HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND BELL JJ

NICHOLAS MACARTHUR FRIEND APPELLANT

AND

FREDERICK CLARKSON BROOKER & ANOR RESPONDENTS

Friend v Brooker [2009] HCA 21
28 May 2009
S475/2008

ORDER

1. *Appeal allowed.*

2. *First respondent to pay the costs of the appellant.*

3. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales entered 25 June 2008 and, in lieu thereof, order that the appeal to that Court be dismissed with costs, including the costs of the application for recall of reasons.*

On appeal from the Supreme Court of New South Wales

Representation

C R C Newlinds SC with H S Packer and B R Kremer for the appellant (instructed by Bull, Son & Schmidt)

B W Walker SC with M S White for the first respondent (instructed by Levitt Robinson Solicitors)

No appearance for the second respondent

CATCHWORDS

Friend v Brooker

Equity – Doctrine of contribution – "Co-ordinate liability" – Appellant and respondent company directors – Respondent personally borrowed money which was on-lent to the company – Company ceased trading – Respondent sought funds from appellant to repay personal loan – Whether fiduciary relationship existed between the two – Whether co-ordinate liability existed so as to require equitable contribution from appellant.

Words and phrases – "common design", "community of interest", "co-ordinate liability", "equitable contribution".

1 FRENCH CJ, GUMMOW, HAYNE AND BELL JJ. This appeal is brought by Mr Friend from the decision of the New South Wales Court of Appeal (Mason P and McColl JA; Basten JA dissenting[1]) which allowed an appeal by the first respondent (Mr Brooker) and set aside the orders of the primary judge (Nicholas J) dismissing a suit in the Equity Division of the Supreme Court of New South Wales[2]. The appeal should be allowed and the orders of the primary judge restored.

2 The appeal raises for consideration by this Court fundamental questions respecting the nature and scope of the equitable doctrine of contribution. These are precipitated by the decision of the Court of Appeal which proceeded from considerations first raised by the President in the course of argument and not advanced to the trial judge.

3 The matter is further complicated by the circumstance that in various respects findings of fact were made or assumed by the Court of Appeal and in this Court the appellant vigorously challenged the procedure adopted by the Court of Appeal, in going beyond the findings made by Nicholas J when disposing of the quite different case presented at trial. However, it will be possible to decide the appeal in favour of the appellant even assuming many of the factual findings and assumptions of which the appellant complains.

The equity suit

4 The suit was tried upon the fifth amended statement of claim. Mr Brooker sought a declaration respecting the existence between May 1977 and January 1995 of a partnership or of an agreement (identified in his pleading as "the Joint Venture") between him and Mr Friend for them to carry on jointly the conduct of a building and construction business. Mr Brooker contended that the second respondent, Friend & Brooker Pty Ltd ("the Company"), had been the "corporate vehicle" for the conduct of the partnership or joint venture agreement. In his reasons for judgment, Nicholas J recorded that Mr Brooker also claimed that there had been a fiduciary relationship between the partners or joint venturers.

5 Mr Brooker (hereafter "the respondent") sought an order for the taking of a full account of the partnership or the Joint Venture and recovery for loss suffered by him by reason of the alleged refusal of Mr Friend (hereafter "the

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1 [2006] NSWCA 385.

2 [2005] NSWSC 395.

appellant") to make equal contribution to the repayment of his personal borrowings for the purpose of the business.

6 Apparently for good measure, in par 24 of his pleading Mr Brooker alleged that Mr Friend had been unjustly enriched at his expense as a result of his being "materially benefited" to the extent of expenditure of those borrowings upon repayment of debts and payment of expenses of the Joint Venture or partnership and as a result of the failure of Mr Friend to make a contribution to or to account to Mr Brooker for his share of the benefit to the Joint Venture or partnership. The failure of the case respecting the existence of the Joint Venture or partnership made it unnecessary for Nicholas J to enter upon any issue of unjust enrichment raised by par 24.

7 The joint reasons in *Lumbers v W Cook Builders Pty Ltd (In Liq)*[3] contain two propositions which are relevant here. The first is that, in general, the bare fact of the conferral of some benefit upon another does not suffice to establish an obligation to repay the expenditure in providing that benefit[4]. The second proposition is that while the concept of unjust enrichment may provide a link between what otherwise appears to be a variety of distinct categories of liability, and it may assist, by the ordinary processes of legal reasoning, in the development of legal principle, the concept of unjust enrichment itself is not a principle which can be taken as a sufficient premise for direct application in a particular case[5].

8 In this Court, Mr Brooker expressly disavowed any reliance upon a cause of action framed as a case of unjust enrichment. However, he did rely upon par 24 as supplying sufficient foundation for the application of the equitable doctrine of contribution in his favour by the Court of Appeal, and for the further formulation of that doctrine which he advanced in this Court in support of the outcome in the Court of Appeal.

9 The Company ceased to trade in about July 1990 and was deregistered on 26 July 1996. It played no active part in the litigation. The Company may be taken to have been insolvent at least since the time it ceased to trade.

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3 (2008) 232 CLR 635; [2008] HCA 27.

4 (2008) 232 CLR 635 at 663-664 [80]. See also the remarks of Lord Esher MR (then Brett MR) in *Leigh v Dickeson* (1884) 15 QBD 60 at 64-65.

5 (2008) 232 CLR 635 at 665 [85].

Mr Brooker's success in the Court of Appeal was based on the proposition that the dealings over some years between him and Mr Friend referable in particular to a certain loan transaction generated a right to contribution in his favour. The parties are in dispute in this Court, among other matters, as to whether the effect of the relief granted to Mr Brooker by the Court of Appeal is to disrupt what otherwise would be the established system for the insolvent administration of the Company, which the parties had jointly controlled.

The facts

10 As already noted, many matters of fact were still in dispute before this Court. Had Nicholas J ordered the account sought by Mr Brooker, various aspects of the dealings affecting the parties would have been for resolution on the taking of the full account. But, in the event, no such order was obtained from the trial judge.

11 However, some basic facts were largely undisputed. In about May 1977, Mr Brooker and Mr Friend resigned from their employment as engineers with John Holland Constructions Pty Ltd, with the intention of establishing an engineering and construction business. The Company was incorporated on 18 July 1977. In 1979 the scope of the business of the Company was expanded to include the purchase and development of land.

12 With respect to the incorporation of the Company, Nicholas J made an important finding respecting the subsistence thereafter of any partnership. He found:

> "What happened was that from the time of incorporation the partnership ceased, just as the parties intended. The effect of incorporation changed the basis upon which the business had been conducted since May 1977, not only with regard to third parties, but also as between themselves. Thereafter their relationship was as co-directors of the company, and the assets and liabilities associated with the business were the company's."

13 Mr Brooker and Mr Friend were the directors of the Company and the shareholding was controlled equally by a complex of their respective family companies and trusts. The trial judge recorded that to finance the activities of the Company funds were obtained by loans from third parties to the Company and from time to time by separate personal borrowings from family and friends by Mr Brooker and Mr Friend; these funds then were lent to the Company and reflected in the loan accounts of the directors as unsecured loans. In this Court, Mr Brooker accepted that the loan accounts were not matched between the two

directors, but fluctuated from time to time depending upon which of them had been tapping available sources of funds.

14 In January 1984 the Company entered into a contract with the Eurobodalla Shire Council ("the Council") for the construction of sewerage reticulation works at Narooma for a sum in excess of $2.5m. The contract reached practical completion in September 1985, but in April 1986 the Council rejected the Company's claim for payment of a sum of about $1m. This placed the Company in extreme financial difficulty and it was in these circumstances that further finance was obtained in circumstances disputed before the primary judge. It may be accepted for the purposes of these reasons that the indebtedness of the Company at this period comprised loans from Trade Credits Ltd, Mr and Mrs de Bakker, and Alcon Investments Pty Ltd; that the second and third loans were secured by mortgages over Brooker properties, and the first loan by mortgages over properties owned by Mr Friend and by Mr Brooker; and that the moneys advanced had been used for the purposes of the business of the Company.

15 Nicholas J found that in November 1986, SMK Investments Pty Ltd ("SMK") acting by its director Mr Graham Peterson ("Mr Peterson") agreed to lend $350,000 to Mr Brooker "and/or his wife" ("the SMK loan"). Mr Peterson was a long-time friend of Mr Brooker. Mr Peterson gave evidence but unsurprisingly, given the scope of the suit as tried by Nicholas J, SMK was not joined as a party to the suit. Had it been a party, then when Mr Brooker made good in the Court of Appeal his claim to contribution by Mr Friend, its order could have provided, by appropriately crafted orders, for a discharge to Mr Friend by direct payment of his share to SMK[6].

16 The term of the SMK loan does not appear explicitly from the evidence. Interest on the SMK loan was fixed initially at 19.5% with a reduction to 18.5% for prompt payment and subsequently at 2% above the Westpac investment loan rate. Interest payments which were not made were capitalised. The loan was secured by a first mortgage over the Brooker family home at Mosman, owned by Mr Brooker's wife, and by a second mortgage over land at Artarmon jointly owned by Mr Brooker and his mother. The mortgage of the Mosman property was supported by a guarantee from Mr Brooker.

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6 See *Wolmershausen v Gullick* [1893] 2 Ch 514 at 528-529; Andrews and Millet, *Law of Guarantees*, 5th ed (2008) at 493-494.

17 Mr Peterson's position in his evidence was that the rights of SMK to recovery of the loan were against Mr Brooker and not the Company or Mr Friend. In the course of his cross-examination, Mr Peterson responded to questions asking why he was not presently "going after" Mr Brooker to recover moneys due and owing but unpaid by saying that he was a friend of Mr Brooker and was not interested in throwing him out of his house. There appears to have been no submission, and no finding was made, that Mr Brooker had borrowed as trustee for himself and Mr Friend or that the indebtedness of the Company to Mr Brooker was held, as to any part, upon trust for himself and Mr Friend.

