SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Management Ltd (receiver apptd)(in liq) v Drake & Ors* [2019] QSC 281
PARTIES:	**LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (plaintiff) v **PETER CHARLES DRAKE** (first defendant) and **LISA MAREE DARCY** (second defendant) and **EGHARD VAN DER HOVEN** (third defendant) and **FRANCENE MAREE MULDER** (fourth defendant) and **JOHN FRANCIS O'SULLIVAN** (fifth defendant) and **SIMON JEREMY TICKNER** (sixth defendant) and **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUUIDATION) ACN 077 208 461**

(seventh defendant)

and

KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND

(eighth defendant)

FILE NO/S:	BS12317/14
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	22 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	1,2,3,8 and 9 April 2019
JUDGE:	Jackson J
ORDER:	**The judgment of the court is that:** **1. The plaintiff's claim is dismissed.** **2. The parties file written submissions as to costs within seven days.**
CATCHWORDS:	CORPORATIONS – MANAGED INVESTMENTS – DUTIES OF OFFICERS OF RESPONSIBLE ENTITIES – Where the plaintiff was the responsible entity of a registered managed investment scheme – Where the plaintiff was also trustee of an unregistered scheme - Where the defendants were the directors of the responsible entity – Where the custodian of the registered scheme lent monies to a borrower secured by first mortgage – Where the plaintiff as trustee of the unregistered lent monies to the borrower secured by second mortgage – Where the borrower contracted with a third party to sell and develop some of its property – Where the third party did not perform the contracts with the borrower - Where the borrower defaulted in repayment of both loans – Where proceedings were brought by the custodian, the plaintiff and the borrower against the third party – Where the unregistered scheme property funded the proceedings – Where the proceedings were settled - Where the settlement proceeds were divided between the registered scheme and the unregistered scheme by the plaintiff in the ratio of 65:35 – Where

the defendants obtained external independent accounting and legal advice before deciding on the 65:35 division – Where the plaintiff alleged that the decision contravened s 601FD(b) or (c) of the Corporations Act – Where the plaintiff alleged that the contraventions caused the registered scheme to suffer loss of the whole of the settlement proceeds

Adler v Australian Securities and Investments Commission (2003) 179 FLR 1, cited

Agricultural Land Management v Jackson (No. 2) (2014) 48 WAR 1, cited

Allco Funds Management Ltd (receivers and managers appointed) (in liq) v Trust Company (RE Services) Limited [2014] NSWSC 1251, cited

Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656, cited

ANZ Executors and Trustees Co Ltd v Qintex Australia Ltd (receivers and managers appointed) [1991] 2 Qd R 360, cited

Australian Securities and Investments Commission v Adler (2002) 168 FLR 253, cited

Australian Securities and Investments Commission v *Australian Property Custodian Holdings Ltd (receivers and managers appointed) (in liq) (controllers appointed) (No 3)* [2013] FCA 1342, cited

Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq) (2017) 348 ALR 525, cited

Australian Securities and Investments Commission v Cassimatis (No 8) (2016) 336 ALR 209, followed

Australian Securities and Investments Commission v Drake (No2) (2016) 340 ALR 75, cited

Australian Securities and Investments Commission v Healey (2011) 196 FCR 291, cited

Australian Securities and Investments Commission v Lewski (2018) 362 ALR 286, cited

Australian Securities and Investments Commission v Mariner Corporation Ltd (2015) 241 FCR 502, cited

Australian Securities and Investments Commission v Maxwell (2006) 59 ACSR 373, cited

Australian Securities and Investments Commission v Rich

(2009) 236 FLR 1, cited

Australian Securities and Investments Commission v Vines (2005) 55 ACSR 617, cited

AWA Ltd v Daniels trading as Deloitee Haskins & Sells (1992) 7 ACSR 759, cited

Berger v Lysteron Pty Ltd [2012] VSC 95, cited

Breen v Williams (1996) 186 CLR 71, cited

Carmine v Ritchie [2012] NZHC 1514, cited

Commissioner of Taxation v Bargwanna (2012) 244 CLR 655, cited

Cowan v Scargill [1985] Ch 270, cited

Crossman v Sheahan [2016] NSWCA 200, cited

Daniels v Anderson (1995) 13 NSWLR 408; 16 ACSR 607, cited

Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317, cited

Edge & Ors v Pensions Ombudsman & Anor [1998] Ch 512, cited

Gambotto v WCP Ltd (1995) 182 CLR 432, cited

Grimaldi v Chameleon Mining NL (No. 2) (2012) 200 FCR 296, cited

Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd (in liq) (1995) 18 ACSR 294, cited

Hutton v West Cork Railway Co (1883) 23 Ch D 654, cited

Jones v Dunkel (1959) 101 CLR 298, cited

March v E & MH Stramare Pty Ltd (1991) 171 CLR 506, cited

Moody v Cox and Hatt [1917] 2 Ch 71, cited

Proficient Building Company Pty Ltd (2011) 87 ACSR 183, cited

Re Burton (1994) 126 ALR 557, cited

Re Idylic Solutions Pty Ltd [2012] NSWSC 1276, cited

Re VBN and Australian Prudential Regulation Authority and A Party Joined (2006) 92 ALD 259, cited

Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, cited

Shafron v Australian Securities and Investments Commission (2012) 247 CLR 465, cited

Travel Compensation Fund v Tambree (t/as R Tambree &

Associates) (2005) 224 CLR 627, cited

Trilogy Funds Management Ltd v Sullivan (No 2) (2015) 331 ALR 185, cited

Vines v Australian Securities and Investments Commission (2007) 73 NSWLR 451, cited

Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285, cited

Willett v Futcher [2004] QCA 30, cited

Young v Murphy [1996] 1 VR 279, cited

Canada Business Corporations Act 1975, s 122

Civil Liability Act 2003 (Qld), s 11

Companies (Queensland) Code, s 229

Companies Act 1961 (Qld), s 124

Companies Act 1993 (NZ), s 131

Corporate Law Economic Reform Program Act 1999 (Cth)

Corporate Law Reform Act 1992 (Cth), s 17

Corporations Act 2001 (Cth), ss 9, 180, 181, 189, 210, 219, 220, 221, 411, 439C, 564, 601EA, 601EB, 601FA, 601FB, 601FC, 601FD, 601NF, 601ND, 1317DA, 1317H, 1317J, 1317S

Corporations Law, ss 232, 601FD, 1317HA, 1317HD

Managed Investments Act 1998 (Cth)

Trade Practices Act 1994 (Cth), s 52

Trustee Act 1925 (NSW), s 14B

Trusts Act 1973 (Qld), ss 23, 54, 72, 94, 96

COUNSEL: D O'Brien QC and M Jones for the plaintiff
G Beacham QC and A Nicholas for the first defendant
P McQuade QC and J Davies for the second defendant
P Freeburn QC and P Hay for the third and fourth defendants
K Barlow QC and G Coveney for the sixth defendant

SOLICITORS: Gadens for the plaintiff
Bartley Cohen for the first defendant
RBG Lawyers for the second defendant
James Conomos Lawyers for the third and fourth defendants

HW Litigation for the sixth defendant

Jackson J:

[1] The program of statutory reforms of the *Corporations Law* in 1998 and 1999 covered a number of subject matters. One was the regulation of managed investment schemes, including the duties of the officers of a responsible entity.[1] Another comprised the obligations of the directors and other officers of a company.[2] The two subjects intersected in the statutory provisions that were introduced for the duties of the directors of a company that is the responsible entity of a registered managed investment scheme owed directly to the members of the scheme.[3] This case concerns two of those duties, as now enacted in the *Corporations Act* 2001 (Cth) ("CA").

[2] The plaintiff is the responsible entity[4] of the LM First Mortgage Income Fund ("FMIF"). The FMIF is a registered[5] managed investment scheme[6]. The defendants were the directors of the plaintiff before it entered into a creditors' voluntary winding up.[7] The FMIF is also being wound up under an order of the court.[8] David Whyte was appointed for the purpose of ensuring that the FMIF is wound up in accordance with its constitution and any orders of the court.[9] Mr Whyte was also appointed as the receiver of the scheme property[10] of the FMIF and empowered to bring proceedings in its name as responsible entity. This proceeding is brought under that power.

[3] The plaintiff's claim is made under the CA for an order to compensate the FMIF for damage to the FMIF that resulted from the defendants' alleged contraventions of a corporations/scheme civil penalty provision in relation to the scheme.

[4] The corporations/scheme civil penalty provisions that the plaintiff alleges the defendants contravened are those contained in s 601FD(1)(b) and (c) of the CA. They provide that an officer of a responsible entity must:

> "(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position;

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1 *Managed Investments Act* 1998 (Cth).

2 *Corporate Law Economic Reform Program Act* 1999 (Cth), Schedule 1.

3 *Corporations Law*, s 601FD(1).

4 *Corporations Act* 2001 (Cth), s 9 definition "responsible entity", s 601EA, s 601FA and s 601FB.

5 *Corporations Act* 2001 (Cth), s 601EB.

6 *Corporations Act* 2001 (Cth), s 9 definition "managed investment scheme" and Chapter 5C.

7 *Corporations Act* 2001 (Cth), s 439C(c), although the fifth defendant is named as a party, the proceeding against him has not been prosecuted by the plaintiff

8 *Corporations Act* 2001 (Cth), s 601ND(1).

9 *Corporations Act* 2001 (Cth), s 601NF(2).

10 *Corporations Act* 2001 (Cth), s 9 definition "scheme property".

(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests;"

[5] A right to compensation for contravention of either provision is provided for by s 1317H(1) of the CA, as follows:

"(1) A Court may order a person to compensate a … registered scheme… for damage suffered by the … scheme… if:

(a) the person has contravened a corporation/scheme civil penalty provision in relation to the… scheme; and

(b) the damage resulted from the contravention.

…"

[6] Simplified, the plaintiff's case is that LMIM was the responsible entity of the FMIF and also trustee of an unregistered scheme, named the "LM Managed Performance Fund" ("MPF"). Accordingly, it held the scheme property of the FMIF on trust for the members of the FMIF[11] and the trust property of the MPF on trust for the beneficiaries of the MPF.

[7] As responsible entity of the FMIF, LMIM caused Permanent Trustee Australia Ltd ("PTAL") as custodian for LMIM as responsible entity of the FMIF initially to lend $16 million to Bellpac Pty Limited ("Bellpac") ("FMIF-Bellpac loan") secured by a real property first mortgage over land known as Balgownie No 1 Colliery, Princes Highway, Russell Vale, near Wollongong in New South Wales ("Bellpac land") and a first ranking equitable charge over the assets and undertaking of Bellpac.

[8] As trustee of the MPF, LMIM initially lent $6 million to Bellpac ("MPF-Bellpac loan") secured by a real property second mortgage over the same land and a second ranking equitable charge over the assets and undertaking of Bellpac.

[9] Subsequently, Bellpac entered into contracts for the development of the Bellpac land with Gujurat NRE Minerals Ltd ("Gujurat"), that included Gujurat becoming lessee of the land under a coal mining lease and carrying on coal mining operations for a time, followed by rehabilitation of some of the land and excision of the land to be developed with a view to its eventual sale as residential land or land suitable for residential development by Bellpac. Gujurat failed to perform or complete the contracts.

[10] Bellpac defaulted in repayment of both the FMIF-Bellpac and MPF-Bellpac loans. PTAL as first mortgagee and chargee appointed receivers and managers of Bellpac's assets and property. Bellpac, by the receivers and managers, demanded that Gujurat perform the contracts.

[11] Gujurat started a proceeding claiming it was no longer bound to do so and entitled to remain in possession of the Bellpac land under the coal mining lease. LMIM and Bellpac started a counter-proceeding claiming performance of the contracts by Gujurat or that

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11 *Corporations Act* 2001 (Cth), 601FC(2).

they were entitled to possession of the Bellpac land. PTAL was added to the proceedings as a plaintiff and the relief claimed was expanded both as against Gujurat and other defendants. All the proceedings were consolidated or ordered to be heard together. I will describe them as the "Gujurat proceedings". Eventually, the Gujurat proceedings were settled.

[12] The settlement was contained in three contracts, all executed and completed on the same day. By one of them, styled the "Deed of Settlement and Release" LMIM agreed to pay $1.3 million to Coalfields (NSW) Pty Ltd ("Coalfields") and Coalfields agreed to withdraw caveats it had lodged over the Bellpac land. By another, referred to by the parties as the "Gujurat contract", PTAL as mortgagee exercising power of sale sold the Bellpac land to Gujurat for $10 million. By the third, styled the "Deed of Release" Gujurat agreed to pay $35.5 million to PTAL and the parties, including LMIM, agreed to mutual releases and to discontinue the Gujurat proceedings. All parties gave mutual releases of all the claims made against the others in the proceedings.

[13] The total amount to be paid by Gujurat under the three contracts was approximately $45.5 million ("settlement proceeds"), which was less than the amount of the debt owing to PTAL as custodian for LMIM as responsible entity of the FMIF upon the FMIF-Bellpac loan at the time of settlement.

[14] The settlement proceeds were divided in the ratio of 65:35, as between the FMIF and the MPF, by LMIM acting through the defendants as the board of directors, so that $15,546,147.85 million was received by LMIM as trustee of the trust property of the MPF and credited to the MPF's account. The remainder was received by PTAL as custodian for the scheme property of the FMIF and credited to the account of the FMIF.

[15] Before entering into the three contracts that settled the Gujurat proceedings LMIM and the defendants as directors of LMIM executed a deed described by the parties as the "Deed Poll", recording their decision as to the division of the settlement proceeds as between the scheme property of FMIF and the trust property of the MPF.

[16] That decision was made after LMIM and the defendants received external accounting and legal advice. In making their decision, the defendants took into account that LMIM as trustee of the MPF almost entirely funded the Gujurat proceedings from the trust property of the MPF, in circumstances where the scheme property of the FMIF did not have the cash resources to provide those funds, as well as other matters.

[17] The 35 percent proportion of the settlement proceeds allocated to the MPF was arrived at, at least in part, by treating the position of LMIM as trustee of the MPF, in effect, as if it were a commercial litigation funder receiving a percentage proportion of the litigation recoveries.

[18] The plaintiff alleges that the decision of the defendants as directors to divide the settlement proceeds and the receipt and crediting by LMIM as trustee for the MPF of its part of the division constituted a contravention by each of the defendants of either or both of 601FD(1)(c) ("duty to act in members' best interests") or (b) ("duty of care and diligence to members") of the CA.

Uncontentious facts

Parties and capacities

[19] LMIM is duly incorporated as a public company.

[20] At all material times, LMIM was, and it still is, the responsible entity of the FMIF.

[21] At all material times, PTAL was appointed the custodian for LMIM as responsible entity of the FMIF pursuant to a custody agreement between it and LMIM dated 4 February 1999.

[22] At all material times until April 2013, LMIM was trustee of the MPF.

[23] From 31 January 1997 to 9 January 2015, the first defendant was a director of LMIM.

[24] From 12 September 2003 to 21 June 2012, the second defendant was a director of LMIM.

[25] From 22 June 2006, the third and fourth defendants were directors of LMIM.

[26] From 18 September 2008 to 13 July 2012, the sixth defendant was a director of LMIM.

LMIM's funds management business

[27] Prior to the events colloquially described as the "Global Financial Crisis", LMIM:

(a) operated nine separate managed investment schemes or funds (including the FMIF and the MPF);

(b) as responsible entity of the FMIF had a "loan book" (a portfolio of investment loans) of up to $1 billion and as trustee of the MPF had a loan book of up to several hundred million dollars;

(c) employed, through an administration company, around 120 to 130 staff; and

(d) operated a network of domestic and international offices, including two at the Gold Coast (Beach Road and Cavill Avenue), as well as offices in Sydney, Perth, Hong Kong, London, Auckland, Queenstown, Dubai, Johannesburg, Bangkok, Tokyo, Toronto and Seattle.

[28] The nature of LMIM's funds management business was complex. It managed different managed investment schemes or funds with different objectives, investor bases and risk profiles. The business attracted investments from clients of financial advisers from around the world. The operations of the business entailed or required expertise of skills in finance, funds management, foreign exchange, property management, town planning, marketing, accounting and legal rights and obligations. In relation to the registered managed investment schemes, it operated in a highly-regulated environment.

[29] LMIM had a tiered management structure and its directors and staff performed different functions and brought different skill sets and experience to the running of the business.

[30] Summarising:

(a) the board of directors provided strategic oversight and direction;

(b) each director had a specific area of responsibility within the company relevant to their skills and experience. The Product Disclosure Statement for the FMIF provided that *"[e]ach executive is responsible to the Board for the operation of their own business unit"*;

(c) the board of directors did not manage the day-to-day business;

(d) the board of directors usually met four times per year and at other times as required;

(e) there were weekly senior LMIM management meetings open to all staff;

(f) the main decision-making bodies governing the operations of the managed investment schemes and funds were the credit committee, the funds management committee, the compliance committee, the risk committee, the property asset management committee, the arrears management committee and the audit committee;

(g) beneath the committees, the staff were organised into work teams or departments led by a team leader who was usually, but not always, a director;

(h) the second defendant led the finance team, at different times David Monaghan and the sixth defendant led the property asset management team, the fourth defendant led the marketing team, the third defendant led the foreign exchange team and Mr Monaghan led the in-house legal team. The first defendant was the chief executive officer and the second defendant acted as his deputy.

