HIGH COURT OF AUSTRALIA

GAUDRON ACJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

WILLIAM ROBERT BURKE & ANOR APPELLANTS

AND

LFOT PTY LIMITED & ORS RESPONDENTS

Burke v LFOT Pty Limited [2002] HCA 17
18 April 2002
S130/2001

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Federal Court made on 18 August 2000 and in its place order that:*

   (a) the appeal to that Court is allowed with costs;

   (b) set aside Order 2 of Moore J made on 11 November 1999 and in its place order that the cross-claim is dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

G J McVay for the appellants (instructed by Gilbert Mane Solicitors)

B W Walker SC with P T Taylor for the first and second respondents (instructed by Horowitz & Bilinsky)

No appearance for the third respondent

CATCHWORDS

Burke v LFOT Pty Limited

Trade and commerce – Damages – Equitable contribution – Liability to pay damages under ss 75B, 82, 87 of *Trade Practices Act* 1974 (Cth) for breach of s 52 of the Act – Whether solicitor who gave negligent advice should contribute to the loss suffered by his client as a consequence of another's misrepresentation which loss could have been avoided by careful advice by the solicitor – Whether equitable maxims prevent requirement of contribution.

Equity – Equitable contribution – Scope of – Requirement of co-ordinate liability – Whether solicitor who gave negligent advice should contribute to loss suffered by client as a consequence of another's representation where the loss could have been avoided by careful advice by the solicitor.

Contribution – Equitable contribution – Scope of and availability – Co-ordinate liability – Requirements of – Whether compatible with the obligations imposed by *Trade Practices Act* 1974 (Cth) for breach of s 52 of the Act.

Words and phrases – "co-ordinate liability", "natural justice".

Trade Practices Act 1974 (Cth), ss 52, 75B, 82, 87.

1 GAUDRON ACJ AND HAYNE J. The first-named appellant, William Robert Burke, was at relevant times the solicitor for and a director of the second appellant, Hanave Pty Limited ("Hanave"). Mr Burke had dealings with the first respondent LFOT Pty Limited ("LFOT"), then known as Jagar Projects Pty Limited. That company was the owner of land and premises in Leichhardt ("the premises") which had been advertised for sale. On behalf of Hanave, Mr Burke entered into negotiations for their purchase and, in due course, Hanave completed the purchase. Mr Burke was Hanave's solicitor on the purchase.

2 The premises consisted of retail outlets, including a shop known as Barbara's Storehouse. It is not now in issue that the first respondent represented to Hanave, through Mr Burke, that the tenant of that part of the premises which was occupied by Barbara's Storehouse was a "high quality tenant" notwithstanding that that tenant had been in arrears in payment of its rent on a number of occasions. Additionally, LFOT failed to disclose to Hanave that an incentive payment had been made to that tenant.

History of the proceedings

3 Hanave brought proceedings in the Federal Court against LFOT and two other persons, Mr Tressider and Mr Glew, the second and third respondents to this appeal. Hanave alleged, amongst other things, that the failure of LFOT to disclose the incentive payment to the tenant of the premises occupied by Barbara's Storehouse and the representation that that tenant was a high quality tenant constituted misleading or deceptive conduct for the purposes of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act")[1]. Additionally, Hanave claimed that Messrs Tressider and Glew had aided and abetted LFOT in that conduct[2].

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1 Section 52(1) provides:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

2 At the relevant time, s 82(1) of the Act provided:

> "A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part ... V ... may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

Section 75B(1) relevantly provided:

> "A reference in this Part [including s 82] to a person involved in a contravention of a provision of Part ... V ... shall be read as a reference to a person who:

(Footnote continues on next page)

4 After filing their defence to Hanave's claim, LFOT and Messrs Tressider and Glew cross-claimed against Mr Burke claiming that, if they were liable to pay damages to Hanave, they were entitled to equitable contribution from Mr Burke on the basis that, as Hanave's solicitor, he acted in breach of his duty to exercise reasonable care in relation to the purchase of the premises.

5 At first instance, Moore J dismissed Hanave's claim for damages[3]. That order was the subject of a successful appeal to the Full Federal Court which, by majority (Wilcox and Kiefel JJ, Emmett J dissenting), held that the misrepresentation with respect to Barbara's Storehouse constituted misleading or deceptive conduct for the purposes of s 52 of the Act[4]. The Full Court ordered that judgment be entered for Hanave against LFOT and remitted the matter to Moore J to determine the remaining issues. Those issues were the liability of each of Messrs Tressider and Glew, the liability of Mr Burke on the cross-claim, the quantification of the damages payable to Hanave and, if the liability of Mr Burke were established, the amount of contribution payable by him.

6 On remitter, Moore J held that Mr Tressider, but not Mr Glew, had aided and abetted the misleading or deceptive conduct of LFOT and that Hanave was entitled to judgment against LFOT and Mr Tressider in the sum of $750,000, that having been found to be the difference between the sale price and the true value of the premises. Additionally, his Honour held that Mr Burke had breached his retainer and was negligent in not advising Hanave to inquire about the solvency and financial standing of the tenants and LFOT and Mr Tressider were entitled, by reason of Mr Burke's negligence, to equitable contribution from him in the sum of $375,000[5].

7 Hanave and Mr Burke appealed to the Full Federal Court from the order for contribution[6]. By majority (Heerey and Lehane JJ, Lee J dissenting), the appeal was dismissed[7]. They now appeal to this Court. Mr Burke does not challenge the finding of negligence made against him, only his liability to contribute to the damages awarded against LFOT and Mr Tressider.

(a) has aided, abetted, counselled or procured the contravention".

3 *Hanave Pty Ltd v LFOT Pty Limited* (1998) ATPR ¶41-658.

4 *Hanave v LFOT* (1999) 43 IPR 545; (1999) ATPR ¶41-687.

5 *Hanave v LFOT* (1999) 168 ALR 318.

6 Mr Burke and Hanave also appealed from the trial judge's assessment of damages.

7 *Burke v LFOT Pty Ltd* (2000) 178 ALR 161.

Mr Burke's negligence

8 Before turning to the question of contribution, it is convenient to say something as to the findings which bear on Mr Burke's negligence and the circumstances in which that negligence occurred.

9 In the first appeal to the Full Federal Court in this matter, it was said that:

> "[t]he combination of [the misrepresentation that no incentive payment had been made] and [LFOT's] assurance about [the lessee of the premises occupied by Barbara's Storehouse] as a tenant must be taken to have been of significance to any rational prospective purchaser and to operate as influential when considering an investment in the centre, or the price paid for it."[8]

In that context, it was held that the misrepresentations were an effective cause of Hanave's entry into the contract to purchase the premises[9].

10 As already pointed out, the misrepresentations with respect to Barbara's Storehouse were made to Mr Burke, as the representative of Hanave. Mr Burke thereafter conducted the negotiations for the purchase of the premises on Hanave's behalf. That being so, the conclusion is inescapable that LFOT's misrepresentations were an effective cause of his participation in Hanave's decision to purchase the premises.

11 Before Hanave entered into the contract to purchase, Mr Burke received and read the proposed contract for sale. It contained a provision, cl 11.3, in these terms:

> "The vendor makes no warranty as to the solvency or financial standing of any tenant and the purchaser is taken to have satisfied itself in this regard."

In evidence, Mr Burke said that he understood cl 11.3 to relate to the future solvency of tenants, and not to their past rental record. Seemingly, that view of cl 11.3 was accepted by the respondents in this Court.

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8 *Hanave v LFOT* (1999) 43 IPR 545 at 557 [51] per Kiefel J; (1999) ATPR ¶41-687 at 42,793.

9 (1999) 43 IPR 545 at 557-558 [51]-[52] per Kiefel J; (1999) ATPR ¶41-687 at 42,793.

12 At first instance, there was evidence that a prudent solicitor would have advised any client intending to purchase tenanted commercial premises to conduct their own inquiries as to the tenants, including to:

> "(a) carry out a credit check on each of the tenants;
>
> (b) have the purchaser's accountant check the books of the vendor for so far as they relate to the rental income and outgoings of the property, and to report on the rent performance of the tenants, income and outgoings and percentage returns;
>
> (c) ... talk to the tenants about the level of business and their satisfaction with the centre."[10]

13 In the result, Moore J held that Mr Burke was negligent in not advising Hanave to make inquiries as to the solvency and financial standing of the tenants before exchange of contracts. Further, his Honour held that if that advice had been given, inquiries would have been made and the true position disclosed with the consequence that "the purchase would not have proceeded at least on the terms it did."[11]

Equitable contribution

14 In general terms, the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the compensation payable in respect of that loss or damage[12], either equally where they are liable in the same amount or proportionately, where the amount of their liability differs[13]. The principle has regularly been applied

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10 (1999) 168 ALR 318 at 324.

11 (1999) 168 ALR 318 at 326.

12 See *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 322 [29 ER 1184 at 1185-1186].

13 See *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 322-323 [29 ER 1184 at 1186].

between co-sureties[14], co-insurers[15], partners[16], co-owners, where payment is made by one in discharge of a common liability, and co-trustees who are *in pari delicto*[17].

15 The doctrine of equitable contribution applies both at common law and in equity[18]. It is usually expressed in terms requiring contribution between parties who share "co-ordinate liabilities" or a "common obligation" to "make good the one loss"[19]. More recently, in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*, the right to contribution was said to depend on whether the liability was "of the same nature and to the same extent"[20].

16 The notion of "co-ordinate liability" is one that depends on common interest and common burden[21]. Perhaps because, at common law, there was no general right of contribution between tort-feasors[22], the notion of "co-ordinate liability" has not traditionally been expressed in terms requiring equal or

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14 See *Dering v Earl of Winchelsea* (1787) 1 Cox 318 [29 ER 1184]; *Mahoney v McManus* (1981) 180 CLR 370.

15 See *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 346 per Barwick CJ, McTiernan and Menzies JJ, 349-350 per Kitto J; *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374 at 379-380 per Menzies, Walsh and Mason JJ.

16 See *Robinson's Executor's Case* (1856) 6 De GM & G 572 at 587-588 per Lord Cranworth LC [43 ER 1356 at 1362].

17 See *Lingard v Bromley* (1812) 1 V & B 114 [35 ER 45]; *Chillingworth v Chambers* [1896] 1 Ch 685 at 698 per Lindley LJ, 707 per A L Smith LJ.

18 See *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 349-350 per Kitto J.

19 See *Dering v Earl of Winchelsea* (1787) 1 Cox 318 [29 ER 1184]; *Street v Retravision* (1995) 56 FCR 588 at 597; *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 12.

20 [1987] SLT 345 at 348 per Lord Ross referring to *Caledonian Railway Co v Colt* (1860) 3 Macq 833 at 844 per Lord Chelmsford.

21 See *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 322 [29 ER 1184 at 1186].

22 See *Merryweather v Nixan* (1799) 8 TR 186 [101 ER 1337]; *Betts v Gibbins* (1834) 2 AD & E 57 at 74 per Lord Denman CJ [111 ER 22 at 29].

comparable culpability or a requirement that the acts or omissions of the persons in question be of equal or comparable causal significance to the loss in respect of which contribution is sought. However, the requirement that liability be "of the same nature and to the same extent", as stated in *BP Petroleum*, is apt to include notions of equal or comparable culpability and equal or comparable causal significance.

17 Culpability, as a factor bearing on the right to equitable contribution, clearly explains the requirement that for there to be contribution between co-trustees, the co-trustees must be *in pari delicto*. So, too, it explains the rule that a person who has been guilty of fraud, illegality, wilful misconduct or gross negligence is not entitled to contribution from his partners[23].

18 In *Dering v Earl of Winchelsea*, Lord Chief Baron Eyre hypothesised that:

> "If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution."[24]

That example was given by the Lord Chief Baron in exposition of the requirement that, to obtain contribution in a court of equity, the applicant should have "clean hands". However, the example his Lordship gave is one that directs attention to causation, in the sense of legal responsibility for the loss in question. The same consideration may have some bearing on the law's acceptance that contribution cannot be obtained if the person against whom contribution is sought is entitled to indemnity from the applicant.

19 In the present case, if regard were to be had to culpability and causation, there would be much to be said for the view that the culpability of LFOT and Mr Tressider and the causal significance of their conduct to the loss suffered by Hanave was of such a different order from that of Mr Burke that they should not be entitled to contribution. Their misleading conduct was a positive inducement to Hanave to purchase, whereas Mr Burke's omission to advise further inquiries merely had the consequence that the respondents' misleading conduct remained undetected.

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23 See *Thomas v Atherton* (1878) 10 Ch D 185. See also *Lane v Bushby* (2000) 50 NSWLR 404.

24 (1787) 1 Cox 318 at 320 [29 ER 1184 at 1185].

20 Further and as earlier indicated, it must be accepted that Mr Burke, who conducted negotiations with LFOT and Mr Tressider on Hanave's behalf, was, himself, misled by their conduct. Had Mr Burke been induced by their conduct not to advise the making of inquiries, he would be entitled to indemnity from them for any liability he incurred to Hanave, thus defeating any claim to contribution.

21 LFOT and Mr Tressider resisted the notion that their conduct was in any way causative of Mr Burke's failure to advise arguing that, in the context of cl 11.3 which related to the future solvency of the tenants, his breach of his duty of care was entirely unrelated to their conduct. Even so, that argument is simply another way of saying that, had Mr Burke acted with due care, the misleading nature of the conduct of LFOT and Mr Tressider would have been exposed before the exchange of contracts.

22 It is unnecessary in this case to further explore the relevance of culpability and the causal significance of the acts and omissions of persons claiming equitable contribution. Similarly, it is unnecessary in this case to further explore how doctrines of equitable contribution operate in connection with particular provisions of Pt VI of the Act. That is because the doctrine of equitable contribution is founded on concepts of fairness and justice – "natural justice", as that term was explained by Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)*[25]. In this context, "natural justice" requires that if "one of several persons has paid more than his proper share towards discharging a common obligation"[26] he is entitled to be recompensed by those who have not. If LFOT and Mr Tressider were to receive contribution from Mr Burke, they would, to the extent of that contribution, not have paid their proper share but would, instead, be unjustly enriched. That is because they would ultimately receive an amount in excess of the true value of the premises which their misleading conduct caused Hanave to purchase.

23 The appeal should be allowed with costs and the order of the Full Federal Court of 18 August 2000 set aside. In lieu of that order, the appeal to the Full Federal Court should be allowed with costs, order no 2 of Moore J of 11 November 1999 should be set aside and, in lieu thereof, the cross-claim should be dismissed with costs.

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25 (1969) 121 CLR 342 at 351.

