SUPREME COURT OF QUEENSLAND

CITATION:	*Blackwatch Projects Pty Ltd & Ors v D J Cowling & B L Roberts (a firm) & Anor* [2016] QSC 291
PARTIES:	**BLACKWATCH PROJECTS PTY LTD** (first plaintiff/first respondent) **OAKLEY PROPERTIES PTY LTD AS TRUSTEE FOR THE OAKLEY PROPERTIES DISCRETIONARY TRUST** (second plaintiff/second respondent) **SILVERSTONE ENTERPRISES NO 7 PTY LTD AS TRUSTEE FOR THE SILVERSTONE DEVELOPMENTS NO 7 UNIT TRUST** (third plaintiff/third respondent) **SILVERSTONE ENTERPRISES NO 13 PTY LTD AS TRUSTEE FOR THE SILVERSTONE DEVELOPMENTS NO 13 UNIT TRUST** (fourth plaintiff/fourth respondent) **DARREN JAMES LUCEY** (fifth plaintiff/fifth respondent) **TROY JUSTIN DAFFY** (sixth plaintiff/sixth respondent) **v** **D J COWLING & B L ROBERTS (A FIRM)** (first defendant/first applicant) **ROBERTS & COWLING PTY LTD** (second defendant/second applicant)
FILE NO/S:	SC No 2144 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	12 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2016
JUDGE:	Bond J
ORDER:	**The order of the Court is that Mills Oakley Lawyers be restrained from continuing to act on behalf of the third and fourth plaintiffs in this proceeding.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – CONFLICTS OF INTEREST – where the defendants apply to restrain the plaintiffs' solicitors from continuing to act – where

	the defendants' pleading asserts that the solicitors were concurrent wrongdoers in respect of the loss which the third and fourth plaintiffs respectively attribute to the defendants – where the defendants submit that the solicitors have a real financial and reputational interest in the outcome – whether the pleaded case in relation to the solicitors' contributory negligence unarguable – whether, in the circumstances, the solicitors should be restrained from acting
	Afkos Industries Pty Ltd v Pullinger Stewart (a firm) [2001] WASCA 372, cited *Agar v Hyde* (2000) 201 CLR 552, considered *Gangemi Pty Ltd v Luppino Pty Ltd* [2012] VSC 168, considered *Mantonella Pty Ltd v Thompson* [2009] 2 Qd R 524, cited *Takla v Nasr* [2013] NSWCA 435, cited *Trollope & Colls Ltd v Atomic Power Constructions Ltd* [1962] 3 All ER 1035, considered *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642, cited
COUNSEL:	P Franco QC, with C Wilson, for the defendants/applicants M D Martin QC, with D V Ferraro, for the plaintiffs/respondents
SOLICITORS:	Wotton + Kearney for the defendants/applicants Mills Oakley Lawyers for the plaintiffs/respondents

Introduction

[1] The defendants seek an order restraining Mills Oakley Lawyers from continuing to act for the plaintiffs in this proceeding. The defendants say that the proceeding involves issues which make it untenable for Mills Oakley to continue to act, in the sense it would create too great a risk to the integrity of the judicial process and the due administration of justice, including the appearance of justice.

[2] The plaintiffs resist the application. They do not want to be deprived of their chosen lawyers.

[3] The parties agreed that the relevant principles are adequately identified in *Gangemi Pty Ltd v Luppino Pty Ltd* [2012] VSC 168 per Sifris J at [5] to [10]. They may be summarised in this way:

(a) The Court always has inherent jurisdiction to restrain lawyers from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice.

(b) The test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the firm should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

(c) It will be a strong indication that lawyers should be restrained from continuing to act when they have a personal stake in the outcome of the proceeding or in their conduct, beyond the recovery of proper fees for acting. This might occur if lawyers' conduct or integrity comes under attack and review in the proceeding, thereby engaging their personal or reputational interest, even if not their financial interest. Because the

lawyers might in a real sense be defending themselves, there is a danger that the client will not be represented with the objectivity and independence to which the client is entitled and which the Court demands.

(d) Due weight should be given to the public interest in litigants not being deprived of the lawyer of their choice without due cause. Indeed, the jurisdiction is to be regarded as exceptional and is to be exercised with caution. The Court should be mindful that sometimes such applications may be misused e.g. by a party seeking to gain some tactical advantage.

(e) The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief.

[4] It remains to note that in an injunction proceeding such as this, authority suggests it will not be appropriate to make a final determination on the merits of the issues which arise in the proceeding and which are said to engage the lawyers' personal interest and therefore the jurisdiction to restrain them from continuing to act. Thus in *Afkos Industries Pty Ltd v Pullinger Stewart (a firm)* [2001] WASCA 372 at [22] to [23], Murray J (with whom Anderson and Steytler JJ agreed) said (emphasis added):

> **It is said that the finding of an actual or potential conflict of interest is wrong and unsupported by the evidence and there is nothing in the mere fact of the pleading by way of defence which could lead to the conclusion that the necessary objectivity and independence required of the solicitors was in any way compromised. It is asserted that an injunction of this kind should only be granted on the basis that the solicitors might have some potential liability by reason of the matters referred to** and that, the appellant asserts, could not be so unless at this stage it can be seen that the pleading by way of defence ought to succeed in that there was some basis for seeking an increase in the limits under the scale and that it was legally possible to do so.
>
> **As I have indicated, in my opinion, while the pleading remained on foot, it was sufficient that it be evaluated in its own terms**. It was in terms capable of raising an issue known to the law, namely the question whether the appellant, by the conduct of its solicitors leading to the compromise in respect of costs, could be said to have failed to mitigate its loss arising from its assertion that due to the fault of the respondent it had been deprived of 30 per cent of its costs, although generally successful in the arbitration. **It was not, in my opinion,** necessary that Miller J be satisfied of the further fact that, assuming it to have been possible to seek an order lifting the limits in respect of costs, such an order should have been made. That would be to place Miller J in the position of having to try **out the merits of the pleading for the purpose of determining whether or not to grant an injunction precluding the solicitors from acting as such or as counsel by reason of any actual or potential conflict of interest or that their duty of independence owed to the court was in any substantial way compromised**.

[5] Against that background, it is appropriate to identify with some precision the issues which arise in this proceeding which are said to create the problem and how and when they became relevant to this proceeding.

