IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2006
[2006] NZSC 105

BETWEEN	AMP GENERAL INSURANCE LIMITED Appellant
AND	MACALISTER TODD PHILLIPS BODKINS First Respondent
AND	GRAEME MORRIS TODD Second Respondent

Hearing: 20 October 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: M A Gilbert, S Hunter and N Till for Appellant
E D Wylie QC for Respondents

Judgment: 8 December 2006

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. Judgment is entered for the appellant on the respondents' claim.

C. No award of costs is made.

REASONS

ELIAS CJ, BLANCHARD, TIPPING AND McGRATH JJ

(Given by Blanchard J)

[1] AMP General Insurance Ltd was the professional indemnity insurer of a law firm, Macalister Todd Phillips Bodkins. One of the partners, Mr Todd, acted as the legal adviser to the Walker Family Trust. The trustees were Mr Todd and a member of the family, Mr L P Walker. The trust carried out several property developments in Central Otago. In about April 1995 it settled the sales of the units in one of the developments (Towne Place). It is common ground that at that time Mr Todd negligently failed to advise that the trustees were personally liable under s 57(3) of the Goods and Services Tax Act 1985 for the GST output tax incurred in relation to those sales.

[2] The GST of $50,486.10 arising from the Towne Place sales was not able to be paid out of the proceeds because there was no surplus after the net purchase moneys were paid to the mortgagee of the property, the Bank of New Zealand. The bank had priority over the Commissioner of Inland Revenue in relation to the proceeds.[1]

[3] The sales of the trust's other properties later proved insufficient to enable the trustees to pay this amount and certain other moneys owing by the trust to the Inland Revenue Department for unpaid income tax, PAYE and ACC levies, a total of about $128,000 plus accruing penalties.

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[1] *Rob Mitchell Builder Ltd (in liq) v National Bank of New Zealand Ltd* (2004) 21 NZTC 18,397 (CA).

[4] The trustees eventually settled with the IRD for a total amount of $102,000 of which Macalister Todd paid $72,000 on behalf of Mr Todd and Mr Walker paid $30,000. Because the trust had no remaining assets, the trustees were unable to obtain reimbursement from that source.

[5] Mr Walker claimed against Mr Todd for the amount he had paid to the IRD. AMP accepted liability under the insurance policy for his claim and settled with him for $27,000. But it has refused to indemnify the firm for the payment made to the IRD on behalf of Mr Todd.

[6] The firm and Mr Todd claimed in this proceeding against AMP that if Mr Todd had appreciated in April 1995, as he should have done, that the trustees were personally liable for GST, and had given the appropriate advice, the amount of the Towne Place GST could have been found out of the trust assets. In the High Court that claim was successful and judgment was entered against AMP for $72,000 plus interest and an additional sum for the costs incurred in negotiating the settlement with the IRD.[2] In the Court of Appeal AMP's appeal against liability was dismissed but the quantum of the judgment was reduced to the amount of the GST on the sales of the Towne Place units as at 30 April 1995, $50,486.10, plus interest on that sum.[3]

[7] The issues to be determined are:

(a) Whether the firm was entitled, subject to issues (b) and (c), to seek indemnity under the operative clause of the policy for the payment made to the IRD on behalf of Mr Todd;

(b) Whether the claim was in any event precluded by an exception to the policy because it was one "arising from a trading loss or trading liability incurred by a business managed by or carried on by the Insured"; and

(c) Whether any loss to the trustees actually resulted from the negligence of Mr Todd.

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2 *Macalister Todd Phillips Bodkins v AMP General Insurance Ltd* [2005] 2 NZLR 854 (Chisholm J).

3 *AMP General Insurance Ltd v Macalister Todd Phillips Bodkins* (Court of Appeal, CA 108/05, 15 December 2005, Robertson, Baragwanath and Doogue JJ).

The policy

[8] A fuller statement of the facts concerning the trust's activities can be deferred until later in this judgment when we deal with the final issue. It is, however, necessary now to describe the salient portions of the professional indemnity policy. It was a policy designed for members of the New Zealand Law Society. In the operative clause, AMP agreed to indemnify "the Insured" in respect of claims "arising out of the conduct of the Professional Services of the Insured for … claims … made against the Insured arising out of civil liability".

