SUPREME COURT OF QUEENSLAND

CITATION:	*Equititrust Limited v Tucker and Others* [2019] QSC 51
PARTIES:	**EQUITITRUST LIMITED (RECEIVERS AND MANAGERS APPOINTED) ACN 061 383 944 ON ITS OWN ACCOUNT AND AS TRUSTEE OF THE EQUITITRUST PREMIUM FUND** (Plaintiff) **v** **DAVID ROBERT WALKER TUCKER** (First Defendant) **TUCKERLOAN PTY LTD ACN 101 109 157 ON ITS OWN ACCOUNT AND AS TRUSTEE OF THE TUCKERLOAN TRUST** (Second Defendant) **DAVID JOHN KENNEDY** (Third Defendant) **MS ASIA DEBT ACQUISITION LIMITED** (Fourth Defendant) **DAVID ROBERT WALTER TUCKER, RICHARD TERRICK COWEN, DAVID HEINER SCHWARZ, JUSTIN OTTO MARSCHKE AND DANIEL GREGORY ARTHUR DAVEY CARRYING ON THE PRACTICE AS PARTNERS UNDER THE NAME TUCKER & COWEN** (Fifth Defendants) **TCS SOLICITORS PTY LTD ACN 610 321 509** (Sixth Defendant)
FILE NO/S:	BS No 7399 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	12 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2019
JUDGE:	Bowskill J
ORDER:	**Direct that the parties confer with a view to providing a draft order reflecting the decision of the court in relation to the strike out applications, and the applications for security for costs. Failing agreement, the matter will be listed for further hearing in relation to the appropriate orders. I will also hear the parties as to costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – applications to strike out the claim and statement of claim in their entirety, or alternatively parts of them, on the basis no reasonable cause of action disclosed or that the pleading has a tendency to prejudice or delay the fair trial of the proceeding

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – AMOUNT AND NATURE OF SECURITY – where the parties agree that security for the applicant/defendants' costs is to be provided, but are in dispute as to the amount of security to be provided for two defendants, and as to the form of security to be provided – where the plaintiff proposed security in the form of a deed of indemnity between a foreign third party insurer of the plaintiff's litigation funder and the applicants for security – whether the form of security proposed is adequate and does not impose unacceptable disadvantage on the applicants

Corporations Act 2001 (Cth) s 183
Legal Profession Act 2007 (Qld) s 249
Uniform Civil Procedure Rules 1999 (Qld) r 171, r 670, r 673

Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd (No 4) [1985] 1 Qd R 127
Allen Dodd (as trustee for the Dodd Superannuation Fund) v Shine Corporate Ltd [2018] QSC 040
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [2011] QCA 252
DIF III Global Co-Investment Fund v BBLP LLC [2016] VSC 401
Lanai Unit Holdings Pty Ltd (as trustee of Lanai Unit Trust) v Mallesons Stephen Jacques (a firm) [2016] QSC 002
Legal Services Board v Gillespie-Jones (2013) 249 CLR 493
Logan APZ Pty Ltd v Council of the City of Logan [2017] QCA 288
Lynx Engineering Consultants Pty Ltd v ANI Corp (No 3) [2010] FCA 32
Murphy v Gladstone Ports Corporation Ltd [2019] QSC 12
Qintex Australia Ltd (in liquidation) v ANZCap Nominees Ltd [2000] QSC 394
Re Tiaro Coal Limited (in liq) [2018] NSWSC 746
Royalene Pty Ltd v Registrar of Titles [2007] QSC 59
Smith v Smith [2015] NSWSC 484
Trailer Trash Franchise Systems Pty Ltd v GM Fascia & Gutter Pty Ltd [2017] VSCA 293
Wainter Pty Ltd v Freehills (a firm) (No 2) [2009] FCA 770

COUNSEL:	M Stewart QC and S Cooper for the plaintiff D O'Brien QC and P Hackett for the First Defendant, Second Defendant and one of the Fifth Defendants (Mr Tucker) D Clothier QC and B Kabel for one of the Fifth Defendants (Mr Cowen) and the Sixth Defendant
SOLICITORS:	Russells for the plaintiff D Tucker for the First Defendant, Second Defendant and one of the Fifth Defendants (Mr Tucker) DLA Piper for one of the Fifth Defendants (Mr Cowen) and the Sixth Defendant

Introduction

[1] By these proceedings, commenced in July 2018, the plaintiff (**Equititrust**) seeks, among other things, to recover an amount of over $17.5 million, which it alleges was unlawfully paid to a third party, in breach of s 249 of the *Legal Profession Act* 2007 (Qld); and compensation for contraventions of s 183(1) of the *Corporations Act* 2001 (Cth) (for misuse of information obtained as a director), as well as for breach of fiduciary duty and breach of trust, from the persons or entities alleged to have committed the contraventions and/or breaches, as well as those alleged to have been knowingly involved in them.

[2] As alleged in the statement of claim, Equititrust is the trustee of a trust called the Equititrust Premium Fund (**EPF**) and carried on a business of borrowing money and lending it on to others, secured against real property by mortgages. In February 2012 the company appointed administrators. Two of the company's secured creditors also appointed receivers and managers. In April 2012 the creditors of the company resolved that it be wound up, and the administrators appointed by the company became the liquidators.

[3] Mr Tucker (the first defendant, and also named as part of the fifth defendant, the solicitors' firm Tucker & Cowen) is said to have been a director of Equititrust from 3 September 2010 to 11 October 2011. Mr Tucker was also, until 22 March 2018, the sole director of **Tuckerloan** Pty Ltd (the second defendant).

[4] Mr Kennedy (the third defendant) is said to have been a director of Equititrust from 14 May 2010 to 14 June 2011, the chief operating officer of the company from about November 2009 to mid-2010 and the chief executive officer from about mid-2010 to 17 October 2011.

[5] It is alleged that Tucker & Cowen acted as the solicitors for Equititrust in numerous retainers, with Mr Tucker being the partner with primary responsibility for such retainers; that TCS Solicitors Pty Ltd (the sixth defendant) (**TCSS**), an incorporated legal practice, succeeded to the business of Tucker & Cowen in about early 2016; and that Mr Tucker is employed as a consultant by TCSS, and has continued to have primary responsibility for the retainers by Equititrust of TCSS.

[6] Mr Cowen is named as part of the fifth defendant, the firm Tucker & Cowen. He is also said to be one of the directors of TCSS.

[7] The fourth defendant, **MS Asia** Debt Acquisition Ltd is said to be a company registered in Hong Kong, in respect of which there were three shares issued, which were transferred to three companies registered in the British Virgin Islands. It is alleged Mr Tucker, or another person Mr Howard, was the sole beneficial shareholder of two of those companies; and that Mr Kennedy was the sole beneficial shareholder of the third.

[8] As articulated in the plaintiff's submissions at [8]:

> "In summary, Equititrust's case is that:
>
> (a) as a consequence of his roles as a director of Equititrust and as Equititrust's solicitor, Mr Tucker was aware of information concerning the recoverable value of various debts owed to Equititrust as trustee of the EPF;
>
> (b) in about April 2012, Equititrust was indebted to BOS International (Australia) Pty Ltd (BOSI) [*from which it had borrowed funds pursuant to a loan facility, for the purpose of on lending to others*] for an amount of approximately $6.8 million. This debt was secured by (inter alia) mortgage securities over the assets in the EPF loan book [*a reference to the loans due to Equititrust from its borrowers, and guarantors, and the associated securities held by Equititrust*]. As a consequence of his roles as a director of Equititrust and as Equititrust's solicitor, Mr Tucker was also aware of the terms of Equititrust's finance facility with BOSI and the amount of the BOSI Debt;
>
> (c) at about that time, Mr Kennedy became aware that an entity associated with Morgan Stanley proposed to purchase BOSI's entire Australian loan book, including the debt owed by Equititrust as trustee of the EPF and the associated securities;
>
> (d) Mr Tucker and Mr Kennedy subsequently negotiated for the fourth defendant (MS Asia), a company incorporated in Hong Kong, to purchase the debt owed by Equititrust to BOSI and associated securities from Morgan Stanley for the sum of $2 million. This purchase price was paid by Tuckerloan (as to $666,667) and Mr Kennedy (as to $1,333,334 with half of that sum being paid on behalf of a third person, Mr Howard);
>
> (e) Tucker & Cowen Solicitors (including by Mr Tucker) acted as the solicitors for MS Asia in its purchase of the BOSI debt, and BOSI Securities;
>
> (f) Mr Tucker and Mr Kennedy (and a third person Mr Howard) are the ultimate beneficial owners of companies incorporated in the British Virgin Islands

which were themselves the shareholders of MS Asia (which has only ever had three shares on issue);

(g) Mr Tucker and Mr Kennedy are each beneficially entitled to a one-third interest of the assets of MS Asia;

(h) MS Asia's acquisition of the BOSI debt and associated securities completed on about 17 July 2012;

(i) on or about 7 August 2012, one of the borrowers from the EPF repaid the sum of $2,325,000 in discharge of a debt it owed to Equititrust. This repayment was effected by payment of that sum to the trust account of Tucker & Cowen. From that payment, the sums of $666,667 were repaid to Tuckerloan, Mr Kennedy and Mr Howard as repayment of the sums advanced to MS Asia to pay the $2 million required to acquire the BOSI debt;

(j) since MS Asia's acquisition of the BOSI debt, in excess of $17.5 million has been recovered through debt recovery proceedings brought on behalf of Equititrust against borrowers from the EPF and guarantors of those debts;

(k) those amounts were received into the trust account of Tucker & Cowen Solicitors and later TCS Solicitors to be held on trust for Equititrust as trustee of the EPF;

(l) of that recovered sum, an amount not less than $11.94 million was paid to MS Asia in Hong Kong and thereafter paid to (or at the direction of) Mr Tucker, Mr Kennedy and Mr Howard;

(m) in causing MS Asia to acquire the BOSI debt and receive and pay away the amounts recovered therefrom, Mr Tucker and Mr Kennedy breached duties which they owed to Equititrust;

(n) Mr Tucker and Mr Kennedy deliberately concealed their beneficial ownership of MS Asia through the British Virgin Island companies;

(o) in receiving and paying away the amounts recovered from borrowers from the EPF, Tucker & Cowen and later TCSS acted contrary to the requirements of the *Legal Profession Act 2007* (Qld) concerning the treatment of trust monies and in breach of trust."

[9] The proceedings are at an early stage. Not all parties have been served yet, and no defences have been filed.

