HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

HIH CLAIMS SUPPORT LIMITED APPELLANT

AND

INSURANCE AUSTRALIA LIMITED RESPONDENT

HIH Claims Support Limited v Insurance Australia Limited [2011] HCA 31
22 August 2011
M24/2011

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

B W Walker SC with P Kulevski for the appellant (instructed by TressCox Lawyers)

D F Jackson QC with M W Thompson SC and C M Harris for the respondent (instructed by Norris Coates)

CATCHWORDS

HIH Claims Support Limited v Insurance Australia Limited

Equity – Doctrine of contribution – Requirement of co-ordinate liabilities – Sub-contractor insured under insurance policy ("HIH policy") issued by member of HIH corporate group ("HIH") and under insurance policy issued by respondent's predecessor in title – Sub-contractor held liable for damage caused to third party by collapse of scaffold – HIH accepted sub-contractor's claim for indemnity under HIH policy and paid portion of sub-contractor's legal costs – After collapse of HIH corporate group, sub-contractor assigned rights against HIH to appellant as trustee under government assistance scheme and appellant paid 90 per cent of amount HIH would have paid under HIH policy in satisfaction of sub-contractor's liability and defence costs, excluding amounts already paid by HIH – Whether appellant could claim equitable contribution from respondent – Whether liabilities of appellant and respondent co-ordinate.

Words and phrases – "co-ordinate liabilities", "common burden", "common interest", "of the same nature and to the same extent".

Appropriation (HIH Assistance) Act 2001 (Cth), ss 3, 4.

1 GUMMOW ACJ, HAYNE, CRENNAN AND KIEFEL JJ. This appeal from a unanimous decision of the Court of Appeal of the Supreme Court of Victoria (Warren CJ, Mandie JA and Beach AJA) concerns a claim for equitable contribution. The appellant's obligation to indemnify the insured arose under the HIH Claims Support Scheme ("the Scheme") which was created by the Commonwealth Government to assist insureds affected by the collapse of the HIH group of insurance companies ("the HIH Group"). The appellant is the trustee of the HIH Claims Support Trust ("the Trust") and administrator and manager of the Scheme. The issue is whether, in the circumstances described below, the appellant is entitled to claim contribution from the respondent in respect of amounts which the appellant paid in satisfaction of liabilities incurred by the insured.

The facts

2 Ronald Steele, who conducted a scaffolding business, was sub-contracted to erect a scaffold at Albert Park, Melbourne for the purposes of the 1998 Australian Grand Prix. At all material times, Steele was insured under a general liability insurance policy ("the HIH policy") issued by a company in the HIH Group ("HIH"). At the same time, the Australian Grand Prix Corporation and its contractors and sub-contractors, one of which was Steele, were insured under an insurance policy ("the SGIC policy") issued by SGIC General Insurance Limited ("SGIC"), whose rights and liabilities had vested in the respondent by the time of the commencement of the proceedings below. At the Australian Grand Prix held at Albert Park in Victoria, on 3 March 1998, a supporting scaffold erected by Steele collapsed, causing damage to a large and valuable video screen known as a "jumbotron" screen, which was operated by Screenco Pty Limited ("Screenco"). That incident has given rise to three separate legal proceedings.

The New South Wales proceeding

3 In a proceeding commenced by Screenco in the Supreme Court of New South Wales ("the New South Wales proceeding"), the Supreme Court found Steele liable for the damage to the screen and entered judgment against him. The position of the parties before this Court was that both the HIH policy and the SGIC policy responded to the claim made against Steele.

4 Before the collapse of the HIH Group in 2001, Steele made a claim under the HIH policy for indemnity in respect of the damage to the screen and any liability established in Steele in the New South Wales proceeding. HIH accepted this claim and, prior to the winding up of the company, had paid approximately $80,000 in legal costs incurred in defence of the New South Wales proceeding on Steele's behalf. Prior to the trial of the New South Wales proceeding, the HIH

Group collapsed. HIH was placed in provisional liquidation on 15 March 2001, and winding up orders were made by the Supreme Court of New South Wales in August 2001.

5 Before completing an account of the New South Wales proceeding, it is necessary to consider the Commonwealth Government's response to the collapse of the HIH Group. On 21 May 2001, the Minister for Financial Services and Regulation issued a media release entitled "Criteria for HIH Hardship Relief", announcing a relief package for "policyholders suffering financial hardship as a result of the HIH [Group] collapse." What followed was the institution of the Scheme, in which public funds were made available for the purpose of alleviating financial hardship of certain policyholders affected by the HIH Group's collapse.

The Scheme

6 In July 2001, before winding up orders were made, the appellant was appointed as trustee, administrator and manager of the Scheme, which was established by the Commonwealth Government following the *Appropriation (HIH Assistance) Act* 2001 (Cth) ("Appropriation Act"). That statute appropriated $640 million to provide financial assistance to "HIH eligible persons", defined as policyholders, insureds or beneficiaries under policies of insurance issued by companies in the HIH Group[1], who "suffered financial loss as a result of the insolvency" of those companies[2].

7 The machinery under which the Scheme was established involved a trust deed ("the Deed") and a Commonwealth Management Agreement between the Commonwealth and the appellant, and a relevant Claims Management Agreement, described hereafter.

8 The Deed states that the objects of the Trust are to provide for "assistance [that] will be paid by [the appellant]" to "certain qualifying individuals and small businesses affected as a direct result of the appointment on 15 March 2001 of the

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1 CIC Insurance Limited, FAI General Insurance Company Limited, FAI Reinsurances Pty Limited, FAI Traders Insurance Company Pty Limited, HIH Casualty and General Insurance Limited, HIH Underwriting and Insurance (Australia) Pty Limited, and World Marine & General Insurances Pty Limited (each an "HIH company" and together "the HIH companies").