[9] The Insured was the firm and/or its present or former partners and employees "in the conduct of the Professional Services of the Firm". Professional Services was defined as including:

> all advice or services performed in the conduct of the profession, which shall also include when acting as trustees, stated in the Schedule [solicitors] … [but] excluding any individual personal appointments … as a Director or Officer unless liability arises from the professional advice given in the capacity of the profession as stated in the Schedule.

[10] The policy had a number of exclusions. The one of relevance to the second issue was that AMP was not required to indemnify the Insured against "a claim or loss … arising from a trading loss or trading liability incurred by a business managed by or carried on by the Insured". It is not in dispute that the business of the trust was managed or carried on by Mr Todd with his co-trustee.

Was the claim within the operative clause?

[11] It was AMP's argument that Mr Todd's personal loss arising from his negligence was not covered by the policy because, as a matter of law, neither he nor the firm could be liable on a claim brought by him for such a loss. Mr Gilbert, for AMP, submitted that cover under the policy could be triggered only by a claim against the firm by a third party. He supported this argument by reference to s 13 of the Partnership Act 1908, stressing the italicised words:

13 Liability of the firm for wrongs

> Where by the wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person *not being a partner in the firm*, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

[12] Mr Gilbert pointed out that Mr Todd was not claiming on behalf of the beneficiaries for a loss suffered by the trust, as would have been enabled by s 33A of the Trustee Act 1956. Since the net assets of the trust had not been diminished when payment was made to the bank and not to the IRD, the claim was solely for loss sustained in Mr Todd's personal capacity. He could not sue himself in respect of his own negligence. Nor, being a partner in the firm, could he rely upon s 13 of the Partnership Act. Counsel's argument was that there was accordingly, in terms of the operative clause, no civil liability out of which the insurance claim could arise.

[13] This argument is grounded on a misstatement of what actually occurred. In reality, as is plain from the agreed statement of facts, Mr Todd has never brought or attempted to bring a negligence claim against himself or against his firm. He has merely sought indemnity from the firm against a claim made against him by a client, his co-trustee, Mr Walker, for professional negligence. He sought, under the partnership arrangements, to transfer to the partnership the liability to the client.

[14] AMP's argument that no claim was made against the firm in respect of the liability for which the firm paid the GST to the IRD may be technically correct but it overlooks the fact that there was a claim against an Insured by a third party. The statement of facts reveals that on 11 September 2001 Mr Walker issued proceedings in the High Court against Mr Todd:

> alleging breach of duty, and seeking a declaration that he (Mr L P Walker) was entitled to an indemnity from Mr Todd in respect of such liability as he was under to the IRD.

This was plainly a claim for professional negligence against a partner who had cover under the policy. Then in June 2002, after a counter-claim had been made by Mr Todd against Mr Walker, the two men reached agreement with the IRD for the acceptance of the separate sums from Mr Todd and Mr Walker totalling $102,000 in

satisfaction of their joint and several liability to the IRD. That agreement was effectively a means of partially discharging Mr Walker's claim for an indemnity for the liability he had incurred because of Mr Todd's professional negligence. The IRD accepted a capping of the trustees' joint and several liability. The payment of $72,000 by the firm reduced Mr Walker's remaining liability to that extent and enabled him to settle at the figure of $30,000. Both men had at this stage reserved their position on claims against each other. Mr Walker then proceeded with his indemnity claim against Mr Todd in respect of the $30,000 he had paid, which was settled at $27,000 plus some expenses and met by AMP on behalf of the firm. The settlement of his claim for indemnity was thus completed in two stages. It is unrealistic to dissect what occurred into separate components when it was actually a process whereby both trustees obtained discharge of their liability to the IRD and Mr Walker obtained indemnity from the firm for all bar $3,000 of that liability.

[15] The question in a situation of partner negligence causing loss to a third party is whether the partners who have not been involved in negligent conduct can require the negligent partner to bear the whole of the loss or whether it is to be borne by all according to their partnership shares in the profits and losses. That depends upon the terms of the partnership. It is not governed by s 13 of the Partnership Act, which is concerned only with the position between the partnership and the third party (client) who is making a claim either against the negligent partner or against the firm. There is no reason why the members of a partnership should not agree that the consequences of a partner's negligence are to be borne by the partnership rather than by the negligent partner alone. Indeed, the position as between partners under the general law is explained in the following passage from the judgment of Crisp J in *Huston v Burns*:[4]

> The obligation invoked [by a partner against whom a claim in tort was made] was contractual in origin in that it arose out of the terms expressed or implied which controlled the relations *inter se* of the partners and which collectively made up the partnership agreement. In those circumstances it was said by courts of equity … that so long as the guilty partner acted *bona fide* with a view to the benefit of the firm and without culpable negligence[5] he was not liable to indemnify his partners.

