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The High Court and contribution

Burke v LFOT Pty Ltd [2002] HCA 17

In *Burke*, misleading and deceptive statements were made regarding the viability of a particular tenant during the course of the negotiations for the sale of a group of retail shops. LFOT was the vendor and Burke was the solicitor for the purchaser. LFOT was found liable for $750,000 in relation to the misstatements. Burke, it was held, would also have been liable if sued, for failing to detect the inaccuracies. The Full Federal Court held that LFOT was entitled to contribution from Burke to the tune of 50%. This was so, notwithstanding the fact that the plaintiff's action against one was under s 82 of the *Trade Practices Act 1974* (Cth), and against the other for breach of contract and negligence. On appeal to the High Court it was argued that there was no right to contribution in such circumstances and that if there was, the contributions should not be equal. The High Court held (Kirby J in dissent) that there was no right to contribution.

The doctrine of co-ordinate liability applies both at common law (as a result of an implied contract) and in equity, although as McHugh J states "the equitable principles now cover the field." Commonly the doctrine is described as requiring contribution between parties who share "co-ordinate liabilities" or a "common obligation" to make good the one loss. In determining whether there is a "common obligation", the traditional test is whether the liability of each party "is of the same nature and to the same extent". Gaudron ACJ and Hayne J held that "the notion of co-ordinate liability is one that depends on common interest and common burden." McHugh J (agreeing with Lee J in the court below) held that "the parties to the proceeding must have shared a common burden arising out of a pre-existing relationship. If the parties are not on the same level of liability, there can be no common interest and no common burden with joinder in a common end and purpose by the several obligations."

McHugh J helpfully gathers authorities which provide some guidance as to liabilities which do not satisfy the co-ordinate liability test:

- The person from whom contribution is claimed must be on the same level of liability as that on which the claimant for contribution stands. It is not enough that the respective liabilities of parties arise out of similar relationships or related transactions.[1]
- It is not enough for the obligations to be merely owed to the same party or be otherwise connected in time and circumstance. Nor will it apply merely because the claimant's payment has benefited or relieved the other party financially.[2]

In *Burke* the liabilities were not co-ordinate. There was no common obligation. The nature and extent of the obligation owed by the vendor and the solicitor were held to be independent, rather than common. The only "shared" element was that there was a common victim. In all other respects, it was held, the obligations were different. McHugh J held:

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

Moreover, in view of the fact that the doctrine is bottomed and fixed on principles of equity and natural justice, it seemed unjust to permit a situation whereby LFOT, if contribution had been ordered, would have, in effect, gained $350,000 by its misdeeds.

In short, *Burke v LFOT*, reaffirms the traditional bases for the doctrine of co-ordinate liability and rejects the notion that liability for the one loss is itself sufficient to justify contribution between wrongdoers. PL

Footnotes:

1 *Scholefield Ltd v Zyngier* [1986] AC 562.

2 *Cockburn v GIO Finance Ltd* (No 2) [2001] 51 NSWLR 624; and see *Alexander (trading as Minter Ellison) v Perpetual Trustees WA Ltd* [2001] NSWCA 240.

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