26 (1969) 121 CLR 342 at 351 per Kitto J, citing *Davies v Humphreys* (1840) 6 M & W 153 at 168-169 [151 ER 361 at 367-368].

24 McHUGH J. In the course of selling a commercial property to Hanave Pty Ltd ("Hanave"), LFOT Pty Ltd ("LFOT") breached s 52 of the *Trade Practices Act* 1974 (Cth) by engaging in misleading and deceptive conduct that induced Hanave to buy the property at an inflated price. Hanave's agent in the transaction was William Robert Burke ("Burke"), the first appellant, who was a director of Hanave. He was also its solicitor and in that capacity he acted for it on the purchase from LFOT, the first respondent. In the course of doing so, he breached the duty of care that he owed to Hanave by failing to check the accuracy of the representations that LFOT had made about the property. The Federal Court assessed Hanave's loss on the purchase as $750,000 and, under s 82 of the *Trade Practices Act*, ordered LFOT to pay that sum as damages to Hanave. Hanave could also have obtained common law damages in that amount against Burke, if it had sued him – which it did not. The Federal Court held that LFOT was entitled to claim a 50% contribution of $375,000 from Burke because he was also liable to Hanave. The issues in this appeal are whether the Federal Court was correct in holding that Burke was liable to make contribution and, if so, in ordering him to make a 50% contribution.

25 Burke and Hanave, the second appellant, contend that the Federal Court erred in holding that, under the general law of contribution, LFOT and Tressider, the second respondent, were entitled to contribution from Burke. The Federal Court had held that, under s 75B of the *Trade Practices Act*, Tressider, a director of LFOT, was also liable for the loss suffered by Hanave. Burke and Hanave contend that the respective liabilities of LFOT, Tressider and Burke to Hanave were not in respect of a common obligation, the existence of which they assert is a necessary condition of a claim for contribution under the general law. Nor, in their submission, should the Federal Court have characterised the loss suffered by Hanave as a burden common to LFOT, Tressider and Burke, such that the payment of damages by LFOT constituted a benefit to Burke.

26 In my opinion, the contentions of Burke and Hanave are correct and their appeals should be allowed. It would be surprising if their contentions were wrong. As the result of its misconduct, LFOT obtained $750,000 from Hanave to which it was not entitled. The Federal Court order requires it to repay that sum to Hanave and puts LFOT back in the position that it would have been in if it had not engaged in misleading and deceptive conduct. Yet if the contribution order stands, LFOT will gain $375,000 by reason of its misconduct, and Burke – who received nothing from Hanave or LFOT – will be out of pocket by $375,000. Any principle of the common law or equity that would lead to such a result is so surprising that it would need to be re-examined. Fortunately, properly understood, the principles concerning contribution do not lead to the orders made by the Federal Court.

The material facts

27 LFOT, formerly Jagar Projects Pty Ltd, owned a property consisting of seven tenanted shops. In June 1994, Burke saw a newspaper advertisement for the forthcoming auction of the property. The advertisement mentioned some of the "established retailers" who were tenants, including Barbara's Storehouse Pty Ltd which occupied two of the shops on the property. The advertisement asserted that the total yearly income generated from the property was $312,644. Barbara's Storehouse contributed approximately one third of that amount.

28 Hanave was the trustee of a trust whose beneficiaries included Burke. On behalf of Hanave, Burke contacted the selling agents of the property. On 28 June 1994, they forwarded him a "property report". The report gave details about the land and buildings and annexed a tenancy schedule, identifying each of the tenants and providing their rental figures. It described the property as a:

> "recently constructed, high exposure, single level, corner retail location, with 7 *established high quality tenants* including Barbara's Storehouse, Orrefors Kosta Boda and Just Jeans amongst others." (emphasis added)

29 In July 1994, Burke received a copy of the draft contract for sale, together with copies of the leases. Clause 8 of the contract provided that the property was sold subject to the lease or leases particularised in Schedule 1. The Schedule named Barbara's Storehouse as the tenant of shops 1 and 2 for a term expiring on 18 May 2003, with an annual base rent of $108,150. It also recorded that Adelights Pty Ltd[27] had taken an assignment of the lease in May 1994.

30 Clause 8.3 contained a warranty on the part of the vendor "that all incentives for the benefit of the tenant under or in connection with the Lease" were either disclosed in the relevant lease or set out beneath that clause in the contract. No incentives were disclosed in the contract, nor was any incentive disclosed in the lease to Barbara's Storehouse. However, in April and May 1993, a company associated with two of LFOT's directors, Tressider and Glew, had made out two cheques to Barbara's Storehouse totalling $60,000. Correspondence between the relevant parties described the payment as a "fitout contribution", but the evidence did not show how Barbara's Storehouse spent the contribution. Adelights did not receive any of the $60,000 when it took an assignment of the lease.

31 The contract for sale included a provision that LFOT made or gave no warranties as to the solvency or financial standing of any tenant. Clause 11 provided:

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27 Adelights had the same shareholders and directors as Barbara's Storehouse.

"11. PURCHASER TAKES LEASE AS IS

11.1 The purchaser acknowledges having inspected every Lease referred to in Schedule 1 and is satisfied as to the terms of the Lease and (subject to any vendor warranties expressly contained in this contract) the legal effect and operation thereof.

...

11.3 *The vendor makes no warranty as to the solvency or financial standing of any tenant and the purchaser is taken to have satisfied itself in this regard*." (emphasis added)

32 From an early stage of its tenancy, Barbara's Storehouse had defaulted in making prompt rental payments. For some months, it paid rent by way of two payments in the month. However, it paid no rent in March 1994, and the balance of rent outstanding at the end of April, May, June and July 1994 was $5,000, $2,000, $2,000 and $3,000 respectively.

33 Although Burke checked the contents of the leases against the Schedule in the property report, he did little or nothing else to verify the accuracy of LFOT's representations. On 20 July 1994, LFOT and Hanave exchanged contracts for a purchase price of $2,550,000. Settlement of the purchase took place on 17 August 1994, after which time the payment pattern of Barbara's Storehouse worsened. The lowest figure for which it was in arrears in 1994 was $9,050 in December. For most of the following year the arrears were constantly in the order of $20,000. Adelights eventually vacated the premises.

34 Hanave commenced proceedings against LFOT in the Federal Court. It alleged that the representations in the newspaper advertisement and the property report constituted misleading and deceptive conduct in contravention of s 52 of the *Trade Practices Act*. The representations related to the overall performance of the property and that of individual tenants, particularly Barbara's Storehouse. Hanave alleged that LFOT's failure to disclose the incentive payment to Barbara's Storehouse was also conduct contravening s 52 and that Tressider and Glew, as directors of LFOT, were individually liable under s 75B of the *Trade Practices Act* for their involvement in the transaction. LFOT, Tressider and Glew denied liability and filed a cross-claim against Burke alleging that it was his negligence and/or breach of retainer that caused Hanave to suffer the loss for which it claimed. They asserted that they were entitled at law to either a complete indemnity or contribution from Burke, to the extent of any liability they may themselves have had to Hanave.

The findings of the trial judge regarding LFOT's conduct

35 The action came before Moore J who found that LFOT had made the alleged representations and that they were false[28]. However, his Honour held that Burke had not relied on the representations. He dismissed Hanave's claim. Hanave successfully appealed to the Full Court of the Federal Court[29]. The majority of the Full Court found that the description of Barbara's Storehouse as a high quality tenant and the failure to disclose the incentive payment constituted misleading and deceptive conduct that had induced Hanave to pay more for the property than it was worth. The Court remitted the matter to Moore J to determine the liability of Tressider and Glew, the cross-claim against Burke, and the assessment of damages.

The liability of Tressider and Glew

36 At the first trial, Moore J accepted Glew's evidence that he did not know that the description of Barbara's Storehouse as a "high quality tenant" had been used in the property report. Since the Full Court described LFOT's contravening conduct as a cumulation of the representation as to the high quality of tenants *and* the failure to disclose the incentive payment, and Glew did not know of the former, his Honour held that he was not involved in the contravention. Tressider, on the other hand, knew of the description in the property report and the rental payment history of Barbara's Storehouse. Moore J also found that Tressider was aware at the time of sale that the contract required disclosure of lease incentives, that the payment of $60,000 could be characterised as such, and that it had not been disclosed. Tressider therefore knew of the essential elements of LFOT's conduct which contravened s 52 and was liable under s 75B of the Act.

Burke's conduct as solicitor for Hanave

37 Burke and Hanave no longer dispute that Burke was retained as Hanave's solicitor, prior to exchange, to act on the purchase of the property. Further, they do not dispute that as the company's solicitor, Burke had a duty to advise Hanave that, having regard to the provisions of cl 11.3, it would be prudent to make inquiries about the financial standing of the tenants before exchange. There was no evidence at the trial that Burke had given Hanave any such advice. Moore J held that, if the advice had been given, Hanave would have made the relevant inquiries which would have disclosed the true position of tenants such as Barbara's Storehouse. In his Honour's opinion, the purchase would not have proceeded, or at least not on the terms that it did.

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28 *Hanave Pty Ltd v LFOT Pty Ltd* (1998) ATPR ¶41-658.

29 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) ATPR ¶41-687.

Principles of contribution

38 Both common law and equity give a person the right to obtain contribution to a payment made by that person in discharging "a common obligation" that is owed by that person and others[30]. In determining whether there is "a common obligation", the traditional test is whether the liability of each party "is of the same nature and to the same extent"[31]. Early cases suggested that the common law right arose as a result of an implied contract between the parties[32]. But whether that be right or not – and if it is, in many cases, it must be the result of a contract imputed to the parties – the equitable principles now cover the field[33]. Those principles are based on the equitable doctrine of equality. When a person pays more than his or her share of a common monetary obligation, the payment *pro tanto* discharges the obligation of all who owe the common obligation[34]. In accordance with the maxim that equality is equity, equity requires the common burden to be shared equally so that none of those owing the common obligation will pay more than his or her share of the burden. An order of contribution prevents the injustice that would otherwise flow to the plaintiff by the defendant being enriched at the plaintiff's expense in circumstances where they have a common obligation to meet the liability which the plaintiff has met or will have to meet[35].

39 In *Albion Insurance Co Ltd v Government Insurance Office (NSW)*[36], Barwick CJ, McTiernan and Menzies JJ traced the origins of the doctrine of contribution back to the second half of the 18th century[37]. Although a distinction

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30 *Didmore v Leventhal* (1936) 36 SR (NSW) 378 at 385; *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350-351.

31 *Caledonian Railway Co v Colt* (1860) 3 Macq 833 at 844.

32 *Craythorne v Swinburne* (1807) 14 Ves Jun 160 at 164, 169 [33 ER 482 at 483-484, 485].

33 *Armstrong v Commissioner of Stamp Duties* (1967) 69 SR (NSW) 38 at 48.

34 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350-351.

35 *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 at 174; *Mahoney v McManus* (1981) 180 CLR 370 at 388.

36 (1969) 121 CLR 342 at 345; see also at 349 per Kitto J.

37 Lord Mansfield gave several decisions on contribution with respect to the position of marine insurers who insured against the same loss. See, for example, *Godin v*

(Footnote continues on next page)

was originally maintained between the right of contribution at common law and in equity[38], the courts in both jurisdictions accepted that the doctrine was "bottomed and fixed on general principles of justice"[39]. In *Dering v Earl of Winchelsea*[40], Lord Chief Baron Eyre described the underlying justification for such orders:

> "in *equali jure* the law requires equality; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity."

40 His Lordship held in that case that the doctrine of contribution applied in the case of sureties who were severally bound by different instruments to the same principal. Since the sureties had a common interest and a common burden, Lord Chief Baron Eyre held them joined by the common end and purpose of their several obligations to make contribution even though they had executed different instruments at different times. Since that case, it has never been doubted that the right of contribution depends upon matters of substance, not form[41].

41 In addition to sureties, other relationships have traditionally been regarded as capable of giving rise to an order for contribution. They include co-insurers under contracts of indemnity insurance, co-contractors, parties liable to the holder of a bill of exchange, partners, joint tenants and tenants in common[42]. More often than not, the relationships between the parties in those cases exhibit the characteristics commonly regarded as essential to establishing an entitlement to contribution, namely "a common interest and a common burthen"[43]. The nature of the relevant interest and burden is such that the discharge of the burden by one party constitutes a benefit to the other or others which, in fairness, the law cannot countenance them keeping. In *Albion*, for example, the right of

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London Assurance Company (1758) 1 Burr 489 [97 ER 419]; *Newby v Reed* (1763) 1 Black W 416 [96 ER 237].

38 For an explanation of the differences between the two jurisdictions see the judgment of Vaughan Williams LJ in *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 at 175-176.

39 *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 321 [29 ER 1184 at 1185].

40 (1787) 1 Cox 318 at 321 [29 ER 1184 at 1185].

41 *Cockburn v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624 at 631 [25] per Mason P.

42 Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 3rd ed (1992) at [1001].

43 *Ellesmere Brewery Company v Cooper* [1896] 1 QB 75 at 79 per Lord Russell CJ.

contribution was attracted in the case of two insurers because both insurance policies covered the risk that gave rise to the claim. Kitto J said[44]:

> "What attracts the right of contribution between insurers ... is not any similarity between the relevant insurance contracts as regards their general nature or purpose or the extent of the rights and obligations they create, but is simply the fact that *each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained*". (emphasis added)

Because payment by one insurer effectively discharged the other's liability to pay the claim, the insurer who had paid was entitled to contribution from the insurer who had not[45].

42 The principles of contribution are therefore designed to adjust the rights of the co-obligors when one of them, voluntarily or involuntarily, discharges their common obligation. Rowlatt[46], in a passage cited by Clauson LJ in *Whitham v Bullock*[47], stated the principle as follows:

> "[I]f, as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a certain way, the Court will so far as possible, having regard to the solvency of the different parties, see that, if the burden is placed inequitably by the exercise of the legal right, its incidence should be afterwards readjusted."

43 In order to establish a right of contribution, it is often said that the claimant must prove that its own liability is "co-ordinate" with that of the party against whom it claims contribution. But as Fitzgerald JA observed in *Stratti v Stratti*, the difficulty in defining which liabilities meet that description is noted almost as often as the term is used[48]. Previous cases provide some guidance, however, as to liabilities that do *not* meet that description. In *Scholefield Ltd v Zyngier*[49], for example, the Privy Council held that there was no room for the

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44 (1969) 121 CLR 342 at 352.

45 (1969) 121 CLR 342 at 346.

46 *The Law of Principal and Surety*, 3rd ed (1936) at 173.

47 [1939] 2 KB 81 at 85.

