SUPREME COURT OF QUEENSLAND

CITATION:	*Equititrust Limited v Tucker and Others (No 2)* [2019] QSC 248
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 ROBERT WALTER TUCKER and RICHARD TERRICK COWEN, 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:	4 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 and 11 September 2019
JUDGE:	Bowskill J
ORDERS:	**1. The plaintiff has leave to file and serve an Amended Claim in the form annexed to the application filed on 19 June 2019.** **2. The amended application filed on 12 August 2019 by the first defendant, the second defendant and Mr Tucker named as one of the fifth defendants, is dismissed.** **3. Paragraph 1 of the amended application filed on 15 July 2019 by the sixth defendant and Mr Cowen**

named as one of the fifth defendants, is dismissed.

4. **The parties are to confer with one another, and conduct themselves reasonably and cooperatively, in relation to the matters the subject of Practice Direction 18 of 2018, and the future progress of this proceeding generally, and either provide agreed directions following the close of pleadings, or alternatively cause an application for directions to be made within fourteen (14) days of the close of pleadings, so that such directions can be made by the Court.**

The following additional orders will be made, after hearing from the parties as to the appropriate time frames:

5. **On or before [date to be determined] the plaintiff file and serve a further amended statement of claim, addressing the matters referred to in paragraph [134] of these reasons, and any other amendments the plaintiff wishes to make.**

6. **On or before [date to be determined] the defendants file and service their defences.**

7. **On or before [date to be determined] the plaintiff file and serve its reply.**

The matter is listed for further hearing on Wednesday, 9 October 2019 at 2.00 pm to hear from the parties as to the time frames for proposed orders 5, 6 and 7 and as to costs. If the parties are in agreement as to the time frames, and if no party wishes to contend for costs orders contrary to those foreshadowed in paragraph [162] of these reasons, the parties may submit a draft order by email to my associate, and obviate the need for further appearance.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – further applications by the defendants to summarily dismiss parts, or all, of the plaintiff's claim, by striking out parts of the further amended statement of claim, without leave to replead, or for summary judgment – further, applications to strike out extensive parts of the further amended statement of claim on the basis of deficiency in the pleading – consideration of the relevant principles which apply on an application under *Uniform Civil Procedure Rules* 1999 (Qld) r 171 and on an application for summary judgment by a defendant under r 293 or the inherent jurisdiction of the court, before defences have been filed

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – GENERALLY –

application by the plaintiff under *Uniform Civil Procedure Rules* 1999 (Qld) r 377(1) and, to the extent necessary, r 376(4), for leave to file an amended Claim, to add a claim for damages for breach of a contractual duty alleged to arise under a solicitor's retainer, which had formerly been pleaded as a breach of the solicitor's fiduciary duty – where the limitation period has now expired – whether the amendment is the addition of a new cause of action – whether, if so, the conditions for leave to be granted to add a new cause of action after expiry of the limitation period under r 376(4) are satisfied

Corporations Act 2001 (Cth) s 183, s 421
Legal Profession Act 2007 (Qld) s 249
Uniform Civil Procedure Rules 1999 (Qld) r 5, r 171, r 376, r 377

Abeles v PA (Holdings) Pty Ltd (2000) 18 ACLC 867
Agar v Hyde (2000) 201 CLR 552
Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251
Allonnor Pty Ltd v Doran [1998] QCA 372
Althaus v Australia Meat Holdings Pty Ltd [2007] 1 Qd R 493
Banque Commerciale SA (in liq) v Akhil Holdings Ltd (1990) 169 CLR 279
Barclay Mowlem Construction Limited v Dampier Port Authority (2006) 33 WAR 82
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [2011] QCA 252
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256
Betfair Pty Ltd v Racing New South Wales (2010) 189 FCR 356
Borsato v Campbell [2006] QSC 191
Bride v Freehill Hollingdale & Page & Ors [1995] WASC 561
Bruce v Odhams Press Ltd [1936] 1 KB 697
Carey v Korda (2012) 45 WAR 181
Carey v Korda (No. 2) (2011) 85 ACSR 331
Chew v R (1992) 173 CLR 626
Cranleigh Precision Engineering Ltd v Bryant [1965] 1 WLR 1293
Dey v Victorian Railway Commissioners (1949) 78 CLR 62
Draney v Barry [2002] 1 Qd R 145
Farah Constructions v Say-Dee Pty Ltd (2007) 230 CLR 89
Firstmac Ltd v Hunt & Hunt (A Firm) [2018] QSC 258
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125
Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd (2001) 38 ACSR 282
Grove v Flavel (1986) 43 SASR 410

Hillig v Darkinjung Pty Ltd [2007] NSWSC 683
Huang v Wang [2015] NSWSC 510
Imobilari Pty Ltd v Opes Prime Stockbroking Ltd (in liq) (2008) 252 ALR 41
Isaac v Dargan Financial Pty Ltd (2018) 98 NSWLR 343
Johnson Tiles Pty Ltd v Esso Australia Ltd (No 2) (2000) 97 FCR 175
Kelaw Pty Ltd v Catco Developments Pty Ltd (1989) 15 NSWLR 587
Kordamentha Pty Ltd v LM Investment Management Ltd & Anor [2016] QSC 183
Land Enviro Corp Pty Ltd (in liq) v HTT Huntley Heritage Pty Ltd (2017) 123 ACSR 1
Littler v Price [2005] 1 Qd R 275
McNamara v Flavel (1988) 13 ACLR 619
Mio Art Pty Ltd v Macequest Pty Ltd (2013) 95 ACSR 583
MSI (Holdings) Pty Ltd (In Liq) v Mainstreet International Group Ltd [2013] 2 Qd R 253
O'Reilly v Law Society of New South Wales (1988) 24 NSWLR 204
Paul v Westpac Banking Corporation [2017] 2 Qd R 96
Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457
R v Byrnes (1995) 183 CLR 501
Re Clark; Clark v Moore (1920) 150 LT Jo 94
Re HIH Insurance; ASIC v Adler (2002) 168 FLR 253
Re Yates, National Mutual Life Association v Catco Developments Pty Ltd (1989) 88 ALR 583
Remmington v Scoles [1897] 2 Ch 1
Renshaw v New South Wales Lotteries Corporation Pty Ltd [2018] NSWSC 1954
Republic of Croatia v Snedden (2010) 241 CLR 461
RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Limited (No 2) [2019] FCA 1385
Robert Bax & Associates v Cavenham Pty Ltd [2013] 1 Qd R 476
Royalene Pty Ltd v Registrar of Titles [2007] QSC 59
Sheahan v Carrier Air Conditioning Pty Ltd (1997) 189 CLR 407
Sherrin Hire Pty Ltd v Sherrin Rentals Pty Ltd [2015] FCA 1107
Spector v Ageda [1973] Ch 30
Spencer v Commonwealth (2010) 241 CLR 118
Target Holdings Ltd v Redferns [1996] AC 421
Theseus Exploration NL v Foyster (1972) 126 CLR 507
Thomas v Queensland [2001] QCA 336
Thomson v STX Pan Ocean Co Ltd [2012] FCAFC 15
United Petroleum Australia Pty Ltd v Herbert Smith Freehills (2018) 128 ACSR 324
Verner v Giannoros [2016] NSWSC 242
Visbord v Federal Commissioner of Taxation (1943) 68 CLR

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Wickstead v Browne (1992) 30 NSWLR 1
Williams & Humbert v W & H Trade Marks (Jersey) Ltd [1986] 1 AC 368
X (Minors) v Bedfordshire County Council [1995] 2 AC 633
Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484

PD Finn's *Fiduciary Obligations* (1977, Law Book Co)

COUNSEL: S Couper 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 and relevant principles

[1] This proceeding was commenced in July 2018. Over a year later, the matter has not progressed beyond interlocutory fights about the statement of claim. No defences have been filed. This decision is the second occasion on which I have dealt with applications to strike out all or part of the statement of claim[1] and, additionally on this occasion, an alternative application for summary judgment for the first, second and one of the fifth defendants (Mr Tucker) on part of the claim.

[2] The proceedings have been discontinued against the third defendant, Mr Kennedy, and the fourth defendant, MS Asia Debt Acquisition Ltd.

[3] A Further Amended Statement of Claim was filed on 18 June 2019 (**FASOC**). The applications the subject of this judgment are:

(1) an application, filed on 19 June 2019, by the plaintiff for leave to amend the Claim;

(2) an amended application, filed on 15 July 2019, by Mr Richard Cowen (one of the fifth defendants) and the sixth defendant (referred to as the **Cowen applicants**) seeking orders striking out various paragraphs of the FASOC, without leave to replead; and directions (the **Cowen application**); and

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[1] The first was *Equititrust Limited v Tucker and Others* [2019] QSC 51 (***Equititrust No. 1***).

(3) an amended application, filed on 12 August 2019, by the first defendant, second defendant and Mr David Tucker (one of the fifth defendants) (referred to as the **Tucker applicants**) seeking orders striking out the whole of the Claim and FASOC; alternatively, striking out parts of the FASOC, without leave to replead; alternatively, for particulars of various paragraphs of the FASOC; alternatively, for summary judgment in favour of the Tucker applicants on part of the plaintiff's claim; and for directions (the **Tucker application**).

[4] Further applications for security for costs have also been filed by the Cowen applicants and the Tucker applicants because, as it is put in the Tucker applicants' submissions, the amount of security previously ordered "has been exhausted" – in large part due to the extensive disputes about the statement of claim already engaged in. Those applications, together with an application by the plaintiff in relation to security for costs, have been adjourned to a date to be fixed, following determination of the present applications.

[5] The relevant rules and principles which apply are not controversial. It is nevertheless appropriate that I record the principles I have applied.[2]

[6] The starting point is rule 5 of the *Uniform Civil Procedure Rules* 1999 (Qld), which provides:

> "(1) The purpose of the rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court."[3]

[7] I keep that steadily in mind in determining these applications, as rule 5(2) requires the court to do. The parties (and their lawyers) are also obliged to act consistently with rule 5. I am not certain that has been the case, to date.

[8] In relation to the strike out applications, the applicants rely upon r 171 UCPR, which confers a discretion on the court to strike out all or part of the statement of claim if it, relevantly, discloses no reasonable cause of action; has a tendency to prejudice or delay the fair trial of the proceeding; or is otherwise an abuse of the process of the court.

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2 See also *Equititrust No. 1* at [13]-[18].
3 Emphasis added.

[9] Where the effect of the invocation of the power would be to summarily dismiss a party's claim, or part of it, the court is to adopt a cautious approach and the discretion should only be exercised in the clearest case.[4] As Mackenzie J said in *Royalene Pty Ltd v Registrar of Titles* [2007] QSC 59 at [6] this "is 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".

[10] The focus of such an application is the pleading itself.[5] As such, the court ordinarily assumes the factual allegations made by the plaintiff can be established;[6] particularly where the application is brought at an early stage.[7] Although, the court is not limited to receiving evidence about the pleading (r 171(3)). Nevertheless, the apparent improbability of impugned allegations of fact does not justify the exercise of the power to strike out a pleading, because "to enter upon the question of their truth or falsehood would be trying the action prematurely".[8]

[11] While the court may determine a difficult question of law on such an application,[9] the power to strike out a sufficiently pleaded statement of claim cannot be exercised "once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it".[10]

[12] A voluminous amount of affidavit material was filed in support of the applications, including multiple affidavits of Mr Tucker deposing to various factual matters, addressing allegations in the statement of claim. It is apparent many of those matters are controversial, and that there will be issues of credibility in the eventual trial. I have not determined these applications on the basis of findings by reference to the affidavit material. It would be inappropriate to do so.

[13] Where the application to strike out is on the basis of deficiency in the pleading, which may be remedied by re-pleading, the particularly cautious approach warranted in cases of summary dismissal does not apply.[11] A pleading may be deficient, and liable to be struck out (for example on the ground that it has a tendency to prejudice or delay the fair trial of the proceeding) because it fails to fulfil the function of a pleading, which is to identify the issues which require the court's attention and determination, provide a structure for the proceeding by providing the framework for disclosure and admissibility

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4 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130; *Agar v Hyde* (2000) 201 CLR 552 at [57]; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [46]; *Spencer v The Commonwealth* (2010) 241 CLR 118 at [24]. See also *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [24]-[26].

5 *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) 95 ACSR 583 at [67]-[69] per Jackson J.

6 See *Kordamentha Pty Ltd v LM Investment Management Ltd & Anor* [2016] QSC 183 at [25] per Applegarth J, referring to *Young Investments Group Pty Ltd v Mann* (2012) 293 ALR 537 at [6].

7 See *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 740.

8 *Remmington v Scoles* [1897] 2 Ch 1 at 7, referred to recently in *Renshaw v New South Wales Lotteries Corporation Pty Ltd* [2018] NSWSC 1954 at [144].

9 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130; *Theseus Exploration NL v Foyster* (1972) 126 CLR 507 at 514-515.

10 *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91.

11 *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [24]-[26].

of evidence at trial, and to ensure a fair trial by giving the other parties fair notice of the case they must meet.[12] The function of a pleading is discharged "when the case is presented with reasonable clearness".[13] Conversely, a pleading will be deficient if it is "ambiguous, vague or too general", such that the other party does not know what is alleged against them.[14]

[14] A pleading must contain a statement of all the material facts (that is, the facts necessary for the purpose of formulating a complete cause of action) relied upon (r 149(1)(b)). Particulars are not meant to be used to fill material gaps in a pleading. They serve a different purpose, which is "to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet"; although in practice the distinction may be difficult to discern.[15]

[15] Importantly, though, "pleadings are not an end in themselves, instead they are a means to the ultimate attainment of justice between the parties to litigation".[16] As the Full Court of the Federal Court (Greenwood, McKerracher and Reeves JJ) observed in *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13], for these reasons "the courts do not, at least in the current era, take an unduly technical or restrictive approach to pleadings". As their Honours also observed, contemporary approaches to case management are in part responsible for this change.[17] They refer in this regard to the observations of Martin CJ in *Barclay Mowlem Construction Limited v Dampier Port Authority* (2006) 33 WAR 82 at [4]–[8], where his Honour said:

> "4. It is, I think, important when approaching an issue of that kind to bring to mind the contemporary purposes of pleadings. The purposes of pleadings are, I think, well known and include the definition of the issues to be determined in the case and enabling assessment of whether they give rise to an arguable cause of action or defence as the case may be, and apprising the other parties to the proceedings of the case that they have to meet.
>
> 5. In my view, the contemporary role of pleadings has to be viewed in the context of contemporary case management techniques and pre-trial directions. In this Court, those pre-trial directions will almost invariably include; firstly, a direction for the preparation of a trial bundle identifying the documents that are to be adduced in evidence in

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[12] *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at [49]-[51] per Keane CJ (as his Honour then was), Lander and Buchanan JJ; *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287.

[13] *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 293 per Dawson J, referring to *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517.

[14] *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [27].

[15] *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712-713.

[16] *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13], referring to *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 293.

[17] *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13]; referring to *Barclay Mowlem Construction Limited v Dampier Port Authority* (2006) 33 WAR 82 at [4]–[8] (a decision of Martin CJ).

the course of the trial; secondly, the exchange well prior to trial of non-expert witness statements so that non-expert witnesses will customarily give their evidence-in-chief only by the adoption of that written statement; thirdly, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourthly, the exchange of chronologies; and fifthly the exchange of written submissions.

6. Those processes leave very little opportunity for surprise or ambush at trial and, it is my view, that pleadings today can be approached in that context and therefore in a rather more robust manner, than was historically the case; confident in the knowledge that other systems of pre-trial case management will exist and be implemented to aid in defining the issues and appraising the parties to the proceedings of the case that has to be met.

7. In my view, it follows that provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and appraising the parties of the case that has to be met, the Court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the Court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.

8. Most pleadings in complex cases, and this is a complex case, can be criticised from the perspective of technical pleading rules that evolved in a very different case management environment. In my view, the advent of contemporary case management techniques and the pre-trial directions, to which I have referred, should result in the Court adopting an approach to pleading disputes to the effect that only where the criticisms of a pleading significantly impact upon the proper preparation of the case and its presentation at trial should those criticisms be seriously entertained."[18]

[16] Martin CJ's observation in [8] reflects the observation made many years earlier, by Lord Templeman in *Williams & Humbert v W & H Trade Marks (Jersey) Ltd* [1986] 1 AC 368 at 435-436 that:

> "My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the

[18] See also *Sherrin Hire Pty Ltd v Sherrin Rentals Pty Ltd* [2015] FCA 1107 at [44] per Edelman J; *Hillig v Darkinjung Pty Ltd* [2007] NSWSC 683 at [35]-[36] per White J; *Verner v Giannoros* [2016] NSWSC 242 a [2]-[5] and [24]-[28] also per White J; and *RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Limited (No 2)* [2019] FCA 1385 at [15]-[16] per Anderson J.

> pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself."

[17] Also in the *Barclay Mowlem* case, Martin CJ was critical of objections to the pleading which were "pedantic and pettifogging in nature" (at [9]); and drew a distinction between the "lawyer looking at that pleading, genuinely interested in knowing what issues are to be tried and the case that has to be met, [who] would have no difficulty in ascertaining those matters" (at [10]) and the "lawyer interested in technical advantage, obfuscation and delay", "feign[ing] ignorance of the substantive issues that emerge from that pleading and the case which has to be met" (at [12]).

[18] Also relevant in this case is the principle that where a court determines on a strike out application that certain claims ought to proceed (or for that matter where there is no challenge to certain claims), it will "hesitate before [striking out another claim] notwithstanding that the legal basis for it may be doubtful or problematic in circumstances where the court will nevertheless be required to hear and determine substantially the same factual matters in respect of the remaining cause[s] of action".[19]

[19] The application for summary judgment by the Tucker applicants relies on r 293 of the UCPR. According to its terms, that rule does not apply as no notices of intention to defend have yet been filed. The Tucker applicants call in aid r 135 UCPR, which empowers the court to give a defendant leave to take a step in a proceeding, before filing a notice of intention to defend (the rule under which the defendants have already been given leave to bring the strike out applications). In an appropriate case, rr 5 and 367 may enable such an application to be brought prior to a defence being filed.[20] Alternatively, the defendants rely upon the inherent jurisdiction of the court to protect its processes from abuse. In that respect, it was uncontroversial that the relevant principles are as articulated in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129, requiring (variously expressly) that the case of the plaintiff be so clearly untenable that it cannot possibly succeed.[21] In the circumstances of this case, I would be disinclined to grant leave to bring a summary judgment application under r 293, before a defence is filed. If there was to be summary dismissal of a part of the plaintiff's claim, at this early stage, before any defence is filed, in my view that would only be appropriate if the test from *General Steel* was satisfied. Given the view I have formed on the merits, this is an academic question, as I am not persuaded a basis for summary dismissal has been shown.

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[19] *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd (in liq)* (2008) 252 ALR 41 at [19], referring to *Johnson Tiles Pty Ltd v Esso Australia Ltd (No 2)* (2000) 97 FCR 175 at [4], citing *Wickstead v Browne* (1992) 30 NSWLR 1 at 5-6 per Kirby P (as His Honour then was). Kirby P's decision in *Wickstead v Browne* was endorsed on appeal to the High Court (given at the end of the application for special leave): see *Bakewell v Anchorage Capital Master Offshore Ltd* [2019] NSWCA 199 at [37]-[43] per Bell P, Macfarlan and White JJA agreeing.

[20] See, for example, *Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors* [2017] QSC 75 at [50]-[51] per Bond J.

[21] See also *Spencer v Commonwealth* (2010) 241 CLR 118 at [55].

[20] In terms of a general outline of the plaintiff's case, I refer to, without repeating here, the introductory summary which appears at [1]-[8] of *Equititrust No. 1*.

[21] As the parties did at the hearing of the applications, I will deal with the strike out applications first (by reference to topic headings), and then the application to amend the Claim.

Allegations of breach of the express trust created by s 249 of the Legal Profession Act

[22] The Tucker and Cowen applicants' previous challenge to this part of the statement of claim was addressed at [20]-[46] and [55]-[57] of *Equititrust No. 1*. It is agitated again on the present applications, by reference to amendments made in the FASOC. But essentially the same point is made: that the plaintiff's claim for breach of the express trust created by s 249 of the *Legal Profession Act* 2007 (Qld) is legally untenable because it cannot, as a matter of law (or fact) be contended that the money paid into the Tucker & Cowen trust account (and, later, the TCS Solicitors' trust account) was received "on behalf of" Equititrust; and accordingly s 249 has no application. In addition, there are said to be other deficiencies in this part of the pleading.

[23] Relevant to this issue, the Cowen applicants seek orders striking out [95]-[101], [105]-[109] and [126A] of the FASOC, without leave to replead. The Tucker applicants seek the same orders for striking out (including [14(c)], [15(a)(i)]), but also apply for summary judgment on this part of the plaintiff's claim.

[24] The following is an outline of the plaintiff's case relevant to, inter alia, the claim for breach of trust under s 249 of the *Legal Profession Act* (references are to paragraphs in the FASOC):

(1) At all material times **Equititrust** Ltd was the trustee of a trust called the Equititrust Premium Fund (**EPF**). Its business was the lending of money secured against real property by first or subsequent mortgages. Its assets consisted principally of cash on deposit with banks, loans to borrowers and the mortgages that secured the repayment of those loans: [1] and [2].

(2) Mr Tucker was a director of Equititrust from about 3 September 2010 to about 11 October 2011: [9]. Mr Kennedy was a director of Equititrust from about 14 May 2010 to about 14 June 2011: [11].

(3) Tucker & Cowen acted as the solicitors for Equititrust in numerous retainers, particularised in [14(c)], relevantly including retainers for debt collecting from defaulting borrowers from Equititrust as trustee of the EPF, and including a "directorship retainer". Mr Tucker was the partner of Tucker & Cowen with primary responsibility for these retainers: [14(d)].

(4) As at 13 April 2012, Tucker & Cowen were acting as the solicitors for Equititrust in the proceedings listed in schedule 3 that are mentioned in schedule 9 and in

proceedings referred to in schedule 4, which was for the collection, by Equititrust, of debts in the EPF Loan Book,[22] or disputes concerning those debts; and Mr Tucker was the partner with primary responsibility for the conduct of those proceedings: [15].

(5) The business of Tucker & Cowen was later acquired by TCS Solicitors Pty Ltd (**TCSS**), an incorporated legal practice. Mr Tucker was the employee of TCSS with primary responsibility for the retainers by Equititrust of TCSS when it succeeded to be business of Tucker & Cowen: [16].

(6) On 15 February 2012, the directors of Equititrust resolved to appoint Mr Pleash, Mr Albarran and Mr Oldham (the liquidators) as administrators of the company under s 436A of the *Corporations Act* 2001: [4].

(7) On 16 February 2012, National Australia Bank Ltd appointed receivers and managers of the property of Equititrust: [5].

(8) On 21 February 2012, BOS International (Australia) Ltd (**BOSI**) appointed the BOSI Receivers as receivers and managers of the trust property of the EPF: [6].

Equititrust and BOSI were parties to a loan facility entered into in June 2007, which was secured by mortgage securities over the assets in the EPF Loan Book and guarantees by Equititrust in its own right and from a company associated with Mr McIvor, the sole member of Equititrust: [3] and [34]. The facility was extended, by agreement reached in December 2010, which included provision for BOSI to charge a "Risk Fee" and an "Overdue Rate" of interest in the event of default in repayment of any amount due: [35]-[40]. In February 2011, BOSI served a default notice on Equititrust, for failure to pay an amount due under the facility: [41]. As at 11 July 2012, BOSI had not imposed the Risk Fee or the Overdue Rate: [44]. Mr Tucker and Mr Kennedy had a role in securing that indulgence: [42]. As at 12 October 2011, the debt due to BOSI was $7.8 million (the Risk Fee and Overdue Rate not having been charged): [43].

(9) On 20 April 2012 Equititrust was placed into liquidation: [7].

(10) The directors of Equititrust had considered and discussed the amount which Equititrust as trustee of the EPF was likely to recover from borrowers and guarantors at the monthly meetings, attended by Mr Tucker between September 2010 and October 2011 and Mr Kennedy between May 2010 and October 2011: [29].

(11) A detailed discussion of each of the loans in the EPF Loan Book and the likely recoverable value thereof took place at a meeting on 14 June 2011, in which Mr Tucker and Mr Kennedy participated: [30].

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[22] "EPF Loan Book" is defined, in [29] of the FASOC as "The loans due from time to time to Equititrust as trustee of the EPF from its borrowers and guarantors and the associated securities held by Equititrust".

(12) Further detailed discussion of each of the loans took place at meetings on 12 and 17 October 2011, attended by Mr Tucker and Mr Kennedy: [31].

(13) As at 12 October 2011, the amount which Equititrust as trustee of the EPF was likely to recover from the EPF Loan Book was a sum of up to $35 million, and in any event, substantially more than $2 million: [32].

(14) As at 13 April 2012, no event had occurred which materially altered the value of the EPF Loan Book: [33].

(15) As at 13 April 2012, Equititrust was indebted to BOSI for just over $6.8 million (the **BOSI Debt**). Equititrust's obligations to BOSI, under various transaction documents, were secured by various instruments registered under the *Personal Property Securities Act* 2009 (the **BOSI Securities**): [54].

(16) In about April 2012, but prior to 13 April 2012, Mr Kennedy became aware of another entity (**AET**) proposing to acquire the EPF Loan Book from BOSI, and Mr Kennedy offered to acquire the EPF Loan Book from that entity (should it succeed in its acquisition) for $2 million: [55] and [56].

(17) Mr Kennedy informed Mr Tucker of the opportunity to acquire the EPF Loan Book, sought his assistance, and invited him to participate. Mr Tucker agreed to participate and assist in the acquisition: [60].

(18) MS Asia Debt Acquisition Ltd was registered as a company in Hong Kong on 29 June 2012. 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 are the shareholders of MS Asia: [17]-[27] and [77]-[78].

(19) On 11 July 2012, AET entered into an agreement with BOSI to acquire the BOSI Securities and take an assignment of the BOSI Debt: [68].

(20) On 13 July 2012, MS Asia entered into a Deed of Assignment with AET to acquire the BOSI Securities and the BOSI debt for $2 million (the **MS Asia Acquisition**): [69]. The money was paid by Mr Tucker (by Tuckerloan) and Mr Kennedy (on his own behalf and on behalf of Mr Howard): [70].

(21) Tucker & Cowen acted as the solicitors for MS Asia in the course of these transactions (referred to in [68]-[70]): [71].

(22) On about 26 July 2012, Mr Hamilton (a solicitor employed by Tucker & Cowen[23]), on Mr Tucker's instructions, retyped and then edited the BOSI Loan Statement, to retrospectively debit a Risk Fee of $1,838,061.13 on 30 June 2011; to retrospectively apply a Default Rate of interest of an additional 5% per annum

[23] [14(e)(iii)] of the FASOC.

from 31 January 2011; to capitalise the interest; and thereby producing a total indebtedness of $11,095,697.51 as at 29 June 2012: [80].

(23) On 7 August 2012, one of Equititrust's debtors, Supported Living on Tweed Pty Ltd (**SLOT**) paid to Tucker & Cowen Solicitors Trust Account an amount of $2,325,000, under a Deed of Release and Final Discharge drawn by Tucker & Cowen. In drawing this deed, Tucker & Cowen were acting as the solicitors for Equititrust, on instructions from the BOSI Receivers. The payment was made in discharge of a debt owed to Equititrust and part of the EPF Loan Book. That money was paid out of the trust account, on 10 August 2012, to each of Tuckerloan, Mr Kennedy and Mr Howard, in repayment of the funds they had respectively provided to acquire the BOSI Debt and BOSI Securities: [83]-[85].

(24) On 27 August 2012, by a Deed of Appointment and Indemnity of Controller, MS Asia, acting pursuant to the BOSI Securities, appointed receivers and managers (the **Receivers**) of the assets and undertaking of Equititrust held as trustee of the EPF: [86].

(25) By executing the Deed of Appointment, MS Asia appointed the Receivers as the agents of Equititrust to take possession of the EPF Loan Book and to receive the proceeds thereof: [87A].

(26) In February 2013, June 2013 and January 2014 the Receivers received sums of money, as agents of Equititrust, from the controllerships of debtors of Equititrust: [88]-[93].

(27) From the date of completion of the MS Asia Acquisition on or about 17 July 2012 Tucker & Cowen continued to act as solicitors on the record for Equititrust in the "Schedule 3 Retainers mentioned in Schedule 9 and the Schedule 4 Proceedings", and have acted as solicitors on the record for Equititrust in the proceedings in Schedule 5, all of which were for the collection, by Equititrust, of debts in the EPF Loan Book, or disputes concerning those debts: [95].

(28) [95A] alleges that "[s]ince the MS Asia Acquisition:-

(a) Tucker & Cowen have received sums totalling $17,434,264.98, 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 specified premises] 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 [of the Receivers] has remained on foot; and

(f) When Tucker & Cowen received each such sum, they did so in their capacity as solicitors for Equititrust, acting:-

(i) in respect of the SLOT Payment, on the instructions of the BOSI Receivers; and

(ii) in respect of all other sums, on the instructions of the Receivers.

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

(29) In respect of all sums comprising the Tucker & Cowen Receipts, inter alia:

(a) the only persons competent and authorised to give instructions to Tucker & Cowen in the conduct of the said retainers [referred to in [96C] (a) and (b)] were the BOSI Receivers for the SLOT Payment and the Receivers for all other receipts;

(b) the only persons from whom Tucker & Cowen, in acting as solicitors, took instructions were the BOSI Receivers for the SLOT Payment and the Receivers for all other receipts; and

(c) the client of Tucker & Cowen was Equititrust (as trustee of the EPF); and

(d) each sum was paid to Tucker & Cowen Solicitors Trust Account on behalf of Equititrust as trustee of the EPF: [96C].

(29) Therefore, Tucker & Cowen received the Tucker & Cowen Receipts on behalf of, and on trust for, Equititrust as trustee of the EPF. By reason of s 249(1) of the *Legal Practitioners Act*, the firm was obliged to hold each sum making up the Tucker & Cowen Receipts exclusively for Equititrust as trustee, and to disburse only on a direction by Equititrust: [96D].

(30) Similar allegations are made in relation to TCSS, in relation to sums totalling just over $58,650, paid into its trust account, and received on behalf of and on trust for Equititrust, to which the obligation under s 249 applies: [98A]-[98C].

(31) Mr Cowen, as a principal of TCSS, is obliged by force of s 244(1) of the *Legal Practitioners Act* to discharge the obligations of the firm, under, inter alia, s 249: [101].

(32) Tucker & Cowen failed, in breach of the trust imposed by reason of s 249(1), to deposit the Tucker & Cowen Receipts into a general trust account for Equititrust (as trustee of the EPF) and instead, in breach of the said trust, paid the sums into a general trust account for MS Asia and, as to the sum of $500,000, into a general trust account for Worrells; have failed to pay any of the sums to Equititrust; and have paid all the Tucker & Cowen Receipts[24] to other persons: [105], [106] and [108]. Likewise, in relation to TCSS: [107], [109].

(33) It is further alleged that, of the funds paid away by Tucker & Cowen from its trust account, not less than (about) $12,500,000 was paid to MS Asia and, thereafter, to each of the companies which are shareholders of MS Asia, of which Mr Tucker, Mr Kennedy or Mr Howard are the ultimate beneficiaries: [112]-[112C] and [77].

(34) Each of Mr Tucker and Mr Cowen are alleged to be liable to restore to Equititrust as trustee of the EPF the sum of just over $16,621,064[25] and TCSS to restore to Equititrust the sum of just over $58,658: [126A].

[25] The applicants submit that a fundamental basis upon which the breach of trust claim proceeds is that the BOSI Receivers and the MS Asia Receivers were the agents of Equititrust, with the consequence that when they instructed Tucker & Cowen and TCSS and recovered the secured property they did so on behalf of Equititrust and, flowing on from that, that when they received the Tucker & Cowen Receipts and the TCSS Receipts, they did so on behalf of Equititrust. The applicants submit that this "reveals a lack of understanding of the role of receivers and of solicitors instructed by them"[26] and that it is "both factually improbable and legally flawed".[27]

[26] In so far as factual improbability is asserted, reliance is placed on affidavit evidence from Mr Tucker who says that the client on whose behalf the moneys were received into the Tucker & Cowen, and later the TCSS, trust account was in fact MS Asia, following the MS Asia Acquisition (of the BOSI Debt and the BOSI Securities).

