# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors* [2017] QSC 75 |
| PARTIES: | **AKLIA HOLDINGS PTY LTD ACN 116 390 295**<br>(plaintiff)<br><br>**v**<br><br>**THE CARTER GROUP PTY LTD (IN LIQ) ACN 127 625**<br>(first defendant)<br>**ADVISOR SOLUTIONS PTY LTD ACN 156 181 609**<br>(second defendant)<br>**SUCCESSION & ESTATE PLANNERS PTY LTD ACN 110 596 891**<br>(third defendant)<br>**THE TOPAZ CORPORATION PTY LTD ACN 144 046 766**<br>(fourth defendant)<br>**PETER ESAU SA**<br>(fifth defendant)<br>**CRAIG STEVEN BALL**<br>(sixth defendant)<br>**SATVIR SINGH BIRK**<br>(defendant by counterclaim) |
| FILE NO/S: | SC No 12296 of 2014 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 10 May 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 August 2016, 27 September 2016 |
| JUDGE: | Bond J |
| ORDERS: | **The orders of the Court are that:**<br>**1. As to the amended application filed on behalf of the defendants on 28 July 2016:**<br>**(a) [43B], [43C], [44](a) and [44](b)(i) of the plaintiff's amended statement of claim are struck out, with leave to re-plead; and**<br>**(b) otherwise the application is dismissed.**<br>**2. As to the application filed by Aklia on 18 April 2016 and the application filed by Mr Satvir Birk on 16 August 2016:** |

**(a) [138B](f), [139](f), [147B](f) and [148](f) of the defendants' amended counterclaim are struck out, with leave to re-plead; and**

**(b) otherwise the applications are dismissed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – GENERALLY – where the plaintiff pleads conversion of shares and units – where the defendants seek summary judgment in respect of parts of the statement of claim – whether an action in conversion is maintainable in respect of intangible rights – whether the plaintiff has no real prospect of succeeding on that part of the plaintiff's statement of claim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – GENERALLY – where the plaintiff pleads loss of a valuable chance – where the defendants seek summary judgment in respect of parts of the statement of claim – where the defendants argue that the pleaded contentions are factually unsustainable – whether the plaintiff has no real prospect of succeeding on that part of the plaintiff's statement of claim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – GENERALLY – where the defendants plead by way of counterclaim that conduct between the directors and shareholders of a company was "in trade or commerce" – where the plaintiff and defendant by counterclaim seek summary judgment in respect of parts of the counterclaim – where the plaintiff and defendant by counterclaim argue that conduct internal to the company cannot be "in trade and commerce" – whether the defendants have no real prospect of succeeding on that part of the counterclaim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – GENERALLY – where the defendants as shareholders claim damages by way of counterclaim – where the plaintiff and defendant by counterclaim seek summary judgment in respect of parts of the counterclaim – where the plaintiff and defendant by counterclaim argue that the claim for damages is a claim which can only be brought by the company by virtue of the *Prudential* principle – whether the defendants have no real prospect of succeeding on that part of the counterclaim

*Uniform Civil Procedure Rules* 1999 (Qld), r 135, r 171, r 293

*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594

*Ekes v Commonwealth Bank of Australia* (2014) 313 ALR 665
*Ferguson v Eakin* [1997] NSWCA 106
*Gould v Vaggelas* (1984) 157 CLR 215
*Harris v Milfull* (2002) 43 ACSR 542
*Hearn v O'Rourke* (2003) 129 FCR 64
*Isakka v South Australian Asset Management Corporation* [2002] QCA 549
*Johnson v Gore Wood & Co* [2002] 2 AC 1
*Mercedes Holdings Pty Ltd v Waters (No 3)* [2011] FCA 236
*New Cap Reinsurance Corporation Ltd v Daya* (2008) 66 ACSR 95
*OBG Ltd v Allan* [2008] AC 1
*Parsons v The Queen* (1999) 195 CLR 619
*Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204
*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204
*Shaker v Al-Bedrawi* [2003] Ch 350
*Telecom Vanuatu Ltd v Optus Networks Pty Ltd* [2005] NSWSC 951
*Thomas v D'Arcy* [2005] 1 Qd R 666
*Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] SGCA 13

COUNSEL: C C Heyworth-Smith QC, with N Derrington, for the plaintiff
R N Traves QC, with M May, for the second, third, fourth, fifth and sixth defendants
S Cooper for the defendant by counterclaim

SOLICITORS: TVP Law for the plaintiff
Nathan Lawyers for the second, third, fourth, fifth and sixth defendants
Potts Lawyers for the defendant by counterclaim

**Background**

[1] The first defendant (**TCG**) was the corporate trustee of The Carter Group Trading Unit Trust (**the TCG Unit Trust**). TCG conducted the business of providing financial planning and insurance services to clients. In order to do so, TCG was an authorised representative of Professional Investment Services Pty Ltd (**PIS**), which held the necessary Australian Financial Services Licence. Two of TCG's directors, Mr Satvir Birk and Mr Ball, were sub-authorised representatives of PIS.

[2] TCG was placed into liquidation by order of the Federal Court on 11 September 2015.

[3] TCG, for all relevant purposes, had as its shareholders three companies, each of which was a trustee of a family trust. Where appropriate I will refer to the three shareholders collectively as the shareholder companies. The shareholder companies held the shares in TCG and the units in the TCG Unit Trust in effectively equal portions. The three shareholder companies were:

(a) the plaintiff (as trustee for the Aklia Family Trust) (**Aklia**);

(b) the third defendant (as trustee for the Ball Family Trust) (**the Ball Trustee**); and

(c) the fourth defendant (as trustee for the Sa Family Trust) **(the Sa Trustee**).

[4] In order to facilitate the business operated by TCG as trustee for the TCG Unit Trust, the shareholder companies were party to a Unit Holders and Shareholders Agreement (**the Agreement**), which was originally entered into on about 1 February 2008. Amongst other things, the Agreement provided:

(a) By its recitals, that Aklia, the Ball Trustee and the Sa Trustee[1] were unit holders in the TCG Unit Trust and shareholders in TCG, and they–

(i) intended that the Agreement would govern their relationship in regard to the TCG Unit Trust and TCG; and

(ii) wished –

> to record the commercial terms of their agreement for the funding, activities and management of the [TCG Unit Trust] and [TCG] on the terms and conditions set out in this Agreement.

(b) by clause 3:

> 3 Objectives
>
> 3.1 Objectives
>
> The objectives of the Parties in entering this Agreement are to:
>
> (a) outline the decision making procedures for the Board and the Advisory Committee; and
>
> (b) ensure that the Business is developed and managed in such a manner as to facilitate the continued development of the Business including achieving maximum profitability.
>
> 3.2 Carrying out objectives
>
> To carry out the objectives, the Parties must:
>
> (a) be just and faithful and provide full information to each other in relation to the affairs and activities of the Business;
>
> (b) do or cause to be done, or not do or not cause to be done, as the case may be, all things necessary or desirable to carry out this Agreement including causing their nominees to the Board to carry out this agreement;
>
> (c) not unreasonably delay any action, approval, direction, determination or decision required under this Agreement or for the conduct of the Business.

