SUPREME COURT OF QUEENSLAND

CITATION:	*Kern Consulting Group Pty Ltd & Anor v Opus Capital Ltd* [2014] QCA 111
PARTIES:	**KERN CONSULTING GROUP PTY LTD** **ACN 084 375 315 as trustee for the** **KERN CONSULTING GROUP TRUST** (first applicant) **GREGORY JAMES KERN** (second applicant) **v** **OPUS CAPITAL LIMITED** ABN 53 095 039 366 (respondent)
FILE NO/S:	Appeal No 10028 of 2013 DC No 4436 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2014
JUDGES:	Fraser and Gotterson JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted.** **2 Appeal allowed.** **3. The amended statement of claim is struck out.** **4. The appellants' application to dismiss the proceeding and the respondent's cross-application for disclosure are dismissed.** **5. The respondent is to pay the appellants' costs of the appeal and of the applications made to the court below.**
CATCHWORDS:	CORPORATIONS – MANAGED INVESTMENTS – OTHER MATTERS – where the responsible entity has appointed an agent as custodian of trust property pursuant to s 601FB(2) of the *Corporations Act* 2001 (Cth) – where the custodian of trust property entered into a lease with the applicants – where the respondent is not a party to the lease – whether the respondent is the proper plaintiff to bring an action for outstanding rent and charges payable under the lease

PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – DEFAULT OF PLEADING – where the pleading is defective for want of parties – where the proceeding could be successfully reconstituted or re-pleaded – whether the proceeding should be dismissed

Corporations Act 2001 (Cth) s 601FB(2), s 601FB(3), s 601FC

Huntley Management Ltd v Australian Olives Ltd (2009) 74 ACSR 266; [2009] FCA 1081, distinguished
Meriton Apartments Pty Ltd v Industrial Court of New South Wales (2011) 284 ALR 130; [2011] NSWCA 243, applied
Public Trustee of Queensland v Opus Capital Ltd & Ors [2013] QSC 131, considered
Spangaro v Corporate Investment Australia Funds Management Ltd (2003) 47 ACSR 285; [2003] FCA 1025, cited
Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107; [1988] HCA 44, cited
Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In liq) (2013) 88 ALJR 132; [2013] HCA 51, cited

COUNSEL: A Musgrave for the first and second applicants
S J Given for the respondent

SOLICITORS: Morrow Petersen for the first and second applicants
Hallett Legal for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Jackson J and the orders proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Jackson J and with the reasons given by his Honour.

[3] **JACKSON J:** The applicants apply for leave to appeal under s 118(3) of the *District Court of Queensland Act* 1967 (Qld). They require leave to appeal against the order of the District Court dated 25 September 2013 dismissing their application to strike out the statement of claim.

[4] The question they would agitate on the appeal is whether the respondent's claims, as pleaded, for rent and charges payable under a lease as against the first applicant and for those amounts under a guarantee as against the second applicant, must fail because the respondent is not a party to the lease or the guarantee on which the claims are brought.

Facts alleged by the respondent

[5] It is useful to begin by summarising the facts alleged in the amended statement of claim and evidenced by the affidavits read on the application.

[6] On 1 October 2002, by a written lease, Daikyo (North Queensland) Pty Ltd as "landlord" leased premises comprising part of the land known as the Cairns Corporate Tower to the first applicant as "tenant" for a term of three years ("original

lease"). Daikyo was then the registered owner of the indefeasible title (the legal title) to the land under the *Land Title Act* 1994 (Qld). Clause 14.01 of the lease provided for or granted a right to renew the lease for a further term of three years.

[7] On 3 March 2003, by cl 1.1 of a written guarantee and indemnity, made between Daikyo as "landlord" and the second applicant as guarantor, the second applicant guaranteed payment of the rent and any other money agreed to be paid by the lessee under the lease ("the Daikyo guarantee"). "Landlord" was defined in the lease to include any person who becomes entitled to become the registered owner of the premises before the lease ended. Further, by cl 8.5 of the Daikyo guarantee, the second applicant agreed that the guarantee would extend to the lease created by the tenant's exercise of any option for renewal.

