Court of Appeal
Supreme Court

New South Wales

Case Name:	Zervas v Burkitt (No 2)
Medium Neutral Citation:	[2019] NSWCA 236
Hearing Date(s):	10 September 2019
Date of Orders:	26 September 2019
Decision Date:	26 September 2019
Before:	Bell P at [1]; Macfarlan JA at [73]; McCallum JA at [74]
Decision:	1. Appeal be allowed in part. 2. Order 1 of the orders made by Levy SC DCJ on 2 November 2018 be varied so as to delete the reference to the second defendant. 3. Order a verdict and judgment for the plaintiff against the second defendant in the sum of $119,135.96. 4. Order 3 of the orders made by Levy SC DCJ on 2 November 2018 be set aside and in lieu thereof order that the first and second defendants are jointly and severally liable to pay the plaintiff's costs of the proceedings at first instance on the ordinary basis. 5. The appellant pay 80% of the cost of the appeal.
Catchwords:	APPEAL – Misleading or deceptive conduct – accessorial liability – representation as to future conduct – determination of liability where applicant held liable for causes of action not pleaded against him – whether failure to accept offer of insurance was a failure to mitigate loss – apportionment of liability – variation of costs orders – joint and several liability

Legislation Cited:	Civil Liability Act 2002 (NSW) Pt 4, s 34 Competition and Consumer Act 2010 (Cth) Pt VIA, s 87CB; Pt XI, s 131; s 140, Sch 2 Australian Consumer Law ss 1, 18, 236 Fair Trading Act 1987 (NSW) ss 28, 32
Cases Cited:	ACCC v Michigan Group Pty Ltd [2002] FCA 1439 Central Darling Shire Council v Greeney [2015] NSWCA 51 Ghunaim v Bart [2004] NSWCA 28; (2004) Aust Tort Reports 81-731 Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; [2013] HCA 10 LM Investment Management Limited (In Liquidation) (Receivers appointed) v BMT & Assoc Pty Limited [2015] NSWSC 1902 Mikaera v Newman Transport Pty Ltd [2013] NSWCA 464; 65 MVR 578 Nominal Defendant v Bacon [2014] NSWCA 275; 67 MVR 425 Nominal Defendant v Green [2013] NSWCA 219; 64 MVR 354 Porges v Adcock Private Equity Pty Ltd [2019] NSWCA 79
Category:	Principal judgment
Parties:	Fotis Zervas (Appellant) Miles Burkitt (First Respondent) Michael Amro (Second Respondent) Ultimate Car Rentals Australia Pty Limited (In Liq) (Third Respondent)
Representation:	Counsel: T Castle and D Edney (Appellant) C P O'Neill (First Respondent) Solicitors: J Kartsounis & Co Solicitors (Appellant) Hicksons Lawyers (First Respondent)
File Number(s):	2018/367709
Publication Restriction:	N/A

Decision under appeal:

Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Civil
Citation:	[2018] NSWDC 328
Date of Decision:	2 November 2018
Before:	Levy SC DCJ
File Number(s):	2016/194972

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Mr Fotis Zervas, the appellant, was the second of three defendants in proceedings brought in the District Court of New South Wales by Dr Miles Burkitt, the respondent to the appeal. The proceedings arose out of the crash of Dr Burkitt's 2006 F430 Spider Ferrari motor vehicle (**the Vehicle**) in circumstances where it had been sub-bailed by the first defendant, Ultimate Car Rentals Australia Pty Limited (**UCRA**) to the third defendant, Mr Michael Amro, who owned a panel and paint shop in Melbourne and crashed the Vehicle whilst "joy riding" it in Melbourne. UCRA, of which Mr Zervas was the sole director, had entered into a Vehicle Management Agreement with Dr Burkitt to rent out the Vehicle in return for a minimum monthly payment and a 50% share of net profits derived from any 24 hour rental of the Vehicle.

UCRA was sued in contract, bailment and for misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law* (**ACL**). Mr Zervas was only sued for accessorial liability in relation to the alleged contravention of s 18 of the ACL, in circumstances where he had made representations to Dr Burkitt

on behalf of UCRA that the Vehicle would be insured by a reputable insurance provider for damage due to fire, theft or any other reasonable losses that occurred to the Vehicle while the Vehicle was in the care, custody and control of UCRA. However, notwithstanding the confined nature of the case against Mr Zervas, the primary judge held him liable in contract, bailment and directly liable under s 18 of the ACL, being causes of action not having been pleaded or run against him. Additionally, the primary judge did not make any findings on the accessorial liability pleaded against Mr Zervas. Mr Zervas lodged an appeal to the Court of Appeal. Dr Burkitt filed a notice of contention seeking to support the judgment against Mr Zervas on the basis of knowing involvement in misleading or deceptive conduct.

The issues on appeal were:

1. In circumstances where the primary judge erroneously held Mr Zervas liable for causes of action not pleaded against him, whether the judgment against Mr Zervas should nevertheless be upheld on the basis that he should have been held liable for accessorial liability in relation to a contravention by UCRA of s 18 of the ACL;

2. Whether the primary judge had erred in assessing damages by failing to reduce the value of the damages claim in respect of the Vehicle by the amount of an insurance settlement offer made to Dr Burkitt.

The issues on cross-appeal were:

3. Whether the primary judge erred in finding that Mr Zervas was a concurrent wrongdoer, with the result that UCRA and Mr Zervas remained jointly and severally liable to the respondent;

4. Whether the primary judge erred in law by applying s 34 of the *Civil Liability Act 2002* (NSW) (**CL Act**) to the award of damages for breach of the ACL;

5. Whether the primary judge erred in allocating responsibility 50:50 as between UCRA and Mr Zervas, on the one hand, and Mr Amro on the other hand;

6. Whether the primary judge erred in allocating costs as between UCRA and Mr Zervas, on the one hand, and Mr Amro on the other hand.

