SUPREME COURT OF QUEENSLAND

CITATION:	*Public Trustee of Qld v Opus Capital Ltd & Ors* [2013] QSC 131
PARTIES:	**PUBLIC TRUSTEE OF QUEENSLAND** (applicant) **v** **OPUS CAPITAL LIMITED** (first respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS CAPITAL GROWTH FUND NO 1** (second respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS DEVELOPMENT FUND NO 1** (third respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS DEVELOPMENT FUND NO 2** (fourth respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS INCOME AND CAPITAL FUND NO 21** (fifth respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS MAGNUM FUND** (sixth respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS PROPERTY TRUST NO 7** (seventh respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS PROPERTY TRUST NO 8** (eighth respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS PROPERTY TRUST NO 11** (ninth respondent) and **OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS PROPERTY TRUST NO 14**

(tenth respondent)
and
OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS PROPERTY TRUST NO 15
(eleventh respondent)
and
OPUS CAPITAL LIMITED AS RESPONSIBLE ENTITY FOR THE OPUS PROPERTY TRUST NO 18
(twelfth respondent)

FILE NO/S:	2181 of 2013
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	7 May and 27 August 2013
JUDGE:	Dalton J
ORDER:	**Declarations as to recoverable costs** **Parties to bring in minutes of order**
CATCHWORDS:	CUSTODIAN TRUSTEE – nature of role – responsibilities and potential liabilities – right to indemnity for legal costs and expenses – construction of contract – trustee's right to indemnity – apportionment of costs between trust funds
	Corporations Act 2001 (Cth) *Legal Profession Act* 2007 (Qld) *Public Trustee Act* 1906 (UK) *Public Trustee Act* 1978 (Qld) *Trusts Act* 1973 (Qld)
	Alsop Wilkinson (a firm) v Neary [1996] 1 WLR 1220 *Barclays Bank Ltd v IRC* [1959] 3 All ER 140 *Berendsen v IRC* [1957] 2 All ER 612 *Brisconnections Management Co Ltd v Dalewon Pty Ltd* (2010) 79 ACSR 530 *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449 *Drummond v Drummond* [1999] NSWSC 923 *Forster v William Deacon's Bank Limited* [1935] Ch 359 *Frost v Bovaird* [2012] FCAFC 60 *In the matter of Noosa Waters Pty Ltd* [1998] QSC 1 *IRC v Silverts Ltd* [1951] 1 All ER 703 *Miller v Cameron* (1936) 54 CLR 572 *Re Brook Bond and Co Ltd's Trust Deed* [1963] 1 Ch 357 *Re Jones; Christmas v Jones* [1897] 2 Ch 190 *Re Suco Gold Pty Ltd (in liq)* (1983) 7 ACLR 873

Tomasevic v Jovetic (No 3) [2012] VSC 558
Trust Company of Australia Ltd v Commissioner of State Revenue (2003) 197 ALR 297

COUNSEL: W Sofronoff QC with D O'Sullivan for the applicant
A Morris QC with G Egan for the respondents

SOLICITORS: Clayton Utz for the applicant
Hallett Legal for the respondents

[1] By originating application the Public Trustee of Queensland seeks an order that Opus Capital Limited pay it sums totalling around $470,000 in respect of legal costs which the Public Trustee has incurred with respect to 11 managed investment schemes, together with a declaration that the Public Trustee is entitled to be indemnified in respect of those sums from the assets of the investment schemes.

[2] Opus Capital Limited is the responsible entity of 11 managed investment schemes within the meaning of s 9 of the *Corporations Act* 2001 (Cth) (the Act). By s 601FC(2) of the Act, and the constitution of each scheme, Opus is trustee for the members of each scheme. Opus has the ability to authorise any person to act as its agent, on any terms it thinks fit – see cll 11.1 and 11.2 of the constitutions. Likewise, under s 601FB(2) and (3) of the Act, a responsible entity can appoint an agent to do anything the responsible entity can do.

[3] Between March 2002 and June 2007 Opus appointed the Public Trustee to act as its agent in respect of each of the 11 managed funds under documents entitled Custody Agreements.[1] Each Custody Agreement is identical for present purposes. The Public Trustee held the property of the managed funds in its name under the Custody Agreements and performed legal and administrative functions in relation to the property on the basis of Instructions (as defined at cl 5 and sometimes called "proper instructions" by the parties) provided by Opus as responsible entity. The general tenor of the Custody Agreements was that the Public Trustee was not to concern itself with decisions as to how the funds or funds' property were managed.

[4] The managed funds were largely invested in property, bought, one gleans, with borrowed money, and were adversely affected by the GFC. The Public Trustee became concerned about its position. Lenders who held security over assets of the funds sent letters of demand, default notices, and notices to enforce their securities to the Public Trustee as owner or mortgagor of the properties– Court Document 17, [96], [104]. There were other matters which gave rise to the Public Trustee harbouring genuine and reasonable concerns about the solvency of Opus and the funds eg., – Court Document 18, pp 838-9, and Court Document 9, paragraphs 12-13 and 19-23. The deteriorating economic conditions revealed what should, I suspect, always have been apparent, had anyone cared to think about it: the invidious position of the Public Trustee who had legal ownership on behalf of others and wide-ranging corresponding obligations at law, but little or no control over, and not much information about, the way the funds were run. A letter from the end of 2009 (Court Document 19, p 786 ff) serves to illustrate. The Public Trustee received a notice from a secured lender to the Capital Growth Fund. The Public Trustee held land for that fund in its own name and was the mortgagor of that

[1] This was apparently a purely commercial arrangement. It was not argued that the Public Trustee lacked power to engage in this business.

land with obligations to the lender under the agreements between them, and no doubt at general law. The Public Trustee also had a side-agreement with the mortgagee in relation to informing it of default under the Custody Agreements. By the notice the mortgagee instructed the Public Trustee to freeze all payments from the bank account associated with the mortgage facility. The Public Trustee had very little information about the financial state of the fund or Opus, and potentially conflicting duties it owed to (at least) the mortgagee, Opus, and beneficiaries of the fund.

[5] Complicating matters were that some managed investment schemes were unit-holders in other of the schemes; there were loans granted by some schemes to other schemes, and there were companies associated with Opus Capital Limited to whom the schemes paid fees for management and leasing services in relation to properties owned by schemes – Court Document 8, paragraph 7. These matters might all assume importance if one or more of the schemes, or Opus itself, became insolvent.

