
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : HART -v- JGC ACCOUNTING & FINANCIAL
SERVICES PTY LTD [2015] WASCA 22

CORAM : MARTIN CJ
NEWNES JA
MURPHY JA

HEARD : 12 NOVEMBER 2014

DELIVERED : 5 FEBRUARY 2015

FILE NO/S : CACV 5 of 2014

BETWEEN : NIGEL WILLIAM HART
Appellant

AND

JGC ACCOUNTING & FINANCIAL SERVICES
PTY LTD
First Respondent

JUSTIN GEORGE COPPIN
Second Respondent

NIKOLA FUDLOVSKI
Third Respondent

ROSEMARY FUDLOVSKI
Fourth Respondent

FUDLOVSKI INVESTMENTS PTY LTD
Fifth Respondent

BLUECHIP ENTERPRISES PTY LTD
Sixth Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA
Coram : KENNETH MARTIN J
Citation : FUDLOVSKI -v- JGC ACCOUNTING &
FINANCIAL SERVICES PTY LTD [No 3] [2013]
WASC 476
File No : CIV 2239 of 2012

Catchwords:

Practice and procedure - Concurrent wrongdoers - Proportionate liability - *Civil Liability Act 2002* (WA) s 5AN(1) - Counterclaim against an additional concurrent wrongdoer - Declaratory relief sought - Statutory interpretation - Principles relevant to proposed joinder under s 5AN(1) - No proper claim for declaratory relief - No proper basis for joinder of concurrent wrongdoer

Legislation:

Civil Liability Act 2002 (NSW), s 35, s 35A, s 36, s 37, s 38, s 39
Civil Liability Act 2002 (WA), Pt 1F, s 5AI, s 5AJ, s 5AK, s 5AKA, s 5AL, s 5AM, s 5AN, s 5AN(1), s 5AO
Civil Liability Act 2003 (QLD), s 32
Competition and Consumer Act 2010 (Cth), s 87CD(3)(b)
Interpretation Act 1984 (WA), s 10(c), s 56(1)
Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA), s 7, s 7(1)(c)
Rules of the Supreme Court 1971 (WA), O 1 r 4B, O 4A r 2(1), O 18 r 3, O 18 r 16
Supreme Court Act 1935 (WA)
Trade Practices Act 1974 (Cth)
Wrongs Act 1958 (VIC), pt IVAA, s 24AI, s 24AE, s 24AL

Result:

Appeal and cross-appeal allowed

Category: A

Representation:

Counsel:

Appellant : Mr R W Bower
First Respondent : Mr T J Carmady
Second Respondent : Mr T J Carmady
Third Respondent : Mr D H Solomon
Fourth Respondent : Mr D H Solomon
Fifth Respondent : Mr D H Solomon
Sixth Respondent : Mr D H Solomon

Solicitors:

Appellant : Corser & Corser
First Respondent : Williams & Hughes
Second Respondent : Williams & Hughes
Third Respondent : Solomon Brothers
Fourth Respondent : Solomon Brothers
Fifth Respondent : Solomon Brothers
Sixth Respondent : Solomon Brothers

Case(s) referred to in judgment(s):

Atkins v Interprac Financial Planning Pty Ltd [2007] VSC 445
Aussie Airlines Pty Ltd v Australian Airlines Ltd (1996) 68 FCR 406
BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [2008] FCA 1656
Cowan v Greatorex [2008] VSC 401
Edwards v Santos Ltd [2011] HCA 8; (2011) 242 CLR 421
Fudlovski v JGC Accounting & Financial Services Pty Ltd [No 2] [2013]
WASC 301
Fudlovski v JGC Accounting & Financial Services Pty Ltd [No 3] [2013]
WASC 476
HSD Co Pty Ltd v Masu Financial Management Pty Ltd [2008] NSWSC 1279
Lion-Dairy & Drinks Pty Ltd v Jacobs Group (Australia) (No 5) [2014]
FCA 897
Miletich v Murchie [2012] FCA 1013

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986)
162 CLR 24

Rivercity Motorway Finance Pty Ltd v AECOM Australia Pty Ltd (No 2) [2014]
FCA 713

Sandtara Pty Ltd v Abigroup Ltd (1997) 42 NSWLR 5

The Commonwealth v Stirling Nicholas Duty Free Pty Ltd [1972] HCA 19;
(1972) 126 CLR 297

Ucak v Avante Developments Pty Ltd [2007] NSWSC 367

Woods v De Gabriele [2007] VSC 177

MARTIN CJ
NEWNES JA
MURPHY JA

1 **MARTIN CJ:** This application for leave to appeal from the decision of the primary judge joining the appellant as a party to the proceedings should be granted, the appeal and the plaintiff's cross-appeal allowed, and the decision of the primary judge set aside for the reasons given by Murphy JA with which I agree.

2 **NEWNES JA:** I agree with Murphy JA.

