* at [57], Nettle JA explained that provisions of this kind "were adopted by the Commonwealth and by each of the States and Territories as in effect a national co-operative scheme designed to overcome what were perceived to be undesirable consequences of the joint and several liability rule".

[4] [2010] NSWCA 32 at [68] per Sackville AJA (Allsop P & Campbell JA agreeing).

29. Caradonna and Flammia would be concurrent wrongdoers if they were persons whose acts or omissions also "caused, independently of each other or jointly, the damage or loss that was the subject of the claim" against the appellant: s.34(2).

30. The appellant submits that applying the plain words of that section, the task of the court presented with a defence pursuant to s.35(1) is to identify:

a. first, the "the damage or loss that was the subject of the claim"; and

b. second, whether the acts or omissions of the alleged concurrent wrongdoers "caused" *that* "damage or loss".

identifying "the damage or loss the subject of the claim"

31. The Act does not define "damage or loss", either individually or as a compendious expression. The appellant submits, however, that some assistance may be obtained from the terms of s.5D of the Act.

32. That section is contained within Part 1A of the Act, which by s.5A(1) "applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise". "Harm" is defined is s.5 as "harm of any kind, including ... (a) personal injury or death, (b) damage to property or (c) economic loss".

33. It will be apparent that Part 1A therefore applies to all "apportionable claims", being claims for damages arising from a failure to take reasonable care (whether in tort, contract or otherwise) in respect of damage or loss falling within parts (b) or (c) of the definition of "harm". Section 5D is then concerned with "[a] determination that negligence caused particular harm".

34. The appellant submits that the "damage or loss" in s.34(2) is therefore the plaintiff's "harm", as defined in s.5, and the plaintiff's "economic loss or damage to property" in s.34(1).

35. In the related context[5] of legislation concerning contribution between tortfeasors, in respect of the task of identifying "damage" (or "harm"), this Court stated in *Mahony v J Kruschich (Demolitions) Pty Ltd*[6] that:

> "*Dillingham*[7] makes it clear that 'damage' in s 5(1)(c)[8] is not to be equated to the 'damages' awarded by a court. In negligence, 'damage' is

[5] see *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at [59] – [68] per Nettle JA, Mandie JA & Beach AJA agreeing.

[6] (1985) 156 CLR 522 at 527 per Gibbs CJ, Mason, Wilson, Brennan & Dawson JJ.

[7] *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323 at 326 per Barwick CJ, Gibbs, Stephen & Mason JJ agreeing.

[8] *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) which provides: "Where damage is suffered by any person as a result of a tort (whether a crime or not) ... any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought".

> what the plaintiff suffers as the foreseeable consequence of the tortfeasor's act or omission. Where a tortfeasor's negligent act or omission causes personal injury, 'damage' includes both the injury itself and other foreseeable consequences suffered by the plaintiff. The distinction between 'damage' and 'damages' is significant. Damages are awarded as compensation for each item or aspect of the damage suffered by a plaintiff, so that a single sum is awarded in respect of all the foreseeable consequences of the defendant's tortious act or omission. But concurrent tortfeasors whose negligent acts or omissions occur successively rather than simultaneously may both be liable for the same damage, being a foreseeable consequence of both torts, although one is liable for some only of the damage for which the other is liable and an award of damages against the one would necessarily be less than an award of damages against the other."

36. It follows that "the damage or loss the subject of the [plaintiff's] claim [against the defendant]", for the purposes of s.34(2), is "what [harm] the plaintiff suffers as [a result][9] of the [defendant's] act or omission".

37. What was the nature of the respondents' harm in the present case? The appellant submits that where a mortgage lender enters into a loan transaction on faith of a security, then where the security fails or is inadequate, its "damage or loss" is its inability to recoup the moneys advanced.

38. As Gaudron J said in *Kenny & Good Pty Ltd v MGICA (1999) Ltd*[10]:

> "The interest that a mortgage lender seeks to protect by obtaining a valuation of the proposed security is not simply an interest in having a margin of security over and above the mortgage debt. Rather, it is that, in the event of default, it should be able to recoup, by sale of the property, the amount owing under the mortgage."

39. The appellant was retained, inter alia, to draft the Mortgage which, the primary judge held, was to be effective to secure, from the property, the moneys advanced even where the loan agreement and mortgage instrument had been forged, and the borrower was unaware of the entire transaction.

40. In the present case, the loan agreement being void, the respondents could not claim the advance (plus contractual interest) as a debt from the "borrower", Vella. By reason of the drafting of the Mortgage, nor could the respondents have recouped the advance from the security, the Enmore property. If the appellant had drafted the Mortgage as an "old form mortgage" where the mortgage instrument itself defined the extent of the security, then it would have been effective to permit the

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[9] "apportionable claims", not being limited to claims in the tort of negligence, the tortious remoteness test of foreseeability will not always be applicable. The use of the word "caused" in s.34(2), however, means there must always be some notion of causation as expressed in s.5D, which applies to all claims based upon a failure to take reasonable care, independently of the nature of the cause of action.

