SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Limited (in liq) v EY (also known as Ernst & Young) & Ors* [2019] QSC 246

PARTIES: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288**
(plaintiff)

v

EY (ALSO KNOWN AS ERNST & YOUNG) (A FIRM)
(first defendant)

and

PAULA MCLUSKIE
(second defendant)

and

MICHAEL JAMES REID
(third defendant)

and

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 007 208 461
(first third party)

and

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND (RECEIVERS APPOINTED) ARSN 110 247 875
(second third party)

and

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 007 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND (RECEIVERS APPOINTED) ARSN 122 052 868

(third third party)

and

TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679 AS RESPONSIBLE ENTITY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511
(fourth third party)

and

LISA MAREE DARCY
(fifth third party)

and

EGHARD VAN DER HOVEN
(sixth third party)

and

FRANCENE MAREE MULDER
(seventh third party)

and

JOHN FRANCIS O'SULLIVAN
(eighth third party)

and

SIMON JEREMY TICKNER
(ninth third party)

and

GRANT PETER FISCHER
(tenth third party)

and

ANGELO VENARDOS
(eleventh third party)

and

CAROLYN ANNE HODGE
(twelfth third party)

and

MICHELLE JACKSON
(thirteenth third party)

and

BRUCE MACKENZIE

(fourteenth third party)

and

ALEXANDER DAVID MONAGHAN
(fifteenth third party)

FILE NO/S:	BS No 2166 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application filed 21 June 2019
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2019 Written submissions 2 August 2019
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application for leave to proceed is dismissed.** **2. The third party notice is struck out against the first, second, third and fourth third parties.** **3. The third party statement of claim is struck out.** **4. The first, second, third and fourth third parties are removed as parties to the proceeding.** **5. Leave is granted to the defendants to re-plead the third party statement of claim against the remaining third parties.**
CATCHWORDS:	CORPORATIONS – WINDING UP – LIQUIDATORS – ACCOUNTS AND AUDITS – Where the defendants were the firm of auditors appointed to audit the financial statements and compliance plan of the FMIF – Where the defendants breached their obligations as auditors – Where the defendants issued a third party notice purporting to join LMIM as first, second and third third party in three different capacities – Whether the claim made by the defendants against LMIM in the third party notice should be allowed to proceed – Whether the defendants have established that their claim raises a serious question to be tried. *Abbott v Commissioner of Police* [2017] 1 Qd R 592, cited *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318, cited *Astley & Ors v Austrust Ltd* (1999) 197 CLR 1, cited *Australian Securities Commission v Marlborough Gold Mines Ltd*

(1993) 177 CLR 485, cited
Auxil Pty Ltd v Terranova (2009) 260 ALR 164, cited
Bialkower v Acohs Pty Ltd (1998) 83 FCR 1, cited
Bone v Commissioner of Stamp Duties (1972) 2 NSWLR 651, cited
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20, cited
Burnells Pty Ltd (in liquidation) v Walsh [1979] Qd R 440, cited
Cooper v Commissioner of Taxation (2004) 210 ALR 635, cited
Crouch and Lyndon v IPG Finance Australia Pty Ltd [2014] 1 Qd R 512, cited
Daniels v Anderson (1995) 37 NSWLR 438, cited
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241, cited
Farah Constructins Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, cited
Friend v Brooker (2009) 239 CLR 129, cited
Hamilton Island Enterprises Pty Ltd v Commissioner of Taxation [1982] 1 NSWLR 113, cited
Ingot Capital Investments Pty Ltd & Others v Macquarie Equity Capital Markets Ltd & Others (2003) 45 ACSR 224, cited
Kuhl v Zurich Financial Services (2011) 243 CLR 361, cited
La Macchia v Minister for Primary Industries and Energy (1992) 110 ALR 201, cited
Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques (No 2) [2018] 3 Qd R 28, cited
Littlewood v George Wimpey & Co Ltd [1953] 2 QB 501, cited
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494, cited
McCracken v Phoenix Constructions (Qld) Pty Ltd [2013] 2 Qd R 27, cited
Moore v Devanjul Pty Ltd [2012] QSC 66, cited
New South Wales v Lepore (2003) 212 CLR 511, cited
NRNQ v MEQ Nickel Pty Ltd [1991] 2 Qd R 592, cited
Perre v Apand Pty Ltd (1999) 198 CLR 180, cited
Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165, applied
Re Amerind Pty Ltd (recs and mgrs apptd) (2017) 121 ACSR 206, cited
Re Gordon Grant & Grant Pty Ltd [1983] 2 Qd R 314, cited
Selig v Wealthsure Pty Ltd & Ors (2015) 255 CLR 661, cited
Selig v Wealthsure Pty Ltd (2013) 94 ACSR 308, cited
Simonius Vischer & Co v Holt & Thomson [1979] 2 NSWLR 322, applied
Sullivan v Moody (2001) 207 CLR 562, cited
Wolmershausen v Gullick [1893] 2 Ch 514, cited
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, cited

Australian Securities and Investments Commission Act 2001 (Cth),

ss 12BAB, 12DA, 12GF
Civil Liability Act 2003 (Qld), s 28
Civil Proceedings Act 2011 (Qld), ss 18, 20
Competition and Consumer Act 2001 (Cth), s 131A, Schedule 2 ss 18, 236
Corporations Act 1989 (ACT), ss 995, 1005, 1325

Corporations Act 2001 (Cth) ss 182, 301, 302, 500, 556, 601FC, 601HA, 601HG, 1041H, 1041I, 1041L, 1041N, 1041P, 1313E, 1317DA, 1317H, 1317J, 1324, 1325

Fair Trading Act 1989 (Qld), s 6, 38, 99

Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)
Jurisdiction of Courts (Cross-Vesting) Act 1987 (Qld)
Law Reform Act 1995 (Qld), ss 4A, 5, 6, 10
Law Reform (Contributory Negligence) Act 2001 (Qld) ss 2, 4, 5

Trade Practices Act 1974 (Cth), ss 51AF, 52, 82, 87
Trusts Act 1973 (Qld), s 59
Uniform Civil Procedure Rules 1999 (Qld), rr 18, 69, 304, 309, 371
Wrongs Act 1936 (SA), s 27A

COUNSEL:	D Ananian-Cooper for the plaintiff A Leopold QC and A Shearer for the defendants P Ahern for the fourth third party D O'Sullivan QC and D Turner for the second and third third parties S Russell (solicitor) for the first third party
SOLICITORS:	Gadens for the plaintiff Clifford Chance for the defendants Squire Patton Boggs for the fourth third party HWL Ebsworth for the second and third third party Russells for the first third party

JACKSON J:

[1] By a third party notice and statement of claim,[1] the defendants claim relief against the third parties identified in the title to the proceeding as set out above.

[2] The plaintiff is LM Investment Management Limited (receivers and managers appointed) (in liquidation) ("LMIM") as responsible entity for the LM First Mortgage Income Fund (receiver appointed) ("FMIF"). The FMIF is a registered managed investment scheme within the meaning of Chapter 5C of the *Corporations Act* 2001 (Cth) ("CA"). LMIM is being wound up in

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1 Filed on 1 March 2019.

a creditors' voluntary winding up. The FMIF is subject to an order that it be wound up in accordance with its constitution and orders of the court. David Whyte is the receiver, appointed by an order of the court, of the scheme property of the FMIF [2] and brings the proceeding in the name of LMIM as responsible entity for the FMIF under the powers conferred on him by that order[3]. Accordingly, in substance, Mr Whyte brings the proceeding on behalf of the members of the registered scheme who are the unit holders of the FMIF and who are beneficiaries under the trust of the scheme property[4] constituted by that registered scheme.

[3] The defendants are the firm of auditors who in relevant years were appointed as the auditors of the financial statements of the FMIF,[5] and as auditors of the compliance plan of the FMIF.[6] The second defendant and third defendant are the individuals who were the lead auditors for each of those categories of audit.