2 Appropriation Act, ss 3-4.

Provisional Liquidators to the HIH [c]ompanies"[3]. The appellant has duties and responsibilities under the Deed, which are limited, "[t]o the extent permissible by law and equity", to those expressly provided in the Deed and other constituent documents of the Scheme[4]. These include administering and using the trust fund, and establishing accounts both for Scheme payments and management expenses[5]. The trust fund established under the Deed includes sums recovered by the appellant as a result of the assignment of rights under an HIH company policy by an insured, reflecting sums recovered as a result of proving in the liquidation of an HIH company[6].

9 Under the Commonwealth Management Agreement[7], pursuant to which the appellant is appointed as administrator and manager of the Scheme[8], the appellant has numerous specific obligations including to receive, review and determine applications for assistance under the Scheme in accordance with certain eligibility criteria[9]; to admit, decline or undertake investigations into applications for assistance[10]; and to collect and check Offers to Assign submitted by applicants[11], which are described below. The appellant is also empowered to authorise Claims Managers[12] (subject to being funded by the Commonwealth) to

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3 Deed, cl 2.

4 Deed, cl 6.1.

5 Deed, cl 9.

6 See the definitions of "Recoveries" and "Trust Fund": Deed, cl 1.1.

7 Entered into by the appellant as trustee of the Trust: Commonwealth Management Agreement, cl 4.1(a).

8 Commonwealth Management Agreement, cl 5.1.

9 Commonwealth Management Agreement, cl 5.3(a).

10 Commonwealth Management Agreement, cl 5.3(b).

11 Commonwealth Management Agreement, cl 5.3(d).

12 Claims Managers are appointed by the appellant and the Provisional Liquidators, or subsequent liquidators of any of the HIH companies, on the terms of a Claims Management Agreement: Commonwealth Management Agreement, cl 1.1.

effect Scheme payments[13], and to pursue "Recoveries"[14], being those sums recovered in the liquidation of an HIH company[15].

10 The definition of "Eligibility Criteria"[16] refers back to the abovementioned media release dated 21 May 2001. That document expressly excludes certain categories of claims from the Scheme. For example, claims in respect of which the insured is not an Australian citizen or permanent resident are excluded. The numerous exclusions make it plain that only certain classes of persons will be assisted to a nominated extent. Under the Scheme, the appellant does not assume obligations in respect of all of the HIH companies' insurance policies. The focus of the Scheme is upon "hardship relief" for certain policyholders and beneficiaries, in the context of the HIH Group's collapse. The Scheme is not directed to co-insurers in respect of the HIH companies' insurance policies.

11 To meet the possibility that the appellant may recover sums in the liquidation of HIH, the appellant asks that any order for equitable contribution be made subject to a requirement that the appellant pay to the respondent one half of any sums so recovered.

12 There is also a Claims Management Agreement to which the HIH companies, the appellant and QBE Management Services Pty Ltd ("QBE") are parties, pursuant to which QBE is appointed by the appellant to provide payment management and recovery services in relation to claims made under the Scheme[17]. The Claims Management Agreement contemplates that the appellant or one of the HIH companies could claim contribution from a co-insurer of that company in respect of monies already paid by an HIH company under an HIH company insurance policy[18].

13 There are three documents relevant to applicants for assistance under the Scheme, such as Steele. An eligible person could apply for assistance by filling

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13 Commonwealth Management Agreement, cl 5.3(i).

14 Commonwealth Management Agreement, cl 5.3(k).

15 Commonwealth Management Agreement, cl 1.1.

16 Commonwealth Management Agreement, cl 1.1.

17 Claims Management Agreement, Background, cl 2.1.

18 See the definition of "Recoveries": Claims Management Agreement, cl 1.1.

out an "Application for assistance" ("Application") and by making an "Offer to assign your policyholder rights" ("Offer to Assign"). In the information section of the Offer to Assign, entitled "Conditions and Obligations", it is stated that an insured with a valid claim under an HIH company policy is an unsecured creditor of the HIH Group. It is also stated that the liquidators have announced that the payment to unsecured creditors is "likely to be less than 50 cents in the dollar" and that the first payment will not be made "until at least March 2003." Then it is said that the Scheme operates to "provide [the applicant] the benefit that would have been provided by [the relevant HIH company] under an insurance policy."

14 In a third document, entitled "Notes for applicants" ("Notes"), the Scheme is described as applying to claims in relation to events which have occurred before 11 June 2001 or claims made against an insured or notified to the insurer prior to that date (as applicable), and it is stated that a means test will be applied in respect of certain identified individual claims "to restrict the Scheme to cases of genuine hardship." The significance of the date of 11 June 2001 is that it was about two months before the commencement of the liquidation of the HIH companies. The Notes also contain the following statement:

> "The Scheme does not provide you with a replacement insurance policy. You should seek alternative cover immediately if your insurance cover is still with an HIH company."[19]

15 By completing and signing the Offer to Assign, an insured offered to assign to the appellant:

> "a) all rights to receive or to demand the receipt of any benefit arising from any claim which [the insured has] made or make[s] under [the insured's] HIH [company] policy, where the claim is the subject of the payment of a benefit under the Scheme [which included any right to recover funds from the HIH Group upon its liquidation]; and
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> b) any rights, however arising, which [the insured] may have or obtain against any person or organisation other than the HIH [company] insurer, in connection with the matters which have given rise to [the insured's] need to make a claim under the policy."