The issues which are said to engage the personal interests of the plaintiffs' solicitors

[6] The plaintiffs collectively operate as property developers and a mid-tier construction entity. Between 2006 and 2013 the defendants acted as the accountants for the plaintiffs. In this proceeding they advance a case for the recovery of damages from their former accountants.

[7] By order that I made on 29 April 2016 I ordered the proceeding be placed on the Commercial List and made directions as to the timing of delivery of pleadings and the occurrence of disclosure.

[8] In the amended statement of claim filed on 29 April 2016, the plaintiffs allege that it was an implied term of the defendants' retainer as accountants that the defendants would carry out their work pursuant to the retainer with the requisite care, skill and diligence that would be

expected of a reasonable person in the position of the defendants. They also allege that there was a duty of care in tort to the same effect.

[9] The relevant part of the case involves the allegation that the defendants were negligent in failing to advise properly with respect to the applicability to the acquisition of commercial property of the margin scheme under *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

[10] The plaintiffs' case in relation to the margin scheme was pleaded in these terms in the plaintiffs' amended statement of claim:

> 47. The defendants advised the plaintiffs that:
>
> (a) the margin scheme as that term is defined in *A New Tax System (Goods and Services Tax Act) 1999* (Cth) (the GST Act) was not applicable to commercial property;
>
> (b) the purchase of commercial property is always subject to GST;
>
> (the margin scheme advice).
>
> 48. The margin scheme advice was partly written and partly oral.
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> 49. Insofar as the margin scheme advice was in writing it was contained in an email from David Cowling to the sixth plaintiff dated 14 November 2012 sent at 5.17pm.
>
> 50. Insofar as the margin scheme advice was oral it was contained in numerous conversations between 14 November 2012 and late 2014 between David Cowling on behalf of the defendants and the fifth and/or sixth plaintiffs and/or Luke O'Dwyer, Silverstone Developments' Development Manager, wherein David Cowling repeated the margin scheme advice.
>
> 51. The margin scheme for the purposes of assessing GST on the sale of real property does apply to commercial property in the circumstances outlined in section 75-1 of the GST Act.
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> 52. The purchase of commercial property is not always subject to GST.
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> 53. In the premises of the matters pleaded in paragraphs 51 and 52 herein, in giving the margin scheme advice (which was wrong) the defendants acted in breach of the implied term and the duty.

[11] The plaintiffs then allege that, in reliance upon the margin scheme advice, the third plaintiff Silverstone Enterprises No 7 Pty Ltd (**SE7**) and the fourth plaintiff Silverstone Enterprises No 13 Pty Ltd (**SE13**) (both of whom were corporate entities of whom the sole director was one Troy Justin Daffy) respectively acquired what is referred to as the Duncan Street property and the High Street property. The contracts for the acquisition of each of these properties were not structured as the purchase of property as a going concern and accordingly GST was added to the purchase price. SE7 and SE13 allege that if they had been properly advised both properties could have been acquired as going concerns to which the margin scheme would have been applied.

[12] SE7 says that in consequence of the advice it received from the defendants it suffered loss in the amount of about $648,000. SE13 claims that in consequence of the defendants' advice it suffered loss in the amount of $273,000. In each case the loss comprised the payment of more stamp duty than was necessary and the payment of more GST than was necessary.

[13] On 24 June 2016 –

(a) I ordered the filing and service of an amended defence by 27 June 2016 and of a reply by 1 July 2016;

(b) I gave directions aimed at the completion of disclosure by 12 August 2016;

(c) I required delivery of expert reports in September and October 2016 with a joint report by 21 October 2016; and

(d) I gave directions aimed at ensuring mediation occurred by 28 October 2016 with the proceeding to be reviewed on 3 November 2016.

[14] On 15 September 2016 the defendants delivered an amended defence in which, relevantly, the defendants denied giving the margin scheme advice and pleaded that:

(a) the defendants advised the plaintiffs that every property purchase needed to be assessed on an individual basis and that the plaintiffs should consult the defendants prior to committing themselves to a purchase;

(b) the plaintiffs failed to do so;

(c) the plaintiffs ought to have known that the margin scheme advice was incorrect because the fifth plaintiff (through a related company) in fact purchased a similar property as a supply of a going concern and therefore on a GST-free basis;

(d) a reasonable person in the position of SE7 and SE13 would have applied the margin scheme and/or made further inquiries of the defendants or Mills Oakley in this regard; and

(e) the failure to do so constituted contributory negligence on the part of the plaintiffs.

[15] Critically, however, the defendants also pleaded that Mills Oakley were retained to act for each of the two property purchases and in each case breached the duty which they owed to SE7 and SE13 in relevant ways. The result, contend the defendants, was that Mills Oakley were concurrent wrongdoers in respect of the loss which SE7 and SE13 respectively sought to attribute to the defendants and any liability on the part of the defendants should be limited to an amount reflecting that proportion of the alleged loss and damage that was just and equitable having regard to the extent of the defendants' responsibility for the loss and damage.

[16] The further result, contend the defendants, is that Mills Oakley have a real financial and reputational interest in the outcome of the proceeding because if the defendants' proportionate liability defence is established, then it follows that Mills Oakley will be found to have acted negligently and such negligence will have caused loss to the plaintiffs. In this way the jurisdiction to restrain solicitors from continuing to act is engaged.

[17] It is appropriate to examine the proportionate liability case pleaded respectively as against SE7 and SE13 in a little more detail. That is because in each case the plaintiffs say that I should form the view that there is no serious question to be tried that the scope of Mills Oakley's retainer or duty of care in tort was such as could have been breached by the matters pleaded by the defendants. The plaintiffs contend it was absolutely clear that Mills Oakley's retainer did not extend to the provision of any taxation advice. In light of that limitation on the ambit of the retainer (which in turn would operate as a limit on the ambit of any duty of care), the proportionate liability defence advanced by the defendants is unarguable. If it is unarguable there would be no basis for any contention that Mills Oakley should be restrained from acting.

