HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CHARLES DELIUS SOMERVILLE ALEXANDER
& ORS trading as MINTER ELLISON APPELLANTS

AND

PERPETUAL TRUSTEES WA LIMITED & ANOR RESPONDENTS

Alexander v Perpetual Trustees WA Limited [2004] HCA 7
12 February 2004
S509/2002

ORDER

Appeal dismissed with costs.

On appeal from Supreme Court of New South Wales

Representation:

B J Shaw QC and T M Faulkner for the appellants (instructed by Mallesons Stephen Jaques)

D F Jackson QC with S D Robb QC for the respondents (instructed by Phillips Fox)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Alexander v Perpetual Trustees WA Limited

Contribution – Statutory right of – Trusts – Money received by firm of solicitors from respondent trustees to be held for a specific purpose and in accordance with specific conditions – Misapplication of funds by firm – Breach of trust by firm – Respondent trustees sued by beneficiaries – Firm sued by respondent trustees – Cross-claim by firm against respondent trustees – Whether contribution available – Whether firm liable to beneficiaries for damage – Whether respondent trustees liable to beneficiaries for same damage – Nature of beneficiaries' rights against firm – Proper construction of *Wrongs Act* 1958 (Vic), Pt IV.

Contribution – Statutory right of – Trade practices – Misleading and deceptive conduct – Money received by firm of solicitors from respondent trustees to be held for a specific purpose and in accordance with specific conditions – Misapplication of funds by firm – Misrepresentations by firm – Respondent trustees sued by beneficiaries – Firm sued by respondent trustees – Cross-claim by firm against respondent trustees – Whether contribution available – Whether firm liable to beneficiaries for damage – Whether respondent trustees liable to beneficiaries for same damage.

Fair Trading Act 1985 (Vic), ss 11, 37.
Wrongs Act 1958 (Vic), Pt IV.

1 GLEESON CJ, GUMMOW AND HAYNE JJ. This appeal is brought from the New South Wales Court of Appeal (Stein JA, Davies AJA, Ipp AJA)[1] which upheld the decision of the Supreme Court (Rolfe J)[2]. The proceedings at trial and in the Court of Appeal involved a range of issues but in this Court the appeal turns upon the construction of Pt IV of the *Wrongs Act* 1958 (Vic) ("the Act") and its application to a claim for contribution under the statute made by trustees.

2 Part IV of the Act (ss 23A-24AD) is headed "CONTRIBUTION" and ss 23B and 24 operate to create both a new right and a remedy for the recovery of what s 23B identifies as contribution from any person "liable in respect of the same damage" as the claimant for contribution[3]. The Act has its provenance in British legislation, the *Civil Liability (Contribution) Act* 1978 (UK) ("the UK Act"), and reference will be made to decisions construing that statute.

3 It is essential to recognise at the outset that both the Act and the UK Act provide for contribution where the claimant and the person from whom contribution is sought are each liable to a common plaintiff. Neither Act provides for contribution between those who may have had some role in an interconnected set of transactions but who are not both liable to a common plaintiff. Nothing in the text of either the Act or the UK Act, or any law reform or other material which preceded either Act, suggests that the aim of the legislation was to provide for contribution between those who were parties to the same transaction or a series of related transactions. It is, therefore, wrong to proceed, whether from general notions of "distributive justice" or otherwise, as if the legislative purpose or object were wider than providing for contribution between those liable to a common plaintiff. These reasons demonstrate that the parties to the appeal in this Court were not liable to a common plaintiff.

4 The Act has no precise analogue in other Australian jurisdictions. The litigation giving rise to this appeal was conducted in the courts of New South Wales, not in those of Victoria. It is not now disputed that Pt IV of the Act was applicable in the New South Wales litigation if its terms otherwise were satisfied. Section 23B(6) states that references in the section to liability in respect of any damage are to liability which has been or could be established in an action

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1 *Alexander and Ors (t/as Minter Ellison) v Perpetual Trustees WA Ltd and Perpetual Trustee Co Ltd* [2001] NSWCA 240; [2002] NSWCA 101.

2 *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642.

3 cf *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64-65 [22]-[24].

brought in Victoria, and that it is immaterial that any issue in that litigation would be determined, in accordance with the rules of private international law, by reference to the law of a place outside Victoria. The various breaches of trust which were committed appear to have occurred in Victoria[4] and, in any event, there are no relevant differences in the principles of trust law in Victoria and New South Wales.

The facts

5 The relevant facts are not disputed and may shortly be stated. However, for a proper appreciation of the issues of law which arise it is necessary to bear in mind that there were transactions involving what may be described as two different levels of trusts. There were trusts of which the respondents were trustees, and trusts of which the appellants were trustees.

6 The first respondent, Perpetual Trustees WA Limited ("PTWA"), was a trustee company enjoying special status conferred by the *Trustee Companies Act* 1987 (WA)[5] and the second respondent, Perpetual Trustee Company Limited ("PT"), had that status under the *Trustee Companies Act* 1964 (NSW)[6]. The companies were members of what was described in the evidence as the Perpetual Group.

7 PTWA and PT were trustees of certain managed superannuation funds. These trusts may be identified as the first level trusts. Some of the beneficiaries thereunder may themselves have been acting as trustees, for example, of family trusts, but with that level of trusts (if any) we are not concerned. Between 1993 and 1995 a number of beneficiaries under the managed funds directed that moneys be invested by the trustees in EC Consolidated Capital Limited ("ECCCL"). The total amounts so invested were $2,377,400 (by PTWA) and $7,179,700 (by PT). Each investment by PTWA and PT was in the sum of $500,000 or a greater amount; the refusal by ECCCL of investments in a sum less than $500,000 removed the requirement of compliance by ECCCL with the prospectus provisions of the then Corporations Law[7]. However, the sums

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4 cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

5 s 4(1) and Sched 1.

6 s 3(1) and the Third Schedule.

7 See *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 77 ALJR 895 at 897 [4]; 196 ALR 482 at 484.

provided by the individual beneficiaries, before they were pooled by PTWA and PT for investment with ECCCL, in each case were less than $500,000.

8 The terms on which the moneys were to be invested by PTWA and PT called for the provision of security by the issue of a bearer certificate of deposit. In breach of their duties as trustees, PTWA and PT failed to ensure that the manner in which the moneys were invested conformed with these terms and, in particular, PTWA and PT did not ensure that the investments were secured by bearer certificates of deposit. On 15 July 1997, ECCCL was placed in liquidation. As a result of the absence of the certificates, the investments were lost.

The plaintiffs sue PTWA and PT

9 Forty of the beneficiaries under the managed funds ("the plaintiffs") successfully sued PTWA and PT for breach of trust. The plaintiffs' case was that PTWA and PT had failed in their duties to exercise the same degree of skill and diligence as an ordinary prudent person would exercise in dealing with the property of another, and to ensure that their duties and powers were exercised in the best interests of the members of the managed funds. Rolfe J ordered the relevant respondent to pay to each plaintiff the amount of the plaintiff's investment. The amounts recovered by the plaintiffs in their action against the respondents were, against PTWA $1,744,683, and against PT $2,112,135.

10 No challenge is made in this Court to these findings and orders respecting the liability of the respondents to the plaintiffs.

11 The respondents had paid the investment moneys on each occasion to the appellants ("Minters"), a well-known national firm of solicitors. Minters acted as solicitor for ECCCL. At all relevant times, a partner in Minters' Melbourne office had the carriage of the matter. Minters was obliged to hold the moneys received from the respondents upon trust for, and to the account of, the relevant respondent, with the power (and duty) to disburse the moneys in accordance with the subscription agreements executed by the respondents. The agreements were governed by the law of Victoria. Minters later released the funds to ECCCL in breach of the terms on which it held them. The trust relationship, with respect to these funds, was between Minters as trustee and the respondents as beneficiaries and constituted the second level trusts. It should, however, be noted that the funds paid by the respondents were derived from the first level trusts, of which the respondents were trustees.

12 The particular respects in which, in the action against them by the plaintiffs, the respondents were found to have acted in breach of their duties to the plaintiffs under the first level trusts were:

(a) their appointment of Minters as their agent, notwithstanding the potential conflict of interest;

(b) the failure of the respondents to make any inquiry from Minters as to whether settlement had been completed regularly and, in particular, whether a bearer certificate of deposit had been obtained as required by the subscription agreements;

(c) the failure to seek to inspect the required bearer certificates of deposit.

PTWA and PT cross-claim against Minters

13 The respondents each brought successful cross-claims against Minters, which acted in the investment transactions both as agent for the respondents (in which capacity it received the investment funds from the respondents, held them on trust for the respondents, and wrongly disbursed them to ECCCL) and as solicitor for ECCCL. The cross-claim by PTWA was the second cross-claim in the proceedings and that by PT was the third cross-claim.

14 Several points should be noted here. First, no claim in the litigation was made by the plaintiffs against Minters; nor were the plaintiffs joined in either the second or the third cross-claim. Secondly, PTWA and PT sued Minters for breaches of the second level trusts, of which they were the beneficiaries; it was not relevantly to the point that, in turn, PTWA and PT were trustees of the managed funds whence the moneys invested with ECCCL originated. It will be necessary to return to this matter. Thirdly, as has been indicated above, the amounts which Minters received from the respondents included, but were not confined to, the amounts invested for the plaintiffs; the cross-claims were not limited to the amounts invested from the funds of the plaintiffs, but included all amounts invested in ECCCL by the respondents as trustees.

15 Other conduct of Minters in relation to the ECCCL investments is described in the reasons for judgment of this Court in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[8]. There, as in the present case, Minters preferred the interests of its client ECCCL, disregarded its obligations as trustee and paid moneys over without obtaining the necessary bearer certificates of deposit. Rolfe J said in his judgment in the present case[9]:

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8 (2003) 77 ALJR 895; 196 ALR 482.

9 (1998) 29 ACSR 642 at 727.

"The continued failure of [Minters] to advise the investor that conforming deposit certificates were not being obtained was, in my opinion, inexcusable."

16 On the cross-claims by PTWA and PT against Minters, Rolfe J made the following orders (which included a component of interest) in favour of the respondents against Minters:

"8. Judgment be entered for PTWA against [Minters] in the sum of $3,620,722.00 on terms that PTWA applies that money to replenish the relevant trust funds or to pay the Plaintiffs.