Bellpac loans and securities

[31] On 10 March 2003, PTAL as custodian and LMIM as responsible entity of the FMIF, entered into the agreements for the FMIF-Bellpac loan with Bellpac.

[32] Pursuant to the FMIF-Bellpac loan agreements, PTAL as custodian for LMIM as responsible entity of the FMIF initially advanced $16 million to Bellpac. As security for the loan, Bellpac granted to PTAL as custodian for the FMIF a first registered mortgage over the Bellpac land and a first ranking equitable charge.

[33] The FMIF-Bellpac loan agreements were varied on a number of occasions between December 2003 and July 2008 and the amount of the loan was increased.

[34] On 23 June 2006, LMIM as trustee of the MPF and Bellpac entered into the agreements for the MPF-Bellpac loan pursuant to which LMIM initially lent $6 million to Bellpac. As security for the loan, Bellpac granted to LMIM as trustee for the MPF a real property mortgage and a second ranking equitable charge.

[35] On or about 23 June 2006, various parties including PTAL as custodian and LMIM as responsible entity of the FMIF, and LMIM as trustee of MPF entered into a deed of priority.

Bellpac sale to Gujurat

[36] On 21 October 2004, Bellpac, GPC Equipment Pty Ltd, Gujurat, Bounty Industries Australia Pty Ltd and Coalfields entered into a contract styled the "Land and Asset Sale Agreement" by which Bellpac agreed to sell to Gujurat and Coalfields certain assets including the Bellpac land.

[37] On 3 December 2004, Bellpac, GPC Equipment Pty Ltd, Gujurat and Coalfields entered into agreements which amended the Land and Asset Sale Agreement, including a contract styled the "Remediation Licence Deed".

[38] Subsequent to December 2004, a dispute arose between Bellpac and Gujurat. In April 2007, Bellpac commenced legal proceedings against Gujurat, and Gujurat filed a cross-claim.

[39] In 2007 and 2008, Bellpac, Gujurat and a subsidiary of Gujurat, South Bulli Holdings Pty Ltd, executed three settlement deeds in relation to the disputes between those parties, including a contract styled the "Deed of Settlement" dated 12 September 2007 and a contract styled the "Amendment Deed and Restated Settlement Deed" dated 23 July 2008.

The Gujurat proceedings

[40] On 6 May 2009, PTAL as custodian for the FMIF appointed receivers and managers to Bellpac's property.

[41] On 13 May 2009, Gujurat issued a summons in the Supreme Court of New South Wales ("Gujurat summons") against Bellpac claiming an injunction to restrain Bellpac from exercising rights or entitlements under the Remediation Licence Deed dated 3 December 2004, including enforcement of any rights or entitlements arising from an alleged purported rectification notice under that contract served by Bellpac on Gujurat on 24 April 2009.

[42] On 7 July 2009, LMIM and Bellpac, by the receivers and managers appointed by PTAL, issued a summons in the Supreme Court of New South Wales ("LMIM summons") against Gujurat claiming declaratory relief that the Deed of Settlement dated 12 September 2007 and the Amendment Deed and Restated Settlement Deed dated 23 July 2008 were made in breach of the terms in cl 6.1 of the equitable charge granted by Bellpac to LMIM and that those contracts were void and of no effect.

[43] LMIM's summons claimed an order that Gujurat procure the surrender or termination of the "Coal Lease" from the "Development Land" and "Retained Land" within the meaning of those terms in the Remediation Licence Deed. Further relief was claimed for a declaration that by conducting mining activities, Gujurat was in breach of the terms of the Remediation Licence Deed and for an order in the nature of an injunction that Gujurat cease mining activities on the Development Land and Retained Land, as well as damages.

[44] On 22 July 2009, LMIM and Bellpac, by the receivers and managers appointed by PTAL, filed a statement of claim ("LMIM's statement of claim") for relief substantially the same as that sought in LMIM's summons. The statement of claim alleged that:

(a) Gujurat had breached the contracts between Bellpac and Gujurat comprised in the Land and Assets Sale Agreement and the Remediation Licence Deed;

(b) under the equitable charge, Bellpac was prohibited from dealing with its rights under the Land and Assets Sale Agreement and the Remediation Licence Deed without the prior written consent of LMIM;

(c) Gujurat was aware that it was necessary for Bellpac to obtain LMIM's consent to any variation of the Remediation Licence Deed but that without obtaining that consent Bellpac and Gujurat, inter alia, entered into the Deed of Settlement dated 12 September 2007 varying those contracts and Bellpac and Gujurat, inter alia, entered into the Amendment Deed and Restated Settlement Deed dated 23 July 2008 also varying those contracts; and

(d) accordingly, the Deed of Settlement and the Amendment Deed and Restated Settlement Deed were void or unenforceable by Gujurat.

[45] Up to this time PTAL, as custodian of the FMIF, was not a party to the proceedings, although Bellpac was acting through the receivers and managers appointed by PTAL.

[46] Gujurat's summons was intended to establish its entitlement to continue its mining operations, that it was not required to remediate the Bellpac land and would have unfettered access to the parts described as the Development Land and the Retained Land, so long as the coal mining lease remained on foot. LMIM's summons and statement of claim were intended to achieve the opposite outcome.

[47] LMIM's view was that the Bellpac land was unsaleable while Gujurat remained in occupation under the coal mining lease and that Gujurat was the only likely buyer.

[48] On 30 November 2009, PTAL was joined as a plaintiff to LMIM's summons and statement of claim and PTAL made similar claims to those made by LMIM.

[49] On 8 February 2010, LMIM, Bellpac and PTAL, as plaintiffs, filed a commercial list statement in the Supreme Court of New South Wales against Gujurat, Coalfields, Coal Contractors Australia Pty Ltd, and GPC Equipment Pty Ltd as defendants. The relief previously claimed against Gujurat by the statement of claim was altered. A declaration and damages for contravention of ss 51A and 52 of the *Trade Practices Act* 1974 (Cth) and Gujurat's liability as a person involved in the contraventions under s 75B of that Act were claimed. Alternatively, the plaintiffs claimed damages for Gujurat tortiously interfering in the contractual relations between Bellpac and LMIM and Bellpac and PTAL under their equitable charges.

[50] On 16 March 2010, Coalfields filed a cross-claim against Bellpac and Gujurat. On 25 June 2010, Gujurat filed a cross-claim against Bellpac, LMIM and PTAL.

[51] Summarising, LMIM's claim as trustee of the MPF was not a claim to enforce its rights as second mortgagee or second chargee as such. In substance, it was a claim for relief as to the invalidity of contracts between Bellpac and Gujurat or for damages based on misleading or deceptive or unconscionable conduct or tortious interference with contractual relations by Gujurat. Bellpac's claim by the receivers and managers appointed by PTAL was for similar relief as to the validity of the contracts. From the time it was joined as a party to the proceedings, PTAL made a similar claim to LMIM's claim.

Funding the proceedings

[52] From about July 2009 onwards, cash funds from the scheme property of the FMIF were not available to fund the proceedings or any settlement thereof.

[53] LMIM as trustee for the MPF funded the proceedings and settlement thereof, almost entirely, and provided further funding for other recoveries, as follows:

(a) MPF funded $1,597,566.19, which included $61,730.21 paid after LMIM as trustee of the MPF was credited with and received its 35 percent proportion of the settlement proceeds;

(b) Prior to receiving a proportion of the settlement proceeds, LMIM as trustee of the MPF also funded $414,585.71 in respect of other recoveries, being proceedings to recover on the bonds issued by Gujurat and to sue the guarantor; and

(c) After receiving its proportion of the settlement proceeds, LMIM as trustee of the MPF continued to provide funding in respect of those matters to an amount of $524,289.40.

Settlement contracts and payments

[54] On 9 November 2010, a non-binding heads of agreement was executed at a mediation between the parties to the Gujurat proceedings. The heads of agreement provided for the compromise of all the claims made by the parties in the proceedings.

[55] Between 9 November 2010 and 2 June 2011, the parties continued to negotiate settlement of the Gujurat proceedings. The negotiations were protracted. Gujurat proved to be a difficult counter-party.

[56] On or about 21 June 2011, the Deed of Settlement and Release, the Gujurat contract and the Deed of Release were executed. As previously summarised, under those contracts, at completion:

(a) LMIM was to pay Coalfields the sum of $1.3 million by bank cheque pursuant to the Deed of Settlement and Release;

(b) PTAL was to receive $10 million pursuant to clause 16.7 of the Gujurat contract; and

(c) PTAL was to receive $35.5 million pursuant to clause 7 of the Deed of Release.

[57] LMIM as trustee of the MPF agreed to discontinue its claims and give a release from all claims to the other parties as part of the consideration for the payment by Gujurat of $35.5 million under the Deed of Release. Accordingly, it was necessary for LMIM as trustee of the MPF to agree to the Deed of Release to settle the proceedings. As well, under the Deed of Settlement and Release, Coalfields agreed to remove the caveats it had lodged over the Bellpac land. Accordingly, it was necessary for LMIM to agree to pay Coalfields $1.3 million under the Deed of Settlement and Release to settle the proceedings.

[58] On 21 June 2011, Allens, as lawyers for the plaintiffs, directed Gujurat to pay the total amount of $45.5 million to different payees at completion. LMIM as trustee for the MPF received a bank cheque on account of its proportion of the settlement proceeds at settlement.

[59] The amount LMIM as trustee of the MPF received at completion (after adjustments) was approximately $13.6 million. On the extended settlement date (8 September 2011), a further amount of approximately $1.9 million was received.

Division of the settlement proceeds

[60] On 1 December 2010, David Monaghan sent an email to the second defendant, copied to the sixth defendant, which stated:

> "I have investigated the going rate for litigation funding. Advice from Allens is that they believe it is usually 30-35% of the recovered sum, but varies from transaction to transaction. They referred me to a reported case in which the figure was 30-45%, depending on when the recovery happened. If the recovery happened at or prior to mediation (as in our case) it was 30%. There were also other amounts charged, up to $115,000 as a fee, plus I believe the actual outlays (paid in legal costs) could also be recovered.
>
> In our case the settlement sum was effectively paid for the sale of the land, which must have had some value anyway, but I believe there is a good argument that the land was practically unsaleable if not sold to Gujurat, and Gujurat needed to be persuaded to buy it via the litigation. So perhaps you could say that the amount recovered was effectively the additional amount you have obtained over and above what would have been obtained from a straight sale of the land (eg by auction). It is difficult to know what the latter figure would be, but I think it could be somewhere around $10M (an educated guess). On that basis I think there would be an argument that up to 30% of $40M (being the recovered amount of $50M less the value of the land assumed at $10M) could be justified. That gives you a figure of $16M.
>
> These are very rough figures but give you a guide. It would be a good idea to have some sort of independent confirmation of what is reasonable. I think an accountant is the type of person you would ask to provide that confirmation."

[61] On 2 December 2010, Andrew Petrik of LMIM sent an email to the sixth defendant copied to the second defendant, the third defendant, Mr Monaghan and the first defendant referring to a presentation from "IMF funding" which denoted a range of litigation funding fees. Mr Petrik identified the quantum of funds contributions respectively by the FMIF and the MPF and stated that "MPF has contributed around 95% of funds for legal proceedings against Bellpac".

[62] On 3 December 2010, the second defendant instructed Mr Monaghan to contact Aaron Lavell at WMS to initiate obtaining an independent accountant's report. The formal engagement of WMS was arranged by Mr Monaghan, in conjunction with the sixth defendant.

[63] On 7 March 2011, LMIM received advice from WMS as to the appropriate proportion to be paid to LMIM as trustee of the MPF from the litigation settlement proceeds ("WMS report").

[64] On 14 March 2011, the second defendant advised the other directors of LMIM that she had instructed Mr Monaghan to seek further advice on the proposed division of funds from the settlement of the Bellpac proceedings. She held concerns that the WMS report was accounting advice only.

[65] On 17 March 2011, Mr Monaghan instructed John Beckinsale, a partner of Allens, to proceed with the advice. Having identified the need for legal advice, Mr Monaghan was tasked with instructing Allens and framing the terms of the advice sought. Mr Monaghan's instructions to Allens stated, in part:

> "**Please note that Alf Pappalardo and Bruce Wacker are acting in relation to documenting the settlement with Gujurat.**
>
> …
>
> I am seeking an advice confirming that the proposed split of proceeds between the funds is legally acceptable given that LM is in a position of conflict, being the trustee of both the FMIF and the MPF. I am happy to discuss the scope of the required advice with you further". (emphasis added)

[66] On 28 March 2011, LMIM received advice from Allens ("Allens advice") that it was legally acceptable to divide the settlement proceeds between the FMIF and the MPF in the ratio of 65:35. The advice stated, by way of summary, that "[w]e consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict". That opinion was expressed to be subject to a number of matters detailed in the summary.

[67] On 7 April 2011, Mr Monaghan provided a copy of the Allens advice to the second defendant and Mr Fischer under cover of an email which stated "there is a lot to wade through, butthe conclusion is that the transaction is okay". That summary was sent on to the third defendant and the sixth defendant.

[68] On 14 June 2011, LMIM and each of the directors executed a deed poll ("Deed Poll") that provided for the settlement proceeds to be divided 65 percent to the FMIF and 35 percent to the MPF ("ratio of 65:35").

The Deed Poll

[69] The Deed Poll provided:

> "BACKGROUND
>
> ...

H. Shortly after LM commenced the litigation, redemptions from the FMIF were frozen which resulted in no new funds flowing in from investors and an obligation to remit borrower's payments to LM's former funder, the Commonwealth Bank. FMIF was in the position of being unable to provide funding for the litigation and of being unable to satisfy any adverse costs orders that might have been made against LM. Accordingly, the MPF has contributed the majority of the funding for the litigation (and certain other actions designed to recover funds from Gujurat or put pressure on it) amounting to approximately 91% of the total funding (the FMIF has contributed the remaining 9%)

I. The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of the proceeds recovered by the litigation

…

3. DIRECTORS CONCLUSIONS

3.1 After giving full and comprehensive consideration to all of the relevant issues, the Directors have concluded that:

…

(b) there is a need for the FMIF RE to reach agreement with the MPF Trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF Trustee.

…

(m) the Settlement Proposals would be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length – the Directors have come to this conclusion on the basis of their own experience and previous dealings in relation to comparable transactions as well as the WMS Report. The proposed Proceeds Split is similar to that which would prevail in the open market for similar transactions between unrelated parties and is not extraordinary or excessively generous – in giving consideration to this issue, the Directors considered the litigation funding practices in the open market.

(n) in light of the independent expert advice as well as a report that has been prepared in accordance with RG111 and RG112 has been received the Settlement Proposals are fair and reasonable and are approved."

The Deed of Release

[70] The Deed of Release provided for:

(a) mutual releases by the parties to the proceedings of all claims, including the claim brought by LMIM as trustee of the MPF; and

(b) LMIM to execute consent orders that would dismiss the proceedings and, therefore, the claims brought by LMIM as trustee for the MPF.

[71] The Gujurat contract is referred to in the Deed of Release as the "Sale Contract" and defined in the Deed of Release as a "Transaction Document" any breach of which was excluded from the release (see cl 5.1, 6.1). It was not entered into irrespective of the Deed of Release or the Deed of Settlement and Release.

[72] The Deed of Release provided for Gujurat to pay the amount due under it to PTAL and did not provide for Gujurat to pay any sum to LMIM. However, the Deed of Release was entered into after the Deed Poll had been executed by LMIM and the directors and the instructions given to Gujurat for payment on settlement on the same day that the Deed of Release was entered into included the payment of a sum by bank cheque to LMIM.

[73] Before turning to the contentions or any further detail as to the facts, it is appropriate to consider the operation of the relevant sections of the CA in some detail.

Duty to act in members' best interests

[74] As previously stated, both relevant duties were introduced as part of Chapter 5C of the *Corporations Law* in 1998.[12] Not long afterwards, the duties of a director or officer of a company were amended,[13] to include ss 180 and 181 of the CA in the following relevant form:

> "**180 Care and diligence—civil obligation only**
>
> *Care and diligence—directors and other officers*
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
>
> Note: This subsection is a civil penalty provision (see section 1317E).
>
> *Business judgment rule*
>
> (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.
>
> Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity

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12 *Managed Investments Act* 1998 (Cth).

13 *Corporate Law Economic Reform Program Act* 1999 (Cth), Schedule 1.

(including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

181 Good faith—civil obligations

Good faith—directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E)."

[75] None of the pre-1998 corporations or company law legislative provisions contained an express duty "to act in the best interests" of the company. That was first introduced by ss 601FC(1)(c) and 601FD(1)(c) of the *Corporations Law*, followed by s 181(a) of the *Corporations Law*.