18 The trial judge accepted evidence that Mr Friend had been told by Mr Brooker that the SMK loan had been proposed by Mr and Mrs Peterson and Mr Friend had responded "Well then, we should do it". There was no evidence that he knew of the interest rate or other terms of the loan. Nicholas J dealt with the paucity of evidence as follows[7]:

> "There is also no evidence that Mr Friend agreed to be jointly liable for, or to contribute to, the repayment of the SMK loan. It is difficult to accept that, if in truth he held the belief that Mr Friend was equally liable for this loan, Mr Brooker proceeded with the borrowing, and procured the securities from his wife and his mother, without first obtaining Mr Friend's acceptance of such liability. That there is no evidence that there was even discussion as to liability is remarkable having regard to the financial difficulties then facing the company, and the likelihood that it may have been unable to repay Mr Brooker the monies which he had on-lent to it. The absence of evidence as to these matters is, in my opinion, further indication that there was no agreement to the effect claimed in these proceedings. This doubt is reinforced by the delay until about October 1994 when Mr Brooker first claimed that Mr Friend was equally liable for the loan."

19 On 8 November 1986, $20,000 was paid to Mr Brooker in advance of settlement of the loan. The balance of $330,000 appears to have been applied at settlement on 23 December 1986 towards the discharge of the indebtedness of the Company to the three parties mentioned above and to pay Mr Brooker $37,183.95. His evidence was that the latter sum was used by him to pay small unsecured debts and to reimburse him for other expenses of the business previously paid by him. All these moneys were treated in the accounts of the Company as having been lent to it by Mr Brooker. However, in this Court,

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7 [2005] NSWSC 395 at [75].

Mr Friend did not accept that all the proceeds of the SMK loan had been applied to the benefit of the Company; the matter had not been pursued at trial because all such questions were to be left for the taking of the account were that remedy to be ordered.

20 There was a protracted dispute with the Council which extended over many years and various sums were received by the Company from the Council. On 19 September 1994, pursuant to a Deed of Release the Council paid the Company the final sum of $900,000. Nicholas J found that Mr Friend and Mr Brooker then fell out over the application of that sum to repay the balance of the SMK loan and interest. Mr Brooker claimed that the SMK loan had been made jointly to him and to Mr Friend, and that Mr Friend also was liable to SMK. By December 1995 the total debt on the SMK loan was approximately $1.1m. Of that $750,000 was interest.

21 Further disputes ensued over the years that followed concerning the state of the accounts of the Company and the loan accounts of Mr Brooker and Mr Friend. Mr Brooker contends that in all he has paid $575,000 to SMK from his own funds. However, between 24 August 1995 and 3 March 1998, Mr Brooker received from the Company an amount of $345,000, apparently by way of loan, which was used for his personal expenses and which he was not in a position to repay the Company.

The trial

22 The Supreme Court suit was commenced by Mr Brooker in 2000. The case went to trial in December 2004 and the suit was dismissed on 29 April 2005. The primary judge received affidavit and oral evidence from Mr Brooker and Mr Peterson. Mr Peterson deposed that at 8 November 2004 the amount outstanding on the SMK loan was $1,349,423.48. Affidavits by Mr Friend were not read and he gave no oral evidence. Counsel for Mr Friend emphasised in this Court that what would have been contested issues of fact were put aside in the presentation of his case at trial, on the understanding that they would be pressed only if and when Mr Brooker succeeded in obtaining the order for a full account.

23 Nicholas J recorded that it was common ground that no partnership accounts had been kept. Nor, it may be added, was there any evidence of the filing of partnership income tax returns. His Honour also said[8]:

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8 [2005] NSWSC 395 at [74].

> "It seems to me that the parties, with the benefit of professional advice, incorporated their business because it was commercially advantageous to do so in that it protected the personal position of each. Mr Brooker impressed me as an experienced businessman well aware of what was required for the protection of his interests. It is reasonable to expect that there would have been some record of an agreement intended to operate outside the corporate structure whereby the parties preserved the risk of personal liability for the debts of each other where the proceeds were on-lent to the company. The absence of such evidence suggests that there was in fact no such agreement."

24 The critical finding by the trial judge which led to the dismissal of the suit was as follows[9]:

> "In my judgment Mr Brooker has utterly failed to prove any agreement pursuant to which the existence of a fiduciary relationship with Mr Friend was established after the incorporation [of] the [Company]. I reject the submission made on his behalf that the relationship between the parties in the conduct of the business was that of a common law partnership, or a joint venture, or some other relationship which gave rise to an entitlement to an accounting from each other of all contributions by and payments to them to ascertain what, if anything each must pay to the other so that the ultimate loss of the business is shared equally between them."

The appeal to the Court of Appeal

25 Mason P concluded (with the apparent agreement of McColl JA[10]) that the trial judge had correctly held that Mr Friend was not jointly liable at law to SMK to repay the SMK loan, because (leaving aside the situation of the wife and mother of Mr Brooker) Mr Brooker was the only borrower[11].

26 The Court of Appeal unanimously rejected the claim for a general accounting spanning the period from 1977 onwards. That outcome appears to have been reached on the footing that the SMK loan was the only third party indebtedness which had arisen by reason of the activities of the Company and which remained outstanding. However, having regard to what was seen to be the

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9 [2005] NSWSC 395 at [79].

10 [2006] NSWCA 385 at [163].

11 [2006] NSWCA 385 at [6].

course of conduct of the parties with respect to the SMK loan, by majority the Court of Appeal granted declaratory and consequential relief referable to the outstanding indebtedness on the SMK loan. The Court of Appeal declared that Mr Friend:

> "is required to contribute so as to equalise the burden borne by [Mr Brooker] since 1995 of [his] obligations under the borrowing of $350,000.00 from [SMK] made in 1986".

The Court of Appeal also referred for determination by the Equity Division "the conditions under which it is just that [Mr Friend] should be ordered to pay to [SMK] the sum found to be due by him". This order was made notwithstanding the absence of SMK from the parties to the suit, as noted earlier in these reasons.

27 For the reasons which follow, the appeal to this Court should be allowed. It is convenient first to say something more respecting the course of the litigation in the Court of Appeal.

The reasons of the Court of Appeal

28 The appeal was heard on 13 March 2006 and reasons for judgment were delivered on 20 December 2006. On 23 February 2007 Mr Friend moved the Court of Appeal to recall the whole of the reasons of Mason P and five paragraphs[12] of the reasons of McColl JA. The motion was heard on 29 November 2007. On 7 May 2008 Mason P and McColl JA delivered reasons refusing that relief and Basten JA affirmed his original (and dissenting) reasons. After hearing further argument on 21 May 2008, on 29 May 2008 the Court of Appeal delivered reasons for the making of the orders supported by the majority[13]. The orders of the Court of Appeal were entered on 25 June 2008. Those orders included a stay of the implementation of the orders which remains in force pending the outcome of the present appeal by Mr Friend to this Court.

29 At the hearing of the recall application, Mr Friend had submitted that the Court of Appeal should not have entertained submissions by Mr Brooker which singled out the SMK loan for specific relief, having regard to the pleadings and the conduct of the trial. The majority rejected that submission. Basten JA did not embark upon this controversy.

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12 Pars 152, 155, 156, 162 and 163.

13 [2008] NSWCA 118.

30 Mason P said:

> "Issues in dispute are often refined as litigation progresses. Arguments are recast. Particular factual and legal propositions that once were in dispute become common ground. The obligation to afford procedural fairness requires the court to remain focussed upon the arguments put to it. To go beyond them will usually entail unfairness to one or both of the parties. But to refine and confine them is of the essence of an adversary system that includes an oral hearing. The proposal to restrict relief to the SMK transaction to the extent that moneys were outstanding by Mr Brooker was raised and addressed during the hearing of the appeal and in the supplementary submissions filed after judgment in the appeal was reserved."

31 In his notice of appeal, Mr Brooker had pressed his case for the relief sought at trial, in particular, for the taking of a full account. His counsel (not counsel appearing in this Court) maintained that position in the Court of Appeal. The grounds of appeal were not amended. In written submissions filed after intervention by the bench during oral argument, counsel had gone no further than submitting:

> "If it were minded to do so, the Court could fashion relief directed at compensation relating only to the circumstances of the [SMK loan]."

32 In his first set of reasons, Mason P saw the decisive issue as being whether the facts disclosed[14]:

> "a broader arrangement that, consistently with the formal structures and contracts, generated an obligation in conscience requiring [Mr Friend] to contribute towards exonerating [Mr Brooker] from the plight he finds himself in at the end of the venture".

33 The President referred to the holding in *Burke v LFOT Pty Ltd*[15] that to found a claim to contribution there must be a "common obligation", but also emphasised that "an equitable principle such as contribution is not confined by

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14 [2006] NSWCA 385 at [27].

15 (2002) 209 CLR 282; [2002] HCA 17.

legal structures" and that "the right of contribution rests upon matters of substance not form"[16].

34 Mason P appears to have seen the equity to contribute as the product of the circumstances that (i) the Company lacked the means to fund repayment of the SMK loan, (ii) the Company had applied the funds, borrowed from Mr Brooker, for the purposes of its business, in particular to meet indebtedness on the three third party loans, and (iii) Mr Friend had refused to contribute to any further payment by Mr Brooker of indebtedness on the SMK loan.

35 In his dissenting reasons, Basten JA held that even if Mr Brooker and Mr Friend were to be treated as liable on equitable principles of contribution of the kind applicable to co-sureties, relief should be denied because of the absence over a long period of any imminent threat by SMK to recover from Mr Brooker. In this Court the appellant relies upon the reasons of Basten JA on this issue. It will be necessary to return to the subject later in these reasons.

36 McColl JA supported the outcome favoured by Mason P. However, she considered that there had been a fiduciary obligation which required each director to meet an equal share of capital contributions. This was a fiduciary obligation with a positive rather than a proscriptive content. The respondent relies upon the reasons of McColl JA in submissions to this Court and it will be necessary to return to this aspect of the litigation.

37 Something more now should be said respecting the doctrinal basis upon which the respondent supports the application by the Court of Appeal of the equitable doctrine of contribution.

The equitable doctrine of contribution

38 With a claim to contribution, as is the position generally with the intervention of equity to apply its doctrines or to afford its remedies, the plaintiff must show the presence of "an equity" founding the case for that intervention[17]. The "natural justice" in the provision of a remedy for contribution is the concern that the common exposure of the obligors (or "debtors") to the obligee (or

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16 [2006] NSWCA 385 at [34]-[35].