[8] By 1 October 2005, Christie Corporate Pty Ltd ("CCL") had become the registered owner of the land and thereby acquired the reversion under the lease. The Daikyo lease was renewed by "amendment" of the original lease by CCL and the first applicant extending it for a further term of three years and by providing that there would be two further terms (of three years) in the schedule item identifying the option for renewal ("first renewed lease").[1] Clause 4 of the instrument of amendment provided that the guarantor agreed that the guarantor's covenants extended to the varied lease. The second applicant executed the instrument under separate provision for the lessee's signature as sole director and as a deed in his own name.

[9] By 1 October 2008, the Public Trustee of Queensland ("PTQ") had become the registered owner of the land and thereby acquired the reversion under the lease. The lease was renewed by PTQ and the first applicant for a further term of three years ("second renewed lease").[2]

[10] The second renewed lease expired on 30 September 2011. The first applicant remained in occupation until 22 December 2011. Clause 11.07 of the lease provided that if the tenant remains in occupation after the end of any renewed term, the terms of the expired lease may apply.

[11] By the amended statement of claim, the respondent alleges that the first applicant failed to pay the rent and other sums due under the second renewed lease and the period of the holding over in the amount of $242,158.52. It alleges that despite demand the first applicant has failed to pay that sum to PTQ. It alleges that interest is payable under the lease. It alleges that the second applicant is liable to PTQ for the agreed amounts under the Daikyo guarantee.

[12] The respondent is the responsible entity of the Opus Property Trust No. 12, later known as the Opus Income and Capital Fund No 21, a managed investment scheme under Ch 5C of the *Corporations Act* 2001 (Cth) ("CA"). At the material times, the land was an asset of the fund. However, the respondent as responsible entity was not the registered owner. PTQ was the registered owner.

[13] It is not alleged in the amended statement of claim that the respondent was a party to either the second renewed lease or the Daikyo guarantee.

Basis of respondent's claims

[14] The basis of the respondent's alleged causes of action against the applicants is set out in par 7 of the amended statement of claim as follows:

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1 There were other changes, including the substitution of CCL as lessor.

2 Again, there were other changes, including the substitution of PTQ as lessor.

> "Pursuant to Section 601FB and 601FC of the *Corporations Act* 2001 and Clause 24.1(a)(v) of the Constitution of the Opus Income and Capital Fund No.21, the Plaintiff is authorised to bring these proceedings for the benefit of the Fund."

[15] The learned primary judge concluded that:

> "It does seem to me that the statutory provisions referred to, when read with the constitution, justify and authorise the plaintiff in bringing its claim against the first and second defendants …
>
> It seems to me that … it is open to the plaintiff to bring this action and there is no reason to suppose that the material is not there, or the evidence is not there to support the plaintiff's claim. At this stage where I must look at all the material put before me in the best light for the plaintiff, it is very easy to come to that conclusion. It seems to me, therefore, that I should dismiss the applications of the defendant …"

[16] The applicants' essential contention is that they are not liable at the suit of the respondent as pleaded. They appear to start with the propositions of law that any liability they have is a contractual liability and, subject to exceptions, "a third party cannot sue upon a contract and… a stranger to the consideration cannot maintain an action at law upon it": *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*.[3] In effect, they contend that their contracts were with PTQ as lessor and its predecessor as creditor under the guarantee. Secondly, they submit that the pleaded allegations do not vest any chose in action comprised in any contractual cause of action against them in the respondent. The issue they seek to raise is essentially one of law.

[17] In my view, leave to appeal should be granted for the following reasons. First, the allegation in par 7 of the amended statement of claim raises a question of construction of s 601FB and s 601FC of the CA. The parties have found no prior case which deals with that question in a context like this. Secondly, if the applicants' contention is correct, the proceeding is improperly constituted as to parties. The applicants' application to the learned primary judge was made consistently with the obligation of the parties under *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 5 to proceed with a minimum delay and expense to have that question resolved. A plea of this kind is one which is better resolved at an early stage of the proceeding. If successful, the outcome of the appeal will be that either the proceeding stops altogether, or it will be reconstituted with different parties, or the statement of claim will be substantially re-pleaded. Thirdly, although the order appealed from probably does not operate as an issue estoppel, it is better that leave to appeal is granted in a case such as this so that the applicants are not faced at trial by the contention that the point has been resolved against them.

Lease and guarantee

[18] Paragraphs 13 and 14 of the amended statement of claim allege that the second renewed lease and the holding over by the first appellant give rise to the claims for rent and outgoings as set out in Schedule A thereto. A money claim for rent under a lease is now recognised as a contractual cause of action. In *Willmott Growers*

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[3] (1988) 165 CLR 107, 115.

