SUPREME COURT OF QUEENSLAND

CITATION:	*Samuel Holdings Pty Ltd v Securities Exchange Guarantee Corporation Limited* [2010] QSC 450
PARTIES:	**SAMUEL HOLDINGS PTY LTD ACN 063 693 747** (applicant) **v** **SECURITIES EXCHANGE GUARANTEE CORPORATION LIMITED ACN 008 626 793** (respondent)
FILE NO/S:	SC No 7686 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	06 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2010
JUDGE:	Chief Justice
ORDERS:	**1. Declare that the respondent should allow the applicant's claim made 26 November 2008 and deal with it in accordance with Part 7.5 Division 4 of the *Corporations Act* by paying to the applicant:** **1. the sum of $46,998, pursuant to Regulation 7.5.64 of the *Corporations Regulations* 2001, together with** **2. interest thereon at the rate of five percent per annum from 17 December 2008.** **2. Order that the respondent pay the applicant's costs, to be assessed on the standard basis.**
CATCHWORDS:	CORPORATIONS – TRUSTS – where at all material times until 27 March 2008 Opes Prime Stockbroking Limited was a "dealer" and carried on a "securities business" in terms of regulation 7.5.64(1) of the *Corporations Regulations* 2001 (Cth) – where on or about 20 March 2008 the applicant deposited $74,600 with Opes and Opes credited that amount to the applicant's account with Opes – where the transaction was a margin lending transaction – where that amount constituted "property" in terms of regulation 7.5.64(1) – where on 27 March 2008 Opes became insolvent within the meaning of the regulation and was liquidated on 15 October 2008 and made subject to a scheme of arrangement on 4

August 2009 – where the SEGC disallowed the applicant's claim under the regulation for payment from the National Guarantee Fund administered by the SEGC – where applicant seeks a declaration that its claim against the respondent dated 25 November 2008 be allowed and a direction that the respondent proceed accordingly –whether the sum was received by Opes in connection with its securities business

CORPORATIONS – TRUSTS – where applicant contends that the amount was "entrusted to or received by" Opes "on behalf of" the applicant, or alternatively, that Opes held it on trust for the applicant in terms of regulation 7.5.64(1) – where applicant submitted that the moneys were received by Opes on the instructions of the applicant – where respondent relied on the provisions of the facility terms, vesting the moneys in Opes upon receipt – where applicant contended that those provisions did not apply – where applicant alternatively contended that a trust should be implied because the money was paid for a specified purpose which failed – whether amount received "on behalf of" the applicant – whether regulation 7.5.64(1) applies only in the event of there being a trust – whether moneys held on trust for the applicant – whether amount was lent to Opes

CORPORATIONS – TRUSTS – whether section 1017E or s 981H *Corporations Act* 2001 (Cth) establishes a trust

Corporations Act 2001 (Cth), s 761A, s 763A, s 763B, s 763E, s 765A, s 766C, s 888H, s 981A, s 981H, s 982A, s 1017E

Corporations Regulations 2001 (Cth), r 7.1.06, r 7.5.08(a), r 7.5.64, r 7.5.67

Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liq) (1978) 141 CLR 335; [1978] HCA 45, cited

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, cited

Daly v The Sydney Stock Exchange Ltd (1986) 160 CLR 371; [1986] HCA 25, distinguished

National Securities Exchange Guarantee Corporation Ltd v McKenzie (1991) 9 ACLC 573, cited

R v Toohey; Ex Parte Attorney-General (NT) (1980) 145 CLR 374; [1980] HCA 2, cited

Twinsectra Ltd v Yardley [2002] 2 AC 164, cited

COUNSEL: A C Stumer for the applicant
J D McKenna SC with M J Darke for the respondent

SOLICITORS: HopgoodGanim Lawyers for the applicant
Clayton Utz for the respondent

CHIEF JUSTICE:

The claim

[1] The applicant seeks a declaration that its claim against the respondent ("the SEGC") dated 25 November 2008 be allowed, and a direction that the SEGC proceed accordingly.

[2] The applicant made its claim pursuant to Regulation 7.5.64(1) of the *Corporations Regulations* 2001 (Cth), which provides:

> "(1) A person may make a claim in respect of property if:
>
> (a) a dealer has become insolvent at a particular time (whether before or after the commencement of this regulation); and
>
> (b) at an earlier time (whether before or after that commencement), the property was, in the course of, or in connection with, the dealer's securities business entrusted to, or received by:
>
> (i) if the dealer was, at the earlier time, a partner in a participant – the participant, or a partner in, or an employee of, the participant; or
>
> (ii) in any other case – the dealer or an employee of the dealer;
>
> and was so entrusted or received on behalf of, or because the dealer was a trustee of the property for, the person (other than an excluded person in relation to the dealer); and
>
> (c) at the time the dealer became insolvent, the obligations of the dealer, or of a participant of which the dealer is a partner, as the case requires, to the person in respect of the property have not been discharged."