17 See *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 434-435; [1990] HCA 39; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 216 [8], 233 [64], 259 [138]; [2001] HCA 63.

"creditor") and the equality of burden should not be disturbed or be defeated by the accident or chance that the creditor has selected or may select one or some rather than all for recovery[18]. Were equity not to intervene, then it would remain within the power of the creditor so to act as to cause one debtor to be relieved of a responsibility shared with another[19]. Equity follows the law in the sense that it does not seek to direct the manner of exercise of the rights of the creditor, but equity does make an adjustment between the debtors. Thus equity does not interfere with the action of the creditor but seeks to ensure the sharing of the burden between those subjected to it[20].

39 The equity to seek contribution arises because the exercise of the rights of the obligee or creditor ought not to disadvantage some of those bearing a common burden; the equity does not arise merely because all the obligors derive a benefit from a payment by one or more of them[21]. As explained in United States authority[22], contribution is an attempt by equity to distribute equally, among those having a common obligation, the burden of performing it, so that without that common obligation there can be no claim for contribution.

40 Hence the basic characteristics of the doctrine were identified, with reference to long established authority, in *Burke* as requiring contribution between parties sharing co-ordinate liabilities or a common obligation to make good the one loss, where the liabilities were of the same nature and to the same extent[23]. In that case, the purchaser, who had bought retail premises under a misrepresentation concerning the sitting tenants, recovered damages from the vendor for contravention of s 52 of the *Trade Practices Act* 1974 (Cth); the

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18 *Tombs v Roch* (1846) 2 Coll 490 at 499 [63 ER 828 at 832]; *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12-14; *Scholefield Goodman and Sons Ltd v Zyngier* [1986] AC 562 at 570-571; *Mahoney v McManus* (1981) 180 CLR 370 at 387-388; [1981] HCA 54.

19 Story, *Commentaries on Equity Jurisprudence*, 3rd Eng ed (1920), §493.

20 *Pomeroy's Equity Jurisprudence*, 5th ed (1941), vol 2, §§406, 411.

21 *Mahoney v McManus* (1981) 180 CLR 370 at 387.

22 *Nova Information Systems Inc v Greenwich Insurance Co* 365 F 3d 996 at 1006 (2004); *Corpus Juris Secundum* (2007 ed), vol 18, "Contribution", §5.

23 (2002) 209 CLR 282 at 292-293 [15] per Gaudron A-CJ and Hayne J, 303 [50] per McHugh J, 332 [138] per Callinan J.

purchaser also had been negligently advised on the matter by its solicitor but the vendor failed to recover contribution from that solicitor. The liabilities were not of the same nature and extent. Further, McHugh J emphasised that to enable the vendor to diminish the consequences of its contravention of s 52, by obtaining contribution, would be contrary to the policy of the legislation[24].

41 It was said in *Burke*, with reference to authority, that the doctrine is "usually expressed" in terms of "co-ordinate liabilities" or "common obligation"[25]. The terminology of "co-ordinate liabilities" is to be preferred to that of "common obligation", which it subsumes, as indicative of the class of circumstances in which the equity arises.

42 No "common design" between the debtors is required before an equity for contribution may arise. Thus, it is no answer to a claim for contribution that co-ordinate liabilities which are of the same nature did not arise from the one instrument or at the same time or that those which arose later were incurred with knowledge of the earlier liabilities, or that different "causes of action" lay to enforce them[26].

43 Equitable contribution thus is to be contrasted with contribution sought by a common law claim for money paid by the plaintiff to the use of the defendant, where the plaintiff incurs, partly to the benefit and at the request of the defendant, a liability to pay money[27]. In the latter case, mutual relations of the parties are essential to obtain contribution[28].

44 There are significant distinctions between the bases of recovery in an equity suit and in an action at common law. The matter was explained by

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24 (2002) 209 CLR 282 at 308-309 [66]; cf with respect to anti-trust litigation in the United States, *Texas Industries Inc v Radcliff Materials Inc* 451 US 630 (1981).

25 (2002) 209 CLR 282 at 292-293 [15].

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

27 See, for example, *Batard v Hawes* (1853) 2 El & Bl 287 at 296 [118 ER 775 at 778]; *Leigh v Dickeson* (1884) 15 QBD 60 at 64.

28 See *Lumbers v W Cook Builders Pty Ltd (In Liq)* (2008) 232 CLR 635 at 666 [89], 674 [126].

Vaughan Williams LJ in *Bonner v Tottenham and Edmonton Permanent Investment Building Society*[29] as follows[30]:

> "There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued."

His Lordship explained the common law position by reference to the form of the action for money paid to the use of the defendant at his request, the defendant being under a personal liability to pay the money the plaintiff has paid for him.

45 But what, in equity, is sufficient "community of interest" in the subject matter to which is attached a burden which is borne by the claimant for the benefit of the claimant and defendant? In *Whitham v Bullock*[31], the English Court of Appeal referred to the above passage in *Bonner* when considering the situation where the lessee of land had assigned the lease as to part of the land to X and part to Y. The result was that the lessor could distrain against either X or Y for the whole of the rent but could sue to recover from each only the proportionate part of the rent. Was there an equity in X to recover contribution from Y where, under threat of distraint by the lessor by reason of the failure of Y to pay its proportion, X paid the whole of the rent? In giving an affirmative answer, Clauson LJ said that although X was not liable to be sued directly for all of the rent, the equity of X arose from payment under stress of legal process; having in its premises chattels of a value amply sufficient to satisfy a distress, X had saved the chattels by meeting Y's share of the rent. There was a sufficient "community of interest" in the two plots of the leased land; the attached common

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29 [1899] 1 QB 161.

30 [1899] 1 QB 161 at 174. See also the reasons of Bray CJ in *Floreani Bros Pty Ltd v Woolscourers (SA) Pty Ltd* (1976) 13 SASR 313 at 320-321.

31 [1939] 2 KB 81.

burden of liability to distress for the whole of the rent had been shouldered by X to the relief of Y.

46 What, however, is presently significant is that the community of interest had its source in the assignment of the lease as to part of the land to X and part to Y and that the attached common burden was imposed by the law respecting distraint. The equity in favour of X to recover the share of the rent from Y had arisen from the operation of the law upon their situation, not by some looser notion of economic interest which disregards or supersedes the legal framework within which the parties chose to have their dealings.

47 In that sense it is true to say that here, as elsewhere, equity looks to substance and not merely to legal form when it fixes upon the legal situation of the parties and requires that the exercise of legal rights produce a result which conforms to equitable doctrine. But that is not to adopt the wider statement made in the present case by Mason P that the equitable doctrine of contribution "is not confined by legal structures"[32]. That view of the jurisdiction provides a framework of analysis at too high a level of abstraction, and risks a result discordant with accepted principle and the general coherence of the law[33]. In a case such as the present, to proceed in this way may too easily produce an outcome in a given case which is no more than an idiosyncratic exercise of discretion.

48 So it is, as French J put it, that rights of contribution are not attracted to obligations "merely because they are owed to the same party and related to the same transaction or otherwise connected in time or circumstance"[34]. In *Burke*[35] McHugh J referred to authority[36] which indicated that the doctrine is not enlivened merely because the claimant's payment operates to the financial benefit or relief of the other party.

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32 [2006] NSWCA 385 at [34].

33 See *Lumbers v W Cook Builders Pty Ltd (In Liq)* (2008) 232 CLR 635 at 661-663 [75]-[78].

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

35 (2002) 209 CLR 282 at 301-302 [44]-[46].

36 *Ruabon Steamship Co v London Assurance* [1900] AC 6 at 12; *Cockburn v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624 at 633-641. See also the remarks of Brennan J in *Mahoney v McManus* (1981) 180 CLR 370 at 387.

49 The eighteenth century decision most frequently cited in cases dealing with contribution is that on the equity side of the Court of Exchequer in *Dering v Earl of Winchelsea*[37]. There, by way of illustration of the proposition that there need be no contract or privity between sureties, Eyre LCB referred to the "case of average of cargo" where the requirement to contribute was "the result of general justice from the equality of burthen and benefit"[38]. The burden, at least as then understood in maritime law[39], lay in the exercise of the power and authority given by maritime law to the master of the ship for the protection and care of the cargo, a matter explained by Lord Stowell (then Sir William Scott) in *The Gratitudine*[40]. That authority, with many others, was cited by Gray J when delivering the decision of the Supreme Court of the United States in *Ralli v Troop*[41]. Judge Learned Hand later spoke of the sacrifice being made for the joint venture and directed by the person then in control of that venture[42]. Thus, and contrary to what was suggested in oral submissions for Mr Brooker, the law respecting general average was not prayed in aid in *Dering* in any fashion which provides an exception to the requirement of a common burden imposed by the law.

50 The requirement of a common legal burden presents a major difficulty for any application of the doctrine of equitable contribution between the appellant and the respondent with respect to the liability of Mr Brooker on the loan to him

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37 (1787) 1 Cox Eq Cas 318 [29 ER 1184]; *White and Tudor's Leading Cases in Equity*, 9th ed (1928), vol 2 at 488.

38 (1787) 1 Cox Eq Cas 318 at 322-323 [29 ER 1184 at 1186].

39 In modern times, with improved communications, the general average act may be that of the shipowner: *Australian Coastal Shipping Commission v Green* [1971] 1 QB 456 at 480-481, 485, 486-487. But such cases apart, it is unsettled whether under the York-Antwerp Rules 1924 the general average act may be the act of a stranger to the adventure: Lowndes and Rudolf, *The Law of General Average and the York-Antwerp Rules*, 13th ed (2008) at 83-86. See also *Marine Insurance Act* 1909 (Cth), s 72.

40 (1801) 3 C Rob 240 at 257-258 [165 ER 450 at 456].

41 157 US 386 at 397-398 (1895).

42 *The Moran No 16* 40 F 2d 466 at 468 (1930).

by SMK. In particular, SMK had not contracted with Mr Friend and Mr Brooker had not contracted with SMK as trustee for himself and Mr Friend.

51 The respondent, Mr Brooker, seeks to outflank this obstacle and to support the outcome in the Court of Appeal by setting up a category of contribution based upon "common design". The appellant responds by denying the existence of such a category, and also by relying upon the evidence of Mr Peterson that having regard to Mr Brooker's financial straits he is not presently proposing to claim against him for payment of the SMK loan.