Group Inc v Willmott Forests Pty Ltd (Receivers and Managers Appointed) (In liq)[4] it was said:

> "It is then important to recognise that it is now firmly established that a lease is a species of contract. As Deane J said in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*, '[a] lease for a term of years ordinarily possesses a duality of character which can give rise to conceptual difficulties. *It is both an executory contract and an executed demise*'... Hence, as Mason J said, 'the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases'.
>
> The rights and duties which a landlord and tenant have under a lease are bundles of rights and duties which together can be identified as species of property. The origins of those rights and duties lie in the contract which the landlord and tenant or their predecessors in title made. In every case, the rights and duties of the landlord and tenant, whether as an original party to the lease or as a successor in title, stem from the contract of lease and any later contract made in relation to that lease. When a company is the landlord, the rights and duties which that company has in respect of the lease are properly described as 'property of the company that consists of … a contract'. The landlord's rights and duties are a form of property; those rights and duties 'consist of', in the sense of derive from, the contract of lease." (citations omitted) (emphasis in original)

[19] Paragraph 11 of the amended statement of claim alleges that under the Daikyo guarantee the second appellant guaranteed "the payment by the First [Appellant] of the rent and any other money agreed to be paid [under the lease], and also agreed to indemnify Daikyo and any subsequent registered owners of the subject premises for any default by the First [Appellant] under the [l]ease or any renewal thereof".[5]

[20] A money claim upon a guarantee, including a claim for indemnity, is also a contractual cause of action.

[21] Thus the appellants submit that PTQ as lessor under the second renewed lease and as a subsequent registered owner is the contractual obligee, entitled to any payment due or indemnity under either of those contracts.

[22] The amended statement of claim does not allege that PTQ was the trustee of and the respondent was the beneficiary of the benefit any contract or contractual chose in action or that PTQ contracted as agent for the respondent, either as principal or undisclosed principal.

[23] As to the pleaded legal relationships in contract, apart from s 601FB and s 601FC of the CA, the position may be described by adapting the language of *Meriton Apartments Pty Ltd v Industrial Court of New South Wales*[6] as follows:

> "Even if there was a basis for concluding that [the respondent] was the beneficiary of contractual promises and was entitled to sue [the

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4 [2013] HCA 51; (2013) 88 ALJR 132, 140-1 [39]-[40].

5 It is unnecessary to consider whether that is an accurate statement of the effect of the Daikyo guarantee.

6 [2011] NSWCA 243; (2011) 284 ALR 130, 151-152 [104]-[105].

> appellants] as promisors, that would not convert [it] into a party to [the lease]: *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 112–13, 115 and 123; 80 ALR 574 at 577, 579 and 584; [1988] HCA 44 (*Trident v McNiece*) per Mason CJ and Wilson J; at CLR 165–6 and 172; ALR 615–16 and 620-1 per Toohey J; compare at CLR 174 and 175; ALR 622 and 623 per Gaudron J. Similarly, if [the respondent] could establish that [PTQ] was trustee of a contractual promise for its benefit, [it] would not become a party to the contract: *Trident v McNiece* at CLR 121; ALR 583 per Mason CJ and Wilson J; at CLR 148; ALR 603 per Deane J; at CLR 135; ALR 593–4 per Brennan J; *Construction Engineering (Australia) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541 at 546; 58 ALR 411 at 414; [1985] HCA 13 per curiam.
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> A person may enter into a contract on behalf of an undisclosed principal. In such circumstances the undisclosed principal is a party to the contract although not named as such: see, for example, *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (the 'New York Star')* (1980) 144 CLR 300; 30 ALR 588; [1980] 3 All ER 257. But no basis has been shown in the present case for treating [PTQ] as an agent for [the respondent] as undisclosed principal."

Chapter 5C provisions

[24] As previously stated, the Opus Income and Capital Fund No. 21 is a managed investment scheme under Ch 5C of the CA.

[25] Before 1998, the regulation of collective investments made by an unincorporated group of investors,[7] was made through the provisions of the Corporations Law relating to a "prescribed interest".[8] The scheme of the statutory regulation now contained in Ch 5C of the CA was introduced as Ch 5C of the *Corporations Law* by the *Managed Investments Act* 1998 (Cth). That Act was preceded by a joint report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee (ALRC Report No. 65, 1993, "Collective Investments: Other People's Money").

