IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S258 of 2014

BETWEEN:

DOLORES LAVIN

First Appellant

DOLORES LAVIN MANAGEMENT PTY LIMITED (ACN 077 840 003)

Second Appellant

AND

PAOLA TOPPI

First Respondent

NEIL CUNNINGHAM

Second Respondent

BASECOVE PTY LIMITED (ACN 074 145 261)

Third Respondent

RESPONDENTS' WRITTEN SUBMISSIONS

Part I: Suitability for Publication

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The respondents agree that the issues are those identified by the applicants. The respondents submit that the questions raised in the appellant's submissions ("AS") ought be answered: as to AS paragraph 2, "No"; as to AS paragraph 3, "Yes"; as to AS paragraph 4, "these questions do not arise".

Beazley Singleton Lawyers
Suite 1405, The Chambers
Level 14/370 Pitt Street
Sydney NSW 2000

Tel:(02) 9283 8622
Fax: (02) 9283 8722
Ref: Philip Beazley

Part III: Notice of Constitutional Matter

3. We certify that no notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) is required.

Part IV: Material Facts

4. There are no facts in dispute.

5. Nevertheless, the essential facts can be expressed more narrowly and as follows:

(a) In 2005, National Australia Bank ("NAB") lent moneys to Luxe Studios Pty Limited, being a company in which both Paola Toppi and Dolores Lavin held an equal number of shares and of which they were both directors;

(b) After various refinances over time, by or about 29 October 2008 the various loans and guarantees were consolidated whereby Luxe Studios Pty Limited was the borrower of funds from NAB, such loan being guaranteed by four guarantors: Paola Toppi and her partner Neil Cunningham (representing the Toppi Interests); and Dolores Lavin and Dolores Lavin Management Pty Limited (representing the Lavin Interests) – that liability was joint and several so far as the obligations to the NAB were concerned.

(c) On or about 14 June 2010, NAB commenced proceedings *inter alia* against Luxe Studious and the four guarantors.

(d) On or about 8 September 2010, NAB entered into a deed with the Lavin Interests, being Dolores Lavin and Dolores Lavin Management Pty Limited. The deed provided that, subject to NAB receiving settlement moneys, the proceedings against the Lavin interests would be dismissed and NAB covenanted not to sue them.

(e) On or about 30 November 2010, the Lavin interests paid $1,349,632.09 to NAB in accordance with the deed and accordingly the covenant not to sue became operative as between the NAB and the Lavin interests.

(f) On or about 18 May 2011, the Toppi interests paid $2,900,000 to NAB.

6. In the Supreme Court of New South Wales, the Toppi interests sought contribution against the Lavin interests, having paid about $1,350,000 more than them. After some slight deductions allowed by Rein J due to interest payments (the Toppi Interests having

paid almost 6 months later),[1] the contribution claim was allowed and on 18 September 2014, his Honour ordered the Lavin interests to pay the Toppi interests $726,308.50,[2] being half of the additional amount paid by, after taking into account an adjustment due to the Toppi interests having paid later in time.

Part V: Statutes and Regulations

7. The respondents agree that there are no relevant statutes or regulations in the appeal.

Part VI: Argument

8. There was no dispute at first instance or in the Appeal that a right to contribution requires co-ordinate liabilities of the same nature and to the same extent (and Leeming JA expressly proceeded on that basis).[3]

9. The principal argument by the appellants at each stage of this litigation has been to the effect that the liabilities between the appellants and the respondents were no longer coordinate because the appellants' liability to the National Australia Bank ("NAB") was no longer enforceable by the NAB once the NAB gave the covenant not to sue[4]. That argument now contains an additional feature, which is that the NAB retained only a "right without a remedy" (AS[24]).