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4 [1955] Tas SR 3 at p 10.

5 A concept distinguishable from the kind of negligent conduct admitted in this case and not requiring discussion here.

An acknowledgement that individual partners need not bear the full cost of any negligence in their conduct of the professional services of the firm may be found in the express terms of a partnership agreement. Or it may be implicit in the partnership arrangements, and discernible particularly in the contract the partnership makes with its insurer for professional liability insurance.

[16] It is therefore necessary in a given case to determine whether a partner who has by his or her negligence created a liability claimable against the partnership is to be regarded as having acted in breach of duty to the other partners in the particular instance, and so must exclusively bear the loss, or whether, as we think has long been the case in modern professional partnerships, partner negligence leading to a claim by a client is regarded as an unfortunate but accepted fact of life, since even the best of professionals may have an occasional lapse, and is handled by appropriate insurance arrangements protecting all the partners, including any who may be guilty of negligence.

[17] In the present case it is quite clear from the insurance arrangements, which must be taken to reflect the arrangements between the partners in this respect, that the consequences of negligence of a partner are to be borne by the firm. That is why both the firm and each of its partners are defined as an Insured. It is also very plain from the definition of professional services in the policy that it is intended to protect a partner against liability for professional negligence when acting as a trustee in the course of his or her profession as a solicitor.

[18] Leaving aside for the moment the questions arising under issues (b) and (c), if a claim could not be brought by the firm under the insurance policy in the circumstances of this case the position would be very curious and indeed arbitrary. The liability of the insurer might depend entirely upon the sequence of events. Mr Gilbert accepted that if Mr Walker and Mr Todd had together paid the IRD $102,000 or had agreed to make a joint payment of that amount in order to settle their joint liability, then they could have together brought a claim against the firm, for which it would have been indemnified under the policy. Similarly, if it happened that Mr Walker had paid the full $102,000, he could have claimed against the firm

for that amount. It would not have been possible for AMP, subrogating itself to the rights of the firm, to claim reimbursement from Mr Todd because he too is an Insured under the policy.

[19] When Mr Todd received notice of the claim against him by Mr Walker, he was entitled to say to his partners that this was a liability of the firm. The firm correctly accepted that it was obliged to indemnify Mr Todd. It relieved him from the liability for Mr Walker's claim by paying $72,000 to the IRD so that, to that extent, Mr Walker no longer had need of an indemnity from Mr Todd. It is not to the point that the firm also thereby discharged Mr Todd's personal liability to the IRD, so long as it was meeting a claim for negligence in the performance of professional services, including those performed as a trustee.

[20] We therefore conclude that the claim fell within the operative clause of the policy.

Did the claim arise from a trading loss or a trading liability?

[21] Next, it is said for AMP that the claim is excluded because it is for a loss arising from a trading loss or liability incurred by the trust, which was admittedly a business managed or carried on by an Insured, Mr Todd. There is a short answer to this argument. The claim does not arise from any trading loss or liability of the trust, or more accurately the trustees, as such. The GST liability, incurred in the course of the trust's property development business, was certainly a trading liability. If, at the time it was incurred, the trust had simply lacked the resources to meet it, any claim for the trustees' consequent personal loss would have fallen within the exclusion. But the trustees' argument in the present case is not that Mr Todd caused them to incur a GST liability that was never going to be met from trust assets, and thus should never have been incurred. Rather, their claim arises from Mr Todd's negligent omission to advise them of their *personal* liability for GST, and thus of the need to act to secure indemnity for that liability from trust assets still under their control. What the trustees lost, it is said, was the opportunity to recoup the GST from trust assets before any equity in those assets dwindled away in unsuccessful trading. As the exclusion is framed, it does not cover this situation.

Did loss result from the negligence of Mr Todd?

[22] But has it been shown by the firm that the trustees did in fact lose an opportunity of recouping the GST from trust assets? AMP's argument is that the burden of establishing the loss rests on Macalister Todd and that it has not been shown that, either in April 1995 or at any time thereafter, if the trustees had been made aware of their personal GST liability, they were in a position to apply trust assets in or towards meeting that liability.