[10] By applications filed on 7 and 29 January 2019, Mr Tucker and Tuckerloan have applied for orders:

(a) striking out the claim and statement of claim in their entirety, or alternatively striking out particular paragraphs of the statement of claim, or alternatively, for the plaintiff to provide further particulars of those paragraphs; and

(b) that the plaintiff provide security for costs in the sum of $373,885, by payment into court.

For ease of reference I will refer to these as the Tucker application(s), and the moving parties as the Tucker applicants.

[11] Likewise, by applications filed on 29 January 2019, Mr Cowen and TCSS have applied for orders:

(a) striking out the whole of the claim and statement of claim, or alternatively various paragraphs of the statement of claim, and of the prayer for relief in the claim; and

(b) that the plaintiff provide security for costs in the amount of $161,705.61 by payment into court.

For ease of reference I will refer to these as the Cowen application(s) and the moving parties as the Cowen applicants.

[12] Neither Mr Kennedy (the third defendant) nor MS Asia (the fourth defendant) appeared at the hearing (as to the latter, it was expressly said it has not yet been served). In some respects the discussion below about aspects of the pleading concerning Mr Tucker applies also to the pleading concerning Mr Kennedy. It is anticipated that, in any repleading undertaken consequent upon this decision, the plaintiff would address the issues as against Mr Kennedy in the same way as against Mr Tucker (where appropriate).

Strike out applications

Relevant principles

[13] Rule 171 of the UCPR confers a discretionary power on the court to strike out all or part of a pleading which, relevantly, discloses no reasonable cause of action or has a tendency to prejudice or delay the fair trial of the proceeding.

[14] As to what is required of a pleading, the relevant principles are uncontroversial. They were summarised in *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [27]-[28] by Philippides J (as her Honour then was), with the agreement of Chesterman JA and North J. Considerations relevant in deciding if a pleading is deficient include whether it fails to fulfil the function of pleadings, which is to state with sufficient clarity the case that must be met and so define the issues for decision, ensuring procedural fairness; whether it is ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against them; and whether the pleader's case is not advanced in a comprehensible, concise form appropriate for consideration by both the court, and for the purpose of the preparation of a response.

[15] As an overarching consideration, Equititrust emphasised that its case is largely one of inference, and in this regard relied upon the observations of McPherson J (as his Honour then was) in *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd (No 4)* [1985] 1 Qd R 127, a case in which the plaintiffs alleged a (wrongful) understanding between the defendants, that they or some of them would acquire a sufficient number of shares in a company to acquire control of its affairs. His Honour said, at 133:

> "If such an understanding does exist, it is extremely unlikely that the plaintiffs will be in a position at trial to adduce direct evidence that the defendants arrived at it. That is to say, it is improbable in the extreme that they will be able to prove that the understanding alleged was arrived at on a particular day or days, or between identified individuals acting on behalf of named companies, etc. In a practical sense it is impossible to expect the plaintiffs to give precise particulars of matters of that kind. However, that does not mean either that the plaintiffs' pleading must be struck out for want of particularity, or that they are relieved of the duty to give any particulars at all. The defendants are entitled to be apprised before trial of the nature of the plaintiffs' case. Their right to be so apprised must be accommodated to the nature of that case itself, which is one that sets up the existence of an understanding of a kind which, as I have said, is not likely to be established by direct evidence."

[16] McPherson J went on to say, by reference to the practice in cases of criminal conspiracy, that whilst proof of conspiracy "almost invariably rests upon inference deduced from acts of the parties", and the prosecution may not be able to give particulars or evidence of the actual making of the agreement, "what certainly can be done is to give particulars of the 'acts' relied upon to justify the inference".

[17] So too, in this case, the plaintiff is properly required to plead the facts relied upon to justify the inferences that it contends ought to be drawn.[1] So much is confirmed by r 150(2) of the UCPR.

[18] Nevertheless, it may be accepted that the court's discretion to strike out a pleading, or part of it, "should not be exercised except in clear cases", "especially so where the case is pleaded as a circumstantial one and the inference to be drawn from evidence critical to determining liability is not common ground and the evidence is untested": *Royalene Pty Ltd v Registrar of Titles* [2007] QSC 59 at [6] per Mackenzie J.

[19] At the commencement of the hearing of the applications, the plaintiff tendered as an exhibit a draft proposed amended statement of claim (exhibit 2), and argument on the applications proceeded by reference to exhibit 2. There was considerable cross-over between the arguments in relation to the Tucker application and the Cowen application, although the claims against Mr Cowen (as part of the firm) and TCSS are essentially

[1] See also Smith v Smith [2015] NSWSC 484 at [62].

consequential upon the claims against Mr Tucker. It is convenient to deal with the arguments by reference to the pleaded causes of action, as the parties did in their submissions.

The claim of breach of s 249 of the Legal Profession Act

[20] Section 249(1) of the *Legal Profession Act* 2007 provides that:

> "A law practice must –
>
> (a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received; and
>
> (b) disburse the trust money only under a direction given by the person."[2]

[21] "Trust money" is defined to mean "money entrusted to a law practice in the course of or in connection with the provision of legal services by the practice" (s 237).

[22] Central to the plaintiff's claims in this proceeding is a transaction by which, on about 17 July 2012, MS Asia acquired the debts owed by Equititrust to BOS International (Australia) Limited (**BOSI**) in respect of the moneys borrowed for the purposes of the Equititrust Premium Fund (the **BOSI debt**) and the securities held by BOSI for Equititrust's indebtedness, which included mortgage securities over the assets in the EPF Loan Book (the **BOSI securities**) for $2 million (statement of claim at [34], [54] and [68]-[70]).

[23] It is alleged that the $2 million was paid for by Mr Tucker (with funds from an account held by Tuckerloan), Mr Kennedy and Mr Howard (as to one third each) (statement of claim at [70]). It is also alleged that Tucker & Cowen acted as the solicitors for MS Asia in relation to the acquisition (statement of claim at [71]).

[24] It is alleged that, on 7 August 2012 [*3 weeks after the MS Asia acquisition*], one of the debtors in the EPF Loan Book, called Supported Living on Tweed Pty Ltd (**SLOT**), paid to the Tucker & Cowen solicitors' trust account the sum of $2,325,000, pursuant to a Deed of Release and Final Discharge drawn by Tucker & Cowen (statement of claim at [83]). It is proposed to plead that the Deed provided, by clause 3.1, that the SLOT payment was to be paid to "the Mortgagee", namely Equititrust (exhibit 2 at [83A]).

[25] It is then alleged that, three days later, on 10 August 2012, Tucker & Cowen repaid, from the SLOT payment, the sums of $666,667 to each of Tuckerloan, Mr Kennedy and Mr Howard, in repayment of their advances towards the $2 million for the acquisition by MS Asia (statement of claim at [85]). The payments referred to in this and the preceding paragraph can be seen in the "trust account statement" incorporated as schedule 6 to the statement of claim.

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[2] Underlining added.

[26] It is alleged that on 27 August 2012 MS Asia appointed Mr Peldan and Mr Cook as the receivers and managers of all the assets and undertaking of Equititrust, pursuant to the BOSI securities (the **Receivers**) (statement of claim at [86] and [87]). Referring to certain provisions of the deed of appointment of the Receivers, it is proposed to allege (exhibit 2 at [87A]) that:

> "… after execution of the Deed of Appointment, Equititrust was the only person entitled (by its agents, the Receivers) to take possession of the EPF Loan Book and to receive the proceeds thereof". [*emphasis added*]

[27] Paragraphs [88]-[94] of the statement of claim contain allegations of MS Asia, by the Receivers, appointing Equititrust, under the BOSI securities, as its agent to take possession of the assets of debtors of Equititrust (Handley Heights Pty Ltd and MQ Ink Pty Ltd), and Equititrust, by the Receivers, appointing receivers to another company, Kunda Trading Pty Ltd [*not specifically alleged to be a debtor of Equititrust*], and of the receipt by the Receivers of various amounts of money from the controllership of those companies, as agent for Equititrust. It does not appear to be alleged that these sums of money were deposited into the trust account of Tucker & Cowen (cf [96(c)] of the statement of claim). The relevance of these allegations, in this part of the pleading, leading to the pleading of breach of s 249 of the *Legal Profession Act,* is not clear.

[28] It is alleged that from the date of the MS Asia acquisition on 17 July 2012 Tucker & Cowen have continued to act as the solicitors for Equititrust in the various proceedings listed in schedule 4 and schedule 5 to the statement of claim (statement of claim at [95]).

[29] At [96] of the statement of claim it is alleged that (underlining represents the proposed amendment):

> "Since the MS Asia Acquisition:
>
> (a) Tucker & Cowen have received sums totalling not less than $17,565,264.98, particulars whereof are set out in Schedule 6 hereto;
>
> (b) Each such sum proceeded from the EPF Loan Book, on account of debts owing to Equititrust as trustee of the EPF;
>
> (c) Each such sum was (in the premises of paragraphs 54, 87 and 87A hereof) the property of Equititrust as trustee of the EPF, being:
>
> (i) the proceeds of loans made to its borrowers; or
>
> (ii) payments received from the exercise of securities held by it; or
>
> (iii) the enforcement of guarantees held by it;
>
> (d) Each such sum was banked to the general trust account of Tucker & Cowen with Commonwealth Bank of Australia;

(e) The Deed of Appointment has remained on foot.

(The sums banked to the trust account of Tucker &Cowen are referred to as 'the Tucker & Cowen Receipts')."

[30] It is proposed to allege, by [96A] of exhibit 2, that:

"In the premises of paragraphs 6, 6A, 54, 83, 83A, 86, 87, 87A to 93, 95 and 96 hereof, in respect of all sums comprising the Tucker & Cowen Receipts:

(a) the Schedule 4 Proceedings and the Schedule 5 Proceedings included retainers of Tucker & Cowen pursuant to which they received the Tucker & Cowen Receipts;

(b) the only persons competent and authorised to give instructions to Tucker & Cowen in the conduct of the retainers were:

(i) the BOSI Receivers for the SLOT payment; and

(ii) the Receivers for all other receipts;

(c) the only persons from whom Tucker & Cowen, in acting as solicitors, took instructions were:

(i) the BOSI Receivers for the SLOT payment; and

(ii) the Receivers for all other receipts;

(d) the client of Tucker & Cowen was Equititrust." [*emphasis added*]

[31] Paragraph [97] (with proposed change underlined) pleads:

"In the premises of paragraphs 96 and 96A hereof:

(a) Tucker & Cowen were, by force of subs 249(1) of the LPA obliged:

(i) to hold each sum making up the Tucker & Cowen Receipts exclusively for Equititrust as trustee of the EPF; and

(ii) to disburse the Tucker & Cowen Receipts only under a direction given by Equititrust, as trustee for the EPF; and

(b) Tucker & Cowen received the Tucker & Cowen Receipts upon trust for Equititrust, as trustee for the EPF."