[76] The origin of ss 601FD(1)(c) and the corresponding duty of a responsible entity under s 601FC(1)(c) lies in the 1993 report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee entitled "Collective Investments: other people's money".[14] Paragraph 74 of the summary of recommendations recommended that the *Corporations Law* should impose an obligation on the operator of a collective investment scheme "to exercise its powers and perform its duties as operator in the best interests of investors rather than in its own, or anyone else's, interest, if that interest is not identical to the interests of the scheme investors." Paragraph 10.8 referred to the discussion paper released prior to the report and responses received by the reporters in relation to a proposal that "the law should impose on operators a duty to avoid conflicts of interests" and continued that the reporters had concluded that "the appropriate

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14 [1993] ALRC 65.

formulation of the test [was] that the operators must prefer the interests of investors over their own interests where any conflicts arise". The proposal at the time of the report was reflected in draft s 260AE, contained in volume 2 of the report, that would have prohibited an operator from the "exercise [of] its powers, or perform[ing] it duties… in the interest… of anyone else if that interest is not identical to the interests of the scheme investors generally." That draft section was not enacted.

[77] The *Managed Investments Bill* 1988 (Cth) contained and introduced what became ss 601FC and 601FD of the *Corporations Law*. Paragraph 8.8 of the Explanatory Memorandum to the Bill said about draft s 601FC(1) that the responsible entity of a managed investment scheme "will be subject to extensive statutory duties… [that] will reflect both the fundamental duties of a fiduciary, as well as certain of the duties currently imposed…". Paragraph 8.18 of the Explanatory Memorandum said about draft s 601FD(1) that "the duties of officers of a responsible entity will reflect, in part, the duties owed by the responsible entity. These include the duties:… to exercise the appropriate degree of skill, care and diligence; to act in the best interests of the members…"

[78] The origin of s 181 of the CA lies in the Corporate Law Economic Reform Program[15] Proposals for Reform: Paper No 3 entitled "Directors' Duties and Corporate Governance: Facilitating innovation and protecting investors". Proposal No 2 of that paper was as follows:

> "The Law should expressly recognise the oversight role played by directors and their reliance on delegates to manage their company's day-to-day affairs.
> …
>
> The existing duty in subsection 232(2) to act *honestly* should be reformulated to capture the fiduciary principles that a director or other officer of a corporation must exercise their powers and discharge their duties:
>
> (a) in good faith in the best interests of the corporation; and
>
> (b) for a proper purpose."

[79] The discussion within the text of the paper equated the pre-1998 provision (then s 232(2) of the *Corporations Law*) to the equitable duty or duties of directors,[16] identified a potential inconsistency between the duty to act "honestly" and another section in the legislation at that time,[17] referred to comparator "best interests" provisions in the companies' legislation of New Zealand[18] and Canada[19] and recommended that the *Corporations Law* be amended to replace the duty to act honestly with a duty to act "in

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15 Often abbreviated to "CLERP".

16 Corporate Law Economic Reform Program Proposals for Reform: Paper No 3 entitled "Directors' Duties and Corporate Governance: Facilitating innovation and protecting investors", p 19.

17 Corporate Law Economic Reform Program Proposals for Reform: Paper No 3 entitled "Directors' Duties and Corporate Governance: Facilitating innovation and protecting investors", p 49.

18 *Companies Act* 1993 (NZ), s 131(1).

19 *Canada Business Corporations Act* 1975, s 122(1)(a).

good faith in the best interests of the company and … for a proper purpose", as set out above.

[80] Those CLERP proposals informed the *Corporate Law Economic Reform Program Bill* 1998 (Cth), which resulted in s 181 of the *Corporations Law* that is now s 181 of the CA. The Explanatory Memorandum to the Bill described the key features as including:

> "**Reformulating the existing duty to act honestly** in subsection 232(2) to capture the fiduciary principles that a director or other officer of a corporation must exercise their powers and discharge their duties in good faith in what they believe to be in the best interests of the corporation and for a proper purpose. Breach of this will continue to attract both criminal and civil consequences."[20]

[81] I observe that the CLERP proposals also pre-dated the *Managed Investments Bill* 1998[21] that introduced the provisions that became s 601FD(1) of the CA but that the report that resulted in the *Managed Investments Bill* 1998 was made some years earlier.

[82] To some extent, s 601FD(1) of the *Corporations Law* was a hybrid, because it did not replace an officer's duty to "act honestly" with a duty "to act bona fide in the best interests of the members". Instead, s 601FD(1)(a) retained an express duty to "act honestly" while the first clause of s 601FD(1)(c) provided for a duty to "act in the best interests of the members".[22] In contrast, s 181 of the CA, as introduced in 1998, deleted the prior express duty to "act honestly" (then in s 232(2) of the *Corporations Law*) and replaced it with an obligation to exercise the powers and to discharge the duties "in good faith in the best interests" of the corporation.

[83] The duty under s 601FD(1)(c) to act in the members' best interests is a duty owed directly by a director to the members of the registered scheme. It crosses the divide under which usually a director of a corporate trustee owes duties to the corporation but not directly to the beneficiaries.[23]

[84] The statutory right to recover for a contravention of the duty to act in the members best interests or the duty of care and diligence to members arises as follows. Section 601FD(3) provides that a person who contravenes s 601FD(1), or is involved in the contravention, contravenes s 601FD(3). Section 1317DA provides that items 1 to 13 of the first column of the table in s 1317E(1) are "corporations/civil scheme penalty provisions". Item 8 of the first column refers to s 601FD(3). As previously set out, s 1317H(1) provides that a court may order a person to compensate a registered scheme for damage suffered by the scheme if the person has contravened a corporation/scheme civil penalty provision in

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20 Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill* 1998 (Cth), 11 [4.2] and 17-18 [6.2]-[6.7].

21 See also the Explanatory Memorandum to the *Managed Investments Bill* 1998 (Cth), 15-17 [8.8]-[8.22].

22 The same structure was followed for s 601FC(1).

23 *Young v Murphy* [1996] 1 VR 279.

relation to the scheme and the damage resulted from the contravention. Section 1317J provides that either ASIC or the responsible entity for the scheme may apply for a compensation order under s 1317H. And s 1317H(4) provides that if anyone other than the responsible entity is ordered to compensate the scheme the responsible entity may recover the compensation on behalf of the scheme.

[85] Returning to s 601FD(1)(c), as a matter of grammar, there are two clauses of that paragraph. The first clause provides that the officer must "act in the best interests of the members". The second clause provides: "and, if there is a conflict between the members' interests and the interests of the responsible entity, [the officer must] give priority to the members' interests." As a matter of ordinary meaning and grammar, the first and second clauses provide for separate duties.

[86] So much was authoritatively decided by the High Court in *Australian Securities and Investments Commission v Lewski*[24] in the following passage:

> "Sections 601FC(1)(c) and 601FD(1)(c) each involve two separate duties of loyalty. The first is a duty to act in the best interests of the members. The second is to give priority to the members' interests if there is a conflict between the members' interests and the interests of the responsible entity.'"[25]

[87] As to the second duty, the plaintiff submits that in giving effect to the interests of the MPF, the defendants preferred the "interests of the responsible entity", LMIM, to the interests of the members. In my view, on the proper construction of the provision, the interests of the responsible entity do not include the duty of the responsible entity as trustee of another trust to the beneficiaries of that trust.

[88] First, in my view, that is not the ordinary meaning of the words of the text: "interests of the responsible entity" in s 601FD(1)(c).

[89] Second, by way of context, s 601FC(1)(c) provides that the corresponding duty of a responsible entity, in exercising its powers and carrying out its duties, is that the responsible entity must "act in the best interests of the members and, if there is a conflict between the members' interests and its **own interests**, give priority to the members' interests", supporting the view that the interests of the responsible entity in s 601FD(1)(c) are the responsible entity's own interests.

[90] Third, nothing in the legislation of the CA prohibits one company from becoming the responsible entity of more than one registered scheme. If the "interests of the responsible entity" in the second duty included its duties as responsible entity of another registered scheme, and a conflict arose between the interests of the members of one scheme and the interests of the members of another scheme, s 601FD(1)(c) would simultaneously require the directors of the responsible entity to prefer the interests of the members of each

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[24] (2018) 362 ALR 286.

[25] (2018) 362 ALR 286, 303 [70].

scheme over the interests of the members of the other scheme, an apparently absurd result.

[91] Fourth, in my view, no case law authority supports the plaintiff's construction. To the contrary, in *Allco Funds Management Ltd v Trust Co (Re Services) Ltd*,[26] the court said:

> "Section 601FD does not assist. The section does not permit or exonerate breaches of fiduciary duty committed against another party, in this case AFML. The section provides that where there is a conflict between the interests of the members and those of the RE, the interests of the members must take priority. Section 601FD(1)(c) involves only a contest between the members and the RE. It has no field of operation where there is a conflict of interest between the RE and some other entity of which the director of the RE is also a director. It also has no impact on their fiduciary duties at general law."[27]

[92] Accordingly, in my view, the second duty in s 601FD(1)(c) does not apply to the questions raised by this case, because LMIM's duties as trustee of the MPF were not "interests of the responsible entity" within the meaning of that duty. It follows that whether there was any contravention of the duty to act in the members' best interests in the present case turns on the operation of the first duty imposed under s 601FD(1)(c).

[93] None of the parties closely analysed that operation, as a matter of law. The Explanatory Memorandum to the *Corporate Law Economic Reform Program* Bill 1998 described the corresponding changes made to introduce s 181 of the *Corporations Law* as "mirror[ing] the fiduciary duty of a director to act in what they believe to be in the best interests of the corporation and for proper purposes."[28]

[94] The plaintiff approached the duty to act in the members' best interests as though it captured the equitable principle or rule that applies when a trustee or fiduciary is placed in a position or situation of conflict between duty and duty, a description coined by Professor Finn.[29] The equitable rule is described thus:

> "But the mere acceptance of multiple 'fiduciary' engagements or employments is obviously not offensive in itself. It is the staple of the commission agent, the solicitor, the corporate trustee, the company director and the liquidator. The vice condemned by the courts only arises when the fiduciary, by his action or inaction in either or both of two relationships, brings about an actual conflict between the duties owed in each relationship."[30]

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26 [2014] NSWSC 1251

27 [2014] NSWSC 1251, 45-46 [189].

28 Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill* 1998, 27 [6.7].

29 Finn, *Fiduciary Obligations*, 1977, 252 [580].

30 Finn, *Fiduciary Obligations,* 1977, 252-253 [581].

[95] The corporate trustee referred to by Professor Finn as at 1977 would have included companies then subject to the *Trustee Companies Act* 1968 (Qld), companies not dissimilar to the licensed trustee companies now regulated by Chapter 5D of the CA.

[96] The plaintiff relied on *Moody v Cox and Hatt*[31] as supporting its claim of breach of the duty to act in members' best interests. That case concerned a solicitor who acted for both the vendor and purchaser in a contract of sale of land who failed to disclose to the plaintiff facts relevant to the value of the property that he knew when acting in the negotiation for the vendor. The court of appeal reasoned, by analogy, that because an attorney selling to his client is bound to disclose everything that may be material a solicitor must be under the same duty when acting for both vendor and purchaser. Lord Cozens-Hardy MR said:

> "… if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say – which would be much better – 'I cannot accept this business.'"[32]

[97] That reasoning does not answer the problem presented in the present case, for reasons I will later discuss. But one thing it does illustrate is the proscriptive operation of a fiduciary duty. So far as "fiduciary" duties are concerned, there is an unresolved debate about whether all fiduciary duties are necessarily proscriptive, or whether there are prescriptive fiduciary duties as well. *Breen v Williams*[33] is thought by some to require acceptance that all true fiduciary duties are proscriptive, but there is a developing body of contrary opinion. Still, in *Breen v Williams*, the narrower view was pithily put by Gummow J, as follows:

> "Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under an obligation to act in the interests of another. Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty."[34]

[98] Professor Lionel Smith has captured the contrary approach and views in a recent article entitled "Prescriptive Fiduciary Duties".[35] In part, the question may be a dispute as to which duties the label "fiduciary" is correctly applied, as a matter of taxonomy, rather than necessarily affecting the liabilities and available relief in the cases around which the arguments revolve.

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31 [1917] 2 Ch 71.

32 [1917] 2 Ch 71, 81.

33 (1996) 186 CLR 71.

34 (1996) 186 CLR 71, 137-138.

35 L Smith, "Prescriptive Fiduciary Duties", (2018) 37 UQLJ 261.

[99] For present purposes, however, the question is what is required by the statutory duty that an officer of a responsible entity must act in the best interests of the members, when the responsible entity operates the registered scheme and performs the functions conferred on it by the scheme's constitution and the CA,[36] and in circumstances where the responsible entity in exercising its powers, and carrying out its duties, has a corresponding duty?[37]

[100] It is unnecessary in this case to decide whether the duty to act in the members' best interests is positive in character, so as to oblige an officer to act to cause the responsible entity to exercise its powers or carry out its duties otherwise. That is unnecessary because in the circumstances of the present case there is no question that LMIM as the responsible entity did exercise its powers to operate the scheme[38]of the FMIF by deciding to divide the settlement proceeds, entering into the three contracts and receiving and crediting the relevant amounts in accordance with ratio of 65:35.

[101] In other contexts, the protean nature of a duty to act in the best interests of the object of a power has been recognised. For example, the constitutional power of directors of a company to issue shares in the company is one that must be exercised for the benefit of the company as a whole.[39] Another example is the power of the general meeting of a company to amend the constitution to include a power to expropriate a member's shares. In that context, the High Court abandoned the "test" of what is done "bona fide for the benefit of the company as a whole"[40] as "inappropriate, if not meaningless, where the amendment [is] proposed to adjust the rights of conflicting interests."[41]

[102] It must not be forgotten that s 601FD(1)(c) exists in the context of paragraphs (a) to (f) of s 601FD(1). The express duty of care and diligence to members provided for in paragraph (b), for example, suggests that the duty to act in members' best interests in paragraph (c) is not that. Similarly, the duty to act honestly in paragraph (a) suggests that that honesty is not the particular concern of the duty to act in the members' best interests in paragraph (c). The express obligations in paragraph (f) to take the steps a reasonable person would take to comply with the CA, the conditions of the responsible entity's Australian financial services licence, the scheme's constitution and the scheme's compliance plan suggest that those subjects may not be the concern of paragraph (c). The express obligations in paragraph (e) not to make improper use of the officer's position are, however, less easy to differentiate from what may be the remaining scope of the duty to act in the members' best interests in paragraph (c).

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36 *Corporations Act* 2001 (Cth), s 601FB(1).

37 *Corporations Act* 2001 (Cth), s 601FC(1)(c).

38 *Corporations Act* 2001 (Cth), s 601FB(1).

39 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 289.

40 As formulated in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671.

41 *Gambotto v WCP Ltd* (1995) 182 CLR 432, 443-444.

[103] How, then, is a positive requirement to act in the "best interests of the members" of a registered scheme to be applied when the question raised is the conflict of interests of and possible adjustment of the competing rights of the members of one scheme with those of another scheme or trust fund?

[104] The approach submitted by the defendants is to construe the duty to act in members' best interests as not applying to a director where the responsible entity has a conflicting fiduciary duty to the beneficiaries of another trust.

[105] Another statement made by the High court in *Australian Securities and Investments Commission v Lewski*[42] as to the duty to act in members' best interests was as follows:

> "The Loyalty Duty **requiring a director to act in the best interests of members is not purely subjective**. As Bowen LJ said of **the equitable progenitor** from which this statutory duty was developed and adapted, otherwise a wholly irrational but honest director could conduct the affairs of the company by "paying away its money with both hands in a manner perfectly *boná fide* yet perfectly irrational". Although the duty is not satisfied merely by honesty, it is a duty to act in the best *interests* of the members rather than a duty to secure the best *outcome* for members. Key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than "the success or otherwise of a transaction or other course of action". The purpose and terms of the Trust are the existing legal purposes and terms of the Constitution, not the purpose or terms that are honestly believed to exist.
>
> The Loyalty Duty **requiring a director to give priority to the members' interests in circumstances of conflict of interest is narrower in one respect than the equitable rule concerning conflict of interest and duty**. **It does not proscribe acts of a director that put herself or himself in a position of conflict. It only proscribes acts in the course of that conflict that do not give priority to the members' interests.** Nevertheless, the duty is not satisfied by an honest or reasonable belief. A contravention occurs when a director prioritises her or his own interests over those of the members, no matter how honest or reasonable the director was in doing so."[43] (footnotes omitted) (emphasis added)

[106] The second part of this passage recognises that the second duty, namely the duty to give priority to members' interests, deals with acting in conflict of duty and interest, and that suggests that the first duty, the duty to act in members' best interests, does not.

[107] Another point, appearing from the text of the statute, and made by the High Court in *Lewski* in the second part of the passage set out above, is that the duty to give priority to members' interests is not engaged by and does not prohibit an officer of the responsible entity from placing himself or herself in a position of conflict of duty and duty or duty and interest.

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42 (2018) 362 ALR 286.

43 (2018) 362 ALR 286, 304 [71]-[72].

[108] In my view, although described as a "Loyalty Duty" in *Lewski*, and although explained in some of the contextual materials leading up to its enactment as a fiduciary duty, the statutory duty under s 601FD(1)(c) to act in the members' best interests is not to be equated with a fiduciary duty, per se.