(c) By clause 4, identification of the shareholding in the TCG Unit Trust and the shareholding in TCG;

(d) By clause 5, acknowledgment of the existence of loans accounts between each of the shareholders and TCG and a statement of a restriction on TCG's issuing further units or shares;

(e) By clause 6, terms concerning the composition of TCG's Board (**the Board**), and representation on, and voting in, unit and shareholders meetings;

(f) By clauses 7 to 10, terms concerning the powers and authority of the TCG Board to manage the activities of TCG and the business of providing financial planning and insurance services run by TCG, and its obligation concerning the preparation of financial reports and the maintenance and audit of accounts and records of the TCG Unit Trust;

(g) By clause 11, that the net income of the TGC Unit Trust would be distributed monthly unless otherwise agreed by the Board, subject to the stated duty that the Board was obliged to ensure that it adopted a policy of not distributing profit until the Board

[1] There was another unit holder and shareholder, but it is not necessary to discuss the involvement of that person.

believed that to do so was consistent with prudent financial management having regard to certain specified considerations;

(h) By clauses 12 to 15, detailed terms covering the circumstances in which the parties were permitted to transfer their units and shares, including rights of pre-emption to the others in the event that a party wanted to transfer;

(i) By clause 19, terms defining what would constitute an "event of default", which also provided that the consequences of committing such an event included (i) the defaulting party was deemed to notify that it wished to transfer its units and shares at market value, and (ii) a pre-emption right to the other parties in relation to that intention.

[5] TCG had as its directors, pursuant to the Agreement, persons said to be associated with the three shareholder companies,[2] namely –

(a) Mr Satvir Birk, who was also the defendant by counterclaim, and who was said to be Aklia's nominee to the board of TCG;[3]

(b) Mr Ball, who was also the sixth defendant, and who was a director of the Ball Trustee; and

(c) the fifth defendant (**Mr Sa**), a director of the Sa Trustee.

[6] Where appropriate I will refer to the Sa Trustee, the Ball Trustee, Mr Sa and Mr Ball, collectively, as the defendants.

[7] Aklia's claim in this proceeding arises because on about 6 November 2014, Mr Sa and Mr Ball caused it to be deprived of its shares in TCG, and its units in the TCG Trust. They did so by causing the shares and the units which had been held by Aklia to be transferred in equal shares to the Sa Trustee and the Ball Trustee. There is no dispute that this transfer happened.

[8] Aklia's case is essentially that the transfer was done wrongfully, without its consent, and caused it loss in many ways. Aklia claims:

(a) orders under the *Corporations Act* 2001 (Cth) correcting the share register of TCG and requiring relevant defendants to provide the requisite notices to ASIC;

(b) as against the Sa Trustee and the Ball Trustee –

(i) a declaration that Aklia is entitled to the shares and units which were wrongly transferred, a declaration that Sa Trustee and the Ball Trustee hold the relevant shares and units (and any benefits which have accrued to them by reason of the transfers) on trust for Aklia, and the taking of an account of any benefits which have accrued to them by reason of the transfer;

(ii) damages for breach of the Agreement and/or equitable compensation;

(c) as against Mr Sa and/or Mr Ball –

(i) a declaration that Aklia is entitled to the shares and units which were wrongly transferred;

(ii) a declaration that they unlawfully caused the shares to be transferred in the way they were;

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[2] That Mr Ball and Mr Sa were directors in this way was not disputed. It was not controversial that a Parminder Birk was a director of Aklia (and its sole shareholder), but there was a dispute on the pleadings as to whether Mr Satvir Birk was a director of Aklia.

[3] Although there was no dispute that Mr Satvir Birk was a director of TCG, Aklia disputed whether he could be properly characterised as its nominee to its board.

(iii) a declaration that they contravened s 182 of the *Corporations Act* by improperly using their positions as directors of TCG to gain an advantage for the Sa Trustee and the Ball Trustee by virtue of the transfers;

(iv) damages for conversion.

[9] The defendants' defence is essentially that the transfer of the shares and the unit was authorised by the terms of the Agreement in the circumstances which happened. Briefly, the defendants' case that the transfer was authorised ran as follows:

(a) Mr Satvir Birk was to be regarded as Aklia's nominee to the TCG board: counterclaim at [13].

(b) On 14 December 2007 TCG entered into a Corporate Authorised Representative Agreement (**the CAR Agreement**) with PIS, and, relevantly, Mr Satvir Birk, Mr Ball and Mr Sa (who gave PIS a guarantee and indemnity in relation to the performance of the agreement by TCG): counterclaim at [9] to [10]. The CAR Agreement set out various obligations requiring proper performance and adherence to professional standards. A second CAR agreement was entered into in March 2014, but without, relevantly, Mr Satvir Birk: counterclaim at [122].

(c) Between 2009 and 2013, Mr Satvir Birk engaged in improper conduct and transactions whilst providing services to clients of TCG, including:

(i) the misappropriation of funds from client accounts: counterclaim at [28];

(ii) causing clients to purchase investments at above market prices: counterclaim at [23], [37], [58], [65], [70], [76], [83], [89], [104];

(iii) causing clients to breach self-managed superfund rules: counterclaim at [43], [48]-[53], [58], [65], [70], [76], [83], [95]-[99], [104];

(iv) making unauthorised transfers not for the benefit of the client: counterclaim at [41]; and

(v) causing money to be transferred to accounts which were not those of the client: counterclaim at [32].

(d) His actions breached the CAR Agreement, in various respects including because it caused TCG to fail to carry out its duties professionally and with due care and skill: e.g. counterclaim at [26](d) and [30](g).

(e) The failure of Aklia –

(i) to disclose (or to cause Mr Satvir Birk to disclose) to the defendants the improper conduct and transactions by Mr Satvir Birk; and

(ii) to cause Mr Satvir Birk as its nominee to the TCG board to carry out the Agreement (essentially by causing him not to engage in the improper conduct and transactions in which he did engage),

amounted to breaches by Aklia of clause 3.2(b) of the Agreement and an "event of default" under the Agreement, thereby engaging the pre-emption provisions of the Agreement: counterclaim at [123] to [134].

(f) Steps occurred in performance of the pre-emption provisions, which meant that Aklia became obliged to make an offer of its shares and units in TCG at market value to the Sa Trustee and the Ball Trustee, market value having been determined by an independent valuer to be $nil: counterclaim at [150] to [177].

(g) The Sa Trustee and the Ball Trustee accepted the offer to purchase the shares and the units at the value so set, which obliged Aklia to transfer them: counterclaim at [178] to [179]. Aklia defaulted in so doing, which then permitted the Sa Trustee, the Ball Trustee, Mr Sa and Mr Ball to take the requisite steps to effect the transfer of the shares and the units: counterclaim at [180] to [182].

[10] The counterclaim also advanced a damages case under the *Trade Practices Act* 1974 (Cth) (**the TPA**) and Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) (**the ACL**) and for breach of the Agreement.

[11] As to the statutory cause of action, essentially the case was as follows:

(a) Aklia's conduct in failing to disclose to the defendants the improper conduct and transactions by Mr Satvir Birk was conduct "in trade or commerce" within the meaning of –

(i) section 52 of the TPA (in relation to conduct before 1 January 2011); and

(ii) section 18 of the ACL (in relation to conduct after 1 January 2011): see counterclaim at [136A] to [136].

(b) Aklia's conduct was misleading and deceptive or likely to mislead or deceive in contravention of those sections because in the context a reasonable person would have expected Aklia to make the relevant disclosures: counterclaim at [137].

(c) If Aklia had not engaged in the conduct –

(i) steps would have been taken to prevent the improper conduct and transactions by Mr Satvir Birk from occurring;

(ii) compensation payable would have been an amount which TCG could have paid;

(iii) PIS would not have terminated TCG's status as an authorised representative and would have continued to pay commissions to TCG;

(iv) TCG would not have been wound up in insolvency;

(v) Mr Sa and Mr Ball would not have had the liability which they had under the CAR Agreement or the Second CAR agreement to indemnify PIS for losses arising from Mr Satvir Birk's conduct;

(vi) The contemplated transaction whereby TCG would have sold the whole of its client book for $3.41 million would have proceeded to completion: see counterclaim at [138A].