[18] I point out immediately that the plaintiffs have not brought an application to strike out any part of the defendants' pleading. Nor have they sought summary judgment in respect of any part of it. Their resistance to the present application by the defendants is not an appropriate vehicle to entertain complaints about the form of the defendants' pleading. However, it does seem to me that if the plaintiffs are right that there is a fatal flaw in the defendants' proportionate liability case not remediable by pleading amendment, so that I could not regard it as an arguable defence, then I might be persuaded that the defendants' application would fail at the threshold. The hypothesis would be that, even though no strike out application is

brought, I should form the view that the pleaded allegations could not continue to form part of the case. On the other hand, if I was not so persuaded by the plaintiff, and I formed the view that the case would continue to involve issues in which Mills Oakley's conduct was impugned, then it would be necessary to consider the defendants' application further. And in those circumstances, *Afkos Industries Pty Ltd* would suggest that the pleading would then be evaluated on its own terms and without seeking to evaluate the merits of the case said to engage the solicitors' personal interests.

Is the proportionate liability case unarguable?

The case against SE7

[19] The pleaded case as against SE7 was as follows (emphasis added):

The Duncan Street Property Contract

74 **On a date prior to 21 January 2014, [Silverstone Enterprises Pty Ltd] as trustee for the Silverstone Developments No 6 Unit Trust (SSE) or alternatively, [SE7] retained Mills Oakley Lawyers (MOL) to advise it in relation to the proposed purchase of the Duncan Street Property, including drafting contractual terms (the First MOL Retainer).**

Particulars

The fact that [SSE] entered into the First MOL Retainer is evidenced by the letter from Mills Oakley to SSE, enclosing a costs agreement, dated 28 August 2013 (the SSE Duncan Street Costs Agreement).

Alternatively, the fact that [SE7] entered into the First MOL Retainer is inferred from the fact that MOL are named as [SE7]'s solicitors in the Duncan Street Property Contract and MOL prepared the special conditions to that contract.

The Defendants will provide further and better particulars of the First MOL Retainer after completion of non-party disclosure.

75 Prior to 21 January 2014:

(a) MOL held themselves out as having expertise in relation to property, building, construction and infrastructure, specifically that:

(i) their expertise included major acquisitions and disposals, including contract and option drafting, negotiation, confidentiality and exclusivity land sale disclosures;

(ii) they had a deep understanding of the development processes and risks associated and the sector and an ability to apply this understanding to all aspects of building and construction law;

(b) MOL knew or should have known:

(iA) of the existence and potential application of the margin scheme to sales of residential property;

(i) that [SE7] intended to purchase the Duncan Street Property for the purpose of redeveloping it into a residential development called Sassari Apartments West End, incorporating 94 individual residential lots;

(ii) the matters pleaded in paragraph 58 of the Statement of Claim;

Particulars

The Defendants will provide further and better particulars of MOL's knowledge after completion of non-party disclosure.

(iii) [SE7] relied on MOL to exercise reasonable skill and care in advising it about the proposed purchase of the Duncan Street Property;

(iv) [SE7] required MOL's advice for the purpose of assessing the terms on which it would offer to purchase the Duncan Street Property and the consequences of that proposed acquisition in terms of payment of stamp duty and GST;

(v) [SE7] had not sought advice from the Defendants about the terms of the Duncan Street Property Contract and the consequences of proceeding with the proposed acquisition in terms of payment of stamp duty and GST;

Particulars

The Defendants will provide further and better particulars of MOL's knowledge after completion of non-party disclosure.

(vA) that MOL could not properly advise [SE7] in relation to the proposed purchase of the Duncan Street Property, nor draft the special conditions to the Duncan Street Property Contract, without knowing whether the sale attracted GST and whether the margin scheme applied;

(vB) that MOL had neither itself investigated whether the sale attracted GST and whether the margin scheme applied to the proposed purchase of the Duncan Street Property nor been provided with advice on this issue by any other party;

(vC) that a prudent purchaser in the position of [SE7] would obtain such advice from a suitably qualified tax advisor and provided a copy, or alternatively a summary, of such advice to MOL before binding itself to purchase the Duncan Street Property and that [SE7] had not done this;

(vD) alternatively, that MOL had investigated whether the sale attracted GST and whether the margin scheme applied to the transaction and had not been advised [SE7] of the results of its investigation;

(vE) further or alternatively, that legal advice about the terms of the Duncan Street Property Contract and the consequences of proceeding with the proposed acquisition in terms of payment of stamp duty and GST;

(A) did not amount to "taxation advice" within the meaning of that phrase in clause 4.2 of the SSE Duncan Street Costs Agreement;

(B) was required to be provided to [SE7] pursuant to the First MOL Retainer;

(vi) if MOL failed to provide appropriate advice about the consequences of entering into the Duncan Street Property Contract in terms of payment of stamp duty and GST, [SE7] was vulnerable to the risk of sustaining pure economic loss of the type pleaded in paragraph 83 below; and

(vii) the risk pleaded in subparagraph (vi) above could be avoided by providing [SE7] with advice in terms referred to in paragraph 81 below.

76 In the premises of paragraph 75 above, the risk pleaded in paragraph 75(b)(vi) above was in the circumstances:

(a) foreseeable;

(b) not of an insignificant magnitude; and

(c) a risk that a reasonable person in MOL's position would have taken precautions to avoid in the form of the steps pleaded in paragraph 75(b)(vii) above.

Particulars

The best particulars of the relevant circumstances are those pleaded in paragraphs 74 and 75 above. Further particulars will be provided following disclosure of relevant communications between [SE7] and MOL.

77 In the premises of paragraphs 74 to 76 above:

(a) **it was an implied term of the First MOL Retainer that MOL would provide legal services pursuant to that retainer with a level of skill and care reasonably expected of solicitors with expertise in property, building, construction and infrastructure**;

Particulars

The said term is implied to give the First MOL Retainer business efficacy.

(b) **MOL owed [SE7] a duty of care to exercise a level of skill and care reasonably expected of solicitors with expertise in property, building, construction and infrastructure in performing work under the First MOL Retainer (the First MOL Duty)**.

78 Prior to 21 January 2014, MOL:

(a) prepared the Duncan Street Property Contract, including Special Condition 9 pleaded in paragraph 54(b) above;

(b) advised [SE7] that:

(i) the purchase price under the Duncan Street Property Contract amounts to consideration for a taxable supply (as that term is defined under A New Tax System (Goods and Services Tax) Act 1999 (Cth) (the GST Act)) for which the seller is liable to pay GST;

(ii) pursuant to Special Condition 9(b)(ii) of the Duncan Street Property Contract, [SE7] must pay to the seller an additional amount equal to the amount of GST payable in respect of that taxable supply;

(iii) [SE7] would be entitled to recover an input tax credit on the acquisition;

Particulars

The fact that MOL gave the alleged advice is inferred from the terms of Special Condition 9 of the Duncan Street Property Contract.