The Court held (Bell P, Macfarlan and McCallum JJA agreeing), partly allowing the appeal:

Per Bell P (Macfarlan and McCallum JJA agreeing)

1. The primary judge erred in holding Mr Zervas liable in contract, bailment and for contravention of s 18 of the ACL. None of the matters for which Mr Zervas was found liable was the subject of any pleading against him. The primary judge further erred in not making any findings on the accessorial liability case pleaded against Mr Zervas: [8]-[11] (Bell P); [73] (Macfarlan JA); [74] (McCallum JA).

2. In light of the fact that the primary judge held that UCRA represented that the Vehicle would be fully covered by comprehensive insurance arranged by UCRA and Mr Zervas whilst bailed, Mr Zervas did not have reasonable grounds for making this representation as he knew that UCRA did not itself intend to take out or arrange insurance. As Mr Zervas was the mind and manifestation of UCRA, this lack of intention was known to Mr Zervas, and thus the primary judge ought to have held that he was knowingly involved in misleading and deceptive conduct on the part of UCRA: [12]-[30] (Bell P); [73] (Macfarlan JA); [74] (McCallum JA).

3. As to the argument that damages should have been reduced because of the failure to accept an offer of settlement, the evidence did not support the fact that, on the balance of probabilities, an insurance offer capable of acceptance by Dr Burkitt was ever made. Even if such an offer had been made, Mr Zervas failed to demonstrate that the offer was unreasonably rejected by Dr Burkitt: [31]-[45] (Bell P); [73] (Macfarlan JA); [74] (McCallum JA).

4. The primary judge did not sever liability as between UCRA and Mr Zervas but, rather, held these two parties, on the one hand, to be jointly and severally liable for 50% of the damage to the Vehicle, and Mr Amro to be 50% liable: [49]-[50] (Bell P); [73] (Macfarlan JA); [74] (McCallum JA).

5. There was no error in applying s 34 of the CL Act. Any liability that Mr Zervas had in the present case was a liability under s 236 of the ACL (NSW) and not the ACL (Cth). As such, the proportionate liability regime under Part 4

of the CL Act applied to make the claim against Mr Zervas an apportionable claim under the CL Act: [51]-[60] (Bell P); [73] (Macfarlan JA); [74] (McCallum JA).

6. The apportionment of responsibility involves a value judgment, and it was open to the primary judge to apportion responsibility in the way he did: [61]-[63] (Bell P); [73] (Macfarlan JA); [74] (McCallum JA).

7. The costs order made at first instance should be varied, so that UCRA and Mr Zervas should be made jointly and severally liable for the costs at first instance on the ordinary basis: [64]-[68] (Bell P); [73] (Macfarlan JA); [74] (McCallum JA).

JUDGMENT

1 **BELL P:** The appellant, Mr Fotis Zervas, was the second of three defendants in proceedings brought in the District Court of New South Wales by Dr Miles Burkitt who is the respondent to this appeal. The first defendant in the proceedings at first instance, Ultimate Car Rentals Australia Pty Limited (**UCRA**), is now in liquidation, having gone into liquidation in the course of the hearing at first instance. The third defendant to the proceedings at first instance, Mr Michael Amro, did not participate in the proceedings at first instance nor on appeal.

2 The proceedings arose out of the crash of Dr Burkitt's 2006 F430 Spider Ferrari motor vehicle (**the Vehicle**) in circumstances where it had been sub-bailed by UCRA to Mr Amro who owned a panel and paint shop in Melbourne known as Universal Kustoms.

3 UCRA, of which Mr Zervas was the sole director, was sued in contract, bailment and for misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law* (**ACL**). It had entered into a Vehicle Management Agreement (**VMA**) with Dr Burkitt to rent out the Vehicle in return for a minimum monthly payment of $2,500 and a 50% share of net profits derived from any 24 hour rental of the Vehicle.

4 The VMA was executed in July 2015 (shortly after the crash) but backdated to 2 May 2015, the day on which Dr Burkitt delivered the Vehicle together with

another one of his cars to UCRA's showroom in Sydney. They were subsequently transported to Melbourne where the primary judge held UCRA had a branch office and where it was thought that the two vehicles would have a better prospect of being rented out.

5 Before the Vehicle could be rented out in Melbourne, however, Dr Burkitt was told that it would need to undergo some minor repairs, detailing and also be repainted to touch up some scratches. It was in this context that the Vehicle came into the possession of Mr Amro who crashed it whilst evidently "joy riding" it in Melbourne in the company of a 16 year old girl. The primary judge unsurprisingly found that Mr Amro was liable in negligence.

6 Mr Zervas was only sued for accessorial liability in relation to the alleged contravention of s 18 of the ACL by UCRA. The representation founding the misleading and deceptive conduct claim was that, in conversations at UCRA's premises in Sydney on or about 2 May 2015 and at UCRA's showroom in Melbourne in or about early June 2015, UCRA, through Mr Zervas, had represented to Dr Burkitt:

> "[t]hat the Vehicle would be insured by a reputable insurance provider for damage due to fire, theft or any other reasonable losses that occur to the Vehicle while the Vehicle was in the care, custody and control of the defendant".

7 The primary judge held at [27] of his judgment, in a finding not challenged by Mr Zervas, that at the time of the bailment of the Vehicle to UCRA on 2 May 2015, Dr Burkitt was:

> "concerned, and insistent about, and had obtained reassurance from [UCRA and Mr Zervas], in the form of oral confirmation by [Mr Zervas], that his vehicles would be fully covered by comprehensive insurance arranged by [UCRA and Mr Zervas] whilst bailed, including insurance cover for any occasions when the vehicles were not hired out, and were otherwise available for him to drive as the owner."

Clear errors

8 Notwithstanding the confined nature of the case against Mr Zervas, namely one confined to accessorial liability, the primary judge held him liable in contract, bailment and directly liable under s 18 of the ACL.

