SUPREME COURT OF QUEENSLAND

CITATION:	*Ligon Sixty-Three Pty Ltd v ClarkeKann & Ors* [2015] QSC 153
PARTIES:	**LIGON SIXTY-THREE PTY LTD** ACN 002 954 065 (plaintiff/applicant) **v** **CLARKEKANN** (defendant/first respondent) **BEAZLEY SINGLETON LAWYERS** (second respondent) **HAMILTON ISLAND ENTERPRISES LIMITED** (third respondent)
FILE NO/S:	SC No 7108 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2015; Further submissions heard on the papers 19 March 2015; 25 March 2015
JUDGE:	Philip McMurdo J
ORDER:	**1. The plaintiff's application to join Beazley Singleton Lawyers as a defendant be refused.** **2. The plaintiff's application to join Hamilton Island Enterprises Ltd as a defendant be refused.** **3. Paragraphs 35 through 47 and 48 through 60 of the Amended Defence be struck out.**
CATCHWORDS:	LANDLORD AND TENANT – COVENANTS – NOT TO ASSIGN OR SUBLET – LESSOR'S CONSENT – NOT TO BE UNREASONABLY WITHHELD ETC – where the plaintiff had acted upon the defendant's advice to sue the purchaser in a contract to sell its sub-lease, that claim had been dismissed and the plaintiff sought to recover its losses and costs – where the defendant pleaded that the plaintiff's sub-lessor was a concurrent wrongdoer under the proportionate liability provisions of the *Civil Liability Act* 2003 (Qld) – where the plaintiff sought to have the sub-lessor joined as a defendant in the proceedings – where the defendant claimed the sub-lessor breached obligations owed to the plaintiff by

unreasonably withholding consent from the plaintiff to assign its sub-lease to the purchaser – whether s 121 of the *Property Law Act* 1974 (Qld) imposes an obligation on the sub-lessor, gives rise to implied contractual obligations or is the basis for imposition of a common law duty of care upon the lessor – a lessee's covenant not to assign without consent does not give rise to an implied covenant by the lessor not to unreasonably withhold consent or to liability on the part of the lessor – s 121 acts as a proviso on the lessee's covenant not to assign without consent that consent would not be arbitrarily withheld – where the lessor's alleged unreasonable refusal of consent to assign the sub-lease would not have prevented the plaintiff from assigning it – where the pleaded bases for the sub-lessor's liability to the plaintiff were wrong in law, the sub-lessor was not a concurrent wrongdoer and the plaintiff's application to join the sub-lessor as a defendant was refused

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND ITS PREDECESSORS – PARTIES – OTHER MATTERS – where the plaintiff applied to join two other parties as defendants in the proceeding, prompted by the defendant's amendments its Defence pleading the other parties were concurrent wrongdoers for the purpose of the proportionate liability provisions of the *Civil Liability Act* 2003 (Qld) – where the second respondent could not be joined as a defendant in the proceeding as it was immune from suit – whether the second respondent could, notwithstanding its immunity from suit, be a concurrent wrongdoer – a party that was at no time liable for loss or damage that is the subject of a claim cannot be a concurrent wrongdoer for the purpose of Chapter 2, Part 2 of the *Civil Liability Act* 2003 (Qld)

PROFESSION AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – IMMUNITY FROM SUIT – where the plaintiff sought to join another legal firm as a defendant in a proceeding to recover from the defendant losses incurred in unsuccessfully prosecuting a claim – defendant pleaded the second respondent legal firm was a concurrent wrongdoer for the purpose of the proportionate liability provisions of the *Civil Liability Act* 2003 (Qld) – where the second respondent was retained by the plaintiff to act for it in relation to an unsuccessful claim and allegedly failed to advise the plaintiff that its case was weak and that it should not be prosecuted to a judgment – where the second respondent was immune from suit and the application to join it as a defendant was refused

PROFESSION AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – IN RELATION TO LITIGATION

PROFESSION AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – IN RELATION TO PROPERTY TRANSACTIONS

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – whether a party that was at no time liable for the loss or damage that is the subject of a claim can be a concurrent wrongdoer for the purpose of Chapter 2, Part 2 of the *Civil Liability Act* 2003 (Qld) – difficult to characterise a "wrongdoer" as a person who could not be liable in relation to the claim – a wrongdoer's acts or omissions must have caused the loss or damage, connoting a legal liability of the wrongdoer to the plaintiff – difficulty in apportioning responsibility when comparing responsibility of a concurrent wrongdoer if a responsibility that is not a legal responsibility could be assessed and compared as required by s 31 of the *Civil Liability Act* – whether s 121 of the *Property Law Act* 1974 (Qld) imposes an obligation on a lessor – s 121 acts as a proviso on the lessee's covenant not to assign without consent, that the consent would not be arbitrarily withheld

TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – PRINCIPLES AND MODE OF APPORTIONMENT – where the first respondent was immune from suit – whether a party that was at no time liable for the loss or damage that is the subject of a claim can be a concurrent wrongdoer for the purpose of Chapter 2, Part 2 of the *Civil Liability Act* 2003 (Qld)

TORTS – NEGLIGENCE –STATUTES, REGULATIONS, ETC – APPORTIONMENT IN PARTICULAR SITUATIONS AND CASES

Civil Liability Act 2003 (Qld), s 30, s 31
Property Law Act 1974 (Qld), s 121(1)

Alpine Holdings Pty Ltd v Feinauer [2008] WASCA 85, considered
Attard v James Legal Pty Ltd (2010) 80 ACSR 585; [2010] NSWCA 311, cited
Biggar v McLeod [1978] 2 NZLR 9, cited
Bird v Ford [2013] NSWSC 264, dissaproved
Boss v Hamilton Island Enterprises Ltd [2008] QSC 274, considered
Boss v Hamilton Island Enterprises Ltd (2010) 2 Qd R 115; [2009] QCA 229 ,considered
Chamberlain v Ormsby t/as Ormsby Flower [2005] NSWCA

454, cited
Day v Rogers [2011] NSWCA 124, cited
Donnellan v Woodland [2012] NSWCA 433, applied
D'Orta-Ekenaike v Victoria Legal Aid & Anor (2005) 223 CLR 1; [2005] HCA 12, applied
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, considered
Giannarelli v Wraith (1988) 165 CLR 543, applied
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613, applied
Ideal Film Renting Company Ltd v Nielsen [1921] 1 Ch 575, applied
Jackson Lalic Lawyers Pty Ltd v Attwells [2014] NSWCA 335, cited
Kendirjian v Lepore [2015] NSWCA 132, considered
Ligon Sixty-Three Pty Ltd v Ronson Investments Pty Ltd as Trustee for the Ronson Superannuation Fund [2012] QSC 141, cited
Shrimp v Landmark Operations Ltd (2007) 163 FCR 510, cited
Symonds v Vass (2009) 257 ALR 689; [2009] NSWCA 139, considered
Treloar v Bigge (1873-74) LR 9 Exch 151, applied
Yared v Spier [1979] 2 NSWLR 291, applied

COUNSEL: R J Anderson for the plaintiff/applicant
P K O'Higgins for the defendant/first respondent
T Pincus for the second respondent
G Sheahan for the third respondent

SOLICITORS: Bennett Philp for the plaintiff/applicant
Bartley Cohen for the defendant/first respondent
K&L Gates for the second respondent
Gadens for the third respondent

[1] The plaintiff owned an apartment on Hamilton Island which it agreed to sell by a contract which was prepared by the defendant firm of solicitors. In 2009, shortly prior to the agreed date for settlement, the purchaser terminated the contract on the basis of the non-fulfilment of certain conditions of its performance. According to the plaintiff's case, the defendant then advised it to sue for specific performance which it did. The plaintiff also says that the defendant advised it to reject an offer of settlement.

[2] After a trial, the plaintiff's claim against its purchaser was dismissed.[1] Consequently, the plaintiff lost the benefit of its contract and had to pay its costs and those of the purchaser. It seeks to recover those losses in this proceeding.

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[1] *Ligon Sixty-Three Pty Ltd v Ronson Investments Pty Ltd as trustee for the Ronson Superannuation Fund* [2012] QSC 141.

[3] The present applications arise from the defendant's pleas that there were concurrent wrongdoers for the purpose of the proportionate liability provisions of the *Civil Liability Act* 2003 (Qld). One was another law firm, Beazley Singleton Lawyers, which acted for the plaintiff in its proceeding against the purchaser without, it is alleged, telling the plaintiff that its case was weak and that it should not be prosecuted to a judgment.

[4] The other concurrent wrongdoer is said to have been Hamilton Island Enterprises Ltd, which I will call HIE. It holds a perpetual lease from the Crown over the whole of Hamilton Island. The plaintiff's apartment was held by it as a sub-lessee from HIE and it was that sub-lease which the plaintiff contracted to sell. The completion of the plaintiff's contract of sale was conditional upon the approval of HIE to the assignment of the sub-lease and it was an express term that if HIE's approval was not given by a certain date, either party might terminate the contract, the deposit would be refunded and neither party would have any claim against the other.

[5] HIE said it would approve the assignment only if the purchaser executed a certain deed in its favour. That deed would have created obligations upon the purchaser which, as described of an equivalent document in *Boss v Hamilton Island Enterprises Ltd*,[2] would have involved the imposition of new terms which substantially eroded the rights conferred by the sub-lease.[3]

[6] In the present case, the defendant pleads that HIE is liable to its sub-lessee, the plaintiff, at least for the loss of the contract of sale, because it unreasonably withheld its consent.

