SUPREME COURT OF QUEENSLAND

CITATION:	Moloney & Anor v Marler & Darvall [2004] QSC 228
PARTIES:	**GREGORY MICHAEL MOLONEY and PETER IVAN FELIX GEROFF AS COURT APPOINTED LIQUIDATORS AND TRUSTEES OF THE UNREGISTERED MANAGED INVESTMENT SCHEME KNOWN AS THE SENTRY ALLIANCE SCHEME FORMERLY CONDUCTED BY ATLANTIC 3 FINANCIAL (AUST) PTY LTD ACN 056 262 723 (IN LIQUIDATION)** (applicants) **v** **MARLER & DARVALL FORMERLY C.B. DARVALL & DARVALL (A FIRM)** (respondent)
FILE NO/S:	BS 1713 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	9 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29, 30 June and 1 July 2004
JUDGE:	Muir J
ORDER:	**Declare that the respondent has no lien over the title deeds described in the application filed on 20 February 2004.** **Order that the respondent pay the applicants' costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – LIENS – WHEN LIEN ARISES – where the respondent is claiming a solicitors' lien in respect of title deeds held by the applicant liquidators/trustees – whether the respondent is entitled to a lien in respect of the title deeds – EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – INDEMNITY, LIEN AND REIMBURSEMENT – GENERAL PRINCIPLES – solicitor lienee's right of

subrogation – limits of lienor's rights of retention – limits on trustees rights of indemnity - right of a trustee to indemnity from the trust assets

Barlow Clowes International Ltd (In Liquidation) v Vaughan [1992] 4 All ER 22
Barratt v Gough-Thomas [1951] Ch 242
Bozon v Bolland (1839) 4 M Y & CR 354: 41 ER 138
Brandao v Barnett (1846) 8 ER 1622
Cohen v Cohen (1929) 42 CLR 91
Duke Finance Ltd (In Liquidation) v Commonwealth Bank of Australia (1990) 22 NSWLR 236
Ecclesiastical Commissioners v Pinney [1900] 2 Ch 736
Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liquidation) [2002] NSWCA 29
Gibson v May (1853) 4 De G M & G 512
Leeper v Primary Producers' Bank of Australia Ltd (In Voluntary Liquidation) (1935) 53 CLR 250
MPS Constructions Pty Ltd (In Liquidation) v Rural Bank of New South Wales (1980) 49 FLR 430
Official Trustee in Bankruptcy v Kioussis [2000] NSWSC 248
Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360
Re ADM Franchise Pty Ltd (1983) 7 ACLR 987
Re Byrne Australia Pty Ltd (No2) [1981] 2 NSWLR 364
Re Enhill Pty Ltd [1983] 1 VR 561
Re Global Finance Pty Ltd [2002] 26 WAR 385
Re Johnson (1880) 15 ChD 548
Re London & Globe Finance Corporation [1902] 2 Ch 416
Re Matheson (1994) 121 ALR 605
Re Suco Gold Pty Ltd (In Liquidation) (1983) 33 SASR 99
Staniar v Evans (1886) 34 ChD 470
Stumore v Campbell [1891] 1 QB 86

COUNSEL: D A Savage SC, with him R M Derrington for the applicants
P J Dunning for the respondent

SOLICITORS: Gadens Lawyers, solicitors for the applicants
Marler and Darvall, solicitors for the respondent

Nature of the Application

[1] The applicant liquidators and trustees appointed in respect of an investment scheme apply for a declaration that any lien in favour of the respondent firm of solicitors with respect to legal fees claimed to be owing by Atlantic 3 Financial (Aust) Pty Ltd (In Liquidation), the scheme operator, does not extend to certain title deeds and for an order that the respondent, in exchange for payment of the sum of $7,500, deliver up the title deeds held by the respondent to the solicitors for the applicants.

Introduction

[2] Atlantic 3 Financial (Aust) Pty Ltd ("A3") was in the business of promoting investment schemes in which it would solicit moneys from investors to lend on first mortgage security. The "Sentry scheme", which is at the centre of these proceedings, is reasonably typical of the general run of schemes set up by A3.

[3] Sentry Alliance Pty Ltd ("Sentry") approached A3 for a loan of approximately $199,000 to pay out a lender to it whose loan was secured by a registered first mortgage. The proposal was that A3 acquire for $199,067 the interest of the existing mortgagee in the mortgage. It was contemplated also that the mortgage be varied to provide for a further loan of $38,932 to fund the completion of construction of some storage units on the mortgaged land. Dr Acker, a director of A3, contacted persons known to him, whom he knew to be interested in investing moneys on first mortgage security, and offered them an interest in the subject mortgage.

[4] Once sufficient funds had been collected to enable the transaction to proceed, A3 instructed Mr Marler, a member of the respondent firm of solicitors, to prepare the necessary documentation and attend to settlement.

[5] The original investors were provided with a document described by Dr Acker as a "write up." It identified, in a general manner, the nature of the investment and the security to be granted in respect of it. No copy of this document has been located.

[6] Dr Acker arranged for each of the investors who agreed to participate in the scheme to send a letter of instructions to Mr Marler at C.B. Darvall & Darvall which provided:

> "I/WE hand you herewith (sum invested) for you to hold in your trust account. You may release these funds when you hold on my account, a _____interest in the first mortgage known as the Melbourne Centre mortgage. I understand the terms are:
>
> | | |
> |---|---|
> | Payment: | Interest only, monthly in arrears |
> | Interest Rate: | 10.50% per annum |
> | Term: | One year |
> | Title is to be vested as follows: | [the name of the investor or its nominee] |
>
> You are instructed to register this mortgage as soon as possible.
>
> Please receipt these funds and provide me with an Epitome of Investment and complete documentation upon settlement.
>
> These instructions are valid for a period of 14 days, after which time they may be extended by my directive.
>
> _____ _____DATE"

The document was headed "Letter of Instruction." It set out, opposite the name and address of the addressee, details of the respondent's Trust Account.