9 None of the matters for which Mr Zervas was found liable was the subject of the pleading against him and counsel for Dr Burkitt, who appeared both at first

instance and on appeal, candidly accepted that he did not ever seek that Mr Zervas be found liable in contract, bailment or for direct, i.e. non-accessorial, liability under the ACL. That this was, to say the least, regrettable is an understatement.

10 Another consequence of the approach adopted by the primary judge was that he did not make any findings on the accessorial liability case pleaded against Mr Zervas.

11 Counsel for Dr Burkitt was, quite properly, constrained to accept that the appeal was bound to succeed insofar as Mr Zervas had been found liable at first instance for causes of action which had not been pleaded or run against him.

Notice of contention

12 Counsel for Dr Burkitt, faced with the clear errors made by the primary judge, relied upon a notice of contention in which he sought to uphold the primary judge's finding against Mr Zervas on the basis that he should have been held liable for the sole case that had in fact been pleaded against him, namely one of accessorial liability under the ACL.

13 In considering the notice of contention, this Court's task is made difficult by the fact that, insofar as the primary judge found that both Mr Zervas and UCRA had contravened s 18 of the ACL and, as such made a finding as to what representation had in fact been made, his Honour's finding in at least part of his judgment departed from the pleaded case of misleading or deceptive conduct in a material respect.

14 I have already referred to and set out the pleaded representation in [6] above. Despite the use of the phrase "would be" in the pleading and indeed in his finding in [27] of the judgment set out at [7] above, the primary judge appeared, in a critical passage in another part of his judgment, to treat the representation as that UCRA *had existing insurance cover* for the Vehicle and concluded that, as this was not the case, the representation was false and misleading. Thus, at [125]−[129] of his judgment, the primary judge said:

> "125. I find that the bailment of the plaintiff's vehicle to [UCRA and Mr Zervas], and the statements in the form of representations made orally to the

plaintiff on behalf of [UCRA] by [Mr Zervas], to the effect that the vehicle *was* or would be covered by insurance, comprised conduct in the course of trade or commerce: s 18(1) of the ACL.

126. I find that the cited statements *as to the existence of insurance cover* for the vehicle were untrue in circumstances where [UCRA and Mr Zervas] knew that such statements were untrue. I accept that the plaintiff had repeatedly asked [UCRA and Mr Zervas] for proof of the existence of that insurance, and [UCRA and Mr Zervas] continued to be unable to do so.

127. In my opinion, in that regard, the cited statements by [UCRA and Mr Zervas] concerning insurance, comprised conduct that was misleading, deceptive and likely to mislead or deceive: s 18(1) of the ACL.

128. I find that those misleading and deceptive statements constituted material inducements that led the plaintiff to rely on them and to enter into the bailment contract with [UCRA and Mr Zervas].

129. I find that at that time, [UCRA and Mr Zervas] knew that the represented insurance cover *did not exist*, and could not have been effected within the business model that was maintained by those defendants." (emphasis added).

15 The difficulty with the portions of these paragraphs that I have emphasised and the conclusions they contain, including conclusions tantamount to a finding of fraud, is that they are expressed in terms which depart from the misleading or deceptive conduct case pleaded in the Amended Statement of Claim (**ASOC**). They are also inconsistent with the finding made at [27] of the judgment which is reproduced at [7] above.

16 The representation as pleaded was undoubtedly one as to a future matter, and whether or not such a representation is misleading or deceptive depends upon whether or not the representor had reasonable grounds for making it at the time it was made. If reasonable grounds existed, the statement will not have been misleading or deceptive.

17 In *ACCC v Michigan Group Pty Ltd* [2002] FCA 1439, Dowsett J observed at [303] that:

"It is quite possible that the act of a natural person respondent on behalf of a corporation will constitute a contravention of the [*Trade Practices Act 1974* (Cth)] by that corporation, and yet the natural person respondent will be found not to have been knowingly concerned in that contravention. In the case of representations as to existing facts, this is because it is not necessary to show that the respondent corporation knew of the misleading nature of the statement in question, but knowing involvement predicates such knowledge on the part of the relevant natural person. The matter is even more complex in the case of representations as to future matters. A representation on behalf of a corporation will constitute a contravention if the corporation fails to show reasonable grounds for it. However a natural person respondent bears no onus of proof. It will be necessary for [the Australian Competition and

> Consumer Commission] to demonstrate that such a person knew that the representation was made; and either: knew that it was misleading; or knew that the corporation had no reasonable grounds for it."

18 Accordingly, it is necessary for the purposes of the notice of contention to address whether or not Dr Burkitt can establish, on the balance of probabilities, that Mr Zervas knew that the representation by UCRA on 2 May 2015 that the Vehicle *would be* insured was misleading or knew that UCRA lacked reasonable grounds for the representation that the Vehicle would be insured.

Did Mr Zervas know that UCRA had no reasonable grounds for the making of the representation?

19 Mr Zervas was, of course, the sole director of UCRA and the human agent who made the representation to Dr Burkitt.

20 In making his finding as to the representation set out at [7] above, the primary judge made reference to the following portion of Mr Zervas' cross-examination:

> "Q. And this insurance arrangement was going to be particularly interesting, or particularly different, because Dr Burkitt wanted to make sure that he was insured whilst driving his own vehicle whilst it was part of your fleet?
>
> A. Yes.
>
> Q. And he wasn't going to take out separate insurance for that, that was going to be covered by your insurance, that's right, isn't it?
>
> A. Yes.
>
> Q. In fact, you told him, did you not, that you will get it through a reputable insurance provider?
>
> A. *If we were to take out the policy*, yes, it's got to be through someone like a large provider that actually will insure the car.
>
> Q. You said, in effect, 'No problem, I'll take care of all of those things, and your car will be covered at all times', is that right?
>
> A. Well, yeah, *so if we took it on*, we'd be organising insurance for that." (emphasis added).