[7] Prompted by the defendant's pleas of concurrent wrongdoing, the plaintiff applies to join as defendants Beazley Singleton and HIE. Its proposed pleadings against them would replicate what is pleaded about them by the present defendant. Each of those parties opposes being joined as a defendant, upon the basis that the pleaded case against it could not succeed.

[8] Prompted by the arguments of Beazley Singleton and HIE, the plaintiff makes an alternative application, which is to strike out from the Defence the allegations of concurrent wrongdoing.

The case against HIE

[9] It is convenient to discuss first the case against HIE. The sub-lease contained relevantly these clauses about an assignment:

> "2.12 Assignment
>
> 2.12.1 The Sub-lessee must not assign this Sub-lease without first obtaining the written consent of:
>
> (a) the Minister; or obtaining the relevant General Authority to Transfer a Sublease on NCL2803, and
>
> (b) the Sub-lessor.

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2 [2010] 2 Qd R 115.
3 Ibid 156 [147].

2.12.2 The Sub-lessor must not arbitrarily or capriciously withhold its consent if the Assignee:

(a) is acceptable to the Minister; and

(b) is entitled to hold the Sub-lease; and

(c) is in the opinion of the Sub-lessor, financially sound and respectable; and

(d) signs a power of attorney in the same form as Part 5;

(e) signs a Deed of Covenant in a form required by the Sub-lessor. The Deed will be prepared at the cost of the Sub-lessee."

[10] The assignment was also governed by s 121(1) of the *Property Law Act* 1974 (Qld) which was and is relevantly as follows:

"121 Provisions as to covenants not to assign etc. without licence or consent

(1) In all leases whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of premises leased or any part of the premises, without licence or consent, such covenant, condition, or agreement shall -

(a) despite any express provision to the contrary, be deemed to be subject -

(i) to a proviso to the effect that the licence or consent is not to be unreasonably withheld …"

[11] The facts pleaded by the present defendant about HIE and proposed to be pleaded against HIE are as follows. On 3 August 2009, the plaintiff, through the defendant, sought HIE's consent to the assignment of the sub-lease to its purchaser. On 5 August 2009, HIE replied that it would consent to the assignment if the purchaser executed a certain deed. The terms of that deed were "similar or identical to" that which were considered by the Court of Appeal in *Boss*. The judgment of the Court of Appeal was given on 11 August 2009, dismissing the appeal from my judgment which was given on 14 November 2008.[4] The effect of each of those judgments was that the terms of that deed resulted in HIE's withholding of consent in the absence of the execution of the deed being unreasonable in the sense of the proviso in s 121(1)(a)(i). Therefore, the present defendant alleges, from the time of my judgment or, at the latest, the date of the judgment of the Court of Appeal, HIE knew or ought to have known that its insistence on the execution of the deed in the present case was not reasonable and "was *in breach of its obligations* under s 121 of the *Property Law Act* to act reasonably". (my emphasis)

[12] On 13 August 2009, the present defendant wrote on behalf of the plaintiff to HIE to say that the purchaser had requested amendments to the deed of consent. On the same day, HIE refused to make any changes to the deed and said that its terms and conditions of its consent were reasonable.

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[4] *Boss v Hamilton Island Enterprises Ltd* [2008] QSC 274.

[13] Under the plaintiff's contract with its purchaser, settlement was to take place on a date fixed by the plaintiff's notification to the purchaser that (amongst other things) HIE had approved the assignment of the sub-lease. It was a further term that if HIE did not approve the assignment of the sub-lease then either party might terminate the contract. In the proceeding by the plaintiff against the purchaser, the plaintiff argued that the purchaser should have executed the deed which HIE required. That argument was rejected and consequently the purchaser was held entitled to terminate for the plaintiff's failure to procure the consent of HIE.

[14] It is alleged that HIE knew or ought to have known that if its consent was not given, the purchaser might terminate the contract causing loss to the plaintiff.

[15] The Amended Defence then makes these allegations:[5]

> "59. By reason of its conduct in insisting on the deed of consent as a condition to its approval of the assignment of the Sublease …, HIE caused [the purchaser] to be in a position to, and entitled to refuse to complete the contract when called upon by the plaintiff to do so on 19 August 2009 and terminate the contract.
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> 60. By reason of the matters pleaded in this defence, any loss and damage arising from the termination of the contract by [the purchaser] was caused by HIE's breach of its obligations under section 121(1), … [its] implied obligation to act reasonably under the contract, and its duty to act with reasonable care in exercising its rights with respect to approval of the assignment."

[16] Paragraph 60 appears to identify three suggested bases for HIE's liability to the plaintiff. The first is a breach of what is said to have been its *obligations* under s 121(1). The second is an "implied obligation to act reasonably under the contract", being the contract constituted by the sub-lease. The third is a common law duty of care.