No imminent threat?

52 In *McLean v Discount and Finance Ltd*[43] Starke J explained that at common law an action for contribution cannot be maintained in advance of actual payment of more than the just proportion of the principal obligation; on the other hand, equity acts *quia timet* where the apprehended over-payment appears sufficiently imminent. Starke J referred to *In re Anderson-Berry*[44], in which Sargant LJ used the expression "clear threat" and opined that "the origin of quia timet may be an illustration of the rule that prevention is better than cure"[45]. That which is prevented in this way may be seen as the situation whereby the co-obligor's obligations are discharged in circumstances where the plaintiff is left with the chance that the action at law the plaintiff then brings against the co-obligor for money paid is unfruitful.

53 But was there a "clear threat" posed by SMK? The appellant points to the evidence of Mr Peterson respecting his friendship with the respondent and his wish not to see him thrown out of his house. This, with the failure of the respondent to counter the effect of that direct evidence as to the attitude of SMK, is said to show error on the part of the majority of the Court of Appeal. The appellant draws support from the dissenting reasons of Basten JA that the respondent must fail for lack of evidence to support the existence of "a real possibility" that he would be required to pay and be able to pay more than one half of the moneys due and owing on the SMK loan but unpaid[46]. Basten JA referred to the discussion of supporting authorities respecting the *quia timet*

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43 (1939) 64 CLR 312 at 341; [1939] HCA 38.

44 [1928] Ch 290.

45 [1928] Ch 290 at 307.

46 [2006] NSWCA 385 at [202].

jurisdiction by the New South Wales Court of Appeal in *Harpley Nominees Pty Ltd v Jeans*[47].

54 It will never be possible to lay down exhaustively detailed criteria marking out the limits of the power of equity to act *quia timet*. However, were it not for recent decisions which appear to relax the strength of the requirement for imminent threat, the situation disclosed by the evidence of Mr Peterson in particular would support the conclusion reached by Basten JA.

55 Some care is required here in distinguishing the relationship of surety and principal debtor and that between co-sureties. The surety who discharges the principal obligation is regarded as having paid money to the use of the principal debtor and may recover indemnity by means of an action against the principal debtor for money paid[48]. The principal debtor must indemnify and save harmless the guarantor. Such is the tenderness of equity for the surety that the surety may obtain an order directing the principal debtor to pay to the creditor a definite sum of money that has become payable, even though the creditor has made no demand for payment[49]. It is said to be unreasonable that such a cloud should hang over the surety[50].

56 In *Stimpson v Smith*[51], reference was made in the English Court of Appeal to the view expressed in the Supreme Court of Queensland by Williams J in *Moulton v Roberts*[52] that the principles developed respecting the exoneration of the surety by the principal debtor were "equally apposite" to the relations between co-sureties. In *Stimpson v Smith*[53], Peter Gibson LJ accepted that it was

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47 [2006] NSWCA 176.

48 *Israel v Foreshore Properties Pty Ltd (In Liq)* (1980) 54 ALJR 421 at 423-424; 30 ALR 631 at 636.

49 *Holden v Black* (1905) 2 CLR 768 at 782-783; [1905] HCA 40.

50 *Ranelaugh (Earl) v Hayes* (1683) 1 Vern 189 at 190 [23 ER 405 at 406]; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 at 606; *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 81-82.

51 [1999] Ch 340 at 349-350, 352-353.

52 [1977] Qd R 135 at 138.

53 [1999] Ch 340 at 350.

enough that the creditor could enforce the guarantee for more than the surety's rateable share.

57 On the other hand, in *Woolmington v Bronze Lamp Restaurant Pty Ltd*[54], Needham J, whose opinion in such matters deserves great weight, said that as the authorities then stood, none had gone to the length of deciding that the plaintiff surety could maintain an equity suit for contribution without either having paid at least the amount due by the plaintiff under the guarantee or being under a liability by judgment to pay the full amount. However, Needham J was prepared to go so far as to make a declaration and order for contribution in favour of a surety who satisfied the court that he was willing able and prepared to pay at least his share of the principal debt[55]. In the case before him, this was not so and relief was refused.

58 In his written submissions, the respondent relied upon *Moulton v Roberts*[56] as authority for the proposition that it is sufficient for equity to grant *quia timet* relief that his liability to SMK is fixed, accrued and ascertainable albeit there is no immediate jeopardy or demand by SMK. Several points should be made here.

59 The first is that the correctness for Australian law of *Stimpson v Smith* and *Moulton v Roberts* need not be decided in this appeal. There was common obligation in those authorities by reason of liability on a guarantee, but in the present case the only obligation to SMK, and the only exposure to action by it, was that of Mr Brooker.

60 The second point is that in oral submissions Mr Brooker emphasised that while there was no common obligation of Mr Friend to SMK, the "common design" principle for which he contended attracted equitable intervention in his favour simply because of his risk of expense. But even making (without deciding) such an assumption in favour of Mr Brooker, for him to seek equity it would be necessary for him to do equity. This, consistently with the reasoning of Needham J in *Woolmington v Bronze Lamp Restaurant Pty Ltd*[57], would require him, in seeking contribution, to have satisfied the trial judge that he was ready, willing and able to pay at least one half of the indebtedness to SMK. Given what

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54 [1984] 2 NSWLR 242 at 245.

55 [1984] 2 NSWLR 242 at 245.

56 [1977] Qd R 135.

57 [1984] 2 NSWLR 242 at 245.

the trial judge identified as Mr Brooker's financial straits[58], this probably could not be realistically attempted.

61 These considerations make this appeal an inappropriate occasion to resolve any uncertainties in the case law respecting the scope of the *quia timet* power of courts of equity in contribution suits.

62 The appeal should be disposed of on the broader ground urged by the appellant, the rejection of the alleged principle of "common design".

"Common design"

63 In his reasons Mason P referred to the judgment of Cooper J given in the Full Court of the Federal Court in *Cummings v Lewis*[59]. The case appears not to have been cited in oral argument or in the written submissions presented to the Court of Appeal. However, in this Court Mr Brooker relies upon the analysis of the authorities by Cooper J to support the relief he obtained in the Court of Appeal. This is said properly to obviate the need in the present case for exposure to a common legal obligation, by reliance upon "common design".

64 In oral submissions counsel for Mr Brooker developed his written submissions apparently beyond what had been decided by the Court of Appeal, with a reformulation of what was identified as the "common design" principle for equitable contribution. This was said to be a distinct principle, where the equity is found not in the relationship of obligee and co-obligors, but simply in commonality of benefit from the operation of that design. The final formulation by counsel of the suggested principle was as follows:

> "Contribution will be enforced where the party seeking it has, by reason of and in reliance on a common design with the party from whom contribution is sought, undertaken a risk or expense which:
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> (a) was undertaken with the knowledge and assent of that other party;
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> (b) was undertaken in order to effectuate or facilitate the common purpose or benefit which was the object of their common design;

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58 [2005] NSWSC 395 at [59].

59 (1993) 41 FCR 559; Sheppard and Neaves JJ were the other members of the Full Court.

(c) in light of the parties' relationship and the nature of their common design, could not fairly be expected to be borne as a burden alone by the party undertaking it;

and there is no contract to the contrary."

65 There are significant obstacles to the respondent making out such a case given the state of the evidence and the conduct of the trial. Paragraph (c) highlights the point. It was not open to the Court of Appeal, had it been invited to do so, and it is not open now to this Court, to attempt any finding as to whether Mr Brooker could not "fairly be expected" to bear alone the burden of the SMK loan, in the light of what is said to have been the relationship of the parties and their common design.

66 Further, and as an additional ground of decision, the suggested principle is not the law of Australia.

Cummings v Lewis

67 It is convenient to begin with a consideration of the origin of the respondent's proposition in the decision of Cooper J to which the Court of Appeal referred and upon which the respondent relies. This will disclose an infirm foundation for what is now advanced in this Court.

68 Cooper J concluded that it was not always essential that there was exposure to a common obligation or risk[60]; it would be sufficient[61]:

> "that the persons involved were all parties to a common design to achieve a common end and that in furtherance of the attainment of the common end one party has with the knowledge and concurrence of the others done an act which has resulted in that person incurring expense or suffering loss".

69 Several things should be said immediately respecting that statement of principle. The first is that Cooper J held that the facts in *Cummings* failed to attract its application; the race horses in question had been purchased by Mr Cummings in his own right and the indebtedness to the sellers was not a burden undertaken by Mr Cummings for the benefit of Mr Cummings and those

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60 (1993) 41 FCR 559 at 594.

61 (1993) 41 FCR 559 at 598.

defendant accountants who were to market syndicates for "tax effective" purposes. As Sheppard and Neaves JJ put it, there was no more than a "loose" arrangement under which Mr Cummings would acquire horses and two firms of accountants would prepare and market the tax schemes[62]. Their Honours concluded that the parties to that arrangement each brought a separate expertise and skill and said[63]:

> "These were to be combined for the benefit of each of the parties, not in the sense that each would share profits from a common enterprise or a common benefit such as a separate utilisation of a single product or service produced by the combined efforts of the two, but in the sense that each would, as a result of his interest in the project, take to his own business undertaking the advantages and benefits to which we have referred. On no basis does such an arrangement impose obligations on one party to contribute to the losses of the other."

70 The second matter is that Cooper J saw the equitable doctrine as an application of the same underlying principle as that of general average contribution in maritime law. This was that he who enjoys the benefit ought also to bear the burden; the property of one co-adventurer to a maritime adventure had, in the necessitous circumstances that arose on the voyage, been sacrificed to preserve the property of the other co-adventurers[64]. However, as pointed out earlier in these reasons, that sacrifice was an exercise of the power and authority of the master, to which the co-adventurers were subjected by maritime law. There was in these cases common liability to compulsion of law.

71 The third matter is that the authorities in equity on which Cooper J relied do not support a proposition of the width and generality which his Honour drew from them. The cases are *Re Direct Birmingham, Oxford, Reading and Brighton Railway Co (Spottiswoode's Case)*[65]; *Ashhurst v Mason*[66] and *Jackson v Dickinson*[67].

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62 (1993) 41 FCR 559 at 562.

63 (1993) 41 FCR 559 at 563.