9. Judgment be entered for PT against [Minters] in the sum of $8,818,802.00 on terms that PT applies that money to replenish the relevant trust funds or to pay the Plaintiffs."

The form of these orders reflects the circumstance already remarked that the cross-claims extended beyond the funds claimed by the plaintiffs to include all amounts invested by PTWA and PT in ECCCL.

17 The cross-claims against Minters were based on three causes of action: breach of trust, negligence, and misleading and deceptive conduct in breach of the *Fair Trading Act* 1985 (Vic) ("the Fair Trading Act"). Section 11 thereof forbade the engagement, in trade or commerce, in conduct that was misleading or deceptive or was likely to mislead or deceive and s 37 provided, subject to a time limitation, a remedy for the recovery of the loss or damage suffered by reason of such conduct. Rolfe J found that there were breaches of trust, negligence, and misleading and deceptive conduct. He made the orders set out above on the basis of equitable compensation for breach of trust. In particular, he treated the failure to obtain the required security as causative of the whole of the loss of the amounts invested in ECCCL by the respondents.

<u>The present appeal – Minters' cross-claim against PTWA and PT</u>

18 This appeal does not involve a challenge to any of the above aspects of the decision of Rolfe J, which was confirmed by the Court of Appeal. The appeal arises from another branch of the litigation, a cross-claim by Minters against PTWA and PT.

19 Minters, by what was the seventh cross-claim in the action, claimed against PTWA and PT contribution under s 23B of the Act. That claim was rejected by Rolfe J and the Court of Appeal. That rejection is the subject of the present appeal. If its appeal succeeds, Minters seeks the remitter of the

proceedings to the Supreme Court of New South Wales for the determination of the amount of contribution it may recover under the Act.

20 As noted above, the plaintiffs did not sue Minters or otherwise seek to establish any liability to them on the part of Minters. However, Minters (for the purposes of its claim to contribution under the Act) asserts the existence of that liability to the plaintiffs (and other investor-beneficiaries) and says that it is entitled by the statute to share that liability with the respondents. The respondents emphasise that it was necessary for Minters to plead in its cross-claim and to prove a direct liability to these investors. In the Court of Appeal and in this Court, it is said that there has been a failure in this respect which is fatal to Minters' case. That submission should be accepted. It is now convenient to turn to the provisions of Pt IV of the Act.

Part IV of the Act

21 Part IV, in substantially its present form, was inserted by the *Wrongs (Contribution) Act* 1985 (Vic) ("the Contribution Act") and came into force on 12 February 1986. Prior to the enactment of that legislation, contribution under the Act was restricted to claims between tortfeasors. Section 24(1)(c) had provided that:

> "any tort-feasor liable in respect of [damage suffered by any person as a result of a tort (whether a crime or not)] may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage (whether as a joint tort-feasor or otherwise)".

22 The amendments made in 1985 to the Act primarily were designed to remove this restriction and permit, for the first time in Victoria, contribution between persons liable in respect of the same damage where the legal basis of liability arose out of a breach of contract, a breach of trust or otherwise[10]. No doubt the amendments were also designed to resolve the conceptual and practical difficulties for which the earlier legislation had become notorious[11].

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10 Explanatory Memorandum, Wrongs (Contribution) Bill.

11 See *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 211-212; *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 59-60 [7], 69-70 [46].

23 Such reforms were not without precedent. In 1978, the United Kingdom Parliament had enacted the UK Act. This statute, the relevant provisions of which do not extend to Scotland (s 10(3)), removed the restriction then operative on the availability of the statutory right to contribution in areas other than tort[12]. The UK Act was enacted as a result of a recommendation by the English Law Commission to the effect that[13]:

> "statutory rights of contribution should not be confined, as at present, to cases where damage is suffered as a result of a tort, but should cover cases where it is suffered as a result of tort, breach of contract, breach of trust or other breach of duty ... [T]he statutory right to recover contribution should be available to any person liable in respect of the damage, not just persons liable in tort".

24 The recommendations of the Law Commission were adopted with approval by the Chief Justice of Victoria's Law Reform Committee in 1979 and the Contribution Act in large part mirrored the reforms contained within the UK Act[14].

25 The issue currently before the Court is not to be resolved primarily through reference to common law and equitable principles governing contribution, nor through a misplaced reliance on the circumstance that the areas of liability in respect of which the right to contribution potentially may apply have significantly been widened by the Act. Cautionary observations to like effect were made with respect to the UK Act by the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond*[15].

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12 See *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK), s 6, adopting a recommendation of the Law Revision Committee, *Third Interim Report*, (1934), Cmd 4637 at 8.

13 *Report on Contribution*, (1977), No 79 at 23. See also Hong Kong, Law Reform Commission, *Report on the Law relating to Contribution between Wrongdoers*, (1984) at 50; Ontario, Law Reform Commision, *Report on Contribution among Wrongdoers and Contributory Negligence*, (1988) at 268; New Zealand, Law Commission, *Apportionment of Civil Liability*, (1998), No 47 at 1; New South Wales, Law Reform Commission, *Contribution between Persons liable for the Same Damage*, (1999), No 89 at 51.

14 Victoria, Chief Justice's Law Reform Committee, *Contribution*, (1979) at 1-2.

15 [2002] 1 WLR 1397 at 1401, 1409-1410, 1417; [2002] 2 All ER 801 at 805-806, 813, 820-821.

26 The evident remedial purpose of the legislation has been relied upon, in both the United Kingdom and this country[16], to support what is said to be a wide or broad interpretation of the statutory right and remedy which it created. Such expressions mask the requirement that the legislation be given its proper construction having regard to its purpose and scope[17]. The new statutory right and remedy do not operate at large. Rather, they are available only to a party who meets the criteria specified in Pt IV. In *Royal Brompton Hospital*, Lord Bingham of Cornhill said of the UK Act[18]:

> "When any claim for contribution falls to be decided 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?"

Translated to the present appeal, A represents the plaintiffs, B the respondents, and C Minters[19].

27 Where a person has suffered damage in connection with some transactions or events involving the wrongful conduct of others, the statutory creation of rights of contribution between the wrongdoers seeks to address the injustice that may result in some cases if the victim, by his or her selection of defendants, could throw the burden of liability on to one or some of the wrongdoers, to the exclusion of the others. A policy of preventing or limiting such injustice will require a legislature to make choices between different methods of giving effect to that policy. Those choices will be reflected in the terms of the legislation. The Act directs attention to a common liability by using in s 23B the expression "in respect of the same damage". This is a narrower concept than that of liabilities arising out of, or by reason of, the same transactions or related transactions. In resolving questions of construction of the legislation, it is not to be assumed that the legislative purpose is always to provide the widest possible sharing of liabilities, actual or potential, real or hypothetical.

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16 *K v P (J, Third Party)* [1993] Ch 140 at 148; *Friends' Provident Life Office v Hillier Parker May & Rowden* [1997] QB 85 at 102-103, 113; *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 11-12.

17 cf *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at 417-418 [41]-[44].

18 [2002] 1 WLR 1397 at 1401; [2002] 2 All ER 801 at 806.

19 *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 61 [12].

The construction of Pt IV

28 Section 23B is headed "Entitlement to contribution". Sub-section (1) thereof provides that:

> "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)." (emphasis added)

Section 24(2) provides that the amount of contribution recoverable under s 23B from a person is that found to be "just and equitable having regard to the extent of that person's responsibility for the damage".

29 The first phrase emphasised in s 23B(1) as set out above identifies the position to be established respecting Minters as the "person liable". The phrase is given content by s 23A. Sub-sections (1) and (2) thereof provide:

> "(1) For the purposes of this Part a person is liable in respect of any damage if the person who suffered that damage, or anyone representing the estate or dependants of that person, is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, *whether tort, breach of contract, breach of trust or otherwise*.
>
> (2) References in this Part to an action brought by or on behalf of the person who suffered any damage includes references to an action brought for the benefit of the estate or dependants of that person." (emphasis added)

30 The terms of s 23A(1) which have been emphasised indicate that, consistently with the recommendations of the English Law Commission which have been set out earlier in these reasons, the legal basis of the alleged liability of Minters in the present case is not limited to tort, but includes contract and trust or other breach of duty. It appears not to be disputed that the phrase "or otherwise" extends to liability based in the Fair Trading Act.

31 It should be added that a person is entitled to *recover* contribution pursuant to s 23B(1) notwithstanding that that person (ie, the claimant) has ceased to be liable in respect of the damage in question. This is so provided that the claimant was liable immediately before the claimant made or was ordered or agreed to make the payment in respect of which contribution is sought

(s 23B(2)). Further, a person is liable to *make* contribution notwithstanding that that person has ceased to be liable in respect of the damage in question. This is so unless that person ceased to be liable by virtue of the expiry of a limitation period which extinguished the right on which the claim against that person in respect of the damage was made (s 23B(3)).

32 Two relevant propositions are, therefore, central to the proper application of s 23B as it is to be understood in the light of s 23A. First, the party claiming contribution ("the claimant") must show that it is liable in respect of damage suffered by another person ("the injured plaintiff"). Secondly, the claimant may recover contribution from any other person ("the potential contributor") who is also liable to the injured plaintiff in respect of the same damage. The relevant inquiry is not confined to whether the damage for which each is liable can be said to be the same; both claimant and potential contributor must be liable to the injured plaintiff.

33 It will be necessary to deal in detail with the arguments that were advanced in the present matter. It is convenient to say at once, however, that Minters' claim for contribution should be held to have failed. Minters was not liable to the plaintiffs (the investors) for the damage in respect of which it sought contribution. PTWA and PT were liable to the plaintiffs for breach of the first level trusts. Minters was held liable to PTWA and PT for breach of different trusts (the second level trusts) and for *that* breach it was not liable to the plaintiffs. PTWA and PT having sued Minters to judgment, the plaintiffs could not have sued Minters for that breach. Minters, therefore, did not show that it was liable to the plaintiffs in respect of the damage which the plaintiffs had suffered and for which PTWA and PT were also liable to the plaintiffs.

The issues

34 Two vital questions arise. The first is whether Minters may properly be characterised for s 23B(1) as a "person liable in respect of any damage suffered by another person". The answer necessarily depends upon an identification of the person, or persons, by whom the relevant damage was suffered, and requires consideration of s 23A(1).

