

## **LAVIN & ANOR v TOPPI & ORS (S258/2014)**

Court appealed from: New South Wales Court of Appeal  
[2014] NSWCA 160

Date of judgment: 23 May 2014

Special leave granted: 12 September 2014

Ms Dolores Lavin and Ms Paola Toppi were directors and equal shareholders of Luxe Studios Pty Ltd (“Luxe”), which had a loan from the National Australia Bank Ltd (“the Bank”). By written guarantee Ms Lavin, Ms Toppi and others associated with them (including the other parties to the current application to this Court) were guarantors of Luxe’s obligation to repay that loan. When Luxe defaulted, the Bank sued the guarantors.

Ms Lavin reached an agreement with the Bank, which was set out in a “Deed of Release and Settlement” (“the Deed”). Under the Deed, Ms Lavin paid the Bank an amount that was less than half of the balance owed to it by Luxe under the loan. The Bank in return covenanted not to continue its claim against Ms Lavin or to make a new claim against her. Its claim against Ms Lavin was then dismissed by consent.

Ms Toppi subsequently paid out the rest of Luxe’s debt to the Bank. She then sued Ms Lavin for an equitable contribution to the difference between the amounts they had each paid to the Bank. Ms Lavin contended that the Deed had limited her liability as a co-surety such that her liability to the Bank was no longer co-ordinate with Ms Toppi’s.

On 18 September 2013 Justice Rein ordered Ms Lavin to pay Ms Toppi equitable compensation of \$726,000, being half of the difference between the amount of Ms Lavin’s payment to the Bank and the amount paid by Ms Toppi.

On 23 May 2014 the Court of Appeal (Macfarlan, Emmett & Leeming JJA) unanimously dismissed Ms Lavin’s appeal. Their Honours found that none of the terms of the Deed amounted to a release of Ms Lavin from her liability to the Bank. There was merely a promise not to sue, which in no way constrained the rights of other guarantors as against Ms Lavin. The Court of Appeal therefore held that Ms Toppi was entitled to equitable contribution from Ms Lavin as a co-surety.

The grounds of appeal include:

- The Court of Appeal erred in holding that co-sureties were subject to co-ordinate liabilities of the same nature and to the same extent, notwithstanding the receipt by one co-surety from the creditor of a covenant not to sue and the dismissal as against that co-surety of the proceedings brought by the creditor against the co-sureties.
- The Court of Appeal erred in concluding that the payment by the Respondents to the Bank entitled them to contribution, when the Appellants

derived no practical benefit from that payment because, by reason of the covenant not to sue, they could not be required to satisfy any remaining liability to the Bank.