

SUPREME COURT OF QUEENSLAND

CITATION: *Kordamentha Pty Ltd v LM Investment Management Ltd & Anor* [2016] QSC 183

PARTIES: **KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND**
(plaintiff)
v
LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)
(first defendant)
and
DAVID WHYTE IN HIS CAPACITY AS COURT APPOINTED RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND
(second defendant)

FILE NOS: SC No 8032 of 2014
SC No 8034 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 19 August 2016

DELIVERED AT: Brisbane

HEARING DATE: 31 May 2016, supplementary written submissions 28 June and 5 July 2016

JUDGE: Applegarth J

ORDER: **The application to strike out the indemnity claim is refused. The plaintiff has leave to amend. The parties are directed to agree a form of orders.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – EMBARRASSING, TENDENCY TO CAUSE PREJUDICE, SCANDALOUS, UNNECESSARY ETC OR CAUSING DELAY IN PROCEEDINGS – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the first defendant (“LMIM”) was formerly the trustee of two trusts – where LMIM passed certain resolutions and entered into deeds of assignment in which LMIM as trustee for one trust (“FMIF”) assigned loans and securities to itself

in its capacity as trustee for the other trust (“MPF”), in consideration for a settlement sum – where the plaintiff pleads that LMIM was acting as trustee for both trusts when it entered into the deeds and passed the resolutions – where the plaintiff pleads that LMIM breached duties it owed to the members of the MPF trust not to place itself in a position of conflict of duty – where LMIM is pleaded to be liable for the loss caused by this breach – where the plaintiff further pleads that LMIM is entitled to an indemnity against the FMIF in respect of that liability, and that the plaintiff is entitled to be subrogated to that right of indemnity – whether the relevant part of each pleading should be struck out because it does not disclose a reasonable cause of action – whether the relevant part of each pleading should be struck out because it has a tendency to prejudice or delay the fair trial of the proceeding

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

Trusts Act 1973 (Qld), s 72

Uniform Civil Procedure Rules 1999 (Qld), r 171(1)(a), r 171(1)(b)

Australian Securities and Investments Commission v Letten (No 17) (2011) 286 ALR 34; [2011] FCA 1420, cited
Banque Commerciale SA (in liq) v Akhil Holdings Ltd (1990) 169 CLR 279, cited

Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [2011] QCA 252, cited

Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation (2009) 239 CLR 346, cited

Chief Commissioner of Stamp Duties v Buckle (1998) 192 CLR 226, cited

Dey v Victorian Railway Commissioners (1949) 78 CLR 62, cited

Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq) [2002] FCAFC 285, cited

Jessup v Queensland Housing Commission [2002] 2 Qd R 270; [2001] QCA 312, cited

Moloney v Marler & Darvall [2004] QSC 228, considered
Nicholls v Michael Wilson and Partners Ltd [2012] NSWCA 383, cited

Nolan v Collie (2003) 7 VR 287, considered

Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360, cited

Park & Muller (liquidators of LM Investment Management Ltd) v Whyte [2015] QSC 287, cited

Re Beddoe [1893] 1 Ch 547, cited

RWG Management Ltd v Commissioner for Corporate Affairs [1985] VR 385

Spencer v The Commonwealth of Australia (2010) 241 CLR 118, cited

Wellington Capital Ltd v Australian Securities and Investment Commission (2014) 254 CLR 288, cited
Young Investments Group Pty Ltd v Mann (2012) 293 ALR 537; [2012] FCAFC 107, cited

COUNSEL: S E Brown QC and M J Luchich for the applicant/second defendant
 A Crowe QC and E Goodwin for the respondent/plaintiff

SOLICITORS: Tucker and Cowan for the applicant/second defendant
 Minter Ellison for the respondent/plaintiff

