PLAINTIFF'S SUBMISSIONS ON AMENDMENTS TO DEFENCE

COURT DETAILS	
Court	Supreme Court of New South Wales
Division	Common Law
List	Representative Proceedings
Registry	Sydney
Case number	2018/263841
TITLE OF PROCEEDINGS	
Plaintiff	**Rosa Maria Colagrossi**
Defendant	**Transport for New South Wales**
FILING DETAILS	
Filed for	**Rosa Maria Colagrossi**, plaintiff
Legal representative	Rick Mitry, Mitry Lawyers
Legal representative reference	RM:13137
Contact name and telephone	Amanda Charchar (02) 9222 2833
Contact email	amanda.charchar@mitry.com.au

A INTRODUCTION

1. The Defendant seeks to rely upon an Amended Defence filed on 5 April 2019. The Amended Defence seeks to introduce a defence of proportionate liability, on the basis that the ALTRAC Partnership (**ALTRAC**) and Acciona Infrastructure Australia Pty Ltd (**Acciona**) are concurrent wrongdoers, within the meaning of Part 4 of the *Civil Liability Act 2002* (NSW) (**CLA**). It is common ground that ALTRAC was the head contractor and Acciona was the civil works subcontractor in respect of the works said by the Plaintiff to constitute a nuisance in respect of herself and group members.

2. The Plaintiff opposes the proposed amendments. The Plaintiff's argument may be summarised in the following propositions:

   (a) for a cause of action to constitute an apportionable claim under Part 4 of the CLA, a failure to take reasonable care must form an essential element of the cause of action (as opposed to merely being relevant to an assessment of whether the claim succeeds, or relevant to a defence raised);

   (b) further and relatedly, a cause of action based upon strict liability cannot constitute an apportionable claim under Part 4 of the CLA;

   (c) the Plaintiff's claims in private and public nuisance accordingly are not capable, as a matter of law, of constituting apportionable claims, as a failure to take reasonable care is not an essential element of the cause of action, and further or alternatively because the liability of the Defendant is strict;

   (d) it follows that the pleading of a proportionate liability defence does not disclose a reasonable defence and the amendments to introduce it into the defence should not be permitted.

3. The plaintiff submits that the matter should be determined as an interlocutory question now, because the proportionate liability defence, if allowed to proceed, has very significant potential consequences. It would mean that the plaintiff has to make a decision as to whether to sue ALTRAC and or Acciona in addition to the defendant. A suit by the plaintiffs against ALTRAC and or Acciona would add to the size, scope, complexity and cost of the proceedings and it would delay the progress of the proceedings while the pleadings are amended.

4. The plaintiff's opposition to the defendant's concurrent wrongdoer defence raises a discrete point of law which does not depend on any evidence; it is simply whether or not a nuisance claim is apportionable. In circumstances such as these, the authorities suggest that it is better to decide the point at an interlocutory stage (see, e.g., *Jefferson Ford Pty Ltd v Ford Motor Co of Australia Ltd* (2008) 167 FCR 372 at [23] (Finkelstein J) and [131] (Gordon J)).

B. BRIEF SUMMARY OF THE CLAIMS AND DEFENCES

The plaintiff's claim

5. The plaintiff brings causes of action, on behalf of herself and group members, in private nuisance and public nuisance.

6. The essence of a private nuisance claim is that the defendant has substantially and unreasonably interfered with a person's enjoyment of an interest in land: see e.g. Balkin and Davis, *Law of Torts* (3rd ed. 2004) at [14.5], [14.11]. The essence of a public nuisance claim is that the defendant has substantially and unreasonably obstructed or inconvenienced the public in the exercise of public rights; to maintain a private right of action the plaintiff must be a person who has suffered special damage over and above an ordinary member of the public by reason of the conduct: Balkin and Davis at [14.54], [14.58].

7. Both private nuisance and public nuisance require the Court to form value judgments about the character of the interference, obstruction or inconvenience caused by the defendant, namely whether it is "substantial" and "unreasonable". However, as is expanded on below, neither cause of action requires the Court to find that a defendant has failed to take reasonable care for a plaintiff to succeed.

