# SUPREME COURT OF QUEENSLAND

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| CITATION: | *CB Darvall & Darvall v Moloney & Anor* [2006] QSC 345 |
| PARTIES: | **AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION**<br>(applicant)<br>v<br>**ATLANTIC 3 FINANCIAL (AUST) PTY LTD**<br>(first respondent)<br>and<br>**FREDERICK MICHAEL ACKER**<br>(second respondent)<br>and<br>**GERILYN MARIE POLANSKI**<br>(third respondent)<br><br>**CB DARVALL & DARVALL (A FIRM)**<br>(appellants)<br>v<br>**GREGORY MICHAEL MOLONEY and PETER IVAN FELIX GEROFF AS COURT APPOINTED LIQUIDATORS AND TRUSTEES OF THE UNREGISTERED MANAGED INVESTMENT SCHEMES KNOWN AS THE MACKAY LEAGUES CLUB LIMITED SCHEME, THE NUMINKO PTY LTD SCHEME AND THE CLEARVIEW PROPERTIES SCHEME, FORMERLY CONDUCTED BY ATLANTIC 3 FINANCIAL (AUST) PTY LTD ACN 056 262 723 (IN LIQUIDATION)**<br>(respondents) |
| FILE NO: | S4426 of 2003 |
| DIVISION: | Trial Division |
| PROCEEDING: | Appeal against rejection of proofs of debt - determination of preliminary questions |
| DELIVERED ON: | 9 November 2006<br>Consent order regarding costs made 16 November 2006 |
| DELIVERED AT: | Supreme Court, Brisbane |
| HEARING DATE: | 31 July, 1 August 2006 |
| JUDGE: | Wilson J |
| ORDER: | **1) The answers to the preliminary questions are contained in the reasons for judgment.** |

**2) By consent, the appellant, CB Darvall & Darvall, is to pay the respondent liquidators' costs of and incidental to the determination of the preliminary questions, including the hearing on 31 July and 1 August 2006, to be assessed on the standard basis.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENT SCHEMES – PROOFS OF DEBT REJECTED BY LIQUIDATORS – APPEALS AGAINST LIQUIDATORS' DECISIONS – where the liquidators of a company which had conducted unregistered managed investment schemes rejected the proofs of debt of a solicitors' firm – where the firm appeals those decisions – where the appellants are asking the court to answer preliminary questions

ESTOPPEL – FORMER ADJUDICATION – JUDGMENT INTER PARTES – ISSUE ESTOPPEL – RESPECTING WHAT MATTERS DECISION CONCLUSIVE – MATTERS NECESSARY TO THE DECISION – where this court previously determined that the appellants did not have a solicitor's lien over title deeds for outstanding legal fees allegedly owed by company which had conducted an unregistered managed investment scheme – whether the liquidators were estopped or otherwise prevented from now asserting that the company does not have a right of indemnity out of the trust property of other schemes, and that the appellant is not entitled to be subrogated to that claim for indemnity

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – TRIAL – OTHER MATTERS – SUMMARY DETERMINATION OF ISSUES – where the court was asked to answer two sets of preliminary questions – where, for one set of questions, the parties agreed on the facts upon which the court should base its answers – where, for the other set of questions of mixed fact and law, the court was asked to assume certain facts and contentions – whether there was sufficient evidence before the court to determine some of the questions

*Corporations Act 2001* (Cth), s 601ED(5), s 601EE
*Uniform Civil Procedure Rules 1999* (Qld), rr 482-486

*Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, cited
*Brewer v Brewer* (1953) 88 CLR 1, cited
*Cachia v Isaacs* (1985) 3 NSWLR 366, cited
*Clout v Klein* [2001] QSC 401, cited
*Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* (2002) ATPR 41-864; [2002] NSWCA 29, cited
*Gleeson v J Wippell & Co* [1977] 1 WLR 510, cited
*Hunter v The Chief Constable of the West Midlands Police* [1982] AC 529, cited
*Nolan v Collie* (2003) 7 VR 287, cited

*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, considered
*R v Township of Hartington* (1855) 4 El & Bl 780; 119 ER 288, cited
*Ramsay v Pigram* (1967-1968) 118 CLR 271, cited
*Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495, cited
*Reichel v Magrath* (1889) 14 App Cas 665, cited
*Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287, cited
*Rogers v R* (1994) 181 CLR 251, cited
*RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, cited
*Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699, cited
*State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports 81-423, cited
*Trawl Industries of Australia Pty Ltd v Effem Foods Pty Limited* (1992) 36 FCR 406, cited
*Worrall v Harford* (1802) 8 Ves Jun 4; 32 ER 250, cited