[10] (1999) 199 CLR 413 at [16].

respondents to enforce the security against the Enmore property despite the fact that it was forged[11].

41. The appellant's act or omission founding its liability to the respondents was its drafting of the Mortgage. The immediate consequence was that the respondents advanced money to Vella on the faith of an ineffective security. The respondents' "harm" was its inability to recoup that advance from the "borrower" and "mortgagor" Vella.

42. The next question, then, is whether Caradonna and Flammia "caused, independently of [the appellant] or jointly" the respondents' inability to recoup the advance from Vella.

"caused, independently of each other or jointly"

43. In *Shrimp v Landmark Operations Ltd*[12], Besanko J stated in respect of s.87CB(3) of the *Trade Practices Act 1974* (Cth), an equivalent to s.34(2), that "the word 'caused' ... should be read as meaning such as to give rise to a liability in the concurrent wrongdoer to the plaintiff". This interpretation has been adopted by single judges in NSW[13] and Victoria[14] and by the Court of Appeal in *Quinerts*[15].

44. The appellant accepts that "caused", in s.34(2), should be read in that fashion. It submits that it follows that the test for causation in s.34(2) is the test appropriate to the cause of action upon which the concurrent wrongdoer's liability is founded. For present purposes, the relevant test is material contribution: *March v E & MH Stramare Pty Limited*[16].

45. Caradonna and Flammia's liability to the respondents lay in the tort of deceit, or fraudulent misrepresentation. That being so, causation (of damage or loss) is satisfied "so long as [the misrepresentation] plays some part even if only a minor part in contributing to the formation of the contract"[17]. This is, in substance, the "material contribution" test applicable to the claim against the appellant[18].

46. The other matter which is important to note is that the words "independently of each other or jointly" make it clear that s.34(2) is intended to embrace not only

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[11] as in fact occurred in *Small v Tomassetti* (2001) 12 BPR 22,253; (2002) NSW ConvR 56-011; [2001] NSWSC 1112.

[12] (2007) 163 FCR 510 at [62].

[13] *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187 at [18] – [21] per Barrett J and *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 at [15] per Rothman J.

[14] *Sali v Metzke & Allen* [2009] VSC 48 at [282] per Whelan J.

[15] at [58] & [64].

[16] (1991) 171 CLR 506 at 512 – 514 per Mason CJ (Toohey & Gaudron JJ agreeing).

[17] *Gould v Vaggelas* (1985) 157 CLR 215 at 236 per Wilson J.

[18] see *Suncoast Pastoral Co Pty Ltd v Coburg AG (No 2) Pty Ltd* [2012] QSC 157 at [49] – [50] per Applegarth J.

"joint" wrongdoers, but wrongdoers whose liability is truly several. As McColl JA stated in *Bracks v Smyth-Kirk*[19]:

> "Joint tortfeasors are responsible for the same wrongful act or tort leading to a single damage. Concurrent tortfeasors are independent tortfeasors whose separate acts combine to produce damage. The difference between joint tortfeasors and several (concurrent) tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage. For there to be joint tortfeasors there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage"

47. Concurrent wrongdoers may be joint and several. The only thing the statute requires is concurrence in being liable to the plaintiff in respect of "the damage or loss the subject of the claim". It does not require a concurrence in the acts or omissions constituting the breaches of duty or the steps in the chain of causation between the [defendant's] breach of duty and [the plaintiff's] "damage or loss". In this respect, s.34(2) is to be contrasted with claims for contribution in equity, where this Court has held that a "common burden" between obligors is required[20].

48. Did Caradonna and Flammia's misrepresentations – all to the general effect that Vella had authorised the Mortgage – materially contribute to the respondent's inability to recoup their advance?

49. The appellant submits that that question can only admit of one answer: yes. For the Mortgage to be ineffective, two things were required:

a. that the loan agreement was void; and

b. that the mortgage instrument did not itself contain the debt covenant, but did so solely by reference to the loan agreement.

50. The appellant's acts and omissions were responsible for (b), but Caradonna and Flammia were responsible for (a). Both sets of acts and omissions were necessary for the Mortgage to be ineffective and for the respondents to suffer the loss of being unable to recoup their advance.

51. In a broader sense, however, Caradonna and Flammia's misrepresentations induced the respondents to enter into the entire transaction – one in which the respondents advanced money to Vella on faith of a security that was inadequate. The unitary nature of mortgage transactions[21] is critical to the analysis which holds, as Gaudron J noted in *Kenny v Good*, that the lender's cause of action against a valuer is not complete until "it is reasonably ascertainable that sale [of the security] will result in a loss". The loss is not generally suffered by the lender immediately because the advance by the lender is part of a single transaction which includes the

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[19] [2009] NSWCA 401 at [95].

[20] *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72 at [55] per Gummow ACJ, Hayne, Crennan & Kiefel JJ.

[21] see, for example, the discussion of the authorities by Davies J in *Ross v Cook* [2009] NSWSC 671.

borrower's promise to repay and the lender's security over the borrower's property. There is no actual, as proposed to merely prospective, loss (or damage) until it is "reasonably ascertainable" that both the borrower's personal covenant and the security are inadequate.