The Defendants will provide further and better particulars of MOL's advice following completion of non-party disclosure.

(c) further or alternatively, failed to advise [SE7] of the matters known to MOL and pleaded in paragraphs 75(b)(vA) to (vE) above.

79 On 21 January 2014, [SE7] entered into the Duncan Street Property Contract in reliance on the matters pleaded in paragraph 78 above.

80 [SE7] paid:

(a) GST on the purchase of the Duncan Street Property in the amount of $415,000; and

(b) stamp duty on the total purchase price in the amount of $243,012.50.

81 **In breach of the First MOL Retainer and the First MOL Duty, MOL**:

(a) provided the advice pleaded in paragraph 78(b) above;

(b) failed to make any inquiries of the vendor as to its intentions regarding the margin scheme;

(c) failed to advise [SE7] of the matters pleaded in paragraphs 75(b)(vA) to (vE) above;

(d) failed to advise [SE7]:

(i) that the Duncan Street Property was capable of being classified as a GST-free supply of a going concern for the purposes of Subdivision 38-J of the GST Act and the margin scheme (as that term is defined in the GST Act) could have been applied by [SE7] pursuant to section 75-11(5) of the GST Act; and

(ii) of the consequences to [SE7] in terms of payment of stamp duty and GST if [SE7] purchased the Duncan Street Property fully taxed and claimed an input tax credit on the acquisition and did not apply the margin scheme;

Particulars

The consequences to [SE7] in terms of payment of stamp duty and GST are those pleaded in paragraphs 59(a) and 59(b) of the Statement of Claim.

82 If MOL had provided [SE7] with advice in terms of paragraphs 81(c) or 81(d)[1] above, [SE7] would have acted consistently with that advice by applying the margin scheme to the acquisition of the Duncan Street Property.

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[1] I have altered the cross-references to correct typographical errors identified during oral argument by Senior Counsel for the defendants.

83 As a result of MOL's breach of the First MOL Retainer and the First MOL Duty, [SE7] suffered loss and damage in terms pleaded in paragraph 59 of the Statement of Claim.

84 If the Defendants are liable to [SE7] for breach of contract and/or negligence on the basis pleaded in paragraphs 47A to 59 of the Statement of Claim (which is denied), the Defendants say that:

(a) [SE7]'s claim against the Defendants for breach of contract and negligence is an apportionable claim within the meaning of s 28(1) of the Civil Liability Act 2003 (Qld) (the CLA);

(b) in the premises of paragraphs 74 to 83 above, MOL is a concurrent wrongdoer within the meaning of section 30 of the CLA; and

(c) any liability on the part of the Defendants is limited to an amount reflecting that proportion of [SE7]'s loss and damage that this Honourable Court considers to be just and equitable having regard to the extent of the Defendants' responsibility for the loss and damage.

[20] The foundation of the pleaded proportionate liability defence is that –

(a) Mills Oakley owed SE7 a duty in contract and tort to exercise reasonable skill and care in providing advice; and

(b) the scope of that duty was such as would encompass –

(i) consideration of and giving advice concerning the taxation related matters referred to at paragraphs 78(b) and 81(a), (b) and (d); and

(ii) consideration of and giving warnings concerning the matters referred to at paragraphs 75(b)(vA) to (vE) above.

[21] It is apparent that on the face of the defendants' pleading there is a lack of clarity as how the retainer which ultimately founded the concurrent wrongdoer proposition in relation to a cause of action advanced by SE7 came into being. If the retainer was initially by SE7 then the argument makes sense. But if the initial retainer was by a different company, SSE, it is not clear on the face of the pleading how a contract between SSE and Mills Oakley became a contract between SE7 and Mills Oakley.

[22] The evidence before me as to the scope of Mills Oakley's retainer came in the form of a combination of documentary evidence tendered by the defendants and affidavit evidence by Mr Daffy on behalf of the plaintiffs.

[23] Mr Daffy relevantly deposed (emphasis added):

4. **In or about August of 2013, Silverstone Developments engaged Mills Oakley to act in the acquisition of a commercial property at 25 Duncan Street, West End (the Duncan Street Property).** Mills Oakley was engaged to prepare the contract and ancillary documents necessary to give effect to Silverstone's agreement with the vendor and to negotiate and finalise those documents. **Silverstone Developments nominated [SSE] to be the purchasing entity**.

5. **On 29 August 2013 I received by email a costs agreement from Mills Oakley addressed to [SSE]**. I read the costs agreement understood its terms, including the scope of work. **A true copy of the costs agreement signed by me appears at pages 8 to 17 of the exhibits to the affidavit of Elizabeth Conlan filed 31 August 2016**.

6. **Mills Oakley was not retained to provide taxation advice on the acquisition of the Duncan Street Property (including GST advice). I did not retain Mills Oakley to provide taxation advice because the Silverstone Developments group of companies and I had received that advice from our accountant, David Cowling**. My instructions to Mills Oakley were that GST would be payable in addition to the purchase price[2].

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[2] Objection was taken to the admissibility of last sentence of this paragraph on the basis that if the reference was to written instructions it was secondary evidence of the contents of a document and if it was to oral instructions it did not even identify that words to a particular effect were said to any person. In my view the objection is correct. I will ignore the sentence. However, I should record my decision on the merits of the application would not have been affected had my ruling been otherwise.

7. On 2 September 2013 [SSE] entered into a written contract to purchase the Duncan Street Property. Exhibit "TJD1" to this affidavit is a true copy of that contract. In January of 2014 Silverstone Developments elected to change the purchasing entity from [SSE] to [SE7]. Silverstone instructed Mills Oakley to prepare the deeds of rescission and new contract and ancillary documents necessary to facilitate the change of purchasing entity. True copies of those documents appear at pages 66 to 107 of the exhibits to the affidavit of Elizabeth Conlan filed 31 August 2016.

8. The work performed by Mills Oakley in preparing the deeds of rescission and new contract necessary to facilitate the change of purchasing entity was carried out pursuant to the costs agreement signed by me and referred to in paragraph 5 herein. **Neither [SE7] nor I retained or requested Mills Oakley to provide taxation advice with respect to the acquisition of the Duncan Street Property**.