[32] Mr Tucker and Mr Cowen, as principals of Tucker & Cowen, are said to be severally obliged, by s 244(1) of the *Legal Profession Act* to discharge the obligations of Tucker & Cowen under, relevantly, s 249 (statement of claim at [98]).

[33] It is further alleged that on and after 31 May 2016 TCSS received sums of not less than $54,658.53 (particularised in schedule 7), comprising amounts which "proceeded from the EPF Loan Book, on account of debts owing to Equititrust as trustee of the EPF"; that these sums were the property of Equititrust; and that these sums were banked to the general trust account of TCSS (the **TCSS receipts**) (statement of claim at [99]). It is alleged TCSS was obliged by s 249 of the LPA to hold those sums exclusively for Equititrust and to disburse the TCSS receipts only under a direction given by Equititrust, and that TCSS received the TCSS receipts on trust for Equititrust as trustee for EFP (statement of claim at [100]).

[34] Mr Cowen, as a principal of TCSS, is said to be obliged, by s 244 of the *Legal Profession Act,* to discharge the obligations of TCSS under, relevantly, s 249 (statement of claim at [101]).

[35] It is also alleged that since the completion of the MS Asia Acquisition, TCSS and/or MS Asia have received other sums from realisation of the BOSI securities, particulars of which are yet to be provided (statement of claim at [102]).

[36] The conduct said to amount to contravention of s 249, by Tucker & Cowen and TCSS, is pleaded in paragraphs [105]-[109], both by reference to s 249 and also to the pleading of an express trust. That conduct is:

(a) failing, in breach of s 249, to deposit the Tucker & Cowen Receipts and the TCSS Receipts into a general trust account for Equititrust (as trustee of the EPF);

(b) instead depositing those sums into a general trust account for MS Asia and, in some respects for Worrells; and

(c) failing to pay any of those receipts to Equititrust, but rather paying them away to persons other than Equititrust.

[37] There is an alternative pleading of a constructive trust (see [103], [104], [110] and [111] of the statement of claim).

[38] The first attack on the pleading of this cause of action is that it is untenable because the Tucker & Cowen Receipts and the TCSS Receipts (as those terms are used in the statement of claim) deposited into the trust account were not received on behalf of Equititrust; but rather were received on behalf MS Asia, consequent upon MS Asia exercising its rights, as a secured creditor, under the BOSI securities (which it acquired in July 2012). The Tucker applicants and the Cowen applicants contend that MS Asia was the "client" on whose behalf the money was received, not Equititrust.

[39] In written submissions for the Tucker applicants and the Cowen applicants it is said there is no plea that the funds were in fact received "on behalf of" Equititrust as trustee for the EPF; and no plea that Tucker & Cowen and TCSS received the monies acting as the solicitors for Equititrust as trustee for the EPF. Rather, the pleading merely alleges in a

conclusory way that because the sums recovered by MS Asia "proceeded from" the EPF loan book, on account of debts owing to Equititrust, the money recovered was therefore the property of Equititrust.

[40] The plaintiff submits that the criticism of its claim for breach of s 249 mischaracterises the effect of the statement of claim and is factually incorrect. It submits the defendants' criticism overlooks the fact that, to the extent the statement of claim pleads that MS Asia took steps to collect the BOSI debts, by enforcing the BOSI securities, this enforcement and collection is pleaded as having been effected by the appointment of receivers and managers (referring to paragraphs [86] to [93] of the statement of claim). The plaintiff submits the receivership involved the collection of debts owed to Equititrust; that in proceedings undertaken to recover debts owed to Equititrust, Tucker & Cowen's client was Equititrust; and the monies received in the course of those recovery proceedings were collected by Equititrust and received by Tucker & Cowen on behalf of Equititrust, not on behalf of any other party (as proposed to be pleaded in the new [96A]).

[41] This point is made by reference to the terms of the deed of appointment of the Receivers, and the BOSI securities (referred to in [17] of Mr Tucker's submissions), under which the plaintiff submits the receivers acted as the agent of Equititrust (as proposed to be pleaded in the new [87A]).

[42] The Tucker applicants and the Cowen applicants accept that, under the BOSI securities[3] and the deed of appointment of the Receivers,[4] there is a provision stating the Receiver is the agent of (in effect) Equititrust. But they take issue with the proposed pleading, in [87A] of exhibit 2, that "after execution of the Deed of Appointment, Equititrust was the only person entitled (by its agents, the Receivers) to take possession of the EPF Loan Book and to receive the proceeds thereof." They submit that is not the case, as the BOSI securities contemplate the secured creditor (relevantly, MS Asia, following the assignment from BOSI) being able to exercise the powers of a receiver.[5] In addition, they submit that under the deed of appointment of the Receivers, MS Asia retained the ability to direct the Receivers to pay money recovered directly to itself.[6]

[43] The Tucker applicants emphasise the special and limited character of the agency relationship between the Receiver and the debtor (here, Equititrust); with the Receiver's primary duty being to the secured creditor, to realise the security and pay over to it the secured amount.[7]

[44] Those submissions lead to the conclusion, on the applicants' argument, that the plaintiff's claim in this regard is based on a factually and legally flawed premise, which is expressed

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[3] An example of which appears at p 94 (cl 14.2) of ex DRT-4 to Mr Tucker's affidavit filed 29 January 2019 (CFI 31).
[4] See p 66 (cl 7.1) of ex SCR-3 to Mr Russell's affidavit filed 13 February 2019 (CFI 43).
[5] See, for example, the charge at p 93 (cl 12(e)) and p 96 (cl 15.1) of ex DRT-4 to Mr Tucker's affidavit (CFI 31).
[6] Referring cl 9.1 of the deed of appointment (at p 67 of ex "SCR-3" to Mr Russell's affidavit (CFI 43)).
[7] Referring to Expo International Pty Ltd v Chant [1979] 2 NSWLR 820 at 827-828 and Sheahan v Carrier Air Conditioning Pty Ltd (1997) 189 CLR 407 at 435-436.

in the proposed new [87A] – that is, that upon the appointment of the Receivers, Equititrust was the only person entitled (by its agents, the Receivers) to take possession of the EPF Loan Book and to receive the proceeds thereof.

[45] The plaintiff's answer to this is to submit that such provisions as were referred to, in the example BOSI security and the deed of appointment, merely set out the rights which MS Asia *might* have exercised. The plaintiff submits the case pleaded in the statement of claim is the course which (it contends) MS Asia in fact pursued: it did not collect the debts; rather it appointed receivers and managers to the assets of Equititrust; and those receivers paid the money they collected in to the account of Equititrust. The plaintiff submits the points raised by the Tucker applicants and the Cowen applicants are matters that may be pleaded by way of defence to the claim (for example, if there is evidence of a direction by MS Asia, under the deed of appointment); but do not render the claim untenable such that it ought to be struck out.

[46] I accept that submission. It may eventuate, upon consideration of the evidence and arguments at trial, that the correct analysis of the factual circumstances of the payments received in the course of recovery of the BOSI debts is as contended by the defendants. It may also be accepted that, as currently worded, proposed [87A] is not legally accurate (because of the inclusion of the word "only"). But for present purposes, the Tucker applicants and the Cowen applicants have not established that the claim, in so far as it pleads contravention of s 249 of the *Legal Profession Act* or a coextensive express trust, is bound to fail on this fundamental basis, such as to warrant striking out the claim(s).

[47] However, in relation to the alternative pleading of a constructive trust, I accept the argument for the Cowen applicants and the Tucker applicants that it ought to be struck out. The relevant paragraphs are [103] and [104] of the statement of claim. Paragraph [103] pleads:

> "Further and in the alternative to the allegations in paragraphs 96 to 98 hereof, in the premises, Tucker & Cowen received and held the Tucker & Cowen Receipts upon constructive trust for Equititrust, as trustee for the EPF."

[48] Paragraph [104] is in similar terms, in relation to the receipt by TCSS of the TCSS Receipts.

[49] The basis on which it is pleaded that a constructive trust arose *further* to the allegations in [96] to [98] of the statement of claim is not clear (including from the plaintiff's submissions). It seems (as the heading before [103] and [104] indicates) that the pleading of a constructive trust is really an *alternative* to the claim based on s 249 and/or an express trust.

[50] The first point made by the applicants is that there are no "premises" identified, so it is not possible to ascertain, from the pleading, the basis on which a constructive trust is said to arise. Having regard to [23] of the plaintiff's submissions, it appears the pleading of a constructive trust is on the basis that even if the moneys were not received on behalf of

Equititrust, a constructive trust is said to arise against Tucker & Cowen and/or TCSS as a result of the alleged breach of fiduciary duty by Mr Tucker (later pleaded in the statement of claim). But that is not what is pleaded.

[51] In any event, the applicants contend it is not a viable claim because, as articulated in [23] of the plaintiff's submissions, it is a constructive trust said to arise from the receipt by Tucker & Cowen and/or TCSS of the money; but there are no allegations in the pleading of knowledge of the relevant kind, nor of the beneficial receipt of the money (on any view, the money received into the trust account was being held for the benefit of someone else).[8]

[52] Thirdly, the applicants submit there is no scope for the imposition of a constructive trust, as an alternative, in the face of s 249 of the *Legal Profession Act*. That is supported by *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [119], where Bell, Gageler and Keane JJ affirmed the principle that "[a] trust relationship is not to be recognised or enforced, and is therefore not to be inferred, if and to the extent the trust relationship would give rise to rights or obligations inconsistent with those conferred or imposed by statute".

[53] In their present form, I accept the submission for the Cowen applicants and the Tucker applicants that [103] and [104] ought to be struck out; together with [110] and [111] (where the breach of the constructive trusts is pleaded).

[54] In so far as the remedy of a constructive trust is sought to be relied upon as against either Tucker & Cowen, the firm, or TCSS, for the alleged breach of duty(ies) by Mr Tucker, as foreshadowed in the plaintiff's submissions, that is not a matter that is presently pleaded, but is something that may be separately addressed by the plaintiff in a further version of the statement of claim, taking into account the challenges raised against it.

[55] The Tucker applicants and the Cowen applicants also attack the pleading of the claim for breach of s 249 on the basis that there are deficiencies in the pleading. In some respects, exhibit 2 represents an attempt by the plaintiff to address those deficiencies. Nevertheless, I accept that there are aspects of this part of the pleading that warrant further attention, including:

1. Clear articulation of the categories of payments alleged to have been received, on behalf of Equititrust as the client. At present, there are five categories referred to:

    (a) the SLOT payment;

    (b) the external administrator recoveries;

    (c) the recoveries pursuant to retainers held by Tucker & Cowen;

[8] Cf the first limb of the rule in Barnes v Addy, as explained in Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 at [111]-[112].

