IN THE SUPREME COURT OF NEW ZEALAND SC 92/2014

[2015] NZSC Trans 10

BETWEEN **MARK STEPHEN HOTCHIN**

Appellant

AND **THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED**

Respondent

Hearing:	26 March 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	N S Gedye QC and J A MacGillivray for the Appellant D J Cooper and J Q Wilson for the Respondent

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CIVIL APPEAL

MR GEDYE QC:

May it please the Court. Gedye for the appellant with Mr MacGillivray.

ELIAS CJ:

Thank you Mr Gedye, Mr MacGillivray.

MR COOPER:

May it please the Court. Cooper for the respondent, and Mr Wilson.

ELIAS CJ:

Thank you Mr Cooper and Mr Wilson. Yes Mr Gedye.

MR GEDYE QC:

Your Honours should have before you an outline which I have handed up, a one page outline of the matters I propose to cover?

ELIAS CJ:

Yes, thank you.

MR GEDYE QC:

And Your Honours will have noted that the appeal against the second respondent has been abandoned.

ELIAS CJ:

Yes.

MR GEDYE QC:

That doesn't alter any aspect of what's proposed today.

ELIAS CJ:

We're down one counsel submissions so I think I was a little worried we'd complete in the day but we should be well within it.

MR GEDYE QC:

Yes, I think we should Your Honour. I see that there's a judgment at 2.15 but I assume that will only be a short matter.

ELIAS CJ:

Yes.

MR GEDYE QC:

If Your Honours please, the appeal concerns the correct interpretation of section 17 of the Law Reform Act 1936, and in particular whether the same principles apply in equity and under the statute. It is our case that all the statute requires is tort liability for the same damage or harm. In this case there was a single form, or type of damage, which was the inability of the investors to recover the money they invested.

It was the loss of a specific sum which the investors lent to the finance company. We say the key error in the Court of Appeal and the High Court was to import equitable principles and restrictions into section 17 and we say that that error drove an incorrect assessment of the same damage issue.

I'd like to start by dealing with the text and then the scheme and purpose of section 17 I propose to adopt orthodox statutory interpretation approach as confirmed by this Court in the *Commerce Commission v Fonterra* [2007] NZSC 36 case in 2007. I can be very brief with regard to the text because in our submission it's a simple provision expressed in plain words. Nothing in the text, in our submission, justifies the importation of equitable principles. The text is to be found under tab 2 of the bundle. The operative text is to be found in two main places under the opening words of section 17(1) and then the words in 17(1)(c). 17(1) starts off, "Where damage is suffered by any person as a result of a tort," and then subsection (1)(c) picks that up and states that, "Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is," and I'll skip the next phrase liable in respect of the same damage whether as a joint tortfeasor or otherwise.

In my submission this produces a very simple test on the face of it. The damage must be the result of a tort. Tortfeasor A must be liable in respect of it. Tortfeasor B must also be reliable in respect of the same damage. The words used in the statute are not consistent with the requirement for there to be co-ordinate liability, as required in equity. They do not say liable with another tortfeasor or jointly with another tortfeasor and in fact the wording expressly refers to several tort liability. I refer first to the heading in section 17 which refers to proceedings against and contribution between joint and several tortfeasors but the matter is made clear beyond doubt by the words of section 17(1)(c) which refers to liability whether as a joint tortfeasor or otherwise. "Or otherwise" can only mean in its context several liability.

So in summary on the text the statutory wording makes it necessary to establish that both tortfeasors may be liable for the same damage but providing that is apparent the wording of section 17 doesn't require any commonality in the respect of causes of action. The bases for liability, the methods or quantification leading to a damage award, damages award, or the relationship between tortfeasor A and tortfeasor B. The words require simply and only that there must be two persons liable in tort and they must be liable in respect of the same damage. That is submitted, the error

below, in our submission was to analyse the sameness of damage in terms of whether it resulted in both cases from co-ordinate liability. Section 17 does not require that.

Looking now to the purpose and context of the statute, is there anything about the context requiring the importation into section 17 of restrictive equitable principles or that tortfeasor A must have the same basis for liability as tortfeasor B. We say adamantly no, in fact we say that the context of the legislation points to the opposite conclusion. It is clear, I think, from the authorities that the legislation was enacted to have remedial effect and to fill the hole in the common law and in equity resulting from the *Merryweather v Nixan* (1799) 8 TR 186 case in 1799 which held that contribution between tortfeasors was not permitted. The statute was enacted to cure that lacuna in the law in 1935 in the UK and the present statute we're concerned with followed a year later in New Zealand in 1936. It was not Parliament's intention to codify equitable rights, but rather to provide for new rights which did not exist in equity. It would be inconsistent with that remedial intent to find that Parliament intended to create the same rights as an equity. Parliament's intention in enacting this remedial statute was simply to enable co-tortfeasors to obtain a contribution in respect of the same damage. It would be wrong to apply a gloss to the statute's words to require co-ordinate liabilities. It is our case that the trustees' argument in this case would negate that intention.

ARNOLD J:

Can I just ask, the principles of contribution go back beyond this statute in other contexts and so when contribution was made available in respect of joint tortfeasors or several tortfeasors. Is the Court entitled to say well that was against the background of the common law developed principles of contribution and that one might assume that this statute simply effectively picked those up and applied them in the joint and several tortfeasor context?

MR GEDYE QC:

In my submission I, I would accept that, that the background may of course be looked at as part of the general context but the words of the statute do not accommodate an importation of equitable principles so it is correct to interpret the statute according to what its words provide. The, the background and the context do not override the words or do not justify adding a substantial gloss to them. Parliament could easily have provided words requiring co-ordinate liability. I want to point to a passage in

which Justice Kirby in the Minter Ellison case pointed that out. He did that at paragraph 93 of the judgment. Also as I will come to there is no inherent reason why there should be co-ordinate liability in a claim between two tortfeasors. So it is our case that when looking at the statutory regime there is no justification for imposing co-ordinate liability, no justification based on the historic development of the law of contribution. This was a remedial provision aimed at curing what was seen as a defect in the law.

ELIAS CJ:
In what sense are you using the term "co-ordinate liability?"

MR GEDYE QC:
In the equitable sense Your Honour. In the sense explained by this Court in the *Marlborough District Council v Altimarloch Joint Venture Limited* [2010] NZSC 126; [2012] 2 NZLR 726 case. In the sense that there must be a common liability on a common demand. I would say this case has a substantial semantic element to it and that as I will come to, the *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 (HL) case uses some terminology that could be taken we say the wrong way. There is frequent reference in that case to common liability but we say that all that means in the context of the statute is liability for the same harm and that it does not mean co-ordinate in the sense of having the same characteristic, same essential duties, a common, joint liability on a common demand.

The law in New Zealand until now has involved a straightforward application of the statutory test without importing equitable principles and I rely particularly on *Dairy Containers Limited v NZI Bank Limited* [1995] 2 NZLR 30 (CA) case which I will return to. But I did want to refer Your Honours to two cases in particular. One is the High Court of Australia case. I refer to it as the Minter Ellison case, Minter Ellison against Perpetual, although it is cited as *Alexander v Perpetual Trustees* (2004) 216 CLR 109 (HCA). This was handed, this was filed separately some time ago. I, I say at the outset it is a curious case because there was six Judges, three of whom decided one way and three of whom decided the other way and by virtue of the Australian legislation the judgment of the Chief Justice carried the result but I am not putting this case to you as dicta from a minority per se because the joint judgment which decided against contribution did not in fact hold against the point I am advocating which is that you look only at common liability and you do not need to

require co-ordinate liability and in fact one part of the joint judgment expressly says that you don't do that, and I'll come to that.

Very briefly on the facts of that case there was an investment made in a company called ECCC, that investment was supposed to be secured by deposit certificates issued by a bank. Minter Ellison acted as solicitors for ECCC and were found to be negligent in processing the loan without these security certificates. Perpetual Trust acted for two superannuation funds which made substantial investments in ECCC and Perpetual Trust were found to have been negligent for permitting the investments without the proper securities. Minter Ellison sought contribution from Perpetual Trust. We rely on the three judgments in that case, particularly those of Justice Callinan and Kirby as setting out the correct approach. But as I've said even the joint judgment recorded what we say is the correct approach and I refer to paragraph 25 of the joint judgment.

ELIAS CJ:
So the disagreement is on application?

MR GEDYE QC:
In my submission yes Your Honour. Now I should add that this judgment was addressing the Victorian Wrongs Act 1958, which is a statutory contribution provision we say materially the same as the New Zealand statute. Like a number of jurisdictions the Victorian Wrongs Act also allows omnibus causes of action to generate contribution, so claims of contract and tort and breach of trust and so on can all generate contribution whereas New Zealand is simply limited to tort claims. But in my submission no aspect of that wider basis for contribution liability makes any difference. At 25 the joint judgment said the issue –

ELIAS CJ:
Sorry, why do you say that? Because there you are only relying on tort, liability in tort?

MR GEDYE QC:
Yes Your Honour. The general principles relating to the approach in the statute do not differ depending on whether that statute permits only tort claims or tort contract trust and so on.

At 25 the Court said, "The issue currently before the Court is not to be resolved primarily through reference to common law and equitable principles governing contribution." And that goes on with another point. The judgment of Justice Callinan at 166 of that decision, towards the middle and end of that paragraph –

WILLIAM YOUNG J:
Sorry, 166?

MR GEDYE QC:
Yes Sir. Also made it clear that the statute should be approached standing on its own. He said, "The right to contribution is the consequence at which the Wrongs Act aims and follows from a natural reading of it and the Fair Trading Act. The fact that the plaintiffs chose not to make them all is itself entirely fortuitous and has nothing to do with the meaning of the Wrongs Act. It is an Act intended to extinguish technical defences based on old equitable and common law rules which demand a fair and reasonable sharing of blame among those who have contributed to identifiable loss and damage and it is to that intention readily discernible from its language that I will give effect."

And Justice Kirby's decision, I would invite Your Honours to review paragraph 79 to 84 where he traverses the history and the provenance of the legislation in considering what its purpose and context is. In particular at paragraph 85 Justice Kirby said, he referred in the middle of that paragraph, "To demonstrate beyond doubt the remedial and reformatory character of the legislation so enacted." And at 88 he criticised the approach in the Court of Appeal saying, "Instead of analysing the meaning, application and purpose of the reformatory provisions of the Wrongs Act the learned Judges of the Court of Appeal focused on judicial exposition. It is important the Court should not make the same mistake. The amendments to the Wrongs Act introduce deliberate and important reforms to the written law. They require of Judges a fresh look at the availability of contribution freed from restrictions earlier devised by Judges which in part the remedial provisions were designed to overcome."

ELIAS CJ:
Where is the provision in the Wrongs Act? Is it, where is it set out? The text?

MR GEDYE QC:

It is section 23A and B and –

GLAZEBROOK J:

There is something at paragraph 21. I am not sure whether that is the –

MR GEDYE QC:

No, there is, there is a page where the whole section is set out. Starting at paragraph 148.

GLAZEBROOK J:

I am missing some sections, some pages.

MR GEDYE QC:

Oh, well, do we have a spare copy? Well –

ELIAS CJ:

I am too.

GLAZEBROOK J:

Pages 449 to 450.

MR GEDYE QC:

I do apologise Your Honours. I can read the relevant section because it is only brief, and I will make a copy available in the break.

ELIAS CJ:

I think if you made a copy available to us of pages 449 and 450 that would be helpful.

MR GEDYE QC:

I apologise for that.

ELIAS CJ:

That is all right.

MR GEDYE QC:

Section 23 is headed "Entitlement to contribution." It says, "Subject to the following provisions of this section a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage, whether jointly with the first mentioned person or otherwise." And the only difference I saw between that and the New Zealand section was the word "any" before "damage." The New Zealand section is cast differently. It talks about, "any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor," and because this is an omnibus provision incorporating contract, tort, breach of trust and so on it cannot have that wording. But materially it is the same. A person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage. And certainly the discussion in the Minter Ellison case focuses on the single ultimate issue of whether the damage was the same and the statute simply uses those words "same damage," and it is on that basis that I submit the case is helpful.

So I submit that Minter Ellison is authority and the exposition, particularly of Justices Kirby and Callinan demonstrates this for the proposition that you must interpret the statute according to its plain words and that there is no basis for importing the principles and equity. It is notable that the Court in Minters did not make any reference to the leading Australian case on equitable contribution which is *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 (HCA) and my friends refer to *Burke* and I think this Court looked extensively at *Burke* in the *Altimarloch* case. There was no doubt that Burke is a prominent decision in Australian law on equitable contribution and apart from one brief mention by Justice Kirby the Court simply did not look at *Burke*. It followed a completely different approach under the statute. I am perhaps labouring this point because both the Court of Appeal and High Court in this case expressly stated that the same principles apply in equity and under the statute.

If I could take Your Honours now to the *Royal Brompton* case which is the other leading case on this issue. It is at tab 9 of the bundle. And I think the importance of this case is it has been very influential on the result in the Courts below, but in our submission *Royal Brompton* is a case limited to the contribution statute. It does not import equitable contributions and all references in that case to common liability should be read to mean liability for the same damage. The *Brompton* case proceeded under the 1978 statute in the UK which was, which is materially the same

as the New Zealand statute except that that Act also allows claims and contract tort and other causes of action and is not limited to tort liability.

ELIAS CJ:
Sorry, what date is that statute?

MR GEDYE QC:
1978 Your Honour.

ELIAS CJ:
Oh, yes. That is right.

MR GEDYE QC:
Law reform moves slowly there. The original statute came out in1935 and it was 1978 before it was reformed. But only by extending the available causes of action.

I would like to take Your Honours to Lord Hope's judgment which is in my submission the clearest of the three judgments on the point which I am addressing which is the correct approach under the statute. At paragraph 37 of Lord Hope's judgment he also starts with the remedial effect of the new Act. He said, "The purpose of the Act as its long title indicates was to make new provision for contribution between persons who are jointly or severally or both jointly and severally liable for the same damage." A little further on he says, "The starting point for the exercise is the assumption that two or more persons have contributed albeit in different ways to the same wrong." So straight away you have a conflict with the equitable principle that you have to have a co-ordinate basis for liability. In paragraph 38 he reviews the provenance of the statute starting with the *Merryweather & Nixan* case. And further on at 46 is the clear statement, which I submit demonstrates the error in the Courts below. He talks about, "the assumption which has always been made in contribution cases that the relief is available only where two or more persons have contributed, contributed albeit in different ways to the same harm or damage. That is where a single harm has resulted from what they have done. Where this occurs it may be said," and then importantly he says in brackets, "(loosely) as their liability is not common in the strict sense as in the case of co-trustees or co-owners. It may be said that they share a common liability to pay compensation for having inflicted the same harm." So His Lordship there is expressly avoiding and delineating co-ordinate liability under the statute.

ELIAS CJ:

Just explain that a bit more? In what way?

MR GEDYE QC:

Where His Honour makes it, where His Lordship makes it clear that liability is not common in the strict sense, and that is the sense required in equity as in the case of co-trustees or co-owners, and he is saying it is not common in the strict sense. He is referring in my submission to co-ordinate liability as requiring equity. What he is saying is that you need common liability in the sense of liability for the same harm. In the sense only of the same harm.

Lord Steyn at paragraphs 24 to 27 is, says nothing different in my submission. He reviews the legislation, notes that it is to make new provision for contribution between persons who are jointly or severally, or both jointly and severally, liable for the same damage and Lord Bingham –

ELIAS CJ:

I'm sorry, I'm perhaps a little slow on this, I'm just trying to work out whether Lord Hope – Lord Hope is not saying that the strict sense attaches only to people in relationships such as co-trustees or co-owners. Presumably he would admit joint tortfeasors?

MR GEDYE QC:

Well certainly joint tortfeasors –

ELIAS CJ:

Yes.

MR GEDYE QC:

– but what he's saying in my submission is that the most telling reference is the reference to persons being liable in different ways. There's several references in this decision to liability being in different ways.

ELIAS CJ:

Yes.

MR GEDYE QC:

Of course that's the antithesis to what equity requires.

ELIAS CJ:

Yes, yes, I understand that. I was just boggling a little bit at the strict sense being equated with co-trustees or co-owners because it's a little bit wider than that.

MR GEDYE QC:

Yes, I think he's just giving examples.

ELIAS CJ:

Yes.

MR GEDYE QC:

And it's just a parenthetical insertion in his, in the main sense of what he's saying. He's says, "Where this occurs it may be said… not common in the strict sense."

ELIAS CJ:

Well, where they've contributed in different ways that is not co-liability in the strict sense. Not common in the strict sense.

MR GEDYE QC:

No, it cannot be.

ELIAS CJ:

Yes.

MR GEDYE QC:

No. There's an aspect of *Royal Brompton* which is, with respect, a semantic. There's been great attention paid to specific sentences in this decision but read as a whole it's clearly saying, in my submission, that you can have different bases of liability. That co-ordinate liability is not required and that when they say you need common liability what they mean is liability for the same harm, and that's all they mean, and that's all the statute requires and it's the factor that's the same harm that makes it just and acceptable to all the contribution.

ARNOLD J:

Do you accept the distinction that Mr Cooper draws between the notion of the same harm and two separate things which produce the same result, there's some authority for that sort of distinction, what do you say about that?

MR GEDYE QC:

I think my friend was referring to a statement by Lord Hope on page 1417 at line G where he –

O'REGAN J:

What paragraph number?

MR GEDYE QC:

Paragraph 47 Your Honour. I better read the whole thing. "The effect of those words is that the entitlement to contribution applies only where the person from whom the contribution is sought is liable for the same harm or damage, whatever the legal basis of his liability." And then this is the sentence my friend relies upon. "But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage."

With respect, by itself that statement doesn't get one anywhere because all it is saying – well it provides no guidance in terms of same damage, and it's part of a longer exposition because the next sentence goes on, "The facts must be examined more closely in order to determine whether or not the damage is the same." So except the fact that there are two wrongdoers and that the result is generally similar doesn't get you there. You do need to look at whether both persons are liable in respect of the same damage but this is just one sentence taken out of a longer exposition which makes it clear that you do have to look at the facts to determine whether the damage is the same. By itself it's not a statement of principle contrary to my case.

ARNOLD J:

Thank you.

GLAZEBROOK J:

Well the examples do seem to refer to people acting together and separately though, but you say in a different context. I'm just thinking of the slander and then at the end

the two dogs acting in concert, but you don't know who, which dog killed which sheep or indeed if one of the dogs didn't kill the sheep.

MR GEDYE QC:

Yes. There are many difficult factual cases in this area and Lord Hope gave the example of the dogs and I think the black-faced ewes. But those don't interfere with the basic principle which is that you can have different roles, people acting separately and differently, provided the resultant harm is the same. I'll be coming to same harm as a separate topic.

I just wanted to conclude the review of *Royal Brompton* with Lord Bingham's judgment which is the one perhaps which is given the most difficulty because of a number of, well a few phrases he's used. For example he talks about – well paragraphs 5 and 6 are the key paragraphs in Lord Bingham's judgment and he starts, as they all do, with reference to the object of the 1978 Act being to widen the class of persons between whom claims for contribution would lie, and that's a reference to the different causes of action, and he says, "It is, however, as I understand it, a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A." And I accept taken by itself, and without law, that may provide apparent support for the idea of importing co-ordinate liability into the statute. But in fact as His Lordship goes on it's clear that he's not saying that. At the end of paragraph 5 he says, "Both sections, by using the words 'in respect of the same damage', emphasise the need for one loss to be apportioned among those liable."

