SUPREME COURT OF QUEENSLAND

CITATION:	*Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 240
PARTIES:	**STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068** (first plaintiffs) **QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068** (second plaintiff) **JOHN RICHARD PARK, KELLY-ANNE LAVINA TRENFIELD & QUENTIN JAMES OLDE AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068** (third plaintiffs) **v** **QNI METALS PTY LTD ACN 066 656 175** (first defendant) **QNI RESOURCES PTY LTD ACN 054 117 921** (second defendant) **QUEENSLAND NICKEL SALES PTY LTD ACN 009 872 566** (third defendant) **CLIVE FREDERICK PALMER** (fourth defendant) **CLIVE THEODORE MENSINK** (fifth defendant) **IAN MAURICE FERGUSON** (sixth defendant) **MINERALOGY PTY LTD ACN 010 582 680** (seventh defendant) **PALMER LEISURE AUSTRALIA PTY LTD ACN 152 386 617** (eighth defendant) **PALMER LEISURE COOLUM PTY LTD ACN 146 828 122**

(ninth defendant)

FAIRWAY COAL PTY LTD ACN 127 220 642
(tenth defendant)

CART PROVIDER PTY LTD ACN 119 455 837
(eleventh defendant)

COEUR DE LION INVESTMENTS PTY LTD ACN 006 334 872
(twelfth defendant)

COEUR DE LION HOLDINGS PTY LTD ACN 003 209 934
(thirteenth defendant)

CLOSERIDGE PTY LTD ACN 010 560 157
(fourteenth defendant)

WARATAH COAL PTY LTD ACN 114 165 669
(fifteenth defendant)

CHINA FIRST PTY LTD ACN 135 588 411
(sixteenth defendant)

COLD MOUNTAIN STUD PTY LTD ACN 119 455 248
(seventeenth defendant)

EVGENIA BEDNOVA
(eighteenth defendant)

ALEXANDAR GUEORGUIEV SOKOLOV
(nineteenth defendant)

ZHENGHONG ZHANG
(twentieth defendant)

SCI LE COEUR DE L'OCEAN
(twenty-first defendant)

DOMENIC MARTINO
(twenty-second defendant)

and

MARCUS WILLIAM AYRES
(first defendant added by counterclaim)

STEFAN DOPKING
(second defendant added by counterclaim)

FILE NO: SC 6593 of 2017

DIVISION: Trial Division

PROCEEDING: Applications filed by defendants on 12 July 2018 (CFI 302)

and 3 October 2018 (CFI 358)

Applications filed by plaintiffs on 18 June 2018 (CFI 287) and 11 July 2018 (CFI 300)

DELIVERED ON: 22 October 2018

DELIVERED AT: Brisbane

HEARING DATE: 8 and 9 October 2018

JUDGE: Jackson J

ORDER: **The order of the court is that:**

1. **The application for leave to proceed filed on 3 October 2018 is dismissed, except for the counterclaim not struck through on the draft pleading that is the Annexure to these reasons**

2. **The defence and counterclaim filed 12 April 2018 is struck out with leave to the defendants other than the fourth, twentieth and twenty-first defendants to file an amended consolidated defence and counterclaim in accordance with the draft pleading that is the Annexure to these reasons.**

3. **As to the consolidated statement of claim filed 6 August 2018:**

   (a) **the words "and were subject to the equitable liens pleaded in paragraphs 112 and 113" are struck out of paragraphs 182, 187, 194, 203, 208, 214, 220, 226, 232, 238, 244, 250, 256, 263, 271, 278, 290, 309, 318, 329, 337, 345, 353, 359, 365 and 372;**

   (b) **paragraph 313 is struck out; and**

   (c) **paragraphs 378 and 379 are struck out.**

4. **Adjourn the hearing of any further orders or directions as to pleadings to a date to be fixed.**

5. **Reserve all questions of costs of the applications.**

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – PROCEEDINGS BY OR AGAINST THE COMPANY – LEAVE TO PROCEED – WHEN LEAVE GRANTED – where leave sought to proceed against company in liquidation that was manager of joint venture business – where counterclaim for failure to transfer property to new manager as required alternatively by contract, trust, agency or bailment – where causation of two billion dollar loss alleged on basis that business ceased

operations due to failure to transfer property – where alleged particular leases, licences and contracts necessary for continued operation – where various other counterclaims – whether leave to proceed against company in liquidation should be granted

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – OTHERWISE ABUSE OF PROCESS – where plaintiffs apply for strike out of counterclaim and defence of set-off – where no leave to proceed on counterclaim that forms the basis of set-off – whether set-off should be struck out as disclosing no reasonable defence

EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – INDEMNITY, LIEN AND REIMBURSEMENT – RELEVANT PRINCIPLES – where statement of claim alleges joint venture agreement contract gives rise to trust relationship – where statement of claim alleges right to indemnity, lien and right of retention for liability incurred in conducting joint venture – where lien alleged as basis for proprietary relief throughout statement of claim – where defendants complain that lien cannot extend to all trust property – where no allegation that at the time of payments or transfers the trust property was insufficient to meet right of indemnity should the payment or transfer be made – whether lien allegations should be struck out as disclosing no reasonable cause of action

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – SHORT FORM MONEY COUNTS – where claims for money paid – where defendants complain that no allegation that the payments discharged relevant debts – whether claims for money paid should be struck out as disclosing no reasonable cause of action

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – OVERRIDING PURPOSE OF AND OBLIGATIONS UNDER RULES OR ACTS REGULATING CIVIL PROCEEDINGS – where *Uniform Civil Procedure Rules* 1999 (Qld) provide for overriding objective, undertaking to the court to proceed expeditiously and sanctions for failure to comply – discussion of relevant principles to be applied

Corporations Act 2001 (Cth), s 471B, s 588FE, s 588FF, s 1324

Trusts Act 1973 (Qld), s 72
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 171, r 292, r 293

Agar v Hyde (2000) 201 CLR 552, cited

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570, cited

Agusta Pty Ltd v Official Trustee in Bankruptcy (2008) 6 ABC (NS) 164, cited

Agusta Pty Ltd v Official Trustee in Bankruptcy [2009] NSWCA 129, cited

Alati v Kruger (1956) 94 CLR 216, cited

American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd (1981) 147 CLR 677, cited

Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Ltd [2018] HCA 43, cited

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, considered

Australian Securities and Investments Commission v Letten (No 17) (2011) 286 ALR 346, cited

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485, cited

Basha v Basha [2010] QCA 123, cited

Batistatos v Roads & Traffic Authority of New South Wales (2006) 226 CLR 256, considered

Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd [2018] QSC 3, cited

Burness (as liquidator of Denward Lane Pty Ltd (in liq)) v Supaproducts Pty Ltd (2009) 259 ALR 339, cited

Byrnes v Kendle (2011) 243 CLR 253, cited

Cherry v Boultbee (1839) 4 My & Cr 442, 41 ER 171, cited

Commonwealth v Davis Samuel Pty Ltd (No 5) (2008) 164 ACTR 1, cited

Denton v TH White Ltd [2014] 1 WLR 3926, cited

Dey v Victorian Railways Commissioners (1949) 78 CLR 62, cited

Eighty Second Agenda Pty Ltd v Handberg [2014] VSC 665,

cited

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303, cited

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, cited

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited

Graham & Linda Huddy Nominees Pty Ltd v Byrne [2016] QSC 221, cited

Hartglen Pty Ltd v Geoff Mitchell & Associates Pty Ltd [2004] QSC 67, cited

Hartnett v Hynes [2009] QSC 225, cited

Hartnett v Hynes [2010] QCA 65, cited

Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd (2011) 32 VR 539, cited

Heperu Pty Ltd v Belle (2009) 76 NSWLR 230, cited

Hewett v Court (1983) 149 CLR 639, cited

Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld) [1984] 1 Qd R 576, considered

Kizbeau Pty Ltd v WG & B Pty Ltd (1995) 184 CLR 281, cited

Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd (2008) 74 NSWLR 550, cited

Lumbers v W Cook Builders Pty Ltd (in liq) (2008) 232 CLR 635, cited

Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938) 61 CLR 286, cited

Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (2013) 42 VR 27, cited

Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610, cited

Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210, cited

Parbery & Ors v QNI Metals Pty Ltd & Ors (2018) 127 ACSR 582, related

Park v Whyte (No 3) [2018] 2 Qd R 475, cited

Pethybridge v Stedikas Holdings Pty Ltd [2007] NSWCA 154, cited

Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165, cited

Proactive Management & Ors v Over Fifty Funds & Ors [2007] NSWSC 802, cited

QNI Resources Pty Ltd & Ors v Park & Ors (2016) 116 ACSR 321, related

QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq) [2017] QCA 167, related

Quinlan v Rothwell [2002] 1 Qd R 647, cited

Re Nisbet and Potts' Contract [1906] 1 Ch 386, cited

Re Siromath Pty Ltd (No 3) (1991) 25 NSWLR 25, cited

Re Worldwide Specialty Property Services Ltd (in liq) [2017] NSWSC 1851, cited

Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455, cited

Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, cited

RWG Management Ltd v Commissioner for Corporate Affairs [1985] VR 385, cited

Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2004] QSC 457, cited

Spencer v Commonwealth (2010) 241 CLR 118, cited

Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245, cited

Testel Australia Pty Ltd v KRG Electrics Pty Ltd [2013] SASC 91, cited

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107, cited

UBS AG v Tyne [2018] HCA 45, cited

Webster v Lampard (1993) 177 CLR 598, cited

X v A [2001] 1 All ER 490, cited

COUNSEL: G Gibson QC, with T Sullivan QC, C Curtis and A Rae for the plaintiffs
M Condon SC, with N Kabilafkas and T March for the defendants except the fourth, twentieth and twenty-first

defendants

SOLICITORS: King & Wood Mallesons and HWL Ebsworth for the plaintiffs
Alexander Law for the defendants except the fourth, twentieth and twenty-first defendants

JACKSON J:

Introduction

[1] These are four applications that were argued at the same time. They are of two kinds. First, the defendants except the fourth, twentieth and twenty-first defendants ("defendants") apply for leave to proceed on their counterclaim ("application for leave") against the second plaintiff ("QNI") and the third plaintiffs and second defendant added by counterclaim ("GPLs").[1] Second, the defendants apply to strike out paragraphs of the amended consolidated statement of claim ("CSOC") and the plaintiffs bring two applications to strike out paragraphs of the consolidated further amended defence and counterclaim.

[2] On 19 April 2018, the proceeding was by order continued as a consolidated proceeding of four earlier originating proceedings. The CSOC is as filed on 6 August 2018. The consolidated defence and counterclaim evolved from the document filed on 12 April 2018 through a series of iterations produced in the few days before the hearing and during the hearing until the final form that was made exhibit "B" on 9 October 2018 ("9 October CDAC").

[3] Leave to proceed is applied for against QNI as a company ordered to be wound up in insolvency under s 471B of the *Corporations Act* 2001 (Cth) ("CA"). Leave to proceed is applied for against the GPLs, who are the general purpose liquidators of QNI, for conduct as the former administrators of QNI and (possibly) as liquidators.

[4] Leave is sought *nunc pro tunc*, because the originating proceedings were started and the consolidated proceeding has continued without it being granted. An earlier application for leave was dismissed ("first application for leave"),[2] and an appeal from that order was dismissed ("appeal").[3]

[5] In effect, the defendants submit that there are two distinctions to be drawn between the circumstances at the time of the first application for leave and those that obtain now. First, they submit that the bases of their counterclaim as now formulated in the 9 October CDAC are improved. Second, they submit that the decisions on the first

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1 For clarity, in these reasons I will adopt the same abbreviations and naming conventions for the parties that are used in the pleadings.

2 *QNI Resources Pty Ltd & Ors v Park & Ors* (2016) 116 ACSR 321; [2016] QSC 222.

3 *QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167.

application for leave and appeal did not fully consider the strength of the relevant causes of action.

[6] QNI and the GPLs submit that nothing of substance has changed and the present application for leave should be dismissed for much the same reasons as the first application and appeal. As well, they submit that the 9 October 2018 counterclaim and evidence tendered in support of it are insufficient.

[7] On their applications to strike out, the plaintiffs submit that, if leave to proceed is not granted, the counterclaim must be struck out and the same outcome must follow for the paragraphs of the defence that set up the causes of action alleged in the counterclaim as a set-off, as not disclosing a reasonable defence or otherwise an abuse of process, relying upon *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 171. A submission of abuse of process also engages the inherent jurisdiction. Alternatively, if leave to proceed is granted, they challenge particular paragraphs of both the counterclaim and the defence.

[8] On their application to strike out, the defendants challenge the substance of the plaintiffs' pleaded causes of action based on QNI's alleged right to an indemnity for debts and liabilities incurred in relation to the operation of the joint venture business of the Yabulu refinery ("Joint Venture"), whether in the character of General Manager of the Joint Venture under the Joint Venture Agreement ("JVA") or as trustee, both against the first and second defendants ("Joint Venturers") personally and by a lien as against the assets of the Joint Venture, including by a right of retention of the Joint Venture assets it holds. The defendants submit that the pleading and uncontentious facts show that the causes of action alleged do not disclose a reasonable cause of action or are otherwise an abuse of process. As well, they challenge many other paragraphs on pleading grounds. This, notwithstanding that prior interlocutory decisions have held that the plaintiffs have an arguable or prima facie case.[4]

[9] Detailed written submissions were exchanged in the days before the hearing of the applications and the oral hearing extended over two days. Because of the need for expedition, and having regard to the views I have reached on some of the different issues, I propose to deal with the applications by considering the application for leave first, and the cross applications to strike out second.

Summary of conclusions

[10] First, in my view, with some exceptions, the application for leave must be refused. It follows that most of the counterclaim must be struck out.

[11] Second, the parts of the defence that set up the same claims by the Joint Venturers against QNI for damages or equitable compensation by way of set-off of must also be struck out.

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4 *Parbery & Ors v QNI Metals Pty Ltd & Ors* (2018) 127 ACSR 582; [2018] QSC 107.

[12] Third, other parts of the defence must be struck out.

[13] Fourth, some parts of the statement of claim must be struck out.

Leave to proceed

[14] The parties made detailed submissions in writing as to the law and principles to be applied in considering whether to grant leave to proceed against QNI, captured in summary by the requirement of a "serious question to be tried" or a "solid foundation [that] gives rise to a serious dispute".[5] One difference between the present application and the first leave application is that QNI is now ordered to be wound up in insolvency, so the application against it is now brought under s 471B, not s 500, of the CA. That does not change matters in any significant way. The principles to be applied on the application for leave against QNI were also stated in the reasons for judgment on the first leave application[6] and referred to in the reasons for judgment on the appeal.[7] In the circumstances, it is unnecessary to set out more about them in these reasons.

[15] On the application for leave against the GPLs, the parties also made detailed submissions in writing as to the law and principles to be applied, if leave to proceed is required, summarised as whether the court is "satisfied that there is a prima facie case" considering the "sufficiency of the evidence adduced as to the prospects of success" and whether the claim has "sufficient merit".[8] There was no significant difference between the parties' submissions as to the law to be applied, except that the Joint Venturers submit that leave to proceed is not required against a liquidator in a creditors' voluntary winding up.