[109] However, the duty to act in the members' best interests does have equitable origins, as explained in the first part of the passage from *Lewski* set out above above, by the reference to the duty's "equitable progenitor". The reference there made is to the reasons of Bowen LJ in *Hutton v West Cork Railway Co*.[44] That case was not concerned with a fiduciary duty, but with the limits equity imposed on the scope of the constitutional power of a company in general meeting to vote remuneration to the directors retrospectively, in the light of the statutory provisions then in force, regulating that power.[45] The headnote referred to the power of a general meeting to expend a portion of the company's funds in gratuities, provided the grants "are made for the purpose of advancing the interests of the company",[46] but similar language does not appear in the judgments and there is no reference to the "best interests" of the company.

[110] These historical strains of authority, and the statutory context and history, illustrate the disparate sources of and the associated risk of error in eliding the duty to act in members' best interests in the first duty under s 601FD(1)(c) with the duty to give priority to members' interests in the second duty under s 601FC(1)(c).

[111] Accordingly, the starting point is not that on the proper construction of s 601FD(1)(c) the defendants were required to give priority to the members' interests of the FMIF in order to discharge the duty to act in the members' best interests. Second, there was no necessary breach of the duty to act in members' best interests simply because there was a conflict of duty and duty between LMIM's fiduciary duty to the members of the FMIF and LMIM's fiduciary duty to the members of the MPF.

[112] The latter conclusion is reinforced by the provisions of the constitution of the FMIF that provide:

> "29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE
>
> 29.1 Subject to the Law, nothing in this Constitution restricts the RE (or its associates) from:
>
> (a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);

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44 (1883) 23 Ch D 654.

45 For modern comparators, see *Gambotto v WCP Ltd* (1995) 182 CLR 432, 439-447 and *ANZ Executors and Trustees Co Ltd v Qintex Australia Ltd (receivers and managers appointed)* [1991] 2 Qd R 360, 368-370.

46 (1883) 23 Ch D 654.

(b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or

(c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.

29.2 All obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law."

[113] It is permissible to reduce the fiduciary obligations of a trustee in some situations. One is where the trust instrument makes provision for it. Another is where the beneficiaries give fully informed consent.

[114] In *Australian Securities and Investments Commission v Drake (No2)*[47] https://advance.lexis.com/search/?pdmfid=1201008&crid=4f24d132-7f53-4ebc-b305-8014b1ee4673&pdsearchterms=%5B2016%5D%2BFCA%2B1552&pdicsfeatureid=1517127&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=or&pdpsf=his%3A1%3A1&pdquerytemplateid&ecomp=7g36k&earg=pdpsf&prid=ae02ebda-d7f5-41a2-bd1e-d839d2d2a05a Edelman J said:

> "Fiduciary duties are shaped, and can be modified, by the trust instrument or an underlying contract. For instance, in *Kelly v Cooper*… the Privy Council held that no breach occurred since the contract of agency envisaged that the fiduciary might have a conflict of interest. The decision in *Kelly v Cooper* was applied by Lord Browne-Wilkinson in *Henderson v Merrett* where his Lordship said that '[a]lthough an agent is, in the absence of contractual provision, in breach of his fiduciary duties if he acts for another who is in competition with his principal, if the contract under which he is acting authorises him so to do, the normal fiduciary duties are modified accordingly': see also *Chan v Zacharia*... The decision in *Kelly v Cooper* has also been approved in Australia: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)…;* and *Backwell IXL Pty Ltd v Hogg*."[48] (citations omitted)

[115] Clause 29, relevantly, was part of the trust instrument constituting the MPF and subject to any statutory prohibition, authorises LMIM as responsible entity to deal with itself as trustee of another trust. In this case, the MPF was another trust of which LMIM was trustee.

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47 (2016) 340 ALR 75.

48 (2016) 340 ALR 75, [354].

[116] As such, the obligation of the defendants to act in the best interests of the FMIF has to take into account the fact that the constitution of the FMIF expressly authorised LMIM:

(1) to act as a RE for another trust, or fund;

(2) to deal with itself as trustee of another trust; and

(3) to be interested in a contract or transaction with itself as trustee of another trust.

[117] However, identifying that the scope of the duty to act in the members' best interests does not operate as proscriptively as the plaintiff submits still does not answer the question: what is the scope of the duty in a case like the present?

[118] There is a comparator duty to act in the best interests of the beneficiaries of a trust. In 1985 in *Cowan v Scargill*,[49] Megarry V-C said that:

> "[it is] the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries."

[119] Ever since, some have accepted that as a statement of the law while others point to the absence of earlier authority for a general duty stated in terms of a duty to act in the best interests of the beneficiaries. Whether supported by earlier authority or not, it has proved influential in the drafting of some statutes, including, it seems, ss 181, 601FC(1)(c) and s 601FD(1)(c) of the CA. As well, there is now a comparator provision in general trusts legislation in this jurisdiction as to a trustee exercising a power of investment[50] or a court conferring additional powers on a trustee.[51] And the concept or duty is picked up in some cases.[52]

[120] But there are significant arguments that the duty as formulated in *Cowan v Scargill* was ahistorical. The arguments are helpfully marshalled in two articles by M Scott Donald, "Best interests?"[53] and Professor Geraint Thomas, "The duty of trustees to act in the 'best interests' of their beneficiaries".[54]

[121] This case is not the occasion to attempt a resolution of those arguments. However, they serve to explain why it is that although one can readily find statements as to the existence of an overarching duty of a trustee to act in the best interests of the beneficiaries of a trust, including in some leading text books, cases that have been resolved by reference to that duty and which explicate its meaning are elusive.

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49 [1985] Ch 270, 286-287.

50 *Trusts Act* 1973 (Qld), s 23(2)(a), introduced in 1999; cf *Trustee Act* 1925 (NSW), s 14B(2).

51 *Trusts Act* 1973 (Qld), s 94(1).

52 For example, *Berger v Lysteron Pty Ltd* [2012] VSC 95, [67]-[85]; *Carmine v Ritchie* [2012] NZHC 1514, [66]; *Willett v Futcher* [2004] QCA 30, [19] and *re Burton* (1994) 126 ALR 557, 559-560.

53 (2008) 2 Journal of Equity 245.

54 (2008) 2 Journal of Equity 177.

[122] Where elsewhere might guidance be found? One possibility is where a trustee is bound to decide as between competing interests of beneficiaries under existing trust powers and structures.

[123] First, it is to be noted that under s 601FC(1)(d) of the CA, a responsible entity is subject to a duty to "treat… fairly" members of a scheme who hold interests of different classes. That is a situation where individual "best interests" obligations to each class would conflict.

[124] Second, the paradigm of this situation in trust law is to be found in the differing effects of an investment decision of a trustee as between the interests of beneficiaries who take in succession. An interest enjoyed first in time is advantaged by an investment decision that produces the highest income for distribution. An interest that is enjoyed subsequent in time is advantaged by the preservation and maximisation of capital (including by retaining and transferring income to capital) for future distribution. This is a subject of considerable complexity. Historically, it has produced restrictions as to permissible lists or species of investment. Many of the restrictive rules have been relaxed nowadays. But there remains a duty of the trustee in making decisions as between the conflicting interests, usually expressed as a duty to act "fairly" as between the conflicting interests, or "impartially".[55]

[125] It is worth noting that a duty of "impartiality" may be a difficult concept to apply as between conflicting interests. So in *Edge & Ors v Pensions Ombudsman & Anor*,[56] the court said:

> "… dealing with the exercise of a discretionary power to choose which beneficiaries, or which classes of beneficiaries, should be the recipients of trust benefits. In relation to a discretionary power of that character it is, in my opinion, meaningless to speak of a duty on the trustees to act impartially. Trustees, when exercising a discretionary power to choose, must of course not take into account irrelevant, irrational or improper factors. But, provided they avoid doing so, they are entitled to choose and to prefer some beneficiaries over others."[57]

[126] The result of this analysis of the meaning and context of the duty to act in the members' best interests, in my view, is that none of the parties' respective positions is entirely borne out. It would be an error, in my view, to construe the duty to act in members' best interests as requiring an officer of a responsible entity necessarily to prefer the members' interests to the interests of the members of another scheme or beneficiaries of another trust, where they conflict. Equally, in my view, it would be an error to construe the duty to act in members' best interests as never applying if there is such a conflict.

[127] Before going further, it will be necessary to consider the facts of this case more closely.

Duty of care and diligence to members

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55 Heydon and Leeming, *Jacobs' Law of Trusts in Australia,* 8 ed, [1711].

56 [1998] Ch 512.

57 [1998] Ch 512, 533.

[128] Before the amendments made in 1998[58] and 1999,[59] the relevant statutory duties of a director as an officer under the *Corporations Law*[60] were in a form that corresponded to the earlier *Companies Code*[61] of this and other jurisdictions that, in turn, largely corresponded to the form of the duties contained in the *Uniform Companies Acts* of the early 1960s[62] that contained a statement of a director's duty of honesty and duty of reasonable care and diligence.

[129] Immediately before the 1999 amendments, the *Corporations Law* provided that "[a]n officer of a corporation shall at all times exercise a reasonable degree of care and diligence in the exercise of his or her powers and the discharge of his or her duties".[63] The *Companies Code* before that was in virtually the same terms.[64] The *Uniform Companies Act* section before the *Companies Code* provided that "a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office".[65]

[130] The history of the legislative developments and the prior non-statutory law as to a director's duty of care and skill were carefully traced in 2016 by Edelman J in *Australian Securities and Investments Commission v Cassimatis (No 8)*.[66] I accept and rely on that analysis.

[131] The parties made detailed submissions, with many references to cases, as to the principles according to which the duty of care and diligence to members operates. But the starting point in the present case is the text and context of s 601FD(1)(b) and the decisions upon it that are binding authority.

[132] According to the text of s 601FD(1)(b), the duty is one of "care and diligence", an expression not defined elsewhere in the CA but which has a long statutory history. The duty is owed by an officer of a responsible entity of a registered scheme. As such, it is informed by the powers and the duties of the responsible entity under Chapter 5C of the CA, the constitution of the registered scheme and the general law, including that the responsible entity is to operate the scheme[67] with the powers conferred by statute[68] and as the trustee of the scheme property under s 601FC(2). Also, as context, the responsible

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58 *Managed Investments Act* 1998 (Cth).

59 *Corporate Law Economic Reform Program Act* 1999 (Cth), Schedule 1.

60 *Corporations Law*¸ s 232(2) and (4).

61 *Companies (Queensland) Code*, s 229(2) and (4).

62 *Companies Act* 1961 (Qld), s 124(1).

63 *Corporations Law*, s 232(4).

64 For example, *Companies (Queensland) Code*, s 229(2).

65 For example, *Companies Act* 1961 (Qld), s 124(1).

66 (2016) 336 ALR 209, 288-295 [413]-[445].

67 *Corporations Act* 2001 (Cth), s 601FB(1).

68 *Corporations Act* 2001 (Cth), s 601FB(2).

entity owes a corresponding duty in exercising its powers and carrying out its duties provided for under s 601FC(1)(b).

[133] Those matters inform the subject of the duty that the officer must exercise with the required degree of care and diligence. That degree is measured by reference to the "degree" that a "reasonable person" would exercise. The reasonable person's hypothetical conduct is measured by reference to an express condition, namely as if the reasonable person were "in the officer's position". This was described by the High Court in *Lewski* as "the degree of care that a reasonable person would exercise tailored to the circumstances of the… director."[69]

[134] The terms of s 180(1) of the CA are not identical to, but correspond to, the considerations expressly raised by the terms of s 601FD(1)(b) and may be viewed as context for the construction of s 601FD(1)(b), keeping in mind the differences. An important difference is that a corporation is not the trustee of its property and the directors of a corporation are not responsible for managing the corporation's affairs as a trustee, unless in circumstances where the corporation is a trustee of a trust. With these differences in mind, however, some assistance may be obtained from the High Court's consideration of s 180(1) in *Shafron v Australian Securities and Investments Commission*[70] as follows:

> "The degree of care and diligence that is required by s 180(1) is fixed as an objective standard identified by reference to two relevant elements – the element identified in para (a): "the corporation's circumstances", and the element identified in para (b): the office *and* the responsibilities within the corporation that the officer in question occupied and had. No doubt, those responsibilities include any responsibility that is imposed on the officer by the applicable corporations legislation. But the responsibilities referred to in s 180(1) are not confined to statutory responsibilities; they include *whatever* responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer."[71]

[135] The parties relied on a number of cases decided under s 601FD(1)(b)[72] and a number of cases decided under s 180(1)[73] or its predecessor[74] as relevant to the requirements of the

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69 (2018) 362 ALR 286, 303 [68].

70 (2012) 247 CLR 465.

71 (2012) 247 CLR 465, 476.

72 *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525, [187]; *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185, 228-231 [199]-][210]; *Allco Funds Management Ltd (receivers and managers appointed) (in liq) v Trust Company (RE Services) Limited* [2014] NSWSC 1251, [189]; *Australian Securities and Investments Commission* v *Australian Property Custodian Holdings Ltd (receivers and managers appointed) (in liq)(controllers appointed) (No 3)* [2013] FCA 1342, [532], [535]-[537]; *Re Idylic Solutions Pty Ltd* [2012] NSWSC 1276, [2456] and [2474].

73 *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, [533]; *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, [170], [191];

duty of care and diligence to members under s 601FD(1)(c). Some of those cases concerned whether and the extent to which an officer may rely upon the advice of others in making the impugned decision.[75] It is unnecessary to set out slabs from the cases referred to before turning more closely to the questions raised by the facts in the present case.

Causation under s 1317H

[136] The plaintiff alleges that the damage that resulted from the defendants' contraventions of the duty to act in members' best interests or the duty of care and diligence to members was that the FMIF did not receive the amount that was received by LMIM as trustee for and credited to the MPF. That is to say, the damage was the amount of the settlement proceeds that PTAL as custodian for the FMIF did not receive. The plaintiff did not contend at this point that that amount formed part of the plaintiff's scheme property before it was received by LMIM as trustee of the MPF. The issue between the parties is whether that damage resulted from the alleged breaches of duty, so as to entitle the plaintiff to an order for compensation under s 1317H of the CA.

[137] A number of aspects of s 1317H have been said to be "curious".[76] Of present relevance is that the section confers a power to compensate a "scheme", which is not a legal entity. However, that has been construed to mean that a court may order the contravener or a person involved in the contravention to pay the amount of the compensation to the responsible entity of the scheme who holds it as scheme property. Under the orders made for the winding up of the FMIF, however, the relevant person is Mr Whyte as receiver if the property of the FMIF.

[138] It is necessary to consider what satisfies the requirement within s 1317H(1)(b) that "the damage resulted from the contravention". It is appropriate to examine the statutory origins of s 1317H.

[139] Prior to 1992, s 232(8) of the *Corporations Law* provided that a corporation could recover "loss or damage [suffered] as a result of [a] contravention" of that section. That section contained the duties of an officer to act honestly and to exercise a reasonable degree of care and diligence in the exercise of his or her powers and the discharge of his or her duties.

[140] In 1992, s 232(8) was replaced by ss 1317HA and 1317HD of the *Corporations Law* that were introduced as part of the introduction of a civil penalty regime for contravention of,

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Australian Securities and Investments Commission v Adler (2002) 168 FLR 253, [307], [372], [434]-[435].

74 *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, [7192]; *Australian Securities and Investments Commission v Vines* (2005) 55 ACSR 617, [731], [1070]-[1077]; *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 452; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, [99], [101], [103].

75 *Avestra* at [187]; *Healey* at [167]; *Maxwell* at [101] and [113]; *Vines* at [731].

76 *Grimaldi v Chameleon Mining NL (No. 2)* (2012) 200 FCR 296, [625].

inter alia, a director's duties of honesty and care and diligence.[77] They provided for an order for recovery of compensation when "the corporation has suffered loss or damage as a result of [an] act or omission" contravening a civil penalty provision in "an amount equal to the amount of that loss or damage".

[141] The *Managed Investments Act* 1998 (Cth) amended s 1317HA, but it was the *Corporate Law Economic Reform Program Act* 1999 (Cth), which introduced s 1317H, in the same terms substantially as the current provision.

[142] In *Adler v Australian Investments and Securities Commission*,[78] the court said of s 1317H:

> "I do not think it necessary to further the debate over causation for the purposes of determining equitable compensation. I am respectfully unable to agree that analogy with equitable claims against fiduciaries influences the meaning and application of 'resulted from' in s 1317H. As Spigelman CJ observed in *O'Halloran v RT Thomas & Family Pty Ltd* (at 272) -
>
> > '… the remedy of equitable compensation differs from damages at common law. It also differs from damages under a statutory regime where the court is concerned with, and confined by, the construction of the statute. Causation for purposes of s 212 of the *Corporations Law* will not involve the same analysis of causation as is required for breach of a fiduciary obligation.'
>
> For s 1317H, the analogy with equitable claims against fiduciaries is all the more difficult because some civil penalty provisions in the Act do not involve contravention by a person standing in a fiduciary capacity.
>
> **In my opinion, the words "resulted from" in s 1317H are words by which, in their natural meaning, only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation.** …"[79] (emphasis added)

[143] In *Agricultural Land Management v Jackson (No. 2)*,[80] Edelman J said that *Adler* applied a "but for" approach as a negative criterion. The same "but for" approach has been applied as a negative criterion by the plurality of the High Court in relation to compensation of breach of statutory proscriptions of misleading or deceptive conduct. Further, in *Agricultural Land Management* the court explained that an analogy with equitable compensation would reach the same conclusion, because reparative compensation for a breach of fiduciary duty of the kinds raised in the present case would involve a negative "but for" criterion.[81]

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77 *Corporate Law Reform Act* 1992 (Cth), s 17.