35 Minters' submissions on this point are somewhat equivocal. One reading of its written submissions suggests that the persons who suffered the relevant damage are the plaintiffs; another suggests that the relevant class is not so confined but includes all the investor-beneficiaries. The distinction would be of great significance in the quantification of the amount of contribution to be awarded under s 24, were that stage in the litigation to be reached. However, as will appear, whatever reading of the submissions be adopted, Minters' case fails at the threshold before questions of quantification arise.

36 Given the terms of s 23A(1) of the Act, Minters' case depends upon acceptance of the proposition that the plaintiffs (or the investor-beneficiaries) are "entitled to recover compensation" from Minters in respect of "damage" suffered by them. Minters submits that such an entitlement arises in one of two ways. The primary submission is that the status of the plaintiffs as beneficiaries of the respective first level trusts of which the respondents were trustees rendered them under the general law "entitled" to recover compensation directly from Minters in respect of loss or damage suffered to the trust property. Secondly, the plaintiffs are said to enjoy a right pursuant to s 37 of the Fair Trading Act to recover compensation for loss or damage suffered by them as a result of Minters' misleading and deceptive conduct. Neither submission should be accepted.

37 The second question which is of critical importance is presented by the requirement in s 23B(1) that the respondents, the parties against whom Minters asserts an entitlement to contribution, be liable "in respect of the same damage". In *Royal Brompton Hospital* it was held that this requirement in the UK Act was not satisfied. The hospital claimed damages against the architect it had engaged under a building contract in respect of, among other lapses, the negligent issue of extension certificates to the builder. The claim by the architect against the builder for contribution was struck out. This was because the claim by the hospital against the builder was for damages for delay in completion, whilst its claim against the architect was for the impairment of its ability to proceed against the builder. Thus, the Law Lords held that the statutory criterion that the claims be for "the same damage" was not met. Lord Steyn said that the "natural and ordinary meaning" of that phrase was controlling[20]. Lord Bingham of Cornhill described that phrase as emphasising the need, which was "a constant theme of the law of contribution", for the "one loss to be apportioned among those liable"[21].

38 But what is the "damage" which must have this identity? The legislation offers no definitions. In *Royal Brompton Hospital*[22], the House of Lords held that "damage" does not mean the "damages" awarded as compensation by a court, usually as a single sum. That is consistent with decisions in this Court construing similar legislation[23], but does not take the matter very far.

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20 [2002] 1 WLR 1397 at 1410; [2002] 2 All ER 801 at 814.

21 [2002] 1 WLR 1397 at 1401; [2002] 2 All ER 801 at 805-806.

22 [2002] 1 WLR 1397 at 1401, 1410; [2002] 2 All ER 801 at 806, 813-814.

23 See *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527.

39 The definition in s 23A(1), which has been set out, suggests that there may be the necessary sameness in the "damage" for which the two parties to the contribution claim are liable to a third, even without an identical legal basis for that liability. So it may be in a given case that the liability of one party is founded in contract and the other is in tort. But that does not resolve the present problem, which concerns liabilities founded in breaches of trusts at the two levels. The legal basis of liability may in each case be located in trust law, but what is meant by the requirement of "the same damage" where a plurality of trusts is involved?

40 Minters' submission is to the effect that "any damage" identifies interference with any legal or equitable right or interest. The "interference" would include the infliction of injury to proprietary interests and the infliction of personal injury as an interference with the interest in bodily integrity[24]. Understood in this fairly broad sense, the submission by Minters may be accepted for present purposes, without finally ruling on the question[25]. That is because, even on the basis that the relevant interests damaged were those conferred by law upon the beneficiaries of trusts, the appeal must fail.

Conclusions respecting breaches of trust

41 Here, the claim under s 23B proceeds upon the basis that Minters is liable in respect of certain damage, and that, although it has never been sued, it is entitled to recover contribution from the respondents, who are said to be persons liable in respect of the same damage. The relevant damage is said to be damage suffered by the plaintiffs and other investors who were beneficiaries of the first level trusts, of which PTWA and PT were trustees. The liability in respect of that damage exists if the plaintiffs and the other investor-beneficiaries were entitled to recover compensation from Minters in respect of that damage.

42 The proposition that the plaintiffs and the other investor-beneficiaries were entitled to recover compensation from Minters in respect of damage, and the proposition that the respondents were liable to the plaintiffs and others in respect of the same damage, are contested, and were rejected by Rolfe J and the Court of Appeal. Additionally, Davies AJA in the Court of Appeal, with whom Ipp AJA agreed, said that, in the circumstances of the case, it was not just and equitable, within the meaning of s 24(2), that an order for contribution be made

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24 See *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527.

25 cf *Tame v New South Wales* (2002) 211 CLR 317 at 373-375 [168]-[172].

and that the respondents were entitled to be fully indemnified by Minters in respect of any damages which might otherwise fall within the provisions of s 23B.

43 In dealing with the claim for contribution, Rolfe J said[26]:

> "If the case turned on the negligence of [Minters] then, in my opinion, it would be appropriate to consider whether PTWA and PT had been guilty of contributory negligence. If that was a matter I had to consider I would have come to the conclusion, essentially for the reasons I have given in articulating why they are liable to the plaintiffs, that they had been guilty of contributory negligence and, as between them and [Minters] I would have apportioned the damages as to 40% and 60% respectively.
>
> If I had come to the conclusion that the matter turned on the Fair Trading Act, I would have found that [Minters] engaged in misleading conduct and it would have been necessary for me to mould relief conformably with the decision of the Court of Appeal in *Akron Securities Ltd v Iliffe*[27]. My inclination, prima facie, would have been to grant relief reflecting the culpability between the parties in the terms to which I have referred in considering contributory negligence. It is not necessary to reach a final conclusion on this point.
>
> In my view, the highest duty owed by [Minters] to PTWA and PT was as trustee and, accordingly, I am of the view that PTWA and PT are entitled to judgment against [Minters] for the full amount required to replenish the trusts, together with compound interest on yearly rests on the trustee basis and for costs."

44 It may be noted that the first two causes of action are fault-based and the third, restitutionary or restorative, in the sense used by Street J in *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd*[28], and recently exemplified in *Youyang*[29]. Hence the use by Rolfe J of the term "highest duty". Rolfe J said that, where a trustee is ordered to pay equitable compensation for

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26 (1998) 29 ACSR 642 at 756-757.

27 (1997) 41 NSWLR 353.

28 (1966) 84 WN (Pt 1) (NSW) 399 at 406.

29 (2003) 77 ALJR 895 at 901-902 [35]; 196 ALR 482 at 490-491.

breach of trust, the amount is not reduced by contributory negligence on the part of the beneficiary. That was correct[30]. Further, Rolfe J said the amount recoverable by the respondents by way of equitable compensation from Minters was not in respect of the same damage as that suffered by the plaintiffs; the "damage springs from different breaches and there is no co-ordinate liability"[31].

45 The same reasoning prevailed in the Court of Appeal but cannot be fully accepted. The question raised by s 23B is whether Minters and the respondents were liable to the plaintiffs (and, it would seem, to the other investor-beneficiaries) in respect of the same damage sustained by the plaintiffs. But that is not necessarily the same question as whether the liability of Minters to the respondents under the cross-claims by the respondents was in respect of the same damage as the liability of both Minters and the respondents to the plaintiffs and the other investor-beneficiaries.

46 The respondents' cross-claims against Minters, in so far as they were based on a cause of action in negligence, were always exposed to the possibility of a reduction on account of contributory negligence[32]. It does not follow that any other cause of action available to the respondents was exposed to the same reduction[33]. As to the matter of the claim under the Fair Trading Act, it is convenient to leave that to one side for the moment.

47 The rights or interests the infringement of which constituted the damage for which equitable compensation by Minters to the respondents was ordered by way of remedy on the respondents' cross-claims were different from, although related to, the rights or interests of the plaintiffs and others which were infringed by the acts and omissions of the respondents. Minters was liable to make restitution to the respondents of the moneys it received on the second level trusts for the respondents and paid away in breach of trust.

48 Even so, it is said on behalf of Minters that the plaintiffs (and the other investor-beneficiaries) were privy to the respondents' cross-claims against Minters, in the sense that, if the cross-claims had failed, they would have been bound by that outcome and would have lost whatever prospect they might have

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30 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 201-202 [86], 230-231 [170]-[173].

31 (1998) 29 ACSR 642 at 756.

32 *Wrongs Act* 1958 (Vic), s 26.

33 *Astley v Austrust Ltd* (1999) 197 CLR 1.

had of proceeding directly against Minters for breach of trust[34]. That directs attention to the question raised by s 23A(1). Were the plaintiffs entitled to recover compensation from Minters?

49 In answering that question it is necessary first to further consider the nature and form of the two cross-claims of the respondents against Minters for breach of trust.

50 The cross-claims asserted that PTWA and PT "invested trust funds at the direction of trust members" including the plaintiffs, and that they now sought to recover those trust moneys. It also was alleged, as Rolfe J held to be the case, that the moneys paid to Minters in the course of making that investment were held on trust for PTWA and PT. The cross-claims did not make it plain that the beneficiaries of these second level trusts were PTWA and PT but that appears to be the assumption. This being so, the cross-claims were brought by the beneficiaries of the second level trusts against the trustee thereof. It was not to the point that, as was the case with the orders made by Rolfe J, the moneys so recovered would be funds for which PTWA and PT were bound to account as trustees of the first level trusts. If a beneficiary, who happens to be a trustee of another trust, sues its trustee for breach of trust, it is not readily apparent that the beneficiaries of the other trust are necessarily proper parties to that suit.

51 However, the appeal was argued on the assumptions (more favourable to Minters' case) that what was being enforced by the cross-claims were the first level trusts, and that PTWA and PT were in a similar position to that of trustees to whom a third party owes an equitable debt created in the course of the exercise of the investment powers of PTWA and PT under the first level trusts. Those assumptions, which give the beneficiaries of the first level trusts a more direct interest, may be accepted for present purposes.

52 On one of the cross-claims the claimant was PTWA and on the other PT; the plaintiffs and the other investor-beneficiaries were not joined. It was not necessary that they be joined. Order 8 r 15(1) of the Supreme Court Rules 1970 (NSW) provided that when any proceedings were brought by a trustee it was not *necessary* to join as a party any of the persons having a beneficial interest under the trust. That provision had its origins in the *Chancery Procedure Act* 1852

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34 *Young v Murphy* [1996] 1 VR 279 at 286.

(UK)[35] and is found in other jurisdictions, for example in r 16.02 of the Supreme Court (General Civil Procedure) Rules 1996 (Vic)[36].