(d) the recoveries pursuant to retainers held by TCSS; and

(e) ongoing recoveries pursuant to retainers, not yet able to be particularised.

2. The money said to have been deposited into the trust account on behalf of Equititrust since the MS Asia acquisition is said to be particularised by reference to schedule 6 (a trust account statement, commencing with an entry on 8 August 2012 referring to the receipt of the SLOT payment), and is collectively referred to as the Tucker & Cowen Receipts in [96] of the statement of claim. It is apparent from [96(c)] and [96(e)] that the pleading in this paragraph of the money being the property of Equititrust is on the basis of the contended effect of the deed of appointment of the Receiver. That begs the question – is the SLOT payment properly included as part of the "Tucker & Cowen Receipts" as defined, being a payment received prior to the appointment of the Receivers?

3. As I have already mentioned, as far as I can see, there is no pleading that the recoveries from Handley Heights, Kunda Trading and MQ Ink were paid into the Tucker & Cowen trust account. Are these monies also intended to be included within the meaning of "Tucker & Cowen Receipts"? Were these recoveries in the context of retainers held by Tucker & Cowen?

4. Proposed [96A] is confusing in that it pleads that "in respect of all sums comprising the Tucker & Cowen Receipts", relevantly, (a) "the schedule 4 proceedings and the schedule 5 proceedings included retainers of Tucker & Cowen pursuant to which they received the Tucker & Cowen Receipts". As presently worded, [96A] appears to plead that the totality of the receipts were received pursuant to retainers in relation to the court proceedings in schedules 4 and 5. But that is not the case in relation to the SLOT payment, and it is not clear in the case of the external administration recoveries. For the reasons just identified, in my view the pleading needs to articulate more clearly the receipts, and the bases upon which it is contended they were received into the Tucker & Cowen trust account "on behalf of" Equititrust.

5. There are two aspects to that point: the need to clearly articulate the classes or categories of receipts *and* the bases upon which it is contended they were received into the trust account "on behalf of" Equititrust. As to the latter, the Tucker applicants and the Cowen applicants contend there is no express allegation to that effect in the pleading. It would appear proposed [96A] was an attempt to address this part of the attack on the pleading. This is an aspect of the case in which the plaintiff relies upon an inference, to be drawn from facts (which are otherwise pleaded, inter alia, in [86] (appointment of the Receivers), [87] (terms of the deed of appointment), [87A] (noting the issues with this discussed above), [95] (that Tucker & Cowen have continued to act for Equititrust in the schedule 4 and schedule 5 retainers) and [96]. The pleader needs to go one step further, and articulate expressly the inference which it contends is to be drawn, from the matters

culminating in the allegations in [96], in terms of the receipts being paid into the trust account "on behalf of" Equititrust.

6. The Tucker applicants and the Cowen applicants say there has been no attempt to particularise, from the many retainers listed in schedule 4 and schedule 5, which ones are said to have related to the receipts. Counsel for the plaintiff accepts that is the case, but says that is not a strike out point, but rather a matter for a request for particulars, the response to which may be delayed until after disclosure. I accept that. I note that there was an attempt to match up some of the debtors referred to by name in the retainers in schedules 3, 4 or 5, with receipts in schedule 6, during the course of the hearing (MFI A),[9] but that was plainly incomplete.

[56] There should be leave granted to address these matters by amendment to the current pleading. I will hear from the parties as to the appropriate form of relief.

[57] The relief sought for contravention of s 249 of the *Legal Profession Act* and/or the express trust is also said to be problematic. In so far as it concerns Mr Tucker, personally, and the firm Tucker & Cowen, the prayer for relief seeks orders including that they pay to the plaintiff the whole of the pleaded amount of the Tucker & Cowen Receipts, namely $17,565,264.98, and the TCSS Receipts, namely $54,658.53 (see [126] of the statement of claim, and paragraphs 1 and 2 of the prayer for relief). The plaintiff has indicated in its written submissions that it proposes to review [126] to plead the bases for the claimed entitlement to restoration of the Tucker & Cowen Receipts and the TCSS Receipts by reference to the alleged breaches. This review will presumably take into account the matters raised in the Cowen applicants' submissions at [32]-[35] and the Tucker applicants' submissions at [70]-[72]. In the circumstances, it is unnecessary to address this further.

Breach of various duties owed by Mr Tucker and Mr Kennedy

[58] The Tucker applicants challenge the claims made in [112]-[113] of the statement of claim, that Mr Tucker, Mr Kennedy and MS Asia knowingly participated in and procured, inter alia, the breaches of trust by Tucker & Cowen and TCSS, constituted by the alleged failure to hold the Tucker & Cowen Receipts and the TCSS Receipts exclusively for Equititrust as the person on whose behalf they were received, and by the disbursement of that money other than under a direction given by Equititrust. The challenge is consequential upon the challenge to the viability of the claim of contravention of s 249 and breach of the coextensive express trust, which I have dealt with above. The conclusion reached in relation to the constructive trust pleading, however, also flows through to [113], such that the reference in this paragraph to breach of constructive trust should be struck out.

[59] Both the Tucker applicants and the Cowen applicants then focus their attack upon [114] of the statement of claim, which reads (underlining shows proposed change):

[9] T 1-59.

"114. Further, in the premises of paragraphs 14 to 16, 77 to 82, 85, 95, 98 and 105 to 112 hereof, in causing and procuring MS Asia to engage in the MS Asia Acquisition and to receive and pay away the Tucker & Cowen Receipts and the TCSS Receipts:

(a) Mr Tucker acted in breach of the duties set out in paragraphs 49 and 53 hereof; and

(b) Mr Kennedy acted in breach of the duties set out in paragraphs 51 and 53 hereof."

[60] Paragraph [49] pleads that Mr Tucker was, by 13 April 2012, subject of the following duties:

(a) a duty under s 183(1) of the *Corporations Act* not to make improper use of information acquired by virtue of his position as a director to gain advantage for himself or someone else;

(b) a fiduciary duty of confidence as a solicitor, including a fiduciary duty not to take private advantage for himself or others of information acquired in the course of his retainers as Equititrust's solicitor, including when acting for it a trustee of the EPF;

(c) a fiduciary duty as a solicitor not to permit a conflict to arise between his duties to Equititrust, including as trustee of the EPF, and his private interests, including the interest of his firm Tucker & Cowen;

(d) a fiduciary duty as a solicitor to advise his client Equititrust of any facts or matters within his knowledge which may have had a real capacity to affect the interests of Equititrust, including as trustee of the EPF, relevant to any of his retainers as its solicitor; [omitted in exhibit 2]

(e) a solicitor's fiduciary duty of loyalty owed to Equititrust, including as trustee of the EPF.

[61] In [51], Mr Kennedy is alleged also to have been subject to a duty under s 183(1) of the *Corporations Act* and a fiduciary duty of confidence as an employee.

[62] Paragraph [53] pleads that, in the premises of [52] (which pleads that the knowledge and information referred to in [28]-[43] were of such a nature and were imparted to Mr Tucker and Mr Kennedy in such circumstances as to be inherently confidential) both Mr Tucker and Mr Kennedy were under an equitable duty of confidence not to disclose the information or make improper use of it.

[63] An overarching complaint made by both applicants is that the rolled up conclusory allegation in [114], as it is said in the Cowen applicants' submissions, "makes it impossible to know precisely how it is contended each alleged duty was breached and the material facts relied upon. It also makes it impossible to know how the apparent

relief that is claimed is related to each alleged breach". In my view, this is a valid complaint about the form of the statement of claim. The plaintiff should be required to plead (by cross-reference if that is apt) the material facts relied upon to allege that each of the duties said to be owed by Mr Tucker (and Mr Kennedy) were breached.

[64] The deficiency of the pleading in this respect is demonstrated by reference to one of the duties alleged to have been breached, namely the duty under s 183(1) of the *Corporations Act*, which provides as follows:

> "A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
>
> (a) gain an advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation."

[65] The applicants complain that the plaintiff has not pleaded, with specificity:

1. what information was obtained by Mr Tucker as a director;[10]
2. how he is said to have improperly used that information; and
3. how he did so to advantage himself or another person.

[66] In its submissions, the plaintiff endeavours to answer this complaint, by pointing to where, in the statement of claim, the material facts required to make out a claim under s 183 are to be found (see at [25]-[33] of the submissions). But in my view this reinforces the applicants' argument, rather than answering it.

[67] In [26] of the plaintiff's submissions there are outlined five "facts and matters" Mr Tucker is said to have known, on the basis of information acquired by virtue of being a director. But as the applicants submit, that is not (clearly) replicated in the pleading. The submissions also (at [27]) seek to identify where the facts relied upon to contend Mr Tucker improperly used the information and (at [28]) that he did so for the purpose of gaining an advantage, can be found. Putting that together involves joining the dots between a number of paragraphs of the statement of claim, and also applying the reader's mind to the date at which Mr Tucker ceased to be a director, in order to determine whether particular information is alleged to have been acquired as a director, in the dual capacity of director and solicitor, or only as a solicitor.[11]

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[10] As to the need to identify the information with precision, see, by analogy with a claim for misuse of information said to be protected by a duty of confidence in equity, Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434 at 443 per Gummow J; and Liberty Financial Ltd v Scott (No 3) [2005] VSC 363 at [50]-[51].
[11] See T 1-52.

[68] Returning to [114], where the breach, of this and the other duties, is pleaded, all the dots which seem to need to be joined are not referred to or identified (for example, there is no reference in [114] to [45] and [48] of the statement of claim, which the plaintiff's submissions (at [26]) refer to as the source of the detail of the "information", with further internal cross-references. It should not be for the reader of the pleading to try to conduct a "treasure hunt"[12] to try to find the pleading of the elements of these causes of action; even if they are said to be on the basis of inferences drawn from other facts.

[69] I accept the submission by Mr Clothier QC for the Cowen applicants that what is required for the purposes of the s 183 claim is a precise pleading of the information that is said to have been obtained by the person as director, a pleading of the material fact of its misuse (not merely its use, but its misuse), and a pleading of the material fact of a relevant purpose in connection with its misuse. The pleading alleges a narrative of facts, but does not draw it all together.[13]

[70] To be clear, I accept the plaintiff's submission that it is not able, and is not required, to give further particulars of specific pieces of information by which it is alleged Mr Tucker acquired the knowledge he is alleged to have had; which if required would be a request for evidence (paragraph [32] of the plaintiff's submissions); nor to give particulars of specific retainers under which it is alleged Mr Tucker received specific pieces of information (paragraph [36] of the plaintiff's submissions). Accepting that the plaintiff relies upon inferences to be drawn from facts which it alleges, in my view what is required is a clearer pleading of the matters referred to in paragraph [70] above.