10. That additional feature exposes the core difficulty with appeal. The focus of contribution is on the liability of the surety, not the rights of the creditor. Until the respondents made their payment, the appellants' liability to the NAB remained unaltered (and co-ordinate). What did alter were the rights of the NAB to take action in respect of it. To use the language of AS[25], the appellants continued to be obliged to perform substantially the

---

1 See **AB 191-192.**

2 **AB 195.**

3 **AB 232**: Leeming JA at [74]; and generally *Burke v LFOT Pty Limited* [2002] HCA 17; 209 CLR 282, *Friend v Brooker* [2009] HCA 21; 239 CLR 129; *HIH Claims Support Limited v Insurance Australia Limited* [2011] HCA 31; 244 CLR 72.

4 **AB 142** at clause 8(b) of Deed dated 8 September 2010.

same obligation as the respondents (that is, to make good Luxe Studio's default in payment); the difference was in the NAB's rights, not the parties' obligations.

11. Those submissions also answer the contention that the appellants received no benefit; their extant liability was discharged by the respondents' payment. Leeming JA's reasoning in relation to this issue is at [73] to [77][5] is, with respect, correct.

12. The remaining error asserted (at AS[17.2] and [28]-[30]) is that the Court of Appeal erred in determining that the respondents' right to contribution arose no later than the demand by the NAB.

13. It is useful first to observe that Leeming JA's analysis of this issue played no part in his Honour's analysis of the primary issue, that is, whether or not the respondents had no right to contribution by reason of the covenant not to sue. Put differently, even if the respondents' right to contribution only arose when they made their payment (which, in any event would only have been the position at common and law, not in equity – itself a distraction for the reasons given by Leeming JA at [40] to [44])[6], that would not have altered the outcome because of the conclusion that that right was unaffected by the covenant not to sue). In any event, his Honour reasoning at [46]-[50][7] was, with respect, correct.

14. Although the appellants are correct to say that as at the date of the NAB's demand the *amount* of contribution that may become payable could not be determined, that does not have the effect that no right then existed. That right could have been enforced by the methods identified by his Honour at [46][8] and is also consistent with the passage from Glanville Williams[9] extracted by his Honour at [76].[10]

---

5 **AB 231-233.**
6 **AB 222-223.**
7 **AB 224-225.**
8 **AB 224.**
9 Glanville Williams, *Joint Obligations*, (1949 Butterworths) at 1656.
10 **AB 232-233.**

15. Analysis of the principles of equitable contribution ought not be constrained by dogmatic recitation of phrases such as: "co-ordinate liabilities";[11] "common obligation";[12] "to make good the one loss";[13] "of the same nature and to the same extent";[14] "common burden";[15] or "community of interest".[16]

16. Reliance upon these criteria is misplaced for two reasons. First, they are descriptions, illustrating when the principles of equitable contribution are often invoked. Such quotes have never been intended to set out the metes and bounds of the doctrine. Secondly, closer analysis of the authorities from which these various quotes spring, does not support the position of the appellants, but rather favour the respondents.

17. The doctrine of equitable contribution is underpinned by broad considerations of natural justice and fairness.[17] Thus, as long ago as 1787, Eyre LCB explained:[18]

> "If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice and does not spring from contract."

---

11 *Burke v LFOT Pty Limited* (2002) 209 CLR 282 at [15]; *Friend v Booker* (2009) 239 LR 129 at [41]; *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72 at [45]; see also *Bialkower v Acohs Pty Limited* (1998) 83 FCR 1 (FC) at 12B.

12 *Burke v LFOT Pty Limited* (2002) 209 CLR 282 per Gaudron ACJ and Hayne J at [15], per McHugh J at [38]; *Friend v Booker* (2009) 239 LR 129 at [41]; *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72.

13 *Street v Retravision (NSW) Pty Limited* (1995) 56 FCR 588 per Gummow J at 597F; *Bialkower v Acohs Pty Limited* (1998) 83 FCR 1 (FC) at 12B; *Burke v LFOT Pty Limited* (2002) 209 CLR 282 per Gaudron ACJ and Hayne J at [15].