21 It is necessary, at this point, to explain Mr Zervas' reference to "[i]f we were to take out the policy" and to "if we took it on." There was a hotly contested issue at first instance (but not agitated on appeal) as to whether or not the rental arrangements were in fact with UCRA (with Dr Burkitt's two vehicles to be sent to its Melbourne branch office) or, in fact, with a separate legal entity, Dream Drives Pty Ltd (**Dream Drives**), with which UCRA in fact only had a loose and non-legal affiliation. Part of UCRA's defence was that the contract and bailment was not in fact with it but with Dream Drives. The primary judge rejected this

argument (and it was plainly inconsistent with the VMA) but that argument explains Mr Zervas' reference to "if we took it on", namely that UCRA had promised to provide "cover at all times" if it took Dr Burkitt's car into its fleet. The primary judge's rejection of the argument that it was not UCRA but Dream Drives that "took on" Dr Burkitt's vehicles had the consequence that UCRA's representation was as to something that *it* would do which was relevantly unqualified.

22 It was common ground that UCRA did not take out any relevant insurance. The reason why appears to be bound up with an assumption on Mr Zervas' part that Dream Drives would take out such insurance. In this context, Mr Zervas gave the following evidence:

> "Q. I apologise for talking over you, and did you take out insurance for this car?
>
> A. *No, there was no need, the car was not in my care*.
>
> Q. And I think yesterday you conceded to me that *you don't have any style of insurance which would cover the whole fleet*?
>
> A. That's correct, no-one provides it at the moment.
>
> Q. Did you take out insurance to insure the car for fire and theft or any reasonable losses that may occur while the vehicle is in the care of Ultimate?
>
> A. Yeah, the – the vehicle – when the vehicle went to *Melbourne that was all being organised from Dream Drives Melbourne, so they were supposed* to install the car with a tracker, *take out an insurance policy* as per Andrew [Triantafyllos'] conversations with Dr Burkitt.
>
> Q. But Ultimate Car did not take out insurance for any damage due to fire and theft or other reasonable losses that may occur while it was in your possession?
>
> A. *No, there was no need*.
>
> Q. Well it was in your possession for a brief time, wasn't it, when it was located at Mascot?
>
> A. Yes, correct.
>
> Q. And you didn't take out insurance then?
>
> A. No, I didn't." (emphasis added).

23 It may be inferred, in my opinion, from this evidence that, at the time the representation, as found by the primary judge in [27] of his reasons, was made, UCRA did not have any intention of itself taking out or arranging insurance if the Vehicle was to be rented out in Melbourne, and this lack of intention was known to Mr Zervas as he was the mind and manifestation of UCRA. UCRA

had no basis, to Mr Zervas' knowledge, for giving the assurance as to insurance cover (as found by the primary judge), in circumstances where it did not itself intend to arrange it if the Vehicle was to be sent to Melbourne. The representation, fairly understood, was that *UCRA* would procure satisfactory and comprehensive insurance. A belief that another company would arrange insurance or that it was the other company's responsibility to do so does not provide a reasonable basis for the making of a representation that the company with which Dr Burkitt was dealing (as found by the primary judge) would *itself* arrange or provide satisfactory insurance coverage.

24 Counsel for Mr Zervas placed reliance on affidavit evidence given by Mr Zervas to the effect that, in the course of a conversation on 2 May 2015 when Dr Burkitt was in his Sydney office with him and a Mr Andrew Triantafyllos was on speaker phone from Melbourne, the following exchange occurred:

> "Plaintiff: My only real concern is that the cars will be in Melbourne and I won't be able to drive them when I want to. *Also, I want the cars insured by you*.
>
> Andrew: *With the insurance, the cars will be covered under our fleet insurance policy*. I haven't seen the cars and we will need a full inspection carried out to ensure that they are in pristine condition before they join the fleet." (emphasis added).

In his reply affidavit, Dr Burkitt said that he disputed the effect of the conversation set out in the paragraph of Mr Zervas' affidavit from which the above extract is taken.

25 The primary judge did not in terms make any finding as to this disputed conversation although he did say at [30] of his judgment that:

> "I formed the impression that Mr Zervas had reconstructed his evidence in a way that sought to avoid liability to the plaintiff by seeking to deflect responsibility for the damage to Mr Andrew Triantafyllos, who was not a party to these proceedings. Mr Triantafyllos was closely associated with [UCRA and Mr Zervas], and unbeknown to the plaintiff, he apparently conducted another car rental business in Melbourne."

The other car rental business to which the primary judge was referring was Dream Drives.

26 The passage extracted from Mr Zervas' affidavit set out in [24] above is inconsistent with the representation as found to have been made and is also premised on Dr Burkitt dealing directly with the Melbourne based Mr

Triantafyllos and looking to "Dream Drives" as the party with which he was dealing. As already noted, the primary judge rejected this version of events.

27 It follows, in my opinion, that the evidence relied upon by Mr Zervas cannot be taken as having been accepted by the primary judge. Even if it had been accepted, however, for the reason that I have given in [23] above, I do not consider it avails Mr Zervas. At best it could found an assumption that another party would arrange insurance when the representation, as found, was that comprehensive insurance would be provided *by UCRA.*

28 Dr Burkitt's evidence and case was to the effect that he would not have surrendered possession of the Vehicle to UCRA on or about 2 May 2015 but for the representations. This is no reason not to accept this claim and the primary judge so found at [128] and [157]. It is entirely plausible that a person in the position of Dr Burkitt would not have delivered possession of his very valuable vehicle had he not received an assurance from UCRA that that company would arrange comprehensive insurance coverage.

29 For the above reasons, it follows, in my opinion, that the primary judge ought to have held that Mr Zervas was knowingly involved in misleading and deceptive conduct on the part of UCRA in that he knew of the representation and knew that UCRA was not going to take out insurance because of his belief that some other entity would take it out. This is not what was conveyed to Dr Burkitt on the findings that the primary judge must be understood to have made.