[6] In September 2008 the Public Trustee gave notice terminating the Custody Agreements in relation to all the funds.[2] At that time the Public Trustee had the right to terminate on three months' notice – cl 12.1 and Schedule 6 of the Custody Agreements. Pursuant to these notices, the Custody Agreements therefore were terminated in December 2008.[3]

[7] Clause 12.5 of the Custody Agreements provided:

> "Subject to this agreement, on termination of this agreement The Public Trustee must, at the expense of [Opus], promptly transfer, … the assets of the Portfolio, according to the Instructions of [Opus] (subject to any contrary direction given to The Public Trustee which has the lawful effect of overriding this provision), and [Opus] agrees promptly to give the necessary Instructions for the transfer of those assets. The Public Trustee must also, at the expense of [Opus], promptly deliver … any documents evidencing title to those assets which it is holding, according to the Instructions of [Opus]. Notwithstanding the provisions of this clause, The Public Trustee may retain any assets which it is lawfully permitted to retain in the exercise of its rights under this agreement."

[8] Notwithstanding the provisions of cl 12.5, no replacement custodian was appointed by Opus until June 2012, and no instructions to transfer were given to the Public Trustee until then.

[9] On 30 August 2010 ASIC served Opus with notice of a decision to cancel its Australian financial services licence because Opus did not have the requisite level of net tangible assets to support the licence. On 3 September 2010 Opus obtained a stay of this decision from the AAT, and on 20 September 2010 the AAT set ASIC's decision aside. ASIC appealed and on 31 August 2011 the Full Federal Court set aside the AAT decision of 20 September 2010 and remitted the matter to the AAT for further consideration. At some point after that ASIC and Opus resolved their differences and Opus retained its financial services licence.

---

2 Except (apparently by oversight) that named as the fifth respondent in this proceeding. It terminated that last custody agreement in September 2009.

3 And (as to the fifth respondent) in December 2009.

[10] None of the foregoing events could be expected to engender cordial relations between the Public Trustee and Opus, and from December 2009 they were engaged in contentious correspondence through their solicitors. The Public Trustee began to incur legal costs of a type, and in amounts, which were extraordinary in the course of its dealings with Opus. From the end of 2009 there was contention between the parties about who was responsible for paying these legal costs. The types of legal costs incurred are dealt with in some detail below. Broadly they might be said to have been incurred as a result of disquiet on the part of the Public Trustee as to its obligations and potential liabilities if Opus or the funds were insolvent.

[11] To end the historical narrative, the funds named as respondents four, seven, nine, ten, eleven and twelve were wound up in December 2012 and that named as respondent two on 26 March 2013. It is now necessary to examine the provisions of the Custody Agreements in some detail.

Terms of the Custody Agreements – Responsibilities of Public Trustee

[12] By the Custody Agreements the Public Trustee agreed to "custodially hold" property of the managed investment funds (called the "Portfolio"), including holding assets and title documents in its own name as legal owner.

[13] Clauses 3 and 4 of the Custody Agreements were designed in the main to delimit the Public Trustee's area of responsibility in its role as custodian under the agreements. It was Opus who was responsible for taking decisions in relation to the property which the Public Trustee held called, "the Portfolio", (cl 4.1). The Public Trustee was not responsible for reviewing, or advising Opus on, the Portfolio (cl 4.3). The Public Trustee was not responsible for ascertaining the value of any property held; whether the price to be paid for any property to be purchased was proper, or whether instructions it received from Opus were in accordance with the scheme constitution or policies etc. (cl 4.10). Clause 5 defined an Instruction given to the Public Trustee from Opus and authorised the Public Trustee to act on Instructions. Subject to the agreements, the Public Trustee was obliged to act on Instructions in relation to any assets of the Portfolio (cl 4.1), and was not obliged to see whether a person authorised to issue Instructions was acting in the proper exercise of their powers or duties (cl 4.8). While the Public Trustee was obliged to pass on information regarding the Portfolio to Opus, it was not responsible for the accuracy or completeness of any information it passed on (cll 4.2 and 4.5).

[14] The Public Trustee could sometimes refuse to act in relation to scheme property: if its standard limitation of liability clauses could not be included in its contractual dealings (cl 3.4); if it was asked to take on liabilities which might extend beyond assets held custodially (cl 4.16), or in other reasonable circumstances (cl 3.3). The Public Trustee was authorised (cl 3.10), indeed obliged (cl 4.21), to act in accordance with the general law. It had power to do "any other things which it considers necessary, desirable, incidental to or in furtherance of" various matters (cl 3.11), and had an absolute discretion as to the exercise of all powers, authorities and discretions vested in it, express provisions of the contract aside (cl 3.12).

[15] It will be observed that most of these provisions tended in the direction of cutting down the Public Trustee's area of responsibility, and thus potential liability, to Opus. At cl 10 and Schedule 8 there were specific indemnities and limitations of liability which were of benefit to the Public Trustee so far as Opus was able to make

good the financial indemnities promised. The clauses could not protect the Public Trustee against action from third parties, and could not be of any practical use if Opus was insolvent. The financial circumstances from 2008 onwards brought this latter point into the forefront of the Public Trustee's thinking.

Obligations and Potential Liability of Public Trustee

[16] In my view there was real reason for the Public Trustee to think that if it dealt with scheme property, in accordance with Instructions from Opus, to the detriment of the members of the scheme, it might become liable to make good that loss. Furthermore, there was real reason for the Public Trustee to think it might also incur liabilities to others, such as lenders to the schemes, if its acting in accordance with Instructions from Opus, caused those third parties loss. There were at least four sources of such potential liabilities.

[17] First there was potential for liability pursuant to the Act. Pursuant to s 601FC of the Act a responsible entity has duties to exercise the degree of care and diligence that a reasonable person would exercise; act in the best interests of members of an investment scheme, and ensure that all payments made out of an investment scheme are made in accordance with its constitution. If duties of that type are breached, that is a contravention of the Act – s 601FC(5). Relevantly to Opus, a person must not intentionally or recklessly be involved in such a contravention.

[18] Secondly, there was the potential for liability based on breach of the Custody Agreements. Clause 4.18 of the Custody Agreements provided:

> "The Public Trustee agrees to compensate a Scheme by making a payment to that Scheme in the event of The Public Trustee being required by law to make such payment if there is a loss to a Scheme as a result of The Public Trustee failing in its obligations under this agreement."

