SUPREME COURT OF QUEENSLAND

CITATION:	*Barnes & Anor v Ryan & Anor* [2003] QCA 292
PARTIES:	**ARNOLD WALTER BARNES** and **IAN DOUGLAS BARNES** (plaintiffs/appellants/cross-respondents) v **DENIS ANTHONY RAPHAEL RYAN** and **NOEL LESLIE RYAN** (defendants/respondents/cross-appellants)
FILE NO/S:	Appeal No 8473 of 2002 DC No 192 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	18 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2003
JUDGES:	Davies and Williams JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Cross-appeal allowed** **3. Judgment below set aside. In lieu judgment for the defendants against the plaintiffs with costs on the appropriate District Court scale** **4. Plaintiffs to pay the defendants' costs of the appeal**
CATCHWORDS:	CONTRACTS - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - IMPLIED TERMS - IMPLICATION OF MUTUAL OBLIGATION - where parties experienced businessmen - where plaintiffs alleged that parties had entered into a joint venture agreement whereby parties would make contributions to liabilities and outgoings of joint venture equally - where parties had been involved in two previous business projects - where mutual obligation said to derive from such obligations of parties in previous projects - whether evidence supported implied agreement as to mutual obligations of parties CONTRACTS - DISCHARGE, BREACH AND DEFENCES TO ACTION OF BREACH - OTHER MATTERS - where parties involved in business venture - where plaintiffs and

defendants directors of company - where plaintiffs and defendants executed a guarantee in favour of the bank - where overdraft facility provided by bank - where plaintiffs alleged effect of guarantee was agreement between the parties to be equally responsible for credit advanced by bank - where plaintiffs sued defendants for breach of such contract - whether agreement between parties existed

CONTRACTS - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - OTHER MATTERS - where company in financial trouble - where defendants agreed to send salesperson to work for company - where defendants agreed to contribute to wages of salesperson - where plaintiffs sued for breach of contract to pay wages - whether agreement made with plaintiffs personally or plaintiffs' company - whether plaintiffs could recover for wages paid to salesperson

Mahoney v McManus (1981) 180 CLR 370, considered

COUNSEL: M W Jarrett for the appellants/cross-respondents
M K Stunden for the respondents/cross-appellants

SOLICITORS: Butler McDermott & Egan (Nambour) for the appellants/cross-respondents
Griffiths Parry Lawyers (Maroochydore) for the respondents/cross-appellants

DAVIES JA:

1. The proceedings below and this appeal

[1] These are an appeal by the plaintiffs against a judgment for them against the defendants for $37,996 and a cross-appeal by the defendants against that judgment. The plaintiffs were Arnold Walter Barnes and Ian Douglas Barnes who are father and son. It is convenient hereafter to refer to them respectively as Barnes senior and Barnes junior and collectively as the plaintiffs. The defendants were Denis Anthony Raphael Ryan and Noel Leslie Ryan who are respectively uncle and nephew. It is similarly convenient to refer to them together as the defendants and respectively as Ryan senior and Ryan junior.

[2] The plaintiffs' claim was for $117,185.74 for breach of contract, costs and interest. This sum was made up of $41,557.49 in respect of an overdraft with National Australia Bank ("NAB"), $21,270 in respect of a loan from Commonwealth Bank of Australia ("CBA"), $14,455.29 in respect of levies and fees owing to Narangba Exhibition Village Pty Ltd ("Narangba"), $1,825 in respect of wages for a man called Rob Clarke and interest on each of the above sums. The sums claimed in respect of NAB and CBA loans and the Narangba levies and fees were, in each case, one-half of the total paid by the plaintiffs in respect thereof. These sums were claimed as damages for breach of a joint venture agreement said to have been made between the parties. The claim in respect of Clarke's wages was made pursuant to an agreement said to have been made between the parties whereby the defendants agreed to pay three-quarters of Clarke's wages over a period of 22 weeks.

[3] The overdraft with NAB was the overdraft of $50,000 for a company Australis Housing Corporation Pty Ltd ("Australis") and the loan from CBA was also a loan to Australis. In respect of the overdraft, both plaintiffs and both defendants executed a guarantee in favour of NAB dated 16 February 1996 limited to $50,000. In respect of the CBA loan, each of the plaintiffs and defendants executed identical guarantees in favour of CBA on 5 January 1996.