COUNSEL: P Dunning SC and D O'Brien for the appellant CB Darvall & Darvall
PH Morrison QC and M Luchich for the respondent liquidators

SOLICITORS: Marler & Darvall for the appellant CB Darvall & Darvall
Gadens for the respondent liquidators

[1] **WILSON J**: On 17 July 2003 Fryberg J ordered that 15 unregistered managed investment schemes operated by the first respondent ("Atlantic 3") be wound up pursuant to s 601EE of the *Corporations Act 2001* (Cth). They included schemes known by the following names –

(i) Sentry Alliance Ltd ("the Sentry Scheme");

(ii) Mackay Leagues Club Ltd ("the MLC Scheme");

(iii) Numinko Pty Ltd ("the Numinko Scheme"); and

(iv) Clearview Properties Pty Ltd ("the Clearview Scheme").

The respondent liquidators were subsequently appointed to wind up five of the schemes, including those just listed, by an order of Mullins J made on 19 August 2003.

[2] The appellants ("Darvalls") are a firm of solicitors which performed work for Atlantic 3 in connection with managed investment schemes operated by it (including those just listed), and for it in its own capacity. Their principal is Mr Marler. On 27 September 2005 they lodged the following proofs of debt with the liquidators –

(i) in the MLC Scheme, $187,997 for legal services provided to Atlantic 3 as trustee for the MLC Scheme;

(ii) in the Numinko Scheme, $48,043.13 for legal services provided to Atlantic 3 as trustee for the Numinko Scheme; and

(iii) in the Clearview Scheme, $51,322.43 for legal services provided to Atlantic 3 as trustee for the Clearview Scheme.

The liquidators rejected the proofs of debt on 23 December 2005.

[3] By this application Darvalls have appealed against those rejections.

[4] In support of their claim for legal fees Darvalls rely on a document headed "Costs Agreement" and dated 11 November 1996 which is in the following terms –

> "We, the directors of Atlantic3-Financial (Aust) Pty Ltd, ACN 056 262 723 of Research Park, Bond University Robina in the State of Queensland
>
> HEREBY ENGAGE YOU TO perform all the legal work for the Company with such legal work present and future, to be charged at the rate of $300.00 per hour.
>
> We acknowledge that in the event that there is a dispute in relation to any account rendered by you to the Company all costs of and incidental to the dispute will be met by the Company".

[5] Darvalls and the liquidators have sought the preliminary determination of a list of separate questions, which fall into two categories:

(i) the estoppel questions; and

(ii) the indemnity questions.

**Background**

[6] There were some investors who were common to two or more schemes, but there was an absence of complete co-incidence of investors between any two schemes. There were different investments associated with the different schemes. There was a mingling of funds in respect of one scheme with funds collected in respect of other schemes, and moneys collected for a particular scheme were applied to the benefit of one or more other schemes without the consent of investors and without taking appropriate security. There has never been any suggestion that Darvalls were parties to any breach of trust. The operation of the schemes produced different losses.

[7] Shortly after the appointment of the liquidators, a dispute arose between them and Darvalls about Darvalls' retention of the title deeds to certain lands which were the subject of mortgages held by Atlantic 3 on behalf of the Sentry Scheme ("the Sentry title deeds"). Darvalls asserted a solicitor's lien over the Sentry title deeds to secure payment of fees in excess of $800,000 allegedly owing to them by Atlantic 3 for work done other than in respect of the Sentry Scheme (save for $7,500).

[8] The liquidators applied for a declaration that any lien in favour of Darvalls with respect to legal fees claimed to be owing by Atlantic 3 did not extend to the Sentry title deeds. Further, they sought an order that Darvalls deliver up those deeds in exchange for $7,500 (which was Mr Marler's original estimate of the value of work performed in relation to the Sentry scheme).

[9] The application was heard by Muir J, who declared that Darvalls had no lien over the Sentry deeds.[1] He concluded that the Sentry deeds were deposited with Darvalls for a special purpose which prevented a lien arising – namely, they were deposited on behalf of investors in the Sentry scheme on the basis of a letter of instructions from each original investor in that scheme, and those investors were not clients of the firm.

[10] Muir J considered also whether Atlantic 3 had a claim against the funds of the Sentry scheme in respect of which Darvalls had a right of subrogation. He found that moneys invested in that scheme were received by Atlantic 3 as trustee for the investors in that scheme (either all pursuant to the trust in which the original investors invested or pursuant to that trust and one or more separate trusts in which new investors invested), and that the beneficial entitlement to the mortgage had not passed to investors in other schemes. He was not satisfied that Atlantic 3's conduct in relation to other schemes had resulted in a claim by it against the fund of a Sentry trust in respect of which Darvalls enjoyed a right of subrogation, or that it had any personal claim against the Sentry trust which might have assisted Darvalls.