[7] Six investors ("the original investors"), between 29 April 1998 and 11 June 1999, paid a total of $254,000 into the respondent's trust account and gave instructions in terms of those set out above. The sums paid were; $50,000, $100,000, $30,000, $25,000, $30,000 and $33,000.

[8] On 13 May 1998 the respondent provided the funds necessary for settlement from its trust account. Mr Marler then sent to each investor a letter in the following terms:

> "Re: Atlantic 3-Financial (Aust) Pty Ltd - Advance to Sentry Alliance (Melbourne Centre)
>
> We refer to the above matter and now enclose herewith the following:
>
> 1. Trust account Receipt for funds in the sum of [figure advanced] received by direct deposit on [or as the case may be]
> 2. Epitome of Investment."

[9] A copy of the letter was sent to Atlantic 3. The "Epitome of Investment" enclosed with the letter provided:

> "EPITOME OF INVESTMENT
>
Investor:	[Investor's Name]
Address:	[Investor's Address]
Mortgage Type:	Interest Only, payable monthly in arrears
Principal Amount:	[$ Sum lent]
Funds Received:	[Date]
Term of Investment:	One year
Interest:	10.5% per annum on the balance owing from time to time.
Security Description:	Share of first registered Mortgage No U562310V over:- [The real property description of 18 lots is set out]
Registered Proprietor:	SENTRY ALLIANCE PTY LTD
Security Documents held by:	C.B. DARVALL & DARVALL SOLICITORS"

[10] In the case of one of the investors the interest rate shown was 11 per cent, rather than the 10.5 per cent shown for the others.

[11] Between 23 November 2001 and 19 July 2002 a further eight investors advanced an additional $334,400 bringing to $769,344 the total of the moneys paid into the scheme. Repayments of capital of $180,944 were made to some investors leaving a balance of investors' funds of $588,400. The applicants and the respondents agree that this balance is accurate but disagree, in relatively minor respects, as to the size

of the contributions of a few of the investors. These differences have no bearing on the outcome of these proceedings.

[12] The letters of instruction with respect to the second tranche of investments was addressed to the respondent, but the investor was instructed to transfer the funds telegraphically to a specified trust account of A3 or to post a cheque to A3 at its address at Burleigh Heads. The Epitome of Investment was in terms similar to that set out above except that the words "is described by the attached copy of the original proposal" appeared against the heading "Nature of Investment" and the words "to be" were inserted between "security documents" and "held by" in the heading opposite "C.B. Darvall & Darvall Solicitors.". The letters acknowledging the investment were written by A3 and did not follow a standard format.

[13] Only the moneys lent by investors in the first tranche found their way into the respondent's trust account and the respondent was unaware of the existence of the later loans.

[14] The "write up" provided to prospective investors for the second tranche, after stating that the project consisted of 72 commercial storage warehouse/office units plus lock up yard each on its own parcel of land, stated –

> "52 units have already settled at an average price of $70,000. The developer wishes to market the remaining units and provide an interest reserve while doing so. The units are new, and quite well done. Very low LVR.
>
> | | |
> |---|---|
> | Finance Required: | 90,0000 as an additional advance to an existing first mortgage. |
> | Interest Rate: | 10.5% per annum |
> | Term: | 12 months |
> | Payments: | Interest only, monthly, in arrears. |
> | Borrower: | Sentry Alliance, the developer. Personal Guarantee of Neil Barnes. |
> | Security: | Registered 1st mortgages over 18 units. |
> | Valuation: | Fitzroy's Valuers - $72,500 per unit, for one sale at a time. |
> | LVR: | We hold a $305,000 1st mortgage over the 18 remaining units. This increases the total loan to $395,000. Assuming a 30% discount on valuation for a forced in line sale; |
>
> Value is $50,750 X 18 + $913,500
> LVR: 395,000/913,500 + 43.2%
>
> Comments: The total loan per unit is only $21,944 which is far below replacement cost and in our view the units would sell immediately at that price. Rental income is about $90 per week which is a 21.3% return on the mortgaged amount. The units are also exceptionally attractive and offer more than traditional storage facilities."

[15] The commentary opposite "LVR" implicitly asserts that $305,000 had been advanced but the actual advances appear to have been $199,087 plus $38,932, making a total of $237,999.

[16] On 11 May 1998, $199,067.68 was transferred to the Trust Account of the respondent's town agent in Melbourne to enable Sentry Alliance to repay the existing mortgagee. The contemplated further advance of $38,932 was probably made shortly after 26 May 1998, the date on which $33,000 was received from the last to invest of the original investors. After settlement and, presumably, after registration of the transfer of mortgage into A3's name, the mortgage and title deeds were sent to the respondent by its Melbourne agent.

[17] In about June 1999 the respondent, on instructions from A3, prepared a Deed of Priority and Postponement in order to permit a further advance of $95,000 to be made by A3 to Sentry to enable the completion of building works. The documentation governed the respective priorities of A3 as first mortgagee and a second mortgagee. The further advance was made in about June 1999 and brought the total amount lent to Sentry pursuant to the Sentry scheme to $333,000.

[18] Sentry defaulted in its obligations under the mortgage and A3 entered into possession as mortgagee in 2001. Despite Sentry being in default, A3 continued to make interest payments to investors. Dr Acker asserted that he and another director of A3, and also A3, had made some of those payments and had also met other expenses of A3 in relation to the subject investment on A3's behalf. Whether that is so is difficult to say on the available evidence but I do not accept that Dr Acker, the other director, or A3 contributed more to the Sentry scheme than they withdrew.