53 The present issue is rather different and may be expressed by asking whether those for whom PTWA and PT were trustees had been entitled themselves to institute the cross-claims brought against Minters. The orders made by Rolfe J on the cross-claims by PTWA and PT for equitable compensation plainly were an exercise of the equitable jurisdiction of the Supreme Court to remedy breaches of trust.

54 Reference has been made earlier in these reasons to the provisions made in s 23B(2) and (3) with respect to the cessation of liability in respect of the damage in question. However, as the respondents submit, in the context of a claim for contribution under the statute, the entitlement which it postulates must be actual, not purely hypothetical and conditional. The statute should be applied by reference to the facts that exist, and the events that have occurred, in the particular case. If it were otherwise, Minters would have a claim for contribution with respect to a liability that may not exist.

55 In *Ramage v Waclaw*[37], Powell J reviewed many of the authorities, including the judgment of James LJ in *Sharpe v San Paulo Railway Co*[38], which support the proposition that, where relief is sought in the equitable jurisdiction of the Supreme Court against a third party, a beneficiary may sue in his own name, joining as defendants the trustee and any other beneficiaries, but only where there are "special circumstances". One reason for this restriction, given by James LJ in *Sharpe*[39], is the avoidance of the vexation of the third party by multiple suits. Powell J held that the "special circumstances" were not confined to collusion between the trustee and the third party, or the insolvency of the trustee[40]. But the general principle is that stated by Scott[41]:

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35 15 & 16 Vict, c 86, s 42, r 9.

36 See also *Young v Murphy* [1996] 1 VR 279 at 283. In England, see RSC O 15 r 14; Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 1 at 196.

37 (1988) 12 NSWLR 84 at 91-93.

38 (1873) LR 8 Ch App 597 at 609-610.

39 (1873) LR 8 Ch App 597 at 609.

40 (1988) 12 NSWLR 84 at 91-92.

41 *Scott on Trusts*, 4th ed (1989), vol 4, §282.

> "The interests of the beneficiaries of a trust are protected against a third person acting adversely to the trustee through proceedings brought against him by the trustee and not by the beneficiaries. As long as the trustee is ready and willing to take the proper proceedings against the third person, the beneficiaries cannot maintain a suit against him."

56 Minters referred to statements of principle by the Privy Council in *Hayim v Citibank NA*[42]. Their Lordships referred to some of the authorities discussed by Powell J in *Ramage*, including *Sharpe*, and concluded that "special circumstances" included a failure by the trustees to perform their duty to the beneficiaries to protect the trust estate or the interests of the beneficiary therein[43]. Nothing there said assists the arguments by Minters that the plaintiffs had the necessary entitlement for Pt IV of the Act.

57 In the present litigation, no question arises respecting the solvency of PTWA and PT, or of collusion between them and Minters. To the contrary, PTWA and PT were ready and willing to take and did take, by instituting and pursuing the second and third cross-claims to judgment, the proper steps against Minters to restore the first level trusts. The plaintiffs and the other investor-beneficiaries thus had no entitlement themselves to recover compensation from Minters.

58 There is a further point, which involves discarding the assumption made above concerning the nature of the cross-claims made against Minters. In the circumstances of this litigation, the plaintiffs and the other investor-beneficiaries, by reason of the breach by the respondents of the first level trusts, were entitled to equitable compensation by the respondents, an entitlement which the plaintiffs enforced to judgment. But there was no entitlement in the plaintiffs or other beneficiaries of the first level trusts to institute or prosecute the second and third cross-claims in fact pursued by the respondents against Minters. These cross-claims were the enforcement of the entitlement of the respondents arising by reason of the breach by Minters of the second level trusts of which the respondents were the beneficiaries. That entitlement of the respondents was not gainsaid or diminished or supplemented by the circumstance that the respondents were trustees of the first level trusts in favour of the plaintiffs and the other investor-beneficiaries. Accordingly, for these further reasons, there was no

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42 [1987] AC 730.

43 [1987] AC 730 at 748.

liability in respect of which Minters could sue against the respondents the order for contribution brought on the seventh cross-claim.

59 It was pointed out in the Court of Appeal that, even if the statutory conditions of an entitlement to contribution were otherwise satisfied, it would become necessary, given the terms of s 24(2) of the Act, to consider the amount of the contribution that would be just and equitable. Davies AJA, with whom Ipp AJA agreed, held that the amount would be nil. As trustee for the respondents, Minters was obliged to make full restitution in respect of the trust property which, in breach of trust, it paid away. It was obliged, and ordered, to replenish the trust funds. If that were the liability in respect of which it was seeking contribution from the respondents, then it is difficult to see that justice and equity would require any such contribution.

60 But, according to Minters, that is not the relevant liability. The relevant liability, it is said, is the liability of Minters (and the respondents) to the plaintiffs and others. There may be some force in the argument that, if there were otherwise a liability in respect of the same damage, which could form the basis of a claim by Minters for contribution by the respondents, then the justice and equity spoken of in s 24(2) would require a fault-based approach to contribution. This would lead to the same practical result as that reached by Rolfe J in relation to contributory negligence. However, in view of the conclusion reached on the anterior question, it is unnecessary to express a final view on the argument.

The Fair Trading Act

61 There remains for consideration the Fair Trading Act. Rolfe J, on the cross-claims by the respondents, held that Minters had engaged in misleading or deceptive conduct. However, it is not the liability of Minters to the respondents for contravention of the statute which is the basis of the claim by Minters for contribution under the Act. That basis lies in what is said to be a liability of Minters to the plaintiffs and the other investor-beneficiaries. But, however that may be, the respondents have not been found to have engaged in misleading and deceptive conduct. There was no liability of Minters and the respondents to the plaintiffs and the other investor-beneficiaries for "the same damage" sustained by contravention by them of the Fair Trading Act. It is true that the respondents had been the causes of damage to the beneficial interests under the first level trusts. But that was not "the same damage" as that sustained by the respondents by reason of the misrepresentations made to them by Minters.

62 Rolfe J found that Minters had engaged in misleading and deceptive conduct, specifically by writing letters to the respondents which failed to disclose that no bearer deposit certificates had been obtained. Those letters, he found, "amounted to misrepresentations by silence in so far as they conveyed the

impression, on a fair reading of them, that settlement had taken place conformably with the subscription agreements whereas it had not"[44]. Because Rolfe J took the view that "the highest duty owed by [Minters] to PTWA and PT was as trustee", he did not go on to deal with the precise form of the relief to which the respondents would have been entitled under the Fair Trading Act, other than to say that his provisional view was that he would have had to mould relief which would reflect the comparative culpability of the parties, that is to say, the respondents as cross-claimants and Minters.

63 Since he was prepared to make orders on the cross-claims to provide equitable compensation, there was no need to give further consideration to the causes of action in negligence or for contravention of the Fair Trading Act. The respondents were entitled to relief on their cross-claims on the basis most favourable to them. In *Henderson v Merrett Syndicates Ltd*[45], Lord Goff of Chieveley, in a passage cited by this Court in *Astley v Austrust Ltd*[46], said:

> "I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him".

His Lordship was there speaking of concurrent liability in contract and tort. The same applies in principle in the present case.

64 Rolfe J appears to have envisaged, without deciding the matter, that, without recourse to s 24(2) of the Act, he would have been able, by granting appropriate relief under the Fair Trading Act, to limit the entitlement of the respondents by reference to what he called their own "culpability". He never made any assessment, or award, of damages in respect of the contravention of the Fair Trading Act. Nor did he address the kinds of question that would have arisen under ss 23A and 23B of the Act. He did not examine the question of any entitlement of the plaintiffs to sue Minters under s 37 of the Fair Trading Act to recover the amount of the loss or damage they could show they had sustained by reason of Minters' misleading and deceptive conduct, an entitlement that may have been supported by the construction given to the *Trade Practices Act* 1974 (Cth) in *Poignand v NZI Securities Australia Ltd*[47]. He did not deal with the significance, if any, of the time limit upon proceedings for relief imposed by

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44 (1998) 29 ACSR 642 at 751.

45 [1995] 2 AC 145 at 194.

46 (1999) 197 CLR 1 at 22 [46].

47 (1992) 37 FCR 363.

s 37(2) of the Fair Trading Act. He did not compare the nature of the relief to which the plaintiffs might have been entitled against Minters with that to which the respondents would have been entitled against Minters.

65 In particular, Rolfe J did not consider whether, if the respondents had replenished the trust estates of which they were trustees, there would have been any loss or damage suffered by the plaintiffs by reason of Minters' contravention of the Fair Trading Act. The existence of any such liability remains purely theoretical. No loss by the plaintiffs and the other investor-beneficiaries has been established. So long as the respondents made good, out of the funds available to them (including their own assets, or the proceeds of the exercise of their entitlement against Minters for breach of the second level trusts), the loss to the first level trusts of which they were trustees, there would be no loss to the plaintiffs and others resulting from the contravention of the Fair Trading Act.

Conclusion

66 The appeal should be dismissed with costs.

67 McHUGH J. For the reasons given by Callinan J, the appellants breached s 11 of the *Fair Trading Act* 1985 (Vic) and their breach was a cause of the loss suffered by the plaintiffs in the action. The appellants were therefore liable to the plaintiffs to the extent that the appellants caused the loss of the funds invested in EC Consolidated Capital Limited ("EC Consolidated") on behalf of the plaintiffs. The respondents too have been held liable to the plaintiffs for losing the funds invested in EC Consolidated, such liability having been found to be established by the trial judge. Accordingly, within the meaning of s 23B(1) of the *Wrongs Act* 1958 (Vic) ("the Act"), both the appellants and the respondents were "liable in respect of the same damage" – the loss of the funds beneficially owned by the plaintiffs. Because that is so, s 23B of the Act entitles the appellants to contribution from the respondents in respect of the damage for which the appellants are responsible. For the reasons given by his Honour, I also agree that the respondents cannot rely on the various "defences" upon which they seek to rely.

68 Accordingly, the appeal must be allowed. I agree with the orders proposed by Callinan J.

69 KIRBY J. 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. The apportionment might not be capable of being performed with scientific precision because of the diversity of the several responsibilities and the scope for different assessments of the requirements of justice and equity in the case. But the fundamental notion of contribution is a simple one. In an ideal world it would not be "defeated by too technical an approach"[48].