78 (2003) 179 FLR 1.

79 *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 156 [707]-[709].

80 (2014) 48 WAR 1.

81 (2014) 48 WAR 1, 85-86 [451]-[452].

[144] A number of the parties urged that the question of causation should be resolved as a "practical matter" of "common sense", relying on *March v E & MH Stramare Pty Ltd*.[82] To decide this case, it is not necessary to analyse the role of "common sense" in answering the statutory question under s 1317H whether the alleged damage resulted from the alleged contraventions. However, a few observations may be made.

[145] First, *March v E & MH Stramare* was a claim for damages for negligence at common law. It was in that context that the approach to a question of causation was said to be one of "common sense", relying on earlier cases.[83] It should not be forgotten that in a common law action for damages for the tort of negligence, it was the jury's function to find whether the alleged tort caused the alleged loss. Perhaps it is not surprising in that context that a direction to the jury as to the legal test to find whether the factual allegation was proved should engage or invoke a test of "common sense". However, times have changed. The question as to causation in a claim for damages for financial loss alleged to be suffered by a defendant's negligence is answered nowadays in this jurisdiction under the *Civil Liability Act* 2003 (Qld). The statutory questions under that Act require a court to consider separately, whether the breach of duty was a necessary condition of the concurrence of harm (factual causation) and whether it is appropriate for the scope of liability of the person in breach to extend to the harm so caused (scope of liability).[84] The scope of liability element is the legal norm to be applied. The factual causation element requires a court to decide whether the breach was a necessary condition of the occurrence of the harm on the balance of probabilities as a matter of fact only. The statutory provision assigns no role to "common sense".

[146] The statutory provision in question in the present case is s 1317H(1) of the CA. The role of "common sense" and the "but for" approach to causation in that context were dealt with in two parts of *Agricultural Land Management*[85] as follows. First, as to the non-statutory law:

> "In difficult cases the 'sense' of an answer is rarely common amongst judges. In the leading exposition of the common sense test in *March v E & MH Stramare Pty Ltd*, the 'sense' of the result was not 'common' between the five judges of the High Court of Australia (who allowed the appeal) and the majority of the Full Court of the Supreme Court of South Australia. This is one of the reasons why 'common sense' has been criticised as a test for causation. It is also why a number of High Court judgments have doubted whether 'common sense' can be a useful legal norm. It is important that 'common sense' be contextualised and supported by reasoned explanation so that it does not become a shroud which obscures teleological reasoning.
>
> Within a 'common sense' approach it has been held that at common law the 'but for' test has an important role to play as a negative criterion. In other

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82 (1991) 171 CLR 506.

83 (1991) 171 CLR 506, 515, 523, 525 and 531.

84 *Civil Liability Act* 2003 (Qld), s11(1).

85 (2014) 48 WAR 1.

> words, it is generally necessary, but not always sufficient, for the plaintiff to prove that the plaintiff's loss would not have been suffered but for the defendant's breach of duty."[86]

[147] I entirely agree with that passage. I observe, as well, that the lack of utility of "common sense" as a legal norm has been identified in the context of the recovery of alleged loss of damage suffered by a contravention of s 52 of the *Trade Practices Act* 1994 (Cth)[87] which is a useful comparator for consideration of the proper construction of s 1317H(1).

[148] At the risk of some repetition for clarity, the second relevant part of *Agricultural Land Management* specifically dealt with the application of a "but for" approach under s 1317H:

> "In *Adler*, Giles JA applied a "but for" approach as a negative criterion. The same "but for" approach has been applied as a negative criterion by the plurality of the High Court of Australia in relation to compensation for breach of statutory proscriptions against misleading or deceptive conduct. Their Honours referred to "the essential question of causation" and spoke of "determining what action or inaction would have occurred if the true position had been known".
>
> The application of an analogy with equitable compensation reaches the same conclusion; as explained above, reparative compensation for a breach of fiduciary duty of this type should involve a negative "but for" criterion. Although Giles JA warned against the application of equitable analogies to s 1317H, it is hard to see why analogies cannot be drawn with the approach to causation taken to breaches of near-identical duties in equity. As I have explained, the meaning of causation is intimately connected with the character of the duty breached. Section 1317H provides remedies for provisions, many of which concern breaches of duties owed by directors. Those duties were historically recognised only in the Court of Chancery. Perhaps for this reason, Lee AJA observed in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* that it 'may be thought that the words 'as a result of' or 'resulted from' imported the test applied in equity for linking a breach of duty in equity to loss or damage suffered."[88] (footnotes omitted)

[149] It is necessary to identify with some precision and to analyse with some care the plaintiff's case that its alleged loss resulted from the alleged contraventions.

[150] The hypothetical or counter-factual scenarios alleged by the plaintiff in the statement of claim are as follows:

> "45AA Had the first to sixth defendants complied with their duties…

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86 (2014) 48 WAR 1, 74-75 [393]-[394].

87 *Travel Compensation Fund v Tambree (t/as R Tambree & Associates)* (2005) 224 CLR 627, [45].

88 (2014) 48 WAR 1, [451]-[452].

(a) LMIM as RE of the FMIF would have entered into the Deed of Release, the Deed of Release and settlement and the Gujurat Contract on the terms provided therein;

(b) LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release on the terms provided therein;

(c) The Deed Poll would not have been entered into;

(d) The first to sixth defendants would not have split the proceeds of settlement at the proceedings;

(e) The settlement payment would not have been made to LMIM as trustee of the MPF;

(f) All proceeds of the settlement of the proceedings would have been paid to LMIM as RE of the FMIF.

45AB In the alternative… , in respect of the breach of [the duty of care and diligence to members] had the first to sixth defendants complied with their duty…"

(a) LMIM as RE of the FMIF would have entered into the Deed of Release, the deed and release and settlement of the Gujurat Contract on the terms provided therein;

(b) LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release on the terms provided therein;

(c) The Deed Poll would not have been entered into;

(d) The first to sixth defendants would have caused LMIM as trustee of the MPF to be reimbursed for the contribution it made to the funding of the proceedings together with interest at a commercial rate upon that amount;

(e) otherwise the proceeds of the settlement of the proceedings would have been paid to LMIM as RE of the FMIF."

[151] The plaintiff alleges and submits that had the defendants not contravened their duties the defendants would have caused LMIM to enter into the same settlement transaction that was entered into by the three contracts, but there would have been no division of the settlement proceeds so that all of them would have been received by PTAL as custodian for the FMIF. That is, the defendants would have caused LMIM to enter into the Deed of Release and the Deed of Settlement and Release (including payment by LMIM of $1.3 million to Coalfields) but not to decide to divide the settlement proceeds in any amount for the benefit of the MPF. The plaintiff submits the defendants would have done so because that was the only realistic opportunity to recover money in relation to the FMIF-Bellpac loan made by PTAL as custodian of the FMIF. The plaintiff submits the defendants had the

power (presumably meaning through LMIM as trustee of the MPF) to grant releases in respect of the MPF-Bellpac loan made by LMIM as trustee of the MPF.[89]

[152] In support of this conclusion, the plaintiff submits that had the defendants complied with their duties, they would have acted in a way which promoted and advanced the position of the FMIF over all other persons, including LMIM as trustee of the MPF. The plaintiff submits that had the defendants so acted, they would have faced the prospect of a claim by a new trustee or members of the MPF for breach of trust, but that cl 18.1(b)(ii) of the Constitution of the MPF would have excluded that liability. Under that clause, LMIM was not liable for any loss or damage arising out of a matter because in respect of the matter it acted "as required by law". Lastly, the plaintiff submits that its case does not rely on there being a breach of trust by LMIM as trustee of the MPF, but concerns the conduct of the defendants as directors and their duties to members of the FMIF.

[153] It will be observed that the plaintiff's case on causation under s 1317H is primarily based on a positive duty of the defendants to act in the postulated hypothetical or counterfactual way, including that they were required to act to expose LMIM as trustee of the MPF to a claim for breach of trust by deliberately giving full priority to the interests of the members of the FMIF.

[154] In the language of causation, the question is whether "but for" the alleged breaches of duty, the same settlement transaction would have been obtained, including that LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release and paid Coalfields $1.3 million.

[155] Two alternative scenarios are alleged as to the disposition of the settlement proceeds. First, all of the settlement proceeds would have been paid to PTAL as custodian for LMIM as responsible entity of the FMIF and none to LMIM as trustee of the MPF. That outcome is alleged as the counterfactual had either the duty to act in members' best interests or the duty of care and diligence to members been complied with. Second, alternatively, but only in respect of the alleged breach of the duty of care and diligence to members, PTAL as custodian of the FMIF would have received the settlement proceeds except for an amount to reimburse LMIM as trustee of the MPF for the contributions it made to funding the Gujurat proceedings together with interest at a commercial rate. Each of those scenarios must be considered in turn.

[156] On either scenario, there is no direct evidence that the defendants, or any of them, as directors of LMIM in its capacity as trustee of the MPF would have agreed to resolve to enter into the Deed of Release and the Deed of Settlement and Release or to pay Coalfields $1.3 million if a lesser amount of the settlement proceeds were to be received by LMIM and credited to the account of the MPF.

Causation under the first scenario - all the settlement proceeds

[157] Accordingly, the question of causation in fact resolves, first, to whether it should be inferred that the defendants as directors of the LMIM as trustee of the MPF would have

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[89] I observe that LMIM's rights and claims made against Gujurat were not for this MPF-Bellpac loan.

caused LMIM to enter into the Deed of Release and Deed of Settlement and Release if all of the settlement proceeds were to be paid to PTAL as custodian for LMIM as responsible entity for the FMIF. The plaintiff does not shrink from the submission that the defendants would have done so cognisant of the fact that to do so would or might have been a breach of LMIM's duty as trustee of the MPF.

[158] The plaintiff's first scenario involves acceptance by LMIM as trustee of the MPF of nothing in return for its releases under the Deed of Release and Deed of Settlement and Release and agreement to pay Coalfields $1.3 million, which makes the factual conclusion that LMIM would have entered into the transaction as trustee of the MPF on that basis *prima facie* unlikely.

[159] But there is more to it than that. The plaintiff's first scenario assumes two further facts. First, that there was no understanding of the type alleged by the defendants that in funding the proceedings, LMIM as trustee of the MPF was to receive a share of the proceeds. Second, that LMIM as trustee of the MPF had been funding the proceedings as second mortgagee under the mortgages. Let those assumptions be accepted for the purpose of analysis.

[160] From those assumed facts, it follows that in negotiating for and considering the proposed terms of the settlement, LMIM as trustee of the MPF, by the defendants, would have been aware that if the settlement proceeded, it would receive nothing. Second, they would have been aware that in funding the proceedings in the past, LMIM as trustee of the MPF had thrown good money after bad. Third, they would have been aware that in continuing to fund the solicitors and other expenses of progressing the settlement negotiations to a conclusion, on the terms of the Deed of Release, the Deed of Settlement and Release and the Gujurat contract, LMIM as trustee of the MPF was obtaining no benefit and was acting solely to assist LMIM as responsible entity of the FMIF. Fourth, they would have been aware that LMIM as trustee of the MPF had a duty to act in the best interests of the MPF and that it would be a breach of trust to use or to have used the trust funds of the MPF solely to benefit LMIM as responsible entity of the FMIF. Fifth, the defendants would have been aware that without LMIM as trustee of the MPF's agreement to the Deed of Release and Deed of Settlement and Release, including payment by LMIM to Coalfields of $1.3 million, the settlement overall would not proceed.

[161] It will be observed that the position of the defendants, as directors of LMIM as trustee of the MPF, in that analysis, concerns the relevant legal obligations and possible breach of trust of LMIM as trustee of the MPF, not those of the defendants individually. However, the defendants as directors undoubtedly owed both statutory duties and duties under the general law to LMIM as a company. As well, as individuals, they were exposed personally to the risk of liability for their involvement in any breach of trust by LMIM as trustee of the MPF, either as accessories for knowing assistance or for inducing the breach of trust.

[162] The solution posited by the plaintiff to those hypothetical facts operating contrary to the likelihood that LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release is the possible protection of LMIM as trustee under cl 18.1(b)(ii) of the Constitution of the MPF. Clause 18.1 provided as follows:

> "The following clauses apply to the extent permitted by law:

(a) The Manager is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:

(i) otherwise than in accordance with this Constitution and its duties; and

(ii) without a belief held in good faith that it was acting in accordance with its Constitution or its duties.

In any case the liability of the Manager in relation to the Scheme is limited to the Scheme Property, from which the Manager is entitled to be, and is in fact, indemnified.

(b) In particular, the Manager is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:

(i) it relied in good faith on the services of or information or advice from, or purporting to be from, any person appointed by the Manager;

(ii) it acted as required by Law; or

(iii) it relied in good faith upon any signature, marking or documents."

[163] There may be a difficulty with the construction of cl 18.1(b)(ii). Because cl 18.1(b) opens with the words "In particular", the provisions of that paragraph may be construed as operating only where the conditions of cl 18.1(a) are satisfied. By cl 18.1(a)(ii), cl 18.1(a) does not apply if LMIM acted without a belief held in good faith that it was acting in accordance with its duties (to the MPF). The facts of which the defendants would have been aware, as previously discussed, would make it difficult to satisfy that condition, particularly an awareness that, in effect, the funds of LMIM as trustee of the MPF were being wasted in progressing the settlement.

[164] However, that difficulty may be put to one side. Even if cl 18.1(b)(ii) is construed as operating independently, so that LMIM as trustee of the FMIF is not liable for any loss or damage arising out of a matter where in respect of that matter it acted as required by law, the question remains whether that relief from liability would have been engaged in the circumstances of the case. In my view, it would not. A trustee of a trust is not "required by law" to act in breach of trust because it is subject to an inconsistent duty, imposed by statute,[90] to act in the best interests of the members of a management investment scheme or to observe a duty of care and diligence to members of a managed investment scheme.[91]

[165] Once that conclusion is reached, the question remains whether LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release

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90 *Corporations Act* 2001 (Cth), s 601FC(1)(c).

91 *Corporations Act* 2001 (Cth), s 601FC(1)(b).

on the footing that all the settlement proceeds would go to PTAL as custodian for LMIM as responsible entity of the FMIF, as discussed above.

[166] In my view, there is no sufficient basis for finding, as a matter of inference and fact that the defendants, or a sufficient number of them, would have agreed to a resolution or decision as the board of directors of LMIM as trustee of the FMIF to do so, or that hypothetical directors acting reasonably, would have done so.

[167] The plaintiff did not allege that this is a case where the damage suffered as a result of the contravention constituted by the breaches of duty alleged was the loss of a valuable commercial opportunity[92] for PTAL as custodian for the FMIF to receive all of the settlement proceeds. Accordingly, it is unnecessary to consider any question of that kind.

Causation under the second scenario - all the settlement proceeds except the amount funded from the MPF with interest

[168] The second scenario alleged in paragraph 45AB of the statement of claim posits that the plaintiff as responsible entity for the FMIF suffered damage measured by the difference between the amount received by and credited to LMIM as trustee of the MPF and the amount that LMIM as trustee of the MPF contributed to fund the proceedings together with interest at a commercial rate. This damage is alleged to have resulted from the contravention of the defendants' breaches of the duty of care and diligence to members.

[169] Again, there was no direct evidence of what the defendants would have done had they not decided as directors of LMIM as responsible entity of the FMIF to credit the higher amount of 35 percent of the settlement proceeds to LMIM as trustee of the MPF. Accordingly, again, the question is whether it should be inferred that LMIM as trustee of the MPF would have entered into the Deed of Release and Deed of Settlement and Release on the basis of the lower amount being received by and credited to LMIM as trustee of the MPF.

[170] As with the first scenario, it is necessary to identify the facts on which the hypothetical decision would have turned with some precision. It is not entirely clear whether the plaintiff, on the second scenario, alleges that there was no understanding of the type alleged by the directors. However, let it be assumed that it does and that there was no such understanding. Second, let it also be assumed that the defendants were aware that LMIM as trustee of the MPF had been funding the proceedings on the footing that it was doing so as second mortgagee. Third, let it be assumed that the defendants were aware that the terms of the proposed settlement would not result in LMIM as trustee of the MPF receiving any amount as second mortgagee. Fourth, let it be assumed that the defendants were aware that it would be a breach of the duty of care and diligence to members of LMIM as responsible entity of the FMIF to agree to pay an amount calculated by reference to the expected return of a litigation funder who agrees to provide funding in advance of the prosecution of litigation of the kind involved in the proceedings.

