PROPORTIONATE LIABILITY UPDATE

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1. This paper is supplemental to my ALJ article: *Proportionate Liability in Commercial Cases: Principles and Practice*.[1] Here I examine an important recent case, with commentary as to the relevant detail of the decision and the implications of it.

Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS 631436T[2]

2. *Tanah Merah* merits careful consideration as the decision of the Victorian Court of Appeal has settled some contentious issues concerning the proportionate liability regime. The Victorian Court of Appeal (substantially) dismissed an application for leave to appeal from a VCAT decision of Judge Woodward.[3]

3. On 24 November 2014, a fire broke out on the balcony of an apartment of the 21 storey Lacrosse apartment tower in Docklands, Melbourne. The building was newly constructed. The fire spread through external cladding. The building was extensively damaged.

4. The owners of the apartments and the Owners' Corporation sued the Builder, LU Simon Pty Ltd, for damages for breach of contract in respect of the cost of the rectification works. The Owners sued for breach of warranties implied into the Design and Construct Contract by ss 8(b), (c) and (f) of the *Domestic Building Contracts Act 1995* (Vic), to the effect that the Builder warranted that the materials used would be good and suitable for purpose, the works would be carried out complying with all laws and legal requirements and that the work and materials would be fit for purpose.

5. Significantly the Owners did not rely upon the warranty implied by s 8(d) of the Act, that the Builder warranted that the work would be carried out with reasonable care and skill. As will be explained had the Owners put their case that

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1 (2019) 93 ALJ 1

2 [2021] VSCA 72 per Beach, Osborn JJA; Stynes AJA; No application for Special Leave to the High Court was made against the decision of the Court of Appeal

3 [2019] VCAT 286; Leave to appeal on one ground, ground 3, was granted but that was of small significance in relation to the matters of interest here: [2021] VSCA 122

way, that would have undermined their contention that s 24AF(1)(a) of the *Wrongs Act 1958* (Vic) was not engaged.

6. The Builder made claims, inter alia, against the Building Surveyor (Mr Galanos and his employer Gardner Group Pty Ltd), the Architect (Elenberg Fraser Pty Ltd) and the Fire Engineer (Tanah Merah Pty Ltd, trading as Thomas Nicolas). The Builder claimed that in relation to any liability of it to the Owners for breach of contract damages, that that in turn was caused by a failure by each of the Building Surveyor, the Architect and the Fire Engineer in exercising due skill and care in performing various contracts between the Builder and those Contractors in respect of the construction of the Lacrosse building. The Builder alleged negligence against the Contractors.

7. The Owners did not directly sue the Contractors of the Builder. Plainly enough from the way that the Owners made their claims, the Owners sought to avoid making an apportionable claim against the Builder, and hence open up the possibility of the Builder reducing its liability to the Owners by apportionment of that with (alleged) concurrent wrongdoers, being the Contractors of the Builder. In other words, the Owners sought a breach of contract damages award against the Builder for 100 per cent of the damages claimed. The Builder was a very substantial corporation, doubtless with adequate insurance cover. The Contractors were also substantial corporations, again doubtless with adequate insurance cover. The Owners were not concerned to sue all of the possible wrongdoers for fear that a judgment in their favour against the Builder would remain unsatisfied.

8. In Part IVAA of the *Wrongs* Act, an "apportionable claim" is defined in 24AE to mean, "a claim to which this Part applies". Section 24AF(1) specifies the claims to which the Part applies to be:

> *"(a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and*
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> *(b) a claim for damages for contravention of section 18 of the Australian Consumer Law (Victoria)."*
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> (emphases supplied)

9. The Owners, in making their claims against the Builder in the way that they did, were seeking to avoid the application of s 24AF(1)(a) so that their claims were *not* apportionable ones, and hence no proportionate liability apportionment in favour of the defendant Builder and against the Contractors could be made by VCAT. In terms, the Owners alleged that the implied contractual warranties that they relied upon against the Builder were an absolute (or strict) liability, and a liability *not* qualified by any obligation on them to take reasonable care.[4] Importantly, a person in the position of the Builder could not have contracted out of the implied warranties relied upon by the Owners.[5]

10. If the Owners could more easily have made good a breach of contract damages claim against the Builder based upon want of compliance with statutory warranties rather than a negligence claim, I suggest that it is difficult to criticise the Owners for seeking that route home to judgment against the (solvent) Builder. A plaintiff's first interest is in succeeding on liability against the defendant.