MURPHY JA:

Introduction

3 This is an appeal against an interlocutory decision by the primary judge, Kenneth Martin J, in relation to proceedings managed by his Honour in the CMC list.

4 In summary, the third, fourth and fifth respondents are the plaintiffs in the primary proceedings. They sued the first and second respondents in those proceedings. (In these reasons I will refer to the third to fifth respondents as the plaintiffs and (unless the context otherwise indicates to the contrary) to the first and second respondents collectively as 'JGC'.)

5 In their statement of claim, the plaintiffs alleged, in effect, that:

- (a) the appellant (Mr Hart) recommended that they make certain investments in SAS Global Ltd (SAS Global) or related companies;
- (b) after receiving the recommendation, the plaintiffs instructed JGC to advise them whether to undertake the investments;
- (c) JGC advised the plaintiffs that the investments recommended by Mr Hart should be undertaken; and
- (d) in reliance on such advice from JGC, the plaintiffs made the investments and suffered loss and damage.

6 The plaintiffs plead certain causes of action against JGC. No claims are made against Mr Hart.

7 In late 2013, JGC sought to join Mr Hart as a party to the action. To that end, JGC proposed to issue a counterclaim against the plaintiffs and to join Mr Hart as an additional defendant to the counterclaim. Order 18 r 3 of the *Rules of the Supreme Court 1971* (WA) (RSC) provides,

relevantly, that where a defendant to an action, who makes a counterclaim against the plaintiff, alleges that any other person is liable to him along with the plaintiff in respect of the subject matter of the counterclaim, or claims against such other person any relief related to or connected with the original subject matter of the action, then the defendant may join that other person as a party against whom the counterclaim is made.

8 Against the opposition of both the plaintiffs and Mr Hart, the primary judge granted JGC's application and ordered the joinder of Mr Hart as a defendant to a counterclaim by JGC: *Fudlovski v JGC Accounting & Financial Services Pty Ltd [No 3]* [2013] WASC 476.

9 His Honour ordered, relevantly, that:

The defendants [JGC] have leave to file and serve a consolidated defence and counterclaim with the counterclaim to be in accordance with the minute of proposed counterclaim dated 31 October 2013 ... and to the extent that [Mr] Hart is reflected as a defendant to the counterclaim, leave is given to join him as a defendant to the counterclaim pursuant to s 5AN(1) of the *Civil Liability Act* and s 87CH(1) of the *Trade Practices Act*.

10 By the counterclaim the subject of the primary judge's order, JGC and Mr Coppin are, respectively, the first and second plaintiffs by counterclaim. Each of the plaintiffs is a defendant to the counterclaim, and Mr Hart is the fifth defendant by counterclaim. The counterclaim contains a section headed 'Apportionment under the *Civil Liability Act* and *Trade Practices Act*' under which various alleged material facts are pleaded (BB 157). At the conclusion of that section, the relief claimed by the plaintiffs by counterclaim is in the following terms (BB 178):

- (1) A declaration as to the respective proportion of any damage or loss that the parties may be responsible for in relation to the SAS Global Claims (as defined in the Amended Statement of Claim).
- (2) Such other orders as the court thinks appropriate.

11 Mr Hart now appeals against the primary judge's decision.

12 His Honour's decision occurred against the following background.

The earlier application for joinder of Mr Hart as a third party

13 Earlier in the proceedings JGC had joined Mr Hart as the third party to the action and claimed contribution or indemnity arising out of s 7 of the *Law Reform (Contributory Negligence and Tortfeasors Contribution)*

Act 1947 (WA) (Law Reform Act). Mr Hart applied to set aside the third party proceedings against him on the basis that the claim was precluded by the operation of pt 1F of the *Civil Liability Act 2002* (WA) (the WA Act). That application was heard by the primary judge on 5 July 2013. His Honour delivered reasons for judgment on 16 August 2013: ***Fudlovski v JGC Accounting & Financial Services Pty Ltd [No 2]*** [2013] WASC 301 (third party judgment).

14 In the third party judgment, his Honour said that the fundamental issue was whether pt 1F of the WA Act, which introduced the principles of proportionate liability in certain causes of action arising after 1 December 2003, precluded any statutory right to contribution against Mr Hart pursuant to s 7(1)(c) of the *Law Reform Act*.

15 His Honour, with respect to the principles in connection with proportionate liability legislation, said:

It is convenient at the outset to reflect upon some observations about proportionate liability legislation in the recent High Court decision, ***Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*** [2013] HCA 10; (2013) 87 ALJR 505 (French CJ, Hayne & Kiefel JJ). These observations concern substantially equivalent provisions in pt 4 of the *Civil Liability Act 2002* (NSW) (the NSW Act), dealing with proportionate liability and concurrent wrongdoers. The plurality observed of the legislation:

'Part 4 of the *Civil Liability Act* represents a departure from the regime of liability for negligence at common law (solidary liability), where liability may be joint or several but each wrongdoer can be treated as the effective cause and therefore bear the whole loss. Under that regime, a plaintiff can sue and recover his or her loss from one wrongdoer, leaving that wrongdoer to seek contribution from other wrongdoers. The risk that any of the other wrongdoers will be insolvent or otherwise unable to meet a claim for contribution lies with the defendant sued. By comparison, under a regime of proportionate liability, liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility. It is therefore necessary that the plaintiff sue all of the wrongdoers in order to recover the total loss and, of course, the risk that one of them may be insolvent shifts to the plaintiff [10].'