[27] The Tucker applicants contend, on the basis of affidavit evidence from Mr Tucker (which Mr Cowen in turn relies on) that the Tucker & Cowen Receipts and the TCSS Receipts were in fact received by Tucker & Cowen and TCSS, respectively, pursuant to their retainers acting for MS Asia.[28] Mr Tucker says he issued a retainer agreement to MS Asia, which was dated 26 July 2012;[29] although there is no evidence it was ever returned or signed.[30]

[28] The plaintiff points to the appointment of the Receivers in August 2012, subsequent to this purported retainer agreement, and submits that whatever might have been MS

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24 Save for the amount particularised in [106(a)].
25 The $17,434,264.98 referred to in [95A] less the $813,200.37 referred to in [106(a)].
26 See, eg, Cowen applicants' submissions at [33].
27 Tucker applicants' submissions at [30].
28 Affidavit of Tucker (CFI 112) at [4]-[7] and affidavit of Tucker (CFI 76) at [100]-[111].
29 Affidavit of Tucker (CFI 76) at p 249.
30 Ibid at p 282.

Asia's plan as at 26 July 2012 (when Mr Tucker says he issued the Master Client Agreement), in August 2012 it appointed the Receivers, and what then happened was done by and on the instructions of the Receivers (not MS Asia).[31] The plaintiff also refers to the appointment, on 12 July 2012, of Mr Tucker and Mr Kennedy as holding powers of attorney for MS Asia, and in that context calls into question why the letter of 26 July 2012, enclosing a "Master Client Agreement", would be addressed to Mr Croagh, of MS Asia, at an address in Hong Kong.

[29] For the applicants, reliance is also placed on letters sent by Tucker & Cowen to MS Asia in June 2013, said to provide updated fee estimates or increases in charge out rates.[32] However, all but one of these letters records the work to be performed, commencing with the words "[t]o act for you (and the Receivers and Managers appointed by you to the Equititrust Premium Fund)…".

[30] Although the factual circumstances are somewhat murky, what is apparent is that the money recovered, as the proceeds of realisation of Equititrust's assets, through the actions of the Receivers, was paid into the Tucker & Cowen (and later TCSS) trust account; not into an account opened by the Receivers, for example under s 421 of the *Corporations Act* 2001. In addition, it does not appear to be the case that the Receivers gave any direction to Tucker & Cowen (or TCSS) for payment of the money out of the solicitors' trust account to MS Asia. Even Mr Tucker does not contend that they did. On the contrary, Mr Tucker annexes authorities signed by Mr Croagh, a director of Ms Asia, for payment of moneys out of the trust account directly to, inter alia, Mr Kennedy, Tuckerloan, and Mr Howard on 8 August 2012.[33]

[31] The plaintiff refers to various documents in evidence before the court which support its contention that the moneys were paid to Equititrust. For example, reference is made to the Deed of Assignment in relation to the debt owed by what is called the Meridien Group to Equititrust. MS Asia and the Receivers were parties to this Deed, which effected an assignment of the debt from Equititrust (as manager of the EPF) (the Assignor) to Atlantic Debts Australia Pty Ltd (the Assignee).[34] Tucker & Cowen are identified as the Assignor's solicitors. Clause 2.1 records that the assignment is "in consideration of payment by the Assignee *to the Assignor* [Equititrust] of the Purchase Price …" (see also clause 4.2).[35]

[32] Reference is also made to the Deed of Release and Final Discharge dated 6 August 2012 in relation to the debt owed by Supported Living on Tweed Pty Ltd (referred to as SLOT).[36] This was a document prepared by Tucker & Cowen. Clause 3.1 provides for the Mortgagor (which is SLOT) to pay the Discharge Amount "to the Mortgagee"

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31 T 2-26.
32 Affidavit of Tucker (CFI 76) at pp 282-301.
33 Ibid at pp 232, 237, 242.
34 Affidavit of Russell (CFI 102) at p 70.
35 Ibid, at pp 77 and 78. Emphasis added.
36 Affidavit of Pleash, volume 3 of the exhibits (CFI 106), commencing at p 790.

(which is Equititrust in its capacity as manager of the EPF).[37] Reference is also made to a letter dated 24 July 2012 from Mr Tucker of Tucker & Cowen to the solicitor for SLOT, which begins "[w]e act for the receivers and manager of the Equititrust Premium Fund…";[38] which is said to be inconsistent with the contention pressed in support of the summary judgment application, that Tucker & Cowen were acting for MS Asia.[39]

[33] Clearly, there is a triable issue in relation to this. Contrary to the assertion by Mr Tucker that the client was at all relevant times MS Asia, there is a sound basis (albeit at this preliminary stage) for concluding that Tucker & Cowen were acting as the solicitors for the Receivers, and not MS Asia.

[34] Turning then to the argument that, as a matter of legal principle, the plaintiff's allegations of breach of trust are flawed and untenable.

[35] The BOSI securities provided for the appointment of a receiver, and provided that the receiver "shall be the agent of the Chargor and the Chargor shall alone be responsible for his acts, defaults and remuneration".[40]

[36] Under the Deed of Appointment of the Receivers by MS Asia:[41]

(1) Clause 3.1 provides: "The Receivers agree to act according to the appointment as receivers and managers pursuant to the Security and to:-

(a) enter upon and take possession of the assets charged by the Security;

(b) to exercise the powers conferred upon him as such; and

(c) to immediately take steps to effectively get in and collect all of the assets the subject of the Security;

in order to discharge the indebtedness of the Company [Equititrust] to the Chargee [MS Asia]."

(2) Clause 7.1 provides: "To the full extent permitted by law the Receivers are, and acts as, the agents of the Company and unless and until the Chargee otherwise determines and advises the Receivers by notice in writing."[42]

(3) Clause 9.1 provides: "The Receivers agree with the Chargee that unless otherwise directed by the Chargee he will pay or cause to be paid to the credit of the account or accounts (set out by him in respect of the appointment, details of which he will provide to the Chargee) all moneys and negotiable securities which he or his servants or agents may from time to time receive in respect of or in the course of

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37 Ibid, at pp 794 and 795.
38 Ibid, at p 808.
39 Cf affidavit of Tucker (CFI 76) at [100] ff and, also, affidavit of Tucker (CFI 112) at [7].
40 See, for example, Affidavit of Tucker (CFI 31) at p 94.
41 See the affidavit of Pleash (CFI 106), commencing at p 811.
42 Emphasis added.

the appointment or in respect of any assets or property the subject of or charged under or by virtue of the Security and that all such moneys and securities will be paid into one of the bank accounts forthwith upon receipt of the same by the Receiver and by his servants or agents and forthwith upon the same coming under the control of the Receiver his servants or agents and that all such moneys in those bank accounts will be paid after payment of any statutory priority debts:-

(a) First – in payment of all costs, charges and expenses properly incurred by the Receivers in connection with the appointment (including remuneration as provided for in this Deed) and/or incurred by the Chargee in connection with the appointment of the Receivers or in connection with the realisation of the assets of the Company.

(b) Secondly – in payment of debts which the Company and/or the Receivers are required by law to pay in priority.

(c) Thirdly – in such short term investments as the Receivers may see fit.

(d) Fourthly – towards payment of all principal, interest and other moneys secured by the Security until the whole of the indebtedness and liability of the Company to the Chargee secured by the Security has been duly paid to the Chargee."[43]

[37] Just as the factual circumstances are murky, and warrant a trial, I consider there are arguable legal issues which similarly militate against summary dismissal of this part of the plaintiff's case.

[38] The unusual and limited nature of the agency relationship created by a provision such as clause 7.1 is emphasised by the applicants.

[39] In this regard, in *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 419, Brennan CJ said:

> "The mortgage debenture [which provided for the appointment of a receiver of the mortgaged premises, and for the receiver to be the agent of the mortgagor] is an example of what Williams J in *Visbord v Federal Commissioner of Taxation*[44] described as 'a well-established legal device for a mortgagee, upon default by a mortgagor, to have the right to appoint a receiver, who is to be the agent of the mortgagor, so that the mortgagee obtains the benefits without being subject to the liabilities of a mortgagee in possession.' Although a receiver appointed with powers such as those contained in cl 19 is the agent of the debtor company so that, in his dealings with third parties, his acts are binding on that company, the receiver is not treated as an ordinary agent of the company in exercising powers (including

[43] Emphasis added.
[44] (1943) 68 CLR 354 at 381.

the power of sale of the company's assets) which are conferred for the purpose of realisation of the security by the mortgagee. The receiver is appointed not for the benefit of the company but for the benefit of the mortgagee.[45] The special nature and limited extent of a receiver's duty to the company in exercising his powers[46] do not deny to the receiver's acts done in exercise of those powers the character of acts done by the company's agent."

[40] In the same case, Dawson, Gaudron and Gummow JJ said (at 431-433):

"… Clause 19 [of the mortgage debenture] further stated that:

'PROVIDED ALWAYS that every such Receiver shall be the agent of [the company] and [the company] alone shall be responsible for his acts and defaults …'

It is common ground that, upon the making of the winding-up order in respect of [the company], this agency ceased. That is to say, the receiver 'could no longer pledge the credit of the company'.[47] Moreover, even when the agency was operative, it was one with 'some peculiar incidents',[48] the 'control exercisable by the company as principal [being] circumscribed by the duty which the receiver owes to the debentureholders'.[49] In *Visbord v Federal Commissioner of Taxation*[50], Williams J, after observing that the receiver as agent of the mortgagor 'occupies a very special position' continued:

'He is appointed to and may be removed from office by the mortgagee. He can demand and recover all the income of which he is appointed receiver by action distress or otherwise in the name either of the mortgagor[51], or of the mortgagee. If the mortgagor has attorned tenant to the mortgagee, the receiver can therefore sue the mortgagor for the rent in the name of the mortgagee. He can only insure or do necessary or proper repairs to the mortgaged property to the extent to which he is directed to insure or do such repairs by the mortgagee in writing. The mortgagor is unable to instruct him to do anything contrary to his statutory duties or to dismiss him. If the mortgagor dies the appointment of the receiver is not terminated[52]. The compulsory winding up of a company operates as a dismissal of all the company's servants and agents. The company cannot authorise the receiver to do

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45 *In re B Johnson & Co (Builders) Ltd* [1955] Ch 634 at 644-645.
46 See *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at 384-385.
47 *Gaskell v Gosling* [1896] 1 QB 669 at 700; revd on other grounds [1897] AC 575.
48 *Kerr on the Law and Practice as to Receivers and Administrators,* 17th ed (1989) p 375.
49 Fletcher, *Law of Insolvency,* 2nd ed (1996), p 395.
50 (1943) 68 CLR 354 at 382.
51 *M Wheeler & Co v Warren* [1928] Ch 840.
52 *In re Hale; Lilley v Foad* [1899] 2 Ch 107.

> any act which it is unable to do itself, so that it cannot empower the receiver, after the date of the liquidation, to carry on its business so as to create debts provable against the unmortgaged assets of the company (*Gosling v Gaskell*[53]; *Thomas v Todd*[54]); but the receiver can still continue to exercise his powers in the name of the company although the company is no longer liable for any debts which he may incur in doing so[55]. See also *In re Courts (Emergency) Powers Act* 1939 *and S Brown & Son (General Warehousemen) Ltd*[56]*; In re Wood's Application*[57]*.'*
>
> These peculiarities become less so upon consideration of the reasons for the inclusion of a provision such as cl 19. These concern the protection or advancement of the interests of the secured creditor and the receiver, not those of the borrower. What Williams J[58] described as this 'well-established legal device' was designed for the secured creditor to obtain the benefits without being subject to the liabilities of the mortgagee in possession. The stipulation that in exercising the powers set out in cl 19 the receiver was to be agent of [the company] assisted the receiver by imposing liability in respect of dealings by the receiver with third parties upon [the company] rather than upon the receiver personally…"[59]

[41] The first argument of the applicants is that, once Equititrust was in liquidation (on 20 April 2012), there could be no agency relationship between the Receivers and Equititrust (relying upon *Sheahan* at 432[60]). Accordingly, the applicants contend that, even if it be the case that Tucker & Cowen were acting for the Receivers, rather than MS Asia, it cannot be said that any moneys received, being the proceeds of realisation of assets by the Receivers, were received "on behalf of" Equititrust.

[42] But the plaintiff submits that the point was not decided in *Sheahan* (which proceeded on the basis this was "common ground") and, further, points to contrary authority, in the decision of the New South Wales Court of Appeal in *Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd* (2001) 38 ACSR 282 at [57] per Fitzgerald JA, in support of the proposition that, after compulsory winding up, a receiver continues to have a limited agency on behalf of the company in so far as such an agency is

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53 [1897] AC 575.
54 [1926] 2 KB 511.
55 *Gough's Garages Ltd v Pugsley* [1930] 1 KB 615.
56 [1940] Ch 961.
57 [1941] Ch 112.
58 *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at 381.
59 See also at 436; and see *Carey v Korda* (2012) 45 WAR 181 at [45]-[50] per Murphy JA (Martin CJ and Newnes JA agreeing).
60 Also, *Land Enviro Corp Pty Ltd (in liq) v HTT Huntley Heritage Pty Ltd* (2017) 123 ACSR 1 at [28]; and *Kelaw Pty Ltd v Catco Developments Pty Ltd* (1989) 15 NSWLR 587 at 593 (both in relation to the power of a receiver to bring proceedings in the name of the company after liquidation, which subsists, but in respect of which the receiver may be liable for any costs or losses incurred).

compatible with the statutory winding up scheme.[61] Even in *Sheahan,* it seems to me the majority was not saying the agency for all purposes ceases on a winding up – although the receiver "could no longer pledge the credit of the company" after winding up. This seems clear, from the reference to *Visbord* (on p 432 of *Sheahan)*, which includes, at the end of the passage quoted, the statement that "the receiver can still continue to exercise his powers in the name of the company although the company is no longer liable for any debts which he may incur in doing so". I accept the submission for plaintiff that there is, at the least, a legal issue which is arguable and ought not be determined on a summary basis.[62]

[43] Another issue is whether it can be contended that Tucker & Cowen were the solicitors for Equititrust, such that the moneys received into the trust account could be said to be held "on behalf of" Equititrust? The Cowen and Tucker applicants rely upon *Bride v Freehill Hollingdale & Page & Ors* [1995] WASC 561[63] and *Carey v Korda (No. 2)* (2011) 85 ACSR 331 as authority for the proposition that they were not. It is clear from *Bride* that, apart from the "agency" between the receiver and the debtor created by (in that case) the mortgage, there was no other basis on which it could be contended the solicitors, Freehills, acted for the mortgagor. Both the mortgagee bank, and the receivers, had utilised the services of Freehills to give legal advice in connection with the administration of the mortgagor's affairs (at p 5). The mortgagor had not; it was relying solely upon a derivative, or "sub-agency" argument, to contend the receiver's solicitors were also the mortgagor's solicitors (at p 10). That argument was rejected.

[44] In *Carey v Korda (No. 2)* (2011) 85 ACSR 331, Edelman J (then of the Western Australian Supreme Court) held that in circumstances where receivers sought advice from solicitors concerning the exercise their legal powers, they were not acting on behalf of the debtor company, but in their own right. Accordingly, the debtor company was not the client; the client was the receivers (see at [46]-[52]). In the context of this case, the issue arose because of a claim to legal professional privilege asserted by the receivers, as against the debtor company. However, as Edelman J noted at [47]:

> "It is true that actual sales and property realisations could only have been performed by the companies themselves since the lender was not in possession. To the extent that the receivers actually procured those sales for the companies then the receivers did this on behalf of the companies.

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61 Cited with apparent approval by Gotterson JA in *MSI (Holdings) Pty Ltd (In Liq) v Mainstreet International Group Ltd* [2013] 2 Qd R 253 at [17]. See also *Re Yates, National Mutual Life Association v Catco Developments Pty Ltd* (1989) 88 ALR 583 at 587-588 per Sheppard J (referring, inter alia, to *Re Leslie Homes (Aust) Ltd* (1984) 8 ACLR 1020 at 1023 per McLelland J).

62 Notably, in the deed of charge, under which the BOSI Receiver was appointed, clause 14.4 provides for the power of appointment of a receiver, even if an order has been made or a resolution passed for the winding up of the company and cl 14.4(b) provides that "a Receiver appointed in those circumstances may or may not in in some respects acts as the agent of the Chargor" (affidavit of Tucker (CFI 31) at p 96). The appointment of the Receivers by MS Asia did not occur until after the winding up.

63 [1996] ANZ Conv R 593.