52. The acts and omissions of Caradonna and Flammia – their various misrepresentations, including the forgery of the loan and the Mortgage – were "a" cause of the respondents' inability to recover their advance to Vella. That being so, they were concurrent wrongdoers, and the Court in *Quinerts*, and the Court of Appeal in the present case, erred in holding otherwise. As the Court of Appeal in substance adopted and approved the reasoning in *Quinerts*, these submissions consider the earlier decision first.

The errors in *Quinerts*

53. In *Quinerts*, the plaintiff, a lender, established that the defendant, a valuer, had negligently valued a property which was security for a loan to a borrower. Both the borrower and the guarantor defaulted on the loan and guarantee respectively. The security was inadequate to recover the advance. The valuer sought to invoke the proportionate liability provisions in the *Wrongs Act 1958* (Vic), arguing that the borrower and guarantor were "concurrent wrongdoers" within the meaning of s.23AH(1) of that act, which is relevantly identical to s.34(2) of the Act.

54. After surveying the authorities, the Court held that the expression "the damage or loss the subject of the claim" in s.24AH(1) meant the same thing as "the same damage" in s.23B(1), the Victorian equivalent to s.5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (albeit that the Victorian Act, following the *Contribution Act 1978* (UK), is not limited to contribution between tortfeasors). The Court then held, on the facts before it[22]:

> "Consistently with reasoning in *Royal Brompton*[23], I do not consider that the Borrower or the guarantor in this case could be said to have caused or be liable for 'the same damage' as Quinerts. The loss or damage caused by the Borrower and the guarantor was their failure to repay the loan. Nothing which Quinerts did or failed to do caused the Borrower or the [guarantor] to fail to repay the loan. The damage caused by Quinerts was to cause the Bank to accept inadequate security from which to recover the amount of the loan. Nothing which the Borrower or the lender did or failed to do caused the Bank to accept inadequate security for the loan. Furthermore, just as in *Wallace v Litwiniuk*[24], the distinct nature of the damage caused by Quinerts is demonstrated by the need to estimate the damage which the Bank would have suffered if Quinerts had not acted negligently in the preparation of the valuation and then to calculate the difference between that and the damage which the Bank has suffered by reason of the Borrower's and guarantor's failure to repay the loan".

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[22] at [76].

[23] *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397.

[24] *Wallace v Litwiniuk* (2001) 92 Ala LR (3d) 249.

55. The valuer's proportionate liability defence could have been dismissed by noting that the borrower's and guarantor's obligations to the bank were not "damage", but a debt. A critical difference between damage and a debt is that a plaintiff is required to mitigate the former, but not the latter[25]. Indeed, this is one of the bases upon which Sir Richard Scott VC held there was no claim for contribution in *Howkins and Harrison v Tyler*[26], a decision to which Nettle JA referred to in his Honour's reasons for judgment[27].

56. The appellant submits that the passage demonstrates the errors of principle in both *Quinerts*, and the Court of Appeal in the present case.

10 57. The loss or damage caused by the borrower and the guarantor could not be their failure to repay the loan: that was their breach (of contract). The fact that "[n]othing which Quinerts did or failed to do caused the Borrower or the [guarantor] to fail to repay the loan" is therefore irrelevant. The legislation does not require that one concurrent wrongdoer contribute to another's *breach*, only that they are liable to the plaintiff for the "damage or loss the subject of the claim": as stated above, the statute requires concurrence only in damage, not in acts or omissions. The words "caused, independently of each other or jointly" make it plain that the defence is available to "several concurrent" wrongdoers just as it is to "joint" wrongdoers.

20 58. Nettle JA then stated that "[t]he damage caused by Quinerts was to cause the Bank to accept inadequate security from which to recover the amount of the loan". He then proceeded to find that "[n]othing which the Borrower or the lender did or failed to do caused the Bank to accept inadequate security for the loan". He simply asserted that this was the lender's damage. His Honour did not refer to the line of authority stemming from *Kenny & Good*[28] or any other principle in identifying the lender's "damage or loss".

59. The fact that the "Bank [accepted] inadequate security" is not, in itself, "harm": it is an act, which forms part of the chain of causation *between* the valuer's breach and its "damage or loss", not the "damage or loss" itself. The lender's damage or loss
30 is, as earlier submitted, its inability to recoup, or fully recoup, its advance. The fact that neither the borrower or the lender participated in this act is irrelevant.

60. Furthermore, the fact that estimation is required in assessing damages, must be an uncertain factor in the present context. "Damage" and "damages" are not identical, and different causes of action can give rise to different damages, even from the same loss, for instance by the application of different tests for remoteness in respect of consequential loss.

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[25] see *China and South Sea Bank v Tan Soon Gin* [1990] 1 AC 536 at 545 per Lord Templeman and *Hexiva v Pty Ltd v Lederer* [2006] NSWSC 1129 at [66] – [69] per Brereton J.

[26] [2001] Lloyd's Rep PN 27.