[16] The only point I would add to those made by the parties as to the law to be applied on either of the aspects of the application for leave to proceed is to refer to *Agar v Hyde*.[9] That case concerned the correct approach to be taken on an application for leave to proceed by a plaintiff who brings a proceeding against a defendant resident outside the jurisdiction, under what is sometimes called the "exorbitant" jurisdiction. That context is different. But there are two points of present interest that emerge from the reasons of the plurality. First, as will appear later in these reasons in relation to the applications to strike out under UCPR r 171 based on abuse of process, the plurality re-emphasised the point that a court whose jurisdiction is regularly invoked should not decide the issues raised in the proceeding in a summary way except in the clearest of cases, relying on *Dey v Victorian Railways Commissioners*[10] and *General Steel Industries Inc v Commissioner for Railways*

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5 *Commonwealth v Davis Samuel Pty Ltd (No 5)* (2008) 164 ACTR 1, 7 [24]-[29].

6 *QNI Resources Pty Ltd & Ors v Park & Ors* (2016) 116 ACSR 321, 330-332 [44]-[51].

7 *QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167, [26].

8 *Eighty Second Agenda Pty Ltd v Handberg* [2014] VSC 665, [32], [33] and [34].

9 (2000) 201 CLR 552.

10 (1949) 78 CLR 62, 91.

(NSW).[11] Second, the plurality held that the question whether leave should not be granted in that context because of the plaintiff's poor prospects of success should be the same test "as is applied in an application for summary judgment by a defendant".[12]

[17] As there are separate claims for different defendants made by the counterclaim, it is convenient to deal with them separately, starting with the claim of the Joint Venturers.

[18] The claim of the Joint Venturers may be conveniently divided between the causes of action and claims for relief made against QNI and those made against the GPLs. As against QNI, they are for damages for breach of contract or equitable compensation for breach of trust and other relief. As against the GPLs, they are for damages for the tort of inducing breach of contract or equitable compensation for procuring or inducing breach of trust. It is convenient, therefore, to consider QNI's position first.

Claim of the Joint Venturers against QNI

[19] The claim by the Joint Venturers against QNI is alleged in paragraphs 582 to 586, 598 to 602 and 639 to 641 of the 9 October CDAC and paragraphs D, E, F, M, N, O, P, Q, R, S, V and W of the claim for relief.

[20] Paragraph 583 cross-refers to paragraphs 492 to 512C, 513 to 516D, 516M and 519 to 537. Paragraphs 519 to 528 are deleted, so need not be considered. Except for paragraphs 515 to 516 and the allegation of breach in paragraph 516A, paragraphs 513 to 516D and paragraphs 535C to 535E are not, in substance, allegations made against QNI[13] and do not need to be considered on this question. It will be necessary to return to the remaining paragraphs cross-referred to in paragraph 583, but it is convenient first to identify the burden of paragraphs 584 and following.

[21] Paragraph 584 alleges that by reason of those paragraphs "QNIM and QNIR" (an obvious mistake – it should have said QNI) breached the JVA, Administration Agreement and QNI's obligations as agent of or alternatively as trustee for the Joint Venturers causing the Joint Venturers loss and damage. The particulars under that paragraph cross-refer to paragraph 516L, but that paragraph is deleted.

[22] Paragraphs 585 and 586 allege that the Joint Venturers are entitled to the relief claimed in paragraphs D, E, F and M of the relief claimed.

Paragraphs D and E of the claim for relief

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11 (1964) 112 CLR 125, 130.

12 (2000) 201 CLR 552, 576.

13 Paragraph 516A alleges breaches of the JVA and the Administration Agreement. No term of those agreements is alleged that depends on the states of mind of the GPLs alleged in paragraphs 513, 514 and 514A.

[23] Paragraphs D and E are in the nature of a claim for specific performance. Paragraph D claims a declaration that QNI is obliged to perform what are called the "Transfer Obligations". Paragraph E claims an order that QNI perform the Transfer Obligations.

[24] The claims for orders in the nature of specific performance depend on the alleged breach of a contractual obligation to perform the Transfer Obligations. Those obligations are central to the counterclaims of the Joint Venturers against QNI and are alleged in paragraph 508 of the 9 October CDAC as follows:

> "508. Upon the termination of QNI's appointment as Manager and upon the appointment of QN Sales as Successor Manager, QNI was obliged to deliver to:
>
> (a) QN Sales – all Joint Venture Property in its name or in its possession and all documents, books, records and accounts which QNI had maintained pursuant to the JVA, pursuant to clause 5.6(d) of the JVA;
>
> (b) the Joint Venturers – documents, books, records and accounts which QNI had maintained pursuant to the Administration Agreement, pursuant to clause 8.3 of the Administration Agreement; and
>
> (c) the Joint Venturers – all ore, Products and proceeds of the sale thereof in its possession, by reason that the ore, Products or proceeds of sale was the property of the Joint Venturers and held by QNI as bailee or agent or bare trustee."

[25] Paragraphs D and E of the claim for relief may be seen as the other side of the coin of QNI's claim for relief for a lien over the Joint Venture Property and a right of retention of the assets it holds in support of the lien for the debts and liabilities that QNI claims are subject to rights of indemnity from the Joint Venturers. Accordingly, it might be thought that the Joint Venturers, who defend QNI's claims for that relief to a lien or right of retention, should be permitted to advance a claim that turns on the alleged Transfer Obligations.

[26] By recent amendments made in paragraph 508(c), the Joint Venturers advance some of the Transfer Obligations on the basis of non-specific or non-contractual bases of the legal relationships of bailor and bailee, principal and agent and "bare" trustee and beneficiary.

[27] However, the plaintiffs oppose any grant of leave to proceed, including on the obligation alleged in paragraph 508(c), on the ground that the alleged breaches of the Transfer Obligations do not give rise to a sufficiently strong claim for any relief. I will return to that point. It may be put to one side to first consider the other counterclaims of the Joint Venturers against QNI.

Paragraphs F and M of the claim for relief

[28] Paragraphs F and M are claims for damages or equitable compensation or an order under s 1324(10) of the CA. Paragraph F claims the sum of $1,800,438,000 or such other sum as the court determines. Paragraph M claims an unspecified amount.

[29] A claim for damages under s 1324(10) of the CA depends on the condition that the court has power under s 1324(1) or (2) to grant an injunction. If the condition exists, the court may order a person to pay damages in addition to or in substitution for the grant of an injunction under s 1324(10). The power to grant an injunction under s 1324(1) or (2) turns on conduct constituting a contravention of the CA. There is no claim in the proceeding by the Joint Venturers that QNI has engaged in any such conduct or that there is power to grant an injunction against QNI under s 1324(1) or (2). No leave to proceed should be granted on that claim.

[30] Accordingly, paragraphs F and M of the claim for relief should be seen as relevantly confined to claims for damages or equitable compensation.

[31] Paragraph 511 of the 9 October CDAC alleges, in effect, that the failure of QNI to perform the Transfer Obligations, when demanded by the Joint Venturers, was a breach of:

(a) clause 5.6(d) of the JVA;

(b) clause 8.3 of the Administration Agreement; and

(c) the duties alleged in paragraph 508(c), "including QNI's obligations as agent, bailee, nominee and/or bare trustee".

[32] Both (a) and (b) are alleged breaches of contract, while the pleader casts the net more widely in (c). Only (c) could arguably support a claim for equitable compensation for breach of trust.

Causation and loss alleged

[33] Paragraphs 512 to 512B allege causation and loss. For brevity, they may be summarised, as follows:

(a) 512 – the QN Business Property (defined in paragraph 507 to be the Joint Venture Property defined in the JVA identified in paragraph 506(a) and the products of the refinery and funds from the sale of the products held by QNI) was essential to the continuation of the Joint Venture;

(b) 512AA – had the QN Business Property been delivered to the third defendant ("QN Sales") "it would have attempted to conduct the Joint Venture";

(c) 512AB – in March 2016 the GPLs identified $10 million as the amount required to cover a cash flow shortfall to permit the continuation of the Joint Venture into the indefinite future;

(d) 512AC – on 7 March 2016 QNIM had the benefit of an indicative offer of a loan facility from Chifley Securities for $23 million "which it would have accepted, and attempted to convert into an actual loan if the QN Business Property was transferred to QN Sales";

(e) 512AD – failure to deliver the QN Business Property caused:

(i) the Joint Venture to cease to operate;

(ii) the JVA and Administration Agreement to be discharged; and

(iii) the loss of "leases and contracts" – the particulars allege further that all leases and contracts were required to be transferred for the effective continued operation of the Joint Venture, that access to the Port of Townsville was critical to the ongoing operation of the refinery and that the leases and licenses for access to the Port that were "lost" included the Berth 2 Licence (as defined) and the leases and licences referred to in paragraph 506(a)(iii);

(f) 512AE – "by reason of" the:

(i) Joint Venture ceasing to operate;

(ii) JVA and Administration Agreement being discharged;

(iii) essential leases and contracts being lost;

the Joint Venturers have suffered loss; and

(g) 512AE and 512AF – the loss suffered is:

(i) a lost opportunity to earn profits;

(ii) loss of value of the Joint Venturers' net assets, "the current best estimate of" which loss is approximately $1.8 billion, being the difference between approximately $1.95 billion and a "recent" value of $150 million; and

(iii) loss of the value of "installed assets" at the Port of Townsville of $214.5 million.

[34] In summary, therefore, the counterclaim for damages on which the Joint Venturers apply for leave to proceed is for the total identified amount of over $2 billion and an unquantified amount for the lost opportunity to earn profits.

[35] The loss of value of the net assets is represented mostly by alleged value of the plant, property and equipment, as disclosed in the QN Group Special Purpose Financial Statements for the year ended 30 June 2015.[14] As at 30 June 2015, QN Group revalued the plant, property and equipment to $2.193 billion, up from $563 million at 30 June 2014, with resultant net assets as at 30 June 2015 of approximately $1.95 billion.

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[14] Affidavit of D Wolfe filed 22 August 2017, CFI 63, Exhibit DW-02, p 476.

[36] In assessing the reasonableness of the claim for loss of value of the net assets, the likely admissibility and reliability of QN Group's adopted value should not be ignored. The Joint Venturers submit that it will be admissible and probative.

[37] However, the date of assessment of any damages for breach of contract is the date of the breach and the date of assessment of any equitable compensation for breach of trust is no earlier that when the alleged loss was suffered, which is at early March 2016 or later. Further, in assessing damages or equitable compensation, the court is not only concerned with a "market value", per se, but has regard to "true value", taking into account the benefit of hindsight.[15]

[38] The reliability of the valuation of the plant, property and equipment as at 30 June 2015, if admitted as relevant evidence of value as at the date of the alleged breach or loss in early March 2016, would have to be assessed against other uncontroversial facts, including that:

(a) on 7 September 2015, the fifth defendant ("Mr Mensink") as director of the Joint Venturers signed the special purpose financial statements as at 30 June 2015. He was also sole director of QNI;

(b) Note 1(c) to the special purpose financial statements shows that the accounting for the value of plant, property and equipment was changed to the fair value method of valuation, based on a discounted cash flow forecast valuation methodology of the Joint Venture business operations;

(c) however, Note 1(b) to the special purpose financial statements stated that the ability to generate sufficient net cash inflows from operations in order to meet obligations as and when they fell due was "dependent upon improvement in nickel commodity prices; the ongoing QN Group cost reduction program and funding options which may be considered from time to time".

(d) that note also stated that at 30 June 2015 the QN Group had minimal loans and borrowings payable to third parties totaling $25.3 million;

(e) from at least 16 or 17 September 2015 onwards, Mr Palmer and Mr Mensink tried, no doubt using their best efforts, to borrow amounts for working capital for the Joint Venture business against the value of its assets (including the amount of the revaluation of the property, plant and equipment as at 30 June 2015) but were unable to do so;

(f) on 13 November 2015, Mr Palmer advanced $US1.86 million to QNI to meet QNI's liabilities in respect of employee entitlements; and

(g) on 18 January 2016, in that context, Mr Mensink, as sole director, appointed the GPLs as administrators of QNI on the basis of a resolution that QNI was in his opinion then insolvent or would become so.

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15 *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281, 292-296.

[39] Because the methodology for the revaluation was a discounted cash flow forecast, in the absence of any evidence to the contrary, necessarily the value of the plant, property and equipment on revaluation at 30 June 2015 depended on the assumption that the Joint Venture business would continue as a going concern so as to generate the forecast cash flows from operations.

[40] In the absence of any evidence to the contrary, the forecast cash flows for the value of the plant, property and equipment on revaluation at 30 June 2015 necessarily will have included the cashflows from which profits of the kind that the loss of opportunity to earn profits alleged in paragraph 512AE(a) would be derived. There is double counting as between paragraphs 512AE(a) and (b).

[41] It is difficult to make any further assessment of the reasonableness of the alleged loss of opportunity to earn profits, because the allegation of the loss of opportunity to earn profits is made without complying with UCPR r 155(1) which requires that the "pleading must state the nature and amount of the damages claimed" or the other requirements of that rule. I have previously sought to analyse how a pleading of a claim for loss of a valuable commercial opportunity should be made.[16] No attempt of that kind was made by the Joint Venturers in the present case.

[42] There is a question whether the alleged loss of value of the "installed assets" at the Port of $214.5 million, in paragraph 512AF, is not included in the alleged loss of value of the net assets of $1.8 billion in paragraph 512AE(b). In the absence of any evidence to the contrary, the value of the "installed assets" in the Port will be included in the value of the net assets of QN Group. If so, the loss of the value of the "installed assets" at the Port is not an addition to the loss in value of the net assets, yet paragraph 512AF is not pleaded as an alternative allegation.

[43] These points show that there are significant difficulties with amounts of the loss alleged in paragraphs 512AE and 512AF. But, in my view, there is a more significant problem, based in the allegation of causation of those losses.

Causation further considered

[44] Paragraphs 512AE and 512AF allege that the loss was suffered by reason of the Joint Venture ceasing to operate, the JVA and Administration Agreement being discharged and the "essential leases and contracts" being lost. Paragraph 512AD alleges, in turn, that those events were caused by QNI's failure to "deliver" the QN Business Property. Paragraph 511 alleges that the failure to "perform" the Transfer Obligations was the breach of the relevant obligations of QNI.

[45] A claim for damages for breach of contract (other than for nominal damages) and a claim for equitable compensation for breach of trust require a pleading of a causal

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16 *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221, [50]; and see *Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd* [2018] QSC 3, [34].

connection.[17] The causal connection of the alleged breaches to the alleged loss in this case is alleged as one of "but for" causation, meaning that the Joint Venturers must at trial prove a counterfactual scenario whereby if QNI had carried out the alleged Transfer Obligations they would have been able to obtain the transfer of "all leases and contracts to be transferred" that the Joint Venturers allege were "required" for the "effective continued operation of the Joint Venture".[18] In other words, a necessary factual element of the Joint Venturers case is that they would have been able to obtain the transfer (either to QN Sales or to them) of all those leases and contracts, because otherwise the Joint Venture business would have ceased in any event.[19]

[46] However, paragraph 512AA alleges that had the QN Business Property been delivered to QN Sales (as Successor Manager under the JVA) it would have "attempted to conduct the Joint Venture". In other words, the Joint Venturers do not allege that QN Sales would have been able to do so. This point is reinforced by paragraphs 512AB and 512AC. Paragraph 512AB is not an allegation of material fact but a pleading of evidence. In effect, it alleges that in March 2016 the GPLs made a statement of opinion that $10 million was all that was required to cover the cash flow shortfall. Paragraph 512AC alleges that the first defendant ("QNIM") had the benefit of a $23 million "indicative" offer of finance[20] that it would have "attempted to convert into an actual loan".

