IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S223 of 2015

BETWEEN:

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

and

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

APPELLANTS' REPLY SUBMISSIONS

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A. Nature of the Executors' Claim

1 The Executors' submissions (**RS**) approach the issues raised at a high level of generality. That is expressly the approach taken at RS [14], but it reflects the analysis throughout their submissions. Even the principal question identified by the Executors at RS [14] is too imprecise. The question is not whether clause 5 of the Charge is valid as against Nemeske; the critical question is whether any liability flowing from that clause is one in respect of which the trustee can exonerate itself from the assets of the Trust.[1]

B. The 1994 Resolution

2 *Purpose of the 1994 Resolution*: The Executors characterise the present case as one concerned not with whether the trustee's actions were within the scope of its powers under the Trust Deed, but only with the efficacy of the procedure selected by the trustee to exercise its powers (RS [19], [33], [45]-[46]). They say that the purpose of the purported transactions at issue was to achieve an end within the trustee's power — the advancement of capital to Mr and Mrs Nemes — such that the issue is one of procedure, not power (RS [33], [45]-[46]).

3 Again, that submission relies on imprecision. The purpose behind the 1994 Resolution was not simply to advance capital to Mr and Mrs Nemes, but to do so in a particular way. The goal was to make the advancement by creating a legal debt and without effecting any change in ownership of any of the property held on trust (see Appellants' Submissions (**AS**) [33]). The reasons the trustee might want to do this are suggested at RS [47] and [61]. One might also infer from the references in the footnotes to the Executors' submissions that there were some perceived tax advantages from this structure.[2] In any event, the particular mechanism used was not unintentional. It was a matter to which the accountants of the Trust had turned their minds (**AB 136-137**).

4 It follows that the case cannot be approached as if Nemeske intended simply to confer a benefit on Mr and Mrs Nemes, irrespective of the mode of advancement. The transaction was intended to achieve the goal of advancing yet retaining trust capital. The question is whether such a transaction was possible within the scope of the trustee's powers. That question is not answered by imagining other potential transactions which would have been within the trustee's power but which were not in fact pursued (cf RS [18]-[19], [45]).

5 *The reasoning in Vestey's Case, Ward and Chianti*: The Executors rely on the decisions in *Vestey's Case*, *Ward* and *Chianti* as establishing a principle that a resolution to pay a sum to a beneficiary, coupled with the making of corresponding entries in trust accounts, is sufficient to exercise a power of advancement (RS [28]-[29]). That is to describe the outcome in these cases without regard to the reasoning.

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[1] Capitalised terms have the same meaning as defined in the appellants' submissions in chief.

[2] The practices of accountants and the suppositions of tax officials cannot affect the question of whether, as a matter of the law of trusts, the 1994 Resolution was effective. It is unclear whether the submission at RS [20] was intended to assert otherwise.

6 *Vestey's Case, Ward* and *Chianti* stand for the principle that a power under a discretionary trust to "pay or apply" the income or capital of a trust may be exercised by resolving that some specific or identifiable property held on trust would thereafter be held absolutely for one of the discretionary objects of the trust (see AS [43]-[54]). Nothing of that nature occurred in the present case.

7 The Executors resist the contention that *Vestey's Case, Ward* and *Chianti* involved resettlement. Their reasoning appears to be that the amounts advanced in those cases were not always separately invested (RS [24], [29]-[30]). Separate investment is not, however, a necessary precondition for an effective declaration of trust. Thus, one can declare a trust over a specified portion of a fund or chose in action, provided that the subject matter of that trust is sufficiently certain: see, *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In Liq)* (2000) 202 CLR 588 at [30]; *White v Shortall* (2006) 68 NSWLR 650 at [245]-[247].

8 It is this last point that distinguishes this case from one where a trustee 'applies' trust income or capital by resolving that a sum of money forming part of a larger trust fund will thereafter be held for a discretionary object absolutely (cf RS [30]-[32]). Provided that one can identify the proportion of the relevant fund that is the subject of the advancement, that advancement will be effective as a resettlement notwithstanding that the relevant property is not thereafter separately invested: see *White v Shortall* (2006) 68 NSWLR 650 at [245]-[247]. Here, by contrast, there could be no resettlement because the amount advanced did not identify any sufficiently certain part of the Shares which would be held for Mr and Mrs Nemes absolutely (see AS [58]). Nothing in *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494 is to the contrary.