- [1] The plaintiff is the trustee of the LM Managed Performance Fund (“MPF”). It replaced the first defendant (“LMIM”) as trustee on 12 April 2013. LMIM is the responsible entity of a registered scheme called the LM First Mortgage Income Fund (“FMIF”). LMIM holds the property of the FMIF on trust for the members of the FMIF.¹
- [2] The second defendant was appointed by court order dated 21 August 2013 to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution. The second defendant also was appointed as receiver of the property of the FMIF. It is convenient to refer, as the parties’ submissions do, to LMIM acting as trustee for the MPF as “LMIM ATF the MPF” and LMIM acting as responsible entity for the FMIF as “LMIM ATF the FMIF”.
- [3] These two proceedings arise from the entry by those parties into deeds of assignment. In consideration of LMIM ATF the MPF agreeing to pay a “settlement sum”, the custodian of the FMIF assigned existing loans and securities to LMIM ATF the MPF. The assignment deeds were varied and there was a settlement with payment of the settlement sum and interest. The plaintiff claims that by entering into the deeds of assignment and subsequent deeds of variation, and by performing the terms of those deeds, the first defendant breached the duty that it owed to members of the MPF not to place itself in a position of conflict of duty.
- [4] The plaintiff alleges that these breaches of duty caused LMIM ATF the MPF to suffer a loss in the amount of \$5,128,071.34 in respect of the transaction which is the subject of proceeding 8032/14 and a loss of \$18,982,171.51 in respect of the transaction which is the subject of proceeding 8034/14. The loss is calculated on the basis of the difference between the amount of the settlement sum that was paid plus interest and certain payments and the proceeds of sale that have been received. The plaintiff pleads that the first defendant is liable to pay equitable compensation to it for the loss.
- [5] The plaintiff’s pleading goes on to make what has been described, for convenience, as an indemnity claim. According to the plaintiff, the first defendant is entitled to an indemnity out of the assets of the FMIF in respect of the first defendant’s liability, and the plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the indemnity.

¹ *Corporations Act 2001* (Cth), s 601FC(2); *Wellington Capital Ltd v Australian Securities and Investment Commission* (2014) 254 CLR 288 at 299–300 [13].

- [6] The second defendant applies to strike out the paragraphs of the plaintiff's pleading which assert the first defendant's entitlement to an indemnity and the plaintiff's right of subrogation. According to the second defendant, the pleadings are deficient in not pleading material facts which would support the claimed indemnity and the claimed entitlement to be subrogated. In general terms, the second defendant submits that the basis upon which the indemnity is claimed to arise is not made clear and therefore the pleading has a tendency to prejudice or delay the fair trial of the proceeding. To the extent the plaintiff's case, as pleaded, is illuminated by the plaintiff's submissions concerning the legal basis upon which the indemnity is sought, the second defendant submits that the claim is bad in law. In response, the plaintiff submits that its pleading is adequate and that the relief claimed is at least arguable.
- [7] The essential issue is whether the plaintiff's pleading is deficient in not pleading material facts which arguably would support an entitlement to an indemnity, and thereby render it liable to be struck out on the grounds that it does not disclose a reasonable cause of action or because the pleading in its present form has a tendency to prejudice or delay the fair trial of the proceeding.
- [8] The two proceedings are similar and the parties accept that the same issues arise in both, making it convenient to refer to the relevant paragraphs of the plaintiff's pleading in proceeding 8032/14. A number of paragraphs of each pleading were the subject of the applications. Following an exchange of correspondence between the solicitors for the plaintiff and the solicitors for the second defendant, the plaintiff agreed to either effect amendments to the pleadings or provide particulars. This meant that the argument before me focused on the adequacy of the plaintiff's pleadings in respect of certain paragraphs of each pleading which alleged the first defendant's right of indemnity and the plaintiff's right of subrogation. Two other paragraphs were the subject of separate, brief submissions.

The first defendant's alleged liability

- [9] Neither defendant has yet filed a defence. The first defendant (which is controlled by its liquidators) might not file a defence. As noted, the claim against the first defendant rests upon allegations of breach of duty by it as trustee of the MPF. It is alleged to have breached its duties as trustee to members of the MPF by reason of its entry into the deeds of assignment, pursuant to which the custodian assigned loans and securities to LMIM ATF the MPF in consideration for payment of the settlement sum. This is alleged to have occurred in circumstances in which LMIM placed itself in a position where the duties that it owed to the beneficiaries of the FMIF were in conflict with the duties that it owed to the beneficiaries of the MPF. The interests of the beneficiaries of the FMIF required it to maximise the amount the FMIF could recover for the loans and securities that were to be assigned, whereas the interests of the beneficiaries of the MPF required the first defendant to minimise, as far as reasonably possible, the amount it paid to acquire assets on behalf of the MPF. The informed consent of the beneficiaries of the MPF was not obtained. As a result, the first defendant is alleged to have breached the "no conflict" duty. It is further alleged to have breached equitable duties and duties under the *Trusts Act 1973 (Qld)* by entering into each assignment deed and various deeds of variation, and by performing the terms of those deeds.