[47] The point is that the defendants do not allege that any other basis of funding the necessary working capital to continue the Joint Venture business would have been forthcoming, had the Transfer Obligations in relation to the QN Business Property been performed.

[48] It appears that the GPLs as administrators sought funding of $10 million from the Joint Venturers, Mr Palmer and the State Government, but were unable to secure that funding. In any event, on 7 March 2016, the Joint Venturers terminated or notified the GPLs as administrators of the termination of QNI's appointment as General Manager of the Joint Venture, so no question of QNI continuing the Joint Venture can arise after that date.

[49] It also appears that the "indicative" offer of finance made on 7 March 2016 was that made by Chifley Securities to QNIM.[21] That was not an offer capable of acceptance.

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17 *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221, [25]-[27]; *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2004] QSC 457, [15].

18 9 October CDAC, paragraph 512AD, particulars of sub-paragraph (c).

19 Compare, for example *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286, 301, 307, 311 and 312 (breach of contract) and *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, [9], [88] and [190] (equitable compensation).

20 Somewhat inconsistently, paragraphs 502 and 503 allege that Mr Palmer obtained the offer and had agreed to provide the $23 million to QN Sales upon transfer of the QN Business Property. However, the letter of offer is addressed to the directors of QNIM.

21 Affidavit of SM Iskander filed 3 October 2018, CFI 359, Exhibit SMI-108, pp 197-199.

It was also subject to conditions as to due diligence, satisfactory first mortgage security over assets to produce a loan to security value ratio of 65 percent and the provision of personal guarantees. The Joint Venturers do not allege that any of these conditions would have been satisfied.

[50] To further understand some of the bases of the necessary counterfactual scenario (and to some extent the alleged breaches of obligation of QNI by failing to perform the Transfer Obligations), it is necessary to identify more of the QN Business Property previously mentioned. Part of that property is as follows:

> "(i) Real property including Lot 1 on RP 730220 (Title Reference 21019214), Lot 2 on RP 709243 (Title Reference 20314194), Lot 3 on RP 709243 (Title Reference 20314195), Lot 277 on CP K124656 (Title Reference 21300136);
>
> (ii) Personal property including more than 40 motor vehicles;
>
> (iii) Contracts, Leases and Licences including:
>
> (1) Berth 2 Licence Agreement dated 23 August 1994 between QNI and MIM (**MIM Licence**);
>
> (2) Stockpile Area Lease dated 21 April 1998 between QNI and Port of Townsville Limited in respect of:
>
> i. Lot 150 on CP904971;
> ii. Lot 152 on CP904791;
> iii. Lot 153 on CP904791;
> iv. Lot 155 on CP904793;
> v. Lot 156 on CP904793; and
> vi. Lot AA on SP116244 (being part of Lot 791 on EP2348);
>
> (3) Cargo Lease dated 3 November 2008 between QNI and Port of Townsville Limited in respect of:
>
> i. Lease B in Lot 601 on CP EP1802 SP 220262;
> ii. Lease C in Lot 594 on CP EP1758 SP 220263; and
> iii. Lease A in Lot 430 on CP EP1068 SP220261 with follow on titles:
> iv. Lot 430 on CP EP1068 on title reference 47582106;
> v. Lot 594 on CP EP1758 on title reference 50305516; and
> vi. Lot 601 on CP EP1802 on title reference 50309780.
>
> (4) Lease 714895003 dated 4 January 2012 between QNI and Port of Townsville Limited, Lease QN on 228139;
>
> (5) Lease N979022 dated 16 February 1981 in respect of Lease B of Lot 1 on RP30923;

(6) Licence (Conveyor Route) dated 21 April 1998 between QNI and Townsville Port Authority;

(7) Fuel Pipeline Licence dated 11 April 2014 between QNI and Townsville Port Authority;

(8) Stevedoring Licence Agreement dated 22 August 2012 between QNI and Port of Townsville Limited;

(9) Gas Sale Agreement dated 12 May 2005 between QNI and Queensland Power Trading Corporation;

(10) Enertrade Gas Transportation Agreement dated 12 May 2005 between QNI and Enertrade (NQ) Pipeline No 1 Pty Ltd and Enertrade (NQ) Pipeline No 2 Pty Ltd".

[51] Four of the items of property listed were leases with a third party as lessor. It is trite that the incidents of the estate of a lessee at common law include a right to assign or sublet,[22] but conditions prohibiting or requiring the landlord's consent to assignment are ubiquitous. In other words, it is highly unlikely that QNI was entitled to "deliver" the leases, by transfer of possession upon assignment or sublease, without the landlord's consent. It is neither alleged in the 9 October CDAC nor is there any evidence on the application for leave that the leases were assignable or able to be sublet by QNI to QN Sales or the Joint Venturers or that the lessors would have agreed to any assignment, or, if so, on what commercial terms as to any existing debts of QNI.

[52] Other items of the property listed are licences with third parties, items of personal property, but not such that QNI could "deliver" by assignment or transfer of possession. It is neither alleged in the 9 October CDAC nor is there any evidence on the application for leave that the licences were assignable by QNI to QN Sales or the Joint Venturers, or that the licensors would have agreed to any assignments, or, if so on what terms as to any existing debts of QNI. By way of example, on the Joint Venturers' case of loss, one of the critical licences was the Berth 2 Licence Agreement between QNI and MIM (Mount Isa Mines) referred to in paragraph 506(a) particular (iii)(1), as extracted above. On 6 January 2016, the Scheduling Officer of Glencore Port Operations sent an account statement of the overdue invoices payable to MIM in the sum of $1,472,201.52.[23]

[53] The lack of attention that the Joint Venturers have given to the counterfactual scenario necessary to establish the required "but for" causal condition to recover the alleged loss is apparent on the face of the pleading.

[54] But, in my view, there is a greater problem of that kind, not dealt with by the pleading or the evidence at all. The listed QN Business Property does not include

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22 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 683 and 685.

23 CSOC paragraph 82(x); 9 October CDAC paragraph 88.

any contracts between QNI and Aurizon. Accordingly, the Joint Venturers do not allege that QNI breached the Transfer Obligations by failing to "deliver" any such contract to QN Sales or the Joint Venturers.

[55] It is not contentious that the Joint Venture business of operating the Yabulu refinery involved necessary elements of rail transport, including transport of ore to the refinery and transport of product from the refinery. Without the necessary rail transport there is a fundamental flaw in the counterfactual scenario on which the Joint Venturers' claims for loss are premised. No other basis for the Joint Venture business to have continued is alleged.

[56] QNI's dealings with Aurizon over the relevant contracts is a significant subject of the CSOC. Paragraph 69 alleges that there were four transport service agreements described as the "Rail Haulage Agreement Bulk Coal", "Transport Specification and Services Agreement", "Nickel Ore Rail Transport Agreement" and "Glen Geddes Rail Transport Agreement". Paragraphs 70 to 81 allege dealings between QNI and Aurizon over their relations under those agreements and the amounts of QNI's indebtedness from time to time. It is also not contentious that on 27 November 2017, Aurizon gave notice of default and made a demand for immediate payment of approximately $7.8 million under one of the agreements and approximately $4 million under another of the agreements, or that on 13 January 2016, Aurizon gave notice that if the amounts owing were not paid by 18 January 2016, it would suspend transport of product under the agreements.

[57] Copies of the Nickel Ore Rail Transport Agreement and the Glen Geddes Rail Transport Agreement are in evidence. Each of them is made between Aurizon and QNI only. Each of them contains a provision prohibiting assignment by QNI without Aurizon's consent.[24]

[58] Also in evidence is a copy of Aurizon's proof of debt dated 27 January 2016[25] given for a meeting of creditors under Part 5.3A of the CA claiming that it was owed $88,197,831.55 as at that date as follows:

Date	How debt arose	Amount
19 February 2015	Pursuant to the Glen Geddes Rail Transportation Agreement dated 19 February 2015	$6,449,455.50
31 October 2014	Pursuant to the Nickel Ore Transportation Agreement dated 31 October 2014	$81,748,376.05

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24 Clause 18.2 of the the Nickel Ore Rail Transportation Agreement and clause 17.2 of the Glen Geddes Rail Transportation Agreement. See Affidavit of SM Iskander filed 3 October 2018, CFI 363, Exhibit SMI-128, pp 1105 and 1184.

25 Affidavit of SM Iskander filed 3 October 2018, CFI 363, Exhibit SMI-128, p 1215.

[59] A number of allegations are made about Aurizon's debt from time to time in paragraphs 72 to 87 of the 9 October CDAC. It is unnecessary to refer to them further. For present purposes, it is enough to refer to paragraph 104, where the Joint Venturers allege that of the amount of $88,197,831 that the plaintiffs allege QNI owes to Aurizon, $66,319,669 only arose on the termination of the JVA (presumably meaning termination of QNI's conduct of the Joint Venture business). In other words, the Joint Venturers do not challenge that Aurizon was and is owed the difference by QNI, being approximately $21.8 million.

[60] There is no allegation in the 9 October CDAC, or evidence on the application for leave, either that QNI was obliged to "deliver" the Aurizon agreements to QN Sales by assignment, or that Aurizon would have consented to any assignment or novation of those agreements, or that QN Sales or the Joint Venturers would have been able to enter into new contracts with Aurizon, without dealing with QNI's debt.

Breach of the Transfer Obligations further considered

[61] The Joint Venturers' claims for relief based on breaches of the Transfer Obligations depend on a number of steps and alternatives, before the court would reach the question of whether any of the relief claimed should be granted.

[62] The plaintiffs claim in the CSOC is that they were and are not obliged to "deliver" any of the Joint Venture Property that QNI holds or held to QN Sales or the Joint Venturers, by reason of the QNI's rights to indemnity for expenses and liabilities incurred acting as the General Manager and trustee, supported by a lien and right of retention over the relevant property. Both the Joint Venturers' defence and their counterclaim based on breach of the Transfer Obligations depend on negating that claim.

[63] It is appropriate to further consider paragraph 508 of the 9 October CDAC, as set out above. Paragraph 508(a) relies upon clause 5.6(d) of the JVA. That sub-clause provides that when a General Manager ceases to be such it shall deliver to the Successor Manager all Joint Venture Property and all documents, books, accounts and records relating to the Joint Venture which it was the responsibility of the outgoing General Manager to maintain.

[64] Paragraph 508(b) relies upon clause 8.3 of the Administration Agreement. That clause provides that upon termination of the Administration Agreement QNI shall deliver forthwith to the Joint Venturers all books, records and other documents the property of the Joint Venturers or kept by QNI pursuant to the agreement. Clause 8.3 is partly inconsistent with clause 5.6(d) of the JVA, because it provides for delivery of the books etc to the Joint Venturers, not to the Successor Manager where a Successor Manager is appointed, and QN Sales was appointed Successor Manager on 7 March 2016. But, in any event, in my view, clause 8.3 does not add much to the contractual effect of clause 5.6(d).

[65] Of greater interest is paragraph 508(c), that alleges an obligation of QNI to "deliver" to the Joint Venturers "ore, Products and proceeds of sale". It implicitly recognises that these species of property are not fully dealt with by the JVA, or by the

Administration Agreement. Instead the particulars allege or rely upon the obligation arising as:

> "(i) **bailee**, by virtue of its possession and pursuant to pursuant to (sic) clause 5.2(a), (b) and (c) of the JVA, which required QNI to obey directions of the Joint Venturers, the terms of the bailment being subject to directions of the Joint Venturers from time to time, including to deliver up that property on request;
>
> (ii) in the alternative **as agent**, pursuant to clause 5.2(a), (b) and (c) of the JVA, which required QNI to obey directions of the Joint Venturers from time to time, including to deliver up that property on request; and
>
> (iii) in the further alternative, **as bare trustee**, by reason of paragraphs 37 and 108A hereof, its obligation to deliver up that property to the Joint Venturers on request." (emphasis added)

[66] On the first leave application,[26] Bond J considered whether the Joint Venturers had negatived QNI's entitlement to a lien for expenses and liabilities incurred as General Manager and trustee. Their pleading at the time alleged, in paragraph:

(a) 53 – QNI neither owned, nor obtained any beneficial interest in, any part of such Joint Venture Property, including Products;

(b) 61(f) – QNI did not own the Joint Venture or obtain beneficial ownership of the Joint Venture;

(c) 61(h) – QNI has and had no right of indemnity as a trustee of the Joint Venture out of any of the property or assets of the Joint Venture in respect of any liabilities incurred by it; and

(d) 67 – in the circumstances and by virtue of clause 5.6(d) of the JVA, as from 7 March 2016, QNI was obliged to deliver all Joint Venture Property and all documents etc to QN Sales.

[67] Bond J held on the first leave application that QNI might be entitled to an indemnity and lien either because as trustee it had a beneficial interest in the trust assets to the extent of its right to an indemnity or to an equitable lien if the assets were not held on trust[27] and the Joint Venturers had not persuaded him that there was a serious question to be tried as to breach of the alleged obligation to deliver all Joint Venture Property and all documents etc to QN Sales.[28]

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26 *QNI Resources Pty Ltd & Ors v Park & Ors* (2016) 116 ACSR 321; [2016] QSC 222.

27 (2016) 116 ACSR 321, 349 [132].

28 (2016) 116 ACSR 321, 351 [142].

[68] On the appeal,[29] Gotterson JA accepted two uncontroversial principles of law:

(a) first, where the management of property has been conducted by a person authorised to do so by the owner of property, the manager will have a lien over the property in respect of expenditure incurred in managing the property; and

(b) second, where a trustee acting within power incurs a liability to a third person in the course of administering a trust the trustee is entitled to an indemnity out of the trust assets in respect of the liability and will have a commensurate equitable charge or lien over the trust assets in aid of the indemnity. [30]

[69] Not surprisingly, the plaintiffs rely upon both decisions as supporting the conclusion that no leave to proceed should be granted for a claim based on the Transfer Obligations, that again proceeds from the contractual right under clause 5.6(d) of the JVA. They submit, in effect, that the addition in paragraph 508(b) of reliance upon clause 8.3 of the Administration Agreement does not add anything of significance to the reasonableness of the causes of action.

[70] They also submit, in effect, that the matters relied on in the particulars under paragraph 508(c) do not undermine the reasoning or the conclusions reached in the earlier decisions. In my view, the first uncontroversial principle accepted in the Court of Appeal would support that argument. A person entrusted with property to manage it is often a bailee. A relationship of bailee and bailor, stemming from the possession of the manager, as relied on in the particulars under paragraph 508(c), does not, without more, affect the application of the uncontroversial principle. Equally, a relationship of principal and agent, as relied upon in the particulars, does not, without more, affect the application of the first uncontroversial principle.