[4] It will be necessary to expand on the plaintiff's claims against the defendants to a limited extent in these reasons, but the short statement is that they are for damages or compensation for breaches of the defendants' obligations as auditors for the audits of the financial statements of the FMIF and the audits of LMIM's compliance with the compliance plan for the FMIF for the year ending 30 June 2008 through to the year ending 30 June 2012. The statement of claim is lengthy and complex. Previous challenges to parts of it have resulted in amendments. As well, other amendments have been made by the plaintiff, with the result that the sixth further amended statement of claim was filed on 15 April 2019.

[5] On 13 November 2018, the court directed the defendants to file any relevant third party notices in the proceeding on or before 1 March 2019. The third party notice under consideration was filed on 1 March 2019.

[6] At least in part due to the delays on the part of the plaintiff in finalising the statement of claim, the defendants did not file a defence until 25 September 2019.

[7] The point of present concern is that the third party notice purported to join LMIM as first, second and third third party in three different capacities: as first third party in its own right, as second third party as responsible entity for the LM Currency Protected Australian Income Fund ("CPAIF") and as third third party as responsible entity for the LM Institutional Currency Protected Australian Income Fund ("ICPAIF").

[8] Any claim by the defendants against LMIM as a third party, in any of those capacities, is a claim constituting an action or other civil proceeding against a company in liquidation. Because LMIM is subject to a creditors' voluntary liquidation, no such action or other civil proceeding is

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2 *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

3 *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

4 *Corporations Act* 2001 (Cth), s 601FC(2).

5 *Corporations Act* 2001 (Cth), s 301 and 302(b).

6 *Corporations Act* 2001 (Cth), s 601HG.

to be proceeded with, except by leave of the court and subject to such terms as the court imposes.[7] The question for decision is whether the claim made by the defendants against LMIM in the third party notice should be allowed to proceed.

A procedural irregularity

[9] As already stated, LMIM as responsible entity of the FMIF, by Mr Whyte, is already a party to the proceeding as the plaintiff. When leave was given for the defendants to issue a third party notice or notices, it was not given on the basis that LMIM would be made a third party.

[10] That is not surprising, because provision is made in the rules of court for a defendant to file a third party notice if the defendant wants to claim against a person who is not already a party to the proceeding.[8] Where the party against whom a defendant wishes to make a claim is a plaintiff, the rules of court provide for the defendant's claim to be made by way of counterclaim.[9] Where a defendant wishes to add an additional person other than the plaintiff, if the plaintiff is also made a party to the counterclaim, the defendant may do so by counterclaim against the added party.[10] In addition, it is provided that a third party notice may not be filed if the claim may be made by counterclaim.[11]

[11] These rules were not observed by the defendants in filing a third party notice against LMIM as first third party, second third party and third third party. Of course, it is common for a claim to be brought by or against a trustee as such. The different capacities in which a plaintiff may seek relief are at least recognised by the rules of court.[12] Even so, the defendants erred in joining the plaintiff in its different capacities as a third party, rather than bringing their cross-proceeding by way of counterclaim but, in principle, there is no objection to the defendants making their claim against the plaintiff in its different capacities.

[12] Accordingly, I proceed to consider the question whether leave should be granted without focussing on whether there was misuse of the third party procedure and consider, instead, the substance of whether leave to proceed should be granted against LMIM as a company in liquidation, in any of the relevant capacities, on the assumption that the third party claim may have been made by a counterclaim, with the addition of LMIM in capacities other than as responsible entity for the FMIF as a defendant to the counterclaim.

Principles for the grant of leave to proceed

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7 *Corporations Act* 2001 (Cth), s 500(2).

8 *Uniform Civil Procedure Rules* 1999 (Qld), r 192.

9 *Uniform Civil Procedure Rules* 1999 (Qld), rr 175 – 177.

10 *Uniform Civil Procedure Rules* 1999 (Qld), r 178.

11 *Uniform Civil Procedure Rules* 1999 (Qld), r 206.

12 *Uniform Civil Procedure Rules* 1999 (Qld), r 60(1).

[13] The parties are not in substantial dispute about the applicable principles for the grant of leave to proceed against a company in liquidation that are relevant to this application. They may be summarised briefly as follows.

[14] First, where a company in liquidation is the plaintiff in a proceeding, a counterclaim against the company is subject to the requirement of leave.[13]

[15] Second, the purpose of the requirement of leave is to avoid the multiplicity of actions that would be both expensive and time consuming as well as in some cases, unnecessary, if leave were not required.[14]

[16] Third, a person applying for leave must show some reason to depart from the ordinary procedure of lodgement of a proof of debt and must establish that its claim raises a serious question to be tried in the sense that the claim has a solid foundation and gives rise to a serious dispute.[15]

[17] The question for decision resolves, accordingly, to whether the third party notice and statement of claim satisfy the third requirement.

The hearing

[18] The first third party, by the liquidator, the second and third third parties, by Said Jahani,[16] the fourth third party as responsible entity for the WFMIF and the plaintiff, by Mr Whyte, all resist the grant of leave.

[19] Written submissions were filed before the oral hearing of the application on 26 July 2019. Pursuant to directions made at the conclusion of the oral hearing, the defendants filed a further written submission. Further responsive submissions on both sides of the dispute were filed thereafter.

Discontinuance against second, third and fourth third parties

[20] By the further written submissions, the defendants abandoned paragraphs 1 to 5 of the relief sought in the third party notice (and it follows that they abandoned the same paragraphs of the relief claimed in the third party statement of claim). Correspondingly, they abandoned their application for leave to proceed to the extent of the factual allegations raised in paragraphs 19 and 71 to 112 inclusive of the third party statement of claim. Accordingly, the defendants accept that their claims against the second third party, third third party and fourth

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13 *Burnells Pty Ltd (in liquidation) v Walsh* [1979] Qd R 440; *Ingot Capital Investments Pty Ltd & Others v Macquarie Equity Capital Markets Ltd & Others* (2003) 45 ACSR 224.

14 *Re Gordon Grant & Grant Pty Ltd* [1983] 2 Qd R 314.

15 *Ingot Capital Investments Pty Ltd & Others v Macquarie Equity Capital Markets Ltd & Others* (2003) 45 ACSR 224, [47].

16 An out of court receiver and manager appointed to the assets of the CPAIF and ICPAIF by a secured creditor.

third parties must fail, and indicated that they discontinued the proceeding comprised in the third party notice and third party statement of claim against those defendants.[17]

[21] Although the defendants submit that the proceeding has been discontinued as against those third parties, discontinuance requires the filing of a notice of discontinuance[18] which has not yet occurred. Accordingly, it is appropriate to order that the abandoned parts of the third party notice and the third party statement of claim be struck out and that the second third party, third third party and fourth third party be removed as parties from the proceeding.[19]

The capacity of LMIM as First Third Party

[22] Because a trust has no legal personality, it cannot be made a party to a proceeding. The appropriate party, when a claim is sought to be made on behalf of or against the beneficiaries and assets of a trust, is the trustee. Although the rules of court do not make the specific provision in that regard that is made by the civil procedure rules in other jurisdictions, a proceeding by a trustee in that capacity in this jurisdiction is ordinarily expressly indorsed on that basis, as is a proceeding against a trustee in that capacity. There are at least three reasons why that is done under current statutory provisions. First, s 59 of the *Trusts Act* 1973 (Qld) expressly provides that a trustee of any property in that capacity may sue or be sued by himself or herself in any other capacity, subject to the directions of the court as to the manner in which differing interests are to be represented. Second, s 18 of the *Civil Proceedings Act* 2011 (Qld) provides that in a proceeding started and continued by or against a person as representing all of the persons who have the same interest and could have been parties to the proceeding, an order binds the persons who have the same interests as the representative party and could have been parties to the proceeding, unless the court orders otherwise. Third, r 18 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that if a person is suing or being sued in a representative capacity, the plaintiff or applicant must state the representative capacity on the originating process. Rule 18 has been construed as applying to a proceeding brought by or against a trustee in that capacity.[20] That is a beneficial construction, which should be followed.

[23] LMIM's claim as plaintiff against the defendants is brought "in its capacity as responsible entity", thereby clearly indicating that the claim is brought as trustee of the FMIF, because the responsible entity of a registered scheme is a trustee of the scheme property.[21] However, the third party notice of the defendants against LMIM as first third party does not state that it is brought against LMIM as responsible entity or as trustee of the FMIF. Accordingly, the apparent indication is that LMIM is sued as first third party in its own right or personal capacity. There is nothing in the third party notice, as an originating process in the nature of a claim that suggests the contrary conclusion.

