SUPREME COURT OF QUEENSLAND

CITATION:	*Elesanar Constructions P/L v Pacific Exchange Corporation P/L* [2002] QCA 389
PARTIES:	**ELESANAR CONSTRUCTIONS PTY LTD** ACN 000 804 384 (plaintiff/appellant) v **PACIFIC EXCHANGE CORPORATION PTY LTD** ACN 058 325 063 (defendant/respondent)
FILE NO/S:	Appeal No 153 of 2002 DC No 3612 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2002
JUDGES:	Davies and Williams JJA and Holmes J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDER:	**1. Leave granted to add grounds of appeal 4A and 4B in the amended notice of appeal filed 16 August 2002.** **2. Dismiss the appeal against the dismissal of the appellant's claim.** **3. Allow the appeal in respect of the order for costs of the respondent's counter-claim.** **4. Set aside that order.** **5. In lieu order that the respondent pay the appellant its costs of the counter-claim.** **6. The appellant to pay the respondent its costs of the appeal.**
CATCHWORDS:	CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - MATTERS NOT GIVING RISE TO BINDING CONTRACT - STATEMENTS OF INTENTION, NEGOTIATIONS AND INVITATIONS TO TREAT - where there had been discussions between the appellant and the respondent about the possibility of sharing the costs of a sewerage pumping station - whether there was an oral agreement to share the costs associated with the constructions of a sewerage pumping station

EQUITY - GENERAL PRINCIPLES - EQUITABLE DOCTRINES AND PRESUMPTIONS - CONTRIBUTION - whether the appellant and respondent were under a common obligation to the local council to augment the sewerage supply system to the respondent's land - whether the appellant who constructed a sewerage pumping station was entitled to reimbursement from the respondent

PROCEDURE - COSTS - DEPARTING FROM THE GENERAL RULE - OTHER CASES - DISCONTINUANCE OR ABANDONMENT - where substantial counter-claim abandoned at start of trial - whether the learned trial judge's ruling that each party bear its own costs of and incidental to the counter-claim should be set aside

Albion Insurance Co Ltd v Government Insurance Office of New South Wales (1969) 121 CLR 342, considered
BP Petroleum Development Ltd v Esso Petroleum Co Ltd [1987] SLT 345, considered
Burke & Anor v LFOT Pty Ltd & Anor (2002) 187 ALR 612, considered
Cockburn & Ors v GIO Finance Ltd (No 2) (2001) 51 NSWLR 624, considered
Dering v The Earl of Wilchelsea [1787] 1 Cox 318; 29 ER 1184, considered
Mahoney v McManus (1981) 180 CLR 370, considered
Ruabon Steamship Co v London Assurance [1900] AC 6, considered

COUNSEL: A Vasta QC, with D G Eliades, for the appellant
P D McMurdo QC, with D A Quayle, for the respondent

SOLICITORS: Andrew P Abaza for the appellant
Hickey Lawyers (Bundall) for the respondent

[1] **DAVIES JA:** The appellant appeals against the dismissal by the District Court of its claim for contribution against the respondent for the cost of a sewerage pumping station and connections thereto - pumping station SS35 - and interest thereon. It also appeals against the refusal of the learned trial judge to award it costs on the respondent's counter-claim in negligence and nuisance which was abandoned by the respondent at the hearing of the trial.

[2] The claim for contribution at first instance, as it finally emerged, was made on alternative grounds. First it was contended that there was an oral agreement between the parties to share all costs associated with works common to the development of the appellant's land and the respondent's land and that that included the cost of construction of pumping station SS35. Alternatively it was contended that, because the appellant and the respondent were under a common obligation to the Albert Shire Council to augment the sewerage supply system to the respondent's land and pumping station SS35 did that (as well as augment supply to the appellant's land), the appellant, who constructed the pumping station, was entitled to reimbursement from the respondent, for whose benefit that supply was augmented, of an amount representing, at the time of imposition of the obligations or the later of

them, a proportion of the cost of construction of pumping station SS35 which represented the proportion to which it augmented supply to the respondent's land.[1] Both bases were rejected by the learned trial judge.

