IN THE HIGH COURT OF AUSTRLIA
SYDNEY REGISTRY

No. S223 of 2015

BETWEEN:

ROBERT WILLIAM FISCHER
First Appellants
JOHN JULES FISCHER
Second Appellants
ANDREA JULIANA FISCHER MUSSER
Third Appellants
SYLVIA BETH FISCHER KRAMER
Fourth Appellants

And

NEMESKE PTY LTD (ACN 002 870 797)
First Respondent
LORAND LOBLAY
Second Respondent
KAREN LOBLAY
Third Respondent
LAURA MUSSER SLOAT
Fourth Respondent
TOBIAS MUSSER
Fifth Respondent
EVE FISCHER GREGG
Sixth Respondent
SETH DAVID FISCHER
Seventh Respondent
TODD MUSSER
Eighth Respondent
KATHLEEN ELIZABETH FISCHER
Ninth respondent
WILLIAM GEORGE MARCEL FISCHER
Tenth Respondent
CORINNE AYERS
Eleventh Respondent
AARON KRAMER
Twelfth Respondent
MARIANNE FISCHER
Thirteenth Respondent

10

SECOND AND THIRD RESPONDENTS' SUBMISSIONS (THE EXECUTORS)

CURWOODS LAWYERS
Level 9, 95 Pitt Street
SYDNEY NSW 2000

Telephone: (02) 8231 6224
Fax: (02) 9221 3720
Ref: Francine Hendriks

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2. Whether or not the Trustee Nemeske Pty Ltd (hereafter 'Nemeske') effectively bound itself to pay Mr Emery and Mrs Nemes from the Trust pursuant to Clause 4(b) of the Trust Deed by:-

    a. Resolving on 23 September 1994 to make an advance to them as beneficiaries [at AB Vol 1 p129];
    b. Resolving on 2 July 1995 to execute a charge in respect of the amount of the said sum which was presently owing over the assets and provided a transfer in blank of the shares [at AB Vol 1 p149]
    c. Recording in the books and accounts of Nemeske an obligation to the beneficiaries to pay the said sum [AB Vol 1 p126, 240 and 310]
    d. Executing on 30 August 2005 a Deed of Charge which inter alia covenanted to pay to the beneficiaries the said sum [AB Vol 1 p65B to 65T]

3. Whether a declaration by a Trustee to advance capital (or income) where the said sum is not paid, but recorded in the books of the Trustee as a liability to the beneficiaries, can only be effectual, as the appellants contends, in circumstances where there are available liquid funds to the Trustee in the amount of the advance, or whether, as the second and third respondents (hereafter "the executors") contend, this is not a relevant or necessary condition to create obligation to the beneficiaries.

4. Whether as the executors contend, even if the September resolution of the Trustee was ineffectual to give rise to an immediate binding obligation to the beneficiaries, the Trustee was able to create such a binding obligation by the execution of the Deed in August 2005, the Deed being an *intra vires* exercise of power by the Trustee, which cured any legal defects in the prior action of the Trustee in attempting to create an obligation to the beneficiaries for an advance of capital, declared but unpaid.

5. Whether or not the Trustee is estopped by Deed or representation from denying the enforceability of the said sum as a debt.

6. Whether or not if the Trustee is bound by the Deed of Charge but the earlier resolutions of the Trustee were ineffective or invalid the Trustee it is entitled to an indemnity from the trust assets.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903 (CTH)*

7. The executors certify that they have considered whether a notice should be given under Section 78B of the *Judiciary Act 1903 (Cth)* and that no notice needs to be given.

PART IV FACTS

8. The executors do not dispute the appellants' narrative of facts, or chronology, set out in paragraphs 6 to 25 of their submissions. It is important to note that Mr Emery Nemes in whose estate these questions have been raised was the first specified beneficiary of the trust and the first appointer and that Mrs Nemes would have been, had Mr Nemes died first, the person next with the power of appointment [AB 89].