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19 This was consonant with a statement in the abovementioned media release dated 21 May 2001: "Anyone who has not taken out a new policy and is currently insured with [an HIH company] should seek a new policy".

16 In return, the appellant promised to pay to each insured whose offer was accepted "at least 90% of the amount that would have been provided by the original HIH [company] insurer" under the relevant insurance policy. The Offer to Assign expressly provides that the only method which the appellant may use to accept the offer of the applicant for assistance under the Scheme is "payment of a benefit under the Scheme." Where the benefit consists of a series of payments, "the first payment of the series constitutes acceptance by [the appellant] of this offer." The appellant reserved a discretion to withdraw assistance after acceptance of an offer in specified circumstances, none of which is relevant to the facts here. It was not a requirement for acceptance into the Scheme that an applicant should first exhaust any rights under other insurance policies held by the applicant.

Assistance in the New South Wales proceeding

17 On 10 July 2001, Steele made an Application to the appellant for assistance under the Scheme in relation to HIH's inability to honour Steele's entitlement to indemnity, and payment of defence costs, in the New South Wales proceeding. He amended his Offer to Assign on 31 October 2001 to identify correctly his policy number and HIH as his insurer. The appellant informed Steele that he was eligible for assistance. It subsequently accepted his offer by paying solicitors instructed on Steele's behalf up to 90% of their costs in conducting his defence in the New South Wales proceeding (excluding costs already paid by HIH). The appellant then paid 90% of the judgment sum awarded to Screenco in November 2002 at the conclusion of the New South Wales proceeding, and 90% of the costs of all other parties which Steele had been ordered to pay.

18 Such is the background to two subsequent proceedings in Victoria, the second of which is the concern of the present appeal.

The first Victorian proceeding

19 In January 2000, HIH had sought from SGIC an admission that Steele was insured under the SGIC policy. After failing to secure that admission, HIH and Steele instituted a proceeding in the Supreme Court of Victoria against SGIC (later replaced by the respondent). HIH claimed equitable contribution from the respondent in respect of HIH's indemnification of Steele in the New South Wales proceeding. By an amended pleading dated 28 July 2005, Steele claimed an indemnity from the respondent in respect of the damages and costs he had been ordered to pay in the New South Wales proceeding and his defence costs, including sums paid by the appellant. The respondent's defence was that its obligation to indemnify Steele had been discharged by the payments made by the

appellant in satisfaction of the liabilities incurred by Steele. The appellant declined to participate in this proceeding.

20 HIH and Steele were successful at first instance[20]. The Court of Appeal upheld the order for payment of contribution by the respondent in respect of the costs which HIH had paid, but otherwise the appeal was allowed in favour of the respondent, on the ground that the respondent's obligation to indemnify Steele had been discharged by the appellant's payments in respect of Steele under the contract between them[21]. Steele's application to this Court for special leave to appeal that decision was refused[22].

The second Victorian proceeding

21 On 18 August 2008, the appellant brought proceedings against the respondent in the Supreme Court of Victoria, seeking equitable contribution in the sum of one half of all of the benefits it had paid in respect of Steele. The appellant failed both before the primary judge and on appeal to the Court of Appeal.

Reasoning of the primary judge

22 On 1 October 2009, Hollingworth J dismissed the appellant's claim, on the ground that the parties' respective liabilities were not co-ordinate[23]. Her Honour stated that it was inappropriate to construe the appellant's obligation to indemnify Steele as "founded in", or substantially equivalent to, HIH's obligation as insurer under the HIH policy[24]. Steele's assignment to the appellant of his rights under the HIH policy did not constitute an assignment by HIH of its legal obligations

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20 *HIH Casualty & General Insurance v Insurance Australia Ltd* (2006) 14 ANZ Insurance Cases ¶61-685.

21 *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (In liq)* (2007) 18 VR 528 at 531 [9], 558-559 [172]-[178], 561 [191].

22 *Steele v Insurance Australia Ltd* [2008] HCATrans 210.

23 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,842 [138].

24 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,839-77,840 [107]-[114].

under that policy, and HIH remained liable to indemnify Steele[25]. Further, Steele's obligations under his contract with the appellant to provide all reasonable assistance with legal action, and to continue to comply with the HIH policy, merely allowed the appellant to benefit from Steele's equitable assignment rather than putting the appellant in HIH's position[26].

23 Finally, her Honour noted, the appellant was not liable to pay Steele the same benefit he would have been entitled to under the HIH policy: given that Steele had assigned to the appellant his right to recover in the liquidation of the HIH Group, the appellant might ultimately be reimbursed for some part of its payout in respect of Steele[27]. Therefore, Hollingworth J found that the appellant's liability to indemnify Steele arose solely from the independent contract it formed with Steele upon paying benefits in respect of him, and not from HIH's liability to Steele under the HIH policy[28].

24 Based on this analysis, the primary judge found that the respective liabilities of the appellant and the respondent were not co-ordinate, as they did not co-exist at the "relevant date"[29]. Consistently with the parties' agreement at the hearing, her Honour identified the relevant date as the date of the "insuring clause event"[30], being 3 March 1998 (the date the scaffolding collapsed and damaged Screenco's screen). In her Honour's view, the appellant had no

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25 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,839 [110]-[111].

26 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,840 [122].

27 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,840-77,841 [124].

28 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,841 [126].

29 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,841 [127]-[128].