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17 *Uniform Civil Procedure Rules* 1999 (Qld), r 304(1).

18 *Uniform Civil Procedure Rules* 1999 (Qld), r 309(1).

19 *Uniform Civil Procedure Rules* 1999 (Qld), r 69(1).

20 *Moore v Devanjul Pty Ltd* [2012] QSC 66.

21 *Corporations Act* 2001 (Cth), s 601FC(2)

[24] Turning to the third party statement of claim, the defendants' claims against LMIM as first third party are made in paragraphs 21, 26, 59, 63, 68, 69, 70, 119 and 120. Some of those claims are alleged expressly to be the liabilities of LMIM as responsible entity for the FMIF. It might follow that the defendants' failure to name LMIM in the third party notice as the responsible entity or trustee of the FMIF as the first third party was an error which could be treated as a procedural irregularity and corrected.[22] However, part of the third party statement of claim that the defendants expressly abandon are paragraphs 71 to 78. Those paragraphs expressly allege that liabilities of LMIM were claims against LMIM in its capacity as the responsible entity of the FMIF and that LMIM has a right of indemnity and lien over the assets of the FMIF. As those allegations have been abandoned by the defendants it appears to follow that the defendants' claim against LMIM as first third party is only brought against LMIM in its own right and is not pursued on the basis that LMIM has a right of indemnity in respect of its alleged liabilities from the scheme property of the FMIF.

[25] Once that point is reached, two other consequences emerge. First, if the proceeding is pursued against LMIM in its own right and not as responsible entity or trustee of the FMIF as such, the liquidator is the appropriate person to represent LMIM in defending that claim, if at all. Second, there is no question that LMIM, in its own right, by the liquidator is hopelessly insolvent. That is a powerful discretionary factor against granting leave to the defendants that will put the liquidator to the cost of wasting some of what little funds he has in responding to the third party notice and third party statement of claim. There is no suggestion of any insurance. Absent some potential asset in its own right, that is not apparent after LMIM has been in liquidation for a period of now more than five years, success in the proceeding would not be likely to make any sum available to the defendants as an unsecured creditor once the priority debt and claims are paid to the extent that they can be under s 556 of the CA.

Breaches of section 601FC(1) and section 1325 of the CA

[26] Paragraphs 119 to 121 of the plaintiff's statement of claim allege that the compliance plan for the FMIF did not satisfy the requirements of s 601HA(1) of the CA, that there were circumstances that amounted to contraventions by LMIM of the CA, or the constitution of the FMIF, and that LMIM or its agents, officers and employees were not adequately qualified or experienced and did not receive appropriate training to enable them to comply with the CA and/or the constitution of the FMIF in relevant respects.

[27] With one exception, the plaintiff's claim against the defendants is based upon overlapping and alternative causes of action for acts or omissions alleged to have constituted negligence, breach of contract or misleading or deceptive conduct in carrying out the relevant audits resulting in claims for damages:

(a) for negligence and/or breach of contract;

(b) under s 52 of the TPA for contravention of s 52 (prior to 1 January 2011);

(c) under s 236 of the ACL for contravention of s 18 (from 1 January 2011);

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[22] *Uniform Civil Procedure Rules* 1999 (Qld), r 371(1).

(d) under 1041I of the CA for contravention of s 1041H; and

(e) under s 12GF of the ASIC Act for contravention of s 12GF.

[28] Paragraph 20 of the third party statement of claim alleges that by reason of some of those paragraphs of the plaintiff's statement of claim, LMIM as responsible entity contravened the statutory obligations or duties provided for under s 601FC(1) of the CA. Paragraph 21 of the third party statement of claim then alleges:

> "In consequence of the matters referred to in paragraphs 19 [now to be deleted] and 20 above:
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> (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
>
> (b) such loss is or will be suffered by reason of the conduct of LMIM in contravention of Chapter 5C of the [CA]; and
>
> (c) the defendants seek relief against LMIM under s 1325 of the [CA] in order to compensate them for the loss or damage to prevent or to reduce the loss or damage."

[29] Relevantly, s 1325(1) of the CA provides that where, in a proceeding instituted for a contravention of Chapter 5C, the court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, the court may make such order or orders as it thinks fit or appropriate against the person who engaged in the conduct, including all or any of the orders mentioned in sub-section (5) if the court considers that the order or orders concerned will compensate the first mentioned person in whole or in part for the loss or damage, or will prevent or reduce the loss or damage. Subsection (5) includes, by paragraph (e), an order directing the person who engaged in the conduct to pay to the person who suffered the loss or damage, the amount of the loss or damage. The relevant relief claimed by the defendants is damages pursuant to s 1325.

[30] The plaintiff submits that no order of that kind can be made against LMIM because s 1325 does not authorise an order for indemnity or contribution against the liability of a person under another provision of the CA. In *Selig v Wealthsure Pty Ltd*,[23] the court said:

> "However, in so far as the first and second defendants also claim that, to the extent that they are liable to the plaintiffs for any loss or damage an order ought to be made under s 1325 to indemnify and compensate the first and second defendants for that liability for loss and damage, that claim must be rejected. Section 1325 does not have that effect. In particular, it does not have the effect of allowing one contravenor to claim contribution from another contravenor. The question of apportionment is dealt with separately in the Act and s 1325 cannot

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[23] (2013) 94 ACSR 308.

> be used to make an indemnity or contribution order. The scheme of the Act is to make all contravenors liable to the party who suffered the loss or damage."[24]

[31] The point made by the court in *Selig* applies, in principle, to claims made under the TPA, ACL, and ASIC Act as well as the CA. At the relevant time, each of those Acts included provisions for proportionate liability that operated to limit the liability of a defendant who was a concurrent wrongdoer in respect of an apportionable claim[25] and excluded the liability of such a defendant to an order for contribution or indemnity.[26]

[32] The defendants submit that their claim under s 1325 is not a claim for indemnity or contribution, because it is a claim for damages. It must be doubtful whether that distinction is one that would get around the statement made in *Selig* as to the effect of s 1325 as extracted above. Neither of the parties engaged in any close examination of the structure or text of other relevant provisions of the CA. In my view, they are an important consideration in assessing the point of distinction relied on by the defendants.

[33] It is important to keep in mind the nature of LMIM's liability, if any, for the contraventions of s 601FC(1) alleged in paragraph 20 of the third party statement of claim. That section is a "civil penalty provision"[27] and a "corporate/scheme penalty provision"[28] for which Part 9.4B of the CA provides.[29] The court's power to order compensation in favour of a registered scheme for damage suffered by the scheme is that conferred by s 1317H(1) of the CA and if a responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to scheme property.[30] Otherwise, the responsible entity may recover loss or damage by a compensation order on behalf of the scheme.[31] But only ASIC or the responsible entity may apply for a compensation order.[32]

[34] Accordingly, neither *Selig* nor the text or structure of the provisions of the CA supports the conclusion that a party in the position of the defendants is able to obtain an order for damages that would reduce their liability to the plaintiff in a case like the present to nil. As well, the defendants' alleged right to an order under s 1325 is counterintuitive. The plaintiff's claim is

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24 *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308, [956].

25 *Trade Practices Act* 1974 (Cth), s 87CB – 87CI; *Competition and Consumer Act* 2010 (Cth), ss 87CB – 87CI; *Australian Securities and Investments Commission Act* 2001 (Cth), s 12GP – 12GW; *Corporations Act* 2001 (Cth), s 1041L – 1041S.

26 *Trade Practices Act* 1974 (Cth), s 87CB-87CF; *Australian Competition and Consumer Act* 2010 (Cth), s 87CB-87CF; and *Australian Securities and Investments Commission Act* 2001 (Cth), s 12GP-12GT.

27 *Corporations Act* 2001 (Cth), s 1317E(1).

28 *Corporations Act* 2001 (Cth), s 1317DA(a).