- [10] LMIM ATF the MPF and LMIM ATF the FMIF are alleged to have made resolutions which determined that certain amounts would be treated as the amount of the settlement sum referred to in the deeds of assignment. I shall refer to these as the Resolutions.
- [11] LMIM is alleged to have acted in its capacity as trustee of the MPF and to have acted in its capacity as trustee of the FMIF when it entered into the deeds of assignment, when it passed the Resolutions and when the settlement sum was paid.
- [12] In the course of doing so, LMIM is alleged to have incurred the claimed liability to the plaintiff to pay equitable compensation for the loss it suffered as a result of the alleged breaches of duty.
- [13] Importantly, the plaintiff's pleading does not allege that LMIM ATF the FMIF breached duties which it owed, or that, acting in its capacity ATF the FMIF, it was knowingly involved in breaches of duty by LMIM ATF the MPF. The relevant breaches of duty are of duties owed by LMIM ATF the MPF. It is on this basis that paragraph 69B in proceeding 8032/14 and paragraph 55B in proceeding 8034/14 allege:
- “The first defendant is liable (“the Liability”) to pay equitable compensation to the plaintiff for the Loss”.

The plea of an indemnity and an entitlement to subrogation

- [14] The paragraphs which the second defendant applies to strike out are the same in both pleadings, although their numbers are different. It is convenient to set out paragraphs 76 – 85 in proceeding 8032/14:
- “76. The first defendant ATF the FMIF entered into the Deeds acting for the benefit of the FMIF.
77. The Deeds, the payment of Settlement Sum and the payment of the Interest, provided a benefit to LMIM ATF the FMIF and the FMIF.
78. The first defendant was acting ATF the MPF and ATF the FMIF when it entered into the Deeds.
79. The first defendant was acting ATF the MPF and ATF the FMIF when the Settlement Sum was paid.
80. The first defendant was acting ATF the MPF and ATF the FMIF when the Interest was paid.
81. The first defendant was acting ATF the MPF and ATF the FMIF when it passed the Resolution.
82. In the premises pleaded at paragraphs 78 to 81, the first defendant incurred the Liability to the plaintiff, in circumstances where the first defendant was acting ATF the MPF and ATF the FMIF.
83. The first defendant is entitled to an indemnity out of the assets of the FMIF, including the Fund, in respect of the Liability and any other liabilities to the plaintiff in this proceeding (“**Indemnity**”).

84. The first defendant is entitled to a lien or charge over the assets of the FMIF, including the Fund, to secure the Indemnity.
85. The plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the Indemnity.”

The second defendant’s complaint

[15] In summary, the second defendant complains that these paragraphs:

- (a) do not articulate any material fact in support of the allegation in paragraph 82 that the first defendant incurred the Liability to the plaintiff “in circumstances where [it] was acting ... ATF the FMIF”, since the “Liability” is alleged to be a Liability of the first defendant to pay the plaintiff equitable compensation for alleged breaches of duties LMIM ATF the MPF owed to the beneficiaries of the MPF;
- (b) there is no basis pleaded in support of the alleged entitlement of the first defendant to a right of indemnity out of the assets of the FMIF, specifically one that was incurred in respect of a liability owed to LMIM ATF the MPF to which the plaintiff could be subrogated; and
- (c) paragraphs 84 and 85 are similarly deficient in respect of the alleged entitlement to a lien or a charge over the assets of the FMIF, and the pleaded entitlement to be subrogated.

The plaintiff’s response

[16] The plaintiff submits that its pleading is sufficiently clear in pleading that the “Liability” which the first defendant incurred to the plaintiff was incurred by it due to breaches of duty in its capacity ATF the MPF. The plaintiff’s strike out application is said to rest upon the proposition that it is not possible for a trustee who breached one trust to be indemnified out of another trust. However, such a proposition is submitted to be inconsistent with authority, in particular, the decision of the Court of Appeal of Victoria in *Nolan v Collie*.² The indemnity claim is said to be arguable on the basis of that authority and because LMIM is entitled to an indemnity for liabilities incurred in the “performance of the trust”.³ LMIM was performing for two trusts in the one transaction when it entered into the relevant assignment deed. The relevant resolution of the board of directors of LMIM was also passed in performing for both trusts in the one transaction. The second defendant’s contention that indemnity could only be sought in relation to the MPF, being the trust which is the subject of the claim for breach of trust, is said to be inconsistent with propositions adopted in *Nolan*. The case is unlike one in which a trustee which is acting in respect of only one trust has no right of recourse to the funds of another trust to satisfy claims against the trust fund in respect of which the right of indemnity arose.⁴ Instead, in this case LMIM was performing for two trusts in the one transaction. LMIM was purporting to act on behalf of both trusts in connection with the impugned

² (2003) 7 VR 287 (“*Nolan*”).