[4] The levies and fees due to Narangba were, it seems, payable by Australis to Narangba pursuant to an agreement, the Exhibition Village agreement, which was not in evidence. Payment of those monies was secured by a mortgage by Australis in favour of Narangba over land in the Narangba Exhibition Village on which Australis constructed a display home.

[5] The joint venture agreement pursuant to which the NAB and CBA amounts were claimed was alleged by the plaintiffs to have been an oral agreement entered into in or about November 1995 the material terms of which were that:

(a) the parties would enter into a joint venture agreement for the purpose of promoting the business of Australis Homes;[1]

(b) the parties would execute all documents, borrow all monies and perform all acts necessary for the implementation of this purpose;

(c) the parties would distribute the profits of the joint venture equally between themselves or their respective nominees; and

(d) the parties would make or cause their nominees to make contributions towards the outgoings and liabilities of the joint venture, in proportions equal between the plaintiffs and the defendants respectively.[2]

It was alleged that these terms were express; alternatively that the terms in pars (b), (c) and (d) were implied by the course of conduct engaged in by the parties with respect to projects they had pursued in the past, being projects at Long Island and at School/Evans Road.[3] It was then alleged that, for the purposes of the joint venture agreement, on or about 5 January 1996 the parties caused Australis to enter into the loan agreement with the CBA and executed personal guarantees in respect thereof and on or about 16 February 1996 caused Australis to enter into the overdraft facility with NAB and executed personal guarantees in respect thereof.

[6] In this Court the claim based on an express agreement was not pursued, the claim being restricted to one implied by the course of conduct alleged. The amounts claimed in each case represented one-half of the amount which the plaintiffs claimed to have paid Australis to enable it to discharge the respective debts to NAB, CBA and Narangba.

[7] Although no claim for contribution between co-guarantors was ever pleaded, the plaintiffs' counsel relied also, for the first time in his closing address at the trial, on an allegation that the monies paid by the plaintiffs to Australis, to the extent that Australis was thereby enabled to and did discharge its debts to NAB and CBA, were

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1 In their statement of claim the plaintiffs used the phrase "Australis Homes" to describe the company Australis Housing Corporation Pty Ltd; see, for example, par 1, par 3, par 7(a)(i), (b)(i).

2 Amended statement of claim par 4.

3 Amended statement of claim par 5, par 6.

paid only for the purpose of enabling Australis to pay the debts to NAB and CBA respectively and that consequently the plaintiffs were entitled to contribution in respect of those payments from the defendants as guarantors of the respective debts pursuant to the guarantees referred to earlier.[4] However he did not seek to amend the statement of claim, even at that stage, and said:

> "But as I say, your Honour, for the reasons that I've already advanced your Honour probably doesn't have to consider that aspect of the claim."

Defendants' counsel objected to such a claim being made at that stage. Nevertheless, that claim is sought to be pursued in this Court and is again objected to by the defendants' counsel. It will be necessary to consider it and the objections to it. But first it is necessary to consider the plaintiffs' primary claim which was rejected by the learned trial judge.

[8] In their amended defence the defendants denied any agreement such as that alleged by the plaintiffs. In their original defence they asserted an agreement of a different kind entered into in November 1995. This was alleged to be either an oral agreement or one implied by a course of conduct to the effect that the plaintiffs would take over the business conducted by Australis and be responsible for all liabilities in relation to that business. The action appears to have been decided on the basis that, in their amended defence, the defendants amended the date of this agreement to some time between November 1995 and May 1996.[5]

[9] In giving particulars of the oral agreement referred to in the preceding paragraph the defendants said that the parties discussed that the defendants "no longer wished to be a part of the joint venture involving Australis Homes and they requested that Arnold and Ian Barnes take over the running of Australis Homes".[6] In giving particulars of the alternative claim based on an implied agreement the defendants alleged that the agreement was implied from the course of conduct by the plaintiffs in taking over lease equipment and staff and assuming responsibility for the liabilities relating to the company.