[17] Section 121(1) is not in terms which impose an obligation on the lessor. Instead the effect of the proviso is, as I said in *Boss*, to entitle a lessee to assign without consent unless the withholding of the consent has been reasonable.[6] On the pleaded facts and according to the judgments in *Boss*, HIE withheld its consent unreasonably in the present case by insisting upon the deed being executed. Consequently, the present plaintiff was able to assign the sub-lease without HIE's consent and without breaching the covenant in cl 2.12.1 of the sub-lease.[7] But that did not affect the operation of the term of the plaintiff's contract of sale, which entitled the purchaser to terminate if HIE withheld its consent.

[18] In Boss, Fraser JA cited *Treloar v Bigge*,[8] where a lessee covenanted not to assign without the lessor's consent but with the proviso that the consent was not to be "arbitrarily withheld". Amphlett B there said:[9]

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5 Pleaded in substantially the same terms in para 64 of the proposed Further Amended Statement of Claim.
6 [2008] QSC 274, 14 [45].
7 *Boss v Hamilton Island Enterprises Ltd* (2010) 2 Qd R 115, 132 [23]; [2009] QCA 229, 8 [23].
8 (1873-74) LR 9 Exch 151.
9 Ibid 156.

> "The first question in this case is whether the lessee has any right of action on the covenant … and I am of the opinion that he has not. It may be that the words themselves might, if it were necessary to carry out the intention of the parties, be sufficient to raise a covenant by implication in the lessor. But no such obligation ought to be implied if the true intention of the parties can be carried out by adopting a literal and natural construction. … I think they ought to be construed as a qualification on the covenant of the lessee. That covenant is in derogation of his common law rights, and it is more convenient and reasonable to hold that the words were introduced to limit the generality of the covenant than to hold them to impose an obligation on the lessor. The true interpretation of the words, I think, is to release the plaintiff from his covenant not to assign without the plaintiff's assent, if that assent is arbitrarily withheld."

Similarly, in *Ideal Film Renting Company Ltd v Nielsen*,[10] Eve J said:

> "It is established beyond controversy that if the covenant on the part of the lessee not to assign without consent is merely qualified by a proviso that the consent of the lessor is not to be unreasonably withheld, there is no implied covenant by the lessor that he will not unreasonably withhold his consent, and in the absence of an express covenant to that effect no action will lie against him for unreasonably withholding it. But even so the lessee is not left wholly without remedy, for if in fact the consent is unreasonably withheld he can effectually assign without consent."

After a consideration of those and other cases, in *Yared v Spier*,[11] Waddell J said:

> "It seems to me that it has been taken to be settled law for many years that, in the absence of an express covenant by a lessor not to refuse his consent, provisos of the kind under discussion have been regarded as not exposing him to any liability in damages for such a refusal. … Accordingly, the plaintiff has not established that the defendants have any liability under the lease for the alleged wrongful refusal on their part to consent to the proposed sub-lease … ."

[19] The first of the bases pleaded in para 60 could not be upheld. The second is "the implied obligation to act reasonably under the contract". That obligation is also said to derive from s 121(1). Paragraph 49(f) of the Amended Defence[12] pleads that:

> "(f) Section 121(1) of the *Property Law Act* 1974 (Qld):
>
> (i) …
>
> (ii) had the effect of implying as a term of the Sublease an obligation on HIE to act reasonably in making a decision about whether or not to withhold consent to the assignment …"

The difference between this second basis and the first seems to be that the first involved a statutory obligation (to act reasonably) and the second, an implied contractual

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[10] [1921] 1 Ch 575, 581-582.
[11] [1979] 2 NSWLR 291, 297-298.
[12] Substantially reproduced in para 60(e)(ii) of the proposed Further Amended Statement of Claim.

obligation. But as the contractual implication is said to derive from s 121(1), it cannot be accepted. There could be no justification in implying a term as a result of s 121(1) which does not correspond with the effect of s 121(1). Again, the authorities to which I have referred demonstrate that that is not the effect of s 121(1) upon its proper interpretation.

[20] The third suggested basis for HIE's liability is a common law duty of care. This is also said to be the result of s 121(1). In the Amended Defence, it is alleged that the section:

> "(iii) had the effect of creating an obligation to act towards any lessee exercising reasonable care in the exercise of any decision as to consent or otherwise to assignment of the lease."[13]

Again the plea is inconsistent with the proper interpretation of s 121(1). The section qualifies the covenants in cl 2.12 of the sub-lease. If the lessor acts unreasonably in withholding consent, the lessee may assign without it. With that operation of s 121(1), there is no warrant for the imposition of a common law duty of care upon the lessor. The proviso in s 121(1) has the result that ordinarily no loss would be suffered by a lessee from the unreasonable withholding of the lessor's consent. Secondly, the content of this alleged duty of care, although not itself pleaded, would be different from the reasonableness which is stipulated by the proviso in s 121(1). It would involve a duty to exercise *care* and to the end of avoiding a loss to the plaintiff. The proviso in s 121(1) refers to reasonableness in the operation of the parties' contract rather than to what should be done by one party to protect the other from the risk of a foreseeable loss. Consequently, this third basis of liability to the plaintiff could not be upheld.