(d) Because of Aklia's contravening conduct the defendants suffered loss in that –

(i) the contemplated transaction whereby TCG would have sold the whole of its client book for $3.41 million did not proceed;

(ii) by the time the defendants became aware of the improper conduct and transactions by Mr Satvir Birk in about March 2014, the claims for compensation from clients who were the victims of conduct were so large that TCG was unable to pay them;

(iii) the fact that the conduct became known to PIS via complaints about the conduct rather than voluntary disclosure made it more likely that PIS would terminate TCG's status as authorised representative, and that is what happened, and PIS ceased paying commissions to TCG;

(iv) TCG was wound up in insolvency;

(v) Mr Sa and Mr Ball are liable to indemnify PIS for losses arising from all of Mr Satvir Birk's improper conduct under the CAR Agreement and the Second CAR Agreement: see counterclaim at [138B].

(e) The Sa Trustee and the Ball Trustee were entitled to claim damages from Aklia for misleading conduct, the particulars of which were –

(i) the value of the business of TCG, which was $3.94m in the premises of the contemplated sale of TCG's client book, divided according to the Sa Trustee and the Ball Trustee's respective shareholding in TCG; or

(ii) alternatively, the amounts that the Sa Trustee and the Ball Trustee would have received if the contemplated sale of TCG's client book had proceeded, being a total of approximately $656,666 each (approximately $258,000 each by way of payment of beneficiary loans and approximately $398,666 each by way of distribution of the sale proceeds): see counterclaim at [140] and [189].

(f) Mr Ball and Mr Sa were entitled to claim damages from Aklia for misleading conduct, the particulars of which were the amount which they were liable to pay PIS under the CAR Agreement or the Second CAR Agreement to indemnify PIS in respect of losses arising from Mr Satvir Birk's improper conduct and transactions: see counterclaim at [140].

(g) Mr Satvir Birk was a person involved in Aklia's contravening conduct and the defendants were entitled to claim damages from him pursuant to statute: counterclaim at [141] to [143].

(h) But Mr Satvir Birk was also a person directly liable to the defendants for misleading conduct in breach of –

(i) Section 38 of the *Fair Trading Act* 1989 (Qld) (to the extent that such conduct occurred before 1 January 2011); or

(ii) Section 18 of the *Australian Consumer Law (Queensland)* (as defined in s 16 of the Fair Trading Act 1989 (QId)) (the State ACL) (to the extent that such conduct occurred after 1 January 2011),

the case theory for which was essentially the same as that advanced in relation to Aklia: counterclaim at [144] to [149].

[12] As to the cause of action for damages for breach of the Agreement, the case was advanced by the Sa Trustee and the Ball Trustee. The argument was that if Aklia had performed its obligations, the impugned conduct by Mr Satvir Birk would not have occurred, the adverse consequences already mentioned would have been avoided, and the sale of TCG's client book would have proceeded to completion: counterclaim at [187A] to [189]. The damages claimed were particularised in the manner identified at [11](e) above.

**The applications before me**

[13] There were three applications for determination by me.

[14] First, a challenge to parts of the statement of claim. This took the form of an application by the defendants for summary judgment pursuant to r 293 UCPR in respect of certain parts of Aklia's statement of claim, or alternatively an order pursuant to r 171 UCPR that the paragraphs be struck out.

[15] Second, two challenges to the counterclaim, namely:

(a) an application by Aklia for summary judgment pursuant to r 293 UCPR or alternatively an order pursuant to r 171 UCPR striking out the counterclaim of the defendants so far as it claims damages against Aklia.

(b) an application by Mr Satvir Birk for summary judgment pursuant to r 293 UCPR on the counterclaim brought against him by the defendants.

**The principles relevant to all of the applications**

[16] The principles which apply to the resolution of the applications are not controversial.

[17] The approach which should be taken in relation to a defendant's application for summary judgment (which also applies to an application advanced by a person in the position of defendant to a counterclaim) was concisely summarised by Mullins J in *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2012] QSC 211 at [54] in these terms:

> Under r 293(2) of the UCPR, the two conditions of which the court must be satisfied before it can give judgment for a defendant is that the plaintiff has no real prospect of succeeding on its claim and there is no need for a trial of the claim. Although r 293 (and its counterpart r 292) are modern procedural rules for applying for summary judgment in the context of the philosophy of the UCPR found in r 5, authoritative statements about exercising caution in terminating a proceeding summarily remain applicable: *Spencer v Commonwealth* (2010) 241 CLR 118 at [24] and [60], *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 at [29], and *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114 at [80]–[81]. Although the provision considered in *Spencer* was that applying in the Federal Court where the test for summary judgment is "no reasonable prospect," rather than "no real prospect," the comments in the judgments in *Spencer* about the exercise of caution in dismissing an action summarily were intended to apply generally in respect of the procedure of summary judgment.

[18] And, in relation to the power to strike out, I observed in *Lee v Abedian* [2016] QSC 92 at [38] – [39] that (footnotes inserted) –

> … the power to strike out is to be used sparingly and only in clear cases: *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 129 to 130. The power cannot be exercised "once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it": *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J.
>
> However … the Court will not shrink from striking out a pleading which is defective because it does not disclose a reasonable cause of action, has a tendency to prejudice or delay a fair trial, contains allegations which are unnecessary [*A v Ipec Australia Ltd* [1973] VR 39 at 43 per Menhennitt J; *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd* [2014] QSC 205 at [27] to [30] per Jackson J.], scandalous, vexatious or embarrassing [*Robert Bax & Associates v Cavenham Pty Ltd* [2011] QCA 53 at [16] per White JA (with whom McMurdo P and Fraser JA agreed)], or which is otherwise an abuse of the processes of the Court [See, generally, *Radisich v McDonald* (2010) 198 IR 244 at 251; [2010] FCA 762 at [20] and *AED Oil Ltd v Back* [2009] VSC 158 at [7] to [9] per Judd J.].

**The challenge to the statement of claim**

[19] The challenge to the amended statement of claim related to:

(a) [33A], [33B], and [44A] (**the conversion case**);

(b) [43B], [43C] and [44](a) (**the loss of a chance case**); and

(c) [44](b)(i) (**the undistributed profit case**).

[20] I will deal with each argument under a separate heading below.

*The challenge to the conversion case*

[21] The challenge to the pleaded cause of action in conversion is founded on the proposition that the tort of conversion requires a dealing with a chattel to which a plaintiff has a right to immediate possession. As Dixon J stated in *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 229:

> The essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel.

[22] The defendants contend that no different principle applies in the context of a case in which the impugned dealings are dealings with intangible rights such as cheques, shares or units in a unit trust. In such cases if a cause of action in conversion is to be arguable, a plaintiff must still identify a chattel embodying the intangible rights, establish that it owned or had an immediate right to possess that chattel; and establish that the defendants dealt with the chattel in a manner repugnant to the plaintiff's rights, in such a way as caused the plaintiff loss.

[23] Authority supports the defendants' contention.

[24] In *Ferguson v Eakin* [1997] NSWCA 106 at p 7, Cole JA (with whom Meagher JA agreed) referred to the above quoted observations by Dixon J and held (citations omitted):

> Conversion consists of a positive wrongful act of dealing with goods in a manner inconsistent with the rights of the owner. As Dixon J said: "The essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel." Further, there can be no conversion of a chose in action: the subject matter of an action in conversion must be goods or property capable of possession or being subject to a right to possession.

[25] Similarly, in *Isakka v South Australian Asset Management Corporation* [2002] QCA 549, McPherson JA (with whom Jerrard JA and Dutney J agreed) held (at [14]) that it was settled law that a claim for damages for conversion is available only for conversion of a chattel to which the plaintiff has a right of immediate possession.

[26] In *OBG Ltd v Allan* [2008] AC 1, the House of Lords took the same approach: see the speeches by Lord Hoffman at [94] to [107], Lord Walker at [271] and Lord Brown at [321]. A minority took a contrary view: see per Lord Nicholls at [220] to [240] and Baroness Hale at [304] to [305] and [308] to [317].