64 (1993) 41 FCR 559 at 593-594.

65 (1855) 6 De G M & G 345 [43 ER 1267].

66 (1875) LR 20 Eq 225.

67 [1903] 1 Ch 947.

72 *Spottiswoode's Case* comes from the Railway Age, in a period before limited liability was established by the legislation leading up to the *Companies Act* 1862 (UK)[68] and the distinctions between the corporate and partnership business structure were not yet clearly marked out. For example, in 1856 Lord Cranworth LC said of the solvent shareholders in the winding up of a joint stock company that they were bound to make up the sum due to creditors because of "the general rules of law [that] every partner is liable to the whole of the demands on the partnership"[69]. This was also at a time when equity was extending its reach into the law of corporations by the treatment of directors as "trustees"[70], albeit this was before trustees in whom title was vested were clearly distinguished from fiduciaries generally[71].

73 The *Joint Stock Companies Act* 1844 (UK)[72] provided for the provisional registration by the promoters of joint stock companies and for membership of managing committees to act in the formation of the companies (s 4). The project for the construction of the railway from Birmingham to Oxford and thence to Reading and Brighton collapsed before the attainment of complete registration under s 7 of the statute. Mr Spottiswoode was a member of the managing committee and an allottee of 20 shares. Deposits on 4295 shares had been paid and engineering and other expenses were incurred. Funds were provided by various members of the managing committee and applied to repay the deposits of the allottees. The company was wound up on 21 December 1849 under the new winding-up legislation and disputes arose as to the settlement of the list of contributors by the Master in Ordinary of the Court of Chancery. Section 3 of

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68 25 & 26 Vict c 89. See, as to the attainment of limited liability, the account by Professor Gower in *The Principles of Modern Company Law*, 3rd ed (1969) at 44-50.

69 *Robinson's Executor's Case* (1856) 6 De G M & G 572 at 587 [43 ER 1356 at 1362].

70 Exemplified by the discussion in *Lindley on Partnership and Companies*, 4th ed (1878), vol 1 at 758, 773-774. See also *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 604 [25]; [2005] HCA 20; *Mulkana Corporation NL (In liq) v Bank of New South Wales* (1983) 8 ACLR 278 at 278-279, 282-285.

71 See Sealy, "Fiduciary Relationships", [1962] *Cambridge Law Journal* 69 at 70-72.

72 7 & 8 Vict c 110.

the *Winding-up Act* 1848 (UK)[73] defined "contributory" for this purpose as including members of the company and "every other person liable to contribute to the Payment of any of the Debts, Liabilities, or Losses" of the company.

74 The House of Lords ruled in 1852 that Mr Bright, who had been a committee member with Mr Spottiswoode, was not liable as a contributory within the meaning of the statute because he lacked the necessary active involvement in the conduct of the projected company[74]. The committees were not partnerships so that it could not be said on the ground of partnership that each member was bound by the acts of the others[75].

75 However, in 1855 Turner LJ (Knight Bruce LJ concurring) dismissed the motion by which Mr Spottiswoode sought to vary a report by the Master in respect of his liability as a contributory for calls made in the winding-up. Turner LJ treated the dispute as determined by the general principles of equity respecting contribution between co-directors. Each had to bear the burden of each other's acts so far as they acted together or adopted each other's acts. Mr Spottiswoode's activities answered that description[76].

76 The general proposition was that directors who entered into an *ultra vires* transaction were liable to indemnify the company against any loss caused by the breach of duty, and as between themselves, as Turner LJ put it, "they must bear equally the burthens consequent upon their acts"[77].

77 Turner LJ referred[78] to *Dering v Lord Winchelsea* for the general proposition, which he said applied to directors of companies:

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73 11 & 12 Vict c 45.

74 *Bright v Hutton* (1852) 3 HLC 341 [10 ER 133].

75 This had been settled by the House of Lords in 1850 in *Norris v Cottle* (1850) 2 HLC 647 [9 ER 1238]. See Formoy, *The Historical Foundations of Modern Company Law*, (1923) at 83-86.

76 (1855) 6 De G M & G 345 at 372 [43 ER 1267 at 1277].

77 (1855) 6 De G M & G 345 at 372 [43 ER 1267 at 1277].

78 (1855) 6 De G M & G 345 at 371-372 [43 ER 1267 at 1277].

> "that where persons are joined together for one common end or purpose, they must bear equally the expenses incident to the attainment of that end or purpose".

78 That general statement must be read with the earlier rejection by Lord Brougham of the submission made in *Norris v Cottle*[79] that "a party joining others in an adventure or other concern, may become liable in equity to them, though not liable at law either to them or to third parties". Lord Brougham considered and dismissed as follows an illustration which counsel put of the application of that proposition[80]:

> "The case was ingeniously put in the argument here, of a joint or common adventure, as of a voyage in which one agrees to find the ship, another the cargo, and a third the stores, and the ship-owner recovers the price of the ship against the one who purchased it; then, it is said, the others are liable for their share, unless each furnished his *quota* to the common adventure, the one the stores, the other the cargo. If they are so liable in respect of the price recovered by the ship-owner, it can only be because they have made themselves liable to their companions by an express contract to pay unless they furnish their *quota*, or by an implied contract to the same effect, and thus they are legally liable for breach of that contract, or they may be compelled in equity to perform it."

79 The next authority relied upon is *Ashhurst v Mason*[81]. The plaintiff obtained a decree that he and other directors of the English Assurance Company, then in liquidation, were jointly and severally liable to contribute to and make good calls made and to be made upon certain shares. Pursuant to an *ultra vires* board resolution by the directors, the shares had been purchased and placed in the names of the plaintiff and the manager Mr Leyland as trustees for the company. It was no answer to the claim by the plaintiff for contribution that the other directors, not being registered holders of the shares, could not themselves be liable on the calls. The successful argument by Mr Kay QC was that[82]:

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79 (1850) 2 HLC 647 at 670 [9 ER 1238 at 1246].

80 (1850) 2 HLC 647 at 672 [9 ER 1238 at 1247].

81 (1875) LR 20 Eq 225.

82 (1875) LR 20 Eq 225 at 232.

> "the right of contribution is not affected by the circumstance that these shares, *for which they all became liable as trustees for the company*, were, as a matter of convenience, transferred into the names of one of themselves (the Plaintiff), and *Leyland* as their servant or agent". (emphasis added)

Bacon VC described the placement of the shares in the names of the plaintiff and Mr Leyland as the resort to a "piece of machinery"[83]. With that in mind, this case may be seen as an illustration of the disinclination of equity to prefer form to substance. However that may be, the case was treated by Lindley[84] primarily as authority for different propositions. These were that the directors must bear the loss upon an *ultra vires* transaction, unless the company ratifies what has been done, and that one director will be entitled to contribution from the other directors with whose knowledge and consent he acted. The directors were assimilated to the position of trustees in respect of the *ultra vires* activity, in the sense explained above in dealing with *Spottiswoode's Case*.

80 There remains *Jackson v Dickinson*[85]. The two trustees of a settlement made an unauthorised investment in partly paid shares in Cheque Bank, Limited. One of the trustees died and the bank recorded the shares in the sole name of the surviving trustee, the plaintiff. Thereafter the plaintiff paid a call on the shares and successfully sought from the estate of the deceased trustee contribution, not only in respect of the loss sustained to the trust fund by the fall in value of the unauthorised investment, but also in respect of the call. This case is taken as authority for the proposition that the death of a trustee does not exonerate his estate from making contribution in respect of breaches of duty in which that trustee participated whilst alive[86].

81 The reasoning of Swinfen Eady J may also have proceeded on the footing that the surviving trustee in whose name the shares were recorded held them not as the survivor of joint owners but as a tenant in common holding the title on

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83 (1875) LR 20 Eq 225 at 233.

84 *Lindley on Partnership and Companies*, 4th ed (1878), vol 1 at 760, 773-774.

85 [1903] 1 Ch 947.

86 Underhill and Hayton, *Law Relating to Trusts and Trustees*, 16th ed (2003) at 940; Mitchell, *The Law of Contribution and Reimbursement*, (2003) at 261; *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 581; Goff and Jones, *The Law of Restitution*, 7th ed (2007) at 417.

trust for himself and the estate of the deceased trustee; if so, then in substance the call was a burden imposed on property in which both parties shared the beneficial ownership[87].

82 However the basis for the decision in *Jackson* be understood, the case does not support the respondent's case.

83 The result is that the authorities relied upon do not provide any foundation for the decision of the Court of Appeal or for the refinement attempted by the respondent in this Court.

The fiduciary duty

84 McColl JA held that Mr Brooker and Mr Friend were subject to a fiduciary obligation "to be equally and personally liable to each other for losses flowing from personal borrowings"[88]. In this Court, the appellant correctly emphasises that such a formulation of fiduciary duty went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court[89].

85 The respondent seeks to meet this apparent failure to observe the settled doctrine of fiduciary law in Australia by recasting the duty. This is not a duty to the Company as a director but a duty to Mr Brooker which is imposed upon Mr Friend and obliges him not to prefer his own interests to those of Mr Brooker in managing the disbursement of the funds of the Company to repay loans to the Company made possible by Mr Brooker's personal borrowing from third parties, including from SMK. This duty then is said to have been broken by Mr Friend preventing the funds of the Company from being used to reduce the burden of the borrowing by Mr Brooker. The appellant responds with the submission that this attempted reformulation was neither pleaded nor run at trial.

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87 [1903] 1 Ch 947 at 951. His Lordship also remarked that there had been an express agreement between the trustees to contribute equally to any liability arising from the investment: [1903] 1 Ch 947 at 951.

88 [2006] NSWCA 385 at [154].

89 *Breen v Williams* (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ. See also at 93-94 per Dawson and Toohey JJ, 135-137 per Gummow J; [1996] HCA 57, and see further *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 197-198 [74] per McHugh, Gummow, Hayne and Callinan JJ; [2001] HCA 31.

86 The appellant also submits that equity does not impose fiduciary duties between the parties to a deliberate commercial decision to adopt a corporate structure in which they would owe duties, but to the corporation and as directors. Why, it is asked, should equity intervene in such a fashion when the Company, by which Mr Brooker and Mr Friend carried on the business, failed and, in the result, their personal losses will not be in equal amounts? That submission is to be accepted.