> However, in *considering* the exercise of their legal powers the receivers were not acting on behalf of the companies."[64]

[45] Edelman J's decision was affirmed on appeal: *Carey v Korda* (2012) 45 WAR 181. As Murphy JA (with whom Martin CJ and Newnes JA agreed) said at [76]-[77]:

> "[76] The correct conclusion to draw is that it was the Receivers, as principals, who retained Corrs to advise them in relation to their realisation of the Company's assets on behalf of the mortgagee, and in the exercise of their powers and the performance of their duties, as receivers and managers of the companies in question. …
>
> [77] That is not to say that the Receivers, having obtained and received advice in that capacity, would not thereafter be acting as agents for the company in effecting the sale of assets. When, for example, they (directly or through the solicitors) negotiated with third parties, entered into contracts for sale, corresponded with local authorities or undertook searches and the like, the Receivers clearly would be acting as agents of the company in question."

[46] As it was put by Murphy JA in *Carey v Korda* at [78], the point is that it could not be said that merely by virtue of the agency under the charge, the companies in receivership must be regarded as the clients of the solicitors retained by the receivers.

[47] In the present case, the position is less clear because Tucker & Cowen had acted as the solicitors for Equititrust, in debt recovery retainers, for many years prior, and, on the plaintiff's case, continued to do so after August 2012 (when the (MS Asia) Receivers were appointed). But even if Equititrust is not "the client" of Tucker & Cowen, since the Receivers were acting as agents for Equititrust in realising the assets, in my view it is open to argue that the money received, as proceeds of the realisation of assets by the Receivers, and paid into the solicitor's trust account [as distinct from the Receiver's bank account, as in *Sheahan*], was received on behalf of Equititrust.

[48] In *Sheahan,* the issue was whether payments made by the receiver out of the bank account opened by the receiver pursuant to s 421 of the *Corporations Law,* to a creditor of the company, to secure the provision of continued services, in the course of carrying on the business of the company, were voidable as preferences, for which it was necessary to consider whether the payments were out of the money of the company. The majority (Dawson, Gaudron and Gummow JJ) held that they were not. Brennan CJ (at 421 and 423) and Kirby J (at 451) considered that they were.

[49] The reasoning of the majority commenced with an analysis of the legal and beneficial rights of the respective interested parties in relation to the receiver's bank account opened and maintained under s 421 (commencing at p 428). Their Honours said, at 430:

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[64] Emphasis in the original.

> "The effect of s 421, in combination with cl 22 of the debenture [which set out the order of priority of payments to be made by the receiver], at least goes so far as to oblige the receiver to account for and to apply the proceeds in the account in accordance with the terms of the debenture.[65] It is unnecessary to determine whether the receiver held the chose in action represented by the s 421 account as a trustee, 'in the full sense', for the Bank [the secured creditor]. It is sufficient for the purposes of this case that the moneys in the account out of which the three payments in question were made were in no sense either the moneys of [the company] or moneys held to the order or disposition of [the company]."[66]

[50] Their Honours went on to say, at 435:

> "In our view, in characterising the payments made to [the service providing creditor], it is important to have regard to their source, namely the funds in the receiver's account established in conformity with the requirements of s 421(1) of the *Corporations Law* and to the control of those funds in the manner discussed earlier in these reasons, in particular by cl 22 of the debenture. It was in exercise of the authority conferred upon him by the debenture to deal with the moneys in this fashion that the receiver was enabled to make the payments. They were payments by cheques which could only be drawn upon the account by the receiver. It is, therefore, correct to characterise them as payments made by the receiver.
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> …
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> When, for example, the receiver, in obedience to cl 22 of the debenture, applied the moneys received on realisation of the security in payment of his remuneration or in payment to the [secured creditor] Bank or in payment of any surplus to [the company], it would be absurd in any of these instances to identify that activity as one performed as agent for [the company]. Likewise when those moneys were applied by the receiver in payment of an outstanding obligation of [the company] to a third party, the receiver having made a determination of the fitness to do so."[67]

[51] It is clear, from these passages, that both the statutory context in which the receiver's bank account was established, and the authority and obligation conferred by the mortgage debenture on the receiver, in respect of money in the receiver's bank account, were significant to the majority's decision, that payments made by the receiver, out of that bank account, in accordance with the mortgage debenture, were payments made by the receiver, not by (or on behalf of) the company.

[52] It is at least arguable that, in contrast, where the proceeds of realisation of assets have not yet been paid into a Receiver's bank account, they are held on behalf of the

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65 See also at 428.
66 Emphasis added; references omitted.
67 Emphasis added.

company. It is noteworthy that s 421(1)(b) and (c), now of the *Corporations Act* 2001, use the phrase "money of the corporation". At the point of realisation of the assets, the proceeds are the money of the debtor corporation. It is by operation of the security document that those proceeds can be taken into the hands of the receiver, and dealt with in accordance with their contractual obligation under the debenture or deed of appointment (or otherwise as the case may be). Brennan CJ's view that, even after being paid into the receiver's bank account, those moneys were the company's money in the hands of the receiver (see at 421 and 423) did not prevail. Dawson, Gaudron and Gummow JJ reached a different view, as already discussed above. But it seems to me reasonable to argue that there is a question mark over the proper characterisation of the proceeds, *before* they are paid into the receiver's account.

[53] If the correct analysis is that, in taking steps to realise the assets, the receiver is acting as agent for the company (as confirmed in *Carey v Korda* at [47] per Edelman J and, on appeal at [77] and [81] of the Full Court's decision), then moneys which are the proceeds of such realisation, which are paid into the trust account of the solicitor for the receiver, are arguably moneys paid to the receiver on the behalf of the company.

[54] Given the above analysis of the factual and legal issues, I am not persuaded that the breach of trust argument should be summarily dismissed, whether that is on the basis of striking out with no leave to replead, or on the basis of summary judgment. Material facts have been pleaded to support the breach of trust argument and there is an arguable legal basis to support the pleaded case. There are complex and arguable issues of fact and law raised by the FASOC, which warrant proper determination following a trial. Even if the legal basis for this part of the plaintiff's claim was properly considered doubtful or problematic, this is a case in which the court will nevertheless be required to hear and determine substantially the same factual matters in respect of the remaining causes of action, which also militates against striking out the claim.[68]

[55] Separately, the Tucker and Cowen applicants complain of particular deficiencies in this part of the FASOC. I will deal briefly with each of these.

[56] The applicants contend the allegations in [88] and [92] of the FASOC are incomprehensible and inconsistent with the allegation of the Receivers being the agent of Equititrust. Paragraph [88] alleges (with mark up removed):

> "On or about 28 February 2013, by an instrument in writing prepared by Tucker & Cowen, the Receivers appointed Equititrust, pursuant to the Deed of Appointment, as their agent to take possession of real property of Handley Heights Pty Ltd…, a debtor of Equititrust, namely [property description]."

[57] The allegation is particularised by reference to the evidence of Mr Peldan at his (s 19) examination and from the Receivers' Notice to ASIC dated 11 March 2013. Paragraph [92] is in a similar form, in relation to property of another debtor, MQ Ink Pty Ltd.

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[68] See again paragraph [18] above, and the authorities there referred to.

[58] The plaintiff's response is that what is alleged in those paragraphs might be unusual, but it is what (it contends) happened (by reference to the documents). If the defendants want to plead that it did not happen, they can do that, but it does not support striking out the paragraphs.[69] The allegations in each of [88] and [92] are of a step taken, in a particular way, in the controllerships of two of Equititrust's debtors, Handley Heights Pty Ltd and MQ Ink Pty Ltd (the taking of possession of certain real property). In each case, that allegation is followed by an allegation of receipt, by the Receivers, as agents of Equititrust, of a sum of money that was paid into the Tucker & Cowen trust account (at [88A] and [92A]) and which forms part of the Tucker & Cowen Receipts ([95A]). By reference to schedule 6 to the FASOC, it is apparent that the amount referred to in [88A(a)] is said to be "settlement proceeds" of the sale of the Handley Heights property and the amount referred to in [92A(a)] is the "settlement funds" of the sale of the MQ Ink property. In that context, [88] and [92] are part of the pleaded factual matrix in which part of the Tucker & Cowen Receipts were received; whether that be unusual or otherwise. I accept the plaintiff's submissions that no basis for striking them out has been shown.

[59] Next, the allegation in [95(a)] that Tucker & Cowen "have continued to act as solicitors *on the record* for Equititrust" in various retainers is said to be confusing, as not all the retainers are in respect of (court) proceedings, and solicitors do not act *on the record* in retainers, only in proceedings. This is strictly correct. I place this complaint in the category of amendments that the plaintiff should consider making (along with correcting some typographical, and cross-referencing errors), to avoid pedantic responses in the defences when filed (see paragraph [134] below).

[60] The allegation in (amended) [96C(c)] that "the only persons competent and authorised to give instructions to Tucker & Cowen in the conduct of the said retainers were… [the BOSI Receivers and the Receivers]" is challenged, as still being incorrect, despite the issue addressed in *Equititrust No. 1* (at [46]), in relation to an earlier proposed amendment to the statement of claim, as to whether it is correct to assert that, following 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 (because MS Asia also, potentially, has rights to take recovery action directly, under the BOSI Securities). I do not accept the applicants' argument in relation to amended [96C(c)]. The allegation is made, in the premises of the many paragraphs cross-referenced in the chapeau to [96C]. It is in the context of those allegations, that it is alleged the only persons competent to give instructions was the BOSI Receiver and the Receivers. That is the factual context alleged, and pleaded, by the plaintiff.

[61] Additional complaints are made about the pleading in respect of the TCSS Receipts.[70] The circumstances in which the TCSS Receipts were received are pleaded in [98A] and [98B]. Paragraph [98C] pleads that, in the premises of [14] to [16] (which contain the allegations of retainers of Tucker & Cowen, and the registration of TCSS), [79] to

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[69] T 2-53 to 2-54.

[70] For example, Cowen applicants' submissions at [43(d)].

[96D] (the allegations concerning the receipt of the Tucker & Cowen Receipts) and [98A] and [96B] (the allegations concerning the receipt of the TCSS Receipts), TCSS received each sum on behalf of, and upon trust for, Equititrust as trustee of the EPF, and by reason of s 249(1) it was a term of the trust that TCSS was obliged to hold each sum exclusively for Equititrust as trustee of the EPF and to disburse the TCSS Receipts only under a direction given by that entity. It is alleged that the TCSS Receipts were received *on behalf of* Equititrust (one of the essential requirements of s 249(1)(a) of the *Legal Profession Act*). The breach of trust by TCSS is pleaded in [107] and [109]. Part of the alleged breach is failing to pay any of the TCSS Receipts to Equititrust, but rather, paying them all to persons other than Equititrust. It is correct to say it is not expressly pleaded that the payment away was not under a direction given by Equititrust (cf s 249(1)(b) and [106] in relation to the Tucker & Cowen Receipts). That is a matter that can readily be fixed by amendment.

[62] Lastly, the applicants submit the claim for recovery of the full amount of the Tucker & Cowen Receipts and the TCSS Receipts, by way of relief for the breach of trust, is flawed, inter alia, as there are no facts establishing causation pleaded (see [126A] of the FASOC).

[63] The applicants submit that it is not clear how the allegation of payment of the moneys into the trust account in the name of MS Asia could have given rise to any loss (let alone a loss of the full amount of the receipts), in circumstances where there is no allegation in the FASOC that the Receivers, or Equititrust, would have (or could have, given the terms of the deed of appointment) directed Tucker & Cowen to disburse the funds in any other way than the manner that they did – to MS Asia, under the BOSI Securities and in discharge of the BOSI Debt. In this regard, the applicants contend that there is no challenge to the validity of, in particular, the MS Asia Acquisition and, consequently, no loss suffered by Equititrust, as the BOSI Debt always had to be repaid.

[64] The plaintiff says that assertion is incorrect, and refers to [49B] and [51B] of the FASOC, which plead that Mr Tucker and Mr Kennedy, respectively, were precluded, by their respective positions as fiduciaries, from acquiring the BOSI Debt or the BOSI Securities, or having any interest in or deriving any benefit from that acquisition. If that is established, the acquisition of the BOSI Debt and BOSI Securities, by MS Asia (a company in which they each have an interest) could be invalidated.[71] In simple terms, the plaintiff's case is that the MS Asia Acquisition should not have happened. On that analysis, the payment of the Tucker & Cowen Receipts out of the trust account, in purported discharge of the BOSI Debt and the BOSI Securities, to MS Asia, involved payment to a party not entitled to receive the payments, in breach of the express trust. It would not matter if the Receivers had directed the payment(s) be made to MS Asia (as opposed to the solicitors doing that without any direction) – it is still the case that money was paid out to a party not entitled to receive it.[72] But in any event the plaintiff

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[71] See, for example, *Re Clark; Clark v Moore* (1920) 150 LT Jo 94, referred to in PD Finn's *Fiduciary Obligations* (1977, Law Book Co) at [450], see also [451].

[72] Plaintiff's submissions at [41]-[42].

submits that is a matter for defence. The material facts relied upon, and pleaded, by the plaintiff are that the money should have been held in the trust account for Equititrust; it was not; it is now gone; and it should be restored to the trust account.

[65] The plaintiff does not cavil with the principle, affirmed in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [35] and [50] that the quantum of compensation for breach of trust is to be assessed at the time of trial, taking into account all the circumstances then pertaining in determining the amount then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach; nor with the need to establish causation (*Youyang* at [44]). However, the plaintiff submits that the present is not a case like *Target Holdings Ltd v Redferns* [1996] AC 421 at 437 (distinguished in *Youyang* at [45]-[48]) in which it can be said that the breach of trust by the solicitor left the beneficiary of the trust in the same position as if there had been no breach.

[66] I accept that submission. There are plainly substantial questions of fact warranting determination at a trial – not only as to the duty(ies) owed, as well as to the alleged breach of those duty(ies), but also in terms of the loss suffered, assuming the foregoing issues are determined as contended for by the plaintiff. It is not self-evident, such as to justify summary dismissal as sought by the applicants, that the plaintiff suffered no loss, because the Tucker & Cowen receipts would have been properly paid out to MS Asia (and the other recipients) in any event.

[67] In this case, as in *Youyang,* the plaintiff seeks restoration of the trust fund, on the basis that but for the alleged breach of trust by Mr Tucker (and the firm), the Tucker & Cowen receipts would not have been paid away, to parties not entitled to receive them. I accept the plaintiff's submission that "[t]he defendants' response that no loss was suffered as MS Asia was entitled to be paid the BOSI Debt is a matter that should, if it is to be pressed, be pleaded by way of defence" and that the "[t]he question of what loss was caused by the alleged breach of trust is a matter to be resolved at trial".[73]

[68] For completeness, I note that the applicants highlighted the reference in the plaintiff's submissions at [49] to Mr Tucker holding the funds on a constructive trust for Equititrust. It is correct that the pleading of a constructive trust, as an alternative to the express trust, as it appeared in the original statement of claim, was struck out: *Equititrust No. 1* at [53]. The plaintiff then foreshadowed possible reliance on the remedy of constructive trust, for the alleged breach of duty(ies) by Mr Tucker (*Equititrust No 1* at [54]); and in the context of the present applications flagged possible reliance on such a remedy in reply, subject to what is eventually pleaded by way of defence.[74] It is not necessary to say more about this.

[69] There is also a complaint that it is not clear whether [126A] is related to the alleged breach of trust allegations. I do not understand that complaint, as the earlier paragraphs

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[73] Plaintiff's submissions at [56]-[57].
[74] T 2-21.

of the FASOC which are identified as the premises ([79] to [101], [105] to [109] and [112] to [112C]) are all in relation to the breach of trust allegations.

Allegations of breach of duty under s 183(1) of the Corporations Act

[70] The Cowen applicants apply to strike out paragraphs [44A], [49] and [109A] (breaches of s 183 by Mr Tucker), and also [123A] to [123G] and [127F] (allegations of Mr Cowen being knowingly concerned in the breaches by Mr Tucker, and the claim of damage suffered) of the FASOC. The Tucker applicants similarly apply to strike out these paragraphs and also (in relation to the allegations of breach of s 183) the particulars to paragraph [29], and paragraphs [32], [33], [42], [43(a)], [45(b)], [127B] and [127E].

[71] The crux of this part of the plaintiff's claim against Mr Tucker is that in the course of, and by reason of, acting as a director of Equititrust he came to know the information set out in [44A] (the Tucker Director Information); he was subject to a duty to Equititrust as trustee of the EPF under s 183(1) of the *Corporations Act* not to make improper use of that information to gain advantage for himself or someone else [49]; by taking advantage of the opportunity to acquire the EPF Loan Book, and the BOSI Debt and Securities, for $2 million (through MS Asia, in which he has a beneficial interest, with Mr Kennedy and Mr Howard), from which he made a profit, he improperly used that information, for the purpose of gaining an advantage for himself, or alternatively for MS Asia, Mr Kennedy or Mr Howard; and so breached the duty owed under s 183(1) [109A].