[26] The prescribed interest provisions provided for a dual party structure involving a manager and a trustee. In *Spangaro v Corporate Investment Australia Funds Management Ltd*,[9] Finkelstein J summarised ALRC Report No 65 as follows:

> "[The report] found that the dual party structure was fundamentally flawed. In particular, the role of the trustee, originally intended to be that of a mere custodian, had evolved to the point where no-one understood the distinction between the respective roles and duties of the trustee and manager. There was confusion about which of them was responsible for the scheme. The joint report recommended, and the parliament accepted, that for every scheme there should be a single entity (in due course called the responsible entity) in which the functions of both trustee and manager were united. The new legislation made provision for the appointment by the responsible entity of an agent to do anything that their responsible entity was authorised to

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7 Leaving partnerships aside.

8 *Corporations Law*, Ch 7 Pt 7.12 Div 5, ss 1063-1076.

9 [2003] FCA 1025; (2003) 47 ACSR 285, 286-287 [1].

do in connection with the scheme: s 601FB(2). One purpose of this subsection was to enable the appointment of a custodian to hold scheme property: *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 197 ALR 297 at 316; 77 ALJR 1019 at 1034. The custodian did not assume the responsibilities of the former trustee. The responsible entity was accountable for the acts and omissions of its agent: s 601FB(2). Yet, as this case demonstrates, there is still uncertainty about the respective obligations of the responsible entity and an appointed custodian."

Section 601FB provides as follows:

"**Responsible entity to operate scheme**

(1) The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Act.

(2) The responsible entity has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the scheme. For the purpose of determining whether:
(a) there is a liability to the members; or
(b) the responsible entity has properly performed its duties for the purposes of subsection 601GA(2);
the responsible entity is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.
Note: A scheme's constitution may provide for the responsible entity to be indemnified for liabilities - see subsection 601GA(2)

(3) An agent appointed, or a person otherwise engaged, by:
(a) the agent or person referred to in subsection (2); or
(b) a person who is taken under this subsection to be an agent of the responsible entity;
to do anything that the responsible entity is authorised to do in connection with the scheme is taken to be an agent appointed by the responsible entity to do that thing for the purposes of subsection (2).

(4) If:
(a) an agent holds scheme property on behalf of the responsible entity; and
(b) the agent is liable to indemnify the responsible entity against any loss or damage that:
(i) the responsible entity suffers as a result of a wrongful or negligent act or omission of the agent; and
(ii) relates to a failure by the responsible entity to perform its duties in relation to the scheme;
any amount recovered under the indemnity forms part of the scheme property."

[27] Section 601FC provides as follows:

"**Duties of responsible entity**

(1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
   (a) act honestly; and
   (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
   (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
   (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
   (e) not make use of information acquired through being the responsible entity in order to:
      (i) gain an improper advantage for itself or another person; or
      (ii) cause detriment to the members of the scheme; and
   (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
   (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
   (h) comply with the scheme's compliance plan; and
   (i) ensure that scheme property is:
      (i) clearly identified as scheme property; and
      (ii) held separately from property of the responsible entity and property of any other scheme; and
   (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
   (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and
   (l) report to ASIC any breach of this Act that:
      (i) relates to the scheme; and
      (ii) has had, or is likely to have, a materially adverse effect on the interests of members;

   as soon as practicable after it becomes aware of the breach; and
   (m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

(2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.

(3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.

> (5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.
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> Note 1: Section 79 defines ***involved***.
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> Note 2: Subsection (5) is a civil penalty provision (see section 1317E)."

Operation of s 601FB and s 601FC

[28] The logical starting point for analysis is that under s 601FC(2) the responsible entity holds scheme property on trust for scheme members. But the note to the subsection expressly recognises that the responsible entity may also appoint an agent to hold scheme property separately. As is apparent from the terms of s 601FB(1), the primary function of the responsible entity is to operate the scheme and perform the functions conferred on it by the scheme's constitution and the Act. By s 601FB(2), it is compatible with that primary function that the responsible entity has power to appoint an agent or person to do anything that it is authorised to do. Further, s 601FB(4) expressly recognises that an agent may hold scheme property on behalf of the responsible entity.