[21] Clause 2.12.2 was a covenant by the sub-lessor not to arbitrarily or capriciously withhold its consent if there existed the combination of circumstances set out in that clause. One of them was that the proposed assignee had signed a deed of covenant in a form required by the sub-lessor. However, there is no plea that in breach of this covenant, HIE arbitrarily or capriciously withheld its consent. The apparent explanation is that the deed which the purchaser was required to execute went far beyond an agreement to be bound by the terms of the sub-lease, as the judgments in *Boss* explained.

[22] At the hearing, counsel for the present defendant made no submission in support of its pleaded cases against HIE and Beazley Singleton. Instead, he suggested that I should first determine whether the plaintiff's application to join those parties as defendants should succeed. I ruled that he should make any submissions in support of his client's pleading against these parties before I determined the plaintiff's application to join them. He agreed to make those submissions, if any, by a written submission to be delivered after the hearing. However, that document, like the original written submissions for the defendant, made no argument for the merits of the pleaded cases against either Beazley Singleton or HIE.

[23] In my conclusion, the pleaded bases for HIE's liability to the plaintiff are wrong in law. HIE was not a concurrent wrongdoer for the purposes of the proportionate liability provisions of the *Civil Liability Act* 2003 and the liability of the present defendant (if any) to the plaintiff is not to be limited according to the conduct of HIE pleaded in paras 48 through 60 of the Amended Defence.

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[13] Amended Defence para 49(f)(iii).

[24] Consequently, the replication of that case by the joinder of HIE as a defendant to the plaintiff's claim should not be permitted. The application to join HIE as a defendant must be refused. The defendant conceded that in that event, paras 48 through 60 of its Amended Defence should be struck out.[14]

The case against Beazley Singleton

[25] The Amended Defence pleads that, in effect, this firm was constituted by Mr Beazley, who was retained by the plaintiff "on or around 31 August 2009". The plaintiff's proceeding against its purchaser was commenced on 27 August 2009.

[26] According to para 37 of the Amended Defence, Mr Beazley was retained by the plaintiff "to act for it in relation to the refusal by [the purchaser] to proceed with the purchase", work which included:

(a) the provision of advice and assistance in relation to that refusal "and matters arising from that refusal";

(b) the provision of advice and assistance in relation to the plaintiff's proceeding "brought (or to be brought)" against the purchaser;

(c) the provision of advice and assistance "in respect of the conduct of the Proceeding";

(d) the provision of advice with respect to a settlement with the purchaser;

(e) acting "along with the defendant, on behalf of the plaintiff at the mediation of the Proceeding".

By para 38, it is pleaded that Mr Beazley assumed the conduct of the proceeding in place of the defendant on or around 18 October 2010. Those allegations are substantially reproduced in paras 47 and 48 of the proposed Further Amended Statement of Claim.

[27] Paragraph 40 of the Amended Defence pleads a number of omissions by Mr Beazley in that he did not advise:

(a) the plaintiff not to serve the claim and statement of claim;

(b) that its case against the purchaser was not strong;

(c) that he considered that the defendant's advice in respect of the proceeding to be in error;

(d) that there were risks in the proceeding;

(e) that the decision in *Boss* at first instance or on appeal had implications for the proceeding;

(f) that the plaintiff should bring the proceeding to an end;

(g) that the plaintiff should seek to settle the proceeding;

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[14] Supplementary submissions for HIE, para 3.

(h) that the plaintiff should accept any offer made by the purchaser to settle the proceeding.[15]

[28] It is alleged that by a letter dated 28 August 2009 from its solicitor, the purchaser offered to settle on the basis that it would be refunded its deposit and the contract would be treated as validly terminated. It is alleged that that offer was discussed by Mrs Seidler for the plaintiff with Mr Beazley "on or around 31 August and/or 1 September 2009" and that at no time did Mr Beazley advise that the offer should be accepted. A further offer by the purchaser, made in December 2009, is alleged to have been rejected on the advice of Mr Beazley. It is further alleged that in April 2011, the purchaser offered to settle on certain terms which were rejected on Mr Beazley's advice.