[72] The applicants make a number of complaints, as follows. Many of the complaints about [44A] are made also in relation to [44B] (which relates to information Mr Tucker is said to have come to know in the course of and by reason of acting as the solicitor for Equititrust).

[73] Among other things, [44A] alleges that in the course of and by reason of acting as a director of Equititrust, Mr Tucker came to know "the likely recoverable value of the EPF Loan Book as at 12 October 2011 (as pleaded in paragraph 32 above, including the names and details of the borrowers, the guarantors and the associated securities, pleaded and particularised in paragraph 29 above)" [44A(c)(i)]. At paragraph [32] it is alleged that, "[a]s at 12 October 2011, the amount which Equititrust as trustee of the EPF was likely to recover from the EPF Loan Book was: (a) a sum of up to $35 million; and (b) in any event, substantially more than $2 million". It is also alleged, in [44A(c)(vi)], that Mr Tucker came to know that "as at 12 October 2011, the debt due to BOSI was $7.8 million (as pleaded in paragraph 43(a) above) (BOSI not having charged any Risk Fee or Overdue Rate despite its entitlement to do so)". The applicants submit that these two matters (value of the debt owed to BOSI, and that the value of the assets was in excess of $2 million) were in the public domain; and accordingly these two sub-paragraphs should be struck out as untenable, since any confidentiality in the recoverable value had been lost.

[74] I was taken to parts of the evidence before the court, in support of this submission. This includes:

(1) The affidavit of Mr Kennedy, filed on 27 October 2011 in separate proceedings in this court, between Tucker SF Pty Ltd and Equititrust.[75] At [7] of this affidavit, Mr Kennedy says that, after allowing for additional impairments approved by the Board of Equititrust at its meeting on 12 October 2011, the current balance of the EPF would be approximately $30 million.[76] The applicants emphasise that this affidavit was filed by leave and read in open court without objection from Equititrust.

(2) An affidavit of Paul Vincent, filed in another separate proceeding in this court, initiated by Equititrust (for the winding up of a particular scheme),[77] which referred, inter alia, to Mr Kennedy's affidavit.

(3) A decision of Applegarth J, in relation to the proceeding in which Mr Vincent's affidavit was filed, in which reference was made to evidence from Mr Vincent about the liabilities and assets of Equititrust as trustee for the EPF as at October 2011, including the debt owed to BOSI.[78]

(4) An affidavit of Mr Pleash (one of the liquidators), filed in another separate proceeding in this court,[79] in which he sets out some things based on preliminary investigations, including referring to the debt owed to BOSI (at paragraph 72(f)(iv)) and referring to the position as at February 2012 of the Company's (ie Equititrust's) assets (which should be understood as being the EPF Loan Book) being about $11,623,983 and liabilities about $12,201,124 (including the debt to BOSI) (at paragraph 72(i)).

(5) A report to creditors dated 12 April 2012 which includes a range of values for the assets of the EPF between about $7.6 million up to $12.6 million.[80]

[75] I am not persuaded that this supports striking out any part of [44A]. Firstly, to determine the issue on a summary basis, by reference to some of the evidence that might inform a proper determination of the issue at trial, is inconsistent with the principles referred to above.[81] In any event, there is authority that the issue, for the purposes of s 183, is not whether the information is confidential, but how it was acquired.[82] Accordingly, it is not an answer to a claim of breach of the s 183 duty that some of the information alleged to have been improperly used was in the public domain.

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75 Affidavit of Pleash, volume 1 of the exhibits (CFI 104), commencing at p 207.
76 This affidavit is referred to in the particulars to [32] of the FASOC.
77 Affidavit of Tucker (CFI 76), commencing at p 108.
78 *Re Equititrust Ltd* [2011] QSC 353 at [17]-[18].
79 Affidavit of Tucker (CFI 120), commencing at p 13.
80 Affidavit of Tucker (CFI 76), at pp 144-145.
81 Including at paragraph [10] above.
82 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324 at [649], referring inter alia to *McNamara v Flavel* (1988) 13 ACLR 619 at 625 per Millhouse J (see also at 620 per King CJ). See also *Huang v Wang* [2015] NSWSC 510 at [41] per Black J.

[76] The Tucker applicants also complain that there is no plea that Mr Tucker "obtained" any of the Tucker Director Information, only that he "came to know" that information.[83] Although they submit this is "no pedantic distinction", I disagree. The allegation in [44A] is that by reason of Mr Tucker's participation in the events and matters alleged in [28] to [43] of the FASOC, in the course of and by reason of acting as a director, Mr Tucker came to know [the Tucker Director Information]. The focus of s 183(1)(a) is on information obtained by a person *because* they are, or have been, (in this case) a director.[84] Whether you use the particular word in the statute (obtained) or another form of words (came to know) does not matter – what matters is that the information they obtained (or came to know) came to them because they were, or have been, a director. That is what is alleged in [44A].

[77] The Tucker applicants also complain that the allegations in [44A(c)(i) and (ii)] are "either deliberately ambiguous or the Plaintiff is seeking to add additional causes of actions out of time without seeking leave".[85] Those subparagraphs plead that Mr Tucker came to know:

> "(i) the likely recoverable value of the EPF Loan Book as at 12 October 2011 (as pleaded in paragraph 32 above, including the names and details of the borrowers, the guarantors and the associated securities, pleaded and particularised in paragraph 29 above); and
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> (ii) that as at 13 April 2012, no event had occurred which materially altered the likely recoverable value of the EPF Loan Book (as pleaded in paragraph 33 above, including the names and details of the borrowers, the guarantors and the associated securities, pleaded and particularised in paragraph 29 above);"

[78] The Tucker applicants submit the underlined words are "non-sensical".

[79] I can see no difficulty with subparagraph [44A(c)(i)]. When you read [32], that refers to [29]-[31] of the FASOC. Paragraph [29] pleads that the directors of Equititrust had considered and discussed the amount which Equititrust as trustee was likely to recover from borrowers and guarantors at the monthly meetings attended by Mr Tucker between September 2010 and October 2011 and by Mr Kennedy between May 2010 and October 2011; and further states that "[t]he loans due from time to time to Equititrust as trustee of the EPF from its borrowers and guarantors and the associated securities held by Equititrust" will be referred to as the "EPF Loan Book". This definition appeared in the original statement of claim. Particulars to [29], added in the FASOC, inform that "[t]he names and details of the borrowers, the guarantors and the associated securities are particularised in the Consolidated Particulars accompanying this pleading and in the board papers and minutes referred to therein".[86] Paragraph [30] then pleads a meeting

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[83] See, for eg, Tucker applicants' submissions at [76].
[84] See *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324 at [649].
[85] Tucker applicants' submissions at [84].
[86] See, for example, the Consolidated Particulars (CFI 84) at pp 7-8.

of directors on 14 June 2011, at which Mr Tucker and Mr Kennedy participated in a detailed discussion of each of the loans in the EPF Loan Book and as to the likely recoverable value thereof. Paragraph [31] pleads a meeting on 12 October 2011, adjourned until 17 October 2011, at which Mr Tucker and Mr Kennedy participated in a detailed discussion of the loans in the EPF Loan Book and as to the likely recoverable value thereof. Paragraph [32] then pleads that as at 12 October 2011 the amount which Equititrust as trustee of the EPF was likely to recover from the EPF Loan book was a sum of up to $35 million and, in any event, substantially more than $2 million. It is reasonably apparent to the reader that the details of the loans, including the names and details of the borrowers, the guarantors and the associated securities, which were included in the board papers and minutes, are alleged to have informed the discussion of the likely recoverable value of the EPF Loan Book. That is an unsurprising contention, one might think (that details about the borrowers, guarantors and associated securities would inform the likely recoverable value of a loan). I do not regard this as either ambiguous or nonsensical. Nor do I accept that it is impermissibly pleading a new cause of action.

[80] In so far as [44A(c)(ii)] is concerned, it is less clear why the underlined words have been included. I wonder whether it is a typographical error, as a result of copying what has been added to (i). What is pleaded in [33] of the FASOC is essentially what appears in the first part of (ii) (that as at 13 April 2012, no event had occurred which materially altered the likely recoverable value of the EPF Loan Book), with no further reference to [29]. I will invite the plaintiff to consider this, along with the other matters referred to in paragraph [134] below.

[81] The Tucker applicants also complain that there is no proper plea of "when and how each component of the Tucker Director Information was obtained".[87] In so far as the timing is concerned, I accept the plaintiff's submission[88] that this is apparent from a consideration of [28]-[43] if the FASOC, which plead events and matters by reason of participation in which Mr Tucker came to know the things alleged in [44A]. In oral submissions on behalf of the Tucker applicants, this argument unmeritoriously descended to a contention that it is necessary for the plaintiff to specify each piece of information, within the agenda and board papers Mr Tucker is alleged to have had for meetings on 14 June and 12 October 2011.[89] For example, counsel for the Tucker applicants suggested the plaintiff ought to be required to identify, if it is the case, whether it is alleged Mr Tucker misused the information that one of the loans was secured against a property having an area of 52.2 hectares in a particular location.[90] The plaintiff's case is patently not that Mr Tucker misused specific pieces of data, down to minutiae of that kind. The plaintiff's case, as pleaded in [44A] and [109A], is that Mr Tucker improperly used information that came to him (he obtained) because he was, or

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87 Tucker applicants' submissions at [77].
88 Plaintiff's submissions at [68]-[78].
89 See the Consolidated Particulars of [29] (CFI 84), at p 7.
90 Affidavit of Pleash (CFI 103), at p 136 (part of the "Equititrust Loan File Note" referred to in the Consolidated Particulars). See T 2-9.

had been, a director of Equititrust. That information came to him, inter alia, from agenda and board papers Mr Tucker had for the meetings particularised in the Consolidated Particulars (at p 7), which informed a view about the recoverable value of the EPF Loan Book. The plaintiff's case is that he obtained that material because he was a director; and that enabled him, when the opportunity to acquire the BOSI Debt and the BOSI Securities for $2 million arose, to form a view that this was a very good deal.[91]

[82] Next, it is submitted by all applicants that [44A] is defective because it pleads that Mr Tucker "came to know" certain information "in the course of and by reason of acting as a director", where the information relates to a time period well after he ceased being a director (eg [44A(c)(ii)). The applicants accept, as they must [because of the express words of the section] that s 183 operates in relation to information obtained because a person is, or has been, a director. However, they submit that is not what is pleaded in the opening words of [44A].

[83] The plaintiff submits the phrase "by reason of acting as a director" is apt to capture information obtained because Mr Tucker had been a director. In *Republic of Croatia v Snedden* (2010) 241 CLR 461 the phrase "by reason of" was said to connote a causal relationship.[92] The requisite causal relationship in s 183(1) is communicated by the word "because". The plaintiff's argument should be accepted. In my view, the composite phrase which is used in [44A] – "in the course of and by reason of acting as a director" – captures both the time period during which the person is/was a director, and a subsequent time period, where information is obtained "by reason" of (or because of) acting as a director (previously). In addition, the premises of [44A] include both paragraph [9] (the allegation of Mr Tucker being a director) and parts of paragraph [45(b)] where it is alleged that after Mr Tucker ceased to be a director he retained his files in respect of his work as a director in the Directorship Retainer and his board papers for and notes and minutes of all meetings of directors he attended. That, also, makes it clear what is being alleged.

[84] To put the matter beyond doubt, in the course of correcting other matters (as per paragraph [134] below), the plaintiff could add the words "and having acted" after the word "acting" in the third line of the chapeau to [44A]. But in my view, the allegation is sufficiently clear.

[85] A separate but related complaint made by the applicants is that some of the Tucker Director Information is information which only arose after Mr Tucker ceased to be a director, and therefore cannot be within s 183(1).[93] There are a number of reasons for rejecting this submission. First, the duty under s 183(1) expressly extends to information obtained *because* a person has been a director. Self-evidently, that may be information which only arises after they cease to be a director. The focus, as I have

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[91] T 2-31 to 2-32 and 2-34.
[92] See at [22] per French CJ and also at [53] and [69] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[93] See, eg, Tucker applicants' submissions at [78].

already said, is on whether the information was acquired because of the person's position as a (current or former) director. Second, in some respects, the information was said to have been obtained as a result of Mr Tucker attending directors' meetings on 12 and 17 October 2011. The applicants protest that Mr Tucker was removed as a director on 11 October, therefore, how could he have obtained any information, because of his position as a director, after that time. It may be reasonable to infer Mr Tucker was only able to attend such meetings because he had been a director. It is apparent from evidence before the court that Mr Tucker did not, initially at least, accept that his removal (by the sole member of Equititrust, Mr McIvor) was valid – therefore, it may also be reasonable to infer he attended these meetings in fact purporting to be a director (not merely because he had been).[94]

[86] The complaint about the allegation in [44A(c)(ii)] (that Mr Tucker came to know "that as at 13 April 2012, no event had occurred which materially altered the likely recoverable value of the EPF Loan Book") is also rejected. That is simply an allegation that Mr Tucker knew nothing had changed in that time. I can see no reason why the Tucker applicants cannot plead to that.

[87] The Tucker applicants' complaint about [44A(c)(v)] (an allegation that Mr Tucker came to know that "as at 12 October 2011, BOSI had not charged the Risk Fee or the Overdue Rate despite Equititrust's earlier default under the [facility agreement] (as pleaded in pleaded in paragraph 42(c) above)" is also rejected. The complaint is related to the complaint about [42(c)], which alleges that "[b]y numerous attendances, the directors of Equititrust, including Mr Tucker and Mr Kennedy secured the indulgence that BOSI did not … charge the Risk Fee or the Overdue Rate…".[95] The argument is on the basis of Mr Tucker's evidence (that he did not) and lack of particularisation of "securing" an indulgence. It is inconsistent with the principles summarised above to strike out a factual allegation on the basis of controversial evidence. I do not at present see a need for an order for further particularisation. The allegation is presently particularised by reference to a number of emails and meetings. The Tucker applicants are able to plead to the allegation in its current form.

[88] A further complaint, about [44B], is that it includes, as part of the premises, the retainers alleged in [14(c)]. It is submitted this applies to [44A] as well, but that is not apparent from the wording of [44A]. In any event, the complaint is that the retainers referred to in [14(c)] date back to at least 2006, and in many respects do not appear to concern the affairs of Equititrust or the EPF. It is submitted no attempt has been made to confine the allegations to the retainers that might actually be relevant; and as such the

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[94] See the affidavit of Mr Tucker, filed in October 2011 in separate proceedings in this court, annexed to the affidavit of Pleash, volume 4 of the exhibits (CFI 107), commencing at p 1061, in particular at [4] (Mr Tucker refers to receiving notification, on 12 October 2011, that a resolution had been purportedly passed by the shareholder of Equititrust removing him as a director); at [166] (Mr Tucker says on 12 October 2011 he participated in a directors' meeting of Equititrust "notwithstanding my purported removal"); at [168] (that the directors resolved at that meeting that he could participate in the meeting "given the uncertainty about the legal effect of the resolution to remove [him] as a director"); and at [181] (that he participated in the meeting on 17 October 2011).

[95] Tucker applicants' submissions at [88].

allegations have a tendency to delay the proceedings and should be struck out. It seems to me such an attempt *has* been made, by limiting the allegation in [44B] to the "underlined" retainers in schedules 1, 2 and 3. When one goes to those schedules, there are only two underlined in each of schedules 1 and 2 (which relate to the periods as at September 2006 and as at December 2008, respectively). A few more are underlined in schedule 3, but this is not the period complained about. There is no substance to this complaint. As recorded in *Equititrust No. 1* at [72], on the plaintiff's case, the purpose of referring to retainers going back to 2006, more broadly, is to show that the firm, and Mr Tucker, was the longstanding solicitor of the company.

[89] Separately, the Cowen applicants make a complaint about [28(c)], on the basis it is impossible to tell how retainers going back to 2006 (referred to in [14(c)(i)]) have a logical bearing on the financial difficulties "which we know Equititrust experienced in 2012".[96] Inherent in the submission is that the fact alleged is not controversial. As just noted, the relevance of the existence of retainers going back to 2006 (referred to in [14(c)(i)]), more broadly, was addressed in *Equititrust No. 1* and it is unnecessary to revisit that. In the context of [28(c)], it is difficult to see how defaults in 2006 could be causally related to financial difficulties in 2012. In considering the amendments to the FASOC otherwise referred to in paragraph [134] below, the plaintiff should consider revising this subparagraph to remove reference to [14(c)(i)] (or perhaps removing [28(c)] altogether, given that the fact alleged in the chapeau to [28] is clearly not controversial in any event).