9. The executors raise by the Notice of Contention an estoppel argument which rests on further facts regarding the conduct of the Trustee and the two beneficiaries, Mr and Mrs Nemes. This argument was not dealt with by the Court of Appeal (Court of Appeal [115] Vol. 2 p 550) or at first instance. Those further facts are as follows:-

10. Mr Nemes instructed a Ms Grinberg Solicitor between 2002 and 2005 to act for him in preparing his last will (AB Vol 1 p399 – 409) by which he left the shareholding in Nemeske to the appellants with the resulting ability to control the trust. Ms Grinberg's evidence [AB 66] establishes that as at the time that he made the will he was intending by a gift of the shares in Nemeske to give to the Fischers control of that Trust, but that he acted on and believed, at that time, as a result of all the steps taken by Nemeske to confirm that debt of which he was clearly aware, including the entry into the Deed of Charge, that Nemeske was indebted to the estate and the gift would be of, in effect, the net value of the Trust assets after payment of the debt.

10

PART V CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

11. The executors accept that there are no constitutional provisions relevant to the appeal. In addition to the various State trustee statutes referred to by the appellants, applicable because they confer powers to "advance" or "apply" trust, income or capital, the respondents rely upon the following provision:-

Trustee Act 1925 (NSW) Section 38.

PART VI ARGUMENT

Nature of the executors' Claim

12. The executors sought and obtained judgment against Nemeske pursuant to the fifth
20 covenant in the Deed of Charge made 30 August 1995 (AB 65D.40). Limitation defences and other possible attacks upon the validity of the Deed have fallen away. In the Court of Appeal, Barrett JA concluded that the giving of security over the trust property was without power, and probably ineffectual to encumber the property of the Trust in favour of Mr and Mrs Nemes (Court of Appeal [91] to [92] AB Vol. 2 p 540 – 541). Nevertheless Barrett JA concluded that the covenant in Clause 5 of the instrument was valid notwithstanding the ineffective charge.

13. The Court of Appeal also concluded that the covenant was effectual because it confirmed a debt obligation already owed (Court of Appeal judgment [92] AB Vol. 2 p 541). Thus,
30 the Court of Appeal resolved the matter by determining that the Trustee's September 1994 declaration gave rise to an obligation by the Trustee to the two beneficiaries, and that obligation supported the giving of the covenant, pursuant to which the executors' obtained judgment.

14. The executors support the reasoning in the Court of Appeal, but contend that it is not the only way to support the judgment. Indeed, at the highest level of generality the whole case simply turns upon the question as to whether or not there is any reason to conclude that the formally valid covenant given by Nemeske in Clause 5 of the Deed ought not be enforced according to its terms.

40

15. As the matter was approached in the Court of Appeal by firstly considering the legal effect of the September declaration, the executors turn first to that issue. However, the case ought not be approached on the basis that the legal effect of that declaration is the only or a necessary basis of rights of the beneficiaries. Those rights are to be ultimately determined by whether the declaration conjoined with the acknowledgements in the Nemeske's accounts of a liability of the beneficiaries, and the execution of the charge, gave rise to a valid and enforceable covenant within the Deed.

The September Declaration

16. Despite inapt wording in the terms of the September declaration, the clear intent of the words used was to distribute from capital or income of the trust the sum of $3,904,300.00 to two of the discretionary beneficiaries of the Trust, namely Mr and Mrs Nemes (see Court of Appeal per Barrett JA at [51] AB 528 [62] AB 532 and [64] AB 533). In the Court of Appeal and at first instance, the appellants contended that the resolution was ineffectual because it purported to distribute the "asset revaluation reserve" which was a mere accounting treatment, and it was said to be a nonsense to speak of a distribution "out of the asset revaluation reserve" (appellants' submissions para. 34). It is not clear whether the appellants persist with that submission, but if so, it ought be rejected.

17. The Court of Appeal was right to conclude that the resolution properly construed was a resolution to advance and apply capital or income to the extent of $3,904,300.00. At the relevant times, the Trustee had power to advance and apply capital or income to either of the two beneficiaries, Mr and Mrs Nemes. In light of the breadth of that power, there is no necessity for the Trustee to determine whether the sum it wished to advance was income or capital, so far as any exercise of its power under the Trust Deed was concerned. It possibly needed to engage in such characterisation to comply with accounting and taxation obligations but such issues are not relevant to this appeal.