[3] In its notice of appeal and in its outline of submissions filed in this Court the appellant did not rely on the first of these grounds; that is, it did not seek to overturn the learned trial judge's findings and conclusion that there was no oral agreement between the parties as to sharing of the cost of construction of pumping station SS35, of the cost of augmentation of sewerage supply or generally. However on the hearing of this appeal the appellant sought to amend its notice of appeal to include grounds challenging those findings and conclusion and sought to substitute an amended outline of submissions in which it argued those grounds. Mr McMurdo QC for the respondent, although objecting to the proposed amendments, indicated that his client would probably not be prejudiced if he were given an opportunity to respond in writing to the proposed written outline and to any oral submissions advanced by the appellant on this issue at the hearing. On that basis the Court proceeded to hear full argument and permitted further submissions in writing from both parties on that issue. I would now grant leave to the appellant to add those further grounds.

[4] Pursuant to a contract dated 4 March 1993, completed in early April 1993, the respondent became the owner of lot 942, of about 31 hectares, on the northern side of Christine Avenue in the Albert Shire. By that time the appellant was the owner of lot 990 on the southern side of that avenue.

[5] The agreement which the appellant alleged was one made between Mr Cowell on behalf of the appellant and Mr Cea on behalf of the respondent on site in April 1993,[2] to share equally all costs associated with the works common to the development of the appellant's land and the respondent's land.[3] The learned trial judge's rejection of the appellant's contention that there was such an oral agreement was based substantially upon an acceptance of the evidence of the respondent's witnesses in this respect, particularly that of Mr Cea, and the rejection of the evidence of the appellant's witnesses in that respect, particularly that of Mr Cowell. That conclusion was, in turn, based on his Honour's assessment of credit of the respective witnesses.

[6] Mr Vasta QC, for the appellant, submitted that his Honour's conclusion that there was no such agreement was inconsistent with the surrounding circumstances. However, except to the extent that it was subject to that credit finding, the evidence

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[1] It was common ground that pumping station SS35 was constructed by the appellant on its land and that it had the capacity to augment sewerage supply to lot 990, the appellant's land, and, in part, to lot 942, the respondent's land.

[2] The plaint pleaded that the agreement was made "In the months of May and June 1993" but the learned trial judge found that the plaintiff's case at trial was that the agreement was made in April.

[3] Here also the case presented at trial differed from that pleaded. The plaint pleaded an agreement that "certain joint works be undertaken to develop the southern lands and the northern lands and in particular it was agreed that in consideration of the Plaintiff constructing a Sewer Pump Station and Water and Sewer Connections ("the works") the cost thereof would be shared according to usage by estimated population (e.p.) of the northern lands and the southern lands and the Defendant would make payment to the Plaintiff accordingly".

of what took place before the time when it was asserted the agreement was made was, at best for the appellant, equivocal in this respect. And there was evidence of subsequent events which, it seems to me, was inconsistent with any such agreement having been made.

[7] On 10 March 1993 the Albert Shire Council granted rezoning of lot 990 to a company of which Mr Cowell was also a director, subject to conditions.[4] Predecessors in title to the respondent of land which included lot 942, Limgold Pty Ltd, Nista Pty Ltd and Jadekent Pty Ltd, objected to that rezoning. The proceedings were subsequently compromised by a deed dated 28 May 1993 between those companies, the other company referred to and the Council providing for rezoning of lot 990 on conditions, amongst others, that the owners of lot 990 and lot 942 would share the cost equally of reconstruction of Christine Avenue and of construction of a bridge on Christine Avenue. It also imposed some other obligations upon the owner of lot 942 but none which is relevant here. The significance of this deed is that, shortly after it is said that the agreement in contention was entered into to share equally all costs associated with works common to the development of both lots, this deed provided for the sharing of costs between the owners of those lots which did not include the cost of the construction of a sewerage pumping station or of sewerage headworks or generally of costs common to the development of both lots.

[8] Then on 23 June 1993, also shortly after it said that the agreement was made, the Albert Shire Council granted subdivisional approval in respect of lot 942. That approval imposed on the respondent an obligation to pay one-half the cost of the construction of Christine Avenue and one-half the cost of construction of a bridge on Christine Avenue.[5] It also provided that sewerage design for the subdivision should include internal pumping stations and external works necessary to connect the Council's sewerage system to the land and it provided for payment to the Council for contribution, at the Council's current rates of an amount for sewerage headworks. But it did not refer to any obligation to pay one-half of the costs in respect of a pumping station to be constructed on the appellant's land or, more generally, for a sharing of costs associated with works common to lots 990 and 942.[6]