[71] The same points apply equally in relation to the alleged breaches, by Mr Tucker, of his fiduciary duty of confidence as a solicitor, including a fiduciary duty not to take private advantage for himself or others of information acquired in the course of his retainers as Equititrust's solicitor: in terms of the need to identify the information said to be acquired in the course of Mr Tucker's retainers. How this is addressed may be a matter for further consideration by the plaintiff. The facts alleged show Mr Tucker acted as a solicitor prior to becoming a director and continued to do so after he ceased to be a director. But in oral submissions Mr Stewart QC for the plaintiff said the pleading does not make an allegation that information was obtained after Mr Tucker ceased to be a director of the company.[14] That is, all of the information alleged to have been acquired (and misused, etc) is alleged to have been acquired by Mr Tucker in his dual capacities, as director and solicitor. This should be clarified.

[72] The applicants also complain about the breadth of the retainers identified in schedules 1, 2, 3 and 4, not all of which could be said to have anything to do with the knowledge alleged to have been held by Mr Tucker (as it is described in [26] of the plaintiff's submissions). For the plaintiff, it is submitted the purpose of referring to the retainers by Equititrust, going back to 2006, is to show that the firm, and Mr Tucker, was the

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[12] To use Jackson J's phrase, from Mio Art Pty Ltd v Macequest Pty Ltd & Ors [2013] QSC 211 at [62].
[13] Cf T 1-54.
[14] T 1-52.

longstanding solicitor of that company, a relevant factor to determining the scope and content of the duty of loyalty. That is, the retainers are not identified only for the purpose of the inference as to acquisition of knowledge as a solicitor. I accept that submission.

[73] In that regard, the applicants also apply to strike out the reference in [49(e)] of the statement of claim to Mr Tucker owing a solicitor's fiduciary duty of loyalty to Equititrust, as adding nothing in light of the other duties alleged. In the context of this case, in my view it cannot at this stage be concluded that such an allegation of such a duty, and breach of it, adds nothing. I am not persuaded it ought to be struck out.

[74] The issues in relation to the allegation of misuse of information acquired as a director, and as a solicitor, flow through to the separate allegation of improper use of information imparted to Mr Tucker (and Mr Kennedy) in such circumstances as to be inherently confidential (paragraphs [52] and [53] of the statement of claim). There is an additional complaint made, that the circumstances relied upon as being "inherently confidential" are not clearly pleaded. That is a valid criticism, which ought to be addressed, by amendment to, or particularisation of, [52] of the statement of claim.

[75] In relation to the allegation of breach by Mr Tucker of the fiduciary duty as a solicitor not to permit a conflict to arise between his duties to his client, Equititrust, and his private interests (paragraph [49(c)] of the statement of claim), the applicants submit, among other things, that the material facts alleged to have given rise to a conflict are not pleaded. This is a matter that I would expect could readily be addressed, upon reviewing the pleading of breach of the various duties alleged, by reference to other parts of the statement of claim.

[76] The applicants' challenge to the pleading of a fiduciary duty of the kind set out in [49(d)] appears to have been accepted by the plaintiff, as this is struck out in exhibit 2. In its stead, there is a proposed new pleading of a contractual duty (see [102A] and [102B] of exhibit 2). The applicants have flagged opposing any grant of leave to add this claim, inter alia, on the basis it is statute barred. It is not necessary for me to address this issue, as at present it is no more than a proposal in exhibit 2.

[77] There is a broader objection taken by the applicants to the pleading of fiduciary duties owed by Mr Tucker, and breached by him, on the basis that the scope of the fiduciary duty(ies) owed by him will depend upon analysis of the contractual retainers, in terms of what the solicitor has undertaken, or is deemed to have undertaken, to do. It is said the material facts in support of, inter alia, the existence of the alleged duties have not been pleaded. The (remaining) fiduciary duties pleaded in [49] are a duty of confidence, relevantly, not to take private advantage for the solicitor or others of information acquired in the course of the solicitor's retainer by the client; a duty to avoid a conflict between the solicitor's personal interests and those of his client; and (or perhaps reflecting the other two) a duty of loyalty. Each of these are fundamental aspects of the fiduciary duty

owed by a solicitor in any retainer of them by a client.[15] The subject matter over which these fiduciary obligations extend will depend upon the particular retainer(s); as will the determination of whether there has been a failure to discharge those obligations;[16] but the very nature of the solicitor-client relationship is what gives rise to the obligations the subject of the pleaded duties. Whilst it is accepted that the allegations of breach of the pleaded duties requires further attention, I do not accept that more is required in terms of the pleading of the existence of the duty itself.

[78] I will hear from parties as to the appropriate form of relief in relation to this part of the pleading also. It may be appropriate to strike out [114], but give leave to replead. Beyond [114], it is difficult to identify particular paragraphs to be struck out and repleaded, as opposed to amended or particularised (because of the significant interconnection and cross-reference between them).

Tuckerloan

[79] Paragraph [117] of the statement of claim pleads that, in the circumstances alleged, by funding MS Asia's acquisition of the BOSI securities, Tuckerloan was involved in the contraventions of s 183 by Mr Tucker and Mr Kennedy, within the meaning of s 79 of the *Corporations Act*.

[80] Paragraph [118] pleads that Tuckerloan was knowingly concerned in and party to the breaches by Mr Tucker of the other duties alleged in [49] and [53], and the breaches by Mr Kennedy of his other duties in [51] and [53].

[81] In one respect, the Tucker applicants' attack on this part of the pleading flows from their attack on the substantive pleading in relation to breach of s 183, and the other duties. It is unnecessary to say more about this.

[82] Separately, they submit that accessory liability under s 79 of the *Corporations Act* requires proof of knowledge of each of the elements of s 183(1), and that this therefore needs to be alleged and pleaded.[17]

[83] Likewise, in relation to the pleading of accessory liability in relation to the breaches of other duties, on the basis of the second limb in *Barnes v Addy*, it is submitted knowledge must be alleged and pleaded.

[84] In so far as the first limb in *Barnes v Addy* is relied upon, to plead ([118(c)] that Tuckerloan holds any interest in MS Asia and any funds received from it on constructive trust for Equititrust, the Tucker applicants submit there can be no knowing receipt, repeating their arguments about the Tucker & Cowen Receipts and the TCSS Receipts

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[15] Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 67 per Gibbs CJ; see also Maguire v Makaronis (1997) 188 CLR 449 at 463, referring to Clark Boyce v Mouat [1994] 1 AC 428 at 437.
[16] Hospital Products at 73 per Gibbs CJ and at 102 per Mason J; Maguire v Makaronis (1997) 188 CLR 449 at 464.
[17] Referring to Yorke v Lucas (1985) 158 CLR 661 (see at 667-668) and Addenbrooke Pty Ltd v Duncan (No 2) [2013] FCA 820 at [2]-[4].

(having been received on behalf of MS Asia, not Equititrust). That is not a basis on which to strike out this part of the pleading. If the Tucker applicant's argument is ultimately not successful, and the moneys are found to have been paid out of the trust account in breach of the obligation under s 249 of the *Legal Profession Act,* or in breach of trust; and if Tuckerloan is found to have accessorial liability; the remedy of a constructive trust may be available, in respect of the part of the SLOT payment that was paid to Tuckerloan. Again, it comes down to knowledge.

[85] In so far as Tuckerloan is concerned (cf the discussion below in relation to Tucker & Cowen, relevantly Mr Cowen), the knowledge of Tuckerloan is premised upon Mr Tucker having controlled Tuckerloan since its incorporation, and having always been and remaining its only directing mind. In that regard, the knowledge of Mr Tucker is said to be the knowledge of Tuckerloan. I am not persuaded that there is any basis on which to strike out these paragraphs.

***Tucker & Cowen's liability for the wrongful conduct on the part of Mr Tucker under s 13 of the Partnership Act* 1891**

[86] Paragraph [119] of the statement of claim pleads that:

> "Mr Tucker was acting in the ordinary course of the business of the firm Tucker & Cowen, within the meaning of s 13(1) of the *Partnership Act* 1891 in:-
>
> (a) acquiring the knowledge referred to in paragraph 48 hereof; and/or
>
> (b) procuring Tuckerloan to fund the MS Asia Acquisition; and/or
>
> (c) acting as the solicitor for MS Asia in the MS Asia Acquisition; and/or
>
> (d) procuring MS Asia to engage in the MS Asia Acquisition; and/or
>
> (e) acting in the Schedule 4 Proceedings and the Schedule 5 Proceedings after 17 July 2012; and/or
>
> (f) receiving the Tucker & Cowen Receipts; and/or
>
> (g) paying away the Tucker & Cowen Receipts."

[87] Paragraph [120] pleads facts, matters and circumstances from which the allegation in [119] is said to be inferred. These include, in [120(b)] and [120(d)], that a substantial purpose of Mr Tucker was to maintain the retainers by Equititrust of the firm in the schedule 4 proceedings, and to increase the retainers by Equititrust of the firm; and in [120(i)], that he wanted to "buy work" for Tucker & Cowen from Mr Kennedy and MS Asia.

[88] The Cowen applicants contend that the pleading in [119(b)] and [119(d)] is untenable and should be struck out. They rely upon the statement of the test, as it appears for example in *Crouch and Lyndon v IPG Finance Australia* [2014] 1 Qd R 512 at 541 [49], as being "whether the employee or partner was authorised to do acts of the kind in question", which "depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing". The Cowen applicants submit conduct such as referred to in (b) and (d) of [119] is not conduct which falls within the scope of the ordinary business of solicitors.[18]

[89] I am not persuaded this is a basis upon which to strike out those paragraphs. It is a question of fact whether, in the particular circumstances, those things are found to be within the ordinary course of the business of this firm.

Tucker & Cowen's liability

[90] Paragraph [123] of the statement of claim contains a pleading of accessorial liability, under s 79 of the *Corporations Act,* on the part of Tucker & Cowen, for the contraventions by Mr Tucker and Mr Kennedy, of their duties under s 183. Paragraph [124] pleads that, in the premises of [123], Tucker & Cowen contravened s 183(2) of the *Corporations Act*. Paragraph [125] pleads that Tucker & Cowen was knowingly concerned in and a party to the breaches by each of Mr Tucker, of his other duties alleged in paragraphs [49] and [53], and Mr Kennedy, of his other duties alleged in paragraphs [51] and [53].