29 *Corporations Act* 2001 (Cth), s 601FC(5), s 1317E(1) and Item 9 of the table.

30 *Corporations Act* 2001 (Cth), s 1317H(4).

31 *Corporations Act* 2001 (Cth), s 1317H(4).

32 *Corporations Act* 2001 (Cth), s 1317J.

one brought as responsible entity and trustee on behalf of the members of a registered scheme who are trust beneficiaries. It is made against the defendants as auditors of the scheme, in substance upon allegations that the defendants failed to identify or make audit reports as to non-compliances by the plaintiff with its statutory obligations as responsible entity in operating the registered scheme. The defendants' proposed claim against the plaintiff first assumes the defendants' liability to the plaintiff, as trustee, to pay an amount of damages for the benefit of the scheme for breach of one or other of the alleged audit obligations. Then it alleges a liability of the plaintiff, also as trustee, to pay damages under s 1325(1) of the CA that when set off would reduce the defendants' liability as auditors to nil. That result would require positive textual and contextual reasons to support it, as a matter of the proper construction of s 1325(1). In my view there is no such reason.

[35] The defendants submit that *Selig* is only authority for the conclusion that indemnity or contribution cannot be recovered under s 1325. They submit that the defendants' claim under that section is not one for contribution or indemnity, because it can be characterised as an order that will compensate the defendants or prevent or reduce their loss and damage, which is not one for indemnity or contribution. The order claimed in the third party notice relating to s 1325 is for "[d]amages, including damages or compensation… pursuant to… section 1325".

[36] Section 1325(1) confers power to make orders that the court "thinks appropriate", including all or any of the orders mentioned in s 1325(5). The references in s 1325(1) to an order that "will compensate" or "will prevent or reduce the loss or damage" are not to the type or form of order that may be made, but to the purpose or intended effect that the order will have. Only "if" an order will have that purpose or intended effect may it be made.[33] Second, s 1325(5)(e) empowers the court to order a contravenor to pay the person who suffered the damage the amount of the loss or damage. Third, where the loss or damage suffered by a plaintiff is a liability to pay an amount to a third person which the defendant is also liable to pay to the third person, it is conventional to describe a right to recover part or whole of the amount as a right to contribution or indemnity. The judgment on such a claim may take two forms: if the person to be indemnified or to obtain contribution has wholly discharged the common liability to the plaintiff the indemnifier or contributor will be ordered to pay a money sum to that person;[34] alternatively, in some cases, where the person to be indemnified or to obtain contribution has not already discharged the common liability to the plaintiff, the judgment may take the form that, upon that person paying their proportion of the amount payable to the plaintiff, the indemnifier or contributor must pay the remainder to the plaintiff, sometimes described as an equity of exoneration.[35] Fourth, the reference by the court to a right of contribution or indemnity under s 1325(1) in *Selig* was to a "claim that, to the extent that they are liable to the plaintiffs for any loss or damage an order ought to be made under s 1325 to indemnify and compensate the first and second defendants for that liability for loss and

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33 Compare *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 513, [43].

34 For example, *Bullen & Leake & Jacob's Precedents of Pleadings*, 12th ed, Forms 1269 – 1272 and *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501, 511-512. This was the form of judgment at common law.

35 *Wolmershausen v Gullick* [1893] 2 Ch 514, 529-530.

damage".[36] That can only have been to an order for the payment of a money sum to the first and second defendants in respect of their liability to pay the plaintiffs or, possibly, in a form corresponding to an equity of exoneration.

[37] In my view, the distinction the defendants seek to make between the order refused in *Selig* and the present case is not one of substance. It should be mentioned that the decision in *Selig* at first instance was appealed to the Full Court of the Federal Court and then to the High Court which restored the judgment of the court at first instance, without adverse comment or reasoning upon the present question.[37] Accordingly, it is sufficient to dispose of this question that this court follow the court in *Selig*, which it should do, unless persuaded that the decision in *Selig* is wrong.

[38] As to the authority of *Selig* as a matter of precedent, I accept that this court is not bound by a decision of a single judge of another superior court, even the High Court exercising original jurisdiction.[38] However, it has long been the accepted principle that one judge of a court should follow an earlier decision of another judge of the same court unless persuaded that it is wrong, particularly on the construction of a statute of common application.[39] The High Court has explicitly confirmed that one intermediate appellate court or a single judge, whether Federal, State or Territorian, is bound to follow an earlier decision of another intermediate appellate court, on the construction of uniform national legislation among the Australian jurisdictions, "unless convinced that that interpretation is plainly wrong"[40] and has extended the application of that principle to the common law of Australia.[41]

[39] Of course in Australia there are superior courts of coordinate jurisdiction among the Federal, State and Territory constitutional jurisdictions, recognised by the Cross-Vesting legislation.[42] Even before that legislation, however, it was recognised that a judge of first instance will usually follow the decision of another judge of first instance of coordinate jurisdiction unless he or she is convinced that the judgment was wrong, as a matter of judicial comity.[43] One useful statement of that approach is as follows:

> "In my view it is of cardinal importance in the proper administration of justice that single judges of State Supreme Courts exercising federal jurisdiction should strive for

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36 *Selig v Wealthsure Pty Ltd & Ors* (2013) 94 ACSR 308, 432 [956].

37 *Selig v Wealthsure Pty Ltd & Ors* (2015) 255 CLR 661.

38 *Bone v Commissioner of Stamp Duties* [1972] 2 NSWLR 651, 654; *Auxil Pty Ltd v Terranova* (2009) 260 ALR 164, 170 [22].

39 For examples, see *NRNQ v MEQ Nickel Pty Ltd* [1991] 2 Qd R 592, 599 and *Cooper v Commissioner of Taxation* (2004) 210 ALR 635, 641 [46].

40 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

41 *Farah Constructins Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-152 [135].

42 *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth); *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Qld).

43 *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201, 204.

> uniformity in the interpretation of Commonwealth legislation. Unless I were of the view that the decision of another judge of coordinate authority was clearly wrong I would follow his decision."[44]

[40] I am not of the view in this case that *Selig* was clearly wrong.

[41] On the contrary, there are substantial reasons drawn from the context of s 1325(1) in the CA that support the conclusion that it is not available in a case of what is in substance a claim for contribution or indemnity.

[42] First, where the conduct complained of (in this case, the representations alleged in paragraph 55 of the third party statement of claim) constitutes misleading or deceptive conduct in relation to a financial service, s 1041H(1) of the CA prohibits a person from engaging in that conduct. A person who suffers loss or damage by conduct that was engaged in contravention of s 1041H may recover the amount of the loss or damage by action from the contravenor under s 1041I(1) of the CA. However, where there are concurrent wrongdoers in respect of an apportionable claim, s 1041L and the subsequent sections operate to reduce or potentially reduce the liability of a defendant who is a concurrent wrongdoer under s 1041N to an amount reflecting that proportion of the damage or loss claimed that the court considers just. As well, s 1041P provides in respect of such a liability that a defendant against whom judgment is given as a concurrent wrongdoer in relation to an apportionable claim cannot be required to indemnify or contribute to any damages.

[43] All those provisions are in Part 7.10 of the CA. Accordingly, for such a contravention, s 1325(1) could be engaged, theoretically. But having regard to the operation of s 1041N and s 1041P, any construction of s 1325(1) that would permit the court to order one contravenor of s 1041H to pay the full amount of the loss or damage represented by the judgment against another contravenor of s 1041H would operate inconsistently with the provisions for proportionate liability contained in s 1041L to s 1041P. Accordingly, to that extent, s 1325(1) must be read as subject to the operation of other provisions in the Act, even though it is not expressly provided that it is so subject.