C. The Action for Money Had and Received

9 *The relevant principle:* The Executors contend that a beneficiary is able to maintain an action for money had and received against a trustee whenever the trustee "admits the debt" to the beneficiary, irrespective of whether or not the trustee continues to have active duties (RS [37]). That submission is advanced solely by reference to a short passage in Gummow J's judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [67].

10 The passage from *Roxborough* does not support that reading. At the end of the relevant paragraph, Gummow J observed:

> The trust which had not been wholly performed was treated as analogous to the 'open' contract, that is to say, one not discharged; *at that earlier stage, the action for money had and received did not lie.* (Emphasis added.)

The Executors' submissions ignore this critical sentence.

11 *A Pre-Judicature Procedural Curiosity?* The Executors dismiss cases such a *Pardoe v Price* and *Bartlett v Dimond* as explained by procedural considerations in the period before the Judicature Acts (RS [35]), suggesting that such limitations no longer apply as part of "the modern law in Australia" (RS [36]). The submission

cannot be accepted. The relevant principles are substantive, not procedural; they go to the existence of the cause of action, not merely the process by which it can be enforced. For so long as a trustee maintains active duties, no cause of action exists: *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269]; *Roxborough* at [67]. Were it otherwise, the availability of the action at law would undermine the protections afforded to the trustee in equity (see AS [68]).

12 There is no reason to conclude that these principles operate differently since the Judicature Acts. In *Roxborough*, Gummow J cited the pre-judicature cases as authority for the relevant principles without criticism or qualification. Indeed, once the rationale for those principles is understood, it is apparent that the purpose of the rule remains equally important in the post-judicature era.

13 *An Equitable Debt?* The Executors suggest that, even if no action for money had and received accrued prior to the execution of the Charge, the covenant for repayment in clause 5 of the Charge can nevertheless be sustained on the basis that it secured an "equitable debt" (RS [40]-[41]). There are three difficulties with that submission.

14 *First*, what is meant by an "equitable debt" (and the mechanism by which it is said to have arisen) is unclear. In *Ex parte Jones; In re Jones* (1881) 18 Ch D 109 at 120, Jessel MR said:

> [O]f course there can be no other debt than a legal debt, but the inaccurate phrase 'equitable debt' has crept into the books. But this liability is not really a debt at all, it is only a liability in equity to pay a sum of money, and whenever a debt is required by law in order to found any proceedings, this equitable liability will not be enough.

See also *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367; [2015] 1 All ER 747 at [61] (Lord Toulson). When the true nature of an 'equitable debt' is understood, the reference to 'repayment' in the Charge cannot be read as referring to an 'equitable debt' (**AB1 158**). "Repayment" presupposes a legal debt.

15 *Secondly*, in the absence of a breach of trust, the circumstances in which a beneficiary can maintain a claim against a trustee for an 'equitable debt' are subject to limitations commensurate with those which apply to the action for money had and received against a trustee. Thus, in *Webb v Stenton* (1883) 11 QBD 518 at 530, Fry LJ said that "[a] trustee is not... an equitable debtor to the cestui que trust until there is money in his hands which he ought to pay to his cestui que trust". That condition was never satisfied here (see AS [70]).

16 *Thirdly*, even if an 'equitable debt' existed, any claim in respect of it was subject to a range of possible equitable defences (see AS [72]). The effect of executing the Charge would be to surrender the availability of those equitable defences, and to create a bare legal obligation to pay. It would be surprising if the trustee had power under the Trust Deed (or otherwise) to achieve that end. No such power has been identified by the Executors in their submissions.

D. The Notice of Contention

17 Various alternative arguments raised by the Executors at trial and on appeal have fallen away. The Executors no longer contend that the 1994 Resolution took effect through a 'round robin' mechanism by which money was notionally borrowed from Mr and Mrs Nemes to make the distribution to them (cf J[76] **AB2 535**). Similarly, while the Executors make reference to s 38 of the *Trustees Act 1925* (NSW) (RS [11]), no argument based on that provision is advanced in writing (cf **AB1 467-468** [92]-[101]; J[91] **AB2 540-541**).

18 *The Charge as an Advancement:* At RS [44]-[46], the Executors appear to suggest that the covenant in clause 5 of the Charge might, standing alone, be sufficient to constitute an exercise of the power of advancement. If that is the submission, it is raised for the first time and should not be entertained in light of its novelty: *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447; 77 ALJR 1598 at [51].