[24] The retainer agreement to which Mr Daffy referred took the form of a letter on Mills Oakley's letterhead dated 28 August 2013 which was accepted by the client SSE and which relevantly provided (emphasis added):

> Thank you for choosing Mills Oakley Lawyers ABN 51 493 069 734, ("Mills Oakley Lawyers") to **provide the following legal services to you:**
>
> - **preparing draft contract of sale and special conditions for 25 Duncan Street, West End;**
> - **preparing draft ancillary agreement to purchase for the transaction;**
> - **drafting and preparing contracts of sale and special conditions for the four (4) Vertice lots being transferred (Vertice Contracts); and**
> - **negotiating and finalising contract of sale, special conditions, ancillary agreement and Vertice Contracts.**
>
> Before we provide legal services to you or as soon as reasonably practicable after we have begun providing services to you (if the matter is urgent), we are required to disclose certain matters to you and send you a Costs Agreement, in accordance with the *Legal Profession Act 2007* (Qld) ("Act").
>
> **We enclose our Costs Agreement, incorporating the mandatory disclosures under the Act, which sets out the terms of our engagement**.
>
> It is important that you read this information and let us know if you want us to clarify any of it.
>
> Please confirm your acceptance of the Costs Agreement by signing the last page and returning it to our office as soon as possible by facsimile, email or post.
>
> Alternatively, you will be taken to have accepted the offer constituted by submission of our proposed Costs Agreement by contacting us and advising us of your acceptance by phone or written communication, or by giving us instructions to progress or perform work in accordance with the proposed Costs Agreement.

[25] The costs agreement itself was an eight page document, the relevant terms of which were as follows (emphasis added):

> **1. The nature of this document**
>
> 1.1 This Costs Agreement sets out the terms on which we propose to undertake work for you, and deals with how this firm's professional fees and other costs are to be calculated and paid. It includes certain information we are required to disclose to you, mainly relating to legal fees, under the *Legal Profession Act* 2007 (Qld) ("Act").
>
> …
>
> **4. Scope of Work**
>
> 4.1 The work you have instructed to do is:
>
> - preparing draft contract of sale and special conditions for 25 Duncan Street, West End;
> - preparing draft ancillary agreement to purchase for the transaction;
> - drafting and preparing contracts of sale and special conditions for the four (4) Vertice lots being transferred (Vertice Contracts); and
> - negotiating and finalising contract of sale, special conditions, ancillary agreement and Vertice Contracts.

> **4.2 Our engagement does not extend to the provision of any taxation advice. Should you specifically wish to obtain such advice, let us know and we will refer you to Jack Stuk, Partner in Tax in our Melbourne office.**
>
> …
>
> **25. Acceptance of these terms**
>
> 25.1 You may accept the terms of this Costs Agreement by any of the following:
>
> (a) signing and returning a copy of the Costs Agreement;
>
> (b) giving us instructions to act, orally or in writing; and
>
> (c) allowing us to act or continue to act on your behalf in relation to the matters referred to in this letter.
>
> 25.2 If you instruct us to act or continue to instruct us in this matter, we will carry out our engagement in accordance with, and you will be bound by, the terms of this Costs Agreement even if you have not signed and returned this document.

[26] It seems that the plaintiffs' case is that there must have been an implied novation of the initial SSE – Mills Oakley retainer so that it became an SE7 - Mills Oakley retainer. And the plaintiffs would then say that the retainer so novated contained a term which would exclude the possibility of contractual liability for "taxation advice" and that exclusion also must modify the extent of the duty of care in tort, the solicitor having no duty to go beyond instructions by proffering unsought advice[3]. That may well be arguable, but the question for present purposes is somewhat different. Rather it is whether I should form the view that there could be no arguable case that both the duty of care in tort and the contractual duty were not modified in a way which rendered the pleaded proportionate liability case unarguable.

[27] It seems to me that must involve consideration of at least these questions:

(a) Might it be that the SSE – Mills Oakley retainer was not ever novated with the result that the term excluding "taxation advice" from the scope of the retainer never impacted on the rights and liabilities as between SE7 and Mills Oakley whether in contract or in tort?

(b) Even if the term excluding "taxation advice" from the scope of the retainer did form part of a contract of retainer between SE7 and Mills Oakley, might it be that it would not operate so as to exclude from the scope of Mills Oakley's duty, the duty to warn of the sort of matters identified in paragraphs 75(b)(vA) to (vE) of the pleading whether in contract or in tort?

[28] As I have mentioned, the plaintiffs invited me to draw conclusions adverse to the defendants on this application, and to reach the conclusion that the defendants' case was unarguable. However, to repeat the observation of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde* (2000) 201 CLR 552 at 578 [64] (footnotes omitted):

> … frequently the conventional form of pleading in an action of negligence will not reveal the alleged duty with sufficient clarity for a court considering an application for summary termination of the proceeding to be sure that all of the possible nuances of the plaintiff's case are revealed by the pleading. Further, and no less importantly, any finding about duty of care will often depend upon the evidence which is given at trial.

[29] Although this is not an application for summary determination, I find that in this case I am not sure that all the possible nuances of the defendants' case are revealed by the pleading,

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3 *Mantonella Pty Ltd v Thompson* [2009] 2 Qd R 524 at 543, but cf the acknowledgement in *Takla v Nasr* [2013] NSWCA 435 at [68] that the correctness of the view expressed in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642 that a solicitor may have a duty of care extending beyond the ambit of the solicitor's retainer (a so-called penumbral duty) remains a matter of debate.

even when read with the evidence which has been produced. I do not think this application is an occasion to seek to resolve of the debate concerning whether a solicitor's duty may extend beyond the ambit of the retainer or what constraint was imposed by the particular wording of the retainer. Nor do I think this is the occasion to form a final judgment about whether any exclusion of "taxation advice" negated the possibility of the duty extending in a way which suited the defendants' case. Rather, I take the view that the questions I have posed are questions for a trial. In particular, I am not persuaded that I should form the view that it is not arguable that the scope of Mills Oakley's duty might at least have extended to a duty to warn of the sort of matters identified in paragraphs 75(b)(vA) to (vE) of the pleading.

[30] I do not think that I should conclude that the defendants' proportionate liability case as against SE7 fails at the threshold for the reasons advanced by the plaintiffs. In my view it is necessary to consider the defendants' application further, on the basis that a proportionate liability case in which the conduct of Mills Oakley is impugned will continue to form part of the proceeding.