[71] The reliance in the particulars under paragraph 508(c) upon the allegation that QNI was a "bare" trustee, potentially engages the second uncontroversial principle as to a trustee acting within power who incurs a liability to a third person in the course of administering the trust.

[72] The particulars of paragraph 508(c) cross-refer to paragraph 37 of the 9 October CDAC. That lengthy paragraph alleges in paragraph 37(c) that the funds paid into bank accounts in QNI's name were held on "bare" trust for the Joint Venturers. But there is no suggestion that before on or after about 7 March 2016, when the Joint Venturers demanded that QNI deliver the funds to them, funds were used by QNI to pay expenses of the Joint Venture without the consent or acquiescence of the Joint Venturers. In other words, whatever concept of "bare" trust is sought to be engaged by the Joint Venturers, it is not based on the factual contention that prior to the date of termination of the appointment of QNI as the General Manager of the Joint Venture no funds from the accounts were to be utilised to pay expenses or liabilities.

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29 *QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167.

30 [2017] QCA 167, [51].

[73] In my view, an allegation that QNI was a "bare" trustee, without more, does not add to the strength of the Joint Venturers' allegation of breach of the Transfer Obligations.

[74] However, the defendants raise another ground of defence to the plaintiffs' case of a lien and right of retention in support of the right to an indemnity. Paragraph 508B and 508C of the 9 October CDAC allege, in part:

> "508B. …to the extent that QNI was able to enforce its rights pursuant to any indemnity secured by a charge or lien (which is denied) then such charge or lien only extended to such assets as were necessary to secure the payment of such monies as were properly payable to QNI pursuant to the said indemnity upon it asserting what monies were in fact properly payable to it.
>
> 508C. If, as pleaded in paragraph 508B hereof, QNI was obliged, upon a call being made upon it to transfer the QN Business Property, it was obliged to:
>
> (a) provide an account to QNIR and QNIM of the amounts properly due to it;
>
> (b) identify which assets should be retained by it to secure its right of indemnity; and
>
> (c) otherwise transfer the balance of the assets to QN Sales or the Joint Venturers."

[75] Similar allegations are made in paragraphs 510(b), 510B, 532A, 532B, 535(b) and 535B. The Joint Venturers allege that provision of the account and identification of the assets are a condition precedent to QNI's rights of lien or retention as trustee. The "call" for transfer of the QN Business property relied upon consists of the demands alleged in paragraph 509, occurring between 6 or 7 March 2016 and 16 March 2016.

[76] The point raised was argued by reference to part of the reasons in *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)*,[31] where McPherson J said:

> "… in any case in which a trustee is entitled in respect of liabilities properly incurred to his indemnity and lien over assets vested in him as trustee, the trust property (which means the property to which the beneficiaries are entitled in equity) is confined to so much of those assets as is available after the liabilities have been discharged or at least provided for … and the fact that a valuation may be required for accounting purposes merely serves to emphasize that the right of the beneficiaries is limited to the balance remaining after the liabilities are paid or provided for out of the assets once their value is determined. It is

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[31] [1984] 1 Qd R 576.

> therefore not correct to say … that the trustee's lien at all times attaches to all of the assets."[32]

[77] The passage relied upon does not support the conclusion that it is condition precedent to a trustee's rights of lien and retention that the trustee must first provide the trustee's accounts to the beneficiaries. In principle, in my view, there is no reason why provision of a trustee's account is a condition precedent to those rights. For example, it may be uncontroversial that whatever the precise balance of the account, the trustee's right of indemnity will far exceed the value of the trust property or the value of the trust property that the trustee might retain. No purpose would be served, in such circumstances, in making the trustee's obligation to render accounts a condition precedent to the trustee's rights of lien or retention.

[78] Questions may arise when there is a dispute as to a trustee's right to indemnity by reason of the trustee's liability to make good trust assets that have been lost on a breach of trust, by reason of what is sometimes called the "clear accounts rule"[33] or when there is a dispute as to an equitable right to share in a fund where the claimant has an obligation to make good a contribution to the fund under the rule in *Cherry v Boultbee*.[34] But, in my view, the defendants' allegation of law in the present case as to a condition precedent to the rights of lien and retention is not reasonably supported by authority.

[79] In my view, the sum of, and the conclusion that follows from, the points discussed as to the Joint Venturers' claims against QNI is that leave to proceed should not be granted to the extent that the Joint Venturers seek to claim damages or equitable compensation for breach of the Transfer Obligations under paragraphs F or M of the claim for relief.

Paragraphs Q, R and S of the claim for relief

[80] In both paragraphs Q and R of the claim for relief, the Joint Venturers claim equitable compensation. Those claims seem to reiterate the same claim for equitable compensation for breach of trust previously considered. Although paragraph R cross-refers to paragraphs 536, 543 and 550 of the pleading, both paragraphs 543 and 550 are deleted in the 9 October CDAC and paragraph 536 is now only a reference to the breach of trust in failing to perform the Transfer Obligations. No further discussion of these paragraphs is required.

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32 [1984] 1 Qd R 576, 587.

33 *Park v Whyte (No 3)* [2018] 2 Qd R 475, 503-507, [125]-[144]; *Australian Securities and Investments Commission v Letten (No 17)* (2011) 286 ALR 346, 353 [20]; *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, 396-397.

34 (1839) 4 My & Cr 442, 41 ER 171; Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5 ed (2015), 1117-1121 [39-110]-[39-155].

[81] Paragraph S is a claim for compound interest. It stands or falls with the decision as to whether the Joint Venturers are to be granted leave to proceed on paragraphs F, M, Q and R.

Paragraph W of the claim for relief

[82] Paragraph W claims an order that the Joint Venturers are not liable to indemnify QNI for the sum of $74,031,845.17 as a liability incurred by QNI consequent upon termination of the employment of 550 employees on 11 March 2016.

[83] Paragraphs 91(b)(i), (ii), 104(f)(iv), 128(d)(i), 500, 512A and 512B of the 9 October CDAC are the paragraphs that refer to these employees. Paragraph 583 repeats paragraphs 500, 512A and 512B in the counterclaim. Summarising for brevity, they allege that:

(a) 500 – on or about 3 March 2016 Mr Palmer took steps to acquire a loan facility of $23 million (presumably the Chifley Securities "indicative" offer made on 7 March 2016 to QNIM) "to continue the operations of the refinery and the employment of the employees";

(b) 512A – by reason of the termination of the employment of 550 employees of QNI (presumably on or about 11 March 2016 as alleged in paragraph 104(f)(iv)), QNI incurred liabilities to those employees of $74,031,845.17;

(c) 512B – that liability would not have been incurred but for QNI's alleged breaches of contract in failing to deliver the QN Business Property to QN Sales or the Joint Venturers.

[84] It may be observed that:

(a) on 7 March 2016, the Joint Venturers notified termination of QNI's appointment as General Manager of the Joint Venture;

(b) on 11 March 2016, when QNI terminated the 550 employees, QNI no longer had the business of operating the Joint Venture under the JVA;

(c) the 9 October CDAC does not allege in the counterclaim, as prior iterations of the pleading did, that QNI was obliged to deliver the employees to QN Sales or the Joint Venturers on termination of QNI's appointment as General Manager of the Joint Venture.

[85] It might be thought unlikely, in those circumstances, that the GPLs as adminstrators, short of funds, had an option not to terminate the employment of the employees. But it is unnecessary to consider that question any further. The short answer to the Joint Venturers' application for leave in relation to Paragraph W is that if the Joint Venturers are successful in defending QNI's claim for indemnity in respect of the alleged employees' entitlements, on the grounds raised in paragraphs 104(f)(iv) and 128(d)(i) of the defence, it will not require an "order" that it is not liable for those amounts as sought in paragraph W. No basis for that relief as a claim appears or was advanced.

Paragraphs N, O and P of the claim for relief

[86] Paragraphs N and O claim an order that an account be taken of all the property belonging to the Joint Venturers received and disbursed by QNI from 18 January 2016, the date of the SPLs' appointment as administrators, and that QNI deliver to the Joint Venturers the property found to be due on the taking of the account.

[87] Paragraph P claims an order that QNI "account" to the Joint Venturers for the QN Business Property.

[88] No specific paragraph of the 9 October CDAC alleges that the Joint Venturers are entitled to any such relief, unlike the other paragraphs of the claim for relief. No submission either in writing or made orally by the defendants was directed to paragraphs N, O or P.

[89] The Joint Venturers sought leave to proceed on a claim or claims for account on the first leave application. Bond J, inter alia, held that before the court would order the taking of an account it is necessary for the Joint Venturers to demonstrate that they are entitled to some sum from QNI[35] and that a discretionary factor against an order is the failure of a claimant for an account to make an offer and to disclose the capacity to repay any deficiency on the taking of the account.[36] These points were not challenged by the Joint Venturers on the appeal.[37]

[90] In my view, given that the Joint Venturers have not alleged, and there is no evidence on the application for leave, that:

(a) there would be a balance in their favour on the taking of an account;

(b) they have made an offer to repay any amount in favour of QNI on the taking of an account; and

(c) they make no submission as to why the approach taken by Bond J on the first leave application should not be followed, no leave to proceed should be granted on paragraphs N, O or P of the claim for relief.

Leave that should be granted

[91] However, to the extent that the Joint Venturers claim specific performance of the Transfer Obligations as contractual obligations or a like order as against QNI as trustee of an obligation to transfer the trust property, they should be granted leave to proceed,[38] because those claims will not substantially add to the questions to be decided at the trial of the plaintiffs' claims.

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35 *QNI Resources Pty Ltd & Ors v Park & Ors* (2016) 116 ACSR 321, 336 [70].

36 *QNI Resources Pty Ltd & Ors v Park & Ors* (2016) 116 ACSR 321, 337 [73].

37 *QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167.

38 Compare *Proactive Management & Ors v Over Fifty Funds & Ors* [2007] NSWSC 802.

Joint Venturers' counterclaims against the GPLs

[92] The claim of the Joint Venturers against the GPLs is alleged in paragraphs 587 to 591 and 598 to 600 of the 9 October CDAC and paragraphs G, H, I, M, O, P, Q, R and S of the relief claimed.

[93] Broadly speaking, the claims may be divided into two classes: first, personal claims against the GPLs for damages for equitable compensation or orders for an equivalent account ("claims for damages or equitable compensation"); second, orders to require the GPLs to perform QNI's obligations.

Claims against the GPLs for damages or equitable compensation

[94] Paragraph 587 cross-refers to paragraphs 492 to 512C, 513 to 516M, 529 to 535C, 536 and 537 of the defence.

[95] The lynchpin of the claims for damages or equitable compensation is in paragraphs 588 and 589, as follows:

> "588. By reason of the material facts pleaded in 587 above, the GPLs have caused or induced QNI to breach the JVA, the Administration Agreement and its obligations as agent of or alternatively as trustee for QNIR and QNIM.
>
> 589. The GPLs' conduct in causing or inducing QNI to breach the JVA, the Administration Agreement and its obligations as agent of or alternatively as trustee for QNIR and QNIM has caused QNIR and QNIM loss and damage.
>
> **Particulars**
>
> QNIR and QNIM repeat and rely on the particulars in paragraph 516L of this defence."

[96] Paragraph 516L is deleted, but the application should be decided on the assumption that the loss alleged is that in paragraphs 512 to 512B (see the allegation in paragraph 512C of entitlement to the relief in paragraph M of the relief claimed).

[97] A question arises whether the Joint Venturers require leave to proceed on their claims against the GPLs. It is not disputed that leave to proceed is required against a court appointed liquidator.[39] However, there are contradictory decisions as to whether the requirement extends to a liquidator in a creditors voluntary winding up,

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[39] The requirement was identified in *Re Siromath Pty Ltd (No 3)* (1991) 25 NSWLR 25, 28 by analogy between a court appointed liquidator as an officer of the court and a court appointed receiver. It has been accepted since in many cases, although an intermediate appellate court has not considered whether the principle is correctly applied to a liquidator.

who is not an officer of the court. One case decides that it does.[40] Another case decides that it does not.[41] Detailed written submission were made by the plaintiffs as to why the former should be preferred and oral submission were made by the Joint Venturers that the latter should be preferred.[42]

[98] Two points relevant to that question were not explored fully by the parties in argument. First, the tortious or equitable wrongs that the Joint Venturers allege against the GPLs relate principally to the time of their appointment as administrators, and subject to the rights and obligations of an administrator under Part 5.3A of the CA, not to their conduct as liquidators. Second, although the GPLs were voluntary liquidators when first appointed on 22 April 2016, they are not now. Their appointment was converted in to court appointed liquidators when QNI was ordered to be wound up in insolvency on 27 February 2017.

[99] In support of the application for leave against the GPLs, the Joint Venturers made detailed submissions as to the potentially arguable causes of action for damages for the tortious liability of a company director for a breach of contract engaged in by the company or for the equitable liability of a person who procures or induces a breach of trust by a trustee.

[100] The damages or equitable compensation claimed against the GPLs are for the same alleged loss as against QNI. In my view, if required, leave to proceed should not be granted on those claims against the GPLs for the same reasons that it should not be granted against QNI. It is unnecessary to consider whether leave to proceed should also be refused for additional reasons based on the weakness of the bases of the liability alleged against the GPLs.

[101] However, in the view I take, it is unnecessary to resolve the question whether leave to proceed is required against the GPLs as former voluntary liquidators or former administrators. Whether or not leave to proceed is required, I would not permit the Joint Venturers to proceed on the counterclaim against them as pleaded and would strike out the relevant paragraphs as not disclosing a reasonable cause of action or otherwise as an abuse of process, either under UCPR r 171 or in the inherent jurisdiction. I deal with that question later in these reasons.

Orders to require the GPLs to perform QNI's obligations

[102] First, in my view, none of these claims is necessary. If an order is made that QNI perform an obligation by doing an act, there is no reason to make the order against the GPLs personally. They are officers of the court who may be expected to comply with the court's orders against QNI. They are not necessary or appropriate parties simply because they are liquidators of QNI.

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40 *Eighty Second Agenda Pty Ltd v Handberg* [2014] VSC 665, [29]-[30].

41 *Re Worldwide Specialty Property Services Ltd (in liq)* [2017] NSWSC 1851, [26].

42 The defendants' written submissions did not challenge that leave to proceed is required against the GPLs and the amended application for leave to proceed sought such leave.

[103] Second, to the extent that I would not grant leave to proceed against QNI on one or more of the Joint Venturers' claims against QNI, no leave to proceed should be granted against the GPLs on the same claim.

Counterclaims by defendants other than the Joint Venturers

Mr Palmer's counterclaim

[104] First, it is appropriate to deal with the fourth defendant ("Mr Palmer"). The 9 October CDAC purports to make a counterclaim on his behalf, in paragraph CC of the claim for relief for an order setting aside a security deed and a power of attorney executed by him. However, the counsel and solicitors responsible for the 9 October CDAC do not act for him.