[27] at [73].

[28] (1999) 199 CLR 413.

61. His Honour then referred to the present case and held the primary judge's decision had been "at odds with his conclusion"[29] and in that respect held[30]:

> "A more appropriate analogy to the facts in *Permanent Mortgages* would be a case in which a thief steals money from a bank and, because of negligence on the part of the bank's insurance brokers, the bank finds that the risk of the theft is not covered by insurance. In such a case, the damage caused by the thief would be the loss of the bank's money. Nothing, however, which the insurance brokers did or failed to do in effecting appropriate insurance cover would have caused the theft of the bank's money. Contrastingly, the loss or damage caused by the insurance brokers would be the bank's inability to obtain indemnity from an insurance company for the loss suffered by reason of the theft. But nothing done by the thief would have caused the bank's insurance cover to be inadequate. It would follow that the thief would not be a concurrent wrongdoer in relation to any claim which the bank might make against its insurance brokers for failing to arrange appropriate insurance cover[31].
>
> Applying that analogy to the *Permanent Mortgages Case*, the fraudster by his acts and omissions induced [Mitchell Morgan][32] to believe that the mortgage was effective, and so to advance funds on the faith of the mortgage. The loss or damage caused by the fraudster was, therefore, the loss constituted of [Mitchell Morgan] parting with its money. Nothing done or omitted to be done by [Mitchell Morgan's] solicitors caused [Mitchell Morgan] to believe that the mortgage was genuine. Contrastingly, the loss or damage caused by the solicitors was the loss and damage occasioned by their failure to take reasonable care to ensure that the mortgage was so drawn that, despite the fraud, the mortgage was rendered effective upon registration. Nothing done or omitted to be done by the fraudster caused the solicitors to fail to draw the mortgage so that upon registration the mortgage was rendered effective despite the fraud. Further, just as in *Wallace v Litwiniuk* and *Royal Brompton Hospital*, the distinct nature of the damage caused by the solicitors was demonstrated by the need to estimate the damage which [Mitchell Morgan] would have suffered if the mortgage had been rendered effective by registration and then to calculate the difference between that amount and the damage suffered by [Mitchell Morgan] by paying away its money to a thief."

62. The appellant respectfully submits that each aspect of this reasoning is infected with error. In respect of his Honour's analogy, the position of Caradonna and

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[29] at [79].

[30] at [82] – [83].

[31] See and compare Lord Steyn's criticism of the decision in *Hurstwood Developments Ltd v Motor and General & Andersley & Co Insurance Services Ltd* [2001] EWCA Civ 1785, in *Royal Brompton NHS Trust v Hammond* [2002] 1 WLR 1397 at 1413, [33].

[32] wrongly described as "Permanent Mortgages".

Flammia is materially distinct from that of a bank thief. They did not steal money from the respondents' vaults. If they had done so, the appellant accepts that the theft and the mortgage transaction would have been entirely separate matters.

63. Caradonna stole the money, however, not from the respondents, but from *Vella*. The use of this alleged analogy disguises the nature of the acts and omissions which made Caradonna (and Flammia) liable to the respondents – misrepresentations – by over-emphasising the subjective intent of Caradonna and Flammia at the time of making the misrepresentations, a matter which is logically irrelevant to the task of identifying whether those misrepresentations "caused, independently [of the appellant's conduct] or otherwise, the damage or loss the subject of [the respondents'] claim [against the appellant]".

64. Nor is the appellant in a position analogous to an insurance broker: insurance payments are *res inter alios acta* damage suffered by a plaintiff and hence do not diminish a defendant's liability for damage which has been insured[33].

65. The difference in the present case is obvious. As the authorities demonstrate, for the purposes of determining when damage first accrues in a mortgage transaction, the advance, the borrower's promise to repay and the security are considered to be part of a single transaction. Put another way, the borrower's promise and the security are for the purpose of the lender recovering the very money advanced by the lender at the outset of the transaction, and on faith of the promise and security.

66. Nettle JA then expressly relied on the analogy to express a view on the facts of this case. In so doing, his Honour used exactly the same kind of reasoning he earlier used on the facts of the case before him. He identified the loss caused by Caradonna and Flammia once again by reference, not to harm, but to an act: the respondents parting with their money. He then noted that "[n]othing done or omitted to be done by [Mitchell Morgan's] solicitors caused [Mitchell Morgan] to believe that the mortgage was genuine".

67. In that respect, his Honour made an error of fact and an error of principle. The error of fact was that the appellant's conduct in drawing the Mortgage as it did and in advising the respondents that the documentation had been prepared according to its instructions, did carry with it an implied representation that the appellant had drafted the Mortgage with reasonable care so that it was valid (that was the purpose of retaining solicitors to draw a legal document). The error of principle is, once again, that the statutory requirement for the identity of damage does not also require an identity in any acts or omissions anterior to the suffering by the plaintiff of harm – whether those acts or omissions constitute breaches of duty or some step in the chain of causation.