[29] In para 47 of the Amended Defence, it is further alleged that:

> "(a) Mr Beazley failed to conduct the proceedings on behalf of the plaintiff with reasonable care and diligence with the result that interlocutory costs orders were made against the plaintiff on 19 June 2011, 29 September 2011 and 22 November 2011 as referred to in para 29(f)(i) of this defence;
>
> (b) Such failure was in breach of Mr Beazley's duty of care and resulted in the plaintiff sustaining loss and damage by reason that had there been no such dilatory conduct, no such costs orders would have been made."[16]

[30] The argument for Mr Beazley is that the plaintiff's claim against him, replicating as it does the present defendant's pleading, cannot succeed because, as a lawyer giving advice leading to a decision or decisions affecting the conduct of a case in court, or performing work which is intimately connected with the conduct of a case in court, he is immune from suit for negligence or otherwise: *D'Orta-Ekenaike v Victoria Legal Aid*.[17] The immunity is enjoyed not only by a legal practitioner acting as an advocate but also by a lawyer who gives advice which leads to a decision which affects the conduct of a case in court.[18] The immunity applies not only to acts but also to omissions affecting the conduct of the case in court.[19] For example, the claim against the respondent barristers in *Giannarelli v Wraith*[20] was for negligent omissions.[21]

[31] For the plaintiff, it was submitted that the law is unclear as to the existence of the immunity in the context of advice about the settlement of a proceeding. Reference was made to the statement of McHugh J in *D'Orta*[22] that "it is possible to sue a practitioner for the negligent settlement of proceedings …". The argument also referred to *Alpine Holdings Pty Ltd v Feinauer*[23] where Steytler P and Newnes AJA said:

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15 Substantially reproduced in para 49 of the proposed Further Amended Statement of Claim.
16 Reproduced in para 58 of the proposed Further Amended Statement of Claim.
17 (2005) 223 CLR 1; [2005] HCA 12.
18 Ibid 32 [91] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
19 Ibid 31 [87].
20 (1988) 165 CLR 543.
21 See also *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585, 589 [9] (Giles JA); *Donnellan v Woodland* [2012] NSWCA 433, 77 [198] (Beazley JA with whom Hoeben JA and Sackville JA agreed); *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335, 15 [25] (Bathurst CJ with whom Meagher and Ward JJA agreed).
22 (2005) 223 CLR 1, 56 [166].
23 [2008] WASCA 85.

> "Having regard to the present state of the authorities, we do not consider it can be said with confidence where the line is to be drawn as to the application of the immunity in relation to advice given in connection with the settlement of legal proceedings. That is perhaps not surprising. As Priestley JA observed in *Keefe v Marks*, the rule in relation to out of court work is a relative one and the degree of connection is a matter of assessment. Hard and fast distinctions are therefore likely to be elusive."

Their Honours considered that it was sufficiently arguable that a claim against a solicitor, who advised the rejection of a settlement offer was not within the immunity, that the claim should not be summarily dismissed.

[32] The plaintiff's argument also referred to *Symonds v Vass*.[24] Giles JA there expressed doubt as to the application of the immunity where the relevant proceeding had been compromised rather than determined by the court, having regard to what the plurality in *D'Orta*[25] said was the central justification for the immunity, namely "the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances [this being] a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society".

[33] However, subsequent judgments in the New South Wales Court of Appeal have held that the immunity applies to advice resulting in a settlement: *Donnellan v Woodland*;[26] *Jackson Lalic Lawyers Pty Ltd v Attwells*,[27] *Kendirjian v Lepore*.[28] In that last case, Macfarlan JA said that both formulations of the immunity principle, namely that it applies to "work done out of court which leads to a decision affecting the conduct of the case in court" and to "work intimately connected with" work in a court, "sufficiently cover cases … where the alleged negligence was the failure to advise properly in relation to acceptance of a settlement which led to a plaintiff continuing with court proceedings, in particular where a court hearing was in progress".[29]

[34] In the present case, it is alleged that Beazley Singleton failed to advise the plaintiff to settle with the purchaser, as a result of which the proceeding was prosecuted to a judicial determination. That is work which affected the conduct of the case in court, according to what is pleaded. As Beazley JA (as she then was) said in *Donnellan v Woodland*:[30]

> "If the giving of advice, or the omission to give advice, led to a decision to continue with the case, or meant that the case was continued because of that omission, such conduct would lead to a decision affecting the conduct of the case in court, namely, its continuance by way of full argument before a judge."