[19] Dr Acker gave evidence in the proceedings and was cross-examined at some length. In the course of the Sentry scheme he was soliciting investments from prospective investors, at a time when Sentry was in default of its obligations as mortgagor, without informing potential investors of Sentry's default. He admitted the third tranche of investors into the scheme in the knowledge, either that this would unlawfully dilute the interests of the existing investors, or confer no interest on the new investors in the mortgage. He does not appear to have concerned himself with providing new investors with a security which had an appropriate excess in value over the total amount of funds invested in the scheme.

[20] A3, to the knowledge of Dr Acker, engaged in a course of conduct under which funds in respect of one scheme were mingled with funds collected in respect of other schemes. Moneys collected for a particular scheme were applied to the benefit of another scheme or other schemes without the consent of investors, and without the taking of appropriate security.

[21] I did not gain a favourable impression of Dr Acker's credibility and I would not accept his uncorroborated evidence unless it was against interest. I do not propose to go into the state of the record keeping in respect of the Sentry and other schemes in any detail. It is sufficient, I think, for present purposes to note that it was poor except in relation to the recording of the identity of investors in a particular scheme,

the amount of capital contributed to the scheme by investors, and as to payment of interest to investors.

[22] Mr Moloney, who has carried out and caused to carry out extensive financial investigations into the affairs of the schemes and in particular, the Sentry scheme, is also satisfied that the record of scheme expenses in the Sentry scheme ledgers is reasonably accurate.

[23] Messrs Moloney and Geroff were appointed as investigative accountants of the managed investment schemes conducted by A3 by order of this court on 27 May 2003. They produced an investigative accountant's report dated 24 June 2003 which identified 15 schemes conducted by A3, including the Sentry scheme. By a further order made on 19 August 2003, Messrs Moloney and Geroff were appointed liquidators "jointly and severally to wind up" five of the schemes, including the Sentry scheme. These were the schemes in respect of which the investors' investments appeared to be at the most risk. Under that order all right, title and interest in and to the assets of the schemes vested in "the Liquidators as trustees for each of the Schemes." A3 was appointed to wind up the balance of the schemes but Messrs Moloney and Geroff were appointed to supervise A3 "in the winding up."

The Applicants' Contentions

[24] The property over which the respondent claims a lien is held by it in trust for those persons who paid money to A3 for investment in the Sentry scheme. The beneficiaries include all those persons shown in the ledger maintained by A3 to have contributed capital to the Sentry scheme.

[25] No lien in respect of the title deeds can arise as they were placed in the respondent's possession for safe keeping. The Epitome of Investment proclaims that the "security documents" are held by C.B. Darvall & Darvall. This was intended "to afford investors a degree of comfort in relation to the safety of the security documents the subject of the trust." The respondent, to the extent that it can show that it did work for the trustee as trustee of the Sentry trust, is entitled to a lien but was obliged to accept payment of $7,500 in satisfaction of its claims and in extinguishment of the lien.

[26] Alternatively, any lien which may exist is in respect only of costs properly incurred in work done by the respondent in relation to the trust. The principle to be applied is stated in the following passage from the *Principles of the Law of Trusts:*[1]

> "In a trust of any magnitude the trustees will necessarily incur administration expenses. They are entitled to, and for administrative reasons, preferably should, meet those expenses directly from the trust fund. If they meet those expenses personally they're entitled to recoupment from the trust fund: ..when a trustee incurs debts in the administration of

[1] H A J Ford and W A Lee, 3rd ed para 13010

> the trust, creditors may subrogate themselves to the trustees' right of recoupment from the trust assets."

[27] A solicitor for a trustee does not acquire any beneficial interest in the trust save to the extent to which the trustee is entitled to an indemnity out of the estate. To that extent only is the solicitor entitled to retain documents as against the beneficiaries.

[28] A3 is not entitled to recover anything from the assets of the Sentry trust until it has made good the breaches of trust in which it has been engaged. Those breaches are the payment of substantial sums of trust money to investors in other schemes or to the benefit of other schemes. *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liquidation)*[2] is authority for that proposition.

[29] The respondent has not shown that the work performed by it was "properly incurred" in the administration of the Sentry trust. In particular, no records or bills are produced as evidence of the nature and extent of the work done.

The Respondent's Contentions

[30] A solicitor's lien is a general lien and entitles the respondent to retain the property the subject of it as security for A3's full indebtedness to the respondent irrespective of the account on which that indebtedness was incurred.[3]

[31] The client in relation to the work done by the respondent in respect of all of the schemes operated by A3 was A3, not the beneficiaries or any of them. A solicitor's lien is a common law concept. It is right to keep back from the client [A3] the deeds held by the respondent until its bills of costs are satisfied. The capacity in which A3 may have been acting is irrelevant to the respondents' rights as lienor.

[32] It is accepted that the mortgage and the deeds were held in trust for the "original investors." In respect of new investors, although "the matter is finely balanced" their relationship with A3 is probably that of debtor-creditor. The new investors did not sign a "Letter of Instruction" "capable of some coherent meaning", did not pay their moneys into the respondent's trust account and received an "Epitome of Investment" rather than an "Epitome of Mortgage". The money of the new investors was not used to acquire the security, it had already been acquired. Some of their money was used to pay interest to themselves and to the original investors. All of the new investors' moneys went into a bank account where it was mixed with the moneys of investors in other schemes and applied between schemes on an arbitrary basis. Having regard to the impossibility of tracing moneys from one scheme to another the court will apportion "the available fund between (all investors in all schemes) in proportion to their respective claims."

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[2] [2002] NSWCA 29, [47]

[3] 44(1) *Halsbury's Laws of England* 4th ed, para 246 and Sykes and Walker, *Law of Securities*, 5th ed, 746-747.