30 Citing *QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd* (2009) 24 VR 326 at 339-340 [65]-[69] and *AMP Workers' Compensation Services (NSW) Ltd v QBE Insurance Ltd* (2001) 53 NSWLR 35 at 39 [17]: *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,837-77,838 [93], 77,841 [127].

indemnity obligation towards Steele on this date; the appellant did not even exist until 2001, and its indemnity contract with Steele only came into existence upon its payment of the first benefit in respect of him under the Scheme[31]. Accordingly, her Honour held, "there was simply no entitlement to contribution at the relevant date."[32]

25 In an obiter dictum, Hollingworth J also found that the appellant's liability to indemnify Steele was "primary in nature", whereas the respondent's obligation as insurer was "secondary in nature."[33] Applying the reasoning of the Court of Appeal of the Supreme Court of Western Australia in *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* ("*Speno*")[34], and of the House of Lords in *Caledonia North Sea Ltd v British Telecommunications plc* ("*Caledonia*")[35], Hollingworth J stated that an obligation to indemnify under a contract of indemnity was ordinarily not co-ordinate with an obligation to indemnify under a contract of insurance[36]. If it had been necessary to decide, her Honour would have held that there was no evidence in this case displacing the general principle from *Speno* and *Caledonia* that the appellant's indemnity obligation was primary, the respondent's insurance liability was secondary and, therefore, the parties' liabilities were not co-ordinate[37].

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31 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,841 [128].

32 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,841 [130].

33 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,842 [138].

34 (2000) 23 WAR 291.

35 [2002] 1 Lloyd's Rep 553.

36 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,841 [131].

37 *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,842 [137].

Reasoning of the Court of Appeal

26 On appeal, the central submission which the appellant made was that it "effectively stood in the shoes of HIH"[38], thus replicating the circumstances where two insurance policies responded to a shared liability and orthodox principles of equity imposed a duty of contribution between the two insurers[39]. In dismissing the appeal, the Court of Appeal held that it was not necessary to decide whether the parties' liabilities were not co-ordinate on the basis that the appellant's liability was primary and the respondent's was secondary, because the appellant was not entitled to contribution for several other reasons[40].

27 First, their Honours stated, the liabilities for which the parties indemnified Steele were different[41]. Whilst both parties were obliged to indemnify Steele "in respect of his liability for the loss that occurred as a result of the screen being damaged in March 1998", the appellant's obligation was subject to the condition that Steele assign to the appellant his right to prove in the liquidation of HIH[42]. As postulated in the Offer to Assign, the appellant could ultimately receive an additional payment of "50 cents in the dollar" upon the winding up[43].

28 Secondly, the Court drew attention to the foundations of the doctrine of contribution in "notions of fairness, equity … and natural justice", implying that those principles did not require the intervention of equity on the facts of this case[44].

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38 A phrase familiar from use in the context of subrogation.

39 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,500 [11].

40 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,501 [19].

41 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,501 [20].

42 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,501 [20].

43 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,501 [20]-[21].

44 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,501 [22].

29 Thirdly, Steele would not, in their Honours' view, have had "equal or substantially equal recourse" to both the appellant and the respondent, as required by the doctrine of contribution[45]. If Steele had been paid under the SGIC policy, no contract of indemnity would or could have come into existence between him and the appellant as "there would have been no occasion for him to make a claim on the [S]cheme"[46].

30 Accordingly, their Honours concluded that there was no "common interest", "common burden" or "common risk" in respect of the liabilities of the appellant and the respondent[47].

31 On 11 March 2011, a panel constituted by Heydon, Crennan and Bell JJ granted the appellant special leave to appeal to this Court. As the reasons which follow will show, the appeal should be dismissed.

Submissions in this Court

32 In this Court, the appellant essentially contended that the Court of Appeal erred in concluding that the relevant liabilities as between the appellant and Steele and between the respondent and Steele were not co-ordinate. The appellant characterised the facts as giving rise to double insurance in the sense described in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* ("*Albion*")[48]. This was said to arise because it was uncontested that the HIH policy and the SGIC policy involved co-ordinate liability. Whilst that may be accepted, equity would only recognise and enforce a duty to contribute if a co-insurer, against whom such relief was sought, were solvent[49]. It was

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45 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,501-78,502 [23].

46 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,501-78,502 [23].

47 *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases ¶61-863 at 78,502 [24].

48 (1969) 121 CLR 342; [1969] HCA 55.

49 *Mahoney v McManus* (1981) 180 CLR 370 at 376; [1981] HCA 54; *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 597.

submitted that the appellant was not an "officious intermeddler"[50], making a payment which financially benefited the respondent; rather, the appellant had discharged a burden which was "in substance" the same burden shared by the respondent.

33 It was further submitted by the appellant that it would be inequitable for the respondent to escape liability to contribute (to which it would have been exposed if HIH had not collapsed) just because the appellant had assumed responsibility for the insolvent insurer, not through novation or assignment from that insurer, but by way of assignment from the insured. The relationship between the appellant and the respondent was described as "a shared community of interest."

34 The respondent supported the Court of Appeal's conclusion that the liabilities were not co-ordinate on the basis that it never shared a common burden with the appellant. In this context, the respondent relied on the fact that it could not have brought a claim against the appellant for contribution. It was contended that, if Steele had been paid under the SGIC policy, he would have had no claim against the appellant and no contract would have come into existence between Steele and the appellant. This was because of the way in which the Scheme was structured so that no enforceable obligation arose until a payment was actually made. It was said that the "mutuality" necessary for equitable contribution to arise did not exist between the appellant and the respondent.

