



By
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Equitable contribution by professional advisors

SOLICITORS and other professional advisors may rest more easily after the recent decision of the High Court in *Burke v LFOT Pty Ltd* [2002] 76 ALJR 749; [2002] HCA 17.

The essential facts

A purchaser relied on s52 of the *Trade Practices Act 1974* to sue a company that sold it land that included a retail shop. The purchaser complained that the vendor's statements that the tenant was a 'high quality tenant' were misleading because the tenant had a history of rental arrears and had received an incentive payment.

Relying on s75B of the *TPA*, the purchaser also sued the directors of the vendor.

The purchaser did not sue its former solicitor. However, the vendor did, seeking contribution on the basis that if it was liable to the purchaser then so was the solicitor who had breached his duties to the purchaser.

The lower courts

The primary judge held that the solicitor had breached his retainer and was negligent in not advising the purchaser to inquire about the solvency and financial standing of the tenants. He held that the vendor was entitled to contribution from the purchaser's solicitor to the extent of half the vendor's \$750,000 liability to the purchaser. That liability was the extent to which the price paid by the purchaser exceeded the true value of the realty.

By a majority, the Full Court of the Federal Court dismissed an appeal from this determination. Three of

the four judges who had considered the matter found against the solicitor.

The High Court

But by a 4-1 majority, the High Court allowed the appeal and dismissed the vendor's cross claim against the solicitor.

Gaudron ACJ and Hayne J held that the doctrine of equitable contribution is founded on concepts of fairness and justice which required that if "one of several persons has paid more than his proper share towards discharging a common obligation, he is entitled to be recompensed by those who have not."

If the vendor obtained contribution from the solicitor then it would, to the extent of that contribution, not have paid its "proper share but would, instead, be unjustly enriched. That is because they would ultimately receive an amount in excess of the true value of the premises which their misleading conduct caused [the purchaser] to purchase."¹

They found it unnecessary to further explore the relevance of culpability and the causal significance of the acts and omissions of persons claiming contribution and how doctrines of equitable contribution operate in connection with particular provisions of Part VI of the *TPA*.

McHugh J reached the same conclusion. He said there was a right to contribution to a payment made in discharging a common obligation, the test of which was whether the obligations were of the same nature and extent.

In this case, there were independent, rather than common, obligations as the vendor's positive obligation not to mislead was of a different nature

and extent to the solicitor's duty to check the representations.

In making payment to the purchaser, the vendor was not discharging an antecedent obligation, but accounting for money it should never have received. Nor was the purchaser's loss a burden common to them all; payment of damages by the vendor to the purchaser was a benefit to the purchaser's solicitor.

Callinan J endorsed the principles extracted by Kitto J in *Albion Insurance Co Ltd v GIO (NSW)* [1969] 121 CLR 342 and held there was no mutuality of rights and obligations between them.

The vendor, having misled the purchaser, did not have clean hands and was thus not entitled to contribution in equity.

Kirby J dissented saying that contribution in law and equity is fixed on general principles of justice. He rejected the argument that contribution from the solicitor would enrich the vendor saying that to deny it contribution would unjustly enrich the solicitor. Apart from the way in which the case was conducted, he would have apportioned liability equally between the vendor, its director and the purchaser's solicitor.

Conclusion

While the rules governing equitable contribution will give rise to continuing uncertainty, the clear majority in the High Court, overriding the contrary views in both lower courts, reduces the risk to professional advisors of negligent transactional advice. This has been done without preventing the advisor from seeking contribution or indemnity from a party making a misleading representation.

Notes

1 para 22

Andrew Lyons is barrister in Brisbane.



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1 NOVEMBER 2002



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