68. It may be noted that Nettle JA purported to identify the respondents' damage caused by the appellant as "the loss and damage occasioned by [the appellant's] failure to take reasonable care to ensure that the mortgage was so drawn that, despite the fraud, the mortgage was rendered effective upon registration"[34]. It may

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[33] *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 599 – 600 per Windeyer J.

[34] This appears to recognise the close connection between the making of the loan and the grant of the mortgage.

also be noted that his Honour did not actually identify the "loss or damage", merely stating that it was the "loss or damage occasioned by" the appellant's breach of duty. He then stated that nothing done by Caradonna and Flammia contributed to the method by which the appellant drafted the mortgage. If they had so contributed, of course, they would have been joint, rather than several, tortfeasors with the appellant.

69. Lastly, the alleged need to estimate the difference of damages noted by his Honour is a difficulty assumed by his conclusion: ie that the damage caused by Caradonna and Flammia was the money paid by the respondents and not the inability of the respondents to recoup the advance from Vella or his property. Of course the claim against the appellant is limited to the value of the security. In the present case this significantly exceeded the advance. Even if it did not, however, the analysis would not change. The appellant's liability would be limited to the value of their security, because even "an old fashioned mortgage" could not have made Vella liable under the personal covenant contained in the mortgage: *Grgic v Australia and New Zealand Banking Group Ltd*[35]. Caradonna and Flammia, having caused the respondents to enter into the transaction, and not just contributed to the ineffectiveness of the Mortgage, would be liable for the entire advance, not limited (like the appellant) to the value of the security. But the fact that not all the respondents' "damage or loss" has been "caused" by all concurrent wrongdoers does not prevent the apportionment of that part of it which has been: see *Mahony v J Kruschich (Demolitions) Pty Ltd*[36]. The unitary nature of the transaction, and the purpose of the security being to secure the return of the advance, to the limit of the security, is not altered by the fact that the security might be insufficient to do so.

70. The appellant submits that the Court of Appeal's focus upon the comparison between the proportionate liability provisions and those relating to contribution, and particularly in holding that the words "the damage or loss the subject of the claim" in the former case, and "the same damage", in the latter case, led it into error. Once a defendant establishes that the plaintiff's claim against them is an "apportionable claim" (a matter not in dispute in the present case), then the next step is to determine the identity of the "damage or loss the subject of the claim". Neither on the facts of *Quinerts*, nor on the facts of this case, was there any analysis addressed to this matter. In each case, the identity of the "damage or loss the subject of the claim" was, with respect, simply asserted.

71. The approach adopted in *Quinerts* takes the conduct of each alleged concurrent wrongdoer (including the defendant), identifies their breach of duty, the chain of causation and then (purportedly) the damage caused to the plaintiff thereby. In so doing, and by focussing the enquiry on whether the damage is the "same", rather than on whether the conduct of the concurrent wrongdoer materially contributed to the harm caused to the plaintiff by the conduct of the defendant, it is natural to fall into the error of defining the plaintiff's harm by reference to the acts or omissions constituting breach of duty or some step in the chain of causation.

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[35] (1994) 33 NSWLR 202 at 224 per Powell JA, Meagher & Handley JJA agreeing.

[36] (1985) 156 CLR 522 at 527 per Gibbs CJ, Mason, Wilson, Brennan & Dawson JJ, extracted at paragraph 35 above.

72. The appellant submits that to do so is erroneous. If "the damage or loss the subject of the [plaintiff's] claim [against the defendant]", for the purposes of s.34(2), is "what [harm] the plaintiff suffers as [a result of] of the [defendant's] act or omission"[37], then "damage or loss" is conceptually distinct from both the defendant's acts or omissions, and from the means by which those acts or omissions cause the harm.

73. An important consequence of this error, is that for a defendant to successfully invoke the defence in s.35(1), it must have participated either in the concurrent wrongdoer's acts or omissions such that it is a truly a joint wrongdoer, or in some step in the chain of causation anterior to the actual infliction of harm. In either case, such an interpretation puts a gloss on the statute which contradicts the clear words of s.34(2) that the plaintiff's causes of action against the defendant and the concurrent wrongdoer could be entirely independent.

The error of the NSW Court of Appeal

74. The critical reasoning of the Court is found at CA [41]:

> "At the correct level of identification, in the present case there are different interests. Mitchell Morgan could be fraudulently induced to pay out money. It could protect itself and avoid losing the money if it obtained adequate and enforceable security. The loss, or the harm to an economic interest, is in the one case paying out money when it would not otherwise have done so, and in the other case not having the benefit of security for the money paid out. The losses the subject of the claims for economic loss against Messrs Caradonna and Flammia and the loss the subject of the claim for economic loss against Hunt & Hunt are different".

75. This is the sum of the Court's reasoning on this issue. It is the same approach as that in *Quinerts*:

a. separately identifying the breach and chain of causation of the defendant and the alleged concurrent wrongdoer;

b. identification in each of case of the damage caused to the plaintiff by assertion, without analysis and by reference to the acts or omissions constituting breach and/or steps in the chain of causation; and

c. a comparison between the two sets of "damage", concluding that they are distinct.