[33] Mr Dunning, who appeared for the respondent, relied on the following statements of principles:

Principles of the Law of Trusts:[4]

> "A person or entity that undertakes to maintain an account of moneys on behalf of others, whether under a contract, trust or statute, must ensure that credits and debits are posted to accounts maintained on behalf of each client or beneficiary as they arise, together with the resulting balance.
>
> If the solicitor makes a delinquent withdrawal from the clients' bank trust account, resulting in a deficit affecting all clients whose moneys have been deposited in that bank account, the clients share what remains in the account in proportion to their entitlements. Many cases illustrate this: *Re British Red Cross Balkan Fund* [1914] 2 Ch 419."

Barlow Clowes International Ltd (In Liquidation) v Vaughan:[5]

> "The wider argument is that the rule in *Clayton's* Case is concerned with resolving the rights of a banker and his customer to the funds in a bank account and not resolving the conflicting claims of beneficial interests in an account by the beneficiaries; so the rule has no application here."

And at 35:

> "Credits to a bank account made at different times and from different sources [are treated] as a blend or cocktail with the result that when a withdrawal is made from the account it is treated as a withdrawal in the same proportions as the different interest in the account beared to each other at the moment the withdrawal is made."[6]

Jacob's Law of Trusts in Australia:[7]

> "..for example, if a trustee misappropriates $500 of trust moneys belonging to A and subsequently mixes it with $500 of trust moneys belonging to B and then withdraws and dissipates $500 from the mixed fund, the true solution should not be that A lose all rights to the remaining balance of $500, as an application of *Clayton's* Case would suggest, but that A and B each have an equitable charge over the remaining $500, which charges abate rateably. [By DA McConville "Tracing and the rule in *Clayton's Case"*, (1963) 79 LQR 388.]

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[4] Ford & Lee, Law Book Company, Looseleaf
[5] [1992] 4 All ER 22 at 34
[6] At [17250]
[7] 6th ed 1997

> Where it is impossible to attribute particular investments to moneys provided by particular investors, whether by application of *Clayton's* Case or *Hallet's* Case, then the court will apportion the available fund between the investors in proportion of their respective claims. This course was accepted as correct in principle by the New Zealand Court of Appeal in *Re Registered Securities Ltd.* [1991] 1 NZLR 545 at 552-555…"

The Principles relevant to claims by creditors against Trustees

[34] The applicant's primary submission mistakes the nature of the rights of a creditor against the trust fund. The relevant principles are explained in the following oft quoted passage from the joint judgment of Stephen, Mason, Aickin and Wilson JJ in *Octavo Investments Pty Ltd v Knight*[8]:

> "It is common ground that a trustee who in discharge of his trust enters into business transactions is personally liable for any debts that are incurred in the course of those transactions: *Vacuum Oil Co. Pt. Ltd. v Wiltshire* (22). However, he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets: *Vacuum Oil co. Pty. Ltd. v Witshire.* The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee's possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorized to use for the purposes of carrying on the business: *Dowse v Gorton* (23).
>
> In such a case there are then two classes of persons having a beneficial interest in the trust assets: first, the cestuis que trust, those for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied: *Vacuum Oil Co. Pty Ltd. v Wilshire.*
>
> The creditors of the trustee have limited rights with respect to the trust assets. The assets may not be taken in execution (*Savage v Union Bank of Australia Ltd.*(24); In *Re Morgan; Pillgrem v Pillgrem* (25) but in the event of the trustee's bankruptcy the creditors will be subrogated to the beneficial interest enjoyed by the trustee: *Vacuum Oil co. Pty. Ltd. v Wiltshire; Ex parte Garland* (27)."

[8] (1979) 144 CLR 360 at 367

[35] A creditor's right of subrogation is succinctly explained in the following passage from *Lewin on Trusts*[9]:

> "Although unsecured creditors and other claimants do not have a direct claim against the trust property in respect of unsecured liabilities incurred by trustees in the administration of the trust, and cannot levy execution upon the trust property they may by subrogation have a right to stand in the place of the trustee and enforce their liabilities against the trust property to the extent that the trustee would be so entitled. The trustee's right of indemnity is an asset of the trustee, and the trustee's creditors are entitled by subrogation to reach this asset and so enforce their claims against the trust property."

[36] The learned authors of *Halsbury's* state[10]:

> "A solicitor for a trustee or a personal representative does not acquire a lien over the beneficial interests, but to the extent to which the solicitor's client is entitled to an indemnity out of the estate the solicitor is entitled to retain documents as against a beneficiary."

[37] As the creditor's right is one of subrogation it cannot exceed the extent of the claim of the trustee on the trust estate. That claim, or right of indemnity, is often said to be limited to an indemnity from the property of the trust for liabilities "properly" incurred in respect of the trust.[11] Consideration will be given later to limitations on a trustees right of recoupment.

[38] It is instructive to give consideration now to the nature of a solicitor's lien. A useful exposition in this regard is to be found in the reasons of Evershed M.R. in *Barratt v Gough-Thomas*[12]:

> "The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending (it has been said) upon implied agreement. It has not the character of an incumbrance or equitable charge. It is merely passive and possessory: that is to say, the solicitor has no right of actively enforcing his demand. It confers upon him merely the right to withhold possession of the documents or other personal property of his client or former client – in the words of Sir E. Sugden, L.C., "to lock them up in his "box, and to put the key in his pocket, until his client satisfies "the amount of the demand." *(Blunden v Desart* (37). It is wholly derived from and therefore co-extensive with the right of the client to the documents or other property (see the statement of Lord Cranworth, L.J, in *Pelly v Wathen* (38), cited by Chitty, J., in *In Re Llewellin* (39))."