³ *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 369 – 370.

⁴ *Moloney v Marler & Darvall* [2004] QSC 228 at [41] (“*Moloney*”).

transactions. The authorities are said to leave open the possibility of what the plaintiff is seeking to achieve through the indemnity claim.

- [17] The indemnity claim is said to be sufficiently arguable on the basis of authority, particularly *Nolan*, that it should not be struck out. According to the plaintiff, there is a real question to be determined and the discretion to strike out should not be exercised in the circumstances.

LMIM's right of indemnity

- [18] In equity, a trustee has a right of indemnity in respect of liabilities that are properly incurred in the performance of the trust. The trustee is entitled to be indemnified against those liabilities out of the trust property.⁵ A trustee's right of indemnity is recognised by s 72 of the *Trusts Act 1973* (Qld).⁶ In addition, the constitution of the FMIF confers a contractual right of indemnity on LMIM. A trustee's right to an indemnity can extend to the liability of a trustee to pay damages to a third party.⁷
- [19] In *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte*, Jackson J referred to a trustee's right of indemnity in equity as follows:

“The right of indemnity, called a right of exoneration or a right of recoupment, is one that a trustee has against the trust property for a liability or expense properly incurred as trustee. It is a personal right that is supported by a proprietary right in the form of lien or charge over the trust property to the extent of the right of indemnity.”⁸

The words “properly incurred” in statements of principle about the right of indemnity are equivalent to the words “not improperly incurred”.⁹

- [20] A trustee is, however, entitled to be indemnified in respect of a liability improperly incurred to the extent to which, acting in good faith, the trustee has benefited the trust estate.¹⁰
- [21] A trustee's right of indemnification is subject to a rule, which has been described as the “clear accounts rule”, that the trustee make good any loss it caused to the estate.¹¹ This rule strikes a balance between what is due by way of compensation and what is due by

⁵ *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 369.

⁶ *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270 at 275 [14]; [2001] QCA 312 at [14].

⁷ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte* [2015] QSC 287 at [65].

⁸ [2015] QSC 287 at [47] citing *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226, 245-247 [47]-[51] and *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346, 358 [43]. Relevant legal principles in relation to a trustee's indemnity are summarised in *Australian Securities and Investments Commission v Letten (No 17)* (2011) 286 ALR 346 at 350-353 [12] – [20]; [2011] FCA 1420 [12] – [20].

⁹ *Nolan v Collie* (2003) 7 VR 287 at 306 citing *Re Beddoe* [1893] 1 Ch 547.

¹⁰ *Nolan* at 310 [58] citing *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 396.

¹¹ *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 397-398; *ASIC v Letten (No 17)* (2011) 286 ALR 346 at 352 [19]; [2011] FCA 1420 at [19].

way of indemnity. The trustee will still have the right of indemnity to the extent to which the amount due by way of indemnity exceeds the compensation due to the estate.¹²

The pleading issue

- [22] The second defendant is correct in contending that a trustee must incur the relevant liability in the performance or administration of the trust against which it claims a right of indemnity.
- [23] The present application to strike out paragraphs of the plaintiff's pleading which assert LMIM's right of indemnity is not concerned with the question of whether, on the pleaded case, any liability was "properly incurred" and, if it was not, whether the trustee is nevertheless entitled to be indemnified to the extent to which, acting in good faith, it benefited the trust estate. It is concerned with the threshold question of whether the pleading discloses an arguable basis to assert that LMIM has a prima facie right of indemnity against the property of the FMIF which is held on trust for the members of the FMIF. The remedy which the plaintiff seeks, namely being subrogated in equity to the rights of LMIM ATF the FMIF, depends upon LMIM having a prima facie right of indemnity to which the plaintiff may be subrogated, and upon the alleged right of indemnity being adequately pleaded.
- [24] The pleading issue may be framed as follows:

"Is it arguable, on the basis of the pleaded material facts, that LMIM has a right of indemnity as trustee of the FMIF in respect of the alleged Liability?"

Expressed differently, the issue is whether the plaintiff has adequately pleaded that the Liability was incurred in the performance of the FMIF trust.