[90] Another complaint made about [44B] (which alleges that Mr Tucker came to know the same things as alleged in [44A], but in the course of and by reason of acting as the solicitor for Equititrust in certain retainers) is that it is impossible to see how anything Mr Tucker knew, by reason of the 12 and 17 October meetings, was because of acting as a solicitor in a retainer. This argument focusses on the inclusion, within the premises of [44B], of reference to the "directorship retainer"; and emphasises that the "directorship retainer" must have ceased when Mr Tucker ceased to be a director (11 October 2011). This argument overlooks four matters. First, that the premises in [44B] are not limited to acting as solicitor in the directorship retainer; second, that there are factual matters to be determined in terms of Mr Tucker continuing to attend the directors' meetings on 12 and 17 October (as discussed above, material presently before the court suggests he may not, initially, have accepted his removal as effective; and he did in any event continue to attend the directors meetings); third, that the documents which informed the meetings on 12 and 17 October are said to have been in his hands before 11 October (that is, by reason of acting as director [44A] / solicitor [44B]); and fourth, the allegations in [45] of Mr Tucker retaining possession of files and board papers, after he ceased to be a director. It seems reasonably clear that there was not a bright dividing line between the various roles and activities undertaken by Mr Tucker for Equititrust. Accordingly, the way in which the allegations are presently pleaded is understandable, in the circumstances of this case. It follows that I do not accept that the

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[96] Cowen applicants' submissions at [98]; T 1-33.

allegations are "impossible to understand". I consider the defendants, acting reasonably, ought to be able to plead in response to them.

[91] Turning then to [109A] of the FASOC, which reads:

> "In the premises of paragraphs 17 to 27, 28 to 43, 44A, 49, 60A, 60B and 78(k) to 78(n) hereof, it is to be inferred that by:-
>
> (a) acting as alleged in paragraphs 60, 64 to 66, 70 to 73, 76 and 77 hereof; and
>
> (b) in particular engaging in the MS Asia Acquisition, as alleged in paragraphs 70 and 77 hereof; and
>
> (c) procuring MS Asia to receive the MS Asia Profit pleaded in paragraph 112C(a) below; and
>
> (d) himself receiving his share of the MS Asia Profit pleaded in paragraphs 112C(b) and (c) below,
>
> Mr Tucker:-
>
> (e) improperly used the Tucker Director Information;
>
> (f) for the purpose of gaining an advantage for himself or, alternatively for MS Asia, Mr Kennedy or Mr Howard; and
>
> (g) in those premises, thereby breached the duty referred to in paragraph 49 hereof."

[92] The applicants complain that this paragraph does not identify how (or when) Mr Tucker is alleged to have used the Tucker Director Information or why its use was improper, such that it is "impossible for the defendants to know how it is contended that the duty was breached, and the material facts relied upon in support of each particular matter" in (e), (f) and (g).[97]

[93] Other than by reason of obfuscation,[98] I do not see how the defendants can contend they do not understand (let alone that it is impossible to know) how it is contended the duty was breached, and the material facts relied upon in support of the allegation that Mr Tucker improperly used the information for the purpose of gaining an advantage for himself, or alternatively for MS Asia, Mr Kennedy or Mr Howard and, in doing so breached the duty owed under s 183.

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97 See, for eg, Cowen applicants' submissions at [57].
98 Cf *Barclay Mowlem* at [12].

[94] In *R v Byrnes* (1995) 183 CLR 501 the High Court (Brennan, Deane, Toohey and Gaudron J) referred with approval to the observations of Jacobs J in *Grove v Flavel* (1986) 43 SASR 410 (in an equivalent statutory context) that:

> "The word 'improper' is not a term of art. It is to be understood in its commercial context to refer to conduct which is inconsistent with the 'proper' discharge of the duties, obligations and responsibilities of the officer concerned."[99]
>
> And also that:
>
> "… what is 'improper' … cannot be determined by reference to some common, uniform, or inflexible standard which applies equally to every person who is an officer, but rather must be determined by reference to the particular duties and responsibilities of the particular officer whose conduct is impugned".[100]

[95] An objective standard applies in determining what amounts to impropriety.[101] In *R v Byrnes* it was said (at 514-515) that:

> "Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case."

[96] The impropriety in *R v Byrnes* was acting without authority. *Groves v Flavel* involved the use by a director of his knowledge of the company's financial position to gain an advantage for himself and other companies of which he was a director, to the possible detriment of the creditors of the first company.

[97] That is what is alleged in this case – the impropriety of the use of the Tucker Director Information is the use of the information by Mr Tucker for the purpose of gaining an advantage for himself, or alternatively for MS Asia, Mr Kennedy or Mr Howard, to the detriment of the beneficiaries of the EPF.

[98] The allegation of breach in [109A] of the FASOC is in my view quite clear enough for the defendants to be able to understand the case that is put against them, and to be able to respond to it. The matters set out, for example, in [89] of the Tucker applicants' submissions, are matters which may readily be pleaded by way of defence. They do not support striking out the allegation.

Fiduciary duty allegations

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[99] (1986) 43 SASR 410 at 420.
[100] (1986) 43 SASR 410 at 416-417.
[101] *Chew v R* (1992) 173 CLR 626 at 647 and *R v Byrnes* (1995) 183 CLR 501 at 514.

[99] The Cowen applicants apply to strike out paragraphs [44B] (knowledge acquired by Mr Tucker from acting as a solicitor for Equititrust), [49A], [49B], [109C] and [109D] and, in addition to those paragraphs, the Tucker applicants also apply to strike out [128A] to [128D].

[100] I have already dealt with some of the arguments about [44B], in so for as they mirror complaints made about [44A]. As to the argument that some of the Tucker Solicitor Information was in the public domain, I reiterate what I have said at [75] above, and refer also to [106] below.

[101] As to [49B] (likewise [51B]), the applicants' complaint is that it impermissibly pleads an "absolute prohibition", not merely in respect of acquiring the BOSI Debt or the BOSI Securities, but also "having any interest in or deriving any benefit from" such acquisition. Paragraph [49B] reads:

> "In the premises of paragraphs 9, 15, 28 to 32, 44A, 44B, 45 and 49A hereof and paragraphs 51E, 51F below, Mr Tucker was, by 13 April 2012, precluded by his position as a fiduciary from acquiring the BOSI Debt or the BOSI Securities pleaded in paragraph 54 below, or having any interest in or deriving any benefit from the acquisition of the BOSI Debt or the BOSI Securities."[102]

[102] The point made by the applicants seems to be that the duties alleged (including the statutory duty under s 183, and the fiduciary duties) are duties not to improperly use information; not absolute duties not to engage in transactions. That submission is explained by reference to a hypothetical situation (if Mr Tucker had no interest in MS Asia, but MS Asia wanted to retain his firm and he got the benefit of that, that would be captured by this absolute prohibition).[103] But of course that is not what is alleged. What is alleged is that Mr Tucker did have an interest in MS Asia, and that he benefited personally from what he is alleged to have done, in breach of his various duties. What is alleged is that in the circumstances of this case, as a consequence of the duties owed by Mr Tucker, he could not take advantage of the information he obtained by taking up the opportunity which presented itself to acquire the debt and the securities for $2 million. Paragraph [49B] has to be read as a whole, and in the context of the plaintiff's case as pleaded (and by reference to the paragraphs identified as the premises). In that context I do not see anything objectionable about [49B].

[103] In relation to [109C], I do not accept the applicants' argument that the pleading is deficient; although I have suggested a minor amendment in paragraph [134] below. The paragraph is clearly concerned with allegations of breach of Mr Tucker's fiduciary duties referred to in [49A] (so much is apparent from the consideration of the premises, and also from [109C(h)(i)]), and the argument that the paragraph does not identify *why,*

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[102] Paragraph [51B] is in equivalent terms, in relation to Mr Kennedy.
[103] Oral submissions on behalf of the Cowen applicants at T 1-39.

factually the duties and Mr Tucker's personal interests were in conflict ignores what is pleaded in [109(a) to (d)].

Equitable duty of confidence

[104] Paragraph [51E] of the FASOC pleads that, in the premises of [51C] and [51D], the Tucker Director Information was of such a nature and was imparted to Mr Tucker in such circumstances as to be inherently confidential (and, likewise, in relation to the Kennedy Director Information). Paragraph [51F(a)] then pleads that, in the premises of [51E], Mr Tucker was under an equitable duty of confidence obliging him not to disclose the information to anyone, save for the business of Equititrust as trustee of the EPF and not to make improper use of the information for his own benefit or the benefit of a third party.

[105] The applicants' arguments about some of the information being in the public domain are relied upon to support striking out these paragraphs also.

[106] I am not persuaded of that. The following matters support rejection of the applicants' arguments on this point:

(1) Whether information is in the public domain is largely a question of fact, and whether information has entered the public domain requires consideration of the ability to access the information should members of the public wish to do so.[104] I have been taken to some evidence of some parts of the Tucker Director Information referred to in documents filed in open court. But the issue of the confidential nature of the Tucker Director Information, overall, is plainly a controversial issue, warranting determination, following a consideration of the whole of the evidence which may be relied upon at a trial; rather than summary determination on the basis of what is only a piece, or some pieces, of the puzzle.

(2) I accept that there is a serious argument that, even if elements of the Tucker Director Information may be found to have entered the public domain, the information was valuable and confidential in the hands of someone like Mr Tucker (and, for that matter, Mr Kennedy) who was in a position to assess its true significance, in the context of the opportunity that came to him to acquire the debt and the securities for $2 million.[105]

Section 13(1) of the Partnership Act - ordinary course of business

[107] All applicants apply to strike out paragraphs [119]-[122] of the FASOC (which deal with the allegations that Mr Tucker was acting in the ordinary course of the firm Tucker & Cowen, when doing the various alleged impugned things the subject of the plaintiff's claim, such that the firm is liable to the same extent as Mr Tucker).

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[104] *Isaac v Dargan Financial Pty Ltd* (2018) 98 NSWLR 343 at [167] per Gleeson JA.
[105] See, by analogy *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293 at 1312-1313 and 1319.

[108] The applicants focussed particularly on [120(k)] (an addition to the FASOC), which alleges that:

> "(k) The business of the firm was conducted by Mr Tucker and Mr Cowen over a period of many years prior to 13 April 2012 on the following basis:-
>
> (i) Tucker & Cowen often had opportunities to engage in business deals with clients including the acquisition of debts (such as the BOSI Debt) and the entry into ventures with clients (such as the MS Asia Acquisition);
>
> (ii) Mr Tucker often involved himself in such business deals;
>
> (iii) When Mr Tucker offered to Mr Cowen opportunities to engage in such business deals with clients:-
>
> A. Mr Cowen told Mr Tucker that he did not have any interest and 'didn't want to know about it';
>
> B. Mr Cowen took no step to prevent Mr Tucker from engaging in such business;
>
> C. Mr Tucker took up such opportunities 'regularly'."

[109] Particulars of subparagraph (k) are given: "That the firm conducted its business as alleged in subparagraph (k) appears from the evidence of Mr Tucker to that effect, given in his public examination in the Federal Court of Australia on 20 September 2017".

[110] The applicants submit that what is alleged are expressly unauthorised activities in Mr Tucker's private capacity, and "there is no authority to support the proposition that a failure of a partner to prevent another partner from undertaking activities in his personal capacity which are otherwise not part of the firm's business, somehow has the effect that those activities form part of the 'ordinary course of the business' of the partnership, for which both partners are liable".[106]

[111] I am not persuaded that the further arguments made by the applicants, about these paragraphs of the FASOC, lead to any different conclusion to that which I reached in *Equititrust No. 1* at [89], that it is a question of fact, to be determined at a trial, whether Mr Tucker was acting in the ordinary course of *this particular firm's* business. What is alleged in [120(k)] is not that Mr Tucker was acting in his personal capacity, but that the "business of the firm" was conducted on the basis alleged. It is a matter to be determined at trial whether that is established.

Mr Cowen - knowingly concerned / involved

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[106] See, eg, Cowen applicants' submissions at [72] and [73].

[112] Both the Cowen applicants and the Tucker applicants apply to strike out [123A] to [123G], and also [127F] of the FASOC, without leave to replead. These paragraphs plead the basis on which the plaintiff contends Mr Cowen was involved in the alleged contravention of s 183(1) by Mr Tucker and, further or alternatively, knowingly concerned in the breaches by Mr Tucker of his fiduciary duties.

[113] Paragraphs [123A] to [123G] of the FASOC have been repleaded, since [123]-[125] (in so far as they concerned Mr Cowen) were ordered to be struck out, with leave to replead: see *Equititrust No. 1* at [96]-[98].

[114] I am not persuaded to again strike out this part of the FASOC. There are plainly questions of fact (including based on inferences) which will need to be determined at trial. However, subject to one qualification, what is now pleaded in [123A] to [123E] is sufficient, in my view, to present with reasonable clearness what the plaintiff alleges against Mr Cowen.

[115] The one qualification is that the particularisation of [123E], articulated by Mr Couper QC in the course of the hearing, ought to be incorporated into the pleading:[107] to the effect that Mr Cowen was a partner of the firm, and in that capacity had responsibility for the firm's trust account; that he had the knowledge pleaded in [123B], which is to be inferred from the matters pleaded in [123C]; and had the capacity to stop the payments; and with that knowledge, by failing to take steps to cause the money not to be paid away to MS Asia, he was concerned in the contravention. Mr Clothier QC protests that these are not particulars, but material facts missing from the pleading. As discussed above, in addressing the relevant principles, there may be a fine line between a material fact and a particular. The important point is that the nature of the plaintiff's case is clearly presented. The addition of these matters to [123E], whether as part of the paragraph itself (for example, commencing with the words "in that" after the words "the Act" on the third line), or as particulars, will achieve this end.

[116] Otherwise, in my view, the amended paragraphs do address the shortcoming of the original paragraphs. There is now a clear pleading of what it is alleged Mr Cowen knew, in terms of the elements of the alleged contravention of s 183(1) by Mr Tucker and, with the amendment to [123E] just referred to, a clear pleading of the alleged involvement by Mr Cowen.

[117] As to the specific complaints made by the applicants, the first complaint is that [123A] is an irrelevant duplication of the allegation at [119] and should be struck on that basis. There is a slight difference; the emphasis at [123A] is on the allegation of fact that it was Mr Tucker who was the member of the firm who engaged in the acts alleged at [119(a) to (g)]. I do not see a difficulty with this.

[118] In relation to [123B], the complaint is in relation to the allegation that Mr Cowen knew certain things "by on or about 10 August 2012", in circumstances where the MS Asia

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[107] Oral submissions at T 2-41.

Acquisition was completed on 13 July 2012. Paragraph [123C] pleads that Mr Cowen had that knowledge is to be inferred from the facts, matters and circumstances set out in that paragraph. 10 August 2012 is the date on which the first of the Tucker & Cowen Receipts was paid out (to Tuckerloan, Mr Kennedy and Mr Howard). That was two days after the SLOT payment (of just over $2 million) was paid into the Tucker & Cowen trust account. The facts, matters and circumstances from which Mr Cowen's alleged knowledge is said to be inferred span a period of time prior to 10 August 2012 and, in particular, include matters which occurred in the period from 22 June 2012, until after the MS Asia Acquisition was completed, when Mr Tucker was overseas. The complaint is that the pleading that Mr Cowen had knowledge of certain things "by" a particular date is not a pleading that he had that knowledge prior to that date (in particular, at the time of the MS Asia Acquisition). I reject that argument. Reading the whole of [123B] and [123C] together, it is clear that what is being alleged is that it is to be inferred that Mr Cowen had knowledge of what Mr Tucker did, in terms of his participation in and profit from the MS Asia Acquisition, and that he had improperly used information obtained by him as a result of acting as the solicitor for, and being a director of, Equititrust, in doing that (relevantly, at times prior to 10 August 2012) and that Mr Cowen was concerned in the breach of duty by Mr Tucker by failing to do anything to stop the money being paid out of the trust account (the first occasion on which that occurred being 10 August 2012).

