



Perpetual Trustee v CTC Group (No 2) [2013] NSWCA 58 (20 March 2013)

FACTS

Perpetual sued CTC for damages for breaching its duty of care under a mortgage origination deed and CTC alleged that if it were liable to Perpetual its liability was limited by the apportionment provision contained in S35 of the Civil Liability Act 2002. The Court dealt with the primary claim by Perpetual under an indemnity contained in the Deed that CTC would indemnify against any breach of a warranty or obligation or failure to perform any obligation under the deed.

ISSUE

Whether the indemnity provision satisfied S3A(2) of the Act by making express provision with respect to a matter otherwise covered by the apportionment provisions and thereby excluded apportionment of the liability.

FINDING

The Court found that consistent with the Tasmanian Supreme Court in *Aquagenics V Break of Day Council* [2010] TASFC 3 that the plain purpose of S3A(3) was to “ensure the primacy of the express provisions of a contract as to the parties rights, obligations and liabilities under the Contract, over any provision in relation” to matters otherwise covered by apportionment. The Court stressed that “the natural meaning of the words used indicates that a failure to take reasonable care must be part of and therefore an element of the plaintiff’s cause of action” and that for a person to be a concurrent wrongdoer it is necessary that he or she be one of two or more persons who caused same damage or loss for which a plaintiff claimed.

QUOTE

Macfarlan JA held

- 13 “CTC offered various reasons why the Court should conclude that the parties to the MOD did not intend to “contract out” of the apportionment provisions, including the fact that the MOD was entered into before the apportionment provisions came into force.
- 14 However, these submissions should be rejected as they concern an irrelevant issue. The question to which s 3A(2) gives rise is whether a contract makes express provision for the parties’ rights, obligations and liabilities which differs from that provided by the Act. It is not relevant to consider whether the parties adverted to the existence of the apportionment provisions of the Act and decided to contract out of them. Section 3A “does not require the parties to use any particular form of wording to effect a contracting out” (*Aquagenics* at [71]). No reference needs to be made to the Act. All that matters is that the contractual indemnity is inconsistent with the provisions of Part 4.”

IMPACT

The case will affect the result whenever the contract makes provision whether by indemnity or otherwise for the bearing of loss between the parties and seems to reflect a firmer approach by the Court to apportionment. Contract managers should be careful when settling the terms of their contracts particularly indemnities.

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