Transport for NSW ats Colagrossi

Supreme Court of NSW Proceedings No. 2018/263841 (Proceedings)

Defendant's Submissions on the Motion

26 April 2019

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(1) INTRODUCTION

1. On 1 April 2019, the Court made the following orders:

    1. Extend time to the defendant to file an Amended Defence and Amended Statement of Cross Claim to 4pm on 5 April 2019.

    2. On or before 10 April 2014, the plaintiff and cross-defendants, if so advised, are to notify the defendant as to whether they have any objection to the filing of the Amended Defence and Amended Statement of Cross-Claim, and the basis for any such objection.

    3. In the event that any objection is notified under Order 2 above, the defendant is to file and serve a motion on or before 12 April 2019, returnable before the Court on 29 April 2019, for orders confirming the filing of any amended pleadings.

2. On 5 April 2019, the defendant filed an Amended Defence. Paragraphs 22 to 34 of the Amended Defence plead that:

    (a) the Private Nuisance Claim (pleaded in paragraphs 15 to 17 of the Amended Statement of Claim) and Public Nuisance Claim (pleaded in paragraphs 18 to 21 of the Amended Statement of claim) are apportionable claims within the meaning of Part 4 of the *Civil Liability Act 2002* (NSW) (**CLA**);

    (b) ALTRAC and Acciona are concurrent wrongdoers within the meaning of Part 4 of the CLA; and

    (c) any liability of the defendant to the plaintiff for the Private Nuisance Claim and the Public Nuisance Claim (which is denied) should be reduced to nil, or limited to such other amounts as the Court considers just, or just and equitable, having regard to the defendant's responsibility for the loss and damage (if any) suffered by the plaintiff,

    (**Proportionate Liability Defence**).

3. On 10 April 2019, the plaintiff notified the defendant that she objected to the filing of the Amended Defence (**Objection**). The basis of the Objection is that:

    > "..the defence of proportionate liability pleaded at paragraphs 22 to 34 of the Amended Defence [that is, the Proportionate Liability Defence] does not disclose a reasonable defence because each the Plaintiff's claims for private and public nuisance are not, as a matter of law, apportionable claims within the meaning of s 34 of the *Civil Liability Act 2002* (NSW)."

4. In effect, the plaintiff seeks an order under rule 14.28 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**), that the Proportionate Liability Defence be struck out on the basis that neither the Private Nuisance Claim nor the Public Nuisance Claim is 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" and that the contrary position is hopeless.

5. On 12 April 2019, the defendant filed a notice of motion seeking an order confirming the filing of the Amended Defence (**Motion**).

6. These submissions are delivered in support of the Motion.

7. Neither party has sought to adduce evidence on, or in response to, the Motion.

Summary

8. The Court should grant the orders sought in the Motion (and reject the Objection) for the following reasons (which reasons are addressed in further detail in these submissions below):

   (a) The proper construction of s. 34(1)(a) of the CLA (in particular the words "claim … arising from a failure to take reasonable care") was considered in *Perpetual Trustee Company Ltd v CTC Group Pty (No 2)* [2013] NSWCA 58 (in *obiter dicta*) with the relevant members of the Court (Macfarlan and Barrett JJA) expressed differing views.

   (b) Barrett JA considered that the word "claim" as it appears in s. 34(1)(a) of the CLA is a reference to a "litigated" claim, and that the Court can only determine whether a "claim" is an "apportionable claim" in light of the findings made by the Court in relation to the "claim" (at [42]). Macfarlan JA was of the contrary view (at [22]): that the failure to take reasonable care had to be an element of the cause of action upon which the plaintiff succeeded. The third member of the Court, Meagher JA, stated that he preferred not to express any view on the issue (at [36]).

   (c) If Barrett JA's construction of s. 34(1)(a) of the CLA were correct, then the Court could not strike out the Proportionate Liability Defence at this stage of the Proceedings (but would, rather, leave its determination of the Proportionate Liability Defence to the final hearing, that is, based on the litigated "claims"). That is because if the Private Nuisance Claim or Public Nuisance Claim is made out it may well involve a **finding** that TfNSW, or an agent of TfNSW, failed to take reasonable care, such that the claim will be one "arising from a failure to take reasonable care" even if such a failure was not an element of the cause of action.

   (d) Further, even if the Court were persuaded that Macfarlan JA's approach should be followed, it is arguable that a failure to take reasonable care is, or can be, an element of the tort of nuisance, and it may so prove in this case (see, generally, *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, but also *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 for the special case of nuisances arising out of the exercise of statutory authorities).