19 In any event, the argument cannot be accepted for four reasons. *First,* Barrett JA found that there was no power to charge the Shares and the Executors do not challenge that finding (J[92] **AB2 541**). If the Charge did not confer any interest in the Shares, it could not be said to 'apply' trust capital. *Secondly,* the argument flies in the face of the contemporaneous documents. It is apparent that the trustee was not purporting to exercise the power in clause 4(b) of the Trust Deed by executing the Charge. The execution of the Charge was a subsequent act that was predicated on the assumption that there had earlier been an effective advancement to Mr and Mrs Nemes (hence the reference to 'repayment') (**AB1 136-137, 139-140, 149**). *Thirdly,* it cannot be assumed that, if the directors of Nemeske had known the 1994 Resolution was ineffective, they would have nevertheless charged the Shares to effect the distribution. Indeed, given the deliberate methodology selected to effect the advancement, any such realisation may have caused them to abandon their plans for the advancement altogether. One cannot impute an intention to the directors to make an advancement to Mr and Mrs Nemes in any event. *Fourthly,* even if clause 5, standing alone, was construed as a promise to pay some part of the capital or income of the Trust to Mr and Mrs Nemes, it was only a promise to do so in the future. Such a promise would be void as a fetter on the trustee's future discretion to exercise the clause 4(b) power: *Re Stephenson's Settled Estates* (1906) SR (NSW) 420; L Tucker, N Le Poidevin & J Brightwell, *Lewin on Trusts* (19th ed 2015), at [29-227], [29-230]; J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7th 2006), at [1614]. If that promise was void, the same would be true of any clause purporting to secure performance of that promise.

20 *Estoppel*: The Executors' estoppel submissions arise only if the Court finds that the trustee had no power under the Trust Deed to make the 1994 Resolution or to make the covenant to repay in the Charge. In those circumstances, those submissions amount to a contention that the trustee could achieve by representation or by convention that which it had no power to do under the Trust Deed. The proposition should be rejected. An act beyond power cannot be brought within power by way of an estoppel: see *Great North-West Central Railway v Charlebois* [1899] AC 114 at 124; *York Corporation v Henry Leetham and Sons, Limited* [1924] 1 Ch 557 at 573; *Re Jon Beauforte (London) Ltd* [1953] 1 Ch 131

at 137; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 at 296. An estoppel might be personally binding on the trustee, but it would not bind the beneficiaries of the trust absent evidence that they were parties to the representation or convention: see *Trustee Solutions Ltd v Dubery* [2007] 1 All ER 308 at [50]; *Redrow v Pedley Plc* [2002] Pens LR 339; [2002] EWHC 983 (Ch) at [61]-[64]. There is no such evidence in this case.

21 It follows that the issues raised by the Notice of Contention can be dealt with without the necessity of remitter (cf RS [63]).

E. The Trustee's Right of Indemnity

22 The Executors submit that the extent of the trustee's right of indemnity is a complex question, and suggest that the appellants' "bland submission" at AS [76] is "insufficient as a statement of law" (RS [55], [56]). Notably, the Executors mischaracterise that submission as being that "a trustee will not be given a right of indemnity where the trustee is in breach of trust" (RS [56]). The appellants' proposition was that a "trustee has no right to exonerate itself from trust assets for liabilities it incurs through actions beyond its powers" (AS [76]).

23 The orthodoxy of the appellants' submission is apparent from the authorities the Executors rely upon (cf RS [55]). In *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liq)* (2002) ATPR 41-864; [2002] NSWCA 29, Spigelman CJ observed (at [14]):

> It is clear that the right of indemnity cannot be availed of if expense was incurred by conduct outside the scope of the trust or in excess of the powers conferred by the trust.

Similarly, in *Nolan v Collie* (2003) 7 VR 287, Ormiston JA (with whom Batt and Vincent JJA agreed) said that the right of indemnity did not extend to an act "outside the relevant power" (at [53]): see also *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 396. It follows that if the 1994 Resolution or the execution of the Charge was beyond power, Nemeske has no right of indemnity in respect of any liability it has under clause 5 of the Charge.

24 This conclusion is not affected by clauses 6 or 10 of the Trust Deed (cf RS [57]-[59]). Clause 6 is concerned with the liability of the trustee to the beneficiaries for breach of trust, not the trustee's right of indemnity. And clause 10 is substantively identical to the relevant statutory provision considered in *Gatsios Holdings*, being s 59(4) of the *Trustee Act 1925* (NSW). The terms of that provision did not cause Spigelman CJ to doubt that the right of indemnity would not extend to liabilities incurred beyond the trustee's power.

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