[11] There was an appeal to the Court of Appeal, which upheld His Honour's findings in support of the conclusion that no lien arose because the deeds were held for a special purpose.[2]

[12] An application to the High Court for special leave to appeal was dismissed.[3]

[13] In the proceeding before Muir J Darvalls did not seek to establish the quantum of their claim for legal fees other than the specific sum of $14,590.35 in respect of the Sentry scheme. In the Court of Appeal Mullins J summarised the claim this way –

> "In the points of claim the respondents [the liquidators] asserted that the appellant [Darvalls] had claimed the sum of $7,500 as being owed to it by A3 in relation to work performed by A3 relating to the Sentry scheme. In the points of defence the appellant asserted that it had delivered bills in respect of the Sentry scheme in the sum of $13,200.72. That was verified by Mr Marler in paragraph 48 of his affidavit sworn on 15 June 2004 in which he stated that on 31 March 2004 he had caused itemised bills of costs to be delivered to the respondents in the total amount of $13,200.72 in respect of which the appellant had received no objection. In the schedule of bills of costs delivered by the appellant to A3, which is exhibit WLM33 to the affidavit of Mr Marler sworn on 21 June 2004, the total of the bills delivered in respect of the Sentry scheme is shown as $14,590.35. It is not clear whether the bills relating to the Sentry scheme in that schedule subsume the bills delivered on 31 March 2004. Prior to bringing the application, the respondents had offered to pay the appellant the sum of $15,000 in respect of work done for the Sentry scheme."[4]

The offer was clearly couched in terms that it would cover the maximum claimed by Darvalls to the extent the costs were properly incurred. As Her Honour observed,

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1 *Moloney & Anor v Marler & Darvall* [2004] QSC 228.
2 *Moloney & Anor v Marler & Darvall* [2004] QCA 310.
3 *C B Darvall & Darvall (A Firm) v Moloney & Anor* [2005] HCA Trans 171.
4 *Moloney & Anor v Marler & Darvall* [2004] QCA 310, [38].

because of the liquidators' open offer to pay Darvalls $15,000 for their work in respect of the Sentry scheme, no attention was given to the quantum of their costs. Muir J said –

> "... The fees alleged by [Darvalls] to be outstanding for work done for A3 in respect of the Sentry scheme are limited to $7,500. The claim is not particularised by reference to time or content and there is no attempt to show whether work is referable to one set of investors or another …"[5]

Later he said –

> "Whilst the evidence does not suggest that [Darvalls were] aware that A3 was acting in breach of trust at any relevant time, it does not follow that all work done by [Darvalls] in relation to the Sentry scheme at A3's behest was work in respect of which A3 would be entitled to indemnification …
>
> It is impossible in the present state of the evidence to make any final determination in respect of matters such as this but [Darvalls are] unable to rely on any presumption of regularity to relieve [them] from the necessity of showing that the work relied on to support [their] lien was work in respect of which A3 had a right to be indemnified out of a trust estate. The only evidence which exists in relation to the work the subject of the lien claim is Mr Marler's assertion that work to the approximate value of $7,500 was done in respect of the Sentry scheme. That evidence, in my view, is insufficient to establish the existence of a valid claim for a lien on the property of a Sentry trust."[6]

[14] Darvalls co-operated with the liquidators by delivering up the title deeds without prejudice to their claims, in order to facilitate the winding up of the Sentry scheme by the sale of the land. Darvalls then held the proceeds of sale pending the determination of the application. After declaring that Darvalls had no lien over the Sentry deeds, Muir J directed that –

> "The [liquidators] be at liberty to utilise the fund brought into existence through the disposition of the land the subject of the property over which the subject lien was claimed but stay the effect of such direction until the determination of an appeal from this decision or earlier order."[7]

[15] The Court of Appeal varied that direction by inserting the prefatory words –

> "Subject to the payment by [the liquidators] to [Darvalls] of the sum of $15,000".

The $15,000 has since been paid by Darvalls' deducting that sum from amounts otherwise payable to the liquidators.

**The Estoppel Questions**

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5 *Moloney & Anor v Marler & Darvall* [2004] QSC 228, [49].

6 *Moloney & Anor v Marler & Darvall* [2004] QSC 228, [78]-[79].