[19] Third, as the example at [4] above shows, there was potential for liability in the Public Trustee to third parties, such as lenders, if it breached obligations it owed them at law. It would have been irrelevant in assessing that liability that the Public Trustee was acting according to Instructions from Opus under a Custody Agreement.

[20] Lastly, there were obligations and potential liabilities due to the nature of the role of a custodian trustee. A custodian trustee is a statutory invention apparently having its origins in s 4 of the *Public Trustee Act* 1906 (UK).[4] There is a division of functions normally reposed in one trustee between two, a managing trustee and a custodian trustee.[5] In *Forster v William Deacon's Bank Limited* Harnworth MR called the role of a custodian trustee "a lesser function than an ordinary trustee".[6] In *Re Brook Bond and Co Ltd's Trust Deed*[7] Cross J said, "It is apparent that the duties of a custodian trustee differ substantially from those of an ordinary trustee. If the trust instrument or the general law gives the trustees power to do this, that or the other, it is not for the custodian trustee to consider whether it should be done. The

---

4 *IRC v Silverts Ltd* [1951] 1 All ER 703.

5 *Forster v Williams Deacon's Bank Limited* [1935] Ch 359, 365, 372.

6 Above, 367.

7 [1963] 1 Ch 357, 363, cited in *In the matter of Noosa Waters Pty Ltd* [1998] QSC 1; and in *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [46].

exercise of powers or directions is a matter for the managing trustees with which the custodian trustee has no concern, and he is bound to deal with the trust property so as to give effect to the decisions and actions taken by the managing trustee unless what he is requested to do by them would be a breach of trust or would involve him in personal liability" (my underlining). Because of the equivalent of s 19(2)(e) of the *Trusts Act* 1973 (Qld) it was held in *IRC v Silverts Ltd* that a custodial trustee is not a bare trustee. Evershed MR remarked that the distinction was, "… perhaps a fine one, but it is a real one."[8]

[21] In my view, when the Public Trustee assumed legal title of property which in equity belonged to the members of the managed investment schemes of which Opus was responsible entity, the Public Trustee held the property on trust for the members of the managed investment schemes as beneficiaries. This follows, in my view, from the division of legal and equitable ownership of the property, and from the nature of the role of a custodian trustee, as discussed in the above cases. It is the case, notwithstanding the fact that Opus was also a trustee with different functions, and notwithstanding the contractual relationship between the Public Trustee and Opus. There is a short passage in the joint judgment of Gummow and Hayne JJ in *Trust Company of Australia Ltd v Commissioner of State Revenue*[9] which might be read to the contrary of this view, but it is obiter in a case where the relationship between the custodian trustee and equitable owner was not in contention. The authority cited in *Trust Company* is not a custodian trustee case.

[22] After the Custody Agreements terminated, and while the Public Trustee retained the legal title to the property of the managed investment schemes, it continued as a trustee for the investors in the schemes.

Basis of Indemnity claimed by Public Trustee

[23] In this application claiming costs incurred by it, the Public Trustee relied upon the terms of the Custody Agreements; the trustee's right of indemnity at common law and pursuant to s 72 of the *Trusts Act* 1973, as well as s 16 of the *Public Trustee Act* 1978.

[24] Section 72 of the *Trusts Act* provides:

> "A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers."

[25] This is similar to the position at common law which is that trustees are allowed their costs and expenses out of the trust estate if their conduct has been honest and proper – ie, without impropriety – and the expenses were incurred on behalf of the trust fund.[10]

[26] Section 16(1) of the *Public Trustee Act* 1978 provides:

> "The Public Trustee may, subject to the regulations, consult with and employ such solicitors, counsel, financial institutions, accountants

---

8 *Silverts Ltd* (above), pp 705-706; see also *Barclays Bank Ltd v IRC* [1959] 3 All ER 140, 144; *Berendsen v IRC* [1957] 2 All ER 612.

9 (2003) 197 ALR 297, [29].

10 *Miller v Cameron* (1936) 54 CLR 572, 578; *Re Jones; Christmas v Jones* [1897] 2 Ch 190, 197; *Drummond v Drummond* [1999] NSWSC 923, [43].

> and brokers or other persons as the public trustee considers necessary and may remunerate such persons and shall be entitled to be allowed and paid all charges and expenses so incurred."

[27] The provision is a very general one and is found in a part of the Act which deals with the establishment and functions of the Public Trustee. Section 16(1) does not say who it is, who will pay "all charges and expenses so incurred". Pursuant to s 9(4) a provision is made for entitlement for remuneration and allowances as decided by the Governor-in-Council. And by s 17(1) the Public Trustee is enabled to fix fees and charges by gazette notice. The language of s 16(1) – "paid all charges and expenses" – is not the traditional language of indemnities provided to trustees, cf the language of s 16(2) – "entitled to be indemnified out of the estate under administration". There was nothing but assertion on behalf of the Public Trustee that s 16(1) was applicable to the instant case, and I am not convinced that it is. I do not rely upon it in making my decisions in this proceeding.

Terms of the Custody Agreements – Fees, Expenses and Indemnity

[28] The Custody Agreements contain provisions about the Public Trustee's fees and expenses. Clause 3.6 of the Custody Agreements provides:

> "The Public Trustee may appoint or engage at [Opus'] expense accountants, auditors, barristers, solicitors, advisers, consultants … where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. …" (my underlining).

[29] Clause 9.1 of the Custody Agreements provides:

> "[Opus] agrees to pay to The Public Trustee during the continuance of this agreement, and following expiration or termination, until The Public Trustee ceases to hold any assets of the Portfolio, fees in the amounts described and at the time set out in SCHEDULE 5."

In Schedule 5 there are three items: "1. Upfront Fee", "2. Ongoing Administration Fee" and lastly, under the heading "3. Further Expenses":

> "Further expenses incurred by The Public Trustee in relation to the Scheme will be in addition to the above fees. Such expenses will include:
>
> (a) legal expenses – The Public Trustee has the discretion as to the appointment of his solicitor. The Public Trustee may appoint the Official Solicitor to the Public Trustee and where he does the Official Solicitor will charge a competitive commercial. [sic]
>
> …"

[30] Clause 9.2 provides:

> "The Public Trustee is entitled to recover from [Opus] the amount of all Taxes and bank charges, and all other liabilities, costs, charges and expenses which it suffers or incurs (including fees and other amounts payable to Sub-custodians) in connection with the performance of its duties and the exercise of its powers under this agreement including, without limitation, settlement, delivery, registration and transaction charges and foreign currency costs and

charges including any reasonable expenses incurred as a result of [Opus] requesting a certificate pursuant to clause 4.12." (my underlining).