[44] Second, the plaintiff submits that s 1325(1) is analogous to former s 87 of the TPA when it was enacted and that there is authority to the effect that no right of indemnity or contribution of the kind claimed by the defendants in this proceeding was available under s 87, in *Bialkower v Acohs Pty Ltd*.[45]

[45] As to that, the defendants submit that s 1325 serves a different purpose from and is to be distinguished from s 87 of the TPA. Although s 1325(1) must be construed in its current context, it is instructive to keep its history in mind. Section 1325(1) was introduced in its original form in the *Corporations Law*, enacted pursuant to the *Corporations Act* 1989 (ACT) under the cooperative scheme for enacting the *Corporations Law*. Three particularly relevant

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44 *Hamilton Island Enterprises Pty Ltd v Commissioner of Taxation* [1982] 1 NSWLR 113, 119; *Re Amerind Pty Ltd (recs and mgrs apptd)* (2017) 121 ACSR 206, 261 [292]; *Abbott v Commissioner of Police* [2017] 1 Qd R 592, [27].

45 (1998) 83 FCR 1.

provisions were introduced for the first time by that Act. First, s 995 prohibited a person from engaging in conduct that was misleading or deceptive in connection with any dealing in securities. Second, s 1005 provided that a person who suffers loss or damage by conduct of another person that was engaged in in contravention of, *inter alia*, s 995 may recover the amount of the loss or damage by action against the contravenor. Third, s 1325(1) was enacted in terms substantially similar to the present text, although at that time it only applied to a contravention of part 7.11 or 7.12 of the *Corporations Law*. Neither Chapter 5C nor Chapter 6D had been enacted. The explanatory memoranda for the *Corporations Act* 1989 (Act) said of those three provisions that:

(a) section 995 – "it was considered important to include a similar provision to s 52 [of the TPA] in the Bill. Persons who engage in misleading and deceptive conduct thus run, at the very least, the risk of civil liability";[46]

(b) section 1005 – "[w]hile damages were available under the previous legislation this provision adopts a new format (based on TPA s 82)"; [47]

(c) section 1325 - "this is a new provision. It finds a parallel in TPA s 87".[48]

[46] In my view, the legislative history supports the plaintiff's characterisation of s 1325 as analogous to s 87 of the TPA, and therefore calls up as relevant the reasons given in *Bialkower* for the conclusion that s 87 did not confer a right of indemnity or contribution by one contravenor against another.

[47] Third, even if these considerations are not enough, in my view, there is a further reason why it should be concluded as a matter of law that relief is not available to the defendants against LMIM under s 1325(1) for LMIM's contraventions of s 601FC of the CA. An analogous question arose in *McCracken v Phoenix Constructions (Qld) Pty Ltd*[49] in relation to the liability of a director who contravened s 182(1) of the CA to an order for damages at the suit of a creditor of a company. The creditor alleged that they suffered loss or damage being the amount of a debt owed to them by the company which would not be paid, and that the amount was recoverable by the creditor under s 1324(10) of the CA as damages. Although a number of the considerations in that case are not of significance or relevance in this case, the court reasoned that it was difficult to reconcile the provisions contained in Part 9.4B, including s 1317J, that restrict the persons who may apply for an order that a person compensate a corporation or registered scheme under s 1317H, with a construction of s 1324(10) that would permit any creditor to claim damage suffered by them. As the court also observed, such a right might undermine the operation of the insolvency provisions that apply to a company ordered to be wound up or in liquidation by conferring a preferential right on a claimant creditor under s 1324(10). Another point was that should such a right exist, the contravenor was responsible

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46 Explanatory Memorandum to the *Corporations Bill* 1988, Volume 3, 723-724 [2956]-[2961].

47 Explanatory Memorandum to the *Corporations Bill* 1988, Volume 3, 734 [2989]-[2992].

48 Explanatory Memorandum to the *Corporations Bill* 1988, Volume 4, 960-961 [3956]-[3961].

49 [2013] 2 Qd R 27.

not only to the company under s 1317H, but also to the creditor under s 1324(10); that is the contravenor would be liable to pay twice.

[48] In my view, some of that reasoning applies in the present case. The starting point is that a contravention by LMIM as responsible entity for the FMIF of s 601FC gives rise to an order that LMIM compensate the FMIF under s 1317H, for any damage suffered by the scheme that resulted from the contravention. The order may be applied for only by ASIC or LMIM under s 1317J. Next, if such an order is made against LMIM as the contravenor, it must transfer the amount of the compensation to scheme property under s 1317H(4).

[49] But on the defendants' theory of the operation of s 1325(1), the defendants, as well, can obtain an order that requires LMIM to pay the same amount to the defendants for the same contravention, because the defendants are liable to pay an amount of damages for the benefit of the members of the FMIF. In my view, that is not how s 1325(1), properly construed, operates.

LMIM's equitable duties and equitable compensation

[50] Paragraphs 79 to 83 of the plaintiff's statement of claim allege that LMIM paid fees and expenses to itself or LM Administration Pty Ltd that were not authorised by and not in accordance with the constitution of the FMIF or the CA and would not have been made by a reasonable and prudent trustee.

[51] Paragraph 11 of the third party statement of claim alleges that LMIM owed fiduciary duties, called "equitable duties", as the trustee of the FMIF of the usual kind owed by trustees to the beneficiaries of a trust,[50] as follows:

> "(a) to preserve the trust property;
>
> (b) to keep proper accounts;
>
> (c) to exercise the same care that an ordinary prudent person of business would exercise in managing similar affairs of his or her own;
>
> (d) to exercise its powers in good faith and in the best interests of the members of the Funds;
>
> (e) not to prefer its own interests where its interests may be in conflict with the interests of the members of the FMIF; and
>
> (f) to adhere to the terms of the trust, comprising the constitution."

[52] Paragraph 22 of the third party statement of claim alleges that if the defendants are liable in respect of the matters pleaded in paragraphs 79 to 83 of the plaintiff's statement of claim, the payments were made by LMIM in breach of its equitable duties as trustee. Paragraph 26 of the third party statement of claim alleges that if the defendants are liable in respect of the matters alleged in paragraphs 79 to 83 of the plaintiff's statement of claim, LMIM is likewise

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50 Compare the duties of trustees summarised in Heydon and Leeming, *Jacobs' Law of Trusts in Australia,* 8th ed, (2016), [16-08], [17-04], [17-12], [17-13], [17-18] and Finn, *Fiduciary Obligations*, (1977), 80 [165].

liable (to the beneficiaries of the trust) for breach of LMIM's equitable duties as trustee, that the "losses" (meaning the defendants' liability and LMIM's liability as trustee) are common and coordinate and the defendants are entitled to "equitable compensation" from LMIM in respect of any amounts which they may be ordered to pay to the plaintiff.

[53] The flaw in the defendants' alleged right to equitable compensation is that the equitable duties alleged to have been owed by LMIM were not owed to the defendants. They were owed to the beneficiaries of the trust, being the unit holders of the FMIF. The defendants have no right to equitable compensation for any breach of the duties. But that is the only relief claimed against LMIM that might relate to the alleged breaches of equitable duties.

[54] The plaintiff submits that whatever else may be so, the defendants' liability to the plaintiff in the capacity of responsible entity and trustee of the FMIF, on behalf of the beneficiaries of the trust comprising the unitholders, for the plaintiff's claims at common law or under statute as contained in the plaintiff's statement of claim cannot be reduced by LMIM's breach of duty as trustee to the same beneficiaries. I agree.

[55] The defendants allege, in effect, that the liabilities are coordinate liabilities. In my view, they are not, to the extent that the defendants allege any liability of LMIM to make equitable compensation to the defendants. In any event, in my view, equitable contribution is not available as between them.[51] It is unnecessary to discuss this question further as the defendants did not rely on equitable contribution, per se.

Equitable duties and tortfeasor's contribution

[56] Alternatively, paragraph 26(d) of the third party statement of claim alleges that, by reason of LMIM's breach of the equitable duties, LMIM and the defendants are both "tortfeasors" liable to the plaintiff in respect of the same damage within the meaning of s 6(c) of the *Law Reform Act* 1995 (Qld) ("LRA") and the defendants are entitled to orders in the nature of the indemnity or contribution from LMIM under s 6(c) of the LRA.

[57] The plaintiff submits that s 6(c) cannot apply on the facts alleged, because LMIM was not a "tortfeasor" in respect of any breach of the equitable duties. The starting point is that s 6(c) of the LRA provides that where damages are suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage. However, s 6(c) is in Part 3 of the LRA. Section 4A provides that Part 3 applies subject to the *Civil Liability Act* 2003 (Qld) ("CLA").