7 Order 21 July 2004.

[16] **(a) Did the Proceedings necessarily determine that:**

**(i) Atlantic 3 was entitled to be indemnified out of the trust assets of the Sentry Scheme for professional fees in the sum of $14,590.35 referred to in paragraph 2 of the Application allegedly incurred by it as trustee of the Sentry Scheme with the Appellant?**

**(ii) Darvalls were entitled to be subrogated to that claim for indemnity?**

*Answer:* (i) No. (ii) No.

[17] Muir J did not determine whether $14,590.35 or any other amount had been properly incurred in costs in relation to the Sentry Scheme. He was clearly not satisfied that the work done by Darvalls was work in respect of which Atlantic 3 had a right of indemnity out of the Sentry trust estate. Atlantic 3 was entitled to an indemnity out of the Sentry estate only to the extent of liabilities properly incurred in respect of that estate, and as that was not established, Atlantic 3's right to indemnity was not established. It followed that Darvalls, as creditors of Atlantic 3, could not establish a right to be subrogated to any right of Atlantic 3 to be indemnified out of the Sentry estate in respect of these costs.

[18] The Court of Appeal did not revisit this issue. The direction merely had the effect of setting the $15,000 apart so that there could be no question about the use of the balance of the sale proceeds. It did not amount to a recognition that Darvalls were entitled to be paid $15,000 out of the Sentry trust estate for costs incurred in relation to the Sentry scheme. The application for special leave proceeded on the basis that there had been no determination of the Atlantic 3's right of indemnity and Darvalls' right of subrogation.

[19] **(b) Did the Proceedings necessarily determine that:**

**(i) Atlantic 3 was entitled to be indemnified out of the trust assets of each of the Clearview, MLC and Numinko Schemes for professional fees in the sums referred to in paragraph 2 of these reasons for judgment allegedly incurred by it as trustee of the Clearview, MLC and Numinko Schemes respectively?**

**(ii) Darvalls were entitled to be subrogated to that claim for indemnity?**

*Answer:* (i) No (ii) No

[20] The application before Muir J was for a declaration that Darvalls did not have a lien over the Sentry title deeds with respect to legal fees allegedly owing by Atlantic 3. Those title deeds were part of the Sentry trust estate. Atlantic 3's rights to be indemnified out of other trust estates and Darvalls' right to be subrogated to such rights were not in issue.

[21] **(c) In relation to each of the Clearview, MLC and Numinko Proofs of Debts:**

**(i) Are the Liquidators:**
**(1) estopped from;**

**(2) alternatively, engaged in an abuse of process in;**

**(3) alternatively, engaged in a collateral attack on the decision in the Proceedings in:**

**now asserting that Atlantic 3 does not have a right of indemnity out of the assets of each of the Schemes to discharge the alleged debts the subject of the Proofs of Debt because, by virtue of s 601ED(5) of the *Corporations Act,* they were illegally operated by Atlantic 3?**

**(ii) In the alternative to (i):**

**(1) Are the Liquidators, in so far as they are trustees of the trusts comprised in each of the Clearview, MLC and Numinko Schemes and in so far as those trusts have as beneficiaries one or more of the Common Investors precluded from proceeding in the manner pleaded in subparagraph (i) above?**

**(2) Would it be an abuse of process for the Liquidators in so far as they are trustees of the trusts comprised in each of the Clearview, MLC and Numinko Schemes and in so far as those trusts have as beneficiaries persons other than the Common Investors, to assert that Atlantic 3 does not have a right of indemnity out of the assets of each of the trusts to discharge the alleged debts the subject of the respective Proofs of Debt because, by virtue of s 601ED(5) of the *Corporations Act,* they were operated illegally by Atlantic 3?**

*Answers*:

(i) (1) No

(2) No

(3) No

(ii) (1) No

(2) No

[22] Darvalls have submitted that the following issues cannot again be put in issue between them and the liquidators:

(a) "the fee issue": that approximately $15,000 in legal fees was owing to them by the liquidators for work undertaken by them for the Sentry scheme;

(b) "the indemnity issue": the liquidators' assertion that they were prevented from being subrogated to Atlantic 3's right of indemnity out of the Sentry trust estates because of the alleged unlawful nature of the schemes;

(c) "the enforceability issue": that the costs agreement is not a valid and enforceable client agreement under the *Queensland Law Society Act 1952* (Cth).

[23] They have submitted that there is an issue estoppel in relation to the fee and indemnity issues and an *Anshun*[8] estoppel in relation to the enforceability issue.

[24] In the proceeding before Muir J no determination was sought as to Atlantic 3's right to be indemnified out of any of the Clearview, MLC and Numinko trust estates.

[25] The *ratio* of the decision of Muir J and that of the Court of Appeal was that there was no lien because the Sentry deeds were deposited with Darvalls for a special purpose.