30 In oral argument, counsel for Mr Zervas seemed to submit that the fact that the VMA contained a contractual promise to provide insurance in some way meant that Mr Zervas could not be liable under the ACL. That submission was not well founded. Whilst, in some cases, it will be the position that a pre-contractual representation is superseded by or subsumed in a formal contractual document with the consequence that the representation either ceases to be operative, or that reliance can be shown to be no longer placed on the representation but rather on the contractual promise, that was not this case, not least because the VMA was not in fact finalised or executed until well after the making of the representation as found, and the handing over of the Vehicle to UCRA in early May 2015.

Damages

31 Counsel for Mr Zervas made an argument that the quantum of any liability of Mr Zervas to Dr Burkitt should be reduced by reason of Dr Burkitt's failure to accept a settlement offer said to have been made by an insurer of Mr Amro to him, the result of which, it was contended, would be to substantially reduce the quantum of the verdict awarded against Mr Zervas from $183,620.94 for which he was held liable.

32 In this context, ground 4(a) of the amended notice of appeal was to the effect that the primary judge erred in assessing damages by "[f]ailing to reduce the value of the damages claim in respect of the Vehicle by the amount of the Suncorp offer to Dr Burkitt of $160,100 in respect of the Vehicle".

33 This ground was based on a plea in answer to the whole of the ASOC of a failure to mitigate on the part of Dr Burkitt. This aspect of the defence was not dealt with by the primary judge.

34 In written submissions on appeal, it was submitted on behalf of Mr Zervas that:

> "The first error on quantum made by the primary judge concerns the award of damages for loss of the Vehicle. The primary judge failed to address the submission made by Ultimate and Mr Zervas that would bring to account the Suncorp damages offer of $160,100. Whilst that was put as an argument in mitigation of loss in respect of the contract claim in Ultimate and Mr Zervas' closing submissions, the argument is equally as good in relation to any damages assessment for misrepresentation and negligence. The short point is that Dr Burkitt cannot justly refuse an insurance offer from Suncorp on behalf of Mr Amro based on its estimate of the value of the Vehicle, and then claim the whole amount of the value of the Vehicle from Mr Zervas on an argument that he breached a duty in relation to the taking out of insurance over that very Vehicle." (footnotes omitted).

35 There is a short answer to this aspect of the appeal and the argument set out above.

36 The argument proceeds on the basis that an insurer, Suncorp, had offered to pay Dr Burkitt $160,100 by way of compensation for the damage to the Vehicle. In my opinion, the evidence in the case did not support the fact that such an offer capable of acceptance was ever made. At the very least, I do not accept that it was established on the balance of probabilities that such an offer was made. Further, in my opinion, even if such an offer had been made in an unqualified way capable of acceptance, it would be incumbent on Mr Zervas,

as the party raising the argument by way of mitigation, to demonstrate that the offer was unreasonably rejected. This, too, he has failed to establish, for reasons which I will also explain below.

37 To make good these conclusions, it is necessary to set out such evidence as there was in relation to the so called offer from Suncorp.

38 On 1 July 2015, two days after the accident, there was a meeting between Dr Burkitt and Mr Zervas during which, according to Dr Burkitt's account, Mr Zervas said:

> "I don't know I have no information on the young lady. I spoke with Andrew [Triantafyllos] today. He has had some discussions with the owner of the paint shop and he confirmed that, as I said before, that everything will be done under their Business Insurance, so there won't be any issue there. We should have a claim number tomorrow. The insurance broker is coming tomorrow and so that takes care of the insurance of the car.
>
> …
>
> The insurer is going to need to assess the car. I saw the pictures of it last night. It's a write-off. Which is a good scenario for you. We are not just trying to get market value but we are trying to get the improved value of the car. Its market value might be $220,000 but [t]here is also the $30,000 for repairs you just paid.
>
> …
>
> This is why I don't want you calling them and giving them a hard time, let them handle it. Let them come to us with what the claim is and if we need to start calling in favours we can arrange that."

39 On 28 July 2015, Dr Burkitt received an email from "Wendy", a Specialist Customer Service Officer, PI Claims at Suncorp in the following terms:

> "Hi Dr Burkitt,
>
> Please reply all to this email with a copy of your registration papers for you[r] Ferrari registration BNE 77C.
>
> Our assessor will contact you in regards to the assessment either late this week or next week.
>
> If you have any further questions in regards to the assessment please call us on … between 8am and 4pm, Mon[day] – Friday."

40 It is to be inferred from the fact that the subject line on this email contained the number K001470232 that a claim had been lodged with Suncorp for assessment of the loss to the Ferrari. This claim was presumably lodged pursuant to an insurance policy held by Mr Amro. No insurance policy was in evidence.

41 In [65] of his principal affidavit, Dr Burkitt said that on or about 7 August 2015, he received a telephone call from the claims manager, Mr Justin Warn, of Vero Insurance, the insurer for Ultimate Kustoms, during which words to the following effect were spoken:

> "Vero Insurance is the Insurer for Ultimate Kustoms. We are prepared to make you an offer, on a without prejudice basis, to pay you the sum of $160,100 for your Vehicle. *Our offer is subject to our right to refuse to pay the claim if there is a valid exclusion to the policy*. We are still undertaking our investigations.
>
> Your wreck is worth about $18,000 to $20,000. It can be put to auction and you might get a bit more. It's up to you.
>
> We will need to have access to the car to do an inspection." (emphasis added).