[29] Under these provisions, the role of a responsible entity is analogous to the role of a trustee. The position of trustee is express in respect of scheme property held by the responsible entity. The duties of a responsible entity under s 601FC(1) are also analogous to the duties of a company director or a trustee.

[30] There are circumstances in which a trustee may appoint an agent to carry out functions for the business of a trust. There are also circumstances in which an agent may hold or have legal title to property which is trust property. And there are circumstances in which an agent of a trustee may enter into a contract on behalf of the trustee as principal.[10] If the agent is the contracting party, it does not automatically follow that the trustee is entitled to sue on the contract as if it were a party to it, as *Meriton Apartments* illustrates.

[31] Subsection 601FB(2) has two main purposes. First, it operates as a grant of power to appoint an agent or other person to do a thing authorised to be done in connection with a scheme. Secondly, it operates to define, as between the responsible entity and the members, the responsible entity's responsibility for the agent or other person's acts or omissions.[11]

[32] That conclusion is not affected by the proposition that the responsible entity is to hold the scheme property on trust for scheme members under s 601FC(2). That subsection does not directly affect the relationship between an agent or person appointed under s 601FB(2) and the responsible entity. It applies to the relationship between the responsible entity and the scheme members in relation to scheme property held by the responsible entity. That is the relationship of trust created by the statute.

Effect of the custody agreement and constitution

[33] At the material times, the relationship between the respondent and PTQ was contractual. By a custody agreement dated 7 May 2003, the respondent appointed

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10 See Heydon & Leeming Jacobs' Law of Trusts 7th ed Lexis Nexis, Australia, 2006 [1723]-[1733].

11 As well, the responsible entity's entitlement to fees or an indemnity under s 601FB(4) of the CA may be affected.

PTQ to provide custodial services for the Opus Income and Capital Fund No. 21 ("the custody agreement").

[34] PTQ became registered owner of the land pursuant to the custody agreement. As such, PTQ was more than a simple agent authorised to act on behalf of its principal, namely the respondent. It held the legal title to the land. But it did not have the beneficial interest in the land. It held the legal title on trust.

[35] In *Public Trustee of Queensland v Opus Capital Ltd*[12] Dalton J said:

> "A custodian trustee is a statutory invention apparently having its origins in s 4 of the *Public Trustee Act* 1906 (UK). There is a division of functions normally reposed in one trustee between two, a managing trustee and a custodian trustee. In *Forster v Williams Deacon's Bank Ltd* Harnworth MR called the role of a custodian trustee 'a lesser function than an ordinary trustee'. In *Re: Brook Bond & Co Ltd's Trust Deed* 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 exercise of powers or directions is a matter for the managing trustees with which the custodian trustee has no concern, and is bound to the 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' … 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'.
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> 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 scheme 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 the 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* 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.
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> After the Custody Agreements terminated, and while the Public Trustee retained the title to the property of the managed investment schemes, it continued as a trustee for the investors in the schemes." (citations omitted)

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12 [2013] QSC 131.

[36] There is nothing in Dalton J's analysis which is inconsistent with the conclusion that s 601FB and s 601FC did not make the respondent, as responsible entity of the managed investment scheme, a party to a contract made by PTQ, as an agent or person employed by the responsible entity under s 601FB(2).

[37] The respondent relied on *Huntley Management Ltd v Australian Olives Ltd*,[13] as supporting the opposite conclusion. The issue there considered was whether the responsible entity of a managed investment scheme was entitled to bring a proceeding on behalf of the members of the scheme against a former responsible entity, claiming compensation for the former responsible entity's breach of duty. The analogy between a responsible entity as a trustee of the scheme property for scheme members and a trustee of a private trust may be useful in that situation. In general, a replacement trustee is entitled on behalf of the beneficiaries to sue a former trustee for breach of trust.[14] However, that discussion does not answer the question for decision in the present case.

[38] The respondent submits that PTQ does not hold trust property on trust for members of the scheme as beneficiaries, contrary to Dalton J's reasoning. It submits that the respondent as responsible entity holds scheme property on trust for the members under s 601FC(2). The respondent analyses the property holding in two steps. First, PTQ holds the land on trust for the respondent. Secondly, the respondent holds its (equitable) interest on trust for the scheme members. In my view, it is neither necessary nor appropriate to decide that question in order to resolve the present appeal.