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[9] 17 ed, para 21-31
[10] 44 (1) *Halsbury's Laws of England* 4th ed, para 230
[11] *Staniar v Evans* (1886) 34 ChD 470 at 476-477; *Ecclesiastical Commissioners v Pinney* (1900) 2 Ch 736 at 743; *Lewin on Trusts* (supra) para 21-25
[12] [1951] Ch 242 at 250

[39] The solicitor's right of retention, being no greater than that of the client trustee, necessarily concludes when the trustee has paid the solicitor all that is due to him.[13]

[40] The lien is not limited to costs incurred in relation to the document or other property over which the lien is claimed, but, generally speaking, extends to all the solicitor's claims for costs against the client on any account.[14]

[41] The trustee's right of indemnity is only against the trust fund. A trustee who is the trustee of a number of trusts has no right of recourse to the funds of another trust to satisfy his claims against the trust fund in respect of which this right of indemnity arose. Otherwise, the trustee would be applying trust funds for his own benefit or for the benefit of third parties and contrary to the terms of the trust.

[42] That was the approach taken by King CJ, with whose reasons the other members of the court agreed, in *Re Suco Gold Pty Ltd (In Liquidation),*[15] consistently with the reasons in *Re Byrne Australia Pty Ltd (No2)*[16]. A contrary view was taken in *Re Enhill Pty Ltd*[17]. *Re Suco Gold* was followed in *Re Matheson; Ex parte Worrell v Matheson*[18]. A preference for the reasoning in *Re Suco Gold* was expressed by McLelland J in *Re ADM Franchise Pty Ltd* [19]. The learned authors *of Jacobs' Law of Trusts in Australia* described the decision in *Re Enhill* as "obviously wrong" and Sir Anthony Mason, in a commentary included in *Essays in Equity*[20] remarked that the reasons in *Re Enhill*, relevantly, "look distinctly fragile." The leading English texts also cite *Re Suco Gold* and/or *Re Matheson* with approval.[21]

[43] The respondent seeks to avoid the limitations on the extent of a solicitor's lien through its alternative argument that there exists a broader trust in respect of the assets of the Sentry scheme or, alternatively, that the assets of the Sentry scheme should be administered under a regime which permits the investors in all schemes to participate in the proceeds of realisation of the totality of the assets of the schemes. The underlying theory is that, as the respondent's claims for unpaid fees relate principally to work done in respect of other schemes if there is one large or supervening trust or if all the schemes are wound up as one, A3 will have a right of indemnity against the assets of all the schemes which can be availed by the respondent through its right of subrogation.

[44] It is not necessary to explore the most desirable ways of winding up the various schemes conducted by A3 in order to resolve the issues raised on this application. To the extent that orders made in relation to the winding up of the schemes may be varied, it is obviously necessary that relevant issues be properly identified and that all necessary parties be heard or be given the opportunity to be heard.

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[13] *Barratt v Gough-Thomas* at 263; 44(1) *Halsbury's Laws of England* 4th ed, para 230.
[14] 44(1*) Halsbury's Laws of England* 4th ed, para 246 and *Bozon v Bolland* (1839) 4 M Y & CR 354
[15] [1982] 33 SASR. 99
[16] [1981] 2 NSWLR para 364
[17] [1983] 1 VR 561
[18] (1994) 121 ALR 605
[19] (1983) 7 ACLR 987
[20] *Finn* (ed) (1985), pp 249-50
[21] *Underhill and Hayton's Law of Trusts and Trustee* 16th ed pp 461, 462; *Lewin on Trust* (supra) para 22-24

[45] The position in relation to the Sentry scheme is clear enough. The mortgage, when acquired by A3 with the funds provided by the original investors, became property held on trust for the original investors. New investors were admitted to the scheme from time to time on the basis that they acquired an interest in the mortgage commensurate with the sum invested.

[46] I do not accept the argument that the relationship between A3 and the new investors was probably that of debtor/creditor. The letter of instructions, although misleadingly addressed to the respondent, required the funds invested to be deposited in a trust account and to be released only when A3 held, on account of the investor, a stated interest in the mortgage. The Epitome of Investment stated that the nature of the investment was "described by the attached copy of the original proposal." It is not clear what constituted the "original proposal" but it was probably either letter of instructions or a "write up."

[47] There is no reason to suppose that A3 did not continue to hold out to investors that they were to acquire an interest in the mortgage. It is thus reasonable to conclude that, by the documentation, A3 held out to new investors that the moneys they provided would be held in a trust account and applied by A3 in acquiring, for the investor, an interest in the mortgage. The way in which that interest was to be held was not spelt out. It could be acquired either by A3, or another entity at its behest, acquiring the interest and holding it in trust for investors or by investors being placed on the title. Objectively viewed, the intention was that A3 hold investors' money as a separate fund for the benefit of investors and have no entitlement to use the money as its own. The sums invested were thus received by A3 as trustee for the investors.[22]

[48] The following passage from *Jacob's Law of Trusts in Australia*[23] usefully analyses the applicable principles:

> "A debtor is not a trustee for his creditor since there is no identifiable fund which the latter is entitled to compel the debtor to apply for his benefit. It may be difficult to tell whether a trust has been created or merely a debt incurred. The distinction is most important when any question arises of tracing the money into other property upon which it may have been spent. If there is only a debt, the creditor is limited to his common law remedy of action on that debt. If the money was paid on trust, the payor may trace the money into any other property which the payee may have purchased with it. The answer to the question whether a debt or trust was created in any particular case depends upon the intention of the parties. If the parties intended that the one receiving the money should hold that money for the benefit of the other or for the benefit of a third party, then it will be a trust because there is actual trust property. If the payee was entitled to use the money as his own, being under an obligation merely to repay the same amount of money at a future time, then he is merely a debtor."