Striking out principles

- [25] A pleading may be struck out on the ground that it "discloses no reasonable cause of action or defence".¹³ On such an application the Court ordinarily assumes that factual allegations made by the plaintiff are true.¹⁴
- [26] The authorities emphasise that a court should be careful and only strike out a pleading for failing to disclose a cause of action in a clear case.¹⁵ The power to strike out a sufficiently pleaded statement of claim cannot be exercised "once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it".¹⁶

¹² *Ibid*; and see *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2002] FCAFC 285 at [138].

¹³ *Uniform Civil Procedure Rules* 1999, r 171(1)(a).

¹⁴ *Young Investments Group Pty Ltd v Mann* (2012) 293 ALR 537 at 539–540 [6]; [2012] FCAFC 107.

¹⁵ *Ibid*; *Spencer v The Commonwealth of Australia* (2010) 241 CLR 118 at 131 [24].

¹⁶ *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91.

- [27] A pleading also may be struck out on the ground that it has “a tendency to prejudice or delay the fair trial of the proceeding”.¹⁷ A pleading may be deficient, and liable to be struck out on this ground, because it fails to fulfil the function of a pleading which is “to state with sufficient clarity the case that must be met” and thus define the issues for decision.¹⁸ A pleading will lack sufficient clarity if it is “ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him”.¹⁹

The pleading points on this application

- [28] The second defendant’s application invokes these principles. The relevant paragraphs of the plaintiff’s pleading are submitted to not particularise any material fact in support of the conclusionary allegation in paragraph 82 that LMIM “incurred the Liability to the plaintiff in circumstances where [it] was acting ATF the MPF and *ATF the FMIF*” (emphasis added). The pleaded liability is alleged to arise from the entry into and performance of the Deeds of Assignment, with the liability arising as a consequence of alleged breaches of duty by LMIM ATF the MPF. The second defendant rejects the proposition that the pleaded right of indemnity arises because LMIM was wearing “two hats” in the course of the transactions. According to the second defendant, the basis for the claim to the right of indemnity is not articulated in the plaintiff’s pleading.

Nolan v Collie

- [29] As noted, the plaintiff’s position is that the indemnity claim is sufficiently arguable on the basis of authority, particularly *Nolan v Collie*. In that case, Merlaw Nominees Pty Ltd was trustee of the Prudent Trust, the assets of which included a property (“Jolimont”). Merlaw entered into a contract of sale in 1984 to sell Jolimont to Terramont Pty Ltd. It thereby became trustee of a constructive trust, described in the proceedings as “the purchase trust”. In breach of its duty as trustee and in the course of refinancing, Merlaw executed a mortgage over Jolimont in favour of a bank. The mortgage mistakenly secured not only a certain bill facility but also all monies then or thereafter owing by Merlaw to the bank whether on behalf of the Prudent Trust or otherwise.
- [30] Mr Collie, as trustee of certain interests which were affected by the mistake successfully brought a claim against Merlaw and others for equitable compensation for breach of “the purchase trust”. In further proceedings, and after Merlaw went into liquidation, Mr Collie, on behalf of those interests, commenced an action against Mr Nolan, as the replacement trustee of the Prudent Trust, and Merlaw. He sought to establish Merlaw’s right to indemnification from the Prudent Trust estate in respect of its liability for breach of the purchase trust and also a right to be subrogated to Merlaw’s right of indemnity against the Prudent Trust estate. Those claims were allowed and Mr Nolan, as the replacement trustee of the Prudent Trust, appealed. The issue raised on appeal was whether any right of indemnity²⁰ existed in Merlaw as trustee of the Prudent Trust against the assets of that trust. The appellant’s argument pointed to the fact that the breach of trust which was established in the first proceeding was of the purchase trust of which

¹⁷ *Uniform Civil Procedure Rules* 1999, r 171(1)(b).

¹⁸ *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

¹⁹ *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [27].

²⁰ The word “indemnity” is used in this context as a shorthand comprehending rights of exoneration and recoupment.

Merlaw was undoubtedly trustee, but not in its capacity as trustee of the Prudent Trust. Mr Nolan argued on appeal that there was no possible basis for Merlaw to claim an indemnity in respect of the Prudent Trust.