[9] The other evidence relied on by the appellant consisted mainly of some correspondence and diary notes none of which it is necessary to refer to specifically. It is sufficient to say that none of them is more than equivocal on the existence of any such agreement. However the appellant also sought to rely on the evidence of Mr Shepherd, the Council engineer, who was present at a number of meetings involving Mr Cowell and, he thought also, Mr Cea at which, again he thought, some such agreement had been made. In this respect the learned trial judge found:

> "Relevantly, however, Mr Shepherd was uncertain whether Mr Cea had been present at the alleged meeting in April 1993 and, insofar as

4 There was no evidence that that company was associated with the appellant.

5 In two respects; by specifically providing that as a condition of approval (condition 2(A)(iv)) and by requiring the development to comply with a Deed of Compromise between Limgold Pty Ltd, Nista Pty Ltd, Jadekent Pty Ltd, Albert Shire Council and the other company referred to dated 28 May 1993 (condition 26); the deed is referred to in [7] hereof.

6 The same may be said of the Deed of Novation executed on or about 29 July 1994 which in cll 2 and 3 requires the respondent to share the cost of the road and bridge earlier referred to.

> he asserted his presence, I am satisfied that Mr Cea had in fact left the country by the relevant date."

That finding was one made not only upon the basis that his Honour generally accepted the evidence of Mr Cea but also from an examination of his passport.

[10] Finally Mr Vasta QC criticized the failure of the respondent's counsel to put to Mr Cowell and Mr Shepherd some of the evidence which Mr Cea subsequently gave. His Honour found, in my opinion correctly, that the respondent had put his case "with sufficient clarity to both Mr Cowell and Mr Shepherd". Nor do I think that any of the specific pieces of evidence which the respondent's counsel failed to put, in terms, to either witness, could possibly have affected his Honour's assessment of credit which was, as I have implied, supported rather than contradicted by the objective evidence.

[11] In my opinion no substantial basis has been shown for doubting the correctness of his Honour's finding that no such oral agreement was made. That is not to say that there was not some discussion between the engineers for the parties about the possibility of sharing the costs of any sewerage pumping stations common to the needs of both parcels of land. On the contrary, correspondence between the engineers appears to indicate that there was. But it does not prove the making of a contract between the parties to share that cost. I would therefore reject this ground of appeal.

[12] The other ground relied on by the appellant at trial for an entitlement to reimbursement or contribution from the respondent is also relied on here. That is the contention that the appellant and the respondent were under co-ordinate liabilities to augment the sewerage supply to the respondent's land to the extent to which pumping station SS35 did so.[7]

[13] The learned trial judge found that the appellant was obliged, as a term of its development approval, to construct a sewerage pumping station. It may also be inferred from his Honour's judgment that that pumping station was one which was of sufficient capacity to service not only the appellant's land but also a substantial part of the respondent's land. However he found that no obligation of that kind was imposed by the local authority upon the respondent; nor was it required otherwise to contribute to the cost of the pumping station.

[14] It is not entirely clear from the evidence what was the source of the appellant's obligation to construct a sewerage pumping station.[8] However both at trial and before this Court the respondent accepted that, as a term of its development approval, the appellant was obliged to construct pumping station SS35. It seems likely that this obligation was imposed some time in the second half of 1993 and that pumping station SS35 was constructed on the appellant's land some time in 1994.[9] There is no doubt that pumping station SS35 exceeded the needs for augmentation of sewerage supply to the appellant's land and its only other

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7 Giving rise, it was submitted, to an obligation of the kind identified by Kitto J in *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342 at 350 - 352.

8 No relevant development approval was in evidence.

9 Mr Cowell said, in effect, that it was completed by December 1993. However design drawings for it, or at least an essential part of it, were not approved by the Council until 16 February 1994.

conceivable use could have been to augment the supply of sewerage to the respondent's land, which, in the vicinity of the proposed pumping station, was separated from the appellant's land only by a road. There was also some evidence that the Council required the appellant, as a condition either of rezoning or of subdivisional approval, to construct a pumping station of the capacity of SS35, even though it was beyond the capacity necessary to service the appellant's land, so as to avoid the construction of more pumping stations than was necessary in this area. However it is sufficient, for the purpose of this appeal, to accept the respondent's factual concession.[10]

[15] Accepting that a condition of the development approval of lot 990 was that the appellant construct a pumping station which would be sufficient to augment sewerage supply not only to lot 990 but also to part of lot 942, a question arises as to whether that was an obligation of a kind which could give rise to a claim against the respondent for reimbursement of such part of its cost as was fair having regard to the extent to which it served lot 942. It is plain that the condition did not, at the time approval was given, impose a legal obligation on the appellant. The appellant was required to construct the pumping station only if it chose to develop the land in accordance with its application and to accept that condition of its doing so. But once it proceeded to develop its land in accordance with that approval it was bound by the condition.