[10] It is unlikely that, if there was any agreement such as the defendants alleged, it was entered into before 16 February 1996 when all parties executed the NAB guarantee. It is unlikely that the defendants would have executed that guarantee, or the guarantees to CBA on 5 January 1996, unless, at that time, they each had some interest in the business being conducted by Australis, for both the overdraft and the CBA loan were to be used for the purpose of that business. Moreover both defendants remained directors of Australis until August or September 1996 and

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4 *Mahoney v McManus* (1981) 180 CLR 370.

5 See the markings showing amendments to the defence on the original defence (appeal book 758), the amended defence (appeal book 416) and his Honour's reasons at [4].

6 As at November 1995 Barnes senior held one share in Australis, Barnes senior and junior as trustees for the A & I Family Trust held one share and Zingbay Pty Ltd a company in which the defendants were equal shareholders held two shares. The directors at that date were the plaintiffs and Ryan senior. Ryan junior became a director on 7 December 1995. The learned trial judge held, and this does not appear to be disputed on appeal, that both defendants resigned as directors in August or September 1996. Zingbay continued to hold two of the four issued shares in Australis until 5 December 1996 when, it seems, 72,603 further shares were allotted to the plaintiffs as trustees of the A & I Family Trust and 12,500 further shares were allotted to Zingbay.

Zingbay, a company in which the defendants were equal shareholders, remained a shareholder holding two of the four issued shares in Australis until 5 December 1996 and remained a shareholder thereafter.[7]

[11] As the learned trial judge found, Ryan junior was described in Minutes of an Australis Franchise Meeting on 19 October 1995 as a director of Australis with the plaintiffs and Ryan senior. Ryan senior was described as the chairman of directors and he agreed in cross-examination that at that time he was.

The facts relied on to prove the implied agreement

[12] These were said by the plaintiffs to prove a joint venture between them on the one hand and the defendants on the other in respect of two previous projects, the Long Island project and the Evans Road project. However these were accurately described by the learned trial judge as follows:

> "[11] The first may be referred to as Long Island. Long Island appears to have been Crown land over which existed some sort of grazing lease. Interests of the plaintiffs and the first defendant and others appear to have entered into a conditional contract to purchase the leasehold interest. The intent was to use the land for grazing and to develop a low-key tourist resort. It seems leases had to be renewed or granted and the vendor went into liquidation. The purchase or the proposed venture became involved in protracted litigation.
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> [12] The other may be referred to as Evans Road. Some time about 1993 or 1994 interests of the first defendant purchased some land with a view to rezoning and development of a shopping centre. Interests associated with the plaintiffs also bought three adjoining house blocks. In contemplation by the plaintiffs and the first defendant was an amalgamation of all the land for the proposed shopping centre development. However, the parties did not proceed with the shopping centre development and each interest sold their lands separately and retained any profit."

[13] His Honour then went on to say:

> "[13] It was not in dispute that during the course of Long Island and Evans Road the first defendant or his interests was pressed for money and the plaintiffs paid money to discharge those obligations. Repayment of money paid by the plaintiffs was not readily forthcoming. Eventually probably in 1997 the plaintiffs registered a caveat over the Evans Road land which the first defendant was selling. The outstanding debt and the caveat was resolved by a re-alignment of interests in Long Island - see exhibit 15 - executed in the latter part of 1997. Exhibit 15 reveals that although the Long Island and Evans Road dealings were by corporate vehicles of the plaintiffs and the first defendant the settlement acknowledged personal indebtedness by the first defendant."

[14] It is plain that during the course of these projects the plaintiffs, or some entity associated with one or other of them, paid some money on behalf of the defendants

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7 See fn 6.

or one of them or an entity associated with one or other of them. But it seems that at all times this was treated as a loan by the plaintiffs to Ryan senior and, some years later, it was the basis of a caveat lodged by the plaintiffs on Ryan senior's land at Evans Road and, apparently in consequence of this, the execution of an agreement between the plaintiffs and Ryan senior in late 1997, whereby in consideration of Ryan discharging a debt of $73,397.26 to the plaintiffs certain shares, units and loan accounts would be transferred to the plaintiffs and certain shares would be transferred to Ryan senior.