48 (2000) 50 NSWLR 324 at 330 [18]. Mason and Carter state that the term "defies exclusive or narrow definition": *Restitution Law in Australia* (1995) at [622].

49 [1986] AC 562.

application of the doctrine unless the person from whom contribution is claimed has placed himself on the *same level of liability* as that on which the claimant for contribution stands. Thus contribution will not lie simply because the respective liabilities of parties arise out of *similar* relationships or *related* transactions[50].

44 Similarly, the doctrine will not apply if the obligations in question are merely owed to the same party or are "otherwise connected in time or circumstance."[51] Nor will it apply merely because the claimant's payment has benefited or relieved the other party financially. In *Ruabon Steamship Company v London Assurance*[52], Lord Halsbury LC held that the insurers of a vessel were not entitled to claim contribution from its owners for the cost of dry-docking the vessel to effect repairs because the owners had taken advantage of the vessel being dry-docked to have it surveyed. In examining the cases in which contribution had been permitted, Lord Halsbury LC described the common feature as being that[53]:

> "the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation *binding them all to equality of payment or sacrifice in respect of that common obligation*." (emphasis added)

45 In *Cockburn v GIO Finance Ltd (No 2)*[54], Mason P relied on *Ruabon* to support the proposition that "something more" is required to enliven a right to contribution than the fact "that the claimant's payment has benefited or relieved the defendant financially". In *Cockburn*, the New South Wales Court of Appeal reversed the decision of Foster AJ who had ordered contribution between an insurer and a firm of solicitors in relation to a mortgage executed by a son acting under the undue influence of his father. The mortgage was security for a loan ostensibly made to the son but in effect to the father. Foster AJ had held that the insurer and the firm were "under co-ordinate liabilities to make good the one loss"[55]. His Honour's conclusion was based largely on the fact that the mortgage

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50 *Smith v Cock* [1911] AC 317.

51 *Re La Rosa; Ex parte Norgard v Rodpat Nominees Pty Ltd* (1991) 31 FCR 83 at 91 per French J.

52 [1900] AC 6.

53 [1900] AC 6 at 12.

54 (2001) 51 NSWLR 624 at 633 [30].

55 (2001) 51 NSWLR 624 at 630 [21], citing Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 349-350.

would never have been executed *but for* the wrongful conduct of both parties. Reversing the decision of Foster AJ, the Court of Appeal held that the liabilities of the GIO and the solicitors were "fundamentally different in character"[56].

46 Mason P pointed out that in discharging the mortgage the GIO was not meeting a liability to make good a loss it owed, let alone owed concurrently with the solicitors[57]. That was because the mortgage was void *ab initio*. The fact that the solicitors gained an advantage from the court-ordered cancellation of the mortgage was insufficient to establish a basis for their liability[58]. Ipp AJA pointed out that any payment of damages to the mortgagee by the solicitors would have had no effect on any liability of the GIO to the mortgagee[59]. The basic rationale of the right to contribution was consequently lacking – the discharge by one co-obligor of its liability to the principal which discharged the liability of the other[60].

47 The approach of Foster AJ in *Cockburn* illustrates the practical difficulty that arises from using the term "co-ordinate liabilities" to determine rights of contribution. Rather than focussing on the community of interest between parties – which makes it equitable that they share in the discharge of any burden – the phrase "co-ordinate liabilities" directs attention to the burden itself. Meagher, Gummow and Lehane in their great work on equity seem to advocate this approach, an approach that is arguably broader than has been countenanced to date. They suggest that contribution may be recovered[61]:

> "where the liabilities of the co-obligors to the principal claimant are such that enforcement by him against either co-obligor would diminish that obligor in his material substance to the value of the liability."

48 Mason and Carter doubt whether the class of available contribution claims is as broad as Meagher, Gummow and Lehane suggest. Mason and Carter point

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56 (2001) 51 NSWLR 624 at 640 [74].

57 (2001) 51 NSWLR 624 at 634 [41].

58 (2001) 51 NSWLR 624 at 634 [43].

59 (2001) 51 NSWLR 624 at 641 [79].

60 (2001) 51 NSWLR 624 at 640 [78].

61 *Equity Doctrines and Remedies*, 3rd ed (1992) at [1006].

to cases that have satisfied their test[62] yet the courts have refused to order contribution. They argue that there must be, "at least", an involvement of the parties in a common design to achieve a common end[63]. In their view – which I think is correct – only such a community of interest will make it *inequitable* for the party, against whom the contribution is sought, to keep the benefit it derives from the claimant discharging its obligations.

49 However, the circumstances in which a court will order contribution are not closed. In recent years, courts have held that a difference in the causes of action pursuant to which two parties are liable will not of itself preclude an order for contribution between them[64] provided the liability of each "is of the same nature and to the same extent". In *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*[65], BP was liable under a contract with the Shetland Islands Council for the cost of damage to the Council's jetty. Esso was similarly obliged to pay for that damage, pursuant to statute. The Outer House held that the obligations of the two parties were "substantially the same". In those circumstances, Lord Ross held that they could properly be regarded as being under a common obligation, or liable for the same debt, even though their respective obligations had different sources[66]:

> "[T]he origins of the obligation placed on the pursuers and the defenders are separate and distinct, *but the obligation is a common one because each has to perform substantially the same obligation*." (emphasis added)

50 Although *BP Petroleum Development* took the doctrine of contribution to new ground, it did so by applying the basal principle – that the right to contribution depends on the claimant discharging a common obligation, that is to say, an obligation of the same nature and extent owed by the claimant and the defendant.

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62 *Smith v Cock* [1911] AC 317. Lord Mersey stated in that case (at 326): "Before there can be any question of contribution there must be a common obligation upon those who are required to contribute."

63 *Restitution Law in Australia* (1995) at [622].

64 *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 at 348 citing Lord Chelmsford in *Caledonian Railway Company v Colt* (1860) 3 Macq 833 at 844; *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 597.

65 [1987] SLT 345.

66 [1987] SLT 345 at 348.

The cross-claim for contribution in this case

51 LFOT's liability to Hanave arose by reason of its breaching a statutory obligation not to engage in misleading and deceptive conduct. Burke's liability arose pursuant to the common law rules regarding breach of contract and negligence. The difference in the potential causes of action against them does not necessarily preclude an order for contribution. Indeed, decisions of single judges in the Federal Court indicate that an order for contribution under the general law may relieve a party who has breached the *Trade Practices Act* from liability for the entire amount of damages awarded[67].

52 Nevertheless, it is difficult to characterise the respective obligations of LFOT and Burke as being "of the same nature and to the same extent"[68]. LFOT had a positive obligation not to use misleading and deceptive conduct to induce Hanave to purchase the property. Burke had a duty to advise Hanave to check the accuracy of the representations that constituted the misleading and deceptive conduct. They were independent, not common obligations, having different legal sources. They were not of the same nature or the same extent. Moreover, as Moore J held, acknowledging the finding by Kiefel J, in the earlier Full Court decision, the contravening conduct of LFOT "must be taken to have been of significance" to Burke in deciding, on behalf of Hanave, to purchase the property[69]. That is to say, far from their obligations being of the same nature and extent, LFOT's obligation extended to not misleading Burke as well as Hanave.

53 Moore J held that, because Hanave would not have incurred any loss but for the conduct of *both* LFOT and Burke, the liabilities of LFOT and Burke were "co-ordinate"[70]:

> "[F]or liabilities to be 'co-ordinate', they must be to make good the same loss, and must be 'of the same nature and the same extent' or 'in the same degree' ... *In my opinion the liabilities of [LFOT] and Tressider on the one hand and Burke on the other are to make good the same loss, namely Hanave's loss resulting from the purchase of the shopping centre and the liabilities are co-ordinate*." (emphasis added)

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67 *Dorrough v Bank of Melbourne Ltd* (1995) ATPR (Digest) ¶46-152; *Austotel Management Pty Ltd v Jamieson* (1996) ATPR ¶41-454. No decisive authority on the question exists, although the Full Federal Court did not rule it out as a possibility in *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 11-12.

68 *Caledonian Railway Co v Colt* (1860) 3 Macq 833 at 844.

69 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 168 ALR 318 at 329.

70 (1999) 168 ALR 318 at 328.

54 Moore J focussed primarily upon who was potentially liable to make good the loss. His Honour did not assess the nature of the respective obligations owed to Hanave by LFOT and Burke to ascertain whether they were of a nature that made contribution appropriate. Instead, Moore J reasoned that, because the conduct of both contributed to the loss, it would be inequitable if LFOT had to pay the entire amount. His Honour's approach is reminiscent of the approach taken by Foster AJ in *Cockburn*, which the Court of Appeal rejected. It is an approach that minimises, if it does not disregard, the significance of the fact that the loss suffered by Hanave, namely, the difference between the price paid for the property and its actual value at the time of purchase, was the gain of LFOT, and LFOT alone. It is an approach that disregards that LFOT suffers no burden or loss by being ordered to disgorge its ill-gotten gain.

55 In the Full Court of the Federal Court, Heerey J and Lehane J found that the payment by LFOT of the entire loss suffered by Hanave would constitute a benefit to Burke because it would constitute a discharge of his personal liability. For Heerey J, this was a "critical element". The fact that Hanave could not recover its loss from LFOT and recover again from Burke, or vice versa, led his Honour to conclude that Burke should contribute. Heerey J rejected the contention that it was against the basis of equitable intervention that LFOT and Tressider, having been found to have breached s 52, could "in conscience" bind Burke, the very person whom they had misled and deceived, to contribute to Hanave's loss. His Honour likened the situation to that in *BP Petroleum Development*, in that both Esso and LFOT were liable under statutes *for the same damage* for which BP and Burke were liable in contract.

56 However, a crucial distinction between *BP Petroleum Development* and the present case is that Esso was under a specific statutory obligation *to pay for damage to the jetty*. That statutory obligation was "substantially the same" as the contractual obligation of BP. In those circumstances, the Outer Court held that it would be inequitable to order BP to pay the entire sum when its doing so would result in Esso having to pay nothing. It is difficult to directly apply that reasoning to this case where, although the conduct of both parties may ultimately have been responsible for *the loss*, their respective responsibility arose from the breach of *substantially different obligations*.

57 Lehane J distinguished *BP Petroleum Development* from the present case on the basis that the former involved a claimed right to receive contribution to performance of a common obligation, while this case involved a right "in respect of a liability in damages for breach of a shared obligation."[71] With respect, the adjective "shared" is misplaced. The obligations which LFOT and Burke had in this case were only "shared" in the sense that Hanave was the object of them. In

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71 *Burke v LFOT Pty Ltd* (2000) 178 ALR 161 at 187.

all other respects, the obligations were different. This case involves a liability in damages arising from two parties breaching their separate and distinct obligations. That characterisation illustrates the lack of a common interest between LFOT and Burke.

58 Ultimately the distinction between *BP Petroleum Development* and this case was of little significance to Lehane J. His Honour took the view that the authorities did not lay down a general rule that rights of contribution were excluded because the shared obligation was a liability to pay damages or compensation for a civil wrong[72]. Lehane J thought that the law had advanced beyond the stage where it was possible to limit rights of contribution to cases where a common liability arose from an (antecedent) common design to achieve a common end. His Honour said[73]:

> "What the principle expounded in *Albion* requires, in my view, is that two or more persons are each liable in respect of the same debt or to make good the same loss sustained by a third party, in circumstances where discharge of the obligation by one relieves the other(s). *The object is to ensure that equity as between persons liable in those circumstances is not defeated by the caprice of the person entitled to the benefit of the obligation*." (emphasis added)

59 The italicised portion illustrates the "payment as benefit" theory that influenced the reasoning of the majority judgments in this case. The comments of his Honour bear a strong resemblance to the views expressed in his co-authored text. However, as Mason P pointed out in *Cockburn*[74], "merely because a remedy is given against a defendant that hits it in its pocket is not enough to generate a right of contribution" from another person who is also liable to the person who has that remedy. If a person had a claim for contribution in those circumstances, then, as Mason P stated, "orders for specific performance or account of profits might generate a claim for contribution, something which (on my understanding) they cannot do."[75] In paying the entire amount of damages awarded against it, LFOT is merely accounting for the profit it wrongly made from this transaction by reason of its misleading and deceptive conduct. It is not discharging an antecedent obligation, but accounting for moneys that it should never have received. In those circumstances, it would be inequitable to make

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72 In his Honour's opinion, the cases allowing contribution among defaulting trustees were inconsistent with any such rule.

73 (2000) 178 ALR 161 at 190.

74 (2001) 51 NSWLR 624 at 634 [42].

75 (2001) 51 NSWLR 624 at 634 [42].

Burke contribute to LFOT's repayment of Hanave's loss – a loss which was LFOT's gain. It would be absurd to suggest that a person who stole money and was ordered to repay it could obtain contribution from a person who negligently failed to safeguard the money. And in substance, I do not think that there is any difference between that example and the present case.

60 Lehane J acknowledged that there might be cases where persons were liable under different causes of action, which would exclude contribution or affect the operation of the principles[76]. Questions of no right to contribution could also arise where the liability of one party, but not the other, was reduced by reason of contributory negligence. And they could arise where, as between the party suffering loss and one of the parties liable, there were offsetting or countervailing claims which did not affect the claim against the other party liable. The existence of such exceptions highlights the practical difficulties associated with determining claims for contribution solely on the basis of one party making a payment which another party might have been held equally liable to make, albeit for the breach of a completely different obligation. As Lee J stated in his dissent in this case[77]:

> "The grounds of liability and the acts or omissions of the respective parties will differ and different relationships will exist between those parties and the party affected by the separate conduct. Defences that may be raised to the respective acts or omissions will differ markedly and may include cross-claims which raise further issues. In the absence of a single judgment against persons under concurrent liabilities to compensate an injured party, one of those persons cannot apply by cross-claim for an order in equity that the other make contribution to any sum the former has paid in discharge of a judgment or in compromise of litigation."

61 Lee J focussed on the nature of the respective obligations of LFOT and Burke. His Honour thought that the relationship *between them* was no closer than that of concurrent tortfeasors. In his opinion, such a relationship did not have the requisite mutuality between the parties in respect of the burden to be discharged. His Honour said, correctly in my opinion[78]:

> "[T]he parties must share a common burden in respect of *obligations* owed to a third party and as a result must have mutual rights and obligations *inter se*." (emphasis added)

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76 For example, if the measure of damages was different, giving rise, perhaps, to a question whether the loss for which each party was liable was not the same loss.

77 (2000) 178 ALR 161 at 167-168.

78 (2000) 178 ALR 161 at 165.