[23] The answer depends upon whether from April 1995 onwards any asset of the trust had a realisable value, net of GST and expenses, which exceeded the liabilities secured against that asset. Because the High Court Judge and counsel were apparently of the erroneous opinion that the GST liability ranked ahead of secured creditors, so that, if Mr Todd had been alert, GST could have been met out of the Towne Place sales leaving the bank as a creditor for the equivalent amount, this point was not investigated at first instance. The Judge said only that despite their best efforts the trustees were unable to retrieve the situation.[6] He also said the trust was insolvent. But that comment seems to have related to its position by April 2000 when all its assets had been sold.

[24] The Court of Appeal took the view[7] that the litigation had been conducted on the basis that the trust was "solvent at the relevant time", notwithstanding that it was later found to be insolvent. Despite having found that there was "no evidence as to the financial position of the Trust so that the respondents [the firm and Mr Todd] have failed to discharge their onus as plaintiffs to show it was solvent", the Court of Appeal said[8] that AMP did not assert that the trust was to be treated as insolvent at the time of the payment to the bank. We confess to having difficulty in following these apparently self-contradictory propositions. It seems to us that the position is as follows. Because AMP's solicitors misunderstood the GST position they pleaded as an affirmative defence that the failure to pay the GST caused no loss because "such GST was paid to the Bank of New Zealand to the credit of the Trustees (and in

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6 At para [44].
7 At para [17].
8 At paras [40] – [41].

reduction of liabilities owed by the Trustees to the Bank of New Zealand)". In other words, if the trustees had paid the GST, they would have been no better off because their liability to the bank would have been that much greater. That assertion appears to assume that the trustees had a personal liability to the bank. We consider that must be correct, either because the trustees did not have the usual limitation of their liability to the trust assets or, if they did, because any failure to pay the bank the whole of the proceeds would have been a failure to account to the bank under its security, against which any limitation of liability in standard form would not have protected the trustees.

[25] The question whether the trustees actually lost a realistic prospect of resorting to other assets was not directly addressed by the parties in their cases as pleaded or run at trial but it is clear enough that AMP was in a general way putting Macalister Todd to proof that the loss resulted from Mr Todd's negligence and was not simply a trading loss. Chisholm J records the argument by AMP's trial counsel, Mr Till, that Mr Todd's loss "resulted from the absence of a solvent trust fund against which to enforce his right of indemnity".[9] It was therefore incorrect for the Court of Appeal to say that the case had proceeded on the basis that the trust was solvent. AMP is entitled to assert that it was not, and that accordingly there was no loss caused by Mr Todd's negligent performance of his professional duties to the trustees. It is for the respondents, as claimants on the policy, to establish the loss by showing that at some stage on or after April 1995 the trust assets could have been realised in a way which would have enabled payment of the GST if the trustees had been alerted to the problem posed by their personal liability for the GST. To that question we now turn.

[26] The moving spirit behind the establishment of the trust, though he was neither its settlor nor a trustee, was Mr B W Walker. He and his wife and their children were the beneficiaries. Mr Todd's co-trustee, Mr L P Walker, was Mr B W Walker's brother.

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[9] At para [45].

[27] An area of land at Towne Place in Queenstown was acquired by the trust in April 1994. The acquisition and development was funded by an advance from the Bank of New Zealand, for which the bank had security over the property. In October of the same year the trust became the purchaser of another property, at Lake Hayes, using funding from the Southland Building Society. It seems that at this time Mr B W Walker and his wife made an advance of $100,000 to the trust and took a second mortgage over Lake Hayes. Since the development of the Towne Place residential units had taken longer than envisaged, further funding was obtained from the Bank of New Zealand to enable the purchase of two vacant lots at Frankton Road, Queenstown in early April 1995.

[28] The sales of 7 units built by the trust at Towne Place were settled between March and May 1995. The gross realisations totalled $959,000 but, as already mentioned, the realisations did not produce any amount which was free from the Bank of New Zealand's security and available to meet GST.