70 Decisions of the courts, including recent decisions of this Court[49], demonstrate that, in the quest for distributive justice, in cases involving liability of several parties to a common plaintiff, impediments are often thought to arise that defeat the object of contribution[50]. So it has proved in giving effect to early contribution legislation designed to overcome legal impediments[51]. And so it has proved in claims for equitable contribution between co-obligors[52]. It is as if the legal mind, locked in its categories, is fundamentally resistant to the notion of distributive justice as between parties liable, in different legal ways, to a common plaintiff.

71 The present appeal is the latest instance of resistance to the simple idea of contribution. "Gallons of ink" have been spilt over earlier versions of contribution legislation. Despite a new attempt by the Parliament of Victoria to make its reformatory will clear, it seems that the flow of ink will not be stemmed.

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48 *Mahoney v McManus* (1981) 180 CLR 370 at 378 per Gibbs CJ.

49 *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282.

50 Barnett, "The Uneasy Position of Unjust Enrichment After *Roxborough v Rothmans*", (2002) 23 *Adelaide Law Review* 277 at 289.

51 *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 69-70 [46] referring to *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 211; *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 219-220; *Bakker v Joppich* (1980) 25 SASR 468 at 472.

52 *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 321-324 [106]-[117].

The facts

72 *The background facts*: The basic facts are described in the reasons of Gleeson CJ, Gummow and Hayne JJ ("the joint reasons")[53] and in the reasons of Callinan J[54]. Although, in their detail, the facts are complicated, reduced to essentials, they are comparatively simple.

73 The Perpetual Companies ("Perpetual") were trustees of superannuation funds. They were directed by members of the funds ("the beneficiaries") to invest large sums in preference shares offered to the market by a company ("ECCC"). Minter Ellison ("Minters"), a firm of lawyers, acted in that capacity for ECCC. As security for the deposits with that company, a deposit certificate was to be issued by a reputable bank, in the form of a bearer certificate of the deposit, a guarantee or letter of credit. The security documents were drafted by Minters. It also acted as agent for Perpetual. Perpetual paid the funds into the trust account of Minters. Minters was obliged not to release the funds to ECCC until the deposit certificates were issued. However, without provision of the certificates, Minters released the funds to ECCC. With each such payment, Minters incorrectly represented to Perpetual that it had received the deposit certificate. It transmitted purported "certificates" to Perpetual for safe custody.

74 Neither Minters nor Perpetual checked the documents so forwarded in a careful and prudent way, conforming to their respective duties as trustees. Had they done so, each would have recognised that no deposit certificates had been issued and that the beneficiaries therefore had no recourse to a bank to safeguard their investments. In the result, when ECCC became insolvent, the beneficiaries' funds were lost. The beneficiaries sued Perpetual for breach of the terms of the trust upon which Perpetual had received the funds from them. Perpetual, in turn, sued Minters for breach of the terms of the trust upon which Minters had received the deposits from Perpetual. Each of these claims succeeded. A claim that Minters had contravened provisions of the *Fair Trading Act* 1985 (Vic) by making misrepresentations to Perpetual that constituted misleading and deceptive conduct, was also successful. These findings are not now in dispute.

75 The substantial issue before this Court is whether Minters is entitled to contribution[55] from Perpetual and whether it is "just and equitable having regard to the extent of [Perpetual's] responsibility for the damage"[56] that Perpetual

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53 Joint reasons at [5]-[17].

54 Reasons of Callinan J at [122]-[137].

55 *Wrongs Act* 1958 (Vic), s 23B(1).

56 *Wrongs Act* 1958 (Vic), s 24(2).

should share the ultimate burden for the common damage for which the liability of each had been, or could be, established[57].

76 *Common ground*: Further background to this sorry chronicle may be found in an earlier decision of this Court[58]. For the purposes of this appeal numerous points were either common ground or excluded by the limited grant of special leave. Thus, it was not now disputed that the contribution rights and obligations of Minters and Perpetual, although determined in the Supreme Court of New South Wales, were to be decided by the application of the *Wrongs Act* 1958 (Vic). That Act was to be applied as it was amended by the insertion in Pt IV ("Contribution") of a series of provisions adopted by the Victorian Parliament in 1985[59]. Likewise, in so far as the claim was based on statute for misleading and deceptive conduct on the part of Minters towards Perpetual, it was to be determined in accordance with the *Fair Trading Act*[60]. The operation of those two Victorian statutes in the circumstances and their application by the Supreme Court of New South Wales are not now contested.

77 The test for liability to contribution, under the *Wrongs Act*, as between Perpetual and Minters was not limited to the liability that had been legally established between the beneficiaries and Perpetual. As with earlier versions of the contribution legislation[61], the *Wrongs Act* does not confine the right to contribution to liability already proved as between the putative contributor and the original plaintiff. It would scarcely be just or sensible if that were so. It would, in effect, render a claimant for contribution hostage to the way in which another person defined its claim. The *Wrongs Act* recognises that the claimant for contribution is entitled to recover not only for "such liability which has been … established" but also "such liability which … could be established in an action brought against that person in Victoria by or on behalf of the person who suffered the damage"[62].

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57 *Wrongs Act* 1958 (Vic), s 23B(6).

58 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 77 ALJR 895; 196 ALR 482.

59 *Wrongs (Contribution) Act* 1985 (Vic), s 4, with effect from 12 February 1986.

60 ss 11(1), 37(1). See reasons of Callinan J at [154].

61 eg *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5(1)(c) considered *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 219, 222, 224. See also *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169 at 196; *Harvey v R G O'Dell Ltd Galway (Third Party)* [1958] 2 QB 78 at 108-110.

62 *Wrongs Act* 1958 (Vic), s 23B(6). See also reasons of Callinan J at [148].

78 In this sense, as between a claimant for contribution and a putative contributor, the issue presented by the claim under the *Wrongs Act* is, in part, determined by any proceedings that have been brought and, in part, by an answer to the hypothetical question of what "could be established" if such proceedings had been brought.

The legislation

79 *Original statutory reform*: The *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK) was the first statutory attempt to reform the law of contribution in England[63]. That Act was quickly copied throughout the British Empire, including in Australia. However, a defect of the statutory reform (apart from its ambiguous expression) was that it was limited to recovery of contribution as between tortfeasors, that is, "[w]here damage is suffered by any person as a result of a tort"[64].

80 Such was the earlier law in Victoria[65]. Such is still the law in the majority of Australian jurisdictions[66]. Those who suggest that judges should take a passive role, indifferent to the need to update remedies available at common law and in equity, do well to reflect upon the long saga of apparent parliamentary indifference and neglect disclosed by the general legislative inattention to the oft-demonstrated defects in the original contribution legislation. If ever there was an illustration of the need for appropriate judicial steps to facilitate just remedies as between parties, this is it.

81 *Further English reform*: In England (whence, it seems, Australian lawmakers still derive their comparatively rare bursts of imagination in such matters), the Law Commission in 1975 proposed a series of reforms designed to repair some of the larger defects in contribution as between tortfeasors and to broaden the "statutory jurisdiction to make contribution orders [beyond]

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63 See also *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 70 [46].

64 *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK), s 6(1).

65 *Wrongs Act* 1958 (Vic), s 24(1) (since repealed).

66 *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5(1)(c); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA), s 7(1)(c); *Wrongs Act* 1954 (Tas), s 3(1)(c); *Law Reform Act* 1995 (Q), s 6(c); *Law Reform (Miscellaneous Provisions) Act* (NT), s 12(4).

situations in which the claims arise out of tort … to cover breaches of contract, breaches of trust and other breaches of duty as well"[67].

82 Unsurprisingly, the Law Commission's proposal was well received in the English legal profession and community. In consequence, in 1977, the Commission produced its *Report on Contribution*[68]. Although the report was delivered in the context of the Commission's then general review of the law of contract and quasi-contract, the proposals were much broader. Most significantly, it endorsed the expansion of the applicability of statutory compensation to "wrongdoers other than tortfeasors"[69]. In support of the Commission's recommendation, it pointed to the "double advantage" of expanding the entitlement to contribution in such a way[70]:

> "First, it closes the gap where there are no rights of contribution at common law. Second, it allows the courts greater flexibility where the existing rules would otherwise work unjustly. The proposal has won general support from those who commented on our working paper and we accordingly recommend that it should be given legislative effect."

The Commission said that it could see "no policy reason" for leaving the previous gap in the entitlement to contribution "unfilled"[71].

83 *Reform in Victoria*: In Victoria, the question whether the recommendations of the English Law Commission should be adopted in the *Wrongs Act* was considered by a sub-committee of the Chief Justice's Law Reform Committee. With an immaterial reservation, that Committee recommended the adoption in Victoria of the Law Commission's proposals[72].

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67 England and Wales, The Law Commission, *Contribution*, Law Com Working Paper No 59, (1975) at 33 [56].

68 England and Wales, The Law Commission, *Report on Contribution*, Law Com No 79, (1977).

69 England and Wales, The Law Commission, *Report on Contribution*, Law Com No 79, (1977) at 10 [33].

70 England and Wales, The Law Commission, *Report on Contribution*, Law Com No 79, (1977) at 11 [33] (footnote omitted).

71 England and Wales, The Law Commission, *Report on Contribution*, Law Com No 79, (1977) at 10 [33].

72 Victoria, Chief Justice's Law Reform Committee, *Contribution*, (1979), par 1.

The Committee noted that, by the time of its report, the proposals had passed into law in England[73].

84 Whilst remarking on a possible divergence between the law of Victoria and that of England on the subject of the availability of contributory negligence as a defence to a claim of damages for breach of contract[74] and offering some criticisms of the drafting of the English statute, the Committee recommended adoption of the substance of the Law Commission's reforms in Victoria. In the House of Lords in the United Kingdom Parliament, Lord Scarman and the Lord Chancellor made speeches supporting the passage of the English legislation. The latter pointed out that "[t]he present law on contribution has … led to injustice by failing to provide all the remedies that are required"[75]. The Bill was described as "a measure of law reform and … a step further to improve the quality of justice"[76]. The basic principle of contribution was explained in terms similar to those that I have set out at the head of these reasons. In due course, in terms of the amendments to the *Wrongs Act*, the Victorian Parliament enacted the amendments to the law of contribution adapted from the English model[77].