42 Mr Zervas deposed at [52] of his affidavit to a conversation with Dr Burkitt in or around early August 2015 "in regards to his insurance claim with the paint shop" as follows:

> "[Dr Burkitt]: I was offered $160,000.00 for the car plus they said I could sell the wreck for about $20,000.00.
>
> [Mr Zervas]: See if they will pay you more. This is their first offer.
>
> [Dr Burkitt]: I don't understand why they would offer so little money. I was expecting a lot more. We need to prove that the car was in pristine condition and earning income to get more money from them do you have the photos you took.
>
> [Mr Zervas]: They are insurance companies. They try to give you as little as possible. You need to take them on. I should have the photos, let me check and come back to you."

43 Dr Burkitt responded to this evidence of Mr Zervas in his affidavit in reply (at [49]−[50]) in the following terms:

> "I do not remember the exact date, but I recall having a conversation with [Mr Zervas] after the accident in relation to the insurance claim and at some point around that time I requested copies of the pre-accident photographs taken of the Vehicle. However, I recall I said words to the effect of:
>
> > 'The offer is apparently on a without prejudice basis and *subject to certain potential exclusion clauses under the policy*. I would be very grateful if you can give me copies of the pre-accident photographs of the F430 as it will help me get a pre-accident valuation. Thanks so much.'
>
> It is my understanding that the *insurance claim was denied by the insurer on the basis of an exclusion clause under the policy*." (emphasis added).

44 On 24 September 2015, Dr Burkitt replied to the email of 28 July 2015 to which I have referred to in [39]−[40] above in the following terms:

> "Hi Wendy,
>
> Please provide me a Report of the Status of the Claim?
>
> I have had no offer of a settlement in writing.
>
> However, I have had a verbal offer (via Justin W[A]RN) for $160,100.00 as full settlement which [is] not acceptable.
>
> I have a pre-incident valuation by a [c]ertified [v]aluer for $220,000.
>
> So as we are unlikely to have an agreed settlement value, I will be making arrangements to collect the wrecked vehicle and convey it back to Sydney. So please advise me how I should approach this with you people. Meanwhile I have placed the matter with my lawyers, who will pursue the matter either with Suncorp or the [d]river of the vehicle, Mr Michael A[mro] directly."

45 This correspondence demonstrates, in my opinion:

(i) if there was any offer, it was conditional upon the insurer not invoking an exclusion clause;

(ii) as such, it was not an offer capable of acceptance but at most a contingent offer;

(iii) such evidence that existed was that an exclusion had been invoked by the insurer;

(iv) even if there had been an offer capable of acceptance, Mr Zervas did not demonstrate that it was unreasonable for Dr Burkitt to have rejected it. That was all the more so in light of the fact that the parties had agreed that, for the purposes of the proceeding, the Vehicle was worth $200,000.

Cross-appeal

46 In addition to the notice of contention, Dr Zervas filed a cross-appeal. In essence, the cross-appeal related to the fact that the primary judge had apportioned liability as between UCRA and Mr Zervas, on the one hand, and Mr Amro, on the other hand, at 50% each.

47 The primary judge's reasoning on this aspect of the case was contained in [179]−[192] of the judgment as follows:

> "179. [UCRA and Mr Zervas] argued that if they are found to be liable to the plaintiff in damages, then [Mr Amro] should be seen to be a concurrent wrongdoer. This is said to arise because, by his actions, [Mr Amro] was the person who had driven the plaintiff's vehicle into a tree, causing it to be written off.

180. Consequently, [UCRA and Mr Zervas] argued that any liability on their part to the plaintiff in damages ought to be reduced to reflect a fair and just apportionment of responsibility between themselves and [Mr Amro].

181. On the basis of my liability findings, all three defendants must be seen to be concurrent wrongdoers: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10, at [18], [20], [21]. This is because each of them, by their actions and inactions, independently of each other, caused the vehicle to be damaged: s 34(2) of the [*Civil Liability Act 2002* (NSW) (**CL Act**)]. As the plaintiff's claim is for damage to property, and for consequential economic loss, Part 4 of the CL Act applies to this case: s 34(2) of the CL Act.

182. In respect of each lot of defendants, the relevant conduct comprised a different species of activity that on its face, at first analysis seemed to be separate in time.

183. However, the failure of [UCRA and Mr Zervas] to effect any insurance of the plaintiff's vehicle, was in breach of their agreement to do so, and that breach continued up until the time of the breach by [Mr Amro]. Such failure was quite separate and distinct from [Mr Amro's] actions which comprised negligent driving. However, those separate activities, which had a concurrent effect at the time of the damage, have led the plaintiff to suffer the common element of loss comprising $200,000.

184. The respective failures common between [UCRA and Mr Zervas] were first in time. These failures comprised both the misleading and deceptive conduct of [Mr Zervas] on behalf of [UCRA], and the subsequent failure of those defendants to arrange vehicle insurance to ensure that the risk of accidental damage to the plaintiff's vehicle applied in any further contemplated sub-bailments. The relevant failure of [Mr Amro] was the failure to maintain control of the plaintiff's vehicle whilst it was being driven, and that failure occurred after the failure of [UCRA and Mr Zervas].

185. Although each such failure was an independent cause of the plaintiff's loss, this does not mean that the respective wrongdoings were not concurrent: s 34(2) of the CL Act.

186. In my assessment, the plaintiff would not have parted with the possession of his vehicle if he had known that it would not be covered by insurance arranged according to his agreement with [UCRA and Mr Zervas]. In those circumstances, [Mr Amro] would not have acquired possession of the vehicle so as to enable him to have the opportunity to drive it into collision with trees, yet he did drive it into the trees, thus causing damage: s 5D(1)(a) of the CL Act.

187. Accordingly, by independent causation pathways, all defendants relevantly caused, and are relevantly responsible for, the damage to the plaintiff's vehicle.

188. In this case, the task of weighing up the respective contributions of [UCRA and Mr Zervas] on the one hand, and of [Mr Amro] on the other, cannot proceed in the form of a precise mathematical analysis. Instead it must be undertaken according to a broad assessment that is just and equitable according to the respective causative potency of the acts and neglects of the parties found to be liable: *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34, at [10].