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[22] *Cohen v Cohen* (1929) 42 CLR 91 at 101 per Dixon J
[23] 6th ed, 1997 P13

[49] It is unnecessary, for present purposes, to consider whether the new investors are beneficiaries of a trust or trusts separate to the trust in which the original investors are beneficiaries. The fees alleged by the respondent to be outstanding for work done for A3 in respect of the Sentry scheme are limited to $7,500. The claim is not particularised by reference to time or content and there is no attempt to show whether work is referable to one set of investors or another. The beneficial entitlement to the mortgage vested in, and only in, the original investors or, alternatively, in the original investors and the new investors (or some of them) and has not passed to investors in other schemes.

[50] If it can be shown that moneys held by A3 in trust for the participants in another scheme have been misapplied by A3 and applied to the benefit of a Sentry trust those participants will have a claim against A3 for breach of trust. Subject to the qualifications later expressed, it may also be the case that A3 has a right of indemnity in respect of such payments as being expenses incurred by it in the execution of the Sentry trust or trusts.

[51] The accounting investigations into the Sentry scheme undertaken by and on behalf of Mr Moloney suggest that the total amount of Sentry scheme moneys misapplied by A3 for the benefit of other schemes may exceed the total of funds from other schemes and applied to the benefit of the Sentry scheme. Dr Acker claims that A3 and its directors provided their own moneys from time to time to meet interest payments and to discharge expenses of the Sentry scheme. I accept Mr Dunning's submission that the evidence discloses that, if anything, A3 and its directors were borrowers rather than lenders overall. A3 would therefore not appear to have any personal claims on the trust fund which could assist the respondent. This assumes, in favour of the respondent, that A3 derives some rights in respect of moneys paid into the Sentry scheme by its directors.

[52] It is established that the mortgage was acquired with moneys held in trust by A3 for a Sentry trust. As A3 obtained capital for the Sentry scheme from new investors it recorded their contributions in the books of the scheme as investments of capital, thus appropriating the payments to the purposes of the scheme. I have already found that A3's records in this respect were reliably kept. In these circumstances, there is no reason in principle preventing the acceptance of A3's appropriations.[24]

[53] I have also found that the total of investor's capital contributions to the Sentry scheme considerably exceeded the costs of acquisition of the mortgage and the amount of the further advance to the mortgagee. Also, it does not appear that the mortgagor went into default immediately A3 acquired its interest in the mortgage. The scheme funds were thus likely to have been further augmented.

[54] Ultimately, it may be shown that more moneys from other schemes were applied to the benefit of the Sentry trust than were misapplied out of Sentry scheme moneys

[24] *Re Global Finance* [2002] 26 WAR 385 at 422-425

for the benefit of other schemes. But that has not been established for the time being. It follows that the respondent has failed to prove that A3's conduct in relation to other schemes has resulted in a claim by it against the funds of a Sentry trust in respect of which the respondent enjoys a right of subrogation.

[55] If the conclusions just expressed are correct, as they appear to be, A3 has no right of indemnity against the funds of whatever trusts exist in respect of the Sentry scheme. The principle to be applied is that expressed in *Re Johnson*[25]*:*

> "But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me that there is no such equity, because the *cestuis que trust* are not taking the benefit. The trustee having pocketed the money, the title of the creditors, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee."

[56] The respondent faces the additional hurdle that for A3, as trustee of a trust created in respect of another scheme, to have a claim for indemnity in respect of a Sentry trust estate, the debt in respect of which the claim is made must have been incurred by A3 in the proper performance of its duties.

[57] In *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liquidation)*[26] Meagher JA in considering the right of a trustee to an indemnity from trust assets in respect of a liability to pay a penalty imposed for breach by the trustee of s 52 of the *Trade Practices Act* 1974 observed:

> "It is well settled that this right to indemnification [for all charges and expenses incurred in the execution of the trust] extends to reimbursement of the trustee for damages awarded against him for torts committed by him in the course of carrying on the trust business. ..
>
> What are the limits to be placed on this right to indemnification? This is a matter which has rarely engaged the attention of either the Australian or the English courts. Presumably, if the activity which generated the liability in question were a breach of trust, the right to an indemnity under the general law would no longer exist; similarly, if it were criminal in nature. Again, once must in principle incline to the view that if the activity in question had been fraudulent the law would withhold the right to indemnification.."

[58] Meagher JA rejected the view that the activity in respect of which indemnity is claimed must be "reasonable" and that the activity must be "proper." Mason P declined to express a view on those matters. Spiegelman CJ also preferred not to

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[25] (1880) 15 ChD 548, 552 per Jessel MR
[26] [2002] NSWCA

determine the right to indemnity by reference to whether or not the trustee's conduct was "proper" or "reasonable" observing:

> "It is clear that the right of indemnity cannot be availed of if expense was incurred by conduct outside the scope of the trust or in excess of the powers conferred by the trust. The same result should ensue when a trustee incurs expenses as a result of conduct in breach of a duty which the trustee owed to the trust, including the duty to execute the trust with reasonable diligence and care. [See e.g. *Ecclesiastical Commissioner v Pinney* (1900) 2Ch 7368(?)-742-743]"

[59] This foregoing discussion serves to highlight the fact that on the existing state of knowledge about the affairs of the schemes it is possible only to speculate about whether A3 as the trustee of the other schemes may have claims against the assets of the Sentry scheme, whether the claims by Sentry investors may exceed the former claims and whether the circumstances are such that A3 is disentitled from pursuing any claims it may otherwise have. The position is made worse, from the point of view of the respondent, by its inability to show the use in the Sentry scheme of moneys invested by participants of a scheme or schemes in respect of which the respondent is owed legal fees.

Did the circumstances in which the title deeds were placed in the respondent's possession prevent a lien from arising?