11. As a result of various decisions before *Tanah Merah*, it was certainly arguable here that the definition of an "apportionable claim" could be satisfied by the Owners' breach of contract claims against the Builder, notwithstanding that the Owners had carefully avoided *pleading* claims which included a want of reasonable care allegation.[6] The breach of warranties claims alleged here arguably *could* be characterised as conduct arising from the negligence of the Builder, dependent upon the facts as found by the Judge at trial. Any breach or breaches could have been made by the Builder failing to use reasonable care.

12. Accordingly, the Owners' claims against the Builder might or might not have been held to be apportionable claims. It was in the interests of the Owners that the breach of contract claims be found not to be apportionable, but the Builder's interest, *prima facie*, was in the claims against it being held to be apportionable. Potentially available defences are typically pursued by defendants.

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4 [2019] VCAT 286 at [280]

5 *Domestic Building Contracts Act (1995)* Vic., s 10

6 *Demetrios v Lehmann* [2019] VSC 301 per Matthews JR; *Tanah Merah* [2021] VSCA 72 at [109]-[136]

13. The Builder made its negligence claims against the Contractors in relation to any liability it may have had to the Owners, in two ways:

    (a) if a successful claim against it by the Owners *was not* apportionable, then the Builder sought an indemnity from the Contractors; and

    (b) if a successful claim against it by the Owners *was* apportionable, then it sought apportionment against the various Contractors as proportionate liability concurrent wrongdoers.

    Both claims turned on the same facts/contentions of the Builder concerning the alleged want of reasonable care exercised by the Contractors, particularly regarding conduct by them which led to flammable cladding being installed by the Builder.

14. The Owners did not sue the Contractors directly because they principally wanted a 100% judgment for damages for breach of contract against the Builder. However the Owners were at risk in so doing because of the then prevailing legal uncertainty, discussed below, as to the statutory meaning of what an apportionable claim is. Hence, the Owners before Judge Woodward argued in the alternative that *if* their contractual implied statutory warranty claims *were* held to be apportionable claims, *then*, but only then, the Owners adopted the Builder's negligence claims against the Contractors.[7]

15. In turn, the Contractors sought to shift any negligence liability of them to the Owners *back to the Builder*, relying upon the principles of proportionate liability.[8] The Contractors contended that the principal cause of the fire resulting in loss and damage to the Owners was the negligence of the Builder, rather than their own failure to exercise reasonable care. The Contractors relied upon the Builder's selection, or specification, of Alucobest external cladding instead of Alucobond cladding. Both were aluminium composite panels which contained polyethylene. The Builder contended that it was the responsibility of the Building Surveyor, the Architect and/or the Fire Engineer to advise it not to specify and install the cladding which it chose.

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7 [2019] VCAT 286 at [280]

8 [2019] VCAT 286 at [281]

16. The Builder at VCAT:

(a) admitted that the warranties were incorporated into the Design and Build Contract;

(b) admitted that the warranties ran with the building so that the Owners could sue the Builder; and

(c) denied breaching the warranties, but did not advance argument in support of the denial, nor a substantive defence to the Owners' claims of breach of warranties.[9]

17. Judge Woodward found that the Builder had no defence to the Owners' breach of contract claims, and that the Builder's construction of the Lacrosse apartments using non-compliant, flammable external cladding was clearly an error.[10] However, as the Judge observed, not every error is a negligent one.[11] The Judge accepted the Owners' submissions that the warranties:

(a) were not qualified or limited by an obligation to use reasonable care and skill; and that

(b) it was irrelevant *on the Owners' claim against the Builder*, whether the Builder reasonably relied on the Contractors for advice, or believed that the cladding was suitable for the purpose.[12]

Hence, the Judge had no difficulty in finding that judgment should be ordered in favour of the Owners against the Builder.