[58] Section 28(1) of the CLA provides that Part 2 of Chapter 3 of that Act applies to a claim for economic loss in an action for damages arising from a breach of a duty of care or a claim for economic loss in an action for damages under the *Fair Trading Act* 1989 (Qld) for a contravention of the ACL s 18.

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51 *Friend v Brooker* (2009) 239 CLR 129, 151 [48]; Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity; Doctrines & Remedies*, 5th ed, (2015), [10-085].

[59] The dictionary in Schedule 2 of the CLA defines "duty" to mean a duty of care in tort or a duty of care under contract that is concurrent and coextensive with a duty of care in tort or another duty under statute or otherwise that is concurrent with one of those duties. As well, it defines "duty of care" to mean a duty to take reasonable care or to exercise reasonable skill (or both duties).

[60] Paragraph 11(c) of the third party statement of claim alleges that the equitable duties included a duty to exercise the same care that an ordinary, prudent person of business would exercise in managing similar affairs of his or her own. Accordingly, at least in that respect, it is likely that the CLA would apply to the exclusion of the LRA contribution power to order contribution under s 6(c).

[61] But, in any event, the LRA power to award contribution applies to a claim against a "tortfeasor". Section 6 of the LRA is only engaged where there are two tortfeasors to which it can apply. In terms, "any tortfeasor liable in respect of that damage [being damage suffered by any person as the result of a tort] may recover contribution from any other tortfeasor who is … liable in respect of the same damage…" On the defendants' claim in the present case, it is the first "tortfeasor" mentioned. That question may be put to one side. Contribution is only recoverable from "any other tortfeasor who is, or would if sued have been, liable in respect of the same damage". Accordingly, s 6(c) is only engaged if LMIM was a tortfeasor in respect of its alleged breaches of the equitable duties.

[62] There is formidable authority against that conclusion. First, in *Astley v Austrust Ltd*[52] the High Court considered whether contributory negligence operated to reduce the liability of a defendant sued for breach of contract under s 27A(3) of the *Wrongs Act* (SA) which provided for the reduction of a plaintiff's damages to the extent that the court thinks just and equitable where the damage is suffered partly as the result of the plaintiff's fault and partly of the fault of another person or persons. "Fault" was defined to identify the "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort". The majority of the High Court held that the textual indications in and historical reasons for the legislation were unconcerned with contractual claims and that a number of cases that had decided where a defendant was liable in both tort and for breach of contract for failure to exercise reasonable care the apportionment legislation applied to reduce the damages for contributory negligence, were incorrectly decided, saying:

> "The judgment … appears to assume that the principle of apportionment is paramount and that the legislation was intended to require that damages be apportioned in all contract cases where a liability in tort also exists and where contributory negligence can be made out. This assumption is inconsistent with the history of the legislation whose purpose was to enable recovery of damages by plaintiffs in cases where their contributory negligence would have meant that they recovered nothing. The section was designed to increase the rights of plaintiffs, not reduce them.
>
> Furthermore, the assumption overlooks the fact that the damages awarded for the breach of contract may be different from those in tort because of the rules of

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[52] (1999) 197 CLR 1.

> remoteness or the terms of the contract. Nothing in the legislation gives any hint that it seeks to regulate awards of damages in contract cases. Moreover, the assumption that the two causes of action are effectively merged does not accord with the attitude of the courts in relation to the differences between bringing an action in both tort and contract. When a contract action is statute barred, for example, an action in tort may still be taken. Similarly, an action in contract for breach of a promise to take care may be maintainable against a defendant outside the jurisdiction when an action in tort could not be maintained.
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> Moreover, there is nothing in the legislation which suggests that the *Wrongs Act* intends to limit recovery of damages by plaintiffs in contract to the amount allowable under the apportionment section."[53]

[63] Even more significantly for this case, in *Pilmer v Duke Group Ltd (in liq)*[54] the High Court considered the liability of a firm of accountants retained by a company to provide a valuation report in connection with a takeover. The court below had postulated that the accountants were liable for breach of fiduciary duty, as well as breach of contract or negligence. The High Court rejected that the case was one of breach of fiduciary duty. But the court went on to consider the question of whether the liability of a defendant in equity to compensate for breach of fiduciary duty could be reduced by reason of contributing fault, saying:

> "Various judgments in this Court establish that, in Australia, the measure of compensation in respect of losses sustained by reason of breach of duty by a trustee or other fiduciary is determined by equitable principles and that these do not necessarily reflect the rules for assessment of damages in tort or contract. In the present case, the Full Court, but for a reduction by reason of 'contributing fault' on the part of Kia Ora, would have awarded the same amount as equitable compensation for breach of fiduciary duty by the appellants as it awarded for their breach of contract. …
>
> With respect to question (c), concerning 'contributing fault', it is sufficient to say that the decision in *Astley v Austrust Ltd* indicates the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty. *Astley* affirms:
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> > 'At common law, contributory negligence consisted in the failure of a plaintiff to take reasonable care for the protection of his or her person or property. Proof of contributory negligence defeated the plaintiff's cause of action in negligence.'
>
> Contributory negligence focuses on the conduct of the plaintiff, fiduciary law upon the obligation by the defendant to act in the interests of the plaintiff. Moreover, any question of apportionment with respect to contributory negligence arises from legislation, not the common law. *Astley* indicates that the particular

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53 *Astley v Austrust Ltd* (1999) 197 CLR 1, 27-28, [59]-[61].

54 (2001) 207 CLR 165.

> apportionment legislation of South Australia which was there in question did not touch contractual liability. The reasoning in *Astley* would suggest, *a fortiori*, that such legislation did not touch the fiduciary relationship."[55]

[64] In my view, there is no warrant to construe s 6(c) of the LRA differently. The clear balance of authority supports that view.

[65] A trustee liable for breach of fiduciary duty to restore the trust's assets or to pay equitable compensation to a new trustee or other plaintiff on behalf of the beneficiaries is not, thereby, a "tortfeasor" within the meaning of s 6(c).

Implied term as to reliable representations

[66] Paragraph 54 of the third party statement of claim alleges a number of terms of the contracts of retainer by LMIM of the defendants as auditors to audit and review the financial statements and compliance with the compliance plan of the FMIF. Paragraph 54(d) alleges that one term was that responses to the defendants' enquiries, and written representations made by members of management of LMIM, would be the product of reasonable enquiry or due care and skill commensurate with the skills and experience of the member of management, would only be given if there was a reasonable basis for the making of the representation and would be qualified insofar as the person making the representation was unable to give a reliable and unqualified representation. That term is alleged to be an implied term, of the species of implied term described as an implied term in fact or ad hoc.[56]

[67] Further, paragraph 54(e) alleges that it was an implied term of the contract of retainer that the responses to the defendants' enquiries and the written representations made by members of management of LMIM comprised acts and omissions of LMIM itself, acting as the responsible entity and trustee of the property of the FMIF. In other words, that LMIM impliedly promised that statements made by members of management, as between LMIM and its auditors, constituted statements by LMIM. Again, the implied term is alleged to be one of the species of terms implied in fact or ad hoc.

[68] The plaintiff submits that neither of the alleged implied terms existed because they were not necessary to give business efficacy to the contracts of retainer of the defendants as auditors by LMIM.

[69] In paragraphs 64, 65 and 119 to 121 of the plaintiff's statement of claim, the plaintiff alleges that in preparing its financial statements it did not identify mortgage investments as impaired where there was objective evidence of impairment, contrary to the requirements of the relevant Australian accounting standards, with the consequence that the financial statements did not give a true and fair view of the financial position of the FMIF at various stages and, as well, that the plaintiff did not apply generally accepted accounting principles in the preparation of the financial statement in accordance with the constitution in breach of the

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55 (2001) 207 CLR 165, 201-202, [85]-[86].

56 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 185 [21].

scheme valuation measures of the compliance plans and that the compliance plans themselves did not satisfy the requirements of s 601HA(1) of the CA and other particular breaches.

