



HIGH COURT OF AUSTRALIA

11 February 2015

LAVIN & ANOR v TOPPI & ORS

[2015] HCA 4

Today the High Court unanimously dismissed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales, which had held that the first and second respondents ("the respondents"), being sureties who paid a creditor a disproportionate amount of a guaranteed debt, were entitled to recover contribution from their co-sureties, the appellants, notwithstanding that the creditor had covenanted not to sue the appellants for payment of the guaranteed debt.

In 2008, the National Australia Bank ("the Bank") consolidated various loans into one loan to Luxe Studios Pty Ltd. The consolidated loan was guaranteed by, among others, the appellants and the respondents. In 2010, the Bank made demands upon each of the guarantors for payment of the balance of the loan debt. When those demands were not met, the Bank commenced proceedings against all of the guarantors to enforce the guarantee. The appellants and the Bank entered into a deed of release and settlement whereby the Bank covenanted not to sue the appellants if the first appellant paid, relevantly, a minor portion of the guaranteed debt. The first appellant paid that portion and the Bank's covenant not to sue took effect. Thereafter, the respondents paid the remaining major portion of the guaranteed debt.

The respondents commenced proceedings in the Supreme Court of New South Wales claiming contribution from the appellants in respect of the amount of their payment in excess of their proportionate share of the guaranteed debt. The appellants resisted the respondents' claim on the basis that the appellants and respondents were not under "coordinate liabilities" because, by reason of the Bank's covenant not to sue, the respondents' liability under the guarantee was enforceable while the appellants' liability was not. The primary judge rejected that argument and gave judgment for the respondents.

The Court of Appeal dismissed the appellants' appeal. The Court of Appeal held that the Bank's covenant not to sue did not alter the appellants' liability under the guarantee and, as a result, the appellants and the respondents continued to share "coordinate liabilities" of the same nature and extent so as to entitle the respondents to recover contribution. By grant of special leave, the appellants appealed to the High Court.

The High Court unanimously dismissed the appellants' appeal. The Court held that the Court of Appeal was correct in holding that the Bank's covenant not to sue did not extinguish the appellants' liability under the guarantee. Further, the respondents, subject to proving their readiness and ability to perform their own obligations under the guarantee, were entitled in equity to contribution from the time the appellants and the respondents were called upon to satisfy the guarantee. That entitlement could not be defeated by the Bank giving the appellants a covenant not to sue.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*