62 To obtain an equitable order for contribution, his Honour said, the parties to the proceeding must have shared a common burden arising out of a pre-existing relationship. If the parties are not on the same level of liability, there can be no common interest and no common burden with joinder in a common end and purpose by the several obligations.

63 The approach of Lee J is similar to that of the Court of Appeal in *Cockburn*, which was recently followed by a differently constituted Court of Appeal in *Alexander (trading as Minter Ellison) v Perpetual Trustees WA Ltd*[79]. In *Alexander*, contribution was refused where both the claimant and the respondents were in breach of trust duties that they owed in relation to the investment of funds in a company by a number of beneficiaries. The respondents were appointed trustees of the various trusts involved. The claimant solicitors acted for the company with respect to the legal aspects of its investment plan. They also agreed to act for the respondents as its agent on the settlement. The beneficiaries should have received a Deposit Certificate as security for their investment. The solicitors knew that no such certificates had been provided on settlement. They made no attempt to inform the respondents of this breach of the agreement, an omission that was conceded by the solicitors to be both negligent and a breach of the trust duty that they owed as agent of the respondents.

64 The solicitors were ordered to pay damages to the beneficiaries, but they sought an order for contribution from the respondents on the ground that they too had been negligent and had breached the terms of *their* trust by failing to make proper inquiries. The Court of Appeal upheld the decision of the trial judge refusing to make an order for contribution. Accepting that both parties had breached the terms of their trusts, Stein JA held that they were different trusts and different breaches. They were simply not "of the same nature and the same extent"[80]. Davies AJA agreed, pointing out that the respondents had paid trust monies to the solicitors to be held and dealt with by them as *their* trustee and agent. His Honour said[81]:

> "It was no answer to the claim made against the solicitors by [the respondents] that those companies failed in their personal duty to the beneficiaries by leaving entirely to an agent, the solicitors, matters to which they ought to have given their own personal attention. Because the solicitors were trustees and agents for [the respondents] and had a direct

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79 [2001] NSWCA 240.

80 [2001] NSWCA 240 at [119].

81 [2001] NSWCA 240 at [141].

responsibility to those companies, their obligations were not on the same level."

65 This is an even stronger case for refusing contribution than *Alexander*. In *Alexander*, the solicitors obtained no benefit from their breach of duty but had to pay damages. LFOT did obtain a benefit – $750,000, the very amount that it has to repay.

66 Moreover, to award contribution in this case would be inconsistent with the policy considerations behind the enactment of Pts V and VI of the *Trade Practices Act*. It would enable a person in breach of s 52 of the Act to profit by its contravention of the Act. It would enable LFOT to obtain $375,000 from Burke even though its misleading and deceptive conduct misled Burke in his capacity as solicitor and in his capacity as agent for Hanave. Relief under s 82 for a breach of s 52 is not restricted to the astute and intelligent or to those who have taken appropriate steps to protect themselves against such conduct. Failure by a plaintiff to make inquiries that may have exposed the misleading and deceptive conduct does not absolve a defendant from the consequences of its breach of the *Trade Practices Act*[82]. Similarly, the policy of the Act is promoted by holding that those who are misled by breaches of s 52 should not have to assist the contravener of s 52 to pay the damages awarded under s 82 by reason of those breaches. Contrary to the view of Heerey J, it is against the policy of the *Trade Practices Act* that a party, having been found to have breached s 52, could bind the very person who was misled and deceived to contribute to the loss.

Conclusion

67 LFOT's conduct misled the parties with whom it dealt in trade and commerce. Its misleading and deceptive conduct caused Hanave to pay more than the property was worth. Hanave's loss was quantified as the difference between the value of the property at the time of purchase and what it paid for the property. That difference was gained by LFOT, and the order requiring it to pay damages to Hanave is no more than an order requiring it to reimburse Hanave for the loss that it suffered and LFOT gained. In accordance with the course of authority, it is not inequitable that LFOT be solely liable for repaying this sum even though Hanave might have discovered the misleading and deceptive nature of its representations but for the omissions of Burke[83]. It would be inequitable, however, if Burke, who gained nothing from the transaction and was misled by LFOT, should now have to pay LFOT the sum of $375,000. There is no equality

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82 See, for example, *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; *Sharp v Ramage* (1995) 12 WAR 325.

83 *Gould v Vaggelas* (1985) 157 CLR 215.

in LFOT gaining $375,000 and Burke losing $375,000 as the result of LFOT's unlawful conduct.

68 The appeal should be allowed because it would be contrary to equitable principle for Burke to be ordered to pay $375,000 to LFOT merely because LFOT, who wrongly obtained $750,000 from Hanave, has been ordered to repay that sum.

69 KIRBY J. This appeal, from a judgment of the Full Court of the Federal Court of Australia[84], concerns the principles of equitable contribution. Despite their origin and purposes those principles have become needlessly encrusted with artificial rules and restrictions resulting in disputation, confusion and uncertainty[85]. This is so despite the reminder of Gibbs CJ (with the concurrence of Murphy and Aickin JJ) in *Mahoney v McManus*[86] that:

> "the doctrine of contribution is based on the principle of natural justice that if several persons have a common obligation they should as between themselves contribute proportionately in satisfaction of that obligation. The operation of such a principle should not be defeated by too technical an approach".

70 This Court should insist that this approach is observed. If necessary, some of the encrustations should be discarded. We should not turn the clock back nor adopt a view as to the availability of contribution opposite to that expounded by Gibbs CJ. These conclusions require that the present appeal be dismissed.

The trial, first appeal and retrial decisions

71 What should have been a relatively straight-forward dispute between the parties has resulted in two trials, two appeals to the Full Court of the Federal Court and now an appeal to this Court. Hanave Pty Ltd ("Hanave") (the second appellant) purchased seven tenanted shops from Jagar Projects Pty Ltd (now LFOT Pty Ltd) ("LFOT") (the first respondent)[87]. The shops were in Leichhardt, New South Wales. Mr Paul Tressider (the second respondent) was a director of LFOT. A third respondent, Mr Glew, has been found blameless. His position can be ignored.

72 Mr William Robert Burke, the first appellant, was at once a director of Hanave as well as its solicitor. The issue in this case is the obligation of Mr Burke to contribute to the liability which LFOT and Mr Tressider ("the respondents") owe to Hanave. LFOT, which at all times speaks for Mr Tressider, successfully claimed at the second trial, and before the second Full Court, that

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84 *Burke v LFOT Pty Ltd (formerly Jagar Projects Pty Ltd)* (2000) 178 ALR 161.

85 See eg *Cockburn v GIO Finance Ltd* unreported, Court of Appeal (NSW), 2 February 1996 which, as in this case, required a second visit to an appellate court: *Cockburn v GIO Finance Ltd* unreported, Court of Appeal (NSW), 19 June 1997.

86 (1981) 180 CLR 370 at 378.

87 Throughout these reasons, to avoid confusion, the respondent company will be referred to as "LFOT".

they were entitled to contribution from Mr Burke, amounting to half of the liability which the respondents had to Hanave. Mr Burke argued that, if the principles of contribution were correctly applied, he was not liable to contribute a cent. As the litigation proceeded through the Federal Court multiple issues had to be resolved. But by the time special leave was granted by this Court, the only matter in contention was whether the majority of the second Full Court had erred in upholding the finding of the primary judge at the second trial[88]. That finding was that Mr Burke was bound to share equally with the respondents in discharging the damages of $750,000.

73 The liability of the respondents flowed principally from an advertisement in which they described the subject shops as having "high quality tenants". In fact, the principal tenant (Barbara's Storehouse) was at that time, and on a number of occasions beforehand, in arrears with its rent. The primary judge found that this fact made the representation about the shops false[89]. This finding warranted the conclusion that, pursuant to s 82 of the *Trade Practices Act* 1974 (Cth) ("the Act"), the respondents were liable to Hanave for misleading and deceptive conduct contrary to s 52 of the Act[90].

74 In the first and second trial, the primary judge (Moore J) formed conclusions adverse to Mr Burke, as to his credit, his competence as a solicitor and his differentiation between his duties as a solicitor and his interests as an officer of Hanave. Specifically, in his reasons following the first trial, the primary judge concluded that Mr Burke, in proceeding with the purchase of the shops in question, had not in fact relied on the advertisement and other material with the boast of "high quality tenants". His Honour said that Mr Burke had[91]:

> "proceeded with the sale unaware of the true position in relation to the circumstances of Barbara's Storehouse because of a combination of complacency and careless disregard for matters of detail and his reliance on his own knowledge and perfunctory inquiries".

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88 *Hanave Pty Ltd v LFOT Pty Ltd (formerly Jagar Projects Pty Ltd)* (1999) 168 ALR 318. The earlier Full Court decision (also by majority) is *Hanave Pty Ltd v LFOT Pty Ltd* (1999) ATPR ¶41-687.

89 *Hanave Pty Ltd v LFOT Pty Ltd* (1998) ATPR ¶41-658 at 41,322.

90 The terms of s 52 are set out in the reasons of Gaudron ACJ and Hayne J at [3]. Mr Tressider was liable under s 82(1) as a "person involved in the contravention" for having aided and abetted it. See also the Act, s 75B(1)(a).

91 *Hanave Pty Ltd v LFOT Pty Ltd* (1998) ATPR ¶41-658 at 41,332.

75 By majority, the first Full Court reversed the dismissal of the proceedings against the respondents that followed the foregoing conclusion[92]. The first Full Court held that the respondents' established mis-statement of fact and LFOT's assurance about it "must be taken to have been of significance to any rational prospective purchaser" and thus that the "[l]oss suffered by Hanave was caused 'by' the conduct of [LFOT] within the meaning of s 82(1) [of the Act]"[93]. This conclusion led to the remitter of the matter to the primary judge to determine the remaining issues in the case, conformably with the first Full Court's opinion. The correctness of that opinion is not in issue before this Court. However, in the differences that divided the judges to that stage of the litigation can be seen the seeds of the controversies about causation and culpability that have survived into this appeal.

76 Obedient to the decision of the first Full Court, the primary judge determined Hanave's loss, based on what he found to be the difference between the value of the shopping complex (on the assumption that the false representation had been correct) and its value in fact (having regard to the poor credit-worthiness of the principal tenant). The difference in these values was $750,000. That amount was awarded to Hanave against the respondents. The primary judge went on to conclude that Mr Burke should contribute equally with the respondents towards Hanave's judgment in that sum.

77 In his first decision, the primary judge made it clear that his conclusion was that Mr Burke had simply acted "as himself", had acted for Hanave "in a comparatively informal way" and generally had given "no thought to the capacity in which he acted in situations such as when he was reading the draft contract". The primary judge specifically rejected the suggestion, made by Mr Burke during cross-examination, that he had carefully delineated between his activities as a solicitor and as a director of Hanave. He found that such evidence was "disingenuous" and "of convenience only, designed to answer the cross claim"[94].

78 On remitter the primary judge accepted, as the first Full Court had determined, that Hanave was entitled to recover for its loss. But he obviously remained unimpressed with the standard of Mr Burke's attention to the matter as Hanave's director and solicitor. He pointed out that the obligation to scrutinise

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92 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) ATPR ¶41-687 per Wilcox and Kiefel JJ; Emmett J dissenting.

93 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) ATPR ¶41-687 at 42,793 per Kiefel J.

94 *Hanave Pty Ltd v LFOT Pty Ltd* (1998) ATPR ¶41-658 at 41,330.

the draft contract was part of the essential work of a legal practitioner[95]. Over objection, he had received affidavits from two experienced solicitors as to the practice usually followed by solicitors with the retainer that Mr Burke had from Hanave. Especially because of the inclusion in the terms of the written contract of a clause excluding warranties as to the solvency or financial standing of any tenant[96], the primary judge held that it would have been essential for Mr Burke, *qua* solicitor, to have advised that a number of enquiries should be made. These would have included to check the credit-worthiness of existing tenants, to scrutinise the vendor's books of account, and to check with the tenants themselves as to their business and prospects[97]. He found that the failure to do any of these things constituted a breach of the duty of care and of the contract of retainer that Mr Burke had with Hanave. Moreover, he concluded that Mr Burke had misunderstood the warranty in the contract of sale; had not properly advised Hanave; and, had he done so, that there was[98]:

> "no reason to believe … that the advice would not have been acted on and inquiries made. It is probable the true position would have been disclosed and the purchase would not have proceeded at least on the terms it did."

79 In the light of these factual findings, the primary judge concluded that Mr Burke and the respondents were each liable to Hanave to contribute half of the loss that Hanave had suffered.

The decision of the second Full Court

80 The second Full Court was agreed in all issues in the second appeal, save that of contribution. On that point, Lee J would have allowed the appeal[99]. However, both Heerey J[100] and Lehane J[101] reached the opposite conclusion.

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95 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 168 ALR 318 at 323 [12] citing *Solicitors' Liability Committee v Gray* (1997) 77 FCR 1.

96 The terms are set out in the reasons of Gaudron ACJ and Hayne J at [11], McHugh J at [31], Callinan J at [127]. I will not repeat them.

97 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 168 ALR 318 at 324-326 [14]-[18]. The findings are set out in the reasons of Gaudron ACJ and Hayne J at [12].

98 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 168 ALR 318 at 326 [18].

99 *Burke* (2000) 178 ALR 161 at 163 [1].

100 *Burke* (2000) 178 ALR 161 at 185 [114]-[115].

101 *Burke* (2000) 178 ALR 161 at 191-192 [137]-[138].

81 For Heerey J, the primary judge's conclusion that "a cause of Hanave's loss was Burke's failure to advise Hanave to undertake the inquiries"[102] was "logically compelling and was well open on the evidence, applying the common law practical or common-sense concept of causation"[103]. He rejected the contrary argument that the "'real and proximate cause' of Hanave's loss was the fact that the anchor tenant [Barbara's Storehouse] was not able to pay its rent and vacated its two shops within seven months of the purchase"[104]. He concluded that[105]:

> "[b]oth the negligence of Mr Burke and the representation of [LFOT] (to which Mr Tressider was a party) were effective causes (albeit not the only causes) of the same loss by Hanave, viz the purchase of a property worth less than the purchase price. There is the further circumstance that both Mr Burke's negligence and [LFOT's] misrepresentation related to the same subject matter, namely the viability of the [Barbara's Storehouse] tenancy."

82 In the opinion of Heerey J it did not matter that the respective liabilities of Mr Burke and the respondents arose from different causes of action[106]. In his view, the general law of contribution was available in the context of such a claim under s 82 of the Act. It was not incompatible with the provisions of the Act[107]. He rejected the respondents' cross-appeal that contended that Mr Burke's negligence *qua* solicitor had broken the chain of causation between the contravention of the Act by LFOT and the loss suffered by Hanave[108]. He also rejected a competing contention that the culpability of Mr Burke and the

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102 The primary judge, quoted in *Burke* (2000) 178 ALR 161 at 177-178 [78].