[16] The way in which the right has been expressed, both at law and in equity, has been in terms of "co-ordinate liabilities" or "common obligation".[11] However I cannot see why a liability incurred in consequence of acceptance of conditions of approval imposed by a council could not be a liability of a kind which would found a claim such as this. For example I can see no reason why, if each of the appellant and the respondent had contemporaneously accepted as a condition of development of their respective lots a requirement that it provide whatever was necessary to augment the sewerage supply to both lots, and one of them had done so, it would not have been entitled to reimbursement from the other of an equitable proportion of that cost.[12] Nor do I think it would matter that those obligations had different sources; for example that one arose from a condition of approval by a council, accepted by the first party, and the other arose from a deed entered into between the second party and the Council.[13] The appellant's difficulty in this case, it seems to me, is in proving that the respondent shared a co-ordinate liability or common obligation. I shall refer to that in more detail below.

[17] In this Court the main basis of the appellant's contention that the respondent was also obliged to augment the sewerage supply to its land, to the extent to which pumping station SS35 did so, is a Deed of Rezoning dated 30 March 1989 to which

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10 It seems likely that the development approval also required as a condition that the appellant transfer to the Council the land on which the pumping station was constructed. It was common ground that that was, in fact, what occurred.

11 *Burke & Anor v LFOT Pty Ltd & Ors* (2002) 187 ALR 612 at [15], [38].

12 There would, in such a case, be a common interest and a common burden: *Burke* at [41]. It may even be the case that a legal liability is not necessary to found such a claim: *Cockburn & Ors v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624 at [27].

13 See, for example, *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345.

the respondent became a party by novation by a Deed of Novation executed on or about 29 July 1994. The Rezoning Deed was one made by Limgold Pty Ltd and Nista Pty Ltd of the one part and the Albert Shire Council of the other by which, in the event of rezoning of an area of land which then included the respondent's land, Limgold and Nista undertook certain obligations to the Council. By the Deed of Novation between Limgold and Nista as transferors, the respondent as transferee and the Albert Shire Council, the respondent undertook and agreed to be bound and to observe and perform the obligations of Limgold and Nista under the rezoning deed.

[18] This was not the basis of the appellant's contention in this respect at the trial.[14] It is not clear why these deeds were not then relied on although one possible reason for this may have been a failure by the appellant to advert to the significance of the Deed of Novation only a copy of which, incomplete in that it did not include the schedule and so did not clearly identify the deed the obligations under which were novated, had been disclosed by the respondent.

[19] The relevant obligation under the Deed of Novation was in the following terms:

> "[The respondent] undertakes and agrees to be bound by, and to observe and perform, upon and from completion of purchase of the said land by [the respondent], those terms and conditions of the Original Deed that apply to the said parcel as if [the respondent] was a party to the Original Deed in lieu and in place of [Limgold and Nista] … "

[20] The principal clauses in the Rezoning Deed, which it is now accepted is the "Original Deed" referred to in the above clause, are in the following terms:

> "1. [Limgold and Nista] shall carry out design and construction of:-
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> 1.1 all water supply and sewerage reticulation inside the boundaries of the said land; and
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> 1.2 all works necessary to connect the reticulation constructed inside the boundaries of the said land to the Council's sewerage and water supply systems; and
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> 1.3 any augmentation of the Council's sewerage and water supply systems necessary in order to ensure that those systems are able to adequately service the said land and the development proposed to be carried out by [Limgold and Nista] thereon.[15]

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14 The plaint alleged only a claim based on contract. However in further particulars of the plaint, given in answer to a request therefor from the respondent, the appellant relied on a common obligation to provide a sewerage pumping station, the obligation being a requirement of the Council for approval for subdivision. Although these were given as particulars of a contract claim it seems to have been accepted both by the respondent and the learned trial judge that there was an independent claim based on such common obligation. The particulars relied on referred to a large number of documents most of which were relied on to prove the agreement alleged in the plaint. It is impossible to identify from these particulars the documents, if any, relied on to prove such an independent claim though it seems likely that it was the respective development approvals. Neither the Deed of Rezoning nor the Deed of Novation was included in those documents. The claim based on common obligation was repeated in the appellant's reply and answer.