18. Had the Trustee had the requisite sum standing to its credit in its bank account at the date of the declaration, and had it proceeded forthwith after the declaration to pay that to Mr and Mrs Nemes, then there would appear to have indisputably been an exercise of the power under Clause 4(b) of the Trust Deed. The appellants contend the Trustee failed to properly exercise the power because it did not have liquid funds in the requisite amount at the time

of the declaration, and it did not pay the sum to the beneficiaries. In particular, the appellants suggest that the resolution was not an effective exercise of power to advance and apply because it did not alter the beneficial ownership of property held on Trust (see appellants' submissions [27(a]). However, this submission conflates the issue concerning validity of the resolution on the one hand, with the legal consequences of the resolution on the other.

19. At one level there could be no complaint regarding the validity of the September resolution. It did not purport to distribute what the Trustee was prohibited from distributing, or purport to distribute to persons not entitled to receive such a distribution. Had the Trustee acted upon the September declaration by exercising its powers to sell Trust property (the shares in Aladdin) pursuant to Clause 8 and had thereafter distributed the proceeds, or had appropriated shares in Aladdin to Mr and Mrs Nemes (Clause 4(f)), in performance of the September declaration, one imagines no objection could be taken. The real complaint of the appellants is presumably that the September declaration did not, taken alone, create an obligation to Mr and Mrs Nemes that could underpin covenant 5 in the Deed. The appellants contend that is so because at the time of the declaration, the Trustee did not hold liquid funds in the requisite amount, and/or that declarations, such as the September declaration, do not create any binding legal obligation. Identical propositions were rejected by the New Zealand Court of Appeal in *Inland Commissioner for Revenue v Ward [1970] NZLR 1.*

Commissioner of Inland Revenue v Ward

20. *Commissioner of Inland Revenue v Ward* is the earliest modern statement of law on the issue in the present appeal. It has been applied on a number of occasions. It has played an historical role in the recognition in revenue law of the concept of unpaid present entitlements (U.P.E.s) which rest on the assumption that a Trustee can create an equitable obligation upon itself to pay to a beneficiary an amount declared but not distributed[1]. The concept that a Trustee that irrevocably and unconditionally decides to make a distribution

[1] Australian Taxation Office draft – Taxation determination – TD 2015/D5 superceding ATO Interpretative Decision ATO ID 2013/15 copies provided with this submission

or application of income or capital, creates obligations to beneficiaries, has been recognised and commented upon by text writers and other legal commentators[2].

21. In *Ward* the Court had to determine whether a Trustee's declaration to advance income to four infant beneficiaries of the Trust was an application of such income so as to make it income in the hands of the children at the relevant date rather than remaining income in the hands of the Trustee. The Court was in fact construing the words 'pay' and 'apply' where they appeared in s.155 of the *Land and Income Tax Act 1954 (NZ)*.

22. *In Ward* the Court considered and distinguished the decision in *Montgomery v Commissioner of Inland Revenue [1965] NZLR* where Baraclough CJ had held that a declaration in favour of beneficiaries, where the sums were not paid, but continued to remain part of the Trust fund and to accumulate further income was not effectual as an application of the power to 'apply' income. In *Ward* the majority found the Trustee's declaration had been effective.

23. All three Judges in *Ward* considered and analysed the decision of the English Court of Appeal in *Re: Vesty's Settlement [1950] 2All ER 91*. In *Vesty's* case the Court had concluded that a declaration, without payment to the beneficiaries, had been an application of income. Critical to the decision in *Vesty's* case was that the beneficiaries had only a discretionary or contingent interest in the income. In making the declaration to allocate to particular infant beneficiaries part of the income, the merely contingent or discretionary interest of those beneficiaries was made absolute. For that reason the English Court of Appeal had concluded that there had been an application of the income in favour of the beneficiaries. The reasoning in *Vesty's* was relied upon by North P and McCarthy J in *Ward* to conclude there had also been an effective application of income to the four infant beneficiaries (see North P at p 15 and McCarthy J at p 30).