8. The plaintiff's claim centres around the defendant's conduct in authorising or permitting the construction of the Sydney Light Rail Project, a major construction project stretching from Circular Quay to Randwick and Kensington (the **Project**). The Group members are those persons holding an interest in land in the vicinity of the Project, who have suffered loss and damage by reason of an interference with their enjoyment of such an interest (**Private Nuisance Group Members**), or persons who have otherwise suffered loss and damage over and above that suffered by a member of the public from the defendant's interference with public

land through the carrying out of the Project (**Public Nuisance Group Members**): Amended Statement of Claim (**ASOC**) [1(a)], [1(b)].

9. The plaintiff pleads, in summary, that the defendant announced the Project and entered into certain contracts to carry it out: ASOC [5]-[9]. Major construction is alleged to have commenced on about October 2015: ASOC [12]. The Project, it is alleged, was originally due for completion by 16 March 2019: ASOC [10]. However, by reason of certain conduct of the defendant, it is alleged that the civil works on the Project have been delayed (the **Civil Works Delay**): ASOC [12A]-[12D], [14A]-[14D].

10. The causes of action are pleaded out at ASOC [15] and following. As to private nuisance, the plaintiff pleads that the defendant, in authorising or permitting the construction of the Project, and or in causing the Civil Works Delay, has caused a substantial and unreasonable interference with the respective interests in land of the plaintiff and Private Nuisance Group Members (ASOC [15]), which is alleged to have caused loss and damage to the plaintiff and Private Nuisance Group Members (ASOC [16]-[17]).

11. As to public nuisance, the plaintiff pleads that the defendant, in authorising or permitting the construction of the Project, and or in causing the Civil Works Delay, has caused a substantial and unreasonable obstruction or inconvenience to the public in the exercise of public rights (ASOC [18]), which is alleged to have caused loss and damage to the plaintiff and Public Nuisance Group Members, greater in degree than that suffered by the general public (ASOC [19]-[21]).

12. No element of the plaintiff's claim involves a failure to take reasonable care. The plaintiff does not plead, anywhere, that the defendant had a duty to take reasonable care with respect to the plaintiff or any group member, or that the defendant breached such a duty. The conduct of the defendant which has caused the Civil Works Delay is not alleged to have involved such a duty. Rather, that conduct forms part of the conduct which plaintiff contends amounts to a "substantial and unreasonable" interference with private property rights, or obstruction to the general public, as the case may be.

The Defence

13. The basic facts as to the defendant's role in commissioning the construction of the Project are not in dispute: Amended Defence (**AmD**) [5]-[9]. The defendant disputes that its conduct has caused the Civil Works Delay: AmD [12A]-[12D], [14A]-[14D]. It denies having committed a private or public nuisance: AmD [15]-[21].

14. The defendant also relies upon a number of statutory and other defences. These include:

    (a) a contention that the defendant commissioned the Project pursuant to an approval from the Roads and Maritime Service issued under s 144C of the *Roads Act 1993* (NSW), and Project works are therefore deemed by s 141 of the *Roads Act* not to constitute a public nuisance: AmD [21A]-[21J];

    (b) a contention that the defendant had statutory authority to develop the Project under s 104O of the *Transport Administration Act 1988* (NSW) and that the alleged nuisance is the inevitable consequence of the exercise of its powers in that respect: AmD [21K]-[21S];

    (c) a contention that the defendant's allocation of resources is not open to challenge by reason of s 42 of the CLA: AmD [21T]; and

    (d) a contention that the defendant has no liability in respect of the exercise of its power to commission the construction of the Project by reason of s 43A of the CLA: AmD [21U].

15. The new proportionate liability defence is pleaded at AmD [22]-[34]. Relevantly, and crucially for the present application, this defence rests on the contention that the plaintiff's claims of private nuisance and public nuisance are apportionable claims within the meaning of Part 4 of the CLA: AmD [22].