[31] Ormiston JA (with whom Batt and Vincent JJA agreed) stated:

“The assumption made in counsel’s otherwise clear and compelling argument was that indemnity could only be sought in relation to the trust which was held to be the subject of the claim for breach of trust. In many cases that would be so, but the relationship between the two trusts was here relevantly different, in that **there was no necessary inconsistency in finding a right of indemnity existing in a trustee of a trust different from the one held to have been breached.** There was, of course, no misidentification of the subject trust by Warren J. Here, however, the trust breached by Merlaw was a limited and special kind of trust which, significantly, arose directly out of the authorised acts of Merlaw in its capacity as trustee of the Prudent Trust, namely the entry into and performance by Merlaw of the contract of sale of the subject premises, one of that trust’s assets.”²¹

[32] In a case in which a trustee was acting or purporting to act on behalf of both trusts, the right to indemnity is not entirely dependent upon the breach and upon identifying the trust in respect of which the breach occurred. As Ormiston JA explained:

“... there seems to be no reason, at least in present circumstances, why the right to indemnity should be entirely dependent upon the breach and upon identifying the trust in respect of which the breach occurred. The trustee is liable but, in the absence of any explicit or implicit agreement with the judgment creditor that the trustee should be liable only in respect of the assets of a particular trust, the trustee is liable directly to pay the sum ordered by way of compensation. It can relevantly obtain exoneration or recoupment from the assets of a trust in respect of which the trustee was purporting to act. Ordinarily if a breach of trust is alleged, that will identify the trust and the estate in respect of which the trustee was acting, but in the present case there were undoubtedly two trusts at the relevant time, the Prudent Trust, whose asset Jolimont was being sold to Terramont, and the “purchase trust” which came into existence by virtue of the contract of sale in order to give the purchaser a protectable beneficial interest in Jolimont, as the subject of that sale.”²²

[33] In *Nolan* the question was whether a choice had to be made between the two trusts as to which should provide indemnity to Merlaw in consequence of its wrongful mortgaging of Jolimont. Ormiston JA rejected the proposition that there could only be one relevant trust.²³ When Merlaw mortgaged the land to the bank in 1987 and made the title to Jolimont available for that purpose it was acting “just as much in its own interests as in the interests of the ‘trustee’ under the ‘purchase trust’.”²⁴ The benefit of obtaining the new mortgage was seen, at least in part, as a benefit gained by Merlaw in its role as trustee

²¹ (2003) 7 VR 287 at 296 [26] (emphasis added).

²² At 300–301 [37].

²³ At 301 [38].

²⁴ At 302 [40].

of the Prudent Trust, acting as it thought appropriate so as to ensure that the contract of sale was carried out.²⁵ Therefore, although Merlaw acted in breach of the “purchase trust” when granting the “all monies” mortgage, it nevertheless was still acting generally as vendor on behalf of the Prudent Trust, whose asset was the subject of the sale and whose interest in the property it was bound to protect.²⁶

- [34] It is unnecessary for present purposes to discuss the second basis found by the Victorian Court of Appeal for a right of indemnity, namely the fact that the impugned act benefited the Prudent Trust estate. The second basis invoked the authorities previously noted which provide that such a benefit entitles a trustee to claim indemnification even if it cannot establish that a liability was properly incurred.²⁷
- [35] As to the prior question of the prima facie right of indemnity, *Nolan* is authority for the proposition that in certain circumstances a right of indemnity may exist in a trustee of a trust different to the one held to have been breached. The factual circumstances of this case are quite different to those of *Nolan*. However, the plaintiff’s plea that LMIM is entitled to an indemnity out of the assets of the FMIF in respect of the Liability raises the same general issue about the right to an indemnity in circumstances in which a party to a transaction is acting both as trustee for Trust A and as trustee for Trust B. *Nolan* rejects the proposition that there is a rule that indemnity can only be sought as against the trust property of the trust which is the subject of the claim for breach of trust. In some circumstances, a trustee may claim a right of indemnity against Trust B, not based on the benefit which Trust B receives as a result of the alleged breach of trust, but on the fact that it incurred the liability when acting both as trustee for Trust A and as trustee for Trust B.
- [36] The second defendant seeks to distinguish *Nolan* as a case in which Merlaw was acting in a dual capacity. It executed the mortgage which mistakenly secured all monies that it owed and did so when it was acting on behalf of both the “purchase trust” and the Prudent Trust. The act which constituted the breach of trust and which gave rise to the liability was said to have been carried out for both trusts. In a suggested point of distinction, the pleading in this case was submitted by the second defendant to not show that a liability was incurred by LMIM when acting in the execution of the FMIF Trust. Simply saying that it was acting for both trusts at the time was not enough to advance an arguable claim for indemnity.
- [37] The facts of *Nolan* and the facts pleaded in this proceeding are notably different. However, it is the point of principle which emerges from *Nolan* which is important. That principle is that in certain circumstances a party which is acting both as trustee for Trust A and as trustee for Trust B may engage in a transaction or perform some other act which gives rise to a claim for breach of trust in respect of Trust A. Depending upon the circumstances, a right of indemnity may be sought from Trust B. A right of indemnity is not confined to the trust which is held to have been breached.