Then he goes on to what I submit is a particularly noteworthy contribution to this issue, which is his three questions. "When any claim for contribution falls to be decided," and he's obviously dealing with the statute here, "the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it." Now what's noteworthy is that his first question addresses only the damage and it is the first in the sequence. You have to determine what the damage is and from there you proceed to whether both tortfeasors are liable in respect of it. His starting point, his first question doesn't look at cause of action. It doesn't look at jointness or sameness of liability. It doesn't look at any of the duties or damages and for all that it's an

extremely simple looking question, in my submission, it's particularly notable here because it demonstrates the correct analysis.

ELIAS CJ:

Can I just ask you, because I'm a little hung up on the difference between the old statute and the more modern basis in the UK statute. Joint and several tortfeasors, is your submission that several means distinct torts?

MR GEDYE QC:

Yes. Not – well that but perhaps more centrally not acting together in the sense that joint is used.

ELIAS CJ:

Yes.

MR GEDYE QC:

Again it's a semantic problem because –

ELIAS CJ:

But, I mean is there any authority on that point, because it might, it would read more usually if it is a reference to liability. Joint and several liability which might leave open the argument that it has to be, that they have to be joint tortfeasors.

MR GEDYE QC:

Well Your Honour in my submission the answer is found specifically in the New Zealand statute wording. Both in the heading joint and several, but more clearly in (1)(c) which says, "Liable in respect of the same damage." So this is addressing liability. "Whether as a joint tortfeasor –

ELIAS CJ:

Or otherwise.

MR GEDYE QC:

"Or otherwise."

ELIAS CJ:

Yes, yes I see.

MR GEDYE QC:

And “or otherwise” can only mean –

ELIAS CJ:

Yes.

MR GEDYE QC:

“Several” is probably not the most apt word –

ELIAS CJ:

No.

MR GEDYE QC:

It probably just means –

ELIAS CJ:

No you are right but the language makes it –

MR GEDYE QC:

Yes.

ELIAS CJ:

Yes. Thank you.

MR GEDYE QC:

The cases do refer –

O’REGAN J:

But does it mean or otherwise in tort? Or are you saying it means liable anyway?

ELIAS CJ:

Well it must be in tort because of –

MR GEDYE QC:

Yes.

O'REGAN J:

Otherwise you're not a joint, joint tortfeasor.

MR GEDYE QC:

It is, it is a given that it is in tort so it must mean or otherwise. The term that is often used is concurrent tortfeasors. Because of course –

ELIAS CJ:

That is not very helpful either.

MR GEDYE QC:

No it is not. It just means they are acting side by side I guess in some parallel way.

ELIAS CJ:

I was just really wondering whether the English authorities such as *Royal Brompton* understandably have to, all the work has to be done by the same damage because the basis of liability is so open, so diverse, but you say as long as it is in tort it is the same thing. It is not the same tortious liability.

MR GEDYE QC:

I do Your Honour.

ELIAS CJ:

Yes.

MR GEDYE QC:

I say the authorities make it specifically clear that they can be separate Acts and different Acts and unassociated Acts.

ELIAS CJ:

Yes.

MR GEDYE QC:

And what I do say on this point is that the respondent's argument would lead you to the conclusion that you can only get contribution where there are joint tortfeasors, persons acting in concert. And in my submission in the world of tort that would be a rare occurrence. Tortfeasors of course can act jointly, but more commonly they do

not. And that brings me to the submission I wanted to make which is requiring co-ordinate liability in the equity sense is inconsistent with the inherent characteristics of tort claims. The respective characteristics of two or more tort claims are frequently entirely different. Even if the same tort is involved, say negligence, the duties may be very different. They do not have the essentially joint liability characteristics of those persons whom equity recognises requiring contribution that is co-sureties, co-insurers, partners, joint tenants and the like. Tortfeasors by their very nature often stand separately from one another. There is frequently no commonality at all between their obligations and rights.

As an example of this, possibly the best example that there is is the *Dairy Containers* case, and I have dealt with that in some detail in our written submissions at paragraph 20 but that involved the following. Firstly an auditor whose duty was to audit the books of the company and to detect discrepancies. The Auditor-General was liable in negligence for a deficient audit. Secondly, it involved the tort of conversion committed by banks by accepting cheques. That tort of conversion had a, had an overlay imposed by the Cheques Act 1960 involving aspects of negligence. And issues of good faith are remarkably different matters. Then there was the parent company which was the Dairy Board which was said to be liable in tort based on vicariously, vicarious liability for the fraudsters' tortious acts and for negligence by interfering with DCL's affairs. And then fourthly there was the fraudsters themselves who were liable for the tort of conspiracy to defraud. And, unless *Dairy Containers* is said to be wrong, which I think my friend must be driven to say, then that's an excellent example of radically different duties, bases of liability, anything less co-ordinate in the equitable sense would be hard to imagine. But the damage was the same. So in our submission *Dairy Containers* was correct with respect and it illustrates the correct approach. You look at the same harm, loss or damage, and it does not matter, in fact, it's perfectly acceptable and open under the statute for there to be very different causes of action and no commonality between the tortfeasors at any point up until you look at the result of what they did, which was the same harm.

ARNOLD J:

Does the form of the action matter? In this case it's actually the FMA suing under a statutory provision for compensation.

MR GEDYE QC:

In my submission no Sir. The Court of Appeal found that all elements were satisfied except same loss and the respondents have not cross-appealed that. In substance, of course, this is a claim on behalf of investors. The FMA acts only as a proxy for the investor's rights. So prior to this point all the parties have treated this as, this element as satisfied. As we said in paragraph 6 of the written submissions, "It was accepted by the Court of Appeal that all other elements of s 17 are (arguably) made out in this case." And obviously arguably because in this interlocutory setting everything is contingent, multiply contingent upon the FMA succeeding and so on. But one of the matters which was accepted that Mr Hotchin was potentially liable to the FMA in tort, even though sued under a statutory provision, and that the fact that the claim was brought by the FMA did not disqualify operations of statute.

ARNOLD J:

But would it affect whether he should be allowed to pursue his claim in the same trial as the FMA one, given the costs sought and so on? I mean increasing the cost to the FMA would thereby reduce the amounts that the claimants get, because I think the costs come out of the successful award of compensation, don't they?

MR GEDYE QC:

Yes, well they could do, if the FMA is entitled to claim them, yes. Well that would be a discretionary matter enjoinder, in my submission, but the reality in this case is that the facts concerning the claim against the directors, and the facts concerning the claim against the trustees, are completely intertwined, and I'll come to this, but one good example is the FMA says on a certain date the cash flow forecast came out that showed a deficient position and so you, the director, should not have allowed the prospectus to continue. On or about the same date the trustees would have got that cash flow information and so there's a complete commonality between what the directors and trustees were looking at and it would, I think I must be right in saying, it would be inconceivable to have one trial against the directors and anther trial against the trustees, because the information flows and what should have happened in response applied equally to both. The trustees –

ELIAS CJ:

But that point hasn't really been the subject of consideration, has it?

MR GEDYE QC:

No, the trustees didn't raise that point and the FMA has not sought to raise any points about joinder –

ELIAS CJ:

But it's not a point that is resolved. It still remains an available course, does it, for the – I'm just trying to work out how it fits in with your strike-out and what we're being asked to look at, because as you acknowledge, there's a discretionary element in any event.

MR GEDYE QC:

Yes, the point has not been raised by any party in the Courts below. The joinder was attacked purely on the basis of the operation of the statute. The *Dairy Containers* case in the Court of Appeal looked at arguments about escalation of cost and delay and so on but I think all three, or certainly two of the Judges in the Court of Appeal said, well that's just a consequence in a large contribution claim and it has to be accepted. It's a necessary evil.

ELIAS CJ:

But, sorry, I suppose I'm just trying to work out where matters are left in the High Court because this was a strike-out application.

MR GEDYE QC:

Yes.

ELIAS CJ:

Has the Court, in fact, decided – I mean, there still remains a decision to be made as to joinder, does there not?

MR GEDYE QC:

Well, the appellant joined the trustees as of right within the available 14 day period under the High Court Rules, so the onus then shifted to the trustees to apply to strike-out and the FMA as plaintiff didn't seek to be heard on that application, so the FMA has not raised the point, and the trustees themselves didn't raise the point, so my understanding is if this Court were to allow joinder of the trustees they would then just be reinstated as a third party.

In my submission, it would be a trial management issue more than anything else as to deal with the consequences of having the trustees as party to the action, but the FMA, I think I can say, has accepted that the trustees should be part of the main trial because of the complete intertwining of the facts.

WILLIAM YOUNG J:
Well, there are some – I mean, there are disadvantages for the FMA in there, of course, in terms of cost, and some advantages in terms of the defendants running cut-throat defences effectively.

MR GEDYE QC:
Yes, Sir, 17(2), which I'll come to, in fact, I'm about to come to, is the point at which the respective portions of liability is addressed on the basis of what is just and equitable, and so you – it would be very difficult to do the 17(2) exercise unless the trustees were there in the main trial and you could look at what the directors' responsibility was compared to the trustees' responsibility.

In fact, I'd like to come to that point, if I may, which is this, that the existence of section 17(2) removes any argument that you need to read section 17(1) restrictively to ensure that contribution occurs only where it's strictly co-ordinate. Issues of the sameness of responsibility or the extent of responsibility are addressed by 17(2). So if you get through the threshold of 17(1) at trial –

GLAZEBROOK J:
Sorry, whereabouts?

ELIAS CJ:
Under tab 2.

MR GEDYE QC:
Sorry, Your Honour, tab 2. 17(2) engages if you get through the threshold and you go to trial. It says, "In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage," and the Court can exempt someone, or to direct may be – contribution to be recovered, shall amount to a complete indemnity. So the Court has got a power from zero to 100% in terms of the apportionment, and we say

this is an answer to any concern that the respective liabilities need to be the same or that the Court should address the respective causative effect of the actions of both tortfeasors at the threshold stage. Provided you determine that the damage is the same, all other issues of sameness or differentness, of causative potency, responsibility, engage at the trial stage under 17(2), and you can see how broad it is. It talks about just and equitable.

O'REGAN J:
Just coming back to the earlier point, in relation to the other trustee, is Mr Hotchin now not making any – he's accepting he's got no right of contribution from them, is he?

MR GEDYE QC:
From Perpetual Trust, Sir?

O'REGAN J:
Yes. Is that the effect of abandoning the appeal?

MR GEDYE QC:
No, it's not, Sir. There's been a resolution of the claim.

O'REGAN J:
I see, okay.

MR GEDYE QC:
Perpetual and Mr Hotchin have reached an agreement, a settlement agreement. It certainly doesn't signify there's no basis for liability. Indeed, it signifies the opposite, that there is.

O'REGAN J:
But how does that get brought into play on the section 17(2) equation if it's just and equitable as between all of the joint tortfeasors which presumably would include Perpetual?

MR GEDYE QC:
Well not really Sir because Perpetual and Guardian Trust were truly separate. Guardian Trust was the trustee for Hanover Finance Limited under a separate trust

deed and separate securities. Then there were two other finance companies, United Finance and Hanover Capital Limited and Perpetual is the trustee for them under separate trust deeds, separate securities, so they are completely separate.

O'REGAN J:
So in fact there is two different or there would have been two different section –

MR GEDYE QC:
Yes.

O'REGAN J:
– 17(2) equations to be done? Right.

MR GEDYE QC:
Yes, that is right Sir. There would have been no washing up between Guardian Trust and Perpetual because they are completely separate.

GLAZEBROOK J:
But then there is quite complicated law because I remember looking at it, as to what happens when somebody settles and other people. It is –

MR GEDYE QC:
Yes there is.

GLAZEBROOK J:
There is a lot of case law on that and I think it struck me that it tended to be rather unfair that because you, you then got stuck with the, the lot if there had been a settlement but I do remember that there, there is quite, quite a lot of law on that.

WILLIAM YOUNG J:
There was a principle that a settlement with one tortfea - with a joint tort fea - can discharge the other tortfeasors.

MR GEDYE QC:
Yes, a joint tortfeasor Sir yes.

WILLIAM YOUNG J:
Which could be addressed by having an agreement not to settle but not to pursue a claim?

MR GEDYE QC:
Yes.

WILLIAM YOUNG J:
And then I think this has been recently reconsidered I think in the High Court hasn't it?

MR GEDYE QC:
Yes.

WILLIAM YOUNG J:
Here.

MR GEDYE QC:
The issue does not arise here though because the two were completely separately constituted.

I would like next to take Your Honours briefly to the Limitation Act 2010, which is under tab 6 of the bundle. I do not rely heavily on this but I thought I should draw your attention to it as a, a curious addition to the debate on, on topic. You will see section 34 of Limitation Act 2010 operates in subsection (4). Section 34 deals with claims for contributions and subsection (4) says, "It is a defence to a claim for contribution if the claim is filed at least two years after the date on which the liability is quantified." So it is the two year limitation to contribution claims that was under the old Limitation Act as well. But curiously subsections (1), (2) and (3) in leading up to that operative limitation provision traverse a description of tort contribution claims under the Act and other contribution claims. Subsection (1) says, "This section applies to claims under section 17," and just effectively recites section 17's requirements. Subsection (2) then goes on to say, "This section also applies to a claim made by a person (A) who is liable (otherwise than in tort) to another person (B) in respect of a matter." So presumably this addresses equitable contribution claims. Because under New Zealand law unless you are a tortfeasor under the statute that is the only other form of contribution claim you can make. And

subsection 2(b) says, “And for contribution from a third person who is or would if sued in time have been liable (otherwise than in tort) to B (whether jointly with A or otherwise) in a coordinate way in respect of that matter.” And then subsection (3) says, “You are liable in a coordinate way for the purposes of this section if and only if, firstly a common obligation underlies C’s liability to B and A’s liability to B.” So this appears to be the *Altimarloch* co-ordinate liability concept embodied in the statute. This statute of course predated this Court’s decision in *Altimarloch*. It is remarkably prescient in that, that sense. And then (b) sets out the mutual discharge test. “Payment or other discharge of C’s liability to B would have had the effect of relieving A in whole or in part.” I do not suggest that this provision can provide the answer to the issue but it is an interesting example of recognition by the legislature of a different approach under the statute for tortfeasors and a different approach in equity or otherwise than in tort. I do not say that it can produce –

ELIAS CJ:

You are just saying that the legislature has acted consistently with the submission that you make?

MR GEDYE QC:

Well, I think you could submit Your Honour that the 2010 Act is a recognition of what the law in New Zealand was thought to be at that time, and it’s a recognition by the legislature that you do not apply equitable co-ordinate liability principles under the Act, because it treats them explicitly as different. It’s a curiosity, not least because it’s all imitation provision which then appears to proscribe what the substantive law is. We’ve looked very hard as to how this got into the legislature but there’s nothing in Hansard or any preliminary materials that throws any light on it.

ARNOLD J:

So there was no, after the Law Commission did its originally work on the Limitation Act, it sat around for a long time, they didn’t come back to it at some later point?

MR GEDYE QC:

We have not found anything Sir.

ARNOLD J:

Right.

MR GEDYE QC:

Perhaps to conclude the submissions on the statutory purpose. By requiring the liabilities of tortfeasors A and B to be the same or co-ordinate, the Courts below have negated the intent and purpose of section 17 to the point where it will only engage for pure joint tortfeasors. Otherwise it would remove effect from section 17 in the case of any tortfeasors other than purely joint and as the law now stands, from the decision below, there's no difference between section 17 and the approaching equity. A particular reference to that would be paragraph 25 of the judgment below where the Court held that the same principles apply and we say that's fundamentally wrong.

GLAZEBROOK J:

Is it true that the position in equity is quite as rigid? In any event?

MR GEDYE QC:

Well –

GLAZEBROOK J:

Not that that really doesn't affect your argument but it may affect an argument if we say contribution has some sort of meaning that has to be taken from, like the word "contribution" which I think is the point –

MR GEDYE QC:

Yes.

GLAZEBROOK J:

– Justice Arnold was putting to you, has to take its flavour. Well if in fact the position that equity isn't quite as rigid is having to be a joint tortfeasor.

MR GEDYE QC:

I accept Your Honour that the position of equity is not rigid. However, it remains, shall we say, very strict. You do have to establish a co-ordinateness, or a jointness, or a sameness. There's room to argue perhaps that the margins, whether any particular case is sufficiently the same, and I'll come to this when I advance the case in equity, but all the dicta are clear that there must be a co-ordinate element and the decision of this Court, with respect, demonstrate that there is room for differing assessments of whether something is co-ordinate or not. But the principle remains in equity that it must be co-ordinate or joint in some real way.

GLAZEBROOK J:
So that co-ordinate liability in some way rather than co-ordinate harm. So you say –

MR GEDYE QC:
Yes.

GLAZEBROOK J:
– the same harm is sufficient under the statute –

MR GEDYE QC:
Yes.

GLAZEBROOK J:
– as you don't need anything related to that in terms of liability?

MR GEDYE QC:
That's correct Your Honour. Indeed you can have radically different bases for liability under statute. You certainly can't have that in equity. I would resist any suggestion that equity and the statute can in some way be reconciled as effectively the same. In my submission equity, however liberally it is approached, equity very firmly requires the co-ordinateness and *Burke v LFOT* in Australia and *Altimarloch* in this Court are particularly firm about that.

If I may I'd like to turn now to the question of whether the damage was the same in this case. The expression "the same damage" in the statute means simply the harm or loss or damage suffered by the plaintiff. Those alternative means of expressing the concept are taken from *Royal Brompton* and we adopt them. They've been used in the Australian High Court as well. It is the outcome affecting the plaintiff which matters, not the pathways by which each tortfeasor may be liable for it. The harm suffered in this case by an investor is simply the loss of his or her money. Put another way, it was, it is the inability to recover all the moneys they invested.

The cause of action by which a tortfeasor may be liable in respect of this loss of money does not change the character of the harm. The methodology of arriving at a damages award in each case does not alter the harm which has been suffered. The nature of the duties owed, the breaches involved, do not alter, on these facts, the

type and identity of the harm or damage suffered. There is no need to show a common obligation in this case to demonstrate the same harm. I've already referred to Lord Hope's exposition at paragraph 46 where he emphasises the need for the same harm. All of the judgments, in my submission, avoid a technical approach to this issue and they use broad language. Lord Bingham's three-question test starts with a question which can only refer to damage isolated from any issues of cause of action.

In my respectful submission, the Courts below and the submissions by the respondent amount to submissions about damages and the appropriate measure and approach to the award of damages. They use the damages assessment issues to attempt to demonstrate that the harm and loss is not the same, but in this case there can only be one form of harm, loss or damage, which is the loss of the investors' money.

The Minter Ellison case in Australia is closely aligned factually to this case in that investors paid money into an investment company and lost their money, and despite a lot of complexity in that case about levels of trust and other complexities, which I don't need to go through, the High Court of Australia judgments of Justices McHugh, Kirby and Callinan held that the loss there was simply the loss of investors' money, and I'd like to refer you to a couple of passages that show that.