[26] Fryberg J ordered 15 schemes to be wound up pursuant to s 601EE of the *Corporations Act 2001* (Cth). That section applies only where a person operates a managed investment scheme in contravention of s 601ED(5) – that is, where a person operates a scheme that is required to be registered but is not. Atlantic 3's right to indemnity out of the assets of any of the trust estates falls to be determined on the basis that its operation of the schemes was unlawful.

[27] Although Atlantic 3's unlawful operation of the Sentry scheme was put in issue on the pleadings in the application before Muir J, neither party addressed it in submissions, and neither His Honour nor the Court of Appeal made any determination in relation to the effect of that unlawfulness on Darvalls' claim on the Sentry trust estate or any of the other trust estates. I have already discussed the circumstances in which $15,000 was set apart from the balance of the sale proceeds: it was not a recognition that Darvalls were entitled to be paid $15,000 out of the Sentry trust estate for costs incurred in relation to the Sentry scheme despite that unlawfulness or at all. It follows that Atlantic 3's right to indemnity out of the Sentry estate despite the unlawful operation of the scheme was not something fundamental to the decision which Darvalls allowed to be assumed against them; nor was it "the groundwork of the decision itself, though not directly the point at issue".[9]

[28] Similarly, a finding or assumption as to the validity and enforceability of the costs agreement was not necessary to the decision. It was not the subject of pleading by either party or of submissions before Muir J or the Court of Appeal or of any determination by His Honour or the Court of Appeal. I will not repeat what I have said about the direction in relation to the $15,000. I reject Darvalls' submission that the validity and enforceability of the costs agreement was an issue legally necessary to the success or failure of the claims litigated and that "[t]he order of the Court in relation to the payment of the $15,000 necessarily involved a finding that the Costs Agreement, which was the basis for the recovery of those fees, was a valid and enforceable costs agreement."[10]

[29] For an issue estoppel or an *Anshun* estoppel to arise, there must be identity of parties between the parties in the first proceeding and the proceeding in which the estoppel is raised. This requirement is satisfied where there is privity in interest – that is, where one claims "under or through" the other with respect to the matter

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8 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589: there will be an estoppel if a matter relied on as a defence in a second proceeding was so relevant to the subject matter of the first proceeding that it would have been unreasonable not to rely on it.

9 *R v Township of Hartington* (1855) 4 El & Bl 780, 794; 119 ER 288, 293; *Brewer v Brewer* (1953) 88 CLR 1, 15; *Cachia v Isaacs* (1985) 3 NSWLR 366, 381, 386-387.

10 Exhibit 3, [25].

litigated in the earlier proceeding.[11] In relation to trust property, there is normally a sufficient degree of identity between the trustee and the beneficiaries to satisfy the requirement of privity.[12]

[30] In principle I am satisfied that there would be a relationship of privity between the liquidators and the beneficiaries of the Sentry trust sufficient to found an estoppel if an issue which was or ought have been raised in the first proceeding were sought to be raised in the present proceeding. The first proceeding was concerned with a claim against the Sentry trust estate for fees for legal services other than in respect of the Sentry scheme (except for $7,500), while the present proceeding is concerned with claims against three other trust estates for legal work done in respect of them respectively. The issues are clearly different, and while there is some overlap between the beneficiaries of the Sentry trust and the beneficiaries of the other trusts, there is not complete identity.

[31] In these circumstances, there is no attempt to litigate the fee issue in the present proceeding, and there is no issue estoppel in relation to it or the indemnity issue and no *Anshun* estoppel in relation to the enforceability issue.

[32] The Court has inherent power to prevent an abuse of process. In *Rogers v R*[13] Mason CJ said –

> "The concept of abuse of process is not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior object, in that it is not that party's genuine purpose to obtain the relief sought in the second proceedings. The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories.[14] Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process."

It may be an abuse of process to allow a party to relitigate an issue decided between him and a third party if the subsequent proceeding was initiated to mount a collateral attack on a final decision against him made by another court of competent jurisdiction in which he had a full opportunity of contesting the decision.[15] The Court's powers to prevent an abuse of process are to be exercised sparingly and with great caution.[16] As Giles CJ explained in *Stenhouse*,[17] whether there is an abuse of process depends very much on the circumstances –

> "The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the

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11 *Ramsay v Pigram* (1967 – 1968) 118 CLR 271, 279; *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Limited* (1992) 36 FCR 406, 413 per Gummow J. (On appeal *Effem Foods Pty Limited v Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510.)

12 *Gleeson v J Wippell & Co* [1977] 1 WLR 510, 515.

13 (1994) 181 CLR 251, 255.