> 189. The balancing factors seem to me to be, on the one hand, the combined effect of a misleading representation as to the existence of insurance, and the continuing breach by [UCRA and Mr Zervas] in failing to arrange insurance. Such breaches continued right up until the time the damage to the plaintiff's vehicle was incurred. On the other hand, the breach by [Mr Amro] occurred more opportunistically, on the day of the collision, as an incident of negligent driving where that driving was unauthorised.
>
> 190. In aligning those breaches for examination of respective blameworthiness, it seems to me that both sets of acts and neglects involve equal degrees of culpability.
>
> 191. The sequence of events commencing with [Mr Amro's] unauthorised use of the vehicle outside the terms of the bailment, and the failure of [Mr Amro] to maintain control of the vehicle, are just as egregious as the continued effect of the misleading, deceptive and untrue representation as to the existence of insurance, and the continuing failure of [UCRA and Mr Zervas] to effect insurance as agreed.
>
> 192. In those circumstances, giving proper interpretative effect to the purpose of Part 4 of the CL Act, which provides a mechanism whereby concurrent wrongdoers can be made to share responsibility for damage without the need to resort to costly cross-claims, I consider it fair, just and equitable that [UCRA and Mr Zervas] each bear 50 per cent of that portion of damages which comprises the common element assessed at $200,000, namely $100,000 each."

48 The primary judge also split costs 50:50 as between UCRA and Mr Zervas, on the one hand, and Mr Amro on the other hand. Dr Burkitt has also cross-appealed against that aspect of the decision.

49 The first ground of the cross-appeal is that Mr Zervas was not a concurrent wrongdoer within the meaning of s 87CB(3) of the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) as there was "no capacity for their acts to be either independent or joint as is required by the text of s 87CB(3)" of the Competition and Consumer Act with the result that they remained jointly and severally liable to Dr Burkitt.

50 In my opinion, this ground is based on a misreading of the judgment although it must be conceded that the judgment is not totally clear in this respect and it can readily be understood how the misreading arose. Notwithstanding what was said in [192] of the primary judgment, reproduced at [47] above, the primary judge did not sever liability as between UCRA and Mr Zervas but, rather, held these two parties, on the one hand, to be jointly and severally liable for 50% of the damage to the Vehicle, and Mr Amro to be 50% liable. This is reflected in the orders made by the primary judge, albeit that the first order

made by the primary judge included in respect of UCRA and Mr Zervas an amount of $60,000 together with interest thereon which Dr Burkitt concedes should not have been awarded against Mr Zervas, it being an amount solely referable to the contract claim which did not run against him.

51 The second ground of the cross-appeal is that the primary judge erred in law by applying s 34 of the CL Act to the award of damages for breach of the ACL, Dr Burkitt submitting that the application of a state law to a federal cause of action was in error, and that the breach of the ACL was not one of "failure to take reasonable care" within the meaning of s 34 of the CL Act but in misleading or deceptive conduct. Thus Dr Burkitt submitted that under the CL Act, neither UCRA nor Mr Zervas were concurrent wrongdoers. In support of the submission, Dr Burkitt cited the following passage from the decision of Ball J in *LM Investment Management Limited (In Liquidation) (Receivers appointed) v BMT & Assoc Pty Limited* [2015] NSWSC 1902 at [83]:

> "Although the legislation is not entirely clear, each person who is said to be a concurrent wrongdoer must be a person against whom a claim is or could be made for economic loss in an action for damages arising from a failure to take reasonable care. It is plain from s 34(1) that Part 4 of the [CL] Act is only concerned with apportionable claims. Consequently, when s 34(2) [of the CL Act] defines a 'concurrent wrongdoer' by reference to a claim, it must be doing so by reference to an apportionable claim, with the result that a concurrent wrongdoer is a person relevantly who caused damage or loss that is the subject of a claim for economic loss arising from a failure to take reasonable care. That conclusion is consistent with the fact that the court is required to apportion the claim having regard to the defendant's responsibility for the damage or loss and the comparative responsibility of other concurrent wrongdoers. The word 'responsibility' encompasses evaluative notions concerned with the degree to which each party's failure to take reasonable care caused the loss. If a concurrent wrongdoer was simply a person who contributed to the loss, whether as a result of a failure to take reasonable care or not, then it is difficult to see why s 35 [of the CL Act] uses the word 'responsibility'. It would have made more sense for the section to require the court to limit the defendant's liability to the amount it considers just having regard to the extent to which the defendant caused the loss."

52 The answer to this ground of the cross-appeal lies in an analysis of whether or not the knowing involvement claim against Mr Zervas involved a contravention of the ACL (Cth), in which case the applicable proportionate liability regime would be that under Part VIA of the Competition and Consumer Act, or whether it involved a contravention of the ACL (NSW), in which case, the applicable

proportionate liability regime is that under s 34(1)(b) of the CL Act, which relevantly provides that Part 4 of that Act applies to:

> "a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* [(NSW)] for a contravention of section 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010* [(NSW)]) or under the *Australian Consumer Law (NSW)* for a contravention of section 18 of that Law."

53 To answer this question it is necessary to delve into the complexity associated with the operation of the ACL, and how it operates as a law of the Commonwealth and as a State law. This is not always properly appreciated in practice but it is important, as the facts of the present case demonstrate.

54 The ACL is found in Sch 2 to the Competition and Consumer Act. It comprises some six chapters and runs to some 292 sections. Section 1 of the ACL provides that the Schedule applies to the extent provided by Part XI of the Competition and Consumer Act or an "application law". That term is defined in s 140 of the Competition and Consumer Act as meaning:

> "(a) a law of a participating jurisdiction that applies the applied Australian Consumer Law, either with or without modifications, as a law of the participating jurisdiction; or
>
> (b) any regulations or other legislative instrument made under a law described in paragraph (a); or
>
> (c) the applied Australian Consumer Law, applying as a law of the participating jurisdiction, either with or without modifications."