[105] At present, Mr Palmer represents himself in the proceeding. The solicitors for the defendants (as I have defined them above) have not filed a notice of appointment as his solicitors. The amended application for leave to proceed is not clear on its face as to on whose behalf it was filed as applicants. There is, however, no suggestion that the solicitors do in fact have instructions to represent Mr Palmer (or the twentieth and twenty-first defendants). At the outset of the hearing, I questioned whether counsel for the defendants were acting on some form of direct access brief for Mr Palmer. After some initial uncertainty, for a short period, an undertaking to file a notice of appointment as solicitors for Mr Palmer was given by the solicitors for the defendants. A few hours later, their instructions to act for him were withdrawn and they sought and were released from the undertaking. By inference, the position is that Mr Palmer chose not to be represented and thereby not to make an application for leave to proceed.

[106] Accordingly, it is unnecessary to consider any question whether Mr Palmer should be given leave to proceed by counterclaim.

Mineralogy's counterclaim

[107] Second, the 9 October CDAC deleted the counterclaim of the seventh defendant ("Mineralogy"). No question of leave to proceed on Mineralogy's counterclaim remains.

Mr Martino's counterclaim

[108] Third, the twenty-second defendant ("Mr Martino") applies for leave to proceed on his counterclaim in paragraphs 622 and 623 of the counterclaim and paragraph BB of the claim for relief for an order that the GPLs and QNI are estopped from claiming or obtaining the relief sought in paragraph 522 of the CSOC.

[109] The claim for relief in paragraph 522 stems from Mr Martino's involvement in the events pleaded in Section W of the CSOC, in paragraphs 415 to 442, relating to the "Mineralogy Settlement Deed". In the interests of brevity, the relevant facts alleged should be summarised.

[110] On 13 January 2016, QNI, the Joint Venturers and the sixteenth defendant ("China First"), a company of which Mineralogy was the ultimate holding company and Mrs Palmer was director, executed two documents:

(a) first, a share subscription agreement by which QNI agreed to subscribe for 2 million shares to be issued by China First for an allotment amount of $135 million payable in two equal instalments on 31 December 2017 and 31 December 2018 ("Share Subscription Agreement");

(b) second, a fixed and floating charge given by QNI to China First to secure the allotment amount with interest and costs ("China First Charge").

[111] On 18 January 2016, five days later, Mr Mensink, as sole director of QNI resolved that in his opinion QNI was insolvent or was likely to become insolvent at some future time and appointed the GPLs as administrators.[43]

[112] On 1 July 2016, the GPLs and QNI started a proceeding claiming that the Share Subscription Agreement and the China First Charge were voidable transactions ("China First voidable transaction claim"). That claim is continued in Section U and paragraph 505 of the CSOC.

[113] On 29 March 2017, QNI started a proceeding against Mineralogy claiming an order that Mineralogy pay the amount of $104,480,277.21 for debt ("Mineralogy debt claim"). That claim is continued in Section NA of the CSOC.

[114] On 3 May 2017, notwithstanding the unresolved China First Charge voidable transaction claim, Mr Palmer, on behalf of China First, purported to appoint Mr Martino as a controller of QNI's property, under the China First Charge.

[115] On 4 May 2017, in the context of the unresolved Mineralogy debt claim, Mr Palmer, on behalf of Mineralogy and China First, executed a draft deed described as the "Mineralogy Settlement Deed" that was forwarded to Mr Martino, in effect, as an offer to compromise the Mineralogy debt claim. Within minutes of being forwarded the draft Mineralogy Settlement Deed, Mr Martino, purportedly as controller of QNI's property, executed the document and returned it, in compromise of the claims of QNI.

[116] The purported compromise was for China First to reduce the allotment amount under the challenged Share Subscription Agreement of $135 million to $125 million in consideration of QNI's promise to discontinue the Mineralogy debt claim proceeding and not to make future claims against Mineralogy that were the subject of that proceeding. As well, the deed purported to release all directors and related parties of Mineralogy and China First from all claims.

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43 CSOC, paragraph 3(a)(i); *Corporations Act* 2001 (Cth), s 436A(1).

[117] On 9 May 2017, Mr Martino purported to change QNI's representation in the Mineralogy debt claim proceeding to himself and then purported to file a notice of discontinuance of the proceeding.

[118] The plaintiffs allege that Mr Martino willfully or recklessly sacrificed the interests of QNI in executing the Mineralogy Settlement Deed and filing the notice of discontinuance.

[119] In paragraph 522 of the CSOC they seek orders that he was not validly appointed as controller of QNI or be removed as controller, if he was validly appointed, and to restrain him from purporting to exercise any rights as a controller as well as orders as to the invalidity of the Deed of Settlement and Mr Martino's filing of a notice to act on behalf of QNI and filing of a notice to discontinue the Mineralogy debt claim proceeding.

[120] Mr Martino's claim of estoppel in paragraphs 622 and 623 of the 9 October CDAC cross-refers to paragraphs 456 to 457. Again for brevity, the allegations made in those paragraphs may be summarised.

[121] On 18 January 2016, the day the administrators were appointed, the administrators (personally and on behalf of QNI), the Joint Venturers, China First and the fifteenth defendant ("Waratah Coal") executed a document described as the "Priority Deed". Clause 6.1(a) of the Priority Deed provided that the GPLs (as creditors under the deed) consented to the creation and execution by QNI of securities including the China First Charge.

[122] Mr Martino alleges, in effect, that:

(a) the GPLs (as administrators) and QNI (thereby) represented that the China First Charge was valid and that they would not dispute or challenge the rights of the "relevant" defendants;

(b) the Joint Venturers and China First entered into the Priority Deed in reliance on the representation and would suffer detriment of QNI or the GPLs were permitted to resile from them; and

(c) the plaintiffs are precluded by estoppel from claiming the relief sought in paragraphs 504 and 505 of the CSOC.

[123] Paragraph 504 and 505 of the CSOC relevantly claim relief under s 588FF of the CA against the Joint Venturers and China First as to the invalidity of the Share Subscription Agreement and the China First Charge.[44] It is relief that may be granted if a court is satisfied that a transaction is a voidable transaction.[45]

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44 *Corporations Act* 2001 (Cth), s 588FF(1)(h).

45 *Corporations Act* 2001 (Cth), s 588FE(1) and (2).

[124] It is unnecessary to dwell on the logic or strength of Mr Martino's proposed defence by estoppel against the operation of the statutory provisions of the CA for invalidity of the Share Subscription Agreement and the China First Charge as part of a voidable transaction as an uncommercial transaction of a company in liquidation.[46]

[125] For present purposes, it is enough to conclude that Mr Martino's plea of estoppel is raised by way of defence. It is unnecessary for him to claim any order by way of counterclaim. It follows that he should not be granted leave to proceed to make a counterclaim for the relief sought in paragraph BB of the relief sought in the 9 October CDAC.

China First's counterclaim

[126] China First proposes to prosecute two claims if granted leave to proceed. First, paragraphs 620 and 621 of the counterclaim and paragraph AA of the relief claimed in the 9 October CDAC raise the same estoppel plea as that raised by Mr Martino upon his proposed counterclaim. For the same reasons as in Mr Martino's case, no leave to proceed should be given on that claim.

[127] Second, paragraphs 636 to 638 and paragraph Z of the relief sought in the 9 October CDAC allege a claim for damages for breach of contract.

[128] Again summarising for brevity, the cause of action hinges on the condition (which is denied) that the Share Subscription Agreement is void as part of a voidable transaction under ss 588FE and 588FF of the CA. If so, China First will not receive the allotment amount of $135 million.[47]

[129] In that event, China First alleges that:

(a) by clause 6.6 of the Priority Deed, or by an implied term of that contract, QNI and the GPLs promised that they would not "do anything which would not more satisfactorily secure the rights of China First" under the Priority Deed;

(b) it was a breach of clause 6.6 or the implied term when the GPLs sought an order avoiding the China First Transaction and refused to recognise China First's proof of debt and right to cast votes at meetings of creditors; and

(c) China First has suffered loss and damage in that it will not receive the sum of $135 million under the Share Subscription Agreement.

[130] Paragraph Z of the relief claims the sum of $135 million as damages for breach of contract.

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46 Compare, for example, *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 506; *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610, 620.

47 No reduction is given in this part of the proposed counterclaim for the reduction of the amount of $135 million to $125 million allegedly made by the Mineralogy Settlement Deed, but that point may be put to one side.

[131] For present purposes, it is unnecessary to consider whether clause 6.6 of the Priority Deed or the implied term alleged would be enforceable as contractual terms as against QNI in the event that the China First Transaction was ordered to be void *ab initio* as against QNI.

[132] The claim for $135 million is the amount that China First alleges would have been received as the allotment amount for the 2 million shares in China First issued to QNI. It is convenient to pass by the question of whether QNI, then on the edge of insolvency by the resolution of its sole director made five days later, and which proceeded into administration, a creditors' voluntary winding up and a winding up in insolvency, would ever have been able to pay the promised $135 million, because there is a more significant point.

[133] The relief sought by QNI seeks an order that the Share Subscription Agreement be ordered to be void *ab initio* and an order that the China First Share Issue be avoided *ab initio*. In other words, it seeks an order to restore both parties to the position that they were in before the Share Subscription Agreement was made, in the way that an order for rescission does.[48] It could not sensibly be suggested that QNI could avoid the obligation to pay for the shares and at the same time retain them.

[134] There can be significant complexities associated with the damage suffered by a company in relation to a contract for the issue of its shares,[49] but the more difficult questions may be put to one side in deciding this application. On the proposed counterclaim, if the Share Subscription Agreement is ordered to be void *ab initio*, China First's loss cannot be the allotment amount of $135 million, unless the shares it agreed to transfer under the Share Subscription Agreement were worthless and at 13 January 2016 it would have been unable to obtain any amount by way of allotment monies for those shares it offered had they been offered to anyone else.[50] Those are not allegations that China First makes.

[135] Accordingly, in my view, leave to proceed should not be granted to China First on its proposed counterclaim against either QNI or the GPLs.

Counterclaims of all defendants

[136] Paragraphs 575 and 576 and paragraphs A, B and C of the counterclaims for relief in the 9 October CDAC are made on behalf of all defendants.

[137] Paragraph 575 cross-refers to paragraph 1A of the defence. Summarising, the relevant part of that paragraph alleges that on 3 and 4 May 2017, Mr Martino was appointed as agent and controller of property of QNI and on 4 May 2017 entered into the Mineralogy Settlement Deed on behalf of QNI. I have discussed the

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48 Compare *Alati v Kruger* (1956) 94 CLR 216, 222-223.

49 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

50 An analogous question can arise under a guarantee of an executory contract of sale: *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 261.

Mineralogy Settlement Deed above in relation to Mr Martino's counterclaim. I will not, therefore, set out the relevant facts in more detail in this section of my reasons.

[138] Paragraph 1B of the defence further alleges that the Mineralogy Settlement Deed is a bar to QNI proceeding against all defendants. Paragraph A of the counterclaims for relief seeks a declaration that the Mineralogy Settlement Deed is a bar to the claims in the CSOC. A plea in bar is a defence. A declaration is unnecessary.

[139] Paragraph B of the counterclaims for relief seeks an order that the defendants are released and excused from the claims the subject of the CSOC. No basis in law for the court to make an order for release (as opposed to that being the effect of the contract relied upon) was identified. As to an order for "excuse", I do not know what the effect of such an order would be or the basis for making it.

[140] Paragraph C of the claim for relief seeks an order that the CSOC be dismissed, alternatively an order that all claims in the CSOC based on the trust pleaded in Section K of the CSOC be permanently stayed or dismissed as an abuse of process.

[141] A counterclaim for an order for dismissal at trial is unnecessary, and the defendants make no application for summary judgment under UCPR r 293. The defendants made no submissions based on the court's power to permanently stay a proceeding based on abuse of process.

[142] In my view, no abuse of process within the principle as discussed later in these reasons is arguably raised in the present case. If the defendants succeed at trial in defeating the plaintiffs' claims on the basis of the plea in bar based on the Mineralogy Settlement Deed, notwithstanding the plaintiffs' challenge to the validity of that deed raised by the CSOC, the plaintiffs' claims will be dismissed. But there is no reason to grant leave to proceed on a counterclaim for an order for such dismissal or a counterclaim for an order for dismissal or a stay on the ground of an abuse of process.

Plaintiffs' applications to strike out

Principles

[143] UCPR r 171 provides:

> "(1) This rule applies if a pleading or part of a pleading—
>
> (a) discloses no reasonable cause of action or defence; or
>
> (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
>
> (c) is unnecessary or scandalous; or
>
> (d) is frivolous or vexatious; or
>
> (e) is otherwise an abuse of the process of the court.

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading."

[144] Rules in similar form (although not originally permitting the use of affidavit material) have existed in this jurisdiction[51] and elsewhere since the *Rules of the Supreme Court* 1883 (Eng), following upon the *Judicature Acts* 1873 and 1875 (Eng). The relationship of the rules and the inherent jurisdiction of the court was explained by the High Court in *Batistatos v Roads & Traffic Authority of New South Wales*.[52]

[145] Further, the modern procedural approach identified by the High Court in *Aon Risk Services Australia Ltd v Australian National University*[53] recognises that conduct of a proceeding that has a tendency to increase delay, technicality or expense is not solely a matter as between the parties.

[146] A leading case on strikeout under a rule comparable to r 171[54] is *General Steel Industries Inc v Commissioner for Railways (NSW)*[55] and a leading case in the inherent jurisdiction is *Dey v Victorian Railways Commissioners*.[56] Dixon J recognised in *Dey* that in the inherent jurisdiction a case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting their case for determination in the appointed manner by the court with or without a jury. But the court is not disentitled from examining the cause of action for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious.[57] Barwick CJ in *General Steel* reasoned to the same effect for the exercise of a power analogous to that under r 171.[58]

[147] *Batistatos* is also a leading case on abuse of process in the inherent jurisdiction in respect of a plaintiff's claim, where the High Court referred to the classic statement of Lord Blackburn in *Metropolitan Bank Ltd v Pooley*[59] and later cases.[60] Lord Blackburn said:

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51 *Rules of the Supreme Court* 1900 (Qld), O 22 rr 31 and 32.

52 (2006) 226 CLR 256, 268-270 [19]-[26].

53 (2009) 239 CLR 175, 211-215 [92]-[103].

54 A difference is that r 171 permits affidavit evidence to be relied upon.

55 (1964) 112 CLR 125.

56 (1949) 78 CLR 62.

57 (1949) 78 CLR 62, 91.

58 (1964) 112 CLR 125, 129-130.

59 (1885) 10 App Cas 210.

60 (2006) 226 CLR 256, 266 [10] ff.

> "[F]rom early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing—the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action."[61]

[148] An abuse of process may constitute a ground for a permanent stay of a proceeding. But an order for a permanent stay is not granted lightly. Such an order is not made after trial. It is an order made at an interlocutory stage to prevent a plaintiff from proceeding to trial (and judgment) on the merits of a claim.