14 *Hunter v The Chief Constable of the West Midlands Police* [1982] AC at p 536 per Lord Diplock.

15 *Hunter v The Chief Constable of the West Midlands Police* [1982] AC 529, 541; *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports 81-423; *Reichel v Magrath* (1889) 14 App Cas 665.

16 *Clout v Klein* [2001] QSC 401, [54]; *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699, [70].

17 *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports 81-423, 64,089.

> system of administration of justice, and amongst the matters to which regard may be had are –
>
> (a) the importance of the issue in and to the earlier proceedings, including whether it is an evidentiary issue or an ultimate issue;
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> (b) the opportunity available and taken to fully litigate the issue;
>
> (c) the terms and finality of the finding as to the issue;
>
> (d) the identity between the relevant issues in the two proceedings;
>
> (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings; all part of –
>
> (f) the extent of the oppression and unfairness to the other party if the issue is relitigated and the impact of the relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
>
> (g) an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process."

[33] I am unpersuaded that to allow the liquidators on behalf of the investors in the Clearview, MLC and Numinko Schemes to assert that Atlantic 3 does not have a right of indemnity out of the assets of each of those schemes because they were operated unlawfully in breach of s 601ED(5) of the *Corporations Act* would be to allow a collateral attack on the earlier decision by relitigation of the indemnity issue or the enforceability issue or that it would undermine or constitute a collateral attack on the outcome of the earlier proceeding.

[34] As I have explained, in the earlier proceeding, which concerned the Sentry trust estate, neither the indemnity issue nor the enforceability issue was fundamental to the decision or a necessary groundwork of it. It is apparent from the liquidators' outline of argument in the Court of Appeal that, even in respect of the Sentry scheme, they continued to contend that there were live issues as to quantum and whether any debt had been properly incurred. This proceeding concerns claims against the Clearview, MLC and Numinko trust estates, and there was no exploration of factual matters concerning them in the earlier proceeding. In these circumstances it would not be an abuse of process or a collateral attack on the decision in the earlier proceeding to allow these issues to be litigated in the present proceeding. The Court's resources would not be wasted, its processes would not be undermined, and the administration of justice would not be brought into disrepute among right-thinking people.[18]

**Unregistered Managed Investment Schemes**

[35] **Has the issue whether each of the Schemes was an unregistered managed investment scheme within the meaning of s 601ED of the *Corporations Act 2001* (Cth) been determined such that Darvalls cannot deny the existence and operation of the Schemes as unregistered managed investment schemes?**

*Answer*: Yes.

[36] Fryberg J ordered 15 schemes (including Sentry, Clearview, MLC and Numinko) to be wound up pursuant to s 601EE of the *Corporations Act*. That section applies only where a person operates a managed investment scheme in contravention of s

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18 *Hunter v The Chief Constable of the West Midland Police* [1982] AC 529, 536.

601ED(5) – that is, where a person operates a scheme that is required to be registered but is not. Atlantic 3 is bound by Fryberg J's finding that the schemes were unregistered managed investment schemes within the meaning of s 601ED of the *Corporations Act*. As Darvalls claim through Atlantic 3, they are bound by the finding against it.

**The Indemnity Questions**

[37] The Court has been asked to assume the following facts and contentions, and to determine a number of questions in the light of those assumptions –

> "(a) That at all relevant times each of the Sentry, Clearview, MLC and Numinko Schemes [was a] managed investment scheme which [was] required to be registered by s.601ED of the *Corporations Act 2001;*
>
> (b) that at all relevant times each of the said schemes was operated by [Atlantic 3];
>
> (c) that as trustee for each of the said schemes [Atlantic 3] was entitled to be indemnified out of the trust assets of each scheme for liabilities lawfully or properly incurred by it, as trustee, in respect of each scheme;
>
> (d) that [Darvalls] would be entitled to be subrogated to any right of indemnity of [Atlantic 3] in respect of legal fees for work undertaken on behalf of [Atlantic 3] as trustee of each of the schemes (subject to otherwise proving as against [Atlantic 3] an entitlement to be paid those fees, the amount of the fees and that the fees were incurred in relation to the schemes);
>
> (e) that all relevant times each of the said schemes was unregistered;
>
> (f) that from no later [than] 17 December 1999 the continued operation of each of the said schemes by [Atlantic 3] was contrary to s. 601ED(5) of the *Corporations Act 2001*;
>
> (g) that [Atlantic 3] received advice in relation to the operation of the schemes:
>
> (i) from Primrose Couper Cronin Rudkin Solicitors in late 1999 to the effect that A3 would:
>
> (1) need to obtain a licence under the *Managed Investment Act*; and
>
> (2) run out the old book of loans or transfer those loans back to investors
>
> (ii) from [Darvalls] on or about 6 November 2001 to the effect that the Schemes

(1) the did not comply with the Managed Investment Act;

(2) could not be registered under that act; and

(3) could be challenged as illegal.