15 That development was, relevantly, single and multi-unit residential development.

For the purposes of this condition, the Council's sewerage and water supply systems are those mains, pumping stations and associated works in existence at the date hereof and/or at the time [Limgold and Nista] completes its obligations under this condition 1 and which do not exclusively serve the said land and/or the proposed development. The parties acknowledge that the mains constructed or to be constructed through the said land as shown on the plan annexed to this Schedule will be required to be constructed whether or not the proposed development proceeds and shall be constructed either by [Limgold and Nista] pursuant to Clause 1.3 above or, if not constructed by [Limgold and Nista], by the Council. If constructed by [Limgold and Nista], the provisions of Clause 8 of this Second Schedule apply in respect of the full amount of the actual cost to [Limgold and Nista] in that regard.

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6. Unless otherwise agreed in writing by the Council or otherwise directed by the Minister, [Limgold and Nista] shall pay to the Council contributions towards augmentation of sewerage and water supply headworks to be calculated at the rate per equivalent person determined in accordance with the table following:-

Type of land use	Calculation of Equivalent persons
1. Student Housing on Campus	1.0 equivalent persons per bed
2. University Campus buildings (other than commercial/tourist uses)	0.015 equivalent persons per square metre of net usable floor area
3. Research Park - Laboratories and actual research facilities	0.22 equivalent persons per square metre of net laboratory/research floor area
4. Research Park - Office and Administration Areas	0.015 equivalent persons per square metre of gross floor area
5. Accommodation Units off Campus	the number of equivalent persons determined by application of Council's adopted policy in that regard at the time of payment
6. Commercial/Tourist Areas on Campus	the number of equivalent persons determined by application of Council's adopted policy in that regard at the time of payment

"[16]

Clause 7 then provides for the time for payment of any such contributions and cl 8, referred to in cl 1, provides for credit against any headworks charges otherwise payable under the Deed in respect of contributions made or work done in that respect before the date of the deed. It was not contended by the respondent that there had been any relevant contributions made or work done by it in respect of the augmentation of the sewerage service to its land before the date of the Deed. In this

[16] Although there are competing contentions about estimated and actual population numbers in each of lots 990 and 942 intended to be and actually served by pumping station SS35 respectively and some evidence about both, there was no evidence about how either related to the meaning of "equivalent persons" in cl 6, a term which was not defined in the Deed, or what the "rate per equivalent person" was.

Court, argument on both sides concentrated exclusively on cl 1.3. However in order to understand the full extent of the respondent's obligation in this respect it is necessary to read cl 1.3 and cl 6 together.

[21] Read together, cll 1.3 and 6 may be seen as complementary. The construction of cl 1.3, together with the following definition of the Council's sewerage system, is not entirely clear.[17] However, because that system is defined to include mains, pumping stations and other works which, at the time of completion of the obligations under the clause, do not exclusively serve the respondent's land, the obligation in cl 1.3 appears to be to design and construct only such augmentation as was exclusively for the purpose of serving the respondent's land. Clause 6 can then be seen to impose on the respondent a complementary obligation to contribute to the cost of any augmentation of the Council's sewerage system serving the respondent's as well as other land.

[22] If that is the correct construction of cl 1.3, it did not impose on the respondent an obligation to construct or contribute to the cost of construction of pumping station SS35 because that pumping station did not exclusively serve the respondent's land. And it is unclear whether cl 6 imposed an obligation to contribute to that cost or, as seems more likely, an obligation to contribute to the cost of augmentation of sewerage headworks based on some unstated formula.

[23] In any event, it is unclear when, in relation to the date of the Deed of Novation of 29 July 1994, the appellant discharged its obligation under its development approval. If it was before 29 July 1994 and if, contrary to the above conclusion, Limgold and Nista had a common obligation under the Rezoning Deed to augment the Council's sewerage system to enable it to service lot 942, to the extent to which pumping station SS35 so augmented it, the appellant discharged that obligation before the Deed of Novation was executed.