[70] In paragraphs 57 to 59 of the third party statement of claim, the defendants allege that if they are liable to the plaintiff in respect of their audits in connection with those matters, they relied on representations made by management of LMIM in response to enquiries and written representations pertaining to the audits and reviews carried out by the defendants in the course of the preparation of their audits and reviews. Accordingly, the defendants allege that if they are liable in the manner alleged in the statement of claim, they will have suffered loss and damage in consequence of breach of the implied terms of the retainers alleged in paragraph 54 to the extent of the defendants' liability to the plaintiff and they claim damages from LMIM for breach of the retainers.

[71] The extraordinary nature of the alleged implied terms thereby emerges. The defendants' case is that, when LMIM contractually retained the defendants as auditors, LMIM impliedly promised, in effect, that if its management failed to act with due care or skill in giving responses to the defendants' enquiries and in making written representations, any liability on the auditors' part for damages for failure to carry out the audit or review with skill and care or by statute resulting in a liability in damages to the plaintiff as trustee would be answered by an equal offsetting liability of the plaintiff as trustee to the defendants for damages for breach of contract.

[72] In my view, the alleged implied terms are not necessary to give business efficacy to the contracts of retainer between LMIM as responsible entity of the FMIF and the defendants. I note that there is no suggestion made in any submission by the defendants of any case in the context of auditors' liability that would suggest that there may be a reasonable basis for such an implied term. The existence of such an implied term would tend to subvert the liability of an auditor for loss or damage in negligence.

[73] On the contrary, there is intermediate appellate court authority that tends against such an implied term. In *Simonius Vischer & Co v Holt & Thompson*,[57] the auditor defendants alleged that there were terms implied into the audit contract that the company plaintiffs would inform the defendants of all and any breaches of authority by their employees of which the plaintiffs were aware, that the plaintiffs would take all reasonable steps to avoid suffering loss due to the acts or omissions of their employees and that the plaintiffs would inform the auditors of any matters which indicated breaches by the plaintiffs staff which would have a financially disadvantageous effect on the plaintiff's business.[58]

[74] The court referred[59] to the well-known test or principles for ascertaining the existence of an implied term in fact from *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*,[60] and continued:

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57 [1979] 2 NSWLR 322.

58 [1979] 2 NSWLR 322, 347-348.

59 [1979] 2 NSWLR 322, 348-349.

60 (1977) 52 ALJR 20, 26.

> "In my view, the terms suggested cannot survive the application of this test; they must fail to satisfy any of its requirements. It cannot for a moment be supposed that, in order to give business or commercial efficacy to an audit contract, it would be necessary for the client to undertake to warn the auditor of a number of matters which it was the auditor's duty to discover. The terms are, moreover, couched in language of great indeterminacy."[61]

[75] Subsequent authority as to the relationship between an auditor and company over the company's financial statements does not erode the persuasiveness of that statement, nor does recent authority as to the role of necessity in the implication of implied terms, which confirms the *BP Refinery* approach.

[76] In my view, the defendants should not be given leave to proceed on the implied term causes of action.

LMIM's duty of care in tort to the defendants

[77] Paragraph 60 of the third party statement of claim alleges that LMIM and the individual third parties who are alleged to have made the representations set out in paragraph 55 each owed a duty of care to the defendants to ensure that the representations were made with the same qualities as alleged to have been required by the first implied term. Paragraph 63 then alleges liability against LMIM by two paths. First, it alleges that the representations were made by LMIM in breach of the duty of care it owed to the defendants. Second, it alleges that the representations were made by the individual third parties referred to as making the representations in paragraph 55 in breach of their duty or duties of care and that LMIM is vicariously liable for their torts.

[78] It is then alleged, in paragraph 64, that if the defendants are liable to the plaintiff as alleged in the plaintiff's statement of claim, the defendants will have suffered loss and damage in consequence of the breach of their duties to the extent of their liability to the plaintiff.

[79] This is a pleading of a novel duty of care in negligence. It has the same counter-intuitive result mentioned above in relation to the alleged implied term. That is, the duty of care is one alleged to have been owed by LMIM as trustee to avoid economic loss to the defendants in the form of the defendants' liability to LMIM as trustee for negligence or breach of statutory obligation in the performance of the defendants' audits and reviews. In particular, the alleged duty of care is one that would create a counter-liability by LMIM to the defendants in damages for negligence in the same amount as the amount of damages ordered to be paid by the defendants to LMIM for the defendants' negligence or breach of statutory obligation.

[80] I observe that at least since 1995 and *Daniels v Anderson,*[62] Australian common law has accepted that a company may be liable to have its damages for negligence against its auditors

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61 [1979] 2 NSWLR 322, 349.

62 (1995) 37 NSWLR 438.

reduced for contributory negligence under the equivalent of s 10 of the LRA.[63] After the decision in 1998 in *Astley v Austrust Ltd*,[64] the LRA was amended, effective from 7 August 2001,[65] so that a claim for damages for breach of a contractual duty of care that was concurrent and coextensive with a duty of care in tort was included within its operation.[66]

[81] It is to be observed that the duty of care alleged by the defendants would go around any question of contributory negligence, decided on the basis of a reduction of the damages to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage. It would, instead, indemnify the defendants in full for any liability to the plaintiff. In my view, that would be a challenge to the coherence of the present law as to the liability in negligence of auditors and the operation of the principles of contributory negligence in respect of that liability. In answering the question whether a novel duty of care to avoid economic loss to a person should be accepted, the coherence of the postulated duty with the existing legal framework of the relevant relationships is an important factor.[67]

[82] I note that no particular material facts are alleged to support this duty of care. There can be no question that for a novel duty of care in negligence to avoid economic loss it is essential that the plaintiff plead all the material facts.[68] In my view, the alleged duty of care is not supported by material facts that disclose a reasonable cause of action on the basis of any identified "salient features"[69] in the third party statement of claim.

[83] Similarly, there are no facts alleged in the third party statement of claim that would support the allegation in paragraph 63(c)(ii) that LMIM is "vicariously liable" for any breach of duty of care that may have been owed by the individual third parties to the defendants as auditors, as alleged in paragraph 60. I do not embark on a consideration of whether the duty of care alleged to have been owed by the individual third parties is one that can form a reasonable cause of action against them, as there is no contest between the defendants and them on the hearing of this application. Nevertheless, in my view, the allegation of vicarious liability of LMIM for any tort committed by those individual third parties as alleged is, itself, another counter-intuitive and extraordinary allegation.

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63 *Law Reform Act* 1995 (Qld), s 10(1).

64 (1999) 197 CLR 1.

65 *Law Reform (Contributory Negligence) Act* 2001 (Qld), ss 2, 4 and 5.

66 *Law Reform Act* 1995 (Qld), s 5, definition "wrong".

67 *Crouch and Lyndon v IPG Finance Australia Pty Ltd* [2014] 1 Qd R 512, 549-551 [74]-[77]; *Sullivan v Moody* (2001) 207 CLR 562, 581 [55]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 555 [102]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 226-227 [120]-[123].

68 *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques (No 2)* [2018] 3 Qd R 28, 45 [90]-[91]; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 252, 260, 301, 310; cf *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

69 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 254-255 [201]-[202]; *Kuhl v Zurich Financial Services* (2011) 243 CLR 361, 370-371 [20].

[84] As to that, there is no difficulty in accepting that as between LMIM and the defendants the conduct of the individual third parties as "management" of LMIM, as alleged in paragraph 55 of the third party statement of claim, could be conduct for which LMIM is vicariously responsible for contributory negligence.[70] But that is not the allegation made by the defendants. The defendants allege that those individual third parties who constituted the "management", in making the representations alleged in paragraph 55, owed a duty of care individually to the defendants against the economic loss suffered by the defendants in the form of the defendants' liability to LMIM for the defendants' negligence or breach of statutory obligation, and that LMIM is vicariously liable for those torts. In my view, in the absence of any logical basis propounded in support of that basis of liability, it too should not be treated as raising a reasonable cause of action.

[85] In my view, leave to proceed should not be granted on the basis of the causes of action alleged to be based on LMIM's duty of care to the defendants in tort or LMIM's vicarious liability for any torts of the individual third parties.