[60] The learned authors of *Fisher & Lightwood's Law of Mortgage*[27] state in respect of a solicitor's lien[28]:

> "The lien does not arise where documents or other property have been deposited with the solicitor for a special purpose, and accordingly he cannot detain them beyond that purpose:.. But to deprive a solicitor of his general lien there must be a special agreement as to the purpose of the deposit…"

[61] That this proposition needs amplification or explanation may be seen from a number of cases. In *Duke Finance Ltd (In Liquidation) v Commonwealth Bank of Australia*[29] Giles J, discussing bankers' common law liens, said:[30]

> "Although the cases speak in terms of circumstances inconsistent with a lien, they hide a difficulty. To refer back to the reasoning in *Brandao v Barnett*, it is not entirely satisfactory to say that an implied promise to return the securities is inconsistent with the implication of a lien, since in most cases the bank would be obliged in the absence of a lien to return the securities upon demand. To avoid circularity in the reasoning, it must be asked whether there was some particular

[27] 1995 Australian ed
[28] In para 2.34
[29] (1990) 22 NSWLR 236
[30] At 245, 246

> purpose for which the securities came into the possession of the bank whereby there was some inhibition on the bank claiming possession in its own interests, going beyond the customer's ordinary entitlement to have his securities back if he asked for them, giving rise to an inconsistency with the implication of a lien. The cases can be explained as finding such particular purposes – the purpose of keeping the securities in safe custody and not otherwise dealing with them (*Brandao v Barnett* and other safe custody cases); the purpose of holding the securities as security for a specific advance and not otherwise (*London Chartered Bank of Australia v White* (1879) 4 App Cas 413; *Wilkinson v London and County Banking Co* (1884) 1 TLR 63; *Bruce v Good* [1917] NZLR 515, *Baker v Lloyds Bank, Ltd* [1920] 2 KB 322; cf *Re London & Globe Finance Corporation* [1902] 2 Ch 416), the purpose of delivery to a stockbroker for sale (*Symonds v Mulkern*); or the purpose of holding as security under a building contract (*MPS Constructions Pty Ltd (In Liquidation) v Rural Bank of New South Wales*). In each case the circumstances must have been such as to lead to the conclusion that the bank's possession was so confined to the particular purpose as to exclude the implication of a lien."

[62] In terms of the principles under discussion there is nothing to distinguish a banker's common law lien from a solicitor's lien.

[63] Part of the above passage was referred to with implicit approval by Young J in *Official Trustee in Bankruptcy v Kioussis*[31]. In that case Young J concluded –

> "The cases tend to suggest that where documents are given to solicitors for specific purpose, then ordinarily the Court will not infer a general lien. A good illustration is *Gibson v May* (1853) 4 De G M & G 516; 43 ER 607.
>
> Other cases referred to in *Fisher & Lightwood* at para 2.34 are cases where that principle was espoused in more or less detail, or were cases where the property which the solicitor had was for all intents and purposes trust property so that he could not have a lien. An illustration is *Stumore v Campbell* & Co [1892] 1QB 314.
>
> So then, one must examine all the facts and circumstances to see whether a lien should be inferred in this particular case and, if it is, whether it should be for all the costs or only the costs that are applicable to the purpose for which the solicitor had the documents. If the latter is the situation, one must also work out what that purpose was. There are cases where the lien has been held to be restricted to the costs for the purpose of which the documents were held. One such example is *Young v English* (1843) 7 Beav 10; 49 ER 965."

[64] I agree, with respect, that in order to determine whether a lien should be inferred in any given case it is necessary to consider the surrounding facts and circumstances. The general rule is that the solicitor's retaining lien arises in respect of documents

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[31] [2000] NSWSC 248, para 25

and personal chattels the property of the client coming into the solicitor's possession, with the client's sanction, in the course of his employment as solicitor.[32]

[65] Whether the general rule is displaced where the subject property is given by the client to the solicitors for a specific purpose will depend on whether the client's instructions, or any express or implied agreement between the solicitor and the client, are inconsistent with the existence of a lien.[33]

[66] In *Gibson v May*[34] a lessee deposited a lease with the lessor's solicitor (who had acted for both lessor and lessee) with a bill of exchange as security for the costs of preparing the lease, which the lessee was to pay. The lessee later mortgaged the term and, the defendants, who were the lessee's solicitors on that occasion, to obtain the lease, paid the lessor's solicitors bill of costs and received the lease and bill of exchange without the lessee's authority.

[67] It was held that the defendants acquired no lien on the bill of exchange beyond the amount which they paid to the lessor's solicitors. Lord Justice Knight Bruce explained:[35]

> "Now it was an act in the proper discharge of their duty to obtain the lease: and, though they had no express authority so to do, it may be that the money which was actually paid gave them not only a personal demand against Moffatt, but gave them also the same rights as the lessors' solicitors had in the lease and the bill of exchange. But they contend, that they thereby acquired a general lien upon the bill. To that argument I am unable to accede. The other solicitors held it for a specific purpose, and upon an express contract. The Appellants could not, without the sanction of their client, obtain any better or higher right than the other solicitors had."

[68] In *Stumore v Campbell*[36], the plaintiff, as execution creditor, applied to attach money in the hands of the defendant garnishees which had been deposited by the judgment debtor with the defendants for a special purpose that had failed. The defendants were the solicitors of the judgment debtor who had given money to the defendants to give to the plaintiff together with a bill of exchange in order to satisfy the plaintiff's judgment. The judgment debtor died before providing the bill of exchange and the money remained in the hands of the defendants. The defendants claimed that the judgment debtor was indebted to them for legal costs and that, in consequence, they could set up a counter-claim against the executors. It was common ground that a lien did not arise because the money was deposited for a

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[32] 44 *Halsburys Laws of England* 4th ed, para 227
[33] *Re London & Globe Finance Corporation* [1902] 2 Ch 416; *Brandao v Barnett* (1846) 8 ER 1622; *MPS Constructions Pty Ltd (In Liquidation) v Rural Bank of New South Wales* (1980) 49 FLR 430
[34] (1853) 4 De G M & G 607
[35] At 609
[36] [1891] 1 QB 86

special purpose and upon the failure of the purpose the defendants were bound to repay it. There was thus no issue concerning whether a lien had come into existence.