[91] Presently, the fifth defendant is named as Mr Tucker, Mr Cowen, and three other named people, "carrying on practice under the name Tucker & Cowen". The claim against those three other named persons has already been discontinued, as they were not members of the firm (as alleged in [14(b)(iii), (iv) and (v)] of the statement of claim). This is not reflected in exhibit 2.

[92] So for practical purposes, the fifth defendant is Mr Tucker (also separately named as the first defendant) and Mr Cowen.

[93] In so far as these paragraphs allege accessorial liability on the part of Mr Tucker, as a member of the firm Tucker & Cowen, for the conduct of Mr Kennedy, he contends the pleading fails to allege and plead the requisite knowledge.

[94] Paragraph (a) of the particulars to [123] purports to address Mr Tucker's knowledge. It is limited to a contention that Mr Tucker was the member of the firm who engaged in the acts and omissions constituting the conduct in [119(a)] and [119(g)].[19] Paragraph [119(a)] refers to acquiring the knowledge in [48], which in turn contains an allegation that Mr Tucker knew the facts and matters in [28] to [43]. But it is difficult to extract from this the basis on which it is alleged Mr Tucker was involved in a contravention by

[18] Referring to Crouch and Lyndon v IPG Finance Australia [2014] 1 Qd R 512 at [53].
[19] Cf exhibit 2, the reference to paragraph 119 is missing – so that there is only reference to "subparagraphs (a) to (g) hereof", which does not make sense.

Mr Kennedy of the duty under s 183. Mr Tucker's complaint about the pleading is a valid one, but is a matter for which leave to replead should be given, to articulate clearly the basis on which it is alleged Mr Tucker had the requisite knowledge of the contravention by Mr Kennedy of his duty under s 183 of the *Corporations Act,* to make him liable as an accessory for that contravention (if it be established). The same applies to [125(b)], which is pleaded on the same basis as [123] and therefore suffers the same deficiency.

[95] In so far as these paragraphs allege accessorial liability on the part of Mr Cowen, as a member of the firm Tucker & Cowen, for the conduct of Mr Tucker and Mr Kennedy, he contends the pleading fails to allege and plead any involvement by him, let alone any knowledgeable involvement, in any of the conduct of Mr Tucker (or Mr Kennedy). There are a number of paragraphs cross-referenced in the opening of [123], but none of those contain any allegations of involvement, or knowledge on the part of Mr Cowen. In paragraph (b) of the particulars, it is said "that Mr Cowen… had the requisite knowledge of the facts constituting the contraventions by Mr Tucker and Mr Kennedy of their duties under s 183(1) of the Act is to be inferred from" those premises (ie the cross-referenced paragraphs) and the further matters set out in subparagraphs (b)(i) to (xxv), most of which deal with details about deposits to and withdrawals from the trust account.

[96] In so far as [123] is concerned, I accept the submission for Mr Cowen that there is no pleading of Mr Cowen's knowledge of the elements of the contravention of s 183(1) alleged to have been committed by Mr Tucker and/or Mr Kennedy, and no pleading of any involvement by Mr Cowen in that contravention. The only reference to knowledge of either Mr Tucker or Mr Kennedy even being a director of Equititrust (let alone misusing information acquired in that capacity for a particular purpose) is in subparagraph (xix) of paragraph (b) to the particulars to [123] which, as it is proposed to be amended, states that "[i]n any event [Mr Cowen] was aware that Mr Tucker acted as a director of a client while the firm also acted as its solicitors (which awareness is to be inferred from the matters alleged and referred to in this paragraph 123)".

[97] The pleading of knowing involvement by Mr Cowen in the breaches by Mr Tucker and Mr Kennedy of the other duties alleged suffers the same deficiency. As is made clear in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [160], [163], [171]-[179], what must be shown, to establish accessory liability for breach of trust or fiduciary duty, is (relevantly) participating with knowledge in a dishonest and fraudulent design. The facts relied upon to prove participation, with knowledge, by Mr Cowen in a dishonest and fraudulent design (of Mr Tucker and/or Mr Kennedy) are not pleaded – simply a conclusion in [125], on the premises of [123].

[98] In my view, in so far as it concerns Mr Cowen, [123]-[125] ought to be struck out. Counsel for Mr Cowen submits there is no evidence before the court that the plaintiff could replead such a case. However, quite properly this application has focussed on the pleading itself, not evidence, and unless there are limitation issues, I cannot see a reason to foreclose the plaintiff from pleading a claim on this basis, if it can.

Loss and damage

[99] The plaintiff has indicated it will review paragraphs [127]-[130] of the statement of claim, which are also the subject of complaint by the applicants.

[100] That review ought to include consideration of the point raised by the Cowen applicants in [33] of their submissions, as to whether, and how, the plaintiff alleges that a contravention of s 249(1) of the *Legal Profession Act* confers on it a right to sue. That was not addressed by the plaintiff in its submissions, nor orally at the hearing of the application. Given the plaintiff's indication that it will review this part of its pleading, I have not embarked on a consideration of the issue, but note it.

[101] It ought also address the point made by all applicants as to the apparent difficulty of the plaintiff claiming for the recovery of the full amount of the Tucker & Cowen Receipts and the TCSS Receipts, without addressing the issue of causation (see Cowen applicants' submissions at [34]-[35] and Tucker applicants' submissions at [71]-[72]).

Risk fee and overdue rate void as penalties

[102] The Tucker applicants complain about the lack of clarity in relation to the allegations made in [136] to [139] of the statement of claim of the "risk fee" and the "overdue rate" being penalties, in particular in terms of whether these allegations are limited to a claim for monies had and received against MS Asia, or are relied upon in relation to the quantification of the repayment and damages sought against the other defendants. If it is the latter, they also submit the pleading is deficient in some respects (see paragraphs [78]-[81] of the Tucker applicants' submissions).

[103] It appears from paragraphs 15 to 17 of the prayer for relief that orders consequential upon the pleading of these payments as penalties are sought only against MS Asia. However, the question raised in [78] of the Tucker applicants' submissions was not squarely addressed by counsel for the plaintiff at the hearing. It should be.

[104] I record that I would not regard [81] of the Tucker applicants' submissions as providing a basis for striking out these paragraphs, but rather as raising a matter to be pleaded by way of defence. The question whether there are deficiencies in [137] of the statement of claim (as contended in [80] of the Tucker applicants' submissions) is a matter that can be revisited, should it become necessary, for example, when the effect of the allegation (on the claims made and relief sought against parties other than MS Asia) has been clarified.

Complaints about the form of relief sought

[105] The applicants complain about two further aspects of the form of relief sought.

[106] As to the first, I am not persuaded there is a basis to strike out the claim for exemplary damages, having regard to the plaintiff's submissions at [59].

[107] As to the second, the plaintiff has indicated it will review that part of its pleading in which it seeks compensation under s 1317H(1) of the *Corporations Act,* and accordingly it is unnecessary to address this further.

Form of orders to be made

[108] At the hearing, the parties indicated they would wish to be heard on the form of relief, following my determination of the strike out applications. Accordingly, I will not make any orders, upon delivery of these reasons, other than to invite the parties to provide a minute of consent order reflecting the reasons. If the parties are unable to agree, I will relist the matter for the purposes of making appropriate orders.

Security for costs

[109] The plaintiff does not contest the making of an order for security for costs in favour of the Tucker applicants and the Cowen applicants. There is a dispute as to the form in which the security should be provided; and also a dispute as to the amount of security to be provided in respect of Mr Tucker's and Tuckerloan's application. In relation to Mr Cowen and TCSS the parties are agreed that security for costs in the sum of $150,000 is to be provided.

Amount of security to be provided for Mr Tucker and Tuckerloan

[110] Mr Tucker and Tuckerloan seek security in the sum of $373,885, based upon the evidence of Mr Tucker. The plaintiff contends $150,000 would provide appropriate security, on the basis of a competing analysis of Mr Tucker's estimate, undertaken by Mr Graham Robinson of counsel, who estimates the likely recoverable costs up to the filing of defences to be about $170,000.

[111] The relevant principles are uncontroversial. Rule 670(1) of the UCPR confers discretionary power on the court to order a plaintiff to give the security the court considers "appropriate" for the defendant's costs. The applicants rely also upon s 1335 of the *Corporations Act*, which refers to "sufficient" security. In determining what is appropriate or sufficient, the court does not give a full indemnity,[20] and the amount is not determined with mathematical precision but rather on the basis of a "broad brush" approach.[21]

[112] Having considered Mr Tucker's estimate, Mr Robinson's analysis of it, and Mr Tucker's response, and adopting the accepted broad brush approach, in my view an amount of $250,000 would be appropriate and sufficient. It is to be expected that the recoverable costs incurred by Mr Tucker (and Tuckerloan) will be more than Mr Cowen (and TCSS),

[20] Wainter Pty Ltd v Freehills (a firm) (No 2) [2009] FCA 770 at [9]; Lynx Engineering Consultants Pty Ltd v ANI Corp (No 3) [2010] FCA 32 at [24]-[25].
[21] Qintex Australia Ltd (in liquidation) v ANZCap Nominees Ltd [2000] QSC 394 at [25] per Williams J; Lanai Unit Holdings Pty Ltd (as trustee of Lanai Unit Trust) v Mallesons Stephen Jacques (a firm) [2016] QSC 002 at [43] and [52] per Jackson J; see also Allen Dodd (as trustee for the Dodd Superannuation Fund) v Shine Corporate Ltd [2018] QSC 040 at [15]-[17] per Martin J.

given the nature of the allegations which are made against Mr Tucker; but noting that as the case against Mr Cowen is framed, there is a need for him to address the allegations as against Mr Tucker as well. Although not a mechanical exercise, if I factor into account Mr Robinson's critique of some of the items of work which comprise Mr Tucker's estimate, adopting a broad and general approach, a reduction in the amount sought by Mr Tucker to $250,000 is reasonable, taking into account, for example:

1. for the period up to 6 January 2019, a reduction to the amount attributed to the preparation of the chronology (say by half, or $11,000) and perusal of the statement of claim (say by $4,000), removing the amount claimed for legal research ($8,000), and the amount included for the security for costs application ($2,250) and reducing the "balance" (say, by $5,000);

2. for the period between 7 January 2019 and the filing of the defences, a reduction of the amount attributed to drafting the strike out application and affidavit (say, $4,000), and the further amount attributed to the chronology (say by half again, $3,500), removing the amount for settling the submissions on the strike out application ($2,500), again removing the amount attributed to the security for costs application ($2,500) and reducing the amount for preparing instructions to counsel and compiling the briefs (by say half, $6,000);

3. in a general sense, the overarching criticism made by Mr Robinson, that Mr Tucker's estimate is based on time spent in performing tasks, whereas the court scales generally provide for remuneration on the basis of the task performed, rather than the time taken to perform the task (but balancing that with the observations in *Logan APZ Pty Ltd v Council of the City of Logan* [2017] QCA 288 at [32]); and

4. also in a general sense, the differences between counsels' fees and estimates as they appear in Mr Tucker's estimate, and Mr Robinson's opinion as to what may be recoverable.