Conclusions

87 The findings by the trial judge show that over many years Mr Friend and Mr Brooker each utilised their connections with family and friends to obtain loan funds then to be advanced to the Company. The moneys were advanced by these third parties to Mr Friend or Mr Brooker, as the case may be, then lent to the Company, and its indebtedness then appeared in the loan accounts of the directors. But Mr Friend, as appellant, submits that it was not an incident of this relationship that each of them bore in equity any personal responsibility to the other to carry half the burden of repayment of the loans to the other party.

88 The appellant develops that submission by emphasising the significance of the selection by him and Mr Brooker of the corporate structure as the vehicle for their business enterprise. The appellant submits that the equitable doctrine of contribution should not be extended to outflank the consequences of the selection by the parties of the corporate structure. We agree. That selection brought with it the attendant legal doctrines of corporate personality and limited personal liability. Moreover, at the time of the incorporation of the Company, the *Companies Act* 1961 (NSW) was in force and this (and the successor legislation) provided for the breakdown of relations between the controllers of closely held companies by such provisions as those for winding up on the just and equitable ground under s 222(1)(h)[90] and for oppression suits under s 186[91].

89 Further, the attempts by the respondent in this Court to enlist doctrines and remedies respecting contribution and fiduciary obligations seek to avoid the consequences of the undisturbed findings of fact and law by the trial judge. The appellant and the respondent were not, after the formation of the Company in

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90 See *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

91 See *In re Jermyn Street Turkish Baths Ltd* [1970] 1 WLR 1195; [1970] 3 All ER 57.

1977, in a relationship of partnership. Nor were their business dealings pursued pursuant to any agreement in the nature of a joint venture.

90 To speak of a "common design" is to fix attention at a level of abstraction which is well above the endeavour of the parties to derive equal profit for their respective family shareholdings by the conduct of the business of the Company. On the case pleaded the trial judge held that there was no partnership between Mr Friend and Mr Brooker, no joint venture, and no other relationship which gave rise to an entitlement to an accounting between them[92]. Unless those findings were to be upset by the Court of Appeal that ought to have been the end of the litigation.

Orders

91 The appeal should be allowed and the costs of the appellant paid by the first respondent. The orders of the Court of Appeal entered 25 June 2008 should be set aside and in place thereof the appeal to that Court should be dismissed with costs, including the costs of the application to that Court for recall of reasons.

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92 [2005] NSWSC 395 at [79].

92 HEYDON J. The orders proposed by French CJ, Gummow, Hayne and Bell JJ should be made for the reasons given by them in relation to the "common design" point[93] and the "fiduciary duty" point[94]. But those orders should also be rested on an additional and independent ground of decision. It relates to an allegation of what the appellant called a denial of procedural fairness and Mason P called a "process irregularity". The allegation underlay the following ground in the notice of appeal:

> "The majority erred in holding that it was open to the Court of Appeal to make a declaration of liability for equitable contribution, or any final relief restricted to a single transaction involving the parties, given the way the first respondent conducted the trial and the appeal to the Court of Appeal."

The expression "equitable contribution" in that ground refers to the "common design" doctrine which was relied on by the Court of Appeal majority, advocated by the respondent[95] in this Court, but rejected by French CJ, Gummow, Hayne and Bell JJ.

93 The appellant contended that reliance by the Court of Appeal majority on the "common design" doctrine was a denial of procedural fairness. The appellant said that the point had never been pleaded. He said it had not been argued before the trial judge. He said it had never appeared in the respondent's notice of appeal before the Court of Appeal. He said it had never been advanced in the respondent's submissions to that Court. For those reasons the appellant filed a notice of motion seeking recall of Mason P's reasons for judgment and of the paragraph in McColl JA's reasons for judgment in which she agreed with Mason P's discussion of the "common design" doctrine[96].

94 The Court of Appeal majority rejected that "procedural irregularity" complaint for reasons stated by Mason P and agreed in by McColl JA. All of the appellant's propositions were rejected. The Court of Appeal majority asserted that the matter was pleaded. It said the point was argued in written final address before the trial judge and was dealt with by the trial judge. It said that the point

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93 At [63]-[83] and at [87]-[90].

94 At [84]-[86].

95 By "the respondent" is meant the first respondent, Mr Brooker, and by "the company" is meant the second respondent, Friend & Brooker Pty Ltd. The second respondent took no part in the proceedings: see [4] and [9] above.

96 The notice of motion also sought recall of some other paragraphs of her reasons for judgment, but that course was taken for reasons other than the "procedural irregularity" complaint.

was in part the subject of the notice of appeal to the Court of Appeal. It said that after having "emerged" in an "even narrower focus", the point was "raised and addressed" during the hearing of the appeal and in supplementary written submissions filed after judgment was reserved[97].

95 Thus the Court of Appeal majority concluded that the proceedings before it had been conducted in a procedurally impeccable fashion. The submissions of the respondent in this Court defended that conclusion. Those of the appellant flatly denied it. There is some importance, not limited merely to this particular case, in examining whether the Court of Appeal's conclusion was correct. With respect, it was not.

Pleading

96 *Allegations of material fact.* The Court of Appeal majority responded to the appellant's complaint that the "common design" case had not been pleaded in this way. It pointed out that the fifth amended statement of claim was divided into five parts. The fourth, headed "Failure to Account", pleaded, in pars 13-24, various matters of fact relating to the SMK loan. The fifth set out the 15 orders sought. Mason P quoted 10 of the paragraphs – pars 13-15, 17-19 and 21-24 – headed "Failure to Account". Before doing so, he said:

> "It is necessary to set out the references to the SMK loan in the pleading. They show to my satisfaction that the SMK transaction was being singled out as an alternative free-standing claim that, if accepted, could result in relief falling short of a general accounting arising out of the entire 'joint venture' or 'partnership'. Paras 21 and 22 relate to the claim for a general accounting, but their terms are presently relevant because of the opening words of para 23 (*'In the further alternative'*)." (emphasis in original)

Paragraphs 23 and 24 of the fifth amended statement of claim alleged:

> "23. In the further alternative, [the respondent] incurred liability to repay the SMK loans personally with the knowledge and consent of [the company and the appellant] for the purposes of the joint venture or partnership and disbursed the loan moneys to or for the benefit of the joint venture or partnership and thereby for the benefit of [the appellant].
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> 24. To the extent that the SMK loans were expended by [the respondent] to repay debts and pay expenses on behalf of the joint venture and partnership, the SMK loans were expended on

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97 See the passage quoted above at [30].

> liabilities jointly owed by [the appellant and the respondent] as joint venturers or partners, or on items from which the Joint Venture or partnership, and therefore also [the appellant], has materially benefited, and for all of which [the appellant] has not recouped [the respondent], or made contribution to or accounted to [the respondent], for his share of the liability or benefit to the Joint Venture or partnership, as a result of which [the appellant] has been unjustly enriched at the expense of [the respondent]."

97 The problem is that even if it is concluded (contrary to the facts) that the SMK transaction was singled out as an alternative free-standing claim capable of supporting a grant of relief short of a general accounting, the respondent did not plead any matters of fact which would suggest to the appellant that that claim and that relief rested on a case based on the "common design" doctrine. French CJ, Gummow, Hayne and Bell JJ have shown that there is in reality no "common design" doctrine. Of course the respondent was entitled to argue for its existence in the courts below (although he did not) and in this Court (as he did). But, even on the respondent's submission in this Court, at best the basis of support in authority for the doctrine can only be described as thin and sparse. Even if it existed, it must be regarded as little-known and little-understood. That was demonstrated by the numerous permutations which the respondent's attempts to state it in argument in this Court went through[98]. In those circumstances, a case based on it would have to be pleaded with some clarity and specificity if the appellant were not to be caught by surprise. The respondent submitted, and the appellant denied, each at considerable length, that par 24 pleaded a case based on the "common design" doctrine. It certainly does not. That conclusion does not call for elaborate demonstration. It is sufficient to make a simple comparison of par 24 with what Cooper J said in *Cummings v Lewis*[99], with what the Court of Appeal majority, in reliance on that case, said[100], and with the final form of the "common design" doctrine propounded by the respondent to this Court as his justification for the Court of Appeal majority conclusion on the matter[101].

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98 For the sake of clarity, it should be said that senior counsel for the respondent in this Court did not appear in the courts below, and senior counsel for the appellant in the Court of Appeal and in this Court did not appear at the trial. To note that fact is not to suggest any criticism either of them or of any other counsel who have appeared at any stage in the proceedings.

99 (1993) 41 FCR 559 at 598 (quoted at [68] above).

100 See [63] above.

101 See [64] above. That form had been preceded by different formulations in oral argument.

Paragraph 24 does not allege all the material facts necessary to invoke the supposed doctrine[102].

98 *Prayers for relief.* Mason P also said:

> "Most of the prayers for relief were referable to the wider (ultimately unsuccessful) claim for a general accounting. However, paras 31, 32, 34 and 35 provided:
>
> > '31. An order that the [appellant] pay to the [respondent] such amount as may be found due by the [appellant] to the [respondent].
> >
> > 32. Damages or alternatively equitable compensation.
> >
> > …
> >
> > 34. An order that the [appellant] pay restitution to the [respondent].
> >
> > …
> >
> > 35. Such further and other orders and directions as may be appropriate.'"

99 The answer to this point is that it is the joinder of issue on allegations of fact which creates triable issues. The four prayers for relief quoted by the Court of Appeal majority are entirely consistent with remedies to be granted after the general accounting had taken place. They do not point to the SMK loan as a "free-standing claim". And they certainly do not point to the SMK loan as raising a claim based on the "common design" doctrine.

100 It follows that the appellant is correct in his contention that the point on which the Court of Appeal majority decided the case against him was not pleaded. But, although it is the better practice for the parties in litigation involving pleadings to ensure that the pleadings maintain consistency with the issues between the parties and are amended as those issues change, it is, of course, possible for the issues between the parties to widen beyond those articulated in pleadings. Did that happen in this case?

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102 See [65] above.