103 *Burke* (2000) 178 ALR 161 at 182 [99] citing *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 and *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525.

104 *Burke* (2000) 178 ALR 161 at 182 [98] referring to *Trust Co of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237 at 247-249.

105 *Burke* (2000) 178 ALR 161 at 183 [101].

106 *Burke* (2000) 178 ALR 161 at 183 [104] referring to *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 597 per Gummow J approving *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 at 347 ("*BP Petroleum*").

107 *Burke* (2000) 178 ALR 161 at 183-184 [107]-[108] relying on *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1.

108 *Burke* (2000) 178 ALR 161 at 184 [111].

respondents was unequal. Upholding the conclusion of the primary judge at the second trial, Heerey J said[109]:

> "an equal apportionment appears a rational conclusion. In any event … it is doubtful that the general law of contribution authorises an unequal apportionment.
>
> The appellants did not contend that the contribution of Mr Burke should have been only one-third on the basis that Mr Tressider should be treated as separately liable from [LFOT], each attracting one-third liability. Without expressing any concluded view, I would not, in the absence of argument, disturb his Honour's finding on this point."

83 The other judge in the majority in the second Full Court, Lehane J, emphasised the breadth of recent expressions of the principles governing equitable contribution[110]. He saw these as applications of the analysis of the old authorities undertaken by Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)*[111]. He explained that the need for special legislation to cover contribution amongst tortfeasors was simply the product of an anomalous rule of the common law forbidding contribution amongst that category of co-obligors[112]. He concluded that there was nothing in the nature of the liability for damages under s 82 of the Act, arising out of the contravention of s 52, that excluded an order for contribution resting on general equitable principles. He noted that a Full Court of the Federal Court[113] and several first instance decisions of that Court[114] had assumed, or held, that this was so. He acknowledged various

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109 *Burke* (2000) 178 ALR 161 at 185 [114]-[115].

110 *Burke* (2000) 178 ALR 161 at 187 [125] referring to *BP Petroleum* [1987] SLT 345 and *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588.

111 (1969) 121 CLR 342 at 350-352 ("*Albion*"), with the concurrence of Windeyer J at 352. See *Burke* (2000) 178 ALR 161 at 187-188 [126].

112 *Burke* (2000) 178 ALR 161 at 189 [130].

113 *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1; see *Burke* (2000) 178 ALR 161 at 189 [131].

114 *Re La Rosa; Ex parte Norgard v Rodpat Nominees Pty Ltd* (1991) 31 FCR 83; *Trade Practices Commission v Manfal Pty Ltd (No 3)* (1991) 33 FCR 382; *Austotel Management Pty Ltd v Jamieson* (1996) ATPR ¶41-454.

complications that could arise[115]. He then reached the opinion crucial to the present appeal[116]:

> "[T]he analysis shows that the law has advanced beyond the stage where it is possible to limit rights of contribution to cases where a common liability arises from an (antecedent) common design to achieve a common end … [I]t is not easy to fit *BP Petroleum Development* or *Street* within [such a notion]. Nor is it easy to see why any such limitation is required. What the principle expounded in *Albion* requires, in my view, is that two or more persons are each liable in respect of the same debt or to make good the same loss sustained by a third party, in circumstances where discharge of the obligation by one relieves the other(s). The object is to ensure that equity as between persons liable in those circumstances is not defeated by the caprice of the person entitled to the benefit of the obligation."

84 On the basis of this principle, Lehane J held that there was no reason to refuse contribution by Mr Burke by reference to "perceived degrees of culpability"[117]. Although Hanave, for "understandable reasons", had selected LFOT and its directors as the defendants to sue (and not Mr Burke), that selection was no reason for LFOT and Mr Tressider to suffer because "Mr Burke also [was] responsible for the loss for which they are liable"[118]. As to the suggestion that LFOT's contravening conduct was "relevantly, *the* cause of the loss sustained by Mr Burke through his liability for breach of his duty as Hanave's solicitor", Lehane J dismissed that argument. He did so on the basis that Mr Burke had not clearly pleaded such a case, and had not sought to make it at trial nor mounted it on appeal[119].

85 The minority opinion of Lee J did not contest the availability of an order for contribution as between two parties liable to the same obligee for separate contraventions of s 52 of the Act[120]. However, in his Honour's view, for

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115 *Burke* (2000) 178 ALR 161 at 189-190 [132] referring to cases where the liability of one party was reduced by reference to contributory negligence or like offsetting conditions.

116 *Burke* (2000) 178 ALR 161 at 190 [133].

117 *Burke* (2000) 178 ALR 161 at 191 [135].

118 *Burke* (2000) 178 ALR 161 at 191 [135].

119 *Burke* (2000) 178 ALR 161 at 191 [136] (emphasis added).

120 *Burke* (2000) 178 ALR 161 at 169 [31].

contribution to apply as an equitable principle, there had to be mutuality between the parties in respect of the burden to be discharged[121]. Where, as in the present case, the contribution was sought by persons related only by concurrent liabilities, there was no "common" burden or coordinate liability and thus no right to compensation[122]. This reasoning led Lee J to conclude[123]:

> "[E]ither the liability of [LFOT] and Tressider is on a different level from that of Burke, in that Burke may be entitled to be indemnified by [LFOT] and Tressider, or the deceptive nature of the conduct from which the liability of [LFOT] and Tressider has arisen bars the making of an order in equity[124]. In effect, the order made against [LFOT] and Tressider was to disgorge a benefit improperly received. That judgment provided no basis in equity for an order that Burke contribute to that restitution."

86 If, contrary to the foregoing, an order for contribution could be made against Mr Burke, Lee J considered that Mr Burke could not be ordered to contribute half of the judgment sum but only one-third. This constituted a proportionate share with [LFOT] and Mr Tressider who each had separate legal liabilities to Hanave[125].

The applicable principles of contribution

87 Contribution between co-obligors is not new in the law of obligations. As Kitto J remarked in *Albion*, the notion can be traced back at least as far as the maritime law of Rhodes in classical times[126].

88 Although in English law liability for contribution was elaborated in particular pockets of doctrine (co-insurance, co-sureties and trustees) and in the common law as well as equity[127], the basic source of the principle may be traced

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121 *Burke* (2000) 178 ALR 161 at 165 [13].

122 *Burke* (2000) 178 ALR 161 at 165 [13]-[15].

123 *Burke* (2000) 178 ALR 161 at 169 [31]. Further extracts from the reasons of Lee J appear in the reasons of Callinan J at [138]-[139].

124 *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 599-600 per Gummow J.

125 *Burke* (2000) 178 ALR 161 at 169 [33].

126 *Albion* (1969) 121 CLR 342 at 350 citing *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 at 607 and Story, *Commentaries on Equity Jurisprudence*, 3rd Eng ed (1920), par 490 et seq.

127 *Albion* (1969) 121 CLR 342 at 351.

to a common spring. That is, "a principle of natural justice"[128] observed "in all countries, that where several persons are debtors all shall be equal"[129]. Fundamentally, this idea rests not on doctrines peculiar to Chancery law but on doctrines of "equity" in the sense of "reason, justice and law"[130].

89 It is essential to keep this history and the source of the principle firmly in mind in order to ascertain, in a given case, the scope of its operation. So it was that in *Dering v Earl of Winchelsea*[131] Lord Chief Baron Eyre examined cases and authorities illustrating orders for contribution stretching back to the *Statute of Marlborough* 1267[132]. *Dering* was not making new law. On the contrary, the Lord Chief Baron, in applying the principle of contribution to the sureties there in question, was merely instancing one of many applications of a general rule[133]:

> "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; though contract may qualify it … [T]he reason given in the books is, that in *equali jure* the law requires equality; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity."

90 Over the years, attempts have been made by some judges to narrow the scope of contribution, despite the foregoing history and source of the principle. New and unforeseen factual circumstances have repeatedly called for decisions about the circumstances in which "coordinate liabilities" give rise to obligations of contribution. Just what "coordinate liabilities" means in this context is itself

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128 *Albion* (1969) 121 CLR 342 at 351 citing Blackstone's note to his report of *Godin v London Assurance Co* (1758) 1 Bla W 103 at 105 [96 ER 58 at 59].

129 *Ruabon Steamship Co v London Assurance* [1900] AC 6 at 11 cited in *Albion* (1969) 121 CLR 342 at 351.

130 *Albion* (1969) 121 CLR 342 at 351 citing Lord Redesdale in *Stirling v Forrester* (1821) 3 Bligh 575 at 590 [4 ER 712 at 717] and *Marsack v Webber* (1860) 6 H & N 1 at 6 [158 ER 1 at 3].

131 (1787) 1 Cox 318 [29 ER 1184] ("*Dering*"). The case is sometimes described as *Deering v Lord Winchelsea*, see eg *Stirling v Forrester* (1821) 3 Bligh 575 at 585 [4 ER 712 at 715].

132 52 Hen 3, c 9; see *Dering* (1787) 1 Cox 318 at 321 [29 ER 1184 at 1185], where it is cited as "the statute of *Marlbridge*".

133 (1787) 1 Cox 318 at 321 [29 ER 1184 at 1185]. See *Capita Financial Group Ltd v Rothwells Ltd* (1993) 30 NSWLR 619.

sometimes a question of controversy[134]. But, in every case, the resolution of that controversy should be discovered by reference to the pole star identified in *Dering* and accepted by this Court in *Albion*. With the advent of new rights and remedies (most of them statutory), it is most undesirable to circumscribe the application of the principle of contribution.

91 Generally speaking, courts, and especially this Court, have embraced the foregoing approach of flexibility[135]. Thus, the notion that the categories of coordinate liability are closed has been firmly rejected[136]. The liabilities of co-obligors may be joint, several or joint and several[137]. It does not matter that some of the co-obligors (as here) are plaintiffs to the action and others are defendants[138]. For equitable contribution, it does not even matter that one co-obligor has died, for equity will hold the estate burdened by the obligation[139]. The extent of the flexibility of the principle, in accepting liabilities as relevantly coordinate, is illustrated by many decisions.

92 Most importantly, Australian law has long rejected the notion that the respective obligations of the co-obligors must be voluntarily assumed before a right of contribution can be invoked. Many cases have held that an obligation to contribute may be imposed although a duty upon one of the co-obligors is fixed by legislation and on the other by the common law[140]. A similar approach is reflected in a recent decision in the United Kingdom. In *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*[141], a case that arose in Scotland, one party's obligation was statutory and the other's was contractual. But it was held that the liability of both parties was "of the same nature and to the same extent"

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134 Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 3rd ed (1992) at 290 [1006] ("Meagher *et al*").

135 Meagher *et al* at 290-291 [1007] citing *Whitham v Bullock* [1939] 2 KB 81.

136 Meagher *et al* at 290 [1006].

137 Meagher *et al* at 290 [1006].

138 Meagher *et al* at 287 [1003] citing *Tucker v Bennett* [1927] 2 DLR 42 at 47.

139 Meagher *et al* at 287-288 [1003].

140 See *Armstrong v Commissioner of Stamp Duties* (1967) 69 SR (NSW) 38 at 46 per Walsh JA where one obligation was imposed by the *Gift Duty Assessment Act* 1941 (Cth); Meagher *et al* at 291 [1008]; *Spika Trading Pty Ltd v Harrison* (1990) 19 NSWLR 211.

141 [1987] SLT 345.

and therefore contribution could be ordered, as it was. Contribution has been held to apply in respect of rights arising out of different instruments[142]. It has been held to apply although the co-obligors could adopt different methods of discharging their obligations[143]. It is not easily destroyed by formulae expressed in the instruments giving rise to several obligations[144].

93 This is not the occasion to review all of the modern cases on coordinate liabilities. However, enough has been said to show the trend towards accepting a broad ambit for equitable contribution. That trend was encouraged, and furthered, by the analysis of the essential purposes of contribution undertaken by Kitto J in *Albion*. It is also consonant with the opinion of leading textwriters[145]. It does not mean that the principle of contribution is without content or that there are no exceptions to contribution and that any connection between multiple obligors will suffice. Inconsistency with the statute, for example, will deny the remedy. As in every case where statute applies, the overriding duty of a court is to uphold the legislation, for it states the law. No doctrine of the common law or equity may contradict or vary the legislation[146]. Sometimes the particular statutory language will deny the availability of equitable contribution, as where express provisions in a workers' compensation statute provide for compensation as between contributories, thereby expelling equitable contribution as incompatible with the statutory scheme[147]. However, what the trend of cases proves is that it is essential, where a dispute arises, to return to the spring of "natural justice" from which the concept of contribution originates.

94 Three principles of equity also help to guide a decision-maker towards the resolution of the availability of contribution in a particular case. First, there is the precept that equality is equity[148]. This maxim is not to be applied literally.

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142 *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 597.

143 *Capita Financial Group Ltd v Rothwells Ltd* (1993) 30 NSWLR 619 at 628.

144 Meagher *et al* at 297-298 [1018] citing *Cornfoot v Holdenson* [1932] VLR 4.

145 Meagher *et al* at 304-306 [1034].

146 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 324-328 [96]-[99]; *Conway v The Queen* (2002) 76 ALJR 358 at 371 [66]; 186 ALR 328 at 345-346.

147 cf *Floreani Bros Pty Ltd v Woolscourers (SA) Pty Ltd* (1976) 13 SASR 313 where contribution was sought in respect of workers' compensation payments.

148 Young, "Early Equity Reports and 21st Century Australia", (2001) 75 *Australian Law Journal* 615 at 616.

As the cases show, it is not necessary to demonstrate that each of the co-obligors owes exactly the same duty, founded on exactly the same legal source, in precisely the same amount, to the identical obligee. It is enough to say, as Story put it, that "no one ought to profit by another man's loss where he himself has incurred a like responsibility"[149].

95 Secondly, it is important to remember that equity prefers substance over form. It was this precept that led Gummow J in *Street v Retravision (NSW) Pty Ltd*[150] to caution against taking too narrow a view of the "common burden" that must be demonstrated in order to attract an entitlement to contribution. As his Honour pointed out in that case, on such an approach "there could be no common obligation if there were different 'causes of action' against the co-obligors"[151]. Yet even the most superficial examination of the case law in which contribution has been ordered shows that such identity of rights is not essential.

96 Thirdly, there is the injunction of Gibbs CJ in *Mahoney v McManus*[152] with which these reasons began. The operation of the principle of contribution must not be "defeated by too technical an approach". Courts must keep their eye fixed on the purpose of the remedy, ie on the essential concept, not just particular past applications.