[113] I do not, in undertaking this exercise, express concluded views about the matters addressed in Mr Robinson's report; rather, I have endeavoured, in the exercise of the discretion conferred on the court, to give tangible effect to the broad approach acknowledged by the authorities to arrive at a pragmatic outcome reflecting what I regard as appropriate. I am not persuaded to accept Mr Tucker's estimate without qualification; but nor am I persuaded that Mr Robinson's much lower estimate reflects an amount which is appropriate or sufficient, given the nature and complexity of the claims made in this proceeding.

Form of security to be provided

[114] Rule 673(1) of the UCPR provides that if the court orders the plaintiff to give security for costs, the security must be given in the form, at the time, and on any conditions the court directs. The parties were in agreement that in the exercise of the court's discretion

as to the form of the security to be provided, the approach summarised by Hargrave J in *DIF III Global Co-Investment Fund v BBLP LLC* [2016] VSC 401 at [40] applies:

> "(1) the plaintiff is entitled to propose security in a form least disadvantageous to it;
>
> (2) the plaintiff bears a 'practical onus' of establishing that the proposed security is adequate and does not impose an 'unacceptable disadvantage' on the defendant;
>
> (3) in order to be adequate, the proposed security must satisfy the protective object of a security for costs order, namely, to provide a fund or asset against which a successful defendant can readily enforce an order for costs against the plaintiff; and
>
> (4) based on these and any other relevant considerations, the Court will determine how justice is best served in the particular circumstances of the case."

[115] The plaintiff proposes the security be provided in the form of a deed of indemnity between the London based insurer of the litigation funder of these proceedings, AmTrust Europe Ltd, and the respective applicants, together with the deposit of $30,000 into court as security for the costs to register and enforce a judgment in the United Kingdom in relation to any default by AmTrust under the deed of indemnity.

[116] The applicants submit security should be in the form of a bank guarantee or payment into court.

[117] The applicants submit the form of security proposed by the plaintiff is not adequate to achieve its object as security, for the following reasons.

[118] In correspondence from the plaintiff's solicitor to Mr Tucker (with a similar letter also sent to the solicitors for Mr Cowen) dated 7 February 2019, which provided a draft of the deed of indemnity, it was said that:

(a) the terms of the draft (or specimen) were non-variable; and

(b) the provision of any deed of indemnity would be subject to the claimant (plaintiff) and defendants agreeing on the terms of the draft, and the amount of security; and to the "subsequent express written confirmation from AmTrust that AmTrust would be willing to provide a DOI / a DOI in that amount".[22]

[119] By reference to this, the applicants submit the proposal is illusory, because it is conditional upon AmTrust agreeing to provide it. They submit this is reinforced when turning to the terms of the "specimen" deed itself,[23] at the top of which there is note that

[22] Affidavit of Mr Russell (CFI 42), at p 2 and p 36 of the exhibits.
[23] Affidavit of Mr Russell (CFI 42), commencing at p 4 of the exhibits.

this is a "specimen only – any terms would be subject to AmTrust internal sign off and offer and to agreement".

[120] While this may be so, an order for security, to be provided by way of a deed of indemnity, would carry with it a consequential order for the stay of the proceedings if that is not forthcoming. Accordingly, in a practical sense, this does not support the argument that the proposed form is inadequate.

[121] Next, the applicants contend the indemnity itself is not unconditional. The indemnity is contained in clause 2, in terms that:

> "Subject to this provision and to 3, 4, 5, 6, 12, 13 and 15 below, AmTrust hereby unconditionally and irrevocably undertakes to pay to the Respondent any sum or sums which the Claimant is legally liable to pay to the Respondent in respect of the Respondent's costs in the Claim which relate to the cost incurred up to and including the costs of the first instance determination only of the Claim."

[122] Whilst some of the clauses to which clause 2 is subject are mechanical provisions, the applicants make the following submissions about clauses 3 and 15:

1. Clause 3 provides that it is a condition precedent to AmTrust's liability under the deed that the respondent must first have made a valid "Indemnity Demand". As that term is defined in clause 1, it must be "accompanied by a certified copy of the relevant court order and/or Certified Costs Determination Certificate and/or AmTrust Approval and Approved Agreement".

    (a) The applicants raised an issue with the meaning of Certified Costs Determination Certificate, which was said to have the effect of including a self-executing stay in the event that a costs assessment is reviewed. Notwithstanding the statement in the letter referred to at [118] above (that the terms of the draft deed are "non-variable"), Mr Russell, the solicitor for the plaintiff, deposes on information and belief that AmTrust would amend paragraph 1 of this definition in the manner outlined in [5] of his affidavit filed by leave on 14 February 2019. The proposed amendment does not appear to address the issue raised by the applicants, which flows from paragraph 2 of the definition – that where there is a review, there is effectively a stay of enforcement until the court issues a certificate following the review (contrary to r 742(7) of the UCPR).

    (b) Approved Agreement is defined to mean an agreement between the Claimant [plaintiff] and the Respondent [the defendants] as to the amount of costs to be paid by the Claimant. AmTrust Approval is defined to mean "prior written approval from AmTrust to the Claimant [plaintiff] for the Claimant to enter into the Approved Agreement (such approval being in AmTrust's sole discretion)."

(c) Apart from the issue about the meaning of Certified Costs Determination Certificate, the applicants submit the effect of this clause 3 is that only orders of the court as to costs are automatically covered by the indemnity; and that any attempt to resolve the quantum of costs by consent between the parties would be subject to the consent of AmTrust (in its "sole discretion"). The applicants submit there is no evidence before the court as to the arrangements between the litigation funder, Vannin Capital Operations Ltd, and AmTrust, which may inform how the indemnity, and this discretion, would be exercised.

2. Clause 15 provides that "AmTrust will not be deemed to provide any undertaking to pay the Respondent and will not be liable to make any payment to the Respondent under this Deed (or at all) in the event the Respondent is or at any time in the future becomes a Designated Entity". Designated Entity is defined in clause 1 to mean "any person or entity being the subject of any sanction, prohibition or restriction under any United Nations Resolution or of any trade and economic sanction, law or regulation of the European Union, United Kingdom, United States of America or Australia".

(a) The presence of a qualification of this kind in a similar deed of indemnity lead Gleeson JA to the view that the deed did not provide sufficient security (although his Honour made orders which accommodated the possibility of the ordered security being provided by way of a deed of indemnity, with the deletion of this clause).[24]

(b) The applicants emphasise that, despite being aware of *Tiaro Coal* decision, and the applicants' submissions on this point, and despite taking instructions to amend another part of the deed, there is no material before the court regarding any further amendments, including such as to delete this clause. Although Mr Stewart QC for the plaintiff said in oral submissions that he was instructed the clause would be deleted, Mr Clothier QC for the Cowen applicants submits that is meaningless, as the instructions come from the funder, not the insurer; and the correspondence conveying the insurer's position is that the deed is "non-variable". I observe that if this were the only concern, it could be addressed in the way Gleeson JA did in *Tiaro Coal* (making an order conditional upon deletion of the clause).

[123] For the plaintiff, it is said these are mere matters of form which do not affect the adequacy of the deed of indemnity as a form of security. On the other hand, the plaintiff contends the provision of security in the form of a deed of indemnity from AmTrust is the form least disadvantageous to it, because it submits a bank guarantee would be "much more expensive" for the litigation funder (and ultimately for the plaintiff). This submission proceeded by reference to the litigation funding agreement between the plaintiff and

[24] Re Tiaro Coal Limited (in liq) [2018] NSWSC 746 at [25]-[29].

Vannin Capital Operations Ltd, a heavily redacted copy of which is annexed to Mr Russell's affidavit filed on 13 February 2019 (CFI 43).

[124] What can be ascertained from the redacted funding agreement is:

1. By clause 3.1, the funder agrees to provide the Security for Costs in accordance with the terms of the agreement.

2. Security for Costs is defined in schedule B to mean "the funds or Deed of Indemnity provided by the Funder pursuant to clause 21.2".

3. Relevantly, clause 21 provides:

> "21.1 … The Litigant must notify the Funder in writing as soon as reasonably practicable of the making of any order for security for costs in the Action and request the Funder to satisfy the order for costs within 20 Days of that notice.
>
> 21.2 If the Funder elects to satisfy the costs of an order for security for costs or agrees a settlement in respect of the security for costs application, the Funder will notify the Litigant and the Funder will ensure satisfaction of the order for security for costs by, at the Funder's election, a deposit of cash into the trust account of the Solicitors or by way of a Deed of Indemnity, in satisfaction of the order or agreement.
>
> 21.3 If the Funder elects not to satisfy an order for security for costs … this agreement immediately terminates…
>
> 21.4 To the extent that the Security for Costs is not applied to satisfy the Adverse Costs Indemnity, the Security for Costs is to be returned to the Funder together with any interest earned on such monies, within 10 days of final resolution of the Action."

4. "Adverse Costs Indemnity" is defined in schedule B to mean "the undertaking by the Funder to the Litigant pursuant to clause 19". The redacted copy of the agreement only includes clause 19.1, which provides that the "Funder shall pay the Adverse Costs up to the Amount of the Adverse Costs Cap". "Adverse Costs" is defined to mean costs which the court orders the Litigant to pay to the defendant, and any other amounts agreed between the parties to be Adverse Costs.

5. Clause 20 provides for "Adverse Costs Security", which may be provided by the Funder to the Litigant, but only for the purpose of satisfying the Adverse Costs Indemnity. As defined, "Adverse Costs Security" means "the assignment to the Litigant by the Funder of the Funder's rights under the Commercial Litigation Insurance but limited to and only in respect of the Action and for a specified

amount". The Commercial Litigation Insurance is the insurance provided by AmTrust to the funder, against any liability for Adverse Costs.