24. In *Ward* the appellants had sought to distinguish *Vesty* on the ground that in that matter the income had been retained by the Trustees and apparently separately invested. North P rejected that as a relevant distinction and noted that the retained income had remained in the Trust and continued to form part of the Trust property (at p 15.40). Thus, North P

[2] See Marks; Bernard - Trusts & Estates, Taxation and Practice, Taxation Institute of Australia 2009 page 25-150 ff; and Athanasiou; Arthur – Accounting for UPEs in Taxation in Australia, Volume 48 (9) April 2014

clearly rejected any contention that there must be a sub- trust or resettlement for the monies to be relevantly 'applied'. He did say that he read *Vesty's* case as laying down a principle that if the Trustee

> "Takes the necessary step of exercising a power 'to pay or apply' income for the benefit of infants, who only have a contingent interest in the income, it is immaterial whether the income is immediately used for the benefit of the infants and is sufficient if it is allocated to them in terms which makes the parts of income so allocated the separate property of each infant" (at p 15.45).

However, in the absence of any requirement to separately invest the sum, all that should be required would be a sufficient particularity in the terms of the Trustee's declaration to identify that portion of the income in the hands of the Trustee that has been allocated to the relevant beneficiaries.

25. In *Ward* McCarthy J came in even clearer and less equivocal terms to the conclusion that, based on *Vesty's* case, a resolution deliberately arrived at and recorded is sufficient of itself to make an infant beneficiary entitled to an amount covered by the resolution, and was therefore an application of income within the meaning of the relevant Act under consideration (at p 30).

Altering Interests in the Trust

26. The central portion of the appellants' argument appears under a heading "Proper Construction of Clause 4(b)" (at [37]). Nevertheless, a substantial portion of that argument is concerned with the legal effect of a resolution passed in exercise of the power conferred by Clause 4(b). It is clear that it is this latter issue that is the primary focus of the appellants' case.

27. The core of the reasoning by Barrett JA in the Court of Appeal focused upon whether an exercise of power by the Trustee to advance income or capital of the Trust, when performed by the making of an unequivocal declaration and the crediting of the beneficiary in the books of the Trust, altered in regard to the sum, the subject of the declaration, the beneficiaries interest in the Trust. Barrett JA concluded in light of the decisions in *Vesty's* and *Ward* together with *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WASCA at 488, that the acts just described did alter the beneficiaries' interest in regard to the Trust. Indeed, it

gave rise ultimately to a right of action against the Trustee to recover the sum, the subject of the declaration, in an action for monies had and received.

28. In the three cases referred to above, the conduct of the Trustee, the subject of consideration, was merely the making of a declaration, and the respective crediting of the beneficiary in the accounts of the Trust. All three cases involve the application of a legal principle that the requisite conduct in each case, coupled with the terms of the Deed, brought about an alteration in the beneficiaries' rights and entitlements. In that regard, the cases are not solely concerned with the construction or interpretation of the word 'apply' in the respective deeds or legislation with which they were concerned.

29. In none of the three cases was there any express or purported resettlement of a part of the Trust. In all those cases the entitlement declared but not paid remained within the corpus of the Trust. This was so even if there were liquid funds available to the Trustee (as was the fact in *Vesty's* case) which could have been placed in a separate account pursuant to a sub-trust. Such a separate sub-trust could be created, but its existence was not necessary to the application of the principle derived from *Vesty's* case and applied in *Ward* and *Chianti* (see per McCarthy J in *Ward* at p 30, per Buss JA in *Chianti* at p 512 [72] and [73]). The alteration in the equitable rights of the beneficiary as against the Trustee, and in regard to the fund, is effected by the making of the declaration and the crediting of the obligation to the beneficiary in the books of the Trust. Nothing more is required, either in the source of the power conferred upon the Trustee, or in the conduct undertaken by the Trustee in exercise of that power. Thus, the key error in the contentions of the appellants can be identified through their submission at [55]. To suggest there is a difference between *Vesty's* case, *Ward* and *Chianti*, and the present matter because the Trustee "did not purport to confer an absolute beneficial interest in Mr and Mrs Nemes in any property held on trust by exercising the power of advancement", is firstly not even correct as a statement of fact. In none of those cases did the Trustee in terms purport to "confer an absolute beneficial interest" on any of the beneficiaries. What was determined by those case was the requisite conduct of the Trustee gave rise to a right of action in law by the beneficiary by reference to the applicable equitable rules in the line of cases under discussion.