14 *Caledonian Railway Co. v Colt* (1860) 3 Macq 354 per Lord Chelmsford at 359; *British Petroleum v Esso Petroleum* [1987] SLT 345; *Cockburn v GIO Finance Limited* (2001) 51 NSWLR 624 per Mason P at [28]; *Burke v LFOT Pty Limited* (2002) 209 CLR 282 per Gaudron ACJ and Hayne J at [15], per McHugh J at [38]; *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72 at [39].

15 *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 323 [29 ER 1184 at 1186]; *Mahoney v McManus* (1981) 180 CLR 370 at 376; *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72 at [47], [48]; see also *Burke v LFOT Pty Limited* (2002) 209 CLR 282 per Gaudron ACJ and Hayne J at [15], [16]

16 *Friend v Brooker* (2009) 239 CLR 129 at [45]; *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72 at [55]; this phrase was also applied by Leeming JA below at [2014] NSWCA [41], [74].

17 *Albion Insurance* (1969) 121 CLR 342 per Kitto J at 351; see also *Burke v LFOT Pty Limited* (2002) 209 CLR 282 per Gaudron A-CJ and Hayne J at [22]; see also *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 per Vaughan Williams LJ at 176.

18 *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 321 [29 ER 1184 at 1185]; cited by McHugh J in *Burke v LFOT Pty Limited* (2002) 209 CLr 282 at fn 72; extracted by Priestley JA in *Capita Financial Group v Rothwells Limited* (1993) 30 NSWLR 619 per Priestley JA at 621E-G.

18. Accordingly, questions surrounding the right of contribution depend upon matters of substance and not form.[19] Contribution results from the maxim that equality is equity.[20] Whilst criteria such as "co-ordinate liabilities"; "common obligation"; "to make good the one loss"; "of the same nature and to the same extent"; "common burden"; and "community of interest" are helpful indicia of where a right to contribution arises, they ought not be employed as a bed of Procrustes to obfuscate the underlying maxim. Hence, in *HIH Claims*, the plurality, citing Gibbs CJ in *Mahoney v McManus*,[21] emphasised:[22]

> "Given that natural justice, exemplified by equality, underpins the duty to contribute in respect of co-ordinate liabilities, the search for a common obligation 'should not be defeated by too technical an approach [...]*'."

19. Moreover, it is not to the point that – as the appellants contend at AS[26] – at the moment in time the Toppi interests made their payment, there was no common burden existing at that moment in time. Even if that were so (which the respondents refute), the original obligation to pay NAB arose from the same instrument and the same facts and the same cause of action in the same suit: it is to this issue that equity looks to determine whether a right of contribution arises. When one analyses the substance of the transaction, particularly bearing in mind that the parties are co-sureties arising from the same instrument being sued by the same creditor under the same cause of action, then all of the phrases employed in the AS meet the description of the facts before the Court.

20. Cases such as *Dering v Earl of Winchelsea*, establish that contribution is not limited to where the rights arose from the same transaction but can operate in a more expansive sense. Hence, in *Dering*, contribution was ordered notwithstanding that the sureties were not all liable under the same instrument. Thus references to the requirement of "common

---

19 *Capita Financial Group v Rothwells Limited* (1993) 30 NSWLR 619 per Priestley JA at 621E-F; see also *Cockburn v GIO Finance Limited* [No.2] (2001) 51 NSWLR 624 per Mason J at 631, [25].

20 *Burke v LFOT Pty Limited* (2002) 209 CLR 282 per McHugh J at [38]; *Friend v Brooker* (2009) 239 CLR 129 at [39].

21 *Mahoney v McManus* (1981) 180 CLR 370 at 378.

22 (2011) 244 CLR 72 at [39].

* It is noted that in the original quotation, Gibbs CJ continued to say "...to the question whether a surety has paid the creditor, when he has supplied moneys to the principal debtor for the purpose of making such payment".

interest" and "common burthen"[23] were made in the context where the Court was ordering contribution *notwithstanding* that the liabilities arose from separate instruments.