Application of the principles to the present case

97 When the foregoing principles are remembered, it is not surprising that in this case the trial judge and the majority of the second Full Court preferred the broader view as to the availability of contribution over the narrower view urged by Mr Burke.

98 This was not a case where explicit provisions of the Act (whether in ss 52, 82, 87 or elsewhere) expelled the remedy of contribution because such provisions were inconsistent with a statutory provision for contribution. The Act is silent on the point. Contrary to the opinion of McHugh J[153] there is no inconsistency between the provisions of the Act and the award of contribution against

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149 Story, *Commentaries on Equity Jurisprudence*, 3rd Eng ed (1920), par 493 cited in Meagher *et al* at 289 [1004].

150 (1995) 56 FCR 588 at 597.

151 (1995) 56 FCR 588 at 597 cited with approval in *Burke* (2000) 178 ALR 161 at 188 [127].

152 (1981) 180 CLR 370 at 378.

153 Reasons of McHugh J at [66].

Mr Burke. In any case, Mr Burke was not the "very person misled". Relevantly, that was Hanave. And if both Hanave and Mr Burke were misled it was because Mr Burke failed to perform the rudimentary duties descending on him as Hanave's solicitor and director.

99 There is no reason why the general remedy should not be available so long as the respective liabilities are, within the authorities, "coordinate". In the present matter, no decision of this Court forbids the ordering of contribution. Decisions in the Federal Court have, in my view correctly, upheld its availability in like cases as a matter of principle. No State legislation intrudes to afford here a statutory foundation for contribution, unlike that discovered in the peculiarities of the *Wrongs Act* 1958 (Vic)[154] examined in *Bialkower v Acohs Pty Ltd*[155]. Accordingly, the applicable principle of contribution is to be derived from the general doctrines of equity. They were available to the present parties in the Federal Court by virtue of that Court's constituting statute[156].

100 The findings of the primary judge concerning the acts and omissions of the respondents and of Mr Burke respectively are not open to challenge in this Court, and are not disturbed, although their legal significance is contested. Because the findings rested so substantially upon the impressions that the witnesses in the respective camps made on the primary judge, the outcome of the case must necessarily depend on the application of the law to the findings so made. In respect of Mr Burke this includes, relevantly, the finding that he failed as a solicitor to discharge his duties to Hanave with the unsurprising finding that, had he not failed, Hanave would have been in a position to protect itself from the false statement that constituted the breach of the Act, and would probably have done so.

101 It is true that the liability of the respondents under the Act is traced to a statutory source that is therefore different from the duties which Mr Burke breached in his obligations to Hanave. The latter involved obligations resting on the common law, either the tort of negligence[157] or breach of the implied contract of retainer[158]. In keeping with Mr Burke's general disorganisation, there was no

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154 s 23B.

155 (1998) 83 FCR 1 at 13.

156 *Federal Court of Australia Act* 1976 (Cth), s 5(2): "The Court is a superior court of record and is a court of law and equity."

157 *Hill v Van Erp* (1997) 188 CLR 159; *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20 [44].

158 *Groom v Crocker* [1939] 1 KB 194 at 222.

express contract of retainer, still less any attempt on his part to limit his liability under the retainer[159]. As *BP Petroleum*[160] and many other cases show, the absence of such exact identity of obligations, or even of the legal character of such obligations, is not conclusive. It is enough that, as a practical matter, each obligation gives rise to "a like responsibility".

102 The last proposition can be tested in the present case quite simply. Hanave sued the respondents. Given the continuing role of Mr Burke as a director of Hanave that was, as Heerey J remarked, unsurprising. Nor, in those circumstances, was it surprising that Hanave did not sue Mr Burke. But if the shareholders of Hanave, discovering what had occurred, had been in a position to dismiss Mr Burke and his firm and had elected to sue Mr Burke for negligence and negligent breach of his retainer as a solicitor, Hanave would, on the undisturbed findings of the primary judge, have succeeded and recovered damages. The measure of the recovery would have been the loss Hanave suffered by reason of Mr Burke's defaults. That would have been precisely the loss now recoverable against the respondents. There is thus (as Heerey and Lehane JJ noted) a sufficient identity in the coordinate liabilities of the co-obligors to attract relief by way of contribution in favour of one against the other. In the words of Story, Mr Burke and the respondents had incurred a "like responsibility".

103 The test for "coordinate liabilities" which I would accept as giving rise to contribution is whether "the liabilities of the co-obligors to the principal claimant are such that enforcement by [the claimant] against either co-obligor would diminish that obligor in his material substance to the value of the liability. Any alternative or additional requirement in the doctrine of contribution … between the liabilities to which the co-obligors are exposed would produce intolerable uncertainty and obscure the true object of the doctrine."[161]

104 The foregoing proposition can be further tested thus. Why should it depend upon whom Hanave chose to sue to determine the ultimate burden of the damage suffered by Hanave? Especially, why should that be so where one of the alleged co-obligors has effective control of, or influence over, Hanave? Does the law turn a blind eye to that obligor's defaults, as found by the primary judge, simply because he controls or influences the recovery proceedings? Or does equity intervene to recognise the availability of legal remedies against *both* of the propounded co-obligors, hence the coordinate liabilities, and thus the obligation

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159 cf reasons of Callinan J at [143].

160 [1987] SLT 345.

161 Meagher *et al* at 290 [1006].

of each of Mr Burke and the respondents together to contribute to Hanave's damages?

105 In my opinion, the principles stated by this Court in *Albion* and *Mahoney* answer the last question as the majority did in the second Full Court. Mr Burke and the respondents together must "make good the one loss". By discharging their respective obligations to pay Hanave's damages, the respondents not only discharge themselves but they also discharge Mr Burke's liability which otherwise, as a matter of law, could have been enforced against him by Hanave[162].

Answering the suggested exculpation of one co-obligor

106 *Different culpability:* What are the arguments against this conclusion? It is said that there is a difference in the culpability of Mr Burke, on the one hand, and LFOT and Mr Tressider on the other. In my view it was open to the primary judge in the second trial, and to the majority in the second Full Court, to conclude (as they did) that Mr Burke was sufficiently "culpable" to be exposed to the possibility of a proceeding by Hanave against him which could recover the same damages from him as found against the respondents.

107 The primary judge's findings about Mr Burke's acts and omissions as Hanave's solicitor fall far short of exempting him from culpability. Had he acted with proper care and attention as solicitor and director of Hanave the probability is, as found, that no damage at all would have been occasioned to Hanave. In those circumstances, the false representation found on the part of the respondents would have proved immaterial in the event. Damage to Hanave would have been avoided.

108 It is true that the conduct claimed against the respondents substantially involved *positive* acts whereas that alleged against Mr Burke substantially involved *omissions*. However, this difference is immaterial to culpability where (as was found) the defaults of Mr Burke represented a failure by him to conform to his duty to act, imposed upon him both by the common law of negligence and by his implied contract of retainer with Hanave. There is no distinction on the ground of culpability of the co-obligors. But even if there were a distinction, it is legally irrelevant because coordinate liabilities are established by which each co-obligor is liable in law for the common loss. Each is therefore liable in equity to contribute to such loss.

109 *Differences in causation:* Then it is contended that the law of causation in some way excuses Mr Burke. Because he conducted negotiations with LFOT

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162 *Albion* (1969) 121 CLR 342 at 351-352.

and Mr Tressider on Hanave's behalf, it is suggested that he was himself the victim of their conduct and was induced by it not to advise Hanave to make enquiries.

110 This analysis (assuming it to be available to Mr Burke, having regard to the manner in which the case was conducted below[163]) should be rejected. It amounts to the contention that a solicitor is entitled to rely on his own negligent breach of the contract of retainer to exempt him from liability to his client, who the primary judge found would not have suffered damage had the solicitor acted with reasonable care and diligence. Mr Burke should not be heard to propound such an exemption from liability to contribute to the loss in respect of which he has been found to be a cause. The primary judge and the second Full Court applied a common sense test of causation. They reached a conclusion that accords with my view of common sense[164]. Neither in the approach that they took on causation, nor in the result to which it brought them, did they err.

111 *Unjust enrichment:* Then it is said that, if the respondents were to receive contribution from Mr Burke, they would, to that extent, not have paid their proper share towards discharging the common obligation they owed to Hanave but would, instead, be "unjustly enriched" to the extent of Mr Burke's contribution[165]. I find that analysis unconvincing. It amounts to a conclusion expressed in terms of the very matter to be decided. If, as the primary judge and the majority in the second Full Court held, Mr Burke was a "cause" of Hanave's loss, to deny the respondents contribution from Mr Burke is, in effect, unjustly to enrich Mr Burke. Although his negligence was "a cause" and on compelling, undisturbed findings he might by proper conduct have avoided any damage to his client, Mr Burke walks away from having to contribute anything. Yet had he alone been sued by Hanave he would, on the findings, have been held liable to it in precisely the same sum of damages as that recoverable from the respondents.

112 Affixation of the label of "unjust enrichment" only comes at the end of a correct analysis of the requirements of equitable contribution. By contribution, the respondents do not receive from Mr Burke an amount in excess of the true value of the damage that their misleading conduct caused to Hanave. They merely receive a monetary contribution out of recognition of the fact that *but for* the negligence of Mr Burke their misleading conduct would not, on the findings, have caused Hanave to proceed with the purchase. On that premise, Hanave would have been carefully warned by Mr Burke in such a way as to escape

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163 cf *Burke* (2000) 178 ALR 161 at 191 [136].

164 cf *Henville v Walker* (2001) 75 ALJR 1410 at 1426 [97]; 182 ALR 37 at 59.

165 Reasons of Gaudron ACJ and Hayne J at [22].

damage altogether. It follows that both the respondents and Mr Burke, by their respective acts and omissions, were causes of Hanave's damage. It is therefore reasonable, just and lawful that they should contribute in equal part.

113 *Clean hands:* It is then said that the respondents should be denied contribution on the basis that they do not come to equity with "clean hands". This maxim is not applied to deny a party, otherwise entitled, contribution to a common liability where the alleged co-obligor is himself shown to have been seriously neglectful of his duties to the ultimate claimant and where he controls the claimant and directs, or influences, the course of its litigation. It falls ill from Mr Burke's mouth to propound this defence given that it is effectively by his own "caprice" that Hanave elected to proceed against the respondents instead of against him as it might have done.

114 To the hypothetical exclamation set out in the reasons of Callinan J[166], the respondents would have been entitled to say to Mr Burke: "Our deception was found to be a breach of the Act rendering us liable; but we were at arm's length. You, on the other hand, were Hanave's professional lawyer. You had a duty to make the usual checks on the tenants and the properties. That's what you charged Hanave good fees for. Instead you failed. We are both in the wrong. Each of us is liable to Hanave. We should share its loss equally. That will make our company more careful in the future in what it says. But it will also make you more careful in what you do. Neither of us should get off scot-free."

115 *The purpose of equitable contribution:* There was "mutuality"[167] between the parties in respect of a burden to be discharged to the same obligee. It was a common burden derived from obligations which the obligors severally owed to Hanave. Where the loss is common, the circumstances closely interrelated and the full liability could have been recovered from either obligor on the election of the obligee, only the narrowest view of equitable contribution would deny the operation of that doctrine to require a sharing of the burden in a case such as the present. No decision of this Court (or for that matter of the Privy Council or House of Lords) governs the point[168]. There is no reason why we should prefer a rule that prevents the attainment of substantial justice, especially when the remedy that is invoked derives from equity whose business was, and is, the attainment of justice.

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166 Reasons of Callinan J at [143].

167 *Burke* (2000) 178 ALR 161 at 165 [13] per Lee J cited by Callinan J at [138].

168 As pointed out by Callinan J at [141].

116 LFOT would not thereby gain contribution "by reason of its misconduct"[169]. With respect, that classification distorts the true foundation of the order made by the second Full Court. That order rested on the "moral obloquy" found on the part of Mr Burke[170]. The finding to that effect stands unaltered in this Court. It sustains the sharing with LFOT of Mr Burke's legal liability to Hanave.

117 There is no reason of legal authority, principle or policy why equitable contribution should be confined to cases where there was a common design to achieve a common end[171]. That is but one factual instance of coordinate liability. It is not a limitation supported by distinguished scholars[172]. I would reject such a gloss because it frustrates the attainment of the fundamental purpose of the equitable remedy. True, LFOT is ordered to "disgorge its ill gotten gains"[173]. But Mr Burke, the negligent solicitor and inattentive director of Hanave, is also obliged to "disgorge" – for had he acted carefully and faithfully when obliged by law to do so, there would have been no "ill gotten gains" in LFOT in the first place.

118 Perhaps this case demonstrates how varied is the perception of equal justice. The primary judge, the majority in the Full Court and I reach the conclusion favouring the availability and obligation of equitable contribution. The dissenter in the Full Court and the majority of this Court reach a conclusion that, to us, seems perversely indifferent to the principle of equality. Clearly, the foundation of this difference lies in distinct conceptions about the availability of the remedy. In my view it is, and should be, a remedy of wide application for it conduces to substantive justice between co-obligors.

Unequal culpability and rateable contributions

119 In cases of unequal culpability, a question arises as to whether equitable doctrine has moved on so as to recognise (as statutory entitlements to contribution have done) that a court ordering contribution may apportion the contribution of the co-obligors in a just and proportionate way. Observations

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169 Reasons of McHugh J at [26].

170 cf *Burke* (2000) 178 ALR 161 at 183 [106] per Heerey J.

171 cf Mason and Carter, *Restitution Law in Australia* (1995) at 206-207 [622]. See reasons of McHugh J at [48].

172 cf Meagher *et al* at 290 [1006].

173 Reasons of McHugh J at [54].

favourable to this possibility have been made in Australian courts[174]. The weight of authority, and perhaps the history of contribution to this time, appear to be against unequal apportionments. Given the purpose and character of contribution as an equitable remedy, I am unconvinced that, as a matter of principle, rateable apportionment in differing amounts is alien to the notion of contribution[175]. I incline to the view that equity aids "the ascertainment of what would be a just contribution"[176]. If unequal contributions could be ordered, proportionate to the differing responsibilities of the co-obligors, that facility could, in some circumstances, solve the types of argument that were advanced for Mr Burke in this appeal. It would permit adjustment of contributions by reference to considerations such as culpability, causation and notions of unjust enrichment.