The relationship between nuisance and negligence is not straightforward. While negligence and nuisance are separate torts, in some cases establishing a failure to take reasonable care will be essential to making out liability in nuisance. The present proceedings may well prove to be such a case. The Court could not conclude, at this stage, that the Private Nuisance Claim and Public Nuisance Claim were not claims "arising from a failure to take reasonable care" even on the approach taken by Macfarlan JA. That is to say, determining whether any particular alleged nuisance requires proof of a failure to take reasonable care will involve a full consideration of the facts and applicable legal regime that will only be determined at trial.

(e) In any event, the Court should find (in the light of the matters referred to in subparagraphs (a) and (d) above) that it cannot construe s. 34(1)(a) of the CLA or determine the issue of whether a failure to take reasonable care is or may be an element of the tort of nuisance with the "high degree of certainly" required in the context of a strike-out application such as this; *Agar v Hyde* [2000] HCA 41; (2000) 201 CLR 552 at [57]. Such a finding would weigh decisively against the Court's exercise of its discretion under r. 14.28 of the UCPR.

(f) Further, the facts and matters the subject of the Proportionate Liability Defence are the same facts and matters the subject of the plaintiff's pleaded case. The plaintiff has not pointed to the requirement for any additional evidence arising from the Proportionate Liability Defence, over and above that which she would need to adduce to make good her own claim. That being so, the utility of an order striking out the Proportionate Liability Defence is marginal, compared to the potential cost to the defendant in the event such an order were made (that is, were it subsequently found that the defendant should have been permitted to pursue its Proportionate Liability Defence after all).

(2) PROPER CONSTRUCTION OF THE CLA

9. Section 34(1)(a) of the CLA provides that an "*apportionable claim*" is 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*".

10. In *Reinhold v New South Wales Lotteries Corporation (No 2)* — (2008) 82 NSWLR 762 Barrett J (as his Honour then was) held (**emphasis** added):

> [19] It seems to me clear that a person will be a "concurrent wrongdoer" only **if the court makes findings** about the existence of "loss or damage" and about which acts or omissions "caused" the loss or damage. **It is only when those findings are made that it is possible to identify, as contemplated by s 34(2), each person whose acts or omissions, as found, "caused" the "loss or damage", as found**. At that point, and not before, a person can be seen to be a "concurrent wrongdoer".
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> [20] The relevant "claim" — that is, the claim in relation to which the identified person is a "concurrent wrongdoer" — can only be the claim in respect of which the **findings concerning loss or damage and causation are made**. That claim is, of necessity, **a claim already litigated**, **not a pending**

> **or foreshadowed claim**. Its nature and content (and, therefore, its status under s 34(1)) will be discoverable by looking at the findings that cause it to be determined as it is determined. If, on those findings, it is seen that the loss or damage (as established in "an action for damages") arose from a failure to take reasonable care and did not arise out of personal injury, the case will be within s 34(1)(a); and if it is seen that there was a contravention of s 42 of the *Fair Trading Act*, the case will be within s 34(1)(b). In either such case, the already litigated "claim" will be an "apportionable claim" because of s 34(1) and, if, on the findings made, the acts or omissions of several persons "caused" the "damage or loss" as found, the persons will be "concurrent wrongdoers".
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> [22] **On this basis, the nature of a "claim", for the purposes of Pt 4, will be determined by what the court has decided in the case, not by what might be prayed or pleaded in an initiating process or points of claim. In short, "claim" refers to a claim as proved and established, not a claim as made or advanced**.

11. In *Perpetual Trustee Company Ltd v CTC Group Pty (No 2)* [2013] NSWCA 58, Macfarlan JA said (in *obiter dicta*) that claims may only be "apportioned" under s. 35 of the CLA where negligence is an element of the successful cause of action.[1] Barrett JA, on the other hand, said (again, in *obiter dicta*) that one looks to a combination of the terms in which the claim is pleaded *and* the findings of the court in relation to the claim.[2] Meagher JA stated that he preferred to express no view on the issue.

12. This difference between the decisions of Macfarlan and Barrett JJA remains to be resolved; *ASF Resources Ltd v Clarke* [2014] NSWSC 252 per Kunc J at [41] – [42][3]; *Owners – Strata Plan No 68372 v Allianz Australia Insurance Limited* [2014] NSWSC 1807 per Ball J at [31][4]; *Smart v AAI Ltd* [2015] NSWSC 392 per Beech-Jones J at [156][5]; *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Doepel* [2016] NSWSC 1566 per Beech-Jones J at [49][6].