21. Reliance upon *Caledonian Railway Company v Colt*[24] and whether the liability is "of the same nature and to the same extent"[25] is misplaced. *Caledonian Railway Company v Colt* was not a case of contribution at all – the damages sought by the plaintiff were damages payable by him to a third party (McDonald) by virtue of his breach of a separate contract between himself and McDonald (including costs of that suit brought by McDonald against him) which was completely different to the obligations owed to the plaintiff by the defendant railway company, such obligations and penalties for non-compliance being regulated by statute.[26] It was in that context that Lord Chelmsford began his judgment by saying: "The question involved in the proceedings is whether the liability of the Railway Company to the Respondent is of the same nature and to the same extent as the liability of the respondent to John Macdonald".[27] Clearly, they were not.

22. Similarly, in *BP Petroleum Development Limited v Esso Petroleum Co. Limited*[28], questions surrounding whether the parties can be said to have become "liable for the same debt" or "under a common obligation"[29] were raised (and answered in the affirmative) in the context whereby one obligation sprang from statute whereas the other sprang from an independent contract and thus there was no nexus between them. These criteria, properly considered, were being employed expansively and not restrictively, giving greater scope to the doctrine; not trying to cut it back.

23. Statements from *McKenna v Austin*[30] that NAB's ability to sue the Lavin interests was merely "vestigial"[31] or "a right without a remedy" do not avail the appellants.[32] This was

---

23 At 29 ER 1186.
24 (1860) 3 Macq 354. It is noted that this case has been mis-cited throughout the authorities as "3 Macq 833" [sic].
25 *Caledonian Railway Co. v Colt* (1860) 3 Macq 354 per Lord Chelmsford at 359.
26 See 3 Macq 354 at 361.
27 3 Macq 354 at 359.
28 [1987] SLT 345
29 *BP Petroelum Development Limited v Esso Petroleum Co. Limited* [1987] SLT 345 at 348.
30 (1943) 134 F.2d 659

a case involving joint tortfeasors. Moreover, the Court in *McKenna* was keen to ensure that a settlement by one tortfeasor ought not be permitted to allow the wrongdoer an advantage – rather, contribution should still be permitted to operate as between the tortfeasors to ensure that they share their burden equally.[33]

24. The right to enforce equitable contribution is an independent equitable chose in action. As Leeming JA identified below, that right would continue to exist even if the principal creditor were statute-barred against the relevant co-surety and thus could not sue it.[34]

25. The AS (at paragraph 17.2 and 28-30) seeks to step around the difficulty confronted by Leeming JA that immediately prior to the deed, the right of contribution existed. Unlike contribution at common law, equitable contribution arises prior to that, and where the loss or apprehended over-payment appears sufficiently imminent.[35]

26. Once it is accepted that by 7 September 2010, immediately before execution of the covenant not to sue, the Toppi interests had a right to equitable contribution, the question identified by Leeming JA (at [48])[36] necessarily arises: "how was that equitable chose in action lost?" The only conduct that the appellants can point to is the deed executed between themselves and NAB, for which the Toppi interests were not parties. Moreover, the deed, which provided payment by the Lavin interests of less than 50 per cent, far from being a bar to equitable contribution, fulfilled the very requirements of an "imminent threat"[37] that the Toppi interests would be required to pay more.

27. There is nothing unorthodox in applying the principles of equitable contribution to prevent a surety from limiting all future liability to both creditor *and co-sureties* behind

---

31 See the appellants' submissions on special leave at paragraph 20; see also *McKenna v Austin* (1943) 134 F.2d 659 at 664.

32 AS at paragraph 24.

33 *McKenna v Austin* (1943) 134 F.2d 659 at 664 [2,3]; at 665 [11,12]

34 **AB 232:** [2014] NSWCA 160 at [75]; citing Glanville Williams, *Joint Obligations*, (1949 Butterworths) at 165; see also *Wolmerhausen v Gullick* [1893] 2 Ch 514 at 529.

35 *McLean v Discount Finance Limited* (139) 64 CLR 312 per Starke J at 341; *Friend v Brooker* (2009) 239 CLR 129 per French CJ, Gummow, Hayne and Bell JJ at [52].