The history underlying the introduction around Australia of various regimes of proportionate liability legislation is also summarised by Finkelstein J in ***BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)*** [2008] FCA 1656 [4] - [5].

In ***Hunt & Hunt Lawyers***, after referring to the final report of the inquiry into the law of joint and several liability completed by Professor Davis in

1995 - namely, Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (1995) - the plurality observed at [15], there was a 'clear connection' between the Davis Report and pt 4 of the NSW Act. The plurality further observed:

[16] The evident purpose of Pt 4 is to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility. The court has the task of apportioning that responsibility where the defendant can show that he or she is a 'concurrent wrongdoer', which is to say that there are others whose acts or omissions can be said to have caused the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them. If there are other wrongdoers they, together with the defendant, are all concurrent wrongdoers.

[17] The purpose of Pt 4 is achieved by the limitation on a defendant's liability, effected by s 35(1)(b), which requires that the court award a plaintiff only the sum which represents the defendant's proportionate liability as determined by the court. For that purpose, it is not necessary that orders are able to be made against the other wrongdoers in the proceedings. Section 34(4) [provides] that it does not matter, for the purposes of Pt 4, that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died. Thus under Pt 4 the risk of a failure to recover the whole of the claim is shifted to the plaintiff.'

Section 34(4) and s 35(1)(b) of the NSW Act, as referred to by the High Court in *Hunt & Hunt Lawyers*, are substantially equivalent to s 5AJ(1) and s 5AK(1)(b) in the WA Act (third party judgment [2] - [5]).

16 His Honour concluded that on the proper construction of pt 1F of the WA Act, JGC had no valid statutory cause of action against Mr Hart for contribution or indemnity arising out of s 7 of the Law Reform Act [38].

17 His Honour nevertheless observed, in effect, that there were a number of unsatisfactory forensic implications arising from his Honour's decision to set aside the third party proceedings against Mr Hart. They were, in effect:

- (a) a perceived procedural unfairness in making findings adverse to Mr Hart in the litigation in his absence as a party to the litigation;
- (b) in the absence of the joinder of Mr Hart, the plaintiffs may be disadvantaged in resisting claims by JGC that Mr Hart is a concurrent wrongdoer; and

- (c) the risk of inconsistent findings in the event that the plaintiffs subsequently commenced separate proceedings against Mr Hart as a concurrent wrongdoer (third party judgment [41] - [43]).

The joinder decision

18 In the decision under appeal (the joinder decision) the primary judge found, in effect, that JGC could properly claim declaratory relief against Mr Hart and the plaintiffs; that the question of joinder under s 5AN(1) was not confined by the rules of court governing joinder of parties; that a number of the forensic implications to which his Honour had referred in the third party judgment were relevant to the question of joinder; and that adding Mr Hart as a party would simply give him the opportunity to participate in the proceedings, but would not compel him to do so (joinder decision [6] - [19]).

Grounds of appeal - Mr Hart

19 Mr Hart seeks leave to appeal the joinder judgment. He was granted leave to amend his grounds of appeal on 30 April 2014. There was a further application to amend in terms of a minute dated 31 October 2014. That application was allowed. His consolidated amended grounds of appeal read as follows:

1. the learned primary judge erred in law in exercising his Honour's discretion to grant leave for the first and second respondents to join the appellant as an additional party (defendant) to their foreshadowed counterclaim under the first and second respondents' minute of counterclaim ('the proposed counterclaim');
2. the learned primary judge erred in fact and in law by failing to consider the effect of subsection 5AJA(1)(b) of the *Civil Liability Act 2002* (WA);
3. the learned primary judge erred in fact and law by failing to take into account:
 - a. the 'necessity' element of Order 18 Rule 6 of the *Rules of the Supreme Court 1971* (WA) ('RSC'); and
 - b. the relevant common law principles of joinder applicable to RSC Order 18 Rule 6.
4. the learned primary judge erred in law and fact in failing to distinguish the Victorian cases of *Atkins v Interprac Financial Planning Pty Ltd* [2007] VSC 445 and *Cowan v Greatorrex* [2008] VSC 401 in their application to the facts of this case.