[27] Support is also found in the decision of the High Court in *Parsons v The Queen* (1999) 195 CLR 619 at 631-632, where Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ cited with approval observations made by Diplock LJ concerning how the tort of conversion applies in relation to cheques:

> In addition, in respect of wrongful dealings by a third party with those instruments (including dealings with bank cheques), for example dealings by a collecting bank, the "true owner" would have its rights for damages in an action for conversion of the chattels in question. In *Maifani & Co Ltd v Midland Bank Ltd*, a fraudulent employee of the plaintiff company obtained through the medium of the collecting bank payment to himself of a cheque drawn by the plaintiff on its bank in favour of another party as payee. **Diplock LJ observed that it might seem odd that the basis of the liability of the collecting bank was that a piece of paper on which the cheque was written was "goods" belonging to the plaintiff and that the act of the collecting bank in accepting possession of that piece of paper from the employee, in presenting it to the drawee bank and in accepting payment of it, constituted an unjustifiable denial by the collecting bank of the title of the plaintiff to its goods, from which damage flowed. His Lordship pointed out that this result, however, was the common law of England. It was the consequence of the application of the historic origin of the tort of conversion to negotiable instruments by treating them as "goods".**
>
> This development of the common law by treating as the chattel converted the piece of paper representing the cheque and the value of the chattel converted as the money received in payment of the cheque suggests some weakness in the earlier analysis, by such authorities as *East*, that securities, including bills of exchange, which concern mere choses in action were not the subject of larceny at common law because they were of no intrinsic value and did not import any property in possession of the person from whom they were taken. However that may be, there is every reason not to reinstate now such an analysis when construing the terms of the Crimes Act, in particular the definition of "property" in s 71(1).

[28] The defendants argue that the application of these authorities is fatal to Aklia's pleaded case in conversion because the claim as pleaded is based on a dealing with intangible rights (namely, the rights associated with the shares in TCG and the units in the TCG Unit Trust), but not on any dealings with chattels in respect of which Aklia says it has a right to immediate possession.

[29] The defendants' characterization of the statement of claim is correct.

[30] The things which are alleged to have been converted are "shares and units" (see statement of claim at [33A], see also [33B]). The conduct said to constitute the conversion is "effecting the share transfer…and the unit transfer, in the manner pleaded in [26] to [33] herein" (in [33A]). The conduct pleaded in [26] involves "causing there to be registered in the share register of [TCG]" and "causing there to be recorded in the unit holders' register (or such other record) of the [TCG Trust]" transfers of the shares and units. The conduct pleaded in [27] involves "caus[ing] the company register kept by [ASIC] to be changed". But Aklia does not claim to have a right to immediate possession to the share register, the unit holder's register, or ASIC's company register. The only relevant things to which Aklia claims to be entitled are the shares and the units (see [25A]) and, as noted above, they are the things which are alleged to have been converted. But there is no allegation of a dealing with a chattel which embodies Aklia's rights *qua* share and unit holder.

[31] Aklia accepted that the authorities I have mentioned were against it. Aklia contended, however, that it was not appropriate to strike out the paragraphs pleading the cause of action in conversion. Its submission was that the matters adverted to in the dissenting judgments in *OBG Ltd v Allan* were a sufficient basis to conclude that a reasonable argument might be available at appellate level. Aklia contended that if otherwise I formed the view that a trial in this proceeding should proceed in respect of Aklia's claim to damages, then there would be utility in permitting the cause of action in conversion to remain: cf *Wickstead v Browne* (1992) 30 NSWLR 1 at 5.

[32] In other words, Aklia submitted that I should take a similar approach to that taken by White J in *Telecom Vanuatu Ltd v Optus Networks Pty Ltd* [2005] NSWSC 951 in which his Honour held in relation to a strike out of a pleaded conversion case in respect of intangible property:

> [25] In this case, the question comes down to what is the advantage in the preparation for trial, or the conduct of the trial, in striking out the relevant parts of the Summons, weighed against the disadvantage of a new trial if the Court of Appeal or the High Court were to reconsider the essential elements of the tort of conversion and ordered a new trial on that issue. A court at first instance should be wary of summarily disposing of a claim, where there is a reasonable possibility that the law might be developed at an appellate level to uphold the claim. ….
>
> [26] In this case, Telecom Vanuatu raises plausible arguments as to why, at an appellate level, it might be found that the tort of conversion should not be limited to dealings in chattels. I will not attempt to analyse the merits of the argument as it might be presented at an appellate level. That would involve a wider and deeper analysis than was advanced before me. It would necessarily include a consideration of how such a wider tort of conversion would sit with the existing "economic torts" of interference with business relations. I cannot say that at an appellate level, even if it be the level of the High Court, it is not reasonably possible that Telecom Vanuatu's argument might succeed. The marginal utility in striking out the claim is substantially outweighed by the additional costs the parties would incur if Telecom Vanuatu's argument succeeded and a new trial was necessary. It has not been demonstrated that the parties will be put to any substantially greater expense in preparing for the issues raised by the restitutionary cause of action than they would incur in any event in preparing the remaining issues for trial.

[33] I am bound to follow *Isakka v South Australian Asset Management Corporation*, and I must follow *Ferguson v Eakin* unless I am persuaded that it is 'plainly wrong'.[4] Further, I would regard *OBG Ltd v Allan* and *Parsons v The Queen* as powerful reasons to take the same approach. If the only cause of action to recover damages advanced by Aklia in this proceeding was the cause of action in conversion, I would accede to the defendants' application. However in this proceeding the conversion case is not the only cause of action. In light of the other issues which arise in this proceeding, I think the approach which White J took in *Telecom Vanuatu* is warranted. For that reason I would dismiss the defendants' application so far as it relates to the conversion case.

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4 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

*The other challenges to the statement of claim*

[34] The two other areas of Aklia's pleading which were attacked were the loss of chance allegations (statement of claim [43B], [43C] and [44](a)) and the undistributed profit allegations (statement of claim [44](b)(i)). They may conveniently be dealt with together.

[35] It is appropriate first to quote the parts of the statement of claim which are impugned:

> 43A. In the premises, by reason of the share transfer in [TCG] and the unit transfers, [Aklia] lost the ability:
>
> (a) To exercise any control, by reason of its voting power in [TCG], over
>
> (i) The distribution of funds from [TCG];
>
> (ii) The management of the sale of the business run by [TCG]; and
>
> (iii) The way in which debts of [TCG] were paid;
>
> (b) To exercise its power to obtain information about the financial position of [TCG]; and
>
> (c) To compel [TCG] to discharge its obligations as trustee of the Unit Trust properly, and for the benefit of [Aklia], [the Ball Trustee] and [the Sa Trustee] jointly.
>
> 43B. But for the occurrence of the matters pleaded in paragraph 43A herein:
>
> (a) [Aklia] would have been able to exercise its powers to obtain information about the financial position of [TCG] throughout the period from 6 November 2014 to 11 September 2015; and/or
>
> (b) [Aklia] would have been able to exercise its powers and ability as a shareholder to cause [TCG] to pay its debts, as and when they fell due, including to the Commissioner of Taxation; and/or
>
> (c) [Aklia] would have been able to cause [TCG] to sell the business of TCG; and
>
> (together, **the consequences**)
>
> (d) it is more likely than not that [TCG] would not have been placed into liquidation (**the effect on [TCG]**)
>
> 43C. As a result of the consequences and the effect on [TCG], as pleaded in paragraph 43B herein, [Aklia];
>
> (a) lost the chance to prevent [TCG] from being placed into liquidation, which liquidation occurred on 11 September 2015;
>
> (b) lost the chance to recover, from [TCG], distributions from the Unit Trust which had been assigned to [Aklia] but which had been recorded in the books of [TCG] as a loan from [Aklia] to [TCG], prior to the liquidation of [TCG]; and
>
> (c) as a result, has lost all prospect of recovering from [TCG], distributions from the Unit Trust which had been assigned to [Aklia] but which had been recorded in the books of [TCG] as a loan from [Aklia] to [TCG], prior to the liquidation of [TCG].
>
> 44. Further in the premises, by reason of the share transfers in [TCG] and the unit transfers:
>
> (a) [Aklia] suffered loss and damage being the amount which [Aklia] could have received but for the matters pleaded in paragraph 43C above, calculated as follows:
>
> (i) $270,160.81 being the opening balance of Unpaid Present Entitlements owing to [Aklia] as at 30 June 2013;
>
> (ii) plus $111,283.00 being [Aklia]'s one third share of profit available for distribution to unit holders for the year ended 30 June 2014;
>
> (iii) less $107,500.00 being the total distributions in fact received by [Aklia] from the Unit Trust; and
>
> (iv) coming to $273,943.81, being the closing balance of Unpaid Present Entitlements as at 30 June 2014; and
>
> (b) [Aklia] suffered loss and damage, being;

