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## Case Note

3 April 2013

# CRITICAL CHANGE TO PROPORTIONATE LIABILITY

The High Court Decision  
in *Hunt & Hunt Lawyers V  
Mitchell Morgan Nominees  
Pty Ltd & Ors*

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## Introduction

The High Court has today issued its much awaited judgment in what has become known as the **Vella** case, overturning the decision of the NSW Court of Appeal and providing much needed guidance on the application of the proportionate liability regime.

## The Underlying Facts

This case involved a joint venture between a Mr Vella and a Mr Caradonna (who turned out to be a fraudster) to promote a boxing match. Mr Vella and Mr Caradonna borrowed \$300,000 from a friend to use for the joint venture. They placed that money into a joint account they opened for the venture. They also obtained (from Mr Vella's solicitor) Mr Vella's certificates of title over several properties owned by him, which they jointly intended to use as security for a further loan for which they intended to apply. Ultimately, however, they did not proceed with the proposed joint loan.

Mr Caradonna, who retained possession of Mr Vella's certificates of title, unbeknownst to Mr Vella used those certificates of title to fraudulently borrow money in his own name from a number of sources. One such borrowing was from Mitchell Morgan Nominees Pty Ltd. Mr Caradonna applied for the loan in Mr Vella's name through a mortgage broker and forged Mr Vella's signature on the loan agreement and the mortgage documents. Mr Caradonna was assisted by a dishonest solicitor, his cousin Mr Flammia, who misrepresented to Mitchell Morgan's solicitors, Hunt & Hunt, that the documents had been signed before him by Mr Vella whose identity he confirmed from various identification documents. Mitchell Morgan paid the proceeds of the loan (approximately \$1 million) to the joint account, from which the proceeds were quickly withdrawn by Mr Caradonna.

Mr Vella commenced proceedings against a number of parties including Mitchell Morgan, who in turn, issued a number of cross claims including a claim against its solicitors Hunt & Hunt, who sought to limit its liability under the proportionate liability provisions of the **Civil Liability Act 2002 (NSW) (the CLA)**.

## The Supreme Court Decision

The trial judge at first instance, Young CJ, held that:

- + Mr Vella was not liable to Mitchell Morgan as the borrower on the loan because the loan agreement was void by reason of the forgery;
- + Although forged, the mortgage had gained indefeasibility by registration under the Real Property Act 1900 but because the mortgage was worded to only secure money payable by Mr Vella to Mitchell Morgan (and no money was payable by Mr Vella because the loan agreement was void by reason of the fraud), the mortgage in fact secured nothing and should be discharged;
- + Hunt & Hunt was liable to Mitchell Morgan in negligence (for failing to ensure the efficacy of the mortgage as security), but was a concurrent wrongdoer (along with Mr Caradonna and Mr Flammia) whose liability should be limited to only 12.5% of Mitchell Morgan's loss.
- + While the trial judge apportioned the balance of responsibility to Mr Caradonna (72.5%) and Mr Flammia (15%), they were both jointly liable for 100% of Mitchell Morgan's loss as fraudsters do not have the benefit of the proportionate liability legislation.
- + Due to the difficulties of actually collecting any judgment against the fraudsters, Mr Caradonna and Mr Flammia (both of whom had been declared bankrupt), Mitchell Morgan appealed against the judgment limiting Hunt & Hunt's liability to only 12.5%, contending that Hunt & Hunt was not a "concurrent" wrongdoer with Mr Caradonna and Mr Flammia and therefore should not have the benefit of the proportionate liability legislation.

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## The Court of Appeal Decision

The full Court of the NSW Court of Appeal heard the appeal by Mitchell Morgan against Hunt & Hunt on the question of whether Hunt & Hunt was a “concurrent wrongdoer” with Mr Caradonna and Mr Flammia and therefore entitled to the proportionate liability limitation under section 35 of the CLA. In a unanimous decision by Giles JA (with Bathurst CJ, Campbell JA, Macfarlan JA, and Sackville AJA agreeing), the Court of Appeal reversed the trial judge’s finding and instead held that Hunt & Hunt was not a “concurrent wrongdoer” and therefore was liable for the entirety of Mitchell Morgan’s loss (without any reduction for the proportionate liability of the fraudsters).

The Court of Appeal based its judgment on the distinction between the use of the words “damage” and “damages” in the CLA.

Section 34(1) of the CLA defines the term “apportionable claim” in the following terms:

*“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” (our emphasis).*

Section 34(2) of the CLA defines “concurrent wrongdoer” in the following terms:

*“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” (our emphasis).*

The Court of Appeal provided the following analysis:

*“The remedy in an action for damages is judgment for a money sum, whether the claim be one of harm to a personal, proprietary or economic interest. The money sum is compensation for the wrong. But the money sum is not to be equated with the personal, proprietary or economic interest for harm to which the damages are awarded...*

*For s35, the economic interest should not be identified at the general level of not being financially worse off. That would merge loss or damage with damages ... 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 the security for the money paid out. The losses the subject of the claims for economic loss against Messrs Caradonna and Flammia and the subject of the claim for economic loss against Hunt & Hunt are different.”*

By drawing that distinction requiring the concurrent wrongdoers to have caused the same “damage” rather than the same “damages”, the Court of Appeal significantly narrowed the circumstances in which the proportionate liability legislation will operate.

## The High Court Decision

The majority of the High Court (French CJ, Hayne and Kiefel JJ) overturned the Court of Appeal decision holding that:

*“The loss or damage which Mitchell Morgan suffered was its inability to recover the monies it advanced. Mitchell Morgan’s claim against Hunt & Hunt was based on a different cause of action from the claims it would have had against Mr Caradonna and Mr Flammia. But the claims against all of Hunt & Hunt,*

*Mr Caradonna and Mr Flammia were founded on Mitchell Morgan's inability to recover the monies advanced and the acts or omissions of all of them materially contributed to Mitchell Morgan's inability to recovery that amount."*

The majority reasoned that section 34(2) poses two questions for the court, namely:

- + What is the damage or loss that is the subject of the claim?
- + Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss?

On this first question, the majority reasoned that *"damage, properly understood, is the injury and other foreseeable consequences suffered by a plaintiff."* In this case, Mitchell Morgan's damage was its inability to recover the monies it advanced.

On the second issue, the majority reasoned:

*"There were two conditions necessary for the mortgage to be completely ineffective: (a) that the loan agreement was void; and (b) that the mortgage document did not itself contain the debt covenant, but did so solely by reference to the loan agreement. Hunt & Hunt was responsible for (b), but the fraudsters were responsible for (a)."*

Accordingly, the majority concluded that Mitchell Morgan could not recover its entire loss from Hunt & Hunt, but rather could only recover from Hunt & Hunt the proportion for which it was found to be responsible by the primary judge, ie, 12.5%.

Bell and Gageler JJ, in a minority judgment, stated that they would have dismissed the appeal and upheld the judgment of the Court of Appeal.

## Implications

This decision from the High Court should be welcome news to insurers as:

- + it provides some much needed guidance on the application of the proportionate liability regime; and
- + it should provide greater scope for insureds/defendants to avail themselves of the proportionate liability legislation to limit their liability.