[119] There is a further complaint about the use of the word "nature" in phrase "the *nature* and value of the assets of Equititrust and the EPF" in [123B(c)], on the basis that what is earlier alleged, against Mr Tucker, is knowledge of the "likely recoverable value" of the EPF Loan Book, not the *nature* of the assets. This is a pedantic complaint which lacks substance. It is apparent, from [29], [32] and [44A] of the FASOC[108] that the likely recoverable value of the EPF Loan Book is alleged to be informed by knowledge which Mr Tucker had, from information to which he had access by reason of acting as a director, of details of the borrowers, guarantors and the associated securities in respect of the various loans due to Equititrust as trustee of the EPF (its assets). Those things plainly inform the nature and value of the assets.

[120] The applicants' arguments about lack of confidentiality of some of the information alleged to have been obtained by Mr Tucker are also repeated in this context. It is unnecessary to say more about this.

[121] A complaint is made that "no attempt has been made to identify what knowledge alleged in [123B] is to be inferred from what facts alleged in [123C]".[109] I do not accept that, to be sufficient, a pleading of this kind of allegation must specifically match up an allegation of a particular aspect of the knowledge alleged, with a specific fact from which the knowledge is said to be inferred. That would be artificial in the extreme. There is also a complaint that the "pleaded narrative" in [123C] does not support the knowledge alleged. That is not a matter to be determined on this strike out

[108] See also the Consolidated Particulars (CFI 84).
[109] See, for eg, Cowen applicants' submissions at [82].

application – it is a matter which will depend on the evidence which is lead, and the view formed by the trial judge about that evidence and in terms of whether the pleaded inference is found to be reasonable.

[122] The Cowen applicants point to evidence before the court on these applications, to contend that certain allegations are "not true" or "made up".[110] For example, the allegation in [123C(e)] that during Mr Tucker's absence overseas, Mr Cowen was the only partner in the office available to supervise Ms Withers' conduct of the MS Asia Acquisition is said to be "not true". The submission that this is not true is based on Mr Tucker's affidavit (CFI 76) at [90]. It is also said to be inconsistent with [66] of the FASOC, which pleads an email Mr Tucker sent to Ms Withers on 26 June 2012, asking her to "look after this [MS Asia Acquisition] in my absence". I do not accept that is the case.

[123] Assertions of allegations being "made up" are made in relation to the allegation in [123C(p) to (s)] that Mr Cowen gave instructions to abandon a claim pursuant to a lien. Particular documents are hyperlinked within these allegations. The Cowen applicants dispute that those documents can be construed as abandonment of a lien. This is an argument about the effect of a particular piece (or pieces) of correspondence, and a matter for determination at trial.[111] The assertion of being "made up" is also made in respect of [123C(gg)], which alleges that it is to be inferred (from the foregoing paragraphs) that Mr Cowen "authorised payment of or otherwise knew that Tucker & Cowen had" made the payments to Tuckerloan, Mr Kennedy and Mr Howard on 10 August 2012. Reference is made to evidence, in the affidavit(s) of Mr Tucker, that *he* authorised those payments.

[124] I am not persuaded that in relation to any of these matters a basis for striking out the allegation has been demonstrated. These are matters that the Cowen applicants can readily plead by way of defence; and, if they see fit, make a proportionate and appropriate request for particulars of particular allegations. I am not persuaded, in the circumstances of this case, to make final determinations of matters of fact, on an interlocutory application such as this, seeking orders for striking out without leave to replead.

[125] There are set out in [123C] an extensive list of facts, matters and circumstances on which the plaintiff relies as supporting the inference that Mr Cowen knew the things alleged in [123B]. Those may or may not be established, on the evidence at trial; and the inference said to flow may or may not be found to be a reasonable inference. But the allegations are sufficiently clear to enable the Cowen applicants to know the case that is made against them, and to be able to respond.

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[110] Cowen applicants' submissions at [83].

[111] See the correspondence particularised at [123(p)] of the FASOC; see also, preceding this, the email exchanges on 12 July 2012 (affidavit of Pleash, volume 4 of the exhibits (CFI 107) at p 1016-1018).

[126] As to [123D], this pleads, in the alternative to [123B], that Mr Cowen knew the facts alleged in [123B] by reason of having been exposed to the obvious, by virtue of the facts, matters and circumstances pleaded and referred to in [123C], and choosing not to inquire into Mr Tucker's participation in the MS Asia Acquisition. The authorities[112] support the proposition that this is within the categories of knowledge which is relevant in this context.

[127] Paragraph [123G] pleads that "[f]urther or alternatively, in those premises, Mr Cowen was knowingly concerned in and a party to the breaches by Mr Tucker of his fiduciary duties in paragraphs 49A, 49B and 51F hereof".

[128] The complaints made about this paragraph include: that the reference to "fiduciary" is incorrect, in so far as it includes the duty referred to in [51F]; that the "premises" are not identified; and that there is a failure to plead an allegation of participating with knowledge in a dishonest and fraudulent design. As to the "premises" point, it seems to me that reading [123E] to [123G], in sequence, it is clear that "those premises" means [123E], which in turn means [123A] to [123D]. But that could readily be put beyond doubt by minor amendment. As to the substantive point, all that is missing from the pleading is the express words "dishonest and fraudulent design". There is no reason to conclude that those words need to be used, in order for the pleading to be sufficient. The point is that Mr Cowen can only be held liable as an accessory to Mr Tucker's alleged breach of trust or fiduciary duty if the requisite knowledge[113] is established, and if the breach is established to be of a sufficiently serious kind that it can be said to merit the description "dishonest and fraudulent".[114] That will be an objective question of fact to be determined at the trial. The plaintiff contends that is how the alleged breach of trust and duty by Mr Tucker ought to be described. The defendants no doubt will contend otherwise.

[129] Paragraph [127F] pleads that as a result of the contravention of s 183 of the *Corporations Act* by Mr Cowen referred to in [123F], Equititrust suffered damage within the meaning of s 1317H(1) of the Act, namely the damage referred to in [127B] and [127C]. The Cowen applicants submit that, even if the plaintiff's knowing involvement case could be made out, the allegations are of knowledge from August 2012 (which post-dates the MS Asia Acquisition). Accordingly, it is said the causation hypothesis pleaded in [127B] and [127C], which starts with the proposition that had Mr Tucker not contravened s 183, the MS Asia Acquisition would not have occurred, does not work in so far as Mr Cowen's alleged liability is concerned. In response, the plaintiff submits one has to read [127B] and [127C] together; that the causation hypothesis pleaded in [127B] is the framework within which the damage alleged to have been suffered by the plaintiff occurs; and that damage includes the MS Asia Profits

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[112] Referred to in footnote 113 below.

[113] Including actual knowledge, wilful shutting of the eyes to the obvious and knowledge of circumstances which would indicate the facts to an honest and reasonable person: cf *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [174]-[177]; see also *Abeles v PA (Holdings) Pty Ltd* (2000) 18 ACLC 867 at [86]-[89] per Bergin J; *Re HIH Insurance; ASIC v Adler* (2002) 168 FLR 253 at 312 [209] per Santow J.

[114] Ibid at [179]-[186].

([127C(a)], defined in [112C]), the bulk of which is the money paid out of the trust account after 10 August 2012.[115] I accept that; I can see no basis for striking out [127F].

Other matters

[130] The applicants submit that, as the proceeding has been discontinued as against Mr Kennedy and MS Asia, paragraphs of the FASOC containing allegations of breach of duty by Mr Kennedy should be struck out. The plaintiff submits that the allegations concerning the duties owed by, and alleged wrongful conduct on the part of, Mr Kennedy – the other controller of MS Asia – remain relevant to the challenge to the validity of the MS Asia Acquisition and MS Asia's entitlement to recover the Tucker & Cowen Receipts in discharge of the BOSI Debt (see [49B] and [51B] of the FASOC). I accept the plaintiff's submission in this regard.

[131] The applicants also complain that the pleading variously refers to Equititrust and to Equititrust as trustee of the EPF, in a manner which is confusing. This was not addressed by any party in their oral submissions at the hearing, and does not appear to have been addressed by the plaintiff in its written submissions. I am not in a position to determine whether there is any merit to this complaint. I propose to leave this to the plaintiff, amongst the other matters referred to in paragraph [134] below, to consider whether any amendment is warranted.

[132] The Tucker applicants complain about [131(g)] of the FASOC. In [131], the plaintiff claims compound interest and indemnity costs ought to be awarded against Mr Tucker, in the light of a range of facts, matters and circumstances. One of those, in (g), is that Mr Tucker "has had the opportunity to use the fruits of his breaches in trade or business, including in the companies and trusts and the superannuation fund the subject of the summonses issued in the Examination Proceedings on 15 June 2017". That is sought to be struck out because "on no basis" could the allegation be a basis for compound interest and indemnity costs because it is not alleged the opportunity was ever acted on and, further, because the Tucker applicants perceive the pleading in [131(g)] to be an attempt to obtain disclosure of documents relating to Mr Tucker's trusts and superannuation funds, which was refused in Federal Court proceedings. No authority was relied upon to support the argument that what appears in (g) is, as a matter of a law, incapable of supporting a decision to award compound interest and/or indemnity costs. As to the disclosure point, I do not accept that there is any basis for the court to conclude some kind of improper motive. It is an allegation in a pleading; the Tucker applicants are free to plead in response to it as they see fit.

[133] There will be other matters, which were not addressed in the course of any party's oral submissions, but referred to in the lengthy written submissions which were filed, which I have not specifically addressed. In particular (but not only) in relation to the Tucker applicants, although Mr O'Brien QC submitted they had been "selective" in their

[115] T 2-54.

complaints,[116] the written submissions are the antithesis of that, seeming to endeavour to attack and criticise every possible paragraph of the FASOC. It is reasonable to assume that, if any matter was not highlighted in the oral submissions, it is not regarded as a substantial point. For me to elucidate and resolve every one of the objections to the FASOC raised in the submissions would consume an unreasonable amount of further time, and in my estimation be of no perceivable benefit to progressing this proceeding, consistently with rule 5 of the UCPR, in terms of identifying the real issues in the case.[117] In any event, the parties should assume that any matter not expressly addressed by me is unlikely to have been considered a basis for striking out any part of the pleading; and, further, that it is the court's expectation that the parties will proceed to progress this proceeding, reasonably, pragmatically and efficiently, consistently with their obligations under r 5 of the UCPR.

[134] Flowing from my consideration of the matters addressed in these reasons, there are some things that may warrant amendment, or particularisation, as follows:

(1) Cross-references should be checked, to ensure they are accurate – in the sense of not referring to paragraph numbers now deleted (one example is [96D], which refers to [96], which is now deleted; another example is [108], which refers to [104] which is now deleted) and referring to all paragraphs intended to be included.

(2) As to the latter, for example, it emerged at the hearing that there are some cross-references missing in [128A] to [129A] (which should include reference to [127C]).

(3) Paragraph [28(c)].[118]

(4) The inclusion of the underlined words in paragraph [44A(c)(ii)].[119]

(5) The chapeau to [44A] (by reason of *having acted*).[120]

(6) The reference to "on the record" in [95(a)].[121]

(7) In [108(b)], there may be a typographical error in the figure of $313,200.37 referred to (cf $813,200.37 referred to in [106(a)]).

(8) In [107] (in relation to the TCSS Receipts), to expressly plead that the money was not disbursed under a direction given by or on behalf of Equititrust.[122]

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116 T 1-76.
117 Cf *Barclay Mowlem* at [9].
118 See paragraph [89] above.
119 See paragraph [80] above.
120 See paragraph [84] above.
121 See paragraph [59] above.
122 See paragraph [61] above.

(9) In the chapeau to [109C], the cross-reference to [44A] should probably be [44B];[123] and, to put the matter beyond doubt, the words "referred to in paragraph 49A hereof" could be inserted after "duties" in [109C(f)].

(10) In [109D] and [123G], the reference to "fiduciary" duty in [51F].

(11) Particularisation of [123E].[124]

(12) In [123G], the identification of the premises.[125]

(13) The matters referred to in paragraph [159] below.

[135] I propose, as discussed further below, to allow the plaintiff a fairly limited time in which to address any further amendments to the FASOC, before requiring the defendants to file their defences. The purpose is to avoid wasting time on pedantic responses in those defences.

[136] Otherwise, for the reasons set out above, the applications to strike out and, by the Tucker applicants, for summary judgment and particulars, will be dismissed.

Amendment of the claim

[137] The plaintiff applies for an order, pursuant to UCPR r 377(1) and, to the extent necessary, r 376(4), that the plaintiff have leave to file and serve an amended Claim, in the form annexed to its application filed on 19 June 2019.

[138] Only one of the proposed amendments is controversial, namely, the proposed amendment to add paragraph 36A, claiming against the fifth defendants damages for breach of contract.

[139] As to that, in *Equititrust No. 1* at [76] I referred briefly to the challenge then made by the applicants to the pleading in (what was then) [49(d)], that Mr Tucker owed a fiduciary duty to Equititrust (on its own account and as trustee of the EPF), 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". It had been accepted that this was not an incident of the fiduciary duty owed by a solicitor, but the plaintiff flagged a proposed new pleading of a contractual duty to this effect.

[140] That now appears in [102A] to [102C] of the FASOC, which are as follows:

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[123] See, for eg, [67] of the Tucker applicants' submissions.
[124] See paragraph [115] above.
[125] See paragraph [128] above.

"102A. In the premises of paragraphs 1, 2, 4 to 7, 14, 15, 28 to 33, 34 to 44, 44A, 44B 45, 49A and 95 to 96D hereof, on and after 13 April 2012:-

(a) The retainers by Equititrust of Tucker & Cowen were, relevantly, to collect debts in the EPF Loan Book;

(b) After the meeting of the directors of Equititrust on 14 June 2011, referred to in paragraph 30 hereof:-

(i) it was in financial difficulty;

(ii) the members of the EPF were likely to suffer substantial losses of their capital subscribed to the EPF, which is to be inferred from paragraphs 2(c)(iii) and 30 to 33 hereof;

(c) Tucker & Cowen acted as the solicitors for Equititrust after 14 June 2011 in the underlined Schedule 3 Retainers, as alleged in subparagraph 14(c)(iii) hereof;

(d) the following facts known by Mr Tucker were relevant to the retainers by Equititrust of Tucker & Cowen on foot on and after 13 April 2012 (as pleaded in paragraph 15 above) and had a real capacity to affect its interests, as trustee of the EPF:-

(i) that AET was to acquire the BOSI Debt and the BOSI Securities;

(ii) that AET was willing to accept only $2 million for the BOSI Debt and the BOSI Securities;

(iii) the facts referred to in paragraph 32 hereof.

Particulars

(a) The said facts were relevant to the said retainers because:-

(i) the ultimate purpose of the retainers was to maximise the recovery from the EPF Loan Book for the benefit of the beneficiaries;

(ii) the amount recovered for the benefit of the beneficiaries would be increased if the amount paid to BOSI could be reduced;

(iii) conversely, the greater the amount paid to BOSI, the less the amount recovered for the benefit of the beneficiaries;

(b) Equititrust's interests were:-

(i) to discharge its duties as trustee of the EPF, including to act in the best interests of the beneficiaries;

(ii) consequently, to minimise the amount to be paid to BOSI and any assignee of the BOSI Debt; and

(iii) therefore to maximise the sums recovered for the benefit of the beneficiaries of the EPF.

102B. In the premises of paragraph 102A hereof, Tucker & Cowen were, on and after 13 April 2012, under a duty, which arose from each of its retainers from Equititrust as trustee of the EPF, to disclose to Equititrust, by the Liquidators, the knowledge of Mr Tucker referred to in subparagraph 102A(d) above.

102C. Tucker & Cowen, in breach of their duty of disclosure referred to in paragraph 102B hereof, have not disclosed to Equititrust the knowledge of Mr Tucker referred to in subparagraph 102A(d) above."

[141] The plaintiff applies for leave to make this amendment under r 377(1)(c) UCPR, on the basis it is an amendment to the originating process, but does not involve a new cause of action; alternatively, if the amendment is considered to be the addition of a new cause of action, the plaintiff seeks leave to make the amendment under r 376(4), as it is accepted the limitation period has expired.

New cause of action?