²⁵ Ibid.

²⁶ At 302 [41].

²⁷ At 310 [58].

- [38] A critical issue in any asserted right of indemnity against Trust B is whether the liability which the trustee incurred was incurred only in the performance of Trust A. If, instead, it was incurred in the performance of Trust B as well as in the performance of Trust A, then, on the authority of *Nolan*, there is an arguable basis to claim indemnity against Trust B. The essential question in such a case is whether the relevant party was acting in the performance of Trust B (as well as Trust A) when it incurred the liability. In order to engage the argument which is supported by *Nolan* the pleading must sufficiently plead the acts that were done in the performance of Trust B.

Moloney's case

- [39] Reference was made in the course of argument to the decision of Muir J (as his Honour then was) in *Moloney v Marler & Darvall*.²⁸ The second defendant placed particular reliance upon the following passage:

“The trustee’s right of indemnity is only against the trust fund. A trustee who is the trustee of a number of trusts has no right of recourse to the funds of another trust to satisfy his claims against the trust fund in respect of which this right of indemnity arose. Otherwise, the trustee would be applying trust funds for his own benefit or for the benefit of third parties and contrary to the terms of the trust.”²⁹

- [40] The plaintiff does not contest these principles. It accepts that if a party which is trustee of Trust A and Trust B, acting only as trustee of Trust A, incurs a liability to a third party in a transaction, then the trustee cannot seek indemnity from Trust B for the liability. The statement made in *Moloney* requires a factual determination of the trust fund against which the trustee’s right of indemnity arises. Where there is only one trust involved in a transaction, the answer is clear. The trustee cannot have recourse to the funds of another trust by way of indemnity. Where, however, two or more trusts are involved in a transaction, then the trust against which an indemnity may be sought depends upon an inquiry into whether the party was acting in the performance of one or both of the trusts.
- [41] The parties also referred to a passage in *Moloney* in which Muir J contemplated that monies held by a party on trust for participants in a particular scheme may be misapplied by the trustee and applied to the benefit of another trust of which it is trustee.³⁰ In such a case the participants in the first scheme will have a claim against the trustee for breach of trust. Muir J observed that in such a case it may be that the trustee has a right of indemnity in respect of the payment as being expenses incurred by it in the execution of the other trust. This passage is not directed at the present circumstances. It is unnecessary to pursue the matter because there was no claim in that case that funds had been misapplied in the execution of the other trust. It does not appear that Muir J was referred to *Nolan* or other authorities concerned with the present issue. It is sufficient for present purposes to observe that *Moloney* does not contradict the propositions for which *Nolan* is authority.

²⁸ [2004] QSC 228.

²⁹ At [41].

³⁰ *Ibid* at [50].

The arguable point of law

- [42] To the extent that the second defendant's submissions might be thought to rely on the proposition that to allege that LMIM has a right of indemnity against the FMIF, the plaintiff must plead that LMIM incurred a liability in the administration of the FMIF by breaching duties owed by it to members of the FMIF, that proposition is open to argument based on *Nolan*. It is at least arguable that LMIM would have a right of indemnity against the FMIF if, in acting both as trustee of the MPF and as trustee of the FMIF, it incurred a liability to the MPF. The proposition of law upon which the plaintiff relies being at least arguable on the basis of *Nolan*, the second defendant's application to strike out depends on the argument that the pleading is deficient in not bringing the case within the point of law upon which the plaintiff relies.