Justice Kirby, at paragraph 96, starting a couple of sentences in, he says, "Each was responsible," this is Minters and the Perpetual Trust –

ELIAS CJ:
Sorry, what…

MR GEDYE QC:
Paragraph 96, Your Honour.

ELIAS CJ:
No, no, what tab is it?

MR GEDYE QC:
Well, this is the separate case that was filed.

ELIAS CJ:

Yes, that's right, thank you.

MR GEDYE QC:

It's not in the casebook, I'm sorry.

ELIAS CJ:

Yes, I have it here, thank you.

MR GEDYE QC:

A couple of sentences in, His Honour says, "Each was responsible, albeit in differing ways, for the same damage, that is, the loss of the beneficiaries' funds invested in ECCC." And he goes on, "It is erroneous to import into the requirement of liability in respect of the same damage any notion that suggests that such liability must be a common liability to a common plaintiff, based on the same legal category or source of liability. Upon this view, the fact that there were two, even in some cases three, levels of trusts is irrelevant. To introduce that notion, and to assign statutory significance to it, is to mistake the instruction of the reformed legislation, which addresses the identify of the damage, not the identity of its legal or equitable foundation," and his conclusion in the next paragraph is that, "For the purposes of the claim for contribution, the damage was relevantly the same. It was the loss suffered by the beneficiaries," and I would just insert the word "investors" there because their status as beneficiaries is not relevant, "the loss suffered by the investors because neither Minters nor Perpetual performed carefully and faithfully the duties severally cast on each of them by law." And Justice Callinan, at 159 also made it clear that he accepted that the harm in that case was simply loss of money. At 159 he says, "In the present case it cannot be doubted that the plaintiff beneficiary suffered loss. What was their loss? It was the money that they had provided to the respondents for investment on their behalf. That was what the plaintiff sought to recover and it was of no consequence to them who reimbursed it, reimbursed them or how legally those involved might choose to characterise the plaintiff's entitlement and those other obligations." So same loss in, in the Australian case was treated as simply the loss of investors' money.

I also want to refer to a case provided only yesterday which is the *Hunt & Hunt v Mitchell Morgan* [2013] HCA 10 case. Another decision of High Court of Australia. I assume Your Honours got a copy of that yesterday?

ELIAS CJ:

I'm not sure that I did.

MR GEDYE QC:

We could not find a reported decision. It may not be reported yet.

ELIAS CJ:

Oh, yes, I have thanks.

MR GEDYE QC:

It is a decision from April 2013 of the High Court of Australia.

ELIAS CJ:

It is not reported?

MR GEDYE QC:

Well not yet that we could find.

O'REGAN J:

Not in the Commonwealth Law Reports?

MR GEDYE QC:

It, no. It may just be delayed Your Honour. We expected that it would be. It should be but we could not find a reported decision. If we do find one we will of course file it but we had a good look. This decision needs a little explanation because it is actually not a contribution case. It is an apportionment case. It proceeded on a New South Wales apportionment legislation, and I certainly do not want to cloud contribution principles with proportionate liability principles, although they are all part of a general approach to distributive justice but I have put the case before the Court because the relevant test is identical which is whether the same harm or same loss occurred. The facts very simply are that Mitchell Morgan was a lender. It lent money to a person who turned out to be a fraudster and didn't repay it. That loan was supposed to be secured. Hunt & Hunt acted as solicitors for the lender. Hunt & Hunt were negligent in not ensuring that the security was in place. So the essential facts are quite simple. So you have two wrongdoers; one is a person who has fraudulently

borrowed money and didn't pay it back, and then you have the solicitors who are negligent.

To be an apportionable claim under the New South Wales legislation, the Court had to find that Hunt & Hunt were a "concurrent wrongdoer". A concurrent wrongdoer is defined as a person causing the same damage or loss which is the subject of the claim. So it's by that pathway that I say that this case does provide some illumination because it looks at sameness of loss. It was a majority decision, three Judges accepted that the loss was the same and allowed apportionment. The other two did not.

The significant thing about *Hunt & Hunt* is that the High Court of Australia analysed damage or harm in terms of the inability to recover money lent to a borrower. The case is analogous to this case in the sense that investors are effectively lending their money to the Hanover Finance Company on the security held by the trustee. The majority judgment found that the harm was the same despite sharply differing causes of action, duties and breaches, despite differences in the damages assessments. One wrongdoer was a fraudster who borrowed money and then disappeared or didn't pay it, the other was a firm of solicitors who were negligent in not taking security. The harm, though, was simply the loss of the money which Mitchell Morgan had advanced.

WILLIAM YOUNG J:
So, what –

MR GEDYE QC:
The majority of –

WILLIAM YOUNG J:
Why can't, why don't they just sue Hunt & Hunt and what has concurrent loss got to do with the case? Obviously it is but it is –

MR GEDYE QC:
I think in this case –

WILLIAM YOUNG J:
The fraudsters were bankrupt and not, and –

MR GEDYE QC:

Well it was apportionment so that the question was not of contribution but of whether Mitchell Morgan could recover the lot from Hunt & Hunt.

WILLIAM YOUNG J:

Oh I see. And is that because there is an apportionment, a cap system of apportionment –

MR GEDYE QC:

Yes.

WILLIAM YOUNG J:

– in New South Wales?

MR GEDYE QC:

There is apportionment legislation –

WILLIAM YOUNG J:

Oh I see.

MR GEDYE QC:

Which you –

WILLIAM YOUNG J:

Which we do not have.

MR GEDYE QC:

No.

WILLIAM YOUNG J:

Okay.

ELIAS CJ:

So what paragraphs were you –

MR GEDYE QC:
Yes.

WILLIAM YOUNG J:
So this is page 2, it is set out that the cap.

MR GEDYE QC:
Yes. Paragraph 9 is a summary. It says, "These reasons will show that Mitchell Morgan's claim against Hunt & Hunt was an apportionable claim. The loss or damage which Mitchell Morgan suffered was its inability to recover the monies it advanced. Mitchell Morgan's claim against Hunt & Hunt was based on a different cause of action from the claims it would have had against the fraudsters. But the claims against all of Hunt & Hunt and the two fraudsters was founded on Mitchell Morgan's inability to recover the monies advanced and the acts or omissions of all of them materially contributed to that inability to recover that amount. At 24 as a demonstration of the fact the issue is the same it talks about the identification of the damage or loss that is the subject of claim. And it goes on to recite the familiar dicta from *Brompton* and others that it is necessary to bear in mind that damage is not to be equated with what is ultimately awarded by the Court which is to say damages. Damage properly understood is the injury and other foreseeable consequences suffered by a plaintiff. And it discusses economic interest because the statute specifically addresses those. So with some caution because of the fact that it is an apportionment case and the legislation is not identical it is an example of the High Court of Australia judgment reasoning in the way which we say should be followed which is not to cloud or refine the same harm issue but simply to look at it in a factual and practical sense. What is the loss? What is the harm?

The respondents and the Courts below have looked at a number of cases to demonstrate where harm can be different and while some of those cases are conceptually difficult and some may be debated in each of those cases we say that it is possible to identify more than one harm and the fact there are different harms, and if I could just run through a snapshot of each to demonstrate how that is and why they are different from this case. And this is purely a, a bullet point coverage. In *Royal Brompton* one harm was caused by contractors' delays in a building project. The other harm was caused by negligent architects granting extension certificates. Completely different harms factually. One did not contribute to the harm of the other. Payment of one would not have reduced the other.

Another case, *Leoppky v McWilliams* (2001) 202 DLR (4th) 260 (CA), two motor accidents. The claim was that the same neurological damage had been caused but one motor accident was in 1995 and the other motor accident was in 1996. So with respect it is not surprising the Court would find there that the first harm was completely different from the second harm.

Howkins & Harrison v Tyler [2000] Lloyd's Rep PN 1 (CA), a valuer case, harm number one resulted from a deficient valuation, harm number two resulted from the failure of the borrower to pay, and a liability in debt is arguably another matter again and I think the Australian legislation exempts it from contribution, but I don't think it's necessary to descent into whether a debt claim is a type of liability which should not be amenable to contribution. I simply say *Howkins & Harrison*, clearly two different harms.

Bovis Construction Ltd v Commercial Union Assurance Co plc [2001] 1 Lloyd's Rep 416 was liability by a builder for flood damage in a defective building on the one hand and liability by an insurer under a contract of insurance on the other hand, different types of harm.

ELIAS CJ:
Sorry, can you just tell me where –

MR GEDYE QC:
Yes.

ELIAS CJ:
What are you referring to in the written materials we have?

MR GEDYE QC:
Yes, I'm sorry, I whizzing through a whole series of cases. It's a bit hard to point to submissions because I've actually collected all of the cases that have been mentioned but I can tell the that *Howkins* was in the respondent's bundle of authorities as tab 1, *Leoppky v McWilliams* is tab 2.

GLAZEBROOK J:
All right, perhaps if you just slow down slightly –

MR GEDYE QC:
Yes, I'm sorry.

ELIAS CJ:
It's just we don't have a reference to these cases in your outline.

MR GEDYE QC:
Yes, if – bear with me, Your Honour, I'll take you there.

ELIAS CJ:
Well, you probably don't need to. It's just I'd like to take a note of…

MR GEDYE QC:
Well, the first one *Royal Brompton* is covered all over the place. *Leoppky* I think is in my friend's submissions.

GLAZEBROOK J:
And it's tab 2 I've just found in the respondent's bundle.

MR GEDYE QC:
Yes. Paragraph 21 of the respondent's submissions refers to *Leoppky v McWilliams*, two separate motor vehicle collisions. The next case I referred to is *Howkins & Harrison* and that's also dealt with in paragraph 21 of the respondent's submissions. The next case I referred to is *Bovis* and I don't think there's been a specific reference to that in the written submissions but it's at tab 6 of the respondent's supplementary bundle, the light green bundle, and my friend in his memorandum said he would be adverting to that in oral submissions.

Bovis Construction v Commercial Union was a case where contribution was sought, and paragraph 28 of that judgment spells out the different damages. Bovis was liable for flood damage. CU was liable under a policy of insurance.

GLAZEBROOK J:
But in respect of the flood damage…

MR GEDYE QC:

Was the insurance in respect of the flood damage?

GLAZEBROOK J:

Yes, that's what I – it's because in the – why do you say those are different harms as against different liability if it was the same damage from plaintiff's point of view?

MR GEDYE QC:

Well, Your Honour raises an interesting point which is whether insurance cases are different or not, and I submission that's a much more debatable proposition, and in a case where an insurance policy gives full indemnity cover for precisely the same loss, in principle I would argue that they could be treated as the same, but it is at least open –

ELIAS CJ:

What, under section 17?

WILLIAM YOUNG J:

You would have to have a, have a contribution. You would have to have a, have a newfangled version of section 17 –

ELIAS CJ:

Yes.

MR GEDYE QC:

Correct. Contract and tort, yes of course Your Honour, yes.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

In, I see one of the Australian Judges gave an example of someone steals money from the bank and the bank loses it. The bank has an insurance policy which because it was negligently obtained does not cover the loss. So is there a – well how, how is that addressed under their legislation? But that is not really our problem.

MR GEDYE QC:
No it is not.

WILLIAM YOUNG J:
Well I suppose it might be actually. But not a real problem because we do not have a, have a cap.

MR GEDYE QC:
No but to answer Justice Glazebrook's real proposition. If the insurance covers precisely the same loss then it could be arguably be the same but insurance policies frequently do not. They have terms and conditions and they may or may not respond and they typically do not cover all contingencies as I understand CU's policy did not here and so what I say is that can you identify differentness and different type of harm? With insurance policy you normally can. It is the right to get indemnity, with all its terms and conditions, for a loss versus the loss itself. You can identify a level of differentness.

A couple more cases. One is *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd* [2001] EWCA Civ 1785. The case itself is at tab 5 but, and I am not sure this one is mentioned in the submissions. *Hurstwood* needs a brief explanation because in fact the Court held that contribution was allowed but *Royal Brompton* commented that it thought it was the wrong result so I am treating *Hurstwood* as a case of separate damage at least in the House of Lords' eyes in *Royal Brompton*. *Hurstwood*, one, liability number one was that of an engineer who had recommended something called a vibro flotation system for a building. Liability number two was that of a broker who failed to get insurance. In fact the Court at first instance, or Court of Appeal in England held that there was the same loss but *Royal Brompton* disapproved it. What we say is again you can find a differentness in the harm there. A broker's failure to get insurance addresses a different form of harm than a negligent engineer who recommends a deficient system. There is a real differentness about those. And the final case is *Wallace v Litwiniuk* (2001) 92 Alta LR (3d) and I think this will be mentioned by my learned friend at 21 of his submissions. Yes. *Wallace* was a case where –

O'REGAN J:
What tab is it?

MR GEDYE QC:

I am sorry Sir.

GLAZEBROOK J:

Is the insurance really the issue that you would have suffered the harm anyway. You just might have got paid back for it

MR GEDYE QC:

That is one possible distinction yes.

GLAZEBROOK J:

But you would still have, you would still have had a building that did whatever the, the Hurstwood building did with the deficient system?

MR GEDYE QC:

Yes. That is one distinction. Where's *Wallace*?

ELIAS CJ:

Wallace, is at 19?

MR GEDYE QC:

Thank you Your Honour. *Wallace* was a case where claim number one was against a negligent driver and that was obtained for personal injury. Claim number two was against a solicitor who had allowed a limitation period to expire, thus causing an inability to sue the driver. We say that can be treated as two different types of harm or damage. One was a claim for compensation for personal injury. The other was the loss of a legal action which would have entitled the solicitor's client to pursue that driver in law. And that legal action is not, the loss of that legal action is not the same harm as the personal injury. They are different in type. The legal action may or may not coincide exactly with the damages the personal harm. It would almost always have to be discounted for contingencies. There may be other causation issues, meaning that the loss of the legal action was not the same thing as the harm from personal injury.

I deliberately don't propose to go into each of those cases with a refined analysis because my submission is no such difficulty exists here. As a matter of fact, there is only one harm here and that is the loss of the investors' money. You cannot find any

other form of harm. You cannot characterise the investors' loss in any different way as in all of these cases. You could –

WILLIAM YOUNG J:
But some of them, I haven't fully got my head around the exact details of the claim, but aspects of it, that your client advances, but aspects of it include the approval by the trustee of the prospectus.

MR GEDYE QC:
Yes, that's right, Sir, the deed requires the trustee to approve the form and content of the prospectus. I say at once that we advanced in the High Court the proposition the trustee could be liable for mistakes in the prospectus. We don't pursue that now but we do pursue the fact that many elements of the trustee's duties are very similar to the director's duties, but what we do say is it's wrong to look at the sameness of the duties. It's the loss, the resultant loss from each action.

WILLIAM YOUNG J:
So what's the claim that a depositor would have against the trustee in relation to the prospectus? It's simply negligent approval of a misleading prospectus?

MR GEDYE QC:
It could be that, Sir.

WILLIAM YOUNG J:
Which, while not exactly the same as that against the directors, which would focus on particular misstatements, it is a lot of overlap.

MR GEDYE QC:
There is that, Sir, but that is still, with respect, I submit that's still looking at the duty and the cause of action and the basis of liability end of things. How – a more – a less focused claim by an investor would simply be, "You, the trustee, were tasked with being a watchdog for my interests, with monitoring the company and with the particular statutory duty," which I'll come to, "to ensure there were sufficient assets to repay the investment. Because you were negligent, I lost my money. I could not get my money back, either because I invested in the first place or because you failed to pull the plug at a point when receivers would have given a much better return to me." There's many, many causative pathways and arguments but it's wrong, in my

submission, to go into those because they can only all come at the tail end to the proposition that the investor could not recover his money or her money, and that is the loss. It's the only loss that a tort claim against a trustee could give rise to.

WILLIAM YOUNG J:

Well, I mean, if you hugely refine it, you might say, well, there are different losses that accumulate over time so there's the investment of money and return for an investment that isn't worth as much as is paid for it, and then over time that investment deteriorates as…

MR GEDYE QC:

Yes, all of that, Sir, but – and a level of that refined analysis has taken place in the lower Courts but my submission now is all of that should not be looked at now. It's a matter for trial. You couldn't make any sort of fist of that now, and it's really a matter under 17(2) as well. But I was proposing to come on in a little more detail to the bases of liability but would you like to take a break?

ELIAS CJ:

Yes. In terms of your outline, Mr Gedye, are you up to eight?

MR GEDYE QC:

Yes, that's correct, Your Honour.

ELIAS CJ:

Yes.

MR GEDYE QC:

And eight and nine will only take a few minutes.

ELIAS CJ:

So what timing do you…

MR GEDYE QC:

I'm assuming you're taking a break now. If we resume at 11.45 or so, I wouldn't, I think, need more than 12.30, if that suits the Court.

ELIAS CJ:

That's fine, thank you. Thank you, Mr Gedye.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.50 AM

ELIAS CJ:

Yes Mr Gedye.

MR GEDYE QC:

Just to conclude the point. Before I start, we do have those missing pages or what we think may be just mis-sorted pages from –

GLAZEBROOK J:

I could not find the pages in mine, I was trying to find them so –

MR GEDYE QC:

Yes. Well if I may I will hand those up now for Your Honours. Just to conclude the point I was addressing before the break. Trustees could be liable to investors for the same harm by many different pathways in this case. The particulars of a negligence claim against the trustees are potentially multifarious. There is different aspects of negligence in both monitoring and the second statutory duty of ascertaining sufficient assets to repay investors. But the only point that is critical for present purposes is that the liability of the trustees may be able to overlap with the liability of the directors in, to some extent and at some point. So it would be impossible at this interlocutory stage to plot through all the possible timing permutations over the seven and a half month period during which the relevant prospectus was distribute, a period relevant to the FMA's claim. All we have to establish is that the trustees' liability for the same harm may at some point overlap, and in my submission it must overlap, because if you take the first day of the seven month period as day one and the last day as the last day at some point in that time period the trustees' negligence must have produced the same harm. So the requirement that the harm overlap is readily satisfied here.

One issue which has been mentioned in the cases in terms of same damage is what is often called the mutual discharge test. I do not use that term because we are not literally talking about a discharge in the present situation as between joint obligors.

But it is useful to test the same damage proposition by asking whether payment of an amount by tortfeasor A would reduce the amount that the plaintiff could recover against tortfeasor B. In this case it would as the investor has only one type of loss. Section 17 does not require satisfaction of a mutual discharge test and I do not advocate reduction from payment as a test per se but it is a strong indicator of the same damage if payment of a loss by one party would preclude recovery in whole or in part against the other. And that must clearly be the case here because the investor has only suffered a unitary single loss, a specific sum of money. And I say that it is a particularly apt test where the damage or harm or loss is the shortfall in company assets preventing repayment to creditors and I refer to *Re Securitibank* [1986] 2 NZLR 280 (HC) case in this regard.

GLAZEBROOK J:
Sorry did I catch that again. You said the loss was the shortfall in assets? Was that caused by the shortfall in assets?

MR GEDYE QC:
Yes.

GLAZEBROOK J:
I just did not catch it. It was –

MR GEDYE QC:
I say that mutual discharge tests, I will call it that, is particularly apt whether damage or harm is a shortfall in the company assets –

GLAZEBROOK J:
Okay.