36 **AB 224.**

37 To use the language of the plurality in *Friend v Brooker* (2009) 239 CLR 129 at [52].

the backs of those co-sureties. Indeed, contribution is ordered precisely when a creditor choses to treat sureties unequally and has operated in this fashion for centuries. Hence in *Craythorn v Swinburne*[38], Sir Samuel Romilly for the plaintiff submitted:[39]

> "This right of a surety also stands, not upon contract, but upon a principle of natural justice: the same principle, upon which on surety is entitled to contribution from another. The creditor may resort to either for the whole, or to each for his portion; and, as he has that right, if he from partiality to one surety will not enforce it, the Court gives the same right to the other surety, and enables him to enforce it. Natural justice requires, that the surety, having become security with others, shall not have the whole thrown upon him by the choice of the creditor not to resort to remedies in his power; the effect of which would be an equal contribution."

28. Lord Eldon agreed. He held[40] :

> "... whether they are bound by several instruments, or not, whether the fact is or is not known, whether the number is more or less, the principle of Equity operates in both cases; upon the maxim that equality is equity: the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the Court will do it for him."

29. Further, this does not serve to hinder settlements. What it does do is force all those with a common burden to share equally in it, whenever the bank chooses to settle with one of the sureties. That has long been considered a powerful policy consideration, for if contribution is not permitted, then the creditor is free "to saddle the other sureties with a disproportionate amount of liability".[41]

30. Moreover, there is a fundamental difference between a creditor releasing one of several co-sureties on the one hand and a creditor merely covenanting not to sue on the other. At general law, and absent wording to the contrary in the guarantee, the former would release all other co-sureties; whereas the latter would not.[42] To characterise the

---

38 (1807) 14 Fex 160.
39 At 483.4.
40 At 484.4
41 **AB 177**: Rein J at [2013] NSWSC 1361, [17]; **AB 225**: Leeming JA agreeing at [2014] NSWCA 160, [49].
42 *Walker v Bowry* (1924) 35 CLR 48 per Starke J at 57; *Mahoney v McManus* (1981) 180 CLR 370 per Gibbs CJ at 380; see also *Bateson v Gosling* (1871) 7 LR CP 9; see also Meagher, Heydon and Leeming, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (4th ed. Butterworths 2002), at [10-120].

difference as creating merely "a right without a remedy" ignores some fairly basic aspects of the general law of sureties.

31. The outcome in this case, as held by Macfarlan, Emmett, Leeming JJA and Rein J is not only just and fair, it involves an unexceptional application of classic principles of equitable contribution between co-sureties. Indeed, as Leeming JA also noted,[43] in *Pritchard,* Bathurst CJ explained:[44]

> "To avoid the loss of the James guarantees, two matters had to be attended to. First, the securities had to be maintained. That was in the interests of DJZ and there was no reason for it to object. Second, the February 2001 deed had to be drafted in such a way to avoid the consequences that it did not constitute a material variation of the contract of guarantee. This could have been achieved by a covenant not to sue conditional upon Mr and Mrs Christian and Cottenham Nominees Pty Ltd making the payments in cll 1, 2 and 3 of the February 2001 deed and paying $300,000 to the banks referred to in the February 2001 deed if and when demand was made for that amount or if the circumstances referred to in cl 9 of the original deed occurred. *That would not affect the guarantors' right to contribution and would not adversely affect the position of DJZ.*"

Part VII:

32. Not applicable

Part VIII: Time Estimate

33. We estimate that oral submissions in response would take no more than 1.5 hours.

Dated: 10 November 2014

Marcus Pesman	James T Johnson	Charles Alexander
Queens Square Chambers	Frederick Jordan Chambers	Queens Square Chambers
(02) 9221 4752	(02) 9229 7364	(02) 8228 2029
mpesman@qsc.com.au	johnson@fjc.net.au	calexander@qsc.com.au

---

43 **AB 227-228:** [2014] NSWCA 160 at [60].

44 *Pritchard v DJZ Constructions Pty Limited* [2012] NSWCA 196 at [81], emphasis added.