Agreed matters

[3] The following matters are agreed between the parties:

1. At all material times until 27 March 2008 Opes Prime Stockbroking Limited ("Opes") was a "dealer" in terms of that provision.
2. At such times Opes carried on a "securities business" in terms of the regulation.
3. On or about 20 March 2008 the applicant deposited $74,600 with Opes, and Opes credited that amount to the applicant's account with Opes.
4. That amount constituted "property" in terms of the regulation.

5. On 27 March 2008 Opes became insolvent within the meaning of the regulation. (It was then placed into receivership and administration, and liquidated on 15 October 2008, then made subject to a scheme of arrangement on 4 August 2009.)
6. The administrators and liquidators of Opes have made distributions of dividends to the applicant, following its claim for repayment for the amount of $74,600, totalling $27,602, so that the applicant's claim is currently limited to $46,998 (together with a claim for interest).
7. The SEGC has disallowed the applicant's claim under the regulation, a claim for payment from the National Guarantee Fund administered by the SEGC.

This court has jurisdiction under s 888H of the *Corporations Act* 2001 (Cth).

The applicant's position

[4] The applicant claims that the SEGC should have proceeded under sub-regulations (2) and (3), which provide:

> "(2) The SEGC must allow the claim if the SEGC is satisfied that:
>
> (a) subregulation (1) entitles the claimant to make the claim; and
>
> (b) at the time the SEGC considers the claim, the obligations of the dealer, or of a participant of which the dealer is a partner, as the case requires, to the claimant in respect of the property have not been discharged.
>
> (3) If the property is, or includes, money, the SEGC must pay to the claimant an amount equal to the amount of that money."

[5] The applicant contends that the amount was "entrusted to or received by" Opes "on behalf of" the applicant, or alternatively, that Opes held it on trust for the applicant, in terms of sub-regulation (1).

The evidence

[6] Mr Mather, the sole director of the applicant, swears in his affidavit filed 22 July 2010 that on or about 20 July 2007, on behalf of the applicant, he sent a "client account application form" to Opes for the purpose of opening an account with it. On or before 2 August 2007, Opes opened the account. On 19 March 2008, the applicant caused its banker to draw on its account and transfer $74,600 to the bank account of Opes. Opes by its internal accounting attributed that amount to the applicant's account.

[7] In his affidavit filed 3 September 2010, Mr Mather swears that he intended that the applicant use the Opes account for margin lending transactions. In discussions with Mr Boyle, the chief operating officer of Opes, Mr Mather agreed to a "loan valuation ratio" of 60 per cent in relation to a proposed acquisition of 100,000 shares in Arrow Energy Ltd. That led to the deposit of the amount of $74,600,

representing 40 per cent of the price of the shares to be purchased by Opes in Arrow Energy.

[8] In his affidavit filed 3 September 2010 Mr Mather swears:

> "23. On or around 19 or 20 March 2008, I telephoned Opes and spoke to Dean Boyle to inform him that money would be deposited to the Samuel Holdings Account for the purchase of 100,000 Arrow Energy shares. I said words to the following effect:
>
> > 'I am sending through money for the purchase of shares in Arrow Energy. The money coming through is based on the agreed LVR of 60%.'
>
> 24. To the best of my recollection, that is the only information I provided to Opes concerning the proposed transaction."

[9] In his oral evidence, Mr Mather said he had instructed the stockbroker Wilson HTM to acquire the 100,000 shares in Arrow, and told Mr Boyle of Opes what was happening, and that he would be sending $75,000 to Opes as part of the share price, with Opes advancing the rest. He said the $75,000 was the applicant's "equity contribution" to the purchase, not security. In March 2008 he asked Opes for a loan to purchase the shares. Opes said the applicant could use the account and that the 60 per cent LVR on the Arrow shares was fine, and he said he would send $75,000 as his share of the purchase price. I am satisfied this conversation occurred.

[10] Mr Mather was challenged on other aspects of his affidavit evidence, eg para 12 of the affidavit filed 3 September 2010. I did however accept all of Mr Mather's evidence. He was a credible witness, and his evidence was not contradicted by other oral evidence. I accepted his evidence subject only to the following two reservations.