MR GEDYE QC:
– which is preventing repayment to creditors.

GLAZEBROOK J:
Yes.

MR GEDYE QC:

The harm is the loss or the inability to recover but it is, it results from a shortfall in company assets. And I have referred to the *Securitibank* case, one of the more, the earlier contribution cases at tab 10 of the appellant's authorities. It is a decision in the High Court from Justice Barker. The first claim was a claim by a liquidator against directors of a company under the Companies Act 1993 but it incorporated negligence and it was effectively a claim for the company's debts or the unpaid creditors. The second claim was a claim against the auditors. The directors applied to join the auditors as third parties and sought contribution against them and the auditor claim was you would expect of a failure to carry out a competent audit. The Court in that case treated the losses the same, effectively holding that there was one asset base in the Securitibank companies and one shortfall. And that is an example of the insolvency of a company preventing repayment of creditors being treated as the same loss, qua auditor and qua director. By analogy we say the position of the trustee is, is effectively the same in this case, and for each dollar that the director might pay an investor that would be, that would reduce the claim against the trustees by that dollar. Now in many – no, I will leave it at that.

I want to turn now to point 10 of my outline which is that the result is repugnant to justice. I, I respectfully submit that the result in the Court below is not one which is consistent with a just result. One tort wrongdoer is burdened with the entire responsibility, potentially, even though there may be another tort wrongdoer. Indeed in this case a watchdog for investors who has caused the same loss. In the Minter Ellison case Justice Kirby, with respect, with his usual eloquence at paragraph 69 referred to the fundamental justice of contribution. He said, "Where the acts or omissions of a number of parties contribute to the damage suffered by another a rational system of law would provide a means by which those responsible for such damage were obliged to share the burden as between each other in a just and equitable way, having regard to the extent of their respective responsibilities for the damage." He said, "The fundamental notion of contribution was a simple one. In an ideal world it would not be defeated by too technical an approach."

The result in this case in my submission is contrary to the approach in New Zealand to Court contribution since at least the 1980s and in fact we have not found any contrary case since 1936. It shows how wrong it would be to interpret section 17 in this way. The result serves no useful purpose and undermines the legislative intent. At this strike-out stage the Court should assume as pleaded that the director and the

trustee may be found to be two wrongdoers in tort. It is possible at trial both will be found to have caused the loss of investors' money or part of it by their tortious acts or omissions. But because of the FMA's choice of defendant one of two tortfeasors responsible for the same damage avoids all liability and responsibility but the other ends up carrying the entire burden, and we say that is a patently unjust outcome and a capricious outcome. It is worth looking at what would have happened had the investor or the FMA sued only the trustees. It would be equally unfair and unjust if the directors' tortious acts or omissions were not brought to account and contribution from a director were impossible. The decision below in the respondent's argument would allow those tortfeasors bearing the worst culpability to go scot free. I think for example of the fraudsters in *Dairy Containers*. *Dairy Containers* in our submission is a useful example of the rightness of the result contended for by the appellant if DCL, Dairy Containers had chosen to sue only the Auditor-General then the banks, the Dairy Board and the fraudsters would have escaped without liability, and so on. In the interlocutory judgment of the Court of Appeal in *Dairy Containers* is specific comment about the injustice of allowing a plaintiff to dictate contribution outcomes depending on the cause of action chosen. In my submission the result in *Dairy Containers* was exactly right. I submit there is no tenable basis for contending that result was wrong.

O'REGAN J:

The FMA could not choose any other defendants there could it? It did not have power to sue the trustee did it?

MR GEDYE QC:

Yes it does Sir under section 34 of the Financial Markets Authorities Act which is under tab 5. The FMA does have the power to exercise the rights, or exercise other person's rights of action. The FMA now under that statute has extensive powers and that would include the power to sue the trustees, or for example the auditors. The FMA has recently exercised such a power against a trustee in another finance company case, *Viaduct Capital*. That case is now proceeding.

O'REGAN J:

And was that in force at the relevant time, that legislation?

MR GEDYE QC:

I will have to check that Sir but my understanding is it was in force at the time when, in force at a time when the FMA could have exercised its power to claim against the trustees in this proceeding. The Act came into force on the 1st of May 2011. This proceeding was not filed until 30 March 2012.

O'REGAN J:

But did it apply to causes of action that arose before it came into?

MR GEDYE QC:

I will need to check that Sir. May I come back to you on that?

O'REGAN J:

Sure. Yes.

WILLIAM YOUNG J:

I think, it does look pretty prospect look, it does look as though it is pretty forward looking, in other words it, it, sorry, it applies to causes of action which exists rather that necessarily in relation to when the conduct occurred.

MR GEDYE QC:

Yes, that was my understanding Sir. We - but I would rather not guess. I will get an answer for that if I may in the break.

WILLIAM YOUNG J:

Section 34.

MR GEDYE QC:

Or my junior will. The policy point remains regardless of section 34 in my submission.

O'REGAN J:

Well I accept that it is, it is, it is sort of the, the outcome here because of the unusual way this case has, well the, the way this case has come before the Court, it is not necessarily unusual but the fact that it is the FMA taking action, not the investors doing it themselves. That does make it a bit unusual doesn't it?

MR GEDYE QC:

It does Sir but –

O'REGAN J:

You are sort of burdening the FMA with the trustee in its action when it would not, it would not have been able to do that itself.

MR GEDYE QC:

Well the claim has effectively been treated as a claim by an investor in terms of the principles and the policy that I am advancing. It is looking at what a, a person out of pocket, what position that person stands in, and certainly an investor could choose for any number of reasons to sue only one tortfeasor. And we have seen, certainly been cases in, in the books. For example there is the *Deloitte Haskins & Sells v National Mutual Life Nominees Limited* [1993] 3 NZLR 1 case at tab 13 where I think the trustee was sued by the investor. Settled with the investors, then the trustee then proceeded against the auditor. Admittedly in that case on the basis of a direct duty and not under contribution.

O'REGAN J:

But, but you are asking us to find it is unjust because a plaintiff has chosen particular defendants here but in fact the legislation does not give them any choice. That is the point I am putting to you.

MR GEDYE QC:

Well it is unjust from the point of view of the tortfeasor who is burdened with the whole loss and as a matter of principle there would be many cases where a plaintiff may elect to proceed in a way that leads to that result. For example, in *Dairy Containers* the, the plaintiff stated in the Court of Appeal that it had chosen a claim only in contract against the Auditor-General hoping that section 17 tort claims could not arise to keep the claim, to keep the case narrow and the Court said no you cannot by your own choice permit that. They will find a concurrent duty and tort and allow the section 17 process to engage. In –

ELIAS CJ:

That case is unreported, isn't it, the –

MR GEDYE QC:
Yes, that's right, Your Honour. It's under tab 7.

ELIAS CJ:
Thank you.

MR GEDYE QC:
It was never reported and nor was the application that petitioned for leave to appeal to the Privy Council reported although the same arguments were recited in the Privy Council and the Privy Council denied leave. They needed leave because they let the time limit elapse and couldn't go as of right. But the contribution principles were ventilated extensively in both the Court of Appeal and the Privy Council.

ELIAS CJ:
Yes.

MR GEDYE QC:
And underpinning both of those results was the proposition that it is just to distribute liability between two or more tortfeasors.

So, in summary, on the result, I submit there's no reason in principle or policy why the trustee should not potentially contribute to the harm suffered by the investors in this case. If at trial it's found the trustee's acts or omissions have contributed to the losses, it seems self-evidently unjust or even irrational in a system of justice for the trustees to have no liability because of the way the case has proceeded. In my submission, this is the very evil which section 17 was enacted to cure, and if ultimately I were asked to point to one error in the Court of Appeal decision, it's that it has come to the wrong result, with respect. It offends justice that the trustees are not required to contribute and, in my submission, neither in the Court below or in the present submissions has the respondent articulated any reason in justice why the trustees should not be required to answer a liability claim. I submit that Guardian Trust's position effectively seeks to take the Court back to 1799 and the *Merryweather v Nixan* situation. Section 17(2) will enable any apportionment according to what is just and equitable if there is liability.

Just on section 17(2), I'd like to come back to the matter you raised, Justice Arnold, in respect of the extent to which the statute picked up or incorporated equitable

principles. It is the fact that under equity where there's contribution then it's an equalising contribution. The equitable jurisdiction doesn't apportion according to responsibility or culpability. It equalises. It treats each party as having the same liability, co-ordinate liability, and the only basis on which it wouldn't be equal is if there were a pro rata differing responsibility in the first place. Section 17(2) by contrast doesn't seek to equalise. It permits a wide open assessment between zero and 100% of what would be an equitable share, or I'd rather not use the word "equitable" because it confuses the jurisdictions. Let's say an appropriate share. So there's another respect in which the statute operates quite differently than from equity.

I'd like to address you briefly on the difficulty and, in fact, impossibility of determining all these issues at an interlocutory stage. Whatever approach is taken to section 17 by the Court I submit that the assessment of same damage or any other relevant matter will involve complicated areas of fact which have to be determined at trial. It's not possible to say at this stage that the trustees cannot be liable for the same loss as the directors. The factual issues concerning various breaches, various permutations of liability and the results causally flowing from those are very complicated and will involve a great deal of detailed evidence, including forensic accounting evidence. If, as it will, the Court looks at what caused the company to be unable to repay and when and how, there's a whole matrix of possibilities in relation to the directors and the trustees respectively. It is simply not possible to have the degree of assurance needed on a strike-out that the directors cannot be liable. The Court of Appeal in the *Dairy Containers* case signalled some clear warnings about trying to tackle complex liability issues at an interlocutory stage and in fact despite the complexity in that case produced a very short judgment just saying this must go to trial. If the FMA succeeds it is entirely possible and we would say likely that a trustee may be found liable after trial for some part of the investors' lost money. The proposed pleading should be treated as being capable of being proved. If it is accepted that it is probable that there is only a single harm in this case then it must be a question for trial as to whether that, whether there is overlapping liability for that single harm as between directors and trustees. So this submission really cut through all of the preceding submissions saying that the nature of the facts in this case defies any definitive resolution at this interlocutory stage.

Now unless there is anything else under section 17 I would like to now turn to the cause of action in equity. I would like to start on this by acknowledging and

accepting that in equity it is necessary to establish that there is a co-ordinate liability. Unlike *Altimarloch* which went to trial and which came to this Court after all of the facts had been found and tested the possible available of equitable contribution here is being judged at an interlocutory stage. The Court is being asked to make a final determination of whether the liabilities of the trustees and directors respectively are co-ordinate on limited and effectively just pleaded facts. The pleading is not clearly untenable in my submission. The approach to co-ordinate liability and equitable contribution is capable of a broader or a narrower assessment. This Court produced a differing result where Justices McGrath and Anderson would have allowed equitable contribution and, with respect, there were some favourable indications from Your Honour the Chief Justice as well and I rather apprehend that there were some extraneous or some additional issues such as unjust enrichment or some complicated issues arising out of that case that may have prevented the contribution claim proceeding for a particular reason. I accept that other Judges took a narrower view. Even Justice Tipping in his postscript accepted the same, that the approach of Justice McGrath coincided with his own but just took a different view on the facts of whether there was a sufficient sameness. All I submit here is that it is possible to view co-ordinate liability in a more liberal or a wider fashion. I think it is fair to say that *Altimarloch* generally accepts that there may be different causes of action. There does not have to be a precise coincidence between the liabilities and that some differences may be permissible provided there is an essential sameness or coincidence between the two liabilities. If it is accepted as a basic proposition that the Court may approach a claim that way then I say that the facts here may support such an approach and a finding of coincident liability.

I want to take you only briefly to a few factors which demonstrate that the respective liabilities could be regarded as very close. I would ask you to look at volume 4A of the lemon-coloured casebook and these contain the trust deed and the prospectus, which are the two main documents I want to take you to, and, starting at page 509, this is the Hanover Finance Limited trust deed, and it's a –

ELIAS CJ:

Sorry, which volume was it again?

WILLIAM YOUNG J:

That one, 4A.

ELIAS CJ:

4A, thanks.

MR GEDYE QC:

Yes, 4A. Just to orientate you, at page 505 is the relevant clause of the trust deed, 3.01, which is a covenant by the company with the trustee. Then if you go to 509, the relevant covenant is headed "Registered prospectus" and it's a covenant, at the top of 509 with the Roman X, "Not to register a prospectus pursuant to the Securities Act 1978 unless and until the trustee has approved the form and content thereof." So there's a specific duty by the trustee to approve not only the form but the content of the prospectus.

I would like to take you next to –

ELIAS CJ:

Sorry, whose duty?

O'REGAN J:

Well, is it? It's not a duty. It's a covenant –

MR GEDYE QC:

I'm sorry, yes.

O'REGAN J:

It's a covenant by the company not to register, isn't it?

MR GEDYE QC:

Well, in strict form that's correct, Sir, but it contemplates that the trustee will approve the form and content if a prospectus is to be issued.

ELIAS CJ:

Well, I suppose that what…

MR GEDYE QC:

The trustee may decline to but if you issue a prospectus then the trustee –

O'REGAN J:
Well, what if the company doesn't, does register it?

MR GEDYE QC:
Well, then, the company is in breach and – but this engages participation by the trustee, in fact, whether you call it a duty or just actual participation, the acceptance of responsibility to do something, and the affidavits filed show that the trustee did look at drafts of the prospectus and did approve it. Now there's a great deal of –

ELIAS CJ:
Is this any certification that the trustee has –

MR GEDYE QC:
Yes, there is, Your Honour. There's a specific letter with prescribed form which I'll come to in a couple of steps, if I may. But the starting point is the trustee is supposed to approve the form, and you can take it that if the prospectus has been issued that it has done that.

Then could I take you to 608 of the casebook. Now this is part of the Hanover Finance prospectus that is in issue in the case, and you see there a heading, number 12, "Main points of trust deed," and if you flick through that you'll see it goes for several pages, five full pages of the trust deed, sorry, of the prospectus. And I'll come back to that but at 613 is the trustee's letter that Your Honour asked about and the regulations provide for this letter and I accept that it's narrow and circumscribed and it says that, "Clause 13 of the Regs requires us to confirm that the offer of securities set out in this prospectus complies with any relevant provisions in the trust deed. These provisions are those which enable Hanover Finance to constitute and issue under the benefit of the trust deed the securities offered and impose restrictions on the right to offer. The auditors have reported. We confirm the offer of securities complies with any relevant provisions of the trust deeds," and it says, "The basis on which that confirmation is made is as set out above." Information from Hanover Finance, and they do not guarantee repayment of securities.

Now that representation letter involves many issues which I don't need to go into but it would always be read, in my submission, alongside the preceding entry in this prospectus, which is the main points of the trust deed. If at trial the Court found that the trustees did, in fact, approve the prospectus, and that is pleaded and should be

assumed, then an investor could say, well the contents of this section 12 are attributable to the trustee and they include the following. "Duties of the trustee." This is just the second heading. "The trustee represents the interests of all current and future holders of secured deposits invested with Hanover Finance. The trustee is under a duty to exercise reasonable diligence to," and paraphrase that, "ascertain whether there has been a breach of the trust deed or any of the conditions of the issue of secured deposits. Secondly to ascertain whether or not the assets of the charging group that are or may be available whether by way of security or otherwise are sufficient or likely to be sufficient to discharge the amounts of the deposits as they fall due." Both of those bullet point duties are duties imposed by the Securities Regulations in schedule 5.

If you look generally throughout that whole section it is a detailed and comprehensive review of the, the status and the duties and the role of the trustee and globally represents a substantial package of trustee involvement in the company. I am deliberately choosing words that are –

O'REGAN J:
I do not see why, what it is, the duty is under the trust deed isn't it? Why does it matter whether it is stated in a prospectus or not?

MR GEDYE QC:
Because investors may rely on it Sir. It creates proximity with, between investors and trustees. I am really just seeking to show –

ELIAS CJ:
What does the regulation require? Clause, clause 13(3) in the second schedule to the Securities Regulations?

MR GEDYE QC:
That is under tab 4 Your Honour, of the authorities. And, I do not know if it is easier to find reference to page numbers of the actual regs which at page 88 on the bottom left. And clause 13(3) is the regulation that says that in a trust deed there must be a statement by the trustee that the offer of securities complies with any relevant provisions and the trustee does not guarantee repayment. So clause 13(3) of the second schedule is, is brief. The letter incorporates those statements and makes other statements.

ELIAS CJ:

And so what is the, sorry, it is probably a bit, you have probably already taken us to it but I did not have this in focus. What is the relevant provision of the trust deed which it is said was not complied with in the, in your pleadings? Is there one?

MR GEDYE QC:

Yes. The draft pleading is at tab 1. And the relevant paragraph is 10.

O'REGAN J:

Tab 1.

GLAZEBROOK J:

Tab 1 of the authorities.

MR GEDYE QC:

Tab 1 of the authorities, yes.

ELIAS CJ:

And so, what, what paragraph?

MR GEDYE QC:

Paragraph 10, or, yes, paragraph 10 of the draft pleading. Well paragraph 10 sets out the duty, the tort duty which is alleged, and the basis for that duty and what the trustee did and did not do. And paragraph 11 is the draft pleading of the breaches. But in broad terms the breaches are all of the nature of a failure to identify the matters pleaded by the FMA, a failure to exercise reasonable care, skill and diligence to ascertain the Hanover business was being conducted in an imprudent manner, a failure to detect breaches; 11(b)(2), failure to monitor and identify matters likely to have a material and adverse effect; Roman (iii), matters indicating a serious risk, HFL would have insufficient assets to discharge the debt; failure to ascertain that breaches of the trust deed had occurred, and, finally, allowing HFL to distribute a prospectus.

WILLIAM YOUNG J:

Where do the claims about the approval of the prospectus now stand after Justice Winkelmann's decision, because she struck out some of these claims as untenable.

MR GEDYE QC:

Yes, and the appellant does not pursue a claim in tort that the trustee was responsible for the representations made by the directors in the prospectus.

WILLIAM YOUNG J:

But is that much different from is liable for negligent approval of a prospectus? Did she not strike that out too?

MR GEDYE QC:

Well, it…

WILLIAM YOUNG J:

Or, I mean, I haven't read the judgment as carefully as perhaps I should have but…

MR GEDYE QC:

It's not a particular which we've pleaded. Negligent approval of the prospectus is not pleaded.

WILLIAM YOUNG J:

So what's your pleading?

MR GEDYE QC:

In paragraph 11 of the draft claim there's a failure to identify all the breaches and deficiencies –

O'REGAN J:

But it's allowing the registration of the prospectus and that can't have in itself cause loss unless the trustee was meant to have scrutinised it in some way.

MR GEDYE QC:

Yes, you're correct, Sir, and so, in Roman (v), allowing HFL to issue and distribute.

ELIAS CJ:

In the letter, the provisions which are said to have, to, they are said to require to certify really, are that Hanover Finance is entitled to offer the securities –

MR GEDYE QC:

Yes.

ELIAS CJ:

– and that there's compliance with any restrictions on the right to offer the securities.

MR GEDYE QC:

Yes.

ELIAS CJ:

But all of those are referable to the provisions in the trust deed.