35 The respondent also filed a notice of contention, seeking to uphold the Court of Appeal's orders on the basis of submissions accepted by Hollingworth J; namely, that the parties did not have a common burden or obligation at the time of the "insuring clause event", and that the appellant's indemnity obligation was primary whereas the respondent's was secondary. That latter distinction has been referred to in the authorities[51] as inimical to claims for equitable contribution on the basis that the requirement of a common burden or common obligation cannot be satisfied in such circumstances. The notice of contention was amended during oral hearing to add a third ground alleging that the constituent documents of the Scheme did not evince any intention that the appellant, as distinct from the HIH companies, should have rights of contribution in respect of payments made under the Scheme.

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50 cf *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch D 234.

51 *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 599-600; *Speno* (2000) 23 WAR 291 at 327 [167]-[168]; *Caledonia* [2002] 1 Lloyd's Rep 553 at 559-560 [14]-[16], 567 [57], 571-572 [91]-[97].

The principles of equitable contribution

36 In *Albion*, Kitto J said the basic concept of contribution was longstanding[52] and was "accepted by both law and equity as one of natural justice"[53], expressed by ensuring equality between persons obliged in respect of a common obligation; although his Honour recognised that "the doctrine of equality operated more effectually in a court of equity"[54]. He described the basic principle thus: "persons who are under co-ordinate liabilities to make good the one loss … must share the burden pro rata."[55]

37 The rationale for equitable contribution was explained by Eyre LCB in *Dering v Earl of Winchelsea*[56]. Obligors (such as co-sureties) severally bound by different instruments in respect of the same liability, who may not even know of each other, have "a common interest, and a common burthen". It is because the charging of one surety in respect of the common obligation discharges the other that "each therefore ought to contribute to the *onus*."[57] The equity of contribution does not apply between obligors where one of them is, in fact, a surety for a surety rather than a co-surety[58]. The nature or quality of the obligations is critical although the quantum of liability between co-obligors may vary[59].

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52 For example, the doctrine of average has been "repeatedly held to be a rule derived from the maritime law of Rhodes": *Ruabon Steamship Company v London Assurance* [1900] AC 6 at 10; see also *Albion* (1969) 121 CLR 342 at 350.

53 *Albion* (1969) 121 CLR 342 at 350.

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

55 *Albion* (1969) 121 CLR 342 at 350.

56 (1787) 1 Cox 318 at 322-323 [29 ER 1184 at 1186].

57 Reflecting the maxim "*qui sentit commodum sentire debet et onus*" – he who derives the advantage ought to sustain the burden – which merges in equity's more comprehensive rule "equity is equality", as to which see Broom, *A Selection of Legal Maxims*, 10th ed (1939) at 482-485.

58 *Craythorne v Swinburne* (1807) 14 Ves Jun 160 at 171 [33 ER 482 at 486].

59 *Albion* (1969) 121 CLR 342 at 345-346; *Government Insurance Office of New South Wales v Crowley* [1975] 2 NSWLR 78 at 83.

38 Co-ordinate liabilities are not limited to circumstances involving co-sureties, or to double insurance where two insurers each have a secondary liability in respect of the same risk[60]; in the latter case "the two policies of insurance are treated as one insurance"[61].

39 Given that natural justice, exemplified by equality, underpins the duty to contribute in respect of co-ordinate liabilities, the search for a common obligation "should not be defeated by too technical an approach"[62]. It is possible to have a common obligation where the obligation of each of two obligors has a different source, such as statute and contract, as occurred in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* ("*BP Petroleum*")[63], provided the obligations can be characterised as "of the same nature and to the same extent"[64].

40 By way of contrast, the obligation of an indemnifier under a contract of services, and the obligation of an insurer which may cover the same event, have been held not to be obligations "of the same nature and to the same extent" because, as explained in *Caledonia*, liabilities incurred in tort, delict or contract are generally primary whereas the liability of an indemnity insurer to an injured party is generally secondary[65].

41 In the Inner House decision upheld by the House of Lords in *Caledonia*, Lord Sutherland explained the rationale[66]:

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60 As was the situation in *Albion* (1969) 121 CLR 342.

61 *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* ("*Commercial and General Insurance*") (1973) 129 CLR 374 at 379; [1973] HCA 51.

62 *Mahoney v McManus* (1981) 180 CLR 370 at 378.

63 1987 SLT 345.

64 1987 SLT 345 at 348 per Lord Ross, employing the expression of Lord Chelmsford in *Caledonian Railway Company v Colt* (1860) 3 Macq 833 at 844.

65 *Caledonia* [2002] 1 Lloyd's Rep 553 at 559 [13]-[14] and 560 [16] per Lord Bingham, 567 [62] per Lord Mackay, 572 [97] per Lord Hoffmann.

66 *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1182.

> "Contribution …. is a two way exercise. You cannot have contribution from one without contribution from the other."

42 As the requirement of co-ordinate liabilities is essential for the operation of the doctrine of equitable contribution between obligors, the duty to contribute is not based on "some general principle of justice, that a man ought not to get an advantage unless he pays for it."[67]

43 In *Burke v LFOT Pty Ltd*[68], a purchaser of retail premises suffered loss arising out of misrepresentations made by the vendor which were actionable under the *Trade Practices Act* 1974 (Cth), and also loss arising from the negligence of one of the directors of the purchaser who acted as the solicitor in relation to the purchase. The vendor and one of its directors failed to obtain contribution from the solicitor because the liabilities were not, as in *BP Petroleum*, "of the same nature and to the same extent". Accordingly, they were not co-ordinate liabilities in respect of a common obligation[69]. The repayment to the purchaser by the vendor and its director of the difference between the price received and the true value of the premises did not command equity's intervention.