The case against SE13

[31] The defendants' pleaded case in respect of SE13 appears at paragraphs 85 to 92 inclusive in these terms:

> **The High Street Property Contract**
>
> [85] On a date prior to 9 April 2014, Silverstone Developments Pty Ltd (SSD) or alternatively, [SE13] retained MOL to advise it in relation to the proposed purchase of the High Street Property (the Second MOL Retainer).
>
> *Particulars*
>
> The fact that SSD entered into the Second MOL Retainer is evidenced by the matters in paragraph 9 of the affidavit of Troy Justin Daffy filed on 12 September 2016.
>
> Alternatively, the fact that [SE13] entered into the Second MOL Retainer is inferred from the fact that MOL is named as [SE13]'s solicitors in the High Street Property Contract and MOL prepared the special conditions to that contract.
>
> The Defendants will provide further and better particulars of the Second MOL Retainer after completion of non-party disclosure.
>
> [86] Prior to 9 April 2014:
>
> (a) MOL held themselves out as having expertise in relation to property, building, construction and infrastructure, specifically that:
>
> (i) their expertise included major acquisitions and disposals, including contract and option drafting, negotiation, confidentiality and exclusivity land sale disclosures;
>
> (ii) they had a deep understanding of the development processes and risks associated and the sector and an ability to apply this understanding to all aspects of building and construction law;
>
> (b) MOL knew or should have known:
>
> (iA) of the existence and potential application of the margin scheme to sales of commercial property;
>
> (i) that [SE13] intended to purchase the High Street Property for the purpose of redeveloping it into a residential development called Alto Apartments Toowong, incorporating 154 individual residential lots;
>
> (ii) the matters pleaded in paragraph 64 of the Statement of Claim;
>
> *Particulars*
>
> The Defendants will provide further and better particulars of MOL's knowledge after completion of non-party disclosure.

(iii) [SE13] relied on MOL to exercise reasonable skill and care in advising it regarding the proposed purchase of the High Street Property;

(iv) [SE13] required MOL's advice for the purpose of assessing the terms on which it would offer to purchase the High Street Property and the consequences of that proposed acquisition in terms of payment of stamp duty and GST;

(v) [SE13] had not sought advice from the Defendants about the terms of the High Street Property Contract and the consequences of proceeding with the proposed acquisition in terms of payment of stamp duty and GST;

Particulars

The Defendants will provide further and better particulars of MOL's knowledge after completion of non-party disclosure.

(vA) that MOL could not properly advise [SE13] in relation to the proposed purchase of the High Street Property, nor draft the special conditions to the High Street Property Contract, without knowing whether the sale attracted GST and whether the margin scheme applied;

(vB) that MOL had neither itself investigated whether the sale attracted GST and whether the margin scheme applied to the proposed purchase of the High Street Property nor been provided with advice on this issue by any other party;

(vC) that a prudent purchaser in the position of [SE13] would obtain such advice from a suitably qualified tax advisor and provide a copy, or alternatively a summary, of such advice to MOL before binding itself to purchase the Duncan Street Property and that [SE13] had not done this;

(vD) alternatively, that MOL had investigated whether the sale attracted GST and whether the margin scheme applied to the transaction and had not advised [SE13] of the results of its investigation;

(vE) further or alternatively, that legal advice about the terms of the High Street Property Contract and the consequences of proceeding with the proposed acquisition in terms of payment of stamp duty and GST was required to be provided to [SE13] pursuant to the Second MOL Retainer;

(vi) if MOL failed to provide appropriate advice about the consequences of entering into the High Street Property Contract in terms of payment of stamp duty and GST, [SE13] was vulnerable to the risk of sustaining pure economic loss of the type pleaded in paragraph 94 below; and

(vii) the risk pleaded in subparagraph (vi) above could be avoided by providing [SE13] with advice in terms referred to in paragraph 92 below.

[87] In the premises of paragraph 86 above, the risk pleaded in paragraph 86(b)(vi) above was in the circumstances:

(a) foreseeable;

(b) not of an insignificant magnitude; and

(c) a risk that a reasonable person in MOL's position would have taken precautions to avoid in the form of the steps pleaded in paragraph 86(b)(vii) above.

Particulars

The best particulars of the relevant circumstances are those pleaded in paragraphs 85 and 86 above. Further particulars will be provided following disclosure of relevant communications between [SE13] and MOL.

[88] In the premises of paragraphs 85 to 87 above:

(a) it was an implied term of the Second MOL Retainer that MOL would provide legal services pursuant to that retainer with a level of skill and care reasonably expected of solicitors with expertise in property, building, construction and infrastructure;

Particulars

The said term is implied to give the Second MOL Retainer business efficacy.

(b) MOL owed [SE13] a duty of care to exercise a level of skill and care reasonably expected of solicitors with expertise in property, building, construction and infrastructure in performing work under the Second MOL Retainer (the Second MOL Duty).

[89] Prior to 9 April 2014, MOL:

(a) prepared the High Street Property Contract which contained clause 34.5, the terms of which are pleaded in paragraph 60(b) above; and

(b) advised [SE13]:

(i) the purchase price under the High Street Property Contract amounts to consideration for a taxable supply (as that term is defined under the GST Act) for which the seller is liable to pay GST;

(ii) pursuant to clause 34.5 of the High Street Property Contract, [SE13] must pay to the seller an additional amount equal to the amount of GST payable in respect of that taxable supply; and

(iii) [SE13] would be entitled to recover an input tax credit on the acquisition.

Particulars

The fact that MOL gave the alleged advice is inferred from the terms of clause 34.5 of the High Street Property Contract.

The Defendants will provide further and better particulars of MOL's advice following completion of non-party disclosure.

(c) further or alternatively, failed to advise [SE13] of the matters known to MOL and pleaded in paragraphs 86(b)(vA) to (vE) above.

[90] On 9 April 2014, [SE13] entered into the High Street Property Contract in reliance on MOL's advice pleaded in paragraph 89 above.

[91] [SE13] paid:

(a) GST on the purchase of the High Street property in the amount of $800,000; and

(b) stamp duty on the total purchase price in the amount of $486,525.