5. the learned primary judge erred in fact and law in failing to determine that the first and second respondents' application for leave to join the appellant pursuant to s 5AN(1) of the *Civil Liability Act 2002* (WA) was an abuse of process, on the ground that:
 - a. the true nature of the application was an application for leave to make the proposed counterclaim out of time;
 - b. further or alternatively, the making of the counterclaim was unnecessary and for a collateral purpose;
 - c. further or alternatively, the counterclaim had no reasonable prospect of success.
6. The learned primary judge erred in fact and law in failing to apply a proper statutory construction of Part 1F of the *Civil Liability Act 2002* (WA), and erred in law in holding that s 5AN(1) empowered the Court to join the appellant as a defendant to the proposed counterclaim.
7. The primary court erred in fact and law in exercising its discretion to grant leave to institute the proposed counterclaim out of time because:
 - a. the making of the Counterclaim is unnecessary; and
 - b. the forensic advantages identified by the Primary Court favouring joinder of all concurrent wrongdoers at [2014] WASC 476 [41] - [43] ought not to have been accorded any weight in the circumstances of this matter because the joinder of Mr Hart was opposed by both Mr Hart and the plaintiffs and there is no risk of subsequent proceedings against Mr Hart being brought by the plaintiffs.

The plaintiffs' cross-appeal

20 At the hearing of Mr Hart's application for leave to appeal, the plaintiffs applied for, and were granted, leave to cross-appeal against the primary judge's decision.

21 The grounds of the plaintiffs' cross-appeal are in the same terms as ground 7 of Mr Hart's grounds of appeal, referred to above.

The relevant provisions of the *Civil Liability Act 2002 (WA)* - preliminary observations

22 The relevant legislative provisions, with reference to the New South Wales counterpart legislation (*Civil Liability Act 2002 (NSW)*), were helpfully set out in the third party judgment by Kenneth Martin J at [15]:

Part 1F - Proportionate liability

5AI. Terms used

In this Part -

apportionable claim means -

- (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); or
- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 2010* based on misleading or deceptive conduct;

concurrent wrongdoer, in relation to a claim, means a person who is one of 2 or more persons whose act or omission caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

5AJ. Application of Part

- (1) For the purpose of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.
- (2) This Part does not apply -
 - (a) to a claim for damages of a class that is excluded from the operation of this Part by section 3A; or
 - (b) to the extent that its operation is excluded, modified or restricted in accordance with section 4A.
- (3) This Part applies only to causes of action that accrue after the commencement of the *Civil Liability Amendment Act 2003* section 9.
- (4) 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).

5AK. Proportionate liability for apportionable claims [NSW Act s 35]

- (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 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 is to 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.

5AKA. Duty of defendant to inform plaintiff about concurrent wrongdoers [NSW Act s 35A]

- (1) If -
 - (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular

person (the *other person*) may be a concurrent wrongdoer in relation to the claim; [and]

- (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about -
 - (i) the identity of the other person; and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
- (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

the court hearing the proceedings may order that the defendant pay all or any of those costs to the plaintiff.

- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

5AL. Contribution not recoverable from defendant [NSW Act s 36]

- (1) A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim -
 - (a) cannot be required to contribute to the damages or contribution recovered from another concurrent wrongdoer in respect of an apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
 - (b) cannot be required to indemnify any such wrongdoer.
- (2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from or to indemnify another concurrent wrongdoer in relation to an apportionable claim.

5AM. Subsequent actions [NSW Act s 37]

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) In any proceedings in respect of any action referred to in subsection (1) the plaintiff cannot recover an amount of damages that, having

regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

5AN. Joining non-party concurrent wrongdoers in [the] action [NSW Act s 38]

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

5AO. Part does not prevent other liability or operation of other Act [NSW Act s 39]

Nothing in this Part -

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

23 It is to be noted that s 5AK(3) of the WA Act refers to the apportionment or responsibility between 'defendants' and that the court must have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings. Subsection (3) of s 5AK is not in terms directed to establishing the proportionate responsibility of a single defendant where a concurrent wrongdoer is not a party to the proceedings. However, when regard is had to subsection (4) of s 5AK, a consideration of what is 'just' within the meaning of s 5AK(1)(a) would include a consideration of the comparative responsibility of any concurrent wrongdoer who was not a party to the proceedings, even where there is only one defendant (in the ordinary sense of that word) to the action. Further, and in any event, s 10(c) of the *Interpretation Act 1984* (WA) provides that, in any written law, words in the singular number include the plural and words in the plural number include the singular.

24 A defendant for the purposes of s 5AN(1) would include a defendant to a counterclaim, and a third party: s 5AK(5).

25 In relation to the New South Wales provisions, in *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367, Hammerschlag J observed:

If a right or defence depends, as is the case here, upon the provisions of a statute, the claim must state material facts demonstrating that entitlement: *Air Link Pty Ltd v Patterson* [2002] NSWCA 85 at [20] per Sheller JA; *Hunt Contracting Co Pty Ltd v Roebuck Resources NL* (1992) 110 ALR 183 at 190; *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215.

In order for a person to be a concurrent wrongdoer he must be one whose acts or omissions caused the damage or loss that is the subject of the claim.