[69] In *Re London & Globe Finance Corporation*[37] documents relating to shares belonging to a customer were held by stockbrokers to secure a specific advance. After the advance was repaid the documents were left with the brokers and the customer incurred liability to them on subsequent transactions. It was held that although the specific purpose of the deposit had been satisfied by repayment of the initial advance the brokers had a general lien on the shares. Buckley LJ, after distinguishing decisions relied on by the defendant as examples of the exclusion of a general lien by express or implied agreement between the parties, said:-

> "Here there is nothing at all to exclude the general lien.. The transactions as between the customer and the broker resulted in a sum owing by the customer to the broker, and they were in the possession of the broker's securities which had come into his hands in the course of his business as broker of the customer. It is a well-established principle that the broker has as against the customer the right to hold those securities for the amount due."

[70] The approach in *Re London & Globe Finance Corporation* is consistent with that taken in *Leeper v Primary Producers' Bank of Australia Ltd (In Voluntary Liquidation)* in which Rich, Dixon, Evatt and McTiernan JJ in the course of their joint judgment said[38]:

> "Now, if the terms of this receipt express a condition binding on the father upon which the certificate of title was held by him, his lien is displaced. A solicitor's general lien extends to documents which have come into his possession in his professional capacity even for a particular purpose, at any rate after that purpose has been served. But the undertaking to redeliver the instrument to the bank after completion of the registration of the transfer, and the limitation imposed by the word "sole" upon the purposes of the bailment are together inconsistent with the retention of the certificate under a general lien."

[71] The background against which those observations were made is as follows. A solicitor acting for a bank commenced proceedings on its behalf against a customer of the bank using another solicitor as his agent. Judgement was obtained. The bank held a certificate of title to land in which the customer had an interest and which was mortgaged to the bank. The bank purchased the customer's equity of redemption, and in the course of that transaction handed the certificate of title to the solicitor's agent obtaining a receipt to the effect that the document was received for the sole purpose of registering a transfer to the bank and that upon completion the agent undertook to deliver the document to the bank. After registration had been affected the solicitor retained the certificate of title claiming a lien for his unpaid costs

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[37] (supra)
[38] (1935) 53 CLR 250 at 256, 257

[72] I doubt that the mere fact that the title deeds "were in the possession of the respondent for safe keeping" as security documents would be sufficient to prevent a lien from arising. The respondent had a history of acting for A3, as trustee, in various schemes and there was doubtless an expectation that the respondent would do further work in relation to the subject scheme after obtaining the deeds.

[73] But the title deeds were not merely placed with the respondent by A3 for safekeeping. The letter of instructions from each original investor to the respondent, accepted by conduct, obliged the respondent to release the investor's money only "when you **hold on my account** a _____ interest in the first mortgage…**Title is to be vested** as follows: [investor's name.]" (emphasis added)

[74] The letter did not explain whether the interest to be vested was to be legal, through the investor's interest as mortgagee being registered, or beneficial, as a result of A3 holding its registered interest for the investor. But the instructions make plain that, whatever the precise form of the investor's interest, it was to be held by the respondent on the investor's "account".

[75] As the investor, to the knowledge of the respondent, was to obtain a beneficial interest only, it is implicit that the respondent was being given instructions to hold for the investor title the documents which established or constituted the title to his unencumbered interest. In this case, the solicitors were required to hold for the investor the instrument of mortgage and the title deeds. The investor was not a client of the respondent and no lien in respect of the title deeds could therefore arise.

[76] This conclusion is strengthened by the statement in the "Epitome of Investment" that security documents were held by the respondent. I accept the submission, on behalf of the applicants, that the point of this was to provide an assurance to investors as to the safety of their investments.

[77] I conclude that, for these reasons also, a lien over the title deeds did not come into existence.

Has the respondent shown that his claim is a proper one?

[78] It will be apparent from the foregoing narrative that one would not readily conclude that all activities of A3 in relation to a Sentry trust were engaged in in the course of the proper execution of the trust. Whilst the evidence does not suggest that the respondent was aware that A3 was acting in breach of trust at any relevant time, it does not follow that all work done by the respondent in relation to the Sentry scheme at A3's behest was work in respect of which A3 would be entitled to

indemnification. One example of such work is the work done by the respondent in respect of the further advance of $95,000 in 1999. If the effect of what was done on that occasion was to dilute the interests of the original investors, as seems likely, and if, as also seems likely, they did not consent to the dilution, A3's conduct will have been in breach of trust.

[79] It is impossible in the present state of the evidence to make any final determination in respect of matters such as this but the respondent is unable to rely on any presumption of regularity to relieve it from the necessity of showing that the work relied on to support its lien was work in respect of which A3 had a right to be indemnified out of a trust estate. The only evidence which exists in relation to the work the subject of the lien claim is Mr Marler's assertion that work to the approximate value of $7,500 was done in respect of the Sentry scheme. That evidence, in my view, is insufficient to establish the existence of a valid claim for a lien on the property of a Sentry trust.

Conclusion

[80] It will be declared that the respondent has no lien over the title deeds described in the application filed on 20 February 2004. The respondent must pay the applicants' costs of and incidental to the application to be assessed on the standard basis.