CASE NOTES

Hotchin v New Zealand Guardian Trust Co Ltd: *Clarifying the Law on Contribution*

JACK ALEXANDER*

I INTRODUCTION

Hotchin v New Zealand Guardian Trust Co Ltd[1] is the latest decision to arise out of the collapse of Hanover Finance Ltd.[2] The Supreme Court clarified the law on contribution and the requirement that the liability of the two tortfeasors be in respect of the "same damage". In a 3–2 split, the Court held that what is required is not a comparison of the nature and extent of the liability of each party, but rather a broad analysis of the consequences of their respective actions.[3] The Supreme Court accordingly held that the High Court[4] and Court of Appeal[5] were wrong to strike out Mr Hotchin's claim for contribution. On the one hand, the decision — though limited by the nature of the pleadings — represents a welcome clarification to the law on contribution in New Zealand. On the other, it promises to increase the number of claims for contribution. This may give rise to problems in practice. The courts will need to develop safeguards to ensure that frivolous contribution claims[6] do not undermine the integrity of New Zealand's justice system.

II THE CASE

The general background to the collapse of Hanover Finance is by now well-known. Mr Hotchin was a director of Hanover Finance Ltd (Hanover Finance). The New Zealand Guardian Trust (Guardian

---

* BA/LLB(Hons) student at the University of Auckland. I would like to thank Professor Peter Devonshire for his helpful comments on an earlier draft of this case note. Any errors are my own.

1 *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 [*Hotchin* (SC)].

2 The decision of the Supreme Court means it is unlikely to be the last. See Part V below — Mr Hotchin will now be able to proceed to full trial.

3 At [125].

4 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 [*Hotchin* (HC)].

5 *Hotchin v New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 [*Hotchin* (CA)].

6 As many of the judges considered Mr Hotchin's claim to be. See Part V below.

Trust) was the trustee for the securities issued by Hanover Finance. The Financial Markets Authority (FMA) alleged that the prospectus issued by Hanover Finance contained an assortment of untrue statements and that these had resulted in loss to investors.[7] Proceedings were taken against Mr Hotchin by virtue of his position as a director.[8] Mr Hotchin joined Guardian Trust as a third party to the proceedings, arguing that it was liable to contribute to any compensation payable to the FMA.[9] Guardian Trust applied for a strike out, succeeding in both the High Court and the Court of Appeal. Mr Hotchin appealed to the Supreme Court.

The sole issue was whether Mr Hotchin had an arguable claim to contribution from Guardian Trust. Mr Hotchin argued that he was entitled to contribution under the Law Reform Act 1936 (the 1936 NZ Act) or, alternatively, in equity.[10]

For the purposes of the strike out, a number of points were accepted. First, it was accepted that Mr Hotchin was liable to the FMA or investors in tort.[11] This is a point that will be returned to later. Secondly, it was accepted that Mr Hotchin's liability was in respect of damage suffered as a result of his tort. Thirdly, it was accepted that Guardian Trust was liable to the FMA or investors in tort. This meant "that the case stood or fell on … whether Guardian Trust's liability to the FMA/investors [was] in respect of the 'same damage' as Mr Hotchin's liability" so as to render it liable for contribution.[12]

Mr Hotchin was alleged to have been responsible for the issuing and continued distribution of a misleading prospectus and the resulting damage.[13] In comparison, Guardian Trust was alleged to have been responsible for breaching a possible duty owed to "existing, rollover, and prospective investors in the securities to discover and report non-compliance with the trust deed".[14] In essence, the argument was that Guardian Trust had failed to "pull the plug" in time, and that it had contributed to the investors losing value in their deposits. Mr Hotchin claimed that the damage resulting from these two breaches was broadly the same — the loss in value of investments.

In the High Court, Winkelmann J found that the "damage resulting from the alleged breaches of duty by the directors and that

7 See Securities Act 1978, ss 34(1)(b) and 55(a)(ii). The alleged untrue statements primarily related to the liquidity of Hanover Finance.
8 See Section 56(c)(i).
9 Mr Hotchin settled with the FMA following the oral hearing in the Supreme Court. All of the judges agreed that this did not affect the claim for compensation (*Hotchin* (SC), above n 1, at [57]–[69] and [127]–[132]).
10 At [3].
11 Under s 55B(a) of the Securities Act 1978.
12 At [40].
13 At [32].
14 At [118].

resulting from the alleged breach of duty by Guardian Trust were not the same damage".[15] The Court of Appeal upheld Winkelmann J's judgment, noting that the obligations assumed by Mr Hotchin as a director were not of the same nature or extent to those of the trustees.[16] This was deemed to be fatal to the claim for contribution, both under statute and in equity. The Supreme Court disagreed.