[92] In breach of the Second MOL Retainer and the Second MOL Duty, MOL:

(a) provided the advice pleaded in paragraph 89(b) above; or

(b) failed to make any inquiries of the vendor as to its intentions regarding the margin scheme;

(c) failed to advise [SE13] of the matters pleaded in paragraphs 86(b)(vA) to (vE) above;

(d) failed to advise [SE13]:

(i) that the High Street Property was capable of being classified as a GST-free supply of a going concern for the purposes of Subdivision 38-J of the GST Act and the margin scheme (as that term is defined in the GST Act) could have been applied by [SE13] pursuant to section 75-11(5) of the GST Act; and

(ii) of the consequences to [SE13] in terms of payment of stamp duty and GST if [SE13] purchased the High Street Property fully taxed and claimed an input tax credit on the acquisition and did not apply the margin scheme.

Particulars

The consequences to [SE13] in terms of payment of stamp duty and GST are those pleaded in paragraphs 65(a) and 65(b) of the statement of claim.

[32] There was a similar lack of clarity in this part of the defendants' pleading as how the retainer which ultimately founded the concurrent wrongdoer proposition in relation to a cause of action advanced by SE13 came into being.

[33] As was the case with the Duncan Street property, the relevant evidence appears in documents exhibited to Mr Daffy's affidavit and in his affidavit itself. Relevantly he deposed:

9. On or about 20 March 2014, Silverstone Developments engaged Mills Oakley to act in the acquisition of a commercial property at 66 High Street, Toowong (the High Street Property). Mills Oakley was engaged to prepare the contract, to review amendments, to advise upon the terms and procure execution of the contract, to undertake a due diligence on the property and to undertake the conveyance of the property. Silverstone Developments nominated [SE13] to be the purchasing entity.

10. On 15 April 2014 [SE13] received by email a costs agreement from Mills Oakley addressed to [SE13]. [SE13] accepted the terms of the costs agreement, including the scope of work, and continued to provide instructions to Mills Oakley in relation to the High Street property. Exhibit "TJD2" to this affidavit is a true copy of the costs agreement as emailed to Luke O'Dwyer on 15 April 2014.

11. Mills Oakley was not retained to provide taxation advice on the acquisition of the High Street Property (including GST advice). I did not retain Mills Oakley to provide taxation advice because the Silverstone Developments group of companies and I had received that advice from our accountant, David Cowling. My instructions to Mills Oakley were that GST would be payable in addition to the purchase price[4].

12. On 9 April 2014 [SE13] entered into a contract to purchase the High Street Property. A true copy of the contract appears at pages 108 to 129 of the exhibits to the affidavit of Elizabeth Conlan filed 31 August 2016.

13. On 17 April 2014 I received a due diligence report from Mills Oakley. The report appears at pages 18 to 48 of the exhibits to the affidavit of Elizabeth Conlan filed 31 August 2016. Clause 9.3(a) of the report is in accordance with my instructions to Mills Oakley.

[34] The costs agreement and covering letter were only slightly different terms to those which existed in relation to the earlier Duncan Street purchase. The letter was in these terms (emphasis added):

> Thank you for choosing Mills Oakley Lawyers ABN 51 493 069 734, ("Mills Oakley Lawyers") to **provide the following legal services to you:**
>
> - **draft contract for sale, review amendments and advise upon the same, finalise the contract and procure execution of the same;**
> - **undertake a full due diligence on the property and provide a due diligence report to you; and**
> - **conveyancing of the property.**
>
> Before we provide legal services to you or as soon as reasonably practicable after we have begun providing services to you (if the matter is urgent), we are required to disclose certain matters to you and send you a Costs Agreement, in accordance with the *Legal Profession Act 2007* (Qld) ("Act").
>
> **We enclose our Costs Agreement, incorporating the mandatory disclosures under the Act, which sets out the terms of our engagement.**
>
> It is important that you read this information and let us know if you want us to clarify any of it.
>
> Please confirm your acceptance of the Costs Agreement by signing the last page and returning it to our office as soon as possible by facsimile, email or post.
>
> Alternatively, you will be taken to have accepted the offer constituted by submission of our proposed Costs Agreement by contacting us and advising us of your acceptance by phone or written communication, or by giving us instructions to progress or perform work in accordance with the proposed Costs Agreement.

[35] The clauses in the costs agreement were relevantly the same as those in relation to the Duncan Street purchase.

[36] The Due Diligence Report which was the subject of the retainer was exhibited to the affidavit of Ms Conlan. It provided:

(a) (by clause 1):

> **1 Introduction and Scope**

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[4] Objection was taken to the last sentence of this paragraph. I arrive at the same outcome as I arrived at in relation to the similar objection to paragraph 6: see fn 2 above.

[SE13] intends to purchase the freehold title to 66 High Street, Toowong Queensland 4066 (Property).

Mills Oakley has been instructed by [SE13] to undertake a full legal due diligence on the Property.

The purpose of this Report is to:

(a) identify the legal issues which are likely to arise from the acquisition;

(b) identify any legal risks associated with the Property; and

(c) assist [SE13] in determining whether to proceed with the acquisition.

(b) (by clause 4.2) a brief summary of the main terms of the contract including that GST was $800,000 and that the purchase price was $8,000,000 exclusive of GST;

(c) (by clauses 6.2, 6.3, 6.7, 9.3 and 9.5, emphasis added):

6.2 Deposit and purchase price

The purchase price of **$8,000,000 (GST exclusive)** is payable as follows:

(a) initial deposit of $20,000 (already paid to the deposit holder);

(b) balance deposit of $100,000 (to be paid 2 business days after satisfaction of due diligence condition); and

(c) balance of the purchase price of $7,880,000 plus/minus adjustments and plus GST on the date of Completion.

6.3 Due diligence investigations

The Contract is subject to [SE13] giving written notice to the Owner that it is satisfied with its due diligence investigations and has obtained all necessary internal approvals by 5.00 pm on 23 April 2014.

If written notice is not given by [SE13] to the Owner by 5:00 pm on 23 April 2014 then, under special condition 5.4, [SE13] will be taken to be satisfied with its due diligence.

If [SE13] is not satisfied with the results of the due diligence due to a Material Issue, then [SE13] must provide notice on or before the Due Diligence Date to the Owner. In this circumstance, [SE13] will be entitled to a refund of the initial deposit.

…

6.7 GST

The purchase price identified above and identified in the Contract is **GST exclusive**.