[39] It may be accepted that PTQ held the only relevant legal title to the land. That is, its interest as registered owner of the indefeasible title to the land held under the *Land Title Act* 1994 (Qld). Consistently with that, it also had an interest as lessor under the lease for a term of three years which appears to have been a legal (as opposed to equitable) lease.[15] The lease has expired, as did any tenancy during the period when it is alleged that the first appellant held over.

[40] In any event, for present purposes, the first right of concern is the contractual entitlement of PTQ, as lessor, to payment of rent or other outgoings under the expired lease between PTQ and the first appellant. The second right of concern is the alleged entitlement of PTQ under the Daikyo guarantee that the second appellant promised to indemnify a subsequent registered owner for any default by the first appellant under a renewal of the Daikyo lease.

[41] The respondent relied on cl 24.1 of the constitution of the scheme. That clause authorises the respondent to manage the scheme property as if it were the owner, including the power to take any court proceedings to protect the property. Next, the respondent relied on that part of s 601FC(1)(m) of the CA. That paragraph provides that in exercising its powers and carrying out its duties a responsible entity must

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13 [2009] FCA 1081; (2009) 74 ACSR 266, 272-4 [19]-[29].

14 *Occidental Life Insurance Company of Australia Ltd & Ors v Bank of Melbourne & Ors and Corrs Australian Solicitors & Ors* (1993) 7 ANZ Insurance Cases 61-201 at [78,320].

15 The copy in the appeal books bears a dealing number suggesting it was registered under s 64 *Land Title Act* 1994 (Qld). As well, the indefeasible title of a registered proprietor is not held free from the interest of a lessee under a short lease: s 185(1)(b). And a lease taking effect in possession for a term not exceeding three years may be created by parol or in writing as a legal lease: s 12(2) *Property Law Act* 1974 (Qld).

carry out or comply with any duty conferred on the responsible entity by the scheme's constitution. The respondent submitted that it was thus empowered to bring the proceeding in its own name.[16]

[42] In my view, that paragraph does not have the effect of vesting legal ownership of any chose in action held by PTQ to recover a money sum from the first appellant pursuant to the lease in the respondent. Equally, it does not have that effect upon any chose in action held by PTQ to recover a money sum pursuant to the Daikyo guarantee from the second appellant.

[43] If any provision has that effect, it must be s 601FB(3), on the footing that the appointment of PTQ under the power contained in that subsection had the effect in law of constituting it agent of the respondent on any contract it made in carrying out its functions in accordance with the custody agreement, so that the respondent is a party to the relevant contract as principal. However s 601FB(2) does not say that, nor is it necessary to characterise an appointment of an agent or other person pursuant to the power granted under that subsection as having that effect.

Conclusion as to par 7

[44] For those reasons, in my view, the appeal in the present case must be allowed. Paragraph 7 of the amended statement of claim does not disclose a basis for the conclusion that the chose in action for a contractual cause of action is held by the respondent. As presently constituted, the proceeding is defective for want of parties. The alleged causes of action as pleaded are claims that might have been made by PTQ.[17] But the amended statement of claim does not presently disclose a cause of action by the respondent against the appellants. The order made by the court below dismissing the appellants' application should be set aside.

Orders to be made in lieu

[45] The appellants submit that an order should be made that the proceeding is dismissed or struck out. It is therefore necessary to further consider whether the proceeding is doomed to fail because of the decision that the respondent is not able to make the claims as presently pleaded.

[46] There are a number of possible ways in which the proceeding might be reconstituted or re-pleaded.

[47] First, PTQ might be substituted or added as plaintiff, substantially in accordance with the present pleading. There is no evidence that it will refuse to be so joined.

[48] Second, it appears that PTQ gave notice terminating the custody agreement under cl 12.1 and Sch 6 of the custody agreement. Clause 12.5 of the custody agreement

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16 The respondent also sought to rely on s 19(2) of the *Trusts Act* 1973 (Qld) as having that effect. In my view, that contention may be dismissed out of hand. First, the amended statement of claim does not rely on the custody agreement, which is the relevant instrument creating any trust between PTQ and the respondent or the members of the scheme. Secondly, the provisions of s 19(2) operate, inter alia, "subject to… the instrument (if any) creating the trust". But that part of s 19(2) is not a grant of power. It does not operate to permit a trust instrument to empower a person who is not a party to a contract to sue upon the contract.