30. It is not an objection to the application of the legal principle just described, that in the present case the assets of the Trust were not money but shares (rather than say a credit held by the Trustee with a bank). The application of a test of liquidity to the enforceability of the declaration would make no sense given it is unlikely that most trusts would hold money in cash ready to distribute, rather they may hold assets in varying states of liquidity depending on their circumstances and the judgment of the trustees. In many cases the declaration will be given effect to by a cheque drawn on bank but in others it might be satisfied in other ways. As McCarthy J observed in *Ward*, in *Vesty's* case the income assets of the Trust were not in hand and capable of physical division (at p 30.30). In none of the cases under consideration was there any suggestion that the legal principle depended upon the Trustee holding a sum equal to the amount of the advance in a liquid form capable of being the subject of immediate payment. As already observed, in *Vesty's* case and *Ward* the monies were not in fact resettled or placed in any separate account following the Trustee's declaration. In each case, further acts would have needed to have been taken by the Trustee to effect the distribution. One such obvious step might be the drawing of a cheque on the Trustee's bank to effect payment by the bank from any credit balance outstanding to the Trust to the beneficiary.

31. In the present case, and under the present Deed, the sum declared in favour of Mr and Mrs Nemes could have been satisfied by a transfer of shares in Aladdin pursuant to the power conferred under Clause 4(f). The wording of Clause 4(f) permitting the division or distribution of the funds or investments for the time being, being appropriated "to any person entitled thereto" assumes the possibility that an entitlement could arise by prior act of the Trustee, preparatory to any such appropriation. The Trustee could also have sold the shares in Aladdin and used the proceeds in payment of the declared entitlement.

32. None of the decided cases suggest any significance attaches to the nature or number of the steps that might need to be taken by the Trustee to effect payment of a beneficiary's entitlement. If the beneficiary would have a right against the Trustee to demand payment of the declared, but unpaid entitlement, if the Trust had a credit balance for the requisite amount in a bank account at the time, it would appear arbitrary to suggest a beneficiary in regard to whom the Trustee needed to take some different set of steps to effect payment, ought be found to have no enforceable right.

33. Finally, it may be added that nothing depends upon the September declaration advancing a sum of money rather than specific property or some portion of property. The matter was dealt with by Barrett JA (at [63] AB Vol 2 p 532). His Honour relied upon the reasons of this Court in *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494 at [8] finding that in the Unit Trust under consideration the exercise of the Trustee's discretion in regard to an application for redemption led upon favourable exercise to the Unit holder having at least an absolute right to the price for the redemption. Likewise, in the present matter, upon the declaration of the Trustee and the crediting of the obligations in the accounts of the Trust, Mr and Mrs Nemes acquired rights against the Trustee in regard to the Trust to the extent of $3,904,300.00 (per Barrett JA at [64]). The error in the appellants' position is laid bare most starkly in the summary of their position (at [61]). They suggest the September resolution was not supported by the power in Clause 4(b) through its failure to 'advance' or 'apply' capital and hence was *ultra vires* and void. As already argued, it was, clearly properly construed, an attempt by the Trustee to advance capital to Mr and Mrs Nemes. This was a clear exercise of a power conferred upon the Trustee under the Trust Deed. No issue of *ultra vires* can arise. The only important question is whether the exercise of the power, in the fashion undertaken by the Trustee prior to payment of the unpaid beneficiary entitlement, conferred a right upon the beneficiaries to claim or demand that payment. The existing state of the law considered and applied by Barrett JA was to the effect that the beneficiaries had such a right against the Trustee.

The Action for Money Had and Received

34. The appellants contend that an action for money had and received by a beneficiary against a Trustee can be brought only where the Trustee has "come to hold some asset on bare trust for the beneficiary, and has admitted as much to the beneficiary". None of the authorities cited, except possibly the passage of Pollock CB in *Bartlett v Dimond* quoted by the appellants (at [66]) goes so far. The principle described by Gummow J in *Roxborough v Rothmans at Pall Mall* (2001) 208 CLR 516 at 541 [67] stated:-

> "With respect to express trusts it was settled by 1851 when *Edwards v Lowndes* was decided, that it was only at the stage when there remains nothing for the Trustee to execute except the payment over of the money to the beneficiary, or the Trustee admits the debt, that an action for money had not received might lie at the suit of the beneficiary against the Trustee ..."; In another respects, in the

Courts of law the Trustee was treated as the absolute owner and the beneficiaries remedy was exclusively in a Court of Equity which might give effect to equitable set offs and other equitable defences available to the Trustee".