MR GEDYE QC:

Yes.

ELIAS CJ:

So what are the provisions in the trust deed?

MR GEDYE QC:

Well, the trust deed itself –

ELIAS CJ:

It's huge, of course.

MR GEDYE QC:

– has compendious provisions. For example, at page 524 of the bundle, there's schedule B, "Enforcement on default", and prior to that there's a whole suite of provisions in 3, clauses 2 and 3, where the trustee is required to monitor. I'd seek to put this in a practical, factual example this way, if I may.

ELIAS CJ:

But this, though, seems, if it's correct, to simply be an approval that the prospectus complies with the trust deed.

MR GEDYE QC:

The letter, Your Honour, or the…?

ELIAS CJ:

Yes, the letter.

MR GEDYE QC:

Yes.

ELIAS CJ:

I'm just assuming that...

MR GEDYE QC:

We say the letter is one matter which is not a complete picture of the trustee's potential responsibility or what the trustee actually did.

ELIAS CJ:

I see, yes, I see.

MR GEDYE QC:

We say that in fact the draft prospectus was put to the –

ELIAS CJ:

If you look at what the trustee can do –

MR GEDYE QC:

Yes.

ELIAS CJ:

– then you build a duty of care –

MR GEDYE QC:

Yes.

ELIAS CJ:

– to the investors arising out of that.

O'REGAN J:
But is there any suggestion that the prospectus didn't comply with the trust deed?

MR GEDYE QC:
No, Sir.

O'REGAN J:
So what's the significance of the letter then?

MR GEDYE QC:
The letter has limited significance in the putative claim against the trustee. As we've pleaded it here, the whole nature of the claim is failure to monitor, failure to detect deficiencies, failure to intervene. And those failures can engage at the beginning, when an investor makes an investment in the first place, because we say the trustee owes a duty to prospective investors. That was a matter which was accepted in the High Court and we respectfully adopt Justice Winkelmann's reasons for finding that, and, as I understand it, the respondent doesn't challenge that. So right at the beginning there's the prospective investor who makes the decision to invest. Then, during the course of that investment, it's the failure, as it were, to pull the plug at any point. And then when an existing investor makes a decision to roll over or renew his investment, which we understand comprises about 80% or more of the losses in this case is rollover investments, the trustee owes a duty at that point as well because at that point a duty is owed to an existing investor in respect of an existing state of affairs which that investor relies on to then make the decision to renew.

The key allegations by the FMA involve typically cash flow statements that were produced at a specific point in time during the life of this prospectus which the FMA says should have demonstrated that the company would have liquidity problems and which, at some point, made the prospectus contain untrue statements.

The FMA alleges that the prospectus was untrue from day one but it's certainly one possible factual outcome that at some point in the seven month period conditions deteriorated to a point where that prospectus became untrue as a result of specific liquidity and other financial reports. What we say is that those reports went to the directors and would be a crucial part of the factual basis for a finding of fault by a

director in allowing the prospectus to continue. We also say those reports went to the trustees at or about the same time.

So you have a real coincidence between what these two parties are doing. The director gets a statement which he or she doesn't action and lets the prospectus continue. The trustee gets the same statement, doesn't detect the deficiency, allows in effect the prospectus to continue. The faults in a factual sense, if not a legal sense, are almost identical. What's alleged against each is in practical terms is very, very similar.

ELIAS CJ:
Well, except that it's not, it's not sheeted home to the misleading nature of the prospectus. It's to the fact that the company is continuing without the trustees invoking their powers under the trust deed.

MR GEDYE QC:
Yes, Your Honour, I accept that difference can be drawn but I would submit that in practical effect it's not – although a tort claim against the director would be pleaded as a negligent misrepresentation of claim, the real factual setting of that breach is that the director allowed a prospectus to be distributed and continued. That's the effect of the negligent misrepresentation. In form, the action takes the form of a negligent misrepresentation claim. In substance, the claim is that the director allowed a prospectus to continue which contained misrepresentations. And I simply rely on those dicta saying –

O'REGAN J:
Yes, it's a statutory duty, isn't it, to withdraw the prospectus –

MR GEDYE QC:
Yes.

O'REGAN J:
– if it becomes misleading?

MR GEDYE QC:
That's so, Sir, but we're relying –

O'REGAN J:

That's the duty that's being, they're accused of breaching, isn't it?

MR GEDYE QC:

Well, no, strictly speaking the claim against the directors is actually being made under section 55 of the Securities Act which is to distribute a prospectus containing an untrue statement but we're looking at –

O'REGAN J:

But then there's wording that says if you leave it out there you're treated the same way as if you distributed it.

MR GEDYE QC:

Yes, that's right, Sir. Well, distribution is a day by day event and it's an ongoing event. It's a continuum. But we're looking at a putative tort claim, a concurrent tort duty, which is effectively negligent misrepresentation, and all I'm saying is that if you take those dicta saying you don't apply an overly technical approach or a substance over form approach to the assessment of coincident or co-ordinate liability, then it is at least arguable in this case that what the directors, that the director's fault is sufficiently co-ordinate with the trustee's fault. It would take a huge amount of evidence and analysis to determine that issue fairly and properly, and we say that must be a matter for trial. All we are required to establish is that it's not impossible at this stage to strike-out. It is necessary to find that it is impossible.

O'REGAN J:

What is the position of the other directors?

MR GEDYE QC:

They are waiting and seeing Sir. This action was taken effectively as a representative action. Unless there is any other matters those are my submissions.

ELIAS CJ:

It is entirely possible that, that there is no coincidence in liability though as well isn't there? If the claim is being made on the basis of negligent misrepresentation in the issuing and what the trustees could have done by blowing the whistle would have caused the prospectus to be withdrawn effectively. There would be still some liability to some investors which would, which would be entirely separate wouldn't it?

MR GEDYE QC:
Yes.

ELIAS CJ:
Wouldn't that be the case?

MR GEDYE QC:
But there would be overlap which is, in respect of the overlap.

ELIAS CJ:
Just thinking that there are huge causation issues which would have to be looked at if there is contribution in this, in the case.

MR GEDYE QC:
I accept that Your Honour. It is one of the complexities of the case which is why it is in my respectful submission a, a very bold decision that, that the Court can come to the view that it is impossible for there to be co-ordinate liability. On any day when any investor makes an investment the trustees and the directors are both in operation. They have, both have duties on that day and those duties are remarkably similar in substance, and emphasising and focussing very strictly and I would say technically on the form of the negligence claim which is negligence and misrepresentation obscures the fact that in, that the real practical effect of what these two persons did vis-à-vis the investors is essentially similar. And I accept it may depend on whether one takes a narrow view of co-ordinate liability or a wider view. On a very strict view it may not be possible but my, my fundamental point about the equitable claim is you could only take a view on the appropriate width once you had all the facts and all of the causation arguments and fully understood the matrix of events of who did what and why and when and what effect they had. It is a very bold, with respect, step to say that it just could not be possible. Thank you Your Honour.

ELIAS CJ:
Thank you. Yes, thank you Mr Cooper.

MR COOPER:

Your Honour, may I start with the pleadings in the legislation to look at the nature of the allegations made against firstly Mr Hotchin and then secondly those which Mr Hotchin says could have been but have in fact not been by the FMA made against Guardian Trust. And perhaps just as a preliminary to do that to look at the statutory regime under which those claims are made. Some of which we have just touched on in terms of the Securities Regulations. The claim against Mr Hotchin is made under the Securities Act. I appreciate that in part the claim for contribution that Mr Hotchin seeks to make relies on a parallel claim that could have been brought in tort for the same thing but nonetheless the Securities Act establishes the statutory regime under which the conduct occurred under which the securities were offered to the public. The –

GLAZEBROOK J:

Can I just check, because just to make sure that we understand this, that you at this stage certainly are not challenging that basis, so that you're not saying the Act doesn't apply because the parallel claim in tort wasn't made? Do you accept that –

MR COOPER:

We haven't –

GLAZEBROOK J:

– there could be a contribution because a parallel claim in tort could have been made?

MR COOPER:

Yes, we accept that.

GLAZEBROOK J:

Right.

MR COOPER:

We have accepted that concept, that even if the claim is in fact brought under a statutory cause of action, if there were potential –

ELIAS CJ:

The underlying liability is the tort, is that right, or not quite?

WILLIAM YOUNG J:
Well, if you accept – there are two propositions. One is, is the statutory claim a claim in tort anyway, which it may be, and, secondly, it doesn't matter if it isn't because there would be a claim in tort.

MR COOPER:
Yes, Your Honour, and we accept both are arguable for this purpose.

ELIAS CJ:
Thank you.

MR COOPER:
If I just run through the key provisions of the Securities Act, which is in tab 4 of the appellant's bundle. Sorry, it's tab 3, appellant's bundle. The –

ELIAS CJ:
So this is the Securities Act?

MR COOPER:
The Securities Act, yes, Your Honour. There's an overview starting at section 55A which is on page 135 of the numbering within the reprint. Notes for civil remedies available under the Act, pecuniary penalty, a declaration of civil liability, and it works as do other similar Acts of recent years with the concept of a civil liability event defined in section 55B, and the event is the distribution of an advertisement or a registered prospectus that includes an untrue statement. That is the event sought to be proved against Mr Hotchin.

Over the page, 55D, the purpose and effect of a declaration of civil liability, and Your Honours will be familiar with that, if the FMA obtains a declaration, others, investors can sue in reliance without reproving the breach.

55G, over the page, is the compensation. So this is the provision under which the FMA in fact seeks to recover damage, to use for now that term. The Court may, on the application of the Commission, for which we now read FMA or subscriber, order a liable person to pay for the loss or damage that the persons have sustained by reason of the untrue statement in the prospectus.

And then, over the page, which persons are liable, 56(1)(b), in the case of an advertisement, it's a director of the issuer, including Mr Hotchin. And 56(1)(c), in the case of a prospectus, also a director of the issuer. So that's the regime under which the FMA advances its claim against Mr Hotchin, the relevant event being the untrue statement in the prospectus which was distributed.

The Securities Regulations, Your Honours, we touched on. My learned friend did at the end of his submissions there under the next tab. The – I think we went to clause – there's two relevant provisions, there's clause 13(3) of Schedule 2, which I won't take Your Honours to because you've just looked at it, but that's the extent to which the trustee has an obligation as to the content of the prospectus. It's simply that confirmation that the securities are offered in accordance with the trust deed. The other obligation on the –

ELIAS CJ:
But it's not suggested that there was no – that there was any way in which it didn't comply with the trust deed?

MR COOPER:
No, there's no allegation by the FMA against Mr Hotchin of that –

ELIAS CJ:
Yes.

MR COOPER:
– and similarly no allegation in the draft statement of claim by Mr Hotchin against Guardian Trust, so…

ELIAS CJ:
Yes.

MR COOPER:
Yes, Your Honour. The other obligation which the trustees have under the Securities Regulations is under clause 1 of Schedule 4, sorry, Schedule 5, which Your Honours will find at page 175. And so as part of the same statutory and regulatory scheme there is, the duty on the trustees is to exercise –

WILLIAM YOUNG J:
Sorry, what page?

MR COOPER:
175.

WILLIAM YOUNG J:
Of the statute?

MR COOPER:
Of the, sorry, I am into the Securities Regulations. Tab 4. And that is a duty to exercise reasonable diligence to ascertain where there has been a breach of trust, breach of the deed. And also importantly under 2, the nature of the securities whether the assets of a borrowing group will be available. That is essentially the allegation made in the claim against Mr, sorry, in the claim made by Mr Hotchin against Guardian Trust. It is that type of duty.

Now, I can go from there to the pleadings and I have to start with the pleading in volume 1A at, and this is the pleading of the FMA against Mr Hotchin –

GLAZEBROOK J:
Is that in volume 1? I don't know. Is there a 1A as well?

MR COOPER:
I'm sorry. It is volume 1. Yes Your Honour.

GLAZEBROOK J:
Oh, I see.

MR COOPER:
It has, it has. Now, using the volume numbering at page 164 there are a whole series of causes of action against the directors in relation to Hanover Finance. They follow a similar pattern. I will just go through the first one. The reason why there is a series is well the first relates to the prospectus. Others relate to advertisements issued during the currency of that prospectus. Just to pick up the key clauses.

Paragraph 40 on that page of the prospectus was continuously distributed between 7 December 2007 and 23 July 2007. That is that –

ELIAS CJ:
Sorry, what page is it? 40 did you say?

MR COOPER:
Sorry, page 164 –

ELIAS CJ:
Thank you.

MR COOPER:
– paragraph 40. It is the pleading of that concept of continuous distribution. The allegation of breach, so, so the breach here being of untrue statements in the prospectus, in essence misrepresentation, and begin at page 169, paragraph 45. "The HFL prospectus, before and after the registration… contained untrue statements within the meaning of section 55," and I will just draw Your Honour's attention to the first few of those. The first set of them is liquidity representations. So the prospectus contained a statement about the liquidity risk, the allegation being that in this final period of Hanover's operations liquidity deteriorated but the risk statement remained unchanged. There is many pages of particulars all about liquidity risk but the next set of allegations starts at page 181, starting at paragraph 85, untrue statements regarding the principal source of funds –

GLAZEBROOK J:
Sorry, I have got that, thank you.

MR COOPER:
And there is a series of similar allegations, the next set starting at 183, paragraph 80, "Failure to forecast as stated." This, these are allegations relating to, to cashflow forecast. Essentially it is related again to the liquidity risk that the prospectus contained. Cashflow forecast, the allegation again being that as a business position deteriorated the prospectus became misleading. The remedies then sought against the defendants including Mr Hotchin are then found on page 193. There is the heading, "Civil liability." And as could be expected the scheme of this part of the pleading mirrors that of the, of section 55 of the Securities Act. There has been a

civil liability event in 109. Occurred during that period December '07 to July '08. Particulars of who invested and in 109E, which mirrors the language of section 55G, "The subscribers subscribe for the securities on the faith of the prospectus by relying," and there's the allegations of reliance on the statements which have been alleged to be untrue.

The actual loss calculation in the claim is found at 195, paragraph 109Q, or one formulation of loss, I should say, the position being slightly complicated because there was a debt for equity exchange known as the Allied Farmers transaction, so there's a formulation there which gives credit for the benefits to investors of that exchange.

And then the compensation, sorry, 196, the actual prayer for relief in three parts, A, declarations, B, pecuniary penalty, and D relevantly for current purposes orders pursuant to section 55 that the defendants are liable to pay compensation for the subscribers on the amounts there assessed.

Now so that's for pleading as it stands against Mr Hotchin and therefore I'll come to in due course analyse the type of damage for which the FMA says he is liable. The corresponding pleading against Guardian Trust, and we won't – may go to two of these because I want to go to the first pleading as it was originally filed then to the High Court judgment which struck out parts of it, because we put some emphasis on the effect of that striking out, and then the current pleading. The initial one is found in volume 2 at page 357. This isn't – sorry, it's not quite the original. It says "amended" but it was – the date of the amendment there, 28 February, that is a month approximately before the High Court hearing, so this was the state of play when it went to the High Court. At 361, so at page 361, paragraph 9, what was then alleged or proposed to be alleged against Guardian Trust was that it owed a duty in tort to the depositors, including prospective depositors, to exercise reasonable diligence, care and skill, (a) in reviewing and deciding whether or not to approve the form and content of a prospectus." I note and I'll come to compare it to the current version. (a) is now gone and has to be gone because of the strike-out which was not challenged.

The others, (a) to (f), are different allegations in type because they are all about this failure to ascertain compliance with the trust deed. So they are allegations which

relate to a duty of the type found in clause 1 of Schedule 5 of the Securities Regulations.

Paragraph 10 is to what the duty was based on. There's a shopping list of factors which is how a duty of care in tort is often pleaded, and then in (d) over the page, one of those factors, Guardian Trust accepted responsibility for approving the form and content of the prospectus issued by it and did so approve a prospectus. That also has now gone and for the same reason.

Similarly, at the bottom of that same page, (j), Guardian Trust's conduct in relation to the approval of the contents of the prospectus which comprised a detailed review of the text. That, and there's particulars which run all the way over page 5 of that and those various run into page 6. That also has now gone so one could put a line through (j).

WILLIAM YOUNG J:
So all of these have been deleted now?

MR COOPER:
Yes, Your Honour. So within paragraph 9, sorry, 10, the ones which were deleted are (d) and (j).

Then the allegation of breach in paragraph 11, if the plaintiff succeeds in its claims against the first defendant, Guardian Trust will have breached one or more of its duties to the depositors. A change there, one finds…

WILLIAM YOUNG J:
Sorry, what – sorry, I just stopped writing.

MR COOPER:
Sorry, on paragraph 11.

WILLIAM YOUNG J:
Paragraph 11.

MR COOPER:

So this is the allegation of breach and the matters listed in (b) are all retained until one gets to subparagraph 5 over the page at the top of page 365 and what's changed there, and I'll take Your Honours to the new version that, "Allowing Hanover to issue and distribute on an ongoing basis a prospectus containing untrue statements," those next words, "by approving the form and content of Prospectus 36," are now deleted because that was the struck out part.

ELIAS CJ:

By approving, yes, I see.

MR COOPER:

From the word "by" until the word "and" Your Honour. Have been deleted.

ELIAS CJ:

So it's failing to use enforcement powers –

MR COOPER:

Yes.

ELIAS CJ:

– is the basis of the tort claimed?

MR COOPER:

Yes Your Honour. Now we say that's significant change. All of these changes in combination are significant, all are of the same type, it's a movement from an allegation of responsibility for the same thing which was alleged against Mr Hotchin, namely the misleading content of the prospectus to what was left which are different, or allegations different in type, namely failing to monitor ongoing compliance by the company, the issuer Hanover with its obligations under the trust of deed.

So the next step in chronology is the High Court judgment which Your Honours will find in the same volume, page 398, and I come back when dealing with the issue of same damage more generally to other aspects of this, but the key part of it for this purpose starts at page 420. The duty, under the heading, "Duty to monitor prospectus," you'll see a reference in 49 to clause 1 of Schedule 5 of the Regulations, a description of the statement of claim as it then stood. At 51

Her Honour found that "I am satisfied that there is no tenable argument that the trustees owed prospective or roll-over depositors a duty of care in respect of the accuracy of the statements contained within the prospectuses." Then listed the matters relied on for that finding which cover the next two pages of the judgment.

At 53, comments on the fact, and my learned friend referred to it, that in fact in the course of receiving the prospectus the trustee did send it back with some comments from time to time. There's evidence in the volume which I don't think I need to go to given where the pleadings have got to as to the qualifications that went with those comments. But Her Honour didn't think that was sufficient to create any duty of care as to the contents. It refers to policy considerations at 54 and effectively the policy consideration there is the scheme of the Act, that there are responsibilities under the Act and paved on the directors of the issue, Mr Hotchin and the other defendants, and there are different responsibilities imposed on the trustee and what the pleading, as it then stood, sought to do was to blur those two.

And 56, Mr Hotchin argues, paragraph 56, "Mr Hotchin argues that the obligation under clause 1… should be read to include checking whether there is anything untrue in the material accompanying the original offers… This requires a strained reading," Her Honour found, and then at 58, "For these reasons I am satisfied that the allegation that the trustees owed such a duty is untenable."