6. There is a definition in schedule B of "Adverse Costs Fee", which means 40% of the insured amount of the Commercial Litigation Insurance procured by the Funder. It appears from the definition of that term that it is a fee to be paid by the Litigant (the plaintiff) to the Funder, with some scope for negotiation if the proceeding is resolved before trial (again, the provision is partially redacted, so it is not entirely clear). But the parties were not able to direct my attention to the provision of the funding agreement which imposes a liability to pay the Adverse Costs Fee – it is presumably part of the provisions which have been redacted – therefore it is not clear in what circumstances it is payable (including whether, as the plaintiff contends, it is payable where the Security for Costs is provided by way of a deed of indemnity).

7. Clause 22, which deals with distribution of "Proceeds" of the action, provides for payment in the following priority:

> "22.1 first, to the Funder for the Funder Costs;
>
> 22.2 second, to the Funder for the Adverse Costs Fee;
>
> 22.3 third, to the Funder for the Action Costs (excluding the Funder Costs to the extent already satisfied under clause 22.1), the Adverse Costs paid by the Funder, the Adverse Costs Security to the extent not already returned to the Funder in accordance with clause 20.2 and Security for Costs to the extent not alreadyreturned to the Funder in accordance with clause 21.4;
>
> 22.4 fourth, to the Funder, by way of reimbursement of any GST in respect of which the Funder has not obtained or is not entitled to obtain an input tax credit;"

8. "Funder's Costs" is defined in schedule B to mean all and any costs and expenses incurred directly or indirectly by the Funder in relation to the action, the funding agreement, the retainer of the solicitors or dealing with the litigant including, in (e), "any fees and costs incurred by the Funder in respect of securing the Adverse Costs Indemnity, Adverse Costs Security and Security for Costs and the actual amount of any Adverse Costs Security and Security for Costs but only where provided in cash".

[125] The plaintiff sought to argue, by reference to the redacted funding agreement, that the cost of providing security in the form of a deed of indemnity is substantially less than it would be if the security is required to be provided by payment into court or provision of a bank guarantee. The plaintiff submits that where the security is provided by a deed of

indemnity, the cost is 40% of the amount of the security; but where it is provided by cash or bank guarantee, the cost is the whole of the amount of the security.

[126] As to the former, this seems to be based upon the reference in the funding agreement to an Adverse Costs Fee. Having regard to the redacted copy of the funding agreement which is in evidence, I cannot see a basis for this construction. For one thing, the Adverse Costs Fee is defined by reference to a percentage of the insurance premium, not the amount of the security. And, as I have already mentioned, it is not clear in what circumstances the Adverse Costs Fee is payable. There is no reference to it in clause 21, which otherwise deals with Security for Costs.

[127] As to the latter, the plaintiff submits, by reference to clause 22 and the definition of Funder's Costs, that where the security is provided in cash, the Litigant (the plaintiff) has to pay, from any proceeds it receives, to the funder, both the costs of obtaining the security, and the amount of the security itself (seemingly, without reference to whether the security has been called upon, or returned to the funder). This is the basis for the argument that, where the security is provided in cash, there is a cost to the plaintiff of 100% of the security amount (as opposed to the fee of 40% where it is provided by way of a deed of indemnity). Again, I am unable to see how that can be the proper construction of the agreement, given the express provision, in clause 21.4, for return to the funder of any part of the security of costs which has not been applied, and the express reference to that in clause 22.3. It makes sense that the amount of the security, where it is provided by the funder in cash, forms part of the "Funder's Costs" (because it is money the Funder has paid out, as opposed to having arranged for a deed of indemnity). But that does not support the construction contended by the plaintiff, that the whole of that amount constitutes a "fee", essentially, for providing the security. Even if the security is provided by way of a deed of indemnity, if that is called upon, that amount will have to be reimbursed by the Litigant out of any proceeds.

[128] The construction of a contract which is heavily redacted is impractical and artificial. On such parts of the funding agreement as are in evidence, I am not persuaded that what the plaintiff contends is the objective intention, effect or operation of the funding agreement.

[129] Accordingly, I am not persuaded on this basis that there is any particular disadvantage to the plaintiff if the security for costs is required to be provided by cash (or bank guarantee), as opposed to by way of a deed of indemnity.

[130] For completeness, I note that in [13(c)] of Mr Russell's affidavit filed 7 February 2019 (CFI 42) he deposes to being informed by the managing director of Vannin (the litigation funder) that the reasons it prefers to provide security for costs by means of a deed of indemnity include that the deposit of cash or the provision of a bank guarantee is "much more expensive" for Vannin (and also for the plaintiff) than the costs of providing security by means of a deed of indemnity. This is reiterated in a subsequent affidavit, filed 13 February 2019 (CFI 43) (at [6]) where Mr Russell deposes to being informed by the managing director that the terms of Vannin's litigation funding arrangements with

the plaintiff, and insurance arrangements with AmTrust are strictly confidential; that "pricing mechanisms and associated matters in the litigation funding arrangements" are not to be disclosed to the defendants; and that the cost to the plaintiff (if Vannin were to provide security by way of payment into court or a bank guarantee) would exceed the costs to the plaintiff of the insurance and deed of indemnity already arranged with AmTrust "because of the arrangements in that regard".

[131] The plaintiff sought to make this point good by reference to the redacted funding agreement; an argument which I have not accepted.

[132] In any event, the fact that the plaintiff contends the form of security it proposes is the least disadvantageous to it is not the answer to the central question, which is whether the plaintiff has discharged the practical onus of demonstrating that the proposed security, in the form of a deed of indemnity from AmTrust to the applicants, is adequate (in the sense of providing a fund or asset against which the applicants, if successful, can *readily* enforce an order for costs against the plaintiff) and does not impose an unacceptable disadvantage on the applicants.

[133] There are examples of cases in which a court has been satisfied that a deed of indemnity (provided by AmTrust) does provide adequate security.[25] But as acknowledged by Crow J in one of those cases, the question whether the provision of security in the form of a deed of indemnity is adequate in any particular case is to be determined by reference to the deed provided and the evidence in the application, not by reference to any seemingly acceptable practice in AmTrust offering a deed of indemnity in other cases.[26]

[134] It has been held that in exercising the discretion as to the form of security to be provided, the issue is not to be approached by embarking upon a comparison exercise of assessing the relative attributes of the proffered security on the one hand, and the "conventional" or "familiar" forms of security (by cash deposit or bank guarantee) on the other, with a view to determining which form of security would be superior and which would be inferior.[27]

[135] In contrast, in *Trailer Trash Franchise Systems Pty Ltd v GM Fascia & Gutter Pty Ltd* [2017] VSCA 293 at [59] the Victorian Court of Appeal (Tate and Kyrou JJA) said this, by way of obiter:

> "The authorities do not preclude an order that security for costs be in the form of a personal undertaking by a third party other than a financial institution. However, where the court has a choice between security in that form and security in a liquid form that enables funds to be accessed with minimum risk that litigation may be required to enforce the security, ordinarily the court

[25] DIF III Global Co-Investment Fund LP v BBLP LLC [2016] VSC 401; Re Tiaro Coal Limited (in liq) [2018] NSWSC 746; and Murphy v Gladstone Ports Corporation Ltd [2019] QSC 12.
[26] Murphy v Gladstone Ports Corporation Ltd [2019] QSC 12 at [15].
[27] DIF III Global Co-Investment Fund LP v BBLP LLC [2016] VSC 401 at [65]; see also Re Tiaro Coal Limited (in liq) [2018] NSWSC 746 at [12] and [22].

should prefer the liquid form. The need to prefer the liquid form where a choice is available has become more acute since the commencement of the CPA[28] because:

(a) section 8(1) requires a court to seek to give effect to the overarching purpose in the exercise of any of its powers;

(b) section 7(1) provides that the overarching purpose is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute';

(c) section 9(1) provides that in making an order in a civil proceeding, a court must further the overarching purpose by having regard to a number of objects, including: the efficient conduct of the business of the court (s 9(1)(c)); the efficient use of judicial resources (s 9(1)(d)); and the timely determination of the civil proceeding (s 9(1)(f));[29] and

(d) a form of security for costs which does not provide a fund which can be accessed without the cooperation of the opposing party or a person who is connected to that party – and may require the commencement of proceedings to enforce it – has the potential to undermine the overarching purpose. This is because that form of security can give rise to satellite proceedings and additional delay and costs. Such satellite proceedings are contrary to the principle of finality in litigation."

[136] I note in this regard that the evidence before the court includes correspondence from Mr Russell, the solicitor for the plaintiff, to Mr Tucker, of 2 December 2018 in which it is said:

> "Rather than engage in any argument, and consistent with UCPR 5, the plaintiff agrees to provide reasonable security for the costs of Tuckerloan and you, by way of deposit to our firm's trust account, such sum to be invested pending further order."[30]

[137] The plaintiff's position subsequently changed, on the basis of the evidence, given by its solicitor, Mr Russell, as to the preference of the litigation funder. But as both the Cowen applicants and the Tucker applicants submit, there is no evidence that the plaintiff, or its funder, are unable to provide security in the form of payment into court, or into a trust account, or by way of a bank guarantee.

[138] I accept, on the evidence before the court, that AmTrust is an entity of substance;[31] and that the process of enforcing a costs judgment of this court in the United Kingdom is a

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[28] Civil Procedure Act 2010 (Vic).
[29] See by analogy r 5 of the UCPR.
[30] Affidavit of Mr Tucker filed 3 December 2018 (CFI 3) at p 17 of the exhibits.
[31] See the affidavit of Mr Russell, filed 7 February 2019 (CFI 42) at pp 106-109.

relatively straightforward one, the cost of which would be expected to be covered by the additional $30,000 cash security covered.[32] But as against that, AmTrust is a foreign third party to the proceeding, the terms of the proposed deed of indemnity in some respects require the applicants to depend upon AmTrust's cooperation (in respect of which it has "absolute discretion"), and if the deed is not voluntarily responded to upon a request for payment, would involve the applicants in further proceedings to enforce a costs judgment against AmTrust overseas. Those matters raise the considerations referred to in the *Trailer Trash* case referred to above.

[139] As against that, there is no basis in the evidence to conclude that there would be any impediment to the plaintiff, or its litigation funder, providing the security by payment into court, or a bank guarantee.

[140] On balance, I am not satisfied the plaintiff has discharged its practical onus of establishing that the proposed security, in the form of a deed of indemnity, is adequate and does not impose an unacceptable disadvantage on the applicants (defendants). Accordingly, the order of the court will be that the plaintiff provide the security for costs by payment into court, or into a solicitors' trust account, or in the form of a bank guarantee.

[141] Once again, the parties requested the opportunity to be heard, before the orders are made, in particular as to the time for provision of the security.

[142] I will also hear the parties as to costs of the applications.

[32] See the affidavit of Mr Russell, filed by leave on 14 February 2019, at exhibit SCR-4.