[24] If at the time of execution of the Deed of Novation any obligations which Limgold and Nista had to the Council to augment its sewerage system had been relevantly discharged by the appellant, the respondent could not, by execution of the Deed, have assumed any such obligation. The only relevant obligation which the respondent assumed under the Deed was that set out in [19] and the Deed specifically provided:

> "8. The transferee shall have no other obligations other than as set out herein."

Accordingly, if the appellant discharged any obligation which Limgold and Nista had to the Council to augment its sewerage system, to the extent to which pumping station SS35 did so, before 29 July 1994 the respondent did not acquire any relevant obligation under the Deed of Rezoning of 30 March 1989.

[25] There was no reliable evidence as to when, in relation to 29 July 1994, whatever obligations the appellant assumed with respect to the design, construction and transfer to the Council of pumping station SS35 were discharged. As mentioned earlier,[18] Mr Cowell said, in effect, that the pumping station was completed by

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[17] Because of the use of "and/or" twice when, in each case, it seems likely that either "and" or "or" was intended.

[18] See fn 9.

December 1993 but this was plainly wrong for an approval of design drawings relating to it were not approved by the Council until 16 February 1994. The absence of any such reliable evidence was no doubt due to the failure of the appellant, at trial, to rely on the Deed of Novation as the basis for imposition of a co-ordinate obligation on the respondent. But that failure means that the appellant has failed to discharge the onus on it of showing any relevant obligation imposed on the respondent by cl 1.3 of the Deed of Rezoning.

[26] It follows, in my opinion, that for both of the above reasons the appellant must fail on this basis of its claim. In the first place, the Rezoning Deed did not impose on Limgold and Nista, and consequently the Deed of Novation did not impose on the respondent, an obligation to construct or to contribute to the cost of construction of pumping station SS35 because that pumping station did not exclusively serve the respondent's land; and the only obligation in respect of external headworks appears to have been to contribute in accordance with some formula which was never explained. And secondly, in any event, the appellant failed to prove that, by the time that the Deed of Novation was executed, any obligation to construct a pumping station to perform the functions which pumping station SS35 performed had not already been discharged by the appellant itself.

[27] The other basis on which the appellant contended that there was an obligation imposed on the respondent which was co-ordinate with that imposed on it was the respondent's subdivisional approval. Mr McMurdo QC, for the respondent, on the contrary, submitted that, not only did that approval not impose any such obligation on the respondent but that, by expressly and exclusively imposing on the respondent obligations with respect to augmentation of the Council's sewerage system, it superseded any obligation imposed by the Deed.

[28] I have already referred to the subdivisional approval of 23 June 1993. On 5 April 1994 the respondent applied for a substantially amended subdivisional approval. In that application, in reference to condition 2(D) and (E) of the 1993 approval, which related to design of water supply and sewerage respectively, the applicant said:

> "These conditions specify Council's standard criteria for internal and external water and sewer works. With regard to these conditions, we advise that our client is awaiting finalisation of discussions between adjoining owners and Council as to the sharing of costs associated with such work and for the mechanism of gaining credits on headworks. Could you please advise when these issues will be resolved."

[29] The appellant's inquiry contained in the second and third sentences of this passage, plainly related to condition 2(E) of the 1993 approval which was in the following terms:

> "2. The submission for approval of engineering plans and specifications prepared by a qualified Consulting Civil Engineer, for all road, drainage, water supply, sewerage and allotment improvement works, to the standards required by the Manager, Planning and Development Services.
>
> …
>
> (E) Sewerage design shall include all internal sewerage mains, internal pumping stations and rising mains and external works

> necessary to connect to Council's sewerage system at a point determined by the Manager, Planning and Development Services."

It may be accepted that, implicit in the obligation to submit for approval engineering plans and specifications for sewerage design, was one to perform the work for which the design was required.

[30] Condition 5 of those conditions required payment to the Council at the Council's rates current at the date of sealing of the survey plan in respect of the application of an amount for sewerage headworks; and condition 20 provided that survey plans would not be sealed until the applicant had executed a Deed of Novation and variation of the existing development deed with Limgold and Nista so far as it related to lot 942. The latter was plainly a reference to the Rezoning Deed of 30 March 1989.

[31] On 5 August 1994 the application of 5 April 1994 was approved subject to the conditions contained in the approval granted on 23 June 1993 with the addition of one further condition in the following terms:

> "The transfer to Council in fee simple of the land covering the sewerage pump station site and associated access driveway and turn around area."