The structure of the trial

101 The respondent submitted to this Court that (a) a "claim for contribution was referred [to] in submissions at trial"; (b) a "claim for equitable compensation was also emphasised"; (c) the "claim" was referred to in the respondent's statement of issues; and (d) the appellant responded to it. These submissions may be disposed of as follows. Submission (a) is not correct. As to submission (b), no basis was advanced for the award of equitable compensation. And near the end of his final address at the trial, counsel for the respondent said that the distinction between an account and equitable compensation "may very well end up a distinction without a difference because at the end of the day, the exercise is the same." As to submission (c), the respondent's statement of issues did no more than raise the question whether he should receive from the appellant "any amount (and if so what amount) by way of restitution." No basis on which that amount might be ordered was assigned. As to submission (d), the appellant simply said: "Nothing gives rise to any claim for indemnity or equitable contribution."

102 In addition to the four submissions made by the respondent, the Court of Appeal majority said: "Written submissions filed on behalf of [the respondent] at trial included claims referable to the SMK loan in isolation". A reference was given to pars 31-38 of the respondent's "Outline of Plaintiff's Submissions" used at the end of the trial. But those paragraphs said nothing about any "common design" point. They were directed to a contention that the SMK loan was made to the appellant and the respondent jointly. That contention was rejected by the trial judge, who found that the loan was made "to [the respondent] and/or his wife". The respondent did not complain about that finding in his notice of appeal to the Court of Appeal, and Mason P said that the finding was correct.

103 There is a further answer to these points. Even if, contrary to what has just been said[103], a "common design" case had been pleaded or raised, however obscurely, outside the pleadings, the way that the trial was conducted by the parties meant that the trial judge was under no obligation to deal with that "common design" case. Shortly before, and at the start of, the trial, the parties came to an agreement. It was reflected in correspondence, at a directions hearing, and in the opening address of counsel for the respondent. It had the approbation of the trial judge. They agreed that it would not be necessary to tender an expert's report, because the trial should be devoted to one topic – whether the respondent had made out a claim to have accounts taken. The parties further agreed that if the respondent made that claim out, the detailed factual investigation of the parties' dealings would take place before a Master. That position did not change during the trial. In closing address counsel for the

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103 At [97]-[100] above.

respondent adhered to the proposition that the relief sought was an order that there be a full accounting.

104 The statement by the Court of Appeal majority that the respondent's written submissions at the trial included claims referable to the SMK loan in isolation is true to a limited extent. It is true to the extent that pars 31-38 of the respondent's "Outline of Plaintiff's Submissions" referred to above concluded in a claim in par 38 that "the ultimate liability for the repayment of the SMK loan and the interest thereon should be borne equally by [the appellant] and [the respondent]." That section, headed "The third SMK Investments loan", was the fourth section of the document. It followed three other sections headed "Acceptance of Mr Brooker's evidence", "The agreement to share losses" and "The fiduciary relationship". The fourth section was followed by a single paragraph, par 39, under the heading "CONCLUSION":

> "The only mechanism suitable for such 'equalization' of the loss is an order for the taking of accounts. It is submitted that the taking of accounts should be referred to a referee."

The word "equalization" refers back to the words "should be borne equally" in par 38. The conclusion in par 39 referred to the totality of the arguments which had preceded it in the four sections of that document. Thus the respondent did not depart in his written submissions at the end of the trial from the position that he had adopted throughout it. That position had two aspects. One was that no claim for relief referable to any particular transaction was made any more than it had been made in the fifth amended statement of claim. The other aspect was that the only relief sought was the taking of accounts. In final address the respondent did refer to equitable compensation. But the respondent never asked the trial judge to make the kind of order, specific to the SMK loan, which the Court of Appeal made at the end of its third judgment. And he never urged the trial judge to identify and act on the "common design" doctrine.

The trial judge and the "common design" doctrine

105 The Court of Appeal majority quoted pars 75 and 76 of the trial judge's reasons for judgment[104]. According to the Court of Appeal majority, these paragraphs "addressed and rejected a claim that focussed upon a claim for contribution referable only to the SMK loan."

106 Paragraph 75 commences with the statement that there was "no evidence that [the appellant] agreed to be jointly liable for, or to contribute to, the repayment of the SMK loan." That in part repeats and relates back to the trial

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104 Paragraph 75 is quoted at [18] above.

judge's earlier finding that the loan was not a loan jointly to the appellant and the respondent, but to the respondent and/or his wife. Paragraphs 75 and 76 appear just before the trial judge stated his conclusion in par 77 that when the company was incorporated the partnership between the parties ceased[105]. Paragraphs 75 and 76 appear at the end of a lengthy discussion by the trial judge of the significance of conversations between the appellant and the respondent before the incorporation of the company[106]. Paragraphs 75 and 76 were included as a response to the following oral submission advanced on behalf of the respondent and quoted by the trial judge:

> "[T]here is a basic agreement between these two men that whatever ultimately comes out of it, be [it] a gain, be it [a loss,] will ultimately end up equal in their pockets. If that weren't the case … one would imagine that neither of them would be prepared to borrow money off friends and close relatives and [in] large amounts, such as the 350 thousand, risk their own exposure, risk, in effect, their family's assets, unless each of them believed that the other would be equally liable to assist in compensating or in reimbursing those people."

The reference to "350 thousand" was a reference to the SMK loan which was made in 1986 in an amount of $350,000. The principal of SMK Investments Pty Ltd, Mr Peterson, was an old friend of the respondent's. The oral submission was that the conduct of the parties in relation to the SMK loan pointed towards a shared belief that a particular type of agreement – a "Joint Venture or partnership" – existed between the appellant and the respondent. The fifth amended statement of claim alleged that the "Joint Venture or partnership" was "oral and was made" in 1977 and "also arises during a course of dealings" from 1977 to 1996. It was alleged to call for an overall sharing of gains and losses. The trial judge rejected the oral submission for a reason stated in the second sentence appearing in par 75:

> "It is difficult to accept that, if in truth he held the belief that [the appellant] was equally liable for this loan, [the respondent] proceeded with the borrowing, and procured the securities from his wife and his mother, without first obtaining [the appellant's] acceptance of such liability."

A little later in par 75 the trial judge said: "The absence of evidence as to these matters is … further indication that there was no ['Joint Venture or partnership'] agreement". In the second last sentence of par 76, after dealing with the

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105 Paragraph 77 is quoted at [12] above. See also the trial judge's finding in par 79, quoted at [24] above.

106 Paragraph 74 is quoted at [23] above.

agreement between the appellant and the respondent that on 30 June 1993 their company should repay SMK $250,000 in partial repayment of the loan, the trial judge said: "There is no evidence that the issue of joint liability was raised. This occasion provides no support for the existence of the ['Joint Venture or partnership'] agreement."

107 The position shortly stated then, contrary to the opinion of but with respect to the Court of Appeal majority, is that the trial judge could not be said to have "addressed and rejected a claim that focussed upon a claim for contribution referable only to the SMK loan." Rather, the trial judge was responding to a submission using the supposed events surrounding the making of the SMK loan in 1986 and its partial repayment in 1993 as evidence for the "Joint Venture or partnership". A fortiori, the trial judge did not address any claim referable only to the SMK loan which was based on the "common design" doctrine.

108 There was in this respect a divergence between the Court of Appeal majority and the respondent's submissions in this Court. The Court of Appeal majority said that the trial judge dealt with a claim for contribution referable to the SMK loan. On the other hand, the respondent repeatedly submitted that the trial judge had "failed" to address the topic of contribution based on the common design doctrine. It is the respondent who is correct, in the sense that the trial judge did not deal with that subject. But the pejorative undertones in the word "failed" must be rejected. The trial judge is not to be criticised for not dealing with the "common design" doctrine, because the parties did not place that issue before him.

109 Since the only pleading claimed to support the "common design" doctrine consisted of pars 23 and 24 of the fifth amended statement of claim, once the trial judge took the step of rejecting the allegation on which pars 23 and 24 rested, namely that there had been a "Joint Venture or partnership" – a step with which the Court of Appeal did not disagree – there was no basis on which the trial judge could have gone further.

<u>The respondent's notice of appeal before the Court of Appeal</u>

110 The Court of Appeal majority said that grounds 11 and 12 of the respondent's notice of appeal to the Court of Appeal were "referable to the SMK matter in isolation." Grounds 11 and 12 were as follows:

> "11. The trial Judge erred in paragraph [75] and following in finding that there was no evidence of any conversation between the parties in which the [appellant] agreed to accept liability for the SMK loan.
>
> 12. The trial Judge should have found that the unchallenged evidence was that the [respondent] had obtained the [appellant's] agreement to the SMK loan, and that the [appellant's] said agreement was on

> [the] basis that he would contribute equally to any loss personally incurred by the [respondent] by reason thereof."

With respect, that is not the better reading of those grounds. The reference to "paragraph [75] and following" is a reference to pars 75-77. Paragraphs 75 and 76 were quoted by the Court of Appeal and have just been discussed[107]. In par 77, quoted above[108], the trial judge stated his conclusion rejecting the allegations that a "Joint Venture or partnership" agreement existed. The passages to which the grounds of appeal are directed thus dealt with the evidence about the SMK loan as a possible source for a favourable finding about the "Joint Venture or partnership" agreement. The passages are not directed to the "SMK matter in isolation". And the two paragraphs of the notice of appeal were not directed to the "common design" point. That is so because the written submissions of the respondent in the Court of Appeal in support of those two grounds of appeal were directed to the quite distinct question of a fiduciary relationship between the parties.

The hearing in the Court of Appeal

111 In his written submissions filed before the hearing in the Court of Appeal the respondent did not argue for a "common design" doctrine of the kind eventually found by the Court of Appeal majority. Nor did he do so orally. That is why the Court of Appeal majority said only that the point "emerged", and was "raised and addressed", during the hearing of the appeal. Those words were carefully chosen. But were they accurate?

112 In this Court the appellant submitted:

> "[I]t is true that a separate case based on the SMK loan was in play in the Court of Appeal. That proposition is true if you accept that a court determined to decide the case upon a basis that it is determined to decide the case [on], notwithstanding the ways the parties are conducting it, forces a party to adopt a case really against their wishes."

The submission was that the Court of Appeal forced the respondent to adopt a case against his wishes. It continued by saying that counsel for the respondent "valiantly resisted accepting the invitation" of the Court of Appeal. It concluded with the contention that "perhaps understandably" counsel's will was overborne when "in the most lukewarm way" in a written submission put in after the conclusion of oral argument counsel embraced the Court of Appeal's point.