[31] Clause 10.1(a) provides:

"[Opus] indemnifies The Public Trustee against any liability, demand, loss, costs, Taxes charges and expenses which may be incurred by The Public Trustee in connection with:

(i) this agreement and the acts and omissions of The Public Trustee in performing services pursuant to this agreement, except those attributable to the negligence or fraud of The Public Trustee;

(ii) all actions, suits, claims and demands which may be brought or threatened against or suffer or sustained by The Public Trustee by reason of The Public Trustee complying with any Instruction by an Authorised Person; and

(iii) neglect or fraud on the part of [Opus], any Manager or any of their employees, servants or agents." (my underlining).

[32] As explained above, the Custody Agreements have been terminated and the terminations occurred before most, if not all, of the legal costs in contention were incurred. The normal position would be that, apart from accrued entitlements, the contracts no longer governed the parties' rights. There might be an argument in this case that reading cl 9.1 and Schedule 5 of the Custody Agreements together, and interpreting the word "fees" in cl 9.1 to include expenses at item 3 of Schedule 5, the provisions of the Custody Agreements continued to govern the Public Trustee's rights to expenses for so long as it held property pursuant to the Custody Agreements. The Public Trustee submitted that it must be an implied term of the Custody Agreements that if, as here, the managing trustee did not promptly cause transfer of the property of the trust in accordance with cl 12.5 of the Custody Agreements, the terms of the Custody Agreements continued to bind the parties while the custodian trustee retained the trust property. I think senior counsel for Opus accepted this, but primarily his submission was to concede the point – whether it was ultimately right or wrong as a matter of law – so that I assume, without deciding, that the provisions of the Custody Agreements as to expenses apply to the costs in contention before me.

Particulars of Legal Costs

[33] I now turn to the detail of the costs claimed in this application. The Public Trustee engaged Clayton Utz to advise and assist it in relation to the following categories of work:

(a) Review of Instructions received from Opus.

(b) Monitoring the ASIC proceedings against Opus in relation to its financial services licence.

(c) Advice as to the potential insolvency of Opus and some of the events which were occurring related to that - eg appointment of receivers to the property of a fund.

(d) Advice as to its legal obligations as custodian of the assets of each managed scheme in circumstances where it was concerned that the schemes, and possibly Opus, were insolvent.

(e) Transferring assets to a new custodian.

(f) Advice as to the issue before me – recoverability of the above legal expenses under the Custody Agreements.

[34] I will deal with each of these categories in turn. Before doing so, I explain the scope of the application which was before me. This proceeding was begun by originating application and listed in the applications list. It was then sent to the civil list for a one day hearing. The respondent has always contended that the entirety of the dispute between the parties as to what amount, if any, was owing on the invoices rendered by Clayton Utz could not be resolved in one day, and I think that was plainly right. Furthermore, to resolve that dispute would involve essentially an adjudicator acting as taxing master. The hearing before me proceeded on the basis that I would make determinations and declarations as to the categories of costs which were recoverable by the Public Trustee, but that the assessment of how much was owing – that is, which of the costs actually fell within the categories which I declared recoverable – would be undertaken by an assessor – tt 29-30.

(a) Review of Proper Instructions Received from Opus

[35] This is work dealt with at paragraphs 58-67 of Court Document 9. By letter dated 13 October 2010 the Public Trustee advised Opus that because of its concerns about ASIC's wish to revoke Opus' financial services licence (and, it might be inferred, overall solvency concerns about Opus) it intended to refer Instructions it received from Opus to Clayton Utz, "concerning any type of transfer of property, granting of security or leasing document". On 27 October 2010 Opus put the Public Trustee on notice that it considered that unnecessary, and that legal costs so incurred were not to its account under the Custody Agreements. The Public Trustee swears:

> "I engaged solicitors and Counsel to provide the Public Trustee with advice in relation to whether the Public Trustee was obliged to continue to act in accordance with Notices of Proper Instructions and Funds Transfer Requests received from Opus Capital on behalf of an identified Scheme. I sought that advice from Clayton Utz and Mr Sofronoff QC and Mr O'Sullivan of Counsel in November and December 2009. That advice was relevant to my role as custodian for all Schemes as it impacted my ability to continue to comply with Notices of Proper Instructions." – Court Document 9, paragraph 58.

[36] Further, the Public Trustee swears that because of the fears regarding the solvency of the schemes and Opus, from 13 October 2010 Clayton Utz were instructed to review all Instructions provided to the Public Trustee. The Public Trustee thought this was necessary and desirable because he thought that there should be a heightened level of due diligence brought to bear on the Instructions. The Public Trustee was worried that complying with Instructions in circumstances where the schemes or Opus Capital Limited might be insolvent might expose the Public Trustee to liability in circumstances where the indemnity from Opus Capital under the Custody Agreements was of little value – Court Document 9, paragraph 67. He gives an example – Court Document 9, paragraph 64, involving a call to release a bank guarantee.

[37] The Public Trustee and its solicitors, Clayton Utz, said that it was more efficient, once Clayton Utz began reviewing instructions provided by Opus to the Public Trustee, for Clayton Utz to review all the instructions rather than for someone from the office of the Public Trustee to make a decision as to whether or not any particular Instruction was one which might (if complied with) impact on liability issues between the Public Trustee and parties other than Opus and thus require review by Clayton Utz. While this position was challenged in cross-examination, I do not think that the witnesses resiled from it, and it is one which I accept, particularly given that the affairs of the funds were inter-linked. I accept that decisions as to whether any particular Instruction might need to be reviewed were not necessarily straightforward and it was more sensible from a substantive, as well as an economic point of view, to have one person, or group of persons, making decisions about all Instructions rather than divide this task and, necessarily, the thinking which accompanied it.