[149] However, the context of r 171 in the UCPR should not be overlooked, in particular:

(a) rule 5(1) – the purpose of the rules is to facilitate just and expeditious resolution of the real issues in civil proceedings at a minimum of expense;

(b) rule 5(2) – the rules are to be applied with the objective of avoiding undue delay, expense and technicality and facilitating the purpose;

(c) rule 5(3) – a party undertakes to the court and the other parties to proceed in an expeditious way;

(d) rule 5(4) – the court may impose appropriate sanctions if a party does not comply with the rules;

(e) rule 292 – summary judgment to a plaintiff may be granted if a defendant has no real prospect of succeeding and there is no need for a trial;

(f) rule 293 - summary judgment to a defendant may be granted if a plaintiff has no real prospect of succeeding and there is no need for a trial;

(g) rule 366(2) – the court may give directions about the conduct of a proceeding at any time; and

(h) rule 367(1) – the court may make an order or direction even though the order or direction may be inconsistent with another provision of the rules.

[150] The point of the references to rr 292 and 293 is that summary judgment for either a plaintiff or defendant may be granted if the opposite party has no real prospect of succeeding and a trial is not needed. An application for summary judgment and an application to strike out as not disclosing a reasonable cause of action or reasonable defence or is an abuse of process under r 171, or in the inherent jurisdiction, serve cognate purposes. That appears from *Webster v Lampard*,[62] where the plurality

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61 (1885) 10 App Cas 210, 220-221.

62 (1993) 177 CLR 598, 602.

judgment in the High Court adopted the principles stated in *Dey* and *General Steel*, as previously mentioned, upon the application of a rule of court providing for summary judgment for a defendant, where the rule did not contain an express standard or test, such as a "real prospect of succeeding" in UCPR r 293 or "real prospect of successfully defending" in r 292. A significant difference between the procedures, however, is that summary judgment is a final judgment, whereas an order to strike out under r 171 or stay in the inherent jurisdiction is not.

[151] The point of the reference to rr 366 and 367 is that the court has power to make directions that permit or relieve non-compliance with the pleading rules, in order to facilitate the just and expeditious resolution of the proceeding and in order to avoid undue delay, expense or technicality, as provided in accordance with the overriding purpose and direction as to application of the rules under r 5.

[152] The point of the reference to r 5(3) and 5(4) is that the application of the rules, including r 171, occurs in the context of a statutory duty of a party to proceed in an expeditious way and the power to impose sanctions upon a party for non-compliance with the rules, including the rules as to pleading. UCPR r 5 followed the response to the difficulties confronting civil litigation in the 1990s, exemplified by what are commonly referred to as the *Woolf* reforms in England and Wales,[63] and similar changes in approach in the various Australian jurisdictions, that led to the imposition of overriding purpose provisions, like those contained in r 5, and to the decision in *Aon Risk Services*. More recently, the High Court returned to the effect of overriding purpose provisions, such as r 5, in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*,[64] as follows:

> "In *Aon Risk Services Australia Ltd v Australian National University*, it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants. The decision in *Aon Risk Services Australia Ltd v Australian National University* was concerned with the *Court Procedures Rules* 2006 (ACT) as they applied to amendments to pleadings. However, the decision confirmed as correct an approach to interlocutory proceedings which has regard to the wider objects of the administration of justice."[65] (footnote omitted)

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63 For discussion of some aspects of their impact in Australia, see *Spencer v Commonwealth* (2010) 241 CLR 118, 129-133 [19]-[26] and *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27, [1]-[32].

64 (2013) 250 CLR 303.

65 (2013) 250 CLR 303, 321 [51].

[153] Only days ago, in *UBS AG v Tyne*,[66] the High Court further considered the question of abuse of process in the modern procedural context, under provisions such as r 5. The question in that case was whether a permanent stay should be granted to prevent an abuse of process in bringing a second claim where the first claim had been discontinued, but the reasons deal with abuse of process and the modern procedural context more generally. The plurality said:

> "The timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute. These wider interests are reflected in s 37M(2) of the FCA. As the joint reasons in *Aon Risk Services Australia Ltd v Australian National University* explain, the 'just resolution' of a dispute is to be understood in light of the purposes and objectives of provisions such as s 37M of the FCA. Integral to a 'just resolution' is the minimisation of delay and expense. These considerations inform the rejection in *Aon* of the claimed 'right' of a party to amend its pleading at a late stage in the litigation in order to raise an arguable claim. The point is made that a party has a right to bring proceedings but that choices are made respecting what claims are made and how they are framed. Their Honours speak of the just resolution of the dispute in terms of the parties having a sufficient *opportunity* to identify the issues that they seek to agitate."[67] (footnotes omitted)

[154] The potential for sanctions for failure to progress proceedings expeditiously (as expressly provided for in UCPR r 5(4)) has been considered in Queensland,[68] interstate[69] and overseas,[70] including discussion of related principles to be applied with respect to the amendment of pleadings.[71]

[155] This proceeding is one that is case managed on the Commercial List[72] under Practice Direction 3 of 2002 as amended from time to time.

Counterclaims

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66 [2018] HCA 45.

67 [2018] HCA 45, [38].

68 *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455, 459 [22]; *Quinlan v Rothwell* [2002] 1 Qd R 647, 653 [14]; *Hartglen Pty Ltd v Geoff Mitchell & Associates Pty Ltd* [2004] QSC 67, [32]-[34]; *Basha v Basha* [2010] QCA 123, [1] and [21].

69 See eg *Testel Australia Pty Ltd v KRG Electrics Pty Ltd* [2013] SASC 91, [17]-[29].

70 See *Denton v TH White Ltd* [2014] 1 WLR 3926 (CA) for consideration of the approach taken in England and Wales on the related question of whether to grant relief under r 3.9 from sanctions under the *Civil Procedure Rules 1998*.

71 *Hartnett v Hynes* [2009] QSC 225, [10]-[25]; but see the reversal in *Hartnett v Hynes* [2010] QCA 65, [39]-[41].

72 *Supreme Court of Queensland Act* 1991 (Qld), s 58.

[156] Except to the extent that leave to proceed is granted on the counterclaim, the counterclaim should be struck out. That conclusion follows from the refusal of leave to proceed. The relevant claims are stayed or precluded until leave to proceed is granted. The parties should not be required to comply further with the directions that have been made towards trial of the proceeding by reference to any issue raised on the pleadings on claims that are not proceeding to trial. The order to strike out may be made under both r 171 and in the inherent jurisdiction.

Set-off of the Joint Venturers claims for damages or equitable compensation

[157] The Joint Venturers claim a set-off in paragraph 569A of the 9 October CDAC against QNI's claims for debt, either by way of indemnity for the Expenditure Amount, or under the JVA for the amounts of the calls described as the "Old Call Notices" or the "New Call Notices", and whether owing in contract, restitution or equity.

[158] The set-off claimed is of the "damages" for the causes of action pleaded in paragraphs 508 to 512C (damages for breach of contract) and paragraphs 529 to 535B (equitable compensation for breach of trust). Either claim is made by way of equitable set-off.[73]

[159] UCPR r 173 permits a defendant to rely on set-off. To the extent that the Joint Venturers may plead a cause of action for damages for breach of contract or an equity for equitable compensation for breach of trust by QNI, they must plead a reasonable cause of action or equity that as an equitable set-off is a reasonable defence, under r 171.

[160] In my view, for the reasons discussed upon the Joint Venturers' application for leave on the claim for damages for breach of contract or equitable compensation for breach of trust, it follows that their pleas of set-off do not disclose a reasonable defence and should be struck out.

Additional strike out of paragraphs against the GPLs in the defence

[161] The orders to strike out must extend to additional paragraphs in the defence that relate only to the Joint Venturers' claims against the GPLs. I observe that there was never any reasonable defence of set-off against the GPLs, as they do not make a claim in their own right, against which a personal liability to a claim for damages in tort or equitable compensation for procuring or inducing a breach of trust could be set-off as impeaching QNI's claim or the GPLs' claim on behalf of QNI. [74] There was and is no justification for paragraphs in the defence alleging facts only relevant

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[73] The claim for damages for breach of contract is such because it is a claim for unliquidated damages. The claim for equitable compensation for breach of trust is such because it is an equitable claim set up against either a common law claim or another equitable claim: Heydon, Leeming and Turner, *Meagher Gummow and Lehane's Equity: Doctrines and Remedies,* 5 ed (2015), 1102-1109.

[74] Heydon, Leeming and Turner, *Meagher Gummow and Lehane's Equity: Doctrines and Remedies,* 5 ed (2015), 1102-1115.

to a cause of action for damages against the GPLs personally. See paragraphs 516B to 516D and paragraphs 535C to 535E and, in part, paragraph 512C (to the extent it alleges an entitlement to relief against the GPLs personally). They must be struck out.

Defendants' application to strike out

[162] The defendants apply to strike out numerous paragraphs of the CSOC. Because the counsel and solicitors for the defendants do not appear for the fourth, twentieth or twenty-first defendants, the application can only be considered in relation to the allegations against the defendants other than the fourth, twentieth and twenty-first defendants.

[163] For brevity, it is convenient to gather together challenged paragraphs which raise the same point or considerations.

Trust indemnity

[164] The defendants apply to strike out paragraphs 92 to 98 and 101 to 115 of the CSOC.

[165] Section J of the CSOC, including paragraphs 92 to 98, alleges a contractual right as General Manager acting under the JVA to an indemnity respect of the Expenditure Amount in Schedule E. Although the defendants apply to strike out paragraphs 92 to 98, they do not make separate submissions about those paragraphs. In my view, they disclose a reasonable cause of action for the allegation made in paragraph 100 of a contractual right of indemnity.

[166] Section K of the CSOC, including paragraphs 101 to 111, alleges a right as trustee to an indemnity in respect of the Expenditure Amount in Schedule E. Paragraphs 101 to 102D allege the facts in support of the plaintiffs' case that in law QNI was a trustee of the Joint Venture Property for the purpose of carrying on the Joint Venture, with the Joint Venturers as the beneficiaries. Paragraph 102A alleges that the trust was an express trust. Paragraph 102B alleges that the intention to create the trust is manifested in and by the terms of the JVA and the conduct of the Joint Venturers from 1 September 1992 until 18 January 2016 (the appointment of the administrators) as identified in five categories as follows:

> "(i) the Joint Venturers at those times requested, or alternatively required, that QNI hold assets and incur liabilities on their behalf, as pleaded at paragraphs 92 to 94...
>
> (ii) the Joint Venturers at those times requested that QNI bear the liabilities under employment contracts for employees working at the Refinery and/or for the Joint Venture…
>
> (iii) since the Palmer Interests acquired the Joint Venturers on or about 31 July 2009, the Joint Venturers requested, or alternatively required, that QNI incur liability for the raw materials used to generate the produce (sic) of the Refinery…

(iv) since the Palmer Interests acquired the Joint Venturers on or about 31 July 2009, the Joint Venturers requested, or alternatively required, that QNI incur liability for transportation of those raw materials to the Refinery…

(v) since the Palmer Interests acquired the Joint Venturers on or about 31 July 2009, the Joint Venturers requested, or alternatively required, that QNI receive products from the sale of product of the Refinery into a bank account in its own name and apply such income to the operation of the Joint Venture for the benefit of the Joint Venturers…"

[167] The terms of the JVA relied upon are:

"(i) clause 3.1, by which the Joint Venture Property was to be made available for the purpose and duration of the Joint Venture and for no other purpose, and was to be beneficially owned by the Joint Venturers;

(ii) clause 3.2, by which title to the Joint Venture Property could be held in the name of QNI as General Manager of the Joint Venture;

(iii) clause 4.1(e)(i), which contemplated QNI as Manager employing personnel on behalf of the Joint Venturers;

(iv) clause 5.2(a), which enumerated QNI's responsibilities as General Manager which were to include managing the funds of the Joint Venture, and management and control of the Joint Venture Property;

(v) clause 5.2(b), which enumerated further responsibilities of QNI as General Manager of the Joint Venture, including at subclauses (xiii) to (xvi) the payment of funds on behalf of the Joint Venturers;

(vi) clause 5.5(s), which provided that the Joint Venturers were to share in the benefits and assume the obligations arising out of the actions taken by QNI as General Manager under the JVA;

(vii) clause 6.4(f), by which QNI was to maintain funds received or for the account of the Joint Venturers in a dedicated bank account, which was to be used for no other purpose; and

(viii) the fact that no term of the JVA excluded a trust relationship existing between QNI as trustee and the Joint Venturers as beneficiaries".

[168] In effect, the defendants submit that the plaintiffs' pleadings of claims to a trustee's indemnity, lien, right of retention (and breaches of trust) do not disclose reasonable causes of action, because the facts relied upon are insufficient in law to support the

alleged trust.[75] The defendants submit that the JVA is a contractual document under which QNI was appointed General Manager, so that the relationship between the parties was governed by contract. They submit further that whether there is a trust, therefore, depends on the construction of that contract. In summary, the defendants submit that the question of whether a trust was established cannot be ascertained by reference to any of the conduct pleaded in paragraph 102B(b). In support of that submission, the defendants rely on a case to do with the reception of post contractual conduct in aid of the construction of a written contract.[76] However, that case is not in point.

[169] The question in the present case is whether, having executed or become parties to the JVA in the form of a written contract many years earlier, the plaintiff is precluded from proving, by conduct of the parties that occurred over following years, that the relationship between the parties altered, and the scope of QNI's functions and responsibilities was increased to the extent that an inference of the existence of an express trust may be drawn.

[170] In my view, no legal principle prevents such a finding.[77] That is not to say the finding should or will be made. But at this point, the only question is whether the allegation of the existence of a trust based on the alleged facts should be struck out as not disclosing a reasonable cause of action or otherwise as an abuse of process under UCPR r 171 or in the inherent jurisdiction.

[171] In my view, paragraphs 101 to 102B and 102C to 106 of the CSOC and the other paragraphs that relate to them should not be struck out on that basis.

Equitable lien as General Manager

[172] The defendants apply to strike out paragraphs 112 to 115 of the CSOC.

[173] Section L of the CSOC alleges that an equitable lien arose either from QNI's management of the Joint Venture or from that management and the alleged trust.

[174] Paragraph 112 alleges that as General Manager the lien was secured over all of the Joint Venture Property. Paragraph 113 alleges that as trustee the lien was secured over all of the assets QNI held on trust for the Joint Venturers as beneficiaries. Those paragraphs are:

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75 An additional written submission is that enforcement of the alleged trust for the benefit of creditors rather than beneficiaries is an abuse of power, but that submission was not pressed when raised in oral argument.

76 *Pethybridge v Stedikas Holdings Pty Ltd* [2007] NSWCA 154, [59]. I note that the leading case on that question is now *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 582 [35].

77 *Byrnes v Kendle* (2011) 243 CLR 253, 287-290 [107]-[114]; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 121.

> "112. In the premise of the matters pleaded in paragraphs 88 to 95 above, or alternatively paragraphs 88 to 94 and 96 to 97 above, and as a necessary incident of the position of manager of the Joint Venture pleaded in paragraphs 88 to 94 above, QNI's right to an indemnity or exoneration is secured over all of the Joint Venture Property (as defined in the JVA), by way of an equitable lien.
>
> 113. Further or in the alternative, in the premise of the matters pleaded at paragraphs 88 to 94 and 101 to 110 above, QNIs right to an indemnity or exoneration arising from its position as trustee is secured in the form of an equitable lien over all of the assets which it had held on trust for the Joint Venturers as beneficiaries."