44 The equitable doctrine that a duty to contribute applies where obligors are under a common burden or common obligation was restated by this Court in the plurality judgment in *Friend v Brooker*[70]:

> "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. The 'natural justice' in the provision of a remedy for

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67 *Ruabon Steamship Company v London Assurance* [1900] AC 6 at 12 per Earl of Halsbury LC. For a more recent application of the same principle, see *Cockburn v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624 at 634 [42]-[43].

68 (2002) 209 CLR 282; [2002] HCA 17.

69 *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 292-293 [15] and 294 [19]-[22] per Gaudron ACJ and Hayne J, 303 [49]-[50] and 304 [52] per McHugh J, 336 [142]-[143] per Callinan J.

70 (2009) 239 CLR 129 at 148 [38]-[39] per French CJ, Gummow, Hayne and Bell JJ; [2009] HCA 21.

> contribution is the concern that the common exposure of the obligors (or 'debtors') to the obligee (or '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. …
>
> 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. As explained in United States authority, 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." (footnotes omitted)

45 The plurality went on to prefer the wider term "co-ordinate liabilities" said to subsume the expression "common obligation"[71], and confirmed that "the doctrine is not enlivened merely because the claimant's payment operates to the financial benefit or relief of the other party."[72]

46 In that case, the first respondent, a director of a company, had claimed equitable contribution from a co-director in respect of loans he had made to the company, on the basis that the directors were parties to a common design to achieve a common end. The appellant successfully resisted the claim on the basis that the doctrine of equitable contribution should not be extended to "a common design" which would have the effect of "outflank[ing] the consequences of the selection by the parties of the corporate structure" for their business, which "brought with it the attendant legal doctrines of corporate personality and limited personal liability."[73] The result confirms that equity will not intervene in the absence of a common legal burden or co-ordinate liabilities.

47 The authorities show that no court has departed from the requirement that the equity to contribute depends on obligors bearing a common burden, the basis for co-ordinate liabilities in respect of the one loss. A proposition upon which the appellant wishes to rely – namely, that equity looks to substance rather than

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71 *Friend v Brooker* (2009) 239 CLR 129 at 149 [41].

72 *Friend v Brooker* (2009) 239 CLR 129 at 151 [48]; also cross-refer to note 67 above.

73 *Friend v Brooker* (2009) 239 CLR 129 at 161 [88] per French CJ, Gummow, Hayne and Bell JJ; see also at 154 [62] per the plurality, 161 [92] per Heydon J.

form[74] – has never been invoked successfully to achieve a departure from, or modification of, that requirement.

48 In terms of the abovementioned authorities, it was argued for the appellant that the facts of this case justified a "controlled departure" from Lord Sutherland's conception that contribution "is a two way exercise", since the plurality in *Friend v Brooker* concentrated upon equity addressing the "disadvantage" an obligee might cause to an obligor[75]. However, as the passages quoted above show, the reference to "disadvantage" in *Friend v Brooker* is predicated on obligors bearing a common burden.

Should equity intervene?

49 The constituent documents of the Scheme show that the appellant was appointed by the Commonwealth as trustee, administrator and manager of a voluntary scheme, funded by public monies, and brought into existence for the relief of hardship of certain eligible holders of and beneficiaries under insurance policies with companies in the HIH Group. The voluntary nature of the Scheme does not necessarily preclude an equity of contribution, as a voluntary government assistance scheme which allowed double indemnification could give rise to equities[76]. However, a government assistance scheme designed to avoid double indemnification (as here) may have the opposite effect. In *Burnand v Rodocanachi*[77], an underwriter, who had paid an insured on a valued policy of marine insurance, failed in a claim for compensation against the insured, who had also received payment from a compensation fund created by an Act of Congress of the United States. The scheme expressly excluded double indemnification by limiting payments from the compensation fund to the difference between the actual loss suffered by a cargo owner and any sum paid by an underwriter less than the actual loss.

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74 *Friend v Brooker* (2009) 239 CLR 129 at 150 [47].

75 *Friend v Brooker* (2009) 239 CLR 129 at 148 [39].

76 *Randal v Cockran* (1748) 1 Ves Sen 98 [27 ER 916]; *Blaauwpot v Da Costa* (1758) 1 Eden 130 [28 ER 633]. See also *Burnand v Rodocanachi* (1882) 7 App Cas 333 at 337-338, 339-340, 342-343; *Transport Accident Commission v CMT Construction of Metropolitan Tunnels* (1988) 165 CLR 436 at 442; [1988] HCA 46.

77 (1882) 7 App Cas 333.

50 The assignment of the insured's rights, central to the Scheme, and made by Steele in this case, did not place the appellant in the same position as HIH either effectively or "in substance" as contended on behalf of the appellant. Under the Scheme, the appellant did not step into the shoes of HIH and become exposed to all the claims under policies issued by HIH and to contribution claims from co-insurers of HIH. Rather, the appellant stepped into the shoes of Steele, who had assigned his rights to the appellant, thereby entitling the appellant as assignee creditor to lodge a proof of debt in HIH's liquidation. That aspect of the Scheme, which applied to all eligible insureds, appeared to be fundamental to maximising recovery of public funds utilised for the purposes of the Scheme[78].

51 The obligations of the appellant to the insured Steele under the Scheme are not "of the same nature and to the same extent" as the obligation of the respondent in its capacity as co-insurer of HIH in respect of the insured's liability.