[35] Although the immunity has its central justification in the principle of finality of the judicial resolution of controversies, its application is not dependent upon that principle

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[24] (2009) 257 ALR 689; [2009] NSWCA 139.
[25] (2005) 223 CLR 1 at 20 [45].
[26] [2012] NSWCA 433, 85-88 [223]-[233].
[27] [2014] NSWCA 335, 18-19 [36]-[39]; see also *Biggar v McLeod* [1978] 2 NZLR 9, 12, 13; *Chamberlain v Ormsby t/as Ormsby Flower* [2005] NSWCA 454 [120].
[28] [2015] NSWCA 132.
[29] [2015] NSWCA 132 [47].
[30] [2012] NSWCA 433, 77 [198].

being offended in the particular case: *Attard v James Legal Pty Ltd*;[31] *Day v Rogers*;[32] *Donnellan v Woodland*[33] and *Kendirjian v Lepore*.[34]

[36] The plaintiff's submissions emphasised the need for the case to be clearly devoid of merit for it to be summarily struck out or, in this case, for the joinder of a proposed defendant to be refused. It is common ground that the exercise of the court's powers in these applications is to be according to the test expressed in *General Steel Industries Inc v Commissioner for Railways (NSW)*.[35] However, where the boundaries of the case are clearly defined by the relevant pleading, and the immunity would apply if the pleaded facts were established, there is no good reason to allow that case to be litigated. For these reasons I am persuaded that the plaintiff's application to join Beazley Singleton must be refused.

[37] The next question is whether, in that event, the defence which pleads concurrent wrongdoing by Beazley Singleton should be struck out. By his supplementary written submission, counsel for the defendant opposed that application, arguing that although Beazley Singleton was immune from suit by the plaintiff, it was nevertheless a concurrent wrongdoer for the purposes of the proportionate liability provisions of the *Civil Liability Act*. That argument is supported by the obiter dicta of Schmidt J in *Bird v Ford*.[36] In that case, after an unsuccessful suit by the plaintiff, she sued her solicitor in that case, complaining that he should have advised that she had no case and that her proceedings were misconceived. After a trial, Schmidt J dismissed her proceeding against her former solicitor holding that there had been no negligence or other breach of duty. Her Honour found also that none of the alleged negligence could have caused the loss and damage of which the plaintiff complained. There were two relevant retainers: one in which the defendant gave initial advice to the plaintiff before the commencement of the unsuccessful proceedings and the second in relation to the litigation of that case. Schmidt J found that the defendant solicitor was immune from suit in respect of the second retainer.

[38] The defendant had pleaded, in the alternative, that the counsel whom he had briefed in the unsuccessful litigation was a concurrent wrongdoer and that at the highest for the plaintiff, the defendant solicitor was only partly responsible for her loss. The plaintiff's case disputed that there was any wrongdoing by the barrister. Schmidt J considered the question of whether the immunity would apply to the barrister's work was relevant to the solicitor's defence that his liability (if any) should be apportioned under the equivalent New South Wales provisions. In this context, Schmidt J reasoned as follows:

> "254 It follows, as was submitted for Mr Ford, that the question of any immunity which applies to Mr Davidson's work is not relevant to this apportionment claim. It is the extent of a defendant's responsibility for the damage or loss in question, which dictates the judgment which may be given against that defendant. Under s 35(1)(b), judgment may not be given against a defendant for more than that amount, irrespective of

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31 (2010) 80 ACSR 585; NSWCA 311 [22]-[28].
32 [2011] NSWCA 124, 45 [132] (Giles JA with whom Allsop P and Sackville AJA agreed).
33 [2012] NSWCA 433 80-81 [207], [208], [212].
34 [2015] NSWCA 132 [41]-[42], [54].
35 (1964) 112 CLR 125, 128-129 (Barwick CJ).
36 [2013] NSWSC 264.

whether or not the plaintiffs could recover the balance from a concurrent wrongdoer.

255 That the plaintiffs accept that they could not recover anything from Mr Davidson, given the immunity which applies to his work, cannot preclude s 35 being given effect.

256 I do not consider that any negligence has been established on Mr Ford's part and that the immunity which the plaintiffs concede applied to Mr Davidson's work, also applied to that performed under the second retainer by Mr Ford. If those conclusions be wrong, then in respect of the work performed under the second retainer, the question of Mr Davidson's proportionate liability would arise.

257 The plaintiffs' case was that Mr Davidson was not a concurrent wrongdoer. I agree, because I consider that neither Mr Ford nor Mr Davidson were negligent. On the evidence, if that view be wrong, it would follow that Mr Davidson, who held similar views to those of Mr Ford and gave the plaintiffs' similar advice, namely, that while the litigation proposed was arguable, counselling against its pursuit and urging settlement, must have also been negligent in giving that advice."

[39] I respectfully differ from that view for the following reasons.

[40] In a proceeding involving "an apportionable claim", the liability of a defendant who is "a concurrent wrongdoer in relation to the claim" is limited to an amount reflecting that proportion of the loss or damage claimed which the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage: s 31(1)(a) of the *Civil Liability Act* 2003 (Qld). The term "apportionable claim" is defined in s 28 and relevantly includes "a claim for economic loss … in an action for damages arising from a breach of a duty of care …".[37] It is common ground that the plaintiff's claim against the present defendant is an apportionable claim. But is the present defendant a concurrent wrongdoer in relation to that claim?

[41] Section 30 defines a "concurrent wrongdoer" as follows:

"30 Who is a concurrent wrongdoer

(1) A concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.