[15] At no stage in his evidence did either plaintiff swear to mutual obligations of the parties to contribute to a joint venture in respect of either project. Indeed when asked how costs on the Evans Road project would be apportioned or shared Barnes junior said:

> "Well, the - we were dealing in that project and another project, which is the island, Long Island, and we were - both had to make - make the projects, well, with a long term goal of to be successful, so, to answer your question, we poured money into the project, whether it be for our houses or his - or the larger parcel which was Mr Ryan's parcel, to get it to a stage where we could either develop it ourselves or on-sell it."

[16] The reference to "Mr Ryan's parcel" in the above passage was a reference to land owned solely by Ryan senior. It is plain that Ryan junior was not involved in either of these projects. In the course of his cross-examination Barnes junior acknowledged that there was never any agreement with Ryan junior either to share profits or to make contributions to outgoings or liabilities in respect of either project.

[17] The truth of the matter seems to be that, notwithstanding that they were apparently experienced businessmen, both plaintiffs assumed that, because they and a company in which the defendants were equal shareholders were, together, equal shareholders in Australis they and the defendants would contribute equally to the outgoings and liabilities of Australis. This is illustrated by the evidence of Barnes junior with respect to the Long Island project in which he said, in effect that because Ryan senior and the plaintiffs were equal shareholders in a company Wrenport Pty Ltd which was engaged in the project, they individually had an equal obligation to contribute to it. And it is illustrated by the following exchange in examination-in-chief of Barnes senior:

> "What money was put in by Mr Ryan, Mr Denis Ryan and Mr Noel Ryan [to the Australia Homes project]?-- Well, it was very little, very little really. At times there were accounts paid by Denis particularly in relation to a display home.
> Mmm?-- Yes, there were some accounts paid by Denis, but it was out of balance in relation - you know, we should have been putting half and half in.
> Well, why should you have been putting in half and half?-- We jointly owned - we jointly owned Australis Homes."

[18] Australis was formed with little or no capital with the consequence that if it were to expend money, that would have to come either from its shareholders in exchange for shares by way of loan or by loan from an outside creditor which would probably require guarantees from all directors. Indeed monies paid to Australis by the

plaintiffs and, by the defendants' company, Zingbay, was treated in the books of Australis, in each case, as a loan and in December 1996 the amount in the loan account of the plaintiffs was converted into shares and the amount in the loan account of Zingbay was converted into shares.

[19] In my opinion the evidence did not support the plaintiffs' contention that there was an implied agreement between the plaintiffs and the defendants to share equally the liabilities of Australis. It could not be implied from the way in which the parties had dealt with one another in respect of the previous projects and it could not be implied (although this was not even pleaded) from the way in which they dealt with each other in the affairs of Australis.

The contribution claim

[20] The foundation of the principle stated in *Mahoney v McManus*[8] upon which this claim was sought to be made is that the payment was made with the intention that the company should act on behalf of the payer as agent or instrument to discharge the payer's liability to the creditor.[9] What evidence there was in this case on this question was to the contrary. In particular, as I have already mentioned, amounts paid by the plaintiffs to Australis were treated in its books as debts by Australis to them. And such of those debts as had been incurred to December 1996, or some part of them, were converted into shareholding on 5 December 1996.[10]

[21] Moreover because this claim was never pleaded and only raised in an apparently half-hearted manner, for the first time, in address, neither party adduced evidence specifically relating to this issue apart from that to which I have just referred. The learned trial judge did not deal with this claim in his judgment and in view of the fact that no attempt was made to plead it, even at the time it was first raised in address, I do not think he was obliged to do so.

[22] In my opinion it is now too late to make this claim which seems likely, for the reason I have already given, in any event to have failed. Indeed even in this Court no attempt was made to plead this claim, reliance nevertheless being placed on it.

The learned trial judge's conclusion with respect to the NAB debt

[23] The learned trial judge, having rejected the plaintiff's contention for a joint venture agreement pursuant to which the plaintiffs and the defendants would be equally liable for the debts of Australis, nevertheless found an agreement between the parties for the overdraft facility for Australis with NAB.[11] His Honour said:

> "There was however an agreement between the parties for the overdraft facility for Australis to provide needed funds to operate. I

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8 See fn 4.