[175] Paragraphs 114 and 115 allege that the debts secured by the lien included QNI's debts to the employees and the contractual obligations of QNI under contracts entered into in its own name held for the benefit of the Joint Venturers, including those that gave rise to the liabilities set out in Schedule E for the Expenditure Amount. But Schedule E identifies no dates of those liabilities.

[176] If QNI was a trustee, the defendants do not challenge the allegation of a statutory right of indemnity pursuant to s 72 of the *Trusts Act* 1973 (Qld) or that the right of indemnity would extend to all the unpaid liabilities which were reasonably incurred by QNI in acting as trustee or that QNI would then, *prima facie*, have a right as trustee in the form of an equitable lien over the trust assets.

[177] The defendants do challenge the allegations in the CSOC that, other than as trustee, QNI was entitled to an equitable lien or charge, on the ground that there is no disclosed reasonable cause of action for such an alternative lien.[78] As the defendants' written submissions continue, the point agitated is not that the circumstances of an appointment as the General Manager under the JVA to act as agent for the Joint Venturers cannot give rise to an equitable lien by way of charge over the assets in the hands of the manager and agent for any indemnity due by the principal to the agent in respect of the agent carrying out the principal's business. Instead, the point is that a lien cannot exist over property "that was never property of QNI", apparently meaning that was never property to which QNI had a legal or possessory title.

[178] In substance, this point is a direct challenge to Bond J's finding on the first leave application that there "could be" such a lien in law:

> "(by application of the legal principles discussed at [59] to [67] above) to the extent that the General Manager held Joint Venture Property but legal title to the Joint Venture Property remained in the Joint Venturers, the General Manager would have an indemnity in respect of the Joint Venture Expenses properly incurred, which right would be regarded as secured by an equitable lien over the Joint Venture Property, such a lien being created by the court, regardless of the intent of the parties, as a

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78 Defendants' written submissions, paragraph 160.

> remedial device to protect the General Manager against inequitable loss."[79]

[179] Bond J discussed some of the leading cases, in reaching that conclusion,[80] including *Hewett v Court*[81] and other cases. The discussion plainly extends to the possibility of a lien over property neither possessed nor in the legal title of the lienee. Bond J's reasoning was accepted as reasonable in the appeal. The defendants did not advance any submissions why it would be appropriate to decide this question of law, as not reasonably arguable, on a strike out application under r 171 at this point of the proceeding. I decline to do so, or to hold that the plaintiffs do not have a reasonable equity as to an equitable lien as manager and agent.[82]

Lien at the time of payment

[180] There are many paragraphs in the CSOC that allege payments made by QNI to a defendant (including the fourth, twentieth and twenty-first defendants) or a third party at the request of a defendant. As well, there are allegations of payments made by QNI to one or another of the defendants by way of loan. A consistent theme of the pleading is the allegation that a relevant payment (or transfer of property) was not for the purposes of the Joint Venture.[83]

[181] Another consistent theme[84] is that a relevant payment was made by QNI **from funds which** were held on trust and "**were** subject to the equitable liens pleaded in paragraphs 112 and 113". This allegation is repeated in paragraphs 182, 187, 194, 203, 208, 214, 220, 226, 232, 238, 244, 250, 256, 263, 271, 278, 290, 309, 318, 329, 337, 345, 353, 359, 365 and 372.

[182] The relevant payments were made over a period stretching back from early January 2016 as far as May 2010. This raises a difficulty relied on by the defendants in opposition to paragraphs of the CSOC generally.

[183] An example will illustrate the point. Paragraph 308 alleges that on 2 August 2011, QNI paid $40 million to the eighth defendant, Palmer Leisure Australia Pty Ltd ("Palmer Leisure Australia"). Paragraph 307 alleges that at that time, Palmer Leisure Australia issued 4 million ordinary shares to the Joint Venturers at a price of $10 per share. Paragraph 308 alleges that the payment of $40 million was made to discharge the Joint Venturers' obligations to pay for those shares. Paragraph 309 alleges that the $40 million payment was made "from funds which were held on

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79 *QNI Resources Pty Ltd & Ors v Park & Ors* (2016) 116 ACSR 321, 349 [132(b)].

80 *QNI Resources Pty Ltd & Ors v Park & Ors* (2016) 116 ACSR 321, 333-336 [59]-[67].

81 (1983) 149 CLR 639, 645-646 and 688.

82 See also Dal Pont, *Law of Agency,* 3 ed (2014), pp 413-414 [18.25]-[18.30].

83 See paragraphs 191, 200, 206, 209, 215, 221, 227, 233, 239, 245, 251, 257, 264, 272, 279, 284, 291, 300, 310, 319, 330, 338, 346, 354, 360, 366, 469(a), 474(a) and 479(a).

84 Some of the payments to Mineralogy are not included in these allegations.

trust for the Joint Venturers and were subject to the equitable liens pleaded in paragraphs 112 and 113".

[184] However, there is no reasonable basis for the allegation that at 2 August 2011, the funds in QNI's bank account that were held on trust for the Joint Venturers and were utilised for the $40 million payment were subject to a lien to support an indemnity for debts that had been incurred by QNI as at that date. A necessary assumption to support the alleged lien at the time of the payment is that the right of indemnity of QNI at the time raised a lien over the funds used to make the payment.

[185] It is not the law that a trustee who has a right of indemnity, supported by a lien and a right of retention is entitled, per se, to withhold all of the trust assets from distribution or payment of other liabilities. The rights of lien and retention are limited to the amount of the trustee's entitlement to indemnity at the time of a questioned payment, having regard to the value of the trust property. This point is made in *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)*,[85] where McPherson J said:[86]

> "… in any case in which a trustee is entitled in respect of liabilities properly incurred to his indemnity and lien over assets vested in him as trustee, the trust property (which means the property to which the beneficiaries are entitled in equity) is confined to so much of those assets as is available after the liabilities have been discharged or at least provided for … It is therefore not correct to say … that the trustee's lien at all times attaches to all of the assets."

[186] Taking the example of paragraphs 306 to 309 of the CSOC, it would only be true to say that the $40 million payment was made from funds subject to the equitable lien pleaded in paragraph 112 or 113 if, at the time the payment was made, the other assets that comprised the trust property were inadequate to meet the trustee's right of indemnity for expenses and liabilities.

[187] No such allegation is made as to the extent of the right of indemnity and the trust assets as at 2 August 2011. Instead paragraph 309 and many others like it, seem to proceed on an assumption that the liens alleged in paragraphs 112 and 113 are of a general kind that attach to property that was trust property paid away as long ago as 2011, even though the liability or expense for which the trustee now claims a right of indemnity may have been incurred much more recently.

[188] Paragraph 469(b) of the CSOC alleges contingent employee entitlements as follows

> "QNI had significant employment entitlement liabilities, including contingent liabilities, where those liabilities were to be met by available funds or other realizable assets held by QNI for the purposes of the Joint Venture;

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85 [1984] 1 Qd R 576.

86 [1984] 1 Qd R 576, 587.

Particulars

(i) QNI's contingent employee entitlements at the end of each financial year.

YEAR	VALUE
30 June 2010	$38,305,156
30 June 2011	$43,905,781
30 June 2012	$50,574,939
30 June 2013	$57,515,746
30 June 2014	$63,682,072
30 June 2015	$69,749,997
22 April 2016	$74,031,845"

[189] The plaintiffs submit that those amounts and the amounts of future liabilities under the rail transport contracts alleged in paragraph 469(c) were future liabilities. The plaintiffs rely on the reasons for decision of Nicholas J in *Agusta Pty Ltd v Official Trustee in Bankruptcy*[87] as authority that there was a lien for future debts at the time of the various payments alleged in the CSOC.[88] However there was a successful appeal from that decision, in *Agusta Pty Ltd v Official Trustee in Bankruptcy*,[89] although it did not ultimately decide this question.

[190] I do not agree that there is a general right of indemnity against all trust property, unless the trust property remaining after the questioned payment is made is insufficient to meet the present and continent liabilities. There may be a right of retention over trust assets and a lien in respect of contingent liabilities, but that does not avoid the need for the calculation of the kind referred to in *Kemtron*, otherwise a trustee would be entitled to hold all trust assets indefinitely against future possibilities in defiance of present rights of trust distribution. I am somewhat fortified in my view by *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*.[90]

[191] In my view, the material facts necessary to support the numerous allegations at the time when a payment was made from trust funds the funds paid were subject to an equitable lien under paragraph 112 or 113 of the CSOC have not been alleged.

[192] It follows that the words "and were subject to the equitable liens pleaded in paragraphs 112 and 113" should be struck out of paragraphs 182, 187, 194, 203,

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87 (2008) 6 ABC (NS) 164.

88 Although not referred to in argument, see also *X v A* [2001] 1 All ER 490.

89 [2009] NSWCA 129.

90 (2008) 74 NSWLR 550, 558-563 [38]-[55].

208, 214, 220, 226, 232, 238, 244, 250, 256, 263, 271, 278, 290, 309, 318, 329, 337, 345, 353, 359, 365 and 372 of the CSOC.

Schedule E debts

[193] The defendants submit that the plaintiffs have failed to plead material facts that QNI incurred each of the debts listed in Schedule E to a third party or that the Joint Venturers are liable to indemnify QNI in respect of each of those debts.

[194] As to the first point, the defendants do not identify any authority which supports the proposition that in pleading the material facts to support a claim for indemnity for debts incurred as a manager and agent, alleged to be incurred at the request of and solely for the benefit of the principal, or for indemnity as trustee for expenses or liabilities reasonably incurred, a plaintiff must plead all the evidentiary facts by which each of the alleged debts arose. It is a material fact to allege that a debt which is the subject of the claim for indemnity was incurred. But that is done in the CSOC by paragraphs 94 and 98 and Schedule E. In my view, it is not necessary for the plaintiffs to allege the evidentiary circumstances under which each of the debts was incurred, on the footing that a failure to do so means that the pleading does not disclose a reasonable cause of action. Details of that kind, if required by the defendants, are a matter for particulars. Even if they were not, in the circumstances of this case, I would direct under UCPR r 367(1) that r 149(b) is disapplied to the extent necessary to permit this aspect of the CSOC to stand.

[195] Those circumstances are that on 16 March 2018 further and better particulars were given of the debt of each creditor that exceeds $10,000 including the date, the contract and the nature of the debt. Second, it appears from an affidavit of the former Chief Financial Officer of the QN Group[91] that he has assessed the Schedule E Proof of Debt Amounts, on behalf of the defendants.

[196] An allied submission made by the defendants is that in some relevant paragraphs of the CSOC, for example paragraph 97(b), the contractual entitlement to indemnity is confined to expenses "properly" incurred. And in relation to the plaintiffs' claim for indemnity as trustee paragraph 107 alleges an entitlement to indemnity under s 72 of the *Trusts Act* 1973 (Qld) for liabilities "reasonably" incurred. The defendants challenge those allegations on the basis that the absence of pleading of specific facts in relation to each debt, to show that it was "properly" or "reasonably" incurred, is a failure to plead a material fact. I do not agree. But if it were a failure to plead a material fact, in the circumstances of this case, I would direct under UCPR r 367(1) that r 149(b) is disapplied to the extent necessary to permit this aspect of the CSOC to stand and deal with any question whether a debt was properly or reasonably incurred by particulars.

[197] Ordinarily, in conducting the business of and in the administration of a trust or an estate, an agent or trustee as an accounting party will render an account of expenses or liabilities incurred for which an indemnity is sought. If necessary, a court will

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91 Exhibit 1 in the hearing.

order an account in common form to be filed by an accounting party. An account in common form would not require that every expense sought to be allowed on the account as properly or reasonably incurred should be supported by full particulars of all the relevant circumstances in the first instance. Where the account is to be vouched, the trustee will supply the appropriate invoices and receipts, but the process requires that the principal or beneficiary who challenges an item identify the items in dispute.

[198] The usual procedure adopted as between QNI and the Joint Venturers in relation to the Joint Venture in the years up to and including the financial year ended 30 June 2015 involved the preparation of the annual Joint Venture or QN Group Accounts by employees of QNI from the books and records kept by QNI. All expenses and liabilities incurred by QNI were treated as being expenses and liabilities of the Joint Venture and included in the special purpose financial statements of the Joint Venture or QN Group and allocated as between the financial statements relating to QNIM and QNIR.

[199] In my view, bearing in mind the relevant principles and uncontested facts, the material fact that must be alleged in the statement of claim upon QNI's claim for an indemnity for an expense or liability incurred is that the expense or liability was properly or reasonably incurred. By analogy with the remedy of an account, if the Joint Venturers as principal or beneficiary desire more information as to the circumstances in which a debt was incurred, they may request it, having regard to their obligations under UCPR r 5.

Claims for money had and received and money paid

[200] The first group of relevant paragraph numbers challenged by the defendants' written submissions are 152 to 169 and 177 of the CSOC.[92] Although paragraphs 178 to 181 are also challenged, they are summary paragraphs that also pick up claims and amounts alleged to be due for causes of action apart from monies paid.

[201] One relevant example is paragraphs 152 and 153, where the plaintiffs allege that on 15 May 2012 QNI made a payment to Nan Hua International Engineering Company Limited, that the payment was made at the direction and request of Mineralogy by Mr Palmer and was made on behalf of and to the use of Mineralogy in the amount of $2,001,000.50. After credit is given to Mineralogy for amounts repaid in paragraph 173, the claim is made in paragraph 178 that Mineralogy is indebted to QNI in a sum that includes the debt owing under paragraph 152 and 153. The claim for relief in respect of those allegations is made in paragraph 508.

[202] The defendants submit that the form of pleading discloses no cause of action for "restitution" for money paid.[93] The defendants further submit that the weakness in the form of pleading is that there is no allegation that the payment discharged a debt of the relevant defendant, in this instance, Mineralogy. In support of these

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92 Defendants' submissions, paragraph 194.

93 Defendants' submissions, paragraph 196.

submissions, the defendants refer to a number of relatively recent cases that proceed from the assumption that the cause of action pleaded is a cause of action based on a benefit conferred on the defendant of the discharge of a debt paid by the plaintiff under the law of restitution.[94] The weakness in that contention is that it assumes discharge of the defendants' debt is a material fact for all claims for money paid. That assumption is false. The history of the action for money paid is sufficiently discussed for present purposes by Professor Stoljar,[95] who referred to the preference of proceeding on an *indebitatus* or money count on a summary pleading form, and by Mason, Carter and Tolhurst.[96]

[203] The defendants' written submissions refer to a passage from *Bullen and Leake's Precedents of Pleading*, 3 ed (1868),[97] an edition of that famous work that is sometimes treated as the zenith of common law pleading as it existed immediately before the introduction of the *Judicature Acts* of 1873 and 1875 (Eng) that brought with them the "material fact" model of pleading that underlies the current rules of court as to pleading in this jurisdiction[98] and elsewhere. The relevant passage relied on by the defendants related to an action for money had and received, not money paid. There is binding modern authority supporting a cause of action for money paid by P to TP at D's request.[99]

[204] Under the current rules, a claim for money paid at the defendants' request does not involve as a necessary allegation of material fact that the payment made at a defendant's request discharged a debt of the defendant. For example, Form 394 of *Bullen and Leake and Jacob's Precedents of Pleadings*, 12 ed (1975), is a statement of claim as follows:

> "1. On or about the—day of—, 19— the plaintiff paid to one *A B* the sum of £— for and on behalf of the defendant and at his request.
>
> **Particulars**
>
> The said request was made by the defendant orally at —, on the said date…
>
> [*or* The said request is to be implied from the following circumstances, namely *state the circumstances*.]