[29] The agreed statement of facts records that in November 1995 the trustees decided to sell assets to clear the GST arrears, for which they still did not appreciate they had a personal liability. The trustees were attempting to obtain subdivision consent and, then, titles for 13 development units on the Frankton Road property. They were already under pressure from the Bank of New Zealand so it can be surmised that a significant sum was still owing to that institution. In January 1996 Mr Todd told the IRD that the trustees were "doing everything in their power to try and get matters resolved". In March 1996 agreement was reached for the sale of 10 development units but payment of the full amount was delayed until titles were available. Later that month the bank agreed to lend a further $305,000 on a temporary facility. In October 1996 settlement took place. The amount received from the sale was enough to clear the trust's indebtedness to the bank and to pay the GST which arose from that sale. The trustees were also able to pay an amount of $20,651.36 in reduction of the mortgage to Mr and Mrs Walker despite the fact that the Walkers did not have a mortgage over the Frankton Road property. So there was that amount of "free" money available to the trustees at that time. There is nothing to suggest that it could not have been used to pay some of the GST arrears.

[30] The trustees were then left with two properties. The remaining three future development units at Frankton Road were subject to a mortgage of $85,000 to Primiosso Holdings Ltd and Capital Acceptance Ltd. Why and how this mortgage came to exist is not made clear in the statement of facts. The Lake Hayes property was now subject to mortgages to the Southland Building Society (for an unspecified amount), and to Mr and Mrs Walker (for the reduced sum of about $80,000). The building society advanced two further sums in late 1997, both of which were utilised for the development of a house on the Lake Hayes property.

[31] In February 1999 Mr Todd and Mr L P Walker became aware of their personal liability to the IRD for the GST. They had been delegating the running of the trust's affairs to Mr B W Walker. He wrote to them suggesting that Lake Hayes could be sold for $500,000. The statement of facts suggests that at that time the secured indebtedness to the building society was just over $300,000, with the society's mortgage having long since fallen into arrears, and there was of course the residue of the loan from Mr and Mrs Walker. Further GST would necessarily be incurred on any sale. It was of significance, in the trustees' consideration of any sale, that the Lake Hayes house was not complete. Even by December 1999, when the building society obtained a valuation, it was estimated that another $50,000 of work was needed to finish the project.

[32] In the same month the three Frankton Road units were sold but the payment to the mortgagees, along with GST on the sale and usual expenses, absorbed the entire proceeds.

[33] In April 2000 the building society sold the Lake Hayes property by mortgagee sale for $450,000 inclusive of GST. The statement of facts records that after payment of the building society and of GST on the sale, rates and expenses, the balance left was only $16,849.77. That sum was paid to Mr and Mrs Walker in further reduction of the amount owing to them, for which they had security over the property.

[34] It is apparent on an examination of this sequence of events that the only real opportunity for the trustees to pay the Towne Place GST, if alerted to their personal

liability, was upon the Frankton Road sale in October 1996 when, as Mr Wylie QC for the respondents submitted, it is probable that they could have declined to pay the balance of $20,651.36 to the Walkers who did not hold a security over that property.

[35] Mr Wylie suggested that there were two other possibilities. First, he said that the Bank of New Zealand might have been persuaded to allow the trustees to pay the GST from the Towne Place proceeds instead of paying the equivalent amount to the bank. Counsel had to accept, however, that there was no evidence from the bank to that effect. Macalister Todd had given the bank an undertaking to provide it with "the balance sale proceeds of each unit on completion of settlement". Undoubtedly either the bank would not have released the trust from that obligation to the extent of the amount needed to pay the GST or, if it had been prepared to do so, it would not have thereby agreed to surrender part of its security except on the basis of acceptance by the trustees of personal liability to repay the sum in question. We have not been satisfied that any opportunity at all of reducing or extinguishing their personal liability was lost at this point.

[36] Mr Wylie also submitted that if the trustees had appreciated the situation in relation to their personal liability they could have sold the Lake Hayes property at an earlier time "at a fire sale price to clear the debt". He said they would not have allowed Mr B W Walker to continue to manage the situation. The problem with that argument is that the trustees took no such action in February 1999 when advised by the IRD of their personal liability; and even in a complete or near complete state, the property did not realise upon a forced sale by the building society anywhere near enough to clear the two mortgages. We have no information credibly supporting the view that at any earlier time the outcome might have been any more successful. Nor do we have any indication of the attitude of Mr and Mrs Walker if the trustees had at an earlier time asked that they be permitted to resort to the proceeds of sale for payment of the GST arrears, rather than paying any balance to the Walkers under their mortgage. From the fact that, after the trustees knew of their GST liability, they proceeded to pay the balance of the Lake Hayes proceeds to Mr and Mrs Walker, it would appear that the Walkers would have insisted on payment in accordance with their security. It is true that they permitted the trustees to pay the GST arising from the Lake Hayes sale but they probably did so because they shared Mr Todd's

erroneous belief that GST from the sale of a property ranked ahead of the indebtedness secured over that property.