(i) [Aklia]'s one third share of profit available for distribution to beneficiaries for the period ended 30 June 2015; and

(ii) [Aklia]'s one third share of the total sum of distributions made to [the Ball Trustee] and [the Sa Trustee] between 6 November 2014 and 30 June 2015; and

Particulars

[Aklia] is unable to particularise any further the value of the one third share of profit or distributions that would have been available for distribution or which would have been distributed to [Aklia], but for the conduct of [Mr Sa] and/or [Mr Ball], but will provide further particulars after disclosure and the exchange of expert evidence.

(c) [Aklia] is entitled to and claims against [the Ball Trustee] and [the Sa Trustee] (for breach of contract and on account of it holding the shares and units on trust), damages and/or equitable compensation together with compound interest thereon, or, in the alternative, simple interest, at the rate of 7% per annum from 6 November 2014 to judgment in this proceeding.

[36] The defendants' first challenge to these paragraphs was that I should find that the contentions in [43B](b), [43B](c) and [43B](d) were factually unsustainable. If those allegations were summarily determined in the defendants' favour then the consequential propositions in [43C] and [44](a) would fall away.

[37] As to [43B](b), the defendants contended:

(a) TCG's 2014 and 2015 accounts showed that payments from PIS were by far the major source of income for TCG. Aklia does not assert that it would have caused TCG to earn some new form of income, and so the allegation must be that if Aklia had retained its shares and units, then PIS would not have ceased making payments to TCG.

(b) The events leading to the cessation of payments by PIS are confirmed in correspondence from PIS. On 7 November 2014, PIS wrote to TCG to terminate the CAR Agreement. The letter referred to "numerous complaints from claimants in relation to financial advice provided by Satvir Birk" and stated that the termination was "due to the abovementioned issues". On 18 May 2015 PIS wrote to TCG to terminate interim arrangements that had been put in place following the above termination, again referring to "the numerous breaches of [the Corporations Act] committed by Mr Satvir Birk whilst he was a financial adviser and director of TCG, which have resulted in $1.8million in settled claims".

(c) In the face of those uncontroversial facts, Aklia has offered no explanation for how it would have been able to cause PIS to act otherwise if it had retained its shares and units.

[38] As to [43B](c), the defendants contended:

(a) The evidence shows that a sale transaction was in progress in March 2014, and the thing which caused it to fail to proceed was the fact that PIS was unwilling to transfer the business while concerns about Mr Satvir Birk's conduct remained unresolved.

(b) In the seven or so months that passed between that failed sale in March 2014 and the transfer of Aklia's shares and units in November 2014, Aklia is not alleged to have done anything with a view to causing a sale of the business.

(c) Aklia has not offered any explanation of how, if it had tried, it would have been able to sell the business notwithstanding the hurdle posed by PIS given their concerns about Mr Satvir Birk's alleged conduct.

[39] As to [43B](d), the defendants contended:

(a) The PIS income was of prime significance to TCG.

(b) Since there is no reason to think that if Aklia had retained its shares and units then it would have retained the PIS income, there is no reason to think that TCG would not have been placed into liquidation if Aklia had retained its shares and units.

[40] The reasons why PIS terminated and what PIS might have done on certain counterfactual scenarios are live issues on the counterclaim. I do not think that I can proceed on the basis that the facts which the defendants assert are uncontroversial are in fact uncontroversial. Aklia pointed out that the only evidence before me on that question was the PIS termination letter and Mr Sa's opinion. I could not act on the latter, and I should not have the certainty sufficient to grant summary judgment in relation to a proposition proved only by an assertion in correspondence. I agree. The defendants' various contentions that Aklia's case is factually unsustainable are matters for a trial.

[41] However, that does not resolve the entirety of the defendants' application against them. One of the problems for the defendants in grappling with Aklia's case and with demonstrating to me that there was no real prospect of Aklia succeeding, was their inability to identify just what it was about what Aklia said it could and would have done that Aklia had no real prospect of demonstrating.

[42] That was not their fault because, in truth, the case pleaded by Aklia in at [43B](b), [43B](c), [43B](d) and [43C] is deficient. The generality of the language used does not actually convey what it was that Aklia would have been able to do to achieve each of the outcomes mentioned in [43B](b), [43B](c) and [43B](d). The defendants are left entirely in the dark as to the nature of the chain of events which Aklia says it could have instituted which would have achieved those outcomes. It has failed to plead the material facts which establish the causal link between the counterfactual of it having the shares and the units and the outcomes on which it relies. If the damages case truly is a case of damages for loss of a valuable chance, these matters are the means by which the chance is both shown to be lost and demonstrated to be valuable. If the damages case is that particular monies were lost (and that is how [44](a) presently reads, notwithstanding that during argument I was informed that the case was no more than a loss of a chance case[5]) then these matters are the means by which the causal link between the impugned conduct and the loss of those monies is demonstrated.

[43] In argument before me Aklia contended that either by:

(a) persuasion; or

(b) litigation under the *Corporations Act*,

Aklia could have taken steps which could and would have achieved the outcomes referred to in [43B]. It should be permitted to do so at trial.

[44] If that is so, then the steps which it says it could and would have done should be pleaded and the connection between those things and the outcome articulated. Senior Counsel for Aklia took me to other aspects of the evidence which suggested bases on which it might be thought the opportunity was valuable (e.g. because GST statements could have been managed in a particular way which would have reduced the insolvency risk for TCG), but again if considerations of this nature are said to be matters which suggest that the opportunity lost was valuable, then they are matters which should have been pleaded.

[45] The pleading defects I have identified suggest the proper resolution of the defendants' application is that [43B], [43C] and [44](a) be struck out with leave to re-plead. If Aklia

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[5] Transcript, p 1-37 line 37.

cannot do this satisfactorily, then the defendants can again pursue summary judgment. By the same token, if Aklia can plead a case which does comply with the rules of pleading, and the defendants still wish to seek to persuade a judge that that case is factually unsustainable, the judge will have a more secure basis against which to measure the arguments.

[46] The defendants' also contended that they are entitled to summary judgment in respect of the damages case pleaded at [44](b)(i). That argument too was founded on the proposition that the factual contentions advanced could never be sustained at trial based on the evidence before me. The argument essentially went as follows:

(a) TCG's 2015 financial statements for the year ended 30 June 2015, showed its operating profit for that year to be $103,409.

(b) Aklia could never show that it would have received one third of such amount from TCG even if the share and unit transfers on 6 November 2014 had not been effected because TCG would not have distributed any more than it in fact distributed.