[11] I proceed on the basis, in the context of the contractual provisions to which I will come, that the applicant was most likely furnishing the $74,600 as "collateral", with Opes to fund the acquisition, and that the shares be vested in it. Both parties addressed me on the basis that if the applicant entered into the arrangement of which Mr Mather gave evidence, that was the most likely characterization.

[12] Second, when Mr Mather agreed in cross-examination that a "borrowing request" was made, I was not satisfied he was agreeing to anything more than that a request for finance was made. He was not accepting that a "borrowing request" in terms of the agreement had been made. Otherwise his oral evidence would have contradicted para 24 of his affidavit of 3 September 2010.

[13] The share purchase transaction did not proceed. That was because Wilson HTM mistakenly sent the contract note to Chimaera Financial Group Ltd rather than Opes. That occurred in late March, just prior to Opes falling into insolvency. Wilson HTM sold the shares back into the market.

[14] By its solicitors, the applicant on 26 November 2008 claimed repayment of the sum of $74,600 under regulation 7.5.64. The SEGC asserted in response that the payment of the money to Opes "occurred under the Securities Lending and

Borrowing Agreement" between the applicant and Opes, and involved "an outright transfer of property" (letter of 21 January 2010).

Terms of the agreement

[15] For the last contention, the SEGC relies at least partly on the terms of the Securities Lending and Borrowing Agreement which came into operation on Opes' accepting the applicant's application to open the account. Clause 6 of the "acknowledgements" in the application form provided that the account would be established "on the terms set out in this FSG", meaning (as was common ground) the document entitled "Securities Lending and Borrowing Financial Services Guide", which included a section headed "facility terms". That section included the terms on which the SEGC relies for its contention that Opes became entitled to the sum of $74,600 upon payment by the applicant to it.

[16] The nature of the agreement between Opes and the applicant is set out in the first clause of the "facility terms":

> "These are the terms of the Securities Lending Agreement made by acceptance of your Application Form in which you requested this facility.
>
> It is made between:
>
> 1. Opes Prime Stockbroking Limited (ABN 180 862 940 28) (Opes Prime); and
>
> 2. the person described in the accompanying Application Form as the Client (Client)
>
> IT IS AGREED AS FOLLOWS:
>
> 1 Loans of Securities
>
> 1.1 (Borrowing Request)
> The Lender will lend Securities to the Borrower, and the Borrower will borrow Securities from the Lender, in accordance with the terms of this Agreement regardless of which party is the Lender, in all cases Opes Prime must have received from the Client and accepted (by whatever means) a Borrowing Request, regardless of which party is the Lender."

[17] The term "Borrowing Request" is defined in cl 22 as follows:

> "Borrowing Request means a request made orally or in writing, in a form approved by the Lender, by the Borrower to the Lender pursuant to clause 1.1 specifying, as necessary:
>
> (a) the description, title and amount of the Securities required by the Borrower;
>
> (b) the description (if other than Australian currency) and amount of any Collateral to be provided;

(c) the proposed Settlement Date;

(d) the duration of such loan (if other than indefinite);

(e) the mode and place of delivery, which will, if relevant, include the bank, agent, clearing or settlement system and account to which delivery of the Securities and any Collateral is to be made;

(f) the Margin in respect of the transaction (if different from that provided in clause 22); and

(g) the Fee."

[18] The use in cl 1.1 of the terms borrow and lend reflects language peculiar to the financial services market. The agreement actually envisaged the absolute transfers of shares and moneys put up as security for the "borrower's" performance, as may be drawn from cl 3.4:

"3.4 (Transfer)

Notwithstanding the use of expressions such as 'borrow', 'lend', 'Collateral', 'Margin', 'redeliver' etc., which are used to reflect terminology used in the market for transactions of the kind provided for in this Agreement, all right title and interest in and to Securities 'borrowed' or 'lent' and 'Collateral' which one Party transfers to the other in accordance with this Agreement will pass absolutely from one Party to the other free and clear of any liens, claims, charges or encumbrances or any other interest of the Transferring Party or of any third party (other than a lien routinely imposed on all securities in a relevant clearance system) without the transferor retaining any interest or right to the transferred property, the Party obtaining such title being obliged only to redeliver Equivalent Securities or Equivalent Collateral, as the case may be. Each Transfer under this Agreement must be made so as to constitute or result in a valid and legally effective transfer of the Transferring Party's legal and beneficial title to the recipient."