III THE EXISTING LAW ON CONTRIBUTION

Where more than one person has contributed to the same damage, the rules of joint and several liability dictate that a plaintiff may choose to sue any or all of the wrongdoers who contributed to that damage.[17] This may result in injustice if the plaintiff chooses to sue only one of the wrongdoers.[18] The law corrects this injustice by allowing the wrongdoer who is sued a right of action in contribution against the other wrongdoers. Contribution is available on two bases. The first is statutory. Section 17 of the 1936 NZ Act sets out the requirements:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> ...
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
>
> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

15 *Hotchin* (SC), above n 1, at [43].
16 *Hotchin* (CA), above n 5.
17 Stephen Todd "Multiple Tortfeasors and Contribution" in Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 1279.
18 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350 per Kitto J.

As O'Regan J noted, the s 17(1)(c) "same damage" requirement has proven particularly "elusive" in the case law.[19] This is a view shared by commentators. Stephen Todd, writing after the Court of Appeal decision, noted that while the case law tends to support an examination of whether the "coordinate liability are of the same nature and extent", there is "a good argument" that that this focus is misplaced.[20]

Contribution is also available in equity. The difference between statutory contribution and equitable contribution is that the former is only available in respect of tortfeasors.[21] Equitable contribution was pleaded in the event that Mr Hotchin was not found liable in tort at the full trial. The issue received only limited discussion in the Supreme Court, and is subsequently dealt with in a summary manner below.

IV THE JUDGMENTS

The Majority View

The three majority judges (Elias CJ, Glazebrook and William Young JJ) wrote separate judgments. The judgments are notable not only for the conclusion that the words of the statute require only that liability be in respect of the "same damage", but for the approaches that the judges took to reach this decision. While the majority focused on interpreting the statute in light of its plain meaning, purpose and legislative history, the minority focused on the at times contradictory case law. The resulting 3–2 split is a testament to the effect that such different approaches may have.

1 Glazebrook J

Glazebrook J began by analysing the nature of the claims against Mr Hotchin as a director, before discussing the possible liability of Guardian Trust.[22] Her Honour then turned her focus to the scope of

19 *Hotchin* (SC), above n 1, at [258]. The New Zealand Law Commission has recommended reform in this area — see Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

20 Todd "Multiple Tortfeasors and Contribution", above n 17, at 1295. See also Stephen Todd "Multiple Causes of Loss and Claims for Contribution" (2013) 25 NZULR 960; and Ben Prewett "Wrongdoers' Rights to Contribution in Mixed Liability Cases" [2012] NZ L Rev 643.

21 Whereas the latter may encompasses non-tortious breaches — see, for example, *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726. Contribution under statute in New Zealand differs to that in Australia and the United Kingdom, where contribution is not limited to tortfeasors.

22 *Hotchin* (SC), above n 1, at [52].

the test for contribution under statute. She noted that case law on the subject has been "confusing, drawing fine distinctions that are hard to understand, let alone justify".[23] With this in mind, Glazebrook J placed emphasis on simplicity and the wording of the statute. The conclusion reached was that s 17(1)(c) requires only the same damage, rather than any further common liability.[24]

Glazebrook J's main concern with the narrow test favoured by the minority was that such an approach "would necessarily deny contribution from the directors in the situation where investors might choose … to bring an action against the trustee rather than one against the directors".[25] She considered that it would be "most unjust" if the trustee (the so-called secondary wrongdoer) could not claim contribution from the directors, should the investors successfully sue the trustee.[26]

Glazebrook J readily acknowledged that the broad scope for contribution will mean "that there will be much more scope for claims of contribution", which "could have the effect of drawing in more third party claimants to lengthy trials and perhaps lengthening trials for plaintiffs".[27] Her Honour considered that this was "the price necessary to secure conceptual simplicity and a just result".[28]

As a result, her Honour concluded that the "test for contribution under s 17(1)(c) of the 1936 NZ Act and that for equitable contribution is the same".[29]

2 Elias CJ

The Chief Justice's judgment was of a similar vein to Glazebrook J's, particularly as it related to contribution under the 1936 NZ Act. Citing *Royal Brompton Hospital NHS Trust v Hammond,*[30] a decision from the House of Lords, Elias CJ accepted that the "'safest course' is to apply the statutory language directly".[31] On this basis, it is left to the court to decide, as a question of fact and degree, whether the damage is "in substance" the same.[32] On the facts, her Honour considered that the damage was indeed the same — the loss of funds that were invested.[33]

---

23 At [71].
24 At [73].
25 At [71].
26 At [71].
27 At [72].
28 At [72].
29 At [97].
30 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397.
31 *Hotchin* (SC), above n 1, at [137].
32 At [139].
33 At [144].

The Chief Justice's judgment is also notable for its brief discussion of equitable contribution. Her Honour considered this to be an ancillary issue, primarily "because it is clear from the different views taken in this Court that the decision in this case is not likely to be the last word on this vexed topic".[34] With respect, and given the role of the Supreme Court, it is unfortunate that no conclusive decision was reached on this issue. It remains to be seen when the issue will next reach the Supreme Court.

3 William Young J

Young J agreed with Elias CJ on the issue of equitable contribution, and therefore focused solely on contribution under the Law Reform Act.[35] His Honour began by comprehensively examining the background to contribution under common law before the introduction of statute. He then traced the NZ Act to the Law Reform (Married Women and Tortfeasors) Act 1935 (1935 UK Act)[36] and the accompanying Law Revision Committee Report.