18. The allegation against the Builder that it failed to use reasonable care was fought in the VCAT proceeding brought by the Builder against the Contractors.[13] That was the Contractors' counter-allegation. However, no lack of reasonable care by the Builder was found by Judge Woodward.[14] The Builder was unaware of the fire

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9 [2019] VCAT 286 at [283], [284]

10 [2019] VCAT 286 at [284]; [302]

11 [2019] VCAT 286 at [302]; approved [2021] VSCA 72 at [74]

12 [2019] VCAT 286 at [284]-[286]

13 [2019] VCAT 286 at [293]-[324]

14 [2019] VCAT 286 at [303]-[307]; [323]

risks associated with aluminium composite panels (ACPs).[15] The Judge found that the Builder's choice of Alucobest over Alucobond, was not causally relevant. The relevant necessary condition for the ignition of the Alucobest panels and the subsequent spread of the fire, was the installation of ACPs with a 100 per cent polyethylene core, *not* the decision by the Builder to specify and install Alucobest instead of Alucobond.[16] Both ACPs had a flammable polyethylene core. The Builder established that the Contractors breached the various contracts that they had with the Builder by failures by the Contractors to use reasonable care in relation to the cladding, and that that caused the Builder's loss and damage, being the Builder's liability to the Owners.[17] The Contractors ought not to have permitted the Builder to specify combustible ACPs.

19. Judge Woodward did not make any proportionate liability apportionment in favour of the Builder against the Contractors because the breach of warranties claims which were upheld did not arise from a failure by the Builder to take reasonable care, and hence were not apportionable claims. However, the claims made by the Builder against the Contractors were apportionable ones as they did arise from a failure by the Contractors to use reasonable care.[18] VCAT made an apportionment in relation to the Builder's liability to the Owners between the Building Surveyor (33 per cent), the Architect (25 per cent) and the Fire Engineer (39 per cent), and another party who did not participate in the trial (Mr Gubitta – who started the fire by failing to extinguish a cigarette completely - 3 per cent). The effect of that was that the Builder was reimbursed by the (solvent) Contractors as to 97% of the judgment against it and in favour of the Owners.[19]

20. The Builder did not contend before VCAT that the Owners' claims against it were apportionable ones. I suggest that this is important. Typically, it is in the interests of a defendant to contend that the plaintiff's claim is apportionable, so that the defendant's liability to the plaintiff is reduced to the extent that the defendant, in relation to an apportionable claim, can deflect some of its liability to the plaintiff onto concurrent wrongdoers. However, here the Builder appears to have been

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15 [2019] VCAT 286 at [303]-[307]

16 [2019] VCAT [191]-[192]

17 [2019] VCAT 286 at [323]

18 [2021] VCAT 72 at [92]-[95]

19 No order was made affecting Mr Gubitta

well aware that it was unlikely to successfully defend the Owners' breach of contract claims, but sought (successfully) to reduce its ultimate liability to the Owners by a different route: Suing the Contractors alleging negligence against all of them *in relation to* the Builder's liability to the Owners. Hence it appears that it was of little if any concern to the Builder what apportionment was made between the various (solvent) contractors. The Builder left the Contractors to fight that out among themselves. Judge Woodward recorded that:[20]

(a) each of the Building Surveyor, the Architect and the Fire Engineer were essentially unanimous that if they were found to be in breach of the various contracts with the Builder, any judgment against them (in favour of the Builder) was limited under the proportionate liability regime to a sum reflecting their allocated responsibility (inter se), for the loss and damage caused;

(b) each of the Contractors disagreed on what their respective allocations of responsibility should be; and that

(c) the Builder's counsel was "not saying anything about apportionment".

21. Overall then, both the Owners and the Builder succeeded in the proceeding before VCAT. The Owners obtained judgment against the Builder in a sum exceeding $12 million in relation to the Owners' rectification costs. The Builder was found not to have been negligent, as the Contractors had contended against the Builder, and it was able to pass 97% of its liability to the Owners onto the Contractors.