(c) In the period before TCG's liquidation on 11 September 2015, distribution would have depended on what the TCG board decided. The two other members of TCG's board were associated with the Ball Trustee and the Sa Trustee and each of those entities were owed just as much as Aklia was owed. Aklia has not identified any reason why they would have acted any differently than they in fact acted, even on the counterfactual that Aklia's shares and units had not been transferred.

(d) In the period after TCG's liquidation, distribution would have depended on what the liquidators decided. The liquidators have not made any distribution to the Ball Trustee or to the Sa Trustee and there is no reason to think that the liquidators would have acted differently even on the counterfactual that Aklia's shares and units had not been transferred.

[47] These matters seem to me to be entirely matters for trial. Given that there were some distributions made it is inevitable, if Aklia can make good the counterfactual asserted, that a different decision would have had to be made. There is no reason to think that the right to a distribution was entirely valueless and I agree with Aklia's argument before me that the defendants' evidence concerning the fact of a distribution suggests the contrary.

[48] However, as pleaded, the damages case pleaded at [44](b)(i) turns on the matters identified in [43B] and [43C]. The requirement to articulate the material facts which establish the causal link to the damages claim asserted applies to it as well. It is not sufficiently articulated at present. [44](b)(i) should also be struck out with leave to re-plead.

**The challenges to the counterclaim**

[49] Some challenges to the counterclaim which had been advanced in the filed applications were not pursued once the applicants had had an opportunity to evaluate amendments made in an amended pleading delivered the day before the hearing of the applications. Three issues were advanced, namely:

(a) the "in trade and commerce" issue;

(b) the reflective loss issue; and

(c) the loss on guarantee issue.

[50] Before explaining how those issues arise, it is appropriate to deal with an antecedent question. Insofar as Mr Satvir Birk advances the application for summary judgment, he does so as a defendant to the counterclaim, but without having filed a notice of intention to defend. Permitting that course would be contrary to r 293 UCPR. Further r 135 UCPR would require the grant of leave before permitting such a step to be taken. The defendants contend that his

application should be dismissed for either of these reasons, notwithstanding that it seems merely to mirror the arguments which Aklia also advances against the defendants' counterclaim.

[51] The answer to the concerns raised was that in the exercise of my power to give directions I had on 22 July 2016 directed that Aklia and Mr Satvir Birk file and serve any application for interlocutory relief in respect of the defendants' pleading, and the application was filed in compliance with my direction, which was made so that I might deal with all of the applications concurrently. That direction was made without demur by the defendants at a time when Mr Satvir Birk's counsel pointed out that he had not yet defended. In my view it accords with my power to make directions inconsistent with the UCPR pursuant to r 367, and the philosophy set out in r 5 UCPR, that I proceed to determine the question, it having been fully argued and there being no prejudice suffered by the defendants.

[52] The third of the issues listed at [49] does not require substantive consideration. Mr Satvir Birk's written submissions contended that the claim advanced by Mr Sa and Mr Ball was flawed because of the absences of any plea that PIS had demanded any payment from them as guarantors and any plea of actual loss: see written submissions at [30] to [36]. But when I pointed out that the pleading asserted that Mr Sa and Mr Ball were subject to an actual legal liability to indemnify PIS for losses (see counterclaim at [138B](f), [139](f), [147B](f) and [148](f), and queried why that was not sufficient, the submission was not pressed further.[6] Nevertheless, it should be noted that the paragraphs which asserted the legal liability were pleas which asserted rolled up conclusions which were deficient for failure to plead the material facts which would make them good. Senior Counsel for the defendants seemed to accept that his client should amend the pleading to do this.[7]

*The "in trade and commerce" issue*

[53] The "in trade and commerce" issue was a reference to the argument advanced by both Aklia and Mr Satvir Birk that the defendants had no real prospect of establishing that Aklia's conduct in failing to disclose to the defendants the improper conduct and transactions by Mr Satvir Birk was conduct "in trade or commerce" within the meaning of –

(a) section 52 of the TPA (in relation to conduct before 1 January 2011); and

(b) section 18 of the ACL (in relation to conduct after 1 January 2011).

[54] The defendants' pleading explicitly founded the proposition that the conduct was "in trade or commerce" on the following premises:

> 136A (a) The commercial relationship between Aklia, the Sa Trustee and the Ball Trustee was the subject of, inter alia, [the Agreement]:
>
> (b) the commercial objective of [TCG], as trustee of the Unit Trust, was for Aklia, the Sa Trustee and the Ball Trustee to earn profits (in the form of distributions from [TCG] as trustee of the Unit Trust) from the carrying on of a financial services business in Australia by [TCG] (as authorised representative of PIS):
>
> (c) with [TCG] acting in that regard through Mr Ball (as sub-authorised representative of PIS) and Mr Birk (as sub-authorised representative of PIS)
>
> (d) with [TCG] carrying on its business in conjunction with the business of Sa & Birk Accountants (which provided accounting services by Mr Sa) and
>
> (d) with Mr Sa, Mr Ball and Mr Birk acting as "nominee to the Board" for the purposes of clause 3.2 of [the Agreement] and representative for the purposes of clause 6.3 of [the Agreement] of the Sa Trustee, the Ball Trustee and Aklia respectively.

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[6] Transcript, p 1-51 line 17 to p 1-52 line 10.

[7] Transcript, p 1-86 line 20 to p 1-87 line 12.

136B In the premises of paragraph 136A, dealings between Aklia, the Sa Trustee and the Ball Trustee, as shareholders in [TCG] and unitholders in the Unit Trust, and between Mr Sa, Mr Ball and Mr Birk, occurring under the terms of [the Agreement], to carry on the business of [TCG], are activities or transactions that, of their nature, bear a trading or commercial character.

136C The carrying on, by [TCG], of a financial services business in Australia wherein [TCG] provided financial services to its clients for a fee is an activity or transaction that, of its nature, bears a trading or commercial character.

136D The authorisation by PIS of [TCG] conducting a financial services business in Australia as its authorised representative in exchange for PIS obtaining the right to receive payments in respect of such services under the CAR Agreement is an activity or transaction that, of its nature, bears a trading or commercial character.

136E The transaction pleaded in paragraph 109 [i.e. the contemplated transaction whereby TCG would have sold the whole of its client book for $3.41 million] is an activity or transaction that, of its nature, bears a trading or commercial character.

136F Aklia's conduct pleaded in paragraph 123 above [i.e. Aklia's failure to disclose the improper conduct of Mr Satvir Birk] was an aspect or element of the activities or transactions pleaded in paragraphs 136B, or further and alternatively the activities or transactions pleaded in paragraph 136C, or further and alternatively the activities or transactions pleaded in paragraph 136D, or further and alternatively the activities or transactions pleaded in paragraph 136E, in that:

(a) the conduct constituted a continuing breach of [the Agreement]

(b) having [TCG] as authorised representative of PIS was the way that [TCG] equipped itself to lawfully earn income by means of the activity or transaction pleaded in paragraph 136C above

(c) retaining [TCG]'s status as an authorised representative of PIS was the way that [TCG] continued to equip itself to lawfully earn income by means of the activity or transaction pleaded in paragraph 136C above;

(d) the matters pleaded in paragraphs 21 to 108 above were materially relevant to:

(i) whether [TCG] was in breach of the CAR Agreement;

(ii) whether [TCG] would retain its status as authorised representative of PIS

(iii) in turn, whether [TCG] could lawfully carry out the activity or transaction pleaded in paragraph 136C above;

(iv) in turn, whether PIS would continue to supply to [TCG] the services provided under the activity or transaction pleaded in paragraph 136D above;

(e) the conduct pleaded in paragraph 123 above precluded [TCG] from complying with its obligations under clauses 5.3 and 5.18 of the CAR Agreement, which exposed [TCG] to termination of the CAR Agreement, being the agreement which made it lawful for [TCG] to carry on business;

(f) the purpose of the conduct pleaded in paragraph 123 above was to influence the future trade and commerce of [TCG] by concealing matters which might prevent future trade and commerce by [TCG] (namely, the matters pleaded in paragraph 21 to 108 above).