It follows in my view, that for a defendant to assert that there is a person who is a current [sic - concurrent] wrongdoer the defendant must plead the necessary elements which result in the asserted conclusion. Those elements are:

- a the existence of a particular person;
- b the occurrence of an act or omission by that particular person; and
- c a causal connection between that occurrence and the loss that is the subject of the claim [33] - [35].

See also *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 [17] - [18] to similar effect.

26 Those observations would apply equally to the operation of pt 1F. Further, in appropriate circumstances, a pleading to that effect by a defendant might itself constitute sufficient compliance with s 5AKA(1).

27 The proportionate liability provisions of the *Competition and Consumer Act 2010* (Cth) (CCA) are broadly the same as the provisions in the NSW Act. It may be noted that s 35(3)(b) of the NSW Act, and s 87CD(3)(b) of the CCA both provide that the court 'may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings' (emphasis added). The equivalent provision in the WA Act, s 5AK(3)(b), is however mandatory in terms - it provides that the court 'is to have regard' to the comparative responsibility of the absent concurrent wrongdoer. To that extent the WA Act is even clearer in relation to the apportionment of responsibility as against an absent concurrent wrongdoer.

Victorian Act

28 It is also useful to note here the following matters with respect to the equivalent Victorian legislation: pt IVAA of the *Wrongs Act 1958* (VIC) (Victorian Act). First, s 24AI of the Victorian Act is broadly similar to s 5AK of the WA Act, although not identical to it. Section 24AI of the Victorian Act omits a provision to the effect of s 5AK(4) of the WA Act. Thus, s 24AI of the Victorian Act does not provide:

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

29 Secondly, whilst s 5AK(3) of the WA Act is similar to s 24AI(3) of the Victorian Act, insofar as they both relate to the apportionment of responsibility between 'defendants' (ie, persons joined as parties - see s 5AK(5) of the WA Act and s 24AE of the Victorian Act) there is a material difference. Unlike s 5AK(3)(b) of the WA Act, s 24A(3) of the Victorian Act provides, relevantly:

In apportioning responsibility between defendants in the proceeding *the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding* unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up. (emphasis added)

30 Thirdly, in the absence of a provision such as s 5AK(4) of the WA Act in s 24AI of the Victorian Act, a question may arise as to the operation of s 24AI where there is only one 'defendant', who claims that responsibility also resides in a concurrent wrongdoer who is not a party to the proceedings (with the result that there are no 'defendants' to which s 24AI(3) of the Victorian Act would apply).

31 Fourthly, the Victorian Act does not have a provision equivalent to s 5AKA of the WA Act. In other words, there is no obligation, in the Victorian legislation, on a defendant in proceedings involving an apportionable claim to inform the plaintiff of the identity and circumstances of another potential concurrent wrongdoer, where the defendant has reasonable grounds to believe that that person may be a concurrent wrongdoer.

32 Fifthly, the Victorian equivalent of s 5AN of the WA Act is s 24AL of the Victorian Act. In *Woods v De Gabriele* [2007] VSC 177, Hollingworth J, on the application of the defendants to the action, joined a concurrent wrongdoer as a further defendant to the action. Her Honour said that a third party procedure was not the appropriate vehicle for

joinder in that case because the defendants had no claim against the alleged concurrent wrongdoer, and the Victorian Act clearly envisaged the possible joinder of the person as a defendant for the purpose of apportioning responsibility [65].

33 In *Atkins v Interprac Financial Planning Pty Ltd* [2007] VSC 445, the defendants sought a declaration against the concurrent wrongdoer. Hargrave J considered that the most appropriate procedure for joinder was for the defendants to plead their allegations of concurrent wrongdoing in an amended defence and counterclaim, with leave being given to join the added parties as defendants to that counterclaim. His Honour said that this would 'enable the plaintiff to plead its answer to these allegations in a reply and defence to counterclaim. It will also enable the added parties to defend the counterclaim if they so desire' [36]. (This appears to have been the template for the primary judge's orders in this case.)

34 In *Cowan v Greatorrex* [2008] VSC 401, Hollingworth J referred to her Honour's earlier decision in *Woods*, and to the decision of Hargrave J in *Atkins*. Her Honour noted that in the case before her, the defendants did not seek any relief against the concurrent wrongdoer. They merely sought to add the concurrent wrongdoer as a defendant (in the ordinary sense) to the plaintiff's action. Her Honour allowed that course: *Cowan* [31] - [36].

Section 5AN of the WA Act - joinder

35 It is convenient to restate here the wording of s 5AN of the WA Act:

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

36 The plaintiffs accepted in this appeal that a plaintiff would not, at least generally, need leave to join a concurrent wrongdoer as a second defendant (in the ordinary sense of that term) to an action. It was also accepted that the power under s 5AN(1) to join a 'defendant' (in the sense defined in s 5AK(5)) is evidently designed to facilitate the joinder to the proceedings of another concurrent wrongdoer, even where the plaintiff has not joined that person as a defendant (in the ordinary sense of that term) to the action. (See appeal ts 32 - 33, 35.)