76. As the appellant has submitted, it is to take an erroneous approach to the construction of the statutory provisions in question.

77. It will very often be the case, where the liability of wrongdoers to the plaintiff arises by different acts or omissions, that it will be possible to describe the loss or damage flowing therefrom in different terms, at different levels of generality. The "damage or loss" flowing from the various alleged concurrent wrongdoers should

[37] see paragraph 35 above.

be analysed as a matter of substance, not form, and in holding as it did the Court of Appeal failed to provide a principled basis to distinguish the loss said to flow from acts and omissions of the appellant from those of Caradonna and Flammia.

78. The acts and omissions of the appellant on the one hand, and those of Messrs Caradonna and Flammia on the other, were distinct. It necessarily follows that the causal chain leading from those acts and omissions to the "damage or loss" must be at least partly distinct. But it does not mean that the loss suffered by the respondents by the conduct of each is distinct.

79. In this regard, the identity of the loss caused by the two parties is demonstrated by the fact that the loss of the security would have been meaningless to the respondents unless they had also made the advance. The true "damage or loss the subject of the claim" is not just the loss of security, it is the loss of the security in circumstances where the advance was made. Conversely, the damage or loss flowing from the acts and omissions of Caradonna and Flammia is not just the making of the advance, but doing so in circumstances where there was no effective security – a security which was ineffective partly because of their conduct. The security over the Enmore property was designed to secure the very advance in fact made to Vella.

80. Giles JA at CA [73] appeared to hold that it is permissible to use acts or omissions as part of the process of defining the plaintiff's harm. If so, his Honour cited no authority for that proposition, which the appellant submits should not be accepted. His Honour proceeds in that paragraph to deny that Nettle JA, in his reasons, required an identity in the acts or omissions constituting breach or steps in the chain of causation. For the reasons stated earlier in those submissions, in so doing, his Honour erred.

81. In dealing with the appellant's argument that Caradonna and Flammia not only caused the respondents to make the advance, but also caused the Mortgage to be ineffective, his Honour held at CA [80]:

> "There was loss immediately Mitchell Morgan paid out money which it would not have paid out but for the fraud. Mitchell Morgan could immediately have sued Mr Caradonna and Mr Flammia. Had the mortgage been drawn with a covenant to pay a stated amount, it would have been effective to enable Mitchell Morgan to recover its money from the Enmore property despite the forgery of Mr Vella's signatures. The negligence lay in failing to take an appropriate step against the fraud which occurred. The harm to Mitchell Morgan's economic interest from absence of mortgage security came from the inappropriately worded mortgage (the damage); the forged loan agreement was part of the occasion for that loss to sound in a money amount (the damages). It is distinct from the harm from payment out as a consequence of the fraud. They are not two sides of the same coin, as is evident from the potential difference in damages".

82. The fact that the respondents could have immediately sued Caradonna and Flammia does not distinguish their claim against the appellant: as soon as the respondents made the advance to Vella, they had no right to compel him to repay it as both the loan agreement and the Mortgage were ineffective. As the Mortgage was

ineffective *as soon as it was registered*, the claim accrued as soon as the respondents made the advance.

83. That point is important. Although registration of the Mortgage and payment of the advance into the Joint Account occurred on the same day, it nevertheless remains true that the former occurred first, as the respondents wanted confirmation of registration before making the advance: J [57]. On his Honour's analysis, the respondents had no claim against Caradonna and Flammia until the advance was made. But the same must surely apply to the claim against the appellant. At the time of the registration of "the inappropriately worded mortgage", the respondents had lost nothing. The Mortgage was designed to secure the advance. The fact that it was ineffective upon registration was irrelevant to the respondents, *until the respondents parted with the moneys the Mortgage was designed to secure.*

84. The advance and the Mortgage were therefore, consistent with the authorities, part of a single transaction. His Honour's identification of the "damage or loss the subject of the claim" as "the inappropriately worded mortgage" is an assertion unfounded in any reasoning or authority, and his statement that "the forged loan agreement was part of the occasion for that loss to sound in a money amount (the damages)", rather than a necessary precondition to the ineffectiveness of the mortgage, should, with respect, not be accepted.

Conclusion

85. For the foregoing reasons, the appellant submits that reasoning of both the Court of Appeal in *Quinerts*, and the Court of Appeal in the present case, takes an erroneous approach to the task of construing and applying s.34(2) of the Act, the consequence of which approach is to unduly narrow the scope of the statutory defence, contrary to the plain words and legislative intent.

Issue 2: the appellant's "scope of liability"

86. In CA2 the Court of Appeal held that the measure of the respondents' damage was the amount paid away on 19 January 2006, plus the interest that would have accrued on the (void) unpaid loan until the date of a hypothetical exercise of the power of sale by the respondents pursuant to a valid mortgage drafted by the applicant on 5 September 2006, followed by statutory interest from that date till the date of judgment.