120 Any other view will tend, in particular cases, to produce artificial and unjust outcomes. It would effectively reserve contribution to cases of exact equivalence in the responsibilities of co-obligors. In life, such exact equivalence will often be missing. It would be artificial, for example, for equity to provide contribution in cases of exact equivalence but to deny it where, say, it would be just and equitable to apportion 40, 30, or 10 per cent of the common obligation to one or more co-obligors. If some, but not all, co-obligors are insured, or entitled to an enforceable personal guarantee, equity has not withheld relief by way of contribution. If double insurance is not for precisely the same risks, but each policy covers the particular loss in question, contribution may be ordered[177]. If insurance of the same risks exists but for different limits, contribution is available[178]. Where two guarantors have promised to redeem a debt, but the exposure of one is subject to an applicable cap or limitation, it is unpersuasive to

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174 *Jones v Mortgage Acceptance Nominees Ltd* (1996) 63 FCR 418 at 422. In *Bialkower* at first instance, *Acohs Pty Ltd v RA Bashford Consulting Pty Ltd* (1997) 144 ALR 528, Merkel J held that such apportionment under the general law of contribution was available. In the Full Court, the rateable apportionment was upheld but under the *Wrongs Act* 1958 (Vic). The position under the general law was reserved. In *Duke Group Ltd (In Liq) v Pilmer* (1998) 27 ACSR 1 at 495-496, the primary judge ordered contribution in unequal portions. His order was subject to a separate appeal, a point noted by this Court in *Pilmer v Duke Group Ltd (In Liq)* (2001) 75 ALJR 1067 at 1102-1103 [176]; 180 ALR 249 at 298-299.

175 *Bialkower* (1998) 83 FCR 1 at 13.

176 *Jones v Mortgage Acceptance Nominees Ltd* (1996) 63 FCR 418 at 422.

177 *Albion* (1969) 121 CLR 342.

178 *In re MacDonaghs* (1876) 10 IR (Eq) 269; cf *Government Insurance Office of New South Wales v Crowley* [1975] 2 NSWLR 78.

say that equity cannot fashion a rateable contribution[179]. Statute now permits it. And equity, like the common law, now operates in a universe of statute. In my view, equity may therefore sometimes partake of relevant characteristics adopted by analogy from statute.

121 Equitable remedies, such as contribution, should be developed by the courts to meet new and modern needs[180]. In developing equitable principles to fit the modern world, courts, including this Court, should look beyond the exposition of the principles in old cases or texts that necessarily reflect the often rigid legal environment and judicial disposition of past times. Instead, they should search for the underlying purpose of the old rule: concepts, not detail[181]. Equitable remedies need to be fashioned to meet new and changing circumstances. Contribution is one such remedy. Our admiration of equity's past is best expressed by being alert to assure its present operation and future relevance.

122 In this case it is not necessary to go further down this path. With the primary judge and the majority in the second Full Court, I am of the view that LFOT's misrepresentations and Mr Burke's negligence were each effective causes of Hanave's loss. Accordingly, "an equal apportionment appears a rational conclusion"[182].

123 As I have recorded[183], in the second Full Court, Lee J was of the view that, were contribution applicable, LFOT and Mr Tressider should each share with Mr Burke a third of the liability of Hanave[184]. However, I agree with the majority in the Full Court. Having regard to the way the proceedings were

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179 See Meagher *et al* at 297-298 [1018].

180 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 265-266 [46]; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [56]-[59].

181 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 33-34 [159]-[160], 36-37 [168]-[169], 37-38 [175], 39 [181]; 185 ALR 1 at 45-47, 49-50, 51, 52-53; cf Young, "Early Equity Reports and 21st Century Australia", (2001) 75 *Australian Law Journal* 615 at 621-622.

182 *Burke* (2000) 178 ALR 161 at 185 [114] per Heerey J; see also at 191-192 [137] per Lehane J.

183 Reasons above at [86].

184 *Burke* (2000) 178 ALR 161 at 169 [33].

conducted, that approach was unavailable to Mr Burke in the Full Federal Court[185]. Still less is it available to him in this Court. The suggestion that contribution was inapplicable because the respondents were bound in law to indemnify Mr Burke should likewise be rejected.

Conclusion and order

124 It was open to the primary judge in the second trial, on the findings that he made, to order contribution as he did. The majority in the second Full Court were correct to uphold that order. Their holding was compatible with the authority of this Court. It was consonant with decisions in this country and elsewhere, as with the history, nature and purposes of the remedy of equitable contribution. It advanced substantial justice, which it is the fundamental object of contribution to secure, as between co-obligors. The appeal should be dismissed with costs.

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185 *Burke* (2000) 178 ALR 161 at 185 [115], 191-192 [137].

CALLINAN J.

The facts

125 The first respondent was the owner of a building tenanted by seven shopkeepers, one of which was Barbara's Storehouse Pty Ltd ("Barbara's"). The second and third respondents were directors of the first respondent. The second appellant came to purchase that building. It was a trustee company, and, as well as being a beneficiary under the Trust which it administered, the first appellant was its solicitor and one of its directors. The building was to be offered at auction. The auction was advertised in a newspaper circulating in Sydney at that time. By then, Barbara's had on numerous occasions failed to pay rent on the due dates and had frequently been in arrears in very substantial sums of money. Barbara's was described in the advertisement as a high quality tenant. At an earlier time, the first respondent had paid to Barbara's a sum of $60,000, which could be characterised as an incentive payment. That was not the only payment or offer of payment of significance made by the first respondent to Barbara's or a person associated with it. Its principal became aware that the second appellant intended to purchase the building. He threatened the first respondent that he would speak to the first appellant, presumably to disclose Barbara's trading difficulties, or non-payment of rent, or, in denigration of the building. The second and third respondents then sought to buy the principal's and his wife's silence by a loan of $8,000 repayable in a year. There was no disclosure of these matters by the respondents to the appellants.

126 The building did not sell at the auction. On the next day however, the second appellant entered into a contract for its purchase. The negotiations for the purchase by the second appellant were carried out on its behalf by the first appellant. Contracts were exchanged on 20 July 1994. Before the second appellant executed the contract, the first appellant had familiarised himself with a draft of it, and had checked the contents of the leases of the shops against a schedule to a property report which he had obtained from the first respondent's agents before the auction.

127 Some provisions of the contract should be noted:

> "8.1 Lease incentives …
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> 8.2 ...
>
> 8.3 The vendor warrants that all incentives for the benefit of the tenant under or in connection with the Lease are either disclosed in the Lease or as set out below."

Another clause in the contract stated:

"11. PURCHASER TAKES LEASE AS IS

11.1 The purchaser acknowledges having inspected every Lease referred to in Schedule 1 and is satisfied as to the terms of the Lease and (subject to any vendor warranties expressly contained in this contract) the legal effect and operation thereof.

11.2 The purchaser is not entitled to object, requisition or make a claim, or to rescind or terminate this contract if any covenant in the Lease, the Lease itself (or any guarantee given in support of the Lease, or any covenant contained in any such guarantee) is void, unenforceable or illegal.

11.3 The vendor makes no warranty as to the solvency or financial standing of any tenant and the purchaser is taken to have satisfied itself in this regard."

There was no reference elsewhere in the contract, or in the lease to Barbara's of the incentive payment to which I have referred. The first appellant, not unreasonably in my opinion, took cl 11.3 to be a reference to the capacity of the tenants to pay rent after completion of the contract.

128 The first appellant made no inquiries with respect to the performance of the tenants, and in particular, with respect to Barbara's capacity or inclination to pay rent on time, either in the past or the future.

129 Not long after the contract was settled Barbara's defaulted in payment of rent and vacated the shop which it had occupied. It then became obvious that the building which the second appellant had been induced to purchase by the representations with respect to the quality of the tenants, and the non-disclosure of an incentive, was in fact worth far less than the price that the second appellant had paid for it.

130 The second appellant brought proceedings in the Federal Court of Australia for damages for breach of s 52 of the *Trade Practices Act* 1974 (Cth)[186]. The respondents, as well as defending the action, brought a cross-claim against the first appellant alleging that his negligence as a solicitor caused or contributed to any loss that the second appellant might have sustained. The

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186 The section relevantly provides:

"Misleading or deceptive conduct

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

respondents, as cross-claimants, claimed that they were, or would be, entitled at law to a complete indemnity or contribution from the first appellant to the extent of any liability which any of the respondents might have to the second appellant.

131 The second appellant failed at first instance before Moore J on the basis that there was no reliance, and that any loss was caused by the first appellant's carelessness. The Full Court of the Federal Court (Wilcox and Kiefel JJ; Emmett J dissenting), the earlier Full Court, reversed the decision at first instance, holding that there was contravening conduct by the first respondent and that it was a cause of the loss sustained by the second appellant. The matter was, however, remitted to the primary judge, Moore J, for the determination of the respondent's cross-claim which it had been unnecessary for his Honour to decide because of the view that he had formed on reliance and causation. Moore J determined that the first appellant had been negligent in certain respects in failing to investigate the tenants' performances as rent-payers and was therefore liable to pay contribution to the first and second respondents of one-half of the loss sustained by the second appellant. No separate consideration need be given in this Court to the position of the respondent company and Mr Tressider[187], the latter of whom was held to be an aider pursuant to s 75B(1) of the Act[188], and both of whom will be referred to collectively as the respondents.

132 Both an appeal and a cross-appeal against that decision were dismissed by the Full Court of the Federal Court (Heerey and Lehane JJ; Lee J dissenting).

133 In the Full Court, the appellants had first argued that in view of what they described, not inaccurately, as the bribe offered to Barbara's principal by the first respondent, there was no reason for the Court to infer that, whatever inquiries the first appellant might have made of Barbara's, he would have been told the truth;

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187 Mr Glew was not held to be an aider or abettor.

188 The sub-section provides:

> "A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB or V, or of section 75AU or 75AYA, shall be read as a reference to a person who:
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> (a) has aided, abetted, counselled or procured the contravention;
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> (b) has induced, whether by threats or promises or otherwise, the contravention;
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> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention."

and therefore any failure to inquire on his part was irrelevant. I would not, with respect, have dismissed such a submission lightly. I would myself doubt whether there is any settled conveyancing practice of inquiring of tenants by solicitors for intending purchasers of tenanted premises. The submission of the appellants had much to commend it. If Barbara's principal and the respondents were prepared to conspire to conceal the truth, then it is likely that they would act independently to do so. Heerey J, who took a different view, said that it was uncertain what records of payments by tenants had found their way into evidence at the trial and which of those were before the Full Court. I interpolate at this point that this is apparently another instance of the conduct of trials in which no scrupulous regard has apparently been paid, as it should be, particularly in commercial cases, to what is tendered, is truly admissible and has in fact been received in evidence, matters to which Kirby J and I referred critically in *Tepko Pty Ltd v Water Board*[189]. The fact that a case is a commercial case provides no warrant for the compilation of volumes of discovered documents and their bulk tender without identification of their relevance and attention to their probative value.

134 Because the litigation was commercial litigation, Heerey J regarded himself as entitled, as was the trial judge, to draw inferences from the circumstances, and the way in which the letting of retail tenancies is normally conducted. Heerey J accordingly thought it inconceivable that records of payments in documentary or electronic form or both would not exist and be available for perusal. This was the foundation for his Honour's conclusion that, if the position were otherwise, then the appellants should have established it, but failed to do so. I would also respectfully question his Honour's assumption as to the availability of records in this case, and the imposition of an onus to disprove the contrary upon the appellants. The respondents' conduct with respect to the bribe, the deceptive advertisement, and the non-disclosure of the incentive payment in the contract provide good reason to believe that the first respondent's financial dealings were, to say the least, unorthodox and not such, in any event, as would be likely to reveal the true position to the appellants. His Honour's assumption also overlooks the principle that all evidence is to be assessed in the light of the respective parties' capacity to adduce it[190]. Indeed, it seems to me that the failure on the part of the respondents to adduce evidence about the availability of records and what they might reveal would be a matter itself from which inferences adverse to the respondents, and favourable to the appellants, might fairly be drawn. Nor was it by any means a necessary inference that the agreement of the parties at the trial that Barbara's was in arrears in rental payments must have been based upon contemporaneous, and, indeed, correct

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189 (2001) 75 ALJR 775 at 806 [169], see also Gaudron J at 784 [52]; 178 ALR 634 at 675, see also at 647.

190 See *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 454 [36].

records. It was sufficient for the appellants' purposes at the trial to secure admissions from the respondents as to recurrent defaults in significant sums by Barbara's.

135 Despite any doubts which I might entertain as to the conclusion of Heerey J on the appellants' first submission that inquiries would probably have been futile and their absence irrelevant, because the first appellant's appeal is confined to the order for contribution, I need make only this observation. The true nature of the first appellant's alleged negligence, and the lack of any moral obloquy attached to it may be of relevance to the question whether justice requires that contribution be made.

136 As Heerey J pointed out, the earlier Full Court had held that the first respondent's misrepresentation was an operative cause of the second appellant's decision to purchase and the loss which it sustained. His Honour then said that the holding by the trial judge that a failure to advise the second appellant to make inquiries by which the falsity of the misrepresentation would have been discovered was also a cause of the loss was consistent with what the earlier Full Court had held. Heerey J thought this conclusion logically compelling and then turned to the issue of contribution. Both the negligence of the first appellant and the representation of the first respondent, his Honour said, "were effective causes (albeit not the only causes) of the same loss by [the second appellant], viz the purchase of a property worth less than the purchase price."[191] There was, his Honour added, another circumstance to which the first appellant's negligence and the first respondent's misrepresentation related, "the viability of [Barbara's] tenancy."[192] His Honour regarded *Albion Insurance Co Ltd v Government Insurance Office (NSW)*[193] as applying to this case: the same critical element existed here and there, that is, payment by one party for the benefit of both. It was his Honour's opinion that, for an obligation to contribute to exist, the liabilities need not have arisen from the same instrument or at the same time or with knowledge on the part of each putative contributor of the other's liability. Nor did it matter, in his Honour's view, that the liabilities arose from different causes of action. He dismissed a submission by the appellants that "'it was against the very basis of equitable intervention' that [the respondents], having been found to have engaged in misleading and deceptive conduct, could 'in conscience' bind [the first appellant] the very person whom they misled and deceived, to contribute to [the second respondent's] loss", on the basis that liability under s 52 of the Act did not depend upon any finding of fraud or moral

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191 (2000) 178 ALR 161 at 183.

192 (2000) 178 ALR 161 at 183.

193 (1969) 121 CLR 342.

obloquy and that, in any event, contribution was not exclusively a doctrine of equity[194].