[37] We therefore conclude that, except in respect of the sum of $20,651.36 which was available to the trustees in October 1996, it has not been shown that the trustees could have rescued their position if Macalister Todd had informed them of their personal liability for the Towne Place GST.

[38] It does not follow, however, that Macalister Todd's claim can succeed even to that limited extent, for in reality AMP has already discharged its obligation under the policy by accepting Mr Walker's claim for reimbursement of GST which was compromised at a figure of $27,000, a sum greater than the loss actually claimable under the policy, resulting from the negligence. That figure must be taken into account when an assessment is made of whether any part of the insured loss has not been met by AMP. The conclusion must be that AMP has already accepted a claim which exceeds the loss provable against the firm resulting from Mr Todd's negligence.

Result

[39] We accordingly allow the appeal and enter judgment for AMP. But as its first two arguments, on which it has failed, were the primary focus of its case, we have concluded that costs in all Courts should lie where they fall.

ANDERSON J

[40] Mr G M Todd, a partner in a firm of barristers and solicitors, and Mr L P Walker were trustees under a deed of trust establishing an arrangement known as the Walker Family Trust.

[41] The trustees carried out a number of land development projects, the legal aspects of which were handled by Mr Todd's firm, principally through him. Such activities attracted GST, income tax, PAYE and ACC levies. By virtue of the tax statutes the trustees were personally liable, jointly and severally, for those imposts.

Mr Todd and Mr Walker were unaware of their personal liability until officers of the Inland Revenue Department said they would be looked to personally for payment.

[42] In imposing personal liability the tax statutes do no more than recognise the general principle that liabilities incurred by a trustee in relation to a trust are always the personal liabilities of the trustee. This is an aspect of the nature of a trust, which is not a person but an equitable obligation to deal with property for the benefit of beneficiaries. A creditor has a personal right to sue a trustee and to get judgment and make the trustee bankrupt.[10] As Latham CJ put it when referring to a trustee's liability in *Vacuum Oil Company Pty Ltd v Wiltshire*:[11]

> In respect of debts incurred by him in so carrying on the business he is personally liable to the trading creditors – the debts are his debts.

[43] The personal liability of a trustee is counter-balanced by equity, which allows full indemnification of the trustee out of the trust's property, or for the trustee to apply the trust property in discharge of the liability.[12] Unfortunately for Mr Todd and Mr Walker, they did not learn of their liability at a time when there were any assets to which they could have recourse.

[44] The tax debt, which included substantial penalties and interest, was quantified at almost $173,000 when a demand was made in February 1999 and more than $278,000 by March 2001. Mr Walker sued Mr Todd seeking indemnity in respect of such liability as he was under to the IRD. Mr Todd responded with a counter-claim seeking contribution or indemnity.

[45] The agreed statement of facts records that in the latter part of the year 2000 Mr Todd entered into negotiation with the IRD "in regard to his personal liability as a trustee of the Walker Family Trust". The IRD was dealing separately with Mr Walker. It also records that on 9 April 2001 the IRD advised that an offer of $72,000 "made by Mr Todd in relation to his personal liability as trustee" could very well be accepted. In June 2002, before the litigation between Mr Todd and

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10 *Re Johnson* (1880) 15 Ch D 548.

11 (1945) 72 CLR 319 at p 324.

12 *Hardoon v Belilios* [1901] AC 118 at p 125; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at para [47].

Mr Walker was resolved, the IRD agreed to accept $72,000 from Mr Todd and $30,000 from Mr Walker in satisfaction of their personal liability as trustees of the Walker Family Trust. The firm paid on behalf of Mr Todd and Mr Walker met his share.

[46] The firm had a professional indemnity policy with the appellant insurer, which compromised Mr Walker's claim by a payment of $27,000. The firm then claimed under the policy for the $72,000 it had paid on behalf of Mr Todd. This appeal is concerned with the question whether the insurer is liable to indemnify the firm for that payment.