87. The appellant accepts that had it drafted the mortgage of the Enmore Property to expressly include the repayment obligation set out in the loan agreement, that as a matter of fact, the respondents could have enforced the mortgage against Vella's property and extracted from that property not only the lost advance, but the contractual interest that accrued up to and including the date of sale (that interest being 78% per annum, reduced to 54% for prompt payment – J [865] – the maturity date being 19 March 2006, or two months after the advance – J [522]).

88. The appellant does not accept, however, that the mere fact that this is what would have occurred means that the loss of the ability to extract extremely high rates of interest from the property of the innocent borrower, Vella, is a "harm" to the

respondents for which the appellant, by s.5D, is required to compensate the respondents by way of an award of damages.

89. Section 5D(1) of the Act requires the Court, in assessing whether "negligence caused particular harm", to consider two matters: "factual causation" and the defendant's "scope of liability". The loss of the ability to extract "contractual" interest from the Enmore property satisfies the first criterion. The appellant submits, however, that it does not satisfy the second.

90. Section 5D(4) provides that "[f]or the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party".

91. The respondents' cause of action against the appellant (and Caradonna and Flammia) accrued in both contract and tort on 19 January 2006 because both the loan agreement and Mortgage were void *ab initio*, and hence the transaction into which the respondents had entered never had the prospect of recouping the advance made on that date. That is therefore the prima facie date of assessment of loss: *Johnson v Perez*[38]. The recoverability of interest after that date is not as part of the "damage or loss the subject of the claim", but can only be recovered (if proved) as consequential loss, or pursuant to section 100 of the *Civil Procedure Act 2005* (NSW). As a separate element of the respondents' (alleged) loss, the accruing "contractual" interest must be assessed as "harm" individually in the application of the mandatory provisions of s.5D.

92. It may be accepted that the appellant's scope of liability included protecting the advance made by the respondents. That was the purpose of the Mortgage and an important part of the appellant's retainer. But there is something repugnant in awarding the respondents as "compensatory" damages, a sum to represent the interest it would have recovered in respect of a fraudulent loan, from the property of an innocent third party, in circumstances where a defrauded mortgagor would by the nature of the fraud likely discover it (as Vella did in this case) well after the "loan" was in default, and attracting what in substance was penal interest, and at interest rates many times those of commercial lenders. The respondents adduced no evidence that it would have been in the position to make a loan to a genuine borrower at anything like the rates it now claims as compensation: J [686] – [693].

93. The primary judge further held at J [365] – [366] that "the mortgagees failed to make the enquiries that a reasonably prudent mortgagee would make before entering into the transaction. It is no answer to say that mortgagees of third last or second last resort habitually do not make such enquiries. Had the mortgagees pursued basic enquiries they would have discovered the truth".

94. In that regard, applying section 5D(1)(b), the appellant's scope of liability to the respondents, in exercising due care and sill in drafting the Mortgage, extended to protecting the recoupment of the advance by the respondents from the property in the event that the transaction was fraudulent. It is submitted, however, that the appellant's scope of liability did not extend to providing the respondents a means

[38] (1988) 166 CLR 351.

by which they could earn a windfall profit on the basis of a forged mortgage enforceable against the property of an innocent borrower.

95. The respondents were "lenders of last resort" who lent funds to desperate borrowers and made minimal enquiries either as to the identity of the borrower or his or her ability to repay. The respondents addressed this risk in two ways: by charging extremely high rates of interest, well above commercial rates, and by ensuring that the value of the security was significantly higher than the amount advanced. Neither was to the advantage of an innocent mortgagor, who would have to seek compensation from the Torrens Assurance Fund. It was a business model which inherently carried with it a great risk of fraud, and which the courts have recognised has significant potential to be unjust and unconscionable, particularly where high rates of interest are concerned: *Kowalczuk v Accom Finance Pty Ltd*[39]. In the event of fraud, the likely profit of the lender would increase because interest at the higher default rate would accumulate during the period which the mortgagor (a) was unaware of the existence of the mortgage and (b) disputed its enforceability. That is exactly what occurred in the present case: Vella discovered the mortgage in May, by which time it was at least six weeks in default, and then disputed its validity.

96. The appellant notes that if the respondents sought compensation from the Registrar-General, any claim for interest is limited to the official cash rate of the Reserve Bank of Australia in respect of any particular day plus 2%: see s.129B(5) of the *Real Property Act 1900* (NSW).

97. The imposition of a duty of care involves not just the intention (actual, inferred and presumed) of the parties but considerations of legal policy: *Cattanach v Melchior*[40]. The appellant submits that there is no evidence that the appellant assumed a responsibility to assist the respondents to obtain the rates of interests specified in a loan agreement which is void for fraud from an innocent mortgagor, and which they could not show would have been the subject of agreement by a genuine borrower. The appellant further submits that the imposition of such a duty would be contrary to legal policy for the reasons set out above.

98. The respondents' inability to extract interest at 78% per annum was not a "loss" in the sense of "damage" or "harm". Rather it was an opportunity to claim an unearned windfall profit, for which Vella would be forced to seek compensation from the public through the Torrens Assurance Fund. Being neither a true loss nor within the scope of the appellant's retainer, and the respondents having failed to adduce any evidence that they were able to lend the moneys advanced to Vella to a third party, the respondents are entitled solely to statutory interest as and from 19 January 2012. It follows that the primary judge's award should be restored.

