



HIGH COURT OF AUSTRALIA

Manager, Public Information

28 May 2009

FRIEND v BROOKER & ANOR [2009] HCA 21

Today the High Court determined that a director of a company who borrowed from a third party to on-lend the money to the company could not claim contribution from a fellow director toward repaying the third party lender. The remedy of equitable contribution did not apply where there was no co-ordinate liability or common obligation on the part of the two directors.

In May 1977 Mr Frederick Brooker, a civil engineer, and his colleague, Mr Nicholas Friend, agreed that they would set up a construction business together. Although the business relationship was initially created as a partnership, they incorporated the company of Friend & Brooker Pty Ltd on 18 July 1977 to carry on the business. Each of Mr Friend and Mr Brooker was a shareholder and director of the company. Over the years they each obtained loans from family and friends which were then advanced as loans to the company, to ensure the company could continue to operate during periods of financial difficulty. The company's indebtedness appeared in its books as debts due to either of the directors, Mr Friend or Mr Brooker.

In 1986 Mr Brooker obtained one such loan of \$350,000 from SMK Investments Pty Ltd (the SMK loan). By December 1995, with the accrual of interest, the amount needed to repay the loan was \$1.1 million.

The company ceased to trade in 1990 and was deregistered in 1996. Thereafter Mr Brooker and Mr Friend disputed the company accounts and who was responsible for repayment of various loans. In 2000 Mr Brooker filed a claim in the Supreme Court of NSW alleging that the company had been a corporate vehicle for the conduct of a partnership or joint venture between the two men. He sought the taking of a full account of the partnership and recovery for loss he had suffered because Mr Friend refused to make equal contribution to the repayment of his personal borrowings made for the purpose of the business. The primary judge dismissed the claim, having found no evidence to support Mr Brooker's contentions that a partnership or joint venture existed. He considered the law concerning corporate insolvency should determine how the debts owed by the company were to be dealt with.

Mr Brooker appealed to the NSW Court of Appeal and, in allowing the appeal, the majority considered that Mr Friend had an equitable duty to contribute equally to repayment of the SMK loan. The High Court granted special leave to Mr Friend to appeal from that decision.

In a unanimous decision, the High Court considered the equitable doctrine of contribution could not be extended to overcome the undisturbed findings of the primary judge that, after the company was created, Mr Brooker and Mr Friend were neither in a partnership nor a joint venture. Mr Brooker and Mr Friend had set up a corporate structure as the vehicle for their business enterprise and the consequences were that companies legislation determined how the debts owed by the company were to be dealt with. The Court also held that there was no fiduciary obligation requiring Mr Brooker and Mr Friend to be personally liable to each other for losses flowing from their personal borrowings. The Court allowed Mr Friend's appeal and reinstated the decision of the primary judge.

- *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.*