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

10 **NEIL CUNNINGHAM**

Second Respondent

BASECOVE PTY LIMITED ACN 074 145 261

Third Respondent

APPELLANTS' SUBMISSIONS IN REPLY

Part I: Suitability for publication

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

Part II: Appellants' Reply to the Respondents' Argument

20 2. Whilst the Respondents are correct to say that the doctrine of contribution is underpinned by considerations of natural justice and fairness[1], application of the doctrine in a given case must nevertheless accord with "*accepted principle and the*

[1] Respondents' Submissions paragraph [17]

Websters Lawyers
Level 11, 37 Bligh Street
Sydney NSW 2000

Telephone: (02) 9233 2688
Fax: (02) 9233 3828
Ref: Stephen Roy Webster

general coherence of the law" lest it produce a result which is nothing more than an idiosyncratic exercise of judicial discretion[2].

3. The Respondents challenge the Appellants' analysis in terms of "co-ordinate liabilities" being "of the same nature and to the same extent".[3] However, the need to identify co-ordinate liabilities of the same nature and to the same extent is now well entrenched in Australia[4].

4. The Respondents observe[5] that the focus of contribution is on the liability of the surety (not the rights of the creditor *per se*). However, there is an obvious reciprocity between the rights of the creditor and the obligations of the guarantor and the one cannot easily, or sensibly, be considered in isolation from the other. Upon the qualitative analysis of the parties' respective obligations which the search for co-ordinate liabilities requires,[6] any analysis which ignored the effect of the Bank's covenant not to sue upon the Appellants' obligation would overlook its most significant feature – namely that, even though the Appellants' liability continued as a formality, in truth there remained no more than a duty of imperfect obligation (from the Bank's perspective, a right without a remedy).

5. The proposition advanced by the Respondents[7] that rights of contribution between co-sureties arise before their respective contributions to the discharge of the principal debt can be ascertained is not correct. When the Bank made demand, and when it sued, it

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[2] *Friend v Brooker* [2009] 239 CLR 129 at [47]
[3] Respondents' Submissions paragraphs [15], [16]
[4] *Burke v LFOT Pty Limited* (2002) 209 CLR 282 at [15], [38], [49]; *Friend v Brooker* [2009] 239 CLR 129 at [40]; *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72 at [39]
[5] Respondents' Submissions paragraph [10]
[6] *HIH Claims Support Limited v Insurance Australia Limited* (2011) 244 CLR 72 at [37] and [55].
[7] Respondents' Submissions paragraphs [14], [25], [26]

was not known whether the co-sureties would pay any part of the principal debt, or whether one would pay more than the other. Even after the Appellants paid, it was not known whether the Respondents would pay any, and if so, what amount. It was only after the Respondents made payment in a sum greater than that paid by the Appellants that the Respondents acquired their right of contribution.

6. While Lord Eldon's observation that: "*The creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt*"[8] may then have been correct, that proposition will have no application where there are not as between the co-sureties co-ordinate liabilities of the same nature and to the same extent. Importantly, it will have no application in the present case, where the creditor and all sureties have themselves agreed that the creditor *would* be at liberty to fix one surety with payment of the whole debt; clause 14.2 of the 2008 Guarantee provided such agreement.

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Martin Einfeld
Tel:(02) 8226 2333
Email: einfeld@stjames.net.au

Steven Golledge
Tel: (02) 9222 9395
Email: sgolledge@3sjh.com.au

[8] *Craythorn v Swinburne* (1807) 14 Ves Jun 160 at 165; 33 ER 482 at 484 cited at Respondents' Submissions paragraph [28]