22. The Contractors applied for leave to appeal to the Court of Appeal on a number of grounds.[21] Of present interest are the challenges by the Architect and the Fire Engineer to Judge Woodward's findings in relation to proportionate liability. Those challenges, on various bases, failed. However, there was a slight alteration of the apportionment between the Contractors of their liability to the Builder.[22]

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20 [2018] VCAT 286 at [580]

21 [2021] VSCA 72 at [13]

22 Fire Engineer – 39 to 42 per cent; Building Surveyor - 33 to 30 per cent. The apportionment against the Architect remained at 25 per cent; *Tanah Merah Pty Ltd v Owners Corporation No 1 of PS 613436T [No 2]* [2021] VSCA 122

23. It is important to put the Contractors' claims regarding proportionate liability in the Court of Appeal in context. For the reasons explained above, it is unsurprising that the Builder did not seek leave to appeal against VCAT's decision that the Owners' claims against the Builder were not apportionable ones, and hence that the proportionate liability regime did not apply in relation to those claims. The Contractors did not seek leave to appeal to set aside Judge Woodward's decision as to the liability of the Builder to the Owners on their breach of contract/breach of warranties claims. It is difficult to see how the Contractors could have done so as that would be a contention for the Builder to make, not the Contractors, and the Builder made no such contention. The Owners' breach of contract claims against the Builder were essentially not contested by the Builder.[23]

24. I suggest that it is relevant to ask: Why was it in the interests of the Contractors to contend that the proportionate liability regime *was* engaged in relation to the Owners' claims against the Builder, and in effect seek to have an apportionment as concurrent wrongdoers *made against them*, when VCAT had decided that the Owners' claims against the Builder were *not* apportionable ones?

25. It appears that the Contractors' aim in the application for leave to appeal was to seek to find a mechanism to re-agitate their contention that the Builder was very much responsible for causing the fire, contrary to the findings of Judge Woodward that the Builder had not been negligent but that the Contractors in various ways and to various extents had been negligent. However it is perhaps unclear why the Contractors did not confine their contentions on appeal to the proceedings brought by the Builder against them, and why it was necessary for them to seek to attack the finding by the Judge that the claims by the Owners against the Builder were not an apportionable ones. The answer may be that the Contractors' challenge to the Builder's negligence judgment against them, might not have succeeded if they had not found some way to overturn Judge Woodward's finding that the Builder had not failed to use reasonable care in choosing and installing the Alucobest external cladding. The Contractors submitted that it was necessary to remit the proceeding to the Tribunal so that the entirety of the claim against the Builder could be "fully determined".[24]

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23 See footnote 20 above

24 [2021] VSCA 72 at [60]

26. These procedural issues perhaps do not matter, but I raise them for consideration. What is of first importance is that the Contractors on the application for leave to appeal to the Court of Appeal squarely contended that the Owners' claims against the Builder were apportionable ones, when the Judge had found to the contrary (but only for want of a finding of negligence against the Builder, so that resolution of the statutory construction issue was not necessary).

27. It will be recalled that the issue here was the proper construction of the words of s 24AF(1) defining what an "apportionable claim" is, being:

> *"(a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care."*

Matthews JR in *Demetrios v Lehmann*,[25] on an interlocutory application, helpfully described the conflicting views which had emerged from the authorities in these terms:

> *"[19] … the tension is between whether a failure to take reasonable care must be a necessary element of the cause of action for it to be an apportionable claim (Legal Construction), or whether a claim is an apportionable claim if it arises in fact from a failure to take reasonable care (Factual Construction). The result of the Factual Construction is that the cause of action relied upon by the plaintiffs can be ignored, and the defendant is at liberty to allege that the damage has been caused by a failure to take reasonable care such that if at the trial negligence can be shown to be a cause of the loss, then all actions for that loss are apportionable, not merely those claims based on a want of care."*

28. Under a Factual Construction, the manner in which the plaintiff pleads its case *does not* determine whether or not the claim made is an apportionable one. On that construction, the Court can take a wider view of the plaintiff's claim if, on the facts as found by the Court, the conduct of the defendant could be *characterised* as "arising from a failure to take reasonable care".