[19] Clause 2 of the Facility Terms provides for the delivery of the securities:

"2. Delivery of securities

2.1 (Delivery)

The Lender will procure the delivery of Securities to the Borrower or deliver such Securities in accordance with the relevant Borrowing Request together with appropriate instructions for or instruments of transfer (if necessary) duly stamped (if necessary) and such other instruments (if any) as required to vest title absolutely in the Borrower.

[20] The title in such securities is to vest in the "borrower":

3. Title, Distributions and Voting

3.1 (Passing of Title)
The Parties must execute and deliver all necessary documents and give all necessary instructions to procure that all right, title and interest in:

(a) any Securities borrowed pursuant to clause 1;

(b) any Equivalent Securities redelivered pursuant to clause 6;

(c) any Collateral delivered pursuant to clause 5;

(d) any Equivalent Collateral redelivered pursuant to clauses 5 or 6;

will pass absolutely from one Party to the other, free from all liens, charges, equities and encumbrances, on delivery or redelivery of the same in accordance with this Agreement. In the case of securities, Collateral, Equivalent Securities or Equivalent Collateral title to which is registered in a computer based system which provides for the recording and transfer of title to the same by way of electronic entries, delivery and transfer of title will take place in accordance with the rules and procedures of such system as in force from time to time."

[21] It will be noted that cl 3.1(c) provides for the passing absolutely of title to any "collateral" delivered pursuant to cl 5. The term "collateral" is defined in cl 22 to include cash. Clause 5.1 says:

"5. Collateral

5.1 (Borrower's Obligation to Provide Collateral)
The Client as Borrower or Lender undertakes to deliver to or to deposit with Opes Prime or its Nominee (or in accordance with Opes Prime's instructions):

(a) Collateral of the kind specified in the relevant Borrowing Request or as otherwise agreed between the Parties; and

(b) appropriate instructions for transfer or instruments of transfer duly stamped (if necessary) and such other instruments as may be requisite to vest title to them in Opes Prime simultaneously with delivery of the Borrowed Securities, in accordance with this clause 5."

[22] Having referred to cl 3.1 and cl 3.4, the SEGC contended, in its points of defence, that the applicant paid that amount of $76,400, which the SEGC styled as a "deposit", pursuant to some or all of those terms, and then contended:

> "In the premises, by making the Deposit, the Applicant transferred the full legal and beneficial title in the money the subject of the Deposit to Opes and Opes did not receive the Deposit 'on behalf of' the Applicant or as 'trustee' for the Applicant, within the meaning of regulation 7.5.64(1)(b) of the Corporations Regulation.
>
> Further or in the alternative…Opes did not receive or retain the Deposit on trust (whether constructive, implied or express) and, accordingly, did not receive the Deposit 'on behalf of' the Applicant or as 'trustee' for the Applicant, within the meaning of regulation 7.5.64(1)(b) of the Corporations Regulation."

A typical transaction under those provisions

[23] Mr Stumer, who appeared for the applicant, offered this description of a typical transaction under these terms:

> "(a) The 'Client' would identify Securities in which it intended to invest and would make a 'Borrowing Request' to Opes in respect of those Securities;
>
> (b) The 'Client' would deposit an amount of 'Collateral' with Opes either in the form of 'Securities' or 'Cash Collateral'. The amount or value of the Collateral would depend upon the 'Margin' agreed between the parties;
>
> (c) Opes would provide funds in the form of a margin loan for the Client to purchase an agreed quantity of the specified Securities;
>
> (d) The Securities purchased would be transferred to Opes which would obtain full beneficial and legal title to them. In that transaction, the SLBA designated the Client as the 'Lender' of the Securities and Opes as the 'Borrower'.
>
> (e) Opes would be obliged to transfer back to the Client 'Equivalent Collateral' and 'Equivalent Securities' at the conclusion of the transaction (for example, when the Client repaid the funds used to purchase the Securities)."

The SEGC's contentions at the hearing

[24] Before me, Counsel for the SEGC made four principal submissions:

> "(a) First, the $74,600 was not received by Opes in connection with its 'securities business' (essentially its stockbroking business), but in connection with its distinct securities lending business;
>
> (b) Secondly, even if the $74,600 was received in connection with Opes' securities business, it was not received on behalf of, or because Opes was trustee for, Samuel Holdings. The SEGC submits that the transfer of the $74,600 to Opes did

no more than create a debt which Opes was liable to repay to Samuel Holdings;

(c) Thirdly, Opes had no obligations in respect of the $74,600 which were undischarged when it became insolvent. It was liable for a debt which had not been repaid, but that was not an obligation in respect of the $74,600 as such;

(d) Fourthly, Samuel Holdings was not entitled to make any claim in respect of the $74,600 because that money was, in fact, lent to Opes and regulation 7.5.67 of the *Corporations Regulations* precludes a claim being made in such circumstances."