[38] No doubt this led to some perfectly benign Instructions being reviewed by Clayton Utz, but in all the circumstances I cannot see that this was unreasonable. It seems to me that the costs associated with this fall within cl 3.6 of the Custody Agreements because the Public Trustee reasonably considered, in my view, it was desirable for the purpose of performing the duty of complying with Instructions given to it under the Custody Agreements, for this to occur. In my view the costs are also recoverable pursuant to cl 10.1(a)(i) as costs incurred in performing services pursuant to the Custody Agreements which were not attributable to the negligence or fraud of the Public Trustee. The costs would be recoverable under the trustee's indemnity at common law and s 72 of the *Trusts Act*, as reasonably and properly incurred in the circumstances.

[39] In part at least it may have been concerns about its own liability which motivated the Public Trustee to seek the advice it did. That does not mean that the costs were not recoverable. They were still costs in connection with the Custody Agreements, and of, or in connection with, performing services pursuant to the Custody Agreements, viz complying with the Instructions issued by Opus. While the Custody Agreements oblige the Public Trustee to comply with Instructions, in the circumstances which had arisen, there was reason for the Public Trustee to be cautious about doing so, and its obligation to comply with Instructions was not absolute – see the clauses summarised at [14] above, and the general law position at [20].

[40] Opus argued that the refusal of the Public Trustee to waive privilege in the legal advice it took, and for which it claims payment, demonstrates that the costs incurred by the Public Trustee were not for the benefit of the trusts, or for the purpose of exercising powers or performing duties under the Custody Agreements, but were incurred in the Public Trustee's own interests. This argument would be stronger in a trust case where a trustee took advice but refused its beneficiary access to that advice. It might be thought that was a powerful indication that the advice was not taken in the interests of the trust, but in the trustee's own interests. The position here is more complicated because the role of trustee is split and the denial is made by one trustee to another in circumstances where there was potential, if not actual, conflict between them. The argument also assumes that the denial of access on the grounds of privilege is correct, which I am not prepared to assume. I do not accept the argument on the facts of this case.

(b) Monitoring ASIC Proceedings

[41] This is work dealt with at paragraphs 27-35 of Court Document 9. The Public Trustee discovered that ASIC had decided to cancel Opus' Australian financial services licence because it saw information made available to the general public by ASIC. Opus did not inform the Public Trustee of the fact, nor did ASIC.

[42] Under the Act a responsible entity must have an Australian financial services licence, so understandably the matter was of considerable concern to the Public Trustee. On 9 September 2010 the Public Trustee met with his external solicitors, Clayton Utz, and ASIC. ASIC said that Opus had one year to rectify its breach of the net tangible asset requirement, which was affecting the status of its Australian financial services licence. ASIC also said that if ASIC were to cancel the licence, it would take steps to ensure a responsible entity was in place for the funds.

[43] As outlined, the history of proceedings between Opus and ASIC had a long course and did not come to an end until October 2011. The Public Trustee swears that during that time he sought legal advice and had his external solicitors monitor the course of the legal proceedings before the AAT and the Full Federal Court. He swears that the Public Trustee thought the work necessary and desirable – paragraph 35, Court Document 9. He swore that this work comprised:

> "(a) considering the Australian Securities and Investments Commission's (ASIC) decision to cancel Opus Capital's AFSL, and the subsequent appeal to the AAT and the Full Federal Court;
>
> (b) considering the implications of the cancellation of Opus Capital's AFSL on the Public Trustee's ability to continue to process Notices of Proper Instructions and the role and obligations of the Custodian generally in this situation;
>
> (c) attending at hearings of the appeal and the provision of advice and updates in relation to the status of each of the proceedings; and
>
> (d) considering the settlement of the proceeding and the implications of the terms of that settlement for Opus Capital and the Public Trustee's role as custodian." – Court Document 9, paragraph 34.

[44] In my view, the fees which relate to this work fell within cl 3.6 and cl 10.1(a)(i) of the Custody Agreements. The Public Trustee considered it necessary and desirable, and I view that as reasonable. It is true that the advice and consideration was one step removed from an exercise of power by the Public Trustee under the Custody Agreements, cf the advice just considered at category (a) above. Nonetheless, the advice and consideration were sufficiently directly connected with the Public Trustee's exercise of its powers and duties under the agreements, including but not limited to, complying with any Instruction it might receive from Opus, or indeed another person eg., purportedly appointed by ASIC as responsible entity and managing trustee to the funds. It certainly was within the wider words, "in connection with this agreement" of cl 10.1(a)(i), and not attributable to negligence or fraud of the Public Trustee. It was also work which was reasonable and proper within the general law tests.

[45] It was submitted that the Public Trustee's response to ASIC's decision was extravagant and that it did not itself need to attend at Court hearings, but could have relied upon advice from either ASIC or Opus itself. I reject that argument. The matter was of central importance to the performance of Opus' role as responsible entity to the funds, and thus the relationship it had with the Public Trustee. That the Public Trustee originally discovered the decision to terminate the licence without either ASIC or Opus telling it in advance must have given the Public Trustee reason to doubt that it would be informed, and informed in a timely way, of relevant matters. In addition, by attending at the Court hearings the Public Trustee no doubt obtained much more information than simply the result of any particular proceeding. Having regard to the serious nature of the solvency problems Opus was experiencing, it seems to me that attendance was not unreasonable.

[46] Once again, I cannot see that the motivation for the Public Trustee's seeking advice disqualifies it from recovery. The work was to enable it to know how best to carry out properly its obligations under the Custody Agreements and at general law.

(c) Advice as to Potential Insolvency

[47] This is work dealt with at paragraphs 18-26 of Court Document 9. The Public Trustee swore that the legal work done was because:

> "The Public Trustee sought advice and provided instructions for the following work to be done, arising out of the concerns that existed as to whether Opus Capital and the Schemes were solvent or not:
>
> (a) seeking information from Opus Capital in relation [sic] its financial position and the financial position of the Schemes;
>
> (b) considering the information provided by Opus Capital and publicly available information to attempt to assess the financial position of Opus Capital and the Schemes, and how this impacted on the Public Trustee's rights and obligations as custodian of the Scheme assets;
>
> (c) considering forbearance agreements and other standstill arrangements entered into by Opus Capital on behalf of the Schemes, in order to understand what had been agreed and whether the agreements had any implications for the Public Trustee or the Scheme assets held by the Public Trustee;
>
> (d) considering the appointment of Receivers and Managers to some of the schemes and corresponding with those Receivers and Managers including regarding whether the Public Trustee should comply with Notices of Proper Instructions received from an external administrator;
>
> (e) considering demands and default notices and the obligations of the Public Trustee in light of those notices; and
>
> (f) considering the obligations of the Public Trustee as Custodian in light of the concerns regarding solvency." – Court Document 9, paragraph 24.