(h) that [Atlantic 3] continued to take funds from investors from late 1999 and after receipt of the advice referred to in paragraph (g)."

[38] The parties are agreed as to the answers to all of these questions except (b) and (c) which relate to the operation of the schemes from 17 December 1999.

[39] It is convenient first to record the questions and answers on which they are agreed.

**(a) Is Atlantic 3 entitled to a right of indemnity out of the assets of each scheme for professional fees incurred by it in the operation of the schemes so far as they relate to work done prior to 17 December 1999?**

*Answer:* Only to the extent that Darvalls establish as a matter of fact that the legal fees claimed were reasonably and properly incurred by Atlantic 3 by reference to facts including the following:

(i) the quantum of the fees claimed;

(ii) the items of work done in respect of the fees;

(iii) that the work done in respect of the fees was in relation to the particular scheme;

(iv) that there was a valid and enforceable client agreement under the *Queensland Law Society Act 1952* (Qld).

**(d) Was the operation of the schemes by Atlantic 3 in breach of s 601ED(5) of the *Corporations Act 2001* (Cth) a breach of trust by Atlantic 3?**

*Answer*: Yes.

**(e) Is it a pre-condition to Atlantic 3 being entitled to recover from the assets of the schemes expenses incurred in the operation of the schemes that it make good any loss occasioned by the said breach of trust?**

*Answer*: Yes.

**(f) Are Darvalls entitled to any right of subrogation to the assets of the schemes for professional fees rendered by them to Atlantic 3 for the operation of the schemes in the event that no right of indemnity out of the assets of the schemes subsists in favour of Atlantic 3?**

*Answer*: No.

[40] The remaining questions are:

**(b) Is Atlantic 3 entitled to a right of indemnity out of the trust assets of each scheme for professional fees incurred by it in the unlawful operation from 17 December 1999 of each scheme?**

**(c) Further or alternatively, are the legal expenses incurred by Atlantic 3 in operation of each of the schemes from 17 December 1999 expenses not properly incurred by it as trustee of the schemes by reason of the unlawful operation of each of the schemes?**

Darvalls submit that there is insufficient evidence upon which the Court can determine these as preliminary questions.

[41] The Court may separately determine questions in a proceeding pursuant to chapter 13 part 5 of the *Uniform Civil Procedure Rules 1999* (Qld), which provides –

"**482 Definition for pt 5**

In this part –

***question*** includes a question or issue in a proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings, agreement of parties or otherwise.

**483 Order for decision and statement of case for opinion**

(1) The court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding.

(2) The Supreme Court, other than the Court of Appeal, may also state a case for the opinion of the Court of Appeal.

**484 Orders, directions on decision**

If a question is decided under this part, the court may, subject to rule 475, make the order, grant the relief and give the directions that the nature of the case requires.

**485 Disposal of proceedings**

The court may, in relation to a decision of a question under this part, as the nature of the case requires —

(a) dismiss the proceeding or the whole or part of a claim for relief in the proceeding; or

(b) give judgment, including a declaratory judgment; or

(c) make another order.

**486 Form and content of separate question**

A separate question or questions must —

(a) set out the question or questions to be decided; and

(b) be divided into paragraphs numbered consecutively."[19]

[42] The Court has a wide discretion whether to order the separate determination of questions, and the contemporary approach is to do so where questions can conveniently be so decided, even though this may not necessarily resolve the whole dispute.[20] In *Reading Australia Pty Ltd v Australian Mutual Provident Society*[21] Branson J reviewed the principles relevant to the application of a cognate provision in the *Federal Court Rules*.[22] Her Honour noted that –

> "(d) where the preliminary question is one of mixed fact and law, it is necessary that the question can be precisely formulated and that all of the facts that are on any fairly arguable view relevant to the determination of the question are ascertainable either as facts assumed to be correct for the purposes of the preliminary determination, or as agreed facts or as facts to be judicially determined.[23]"[24]

[43] Here the parties presented the Court with a list of separate questions in relation to the estoppel and indemnity questions. In relation to the former they said –

> "The following are the facts agreed upon by the parties"

and then set out in separate paragraphs more than 4 pages of facts upon which the Court was asked to determine certain questions. By agreement, those facts were supplemented at the hearing by a number of affidavits[25] and a further agreed fact.[26] In relation to the indemnity questions they said –

> "The Court is asked to assume the following facts and contentions"

and then set out in separate paragraphs more than a page of facts and contentions, before saying –

> "In light of the assumed facts and contentions, the following questions are stated for determination by the Court."