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107 At [105]-[106].

108 At [12].

113 The appellant's submission is correct. Counsel for the respondent before the Court of Appeal said that the SMK loan was an example of loans made to each of the appellant and the respondent, all of which the respondent wanted brought into account. A little later Mason P said:

> "Why didn't you propound a claim based on the events of November 1986 using the 1977 discussion as background which might have led to just concentrating just on the equities arising out of this one transaction [ie the SMK loan] which seems to have been rather unique."

He did not say what the particulars of the claim might be, or what the specific equities were. Counsel for the respondent answered by repeating that while the SMK loan was the largest part of the respondent's claim, it was not the only part. On numerous occasions thereafter Mason P suggested that the respondent should claim specific relief limited to the SMK loan rather than a general accounting. This was, incidentally, a stand at odds with the Court of Appeal majority's statement in the second judgment that four of the prayers for relief in the fifth amended statement of claim related to that loan[109]. However, contrary to what the respondent submitted to this Court, an examination of the oral argument as transcribed reveals no reference to equitable contribution or the "common design" point. It also reveals that counsel for the respondent did not act on the judicial hints. While on one occasion a similar judicial hint was made to counsel for the appellant during his address to the Court of Appeal, it was not accompanied by any exposition of how contribution based on "common design" could be justified. At the close of oral argument counsel for the appellant was directed to put in a written submission about a piece of evidence, and counsel for the respondent was directed to reply to it. Both sides appear to have gone rather beyond the terms on which leave was granted. In the course of his supplementary submissions the appellant, perhaps scenting an impalpable danger which in due course materialised, stressed that the primary relief sought at trial was "a full account as to all … contributions and receipts" and submitted that:

> "having regard to the express way that the case was run below and the obvious forensic decisions which were made by the [appellant] in that regard, the [respondent] should not be allowed to seek or obtain alternative relief on appeal."

In the course of the respondent's supplementary submissions, he stated:

> "If it were minded to do so, the Court could fashion relief directed at compensation relating only to the circumstances of the 1986 SMK

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109 See above at [98].

> Investments loan. Allegations specific to the SMK investments [sic] were made in paragraphs 23 and 24 of the fifth amended statement of claim."

That submission said nothing about "equitable contribution" or the "common design" point. That submission did not indicate how the relief might be fashioned. Above all, that submission did not indicate on what grounds the relief was to be fashioned. In those circumstances, when, over nine months later[110], the Court of Appeal came to deliver its first judgment, the appellant must have been surprised to read that in the second paragraph of his reasons for judgment Mason P said that the "claim ultimately pressed on behalf of the [respondent] was for contribution by [the appellant] with respect to all or part of the outstanding balance of the SMK loan". With respect, the respondent did not press any such claim. Instead counsel for the respondent was pressed to make some claim about the SMK loan. The basis on which he was to make that claim was not clarified. Nor was the basis on which he actually made it.

114 The respondent submitted in this Court that the Court of Appeal majority was entitled to proceed as it did because:

> "an appellate court is not restricted in its ultimate conclusions by the formulations of the parties in argument and indeed has a responsibility to determine the law applicable to the case and cannot be precluded from doing so because a party fails to address a case open on the pleadings or raised in argument".

The "common design" case was not open on the pleadings and was not raised in argument. Putting these considerations aside, is the submission sound? In support of it, the respondent cited two passages from *Autodesk Inc v Dyason [No 2]*[111]. They do not support it. In the first passage, Brennan J said[112]:

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110 Cf *Direct Birmingham, Oxford, Reading and Brighton Railway Co (Spottiswoode's Case)* (1855) 6 De G M & G 345 at 364 [43 ER 1267 at 1274] (after less than three months' reservation, Turner LJ said: "This case has stood for judgment longer than has been usual with us"); *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 310; *Bishopsgate Investment Management Ltd (in liq) v Maxwell (No 2)* [1994] 1 All ER 261 at 263; *Goose v Wilson Sandford and Co* [1998] TLR 85; *R v Maxwell* (1998) 217 ALR 452 at 462-463; *Laminex (Australia) Pty Ltd v Smeeth* [1999] NSWCA 462 (Mason P, Meagher and Beazley JJA); *Boodhoo v Attorney General of Trinidad and Tobago* [2004] 1 WLR 1689; *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17; *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at 283-287 [30]-[40]; *Monie v Commonwealth of Australia* (2005) 63 NSWLR 729.

111 (1993) 176 CLR 300; [1993] HCA 6.

112 (1993) 176 CLR 300 at 308 (footnotes omitted).

> "A court should not pronounce a judgment against a person on a ground which that person has not had an opportunity to argue. However, a sufficient opportunity to argue a ground is given when the ground is logically involved in a proposition that has been raised in the course of argument before the court or is to be considered by the court as an unconceded step in determining the validity of a conclusion for which one of the parties contends. Of course, the precise ground which a court or judge assigns for a decision will frequently be formulated in terms different from the terms of a submission by counsel but, provided the ground has arisen in one of the ways mentioned, the court or judge may properly proceed to judgment without requiring the case to be relisted for further argument and without inviting supplementary submissions to be made."

The "common design" point was not logically involved in any proposition raised in the course of argument before the Court of Appeal. Nor was it an unconceded step in determining the validity of a conclusion for which the respondent contended: the respondent could scarcely be said to have contended for an order limited to the SMK loan, and the "common design" point was not an unconceded step, but an unknown one. In the other passage relied on[113], Dawson J said nothing which would justify deciding the case against the appellant in reliance on the "common design" point without notice to the appellant that this might happen.

115 The following words of Mason CJ and Brennan J in *Pantorno v The Queen*[114] apply to this appeal:

> "When the parties to an adversarial proceeding agree on a proposition of law and conduct their cases on that basis, their agreement does not bind the trial judge. If the judge determines the law to be different, he may apply the law as he determines it to be, but he must inform the parties of the view he has formed when that is necessary to give them an opportunity to address new issues arising from the judge's departure from the proposition of law on which the case was conducted."

Here the parties were in agreement that whatever propositions of law applied, they did not include the "common design" point: there is no reason to suppose that they or their advisers had adverted to it. Once the Court of Appeal majority perceived that it was material, the parties should have been informed before that perception was acted on.

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113 (1993) 176 CLR 300 at 317.

114 (1989) 166 CLR 466 at 473; [1989] HCA 18.

116 A more specific aspect of this point arises from the Court of Appeal majority's handling of authority. In the first judgment, while giving reasons for deciding the case as he did, Mason P discussed several authorities on contribution, and also referred to *Cummings v Lewis*[115]. That case was heavily relied on by the respondent in this Court, and so were the cases discussed in it. *Cummings v Lewis* was not, however, a case which the respondent relied on, either before the trial judge or in the Court of Appeal. And it was not a case which any member of the Court of Appeal drew to the attention of counsel either during or after argument.

117 In *Rahimtoola v Nizam of Hyderabad*[116] Viscount Simonds concluded his speech with these words:

> "My Lords, I must add that, since writing this opinion, I have had the privilege of reading the opinion which my noble and learned friend, Lord Denning, is about to deliver. It is right that I should say that I must not be taken as assenting to his views upon a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgment of the courts below."

The other members of the House, apart from Lord Denning, associated themselves with those observations[117]. Lord Denning's speech concluded as follows[118]:

> "My Lords, I acknowledge that, in the course of this opinion, I have considered some questions and authorities which were not mentioned by counsel[119]. I am sure they gave all the help they could and I have only gone into it further because the law on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that if there is one place where it should be reconsidered on principle – without being tied to particular precedents of a period that is past – it is here in this House: and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more

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115 (1993) 41 FCR 559 at 593.

116 [1958] AC 379 at 398.

117 [1958] AC 379 at 404 per Lord Reid and 410 per Lord Cohen and Lord Somervell of Harrow.

118 [1958] AC 379 at 423-424.

119 One of the counsel concerned was Richard Wilberforce QC.

> enmeshed in its own net. This I have tried to do. Whatever the outcome, I hope I may say, as Holt CJ once did after he had done much research on his own: 'I have stirred these points, which wiser heads in time may settle.'[120]"

What Lord Denning said did not deal with or excuse the "elementary error"[121] of failing to draw the attention of the parties, particularly the losing party, to the basis on which the losing party was to lose.

118 In days when the reservation of judgments was rarer than now, and when indeed it was quite common for judgments to be delivered immediately on the close of oral argument, courts commonly adhered to a practice of not referring in reasons for judgment to any point or authority not raised in argument. Non-adherence to that practice would run the risk of immediate and well-justified protest from the losing party. Some think the practice remains correct practice. Does it? Points are one thing. Authorities are perhaps another. The practice must be good for points, at least points which are decisive, or materially influential, in the outcome[122]. Any other system would institutionalise constant denials of natural justice. But the practice may be too extreme in relation to authorities. There may well be many occasions on which it is legitimate for a court to refer to authorities not relied on by the parties – for example, where the leading case in a line of authorities has been raised with the parties, but not others. However, the present appeal involved a doctrine – assuming, contrary to the actuality, that it existed – which was little-known and little-understood. It was propounded in this Court on the strength of one decision in the Full Federal Court relying on three relatively old and not well-known English cases. The obscurity of the supposed doctrine is revealed by the fact that its formulation and the meaning of the authorities said to expound it were questions debated in this Court for hours, and over many pages of written submissions. It was therefore incumbent on the Court of Appeal majority to draw the details of the doctrine, and the primary authority on which it supposedly rested, to the attention of the parties, either during the oral argument if the details of the doctrine and the authority were then present to their minds, or whenever they became present during the nine month period during which judgment was reserved. This duty was not complied with. The doctrine was used by the Court of Appeal majority to solve a problem narrower than, and distinct from, that propounded by the respondent during the appeal. The problem in question was not raised with counsel for the appellant at all. At best it could be said that only the most general

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120 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 920 [92 ER 107 at 114].

121 Paterson, *The Law Lords*, (1982) at 39n.

122 See, for example, *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 316.

of allusions to it were made in debate with counsel for the respondent. The making of those allusions was not, with respect, a compliance with the duty.