[171] If those are the relevant facts, in my view, it may be a reasonable inference that the defendants as directors of LMIM as trustee of the MPF would have agreed to enter into the

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92 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

Deed of Release and Deed of Settlement and Release in order to permit the settlement to proceed on the second scenario. Whether or not to do so would be a commercial decision to be made by LMIM as trustee of the MPF. In making such a decision as trustee, LMIM might have sought judicial advice,[93] but courts are reluctant sometimes to give such advice upon a commercial decision.

[172] The further prosecution of the proceedings, as the alternative to a settlement under which LMIM recovered the MPF's funds expended in prosecuting the proceedings to date, together with interest, would have exposed LMIM as trustee of the MPF to further risks. First, there may have been a risk that LMIM as trustee of the MPF would not be able to continue to fund the proceedings to judgment. Second, there were the risks that LMIM as trustee of the MPF may not succeed as plaintiff or defendant in the Gujurat proceedings and that, in any event, it may not succeed against a solvent party. Third, there was the risk that on the realisation of the mortgaged property, LMIM as trustee of the MPF and subsequent mortgagee and chargee to PTAL as custodian for the FMIF would receive none of the proceeds.

[173] None of these questions was pursued, as a matter of fact, at the trial, in order to better inform the answer to the factual question whether the alleged damage resulted from the directors' alleged breaches of the duty of care and diligence to members, because the defendants but for their contravention of the duty of care and diligence, would have agreed to a division of the settlement proceeds of receipt by the MPF of the amount of the funding provided for the Gujurat proceedings with interest. The result is that the court is not well informed as to the degree of the likelihood or possibility that LMIM as trustee of the MPF would have agreed to enter into the Deed of Release and Deed of Settlement and Release in exchange for a division of the settlement proceeds that credited it with the amounts paid to fund the proceeding with interest.

[174] In particular, the parties did not address whether LMIM as trustee of the MPF would have agreed to pay $1.3 million to Coalfields in return for that division of the settlement proceeds. The plaintiff submits that the relevant amount of the costs that were funded by the MPF should be calculated by subtracting $414,585.71 from the amount alleged and admitted in the pleadings of $1,950,421.69. The plaintiff did not address why the defendants as directors would have agreed to enter into the three contracts and to pay Coalfields $1.3 million in return for a counter-payment from the settlement proceeds of either $1,950,421.69 or $1,535,835.98 with interest.

[175] In denying paragraph 45AB, the defendants raise a number of grounds, not all of a piece.

[176] The first defendant alleges that settlement obtained under the Deed of Release, Deed of Settlement and Release and Gujurat contract was the compromise of a long running dispute, LMIM and its legal advisers considered that LMIM as trustee for the MPF had uncertain prospects of success in the proceedings, Gujurat was considered by LMIM and its legal advisers to be a difficult litigant and negotiator, the defendants formed the view that the settlement was the best settlement that could be achieved in relation to the proceedings, that expending further costs on litigating the proceedings was of no

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93 *Trusts Act* 1973 (Qld), s 96.

commercial value to LMIM as trustee for the MPF and that it is to be inferred that LMIM would not have taken any steps that created a risk that the settlement would not proceed. As well, the first defendant alleges that Gujurat would not have settled on terms which left claims made on behalf of LMIM as trustee for the MPF unresolved.

[177] These allegations or grounds of defence made by the first defendant were not joined in by the other defendants. Their position, summarised, was that absent the agreement to divide the settlement proceeds in the ratio of 65:35, the proceedings would not have been settled.

Funding proceedings against Gujurat as second mortgagee

[178] As mentioned, the plaintiff alleges that LMIM as trustee of the MPF funded the proceedings against Gujurat as second mortgagee. Whether that is the correct factual characterisation depends on a number of underlying circumstances and facts.

[179] In April 2009, when the proceedings by and against Gujurat started, PTAL as custodian for the FMIF and lender to Bellpac was first mortgagee of the Bellpac land under a registered real property mortgage and first chargee of Bellpac's assets and undertaking under an equitable fixed and floating charge. LMIM as trustee of the MPF and lender to Bellpac was second mortgagee of the Bellpac land under a real property mortgage and second chargee of Bellpac's assets and undertaking under an equitable fixed and floating charge. In addition to their rights otherwise, *inter se*, a deed of priority regulated the rights of PTAL as first mortgagee and first chargee on the one hand and LMIM as second mortgagee and second chargee on the other.

[180] Bellpac was in default under both the first mortgage and charge and the second mortgage and charge. PTAL as custodian for LMIM as responsible entity of the FMIF and LMIM as trustee of the MPF had issued notices of exercise of power of sale under the real property mortgages.

[181] What were LMIM's rights as trustee of the MPF in relation to the secured property? As second mortgagee of the Bellpac land, LMIM was *prima facie* entitled to sell the Bellpac land. However, it could sell only subject to the first mortgage. Theoretically, LMIM as trustee of the MPF could have appointed a receiver to Bellpac, but the receivers and managers already appointed by PTAL as custodian for LMIM as responsible entity of the FMIF would take possession in priority.

[182] An infirmity in the value of LMIM's security rights as second mortgagee and second chargee was that Gujurat held a coal mining lease over the Bellpac land, or part of it, that entitled Gujurat to possession of the Bellpac land until surrender or expiry of the lease.

[183] However, LMIM as trustee of the MPF had no clear interest in Bellpac's claim and no interest in PTAL's claim. Whilst *prima facie* it was an expense "reasonably incurred"[94] for LMIM as trustee of the MPF to incur the costs of its claims in the Gujurat proceedings and to defend the cross-claims made against it, so as to increase or preserve its securities as

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94 *Trusts Act* 1973 (Qld), s 72.

second mortgagee and second chargee, it was not, *per se*, an expense reasonably incurred for it to incur the costs of PTAL as custodian for the FMIF to bring or defend similar claims or the costs of Bellpac, by its receivers and managers appointed by PTAL, where LMIM as trustee of the MPF would receive no particular benefit in doing so.

[184] Further, as previously discussed, neither LMIM's claims nor its defences in the Gujurat proceedings were those usually brought by or against a second mortgagee or second chargee. No claim was made by LMIM against the mortgagor, Bellpac, and no claim was brought by Bellpac against LMIM.

[185] It does not necessarily follow, therefore, that in funding almost the whole of the costs of the Gujurat proceedings, LMIM as trustee for the MPF was doing so as second mortgagee or second chargee.

[186] There is no evidence that the defendants as the board of directors of LMIM considered whether it was proper for LMIM as trustee of the MPF and second mortgagee or chargee to fund the costs of Bellpac by its receivers and managers or of PTAL as custodian for the FMIF.

[187] Before going further, it is appropriate to identify and consider the plaintiff's claim that the defendants contravened the duty of care and diligence to members more closely.

Alleged breaches of the duty of care and diligence

[188] The plaintiff made an unwieldy number of allegations of contravention of the duty of care and diligence to members by the defendants in the statement of claim and did not ultimately make submissions in support of all of them, but did not abandon or apply to delete any of them either, except for the allegation that LMIM as trustee for the MPF was not a necessary party for the settlement transaction under the three contracts to proceed.

[189] Accordingly, it is appropriate to group the many allegations for the purposes of identification and analysis. This was done by the third and fourth defendants' submissions and the other defendants conformed to that framework.

[190] Summarising, the plaintiff alleges that the defendants:

(a) failed to adequately read or consider the content of the Allens advice;

(b) failed to have proper regard or give adequate consideration to the fact that:

(i) PTAL sold the property to Gujurat as a mortgagee exercising power of sale;

(ii) the FMIF had priority; and

(iii) the MPF could not have prevented the sale of the property to Gujurat under the Gujurat Contract by refusing to provide a release of the MPF Mortgage over the property;

(c) failed to have proper regard or to give adequate consideration to whether there was no necessity for the FMIF to reach agreement with the MPF about sharing the proceeds because:

(i) LMIM as trustee for the MPF was not a party to the Deed of Release or the Gujurat contract;

(ii) there was no binding agreement; and

(iii) the agreement of LMIM as trustee of the MPF was not required in order for PTAL as custodian for the FMIF to perform the obligations under the Deed of Release and the Gujurat Contract;

(d) failed to have proper regard or give adequate consideration to the fact that:

(i) LMIM as trustee of the MPF was a subsequent mortgagee and a subsequent charge holder over the assets of Bellpac;

(ii) LMIM as trustee of the MPF had originally funded the Proceedings as registered mortgagee with second priority under the Deed of Priority and was drawing down the funding against the MPF Bellpac loan; and

(iii) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage;

(iv) PTAL was, as at 22 June 2011, owed $52M by Bellpac.

(e) failed to consider whether the MPF could be treated as if it was an arm's length litigation funder when it was a second registered mortgagee with second priority;

(f) failed to consider whether it was appropriate to split the settlement proceeds in the ratio of 65:35;

(g) failed to obtain independent advice as to whether in the circumstances:

(i) LMIM as trustee for the MPF could be treated as if it were an arm's length litigation funder;

(ii) it was reasonable for LMIM as trustee for the MPF to be paid in accordance with the division of the proceeds – an amount above the sum it had paid, or any amount at all;

(iii) it was in the interests of members of the FMIF to agree that LMIM as trustee of the MPF would be paid as per the ratio of 65:35 (an amount above what it had paid) or any amount at all;

(h) took into account the Allens advice and the WMS report which, as they ought to have known, did not constitute the advice identified above;

(i) in the circumstances, failed to have proper regard or give adequate consideration to the different interests of the members of the FMIF and the beneficiaries of the MPF;

(j) acting reasonably, ought to have concluded the settlement of the Deed of Release and Gujurat contract could occur without the agreement of the MPF;

(k) ought to have concluded that they need not reach an agreement with LMIM as trustee for the MPF about the sharing of proceeds for the settlement to occur;

(l) the directors ought not to have concluded the proceeds split was fair to the FMIF;

(m) ought not to have concluded the proceeds split was in the best interests of the FMIF's members;

(n) ought not to have concluded the proceeds split was reasonable;

(o) ought not to have concluded that LMIM as trustee of the MPF was in an analogous position to a litigation funder and that the settlement proposals would be reasonable on an arms-length basis;

(p) ought not to have concluded the WMS report or the Allens advice justified the payment of any part of the settlement to the MPF;

(q) ought to have determined that LMIM as trustee of the MPF had no entitlement to be paid the settlement, or no entitlement beyond reimbursement;

(r) ought to have determined that the settlement payment was not in the interests of the members of the FMIF;

(s) ought to have determined that the settlement payment would cause detriment, in the form of depletion of assets, to the FMIF (either if the payment was made at all or if the payment was beyond reimbursement); and

(t) ought to have decided not to split the proceeds at all and to pay all the proceeds to FMIF."

[191] Even summarised, the unnecessarily repetitive pleading of the approximately 20 categories of alleged contraventions is apparent.

[192] One allegation is that the defendants failed to adequately read or consider the content of the Allens advice. In substance, the plaintiff submits that because the defendants did not appreciate that the Allens advice, properly read, was inadequate to justify division of the settlement proceeds the defendants must not have read it or adequately read it. I reject that allegation even though some of the defendants could not say in evidence whether they had read the Allens advice. Having regard to the time that passed between March 2011 and when they gave evidence that is hardly surprising.

[193] Another allegation is that the defendants did not obtain their own independent advice as directors, separate from the Allens advice to LMIM. I reject that allegation too. Nothing in the circumstances prevented LMIM from obtaining external advice from Allens (or WMS) as independent advisors or required that the defendants individually or collectively must obtain separate advice.

[194] A third allegation is that the defendants ought not to have concluded that the Allens advice (or the WMS report) justified the payment of any part of the settlement to the MPF.

[195] The WMS Report was obtained on 7 March 2011. WMS, a firm of chartered accountants, were asked for their opinion as to a fair and reasonable split of the likely litigation proceeds to be received by FMIF and MPF. WMS concluded:

> "In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm's length transactions."

[196] The Allens advice was obtained on 28 March 2011. The question asked of Allens was stated in the advice as follows:

> "You have asked us whether it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, given that the RE is in a position of conflict (in its capacity as responsible entity for FMIF and in its capacity as trustee for MPF)."

[197] The answer given by Allens was:

> "We consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict, subject to the following matters…"

[198] The qualifications to the Allens advice were as follows:

> "(a) We assume that in its capacity as responsible entity of the FMIF, the RE [LMIM] has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of FMIF members (see paragraphs 25, 27, 53 and 56 below).
>
> (b) We assume that in its capacity as trustee of the MPF, the RE has considered all feasible options for the recovery of the loan advanced by MPF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of MPF members (see paragraphs 35 and 37 below.)
>
> (c) We assume that the decision by the RE in respect of the split will not be made in order to benefit the RE (or any of its associates) personally, for example, by ensuring that the effect of splitting the proceeds in a certain way results in the RE receiving more fees or some other benefit that would not have occurred had the split been done in a different way (see paragraphs 28 and 38 below).
>
> (d) The directors must be satisfied that the proposed split of settlement proceeds and associated releases of securities by the RE would be reasonable in the circumstances if the RE as responsible entity of the FMIF and the RE as trustee of the MPF were dealing at arm's length. The WMS Chartered Accountants report makes it clear that "there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF". Consequently, the conclusion in the WMS Chartered Accountants report will be an important factor in the RE's decision in respect of the split of the litigation proceeds. However, the RE should not rely solely on the report. The directors of the RE must make "their own independent assessment of the relevant matters, and the advice from WMS Chartered Accountants does not replace "careful judgement by the

directors". They should also consider the relevant factors referred to by ASIC In CP 142. See paragraphs 46 to 50 below.

(e) The RE should ensure that it complies with any procedures in the FMIF compliance plan (or with any other procedures it has in place) in respect of conflicts of interest (see paragraphs 54 and 57 below).

(f) We assume that the RE has not made any representations to the members in the FMIF or the MPF which are inconsistent with the proposal to split the litigation proceeds in the manner outlined in the report of WMS Chartered Accountants.

(g) The directors of the RE must comply with their general law and statutory duties under the Corporations Act (see paragraphs 61 to 65 below). We are not aware of any reason why agreeing to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any issues in this regard (assuming the matters in paragraphs (a) to (f) above are confirmed)."

[199] The second defendant and sixth defendant, who were more closely involved in the Gujurat proceedings than the other defendants, did read and consider the WMS report and the Allens advice. The third and fourth defendants were less involved. The third defendant relied on those who were more involved, including Mr Monaghan. The fourth defendant regarded both WMS and Allens as well-known competent and independent firms. His memory is that his understanding was that the advices were favourable to the proposed division of the settlement proceeds. In my view, it should be found that the defendants as directors did exercise independent judgment in considering the Allens advice.

[200] Another set of allegations is that had the defendants adequately considered the Allens advice they would have concluded that it did not justify the proposed division of the settlement proceeds.

[201] The plaintiff particularises, and relies upon, three grounds or areas for the allegation that the defendants failed to consider the content of the Allens advice, *viz*:

(a) the alleged failure to identify the matters pleaded in paragraph 30H of the statement of claim;

(b) the absence of any reference in the Deed Poll to the Allens advice, LMIM's Conflicts Management Policy or ss 601FC and 601FD of the CA; and

(c) that the draft Deed Poll was circulated by Mr Monaghan and Ms Kingston to the defendants on or about 10 June 2011, ahead of its execution on 14 June 2011 (the implication being that the Deed Poll was only considered in a perfunctory way).

[202] As to the last of those grounds or areas, a number of the directors referred to a meeting at LMIM's boardroom on 14 June 2011, when Mr Monaghan went over the Gujurat proceedings, the proposed settlement and the terms of the Deed Poll. Again, not surprisingly given the interval of time that passed, not all of the defendants recalled the

meeting or its detail, but I find that the meeting occurred and that the defendants gave consideration at the meeting to whether they should enter into the Deed Poll on the terms of the proposed division of the settlement proceeds.

[203] As to the second ground or area, namely the alleged absence of references in the Deed Poll to the Allens advice, the Conflicts Management Policy or ss 601FC and 601FD, in my view, no failure to consider the Allens advice should be inferred from those circumstances. That the Allens advice is not referred to in the Deed Poll is no evidence, one way or the other, as to whether it was read or taken into account by the defendants. That none of the Conflicts Management Policy, s 601FC, or s 601FD is referred to in the Deed Poll is no evidence as to the efficacy of the Allens advice, one way or the other, or whether it was read and considered by the defendants.

[204] As to the third ground or area, namely the failure to identify the matters pleaded in paragraph 30H of the statement of claim, that paragraph makes no fewer than seven distinct complaints about the content of the Allens advice, that the plaintiff alleges the defendants failed to identify. The extent and nature of the pleaded complaints invokes the oft-cited consideration that a question of negligence must not be viewed through the convenient prism of hindsight.[95] In my view, the plaintiff has disregarded that consideration in the presentation of its case.