[47] The policy has certain exclusions, including one in respect of trading losses or liabilities which has relevance here. The first issue however is whether the firm's claim is comprehended by the policy's operative clause, the relevant part for present purposes being in these terms:

> OPERATIVE CLAUSE
>
> AMP agrees, subject to the terms, limitations, exclusions and conditions of this Policy to indemnify the Insured in respect of claims first made against, or losses first discovered by the Insured after the inception of this Policy arising out of the conduct of the Professional Services of the Insured for
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> 1. claims (including claimants' costs) made against the Insured arising out of civil liability, and losses incurred by the Insured due to dishonesty of employees.

[48] To come within the operative clause the $72,000 must relate to a claim, arising out of the conduct by the Insured of professional services, made against the Insured arising out of civil liability. Immediately before the IRD settlement there were two such claims. One was the IRD claim against Mr Todd; the other was Mr Walker's claim against Mr Todd. However, the IRD claim clearly falls within the trading exclusion, which is in these terms:

> AMP shall not indemnify the Insured against a claim or loss … arising from a trading loss or trading liability incurred by a business managed or carried on by the Insured.

[49] As to the Walker claim, that remained extant after the IRD settlement but since Mr Walker had settled for $30,000 that was the limit of his claim. Indeed,

Mr Todd and Mr Walker entered into a deed for the purpose of recording that any claim or claims each might have against the other remained extant, notwithstanding their respective performance of their obligations under the agreement with the IRD. Negotiations continued in respect of the litigation and eventually Mr Walker accepted $27,000 to which I have referred.

[50] In view of the basis of Mr Todd's negotiations with the IRD, the deed entered into between Mr Todd and Mr Walker, and the continuing negotiation in the Walker litigation, I have some difficulty with the statement in para [14] of the majority's reasons for judgment, crucial as it is to the view that the claim is within the operative clause, that the IRD agreement "was effectively a means of partially discharging Mr Walker's claim for an indemnity for the liability he had incurred because of Mr Todd's professional negligence". Before the agreement with the IRD Mr Todd and Mr Walker were each personally liable for a total in excess of $278,000. Mr Todd's potential liability to Mr Walker for negligence was whatever it would cost Mr Walker to discharge his liability. What the payments did was discharge Mr Todd's personal liability at a cost of $72,000, and Mr Walker's personal liability at a cost of $30,000. Incidentally, those payments had the effect of limiting their respective exposure on the claim and counter-claim in the continuing litigation between them.

[51] Nevertheless, the reality of the arrangement is that the IRD discharged the trustees from liability in consideration of the payment of a total sum of $102,000. But for his negligence, Mr Todd would have been entitled to $21,000 from Mr Walker to equalise their contribution. To that extent Mr Todd's payment mitigated Mr Walker's claim, and ought be regarded as coming within the scope of the operative clause.

[52] As to the other $51,000 of the sum paid by Mr Todd, for that to be within the purview of the policy Mr Todd would have to be able to sue himself or his firm for his own professional negligence. That is because the sum represents a trading debt, incurred by Mr Todd, which he was unable to satisfy by recourse to trust assets because he was negligent. The fact that it was probably one which his partners had to share in terms of their partnership arrangements does not render what was

Mr Todd's personal liability a "claim … made against the Insured". It is plain to my mind that the operative clause envisages a claim made against the Insured by one who is not an Insured. This is consistent with the ancient and fundamental legal principle[13] that a person cannot be a plaintiff and a defendant in the same action.

[53] Although, by virtue of s 33A of the Trustee Act 1956, a trustee may sue or be sued by himself in any other capacity, that provision has no application here. If Mr Todd could sue himself at all he would be suing and sued in the same personal capacity. He could not be regarded as suing in his trustee capacity because he would not be doing so for the benefit of the trust beneficiaries but for his own, personal financial benefit.

[54] Notwithstanding the above reasons, I agree with the view expressed by Blanchard J at para [38] of his reasons for judgment that the appeal must succeed because AMP has already accepted a claim which exceeds the loss provable against the firm resulting from Mr Todd's negligence.

Solicitors:
Kensington Swan, Auckland for Appellant
Richard Burtt & Associates, Christchurch for Respondents

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[13] *Nemo agit in seipsum* – no one may sue himself. See also *Re Phillips, Public Trustee v Meyer* [1931] WN 271.