Misleading or deceptive conduct

[86] Next, the defendants allege that the representations alleged in paragraph 55 of the third party statement of claim were made by LMIM in a way that represented the same qualities relied upon for the first implied term. In paragraph 68 the defendants allege that by making the representations LMIM thereby engaged in conduct that was misleading or deceptive for the purposes of s 1041H of the CA.

[87] Paragraph 69 of the third party statement of claim alleges that if the defendants are liable to an adverse judgment or legal costs in the manner alleged in the plaintiff's statement of claim, that is loss or damage they suffered by reason of the contravening conduct. However, paragraph 69(b) alleges that conduct was "in contravention of chapter 5C of the Act", which is illogical. Section 1041H of the CA is not in Chapter 5C of the CA. In any event, in my view, the entitlement to relief under s 1325 of the CA alleged in paragraph 69(c) is not a reasonable cause of action as previously explained.

[88] In paragraph 70(b)(i) of the third party statement of claim the defendants allege that they seek damages in respect of loss and damage in the form of the legal costs incurred in connection with this proceeding but without identifying what the basis of that entitlement might be, except by cross-referring to paragraph 68. No basis is alleged for the conclusion that the costs that the defendants are incurring by reason of their defence of the proceeding brought by the plaintiff, constitute loss or damage suffered by contravening conduct of LMIM in making misleading or deceptive representations within the meaning of s 1041H of the CA or s 12DA of the ASIC Act.

[89] Paragraph 68(d) of the third party statement of claim alleges that s 52 of the *Trade Practices Act* 1974 (Cth) ("TPA") as in force prior to 1 January 2011 and s 18 of the *Australian Consumer Law* ("ACL") as in force from 1 January 2011 applied to representations made by LMIM by its

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[70] *Daniels v Anderson* (1995) 37 NSWLR 438, 568-570; cf as to the vicarious liability of an employer, *New South Wales v Lepore* (2003) 212 CLR 511, 535-546 [40]-[74].

officers, as alleged in paragraph 55 of the third party statement of claim. Sections 52 of the TPA and 18 of the ACL are invoked for the purpose of, *inter alia*, making claims by the defendants for damages against LMIM under ss 82 and 87 of the TPA and s 236 of the ACL respectively.

[90] Paragraph 68(c) and 68(d) further allege that the representations constituted conduct within the meaning of s 12DA of the ASIC Act, s 52 of the TPA and s 18 if the ACL.

[91] However, the conduct by LMIM alleged in making the representations was conduct in the course of LMIM as responsible entity operating the FMIF as a registered scheme. Accordingly, that conduct was providing a "financial service" within the meaning of s 12BAB of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("ASIC Act"). Before the introduction of the ACL effective on 1 January 2011, s 51AF of the TPA provided that Part 5, which included s 52, did not apply to the supply of financial services and s 52 did not apply to conduct engaged in in relation to financial services. On the introduction of the ACL, s 131A(1) of the *Competition and Consumer Act* 2001 (Cth) provided, in effect, that s 18 of the ACL does not apply to the supply or possible supply of services that are financial services and s 131A(2) has provided, in effect, that s 18 does not apply to conduct engaged in in relation to financial services. It follows that the causes of action alleged as contraventions of s 52 of the TPA and s 18 of the ACL are flawed.

[92] As well, the defendants rely on s 38 of the *Fair Trading Act* 1989 (Qld) as in force before 1 January 2011, but that section was limited in application by s 99(4) which disapplied the damages recovery provision in s 99(1) unless the loss or damage was suffered by a "consumer", within the meaning of s 6. That would not include the present case.

[93] Paragraph 68(c)(ii) alleges that the individual third parties' contravening conduct in making the representations alleged in paragraph 55 of the third party statement of claim is conduct in respect of which LMIM is "vicariously liable" for the "torts" committed by the individual third parties. That allegation is unsustainable. Section 1041H is a statutory normative standard of conduct that prohibits misleading or deceptive conduct in particular contexts. It does not operate, of itself, in a way that a contravention could give rise to "vicarious" liability by another legal personality for that contravention as a "tort". First, to label s 1041H or s 12DA as "torts" fails to recognise that they are normative standards that do not contain an element of damage which is the gist of an action in tort. Second, even if s 1041H is combined with the remedial provision that does confer a cause of action for damages, being s 1041I of the CA, the cause of action is not a tort.[71] The same is true of s 12DA to s 12GF of the ASIC Act.

Unpaid audit fees

[94] Paragraphs 113 to 119 of the third party statement of claim concern unpaid audit fees that are alleged to be due to the defendants as auditors for the half year financial statements of LMIM as responsible entity of the FMIF for the period 1 July 2012 to 31 December 2012. Paragraph 118 alleges the total amount of $158,896.51 is unpaid. Paragraph 119 alleges that LMIM has

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[71] *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318, 354 [174]; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 503 [17], 510 [38] and 512 [40].

the right of indemnity against the assets of the FMIF and that the defendants are subrogated to the beneficial interests enjoyed by LMIM over the assets of the FMIF in that amount.

[95] There is no underlying dispute that the relevant amount of audit fees were charged by the defendants for the audit which was carried out between January and March 2013. The defendants' invoices have not been paid following the orders for winding up of the FMIF and the liquidation of LMIM in insolvency.

[96] There may be a question as to whether the fees are payable if the work that was carried out for the audit was defective in the way in which the plaintiff's statement of claim alleges, but I need not consider that. For present purposes it may be that the defendants are entitled to set off that amount against any judgment that would otherwise be payable by them to the plaintiff.[72] This claim should be set up by counterclaim, however, and not by third party claim and statement of claim.

Set off

[97] Lastly, paragraph 120 of the third party statement of claim alleges that the defendants have a right of set off at law or in equity in respect of any liability they may have to the plaintiff in respect of the defendants' claims against LMIM "in its capacity as the responsible entity of the FMIF as referred to in paragraphs 21(c), 26, 59, 63(b), 63(c)(ii), 68(c)(ii), 69 and 119".

[98] The defendants submit that they do not require leave to proceed on the third party claim and statement of claim against LMIM as first third party because of the alleged entitlement to a set off in paragraph 120. That is an extraordinary submission, for more than one reason.

[99] First, it is the defendants who bring this application and who apply for an order for leave to proceed, which makes the submission that it is unnecessary in any event extraordinary.

[100] Second, after a period of a statutory hiatus, set off is now provided for in this jurisdiction by s 20 of the *Civil Proceedings Act* 2011 (Qld). The section provides that if there are mutual debts between a plaintiff and a defendant, the defendant may by way of defence set off against the plaintiff's claim any debt owed by the plaintiff to the defendant that was due and payable at the time the defence of set off was filed. Section 20(5) provides the section does not affect other rights of set off or obligation of a debtor or creditor whether arising in equity or otherwise.

[101] Third, the rules of court provide that a defendant may rely on a set off as a defence to all or part of a claim made by a plaintiff whether or not it is also included as a counterclaim.[73] The defendants did not set up their claims against LMIM by way of set off in a defence. They make the claims in a third party proceeding, started by third party notice and third party statement of claim. In doing so, the defendants did not simply raise a defence for which leave to proceed is not required.

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[72] *Corporations Act* 2001 (Cth), s 553C.

[73] *Uniform Civil Procedure Rules* 1999 (Qld), r 173.

Conclusion

[102] For the reasons set out above, in my view, the defendants should not be granted leave to proceed on the claim made against LMIM as the first third party by the third party notice and statement of claim. Procedurally, the order that should be made is that the application for leave to proceed is dismissed, with consequential orders that the third party notice as against the first third party is struck out and those parts of the third party statement of claim that relate to the first third party should be struck out, in addition to the similar orders that should be made in respect of the second, third and fourth third parties.

[103] Those parts of the third party statement of claim are so intermingled with the rest that the appropriate order is to strike out the third party statement of claim in its entirety, with leave to the defendants to re-plead against the individual third parties.

[104] To the extent that these reasons would admit that the defendants should be permitted to maintain any of their claims against LMIM as responsible entity and trustee of the FMIF, that question may be addressed by the defendants seeking leave to file and serve an appropriate counterclaim against the plaintiff, being LMIM, in its capacity as responsible entity for the FMIF.