35. It is clear from the discussion of those decisions referred to by the appellants, particularly *Pardoe v Price,* and the judgment of Gummow J in *Roxborough,* that the rationale behind the rule was to compel the beneficiary, to proceed against the Trustee for what was said to be unpaid sums, in equity, where the Trustee could raise equitable defences and set offs. These were clearly concerns of a procedural nature in a pre-judicature era.

36. The passage from Gummow J cited above appears in a discussion by His Honour of the doctrinal origins of the action for money had and received. His Honour's statement of the modern law in Australia in regard to actions for money had and received (commencing on p 551 [90]) emphasised both the equitable roots of the action derived from the decision in *Moses v McFerlan,* and the flexibility of the remedy. A position recently reaffirmed by this Court (see *AFSL v Hills Industries* (2014) 253 CLR 560 at 592 [65] ff). The appellants do not suggest that there is any other reason for limiting the action for money had and received against a Trustee by a beneficiary to cases of bare trust than the expressed reasons in pre-judicature act decisions based on the necessity to prevent beneficiaries circumventing the equitable defences of a Trustee by bringing actions at law (Appellantss' submissions at [68]).

37. In any event the rules stated by Gummow J, in summary of the old cases, identified two categories in which an action for moneys had and received lay against a Trustee by a beneficiary, namely where it remained for the Trustee to do nothing except the payment over of the money or where the Trustee admits the debt. Further, it is doubtful if the reference in the old cases to nothing further needing to be done is a reference to the Trustee literally having in hand the cash to pass to the Trustee, but is a reference to the existence of an unconditional obligation. This reflects the language in which the Court in *Vesty's* case and *Ward* both spoke of obligation of the Trustee to the beneficiary following the declaration in each of those matters. As already pointed out, in neither of those cases was there any suggestion that the Trustee held the relevant income that had been applied on a bare Trust.

38. In the present matter the categorisation of the nature of the right held by the beneficiaries against the Trustee for the declared but unpaid entitlement is not determinative of the outcome. In the *Chianti* decision it was necessary to characterise the nature of the action in order to resolve one of the critical questions in dispute, namely, whether the matter had been properly brought within the jurisdiction of the Western Australian District Court. As Martin CJ noted at [4] if the matter had been removed into the Supreme Court, upon the point being taken, the issue would have lost all relevance, and the "arid and pointless debate about the characterisation of the cause of action and the extent of the District Court's jurisdiction would have been avoided".

39. The appellants offer two arguments as to the significance of the characterisation of the cause of action (at [73] to [76]). They suggests that if there was no action for money had and received against Nemeske as at 30 August 1995, there was no pre-existing indebtedness which Nemeske could have covenanted to repay under the Deed of Charge. *Ward's* case clearly contemplated that the beneficiaries had rights to enforce the declaration of entitlements that were unpaid.

40. In *Ward* McCarthy J concluded that the rights as between the beneficiaries and the Trustee did not arise out of debt or contract but were equitable rights (at p.30). A similar view may have been arrived at by North P (at CT 17.45). Little ought turn on the precise characterisation of the cause of action, and whether it is one that may be brought as an action for moneys had and received, or whether it sounds in equitable debt. If the trustee had indeed bound itself by a declaration and altered the nature of the beneficiary's interest in the Trust in regard to the subject of the declaration, then there must be some remedy that can be appropriately brought against the Trustee.

41. The second significance the appellants may attach to the characterisation of the cause of action is because the Deed of Charge recited an existing indebtedness (Recital D), but that of itself does little by way of characterisation of the obligation, and the recital is as consistent with the existence of an equitable debt, as one enforceable through a common law action.

