

update

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Litigation Update: Settlement of apportionable claims – Remaining contribution claims futile

The recent decision by Justice Mandie in the case of Surrowee Pty Ltd v Hansen Yunken Pty Ltd; Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors [2008] VSC 90 in the Victorian Supreme Court upholds the legislature's intent to provide for the separate liability of each defendant before a court in an apportionable claim.

The facts are simple. The principals of an office building sued the builder and the architect for defects. The building surveyor and the consulting engineer were joined as third parties by the architect. The architect settled with the principal (plaintiff) but continued with its claim against the third parties, seeking contribution in relation to the amount it paid under the settlement agreement.

The building surveyor and the engineer contended, on two separate grounds, that the third party pleadings disclosed no cause of action.

The first ground was unsuccessful. It proceeded on the basis that the third parties were not persons "liable in respect of the same damage" within the meaning of Section 23B(1) of the *Wrongs Act*. The Court dismissed that submission, distinguishing between 'monetary damage' and actual "loss or damage" suffered by the plaintiffs.

The second ground was successful. The third parties submitted that the architect's settlement with the plaintiff could only have

been in relation to the architect's potential liability – that is, being an amount reflecting that proportion of the loss or damage claimed in so far as the architect is concerned. The court held that the defendant's position in **settling** an apportionable claim could not place that defendant in a better position than a defendant against whom a **judgment** had been entered in favour of the plaintiff. In his decision, Mandie J went on to say that the amount being exclusive of the responsibility of any other defendants or third parties, the third parties could not be the subject of an order for contribution. The third party claims were therefore futile.

The case serves as a good reminder that when settling claims that are or could potentially be apportionable claims, doing so may well preclude any ongoing rights of contribution against co-contributors.

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