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# *Selig v Wealthsure Pty Ltd & Ors* [2015] HCA 18 (13 May 2015)

## Relevant Principles

The basic tenet of proportionate liability is that each defendant wrongdoer is only responsible for the loss and damage which he or she has caused. In cases involving two or more defendants, the plaintiff will only be able to recover from each defendant the proportion of damages for which that defendant is responsible. Should the plaintiff fail to join as a defendant a particular wrongdoer or should a defendant against whom judgment is entered be insolvent, that is a risk which lies with the plaintiff. Under the proportionate liability scheme, a plaintiff cannot recover from a single defendant the sum of all damages caused by multiple wrongdoers, and then leave it to the defendant to seek contribution from the concurrent wrongdoers. Therefore, the legislation effectively shifts the risk of recovery from the defendant to the plaintiff.

## Background

Mr and Mrs Selig (**appellants**) invested in Neovest Limited (**Neovest**) in reliance on financial advice provided by Mr Bertram (**second respondent**), an authorised representative of Weathsure Pty Ltd (**first respondent**). By virtue of being a "Ponzi scheme", Neovest became insolvent and the appellants lost their investment and suffered consequential losses.

The appellants commenced legal proceedings against the first and second respondents as well as Neovest, Norton Capital Pty Ltd (**Norton Capital**) (a promoter of Neovest), Mr Townley and Mr Norton (directors of Neovest) (**fifth and sixth respondents**), two other directors of Neovest, and the partners of Mr Townley's law firm. The appellant's claims against the first, second, fifth and sixth respondents (**respondent group**) were based upon a number of contraventions of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), including section 1041H of the Corporations Act and its analogue in the ASIC Act, section 12DA both relating to misleading and deceptive conduct. The respondent group claimed that their respective liability should be limited to the proportion of the loss and damage which each of them caused. In this regard, the respondent group relied on Division 2A of Part 7.10 of the Corporations Act and the corresponding provisions of the ASIC Act.

## First instance

In the first instance, Lander J made findings against Neovest, Norton Capital and the two other directors of Neovest, but did not enter judgment against them on account of their liquidation and bankruptcy respectively. Lander J dismissed the action against Mr Townley's partners. He entered judgment in the sum of $1,760,512.00 against the respondent group on the basis that each of them was responsible for the whole of the damage suffered by the appellants. His Honour did not apportion the liability between those respondents.

## Appeal to the Full Federal Court

The first and second respondents appealed Lander J's decision. The issue before the Full Federal Court was whether the damages attributable the causes of action flowing from the non-apportionable sections of the Corporations and ASIC Acts should also be decided on a proportionate basis. By majority, the appeal was allowed and the Full Federal Court held that all causes of action should be decided on a proportionate basis. Mansfield J stated that the deciding factor was whether the claims are in respect of the same loss and damage, as opposed to the nature of the claim itself.

## High Court Decision

The appellants appealed the Full Federal Court's decision.

The parties accepted that the loss and damage suffered by the appellants as a result of each of the various contraventions of the Corporations Act and the ASIC Act was the same. The question was whether Division 2A applies so that the loss and damage was apportioned between the first, second, fifth and sixth respondents in respect of all of those claims or whether Division 2A is limited in its application to the claims based on contraventions of section 1041H only.

Section 1041L(1) of the Corporations Act states that Division 2A applies to claims for damages made under section 1041I for economic loss or damage to property caused by conduct in contravention of section 1041H.

The High Court observed that the Full Federal did not focus on section 1041L(1) but rather on section 1051L(2) which outlines that a single apportionable claim exists where there are proceedings in respect of the same loss or damage even if they are based on more than one cause of action of the same or different kind.

The High Court found that the word "claim" as it appears in sub-sections 1 and 2 section 1051L should be given the same meaning and that the reference to more than one cause of action in 1051L(2) refers only to the multiple ways a plaintiff could substantiate a claim for loss or damages for a contravention of section 1041H. The High Court further referred to section 1041(4) which expressly states that apportionable claims are limited to those claims specified in subsection 1, being those caused by conduct in contravention of section 1041H.

The High Court overturned the decision of the Full Federal Court and found that the proportionate liability provisions in the Corporations Act were clear and related only to claims under s.1041H and no other statutory or common law claims, including any other alleged contraventions of the Corporations Act. A comparable finding was made on the application of the proportionate liability regime under the ASIC Act.

## Outcome

This decision preserves the position that proportionate liability can only be pleaded where the relevant position under legislation explicitly imposes it.

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## Interesting to Note – Award of Costs against Insurer

The appellants sought an order that the professional indemnity insurer of the first respondent, QBE Insurance (Australia) Ltd (**QBE**), a non-party to the proceedings, pay its costs of the High Court and Federal Court appeals. QBE had the conduct of the defence and made the decisions to appeal from the judgment of the primary judge. Shortly after the Notice of Appeal was filed, the second respondent was declared bankrupt and the first respondent's ability to pay the judgment sum and costs was unknown. At the time, approximately $1.35 million of the $3 million insurance cover had been spent conducting the defence on behalf of the first and second respondent

Despite the second respondent's trustee in bankruptcy electing to discontinue the appeal to the Federal Court, QBE asserted its entitlement to conduct the appeal on behalf of both the first and second respondents.

Whether or not QBE's decision to appeal was reasonable, it acted for itself in seeking to better its position as it could not be said that it was in the interests of the first and second respondent. In making the decision to do so, funds that could have been used to pay the appellants were reduced.

The High Court referred to the matter of *Knight v FP Special Assets* where it was held that the Court had a discretionary power to make orders against non-parties where the non-party has played an active part in the conduct of the litigation and has an interest in the subject of the litigation. In these circumstances, the High Court found that QBE should not be regarded as immune from the risk of an order for costs and they were accordingly ordered to pay the appellants' costs of both appeals.