42. Finally, it ought not to matter whether the recital in the deed accurately characterised the nature of the right of the beneficiary against the Trustee. For the reasons given in the section below dealing with the Notice of Contention, even if the recital was wrong in regard

to either the existence of any right, or the characterisation of such right, the creation of the covenant in the deed will remain enforceable.

43. Further, it is noteworthy that the applicants actually commenced the action as plaintiffs seeking a declaration that Nemeske was 'not indebted' to the executors of the estate, and a declaration that the purported distribution to Mr and Mrs Nemes was of no effect or void, and a declaration that the charge did not secure "any monies owed by the first defendant to the second defendant as executors of the Estate of the Late Emery Nemes". The appellants choose the content and terms of the dispute by choosing to seek declarations on those grounds set out in their statement of claim [AB p1] It was not part of the appellants claim that for purely equitable reasons the Trustee should not pay or be obliged to honour the obligation. The form of the cross claim arose responsively to the terms in which the declarations had been sought and therefore no consideration was required of any potential but unraised discretionary and equitable reason for the debt not to be paid.

PART VII: The Notice of Contention

44. There was a clear common intention in entering into the Deed of Charge to create an indebtedness on the part of Nemeske Pty Limited to Mr and Mrs Nemes, and not merely to reflect a prior advance in cash by Mr and Mrs Nemes, but to fulfil the obligation to perfect the advance.

45. There were a number of ways in which the Trustee could have engaged in dealings with Mr and Mrs Nemes that gave rise to an indebtedness, and that constituted acts by the Trustee within power. It could have effected a distribution to Mr and Mrs Nemes by payment of cash or assets. In incurring the obligation to the beneficiaries in Covenant 5, the Trustee did no more than realise its intention of making an advance to Mr and Mrs Nemes. Thus, even if it had not given rise to an enforceable obligation prior to the date of the Deed, the execution of the Deed and giving of the covenant to Mr and Mrs Nemes, was a carrying out of its intention to make an advance to them, a matter that was within the Trustee's power.

46. Entry into the Deed of Charge itself provides a further reason why the characterisation argument should be rejected. By entry into the Deed, confirmation or resolution of any ineffectiveness or potential procedural dispute was overcome. The Deed itself is evidence of the acceptance by the Trustee of a discrete obligation to pay the distribution as a legally enforceable debt. The Trustee intended, as consequence of its decision to distribute, that the beneficiaries were entitled to the said sum, an act it was empowered to achieve if not by the mechanism it actually engaged in then by another. If there were unforeseen defects in the procedures adopted by the Trustee or they had been otherwise ineffective or suffered procedural irregularity, then the Deed itself acted as identification of the obligation as a legal right and confirmation of it.

47. The deferral of any liquidation of assets had obvious and material benefits for the Trust and all potential beneficiaries. To achieve the legitimate objects of the Trust, the Trustees were entitled to effect a transaction that achieved its object without liquidating the assets which they had recently valued. Confirming or ratifying that decision was also a legitimate exercise by the Trustee of its powers. One of the ways that was done was by recoding the obligation in the accounts of the Trust the other was by entering into a deed.

48. As was noted by Dixon J in *Grundt v Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641 at 676:

> "It is important to notice that belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs. A tenant may know that his landlord's title is defective, but by accepting the tenancy he adopts an assumption which precludes him from relying on the defect. Parties to a Deed sometimes deliberately set out a hypothetical state of affairs"

49. The recitals and operative provisions of the deed created such an estoppel.

50. The execution of the Deed of Charge by Nemeske containing the recital as to the debt and covenants regarding payment constituted a representation by Nemeske to the effect that it was indebted to the Nemes' and that it would repay the sum on demand. In having made the Wills in the form admitted to probate and having given the instructions for those Wills in the fashion revealed in the evidence of Ms Grinberg, it is clear that Mr and Mrs Nemes relied upon the existence of the debt and, for the reasons already given, the representation by Nemeske of the indebtedness. The making of their

Wills constituted a form of detrimental reliance, such that Nemeske is not now entitled to resile from the representation of indebtedness.

51. This detrimental reliance crystalised at the latest upon the death of Mr Nemes, when it was no longer possible for him to alter his will or cause the trust to act upon the resolution to take into account of the issues or defects now raised by the appellants as to enforceability of the debt.