13. The defendant's position is that construction of s. 34(1)(a) of the CLA adopted by Barrett JA should be preferred, but that it would not be appropriate for the Court to determine the issue one way or the other at this stage. Rather, for the reasons expressed by Kunc J in *ASF Resources Ltd v Clarke*, the Court should refrain from finally determining the proper construction of s. 34(1)(a) of the CLA in the present application because, in circumstances where there exists an unresolved disagreement in the Court of Appeal as to that matter, the Court cannot itself "reach [a] construction with a high degree of certainty" (being the level of certainty required to make an order striking out the Proportionate Liability Claim (see [16] below)).

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[1] At [22].
[2] At [42].
[3] Interlocutory hearing for orders striking out a proportionate liability defence.
[4] Final hearing.
[5] Final hearing.
[6] Final hearing.

(3) WHETHER A FAILURE TO TAKE REASONABLE CARE IS OR MAY BE AN ELEMENT OF THE TORT OF NUISANCE

14. Because negligence and nuisance both developed as actions on the case it is not surprising that the boundaries between them are fluid and uncertain.

15. Ultimate appellate courts in Australia and the United Kingdom have rejected the submission that negligence has no role to play, or only an incidental role to play, in the tort of nuisance. In *The Wagon Mound (No 2)* [1967] 1 AC 617 the Privy Council responded to such a submission as follows (at 639, emphasis added):

> "It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a **wide variety of tortious acts or omissions** and **in many** negligence **in the narrow sense is not essential**. An occupier may incur liability for the emission of noxious fumes or noise although he has used the utmost care in building and using his premises. … Or he may deliberately obstruct the highway adjoining his premises to a greater degree than is permissible ... **On the other hand the emission of fumes or noise or the obstruction of the adjoining highway may often be the result of pure negligence on his part**: there are many cases … where precisely the same facts will establish liability both in nuisance and in negligence. And although negligence may not be necessary, **fault of some kind is almost always necessary** …"

16. Similar observations were made by the High Court in *Elston v Dore* (1982) 149 CLR 480 at 487-488; and see further the authorities referred to by Ward J in *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [142]ff and particularly the category of nuisance cases in which nuisance and negligence will "coincide", including *Robson v Leischke* [2008] NSWLEC 152.

17. In the present case the Private Nuisance Claim and Public Nuisance Claim are alleged to arise by TfNSW's conduct in authorising or permitting the construction of the Project and "causing the Civil Works Delay" (ASOC at [15], [18]). The "Civil Works Delay" is in turn pleaded to have been caused by alleged "failures" on the part of TfNSW which appear in substance to be failures to take reasonable care, being alleged failures to finalise agreements with stakeholders (and thus efficiently contract for the Project) and to "effectively plan and procure the Project" (ASOC at [12B] and [12D]).

18. Furthermore, it is well established that where an alleged nuisance is attributable to the exercise of statutory powers, there will be no liability "without negligence": *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at [16]; *Marcic v Thames Water Utilities Ltd* [2002] QB 929 at 987-8. In this case, TfNSW has pleaded that the acts relied upon by the plaintiff as constituting a nuisance were performed by it in the exercise of a statutory authority (see Amended Defence at [21K]-[21S]).

19. In addition, TfNSW has pleaded a defence relying on s 43A of the CLA. The effect of that defence, if it were to succeed, is that the plaintiff cannot succeed unless it demonstrates that the acts relied upon were "so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to

be a reasonable exercise of, or failure to exercise, its power" (Amended Defence at [21U]). The matters relevant to the determination of that question are likely to include whether there was an unreasonable failure to take care of the interests of the plaintiff.

20. In all the circumstances, it could not be concluded with the requisite certainty to warrant striking out the Proportionate Liability Defence (see below) that, if TfNSW is found to be liable in the Private Nuisance Claim or the Public Nuisance Claim, a failure to take reasonable care will not have been an essential integer in that liability. Put another way, the present case may well turn out to be a case in which the torts of negligence and nuisance "coincide". Whether that is so will probably be determined only at trial. In the circumstances, it is arguable that the claims will be ones "arising from a failure to take reasonable care" even on the narrower approach adopted by Macfarlan JA.