37 Joinder under s 5AN, when read with s 5AK(5), contemplates joinder of a concurrent wrongdoer 'under this Part [pt 1F]' or 'under rules of court' or 'otherwise'. Given the subject matter of s 5AN(1) - joinder - the words 'or otherwise' in s 5AK(5) would appear to at least include the *Supreme Court Act 1935* (WA) and the inherent jurisdiction of the court. Accordingly, the joinder contemplated by s 5AK(5) is not confined by the rules of court governing the joinder of parties.

38 The power to join a concurrent wrongdoer 'under' pt 1F of the WA Act is a discretionary one - the court 'may' grant leave under s 5AN(1): s 56(1) of the *Interpretation Act 1984* (WA). Where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 40. The following observations, which are not intended to be exhaustive, may be made.

39 In the case of pt 1F of the WA Act, in relation to proceedings involving an apportionable claim, the court is to give judgment against a defendant for no more than the amount which the court considers 'just having regard to the extent of the defendant's responsibility for the damage or loss': s 5AK(1)(a) of the WA Act. Matters relevant to the attainment of justice in that respect would be relevant considerations in the exercise of discretion under s 5AN(1).

40 Ordinarily, and all other things being equal, it is in the interests of justice for the court to have before it, so far as practicable, all the relevant materials to enable it to determine what is 'just': s 5AK(1)(a). Also, ordinarily the conception of a 'just' determination does not involve making adverse findings on questions of responsibility for loss (as opposed to questions of fact arising in the course of giving evidence) against a person who has not had the opportunity to be heard (even where the findings would not formally bind that person).

41 Thus, for example, if a concurrent wrongdoer is properly made a party to, and participates, in the proceedings:

- (a) the concurrent wrongdoer would be amenable to orders for discovery and be subject to the continuing obligation to give

discovery, and would be amenable (although in practical terms this consideration is less significant) to an order for interrogatories;

- (b) there is the potential for the real issues to emerge, or emerge more clearly, by the concurrent wrongdoer providing a pleading or some other document, eg, a statement of issues, facts and contentions, designed to facilitate the identification of the true issues; and
- (c) the other parties would be in a position to cross-examine the concurrent wrongdoer (or its witnesses) if the concurrent wrongdoer (or its witnesses) gave evidence: cf *Lion-Dairy & Drinks Pty Ltd v Jacobs Group (Australia) (No 5)* [2014] FCA 897 [41].

42 Of course, these forensic consequences cannot always be assured. They would not materialise if the concurrent wrongdoer, once joined, chose not to participate in the proceedings, as may well be the case if the concurrent wrongdoer is uninsured and impecunious. Matters of that kind may be the subject of evidence in a particular case.

43 The likelihood and extent to which joinder would add complexity and delay to the litigation may also be factors to be considered in determining whether or not to permit joinder of additional parties under s 5AN(1).

44 Further, in exercising the court's discretion under s 5AN(1), the attitude of the plaintiff to the proposed joinder will also generally be an important, albeit not determinative, consideration. Ordinarily, it is up to the plaintiff to decide which person the plaintiff wishes to join as a defendant. That consideration has particular force in the context of pt 1F where the identity of potential wrongdoers are to be brought to the attention of the plaintiff under s 5AKA, but the plaintiff has no obligation to proceed against such persons. The position under the WA Act may be contrasted with the broadly equivalent position under the Queensland legislation: s 32 of the *Civil Liability Act 2003* (QLD) (Queensland Act). Section 32(1) of the Queensland Act provides, in effect, that a plaintiff must bring its claim against all persons who the plaintiff has reasonable grounds to believe may be liable for the loss or damage. Moreover, s 5AM of the WA Act provides that nothing in pt 1F, or any other law, prevents a plaintiff from subsequently bringing proceedings against a concurrent wrongdoer.

45 A decision to join a person as a party to proceedings also involves broader considerations relevant to the administration of justice generally.

Accordingly, that matter (the general administration of justice) will also be relevant in determining whether or not the court should exercise its discretion under s 5AN(1) of the WA Act.

46 Thus, for example, the prospect of multiplicity of suits, with the potential for inconsistent findings, if joinder were not ordered, would ordinarily be of some relevance. Res judicata estoppels (cause of action or issue estoppels) would apply in relation to subsequent proceedings by a plaintiff against a concurrent wrongdoer who had been a defendant to the earlier action, and issue estoppels would apply as between the plaintiff and a third party to the earlier action. As to the position of issue estoppel applying as between a plaintiff and a third party to the earlier action, see *Sandtara Pty Ltd v Abigroup Ltd* (1997) 42 NSWLR 5, 8 - 9. Section 5AM would not preclude the operation of res judicata estoppels in those circumstances. However, this consideration in itself would not ordinarily be conclusive or even of fundamental importance, given the presence of s 5AM in the statutory scheme, read with s 5AK(3)(b) and s 5AKA.