52 First, there is no common interest or common burden between the appellant and the respondent because, if the respondent had paid Steele under its insurance policy before the appellant formed the contract between it and Steele by making payment under the Scheme, Steele would not have been an eligible person, as defined in the Appropriation Act[79], and could not have satisfied the eligibility criteria[80] for assistance under the Scheme. Steele and the appellant would never have entered into contractual obligations with each other and the possibility of double indemnification in respect of Steele's loss would not have arisen.

53 Secondly, since the appellant undertook no enforceable obligations under the Scheme until a payment or the first in a series of payments was made, the

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78 See the Minister's Second Reading Speech for the Appropriation (HIH Assistance) Bill 2001, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 June 2001 at 27512: "In return for payment under the [S]cheme, claimants will have to assign all rights in connection with the claim to the Commonwealth government. The ultimate effect of this is that the Commonwealth government will become the largest single creditor of [the HIH companies]."

79 Section 3.

80 See the Commonwealth Management Agreement, cl 1.1, definition of "Eligibility Criteria"; media release dated 21 May 2001.

respondent would never have had an opportunity to bring a claim for contribution against the appellant[81].

54 Thirdly, whilst it is true that the HIH policy of Steele is the factum upon which payment was made in respect of him under the Scheme, that the offer of assistance was conditional upon Steele's assignments of his rights under the HIH policy, covering events which had already occurred, means that the risk undertaken by the appellant could not be described as the same risk undertaken by the respondent. It could not be said that the appellant's contract to indemnify Steele, made after the HIH Group's insolvency, and coming into existence upon payment in respect of Steele, and the respondent's contract of insurance covering Steele were, to use this Court's expression in *Commercial and General Insurance*[82], the "one insurance".

55 The respondent's ability to claim the benefit of satisfaction based on the appellant's payments in respect of Steele, when sued by Steele in the first Victorian proceeding, is not sufficient to substantiate a common burden on the appellant and the respondent. A "community of interest" between obligors is not a sufficient condition for the operation of an equity to contribute in circumstances where the obligations in question are qualitatively different, as they are here.

Conclusions

56 That the obligations of the appellant and the respondent are not "of the same nature and to the same extent" is reason enough to find that those obligations are not co-ordinate liabilities. The circumstances in which 90% of the liabilities incurred by Steele were paid by the appellant do not call for the intervention of equity.

57 These conclusions make it unnecessary to deal with the respondent's amended notice of contention.

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81 Theoretically, had the respondent made a payment to Steele, after the appellant assumed enforceable obligations to Steele also by making a payment, different considerations and equities might have arisen.

82 (1973) 129 CLR 374 at 379.

Gummow ACJ
Hayne J
Crennan J
Kiefel J

Orders

58 The appeal should be dismissed with costs.

59 HEYDON J. The respondent's predecessor, SGIC General Insurance Limited ("SGIC"), insured Mr Steele against his liability to pay for the damage caused by his negligent construction of scaffolding. So did a company in the HIH group of insurance companies[83]. After HIH collapsed, the Federal Government, in order to indemnify people in the position of Mr Steele, set up the HIH Claims Support Scheme ("the Scheme"). The Scheme is administered by the appellant. In large measure, though not completely, Mr Steele was indemnified under the Scheme.

60 One striking feature of the litigation is the determination with which the respondent has resisted indemnifying Mr Steele on its policy. The litigation exemplifies the teachings of ordinary litigious experience that insurers who are able to meet the liabilities which they have agreed to meet are often unwilling to do so, while those who are willing to meet them are often not able to do so. Here HIH found itself, after a time, unable to pay, though willing to do so. On the other hand, the respondent, though able to meet its liability to indemnify Mr Steele's obligation to pay for the damage caused by his negligence, has at all stages been unwilling to do so. In 2000 the respondent was asked to admit that Mr Steele was insured under the SGIC policy but evidently did not do so. It then denied the proposition that the policy responded by contending that three exclusions applied. It did this in different related proceedings ("the first Victorian proceedings"). On appeal in those proceedings it unsuccessfully attacked that Court's decision that those exclusions did not apply[84].

61 A second striking feature of the litigation is that normally where a person is insured by two insurers, the liquidation of the first operates adversely to the interests of the second by rendering it liable to indemnify the insured person completely, without having any effective recourse to contribution against the first insurer. Here a first insurer (HIH) went into liquidation, but on the reasoning of the Victorian Court of Appeal in the first Victorian proceedings, this did not result in a second insurer (the respondent) being liable to indemnify Mr Steele, because Mr Steele was substantially indemnified by the appellant. The respondent does not now dispute the proposition that if HIH had not gone into liquidation but had indemnified Mr Steele, it would have been liable to make contribution to HIH. The decision of the Federal Government to save insured persons in the position of Mr Steele from the risk of completely losing indemnity has absolved the respondent from fulfilling what would otherwise have been a just obligation to share the burden with HIH. The liquidation of HIH, instead of

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83 It is convenient to refer to the company as "HIH" and to both the respondent and its predecessor as "the respondent".

84 *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (In liq)* (2007) 18 VR 528.

leaving the respondent to bear the whole burden, has relieved it of the whole burden.