85 *Significance of the reform*: The initiative of the Victorian Parliament to carry into law the reform of statutory contribution and to expand the availability of such contribution beyond that between tortfeasors so as to embrace coordinate liability on "whatever … legal basis", including for "breach of trust"[78], should not be whittled down by this Court. I have included the foregoing history of the enactment of the reforms to the law of contribution in Victoria for three

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73 *Civil Liability (Contribution) Act* 1978 (UK). See United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), 18 July 1978 at 245-255.

74 The Committee referred to *Belous v Willetts* [1970] VR 45; *A S James Pty Ltd v C B Duncan* [1970] VR 705; *De Meza v Apple* [1974] 1 Lloyd's Rep 508: Victoria, Chief Justice's Law Reform Committee, *Contribution*, (1979), pars 10.1-10.2. See now *Astley v Austrust Ltd* (1999) 197 CLR 1.

75 United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), 18 July 1978 at 255.

76 United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), 18 July 1978 at 255.

77 Only minor changes have been introduced in other jurisdictions. See *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA), s 6(1) replacing *Wrongs Act* 1936 (SA), s 25(1)(c); *Civil Law (Wrongs) Act* 2002 (ACT), s 21.

78 *Wrongs Act* 1958 (Vic), s 23A(1).

purposes. First, to demonstrate beyond doubt the remedial and reformatory character of the legislation so enacted. Secondly, to indicate the deliberate purpose that lay behind the adoption of the reforms in Victoria, so far the only jurisdiction to do so in Australia[79]. And thirdly, to highlight the error that arose in the Court of Appeal of New South Wales in these proceedings. There, in the original reasons published by that court for rejecting Minters' claim to contribution, two of the judges made no reference whatsoever to the *Wrongs Act*. Only Davies AJA cited the Act, and then only in describing the claims brought by Minters[80].

86 It was the omission of the Court of Appeal to make any substantive reference to Minters' reliance on the enlargement of the right to contribution provided by s 23B of the *Wrongs Act* that led to a notice of motion by Perpetual seeking supplementary reasons for judgment dealing with the point. Supplementary reasons were later published[81]. The reconsideration did not cause the Court of Appeal to alter its opinion or (if it was still possible at that stage) its orders.

87 In busy courts, it is easy enough to overlook points, as I have myself done. However, this appeal is yet another instance of the phenomenon, all too common, for Australian lawyers and courts to attempt to resolve novel disputes by reference to judicial elaboration rather than the text of an applicable statute. This Court has drawn this tendency to notice more times than I care to remember[82]. The present is a classic illustration.

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79 The South Australian contribution legislation extends to liability in contract and under statute but that liability must be established in an action for contribution: *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA), ss 4(1) and 6(1) and (3).

80 *Alexander (T/as Minter Ellison) v Perpetual Trustees WA Ltd* [2001] NSWCA 240 at [137] per Davies AJA.

81 *Alexander (T/as Minter Ellison) v Perpetual Trustees WA Ltd (No 2)* [2002] NSWCA 101.

82 eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111 [249]; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 184-185 [54]; *Conway v The Queen* (2002) 209 CLR 203 at 227 [65]; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 1893 at 1897 [24]-[25], 1906 [73]-[75]; 201 ALR 414 at 420, 432.

88 Instead of analysing the meaning, application and purpose of the reformatory provisions of the *Wrongs Act*, the learned judges of the Court of Appeal (even, in my respectful opinion, in their supplementary reasons) focussed upon judicial exposition. It is important that this 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. Where there is written law, as here, our duty is to the text and purpose of the legislature[83]. Especially where new written law is adopted following a careful law reform process, it is essential that courts should not adopt a restrictive interpretation that undermines the attainment of the reform, to the full extent possible in the statutory language.

Analysis of the amended *Wrongs Act*

89 *Adoption of broad language*: The breadth of the intended operation of the 1985 reform of the *Wrongs Act* is made clear by the language in which the new provisions are expressed[84].

90 First, some observations need to be made about the interaction of the provisions. Take s 23A(1) of the Act with its definition of "a person [who] is liable", as referred to in s 23B(1). The ambit of the new provision takes its colour from the purpose, which is stated to be to provide for "contribution". That word appears, without relevant restriction, in the heading to Pt IV of the *Wrongs Act*. The legislative history evinces a clear object to enlarge the facility of orders for contribution. Then, the fact that, by s 24(2), that facility is committed to a court or, where applicable, a jury instructed by a judge, indicates that a large latitude is intended, subject to appeal, as may be contemplated by the now wide circumstances to which contribution is made applicable. Then, the criterion in s 24(2) of what is "just and equitable having regard to the extent of that person's responsibility for the damage" reinforces the breadth of the intended operation of the remedy. As previously stated, by s 23B(6), the remedy is to be available not only where liability has been established but also where it "could be established in an action brought … in Victoria".

91 These general observations about Pt IV of the *Wrongs Act* are further reinforced when one turns to the actual language of the critical provisions. Thus, in s 23A, the words "*any* damage" suggest that it is not necessary to establish a strict coincidence between the damage caused by the claimant for contribution and that caused by the putative contributor if some part of the damage in question

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83 *Conway v The Queen* (2002) 209 CLR 203 at 227 [66].

84 The relevant provisions are set out in the reasons of Callinan J at [148].

coincides. Then, the claimant for contribution is entitled to recover "compensation" (as it is expressed) from the putative contributor not necessarily to the extent of the entire "damage". All that is required is that the claim should be "*in respect of* that damage". The breadth of the phrase "in respect of" is established by so much decisional authority that I am almost embarrassed to mention the point[85]. The words of connection chosen by the legislature deny any suggestion that there must be exact identity of the liability for the damage.

92 The foregoing impressions are then reinforced by the wide ambit introduced by the 1985 reforms. Contribution is now available beyond "tort". It extends to "breach of contract, breach of trust or otherwise". The reference to "breach of trust" is itself remarkable. It takes the operation of statutory contribution far beyond tort and that other part of the law of obligations, contracts and quasi-contracts. It provides a statutory remedy in the case of "breach of trust" and "otherwise" where, formerly, only the remedy of equitable contribution would have been available, with its encrustations, recently demonstrated and reaffirmed, over my objection[86].

93 The fact that, in a particular case, the foundation of a claim for contribution might derive from two or more bases of liability, such as tort, breach of trust or breach of statutory duty, indicates that it is a serious mistake to attempt a return to the pre-1985 strictness of coordinate liability, which this Court has held to be necessary in a case of equitable contribution. Under the *Wrongs Act*, the amplitude and multiplicity of the possible bases of liability make it clear that no narrow view is to be adopted in defining a person liable in respect of the "damage".

94 But this is not all. Section 23B(1) is similarly expressed in very wide terms. Again, it is sufficient that the person claiming contribution be "liable in respect of *any* damage suffered by another person". Again, it is unnecessary to establish an exact coincidence of the damage for which the claimant and the putative contributor are responsible. Likewise, the contemplation of contribution "from any other person" emphasises the breadth of the class of putative contributors. Then comes the phrase "liable in respect of the *same damage*". To the suggestion that these words cut back the ambit of the class of potential contributors, the answer appears in the breadth of the definition incorporated in

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85 *Powers v Maher* (1959) 103 CLR 478 at 484-485; *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 416; *McDowell v Baker* (1979) 144 CLR 413 at 419; *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111; *Trustees of the Will of Cunard v Inland Revenue Commissioners* [1946] 1 All ER 159 at 164.

86 *Burke v LFOT Pty Ltd* (2002) 209 CLR 282.

s 23B(1) by force of s 23A(1), as I have just explained. That ambit is still further reinforced by the words in parenthesis, referring to the alternative possibilities that the claimant for contribution and the putative contributor are jointly liable to the first person (in this case the beneficiaries) "or otherwise". The reference to "otherwise" clearly means that the claimant and the putative contributor may be severally liable; liable in respect of different parts of the "damage"; liable on different legal bases ("whether tort, breach of contract, breach of trust …"); liable by statute ("… or otherwise"); and liable whether such liability is established or is such as could be established if an action were brought.

95 *Same "damage" not "cause of action"*: It is very important to notice that neither s 23A(1) nor s 23B(1) states, or suggests, that the liability "in respect of the same *damage*" must arise out of identical *causes of action*, on the part of the "first-mentioned person". On the contrary, the language, purpose and history of the reformed provisions of the *Wrongs Act* make it abundantly clear that this need not be so. It would have been easy for the United Kingdom Parliament (and the Victorian Parliament copying it and the law reform bodies that recommended the reform) to impose in clear terms a requirement of exactly coincident liability and sources of liability. Instead, the reforms and the statutes giving them effect focussed, and focussed only, on the "damage". It is the liability "in respect of the same *damage*" that is critical. Thus, in the application of the provisions of the *Wrongs Act*, the starting point is to find the "damage" "in respect of" which the claim for contribution is made. So long as that "damage" coincides, sufficiently in the context of a reformatory provision contemplating multiple and distinct causes of action giving rise to liability for the damage, the precondition for statutory contribution exists.

96 In this analysis, I therefore agree with the approach of Callinan J in this appeal[87], with which McHugh J agrees[88]. Minters was found to have engaged in misleading and deceptive conduct in contravention of the *Fair Trading Act*. Perpetual was found to have breached duties owed as trustee to the beneficiaries. Each was responsible (albeit in differing ways) for the same damage, that is, the loss of the beneficiaries' funds invested in ECCC. I disagree with the approach stated in the joint reasons[89]. In my view, 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

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87 Reasons of Callinan J at [149]-[166].

88 Reasons of McHugh J at [67].

89 Joint reasons at [27], [33].

were two (even in some cases three) "levels of trusts"[90] 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 identity of the "damage", not the identity of its legal or equitable foundation.

97 *Conclusion – contribution legislation applies*: In the circumstances of this appeal, for the purposes of the claim for contribution, the "damage" was relevantly "the same". It was the loss suffered by the beneficiaries because neither Minters nor Perpetual performed carefully and faithfully the duties severally cast on each of them by law. Both of them were persons liable within s 23A(1). Both were therefore liable to contribute to the damage.

98 By this analysis, within s 23B(1), Minters was a person liable "in respect of" any damage suffered by the beneficiaries, on the footing that the beneficiaries were entitled to recover compensation from Minters "in respect of" that damage, whatever the legal basis of liability. In such circumstances Minters, in accordance with s 23B(1), was entitled to recover compensation from Perpetual, being an "other person" liable "in respect of" the same damage, although severally not jointly, with Minters and on a basis, if necessary, different from the basis upon which Minters was itself liable.

