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Proportionate Liability Update – 'Contracting out' backed by the High Court

CTC Group Pty Ltd v Perpetual Trustee Company Ltd [2013] HCATrans 248

Insurance Update

The High Court dismissed a challenge to the earlier NSW Court of Appeal decision that a party could contract out of the NSW proportionate liability regime without expressly referring to the proportionate liability legislation.

This decision by the High Court confirms the need for contracting parties to:

1. be careful when entering into and negotiating new contracts that contain clauses which affect a party's liabilities to ensure that they do not inadvertently contract out of the proportionate liability regime; and
2. consider existing contractual arrangements (even those predating the proportionate liability regime) to determine whether they have inadvertently contracted out of the proportionate liability regime.

We published a case note on *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 (**the NSWCA Decision**) in March 2013 in which we addressed these matters. In summary, the NSW Court of Appeal concluded that, to contract out of the proportionate liability legislation, all that is required is for the parties to make '*express provision*' for their rights, obligations and liabilities which differ from that provided by the proportionate liability legislation. No particular wording is required.

The High Court refused to allow an appeal against the NSWCA Decision on the basis that there were insufficient prospects of success of the NSW Court of Appeal's decision being overturned.

The special leave application

CTC Group brought the special leave application, seeking to challenge the NSWCA Decision. They argued that the effect of the NSWCA Decision would be to exclude

Who does this affect?

- Contracting parties
- Insured persons
- Insurers

Article Highlights

- The proportionate liability regime has not only shifted risk away from insurers to a claimant, but, given the prevalence of '*contractual assumption of risk*' exclusion clauses, some risk has effectively been shifted to insured parties.
- Businesses need to consider new and existing contractual arrangements, identify its uninsured exposure to risks and arrange appropriate insurance cover in respect those risks.

proportionate liability from almost all contractual claims because it is common for virtually all contracts to include provisions making one party liable to another.

CTC Group accepted that parties might not need to expressly refer to the legislation by name, but they contended that something more was required for a liability provision to simply say '*something contrary*' to the legislation. They suggested it was not enough to say '*You are liable for the full amount*'. When pressed by the High Court as to what could be said then, to engage the contracting out provision, CTC Group suggested that a liability provision might include a statement such as '*notwithstanding the liability of any other parties*' or '*notwithstanding any right of apportionment that may exist*'.

CTC Group contended that the matter was of significant public importance, particularly for the insurance industry who frequently deal with insured persons being sued under contractual indemnities or liabilities. They argued that the purpose of the proportionate liability legislation, to address the perceived insurance industry crisis by limiting the liability of professionals (subsequently reducing strain on insurers), would be defeated if contracting out were to operate as it had in this case.

The High Court's comments

The High Court characterised CTC Group's appeal argument as being that a full contractual indemnity did not have the effect of contracting out because it did not refer expressly to any particular provisions of the proportionate liability legislation.

The High Court dismissed the application, finding that CTC Group's argument had '*insufficient prospects of success to warrant the grant of special leave to appeal*'.

The High Court was particularly concerned that CTC Group's arguments might impinge on the freedom of parties to a contract:

> '[The NSW legislation] *operates to ensure that the apportionment provisions of the Act yield to the express intention of the parties. That this should be so, as the Court of Appeal held, is hardly surprising. The contrary view would attribute to the legislature an intention to interfere with freedom of contract where it is not possible to discern in the Act any hint of an intention to do so.*'

As to what was meant by the words '*express provision*' in the legislation, Kiefel J commented that:

> '*... express provision in that context surely simply means whether or not provision has been made within the written terms of the agreement.*'

Implications of the decision

Although the High Court's comments in the special leave application are not

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precedent, they are, at the very least, persuasive *dicta*. But most importantly, the failure of the special leave application leaves the NSWCA Decision intact as a correct statement of the law.

In the other jurisdictions which allow contracting out, the position is likely to be the same. In *Aquagenics Pty Ltd v Break O'Day Council (No 2)* [2009] TASSC 89, the Tasmanian Supreme Court considered Tasmanian proportionate liability legislation which allows for contracting out in almost the same terms as the NSW legislation. The Tasmanian Court's *obiter dicta* were that their legislation permitted contracting out where there was an express contractual provision to do so, but that there was no requirement that the ousting provision mention the specific proportionate liability legislation being ousted. This is consistent with the NSWCA Decision.

In Western Australia, Section 4A of the *Civil Liability Act 2002* (WA) also allows for limited contracting out of the proportionate liability provisions. Although the WA legislation is not identical to the NSW and Tasmanian legislation, it does contain the similar term that contracting parties may make an '*express provision*' by which the proportionate liability regime may be excluded, modified or restricted.

The WA Supreme Court is yet to consider this point, but it has been considered at a District Court level by Deane DCJ in *Owners of Strata Plan 13529 v Fowler* [2013] WADC 5. In *Fowler*, her Honour chose to follow *Aquagenics*, noting that whilst the WA and Tasmanian legislation are not identically worded, they are very similar, forming the view that there was no '*substantive difference between the sections*'.

Implications for the insurance industry

CTC Group's submissions as to the effect on the insurance industry are interesting. We do not agree with the suggestion that allowing parties to contract out will have the dire consequence of undoing the aims of proportionate liability.

It has been widely accepted by many courts, including the High Court in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 296 ALR 3, that proportionate liability was introduced in order to limit the effect of '*deep pocket syndrome*' where a claimant will sue an insured professional for its loss in the knowledge that an insurer stands to foot the bill. It was thought that by limiting the proportionate share of a professional, the burden on professional indemnity insurers would decrease, thus avoiding a perceived crisis where affordable insurance would become unobtainable.

Where a claim is apportionable, the claimant takes on the risk that it might not be able to recover 100% of its loss because, for example, one of the parties liable to the claimant may be bankrupt or insolvent. In those circumstances, the risk of any of the concurrent wrongdoers being unable to satisfy the judgment against it, rests with the claimant.

Where claims are not apportionable, the claimant can obtain judgment against any one or all liable parties for 100% of its loss and then selectively enforce against whom it chooses, limited only by the fact it cannot recover more than 100% of its loss. If history is to repeat itself, the claimant is more likely to pursue only those parties who are insured.

For the insurers of those parties, in most cases, the position is likely to remain unaffected. This is because the majority of policies (both now and prior to proportionate liability) contain a clause excluding cover in respect of '*contractually assumed risk*'. In other words, if a claim is otherwise apportionable, and an insured contracts out of proportionate liability, then it assumes liability and risk that it otherwise would not have for which no cover is available.

Therefore, where parties have contracted out of the proportionate liability regime, the claimant may obtain full judgment against the insured who may, in turn, not be entitled to indemnity in respect of the contractually assumed portion of its liability (in other words, the amount above what would otherwise have been the insured's proportionate share of the claimant's loss).

If that is right, then the proportionate liability regime, whether there is contracting out or not, will continue to have the desired effect of reducing the risks faced by insurers. It was always the intention of the legislature to put some greater risk on the claimant to the benefit of insurers, but perhaps it was not contemplated that some of that risk would fall upon insured persons as well.

Implications for contracting parties

In addition to carefully considering all new and existing contractual relationships for the possible (inadvertent) exclusion of the proportionate liability regime, businesses would be well advised to obtain advice on the availability of cover in respect of risks contractually assumed, and where necessary, seek additional cover in respect of those risks.

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