9 At 377, 381.

10 The precise facts in these respects were never made clear. By 5 December 1996 Australis had repaid $8,687.51 of its CBA debt and, it seems, its NAB account was in credit due to a payment by it on 2 December (though it later went into overdraft again). The loan account of the plaintiffs as trustees of the A & I Family Trust at that date showed that Australis owed them $58,203.10; and the loan account of Zingbay with Australis was not in evidence. Yet Ms Koch, the plaintiffs' accountant, swore that debts of $72,603 to the plaintiffs as trustees of the A & I Family Trust and $12,500 to Zingbay were on 5 December converted into shares to those respective values.

11 At [54].

> find the agreement involved each of the parties agreeing to be equally responsible for the credit advanced to Australis up to the limit of $50,000. In my opinion the defendants were not restricted or prejudiced in their defence because of the way in which the plaintiffs' pleading was framed. I add that I do not accept that the second defendant just co-operated in what he was told to do with respect to this arrangement."

[24] It may be noted from this that his Honour found this agreement notwithstanding that it was not pleaded.

[25] His Honour must have found this agreement on the basis of the evidence of Barnes junior who said this:

> "So, I was - I was running Australis Homes. It was losing money, and I was - I and - through the trust, was contributing money. It wasn't going very well, and I saw Mr Ryan about - 'All right, let's put in some more money so we can keep paying the bills', and he said, 'Well, rather than put in money, let's just get an overdraft on the house down there.' And that's how we decided to get - that's how the overdraft came about."

[26] It then appears that the overdraft was obtained upon each of the plaintiffs and each of the defendants executing a guarantee limited to $50,000, the guarantee to which I have already referred. In that sense, of course, it is true that each of the parties agreed to be equally responsible for the credit advanced to Australis up to the limit of $50,000. But as I have already indicated the plaintiffs' claim was not based upon a liability to contribute pursuant to the guarantee. I do not think that there was any other basis upon which his Honour's conclusion in this respect could have been reached.

[27] It follows from what I have said that in my opinion the plaintiffs' claim in respect of monies which they paid to Australis to the extent that Australis was thereby enabled to discharge its liabilities to CBA, NAB and Narangba, must fail. And it follows that his Honour's judgment in the plaintiffs' favour, to the extent that it involves a judgment for part of this sum, must be set aside.

The claim for Clarke's wages

[28] On 24 April 1997 Barnes junior wrote, on the letterhead of Australis the following letter:

> "TO…R & M DEVELOPMENTS.
> ATTN…BARBARA.
> RE…WAGE PACKAGE FOR ROB CLARKE.
> BARBARA.
> JUST CONFIRMING PAYMENT ARRANGEMENTS FOR ROB CLARKE.
> 1. R & M DEVELOPMENTS WILL PAY ROB CLARKE $600.00 PER WEEK + 6% SUPERANNUATION FOR A PERIOD OF 12 WEEKS. THIS GROSS AMOUNT INCLUDING SUPER WILL BE PAID DIRECT INTO AUSTRALIS HOUSING CORP NAB BUDERIM ACCOUNT NO 084 567 66037 2926. THESE PAYMENTS ARE TO BE PAID BY AUTOMATIC TRANSFER FROM R & M ACCOUNT.

> 2. AUSTRALIS WILL PAY THE BALANCE OF HIS WAGES TO THE PRE ARRANGED AMOUNT FOR THE SAME 12 WEEK PERIOD.
> 3. ROB CLARKES EMPLOYER WILL BE AUSTRALIS HOUSING CORP.
> 4. AFTER 12 WEEKS R & M WILL HAVE NO FURTHER ON GOING COMMITMENTS TO ROB CLARKE.
> 5. AFTER 12 WEEKS ROB WILL CONTINUE TO BE EMPLOYED BY AUSTRALIS PROVIDED THAT SATISFACTORY SALES TARGETS HAVE BEEN ACHIEVED.
> I HOPE THIS CONFIRMATION IS SATISFACTORY. IF YOU REQUIRE ANYTHING FURTHER PLEASE DO NOT HESITATE TO PHONE ME.
>
> YOURS FAITHFULLY,
> [signed]
> IAN BARNES.
> 0418/ 714 - 200."