It is unclear from the evidence what this condition refers to or whether, by that date, the applicant had constructed pumping station SS35 with a capacity to service a substantial part of the respondent's land. The condition may therefore have referred to the need or possible need for a sewerage pumping station on the respondent's land to augment supply to the balance of its land. In any event it does not appear to be relevant to the question in issue here.[19]

[32] Then on 6 October 1994 the Council granted a further, presumably different subdivisional approval in respect of lot 942. The circumstances in which that occurred are not in evidence. Nor is the application for that subdivisional approval. The approval contained a condition 2E requiring submission for approval of engineering plans and specifications for sewerage works in the following terms:

> "The submission for approval of engineering plans and specifications prepared by a qualified consulting civil engineer, for all road, drainage, water supply, sewerage and allotment improvement works, to the standards required by the Chief Executive Officer or his delegate.
>
> …
>
> E. Sewerage design shall include all internal sewerage mains, internal pumping stations and rising mains and external works necessary to connect to Council's sewerage system at a point determined by the Chief Executive Officer or his delegate. Sewerage pumping stations (if required) and associated access driveways are to be located within an allotment to be transferred to Council, in fee simple."

It can be seen that, except in respect of the last sentence, this condition was in much the same terms as condition 2(E) of the 1993 approval.

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[19] As mentioned earlier (see fn 1) SS35 was capable of servicing only part, albeit a substantial part, of the respondent's land. The approval of 5 August 1994 refers to a letter from the respondent's representative of 22 June 1994 which was not in evidence. That letter may have explained this mystery.

[33] Condition 5 was in much the same terms as condition 5 of the 1993 approval, condition 20 was in the same terms as condition 20 of the 1993 approval and condition 23 provided:

> "The transfer to Council in fee simple of land covering sewerage pump stations (if required) and associated access driveways and turn around areas."

It can be seen that condition 23 is to much the same effect as the new condition imposed on 5 August 1994 except that it appears that by 6 October 1994 the Council was less certain of the need for the respondent to provide a pumping station on its land; and the last sentence in condition 2E expands somewhat on that.

[34] These conditions impose obligations on the respondent to design and construct such internal pumping stations as may be required and to contribute to the cost of external sewerage headworks at the Council's current rates. Neither of these obligations could have been co-ordinate with that imposed on the appellant by the terms of its development approval; the first because it was in respect of internal pumping stations only; the second because it was an obligation to contribute, not to the actual cost of development of this pumping station, but in accordance with some unspecified formula.

[35] Moreover by the time that these conditions were imposed and accepted, on or after 6 October 1994, it seems likely that pumping station SS35 had been constructed and the land on which it was constructed transferred by the appellant to the Council. In any event the appellant did not prove the contrary. Consequently, there was, by then, no obligation to which the respondent's obligation was co-ordinate.

[36] The appeal against the dismissal of the appellant's claim must therefore, in my opinion, be dismissed with costs.

[37] The appellant also appealed against the failure of the learned trial judge to award it costs on the respondent's counter-claim which was a substantial claim in negligence or nuisance for $250,000 damages and a claim for damages for breach of contract in the sum of $8,525. Except for an amount of $2,255.96, the cost of a fence, liability for which had not been disputed by the appellant, the respondent indicated, for the first time at trial, that it was no longer pursuing its counter-claim. Accordingly judgment was given in its favour on its counter-claim for $2,255.96 without interest and his Honour ordered that each party bear its own costs.

[38] The appellant submitted that it prepared its case on the basis that it had to meet this substantial counter-claim and, it having been abandoned only at the commencement of the trial, it should have had the costs of that counter-claim. That seems to me to be plainly right. Accordingly, in my opinion, the learned trial judge's order that each party bear its own costs of and incidental to the counter-claim should be set aside. However as no submissions were made to this Court with respect to the costs which had been reserved I would not make any order in respect of those but I would order that the respondent pay to the appellant its costs of the counter-claim.

Orders

1. Leave granted to add grounds of appeal 4A and 4B in the amended notice of appeal filed 16 August 2002.
2. Dismiss the appeal against the dismissal of the appellant's claim.
3. Allow the appeal in respect of the order for costs of the respondent's counter-claim.

4. Set aside that order.
5. In lieu order that the respondent pay the appellant its costs of the counter-claim.
6. The appellant to pay the respondent its costs of the appeal.