29. It is necessary to observe a fundamental point here. On any view, the Court will only apportion liability between concurrent wrongdoers in relation to an apportionable claim if and when there is legal liability in the defendant to the plaintiff. If the plaintiff loses on liability against the defendant and its claim is

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[25] [2019] VSC 301

dismissed, no question of a proportionate liability apportionment would arise, either on a Factual Construction, or a Legal Construction. As the Court of Appeal stated in *Tanah Merah*:[26]

> "*[109] The definition of apportionable claim is directed to a particular class of claims. In order to meet the description of that class, the claim must be a claim which is sustained by findings of fact. It will not be sufficient to simply raise the claim by pleadings.*"

30. The question of whether a Factual or a Legal Construction is correct would squarely arise where the plaintiff does not plead, or rely upon at trial, a cause of action an essential element of which was that the defendant failed to take reasonable care, but the defendant nonetheless alleged in its proportionate liability defence that *it* had failed to use reasonable care in relation to the facts of the plaintiff's claim against the defendant, *and* where the trial judge so finds. That did not occur here.

31. However, the Court of Appeal clearly decided that the Legal Construction of s 24AF(1)(a) was correct, and that the Factual Construction was incorrect:[27]

> "*[113] The definition does not extend to a claim "involving circumstances arising out of a failure to take reasonable care". The claim itself must arise from a failure to take reasonable care.*
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> …
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> *[115] … the terms in which the claims are framed are the starting point for deciding whether the claim is of the kind referred to in* s 24AF(1)(a) *of the* Wrongs Act.
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> …
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> *[120] … Having considered the statutory text, in context and having regard to its purpose, we have concluded that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In coming to this conclusion, by necessity, we reject the submissions made by Thomas Nicolas and Elenberg Fraser to the contrary for the reasons given above.*
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> …
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> *[128] It follows that the Tribunal made no error when it determined that the breach of warranty claims that it had upheld against LU Simon were not apportionable. At best, those claims involved circumstances arising out of failures to take reasonable care by the consultants and Mr Gubitta. The*

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26 [2021] VSCA 72 at [109], citing *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* [2008] VSCA 208; (2008) 21 VR 84

27 [2021] VSCA 72 at [113], [115], [117], [120], [128]

> *Owners' claims against LU Simon, however, did not themselves arise from any failure to take reasonable care."*

32. It is noteworthy that two of the Contractor/Consultants argued in the Court of Appeal that the Owners' claims against the Builder were apportionable, when the Owners made no claims directly against the Contractors, but did so only indirectly if the Owners' contractual claims against the Builder were held to be apportionable. Judge Woodward held that the Owners' claims against the Builder were not apportionable ones. The Court of Appeal held that the Tribunal decided that correctly. Further, importantly, the Builder before VCAT, and before the Court of Appeal, did not argue that the Owners' claims against it were apportionable ones.

33. Judge Woodward stated that he was "spared" of the need to engage with the question whether a Legal Construction or a Factual Construction of s 24AF(1) was to be preferred.[28] That was correct because His Honour had held that the Builder had not engaged in conduct involving a want of reasonable care, so that the statutory construction question did not arise for him. On the application for leave to appeal, the Contractors in effect were two steps removed from a finding by the Court of Appeal that a Factual Construction was correct. They attempted to overcome the first step (no negligence finding), by contending that the Judge had failed to decide the question of whether the Builder had failed to use reasonable care, but the Court of Appeal had no difficulty in rejecting that contention.[29] The second step of statutory construction (Factual Construction was correct), was rejected by the Court of Appeal for the reasons discussed above. It may incidentally be noted that Judge Woodward preferred a Factual Construction, unlike the Court of Appeal.[30]

34. The decision of the Court of Appeal here finding in favour of a Legal Construction, and against a Factual Construction, is commercially sensible and is, I suggest, to be welcomed as providing certainty regarding an important aspect of the

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28 [2019] VCAT 286 at [322]

29 [2021] VSCA 72 at [69]-[78]

30 [2019] VCAT 286 at [322]

proportionate liability regime. Prior contrary cases adopting a Factual Construction are now not good law.