[205] The first complaint is that the Allens advice does not say how the division of the settlement proceeds is in the best interests of the members of the FMIF. It will be observed that the point is based on the "best interests" of the members of the FMIF. The question Allens were asked to consider was whether the proposed division was legally acceptable, given that LMIM was in a position of conflict. Whether the division was commercially reasonable was not specifically the subject of Allens advice, nor whether it was fair as between the conflicting interests of the members of the FMIF and the beneficiaries of the MPF. The qualifications set out in paragraph [198] above demonstrate that, as do other paragraphs of the Allens advice. I reject that the Allens advice was deficient because it did not further opine on the question of the best interests of the members of the FMIF.

[206] I would add that the evidence supports the conclusions that it was a reasonable view that continuation of the Gujurat proceedings was not a good option for PTAL as custodian for the FMIF and that compromise or settlement of the Gujurat proceedings would require settlement of LMIM's claims as trustee for the MPF as well as compromise or settlement of PTAL's and Bellpac's claims.

[207] The second complaint is that the Allens advice stated in paragraph [56] that LMIM would need to be satisfied that the terms of the settlement and the proposed split of litigation proceeds did not unfairly put the interests of the FMIF ahead of the MPF, which misconstrued the effect of ss 601FC(1)(c) and 601FD(1)(c) of the CA. However, in my view, paragraph [56] does not purport to construe or state the effect of those sections.

[208] The third complaint is that the Allens advice set out inconsistent conclusions but did not state how those inconsistencies were to be resolved. The thrust of the suggested

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95 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, 329 [34].

inconsistencies is that the interests of the members of the FMIF and the beneficiaries of the MPF were irreconcilable. It is true to say, first, that it was in the interests of each set of beneficiaries that the full amount of the loan made from their property to Bellpac was repaid and, second, that their interests were in conflict in relation to obtaining that repayment from the proposed settlement proceeds. But it is a step too far, in my view, to say that no reconciliation could be reached. For example, had there been a separate responsible entity and trustee to consider the proposed settlement and the terms that might be acceptable to enter into the Deed of Release, Deed of Settlement and Release and the Gujurat contract, nothing precluded a commercial settlement by the responsible entity of the FMIF that allowed payment of part of the settlement proceeds to the trustee of the MPF, in order to obtain the trustee of the MPF's agreement to give the releases necessary under the Deed of Release and the Deed of Settlement and Release and payment by the trustee of the MPF to Coalfields of $1.3 million that were necessary parts of the settlement transaction under the three contracts.

[209] In my view, that LMIM was both the responsible entity of the FMIF and the trustee of the MPF did not make the conflicting interests irreconcilable. It required LMIM to proceed in a manner that was impartial and fair as between the conflicting interests.

[210] Additionally, the plaintiff alleges and submits that the settlement proceeds were all part of the scheme property of the FMIF. The basis for the contention appears to be that the Deed of Release provided for payment of $25.5 million of the settlement proceeds by Gujurat to PTAL and the Gujurat contract provided for payment of $10 million of the settlement proceeds by Gujurat to PTAL. But to view the provision of the Deed of Release as the determinant of the interests of the parties to the Deed of Release in those proceeds requires that two critical facts be overlooked: first, that a decision had been made by LMIM as responsible entity of the FMIF and by LMIM as trustee of the MPF as to the division of the settlement proceeds as set out in the Deed Poll before the Deed of Release and the Gujurat contract were entered into formally and settled; second, that the cheques provided at completion of the settlement included a cheque or cheques in favour of LMIM as trustee of and holder of the account of the MPF – that is the money intended to be received by LMIM as trustee and credited to the MPF was not received by PTAL as custodian of the FMIF before being transferred to the account of LMIM as trustee of the FMIF.

[211] The fourth complaint is that the Allens advice:

> "referred at [16](e) to LMIM's compliance plan, which contained the terms pleaded at paragraph 30G above, but did not state how the obligations imposed by sections 601FC(1) and 601FD(1) could be reconciled with the statement at [35] of the Allens Advice that LMIM must act in the best interests of the members of the MPF when making any decision regarding the split of the Settlement proceeds."

[212] In substance, this complaint is the same as the third complaint and does not require further discussion, except to observe that the duty of a responsible entity to act in the best interests of the members of a registered scheme is not, per se, irreconcilably inconsistent with a power of the responsible entity to enter into a commercial compromise where the

responsible entity may owe a conflicting fiduciary obligation to act in the best interests of the beneficiaries of another trust, depending upon the circumstances.

[213] The fifth complaint is that the Allens advice:

> "stated at [57] that LMIM would need to ensure that it followed any procedures or policies it has established in accordance with section 912A(1)(aa) of the Act for managing conflicts of interest, but did not state how the proposed proceeds split could be reconciled with the matters pleaded at paragraph 30G [of the statement of claim]."

[214] However, there is no allegation that LMIM did not follow a procedure or policy it had established in accordance with s 912(1)(aa) of the CA. Paragraph 30G alleges that LMIM's conflicts management policy provided that the duties under ss 601FC(1) and 601FD(1) override any conflicting duty of a director under Part 2D.1 of the CA. The Allens advice was not concerned with a conflict of those duties and did not misstate the effect of them. The plaintiff does not allege how any of the defendants breached their duty of care and diligence to members in relation to the alleged failure of the Allens advice to explain how the division of the proceeds could be reconciled with the priority to be given to the duties to the members of the FMIF.

[215] The sixth complaint is that the Allens advice:

> "stated at [63] that the effect of section 601FD(2) of the Act may have been to impose fiduciary duties on LMIM to act in the best interests of members of the FMIF, but did not identify what those duties would be or that such duties would include a duty of undivided loyalty."

[216] This is an extraordinary allegation, first, because it charges the defendants with contravention of the duty of care and diligence to members for failing to identify an alleged deficiency in legal advice as to the possible effect of s 601FD(2) in relation to fiduciary duties. No basis was identified for a contention that the defendants who were not lawyers should have done so. Second, it is deficient even as a pure criticism of the legal advice, in my view. A failure to identify what the possible fiduciary duties might be could only be relevant if it was relevant to the matter of the advice. Any other discussion would have been irrelevant. The suggested failure to identify a fiduciary duty "of undivided loyalty" would not have assisted in the consideration of the particular questions for advice raised on the facts of the case as instructed to Allens. The thrust of paragraph [63] of the Allens advice was to warn as to the possible width of the statutory duties imposed under s 601FD(1) of the Act, by reason of the priority given to those duties under s 601FD(2). It was not necessary for Allens to go further, in my view.

[217] The seventh complaint is that the Allens advice:

> "did not, when properly construed, reach an opinion that the proposed transaction was 'legally acceptable'."

[218] Paragraph 16 of the Allens advice concluded that it was:

> "legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict".

[219] Whatever is connoted by the seventh complaint is imported by the words "when properly construed". Whatever those words might be intended to mean, no question of construction of paragraph 16 is raised, in my view, so it is unnecessary to consider them further.

[220] In my view, none of the seven complaints made in paragraph 30H of the statement of claim is a matter that the defendants failed to identify in contravention of the duty of care and diligence to members.

[221] By the reply, the plaintiff alleges that LMIM's instructions to Allens for the Allens advice were deficient in the respects alleged in paragraph 30C of the statement of claim. However, except for the subject of paragraph 30C(d)(iii), any issue as to the deficiency in their instructions would be a false issue as the alleged deficient instructions are not alleged to have given rise to a contravention by the defendants of the duty of care and diligence to members.

[222] The exception in paragraph 30C(d)(iii) is that the instructions:

> "did not state that there was no binding express prior arrangement for the MPF to be paid any amount if the amount recovered in the litigation did not cover the whole of the debt owing to the FMIF."

[223] However, as previously discussed, the Allens advice stated:

> "The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation despite it being the understanding of the RE's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation."

[224] I am unable to comprehend the gravamen of the plaintiff's complaint on this allegation, except to the extent that there may be a difference of meaning between the expressions "no binding express prior arrangement" and "no formal agreement… despite it being the understanding…". I do not think that, in context, any difference of meaning is conveyed by the Allens advice. Whatever the content of the express instructions, it does not appear that the Allens advice was based on a false assumption that there was any binding agreement made prior to the advice under which it was a term that LMIM as trustee of the MPF was entitled to a split of the settlement proceeds.

[225] Accordingly, in my view, the defendants did not breach the duty of care and diligence to members in failing to consider that Allens were not given an instruction that there was no binding express agreement.

[226] As previously stated, the plaintiff alleges, in addition to and apart from the alleged deficiencies in the Allens advice and the instructions given to Allens, that the defendants ought not to have concluded that the WMS report or the Allens advice justified the payment of any part of the settlement proceeds for the benefit of the MPF.

[227] There is no basis for saying that the WMS report and the Allens advice did not support the conclusion that the proposed ratio of 65:35 was fair and reasonable, if the directors were satisfied that the proposed settlement with Gujurat and the other parties was in the best interests of the members and beneficiaries of both funds.

[228] Repeating, the WMS report concluded that:

> "In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm's length transactions."

[229] And the Allens advice concluded that:

> "We consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict …"

[230] Based on the assumptions contained in them, the report and advice were unambiguously supportive of the proposed division of the settlement proceeds.

[231] The plaintiff alleges that the defendants contravened the duty of care and diligence to members in failing to have proper regard to or to give adequate consideration to the fact that PTAL sold the property to Gujurat as mortgagee exercising power of sale, and that PTAL as first mortgagee for the benefit of the FMIF had priority over LMIM as second mortgagee. Another similar allegation is that the defendants failed to have proper regard to the circumstances that LMIM as trustee of the MPF was a subsequent mortgagee and a subsequent charge holder over the assets of Bellpac and that LMIM as trustee of the MPF had originally funded the Gujurat proceedings as registered mortgagee with second priority under the Deed of Priority and was drawing down the funding against the MPF-Bellpac loan.

[232] The sale by PTAL as mortgagee was of the Bellpac land. The purchase price of the land comprised only $10 million of the total amount of $45.5 million paid by Gujurat under the three contracts under which the Gujurat proceedings were settled.

[233] I have previously discussed that it is an incomplete analysis to describe LMIM as funding the Gujurat proceedings as trustee of the MPF, because it fails to deal with the facts that PTAL and Bellpac, by the PTAL appointed receivers and managers, were plaintiffs and defendants in the Gujurat proceedings.

[234] These questions are relevant to whether there was a contravention of the duty of care and diligence to members by the defendants and also to whether the alleged contravention caused the members of the FMIF to suffer any loss.

[235] As previously stated, the plaintiff did not allege or attempt to prove or submit that Gujurat would have entered into some other series of contracts to settle the Gujurat proceedings apart from the three contracts that were made. The point is significant, on the facts, because Gujurat did not agree to pay the whole of the amounts payable under the three contracts as the purchase price of the Bellpac land under the Gujurat contract.

[236] Accordingly, whether the defendants ought to have attempted to have achieved that result, and contravened the duty of care and diligence to members in not doing so, must be considered in the light of the prospect whether Gujurat would have been prepared to do so and the prospect of whether LMIM as trustee of the MPF could have agreed properly to release Gujurat and the other parties to the Gujurat proceedings and to pay Coalfields $1.3 million.

[237] The third and fourth defendants submit that, acting reasonably, the defendants were entitled to consider the circumstances in which the funds of the MPF were deployed and contributed to the successful recovery of the total amount of $45.5 million on settlement of the Gujurat proceedings and for the sale of the Bellpac land to Gujurat. I agree. But that does not fully answer the allegation that the defendants failed to give proper consideration to the matters raised by these allegations.

[238] The third and fourth defendants further submit that the defendants were entitled to make a decision based on more than simply the strict legal rights of the parties to the Gujurat proceedings. If, by that, it is meant that the defendants were entitled to make a decision involving a gift of the scheme property of the FMIF to LMIM as trustee of the MPF because it would be fair to do so, even though there was no entitlement to that property, I disagree. The constitution of the FMIF as the trust instrument gave no power to LMIM to give away the scheme property. The defendants as directors of LMIM cannot have had greater powers of disposition of the scheme property than LMIM as responsible entity had.

[239] However, that is not how I characterise the relevant positions and rights of the parties, as previously stated. In any event, in my view, the defendants did not contravene the duty of care and diligence to members by failing give adequate consideration to the fact that PTAL sold the Bellpac land to Gujurat as a mortgagee exercising power of sale, and that PTAL as first mortgagee for the benefit of the FMIF had priority over LMIM as second mortgagee to the proceeds of that sale.

[240] The plaintiff alleges that the use by the defendants of the litigation funding analogy in reaching their decision as to the division of the settlement proceeds in the ratio of 65:35 was a contravention of the defendants' duty of care and diligence to members. Again, the allegation is put in various ways, namely:

(a) the defendants failed to consider whether the MPF could be treated as if it was an arm's length litigation funder when it was a second registered mortgagee with second priority;

(b) the defendants failed to obtain independent legal advice or other independent advice as to whether, in the circumstances outlined above, the MPF could be treated as if it were an arm's length litigation funder; and

(c) the defendants ought not to have concluded that the MPF was in an analogous position to a litigation funder and that the settlement proposals would not be reasonable on an arm's length basis.

[241] Clause 3.1 of the Deed Poll records the defendants' considerations and conclusions as including:

> "(m) the Settlement Proposals would be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length - the Directors have come to this conclusion on the basis of their own experience and previous dealings in relation to comparable transactions as well as the WMS Report. The proposed Proceeds Split is similar to that which would prevail in the open market for similar transactions between unrelated parties and is not extraordinary or excessively generous - in giving consideration to this issue, the Directors considered the litigation funding practices in the open market."

[242] That is, the defendants were of the opinion that there was an analogy to be made between the facts of this case and an arm's length dealing between a litigant and a litigation funder. It is not in dispute that the division of the proceeds would have been reasonable if that were the case. That is not the thrust of the plaintiff's case on this point. The thrust is that there was no proper basis for the analogy between a commercial litigation funder and LMIM as funder of the Gujurat proceedings.

[243] It is apparent from what I have previously said that I do not consider it accurate to characterise LMIM's position as simply funding the Gujurat proceedings as second mortgagee. It was doing so, in part, for the benefit of Bellpac and for the benefit of PTAL. And its own claims were not those of a second mortagee as such.

[244] However, it would be equally inaccurate and imprecise to draw a direct analogy between LMIM's position as funder of the Gujurat proceedings and that of a commercial litigation funder. LMIM was not just funding the litigation for the benefit of the members of the FMIF for a commercial share of the litigation proceeds payable to PTAL as custodian of the FMIF. Nor was it doing so for Bellpac, by the PTAL appointed receivers and managers, for the benefit of the FMIF. It was bringing its own claim for damages, as well, and was interested in the outcome of the proceedings by PTAL and Bellpac because it was the second mortgagee of the Bellpac land and second chargee of Bellpac's property.

[245] The analogy between the position of LMIM as trustee of the MPF as funder of the Gujurat proceedings and a commercial litigation funder with no prior interest in the subject matter of the litigation is not a close analogy, in my view. Once that point in the analysis is reached, this allegation identifies itself as the strongest allegation of a possible contravention of the duty of care and diligence to members by the defendants.

[246] That is because the measure of the division of the settlement proceeds was made at least in part by reference to the proportionate amounts that might have been appropriate in an arm's length dealing between a commercial litigation funder and a litigant. If the analogy is not a close one, the justification of the apportionment that was made may be weakened.

[247] The precise question, at this point, is whether in those circumstances the evidence justifies the conclusion that the defendants contravened their duty of care and diligence to members in reaching the conclusion that the ratio 65:35 was appropriate.

[248] The question of an analogy with a commercial litigation funding arrangement was referred to by LMIM internally, in the WMS report and in the Allens advice.

[249] The internal references were made in the email from Mr Monaghan to the second and sixth defendants sent on 1 December 2010 and the email from Andrew Petrik to the sixth defendant, copied to the first, second and third defendants, as well as Mr Monaghan sent on 2 December 2010, previously set out.

[250] WMS's report opined that:

> "In [e]ffect MPF's role was not dissimilar to a litigation funder."

[251] WMS continued its analysis by referring to two particular litigation funders, although noting that the terms of litigation funding are typically established on a case by case basis. The rates identified were for "normal" ranges of between 20 or 30 percent and 45 percent.

[252] WMS concluded that:

> "In our opinion, there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF. Accordingly, a range of MPF's entitlement between 30% to 40% would appear reasonable given the complexities in the matter and the fact it appears to be close to settling pre trial."

[253] Allens advice provided that:

> "(d) The directors must be satisfied that the proposed split of settlement proceeds and associated releases of securities by the RE would be reasonable in the circumstances if the RE as responsible entity of the FMIF and the RE as trustee of the MPF were dealing at arm's length. The WMS Chartered Accountants report makes it clear that 'there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF'. Consequently, the conclusion in the WMS Chartered Accountants report will be an important factor in the RE's decision in respect of the split of the litigation proceeds. However, the RE should not rely solely on the report. The directors of the RE must make 'their own independent assessment' of the relevant matters, and the advice from WMS Chartered Accountants does not replace 'careful judgement by the directors'. They should also consider the relevant matters referred to by ASIC in CP 142…"[96]

[254] However, Allens' advice as to the division of the proceeds was not based solely on the analogy between LMIM as the funder of the Gujurat proceedings and an arm's length commercial litigation funder. According to the Allens advice, it was also based, inter alia, upon the understanding of the directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation.