62 A third striking feature of this litigation is the determination with which the respondent has, despite its stroke of good fortune to be found in the Federal Government's intervention, resisted paying anything towards alleviation of the appellant's burden of indemnifying Mr Steele, which, but for that intervention, it would have had to bear. One example[85] is that in this Court, the respondent, by amending its notice of contention after the luncheon adjournment during the oral hearing, raised a contention it had not raised before either with the trial judge or the Court of Appeal, namely that the documents underpinning the Scheme did not "evince an intention that the appellant, as distinct from the HIH Companies, should have rights of contribution in respect of payments made by it under the Scheme". The respondent's amendment may be thought by the suspicious-minded to reveal a consciousness that the other points it relied on in defence of the happy position in which the Federal Government's generosity has adventitiously placed it are not valid.

63 However that may be, in the end the respondent must prevail.

64 The circumstances which throw up the present problem are certainly novel, for little can be found in the authorities that is analogous to a comparison of the rights of a trustee of a publicly funded trust dealing with the consequences of collapsed insurers, which has indemnified an insured person, and the rights of an insurer. Indeed, counsel for the appellant conceded that the appellant's position had "novelty", and that the law had to be developed if that position were to be accommodated. He submitted that the discharge by the appellant of HIH's obligation to Mr Steele constituted a benefit to the respondent which, in fairness, the law could not countenance the respondent keeping[86].

65 Novel though it is, the position advocated by counsel for the appellant is not at first sight without attraction. It prevents the respondent from making a gain it would not have made but for the Federal Government's intervention, and would not have made if the respondent had not resisted fulfilment of its duty to indemnify Mr Steele up to and well beyond the time when HIH became insolvent. Thus counsel for the appellant observed that the appellant had not

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85 Another is narrated by the trial judge in the second Victorian proceedings, which have led to this appeal: *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases ¶61-824 at 77,831-77,836 [39]-[82].

86 He referred to *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 300 [41] per McHugh J; [2002] HCA 17.

merely discharged the respondent's burden, but had done so by reason of and according to the measure established by the HIH policy.

66 On the other hand, the appellant's position is unattractive in one respect – particularly when presented by "counsel appearing for a trustee for the Commonwealth", as counsel for the appellant at one point described himself. Contribution is a remedy which rests on a type of mutuality. It prevents the position as between two persons under a liability to a third being different depending on which of the two the third proceeds against. If the first pays, it gets contribution from the second. If the second pays, it gets contribution from the first. In *Friend v Brooker*[87] the plurality explained that if the doctrine of equitable contribution did not exist, "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." That implies indifference to which debtor is relieved; it implies that the doctrine cannot apply unless each disadvantaged debtor has the same right against the advantaged debtor as the advantaged debtor would have had if it had not been advantaged, but disadvantaged. Counsel for the appellant submitted that this type of "mutuality" had never been held to be necessary for the operation of contribution, and that its absence did not bar the remedy. The principle, however, is something inherent in the notion of contribution. A rule of law that was inconsistent with the principle might be a rule, but it would not be a rule resting on contribution.

67 The appellant accepted that if Mr Steele had claimed against the respondent first, and had been indemnified by the respondent, it would not have been open to the respondent to call on Mr Steele to pursue his other rights with a view to reducing the burden on it, and among those other rights was the right to make a claim against the appellant. It accepted that that was so if the Scheme did not contemplate payments for the benefit of co-insurers of HIH, but rather only contemplated payments to policyholders suffering financial hardship. On its true construction, the Scheme was of that character. The respondent would have been subrogated to any relevant right of Mr Steele, but Mr Steele would have ceased to have rights against the Scheme once he had been indemnified, and the right of the respondent, as party seeking to be subrogated, could not rise higher than the right to which it was seeking to be subrogated. The function of the Scheme appears to have been to permit recovery by insured persons in financial need. The function did not allow an insured person to be employed as a claimant in whose shoes an insurer could stand once the insurer had indemnified the insured person. And just as the respondent could have no right of subrogation, it could have no right of contribution either. The appellant submitted that there might be a narrow instance, where the claim of an insured person had been accepted but

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87 (2009) 239 CLR 129 at 148 [38] per French CJ, Gummow, Hayne and Bell JJ; [2009] HCA 21 (footnote omitted).

not paid by the appellant, and where the respondent then paid, in which the respondent might have a claim to compel the appellant to pay contribution: but that was not the present case.

68 In short, if Mr Steele had proceeded against the respondent, the respondent could not have had contribution rights against the appellant, because the appellant was not an insurer of Mr Steele, and the respondent was not eligible to claim under the Scheme. Because Mr Steele made a successful claim on the appellant first, the appellant seeks contribution from the respondent. But the appellant could not point to any way in which, if Mr Steele had proceeded against the respondent first, the respondent could equivalently obtain contribution from it. If the respondent had satisfied Mr Steele's claim, it would have been left bearing the whole loss.

69 The appellant ought not to succeed unless this mutuality difficulty can be overcome. Although the difficulty was debated in argument frequently and at length, the appellant could not resolve it. It contended that if it lost this appeal, there would be a windfall to the respondent. But if the respondent had paid under its policy with Mr Steele first, this would have led to a "windfall" in relation to the Scheme because it was beyond the appellant's power to make contribution to the respondent. That it was the appellant who, having satisfied Mr Steele's claim in large measure, is left to bear the loss to that extent may point to a feature which is either an anomalous feature in the Scheme or a feature of it having the function of minimising litigation. It does not point to any reason for developing the doctrine of contribution to overcome the appellant's difficulty.

70 In those circumstances the law should not be developed so as to benefit the appellant in the circumstances in which it finds itself. To do so would not be to develop the law relating to contribution, but to revolutionise it. It would be a revolution having the tendency to produce idiosyncratic and uncertain results.

71 This appeal must be dismissed with costs.