The Reply

16. The plaintiff has not yet pleaded in reply to the proportionate liability defence. However, the plaintiff has put on a Reply with respect to the other defences relied upon by the defendant. Relevantly, in the Reply the plaintiff contends that, by reason of the matters pleaded at ASOC [12A]-[15]:

(a) the defendant has not complied with certain conditions of its approval from the RMS (and hence the deeming under s 141 of the *Roads Act* is not engaged): Reply [1(f)];

(b) the work done by the defendant in developing the Project was not properly performed in all respects (and hence the work was not the inevitable consequence of the defendant's exercise of statutory authority): Reply [2(d)]; and

(c) section 43A of the CLA does not prevent civil liability arising for the defendant because the manner in which the defendant has developed the Project is so unreasonable that no authority having the power to develop the Project could properly consider the development of the project to be a reasonable exercise of the power: Reply [4(a)].

17. It should be noted that none of the pleadings referred to above involve the contention that the defendant had any duty to take reasonable care, or that by the defendant's conduct in ASOC [12A]-[15] it breached such a duty.

18. Further, and importantly, in answer to the defendant's invocation of s 42 of the CLA, the plaintiff in the Reply says that section 42 of the CLA does not apply because these proceedings do not concern whether the defendant has a duty of care or has breached a duty of care: Reply [3(b)].

C APPORTIONABLE CLAIMS

19. Section 34 of the CLA defines "apportionable claims", relevantly, as follows (emphasis added):

> *(a) 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,*

20. Section 35(a) provides that in any proceedings involving an apportionable claim, "the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that

the court considers just having regard to the extent of the defendant's responsibility for the damage or loss."

21. There is a conflict in the authorities as to how the Court is to assess when an action is one "arising from a failure to take reasonable care.

22. In *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 (***Perpetual***) at [22], Macfarlan JA said (emphasis added):

> *For a successful action for damages to have arisen from a failure to take reasonable care, it is in my view necessary that the absence of reasonable care was an element of the, or a, cause of action upon which the plaintiff succeeded. As observed by Professors McDonald and Carter in "The Lottery of Contractual Risk Allocation and Proportionate Liability" (2009) 26 Journal of Contract Law 1 at 18, the contrary view would produce the absurd result that a party to a contract who failed to perform a strict contractual obligation would benefit from being found to have acted negligently rather than "innocently". If claims could be apportioned where negligence is not an element of the successful cause of action, but merely arises from the facts, a plaintiff could lose his or her contractual right to full damages from a party whose breach of a contractual provision of strict liability happened to stem from a failure to take reasonable care.*

23. The remarks of Macfarlan JA were made in the context of a contractual claim, but they apply equally in the case of nuisance. As is discussed further below, a failure to take reasonable care is not an essential element of nuisance, however it can be relevant to nuisance in that, if a defendant failed to take reasonable care that may be a matter going to whether the relevant interference with property rights or obstruction to public land is unreasonable. To adopt the view that one can have an apportionable claim even where a failure to take reasonable care is not an essential element of the cause of action would lead to the absurd result that a defendant to a nuisance suit could seek to limit its liability by pleading its own negligence.

24. Macfarlan JA in *Perpetual* acknowledged (at [23]) that his view appeared to differ from the decision of Barrett J (as his Honour then was) in the first instance decision of *Reinhold v NSW Lotteries Corporation (No 2)* (2008) 82 NSWLR 762 (***Reinhold***).

Macfarlan JA disagreed with Barrett J's view in *Reinhold* at [30] that the "nature of the claim, for the purposes of Pt 4, is to be judged in the light of the findings made and is not determined by the words in which it is framed". Macfarlan JA considered that the "natural meaning of the words used [in s 34 of the CLA] indicates that a failure to take reasonable care must be part of, and therefore an element of, the plaintiff's successful cause of action."

25. Barrett JA was also part of the Court in *Perpetual*, and re-affirmed the approach he had taken in *Reinhold*: see *Perpetual* at [37]-[43]. The third member of the Court, Meagher JA, preferred not to express a view on the matter: *ibid* at [36].