(4) THE DISCRETION TO STRIKE OUT PLEADINGS

21. The discretion to strike out pleadings is contained in rule 14.28 of the UCPR, which provides as follows:

> (1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:
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> (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
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> (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
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> (c) is otherwise an abuse of the process of the court.
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> (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

22. The principles which inform the exercise of this discretion are found in the joint judgment in *Agar v Hyde* [2000] HCA 41 ; (2000) 201 CLR 552 at [57] (quoted with approval in *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27 ; (2006) 226 CLR 256 at [46]):

> It is, of course, well accepted that a court whose jurisdiction is regularly invoked … should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

23. As observed by Kunc J in *ASF Resources Ltd v Clarke*:

> [14] The High Court's reference [in *Agar v Hyde*] to the "various ways" in which the test has been expressed include the oft-cited discussion by Barwick CJ in *General Steel Industries Inc v Commission for Railways* (NSW) (1964) 112 CLR 125 at 129–130:
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> > It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action — if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal — is clearly demonstrated. The test to be applied has been variously expressed; "so obviously untenable that it can• not possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them" (the pleadings) "to stand would involve useless expense".
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> > At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or "so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument"; "so to speak apparent at a glance".

24. In *ASF Resources Ltd v Clarke* the sixth defendant (the Bank) sought leave to amend its defence to contend that Clarke was a concurrent wrongdoer within the meaning of Part 4 of the CLA and that ASF Resources' claim against Clarke was an "apportionable claim" within the meaning of Part 4 of the CLA. ASF Resources sought an order under 14.28 of the UCPR that the Bank's proportionate liability defence be struck out.

25. Kunc J:

(a) referred to the decisions of Macfarlan and Barrett JJA in *Perpetual Trustee Company Ltd v CTC Group* and said (emphasis added):

> [42] I do not propose to attempt to resolve the difference between their Honours. Rather, for present purposes and in the absence of any authority binding upon me, I take from their Honours' reasons the point that there is much to be said for both sides of the argument on what is a serious and difficult question of construction. **As I will now explain, that conclusion has a significant impact on how the court is to exercise its discretion in the present applications**.

(b) then went on to consider the factors relevant to the exercise of the discretion under rule 14.28 of the UCPR as follows (**emphasis** added):

> [43] In the exercise of its relevant discretions, the court will allow the proposed amended defence in relation to the CLA and dismiss ASF's motion

in so far as it seeks to strike out so much of the Bank's case. There are three reasons for this conclusion.

[44] First, given that the Bank's defence under s 95(1) of the CA [that is, *Cheques Act 1986*] will form part of the ultimate hearing of these proceedings, to allow the proportionate liability defence to go forward **will add only to the legal argument in the case rather than expand it in terms of the evidence sought to be adduced**. Insofar as I assume the Bank will contend at the final hearing that the factual findings can attract the operation of the CLA, those factual findings will be made by reference to the issues raised by the Bank's defence under s 95(1) of the CA. If such findings are made, then the way will be open for the Bank to argue that, on the proper construction of s 34(1)(a) of the CLA, ASF's claim was an apportionable claim. Similarly, **ASF's response to this will be legal rather than requiring ASF to adduce any evidence over and above that which it deploys in answer to the Bank's defence under s 95(1) of the CA**.

[45] Although he was in the minority on this particular issue, I respectfully adopt what was said by Kirby P in *Wickstead v Browne* (1992) 30 NSWLR 1 at 5:

> But as the trial must now proceed, there is merit (as it seems to me) in permitting the appellant to present his case in various ways. The marginal utility to the respondent of preventing the appellant from proceeding upon the alternative cause of action in negligence is minimal. But the marginal cost of doing so would be very great if, subsequently, the trial was concluded, limited by the orders proposed, and it was then held, either by this Court or by the High Court of Australia, that the appellant's cause of action in negligence was viable …

[46] Adopting the learned President's dictum to the circumstances of this case, as the defence under s 95(1) of the CA will proceed, there is merit in permitting the Bank to present its case in various ways, particularly where the additional way in question will only involve additional legal argument. **The marginal utility to ASF in preventing the Bank from raising the question of proportionate liability is minimal but the marginal cost of doing so would be very great if, subsequently, the trial is concluded without that issue being able to be raised, and it was then held, either by the court of Appeal or High Court of Australia, that the Bank should have been allowed to invoke the CLA**.