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[96] The reference to CP142 is to ASIC Consultation Paper 142 dated October 2010.

[255] The statement of claim alleges in paragraph 30C(d)(iii) that there was no binding express prior arrangement that LMIM as trustee of the MPF would be paid any amount if the amount that LMIM as responsible entity of the FMIF recovered did not cover the whole of the amount owing by Bellpac to it. So stated, the allegation elides the legal relationships whereby PTAL was the relevant party to the Gujurat proceedings and was the lender to Bellpac and first mortgagee and charge of Bellpac's property. But the meaning is clear enough.

[256] The statement of claim does not allege that the defendants did not have the understanding alleged in the defence, as a ground of the alleged contraventions of the duty of care and diligence. However, the defendants allege they had the understanding that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation in the defences and the plaintiff denies the understanding in the replies on the ground that the defendants had an expectation that the MPF-Bellpac loan would be repaid in part and possibly in full if LMIM and PTAL were successful in the Gujurat proceedings.

[257] The defendants rely upon the terms of the WMS report, the Allens advice based on the instructions of LMIM and the Deed Poll signed by the directors as contemporaneous documents supporting the existence of the understanding.

[258] Second, the defendants rely on the affidavit and oral evidence of the defendants as all supporting the existence of the understanding.

[259] Against that evidence, the plaintiff relies on a number of facts as contrary to the understanding. First, the plaintiff points to the lack of contemporaneous documents supporting or referring to the understanding, before the time when instructions were given to WMS for the WMS report.

[260] Second, the plaintiff relies on the absence of any reference to the understanding in a document entitled "ASIC Benchmark Disclosure Update for Investors" dated 2 September 2010. The defendants who gave evidence either did not recall reading the document (the third and fourth defendants) or were not asked about it (the second and sixth defendants). The plaintiff's apparent purpose in relying upon the document is that its terms are inconsistent with existence of the understanding. Although the understanding is not referred to in the document, I am not sure that its terms are inconsistent with the existence of the understanding. In any event, as at 2 September 2010, the terms of the proposed settlement of the Gujurat proceedings were not known.

[261] Third, the plaintiff relied on emails passing between the sixth defendant and others, including Mr Monaghan, about the basis of the funding of the Gujurat proceedings by LMIM as trustee of the MPF.

[262] On 17 August 2010, Mr Tickner wrote to Mr Grant Fischer (copied to the second defendant) asking:

> "Have we documented an agreement between MIF and MPF… if not I think we should formalise as soon as practicable".

[263] On 30 August 2010, Mr Tickner wrote to Mr Monaghan asking:

> "Can we amend any agreement we have in place for MPF to assist with litigation costs on Bellpac to also cover Statutory Charges…".

[264] The plaintiff also relied on other forensic points in support of its contention that there was no understanding, including that if there was an understanding it would have been documented, that it was illogical for LMIM as responsible entity for the FMIF to "enter in to an arrangement" to pay an unspecified amount for LMIM as trustee for the MPF to fund legal costs when LMIM as the trustee of the MPF was a substantial debtor of PTAL as custodian of the FMIF for a group of assigned loans, that the understanding was an unlikely commercial arrangement, that there was no evidence that the defendants informed the auditors of the understanding or explained it to Deutsche Bank as lender to the FMIF and that the amounts of the funds provided for the Gujurat proceedings were treated by LMIM as trustee of the FMIF as further advances or amounts payable on the MPF-Bellpac loan account. In assessing the relevant documents and the defendants' evidence, I have not overlooked these points.

[265] The matters relied on by the plaintiff are not enough, in my view, to reject the defendants' evidence as to the existence of the understanding. I acknowledge that some of their evidence on the point was vague. Also, it is not to be ignored that the understanding is evidence of the states of mind of the defendants that it is in their interests to give and difficult to contradict. It is quite possible that the defendants believed that they had the understanding at the time when they gave evidence but that their beliefs are mistaken and the product of reconstruction.[97] Further, the absence of two relevant witnesses should not go unnoticed. The first defendant did not give evidence. The plaintiff submits it should be inferred that his evidence would not have assisted his case.[98] Second, Mr Monaghan, who was closely involved in the Gujurat proceedings as a lawyer advising LMIM was not called by any of the parties to give evidence. However, no inference is more readily drawn against the defendants because of that, because the plaintiff might have called Mr Monaghan.[99]

[266] Even so, after all, it is not inherently unlikely that the defendants expected that LMIM as trustee for the MPF would be acknowledged in any settlement for almost entirely funding the Gujurat proceedings. And it must not be forgotten that the plaintiff's claim was not raised until a number of years after the events in question, so it is not surprising that the defendants' recollections are vague. It is the contrary that would be surprising, in the absence of detailed contemporaneous notes.

[267] The conclusion I reach, on the balance of probabilities, is that in making their decision as to the division of the proceeds the defendants had the understanding that LMIM as trustee of the MPF would receive a share of any proceeds from the Gujurat litigation.

[268] Ultimately, the plaintiff alleges in paragraph 34(g) of the statement of claim that the defendants failed to have proper regard or give adequate consideration to the different

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97 Compare *Chappel v Hart* (1998) 195 CLR 232, 272.

98 *Jones v Dunkel* (1959) 101 CLR 298, 308 and 321.

99 *Crossman v Sheahan* [2016] NSWCA 200, [341]-[344].

interests of the FMIF and the MPF, meaning the different interests of the members of the FMIF as a registered scheme on the one hand and the beneficiaries of the MPF as an investment trust on the other hand, having regard to the matters alleged in subparagraphs 34(aa) to (e) inclusive. In my view, this allegation does not raise any additional point to the separate subject matters of those subparagraphs that are separately considered to the extent necessary above. Nevertheless, I also accept the third and fourth defendants' submission that, in fact, the defendants did consider the different interests of the two funds. Inter alia, the Deed Poll records that PTAL held a first registered mortgage in respect of different indebtedness to that held by LMIM. The Deed Poll also stated that the consent of the MPF was required for the settlement of the Gujurat proceedings and concluded that the "Settlement Proposals are in the best interests of each Relevant Fund's members".

[269] It is appropriate to return to paragraph 34(d) of the statement of claim where the plaintiff alleges that the defendants failed to consider whether LMIM as trustee of the MPF could be treated as if it was an arm's length litigation funder and whether it was appropriate to divide the settlement proceeds in the ratio of 65:35. The substance of this allegation is that the defendants gave too much weight to the analogy of the amount that might have been payable to a commercial litigation funder of the Gujurat proceedings. Similarly, paragraph 37A(aa)(iii) alleges that the defendants ought not to have concluded that the proceeds split was fair to the FMIF and paragraph 37A(aa)(v) alleges that the defendants ought not to have concluded that the division of the proceeds was not unreasonable.

[270] The third and fourth defendants submit that the plaintiff does not make an identifiable complaint about the process of reasoning. I do not agree. The plaintiff does allege that the defendants failed to consider whether LMIM as trustee of the MPF could be treated as if it was an arm's length litigation funder.

[271] The WMS report stated:

> "Based on the background section of our report, we note the following pertinent points:
>
> - The matter became very complicated and the litigation was highly complex and the prospects uncertain. In our opinion, litigation by its nature is difficult to predict with absolute certainty.
> - FMIF was in the position of being unable to provide additional funding, and of being unable to satisfy any adverse costs orders that might have been made against LM.
> - The burden of funding the litigation fell largely on MPF.
>
> The funding in the litigation by FMIF and MPF is summarised at Table 2 above being $1,638,438 by MPF and $161,471 by FMIF. As noted above, this does not include the $1.3M to another party Coalfields, to secure the withdrawal of certain caveats.
>
> In our opinion, based on the information provided and our discussions with Monaghan Lawyers a commercial decision was undertaken by MPF to fund the litigation to attempt to preserve the capital entitlements under the loan documents. In [e]ffect MPF's role was not dissimilar to a litigation funder."

[272] Although, in my view, the analogy with an arm's length litigation funder was not particularly strong, the clear import of the WMS report was that it was an appropriate comparison and their conclusion was that LMIM's role was not dissimilar. That conclusion constituted independent expert advice and was reasoned. Other analogies might have been considered. For example, creditors who fund a liquidator to bring proceedings to recover the property of the company for the benefit of the unsecured creditors may receive more than a refund of the contributed costs by way of distribution, in contravention of the *parri passu* and priority principles that otherwise apply in a company liquidation.[100]

[273] Looking at the question of the fairness and reasonableness of the proposed division of the settlement proceeds as a matter of first principle, it is apparent that both the WMS report and the Allens advice considered that it was relevant to assess it as if it were an arm's length commercial transaction. In my view, that was the correct approach. The analogy made between LMIM as trustee of the MPF as funder of the Gujurat proceedings for the benefit of, inter alia, PTAL as custodian of the FMIF and Bellpac and a commercial litigation funder was part of that approach. But there were other matters.

[274] One was that the Gujurat proceedings would not have been carried on by PTAL and the Bellpac receivers and managers appointed by PTAL without the funding provided by LMIM as trustee of the MPF. That funding included that LMIM gave security for costs of the proceeding by PTAL and Bellpac, as well as paying the costs of their own lawyers. Second, the Gujurat proceedings could not be settled on the terms of the proposed Gujurat contract, Deed of Settlement and Release and Deed of Release without LMIM's releases as provided for, in particular, in the Deed of Release. Third, the Gujurat proceedings could not be settled on the terms of the proposed Gujurat contract, Deed of Settlement and Release and Deed of Release without LMIM paying $1.3 million to Coalfields at or before settlement. Fourth, the defendants had the understanding that LMIM as trustee of the MPF would receive a share of any proceeds from the Gujurat litigation.

[275] In my view, it was prudent for LMIM to obtain external independent professional accounting advice as to whether and to what extent the proposed division of the settlement proceeds was fair and reasonable in an arm's length dealing. Looked at objectively, to do so followed some of the principles underlying similar models for assessment of a related party transaction[101] or the process of obtaining an independent expert's report to assist in making a decision upon voting for or against a scheme of arrangement.[102] Prima facie, generally speaking, it is reasonable for the directors of a corporation to obtain and act on external independent professional accounting and legal advice as to whether a transaction is fair and reasonable to assist in the consideration of whether it is in the best interests of the company and its shareholders and whether the directors duties of care and skill are discharged, although there has been controversy at

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100 *Corporations Act* 2001 (Cth), s 564; *Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd (in liq0* (1995) 18 ACSR 294, 296; *Proficient Building Company Pty Ltd* (2011) 87 ACSR 183, [16].

101 *Corporations Act* 2001 (Cth), s 210, 219, 220 and 221. ASIC Regulatory Guide 111.

102 *Corporations Act* 2001 (Cth), s 411(3)(b), *Corporations Regulation*, reg 5.1.01(1)(a)(ii) and Schedule 8 , para [8303] and ASIC Regulatory Guide 111

times in the case law as to the extent to which directors in performing their functions may rely on information provided by delegates or advisors.[103] Trustees, too, are authorised to do so, generally speaking.[104] Of course, neither directors nor trustees are thereby absolved from the obligation to independently consider and make the relevant decisions in exercising their powers of management or investment, according to any statutory or general law duty of care and diligence to members that applies.

[276] In the case of a company director, and at least the statutory duty of care and diligence imposed under s 180(1) of the CA, s 189 of the CA specifically provides as follows:

> **"189 Reliance on information or advice provided by others**
>
> If:
>
> (a) a director relies on information, or professional or expert advice, given or prepared by:
>
> (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
>
> (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence; or
>
> (iii) another director or officer in relation to matters within the director's or officer's authority; or
>
> (iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and
>
> (b) the reliance was made:
>
> (i) in good faith; and
>
> (ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; and
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> (c) the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;

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103 Compare, for example *AWA Ltd v Daniels trading as Deloitee Haskins & Sells* (1992) 7 ACSR 759, 868 and 1015 and *Daniels v Anderson* (1995) 13 NSWLR 408; 16 ACSR 607, 665. The question is discussed more fully in an article by A Gibbs and J Webster, *"Delegation and reliance by Australian company directors"*, (2015) 33 C&SLJ 297 and in Ford, Austin and Ramsay's *Principles of Corporations Law*, August 2019, [8.340.12]-[8.340.15].

104 *Trusts Act* 1973 (Qld), s 54(1); *Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655, 662, [11].

> the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved."

[277] Where it applies, s 189 has the effect that the director's reliance on the advice is taken to be reasonable, unless the contrary is proved. None of the parties referred to s 189 or made any submissions as to whether it applies in relation to the duty of care and diligence to members of a director as an officer under s 601FD(1)(b) of the CA. Whether or not s 189 applies, in my view, does not affect the answer to whether the defendants' reliance on the WMS report and the Allens advice was reasonable on the facts of this case. In my view, it was.

[278] Both WMS and Allens were professional advisers. The defendants believed that their opinions and advices were within their relevant fields of professional competence. The defendants' reliance on those opinions and advices was made in good faith. The defendants made their own assessments of the opinions and advice in varying degrees.

[279] The sixth defendant instructed WMS with Mr Monaghan. After the second defendant received the WMS report as to the proposed division of the proceeds in the 65:35 ratio, she instructed Mr Monaghan to obtain legal advice as well, which resulted in the Allens advice. She informed the other directors she had done so. When Mr Monaghan obtained and provided the Allens advice to the second defendant, he included a summary of it, saying there was a lot to wade through but the conclusion was that the transaction was ok. The summary was sent on to the fourth defendant and the sixth defendant. The second defendant read the Allens advice. She forwarded it to LMIM's auditor. Neither the auditor nor Mr Monaghan raised any concern as to the sufficiency of the Allens advice or the WMS report. The third defendant did not have any significant role in relation to the Gujurat proceedings. She relied on the directors who did, being the sixth defendant and second defendant. She was aware of WMS' opinion as to the 65:35 ratio and of the summary given by Mr Monaghan of the Allens advice at the meeting on 14 June 2011. She believed the proposed division of the proceeds was in the interests of the members of both the FMIF and the MPF. The fourth defendant relied on his fellow directors and Mr Monaghan. He could not recall whether he read the Allens advice. He knew when he signed the Deed Poll that both the WMS report and the Allens advice had been obtained. He believed WMS and Allens to be well, known, independent and competent firms. His understanding was that their opinions and advices were favourable to the proposed division of the settlement proceeds. The sixth defendant reviewed the WMS report and the Allens advice and concluded that the proposed division of the proceeds was legally acceptable.

[280] The plaintiff did not identify any case in which parties in a position comparable to the defendants have been held to have breached a relevant duty of care and skill by relying on or in failing to reject independent expert opinion of an accounting nature or by way of legal advice. My own researches have only produced one possible case of that kind but the facts are not usefully comparable.[105]

[281] In my view, the plaintiff failed to establish that the defendants' reliance upon the WMS report amounted to a contravention of the duty of care and diligence to members because

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105 *Re VBN and Australian Prudential Regulation Authority and A Party Joined* (2006) 92 ALD 259

that report may have placed too much weight on the analogy of a litigation funder in reaching the opinion that the ratio of 65:35 was appropriate for the division of the settlement proceeds. In relying on that opinion, the defendants were exercising the degree of care and diligence that a reasonable person would exercise if they were in the defendants' positions.

[282] In reaching that conclusion, I have not found it necessary to consider whether the positions of some of the defendants should be distinguished having regard to their relative functions and involvement in the management of LMIM's operations, either generally, or in relation to the Gujurat proceedings, in particular. The third and fourth defendants made detailed submissions that their individual positions should be assessed having regard to their lesser roles and their reasonable reliance on the sixth defendant, second defendants and Mr Monaghan, but I do not consider it necessary to deal with those submissions further, having regard to the conclusion I have reached as to the defendants positions as directors, in general.

Conclusion

[283] It follows, in my view, that the plaintiff has not established a contravention of the duty of care and diligence to members by any of the defendants.

[284] Having regard to my earlier findings as to the operation of the duty to act in the members' best interests and the failure of the plaintiff to prove that any contravention of that duty caused the damage of the loss of all the settlement proceeds not being received by the FMIF, it follows that the plaintiff's claim must be dismissed.

[285] Because of those conclusions, it has been unnecessary to consider other questions that were disputed between the parties, in particular whether, even if there was some contravention of either the duty to act in the members' best interests or the duty of care and diligence to members, the defendants or some of them should be excused from liability under s 1317S of the CA.

[286] In the circumstances of this case, it is not appropriate to make further findings on those questions, because the discretionary power to grant relief under s 1317S must be exercised in relation to "a liability to which the person would otherwise be subject". It would be necessary to identify the precise factual basis of the particular liability before any meaningful consideration could be given to the potential operation of s 1317S. The absence of the relevant factual findings, because I have not found that the defendants or any of them are liable, makes it inappropriate, in my view, to consider the application of s 1317S in a hypothetical way.

[287] Finally, in these reasons I have not dealt with every point that was advanced in the written submissions of the parties. Those submissions were voluminous. To have dealt with every argument or point would have increased the length of these reasons by many, many pages. Instead, I have focussed on the facts and arguments that are necessary to decide the case, in my view. That does not mean I have not given close attention to the other points that were advanced both in writing and orally.