[39] **WILLIAMS JA:** Both equity and the common law recognise that persons subject to a "common burden" or subject to "co-ordinate liabilities" may seek contribution from each other to ensure that one is not unjustly enriched by the other wholly discharging the burden. One of the earliest applications of the principle was in the matter of *Dering v The Earl of Winchelsea* [1787] 1 Cox 318; 29 ER 1184 where Lord Chief Baron Eyre referred to contribution as a "fixed principle of justice". That case was concerned with contribution between sureties and they were referred to as having a "common interest and a common burthen". Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350 said of the general doctrine of contribution that it was a "basic concept . . . accepted by both law and equity as one of natural justice"; that passage was quoted with approval by Gaudron ACJ and Hayne J in *Burke v LFOT Pty Ltd* (2002) 76 ALJR 749 at 753. One finds expressions used in *Albion Insurance* and *Burke* such as "co-ordinate liabilities", "common obligations", and "common interest and common burden" to define the circumstances in which the general doctrine of contribution will be called into play. In *Burke* Gaudron ACJ and Hayne J at 752 and McHugh at 758 quoted with approval the statement by Lord Ross in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 at 358 that the right to contribution depended on whether the liability was "of the same nature and to the same extent".

[40] Given that the principle is based on natural justice it is not surprising that it has been recognised that the right to contribution "depends upon matters of substance not form" (per McHugh J in *Burke* at 756 and per Mason P in *Cockburn v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624 at 631). To similar effect is the observation of Gibbs CJ (with the concurrence of Murphy and Aickin JJ) in *Mahoney v McManus* (1981) 180 CLR 370 at 378: "The operation of such a principle should not be defeated by too technical an approach". That passage was quoted with approval by Kirby J in *Burke* at 762. That broad approach was also recognised by McHugh J in *Burke* at 758 where he said that "the circumstances in which a court will order contribution are not closed".

[41] But despite that liberal approach it has also been recognised that a right to contribution will not arise simply because "the claimant's payment has benefited or relieved the defendant financially" (*Cockburn* at 633, *Burke* at 757, and *Ruabon Steamship Co v London Assurance* [1900] AC 6).

[42] The evidence and documents tendered in this case strongly suggest that the appellant, the respondent and the relevant local authority intended some sharing of sewerage infrastructure costs with respect to the development of each subdivision. That would appear to be particularly so with respect to Cowell on behalf of the appellant and the engineers of the Albert Shire Council. But that is not the end of the matter. As Baron Eyre recognised in *Dering* the application of the principle of contribution may be qualified (or varied) by contract. Further, as McHugh J observed in *Burke* at 757, "contribution will not lie simply because the respective liabilities of parties arise out of similar relationships or related transactions". (cf *Smith v Cock* [1911] AC 317).

[43] In this case, as the careful, detailed analysis by Davies JA demonstrates, the rights and obligations of the parties are to be found in various Deeds and decisions of the local authority with respect to the subdivisions. It is with the rights and obligations of the parties so created with which the court is now concerned. There is no doubt that the parties were involved in somewhat “related transactions” but that is not sufficient to give rise to an entitlement to contribution. The question is whether “common burdens” or “co-ordinate liabilities” were created by the Deeds and decisions; in other words were common obligations imposed on each of the appellant and respondent with respect to the subdivisions. In the end, after some hesitation and with some reluctance, I have come to the conclusion that the analysis of Davies JA is correct and no common burden was created with respect to the construction of sewerage pumping station SS35.

[44] Even giving full recognition to the propositions that the right to contribution depends upon substance not form, that the right to contribution will not be defeated by a technical approach, and that the circumstances in which contribution may be claimed are not closed, the circumstances here do not provide a sufficient basis for the application of the principle. The factual position is fairly analogous to that considered by the court in *Cockburn*; the burden on the appellant of constructing a pumping station of greater capacity than was needed for its own subdivision relieved the respondent of an actual (or at least potential) financial burden but at no time was there an enforceable burden on the respondent to provide such a facility. Further, the respondent never contractually, or otherwise, assumed a burden to contribute to what the appellant had already provided or was obliged to provide.

[45] Subject to what I have said above I agree with the reasons of Davies JA and with the orders he proposes.

[46] **HOLMES J:** I agree with the reasons for judgment of Davies JA and Williams JA and with the orders proposed by Davies JA.