…

9.3 Areas not Investigated

Our investigations and review did not extent to the following:

(a) Taxation, financial or accounting matters or matters of business judgement. [SE13] has conducted these enquiries internally or has arranged for relevant issues to be reviewed by its accountant. We did advise on taxation issues to the extent they involved the effect of GST clauses in the Contract.

…

9.5 Reliance

This Report has been prepared for the benefit of [SE13], and is not to be relied on by any other person without written consent from Mills Oakley Lawyers.

Mills Oakley Lawyers' liability in respect of this Report is governed by its terms of engagement, and qualified by the scope of the engagement.

This Report is not a recommendation to proceed with the transaction.

That decision must be a commercial decision for [SE13].

[37] It may be observed, however, that the SE13 – Mills Oakley retainer did not raise any questions of implied novation. It was clear that there was a retainer and that it engaged a costs agreement which contained the exclusion of "taxation advice" to which I have earlier referred. One problem was that the costs agreement was entered into on a date after the relevant contract was entered into. The plaintiffs contended that it would have been implicit in the contract that the parties intended that it would have a retrospective effect so as to apply to Mills Oakley's acts or omissions prior to the contract and which constituted partial performance of the contract which they anticipated would come into being. For present purposes I am prepared to assume, without deciding, that that is correct: cf *Trollope & Colls Ltd v Atomic Power Constructions Ltd* [1962] 3 All ER 1035 at 1039 per Megaw J.

[38] Thus, say the plaintiffs, the SE13 – Mills Oakley retainer contained a term excluding "taxation advice" and that term would exclude the possibility of contractual liability for taxation advice and that it must also modify the extent of the duty of care in tort. I take the same view here as I expressed at [26] to [30] above.

[39] It seems to me that the question whether I should form the view that there could be no arguable case that both the duty of care in tort and the contractual duty were not modified in a way which rendered the pleaded proportionate liability case unarguable must involve consideration of at least these questions:

(a) Might it be that the term excluding "taxation advice" from the scope of the retainer would not operate so as to exclude from the scope of Mills Oakley's duty, the duty to warn of the sort of matters identified in paragraphs 86(b)(vA) to (vE) of the pleading whether in contract or in tort?

(b) Might it be that the express inclusion in the scope of the retainer undertaking a full due diligence report affected that question?

(c) Might one not infer from the terms of the actual due diligence report which was performed – given its express reference to advising on taxation issues "to the extent that they involved the effect of GST clauses in the Contract" - that Mills Oakley actually accepted responsibility for performing a task sufficiently broad as would assist the defendants' case?

[40] Again, my view is that these are questions for a trial. I am not persuaded that it is not arguable that the scope of Mills Oakley's duty might at least have extended to a duty to warn of the sort of matters identified in paragraphs 86(b)(vA) to (vE) of the pleading.

[41] For these reasons, I form the same view in relation to the defendants' proportionate liability case as against SE13 as I did in relation to the analogous case as against SE7 and which I have recorded at [30] above.

Should Mills Oakley be restrained from continuing to act?

[42] The test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the firm should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

[43] The defendants suggest that there are three disqualifying factors in this case:

(a) First, Mills Oakley would be perceived by such a person as having a personal interest in defending its professional reputation against the allegation that it breached its duty to its clients as alleged.

(b) Second, Mills Oakley would be perceived by such a person as having a financial interest in the case, because if the plaintiffs' recoverable damages are decreased

because Mills Oakley is found to be the concurrent wrongdoer, then Mills Oakley has an exposure to suit by its clients.

(c) Third, there is the potential for witnesses being called to give evidence.

[44] In my view the first two factors are sufficient to found the defendants' entitlement to the relief they seek. It is not necessary to examine the third factor.

[45] The issues which are created by the defendants proportionate liability cases as against SE7 and SE13 are such as would be perceived by a fair-minded, reasonably informed member of the public to engage Mills Oakley's personal or reputation interest, even if not their financial interest. In assisting their client to meet those cases, they would be seen to be in a real sense defending themselves, with the associated risk to objectivity and independence referred to in the cases. The result is that a fair minded, reasonably informed person would think that Mills Oakley apparently had a stake in the outcome.

[46] I think that the fair-minded observer would have a real concern that this factor would give rise to an unacceptable risk to Mills Oakley's objectivity and independence when assessing the position of their client, the strength of their client's case, and the prospect and the desirability of compromise. Indeed, and by way of example, I think that such a person would have had those concerns[5] in relation to the obtaining of the affidavit of Mr Daffy which was relied on to defend this application, given the subject matters with which it dealt.

[47] I acknowledge that I am obliged to give due weight to the public interest that the plaintiffs ought not be deprived of the lawyers of their choice without due cause. I acknowledge that the plaintiffs themselves have clearly evinced a desire that they do not wish to be so deprived. I acknowledge that the jurisdiction is exceptional and to be exercised with caution. Nevertheless, it does seem to me that the issues which have been pleaded give rise to an arguable case which engages the matters to which the cases refer as justifying the exercise of the jurisdiction.

[48] I note further that there is no evidentiary support for the proposition that the application is being misused by the defendants with a view to seeking a tactical advantage. The plaintiffs suggested I should be concerned that that was what was happening here. I do not accept that. It is entirely legitimate that defendants to a professional negligence suit would examine whether there were other professionals engaged in the relevant transactions who might also have necessarily had some responsibility on the subject matter in which their conduct is being impugned and, if they could identify such professionals, to advance a proportionate liability defence if the facts admitted of the argument. The choice to advance a plea of the nature of that presently advanced is unexceptionable. The concern about Mills Oakley's position is simply a legitimate consequence of such a plea being raised.

[49] Moreover, although it could not be said that the application is brought at an early stage, it is certainly not being brought at a late stage. There is a long way to go before this matter will be ready for trial. Of course, there will necessarily be costs and inconvenience for the plaintiffs involved in my making of the order.

[50] In my view the applicant defendants are entitled to the order they seek, at least insofar as Mills Oakley's involvement in relation to SE7 and SE13 is concerned. I note that at one stage the defendants sought to have me restrain Mills Oakley from acting at all in this proceeding, but that argument was not pressed.

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5 I emphasise, of course, that I am here making an observation concerning the appearance of things. I am making no present finding adverse to Mills Oakley.

[51] The order which I make is that Mills Oakley be restrained from continuing to act on behalf of SE7 and SE13 in this proceeding. Costs should follow the event.