[25] It is convenient to analyse the matter by reference to those contentions.

Whether the sum was received by Opes in connection with its securities business.

[26] It was common ground that Opes carried on a "securities business" in terms of the regulation. But Mr McKenna SC, who appeared for the SEGC, submitted that because Opes' role was limited to financing the applicant's purchase of the Arrow shares, the acquisition being managed by the applicant's stockbroker Wilson HTM, Opes was not dealing in the securities, dealing being of the essence of a securities business. Alternatively, to the extent that it dealt because of its proposed acquisition of the shares "lent" by the applicant, it was dealing on its own behalf and therefore outside the scope of the legislation, to which I now turn.

[27] For Sub-division 4.9, Regulation 7.5.08(a) relevantly defines a "securities business" as "a financial services business dealing in securities". The term "financial services business" is defined in s 761A as "a business of providing financial services", one of which is dealing in a financial product, of which securities are a type. The term "dealing" is defined in s 766C(1) to include applying for, acquiring, issuing or disposing of a financial product. By s 766C(3) a person does not "deal" in the financial product if doing so on that person's own behalf.

[28] Mr Stumer pointed out that Opes held itself out as being in the business of dealing in securities, and he referred to paras 11 and 12 of Mr Mather's affidavit filed 3 September 2010, as to the security of dealing with Opes, and its being "a full ASX stockbroker and…covered by the ASX Fidelity Fund". Nevertheless if Opes' role was limited to the provision of funds, this proposed transaction may not have formed part of its business of dealing in securities. But its role was not so limited.

[29] Opes was to acquire the shares, financing the acquisition, with the security of the applicant's "collateral". It was to hold the shares on terms which would then benefit the applicant financially in various ways: by cl 3.2(a) of the "facility terms", Opes was obliged to pay the applicant the equivalent of any income paid by the issuer of the shares, for example by way of dividend; by cl 3.2(b) upon the return of "equivalent securities", the applicant's right to take the benefit of rights relating to conversion, sub-division, consolidation, pre-emption etc was preserved; and by cl 6, with the applicant's right to the provision of "equivalent securities" in certain circumstances, the applicant retained the benefit of any increase in the value of the shares.

[30] To suggest the Opes' role was limited to financing ignores the feature that Opes would hold the shares, with those sorts of entitlements accruing in favour of the applicant. Because of those entitlements, it cannot be said that Opes would have held the shares only on its own behalf. The applicant also had a substantial interest in the matter. The contention for the SEGC was too narrowly put and, as Mr Stumer submitted, other aspects apart failed to make proper allowance for the reference to a deposit of money "in connection with" Opes' securities business.

[31] I conclude that the amount was received by Opes in connection with its securities business.

Whether the amount was "entrusted to or received by (Opes)…on behalf of, or…(as trustee) for…the applicant"

[32] Considering this question involves the construction of Regulation 7.5.64(1) and the authorities bearing on whether a trust must be established; whether the moneys were received on behalf of the applicant; whether a trust would arise here; and whether the statutory provisions deeming the existence of trusts applied.

Construction of the regulation

[33] Mr McKenna submitted that for the regulation to apply, Opes must have held the moneys on trust for the applicant. He relied on an observation by Marks J in *National Securities Exchange Guarantee Corporation Ltd v McKenzie* (1991) 9 ACLC 573, 575, in relation to a comparably worded provision, that a claim depended on the existence of a trust. Mr Stumer pointed out that His Honour's observations amounted to an obiter dictum.

[34] Marks J said he drew assistance from the approach of the High Court in *Daly v The Sydney Stock Exchange Ltd* (1986) 160 CLR 371. In that situation, as drawn from the footnote, an investor sought the advice of a firm of stockbrokers about shares in which he might invest. At the time the firm, though apparently prosperous, was in a parlous financial position, and this was known to the partners. An employee, who was not aware of the firm's position, advised the investor that it was not a good time to buy shares and he should place the money on deposit with the firm until the time was right to buy. The investor lent the money to the firm at interest. The firm subsequently ceased trading and was unable to repay the loan. The investor applied to recover compensation from the Fidelity Fund", under which the right to claim was similarly worded. Yet both Gibbs CJ (p 377) and Brennan J (p 390) referred to money received either as trustee, or otherwise on behalf of the payer. The case was apparently advanced on the basis of trust, which was found not to have arisen (p 380), the court concluding only that the applicable relationship was of debtor and creditor (p 381).