[48] For much the same reasons as given in relation to category (b) above, my view is that the cost of this work was within cll 3.6 and 10.1(a)(i) of the Custody

Agreements. Some of the work described by the Public Trustee – [47](c), (d) and (e) – generated costs which were referable to a direct and particular exercise of power or performance of duty under the Custody Agreements. The other work described appears to be one step away from the actual performance of a duty or exercise of a power but was work done preparatory to the exercise of numerous powers and the performance of numerous duties. In my view, there was a sufficiently direct connection between the type of advice and information sought and the exercise of the Public Trustee's powers and duties under the Custody Agreements for the work to fall within the phrase, "for the purposes of exercising its powers or performing its duties under this agreement" within cl 3.6. In any event, it was work "in connection with this agreement" within cl 10.1(a) of the Custody Agreements. It was work which the Public Trustee reasonably considered necessary or desirable and it was not attributable to negligence or fraud on the part of the Public Trustee. Again, I think the costs were also reasonable and proper at general law.

[49] Once again it may be that the motivation of the Public Trustee was to avoid incurring liability to persons other than Opus, but as explained at [39] above, I do not think that matters for the purpose of saying that the costs incurred were within the two clauses just mentioned.

(d) Advice as to Obligations and Potential Liability of Public Trustee

[50] This is work dealt with at paragraphs 36-40 of Court Document 9. Because the Public Trustee was concerned that Opus and the schemes were, or would become, insolvent it sought advice on:

> "(a) the Public Trustee's obligations under the *Corporations Act 2001* (Cth), the Custody Agreement, and the general law;
>
> (b) the Public Trustee's duty of care as a Custodian;
>
> (c) the Public Trustee's potential liability and the indemnity provisions of the Custody Agreements;
>
> (d) the Public Trustee's obligations in relation to complying with Notices of Proper Instructions and Funds Transfer Requests." – Court Document 9, paragraph 37.

[51] The Public Trustee swears that updated advice as to these topics was obtained as "new events occurred, such as the revocation of the Opus AFSL". The Public Trustee swears that the advice was considered necessary and desirable because he wished to understand what his legal obligations and rights were in the poor financial circumstances which obtained. He wanted to act properly in accordance with these, and not to expose himself to potential liability to scheme members, scheme creditors or ASIC.

[52] Opus' argument that the Public Trustee incurred costs for its own purposes, and therefore to its own account rather than to the account of the funds, has most strength when this category of work is considered. It may be that some of this type of work was the Public Trustee considering and protecting its own interests in relation to the contractual and general law obligations it had undertaken in relation to the Opus funds, rather than its exercising powers or performing duties under the Custody Agreements. In particular the description at (c) above has that flavour about it. A comparison can be found in the cases concerning trustees who incur

costs and wish to seek indemnity from the trust's estate. At general law a trustee who incurs costs "representing and supporting his own interests and not those of the trust estate"[11] cannot recover costs from the trust estate.[12] The reason is as stated by King CJ in *Re Suco Gold Pty Ltd (in liq)*:[13]

> "The right of indemnity which a trustee possesses is therefore in essence a right to resort to the trust property for the protection and preservation of his personal estate against liabilities which he has incurred in the proper performance of the trust.
>
> … A trustee, however, has no legal right to use or apply the trust property other than for the authorized purposes of the trust. In particular he has no legal right to apply the trust property for his own benefit or for the benefit of third parties, *Keech v Sandford* (1726) Eq Cas Abr 741."

[53] However, the Public Trustee's rights are not limited to what it could claim at general law, but also depend on the terms of the Custody Agreements. Even if some costs in this category were not incurred for the purposes of exercising its powers or performing its duties within cl 3.6 of the Custody Agreements, it seems to me they were still within the wide words of cl 10.1(a)(i), costs incurred, "in connection with this agreement". It must be, having regard to the terms of cl 10.1(a)(i), that this phrase is meant to have a different meaning from the phrase which closely follows it in that clause, "performing services pursuant to this agreement", and it seems to me that the first set of words is considerably wider than the second, and wide enough to comprehend the costs claimed here. They are in a clause which indemnifies the Public Trustee, including against claims by third parties, rather than just allows it to claim costs incurred in the performance of the Custody Agreements. I think this category of costs is recoverable under cl 10.1(a)(i) of the Custody Agreements.

(e) Transfer of Scheme Assets

[54] This work is dealt with at paragraphs 41-57 of Court Document 9. The Public Trustee swears that solicitors were engaged to assist with, and provide advice in relation to, the process of transferring the scheme assets to a new custodian. He says this work involved the following:

> "(a) the review of applicable transfer documents;
>
> (b) the review of Scheme assets necessary to be transferred to a new custodian;
>
> (c) consideration of the appropriate method to transfer the Scheme assets;
>
> (d) consideration of whether the Scheme assets could be transferred to Opus Capital (as had been proposed) and whether that would breach Opus Capital's Australian Financial Services Licence;

---

11 *Miller v Cameron* (above), p 579.

12 See further on this point *Drummond v Drummond* (above), [47]; *Tomasevic v Jovetic (No 3)* [2012] VSC 558, [16] and [17]; and *Frost v Bovaird* [2012] FCAFC 60 ff, citing *Alsop Wilkinson (a firm) v Neary* [1996] 1 WLR 1220, 1223-1224.

13 (1983) 7 ACLR 873, 878-879.

(e) consideration of stamp duty implications with respect to a transfer of Scheme assets directly to the new custodian;

(f) discussions with the incoming custodian;

(g) correspondence with Opus Capital calling for the transfer of Scheme assets;

(h) consideration of the appointment of Trust Company (Australia) Limited as the new custodian; and

(i) the transfer of Scheme assets to Trust Company (Australia) Limited." – Court Document 9, paragraph 55.