99 The foundations for the liability of Minters and Perpetual "in respect of" the same damage comprised their several liabilities, which included liability arising out of breach of the *Fair Trading Act* and breach of trust. I agree with what Callinan J has written in this respect[91]. His Honour's approach ensures the sensible operation of the *Wrongs Act* in circumstances of successive breaches of statutory duty and of trust by each of the claimant for contribution (Minters) and the putative contributor (Perpetual) respectively. The alternative and narrower view, preferred in the joint reasons, defeats the achievement of an obvious purpose of the reform to statutory contribution in a way that is unnecessary in the language by which the statute is expressed and contrary to its purpose.

100 In summary, to the extent that there is any uncertainty or ambiguity in the provisions of the *Wrongs Act*, I would prefer the approach of Callinan J because it achieves the object of the reform. It prevents yet another remedial statute from misfiring because of the way a court reads it. It is time, wherever possible, to lift the dead hand of the past from the law of contribution. That, as I take it, was the purpose of the 1985 amendments to the *Wrongs Act*. This Court should give effect to that purpose.

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90 Joint reasons at [5]; see also at [33].

91 Reasons of Callinan J at [149]-[166].

A "just and equitable" apportionment of responsibility?

101 *Is contribution bound to fail?* There are two remaining arguments of Perpetual that need to be addressed. The first arises out of a conclusion of Davies AJA, in his supplementary reasons in the Court of Appeal, providing a second, and alternative, basis for rejecting Minters' claim for contribution. This was his Honour's statement[92] (with which Ipp AJA agreed without separate reasons[93]) that, in the circumstances of the case, "it was not just and equitable that an order for contribution be made against [Perpetual]". This conclusion was put forward on the basis that Perpetual was "entitled to be fully indemnified by [Minters] in respect of any damages which might otherwise fall within the application of the statutory provisions"[94].

102 It must be conceded that there is an important question to be determined concerning the extent of Minters' entitlement to contribution from Perpetual under the *Wrongs Act*, even within the open-ended formula of that Act, with its reference to what is "just and equitable having regard to the extent of [the putative contributor's] responsibility for the damage"[95].

103 At trial, Rolfe J observed that contribution was not available because "[t]he damage springs from different breaches and there is no co-ordinate liability"[96]. I have already endeavoured to show that this approach was in error. However, his Honour went on to state that, if the case "turned on the negligence of [Minters] then, in my opinion, it would be appropriate to consider whether [Perpetual] had been guilty of contributory negligence"[97]. By reference to what he had held in deciding the liability of Perpetual to the beneficiaries, Rolfe J concluded that, approached in such a way, he would have "apportioned the damages as to 40% and 60% respectively", that is, as to Perpetual and Minters[98].

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92 *Alexander (T/as Minter Ellison) v Perpetual Trustees WA Ltd (No 2)* [2002] NSWCA 101 at [27].

93 *Alexander (T/as Minter Ellison) v Perpetual Trustees WA Ltd (No 2)* [2002] NSWCA 101 at [29].

94 *Alexander (T/as Minter Ellison) v Perpetual Trustees WA Ltd (No 2)* [2002] NSWCA 101 at [27]. His Honour referred to the reasons of that court given in [2001] NSWCA 240.

95 *Wrongs Act* 1958 (Vic), s 24(2).

96 *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642 at 756.

97 *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642 at 756.

98 *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642 at 756.

104 Perpetual suggested that there were fundamental flaws in accepting this approach, even if his Honour was wrong in treating contribution as unavailable under the *Wrongs Act* or otherwise. Thus, Perpetual invoked the recent observations of this Court concerning the inadmissibility of notions of contributory negligence when deciding the scope of a fiduciary's duty to a beneficiary[99] and the basic principle that a fiduciary's liability to a beneficiary for breach of trust is one of restoration[100]. That the fiduciary's duty is to make good breaches arising from its default in discharging the fiduciary obligation is not in doubt[101]. As McLachlin J explained in *Canson Enterprises Ltd v Boughton & Co*[102], this is because "[t]he fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. … In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart."

105 Is it therefore self-evident (as Davies AJA appeared to consider) that a claim by Minters for contribution from Perpetual is bound to fail because to uphold it would work a fundamental offence to the liability of a trustee to restore the damage suffered by its beneficiary, that is, Perpetual to the beneficiary plaintiffs and Minters to Perpetual as its beneficiary?

106 *Futility is not established*: In this Court, Perpetual relied upon the conclusion of the majority of the Court of Appeal that, if it came to the assessment of what was "just and equitable", Minters would still recover no contribution. I accept that this argument needs to be dealt with. However, ultimately, for a mixture of procedural and substantive reasons, I would not decide the appeal on this basis.

107 First, when special leave was granted to Minters, it was made clear that this Court would not embark upon any question of apportionment and that the notice of appeal had to be amended to reflect this limitation, as indeed it was. The amended notice of appeal omits the ground of appeal challenging the conclusions of the courts below determining the amount of compensation

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99 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 201-202 [85]-[86] per McHugh, Gummow, Hayne and Callinan JJ, 230-232 [171]-[174] of my own reasons.

100 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 224-225 [151].

101 *Breen v Williams* (1996) 186 CLR 71 at 113; *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 201 [85], 224 [150].

102 [1991] 3 SCR 534 at 543 cited *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 225 [152].

recoverable. Minters thus tendered to this Court only an issue of legal principle concerning the availability of recovery under the *Wrongs Act*. It asked that, if that principle were determined in its favour, the extent of any recovery should be remitted to the Supreme Court. In view of these developments, that is the course that should be taken.

108 Secondly, and in any case, once it is decided (as I would conclude) that the *Wrongs Act* applies to the respective liabilities of Minters and Perpetual, it is arguable that no pre-existing doctrine of equity or of unwritten law concerning the liability of trustees ousts the statutory prescription. Although addressed to the kind of apportionment which he would have made in a case of coordinate liability in negligence, Rolfe J's assessment of the respective "responsibilities" for the damage of Minters and Perpetual, in the sense of the causes of the ultimate loss of the moneys deposited by the beneficiaries (namely 60% Minters and 40% Perpetual) suggests that there might yet be utility in considering the application of the *Wrongs Act*.

109 The very broad criteria expressed in the Act, once it attaches, read against the background of Rolfe J's comment, suggest that a proper application of the Act might result in orders for contribution of a substantial kind. In so far as the earlier reasons of the Court of Appeal were addressed to the issue of equitable contribution, in circumstances requiring coordinate liability, they were not directed to the statutory question presented by s 24 of the *Wrongs Act*. This is what is "just and equitable having regard to the extent of … *responsibility for the damage*". It is arguable that the statute releases the decision-maker from the strictness of the old law. It is possible that it enlivens a large quasi-discretionary decision by reference to a more broadly stated criterion. None of these points has yet been decided by the Court of Appeal. Still less, having regard to the grounds of appeal, are they before this Court.

110 I would therefore reject the first of Perpetual's "threshold" arguments for upholding the judgment of the Court of Appeal on the alternative conclusion stated by Davies AJA. It would be procedurally unfair, and premature, for this Court to decide the matter on such an argument. It is not obvious that the argument would prove fatal to Minters in the application of the *Wrongs Act*.

The argument of "indemnity" fails

111 *Exclusion of other indemnities*: More troubling is Perpetual's second "threshold" argument, advanced on the assumption that the provisions of the *Wrongs Act* were otherwise enlivened. This was that Perpetual was entitled, in the circumstances, to exclude the operation of the contribution provisions of the *Wrongs Act* on the basis of s 24AD(4) of that Act. There was no procedural impediment to considering this point. Indeed, it is involved in the issue of whether the *Wrongs Act* applies at all; and if so how.

112 The sub-section in question reads, relevantly (with emphasis added):

> "(4) The right to recover contribution in accordance with section 23B supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Part in corresponding circumstances but nothing in this Part shall affect –
>
> (a) any express or implied contractual *or other right to indemnity* …
>
> …
>
> which would be enforceable apart from this Part …"

113 Perpetual's argument invoked reflections of the point just dealt with. It drew upon the strict legal and equitable obligations that have hitherto governed trustees in relation to their beneficiaries in respect of breaches of trust; the restitutory principle governing the obligations of trustees; and the irrelevance, in that context, of notions of "contributory negligence" or "contributing fault" on the part of a beneficiary[103].

114 Because the general duty of the fiduciary has been expressed as one to "make good any losses arising from the breach"[104], Perpetual argued that, as against Minters, it was entitled to a full replenishment of the trusts together with compound interest[105]. It submitted that this was, within s 24AD(4)(a) of the *Wrongs Act*, an "other right to indemnity" that "would be enforceable apart from [Pt IV of the *Wrongs Act*]". On that basis, Perpetual submitted that the *Wrongs Act* preserved the beneficiary's "right to indemnity" from its defaulting trustee. So preserved, the duty of Minters (as trustee) to Perpetual (as beneficiary) ousted any entitlement that might otherwise arise for contribution as between Minters and Perpetual pursuant to s 23B of the *Wrongs Act*.

115 For its part, Minters argued that an "indemnity" comprised a promise. As such, s 24AD(4) was not concerned with the preservation of the rights of a beneficiary deriving from the law of trusts and not from any express or implied promise. It is true that indemnities commonly arise from promises of various

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103 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 201 [86], 228-232 [165]-[174]. See also *Maguire v Makaronis* (1997) 188 CLR 449 at 496.

104 *Breen v Williams* (1996) 186 CLR 71 at 113.

105 *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642 at 757.

kinds[106]. There are some indications in the language of s 24AD(4) that the sub-section was concerned with contractual indemnities, these being expressly referred to in pars (a) and (b). However, the use of the words "or other" to signify that other (non-contractual) rights to indemnity were included, suggests that the sub-section is not limited to express or implied promises. Statutory indemnities give rise to non-promissory obligations[107]. Such was the construction urged by Perpetual in the context of s 24AD(4). On that footing, Perpetual submitted that its entitlement to "indemnity" excluded any entitlement of Minters to contribution pursuant to s 23B(1) of the *Wrongs Act*.