[142] In *Borsato v Campbell* [2006] QSC 191 McMurdo J (as his Honour then was) said this in relation to the meaning of "cause of action" in r 376(4):

> "[8] The term 'cause of action' was defined in *Cooke v Gill* as being 'every fact which is material to be proved to entitle the plaintiff to succeed', a definition which many judgments have employed in the context of this rule or its equivalent: see eg *Allonnor Pty Ltd v Doran* per McPherson JA. But it has not been applied literally, for otherwise any new fact to be added to a plaintiff's case would be treated as raising a new cause of action which required leave in the context of a rule such as r 376(4). So in *Allonnor Pty Ltd v Doran* for example, there is an indication of what the Court of Appeal in *Thomas v State of Queensland* subsequently endorsed as a 'fairly broad brush comparison between the nature of the original claim and that to which it is sought to be amended'. **The dividing line is between the addition of facts which involve a new cause of action and those which are simply further particulars of the cause already claimed**, and its location involves a question of degree which can be argued, one way or the other, by the level of abstraction at which a plaintiff's case

is described. Some illustrative guidance is provided by *Allonnor Pty Ltd v Doran*; *Thomas v Queensland* and another judgment of the Court of Appeal, *Central Sawmilling No 1 Pty Ltd v Queensland*.

[9] In *Allonnor*, the plaintiff was employed by the defendant as a delivery driver, and sued for an injury to his back and neck said to have been suffered on a certain date making a certain delivery of furniture. He sought to amend to add a claim for an injury to his shoulder, allegedly caused by another delivery made to a different address but on the same day. McPherson JA 'doubted whether what was sought to be added by way of amendment really amounts to a new cause of action' but in any case held that the new cause of action (if any) arose out of substantially the same facts and the amendment should be allowed. His Honour said:

> 'On any view of what is pleaded, the plaintiff was, at the end of the day in question, left with physical injury to his body, which resulted from the same cause, which was lifting (whether on one or more than one occasion) in the course of the same employment with the same employer. It is not unreasonable to state it in this way, although admittedly it is to some extent a matter of the level of generality at which the proposition is expressed.'

[10] In *Thomas v Queensland*, the Court of Appeal disallowed an amendment of a case brought by an injured motorcyclist against the State as the authority responsible for the highway on which he was injured. His case was that there was a large amount of soil on the road surface which caused his motorcycle to lose traction and collide with another vehicle. His claim was pleaded originally on the basis that the defendant had been undertaking road works at the scene which had resulted in this soil on the road. He sought to amend to claim that the soil was there because it had been washed from a nearby embankment in a way which was attributable to poor construction of the highway in the first place. The Court held that this was a new cause of action, saying in its joint judgment:

> 'The essential elements in a claim for damages for negligence are the duty of care, breach of that duty and injury caused by that breach. Here, although only for one injury an incident is alleged, different duties, different breaches and different causes of injury are now alleged. In our view the effect of the amendment is to include new causes of action.'

> [11] In *Central Sawmilling*, the plaintiffs claimed damages for breach of contract, saying that the defendant, the State of Queensland, by three identified written agreements had promised to provide them with certain quantities of timber. They then sought to amend to plead another agreement made between various timber millers, including the plaintiffs, and the defendant by which they were to receive those amounts of timber. That was held to involve a new cause of action."[126]

[143] *Borsato* was a medical negligence claim. As originally pleaded, the plaintiff alleged a breach of duty on the part of two surgeons in the manner in which they performed surgery on him. The amendments sought to plead a breach of the duty to warn about risks of the surgery. McMurdo J found that:

> "[14] Indisputably, the breach of duty now alleged is quite distinct from that already alleged. In substance it is such a different case from an allegation of negligent performance of the surgery that it cannot be described as some further particularisation of the original claim of breach of duty. It requires the plaintiff to prove a distinct fault, necessarily prior in time to the alleged breach in the course of the surgery, and then to prove the likelihood of some sequence of events in response to a proper warning. I do not accept that it is appropriate for present purposes to characterise the duty in this new case as the same as in the existing case, but on any view the new case involves quite a different breach."

[144] McMurdo J's approach has been adopted in a number of subsequent cases: see, for example, *Wolfe v State of Queensland* [2009] 1 Qd R 97, *Jetcrete Oz Pty Ltd v Conway* [2015] QCA 272 and the discussion in *McQueen v Mount Isa Mines Ltd* [2018] 3 Qd R 1 at [44]-[55].

[145] The plaintiff submits the amendment to the claim does not seek to add a new cause of action because the original statement of claim pleaded all the material facts necessary to establish a cause of action for breach of contract; albeit the original pleading erroneously labelled the duty as fiduciary rather than contractual.

[146] As to that matter, the plaintiff's solicitor, Mr Russell, in his affidavit filed 12 August 2019 (CFI 100), describes the pleading of a duty in terms of the original [49(d)] as a fiduciary duty as an oversight (at [24]). Both the Cowen applicants and the Tucker applicants sought to challenge this characterisation; the Tucker applicants also seeking to cross-examine Mr Russell at the hearing. Although the plaintiff did not object to leave being given to cross-examine Mr Russell, it did not proceed beyond the first few introductory questions, as I formed the view that it was an unhelpful and time wasting exercise. The involvement of human beings in this process means mistakes can be made. There is no need to say more about this.

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[126] Emphasis added; references omitted.

[147] The plaintiff is right to contend that the attribution of a legal label is not determinative of the question whether a new cause of action has been added – what matters is whether the material facts were already pleaded. That is apparent from the observation of Barwick CJ in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 473 that:

> "[in] fact pleading as it was introduced in the judicature system, there is no necessity to assert or identify a legal category of action or suit which the facts asserted may illustrate, involve or demonstrate and on which the particular relief claimed is based or to which it is relevant."[127]

[148] Nevertheless, in my view the amendment does add a new cause of action, because it has been necessary to plead (at least) the additional material fact of a contractual duty arising from the pleaded retainers (see [102B] of the FASOC);[128] it is a different case from that which was previously pleaded, albeit, as discussed below, it arises out of the same or substantially the same facts; and in my view the amendment cannot be described as some further particularisation of the original claim of breach of fiduciary duty.

Leave should be granted under r 376(4)

[149] I consider leave should be granted to make the amendment.

[150] Relevantly, r 376(4) provides that the court may give leave to make an amendment to include a new cause of action in respect of which the relevant period of limitation has ended only if:

(a) the court considers it appropriate; and

(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.

[151] In *Draney v Barry* [2002] 1 Qd R 145 at [57] Thomas JA said:

> "[Rule 376(4)] allows a fairly wide discretion in that the court will not allow such an amendment unless it considers it 'appropriate' to do so and also considers that the new cause of action arises at least substantially out of the same facts as the existing cause of action. I do not think that 'substantially the same facts' should be read as tantamount to the same facts, and consider that the need to prove some additional facts is not necessarily fatal to a favourable exercise of discretion under r 376(4). If the necessary additional facts to support the new cause of action arise out of substantially the same

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[127] See also *Agar v Hyde* (2000) 201 CLR 552 at [64].

[128] In that respect, the present case is distinguishable from *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, in which the plaintiff had pleaded all the necessary material facts to invoke a right to claim damage under a particular Act, but made no reference to the Act.

> story as that which would have to be told to support the original cause of action, the fact that there is a changed focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts. In short, this particular requirement should not be seen as a straitjacket."

[152] In *Thomas v Queensland* [2001] QCA 336 at [19] the Court of Appeal clarified, by reference to this passage from *Draney v Barry*, that:

> "Of course 'the story' is a shorthand reference to the matters that the plaintiff has to prove."[129]

[153] In *Paul v Westpac Banking Corporation* [2017] 2 Qd R 96 at [15] Fraser JA (with whom Gotterson JA and Douglas J agreed) said:

> "In an appropriate case leave to amend to add a new cause of action which is statute-barred may be granted even though it involves reliance upon facts in addition to those out of which a pleaded cause of action arises, provided that those additional facts are substantially the same as facts already pleaded. The question in each case is whether the facts out of which a new cause of action arises are substantially the same as facts relied upon in a cause of action for which relief has already been claimed in the proceeding. As has been mentioned in other cases, this may involve questions of degree and fine judgment, but the answer to that question should be informed by an appreciation that the policies underlying the applicable statute of limitation may be inappropriately undermined if the required analysis is conducted at too high a level of generality..."[130]

[154] But as McPherson JA said, in relation to the predecessor to r 376(4) (in the former *Supreme Court Rules*), in *Allonnor Pty Ltd v Doran* [1998] QCA 372 at [8]:

> "… The policies underlying such statutes [of limitation] are, it is said, not 'threatened by an amendment that merely adds a ground of recovery or defence arising out of a transaction or occurrence already in suit'. See James Hazard Leubsdorf *Civil Procure* §4.23, at 226 (4th ed). Having identified those policies, the authors go on to add:
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> > 'This is usually true even when the new ground involves a variation in the facts. A party will likely collect and preserve all the evidence relating to a transaction or occurrence, not just those aspects of it that support or defeat a single legal theory. Moreover, the defendant's sense of security over the transaction or occurrence has already been disturbed by the pending action.'

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[129] See also *Althaus v Australia Meat Holdings Pty Ltd* [2007] 1 Qd R 493 at [33]-[36] per Keane JA.
[130] References omitted.

> The information collected in this case by solicitors for WorkCover, which is described in the reasons of Williams J on this appeal, confirms the observations of those authors. The defendant in this instance cannot have been surprised or perceptibly disadvantaged by the additional allegations which the amendment seeks to add…"[131]

[155] Having regard to these principles, I am satisfied both that it is appropriate to give leave to make the amendment, and that the new cause of action arises out of the same or substantially the same facts as causes of action for which relief has already been claimed in the proceeding. This case falls squarely within the comments made by McPherson JA in *Allonnor*, as an amendment that merely adds a ground of recovery "arising out of a transaction or occurrence already in suit".

[156] I do not accept that there has been unacceptable or disentitling delay on the part of the plaintiff. The failure to plead this aspect of the case as a breach of contract initially is explained on the basis of oversight (or error), and as soon as the challenge to the original pleading of a fiduciary duty was raised, the plaintiff flagged an amendment to plead the duty as a contractual one. Protestations of delay in the progress of this proceeding sit ill in the mouths of the defendants, in my respectful view.

[157] Nor do I accept that there is any particular prejudice caused to the defendants by the amendment, as the factual matters relied upon are already part of the proceedings which will need to be addressed, both in terms of pleading and evidence, by the defendants. The assertions of prejudice by the Tucker applicants in particular are not rational or reasonable (for example, suggesting the amendment would add two weeks to the length of any trial).

[158] The Cowen applicants and the Tucker applicants make a number of complaints about the pleading of the breach of contract claim itself, which are relied upon as supporting the exercise of discretion to refuse leave to make the amendment. In some respects, these repeat complaints made about other parts of the FASOC, which have already been addressed above. One of the complaints relies upon the evidence of Mr Tucker to the effect that, in the relevant time period between April and July 2012, there were no retainers of Tucker & Cowen by Equititrust.[132] However, it is clear (as in relation to other matters, addressed above) that this is a controversial factual matter,[133] which also raises disputed legal issues, which require determination at a trial.

[159] Of the many further complaints, the following I consider have merit, in the sense of warranting some amendment to the pleading:

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[131] See also the summary of principles in the decision of Bond J in *Firstmac Ltd v Hunt & Hunt (A Firm)* [2018] QSC 258 at [17]-[26].

[132] See the affidavit of Tucker (CFI 112).

[133] Cf the letter from Tucker & Cowen to Balmain dated 19 June 2012, referred to in particulars to [64] of the FASOC; and the affidavit of Daniel Davey sworn 9 October 2012, filed in separate proceedings in this court instituted by Equititrust, identifying that Tucker & Cowen are the solicitors for the plaintiff (at [1]) and continued to act including up to June 2012 (at [7]-[11]) (affidavit of Russell (CFI 102) at pp 43-52).

(1) There should be a pleading of the alleged implied term said to support the duty pleaded in [102B]. Mr Couper QC submits this is obvious,[134] and that may be so, but it should be pleaded.

(2) The references, variously, to retainers in [102A] is somewhat confusing. Whilst I understand the reason for the inclusion, within the premises of [102A], of [14] and [15] of the FASOC (as part of the broader background and context), as clarified by Mr Couper QC for the plaintiff, the relevant time period for the purposes of this part of the claim is between 13 April 2012 and 18 July 2012.[135] However:

(a) Paragraph [102(a)] pleads that on and after 13 April 2012 "[t]he retainers by Equititrust… were, relevantly, to collect debts in the EPF Loan Book", but which retainers is not specified.

(b) Paragraph [102(c)] pleads that Tucker & Cowen acted as the solicitors for Equititrust after 14 June 2011 in the underlined Schedule 3 Retainers.

(c) Paragraph [102(d)] pleads that the facts set out in (i), (ii) and (iii) known by Mr Tucker were relevant to "the retainers by Equititrust… on foot on and after 13 April 2012 (as pleaded in paragraph 15 above)…". The retainers pleaded in paragraph 15 are the proceedings in schedule 3 mentioned in schedule 9 (of which there appear to be about 40) and the proceedings in schedule 4 (the Meridien proceeding).

(d) Paragraph [102B] then pleads a duty owed by Tucker & Cowen, on and after 13 April, "which arose from each of its retainers from Equititrust".

Since the plaintiff's case is that the relevant time period is between 13 April and 18 July 2012, the reference to "the retainers" and "each of its retainers" in [102(a)] and [102B] is vague, and should be corrected. It seems fair to assume the relevant retainers are those referred to in [102(d)]. If that is correct, these paragraphs could readily be amended to clarify this, and avoid complicated responses by way of defences.

[160] Otherwise, I consider the pleading raises an arguable case, in terms of the pleaded debt collection retainers giving rise to a duty on the solicitor to advise the client of things within their knowledge which have the capacity to affect the client's interest in maximising the amount recoverable,[136] which ought to be permitted to be dealt with in

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[134] T 2-73.

[135] T 2-52.

[136] In this regard, the plaintiff refers to and relies upon, inter alia, *Spector v Ageda* [1973] Ch 30 at 48 per Megarry J (as to the obligation on a solicitor, instructed to carry through a transaction by way of discharging an obligation, to advise the client of what the solicitor already knows in relation to the enforceability of the obligation); *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 213-215 per Mahoney JA (referring to the principle that a solicitor owes to his client the duty to tell him of everything of which he knows which will be of assistance to the client in relation to the matters within his retainer); *Littler v Price* [2005] 1 Qd R 275 at [6] per Jerrard JA and [37]-[51] per Cullinane J; and *Robert Bax & Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476 at [54]-[60] per Muir JA.

the ordinary course. There are clearly strongly contested factual and legal matters to be determined. But I am not persuaded that the plaintiff should be summarily foreclosed from prosecuting this claim. The many challenges raised by the applicants to the plaintiff's allegations can readily be pleaded by them by way of defence; and dealt with on the basis of full legal argument in due course.

Proposed orders

[161] The orders to be made are as follows:

(1) The plaintiff has leave to amend the Claim in the form annexed to the application filed on 19 June 2019.

(2) The amended application filed on 12 August 2019 by the Tucker applicants is dismissed.

(3) Paragraph 1 of the amended application filed on 15 July 2019 by the Cowen applicants is dismissed.

(4) Within a specific time frame (I have in mind 14 days, but will hear from the parties) the plaintiff file and serve a further amended statement of claim, which addresses the issues referred to in paragraph [134], and any other amendments the plaintiff considers desirable (having regard, inter alia, to the matters addressed in its submissions). To be clear, the intention of making this order is to avoid pedantic and time-wasting responses in the defences.

(5) Within a specific time frame (as to which, again, I will hear from the parties) the defendants file and service their defences.

(6) Within a specific time frame, the plaintiff file and service its reply.

(7) The parties confer with one another, and conduct themselves reasonably and cooperatively, in relation to the matters the subject of practice direction 18 of 2018, and the future progress of the matter generally and either provide agreed directions following the close of pleadings, or alternatively cause an application for directions to be made within fourteen days of the close of pleadings so that such directions can be made by the court.

[162] I will hear from the parties as to the costs of these applications. However, to facilitate the efficient disposition of the issue of costs, I indicate that I consider the respective defendants should pay the plaintiff's costs of their respective strike out (and summary judgment) applications. The minor respects in which I have found some amendment is warranted to the FASOC did not justify the enormous amount of resources (in terms of time, including the court's time, and money) invested into the broad ranging attack on the FASOC, most of which I have found lacked merit. As to the plaintiff's application to amend the claim: the application was one the plaintiff had to bring; but the

respective sides of the argument have had varying levels of success. This may indicate the appropriate order is that each party bears its own costs.

[163] For the purpose of hearing from the parties as to the appropriate time frames for proposed orders 4 to 6 above, and in relation to costs, should that be necessary, the matter will be listed for further hearing at 2.00 pm on Wednesday, 9 October 2019. Otherwise, if there is no dispute about those matters, a draft order may be submitted by email to my associate.