Particulars

The purpose is to be inferred from the nature of the matters pleaded in paragraphs 21 to 108 above and the matters pleaded in paragraphs 9, 10, 13. 14 and 15 above.

(g) further and in the alternative to sub-paragraph (e), the purpose of the conduct pleaded in paragraph 123 above was to influence the future trade and commerce of [TCG] by concealing matters which might prevent the transaction pleaded in paragraph 109 above from proceeding.

Particulars

The purpose is to be inferred from the nature of the matters pleaded in paragraphs 21 to 108 above and the matters pleaded in paragraphs 9, 10, 13, 14, 15, and 109 to 118 above.

[55] The argument that the defendants had no real prospect of establishing the case so pleaded ran as follows:

(a) The statutory provisions are concerned with conduct by a party towards persons with whom it has or may have dealings which, of their nature, bear a trading or commercial character: *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 604 per Mason CJ, Deane, Dawson and Gaudron JJ.

(b) The correct approach is to determine whether or not the relevant conduct can, according to ordinary usage, be described as having occurred in the course of dealings "which, of their nature, bear a trading or commercial character": see *Hearn v O'Rourke* (2003) 129 FCR 64 at [29] per Dowsett J.

(c) The alleged non-disclosure by Aklia was conduct between the directors and shareholders of TCG, and was therefore internal to that company. It was not conduct which, of its nature, bore a trading or commercial character.

(d) I should take the same approach as Barret J did in *New Cap Reinsurance Corporation Ltd v Daya* (2008) 66 ACSR 95 and conclude that although the transactions on which TCG embarked were "in trade or commerce", the decision-making processes within TCG and the other steps within it were internal to TCG, were anterior to and preparatory for TCG's transactions which were "in trade or commerce", and did not themselves take place "in trade or commerce".

[56] I accept the correctness of the first two propositions, but reject the view that I can accede to the third, at least on an application for summary disposition of the point. If I cannot accede to the third, then the result obtained before Barret J in *New Cap Reinsurance Corporation Ltd v Daya* cannot be obtained here.

[57] The dealings between Aklia, the Sa Trustee, the Ball Trustee and their respective alleged nominees cannot be so clearly characterized as merely internal to TCG as to justify the conclusion that the defendants have no real prospect of demonstrating the contrary. The non-disclosure of which complaint is made was alleged to be more than merely non-disclosure in the course of dealings between directors of TCG *qua* directors, but was alleged to be conduct in the course of dealings between the parties to the Agreement and the persons they had (at least arguably) identified as their nominees for the purpose of performing that relationship. The dealings were between parties who had associated together for the purpose of establishing and regulating a particular commercial relationship as between each other. The complaint of the defendants went to the way in which Aklia dealt with the Ball Trustee and the Sa Trustee during the course of the relationship which was governed contractually by clause 3 of the Agreement. Further, even if the conduct was relevantly internal, part of the case alleges that its purpose was to influence activities which were definitely "in trade and commerce", namely the future (external) trade or commerce activities of TCG: see counterclaim at [136F].

[58] These two conclusions are sufficient to justify the rejection of the applications at least insofar as they were directed to the "in trade or commerce" issue.

*The reflective loss issue*

[59] The counterclaim provided:

> 109. Prior to 6 March 2014, the Sa Trustee (by Mr Sa), the Ball Trustee (by Mr Ball) and Aklia (by Mr Birk) had orally agreed with the shareholder of Munro Wealth Management Pty Ltd (**Munro**) to implement a transaction which was to be documented in writing whereby:
>
> (a) the Sa Trustee and the Ball Trustee would purchase all of the issued share capital in Munro for $290,858;

(b) Munro would purchase the rights to receive commission in respect of clients of [TCG], to be serviced by Munro as licensee of AMP Financial Planning Ply Ltd, for a total sum of $3.41m (**the Book Purchase Price**);

(c) the Book Purchase Price would be funded:

(i) as to 20%, by the Sa Trustee and Aklia;

(ii) as to the remaining 80% by a loan from AMP;

(d) the Book Purchase Price would be disbursed as follows:

(i) approximately $1.2m towards payment of a loan owed by [TCG] to NAB;

(ii) approximately $190,000 towards payment to the ATO in respect of tax debts owned by [TCG];

(iii) approximately $774,000 in payment of beneficiary loans under the Unit Trust ($258,000 for each of the Sa Trustee, the Ball Trustee and Aklia)

(iv) approximately $50,000 towards payment of equipment leases for [TCG]; and

(v) the balance of approximately $1,196,000 to be distributed to each of the shareholders in [TCG] and unitholders in the Unit Trust (i.e. approximately $398,666 to each of the Sa Trustee, the Ball Trustee and Aklia; with the distributions to the Sa Trustee and Aklia to be used to fund 20% of the Book Purchase Price and the distribution to the Ball Trustee to be paid to the Ball Trustee).

[60] The purchase referred to in [109](b) is a purchase by Munro from TCG of certain choses in action owned by TCG. The disbursement of the Book Purchase Price is a reference to payments which would be made by TCG out of the monies received from Munro.

[61] The loss which was the subject of the counterclaim has been described at [11] and [12] above (and was claimed from Aklia and Mr Satvir Birk as damages claimed pursuant to statute and from Aklia as damages for breach of the Agreement), namely:

(a) the value of the business of TCG, which was $3.94m in the premises of the contemplated sale of TCG's client book, divided according to the Sa Trustee and the Ball Trustee's respective shareholding in TCG; or

(b) Alternatively, the amounts that the Sa Trustee and the Ball Trustee would have received if the contemplated sale of TCG's client book had proceeded, being a total of approximately $656,666 each (approximately $258,000 each by way of payment of beneficiary loans and approximately $398,666 each by way of distribution of the sale proceeds): see counterclaim at [140] and [189].

[62] The argument in relation to this heading was that the claim for damages by the Ball Trustee and the Sa Trustee was a claim which could only be bought by TCG, not by its shareholders.

[63] The principles governing the assessment of the merits of this argument are not in doubt.

[64] In *Johnson v Gore Wood & Co* [2002] 2 AC 1 (*Johnson*), the House of Lords restated the so-called "*Prudential*" principle, which arose from the decision of the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. Lord Bingham set out the following statement of principle (at 35-6):

> (1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. …
>
> (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. …

> (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. …

[65] That formulation was adopted by the Queensland Court of Appeal in *Thomas v D'Arcy* [2005] 1 Qd R 666 at [7] – [13] (McPherson JA, Williams JA and White J agreeing).

[66] Most recently, in *Ekes v Commonwealth Bank of Australia* (2014) 313 ALR 665, Bathurst CJ (Beazley P and Emmett JA agreeing) summarized the principles in these terms (referring to *Prudential*, *Johnson* and the High Court decision of *Gould v Vaggelas* (1984) 157 CLR 215) (emphasis added):

> [150] The principles are well established. **When a company suffers loss caused by a breach of duty owed to the company, no action lies at the suit of a shareholder to make good a diminution of the value of the shareholder's shareholding where that loss merely reflects the loss suffered by the company**: *Prudential* at Ch 222–3, *Johnson* at AC 35 and 62 and *Gould* at CLR 221–2. **That principle extends to include losses suffered as a result of diminution in the value of a person's shareholding, loss of dividends and other amounts which the shareholder might have obtained from the company had it not been deprived of its funds**: *Johnson* at AC 66. The principle extends to a case where both the company and the shareholder have a claim for breach of duty which caused the loss: *Johnson* at AC 62.
>
> [151] However, the principle does not prevent the shareholder suing for a loss suffered from a breach of duty owed to him or her where the loss is separate and distinct from the loss suffered by the company: *Gould* at CLR 220, 241 and 257–8 and *Johnson* at AC 35 and 62.