The sufficiency of the plaintiff's pleading

- [43] The plaintiff's pleading makes sufficiently clear that the Liability is a liability that arose because of breaches of duty owed to the beneficiaries of the MPF. The essential issue is whether the plaintiff has sufficiently pleaded that the Liability was incurred in the performance of the FMIF against whose assets it alleges LMIM has a right of indemnity.
- [44] I do not accept the second defendant's submission that no material fact is pleaded that LMIM incurred the Liability when acting on behalf of FMIF. The pleading sufficiently discloses that the plaintiff's case is that LMIM incurred the Liability when acting (both) as trustee for the MPF and as trustee for the FMIF.
- [45] The plaintiff's pleading makes sufficiently clear that LMIM was performing for two trusts, the FMIF and the MPF, when it entered into the deeds of assignment. The relevant resolution upon which the plaintiff's pleading relies was one passed by the board of directors of LMIM and the plaintiff will seek a finding of fact that LMIM was performing for both trusts in the one transaction when it passed that resolution. The plaintiff's pleaded case is that LMIM incurred the Liability to the members of the MPF when it was performing for each of the two trusts. The case is analogous to one in which an entity which is a trustee of Trust A and also a trustee of Trust B enters into a deed of sale or some other transaction and does so acting as trustee for Trust A and as trustee for Trust B. The essence of the plaintiff's case is that LMIM transacted with itself on behalf of different trusts, and that in entering into the various deeds and in passing various resolutions it was acting in the performance of the FMIF Trust and also acting in the performance of the MPF Trust.
- [46] The pleading does not allege simply a temporal connection, namely that LMIM was trustee of both trusts at the same time. The relevant parts of the pleading allege that LMIM was acting as trustee for the MPF and as trustee for the FMIF when certain transactions were undertaken. The matters pleaded by the plaintiff are sufficient to enable the second defendant to know the case which it has to meet and are not deficient in point of pleading. Based upon the propositions of law upon which the plaintiff relies, its pleading sufficiently pleads that the Liability was incurred in the performance of the FMIF. The matters pleaded by it arguably give rise to a sufficient connection with the

execution or administration of that trust so as to give rise to the asserted entitlement to an indemnity out of the assets of the FMIF.

- [47] In the circumstances, I do not consider that this is an appropriate case for summary dismissal of the so-called indemnity claim, being the plaintiff's claimed remedy by way of subrogation to LMIM's alleged right of indemnity. The power to strike out the relevant parts of the pleading and to thereby summarily dismiss the claim should not be exercised in circumstances where there appears to be a real question to be determined about the right of indemnity and the rights of the parties depend upon it. It is best to have the questions of fact and law decided on their merits. Therefore I decline to strike out paragraphs 76 to 85 of Proceeding 8032 of 2014 and paragraphs 62 to 71 of Proceeding 8034 of 2014.

Other issues

Subparagraphs 64(a) in Proceeding 8032/14 and 50(a) in Proceeding 8034/14

- [48] These paragraphs are in an unsatisfactory form. Each is framed as a hypothetical. Whilst it is open to the plaintiff to plead a case in the alternative, it should not plead on a hypothetical basis that LMIM ATF the MPF relied upon a certain valuation. Counsel for the plaintiff accepted the validity of the objection to this form of pleading.

The pleading of causation and loss

- [49] I have earlier outlined the basis upon which the plaintiff approaches the calculation of loss. The second defendant's objection appears to be that the plaintiff does not seek to calculate loss by reference to values as at the date of the impugned transaction. However, I see no reason in principle as to why the plaintiff cannot seek to recover the claimed loss on the basis which it does. Its case, in the form of the proposed new paragraph 69A referred to in paragraph 18 of Minter Ellison's letter dated 25 May 2016, alleges that the breaches of duty pleaded by it have caused LMIM ATF the MPF to suffer a loss in the specified amount. The object of equitable compensation is to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation.³¹ There is nothing inherently wrong in principle with a claim which seeks to compare the sum which the trust paid to acquire certain assets, together with interest, with the amounts which it has received by way of payment and sale proceeds. The difference is arguably the amount required to restore the trust to the position it would have been in if there had been no breach and no transaction. I decline to strike out paragraphs 69A (in its previewed form) and 69B of the pleading in Proceeding 8032/14 or the comparable paragraphs, namely paragraphs 55A and 55B, in Proceeding 8034/14.

³¹ See *Nicholls v Michael Wilson and Partners Ltd* [2012] NSWCA 383 at [174] where certain principles are summarised.

Conclusion

- [50] As noted, following an exchange of correspondence, the solicitors for the plaintiff agreed to effect certain amendments to the pleading and to provide particulars with respect to certain paragraphs. Of the paragraphs which were the subject of argument before me, the second defendant has failed to obtain the orders sought by it to have those paragraphs struck out, save for the pleading which was bad in form in asserting a hypothetical reliance upon a valuation.
- [51] I will hear from the parties concerning the form of orders. However, the plaintiff's further amended pleading to be delivered may include its indemnity claim which, for the reasons I have given, I decline to strike out. I will also hear the parties, if necessary, on the question of costs. However, the parties should attempt to agree an appropriate costs order to reflect the resolution of issues that arose on the application, including the issues which I was required to decide.