[29] R & M Developments Pty Ltd was, it seems, Ryan senior's operating company and Barbara was Ryan senior's personal assistant at and presumably employed by that company. It was common ground that the following notation on a copy of this letter was written by Barbara:

> "spoke w/Ian Barnes & advised that for short period of time, it is easier for us to deposit into Australis Homes bank a/c - agreed that we fax to I.B. copy of deposit slip each week.
>
> B"

[30] The letter of 24 April 1997 was the result of a conversation which the learned trial judge accepted took place between Barnes senior and Ryan senior. Australis at that time was having difficulty in selling its project homes. Clarke was a salesman employed by one of Ryan's entities, possibly R & M Developments. In that conversation Ryan agreed to send Clarke down to try to increase sales. The defendants, it will be recalled, remained guarantors of the NAB and CBA loans. Ryan agreed to contribute towards Clarke's pay to an amount which, together with superannuation, amounted to around $650 a week. The balance, it was agreed, would be paid by Australis. The agreement was for 12 weeks. In fact Clarke stayed on with Australis after that and Australis thereafter was responsible for the whole of his wages.

[31] The learned trial judge was prepared to accept, as against the defendants that this agreement was made by the defendants personally rather than by R & M Developments Pty Ltd or by Ryan senior alone. In this Court the appellant accepted that Ryan junior could not be made liable on this agreement; that it was made with Ryan senior alone. Although this is by no means beyond doubt I am prepared to accept this. It was open to the learned trial judge to infer from the conversation between Barnes senior and Ryan senior that Ryan senior agreed to assume personal responsibility for payment of Clarke's wages at $600 per week plus superannuation for a period of 12 weeks.

[32] It is even less clear, however that, on the other side, the agreement was made with Barnes senior or with the plaintiffs rather than with Australis. It is plain that it was Australis which was agreeing to employ Clarke and the above notation by Barbara

indicates that it had been agreed that payment under the agreement would be made into Australis' bank account. In my opinion the agreement was made with Australis, not the plaintiffs. It follows that, in my opinion also, the plaintiffs were unable to recover the sum for Clarke's wages and that, to that extent also, the judgment of the learned trial judge should be set aside.

Orders

1. Appeal dismissed.
2. Cross-appeal allowed.
3. Judgment set aside. In lieu judgment for the defendants against the plaintiffs with costs on the appropriate District Court scale.
4. The plaintiffs to pay the defendants' costs of the appeal.

[33] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA. Therein all relevant facts are fully set out. I agree with those reasons, but wish to add some brief observations of my own with respect to the contribution claim.

[34] So far as is revealed by the evidence before the primary judge neither the Commonwealth Bank of Australia nor the National Australia Bank had made demands upon all or any of the guarantors before the indebtedness to those banks was discharged. Though there was some evidence that the appellants provided substantially all of the money necessary to discharge that indebtedness there were no findings of fact made as to the basis on which the money was made available. As the pleadings made no allegation with respect to that issue, there was no reason for the learned primary judge to make such findings. As is shown in the reasons of Davies JA the appellants received shares to reimburse them for at least moneys provided for that purpose prior to 5 December 1996. It is not clear whether that shareholding reimbursed the appellants for potential liability as well as liability in fact incurred; again, given the pleadings, it was not necessary for the learned primary judge to make findings with respect thereto.

[35] The decision in *Mahoney v McManus* (1981) 180 CLR 370 was dependent upon the very precise findings of fact made by the trial judge in that case. There, the payments had been made in response to demands served on the guarantors; that alone is sufficient to distinguish the reasoning in that case from the position here.

[36] The appellants did not claim relief by way of contribution in their pleading; in my view, neither the original nor the amended statement of claim sought relief by way of contribution in equity as between co-guarantors.

[37] The fact that there was reference in final addresses to contribution and the decision in *Mahoney v McManus* was not sufficient to entitle the appellants to recover on that ground. The relevant issues of fact were never explored and in the absence of relevant findings the appellants were not entitled to relief by way of contribution.

[38] I agree with the orders proposed by Davies JA.

[39] **ATKINSON J:** I agree that the appeal should be dismissed for the reasons given by Davies JA.