(2) For this part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died."

[42] For present purposes it may be assumed that the defendant was a wrongdoer whose acts or omissions caused the loss or damage that is the subject of the apportionable claim. Was Beazley Singleton also a concurrent wrongdoer? Did its acts or omissions also cause that loss or damage?

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[37] s 28(1)(a).

[43] Section 30(2) provides that it does not matter that a concurrent wrongdoer is insolvent, has been wound up, has ceased to exist or has died. But nor does it matter, the present defendant argues, that a (suggested) concurrent wrongdoer is not and has never been liable in relation to the claim. That argument encounters several obstacles in the language of relevant provisions of the Act.

[44] The first is the difficulty in characterising as a "wrongdoer" a person whose acts or omissions could not found a relevant legal responsibility.

[45] The second is in the requirement that the wrongdoer's acts or omissions must have *caused* the loss or damage that is the subject of the claim. In a sense, many persons might do or not do things which cause in fact relevant loss or damage, according to a simply "but for" test. But as French CJ, Hayne and Kiefel JJ said in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*:[38]

> "The word 'caused', in a statutory provision in terms similar to [s 30(1)] has been read as connoting the legal liability of a wrongdoer to the plaintiff[39]… [and] it would usually be the case that a person who is found to have caused another's loss or damage is liable for it."

[46] Thirdly, by s 31(1)(a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited, as the court considers just and equitable, having regard to the extent of the defendant's *responsibility* for the loss or damage. And in apportioning responsibility between defendants in a proceeding, the court may have regard to the *comparative responsibility* of any concurrent wrongdoer who is not a party to the proceeding. Thus a concurrent wrongdoer, whether a defendant or not, is a person with some responsibility for the loss or damage. The extent of a wrongdoer's responsibility must be assessed in comparison with that of the other wrongdoer or wrongdoers. In *Hunt & Hunt Lawyers*, French CJ, Hayne and Kiefel JJ described the value judgments to be employed in that exercise of comparison.[40] But the notion that there could be a responsibility for the loss or damage, which is not a legal responsibility but which could be assessed and compared as required by s 31, is problematical at least.

[47] Fourthly, s 32(1) requires a claimant who makes a claim to which this part applies to make the claim against all persons the claimant has reasonable grounds to believe may be *liable* for the loss or damage.

[48] In my view, a person who was at no time liable for the loss or damage that is the subject of a claim could not be a concurrent wrongdoer for the purpose of Part 2 of Chapter 2 of the *Civil Liability Act*. Consequently, Beazley Singleton was not a concurrent wrongdoer and therefore nor was the present defendant. There is a further reason, however, for reaching that conclusion. A finding that a person was a concurrent wrongdoer would require at least a finding of some wrongdoing by that person. Where the alleged wrongdoing involves the conduct of a case in court or advice affecting that conduct, the litigation of the question of whether there was "wrongdoing" by the lawyer would offend the principle of finality in the resolution of controversies, just as would a claim against that lawyer as a defendant. This consideration provides a good reason for interpreting the

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38 (2013) 247 CLR 613, 635 [47].
39 *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510, 523 [62].
40 (2013) 247 CLR 613, 637 [57].

word "wrongdoer" to at least exclude the specific instance of a lawyer who is immune from suit for the relevant work.

[49] The question then is whether I should strike out those parts of the Amended Defence which plead that Beazley Singleton is a concurrent wrongdoer. The law on the question of the position of a lawyer, who is immune from suit, for the purposes of the proportionate liability provisions is not yet settled. That might suggest that the Amended Defence should stand, so that the facts could be found in case my conclusion on that legal question is incorrect.

[50] In this case, the inclusion of the Beazley Singleton case within the defendant's case should not carry the risk of a challenge to the correctness in the judgment between the plaintiff and its purchaser. The plaintiff's case is that its claim against the purchaser was correctly dismissed. The defendant's pleadings about Beazley Singleton are upon the same premise. As I have said, it is well established that this would not affect the immunity from suit which is enjoyed by Beazley Singleton. But it can be at least said, in favour of not striking out the Beazley Singleton case, that its presence would involve the mischief of a challenge to the correctness of the earlier judgment.

[51] But assuming that the trial judge finds that there were omissions by Beazley Singleton as pleaded in the Amended Defence, how would the respective responsibilities (for the loss or damage) of the defendant and Beazley Singleton be compared when only one of them was a legal responsibility? By this part of the Amended Defence being allowed to stand, the trial judge would be given a task which, in my view, is far from clear. The inclusion of the Beazley Singleton case would no doubt increase the expense of the preparation for and the conduct of the trial. In my view, that would have no utility.

[52] In my conclusion, this part of the Amended Defence must be struck out. Therefore, paras 35 through 47 of the Amended Defence will be struck out.