[47] **Second, where in a case such as the present, a party invites the resolution of a strike out application by reference to the court construing a statute (or, for that matter, any other document) then the court must be able to reach that construction with a high degree of certainty**. That is because, to quote the High Court in *Agar v Hyde* (see para [13] above) the test, howsoever expressed, to decide issues in a summary way requires "a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way". Based upon my own consideration of the language of s 34(1)(a) of the CLA, the parties'

> respective submissions as to the proper construction of that section, and **taking into account the differences within the Court of Appeal referred to in paras [37] to [40] above**, I am well satisfied that there is much to be said for both sides of the argument. **In those circumstances, I am unable to reach a view as to the proper construction of s 34(1)(a) of the CLA with what I consider to be the requisite high degree of certainty so as to warrant determining the issue now summarily against the Bank.**
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> [48] **Third, as a matter of policy I consider it to be undesirable, unless absolutely necessary, for a piece of legislation like the CLA to be construed outside a factual context determined after a full hearing**. The CLA is a significant and groundbreaking piece of law reform. Substantial policy considerations attend its interpretation and application. The proper interpretation of the legislation has already produced a diversity of views across three levels of the judicial hierarchy of this State (see the account of the litigation culminating in the decision of the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (No 2) [2013] HCA 23 ; (2013) 247 CLR 656 in L Warnick, "Proportionate Liability in the High Court" (2013) 87 ALJ 864).

26. The matters considered by Court in *ASF Resources Ltd v Clarke* in declining to exercise its discretion to strike out the Bank's proportionate liability defence apply in equal measure to the present case.

27. As to the first matter:

    (a) the plaintiff contends that "[t]hrough its conduct in **permitting the construction** of the Project …. the **defendant has caused** a substantial and unreasonable interference with the Plaintiffs' and the Private Nuisance Group Member's enjoyment of the respective interests in land located in the vicinity of the Project including:

        (i) damage to and obstruction of roadways and footpaths through road closures and erection of hoardings, causing a substantial decrease in customers of businesses operated by, or operating on land owned by, Private Nuisance Group Members;

        (ii) excessive noise, vibration and dust caused by construction on the Project;

        (iii) light spillage from light towers used on the Project without adequate screening,

        (Amended Statement of Claim, [15] – [16]);

    (b) as admitted on the face of the Amended Statement of Claim at [15] and [18][7], to the extent any of the matters referred to in subparagraphs (a)(i) to (a)(iii) above actually occurred (which is denied) it was ALTRAC (through Acciona) that physically caused the relevant damage, obstruction, noise, vibration, dust and / or light spillage;

[7] Which speaks of "*authorising or permitting*" rather than "*doing*".

(c) it follows that, to make good the contention in [15] – [16] of the Amended Statement of Claim, the Plaintiff (and each Private Nuisance Group Member) will be required to establish, with precision, the acts or omissions of ALTRAC (through Acciona) said to constitute the contended "substantial and unreasonable interference";

(d) the observations referred to in subparagraphs (a) to (c) above apply in equal measure to the claim for Public Nuisance (see [18] – [19] of the Amended Statement of Claim);

(e) the plaintiff has adduced no evidence as to the extent to which the Proportionate Liability Defence would require it to put on evidence over and above that required to make good the allegations in [14], [15], [18] and [19] of the Amended Statement of Claim;

(f) further, the plaintiff will be required to put on evidence to meet the defences referred to in [18] and [19] above. That being so, the plaintiff is already required to adduce evidence:

(i) of alleged "negligence" (with respect to the exercise of statutory powers); and

(ii) that the acts or omissions the subject of she claims were "so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power" (with respect to the defence under s. 43A of the CLA);

(g) it follows from the matters referred to in subparagraphs (a) to (f) above, that the utility of the orders sought by the plaintiff is "marginal" (because the plaintiff has not pointed to any additional evidence that it would be required to adduce in light of the Proportionate Liability Defence over and above that which it is already required to make good its claims);

(h) however the cost of preventing the defendant from raising the Proportionate Liability Defence could be very great if, subsequently, it were held that the defendant should have been allowed to invoke the CLA.

28. As to the second and third matters, nothing has changed since the decision in *ASF Resources v Clarke* (see the decisions referred to in [12] above), the proper construction of s. 34(1)(a) remains to be resolved so as to permit the present Court to construe that provision with any certainty.

(5) CONCLUSION

29. For the reasons set out above the Court would affirm the filing of the Amended Defence including the Proportionate Liability Defence and order the plaintiff to pay the defendant's cost of the Motion.

DATED 26 April 2019

Nicholas Owens

James Hutton

Nuala Simpson