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94 *Burness (as liquidator of Denward Lane Pty Ltd (in liq)) v Supaproducts Pty Ltd* (2009) 259 ALR 339, [47]; *Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd* (2011) 32 VR 539, [62]-[63].

95 Stoljar, *The Law of Quasi-Contract*, 2 ed (1989), 149-156.

96 Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2 ed (2008), 16-17 [116].

97 As extracted in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 550 [88].

98 *Uniform Civil Procedure Rules* 1999 (Qld), r 149(b).

99 *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 666-667 [89]-[90]; *Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd* (2011) 32 VR 539, 552-553 [59].

> 2. In the premises, the defendant became and is liable to repay the said sum to the plaintiff.
>
> And the plaintiff claims the said sum of £—."

[205] In my view, the defendant's first challenge to the form of pleading of the claim for money paid must be rejected.

[206] The defendants take a second objection under this heading, although not to the paragraphs previously identified. Simplifying a little, in paragraphs 88 to 97 of the CSOC, the plaintiffs allege that QNI acted as General Manager of the Joint Venture solely for the benefit of the Joint Venturers from time to time, and in doing so incurred liabilities and assumed obligations, including duties and liabilities and contingent liabilities in relation to employees. Paragraph 94 alleges that QNI incurred the liabilities to the knowledge of and at the request of, or alternatively the acquiescence of, the Joint Venturers and solely for the benefit of the Joint Venturers. In paragraph 98, the plaintiffs allege that the unpaid liabilities incurred by QNI in so acting are set out in Schedule E to the CSOC. Schedule E provides, in the form of a table, a list of third-party creditors of QNI and the amounts of their debts, totalling $131,639,603.54 and a list of employees' entitlements totalling $74,031,845.17. They are defined together as the "Expenditure Amount". Paragraph 100 alleges that in the premises of the prior paragraphs, the Joint Venturers are liable to QNI for the Expenditure Amount, being $205,671,448.71.

[207] Although the defendants' amended application does not apply to strike out all of these paragraphs, the defendants submit that the claim in respect of the debts for the Expenditure Amount is a claim for money had and received in the nature of the receipt of a payment by the defendant for the use of the plaintiff.[100] In my view, it is not, because the defendants did not receive any payments in respect of the Schedule E debts. It is unnecessary to consider this submission further.

Breach of director's duties against Mr Palmer

[208] As previously discussed, Mr Palmer chose not to be represented on the application. Accordingly, any application by him to strikeout paragraphs of the CSOC was not pressed by counsel or solicitors representing the defendants. It is unnecessary to consider the paragraphs of their written submissions on that question.

Miscellaneous complaints

[209] A number of other paragraphs were challenged in a summary way in the defendants written submissions. No oral submissions were made about them. It is appropriate to decide the questions raised by the submissions in the same way, by reference to the relevant paragraph numbers of the CSOC:

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100 Defendants' Submissions, paragraph 203.

(a) paragraph 9(i) – it is not embarrassing that the periods during which Mr Mensink was a "related entity" of QNIM, QNIR, Waratah Coal and China First are not identified. Each of those companies was a closely held corporation under Mr Palmer's control. It is uncontroversial that Mr Mensink was a director of a number of those companies at dates specified in paragraph 9 and as such was a "related entity" of those companies;

(b) paragraph 44 – it is not embarrassing that no specific examples are given of the allegations that Mr Mensink and Mr Ferguson were accustomed to act in accordance with Mr Palmer's instructions and wishes. Particulars are given of the means by which Mr Palmer gave instructions. Paragraph 47 of the 9 October CDAC expressly alleges that Mr Palmer provided directions to Mr Mensink and Mr Ferguson in their capacities as directors as chairman and on behalf of the JVOC or on behalf of the Joint Venturers;

(c) paragraph 47 – the allegation that Mr Palmer continued to carry out the same functions as he had carried out while a director of QNI is not embarrassing. Paragraph 42 identifies the periods during which Mr Palmer was a director. Paragraph 46 particularises actions by Mr Palmer when not formally a director that were acting in the position of director, that were included in the functions while duly appointed. Paragraph 49 of the 9 October CDAC responds to those allegations;

(d) paragraph 65 – the allegation that Joint Venturers failed or refused to provide funds to QNI sufficient to meet all of QNI's outstanding liabilities that were due and owing from at least 8 October 2015 is not embarrassing. The Joint Venturers do not allege that they provided any funds after 8 October 2015 in the CDAC. Surprisingly perhaps, they allege in paragraph 68(b) of the CDAC that QNI "did not have outstanding liabilities that were due and payable from 8 October 2015". If there were no liabilities payable, there is no pleading embarrassment in response to the allegation of outstanding liabilities;

(e) paragraph 66 – this is the same point as for paragraph 65;

(f) paragraph 67 – the allegation that QNI was unable to pay its liabilities as incurred as and when they were to fall due from 9 October 2015 is not embarrassing. It clearly relies on paragraphs 51 to 66 and is in the usual form corresponding to the meaning of insolvency in s 95A(2) of the CA. The plaintiffs are not required to plead all the liabilities. The defendants allege in paragraph 70(b) of the CDAC that QNI "did not have outstanding liabilities that were due and payable from 9 October 2015". If there were no liabilities due and payable there is no pleading embarrassment;

(g) paragraph 171(e) – the paragraph does identify which amounts were paid by the direction of Mr Palmer or Mr Mensink. See paragraph 171(b) and (c);

(h) paragraphs 186, 202, 276, 317, 344 and 352 – these tracing claims are dealt with below;

(i) paragraph 194 – the defendants correctly submit that the allegation that the money was paid to Mr Palmer at his own request and for his own use is

inconsistent with the allegation in paragraph 167 that the payment was made at the request of Mr Palmer on behalf of Mineralogy. One of the allegations must be deleted or they must be alleged in the alternative, because inconsistent alternatives are permissible;[101]

(j) paragraphs 208, 209, 218, 224, 225, 230, 231, 236, 237 etc to 281, 282 – the allegation in paragraph 208 that on or about 11 September 2012 QNI paid $1.8 million to Waratah Coal is not on its face inconsistent with the allegation in paragraph 171(d). The allegation that the payment was made at the direction of Mr Palmer arguably supports the allegation that Mr Palmer is indebted on a claim of money paid for the debt alleged in paragraph 213(a). The allegation that the money was paid to Waratah Coal not by way of gift to Waratah Coal arguably supports a claim of money had and received or debt against Waratah Coal;

(k) paragraph 313 – the defendants correctly submit that the facts alleged do not support a debt "owed by QNIM and QNIR to Palmer Leisure". If the $40 million payment was made in satisfaction of the allotment monies payable on the 4 million shares issued to QNIM and QNIR, no debt remains owing by QNIM and QNIR to Palmer Leisure. If not, the debt might still be owing but QNI would not be subrogated into Palmer Leisure's rights to recover the debt simply by payment of the money to Palmer Leisure. No facts are alleged that support the payment being received by Palmer Leisure other than for the shares;

(l) paragraph 317 – it is arguable that QNI may be able to trace into the Joint Venturers shares in Palmer Leisure. If Palmer Leisure was a knowing recipient of the $40 million of misapplied trust property, it may be arguable that QNI may be able to trace into any assets acquired with those funds, but no facts are alleged about that claim;

(m) paragraph 318 to 323, 337 to 342, 345 to 349, 353 to 364 – these are arguable claims for money had and received (or loan), as it is alleged that the money was paid, the payment was made for the benefit of the payee, the payment was not made as a gift and the money was not repaid;

(n) paragraph 336 – see the tracing claims below;

(o) paragraph 328 – the allegation that on 6 July 2011 QNI advanced $8.1 million to Palmer Leisure is a sufficient allegation of material fact;

(p) paragraph 373 and 413 – the matters which gave rise to the equitable liens pleaded in paragraphs 112 and 113 are those alleged in paragraphs 88 to 97 and 101 to 110 respectively. They are the matters it is alleged were known in paragraphs 373 and 413;

(q) paragraph 471(b) – this paragraph relates to a claim against Mr Palmer personally and need not be considered; and

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101 *Uniform Civil Procedure Rules* 1999 (Qld), r 154(1).

(r) paragraphs 502(e), (f) & (g) and 503(e), (f) & (g) – this submission is a misstatement of the effect of the "clear accounts" rule.[102]

Tracing claims

[210] Each of paragraphs 186, 202, 276, 317, 336, 344 and 352 of the CSOC alleges in respect of a payment from the trust funds held by QNI that to the extent that QNI as trustee had an equitable proprietary right in those funds that right was transferred into an asset of the recipient, to the extent that they contributed to the care and maintenance of the asset.

[211] Two objections are made to those allegations. First, the defendants submit that there is no case alleged that QNI has an equitable proprietary interest. Second, they submit that no case is alleged that the funds paid were used for the relevant care or maintenance.

[212] Paragraph 343 serves as a relevant example. Paragraph 337 alleges that at the request of the ninth defendant ("Palmer Leisure Coolum"), QNI paid $57,807,342.70 to the Palmer Coolum Resort, "from funds which were held on trust and were subject to the equitable liens pleaded in paragraphs 112 and 113". Paragraph 338 alleges that the payment was not for the purposes of the Joint Venture. Paragraph 371 alleges that the payment was one of those defined as a "Third Party Transfer". Paragraph 447 alleges that the Third Party Transfers were not made for any of the purposes listed in clause 2.1 of the JVA and paragraph 449(a) alleges that the making of the Third Party Transfers constituted a breach of trust.

[213] In my view, the CSOC arguably alleges two relevant "equitable proprietary" interests in QNI for the purposes of paragraph 344. First, the interest of a trustee to recover misapplied trust property. Second, the alleged liens under paragraphs 112 and 113.

[214] As to the extent of the alleged contribution to the care and maintenance of the asset, in my view, the alleged fact of some contribution is a sufficient allegation of material fact to permit the pleading to stand. The extent of the alleged contribution is not a matter that QNI can be expected to be in a position to plead. I am influenced in that view by the circumstance that the defendants do not directly respond to the allegation of contribution to the care and maintenance of the Palmer Coolum Resort in paragraph 345 of the 9 October CDAC.

[215] In my view, these paragraphs should not be struck out.

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102 *Park v Whyte (No 3)* [2018] 2 Qd R 475, 503-507, [125]-[144]; *Australian Securities and Investments Commission v Letten (No 17)* (2011) 286 ALR 346, 353 [20]; *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, 396-397.

Transfers without value

[216] Section T of the CSOC is headed "Third Party Transfers Made Without Value" and contains paragraphs 371 to 379.

[217] The defendants apply to strike out paragraphs 371 to 373, 376 and 377 of the CSOC. Some of these paragraphs were raised in oral submissions.

[218] Summarising, relevant paragraphs allege:

(a) paragraph 371 – that many of the payments were made from trust funds, defined as "Third Party Transfers";

(b) paragraph 372 – that each of the payments was made from funds that were subject to the liens alleged in paragraphs 112 and 113;

(c) paragraph 373 – that each of the Third Party Transfers was made with knowledge by the recipient of the matters which gave rise to equitable liens;

(d) paragraph 376 – the Third Party Transfers were made for no value; and

(e) paragraph 377 – each entity that was liable in respect of a Third Party Transfer knew the that they were for no value.

[219] Paragraph 378 alleges that none of the payees, Mr Palmer and the defendants who had the benefit of the Third Property Transfers, was a bona fide purchaser for value without notice of QNI's equitable lien. Paragraph 379 alleges that QNI can trace into the transferred asset or payment that is subject to QNI's equitable lien.

[220] In my view, these paragraphs confuse different legal concepts. First, a bona fide purchaser of a legal estate without notice has a defence to a claim to an otherwise persisting equitable title or interest.[103] The onus of proving (and pleading) bona fide purchaser for value without notice lies on the purchaser.[104] But that defence does not seem to have anything to do with the present case and I do not understand why it is relevant for the plaintiffs to negative it when it is not alleged by the defendants.

[221] Second, "notice" to or "knowledge of" a recipient that property is trust property is relevant to the personal liability of a recipient under the first limb of the rule in *Barnes v Addy*.[105] But the "trust property" in that formulation is not a trustee's lien over trust property that is received. It is the trust property itself, that is alleged to have been transferred in breach of trust. Put another way, QNI does not hold a lien to support its personal right of indemnity on trust for anyone. The first limb of the rule in *Barnes v Addy* may be engaged in relation to a transfer of trust property by

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103 See, for example *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152-153 [140]; Heydon & Leeming, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5 ed (2015), 351 [8-225].

104 *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, 404, 409 and 410.

105 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 140-141 [111]-[113].

QNI as trustee in breach of trust, but that is in relation to the trust property itself, not QNI's personal right of lien.

[222] Third, if QNI had a lien supporting its right of indemnity as trustee over funds paid or property transferred under one or more of the Third Party Transfers, that equitable interest may be one that persists as against a volunteer.[106] That question may not turn on a question of notice of the recipient at the time of the wrongful payment. And as the funds were paid to the recipient, there may be questions of tracing involved rather than a simple persisting equitable interest in the prior asset.

[223] Paragraphs 374 to 376 are, in my view, relevant as allegations that by the alleged "forgivenesses" Mr Palmer caused a voluntary transfer of the alleged trust property constituted by the debts that arose on the alleged payments made by QNI to the recipients. And paragraph 377 is at least arguably relevant in relation to that fact.

[224] However, it seems clear beyond reasonable argument that the allegation in paragraph 378 of the CSOC that the identified defendants "were not bona fide purchasers for value without notice of QNI's equitable lien over the" assets described as the "Lien Assets" is misconceived and should be struck out as irrelevant (although the defendants did not specifically apply to strike out this paragraph). As well, the allegation that the Third Party Transfers were subject to the equitable liens pleaded in paragraphs 112 and 113 should be struck out for the reasons previously given in relation to those liens.

Other paragraphs not pressed

[225] The defendants' application also seeks to strike out paragraphs 124, 152 to 169, 177 to 182, 187 to 194, 212 and 213, 218 and 219, 224 and 225, 230 and 231, 242 and 243, 248 and 249, 254 and 255, 260 and 261, 266 and 267, 274 to 276, 413, 446 and 449, 460 and 461, 467 to 471, 472 to 476, 477 to 481 and 482 to 485 as well as various paragraphs of the claim for relief.

[226] However, beyond the points dealt with above, submissions were not made in support of the application in relation to those paragraphs and I will not deal with them further.

[227] Annexed to these reasons is a fair copy of the 9 October CDAC (omitting the struck through deletions and underlined additions as marked in Exhibit "B"). The paragraphs that I have determined should be struck out by these reasons are then shown as having been struck through. Because the 9 October CDAC is not a filed document, but was significantly different from the consolidated defence and counterclaim filed on 12 April 2018, the appropriate order is to strike out that pleading with leave to file the 9 October CDAC to the extent that is consistent with these reasons, as shown on the Annexure.

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106 *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 251-268 [87]-[170].