35. I suggest that plaintiffs such as the Owners here, who are in the fortunate position of being able to propound a breach of contract claim (or any other tortious, contractual, statutory or other claim), which does not involve a want of reasonable care aspect, and where the plaintiff has sued a solvent defendant, should be able to do so without being potentially subjected to a proportionate liability apportionment where other wrongdoers, as well as the defendant, were involved in causing the plaintiff loss and damage. Contractual liability is a species of strict liability in the sense that, as the facts in *Tanah Merah* demonstrate, the plaintiff does not have to prove negligent fault by the defendant in causing the plaintiff breach of contract loss and damage. In its decision that a Legal Construction applied, the Court of Appeal took into account the importance of certainty in the law of contract, and risk allocation under contracts, which would or may be displaced by a Factual Construction of what an apportionable claim is.[31]

36. A similarity between a s 24AF(1)(a) failure to take reasonable care apportionable claim and a s 24AF(1)(b) misleading or deceptive conduct claim, may be noted. It is not an essential element of a misleading or deceptive conduct claim that the conduct occurred negligently. However, these two types of claims bear some similarity in that they each involve value judgments by Courts as to whether legal liability ought be imposed. A successful breach of contract damages claim does not. A contract either has been breached by the defendant causing the plaintiff loss or damage, or it has not.

37. Further, as the Court of Appeal observed, an anomalous consequence of a Factual Construction would be that a strictly liable defendant in a breach of contract claim would be able to plead its own negligence as a partial defence to the plaintiff's claim.[32] I suggest that it ought be for the plaintiff to determine what legal claims it brings against a defendant. The proportionate liability regime should not permit a defendant to control, or adapt, a plaintiff's breach of contract or other claim, by

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31 *Tanah Merah* [2021] VSCA 72 at [118]

32 *Tanah Merah* [2021[VSCA 72 at [118]

taking advantage of its own negligence in engaging in the wrongful conduct alleged.

38. The Court of Appeal also provided important guidance concerning the proportionate liability regime in rejecting a further argument of the Architect, Elenberg Fraser. The Architect contended that each of the Owners made one apportionable claim against all respondents in the proceeding, and therefore the Owners' claims against the Builder were apportionable.[33]

39. The Architect's argument was that apportionability was determined in three steps:

first, identification of the loss or damage that is the subject of the claim;

secondly, identification of those persons whose acts or omissions caused that loss or damage; and

thirdly, identification of whether the loss or damage claimed arose from a failure to take reasonable care by any of the persons identified as having committed an act or omission that caused that loss of damage.[34]

40. However, the argument was based upon a misunderstanding of parts of the decision of the High Court in *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd*,[35] as the three step argument assumed the existence of an apportionable claim, and in *Hunt & Hunt* there was no dispute about whether the claims were apportionable ones. *Hunt & Hunt* concerned the issue: Who was a concurrent wrongdoer, not what an apportionable claim was.

41. The Court of Appeal rejected the argument in these terms:

> *"[134] A fundamental flaw in Elenberg Fraser's contentions is that they require consideration of the question of who is a concurrent wrongdoer in respect of a claim, before considering whether the 'claim' is one to which* pt IVAA *applies. As the reasoning in* Hunt & Hunt *shows, the correct approach is to determine whether the 'claim' is apportionable, before then determining whether there are any concurrent wrongdoers in relation to that claim.*

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33 [2021] VSCA 72 [129]

34 [2021] VSCA 72 at [130], [131]

35 (2013) 247 CLR 613 at [7]-[9], [10], [16], [18], [19] and [21]; See *Tanah Merah* [2021] VSCA 72 at [131]

> *[135] As we have already observed, pt* IVAA *of the* Wrongs Act *makes provision for cases involving two or more apportionable claims and cases involving both an apportionable claim and a claim that is not an apportionable claim. If Elenberg Fraser's submissions were to be accepted, these provisions would largely be deprived of any substantive operation. When one reads all of the provisions of pt* IVAA *in their context, it is plain that they operate so as to provide for multiple claims against multiple defendants in relation to the same loss and damage; and while some of those claims may be apportionable, there may be other claims which are not apportionable. Moreover, nothing in pt* IVAA *suggests that a claim that is not apportionable might be transformed into a claim that is apportionable by a party establishing that the circumstances upon which the claimant relies arose out of a failure to take reasonable care."*
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> (Citations omitted)

Conclusion

42. The Court of Appeal in *Tanah Merah* has clearly decided that under s 24AF(1)(a), only a claim where the plaintiff's pleading includes an allegation of a failure to take reasonable care as an essential element of the cause of action is one that arises from a failure to take reasonable care. Such an apportionable claim must be made good by the plaintiff against the defendant before the issue arises whether there were concurrent wrongdoers with the defendant, whose conduct also caused the plaintiff's loss and damage. ©

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