137 In his reasons for judgment, Lehane J, the other member of the majority, accepted that it was true that neither common law nor equity, before the intervention of statute, permitted a claim for contribution by one joint tortfeasor against another. His Honour did not think that two cases that had been relied upon by Heerey J, *BP Development Ltd v Esso Petroleum Co Ltd*[195] and *Street & Halls v Retravision*[196], governed this case. Lehane J was of the view, however, that the obligations owed by the contributing parties were indistinguishable from those of an insurer, and that in *Street* the obligations in question were obligations owed jointly and severally as principals. After reviewing a number of other cases and citing a passage from the judgment of Kitto J in *Albion*, to which later reference will be required, his Honour made remarks to the effect that the nature of liability in tort is viewed differently today from the way in which it was viewed before the development of the modern law of negligence and that the old authorities did not lay down any general rule that a shared obligation to pay damages or compensation for a civil wrong excluded rights of contribution. This led his Honour to conclude that there was nothing in the nature of a liability for damages under s 82[197] of the Act which excluded it from being the subject of an order for contribution. This was, his Honour held, a case in which two persons shared a common liability to make good the same loss, one by way of damages for breach of contract (of retainer) and the other under s 82 of the Act.

138 Lee J, in dissent but with whose approach I would generally agree, held that no basis for contribution in equity arose in this case. His Honour said this[198]:

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194 (2000) 178 ALR 161 at 183.

195 [1987] SLT 345.

196 (1995) 56 FCR 588.

197 The section relevantly provides:

> "Actions for damages
>
> (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

198 (2000) 178 ALR 161 at 165.

"For the principle of equality of contribution to apply in equity there must be mutuality between the parties in respect of the burden to be discharged. That is, the parties must share a common burden in respect of obligations owed to a third party and as a result must have mutual rights and obligations *inter se*[199]."

139 Later his Honour said this[200]:

"A proceeding by one person against another under a concurrent liability to a third party is one between independent and unrelated parties requiring determination of rights arising at law or under statute. An application for an order in equity for contribution is a proceeding between parties who share a common burden that arises out of a pre-existing relationship, the character of which demands an order that there be equality of contribution to the discharge of that burden to give effect to reason and natural justice.

A proceeding seeking an order for contribution between persons related only by concurrent liabilities does not satisfy that test. The grounds of liability and the acts or omissions of the respective parties will differ and different relationships will exist between those parties and the party affected by the separate conduct. Defences that may be raised to the respective acts or omissions will differ markedly and may include cross-claims which raise further issues. In the absence of a single judgment against persons under concurrent liabilities to compensate an injured party, one of those persons cannot apply by cross-claim for an order in equity that the other make contribution to any sum the former has paid in discharge of a judgment or in compromise of litigation. Any order for indemnity or contribution against a person under a concurrent liability must be grounded on rights arising out of contract or tort, or be provided by statute.

…

In the present case, [the first respondent's] conduct, and Tressider's participation therein, caused [the second appellant] to act to its detriment and suffer loss. The actions of [the second appellant] were carried out by [the first appellant] as the natural person who constituted the organic form of a non-corporeal entity. [The first appellant] may claim that in respect

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199 *Craythorne v Swinburne* (1807) 14 Ves Jun 160 [33 ER 482]; *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178.

200 (2000) 178 ALR 161 at 167-168.

of his act or omissions as the solicitor acting for [the second appellant] – instructed by himself so to act – he was misled by the misleading or deceptive conduct of [the first respondent], participated in by Tressider, to the same extent that he was misled whilst acting on behalf of [the second appellant]. Asking whether [the first appellant], in the performance of his duties as solicitor for [the second appellant], should have been more diligent or astute, would not answer the question whether [the first appellant] was entitled to recover from [the first respondent] and Tressider any loss he had suffered as a result of the conduct of [the first respondent]. The essential question of fact would be whether [the first appellant] relied upon [the first respondent's] conduct and did so to his detriment, namely by incurring liability to [the second appellant].

It would be reasonable to conclude that conduct which misled [the first appellant] when he decided on [the second appellant's] behalf to enter an agreement to purchase the property, also constituted conduct likely to mislead [the first appellant] in his concurrent capacity as solicitor for [the second appellant]. Conduct that would be in contravention of the TPA is not conduct that meets the requirements of the TPA by reason only of lack of diligence of a party to whom the conduct is directed. Where that party has professional skills which, if duly applied, may expose and thereby negate the misleading nature of the conduct, liability for that conduct will still attach under s 82 of the TPA if, in fact, the party is induced by the conduct to act contrary to that party's interests or professional obligations".

The appeal to this Court

140 The appellants now appeal to this Court on the following grounds:

"1 The Full Federal Court (Lee J dissenting) was in error in holding that the general law of contribution applied to permit recovery of contribution from the First Appellant by the First Respondent and the Second Respondent arising out of a judgment that the Second Respondent had contravened s 52 of the *Trade Practices Act* and the First Respondent was a person involved in the contravention pursuant to s 75B.

2 The court was in error in holding that the First Appellant who was found to have been negligent and in breach of his retainer as a solicitor to his client was under a common liability to the client with the First & Second Respondents who had contravened s 52 of the *Trade Practices Act* such as to give rise to a right of contribution in the First & Second Respondents as against the First Appellant.

3 The court was in error in not finding that [for] contribution to apply between persons who have concurrent liabilities to a third party there must be a common liability arising out of a common design to achieve a common end.

4 The court should have found that the conduct of the Respondents being proscribed by s 52 of the *Trade Practices Act* would entitle the First Appellant to an indemnity from the First & Second Respondents and thus was a bar to making any order for contribution.

5 The court should have found that as the First & Second Respondents intended to mislead the Second Appellant through the First Appellant that the respective liabilities of the First Appellant and the First & Second Respondents were not in respect of a common obligation and that there was no equality between them such as to give rise to a contribution.

6 If the First Appellant was liable to make contribution to the First & Second Respondents the court erred in not apportioning the liability as to one-third to the First Appellant and a further third to each of the First & Second Respondents."

141 There is no decision of this Court, or indeed of the House of Lords or the Privy Council, which deals with the precise question that this appeal raises. Both *BP* and *Street* are distinguishable for the reasons given by Lehane J and, whilst it cannot be doubted that both law and equity subscribe to a general doctrine of contribution[201], *Albion*, as an insurance case, stands in a separate category from this case. As Kitto J pointed out in *Albion*, contracts of insurance are (both in substance and form) contracts of indemnity: they cover the identical risk and loss that an identical insured has sustained. Relevantly, therefore, there is a complete correspondence in all things except the separate identity of the respective insurers. The importance of an identity of risk is emphasised in the joint judgment by the other members of the Court (Barwick CJ, McTiernan and Menzies JJ)[202]. Not everything that is said, therefore, by Kitto J (with whom Windeyer J agreed) in *Albion*, in the passage quoted by Lehane J, can necessarily be unqualifiedly applied to this case, which is not an insurance case, although the

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201 The extensive principle does seem however to be originally founded in equity. The application of the principle at common law depended upon prior actual discharge of the liability by the claimant as a condition precedent to the making of the claim. See *McLean v Discount and Finance Ltd* (1939) 64 CLR 312 at 341 per Starke J.

202 (1969) 121 CLR 342 at 345-346.

principles extracted by his Honour from the cases can and should be. Kitto J said[203]:

> "The general doctrine of contribution, as I have said, forms part of the common law. It was applicable by Lord Mansfield in *Godin v London Assurance Co* and *Newby v Reed* no less than by Lord Chief Baron Eyre when exercising the equitable jurisdiction of the Court of Exchequer in *Dering v Winchelsea (Earl)*. This was because the basic concept was accepted by both law and equity as one of natural justice, as indeed it had been by the law of other countries since ancient times … Lord Mansfield put the matter squarely on that ground: 'If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata, to satisfy the loss against which they have all insured'; and indeed Mr Justice Park, in his work on Marine Insurance, had described the principle of contribution as a principle of natural justice: see Sir William Blackstone's note to his report of *Godin v London Assurance Co* … The principle proceeded, as Lord Redesdale said in *Stirling v Forrester* which Lord Halsbury approved in *Ruabon Steamship Co v London Assurance*, 'on a principle of law that must exist in all countries, that where several persons are debtors, all shall be equal'. Lord Redesdale had observed that the principle was universal 'that the right and duty of contribution is founded in doctrines of equity'; and the reference was not to doctrines peculiar to chancery but to doctrines of equity in the sense of 'reason, justice and law', the expression used by Martin B in *Marsack v Webber*. The judgment in *Dering v Winchelsea* itself had said that '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' – 'founded on equality, and established by the law of all nations' (to quote the same judgment as differently reported) – and it had gone on to show that law and equity were at one as to the nature of the right, though the doctrine of equality operated more effectually in a court of equity than in a court of law, and there were differences as to the mode and conditions of its application … The right arises at law when 'one of several persons has paid more than his proper share towards discharging a common obligation' … and it arises in equity when a liability of one of several to pay more than his share has been ascertained …; but for present purposes this difference is immaterial: what is important is the reason, namely that payment by the one discharges not only himself but each of the others …
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> What attracts the right of contribution between insurers, then, is not any similarity between the relevant insurance contracts as regards their general nature or purpose or the extent of the rights and obligations they

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203 (1969) 121 CLR 342 at 350-351.

> create, but is simply the fact that each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained; for that is the situation in which 'the insured is to receive but one satisfaction' (to use Lord Mansfield's expression) and accordingly all the insurances are 'regarded as truly one insurance'". (footnotes omitted)

142 The authorities, to which his Honour refers, express the conditions for the application of the doctrine of contribution in different ways: when there is mutuality of rights and obligations inter se; when the burden is and must be seen to be a common burden; when several persons owe the same obligations they should satisfy them equally; when in reason, justice and law there should be equality of liability; when it can be shown that one person has paid more than his or her proper share; and, when general principles of justice require contribution.

143 In my opinion, none of those conditions are satisfied here. There was no relevant mutuality of rights and obligations inter se. The obligation of the respondents was a statutory obligation not to engage in misleading and deceptive conduct. The right of the second appellant was to bring proceedings under the Act if the respondents engaged in misleading and deceptive conduct. The first appellant owed no obligations, and certainly no duty of care, to the respondents. Such obligations as he owed were owed exclusively to the second appellant. Those obligations were of a different kind entirely from those of the statutory obligations of the respondents. The nature and extent of the first appellant's obligations depended very much on the terms of the contract of retainer between the appellants. A person may not contract out of the Act[204]. A person may, however, limit his or her liability under a contract of retainer[205]. The respondents had a statutory obligation not to mislead the first appellant in his role as a director and a governing mind of the second appellant. That, having misled and deceived the first appellant in that role, the respondents should nonetheless be entitled to say that the first appellant should make a contribution in respect of the loss caused by their conduct strikes at the very heart of notions of justice and equity. It would be akin to allowing the respondents to take advantage of their own wrong-doing. It would amount to their being entitled to say, "although we misled and deceived you, you should have known better, you should have completely disbelieved us and found us out to be the deceivers that we were". The respondents certainly would not be entitled to contribution in equity because they do not have clean hands. That fraud, illegality, wilful misconduct or gross negligence will deny a perpetrator relief by way of contribution from partners[206]

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204 *Trade Practices Act* 1974 (Cth), s 68; *Henjo v Collins* (1988) 79 ALR 83 at 98-99.

205 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 22-23 [47]-[48], 37 [86] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

206 *Thomas v Atherton* (1878) 10 Ch D 185; *Lane v Bushby* (2000) 50 NSWLR 404.

just as unclean hands will similarly bar relief by a trustee against co-trustees[207], serves to show that, even though the doctrine of contribution is common to both law and equity, certain types of conduct can still operate to defeat a claim for contribution in law or under statute[208]. Indeed it is likely that in modern times whatever would have provided a defence to a claim in equity for contribution would equally provide a defence in law[209].

144 Much of what I have said is also applicable to the second way in which the necessary conditions have been expressed. The burden that the first appellant carried was not carried in common with the statutory burden which the respondents bore. The obligations owed were quite different because the duties of care had an entirely different content and were by no means necessarily equal in substance. And it is simply not possible to say that, without contribution, the respondents would have paid more than their proper share of the loss which their conduct set in train. This is not a case in which general principles of justice, whether in equity or in law, require contribution.

145 I would not wish to be taken to be saying that in no case in which one of the obligations is owed by statute and another or others are owed at common law or under another statute, the possibility of contribution is necessarily excluded. Whether it is will, depend however, among other things, upon the precise nature and content of the respective obligations owed and rights created or enjoyed[210], and the degree of correspondence between them. Nor does my decision, in this case, so far as contribution in law as opposed to equity is concerned, turn upon the fact that there was, in my opinion, (contrary to the holding of Heerey J) a degree of moral obloquy on the part of one or more of the respondents, and none on the part of the first appellant, although I would not rule out that those matters

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207 See Fratcher, *Scott on Trusts*, 4th ed (1988) at §258.3.

208 For example, a claim for contribution by partners made under s 24(2) of the *Partnerships Act* 1892 (NSW).

209 cf *Wolmerhausen v Gullick* [1893] 2 Ch 514 at 527-528; *AGC (Advances) Ltd v West* (1984) 5 NSWLR 590 at 604; *Morgan Equipment Co v Rodgers* (1993) 32 NSWLR 467 at 482.

210 cf *Caledonia North Sea Ltd v London Bridge Engineering Co* [2000] Lloyd's Rep IR 249, in which the Inner House of the Court of Session rejected a claim for contribution by a contractor which had agreed to indemnify its principal against claims made against and paid out by the latter's insurer on the ground that the liabilities of the two indemnifiers, the principal's insurer, and the contractor were not co-ordinate: their obligations and rights were different. See also *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 11 ANZ Ins Cas ¶61-485 at 75,625-75,626.

might be decisive considerations in some cases. I agree, however, with what was said by Lee J in the Full Court that the fact that there was a degree of moral obloquy on the part of the respondents provides another clear indication that the respective burdens, obligations and rights owed and enjoyed by the appellants were quite different, qualitatively and quantitatively, and accordingly legally, from those owed by the respondents. His Honour was also right, with respect, to have regard to the fact that the Act provides a remedy for the broad spectrum of people likely to be affected by breaches of the Act and does not restrict relief to the astute and the intelligent.

146 Because of the conclusion that I have reached, it is also unnecessary for me to consider another basis upon which perhaps this case might have been decided: that the loss might not necessarily have been the same in any event. *Astley v Austrust Ltd* makes it clear that the first appellant's liability, if any, to the second appellant might have been effectively at the second appellant's election, in tort or in contract[211]. The measure of damages under these heads might not necessarily have been the same as each other, and therefore by no means might they be necessarily the same as those recoverable against the respondents under the Act.

Orders

147 For the reasons that I have given, I would allow the appeal with costs.

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211 (1999) 197 CLR 1 at 20 [44].