47 Ultimately, the question is to be determined by whether, on the evidence before the court and having regard to the issues in the litigation, and bearing in mind the statutory scheme in pt 1F as a whole, it is in the interests of justice to grant leave to join a 'defendant' under s 5AN(1) of the Act.

48 As indicated earlier, joinder under s 5AN(1) is not confined by the rules of court which govern the joinder of parties. Nevertheless, the rules of court may be relevant to the conduct of a proceedings generally if a concurrent wrongdoer is joined to the proceedings.

49 In this regard, O 1 r 4B RSC provides:

- (1) Actions, causes and matters in the Court will, to the extent that the resources of the Court permit, be managed and supervised in accordance with a system of positive case flow management with the objects of -
 - (a) promoting the just determination of litigation; and
 - (b) disposing efficiently of the business of the Court; and
 - (c) maximising the efficient use of available judicial and administrative resources; and
 - (d) facilitating the timely disposal of business; and

- (e) ensuring the procedure applicable, and the costs of the procedure to the parties and the State, are proportionate to the value, importance and complexity of the subject matter in dispute; and
- (f) that the procedure applicable, and the costs of the procedure to the parties, are proportionate to the financial position of each party.

- (2) These rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the objects referred to in subrule (1).

50 Order 4A r 2(1) provides that a case management direction is any procedural direction that in the court's opinion is just to make in a case to facilitate the attainment of the objects referred to in O 1 r 4B(1).

51 As the primary judge, with respect, correctly observed:

Where a joinder as an extra defendant is ordered, then case management directions may then be given to address the basis for that added defendant's participation. The action can then be case managed accordingly (third party judgment [48]).

52 Thus, for example, if a concurrent wrongdoer were added as a defendant (in the ordinary sense of that term) to the plaintiff's action, but the plaintiff nevertheless chose not to claim relief against that defendant, there would be no reason why the court could not, for the purposes of determining what is 'just' within the meaning of s 5AK(1), make orders for each of the two defendants to file and serve a statement of issues, facts and contentions on the question of their respective comparative responsibility for the damage or loss claimed by the plaintiff. Limited discovery confined to those issues could also be ordered.

Disposition

53 A declaration of right may be made without consequential relief: O 18 r 16 RSC; *The Commonwealth v Stirling Nicholas Duty Free Pty Ltd* [1972] HCA 19; (1972) 126 CLR 297, 305.

54 In *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406, Lockhart J (Spender & Cooper JJ agreeing) said:

For a party to have sufficient standing to seek and obtain the grant of declaratory relief it must satisfy a number of tests which have been formulated by the courts, some in the alternative and some cumulative. I shall formulate them in summary form as follows:

- The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257. The answer to the question must produce some real consequences for the parties.
- The applicant for declaratory relief will not have sufficient status if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen': *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10 per Gibbs J: or if the Court's declaration will produce no foreseeable consequences for the parties: *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 180 per Mason J and at 189 per Aickin J.
- The party seeking declaratory relief must have a real interest to raise it: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437 per Gibbs J and *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* [[1927] 2 AC 438] at 448 per Lord Dunedin.
- Generally there must be a proper contradictor: *Russian Commercial & Industrial Bank* at 448; and *Ainsworth* at 596 per Brennan J.

The relevant principles are laid down by the High Court in *Ainsworth*, in particular in the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ at 581 - 582. Their Honours made the point that '[i]t is now accepted that superior courts have inherent power to grant declaratory relief'; and '[i]t is a discretionary power which "[i]t is neither possible nor desirable to fetter ... by laying down rules as to the matter of its exercise"' (a reference to a passage from the judgment of Gibbs J in *Jododex* at 427). See also *Oil Basins Ltd v Commonwealth* [(1993) 178 CLR 643] at 649 per Dawson [J].

These are the rules that should in general be satisfied before the Court's discretion is exercised in favour of granting declaratory relief (414).

55 Questions such as whether plaintiffs have standing, or a sufficient or a real interest in the litigation, and whether they are raising a matter which is purely hypothetical, are questions which cannot be wholly disentangled: *Edwards v Santos Ltd* [2011] HCA 8; (2011) 242 CLR 421 [36].

56 In this case JGC has, in its defence to the plaintiffs' claim, an interest in proving the existence and extent of any liability in Mr Hart to the plaintiffs. However, its interest in proving Mr Hart's liability to the plaintiffs does not go beyond the proof of those matters in the dispute between the plaintiffs and JGC. JGC has no pecuniary claim against

Mr Hart. A bare declaration of Mr Hart's liability to the plaintiffs would be abstract and hypothetical. A declaratory order would not determine any legal controversy between JGC and Mr Hart, or between JGC and the plaintiffs. As between JGC and the plaintiffs, any award of damages against JGC ascertained by reference to the comparative responsibility of Mr Hart to the plaintiffs, would make a declaration as to Mr Hart's liability to the plaintiffs superfluous. If JGC could not prove that its responsibility should be limited having regard to Mr Hart's comparative responsibility, the evidence would not support a declaration in any event.