[55] He swears that he considered the work necessary and desirable as it was central to the Public Trustee's role as custodian. The Public Trustee made an application to the Supreme Court for directions as to the propriety of its transferring to the new trustee.[14]

[56] Of all the categories of expense claimed, it seems to me that this is the most obviously within the comprehension of the Custody Agreements, see cll 3.6, 12.5 and 10.1(a) above. It seems to me that costs fitting the description of the work in Court Document 9, paragraph 55, and the costs of making of the application to the Supreme Court, are recoverable under these provisions. They were costs of transfer, cl 3.6, or costs "in connection" with transfer within the meaning of cl 10.1(a)(i). Insofar as there was advice sought as to the propriety of the Public Trustee's transferring to nominated parties, and correspondence about that – paragraph 55(d), (g) and (h), my view is it was work "in connection with" transfer within the meaning of cl 10.1(a)(i) and was in any event within cl 3.6 as something the Public Trustee reasonably considered necessary or desirable for the purpose of properly performing its duties of transfer pursuant to cl 12.5. It was reasonable for the Public Trustee to be assured that its transfer of the entirety of the funds' property was proper, notwithstanding its receipt of Instructions from Opus. The points the Public Trustee raised as concerns in this regard were not trivial or frivolous. There was no neglect or fraud by the Public Trustee. In my view the costs were also reasonable and proper and for the purposes of the funds, so that they were also recoverable at general law.

(f) Advice in Relation to Recoverability of Legal Expenses

[57] This work is dealt with at paragraphs 68-78 of Court Document 9. It seems that the legal fees in issue are substantially, if not exactly, the costs in contention in this application and dealt with above. The Public Trustee swears that he engaged solicitors and counsel to provide advice in relation to the Public Trustee's rights to recover legal expenses and assert a lien over assets of the schemes – Court Document 9, paragraph 69. He recounts that schedules were prepared as to the Public Trustee's costs in June 2011 and that the invoices sent by Clayton Utz to the Public Trustee were provided to Opus. He complains that despite this, Opus did not pay the claimed legal expenses. He says that as a result of the continuing non-payment of the Public Trustee's expenses he engaged solicitors to do the following work:

---

14 *Re Public Trustee of Queensland* [2012] QSC 281.

> "(a) the preparation of various requests for payment and letters of demand;
>
> (b) the preparation of various schedules concerning the legal work performed and the quantum of the legal fees incurred;
>
> (c) attending meetings and engaging in correspondence regarding the payment of the Public Trustee's legal costs;
>
> (d) considering the Public Trustee's ability to claim legal expenses arising from the Custody Agreements, the *Trusts Act 1973* (Qld) and the general law;
>
> (e) advice as to whether the Public Trustee is able to assert a lien; and
>
> (f) the preparation of these proceedings." – Court Document 9, paragraph 75.

[58] Beginning in 2009, by its solicitors, Clayton Utz, the Public Trustee made demand for legal expenses by presenting bills accompanied by assertions that the fees were incurred in accordance with the Custody Agreements – see for example Court Document 19, pp 799 and 829. There were no descriptions of the work for which charge was made. Opus could not tell if the work fell within the relevant clauses of the Custody Agreements and could not tell which fund or funds should be charged with the fees. As recounted the fees from this time onward were extraordinary in the history of the dealings between the Public Trustee and Opus. Opus required details of the legal expenses and said that any expense had to be referrable to one or other of the 11 funds. There followed an unedifying correspondence – eg Court Document 19, pp 935 ff and 994 ff. Years passed.

[59] In June 2011 the Public Trustee provided a five page, "Schedule of work conducted by Clayton Utz" – Court Document 15, pp 1412-1417. The information in this schedule was at a high level of generality. Some of the items listed in this schedule show that at least some of the work carried out by Clayton Utz was work for which costs were payable by Opus under the provisions of the Custody Agreements. Other descriptions were more opaque – for example the descriptions "prepare brief to counsel to obtain advice; confer with counsel; confer with and take instructions from the Public Trustee" – Court Document 15, pp 1413-1414. One is left to infer that, perhaps, the subject matter of the advice, conference and instructions was the subject matter of one or more of the first two items in relation to that particular bill, which do seem connected with the performance of duties under the Custody Agreements, albeit the description of work is very general. The level of particularity never really rises above items such as, "consider the notice of demand received from Suncorp and request further information in relation to the breach of Opus Capital Ltd", and often falls well below that.

[60] The schedule makes no attempt to allocate fees incurred between funds. A separate document which allocated some amounts from some bills to some of the funds was provided on 15 April 2011 – Court Document 16, pp 1418-1419. By far the largest amount is allocated to a general file. There does not seem to have been any explanation of what the general file was, or how amounts related to the files charged: the document is just a list of billed amounts by file and fund.

[61] The amount of costs in issue by June 2011 was over $300,000. I do not consider these documents adequate for the purpose of allowing Opus to form a view whether it was obliged to pay the amounts claimed. There is no explanation proffered as to why documents which were adequate for that purpose could not have been given to Opus, from time to time, as the fees were incurred, before and after June 2011. The claims were made by a trustee to be paid from trust monies.

[62] In response to a notice by Opus that it would have costs assessed pursuant to s 335(2) of the *Legal Profession Act* 2007 (Qld), Clayton Utz, in February 2012, provided to Opus the invoices it had rendered to the Public Trustee. Opus' response was to make the foreshadowed application in the District Court. The affidavit material in support included an affidavit from a costs assessor who describes the bills from Clayton Utz to the Public Trustee as inadequate for the purpose of a costs assessment because they are little more than schedules of time recorded by what are referred to as "fee earners" by the principal witness from Clayton Utz. By this stage there had been 109 invoices rendered by Clayton Utz totalling $453,891.

[63] Clayton Utz eventually, in June 2012 – Court Document 19, pp 935 and 994 – agreed to prepare itemised bills. On 7 September 2012 Clayton Utz provided such bills for 10 of the funds which in total accounted for around $100,000 of their then costs. A month later, they provided an itemised bill in relation to Opus work on a general file in an amount of around $400,000.[15] Opus delivered objections and made application in the District Court for an assessment on 30 January 2013. The District Court proceeding is stayed pending the decision in this matter. The 12 bills delivered total some 270 pages and the objections to them are about the same length.

[64] The Public Trustee submitted that the costs assessment proceeding in the District Court was misconceived, and I think that is right. The dispute between these parties is not one properly to be resolved by an assessment of costs in the ordinary way. The issue here is recoverability pursuant to the provisions of the Custody Agreements, and the general law as to trustees' indemnities. It might be that an assessment needs to be made after my decision as to whether individual items of costs claimed fall within the declarations I make, but no general questions of reasonableness or recoverability, even between solicitor and client, arise.