[35] Mr Stumer distinguished *Daly* by reference to the Chief Justice's observation at the top of p 380:

> "However, the loan in the present case was not made for any specified purpose and there was no agreement, express or implied, that the moneys lent should not form part of the borrower's general assets."

He submitted that in this case, the collateral was provided for the specific purpose of securing Opes' outlay of the purchase price of the shares to be purchased in Arrow, in the context of the facility terms of the agreement. That does distinguish this situation from *Daly*.

[36] I respectfully disagree with the view that the regulation applies only in the event of there being a trust. The express reference to the moneys being received on behalf of the payer, separately from the reference to trust, must be given effect. There are situations in which A receives money on behalf of B in the absence of a trust. Simple agency is an example.

(b) Was the amount received on behalf of the applicant?

Whether amount received "on behalf of" the applicant

[37] Mr Stumer submitted that the moneys were at all material times received and held by Opes "on behalf of" the applicant, or on trust for the applicant. He referred to the provision in s 9 of the *Corporations Act* that "on behalf of" includes "on the instructions of", and the range of situations the connection may embrace, as discussed in *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374, 386. He urged a broad interpretation of the term, consistently with the remedial objective of the regulation. He submitted that the moneys were received by Opes on the instructions of the applicant "in the sense that the applicant had communicated that it was to be used specifically for the purpose of the anticipated transaction".

[38] On the other hand, Mr McKenna relied on the provisions of the facility terms, vesting the moneys in Opes upon receipt. Mr Stumer countered that those provisions did not apply because the payment was not preceded by a "borrowing request".

[39] Clause 3, on which the SEGC relies, refers to the passing of title to collateral upon "delivery…in accordance with this Agreement". Clause 1.1 provides that "in all cases Opes Prime must have received from the client and accepted (by whatever means) a Borrowing Request, regardless of which party is the lender". As emerges from paras 22-24 of Mr Mather's affidavit filed 3 September 2001, the oral request made of Mr Boyle did not cover all of the matters required to constitute a "borrowing request". There was no mention, for example, of the matters set out in paras (a), (c), (d), (e) and (g) of the definition of "borrowing request". There was no "borrowing request" complying with the agreement.

[40] But that did not mean that the moneys did not vest in Opes. I have concluded that the moneys were paid and received and retained as "collateral". Clause 3.4 does provide that collateral transferred "in accordance with this Agreement" passes absolutely, and clause 1.1 says that Opes "must have received…and accepted" a borrowing request. But the absence of such a request did not deny the moneys their character as "collateral" where the parties were prepared to proceed in the absence of a borrowing request complying with the agreement. Mr McKenna referred to the particular waiver provision in cl 7.9. There is no reason why the parties should not be taken to have waived generally the requirement for the delivery of a fully-blown borrowing request precedent to the furnishing of the collateral. (I note also that cl

5.1(a) contemplated that the parties may agree upon the delivery of collateral of a kind different from that specified in any borrowing request.)

[41] The consequence of cl 3.1 in these circumstances was that Opes gained title to the monies paid upon receipt, which excludes their being characterized as received "on behalf of" the applicant, notwithstanding that Opes never acquired the shares.

Whether moneys held on trust for applicant

[42] That conclusion of itself renders the existence of a trust unlikely. Mr Stumer submitted that a trust should be implied because the money was paid for a specified purpose which failed, and he referred to *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 as explained in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liq)* (1978) 141 CLR 335, 353.

[43] In the latter case, Gibbs CJ said that a trust would be implied in a situation like this where the mutual intention was that the moneys paid "should not become part of the assets" of the recipient. The provision in cl 3.1 runs against that situation: these moneys were intended to become assets of Opes. Consistently, the moneys were not paid on the basis they be kept separate. In fact, they were received into Opes' account with the ANZ Bank and co-mingled with other funds.

[44] Another consideration telling against the existence of a trust was that Opes was not obliged to account to the applicant for interest accrued on the deposit.

[45] Commending a circumspect approach, Lord Millett in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 pars 73-4 said that "the question in every case is whether the parties intended the money to be at the free disposal of the recipient". Here it was, by force of the agreement and because Mr Mather did not attach strings to the payment, saying only that it related to the share purchase and reflected the 60 percent LVR.