57 Adopting the language of Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* [2008] FCA 1656, even if there were a dispute between JGC and Mr Hart, it is 'a dispute without any legal significance' [12]. In that case his Honour was dealing with the proportionate liability provisions of the *Trade Practices Act 1974* (Cth), the statutory predecessor to the CCA. His Honour's observations apply with even greater force to the operation of s 5AK(3) of the WA Act given the mandatory language used in the WA Act, as opposed to the permissive language used in the CCA and the NSW Act (see [27] above).

58 Finkelstein J's observations have been applied in *Rivercity Motorway Finance Pty Ltd v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713 [76] - [77], [87]. See also the observations of Gray J to similar effect in *Miletich v Murchie* [2012] FCA 1013 [114].

59 The position is different from that which pertains in Victoria, where a claim for declaratory relief against a concurrent wrongdoer may be the vehicle facilitating the proper determination of the controversy between a plaintiff and a defendant who seeks to take advantage of the proportionate liability provisions of the Victorian Act.

60 Nor could JGC have a sufficient interest in obtaining a declaration for the purpose of determining any legal controversy between the plaintiffs and Mr Hart.

61 Accordingly, JGC does not have a proper claim for declaratory relief against the plaintiffs or Mr Hart. To that extent, his Honour, with respect, erred in granting leave for JGC to issue a counterclaim seeking declaratory relief.

62 Further, with respect to the forensic considerations to which his Honour had regard in the joinder of Mr Hart (see [17] - [18] above) the following observations may be made. As to the first matter, Mr Hart has been effectively served with the papers by which the relevant allegations

are made against him. Having seen that material, he has made it plain that he does not wish to participate in the proceedings. There is no basis for thinking that the making of any adverse findings against Mr Hart in the litigation would result in any relevant unfairness to him. The second matter concerned the potential unfairness to the plaintiffs in having to deal with claims by JGC to the effect that its liability should be limited having regard to the comparative responsibility of Mr Hart. It is significant that in this case the plaintiffs have already pleaded that Mr Hart recommended the investments to them. Despite this, the position of the plaintiffs was, and is, that the plaintiffs have, on advice, decided not to make any claims against Mr Hart because, ultimately, they did not rely on any advice from Mr Hart in undertaking the impugned investments: see the third party judgment [14(a)]; appeals at 27, 40 - 41. In those circumstances there is no occasion for concluding that the proceedings could work an unfairness to the plaintiffs if Mr Hart were not joined as a party.

63 Further, in this case, the plaintiffs themselves plead against JGC that the original recommendation for investment came from Mr Hart. From JGC's point of view, that fact will be proved by an admission. Whether the plaintiffs relied on Mr Hart's recommendation is a question going to their state of mind. In substance, the joinder of Mr Hart would not in the circumstances of this particular case contribute to an elucidation or just determination of the issues with respect to the comparative responsibility of Mr Hart.

64 The third matter to which his Honour referred was the possibility of inconsistent judgments. It was open to his Honour to take this matter into consideration. Unlike in this appeal, in the court below the plaintiffs did not proffer an undertaking not to proceed against Mr Hart. That is a matter referred to further below.

65 It is sufficient to observe at this point that with respect to Mr Hart's appeal, ground 7(a) and ground 7(b), in connection with the matters referred to in [56] to [63] above, have been established in that his Honour erred in principle and took into account irrelevant considerations, and failed to take into account relevant considerations. It is unnecessary to deal with the other grounds of appeal in Mr Hart's appeal. The cross-appeal to the extent indicated has correspondingly been established.

66 There remains the question of leave. This is an appropriate case to grant leave to appeal. The joinder of Mr Hart would not 'be conducive to the just, efficient or economical resolution of the real issues' in the case:

Rivercity [101]. It is in the interests of justice that Mr Hart be removed as a party to the proceedings, subject to one further matter.

67 In the re-exercise of discretion by this court, it would be in the interests of justice to dismiss JGC's application for joinder on condition that the plaintiffs formally undertook to the court not to bring subsequent proceedings against Mr Hart. That would avoid the risk of multiplicity of suits and conflicting judgments. That matter has particular force here, given the plaintiffs' stated position on the record to the effect that they placed no reliance on Mr Hart and instead took advice from and relied upon JGC. It would be unfair to Mr Hart (whose affairs would presumably be ordered on the basis that he was not being sued) and contrary to the orderly administration of justice, if, at the end of this litigation, the plaintiffs could change their mind and bring proceedings against Mr Hart.

Conclusion

68 Mr Hart should be granted leave to appeal and the plaintiffs should be granted leave to cross-appeal. The cross-appeal and the appeal should be allowed to the extent indicated.