[44] At the hearing it became apparent that those representing Darvalls saw a significant difference between "facts agreed upon between the parties" and "assumed facts and contentions" – a difference not recognised by those representing the liquidators. Senior counsel for Darvalls was at pains to dispel any suggestion that his clients had sought some forensic advantage. He submitted that there was utility in proceeding on the basis that if the Court considered the assumed facts to be sufficient to arrive at conclusions on the indemnity issues, that would foreclose the issue on those

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19 Cross-reference removed.

20 *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287, 288.

21 (1999) 217 ALR 495.

22 *Federal Court Rules* O 29 r 2.

23 *Jacobson v Ross* [1995] 1 VR 337 at 341, referring to *Nissan v Attorney-General* [1970] AC 179 at 242-3; [1969] 1 All ER 629 at 663-4 per Lord Pearson; *Bass v Perpetual Trustee* at [53].

24 (1999) 217 ALR 495, [8].

25 Affidavit of Gregory Michael Moloney (sworn 27 July 2006, filed by leave 31 July 2006); Affidavit of Gregory Michael Moloney (sworn 31 July 2006, filed by leave 31 July 2006).

26 Transcript of the proceeding, p 95.

questions, but if it considered them insufficient, that would not foreclose the issue. The essence of his submission seemed to be that if the Court took the view that because of the assumed facts, no matter what other facts might be proved, his clients could not succeed, then a long factual inquiry would be obviated.[27]

[45] It is not the Court's function to determine questions on a hypothetical basis. The questions in relation to legal expenses incurred from 17 December 1999 are of mixed fact and law. In *Bass v Permanent Trustee Co Ltd* [28] the High Court said –

> "Special problems can arise where the preliminary question is one of mixed fact and law. As Brooking J pointed out in *Jacobson v Ross*,[29] it is necessary in that situation that there be precision both in formulating the question and in specifying the facts upon which it is to be decided. His Honour added:
>
> > 'Care must be taken to ensure that, in one way or another, all the facts that are on any fairly arguable view relevant to the determination of the question are ascertainable ... as facts assumed to be correct for the purposes of the preliminary determination, or as facts which both sides accept as correct, or as facts which are to be judicially determined. Failure to do this, and in particular failure to perceive that the facts alleged in a pleading are some only of the facts relevant to the determination of the preliminary question, may make the order for preliminary determination unfruitful.'
>
> Quite apart from rendering the 'order for preliminary determination unfruitful', the failure to identify the relevant facts or the means by which they are to be ascertained may result in procedures which do not conform to the judicial process. That is a matter to which it will be necessary to return."

[46] Under the general law a trustee is entitled to be indemnified out of the estate against liabilities properly incurred in the execution of the trust.[30] In Queensland s 72 of the *Trusts Act 1973* (Qld) provides –

> "**72 Reimbursement of trustee out of trust property**
>
> A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers." (*emphasis added*.)

[47] The determination of these questions will involve consideration of what is meant by "reasonably incurred", and an examination of Atlantic 3's conduct in incurring the particular fees in question. Mere breach of trust or even acting in contravention of a statutory requirement for registration may not necessarily deprive a trustee of his right of indemnity: it is a matter of assessing the gravity of the trustee's

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27 Transcript of the proceeding, pp 104-109.

28 (1999) 198 CLR 334, 358.

29 [1995] 1 VR 337 at 341, referring to *Nissan v Attorney-General* [1970] AC 179 at 242-3 per Lord Pearson.

30 *Worrall v Harford* (1802) 8 Ves Jun 4; 32 ER 250.

misconduct[31] and whether the trustee, acting in good faith, benefited the trust estate by incurring the liability.[32]

[48] Somewhat reluctantly, I agree with Darvalls that there is insufficient evidence before the Court to determine the questions in relation to fees incurred since 17 December 1999. It is most unfortunate that these questions were allowed to go before the Court in the manner they did, and that it was not until after the liquidators had presented their arguments that Darvalls' position became clear. Darvalls, or their legal representatives, must shoulder the blame, or at least a large part of it, for this having happened. In so far as the liquidators' costs of this proceeding have been increased by the preparation and presentation of their arguments on this point, there may be reason to make an order for costs against Darvalls – I shall hear the parties on this.

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31 R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia* (6th ed, 1997) [2104]; *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* (2002) ATPR 41-864; [2002] NSWCA 29; *Nolan v Collie* (2003) 7 VR 287.

32 *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, 396.