Whether the amount was lent to Opes

[46] It remains in this section of my reasons to mention a contention for the SEGC that the applicant "lent" the sum of $74,600 to Opes. Regulation 7.5.67 excludes any claim against the National Guarantee Fund in relation to money lent to a dealer. This money was paid as intended security for the repayment of the purchase price of shares to be acquired by Opes at the request of the applicant. There was no agreement that Opes repay that amount in the event the transaction proceeded. Consistently, there is no evidence of any terms of repayment, such as any date for repayment or accrual of interest. My conclusion that the moneys vested in Opes upon receipt is itself inconsistent with a view that they were lent.

[47] Mr McKenna sought comfort in the way the amount was characterized in certain documents: its being referred to as a "debt" in the informal proof of debt form signed by Mr Mather; the reference in para 6 of annexure "A" to the claim on the Fund to the moneys being "entrusted" to Opes for a particular purpose; and the applicant's solicitors' suggestion that the moneys bore the character of a bank deposit. These are essentially opinions, and I would not rely on them to characterize the nature of Opes' receipt of the money, which is better gauged by reference to the objective circumstances.

Whether s 1017E or s 981H Corporations Act established a trust in these circumstances

[48] I turn finally to the question whether the amount was subject to a statutory trust.

Section 1017E

[49] This provision deems money to be held on "trust" if paid to the issuer or seller of a "financial product" to acquire an interest in the product, and the issuer or seller does not immediately issue or transfer the product.

[50] The relevant parts of the section follow:

> "(1) This section applies to money paid to:
>
> (a) an issuer (the product provider) of financial products; or
>
> (b) a seller (the product provider) of financial products in relation to which the seller has prepared a Product Disclosure Statement;
>
> If:
>
> (c) the money is paid to acquire, or acquire an increased interest in one or more of those financial products from the product provider (whether or not the acquisition would be by a person as a retail client); and
>
> (d) the product provider does not, for whatever reason, issue or transfer the product or products, or the increased interest, immediately after receiving the money; and
>
> (e) either:
>
> (i) the financial product or increased interest was offered in this jurisdiction; or
>
> (ii) the application for the financial product or increased interest was made in this jurisdiction; or
>
> (iii) the money was received in this jurisdiction.
>
> …
>
> (2A) Subject to subsection (2C), the money is taken to be held in trust by the product provider for the benefit of the person who paid the money."

[51] Section 763A(1) defines "financial product" as follows:

> "(1) For the purposes of this Chapter, a financial product is a facility through which, or through the acquisition of which, a person does one or more of the following:
>
> (a) makes a financial investment (see section 763B);
>
> (b) manages financial risk (see section 763C);
>
> (c) makes non-cash payments (see section 763D).
>
> This has effect subject to section 763E."

[52] Mr Stumer submitted that Opes provided a facility for financial investment, and therefore offered a financial product. Section 763B sets out when one makes a financial investment:

> "For the purposes of this Chapter, a person (the investor) makes a financial investment if:
>
> (a) the investor gives money or money's worth (the contribution) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
>
> (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit."

[53] Mr Stumer submitted that the provisions are attracted because the applicant gave money to Opes intending Opes would use it to generate a financial return for the applicant, in respects covered earlier in these reasons (para 29), in circumstances where the applicant had no day to day control over the use of the money for that purpose – that control rested with Opes.

[54] Under s 765A(1)(h)(i) a "credit facility within the meaning of the regulations" is not a "financial product". Regulation 7.1.06 provides that the provision of credit for any period is a credit facility. The effective provision of credit is only one facet of the facility provided by Opes, which was a facility for the holding of securities by Opes with related financial benefit to the client in the respects covered above. The collateral was furnished to Opes for the purpose of its acquisition of the shares

which would have produced those financial benefits for the applicant. Opes thereby offered a "financial product".

[55] Mr McKenna submitted that the facility provided by Opes in these margin lending situations was not a "financial product" and drew attention to s 763E:

> "763E(1) ["incidental product"] If:
>
> (a) something (the incidental product) that, but for this section, would be a financial product because of this Subdivision is:
>
> (i) an incidental component of a facility that also has other components; or
>
> (ii) a facility that is incidental to one or more other facilities; and
>
> (b) it is reasonable to assume that the main purpose of:
>
> (i) if subparagraph (a)(i) applies – the facility referred to in that subparagraph, when considered as a whole; or
>
> (ii) if subparagraph (a)(ii) applies – the incidental product, and the other facilities referred to in that subparagraph, when considered as a whole;
>
> is not a financial product purpose;
>
> the incidental product is not a financial product because of this Subdivision (however, it may still be a financial product because of Subdivision C).
>
> 763E(2) ["financial product purpose"] In this section:
>
> *financial product purpose* means a purpose of:
>
> (a) making a financial investment; or
> (b) managing a financial risk; or
> (c) making non-cash payments."