55 Part XI of the Competition and Consumer Act, headed "Application of the Australian Consumer Law as a law of the Commonwealth", contains s 131(1) which provides:

> "Schedule 2 applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 or 4 of Schedule 2 by corporations."

56 Section 131(2) extends the application of certain other sections of the ACL as a law of the Commonwealth to persons, but none of those sections are relevant to the present case.

57 It follows that the ACL as a law of the Commonwealth does not relevantly apply to a claim against a person for involvement in a breach of s 18 of the ACL. Rather, it is the ACL as given effect to by the relevant "application law", here s

28(1) of the *Fair Trading Act 1987* (NSW) (**Fair Trading Act**), that applies to the claim against Mr Zervas for involvement in a contravention of the ACL.

58 That section relevantly provides:

> "The Australian Consumer Law text, as in force from time to time:
>
> (a) applies as a law of this jurisdiction, and
>
> (b) as so applying may be referred to as the Australian Consumer Law (NSW), and
>
> (c) as so applying is a part of this Act."

59 The terms of s 32 of the Fair Trading Act should also be noted:

> "(1) The Australian Consumer Law (NSW) applies to and in relation to:
>
> > (a) persons carrying on business within this jurisdiction, or
> >
> > (b) bodies corporate incorporated or registered under the law of this jurisdiction, or
> >
> > (c) persons ordinarily resident in this jurisdiction, or
> >
> > (d) persons otherwise connected with this jurisdiction.
>
> (2) Subject to subsection (1), the Australian Consumer Law (NSW) extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia)."

60 It follows that any liability that Mr Zervas has in the present case is a liability under s 236 of the ACL (NSW) and not the ACL (Cth), and thus the proportionate liability regime under Part 4 of the CL Act applied to make the claim against Mr Zervas an apportionable claim under that Act: see also *Porges v Adcock Private Equity Pty Ltd* [2019] NSWCA 79 at [21].

61 The third ground of cross-appeal in effect involved a challenge to the primary judge's allocation of responsibility as between UCRA and Mr Zervas, on the one hand, and Mr Amro, on the other hand. It will be recalled that the primary judge held that responsibility should be allocated 50:50.

62 "Appellate review of a trial judge's apportionment of liability as between respectively culpable parties … is governed by the stringent tests which limit appellate review of discretionary decisions": *Ghunaim v Bart* [2004] NSWCA 28; (2004) Aust Tort Reports 81-731 at [45]; see also *Nominal Defendant v Green* [2013] NSWCA 219; (2013) 64 MVR 354 at [48]; *Mikaera v Newman Transport Pty Ltd* [2013] NSWCA 464; (2013) 65 MVR 578 at [35]−[36];

Nominal Defendant v Bacon [2014] NSWCA 275; (2014) 67 MVR 425 at [101]; *Central Darling Shire Council v Greeney* [2015] NSWCA 51 at [62]−[68].

63 In my opinion it was open to the primary judge to apportion responsibility in the way he did, between both Mr Zervas (and UCRA), on the one hand, and Mr Amro, on the other hand, having caused or materially contributed to Dr Burkitt's loss: see *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10 at [45] (**Hunt & Hunt**). The apportionment of responsibility involves a value judgment: *Hunt & Hunt* at [57] and the authorities I have referred to in the previous paragraph caution restraint against interference in such an assessment.

Costs

64 Ground 5 of the cross-appeal challenges the primary judge's decision in relation to the costs. The primary judge's order in respect of costs was that:

> "The respective defendants are to pay the plaintiff's costs of the proceedings on the ordinary basis, equally as between [UCRA and Mr Zervas], and [Mr Amro], unless a party can show an entitlement to costs on some other basis…"

65 At [200] of the judgment, the primary judge said:

> "I consider that the different levels of costs as between [UCRA and Mr Zervas] on the one hand, and [Mr Amro] on the other, should be determined on an equal basis. There should be liberty to apply if a party seeks a different costs order."

This was not, with respect to the primary judge, reasoning but nothing more than a statement of his conclusion. Moreover, it is difficult to understand what his Honour meant by the expression "the different level of costs." As I have noted above, Mr Amro did not participate at all in the trial. The trial was occupied with Dr Burkitt's claim against UCRA and Mr Zervas.

66 If the basis of the primary judge's order with respect to costs was that he had apportioned liability under the CL Act 50:50 as between UCRA and Mr Zervas, on the one hand, and Mr Amro on the other hand (and it is not clear from his judgment that this was the basis – although that would supply one explanation for it), I do not think that that was a reason justifying the costs order made.

67 In my opinion, given that the proceedings were taken up in hearing the claims against UCRA and Mr Zervas, it is neither just nor appropriate that Dr Burkitt

should in effect be deprived of a costs order as to 50% of his costs against those parties.

68 In my opinion, and because his success on the notice of contention depended on the finding made at first instance, the costs order made at first instance should be varied so that the first and second defendants should be made jointly and severally liable for the costs at first instance on the ordinary basis.

Conclusion and orders

69 For the foregoing reasons, the appeal should be allowed in part.

70 Order 1 of the orders made by the primary judge should be varied so as to delete the reference to the second defendant. In addition, there should be ordered a verdict and judgment for the plaintiff against the second defendant in the sum of $119,135.96.

71 Order 3 of the primary judge's orders should be set aside and in lieu thereof it should be ordered that the first and second defendants are jointly and severally liable to pay the plaintiff's costs of the proceedings at first instance on the ordinary basis.

72 The appellant should be ordered to pay 80% of the cost of the appeal. This takes account of the appellant's success on the appeal, his lack of success on the notice of contention, and Dr Burkitt's lack of success on the cross-appeal (other than in respect of costs).

73 **MACFARLAN JA**: I agree with Bell P.

74 **McCALLUM JA**: I agree with Bell P.

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