So therefore there, and there's no appeal lodged or pursued against that finding, so absence of a duty of care in respect of the contents, truthfulness of the contents of the prospectus is not and can't be pursued.

The revised pleading that we now have is the one which Your Honours have been referred to by my learned friend which sits in the appellant's bundle of authorities at tab 1 and that is, in broad terms, the same document as the one I took Your Honours to a few minutes ago, except it does not have those paragraphs which are said were missing so I won't go through to show you what's not there but just to go to the end of it to see how the final bit of that pleading is now left. So that's at paragraph 11, which alleges breach by the trustee. None of these is a breach in relation to checking the content of the prospectus. The paragraph 5, which is really the one which refers to the prospectus, is this pleading allowing –

ELIAS CJ:

Sorry I've missed this. What page are we at?

MR COOPER:

We're at page 4 – it's the bundle of authorities Your Honour, tab 1.

ELIAS CJ:

Thank you.

MR COOPER:

And I'm at page 4 using the numbering at the top of the pages and so paragraph 11 of this document is the allegation of breach against Guardian Trust as it now stands and over the page you'll see page 5, paragraph Roman (v), this is the equivalent of the paragraph I referred to in the earlier pleading, but with. "Allowing Hanover to issue and distribute on an ongoing basis a prospectus containing untrue statements," no longer by carelessly reviewing its contents, the essence of the previous allegation, but just by in effect in a "but for" sense by failing to have exercised enforcement powers in relation to its different duties. So it's provided an opportunity thereby allowing the directors to issue a misleading prospectus and –

WILLIAM YOUNG J:

Sorry, just so I understand this. What I took Mr Gedye to be saying was is that the cash flow reports, or liquidity reports which the directors got, and which are the, presumably the basis of the allegation that they acted without reasonable care, were also sent to the trustee?

MR COOPER:

Yes Your Honour.

WILLIAM YOUNG J:

So when you say "yes", yes that's his position or yes, that is the case?

MR COOPER:

I am unsure of the answer to that Your Honour. I don't think it's in the evidence. It maybe. I'm not sure. There is certainly an obligation in the trust deed to provide periodical reports to the trustee on the companies.

WILLIAM YOUNG J:

So they won't necessarily be the same reports as the directors get, they're likely to be differently formatted, or whatever?

MR COOPER:

Certainly the trustee won't get all of the information that the directors receive –

WILLIAM YOUNG J:

No.

MR COOPER:

– but there is this form of statutory report that would go from the issuer to the trustees rather. On receipt of that report the directors have an obligation to look at their prospectus and ensure that it remains accurate and is not misleading investors. The trustee does not, in our submission, have that obligation.

WILLIAM YOUNG J:

Well, mightn't that be a subset of a trustee's obligations?

MR COOPER:

It would be an obligation to monitor the truthful, ongoing truthfulness of the prospectus, which is the allegation that was struck out. As soon as my learned friend puts the claim against the trustee in terms which imply an obligation to do something about the prospectus, then with respect he strays into territory which is covered by the strike-out order which was not challenged on appeal. Is that a convenient time?

ELIAS CJ:

Yes it is, thank you. We'll take the lunch adjournment now.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.24 PM

ELIAS CJ:

Yes Mr Cooper.

MR COOPER:

If I can just firstly answer a question from Your Honour, Justice Young before lunch about the reports which went to the trustee. The evidence on that, and I will not take you to it, it is in volume 3 at page 464 there is an affidavit of a Mr Connor who is the New Zealand Guardian Trust executive with responsibility for this matter and he sets out there the, the nature of the reports received. Some, I will take though if I may the Court to, to one category of those reports which are found in volume 4A, the exhibits volume 4A. And page 633. And these are a series of quarterly certificates given to the trustee in compliance with one of the obligations under the trust deed given by the directors, signed as it happens these ones appears by Mr Hotchin, to the, to Guardian Trust and, and so the directors are quarterly reporting to Guardian Trust on a list of matters, they're the same in each month. Number I, "No matters in our opinion have occurred to affect materially the adverse and adversely the interests of the depositors," is a similar list, number X over the page, page 6, sorry, IX, 634. "The registered prospectus of the company has been up-to-date and not false or misleading in any material particular. So the trustee was itself in effect a, a recipient as it was required to be under the trust deed of the same ongoing representation that went to, implicitly to investors that the prospectus remained up-to-date. It is also correct that the trustee received different and, and more substantive information of the type that is required to be provided in accordance with the trust deed, so...

WILLIAM YOUNG J:

So, these look very formal.

MR COOPER:

They –

WILLIAM YOUNG J:

These, this material looks very formal and on a template obviously.

MR COOPER:

They seem to be the same, yes Sir.

WILLIAM YOUNG J:

But did they also receive what you might call the, the prime material? You do not know?

MR COOPER:

I know they received some things. I know, what we have is evidence of the categories of things that Mr Connor says was received. What I am unsure is I do not know whether on an ad hoc basis or less formally there was other information provided. The relevant paragraphs in Mr Connor's affidavit are 8 and 10.

ELIAS CJ:

Sorry, where are we going now? Which?

MR COOPER:

So if we are in Mr Connor's affidavit which is in volume 3 Your Honour the pink volume.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

It has got monthly management accounts.

ELIAS CJ:

What page?

WILLIAM YOUNG J:

Page 469.

ELIAS CJ:

Thank you.

MR COOPER:

Yes so it is, and over 468 (j), 8(j), "Hanover must provide," and there is a list of, and they do include monthly management accounts, yes Sir. So in the, with that context of that legislative and pleadings background the different damages we say arise reflect the statutory scheme and the separate and distinct responsibilities under that scheme or directors and trustee. The claim by the FMA against Mr Hotchin for misleading investors into subscribing for securities, Hanover debentures, it is not, so Mr Hotchin is not sued for wrongful trading. He is not sued for trading in breach of the trust deed. What he, the harm, the damage that was caused by the misleading

statements was to cause investors to, induce investors in terms of section 55G to buy securities on the faith of a prospectus which was misleading. That may have caused the investors to pay an inflated price although that concept of inflated price works a little uneasily with a debt security rather than an equity security but it, perhaps the easier way to put it is caused investors to subscribe for securities which they otherwise would not have chosen to subscribe for. What it is not though, what that damage is not, is a shortfall in the assets of the company causing the company to be unable to repay the debenture. My learned friend, in discussing the *Securitibank* case, if I understood him correctly, suggested that that formulation, causing a shortfall in the assets of the issuer and thereby causing non way payment of the debt instrument is a common damage. In my submission it's not because there's no way in which misleading investors by a false statement in a prospectus diminishes the value of the assets in the issuer. The claim against the trustee, however, is for a lack of diligence resulting in Hanover, Hanover trading imprudently or at a loss or in breach of the trust deed. They all amount to different aspects of the same thing. It is that claim, the claim of that nature, which does cause the type of damage which my learned friend identified in the *Securitbank* case, namely a loss of assets in the issuer, thereby an inability to repay the investors.

GLAZEBROOK J:

So it's just a matter of how the claim is framed by the FMA because it could have been framed, couldn't it, in the same way for the directors, not withdrawing the prospectus and causing loss thereby?

MR COOPER:

Yes, if the FMA had sued Mr Hotchin for imprudent trading, for trading or investors –

GLAZEBROOK J:

Or not having withdrawn the prospectus as required?

MR COOPER:

Or making investments without adequate security or the various particulars of non-compliance with the trust deed and the various ways in which that can arise. If it was that type of claim, an imprudent or reckless trading case against the directors –

GLAZEBROOK J:

So the plaintiff doesn't just get to choose who they sue, they get to choose how they sue and that will affect contribution?

MR COOPER:

It will do, if the way in which they do sue, the way in which the FMA sues, so the plaintiff, necessarily implies a type of damage which is not the same type of damage which would be caused by the complaint then made by the defendant against the third party, and the distinction we make here is that phrase of the diminution in the value of the assets of the issuer thereby causing it to be unable to repay the investment. We accept that –

GLAZEBROOK J:

Well, but keeping on trading with the prospectus doesn't cause a diminution in the assets of the company, does it, so I'm not sure that that link applies?

MR COOPER:

No, but the allegation against…

GLAZEBROOK J:

The trustees is letting it carry on. There happened to be a diminution of the assets of the company which then meant they couldn't repay because in fact the investors mightn't have lost anything from that. You might have had an untrue statement in the prospectus but, in fact, you might have had a, not in this particular case but say in a public company case, a major windfall that had come in and the investors are fine.

MR COOPER:

Yes, Your Honour, I accept that but –

GLAZEBROOK J:

So it's not from a diminution of assets of the company, and in some cases it mightn't be a diminution. They may not have had the assets in the first place if it's a really untrue prospectus. There might have been no diminution at all. It's just the assets weren't there in the first place.

MR COOPER:

I agree, Your Honour, but the fact that the prospectus can be misleading without any diminution in the value of the assets, in my submission, is consistent with the type of damage being different. The misleading statement in the prospectus causes damage.

GLAZEBROOK J:

No, I understand that. I just don't understand why you say the trustee's liability is related to a diminution in value, or have I missed your point? Are you making another point that I've missed?

MR COOPER:

No, Your Honour. I was perhaps just suggesting that the other half of that –

ELIAS CJ:

Are you saying that that is the trustee's obligation, but does that mean that they are also not liable in tort for if the diminution in the assets of the company should also have been indicated in the prospectus?

MR COOPER:

They will be, they can be liable in tort to investors to the extent that their lack of diligence on their watch caused a diminution in the value of the assets.

ELIAS CJ:

So this is a structural difference, is it, based on the function fulfilled by the trustees? I'm just trying to understand.

MR COOPER:

It is partly that, yes, Your Honour, and partly it's the principle that in a negligence claim, which is what the trustee faces, the type of loss for which the defendant can be liable is the loss to which my duty is focused, the *BNZ v Guardian Trust* –

ELIAS CJ:

But that isn't the loss that's sought here and you really need to indicate to us why the trustee can't be liable for the loss to those who relied on the prospectus.

MR COOPER:

It was the damage caused by the trustee's breach, failure to monitor correctly the compliance with the trust deed. That's the nature of a duty which the trustees owes –

ELIAS CJ:

Yes.

MR COOPER:

– and the purpose of that duty is to ensure compliance with the trust deed so as to preserve the trust assets so as to enable the issuer to repay the debentures upon maturity. That is the purpose of the duty and therefore the type of loss.

ELIAS CJ:

But you would have to convince us that it is not, that that relationship does not also give rise to the duty that would have to be, duty of care that would have to be relied on here. And I do not understand that this point has, or maybe it is raised by the, the contribution argument but I had not thought that we were arguing about duty of care but simply the nature of the loss claimed, which is claimed, well, well the argument is that what is claimed is, is the same damage.

MR COOPER:

Yes. The, the overlap between those two, the nature of the duty and the type of damage is simply the point that the type of damage for which liability can arise in negligence, the type of loss is always to be determined by reference to the duty owed and the purpose of that duty.

ELIAS CJ:

Well, well that might be an eventually outcome but at the moment we have got a pleading that the trustees are liable for this because of their duty of care extends to, to loss on the prospectus by, by investors who relied on the prospectus. I am just trying to work out whether there is something more significant in what you are putting to us than I had appreciated. Because, because the claim is framed simply in terms of the loss in reliance on the prospectus. You might be right that ultimately it will be said there was no duty of care but that is not a matter before us.

MR COOPER:

Well the, the boundaries of the potential liability of a trustee are in a sense a matter before the Court because in seeking to strike-out what we are saying is that the trustee could not owe a duty of care of a type which causes the same damage as the, as Mr Hotchin's duty, as Mr Hotchin's breach could cause to the investors. So in that sense there is an, that is, that is my submission why both the Court of Appeal and Her Honour in the first instance referred to the boundaries of the duty of a trustee, of the types of loss for which the trustee could be liable referring to the *Bank of New Zealand v New Zealand Guardian Trust Co* Ltd [1999] 1 NZLR 664 (CA) case. The, perhaps I could, I could come at it in, in this way. That if the allegation against –

ELIAS CJ:

Do we, do we have this strike-out application?

MR COOPER:

We do Your Honour. It is volume 2, page 385. Sorry, that is, that is the one, the equivalent one from Perpetual so I should take you to ours which starts at 381. It, I think I would have to accept that the way in which this case was clearly argued in the High Court didn't mirror exactly the terms of the strike-out application because for example there's that section of the judgment which I took Your Honours to where there's a strike-out of that part of the allegation concerning a duty to monitor the contents of the prospectus. The way the strike-out application is phrased didn't specify that as a separate basis of strike-out but clearly that was the basis on which it was argued and there's been not been any issue taken with that in the outcome.

GLAZEBROOK J:

Can I just check if we're looking at page 383, 201 is no longer relied on, is that right?

MR COOPER:

Yes, Your Honour.

GLAZEBROOK J:

So that's gone, thank you. I mean I have a bit of trouble really if we're going to be looking in great detail at the duties of the trustee because I haven't quite seen the case as relying on that and it might just be that there's a difference between whether the damage is the same or otherwise but I'm not sure if you look at the duties of

trustees under the regulations that it says anything about a diminution in assets of the company. It just says they have to make sure that the assets are sufficient. Well if the assets haven't changed, but in fact they're not sufficient, then I would have thought the trustees are liable if they haven't, by reasonable diligence, picked that up. If it could have been picked up by reasonable diligence and the trustees have not done so.

ELIAS CJ:
On your argument they wouldn't be liable, would they?

GLAZEBROOK J:
Well I was just reading what it says in the Securities Regulations.

ELIAS CJ:
Yes.

MR COOPER:
Um –

ELIAS CJ:
Because it's a different loss, you say?

MR COOPER:
They would not be liable for that loss, no.

GLAZEBROOK J:
Well then why do they have a duty to make sure they're sufficient and then you say that if they fail in that duty then they're not liable. Well why would that be in terms of the duties as set out in the Regulations?

MR COOPER:
I accept that they would be liable for the diminution in value –

GLAZEBROOK J:
No, no, there's no diminution in value. The assets were never that – were never there. They haven't changed. They've remained exactly the same. It's just that they were never sufficient.

MR COOPER:

The trust –

GLAZEBROOK J:

And the trustees could have picked that up and didn't by reasonable diligence and just did not…

MR COOPER:

Because in that case there is a misleading statement by the directors after that event, which then induces –

GLAZEBROOK J:

No, I'm assuming the misleading statement has got the investors in.

MR COOPER:

Oh, the misleading statement comes first in that scenario?

GLAZEBROOK J:

But the assets of the company have not changed whatsoever. So let's put it at its most. The misleading statement is that the company has assets of $200, when it only has assets of $100. The investors put their money in. It still only has assets of 100, and presumably whatever the people have put in as investments.

MR COOPER:

Well in that scenario I'm not sure on what basis there'd be a claim against the trustee.

GLAZEBROOK J:

Well, because there's no money to pay interest or anything like that and so they haven't had – but they've never had a diminution in value of the assets is what I was suggesting.

MR COOPER:

Sorry, but –

GLAZEBROOK J:

Well I'm just reading the duty that's all and it doesn't say anything to me about diminution in value of the assets.

MR COOPER:

I was concerned, to be precise, about what breach the trustee committed though in the scenario before –

GLAZEBROOK J:

Well it didn't pick up the fact that the assets were not going to be sufficient to discharge the amounts of the debt securities as they become due. And it could have picked that up by reasonable diligence.

MR COOPER:

And then their liability would be for that shortfall.

ELIAS CJ:

Now you're taking a fairly black and white view that the trustees can't be liable for misstatements in the prospectus. That's really what you're putting forward, isn't it?

MR COOPER:

It is what I'm putting forward, Your Honour, and if it were the case that they could be, so if we hadn't had the strike-out, and so we had two parties each of which were liable through different means, not joint tortfeasors clearly but owing different duties, but both liable for, in different ways, for a misrepresentation, that would be factually analogous to the situation in *Altimarloch*, for example, where you had the counsel and the vendor both making representations arising from different duties.

ELIAS CJ:

But this isn't a duty pleaded as arising out of obligations under the – well, it's the functions of the trustees which the tort is based on but it's not confined to their direct responsibility. It's the relationship between the trustees and those investing in reliance on the prospectus. Now that's still to be established at trial but I can't see that we're arguing that here in a case about joinder – about contribution.

MR COOPER:

No, I agree with that, Your Honour, we're not. Where there is an overlap between the issues is on this issue of the type of damage for which the trustee potentially is liable, given the nature of the duty it owes...

ELIAS CJ:

But the loss that is claimed is the loss through reliance on the prospectus. So the argument against you is that it is the same loss.

MR COOPER:

The loss as it's pleaded against, currently pleaded against Guardian Trust, isn't really one about reliance on the prospectus in the way of the pleading that I took Your Honours through. It's really that by not having prevented, in purely about fore-sense, because the trustee hadn't taken action at an earlier time, there was therefore in about fore-sense an opportunity for a misleading prospectus to be issued and then loss. That's the effect of the deletion of those words in the middle of paragraph 11(b)(5) which I took Your Honours to.

O'REGAN J:

So what do you say the different is then between the loss claimed from Mr Hotchin and the loss claimed from the trustee?

MR COOPER:

Perhaps if I – could I answer that, Your Honour, by going to the factual scenario in my learned friend's submission, which is the factual scenario set out on page 20, paragraph 59.

O'REGAN J:

Sorry, what document are you in?

MR COOPER:

I'm in the submissions for the appellant, Your Honour.

O'REGAN J:

Sorry, what was the paragraph?

MR COOPER:

Paragraph 59, Sir, page 20. Now that's given as a demonstration. I accept that these can arise in different ways, but under paragraph (a) the scenario is an investor makes a term investment on the strength of the untrue prospectus. Now we say at that point there's a claim against, already a claim by the investors or the FMA on their behalf against the directors and their measure of damages then is the difference in value between what they paid and what they received. Then down at (d), after that, the trustee was negligent in failing to intervene. So this is I think the sequence of events that Your Honour, Justice Glazebrook, put to me in that scenario. Now what has happened then is that a different damages has arisen because the assets of the company available to repay the debenture have been diminished by conduct of the company but in which the trustee is found to be negligent. So there's further conduct after their initial cause of action against the trustees has accrued and that damage has occurred, and it's damage of a different type, albeit that we accept the proposition that it overlaps and in that broad sense has the same result that investment, the investor will lose, may lose his or her investment.

GLAZEBROOK J:

The investor isn't claiming through diminution of the value of the company though, is it? Even assuming that there has been a diminution in this case? The investors' claiming for the loss of the investment.

MR COOPER:

If the investor was suing the trustee, and saying that the trustee had – and given the strike-out context we're in, where the claim of liability of the trustee for misleading statements in the prospectus has been struck out, so the trustee can't be liable for content of the prospectus, the investors' claim therefore, the residual claim that the investor could bring against the trustee would be one of that loss which is attributable to the management of the company negligently monitored by the trustee. It may, as it happens, combine to result in the ultimate loss of the entire investment as occurred here.

GLAZEBROOK J:

It couldn't sue for more than the loss of its investment, could it, the investor? Especially in a debt security because you don't have any residual interest in the company?

MR COOPER:

I agree, Your Honour, yes.

O'REGAN J:

Or it could sue for the interest returned.