17 I express no view upon the question whether PTQ can bring a claim based on the Daikyo guarantee on the pleaded allegations, which was not a question argued in the appeal.

provides, in effect, that on termination custodially held property is to be transferred according to the instructions of the respondent. If such a transfer were made under s 199 of the *Property Law Act* 1974 (Qld), the transferee may be entitled to bring the proceeding in its name.

[49] Third, if PTQ remains the legal holder of any chose in action for a contractual cause of action against the appellants, there are circumstances where a beneficiary of a trust may bring a proceeding against a third party upon a contract made between the trustee and the third party. Where the trustee refuses to bring the proceeding, the trustee may in some circumstances be made a defendant to a proceeding brought by the beneficiary against the third party as plaintiff, so that all relevant parties may be bound. Courts in this country have decided that this method of proceeding now extends to a claim at common law.[18]

[50] Ford and Lee, *The Law of Trusts*,[19] summarise the position of the beneficiary of a trust thus:

> "As against third persons who commit a wrong in respect of the trust property it is generally the trustee who is the appropriate person to sue. If the trust property is a contract the trustee can maintain such actions on it as he could maintain if he held the contract in his own right: *Young v Murphy* [1996] 1 VR 279; (1994) 13 ACSR 722; 12 ACLC 558 at 734 (ACSR), 290 (VR).
>
> …
>
> If the trustee does not sue to protect the trust property, the beneficiary may in 'exceptional circumstances' (*Lidden v Composite Buyers Ltd* (1996) 67 FCR 560; 139 ALR 549) sue to enforce the trustee's right of action against the third person for injury to the trust property, joining the trustee as a defendant in the proceedings. Under the regime established by legislation derived from the *Judicature Acts 1973-1975* (UK) that is so whether the relief that the trustee could have sued for is legal or equitable. Trustees must be joined as defendants where beneficiaries bring such actions in their own names: *Roberts v Gill & Co* [2010] 2 WLR 1227; [2010] UKSC 22 at [62] and [103] per Lords Collins and Walker SCJJ; but see [83] per Lord Hope SCJ. So far as these rules allow a beneficiary to enforce a trustee's contract with a third person, they are distinct from rules applied in such cases as *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; 62 ALJR 508; 80 ALR 574 at [4110] under which a person not a party to a contract of insurance may sue on that contract." (footnotes omitted)

[51] In the present case, there is a dispute as between the parties as to whether PTQ holds any chose in action against the appellants as trustee for the respondent or as trustee for the members of the scheme. The question as to the correct characterisation of the trust on which PTQ holds any chose in action was not fully argued. As previously stated, in my view, it is not appropriate to decide that

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18 *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560, 563-564; *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432, 436-437. Compare *Barbados Trust Co Ltd v Bank of Zambia* [2007] 2 All ER (Comm) 445.

19 At [1.8370] and [1.8410].

question in order to resolve the appeal. It may be unnecessary to decide it at all if a party who holds the legal title to any chose in action against the appellants brings the proceeding.

[52] Fourth, cl 3.1 of the custody agreement provides, in effect, that PTQ agrees to custodially hold property of the scheme "as agent for" the respondent. The respondent may wish to contend that it was thereby the principal on the contracts made by PTQ or its predecessor with the appellants. There are significant potential arguments against that proposition, but they were not fully argued by the parties for the purpose of resolving the present appeal. It would be inappropriate to resolve them when it is not necessary to do so.

[53] In my view, the order sought by the appellants that the proceeding be dismissed should not be made. It is possible that the proceeding may be successfully reconstituted as to parties or re-pleaded in a way that answers the present inadequacy. The respondent should be given the opportunity to apply to the court below to join another party or parties or to amend the statement of claim and for consequential directions. If no application of that kind is successfully made by the respondent, the appellants may re-apply for an order that the claim should be dismissed.

[54] Therefore, in lieu of the orders for further steps in the proceeding ordered by the learned primary Judge it should be ordered that:

1. the amended statement of claim is struck out.

2. the appellants' application to dismiss the proceeding and the respondent's cross-application for disclosure are otherwise dismissed.

[55] In my view, it follows that the respondent should be ordered to pay the appellants' costs of the appeal and of the applications made to the court below.