[67] In this case, both Aklia and Mr Satvir Birk contended that the claim advanced by the Sa Trustee and the Ball Trustee fell squarely within the *Prudential* principle and, in particular, the parts summarized by Bathurst CJ in *Ekes* and emphasized in the above quote. Their argument involved the following propositions:

(a) On either of the two categories advanced by the defendants, the loss claimed was entirely reflective of loss allegedly suffered by TCG. The former category of loss was said to be a claim for the loss of an asset of TCG, and therefore not claimable by anyone other than TCG. The latter was said to be no more than a claim for a payment which as shareholders they might have obtained from TCG had it not been deprived of its funds. Neither was claimable by them.

(b) The damages claim by the Sa Trustee and the Ball Trustee was founded on the improper conduct of Mr Birk which was not disclosed by Aklia and which non-disclosure caused loss, the manner of causation of which is described at [11] above, namely it caused the contemplated transaction whereby TCG would have sold the whole of its client book for $3.41 million not to proceed and precipitated the insolvency of TCG.

(c) If the conduct of Mr Birk was improper as alleged by the Sa Trustee and the Ball Trustee, such that it should have been disclosed by Aklia in fulfilment of its contractual duty or to avoid statutory contravention, then on that assumption, it would inevitably also have been conduct which amounted to a breach of duty which Mr Satvir Birk owed TCG, whether that duty was regarded as a breach of a fiduciary duty he owed TCG, or as breach of his duties to exercise his powers and discharge his duties with the degree of care and skill that a reasonable person in his position would have, and to do so in good faith in the best interests of the corporation and for a proper purpose.[8] That conduct would inevitably have caused the same loss.

[68] The defendants countered that argument in a number of ways.

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[8] Sections 180 and 181 of the *Corporations Act* 2001 (Cth).

[69] First, they relied on the second proposition stated in *Johnson* and contended that I could not be satisfied that it was inevitably true that TCG would have a cause of action to sue to recover the loss claimed by the Sa Trustee and the Ball Trustee. They contended that I should not shut out a claimant at a preliminary stage based on assumed facts unless I could be so satisfied that it was clear that success for them would necessarily mean that TCG would be successful if it sued, and in respect of the same loss: cf *Harris v Milfull* (2002) 43 ACSR 542 at 556-7. In similar vein, the defendants relied on observations made in *Shaker v Al-Bedrawi* [2003] Ch 350 at [83], to this effect:

> In our judgment **the *Prudential* principle does not preclude an action** brought by a claimant not as a shareholder but as a beneficiary under a trust against his trustee for a profit **unless it can be shown by the defendants that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover. As the *Prudential* principle is an exclusionary rule denying a claimant what otherwise would be his right to sue, the onus must be on the defendants to establish its applicability. Further, it would not be right to bar the claimant's action unless the defendants can establish not merely that the company has a claim to recover a loss reflected by the profit, but that such claim is available on the facts**.

[70] In the present case, so the argument ran, it was up to the defendants to the counterclaim (namely Aklia and Mr Satvir Birk) to persuade me that I should form the view with the requisite degree of certainty that the *Prudential* principle applied. I could not be so satisfied because all I presently had was the assertion by way of argument that TCG probably had a cause of action and that it would sound in damages. I had no pleading by way of a defence and no clear articulation of how and why such breach of duty would sound in the same damages as those claimed by the defendants in their counterclaim.

[71] There is sufficient merit in this point to warrant a rejection of the proposition that there should be a summary determination against the defendants. The argument by Aklia and Mr Satvir Birk seems logical, but it involves accepting on assumed facts and without careful analysis the conclusion that TCG would have a cause of action on those facts to recover the same loss. That is a major assumption, especially where the duties which found the causes of action are not necessarily co-extensive as those which found the defendants' case. The assumption invites me to assume there is no need for an examination of whether, for example, there was some aspect of the defendants' case which involves reliance on conduct which should have been disclosed by Aklia, but which might not necessarily constitute a breach of duties owed to TCG. The difficulty is increased by the fact that both the defendants' case and the putative case by TCG would involve global causation hypotheses by which a multiplicity of events are said to have combined to cause a loss. Acceptance of such cases often involves a matter of inference as much as anything else. It is not clear to me that the process of drawing the inference would inevitably reach the same result from the point of view of TCG as it would from the point of view of the defendants.

[72] I am not willing summarily to dispose of the defendants' case by reference to such an assumption.

[73] This conclusion means that I can deal briefly with the miscellany of other arguments which are said by the defendants either separately or together to amount to good reasons why I should not grant summary judgment (or exercise the power to strike out).

[74] First, in *Giles v Rhind* [2003] Ch 618 the English Court of Appeal accepted that it was arguable that the *Prudential* principle did not apply where the wrongdoer has, by the conduct which is the subject of the shareholder's claim, disabled the company from pursuing such cause of action as it has. On the facts which I am asked to assume to be true for the purpose of disposing of the present applications, the conduct that is the subject of the counterclaim is alleged to have led to TCG losing its main source of income from PIS and going into liquidation. I agree with the defendants' submissions that the resolution of the true nature

of this proposition and the extent to which the facts might make good the factual propositions which might engage it, are matters which should be left for trial.

[75] Secondly, in *Mercedes Holdings Pty Ltd v Waters (No 3)* [2011] FCA 236 at [24]-[56] Perram J explained why he was not prepared to conclude that the *Prudential* principle inevitably applies in the same way to cases where the relevant company operates as trustee of a trust as it does in cases in which no trust is involved. In light of the views I have already reached that I should not summarily determine the defendants' case it is not necessary to express a view on the many interesting arguments raised by his Honour's analysis. Suffice it to say that the need to consider the complexity of the legal issues so raised does not add to the attraction of the argument that it is appropriate to grant summary judgment in this case.

[76] Thirdly, the defendants suggested that the *Prudential* principle should not apply where the company is in fact joined as a party to the proceedings. This was not a contention by the defendants that the case was one of those classes of case where beneficiaries could sue if the trustee unreasonably refused. Rather they contended that given that TCG is joined as a party to the proceeding, and does not make a claim for the damages of which the shareholders loss is alleged to be reflective, then it would be precluded, by *res judicata* and related doctrines, from making such a claim at a later stage. This would tend to strike at the foundation of any issue regarding double recovery or reduction of capital, and so makes the rationale for the principle inapplicable: support for this argument is found in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] SGCA 13 at [85]-[89]. This too provides another reason against acceding to the applications by Aklia and Mr Satvir Birk.

[77] For the reasons identified at [52] above, I would strike out [138B](f), [139](f), [147B](f) and [148](f) of the counterclaim, but with leave to re-plead to assert the material facts which justify the conclusions pleaded in those paragraphs. Otherwise I would dismiss the applications of Aklia and Mr Satvir Birk.

**Conclusion**

[78] I make the following orders:

(a) As to the amended application filed on behalf of the defendants on 28 July 2016:

(i) [43B], [43C], [44](a) and [44](b)(i) of the plaintiff's amended statement of claim are struck out, with leave to re-plead; and

(ii) otherwise the application is dismissed.

(b) As to the application filed by Aklia on 18 April 2016 and the application filed by Mr Satvir Birk on 16 August 2016:

(i) [138B](f), [139](f), [147B](f) and [148](f) of the defendants' amended counterclaim are struck out, with leave to re-plead; and

(ii) otherwise the applications are dismissed.

[79] I will hear the parties as to costs.