GLAZEBROOK J:

On that interest, obviously, yes.

O'REGAN J:

Yes. But it's still, the loss has arisen because the trustees' negligence has led to a further diminution in the value of the assets than would have occurred if the trustee hadn't been negligent, right?

MR COOPER:

Yes.

O'REGAN J:

But that's still, in the end, what the investor is suing for as the way that reflects on the value of their investment, isn't it?

MR COOPER:

That's, in a claim, in a nominal claim by the investor against the trustee –

O'REGAN J:

Assuming the investor is suing the trustee directly, yes.

MR COOPER:

Yes, Your Honour, I agree with that. The investor would sue the trustee for the extent to which its non-repayment of its debenture is attributable to diminution in assets. Attributable to negligent monitoring by a trustee.

O'REGAN J:

Well I think Mr Gedye would say, well in the end that's just another way of saying the trustee is suing for the loss of value of its investment, which is what the – sorry the investor is suing for the loss of value of its investment as it would against Mr Hotchin.

MR COOPER:

And I have to accept it can be characterised – both types of loss can be characterised in the facts of this case as the same result in the language in the *Royal Brompton Hospital* case but we say the same result in that sense isn't the same type of damage, because there are different types of damage reflecting the different duties which lead to the loss of investment in different causative ways.

Perhaps just to respond on this point to the submission made by my learned friend, it's certainly not our position that they need to be joint tortfeasors before the same damage arises. As I have said we would accept that there were claims against the trustee for – if a claim hadn't been struck out for some liability in relation to the content of the prospectus, then they're not joint tortfeasors. They owe different duties, there'd be different causes of action, but they would combine to cause damage in the same way the same damage. Equally in the example I gave earlier, if there were a claim against Mr Hotchin for improving trading in breach of trustee, and Mr Hotchin then sought to join the trustee, we would have a difficult task in characterising that as a different damage because it arises in the same way. So the effect of the test that we propose doesn't, is not extreme in the sense that it was submitted.

I wonder if I could, going back to some of the authorities on the test, and I'll do it quickly, I know Your Honours are familiar to some extent with the leading cases. I wanted to deal both with the equitable contribution test and the section 17. But to start with the equitable cases, in particular the *Altimarloch* judgment, and then briefly the High Court of Australia in *Burke*. *Marlborough District Council v Altimarloch* is found in tab 14 of the appellant's bundle. And I will just go to some passages. There are five judgments and a number of issues which interrelate and it is a little difficult to, to, to move too quickly through it without losing some of the context but the, the four principles I seek to draw from the case perhaps before going to the passages are these. Firstly that for the purposes of contribution it is not sufficient that there be the same result. Rather there needs to be a common liability or a co-ordinate liability. Secondly that this means there is a liability of the same nature and extent. Thirdly that that involves some consideration of the nature of the duty and the breach and the causal connection to the harm and fourthly where separate representations induce entry into a contract, separate representations of the same type then it is perhaps fair to say opinion is divided, that being the facts of *Altimarloch* itself and being I accept the facts it would exist here where the trustees sued over the contents

of the prospectus. The, so in essence there was a purchaser of property where there was a warranty by the vendor about resource consents for a certain quantity of water to be available. It was to be used as a vineyard. There was a similar representation made in a different way from a different duty by the District Council. Both were sued and sought contribution from each other. The claim against the vendor under the Contractual Remedies Act, so it is not a tort claim, hence the reliance on equitable liability.

There were four issues, two of which are relevant for this purpose. One of the issues was a causation issue whether it could be said that the council's negligence actually caused any harm because as a matter of fact the purchaser successfully sued the vendor and recovered damages, putting it in the same economic position it would have been had the representation been true in accordance with the test under the Contractual Remedies Act. So one test was whether it could be said at all that the council's negligence caused any harm and because that causation argument was decided differently by different Judges it means that the contribution issue did not arise in the same way in each judgment. And in the judgment of Your Honour, the Chief Justice in particular Your Honour found that there was no causation. There was a sequence of responsibility hence the vendor having met its responsibility the council's responsibility did not arise and therefore Your Honour did not need to consider fully the issue of contribution in the same way that those members of the Court did who, who found that there was causation.

So the, Justice Blanchard took a different approach, did address the issue of contribution but essentially adopted the test from the judgment of Justice Tipping so it is to that which I ask Your Honours to turn. It is at page 776 of the judgment. The heading at the top of the page where contribution. There is a reference to section 17 of the Law Reform Act there on page, on paragraph 1256 but noting that that does apply for this purpose because of the contractual nature of the claim. Over the page at 128 and really the essence of the reasoning is found here in, in the second, probably from line 19 or 18 of this page downwards. "One wrongdoer can recover contribution from another in respect of the same loss only by virtue of some statutory provision or in accordance with the principles of equitable contribution which now subsume the old common law. Equitable contribution, when two or more parties are under what is conventionally called a co-ordinate liability." There is a difference, a difficulty with a number of these cases and a point my learned friend made that the phrases "co-ordinate liability" and "common liability," the same terminology is used

from one Judge, one case to the next. Perhaps not always in quite the same way and that is, creates difficulties. It is an issue commented on also by Justice Kirby in the High Court of Australia in *Burke*. "In such circumstances the overpaying party can recover equalising contribution from the other party or parties… essential to the application – "

ELIAS CJ:
Sorry, but the way it's used here is a co-ordinate liability would also be a common liability, wouldn't it?

MR COOPER:
Yes Your Honour. I think –

ELIAS CJ:
Yes.

MR COOPER:
And I think most often the two are used to mean the same thing.

ELIAS CJ:
Yes. Interchangeable.

MR COOPER:
I think so.

ELIAS CJ:
Yes. And the words in parenthesis make that.

MR COOPER:
Yes and that, it's those words in parenthesis which is in essence is, I think that's why I take it from the case, that common liability or a co-ordinate liability mean the same thing and they mean a liability of the same nature and extent.

ELIAS CJ:
Yes.

MR COOPER:

"The amounts for which each party is liable," turning over the page, "there is no one loss. No case of which I am aware, and none was cited, has ever applied the equitable doctrine to the extent necessary to cover this degree of dissimilarity." Over the page, it's on page 779 at 134, His Honour, in discussing that principle further, cites the House of Lords in the *Royal Brompton Hospital* case and says that they contain valuable discussions of the history of the law of contribution and its statutory development in the United Kingdom and referring to footnote 123 above, which just quotes the section of the English statute equivalent now to our section 17. I'm going to come to *Royal Brompton* in a minute so I won't go through that but His Honour effectively cites here the same passages of *Royal Brompton* that we rely on. Then at 139, over the page, "It follows from the foregoing discussion that unless this court were substantially to extend the principles of equitable contribution, the vendors could not obtain contribution from the Council even if the Council were liable to the purchaser." And that passage and that sentence His Honour is treating the test in *Royal Brompton* and the equitable contribution test as one and the same.

There was, as comes up reasonably often in some of these contribution cases, there was a subsidiary point here, the concern expressed in the final sentence of paragraph 139, that in this case an effective contribution could be to overcompensate the vendor, having received the purchase price, and also then receiving a part of the difference in value from the council. That's a issue which arises where one party's measure of damage is contractual.

There is a postscript to His Honour's judgment, paragraph 144, where he notes that, "My views, and those expressed by Justice McGrath, differ not so much on the legal approach to be adopted to contribution issues but rather on the application of that approach to the facts of the present case." In my submission that is correct when one goes to Justice McGrath's judgment. Both adopt the essential test of a common liability being one of the same nature and extent. Where they part ways is in implying that here to the situation where there are, if you like, concurrent representations of a similar nature.

ARNOLD J:

So the view, taking the common liability, or the co-ordinate liability, need not be, that the causes of action need not be the same but the nature of the liability must be the same?

MR COOPER:

Yes Your Honour. The cause of action need not be the same.

ARNOLD J:

And to the same extent. I don't quite follow that, to the same extent, because it's accept, isn't it, that there doesn't have to be a complete double coverage obviously?

MR COOPER:

Yes, it is tentatively accepted in all of the cases and indeed as it was, certainly in *Altimarloch*, that there were differing measures of damage.

ARNOLD J:

So what does that mean? Are the liabilities of the same extent?

MR COOPER:

I think that is because in talking about liability here it's not referring to the liability for a sum but the liability in the sense of the obligation. The nature of the duty owed. There's some further discussion on that point Your Honour in the *Burke* case which I'll come to in a minute.

So perhaps if I can then turn to the judgment of Justice McGrath, the relevant passage starts at page 796 and at 210 it's the beginning of a discussion. There is a discussion of a history of the contribution and of the section 17, just over those paragraphs. This largely repeats what is also, or repeats in essence what's also in *Royal Brompton*. My learned friend said this morning that when section 17 and the English equivalent were enacted, they were remedial legislation. My submission, I agree with that, but what they were seeking to remedy was the rule in *Merryweather v Nixan* case which said that the general common law principle of contribution doesn't extent to tortfeasors. It's that lacuna, as my friend put it, which was remedied by section 17. It follows, and this is the reasoning in *Royal Brompton* which I'll come to in a second, that in remedying that lacuna Parliament shouldn't be taken to have meant to change the fundamental concept of contribution but rather to extend it into the tort arena where, since *Merryweather v Nixan* at least in 1799, it could not go.

There's then a discussion of the High Court of Australia case in *Burke* which I'll come to so I won't go through His Honour's treatment of that except perhaps to note at paragraph 224 around about line 10, I prefer in the New Zealand context to adopt the formulation for co-ordinate liabilities, Justices Gaudron and Hayne, which looks to whether the liabilities are the same nature and extent. So I think that's the point that Justice Tipping was making about essentially the same. There was a higher threshold proposed by Justices McHugh and Callinan in that *Burke* case which in passages at least does almost come close to the joint tortfeasor type threshold, but Justice McGrath preferred that test of same nature and extent. And really it's at that first paragraph of 226 where you see departure and views from the position adopted by Justices Tipping and Blanchard.

So in that final sentence of 226, "Here the inquiry establishes that the parties made the same error in their representations which, in each case, induced the purchaser to enter into the contract under a mistaken belief the water rights were of the extent the parties had stated to the purchaser," and it's that concept and analogy which we say could apply as against Guardian Trust were it sued for the contents of the prospectus.

The final judgment's Justice Anderson but you'll see the paragraph reference at 235 His Honour adopts the reasoning of Justice McGrath.

The *Burke* judgment, High Court of Australia, is in tab 3 of our bundle of authorities. It is the smaller white one. Again, this involved that similar position of two parties owing different duties but making representations on essentially the same issue to the plaintiff. It was a purchaser of a building who sued the vendor for misrepresentations about the financial worthiness of a tenant which affected the value, also sued not only the vendor but also the directors of the vendor under the Trade Practices Act. Those defendants sought contributions, sought to join in contribution from Mr Burke who had been the purchaser's solicitor and had also advised the purchaser on the same issues. The Courts below had allowed contribution on that basis, applying the same nature and extent test, and this is an appeal from that. The appeal was upheld by a majority of four to one with Justice Kirby dissenting.

So there's a joint judgment of Justices Gaudron and Hayne. It starts at page 289. The heading, page 292, under the heading "Equitable Contribution" and

paragraph 15, “The doctrine of equitable contribution applies both at common law and equity. It is usually expressed in terms requiring contribution between parties who share co-ordinate liabilities or a common obligation to make good the one loss.” Again, we get that same phrase, “depend on whether the liability was of the same nature and to the same extent”. “The notion of co-ordinate liability is one that depends on common interest and common burden.” And the final sentence of that paragraph, 16, the requirement that is be of the same nature and the same extent is apt to include notions of equal or comparable culpability and equal or comparable causal significance. So I think “the same extent” there is not talking about the quantum of damages that arises but the –

GLAZEBROOK J:
Sorry, I missed where you are.

MR COOPER:
Sorry, Your Honour, I was reading paragraph 16 and –

GLAZEBROOK J:
That’s where I was but I couldn’t quite see that.

MR COOPER:
It’s the final sentence, four lines from –

GLAZEBROOK J:
Final sentence, thank you.

MR COOPER:
The requirement of the same –

ARNOLD J:
This might, this requirement might be explained. I think Mr Gedye said that the equitable doctrine treated the contributors equally and there was an exception and I think Justice Tipping mentioned that where it could be a pro rata, but that doesn’t apply under section 17 because of subsection (2). So would that affect this requirement in terms of section 17?

MR COOPER:

I understand the connection between the two although I think where the equitable concept of contribution has reached under the recent case law is that there is no requirement of an equal sharing. Equitable contribution can be for any relevant percentage in the same way that one can do –

ARNOLD J:

Can it?

MR COOPER:

In fact, *Altimarloch* was an – I mean, one of the issues in *Altimarloch* was the proportion of liability of the Council didn't arise in the outcome but I think the percentage was 25% attributed in the Court of Appeal in responsibility. I don't think there was any issue taken that that, that it had to be 50% or nothing, and there's some discussion in this judgment. I might see if I can find the passage for Your Honour. But there is certainly a judgment of Justice Tipping in, I'll give Your Honours the reference, *Trotter v Franklin*, sitting in the High Court, [1991] 2 NZLR 92, which notes that equity may well require unequal sharing in certain cases. So it's not – the vehicle or doctrine did once, I think, it did once require equal sharing, where it started as a concept of co-sureties, where equal sharing follows naturally from the truly joint nature of the liability, but as the scope of equitable contribution has extended to what the phrase "co-ordinate and common liabilities" is used, so the equal assumption of the sharing ceases to be appropriate.

So and over the page, paragraph 19, "In the present case if regard were had to the culpability and causation, there would be much to be said for the view that the culpability of LFOT," which is the vendor, "and its director Mr Tressider and the causal significance of their conduct to the loss suffered by Hanave," which is the purchaser, "was of such a different order from that of Mr Burke," the solicitor, "that they should not be entitled to contribution. Their misleading conduct was a positive inducement to Hanave to purchase, whereas Mr Burke's omission to advise further inquiries merely had the consequences that the respondents' misleading conduct remained undetected." Now there is some parallel between that and the scenarios that we were discussing in relation to the relative positions of the trustee, Guardian Trust, and Mr Hotchin.

GLAZEBROOK J:

Mr Hotchin, I assume, would say that comes under section 17(2) and shouldn't be decided at a strike-out. I mean, there is a certain logic to that. "I made an untrue statement and you should give me contribution because you didn't stop me" –

MR COOPER:

Yes, and –

GLAZEBROOK J:

– is the sort of issue in terms of culpability there but is that the issue and is it fixed up by 17(2) and does it happen after trial, I suppose, is the other question?

MR COOPER:

What Their Honours said in that passage is not that because of that we will assess contribution at low or zero level in a 17(2)-type application but rather that the nature of the two liabilities is not such as to attract contribution at all so we are at the 17(1)(c) stage of the process.

GLAZEBROOK J:

I understand that. I am just not quite sure why that should be the case.

MR COOPER:

Once – I think it follows –

GLAZEBROOK J:

No, no, I mean you will just say to me well the liabilities are different but the loss is the same. And what do you, what do you say to the other way round then? That the trustees would be able to get total contribution even though the losses are different?

MR COOPER:

Sorry, if the trustees were sued –

GLAZEBROOK J:

If the trustees were sued first. So say here the solicitor had been sued first because the solicitor had a deep pocket or at least the solicitor's insurance company had a deep pocket.

MR COOPER:

Well the outcome would have to be the same in terms of the answer to the contribution question. I mean the outcome must always be mutual.

GLAZEBROOK J:

Does it make much sense that that be the case when in fact the real villain in the case here, if one is putting it in culpability terms, were, were the people who made the, was it false statements in this one? I cannot remember what it was, but anyway, who made the false statements in the first place rather than the person who did not pick it up.

MR COOPER:

There is a, an answer to that on the facts of this case, *Burke* but which might also apply on the facts of our case which is that the party sued, if the solicitor were sued first may well have his own cause of action so not relying on the contribution principle –

GLAZEBROOK J:

Yes, in terms of, in terms of the representations made of course.

MR COOPER:

Because he, and one of, and so similarly here Guardian Trust of course received and relied on representations from Mr Hotchin and the others so the, the issue of symmetry which I accept must apply that if there is no contribution one way there cannot be the other way is partly addressed by, in, in these representation cases by the ability to sue on one's cause of action where that arises. Further there is just a passage at paragraph 22 of that page 294 which I take Your Honours to which is five lines down. "That is because the doctrine of equitable contribution is founded on concepts of fairness and justice. Natural justice as the term is used. In this context natural justice requires that if one or several persons is paid more that his proper share towards discharging a common obligation he is entitled to be recompensed by those who have not." And that concept in this action is a citation of some other authorities to the same point is found also in Justice McGrath's judgment in *Altimarloch* about natural justice. Where there is a common obligation then the conceptual basis for contribution.

So, there, I will not take Your Honours in the time to the other judgments but perhaps just summarise what is, what is in them very briefly. Justice McHugh and to some extent Justice Callinan applied a higher bar, so it was not enough that there would be a liability of the same nature and extent. At least in some passage in Justice McHugh's judgment there is a requirement for what he, some sort of joint or common enterprise between the two parties. A type of, something close to joint tortfeasor in that concept. Although in fact in the part of a judgment where His Honour goes on to make the decision he does apply the same just and equitable. Justice McHugh takes, sorry, Justice Kirby takes a different approach, dissenting and dissents on the outcome so would have said that contribution here were available by the, by the vendor against the purchaser's solicitor.

Now we now may come to *Royal Brompton*. I know Your Honours have been taken to the judgment but, but it is really on the interpretation of *Royal Brompton* because it is *Royal Brompton* which deals with the statutory test that there is perhaps the sharpest difference in, in the interpretation which we say is correct and which was adopted by the Courts below in that which Mr Hotchin proposes. *Royal Brompton* is in tab 9 of the appellant's bundle. And the, perhaps again before going into it, the three principles that we say that one can take and should take from *Royal Brompton*, which I think is consistent with the approach that the Court of Appeal took, are firstly that the legislative change was remedial and did not alter the essential concept of contribution, secondly, that the same result is not the same thing as the same damage, and, thirdly, that the requirement is for a common liability rather than an independent liability and that requires analysis of the legal claims made against the parties, and the passages which, with my submission, support those propositions –

O'REGAN J:
Sorry, what was the third one?

MR COOPER:
That the requirement is –

GLAZEBROOK J:
In fact, can you just go through all of them again? They were just slightly fast for me, so it didn't alter them, it wasn't intended to alter the –

MR COOPER:
Essential concept of –

GLAZEBROOK J:
– previous law.

MR COOPER:
– contribution. It altered the previous law in the extent it covered tort which was previously uncovered. It didn't change the concept of contribution. Secondly, that the same result is not the same thing as the same damage. And, thirdly, that the requirement is for a common liability rather than an independent liability. So there's a – that distinction between what is a common liability and what is an independent liability has to be given some meaning, in my submission, we'll come to that, and that in making that distinction Their Lordships said that one has to have, one has to analyse the legal claims made against each party.

GLAZEBROOK J:
And I assume you were going to explain when you get to the case what same result not the same thing as same damage means?