The most important finding to arise out of this inquiry was a comment by the Law Revision Committee that a right of contribution *might* be conferred:[37]

> … where the tort is not joint (ie, the same act committed by several persons) but where the same damage is caused to the plaintiff by the separate wrongful acts of several persons.

This was reflected in the 1936 NZ Act, with Young J concluding that:[38]

> The text of s 17(1)(c) provides that contribution depends upon two parties being liable in tort for the same damage and there is nothing in the statutory language used to suggest that such liability must also be additionally "common" or coordinate" (whether as a further requirement, or as a test for determining whether the same damage requirement is met).

Such a view appears consistent with s 5 of the Interpretation Act 1999, which states that the meaning of legislation must be ascertained from its text and in light of its purpose.

---

34 At [146].
35 At [160].
36 Law Reform (Married Women and Tortfeasors) Act 1935 (UK) 25 & 26 Geo V c 30, s 6.
37 *Hotchin* (SC), above n 1, at [163], citing Law Revision Committee *Third Interim Report* (Cmd 4637, 1934).
38 At [184].

The Minority View

Arnold and O'Regan JJ disagreed with the majority over both statutory contribution and equitable contribution. O'Regan J delivered the joint judgment.

The reasoning of the minority was similar to that of the High Court and the Court of Appeal. The primary emphasis was on case law, although it was accepted that this had proven "somewhat elusive".[39] Of particular focus was *Royal Brompton Hospital NHS Trust v Hammond* and the position under the Civil Liability (Contribution) Act 1978 (UK) (the 1978 UK Act). In respect of these authorities, the minority concluded that, "in order to establish that parties are liable for the same damage, it is necessary to show they have a common liability to the same plaintiff".[40] With respect, the 1978 UK Act is of limited value in the New Zealand legal landscape — the 1936 NZ Act was based on the 1935 UK Act. The minority also failed to deal with the comments by the Law Revision Committee regarding the 1935 UK Act.[41]

The minority expressly acknowledged that "some of the cases provide support" for a broad approach to the "same damage" requirement.[42] Given the conflicting nature of the cases, with respect, the issue may have been better resolved by reference to the plain language of the statute.

It was also conceded that, if the damage caused by Mr Hotchin was defined generically as "lost money", then it would be reasonably arguable that Guardian Trust had caused the same damage.[43] Given the broad, remedial purpose of the NZ Act, this approach might be preferable.

V WHERE TO NEXT FOR HOTCHIN?

The judgment in *Hotchin v New Zealand Guardian Trust Co Ltd* is far from the end of the road for Mr Hotchin. The strike out determination proceeded on a number of assumptions.[44] It was accepted that Mr Hotchin would not succeed at full trial without proving his liability in tort. This drew concern from a number of the judges, given Mr

39 At [259].
40 At [287]. A similar view was taken as regards equitable contribution.
41 See the discussion of Young J's judgment above.
42 At [263].
43 At [263].
44 See Part II above.

Hotchin's prior statements to the contrary.[45] In this respect, Elias CJ noted that his claim might be viewed with "some scepticism",[46] while Glazebrook J thought this inconsistency would prove "hard to reconcile" at trial.[47]

Another question that will be left for full trial is whether it is just and equitable that Guardian Trust be ordered to contribute. Of particular concern in this regard are the respective roles of Mr Hotchin as director, and Guardian Trust as trustee for the securities. The particulars supplied by the parties make it clear that Guardian Trust relied on the information supplied to it by Hanover Finance, and the accuracy (or lack thereof) of its contents.[48]

Glazebrook J was minded to leave the door open for future strike outs. More specifically, her Honour suggested that Guardian Trust might wish to file strike out applications dealing with whether the claim for contribution was an abuse of process, and whether, in all the circumstances, the Court should simply exempt Guardian Trust from liability.[49]

Young J was of the opinion that there might be cases where no contribution will be ordered because there are primary wrongdoers and secondary wrongdoers.[50] This is another possibility for dealing with cases such as Mr Hotchin's, although Glazebrook J preferred to deal with the issue under the umbrella of what was "just and equitable".

VI CONCLUSION

The decision in *Hotchin v New Zealand Guardian Trust Co Ltd* provides useful indicators of how the court may deal with the increased scope for contribution claims. The judgment is welcome insofar as it clarifies the law on contribution, and does so in light of the plain meaning of the statute. It remains to be seen whether these mechanisms are adequate, although they seem to confer a broad discretion on the courts. As the majority readily accepted, the decision is likely to increase the availability of contribution, and therefore the cost and scope of litigation. For Mr Hotchin, the future is less certain.

45 See, for instance, Hamish Fletcher "FMA wouldn't have won at trial: Hanover directors" *The New Zealand Herald* (online ed, Auckland, 6 July 2015).
46 *Hotchin* (SC), above n 1, at [132].
47 At [68].
48 At [23].
49 At [98].
50 At [225]–[228].