High Court clarifies the limits of the equitable doctrine of contribution

By MATTHEW BRANSGROVE

Matthew Bransgrove is senior partner at Bransgroves Lawyers, and co-author of The Essential Guide to Mortgage Law in NSW (LexisNexis, 2008).

ON 28 MAY 2009 THE HIGH Court in *Friend v Brooker* [2009] HCA 21, on appeal from the NSW Court of Appeal, considered the nature and scope of the equitable doctrine of contribution. A mainstay of the law of guarantee, the doctrine allows two parties responsible severally to the same creditor to seek contribution from one another if a creditor obtains payment from just one of them.

In this case the doctrine was given far wider scope by the Court of Appeal in order to allow one director of a failed company to claim contribution for his unpaid loan account from the other director. The High Court rejected the Court of Appeal's approach and restated the fundamental precepts of when the doctrine can apply.

Facts

The respondent and appellant operated a construction business as a partnership up until 1977. At that point they incorporated a company of which they became co-directors and, through various family trusts, owners of all its shares.

In 1986 the company came into extreme financial difficulty. The respondent director borrowed money in his own name, secured by a mortgage over his home and investment property, and then on-loaned that money to the company. The transaction was recorded against an unsecured loan account in his name in the company accounts.

The claim

Unable to surmount its financial difficulties, the company was ultimately deregistered. The respondent director sued the appellant director for equal contribution to the repayment of his personal borrowings which were entered into for the purpose of making the loan to the company.

The respondent director claimed that between May 1977 and January 1995, a partnership or joint venture existed between the appellant director and himself. He asserted that the company was merely the "corporate vehicle" and that the appellant had "materially benefited" from the conduct of the partnership or joint venture agreement, for which the respondent director sought a full account.

At first instance

The trial judge, Nicholas J, determined that the respondent should fail, having found no evidence to support the respondent's assertion that a partnership or joint venture existed.

His Honour also found that the loan in question was a borrowing of the respondent, not of the company nor jointly with the appellant. His Honour noted: "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." ([2005] NSWSC 395 at [79].)

Court of Appeal

The Court of Appeal overturned the decision of the trial judge (Mason P & McColl JA, Basten JA dissenting). Mason P, found an equity to contribute as the product of the circumstances that:

- ❑ the company lacked the means to fund repayment of the loan;
- ❑ the company had applied the funds, borrowed from the respondent, for the purposes of its business; and
- ❑ the appellant had refused to contribute to any further payment by the respondent of indebtedness under the loan.

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.

High Court

The High Court rejected the reasoning of both Mason P and McColl JA, and reinstated the judgement of the trial judge.

The equitable doctrine of contribution

Rejecting Mason P's conception of the equitable doctrine of contribution, the joint judgement (with which Heydon J agreed) held (at [38]) that the equity in the doctrine of contribution was to ensure that an equality of burden undertaken by the debtors should not be defeated by the whim of the creditor or by accident. The equity does not arise merely because two parties derived a common benefit from the burden undertaken by one of them.

Thus, because the trial judge found that there was no common obligation to pay the creditor, there could be no application of the doctrine of contribution. In obiter dictim their Honours observed that it was immaterial to the doctrine that the concurrent liabilities arose from different instruments or that different "causes of actions" laid to enforce them.

In expressly rejecting Mason P's widening of the incidence of the equitable doctrine of contribution, their Honours stated: "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. 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."

Fiduciary duty

The joint judgement disposed of the fiduciary duty basis upon which McColl JA overturned the trial judge by noting that "such a formulation of fiduciary duty went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court" (at [84]). ❑

> "Because the trial judge found that there was no common obligation to pay the creditor, there could be no application of the doctrine of contribution."