



HIGH COURT OF AUSTRALIA

13 May 2015

RONALD SELIG & ANOR v WEALTHSURE PTY LTD & ORS

[2015] HCA 18

Today the High Court unanimously allowed an appeal against a decision of the Full Court of the Federal Court of Australia and held that the proportionate liability regime in Div 2A of Pt 7.10 ("Div 2A") of the *Corporations Act 2001* (Cth) ("the Act") applies only to claims of misleading or deceptive conduct based upon a contravention of s 1041H of the Act. The Court also made a costs order against the first respondent's professional indemnity insurer, a non-party to the proceedings.

The appellants made an investment on the advice of the second respondent, an authorised representative of the first respondent. The scheme invested in was, in effect, a "Ponzi scheme" and the appellants lost their initial investment and suffered consequential losses. The appellants claimed the first and second respondents had contravened a number of provisions of the Act and the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act"), including s 1041H of the Act and its analogue in the ASIC Act, s 12DA. Section 1041H(1) prohibits conduct, in relation to a financial product or service, that is misleading or deceptive, or is likely to mislead or deceive. Section 1041L(1) in Div 2A defines an "apportionable claim" as a claim for loss or damage "caused by conduct that was done in a contravention of section 1041H".

The first and second respondents submitted that Div 2A and the corresponding provisions of the ASIC Act applied to limit their liability to a proportion of the appellants' loss and damage, having regard to the comparative responsibility of a number of other parties, including the company the appellants invested in and its directors.

The High Court held that an "apportionable claim" for the purposes of Div 2A is, relevantly, a claim based upon a contravention of s 1041H. The term does not extend to claims based upon conduct of a different kind, and therefore the proportionate liability regime established by Div 2A does not apply to other statutory or common law causes of action. The Court held that this reasoning applied equally to the analogue provisions of the ASIC Act.

The High Court further held that the circumstances justified an award of costs against a non-party to the proceedings, the first respondent's professional indemnity insurer. The insurer had the conduct of the defence at trial and made the decision to appeal to the Court below. As the first respondent's cover under the policy was capped, the decision to appeal meant that monies which it would otherwise have been obliged to pay the appellants would be diverted to meet the insurer's legal costs. The Court held that as the insurer was acting for itself in seeking to better its position by bringing the appeal, there was no reason it should be regarded as immune from a costs order.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*