

Supreme Court makes significant ruling on rights of contribution

The Supreme Court recently handed down its judgment in the case of *Hotchin v The New Zealand Guardian Trust Company*.

The Court by majority (Elias CJ and Glazebrook and William Young JJ) held that the rules governing contributions between co-liable defendants require only the “same damage”, words which were intended to cover a broad range of circumstances and claims.

It is not essential that the liabilities of the parties are also common or founded on obligations of a similar nature and extent. O'Regan J (with whom Arnold J agreed) disagreed on this point.

Why is this significant?

Because a broader scope for contribution claims may be expected to have a direct knock-on effect on the scope and cost of litigation for parties and their insurers.

Contribution fundamentals

Currently in New Zealand the rules governing contribution between wrongdoers are found in equitable rules and section 17 of the Law Reform Act 1936 (**the 1936 Act**).

These rules are all about fairness. Where multiple defendants are held “jointly and severally liable” for the same damage suffered by the plaintiff, they each can be obliged to pay up to 100% of the damages awarded for the loss.

Section 17 operates to relieve the harshness of joint and several liability rules. Thus a tortfeasor (wrongdoer) may recover contribution from any other tortfeasor who is (or would if sued in time have been) liable in respect of the same damage. Parties can also claim

contribution under common law rules of equity.

Hotchin v The New Zealand Guardian Trust Company

Mark Hotchin and other former directors of the Hanover finance companies which ceased trading in July 2008 were being sued by the Financial Markets Authority for Securities Act breaches relating to alleged untrue statements in prospectuses as to the companies' liquidity and level of impaired loans.

The former directors sought to share blame and liability for any Securities Act breaches by bringing a third-party contribution claim against Hanover's trustee, The New Zealand Guardian Trust Company (**NZGT**).

NZGT applied to strike out the third-party claims, and were successful in the High Court and Court of Appeal. Winkelmann J in the High Court struck out the claims on the basis that the damage resulting from the alleged breaches of duty by the directors and that resulting from the alleged breaches by NZGT were *not the same damage*.

Winkelmann J reasoned that NZGT could not be liable for the loss independently caused by the directors, assuming the FMA's claim against the directors succeeded. That conclusion related both to equitable contribution and contribution under the 1936 Act.

The Court of Appeal judgment upheld Winkelmann J's approach and conclusions. For the Court, it was critical that “*the obligations they each [the directors and the trustees] assumed were not of the same nature or extent.*” That was because Hotchin and his fellow Hanover directors owed duties to make accurate statements in prospectuses and certificates, while the

trustee's duties were “*of a very different nature...to protect investors against the harm arising from breaches of the companies' obligations under the trust deeds.*”

The majority of the Supreme Court did not find the High Court or Court of Appeal's analysis helpful in resolving the issue before them, which depended not on an analysis of the nature and extent of the parties' respective legal duties, but on a straightforward reading of the particular statutory scheme in its context. The words used in s 17 are “same damage” and therefore require only the “same damage”. That approach was supported by the policy behind the 1936 Act and its predecessors.

The majority criticised any narrower approach as leading to case law which was often “*confusing, drawing fine distinctions that are hard to understand, let alone justify.*” The instant case being an example.

On fairness, Glazebrook J said (at para [71] of her judgment):

“The main concern that I have with the test in the courts below and in the judgment of O'Regan J is that their approach would necessarily deny contribution from the directors in the situation where investors might choose (as they would be fully entitled to do) to bring an action against the trustee rather than against the directors. On any view of the matter the directors who released (and failed to withdraw) a prospectus containing untrue statements must be the primary wrongdoers and it would be most unjust if the trustee (the secondary wrongdoer) could not claim contribution from the directors, should the investors

be successful in such an action against the trustee."

Glazebrook J acknowledged that the majority's broader approach may draw in more third-parties and lengthen trials for plaintiffs but said that "*may just be the price necessary to secure conceptual simplicity and a just result.*"

As to Hotchin specifically, while the majority recognized his right not to have his contribution claim struck out, they also poured cold water on the merits of the claim. William Young J:

"Given the respective roles of the directors and the trustee and, not least, the reliance which a trustee will place on representations made by the directors, it is far from obvious that Mr Hotchin would have a substantial "just and equitable" claim for contribution against the trustee in respect of any shared liability."

Conclusion

Now that the test for contribution under the 1936 Act has been clarified, and at the same time freed from any undue narrowness of approach, there may well be an increase in claims for contributions.

Such claims will almost certainly be harder to strike-out, as Hotchin's case shows, although while emphasizing that "just and equitable" factors may ultimately defeat claims between primary and secondary wrongdoers in some cases.

This seems likely to increase costs of litigation for plaintiffs and defendants or their insurers alike.

Minor defendants - separate trials?

In 2014 the Law Commission released its report on the *Liability of Multiple Defendants*. The major recommendation of the report was that "joint and several liability" (JSL) was the most appropriate liability system for claims against multiple defendants. The risk of insolvent defendants should be

borne by co-liaible defendants, not plaintiffs.

The Supreme Court's decision in *Hotchin*, while not necessarily a reaction to the Law Commission's report, will widen the availability of contribution claims and alleviate some of the harshness of JSL. It will be interesting however to see how the courts will ensure proportionality of costs, especially for so-called "minor defendants" whose breach has contributed to the plaintiff's loss, but is minor compared to the other parties.

On this topic, Glazebrook J seems to contemplate flexibility in dealing with minor defendants: "*It may be that some of these cases could be dealt with by requiring separate trials (with contribution issues following the main hearing) but that will not always be the case.*" This will be an interesting space to watch.

**Stuart Dalzell, Partner*