PART VII: LEGISLATION

99. The appeal concerns the proper construction and application of sections 3, 5, 5A, 5D, 34, 34A and 35 of the *Civil Liability Act 2002* (NSW).

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[39] (2008) 77 NSWLR 205.

[40] (2003) 215 CLR 1.

100. Other than section 34, the provisions have not been amended between the time that the respondents' causes of action against the appellant arose (19 January 2006) and the time of making of these submissions. Section 34 was twice amended with effect 1 January 2011 and 25 October 2011.

101. Those provisions (including the provisions amending section 34) are set out in full in Annexure A to these submissions.

PART VIII: ORDERS SOUGHT

102. The appellant seeks the following orders:

a. Special leave is granted in respect of ground 3 of the applicant's draft notice of appeal.

b. Appeal allowed with costs.

c. Set aside the orders of the Court of Appeal dated 15 March 2012 and in lieu thereof order that the appellants' appeal against Hunt & Hunt from the orders of the Supreme Court made on 7 July 2009 be dismissed with costs.

103. No orders are sought against the third and fourth respondents.

PART IX: ORAL ARGUMENT

104. The appellant estimates that its oral argument will require two hours.

Dated: 2 October 2012

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

BETWEEN: **HUNT & HUNT LAWYERS**
Applicant

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

ANNEXURE A TO THE APPELLANT'S SUBMISSIONS

1. This annexure sets out the terms of sections 3, 5, 5A, 5D, 34, 34A and 35 of the *Civil Liability Act 2002* (NSW).

2. Section 3 has not been amended since the act was first enacted in 2002.

3 Definitions

In this Act:

court includes tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined.

damages includes any form of monetary compensation but does not include:

(a) any payment authorised or required to be made under a State industrial instrument, or

(b) any payment authorised or required to be made under a superannuation scheme, or

(c) any payment authorised or required to be made under an insurance policy in respect of the death of, injury to or damage suffered by the person insured under the policy.

non-economic loss means any one or more of the following:

(a) pain and suffering,

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(b) loss of amenities of life,

(c) loss of expectation of life,

(d) disfigurement.

3. Sections 5, 5A and 5D are contained within Part 1A of the Act entitled "Negligence". Sections 5 and 5A have stood in the same form as when they were inserted into the Act with effect from 6 December 2012.

5 Definitions

In this Part:

harm means harm of any kind, including the following:

(a) personal injury or death,

(b) damage to property,

(c) economic loss.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

5A Application of Part

(1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

4. Section 5D has been in its present form since 1 December 2004.

5D General principles

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5. Sections 34, 34A and 35 are contained within Part IV of the Act ("Proportionate Liability").

6. Section 34 was in the following form since it came into force on 1 December 2004 and was subsequently amended with effect from 1 January 2011.

34 Application of Part

(1) This Part applies to the following claims (***apportionable claims***):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

(1A) For the purposes of this Part, 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).

(2) In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of two 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.

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

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

(5) (Repealed)

7. It was amended by the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW) (No 107 of 2010) with effect on 1 January 2011. The amending provision was clause 3.2 of Schedule 3 to that Act.

Schedule 3 Consequential amendment of other Acts and regulation

...

3.2 Civil Liability Act 2002 No 22

Section 34 Application of Part

Omit section 34 (1) (b). Insert instead:

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*) or under the *Australian Consumer Law (NSW)* for a contravention of section 18 of that Law.

8. It was further amended by the *Home Building Amendment Act 2011* (NSW) (No 52 of 2011) with effect on 25 October 2011. The amending provision was clause [1] of Schedule 2 to that Act.

Schedule 2 Amendment of Civil Liability Act 2002 No 22

[1] Section 34 Application of Part

Insert after section 34 (3):

(3A) This Part does not apply to a claim in an action for damages arising from a breach of statutory warranty under Part 2C of the *Home Building Act 1989* and brought by a person having the benefit of the statutory warranty.

9. The present form of section 34 is as follows.

34 Application of Part

(1) This Part applies to the following claims (***apportionable claims***):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*) or under the *Australian Consumer Law (NSW)* for a contravention of section 18 of that Law.

(1A) For the purposes of this Part, 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).

(2) In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of two 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.

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

(3A) This Part does not apply to a claim in an action for damages arising from a breach of statutory warranty under Part 2C of the *Home Building Act 1989* and brought by a person having the benefit of the statutory warranty.

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

(5) (Repealed)

10. Section 34A has been in the same form since it came into force on 1 December 2004.

34A Certain concurrent wrongdoers not to have benefit of apportionment

(1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an ***excluded concurrent wrongdoer***) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or

(c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

11. Section 35 has been in the same form since it came into force on 1 December 2004.

35 Proportionate liability for apportionable claims

(1) 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.

(2) 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 Part, and

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

(3) 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.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.