52. Further, if and to the extent that the Court were to accept arguments of the appellants to the effect that any of the actions of the Trustee prior to the charge were ineffectual, the representation coupled with detrimental reliance now renders it unconscionable for Nemeske to rely upon those defects in its action. There could be no suggestion that Mr and Mrs Nemes had actual knowledge of any of these defects, nor could it be said that Mr and Mrs Nemes had wilfully shut their eyes, or been careless, as to whether or not such defects had existed. These defects depend upon sophisticated legal argument.

53. Mr Nemes ordered his testamentary affairs on the basis of the representation of the existence of a in debt in circumstances where that cannot be now retracted or altered.

54. The estoppel arguments thus precludes Nemeske from denying its indebtedness even if there was a legal defect in the original transactions.

An Indemnity from Trust Assets

55. The extent of right of indemnity or exoneration (these rights are referred to hereafter as a right to indemnity) out of trusts assets is a complex question. There is undoubted power to give an indemnity in equity even where the trustee has engaged in the commission of wrongs including breaches of the *Trade Practices Act* (see *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liq)* [2002] NSWCA 29) Spigelman CJ, Mason P and Meagher JA, but not crimes or some breaches of trust. This Court has described these as questions which cause difficulty in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 see ff 156 of the judgment of French CJ, Gummow, Hayne and Heydon JJ and also *Nolan v Collie* (2003) 7 VR 287 particularly at p 303 to 309.

56. The appellants' bland submission [at 76] that a trustee will not be given a right of indemnity where the trustee is in breach of trust does not identify in any way the disqualifying conduct except in those broad terms, and is insufficient as a statement of the law.

57. The Trust deed provides [AB Vol 1 p85]

> "6. The trustee purporting to act in the execution of the trusts and powers hereof shall not be liable for any loss not attributable to dishonesty of the trustee or to the wilful commission or omission by the trustee of any act known by the trustee to be a breach of trust."

58. The power to reimburse is contained in clause10 of the Trust deed and extends to "all expenses to be incurred in or about the execution of the trusts".

59. The deed in effect allows for indemnity for acts purporting to be in execution of the trusts unless known to be in breach of them. In the present circumstances it is clear that there was never any knowledge of any potential breach, and that the trustees in representing and entering to the deed confirming the liability were if not authorised to do so were purporting to be and did so honestly in the execution of the trust

60. Alternatively the representation of the existence of the debt (even if not otherwise legally enforceable) was a circumstance that should be treated as no different from an actionable representation made by a trustee in the honest performance of his duties in respect of which the trustee would be entitled to an indemnity.

61. Equally it could not be justifiable to deny the Trustee an indemnity where the mechanism rather than the power to distribute from the trust is attacked. It should be borne in mind that the very retention of the assets rather than their liquidation has lead to the benefits of there being a greater value in those assets. At the time of Mr Nemes making his will in 2002 these were estimated at $6 million (see AB Ms Grinberg's affidavit paragraph 18 AB p 70). The acknowledgement of a debt has enabled the possibility of a net return to the beneficiaries after payment of the debt. The decision to distribute by agreeing to pay a debt rather that liquidate and distribute the money obtained from the liquidated assets (which at

10 the time the resolution was made would have left the trust with potentially $1000 as disclosed in the accounts) has thereby benefited the trust.

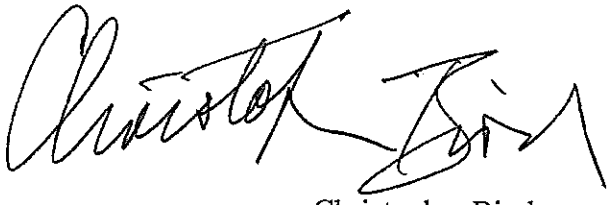
Orders Sought

62. The appellants appeal be dismissed with costs

63. Alternatively in the event that the Court considers it appropriate that the notice of contention and/or indemnity issues be remitted to the New South Wales Supreme Court
20 for determination.

PART VIII

64. The respondents expect to take 1.5 hours in oral argument.



30 Christopher Birch
Senior Counsel for the Defendants

Benjamin DeBuse

Counsel for the Defendants