26. The plaintiff respectfully submits that the approach of Macfarlan JA is to be preferred. It better accords with both the language used in s 34 (that the relevant claim must one in "an action for damages arising from a failure to take reasonable care") and with the purpose of the statute (that a plaintiff will be placed clearly on notice, from the time of filing a defence, that the claim made by it is said to be apportionable: see s 35A of the CLA). Further, the Court has power to grant leave for one or more persons to be joined as defendants in proceedings involving an apportionable claim: s 38 of the CLA. It is difficult to see how that power could be exercised in a matter where one could only determine whether a claim was apportionable at the end of the proceedings when findings are made (as is the approach preferred by Barrett JA).

27. There is recent academic support for the approach of Macfarlan JA: see Lubofsky, "A Contractual Path Around Proportionate Liability?" (2018) 34 *BCL* 5 at 10-11, which cites five reasons for preferring that approach. Similarly, the authors of *Fleming's Law of Torts* (10th ed. 2011), writing prior to the decision in *Perpetual*, observed that (at [11.100], p. 316):

> *it would be perverse if a claim based on a strict liability or warranty, contractual or otherwise, were apportionable simply because those in breach could point to some negligence on their own part. Whether by statutory interpretation or policy, whether or not a claim is apportionable should depend on whether a failure to take reasonable care is a necessary element of the plaintiff's cause of action.*

28. Further, in the standard annotated edition of the CLA (Villa, *Annotated Civil Liability Act 2002 (NSW)* (3rd ed. 2018)), after referring to Macfarlan JA's decision in *Perpetual* the author observes that (pp. 495-496):

> *Consistently with the approach of the High Court in Selig v Wealthsure Pty Ltd (2015) 255 CLR 661 (which considered the proportionate liability provisions of the Corporations Act 2001), it would seem that a plaintiff is entitled to the full benefit of a claim for damages based upon a cause of action that does not require the plaintiff to establish a failure to take reasonable care, and at least to that extent Reinhold should no longer be followed.*

C NUISANCE IS NOT AN APPORTIONABLE CLAIM

29. Liability for nuisance does not depend on a failure to take reasonable care. One can be liable in nuisance even if one has taken reasonable care, or even all possible care: *Read v J Lyons & Co Ltd* [1947] AC 156 at 183; *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 300. See generally *Fleming's Law of Torts*, p. 506; Balkin and Davis, p. 472.

30. For this reason, liability in nuisance, at least in respect of a person whose actions have created the nuisance, is often described as a tort of strict liability: see, e.g., *Fleming*, p. 509.

31. The plaintiff's claims for nuisance are claims of this kind. As set out in detail above, nowhere does the plaintiff allege that the defendant has failed to take reasonable care. Rather, the claim is that the defendant's conduct amount to a substantial and unreasonable interference with private property rights and or a substantial and unreasonable obstruction to public land. The defendant's conduct in the commissioning of the Project is relevant to those claims. But the plaintiff has not alleged, and has no onus to prove, that the defendant was obliged to take reasonable care or failed to do so. The defendant's liability is strict.

32. The defendant cannot rely upon its Defence and the plaintiff's Reply to the Defence in asserting that the plaintiff's claim is a claim in an action for damages arising from a failure to take reasonable care. The statutory language focuses on the plaintiff's action, not on how the plaintiff responds to positive defences which may be raised.

But even if it were permissible to look at the Defence and the Reply, that does not assist the defendant. Nowhere in the Reply does the plaintiff allege a failure to take reasonable care on the part of the defendant. Indeed, as noted above, in the Reply the plaintiff expressly states that the proceedings do not concern whether the defendant has a duty of care or has breached a duty of care: see paragraph 18 above.

D CONCLUSION

33. For the reasons developed above, paragraph 22 of the Amended Defence is bad as a matter of law. The balance of the proportionate liability defence depends upon paragraph 22. It follows that the defendant should not be permited to advance the proportionate liability defence.

34. The defendant should be directed to file a new Amended Defence limited to those minor amendments which the Plaintiff has not opposed. The Defendant should pay the Plaintiff's costs of and incidental to its notice of motion.

Dated: 26 April 2019

C. H. Withers
Banco Chambers
Tel: (02) 9376 0676
Fax: (02) 9376 0699
withers@banco.net.au

A. M. Hochroth
Banco Chambers
Tel: (02) 9376 0624
Fax: (02) 9376 0699
adam.hochroth@banco.net.au

Counsel for the Plaintiff