[65] I have considered whether the costs claimed in this category are in some ways costs of and incidental to the proceeding before me. This was not submitted by either party. Some do seem to be, see [57](f) above. However, given the very extended course over which the costs correspondence extended and given that from February 2012 the parties seemed (mistakenly in my view) to be channelling their efforts and dispute towards a costs proceeding in the District Court, I have come to the conclusion that it would be difficult to deal with all the costs in this category as costs even "incidental to" this proceeding.

[66] I cannot see that the costs in this category are costs which fall within cl 3.6 of the Custody Agreements because I cannot see that they are costs incurred due to the engagement of solicitors for the purposes of the Public Trustee exercising its powers or performing its duties under the Custody Agreements. To the contrary, these costs have been incurred because Clayton Utz was engaged to act for the Public Trustee

---

[15] It was not until prompted in November 2012 that they delivered a bill in relation to the fund which is named as the tenth respondent. This seems to have been an oversight.

in contention between it and Opus as to whether or not the Public Trustee was entitled to indemnity under the Custody Agreements in respect of the above categories of costs. These legal expenses are not the expenses, even indirectly, of an exercise of a power or performance of a duty under the Custody Agreements.

[67] The words of cl 9.2 of the Custody Agreements, see [30] above, are wider than those at cl 3.6 because they allow recovery of costs "in connection with" the performance of the Public Trustee's duties and exercise of powers under the Custody Agreements. Nevertheless, in my view this category of costs is not properly categorised as having been incurred in connection with the performance of those duties or the exercise of those powers, because in substance it was incurred in connection with the Public Trustee's own interests in a dispute with Opus. This construction seems preferable, particularly when the whole of cl 9.2 is read: even though the specific examples of charges and fees it gives are illustrative, not definitive, they are all closely connected with the performance of duties under the agreement. I think there is an analogy between this claim and the trust cases where trustees and beneficiaries come into dispute. The distinction between trustees acting in the interests of their beneficiaries and their trust, and, on the other hand, on their own account, is illustrated by a passage in *Alsop Wilkinson v Neary*[16] in which Lightman J describes the three types of disputes trustees may become involved in. At p 1224 E, he characterises a dispute as to a trustee's entitlement to indemnity for legal costs incurred, as a dispute where a trustee is acting in their own interests, not the interests of the trust: costs normally follow the event of the dispute, the trustee is not entitled to an indemnity in any event. It is not that this dicta determines the question here, but in my view it sheds light on the proper construction of the words "in connection with" at cl 9.2 of the Custody Agreements.

[68] In any case, as cll 3.6 and 9.2 and cl 10.1(a) of the Custody Agreements overlap considerably, the Public Trustee took the position that the disentitling negligence or fraud at cl 10.1(a) applied to matters which otherwise fell within cl 3.6 and 9.2 of the Custody Agreements.[17] A question arises in this regard, see below.

[69] As a matter of construction, it must be that the costs in this category have been incurred "in connection with" the Custody Agreements within the meaning of cl 10.1(a)(i), see [53] above. However, there is a question in my mind as to whether some of the costs in this category were attributable to the negligence of the Public Trustee because, until the itemised bills were prepared, while it claimed costs from Opus, the Public Trustee did not give Opus sufficient material to assess whether those costs were properly claimed under the Custody Agreements.[18] The Public Trustee allowed Clayton Utz to carry on the correspondence described for years, and then participate in the District Court costs assessment. Similarly, I have doubts as to whether or not all these costs could be claimed at general law having regard to the requirement for reasonableness in s 72 of the *Trusts Act* and the authority of cases like *Alsop Wilkinson* (above). However, I am conscious I have not heard the

---

16 (Above), 1223-1224.

17 See paragraph 42 of the submissions filed on 7 May 2013.

18 I do not mean that it was necessary to prepare itemised bills as it now has done to support its claim for costs under the Custody Agreements. Some description which allowed Opus to make an informed decision as to whether the work fell within the relevant clauses of the Custody Agreements or the general law indemnities would have been sufficient. It is just that no such thing was provided before the itemised bills were provided.

parties on these questions and it seems to me I should adjourn the matter to allow that argument, if the matter cannot otherwise be agreed.

Lien

[70] It was conceded by the respondents to this application that the Public Trustee has a lien over scheme assets to secure any rights of indemnity he may have, so I need not deal with this. Likewise, it was acknowledged by the Public Trustee that such lien was only in relation to amounts to be properly indemnified by any particular fund.

Apportionment

[71] Some of the work performed by Clayton Utz was referable to one fund or another. Where it was, Clayton Utz billed that work to a file relating to that particular fund. As well – see [63] above – Clayton Utz opened a general file to which it billed all work which was not relevant to one particular fund, but relevant to all the funds. The Public Trustee submitted that it ought to be allowed to apportion the fees billed to the general file equally amongst all the funds. It relied upon *Re Suco Gold* (above) where King CJ said, in a case about a liquidator who wished to recover costs from the assets of two trusts, "Where no apportionment is possible, the maxim that equality is equity should provide the solution to the problem of apportionment." - p 110.

[72] From the above analysis of categories (a)-(e), it can be seen that there was work which was relevant to all the funds which was for the purpose of exercising the powers or duties under each of the Custody Agreements, or was in connection with each of the Custody Agreements. It seems to me that relying upon the terms of the Custody Agreements – cll 3.6 and 10.1 – the Public Trustee can charge an apportioned part of the fees to each fund. Had there been only one fund, the Public Trustee could have recovered the entire cost of the legal work in the above categories from that fund. At general law it is wrong for a trustee to have resort to the assets of one trust to pay for what was done towards the administration of another: *Brisconnections Management Co Ltd v Dalewon Pty Ltd.*[19] Where there is no more just way, that exercise ought to be an equal distribution of the costs among the trusts: *Brisconnections,* pp 536-537.

[73] In my view the Public Trustee is entitled to make an equal apportionment of costs billed to the general file, which are otherwise recoverable, as between all the funds, both under the Custody Agreements, and at general law. No more just and reasonable solution, than equal apportionment between the funds, was put forward as a basis for apportionment.

Disposition

[74] I will ask the parties to bring in minutes of orders making declarations consistent with the factual findings which I have made, and if necessary hear further argument as to category (f) of the claim. I will hear the parties as to costs of and incidental to this application.

---

19 (2010) 79 ACSR 530, 534.