MR COOPER:
Yes, Your Honour –

GLAZEBROOK J:
Is it easier to explain it in the context of the case rather than –

MR COOPER:
I think I can, Your Honour, and also by that the *Hurstwood* case which is the one my learned friend said which was decided shortly before *Royal Brompton* which Their Lordships said was wrongly decided and that may be an illustration of that difference between same result and same damage.

The first judgment of Lord Bingham, and this starts on page 1399 with a discussion of the historical basis, the final sentence of paragraph 2, "The common link between all these situations was the obvious justice of requiring that a common liability should be shared between those liable." My learned friend relied very much on the list of three questions in paragraph 6 and they are set out and analysed to some extent in his

written submissions also. In my submission, it's necessary though to see those in the context of what comes before them in paragraph 5 and immediately after them in paragraph 7.

Paragraph 5 at (f), "Constant theme of the law of contribution from the beginning that B's claim to share with others and his liability to A rests upon the fact that they, whether equally with B or not, are subject to a common liability." They're simply saying there the Act didn't change that or weaken that requirement. So it refers to the same damage but it wasn't, in His Lordship's view, changing the need for a common liability to sit behind that. "Indeed, both sections, by using the words 'in respect of the same damage', emphasise the need for one loss to be apportioned among those liable." Paragraph 6, you've been taken to.

Paragraph 7, starting just at (c), "The question would then be whether the employer was advancing a claim for damage, loss," sorry, I'll just skip through those parts stating the facts, just after (d), "It would seem to me clear that any liability the employer might prove against the contractor and the architect would be independent and not common. The employer's claim against the contractor would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost it incurred, the sums it overpaid and liquidated damages to which it was entitled." Not lead to the same damage. The – His Lordship also adopted the reasoning of Lord Steyn, which comes next, and the passages in that judgment which are relevant to those propositions start at – I think we can go straight to paragraph 27 on page 1410.

The focus should be, so this is interpreting the words of the English statute as it then was, "The focus is on the composite expression, the same principle. By its historical examination the notion of a common liability and of a sharing of that common liability lies at the root of the principle of contribution." So remedial legislation yes, but without discarding the conceptual basis of contribution. I think one can read that into section 17(1)(c) in one of two ways. One is, as Their Lordships do in this case, it is remedial, it extends it to cover tort but it did not discard with the concept. I think the other way is simply by the fact that within section 17(1)(c) the word "contribution" is used and that is a word used coming with the meaning which has been given to that term in, in equity and common law. Paragraph 30, page 1412, still in the speech of Lord Steyn, counsel for the architect urged the House to eschew an overly analytical approach to the nature of the claims. He said that in the application of the statute a

flexible and broad view should be adopted but loyalty to the statutory criterion of the same damage demands legal analysis of claims. Not simply of the, the result of the relief but of the claim.

There is then a discussion of the *Hurstwood* case which His Honour says, it is on page 1413 was wrongly decided. Now *Hurstwood* was a case where the head, some of the facts are set out here. I will not take Your Honours to the judgment but – the head contractor constructed a factory with faulty foundations and was liable to the owner and sued its broker for failing to obtain insurance. The broker then sought to sue the subcontractor who advised on the foundations. So two parties liable in both cases for the cost of repair. Those were the claims. The High Court struck out the contribution claim because the damage was not the same. The Court of Appeal reversed that decision. The Court of Appeal found, held that the broker was liable to the head contractor for the same damage, meaning compensation for the repair cost. In a, in a clear sense that, that is the same result. The result of a successful claim against either would be to provide damages equal to cost of repair but not the same damage in His Lordship's view for the reasons given on page 1413. And really at line E, "The fact is, however, that the insurance brokers had no responsibility for the remedial work. In my view the extensive interpretation of section 1 adopted by the Court of Appeal led to an inclusion not warranted by the language of the statute." So in my submission that is an illustration where that same damage and same result can depart. Lord Hope, next judgment starting 1414 –

GLAZEBROOK J:

If they had an insurance it would have, that is what I do not quite understand because if they had that insurance it would be paid for, so they did have responsibility for the remedial work. Say, say this was a, a, somebody had, an act insured for, that as not anybody's fault. If they had not, if they had not insured wrongly they would be responsible for the remedial work effectively, or at least for paying for it.

MR COOPER:

Yes Your Honour. So that was, that was the claim against the insurance broker. Had the insurance broker –

GLAZEBROOK J:

Well I just do not understand what is they had no responsibility for the remedial work –

MR COOPER:

Well they –

GLAZEBROOK J:

Because they, they did in fact.

MR COOPER:

Well they have –

GLAZEBROOK J:

Let us just take out the other party and have, have a, an earthquake or a storm.

MR COOPER:

I think the distinction His Lordship is making there is between responsibility for the quantum of remedying the defect in the building and responsibility for the thing which leads to that being the remedial work. So one goes, and analysing what is the damage it is stepping back from the financial consequence to the plaintiff and in a sense it is looking at the causal connection between the wrong and that financial consequence and it is that step in the process which is defined as, encapsulated by the phrase "the same damage". But the mutual discharge concept my learned friend spoke of would clearly be satisfied here. One couldn't be liable, they couldn't both be liable because there'd be over-recovery, but there was different damages because the causal, because the nature and extent of the duties was different the causal nexus was different. And finally on that –

GLAZEBROOK J:

And that's what you mean by that second proposition, do you. The fact that you both had to pay for the repairs is different from the same damage, that's why you had to pay for the same repairs? Or what is it exactly?

MR COOPER:

The cost of remedial works, I think is the measure.

GLAZEBROOK J:

No, I understand that, but what's the difference again?

MR COOPER:

The concept of the same damage –

GLAZEBROOK J:

What does "same damage" mean?

MR COOPER:

The way in which the harm erases is one way of paraphrasing the meaning given there. The nature of the harm caused by the breach of duty.

GLAZEBROOK J:

No, that doesn't help. That makes it worse, but the nature of harm is exactly the same here, to pay for the cost of repairs. But what you mean is one side was responsible for actually requiring the repairs in the first place and the second was responsible only for the payment for them? Is that the lack of ability to pay?

MR COOPER:

Who – yes, a liability and obligation of a very different type.

Lord Hope, at page 1417, agrees with the reasons of, in the other two judgments, speaks also of the history of it, at paragraph 46 on that page, "I do not detect either in the Law Commission's Report or in the wording of the Act itself an intention to depart from the assumption which has always been made in contribution cases that this relief is available only where two or more persons have contributed, albeit in different ways, to the same harm or damage – that is, where a single harm has resulted from what they have done. Where this occurs it may be said, loosely, as their liability is not common in the strict sense, as in the case of co-trustees or co-owners, that they share a common liability to pay compensation for having inflicted the same harm."

I think by saying "not in the strict sense", in my submission, that means not in the sense of joint tortfeasors, that they can be concurrent tortfeasors owing liabilities of the same nature and extent.

And then just the final sentence of that paragraph I think supports that first proposition I put, Your Honour, that the legislative change didn't change the essentially nature of contribution and hence my submission supports our approach and that of the Courts below that the test under equity is not in substance different from the test under section 17(1)(c).

And then, just finally, in paragraph 47, a couple of lines down, "But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely in order to determine whether or not the damage is the same." And I have tried to illustrate what the meaning of that proposition is.

My learned friend relied on the Minter Ellison judgment. One – the passages which my learned friend went to were, I think I'm right, all in the minority, minority in that three/three sense of minority in the Australian case. The essential finding of the majority was that the party from whom contribution was sought didn't owe a duty to the plaintiff and so the issue didn't arise. It would be as if in *Altimarloch*, the duty of care argument failed. I think the minority took a different view on that and hence had to come to consider the issue of contribution. But the – so with that preliminary point, the only other point I wanted to make is there is a difference between the statutory regime under the Victorian Wrongs Act and the one we're considering and in my submission a relevant one. It is at page, it is the loose page which was not in the original copy so it is page 449. Sets out the full Act. What is, there is some similarity I accept between the wording of the section and ours still but this is a legislative reform which replaces there concepts of contribution in particular because of the definition section in 1 so the common law as to what same damage and common liability and co-ordinate liability mean. The issues of those *Altimarloch* and *Burke* cases deal with is really removed under this legislative reform here because you have got a, a statutory and wider definition which does not contain within it these concepts of co-ordinate liability and duties of the same nature –

WILLIAM YOUNG J:
But it does talk about same damage though.

MR COOPER:
It does still use the word "same damage." But into what, through the definitions in 23(a)(1) which I am referring to. So, but the types of damage we are talking about

here is damage in respect of that breach whatever the legal basis of liability whether tort, breach of contract, trust or otherwise. The, there is a, it is similar, different from but similar to the legislative reform proposed by the Law Commission in its 1998 report which would have done a similar thing I think by introducing a defined concept of concurrent wrongdoers. Which have a definition along the lines of what is in 23A(1). So the Court was not approaching the issue of same damage from the background that the House of Lords adopted in *Royal Brompton* of we start with the principles of contribution as they were known to the common law. We read 17(1)(c) in that context and therefore those concepts of common and co-ordinate liability flow with it and rather it was dealing with the stand alone statute with its own definitions section.

O'REGAN J:
So, what, are you saying that the different provision in Victoria leads to a different outcome than would be, would arise in New Zealand where our section does not extend beyond tort?

MR COOPER:
It is not because the section does not extend beyond tort that I make that submission Sir but because we do not have the equivalent of 23A(1) in that Victorian Wrongs Act. We have a section which refers to contribution and, and starts from the same historical basis as the English section considered –

GLAZEBROOK J:
It is not really a definition though is it?

O'REGAN J:
So you are saying that section 17 basically identified the gap in, in the application of the equitable contribution rules and filled it? But section 23 actually changes the historic equitable –

MR COOPER:
Creates a stand alone regime of contribution and apportionment.

O'REGAN J:
Right. But it uses very similar terms to section 17.

MR COOPER:

In the section, same damage, it does yes Your Honour.

ELIAS CJ:

So *Dairy Containers* is wrong?

MR COOPER:

Sure, so one of the claims of, the two claims of contribution found to arise in *Dairy Containers* is one was between, as between the Auditor-General as auditor and the banks. Both of those findings were for effectively negligence in failing to detect a fraud done by way of cashing cheques. The negligence component of a bank's liability arises because the, the defence under the Cheques Act makes it in effect a test of negligence. So one looks at the findings of Justice Thomas in the High Court against the banks and against the auditor. They are both findings of negligence for failing to monitor, detect, prevent fraud by employees. That would, that is like one of the situations which I have said would be, where both Mr Hotchin and the trustee were sued for wrongful trading. So I do not say that is wrong, no. I, there is another finding of contribution from the banks as party seeking contribution towards two individuals who were the directors of the company which facilitated the frauds by the employees, First City Finance. I have, I accept, more difficulty in analysing that within the concept of contribution which I propose, I accept that. Their liability was for effectively a tort of conspiracy by unlawful means. It looks a liability and more different in nature and extent than those of the banks and the auditor. What I'd say about that is there no discussion in the judgment, even in the Court of Appeal or the High Court, of whether their respective liabilities satisfy the test in 17(1)(c). I accept it was assumed that they didn't, but it's not a finding supported by reasons on this issue.

O'REGAN J:

So does this Victorian section, are you saying it occupies the whole ground now, so there is no equitable contribution, no need to apply equitable contribution in Victoria? You would always go to section 23, would you? Is that…

MR COOPER:

Your Honour, I believe that's the position though I say that simply from my reading of the section because it seems all inclusive. It covers – it says –

O'REGAN J:

But that's why you say we shouldn't take it as necessarily giving much guidance on our section 17?

MR COOPER:

Yes, Your Honour, so when one comes down to the same damage test, there's a definition above about what types of damage are relevant for the later parts of the clause and they are any damage on any legal basis whatsoever.

Now the passages in the judgments from the Court below where these concepts were then applied are, in the case of the Court of Appeal, pages 66 to 68, and in the case of the High Court at paragraph 69. I don't know that I need to take Your Honour to this because they cover the different nature of the liabilities arising from the different duty in the terms that was covered in our discussion of those issues earlier but have one, perhaps in the Court of Appeal, if we do go to that, which is in volume 2, and the relevant passages, paragraphs 66 to 68, in my submissions and really for reasons I've already covered, the analysis in those paragraphs is for –

O'REGAN J:

Sorry, what page is that on?

MR COOPER:

Sorry, page 461 of the bundle, Sir.

ELIAS CJ:

Sorry, where are we now?

MR COOPER:

We're in volume 2, Your Honour, and at page 461.

O'REGAN J:

And what is the point you're making here?

MR COOPER:

That this is then the application of that co-ordinate test in that sense that we say applies equally in equity and under 17(1)(c) of a co-ordinate liability being one of the

same nature and extent necessarily requiring some focus on the nature of a duty owed rather than on the ultimate result arising from the breach of that duty.

And that analysis, as I've said before, does proceed on the basis which we say is important and needs to be recognised in now analysing the allegations brought against Guardian Trust that the originally pleaded allegations of…

MR COOPER:
…on the basis which we say is important and needs to be recognised in now analysing the allegations brought against Guardian Trust that the originally pleaded allegations of responsibility for the content of the prospectus are no longer open to Mr Hotchin to rely on when he seeks to bring Guardian Trust into the claim.

Finally, just if I may on that issue of the overall justice in response to a submission from my learned friend, as I suppose is often the case the overall justice of these principles requires to some extent a balancing exercise, including when considering joinder of third parties the complication of the interests of allowing a plaintiff to sue the defendants of its wish in proceeding to trial, and the broader the concept of contribution the greater the risk that plaintiffs, such as the FMA in this case, cannot sue their defendants of choice and bring them to trial quickly. So that's not a complete –

WILLIAM YOUNG J:
But the FMA doesn't seem to care here, is that right, that one assumes, because they're not appearing?

MR COOPER:
They're not taking a position on the application. I know we've not been involved in proceedings because of the strike-out so I can't speak –

WILLIAM YOUNG J:
All right.

MR COOPER:
– apparently. I do know that the FMA has been anxious to have a trial fixture allocated and so in that sense it's keen, as a plaintiff, to proceed, but I don't.

WILLIAM YOUNG J:

What's your answer to the point Mr Gedye makes that if the boot had been on to the other foot you'd have been arguing pretty vigorously for a right of contribution?

MR COOPER:

If the boot had been on the other foot, it would require that we had been sued for careless monitoring of the trustees, of the management of the company. It would be a different – in that case we may well have a claim of contribution because we would say that the FMA could also have sued Mr Hotchin for his careless management. So everything the trustee did was effectively failing to detect some non-compliance with the trust deed by the company and I don't know whether Mr Hotchin was responsible for that or not but we may well have a basis to allege that. So given the nature – a direct claim against the trustee would necessarily require, involve that type of allegation and so the answer may well be different.

GLAZEBROOK J:

Well, that was different from the answer you gave me earlier, which was that you couldn't, if the boot was on the other foot you couldn't. It was also different from the answer you gave me earlier that it depended upon what the FMA chose to sue under and the fact they could have sued for incorrect management isn't taken into account?

MR COOPER:

I didn't intend it to be different, Your Honour. What I meant was –

GLAZEBROOK J:

Well, on both respects it was, I think.

MR COOPER:

But I intended to make a distinction between this. If a trustee was sued by the FMA for careless monitoring of compliance with the trust deed, I accept we could not seek contribution from Mr Hotchin for misleading investors in the prospectus. That was the symmetry point I was making earlier. If the Guardian Trust were sued by the FMA for careless monitoring of compliance with the trust deed, it could seek contribution, in my submission, from Mr Hotchin for his negligent management of the company causing the breaches of the trust deed because then there would be liabilities of the same nature and extent.

Your Honour, Justice Young, there's a second part I wanted to come to you with my answer which is it may also be that Guardian Trust would have a direct claim against Mr Hotchin –

WILLIAM YOUNG J:
On the basis of representation?

MR COOPER:
Yes, Your Honour.

ELIAS CJ:
So it's your submission is that you accept there has to be symmetry? Yes?

MR COOPER:
I think the nature of common obligation, I think, implies symmetry, yes, Your Honour.

Unless Your Honours had further questions, that's all I had.

ELIAS CJ:
Thank you, Mr Cooper. Mr Gedye, do you want to be heard in reply?

MR GEDYE QC:
Yes, just briefly, Your Honour, if I may.

ELIAS CJ:
Yes.

MR GEDYE QC:
Just on the point that my learned friend covered in respect of the Victorian statute, he referred to section 22A which does contain a specific reference to entitlement to recover compensation whatever the legal basis of liability. I want to just say two things about that. Firstly, those words in context serve only to allow the multiple cause of action contribution claims. Claims in tort, contract and trust. Because the words immediately following that phrase, "whatever the legal basis," are "whether tort, breach of contract, breach of trust or otherwise." The phrase does not have a wider function being to open what section 17 does not provide. It simply refers to the ability that under this further reform of the legislation you can claim contribution under

any cause of action and it is not as though section 23 is a new or novel comprehensive provision because the English statute has exactly the same provision best found in the *Royal Brompton* case, tab 9, on pages 1408 and 1409, where the provisions are set out. Section 1 I do not need to refer to but at the bottom of page 1408 it refers to section 6 which is materially identical to section 23A of the Wrongs Act. It says, "A person liable, is liable in respect of any damage for the purposes of this Act if the person who suffered it is entitled to recover compensation from him in respect of that damage whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise. So in my submission that demonstrates that section 23A does not justify a different reading from that to be given to section 17.

The only other matters if Your Honours please is to respond to Your Honour Justice O'Regan's point about the FMA Act, section 34. I submit that the Act clearly permits the FMA to bring proceedings against a trustee now even though the relevant events predated the statute. Section 72 of the Act is the transitional provision which provides, simplistically put, that the FMA will assume all prior functions, rights and powers of the Securities Commission. It provides for a succession of all of the same rights and powers. That shows that the FMA is entitled to take action in respect of matters which occurred prior to its creation. There is nothing in the statute which would prevent it. Section 34(1) states, this is in tab 5. "For example that the FMA may," 34(1)(b), "may take over specified proceedings that have been commenced by a person against another person," so that implies pre-existing proceedings which could have predated the Act. And the proceeding which I mentioned that the FMA has taken in respect of Viaduct Capital related to a 2009 collapse of that company and the proceedings were issued last year against the trustee. So for those reasons I submit that the section 34 right must exist.

There is only one other matter which I, I will raise because the High Court Judge assigned to this matter, Justice Winkelmann asked whether I would mention it to the Court which is that there is a trial date scheduled for stage 1 of the FMA trial against the directors of 7th of September and there has been discussion and consideration at the most recent case management conferences of whether that trial date should stand in light of this appeal and the uncertainty attaching to it. I raise it simply in case the Court feels able to give any indication of whether it would be prudent to defer that date. The defendant's position is that it should be deferred and I think the parties have been, well the parties and the Court, the High Court have been increasingly

recognising that but Justice Winkelmann said it might be prudent if I mentioned the point in case any indication could be given.

ELIAS CJ:

Well we might take a little time to consider how we're going to proceed and we could put out a minute giving an indication of when we would expect to deliver judgment.

MR GEDYE QC:

Thank you, Your Honour. As Your Honours please.

ELIAS CJ:

Thank you. Thank you, counsel, for your help. We will reserve our decision in this matter.

COURT ADJOURNS: 3.55 PM