[56] Referring back to s 763B(a)(ii) and considering the purpose behind such a transaction, Mr McKenna submitted that an intent to generate financial return for the applicant, if established, was but incidental to the primary purpose, which was to obtain finance for the applicant and the securities for Opes. I say "if established" because Mr McKenna submitted that there was no evidence of any requisite intent.

[57] As to that matter, I accept Mr Stumer's response, which was that it was patently clear that the applicant was proposing this transaction in order to secure a financial return for itself: that may safely be inferred.

[58] As to the former point, generating financial return for the applicant should not be regarded as merely incidental to Opes' proposed acquisition of the securities, when one considers the facility as a whole. It is not reasonable to characterize one

purpose as "main" and another as "incidental". It is not reasonable to assume, in terms of sub-s (1)(b)(i), that the main purpose of this facility is not a "financial product purpose", namely, making a financial investment.

[59] I conclude that the provision operated to impress the amount held by Opes with a trust.

Section 981H

[60] Under this provision, money paid to a financial services licensee will be deemed to be held on trust if paid "in connection with" a financial service or a financial product.

[61] The provision follows:

> "(1) Subject to subsection (3), money to which this Subdivision applies that is paid to the licensee:
>
> (a) by the client; or
>
> (b) by a person acting on behalf of the client; or
>
> (c) in the licensee's capacity as a person acting on behalf of the client;
>
> is taken to be held in trust by the licensee for the benefit of the client."

[62] Section 981A applies only to moneys "to which this Subdivision applies", which takes one to s 981A:

> "(1) This subdivision applies (subject to subsections (2), (3), and (4)) to money paid to a financial services licensee (the licensee) in the following circumstances:
>
> (a) the money is paid in connection with:
>
> (i) a financial service that has been provided, or that will or may be provided, to a person (the client); or
>
> (ii) a financial product held by a person (the client); and
>
> (b) the money is paid:
>
> (i) by the client; or
>
> (ii) by a person acting on behalf of the client; or
>
> (iii) to the licensee in the licensee's capacity as a person acting on behalf of the client."

[63] At the relevant time, Opes was a "financial services licensee". The question to be answered is whether, in terms of s 981A, the amount paid to Opes as collateral was

paid "in connection with a financial service that has been provided, or that will or may be provided" to the applicant, or in connection with a financial product held by the applicant.

[64] Mr Stumer addressed the matter in these terms:

> "As to requirement (b), 'financial service' is defined in s 766A(1)(b) to include dealing in a 'financial product'. 'Financial product' is defined in s 764A(1)(a) to include a 'security'. Samuel Holdings was to acquire securities by the purchase of 100,000 shares in Arrow Energy. It is submitted that the payment of the Deposit to Opes was 'in connection with' a financial service that was to be provided to Samuel Holdings by Wilson because the Deposit was paid to secure the funds from Opes to facilitate the transaction."

[65] It has been observed that the words "in connection with" are broad in scope. With these provisions being remedial, concerning the protection of investors, one should not adopt any particularly narrow approach. Mr Stumer submitted:

> "The payment of the Deposit to Opes was 'in connection with' the acquisition of the shares in Arrow Energy because the deposit was to function as the Collateral for the loan of money from Opes to Samuel Holdings to acquire the shares. The Deposit was therefore 'in connection with' a financial service that was to be provided to Samuel Holdings."

[66] The payment of the collateral to Opes was a payment in connection with the proposed acquisition of the Arrow shares, with consequent financial benefit to the applicant: the payment of the collateral was instrumental to the proposed transaction; the transaction would not have proceeded without the provision of the collateral.

[67] Mr McKenna relied on s 982A, which excludes money lent to a licensee from the application of the subdivision. For reasons previously advanced (para 46), these moneys were not lent to Opes.

[68] I conclude that this provision, also, operated to impress the moneys with a trust of which the applicant was beneficiary.

Conclusion

[69] It follows that the applicant is entitled to the relief sought.

Orders

[70] There will be a declaration that the respondent should allow the applicant's claim made 26 November 2008 and deal with it in accordance with Part 7.5 Division 4 of the *Corporations Act* by paying to the applicant:

1. the sum of $46,998, pursuant to Regulation 7.5.64 of the *Corporations Regulations* 2001, together with
2. interest thereon at the rate of five percent per annum from 17 December 2008.

(There was before me no challenge to a claim for interest at five per cent per annum should the principal claim succeed.)

[71] There will be an order that the respondent pay the applicant's costs, to be assessed on the standard basis.