116 *Contribution is not bound to fail*: I am not convinced that s 24AD(4) of the *Wrongs Act* has the effect claimed by Perpetual. It is not conventional to describe the rights of a trustee to follow trust money into the hands of another with notice of the trust as an "indemnity"[108] any more than to describe the beneficiary's entitlement against a defaulting trustee as one of "indemnity". The rights of beneficiaries in relation to trustees are usually described, by reference to equitable principles, in terms of restoration or restitution. Because of the nature of equity and the purposes and flexibility of its remedies, the more mechanical legal notion of "indemnity" fits somewhat uncomfortably with the enforcement of a trustee's obligations to beneficiaries. The elliptical phrase "or other right to indemnity" is not, therefore, facially apt to import the obligations owed by a trustee (Minters) to a beneficiary (Perpetual). It would follow that s 24AD(4) is not enlivened by this case. An earlier suggestion by Minters of a contractual indemnity was rejected. It has not been reagitated in this appeal.

117 Even if the foregoing conclusions were incorrect, it is important to note the limited operation of s 24AD(4), according to its terms. It does not "exclude" any entitlement to contribution. In that sense, the language of s 24AD(4) is to be contrasted with that of the former template[109]. All that s 24AD(4) provides is that nothing in Pt IV of the *Wrongs Act* affects any implied contractual or other right to indemnity. Upon this view, the suggested "indemnity" in the form of the trustee's obligation of restoration to the beneficiary remains. But arguably, it

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106 *Wren v Mahony* (1972) 126 CLR 212 at 225-226; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 595; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 254.

107 *McGrath v Fairfield Municipal Council* (1985) 156 CLR 672 at 679-680.

108 *Wynne v Tempest* [1897] 1 Ch 110 at 114 per Chitty J.

109 eg *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5(1)(c): "[N]o person shall be entitled to recover contribution under this section from any person entitled to be indemnified".

would still fall to be evaluated, in a case to which s 23B(1) of the *Wrongs Act* applies, by the very broad formula stated in s 24(2) of that Act[110].

118 The formula in s 24(2) of the *Wrongs Act*, being stated in legislation, is superimposed upon earlier equitable doctrine governing trustees' obligations to beneficiaries. That doctrine remains to be taken into account in identifying the damage shared between Minters and Perpetual and in coming to a conclusion of what is "just and equitable having regard to the extent of [Perpetual's] responsibility". Arguably, the "responsibility" in question is no longer simply that of a trustee to the beneficiary. It is the "responsibility" for the "damage" which has been suffered "by another person" (here, the plaintiff beneficiaries). In short, upon this view, the mind of the decision-maker is released from the former categories and rules of equity governing the duties of trustees to their beneficiaries. Instead, the decision-maker is invited, once the *Wrongs Act* is engaged, to stand back and make the broad judgment of "responsibility for the damage" which s 24(2) commands. Given the unsatisfactory history of contribution, that would not be an entirely surprising outcome.

Conclusions and orders

119 No one in this case has yet performed in a satisfactory fashion the function envisaged by the *Wrongs Act*, given the view that has been taken that contribution is unavailable both under that Act and by the rules governing equitable compensation. In this appeal Minters has, in my view, made good its complaint that the courts below failed to apply the provisions of the *Wrongs Act*, as the terms of that Act oblige. It is therefore necessary to return this aspect of the proceedings to the Supreme Court for the proper application of the widened language of the *Wrongs Act* to Minters' claim for contribution from Perpetual. Such application would permit a proper determination of Perpetual's two "preliminary" points that I have just mentioned. A consideration of those points at this stage does not suggest that Minters' claim under the Act is futile.

120 I agree in the orders proposed by Callinan J.

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110 cf *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 429-430 per McHugh J, concerning multiple causes in negligence claims.

121 CALLINAN J. The question which this appeal raises is whether the appellant solicitors who were held to have acted in breach of trust and the *Fair Trading Act* 1985 (Vic), and negligently, in relation to funds of which the respondent trustee companies were trustees, and who had themselves acted in breach of trust, were entitled to recover contribution from the latter pursuant to s 23B of the *Wrongs Act* 1958 (Vic).

The facts

122 In late 1997, 40 plaintiffs sued five defendants in the Supreme Court of New South Wales. The plaintiffs were the beneficial owners of funds which were held on their behalf by the respondents. Some of the plaintiffs were themselves trustees for others. Each plaintiff claimed an amount of money that he or she had lost by its being invested, together with other sums of money held on behalf of others, between 1993 and 1995, in preference shares in EC Consolidated Capital Limited ("ECCC"), a company which went into liquidation on 15 July 1997.

123 ECCC had invited members of the public to subscribe for redeemable "A" class preference shares in its capital. No smaller sum than $500,000 could be invested. The business of ECCC was the management of investments in the international money markets and in commodity contracts.

124 ECCC stated in its offer documents that its obligations to redeem were supported by the provision of a "Deposit Certificate" issued by a "Prime Bank", in this case, Dresdner Bank AG, or a wholly owned subsidiary of it. The Deposit Certificate was to be a bearer certificate of deposit, guarantee, or a letter of credit drawn against the Prime Bank and lodged with a "Paying Agent". The Paying Agent was to be National Registries Pty Limited ("National Registries"). The purpose of these arrangements was to secure the investors' capital investment.

125 The respondents ("the Perpetual Companies") were trustees of two managed superannuation funds that were directed by several of their beneficiaries to invest their funds in ECCC. The Perpetual Companies were the third and fourth defendants at first instance and are the respondents to the appeal in this Court.

126 The appellants acted as solicitors for ECCC. They drafted the agreements that set out the basis on which the funds would be released to ECCC. One such agreement was the "Subscription Agreement" which prescribed the obligations to which I have referred, to obtain Deposit Certificates.

127 The appellants also acted as agents for the Perpetual Companies on completion of each settlement. This dual relationship inevitably gave rise to the possibility of a conflict of interest. They held the subscriptions paid by investors in their trust account. The money was to be released to ECCC in accordance

with the Subscription Agreement only, that is, relevantly, when Deposit Certificates of the kind proposed in the offer documents became available.

128 The appellants neither received nor sighted Deposit Certificates, yet they released the funds to ECCC. ECCC's failure to provide a conforming Deposit Certificate was a breach by ECCC of the Subscription Agreement. The appellants did not notify the Perpetual Companies of this fact. To the contrary, they wrote to National Registries, the Paying Agent, after each settlement, enclosing a document that they misdescribed as a Deposit Certificate, for safe custody.

129 The lack of conforming Deposit Certificates led to the loss of the investors' funds because, on ECCC's insolvency, the investors had no recourse to the Prime Bank or otherwise.

Trial at first instance

130 All except two of the plaintiffs sought and received financial advice from Feldworth Financial Services Pty Limited ("Feldworth"). The advice was provided by the managing director of Feldworth, Mr Hans Felden. Feldworth and Mr Felden were the first and second defendants in the proceedings at first instance. Feldworth and Mr Felden did not defend the case brought against them, and the trial judge, Rolfe J, gave judgment against them. Thereafter their involvement in these proceedings ceased.

131 The plaintiffs succeeded against the Perpetual Companies also. Rolfe J concluded that they were guilty of gross dereliction of duty as trustees. In particular, his Honour held that the appointment of the appellants as their agent without regard to the latter's conflict of interest fell short of the standard of conduct to be expected of a reasonable and prudent trustee. His Honour found that the breach was compounded by the failure of the respondents to make any enquiries of the solicitors or National Registries whether the Deposit Certificates had been received.

132 The fifth defendant was Flexiplan Australia Limited ("Flexiplan") which in 1993 replaced one of the Perpetual Companies as the trustee of one of the superannuation funds. The plaintiffs alleged that Flexiplan had acted in breach of its duty as a trustee by failing to obtain written confirmation that the Deposit Certificates had been obtained and were being held by National Registries. Rolfe J was of the view that Flexiplan's position on becoming trustee was different from that of the Perpetual Companies. It was not involved in any transaction in which money was to be expended. That had already happened. The only asset of the trust was the block of ECCC shares that had already been acquired. In the result, his Honour held that the plaintiffs had not established any relevant breach of duty by Flexiplan. No issue was taken in relation to that

finding. Flexiplan was not a party to an appeal to the Court of Appeal, and is not a party to the appeal in this Court.

133 The plaintiffs did not join the appellants as defendants at first instance. The respondents, the Perpetual Companies, cross-claimed against them. Rolfe J found that the appellants had acted negligently, and were derelict in their duty as agent for the respondents. His Honour also found that the appellants had acted in breach of s 11 of the *Fair Trading Act* on the basis that they had wrongly conveyed the impression, in letters to the respondents, that conforming Deposit Certificates had been obtained.

134 At the trial the appellants had conceded liability for breach of trust and negligence, but had sought to escape liability by relying on an exemption clause contained in the Subscription Agreement.

135 Rolfe J concluded that the exemption clause was intended to relieve the solicitors from liability in carrying out their obligations under the Subscription Agreement only: the liability asserted against the appellants in this case did not arise under it. Rather, it arose in the context of their relationship of agency with the respondents. His Honour therefore gave judgment in favour of the respondents against the appellants.

136 The appellants had further submitted at the trial that even if they were guilty of any of the breaches alleged, no damage flowed from them because the chain of causation had been broken by the actions of the respondents in dealing with the Prime Bank. His Honour was nonetheless satisfied that it was the appellants' breaches that led to the failure to obtain conforming Deposit Certificates and that, but for the breaches, the loss would not have been sustained.

137 Rolfe J also held that in the circumstances contribution was not available. The plaintiffs were entitled to recover from the respondents, and the respondents were entitled to recover from the appellants: their respective liabilities arose from different breaches and there was no co-ordinate liability. If it were otherwise, and he was bound to apportion responsibility, he would, his Honour said, have attributed liability of 60% to the appellants and 40% to the respondents.

138 His Honour's disposition of the proceedings between the appellants and the respondents followed detailed argument by the parties which raised and developed the points which his Honour discussed. It should be kept in mind that the action was brought in the commercial division of the Court in which statements and arguments tend sometimes to take the place of detailed pleading, and in practice provide the basis for the joinder of issues. Although there were extensive pleadings here, it is plain that there were also departures from, and

additions to them in argument. I am satisfied that in all relevant and practical senses, the issues argued in the appeals were sufficiently raised at the trial.

Appeal to the New South Wales Court of Appeal

139 The appellants appealed to the Court of Appeal of New South Wales (Stein JA, Davies AJA and Ipp AJA). They contended that the primary judge erred in his construction of the exclusion clauses and that their effect, on their ordinary and natural meaning, was to relieve the solicitors of all liability to the Perpetual Companies. They also argued that his Honour had erred in rejecting the appellants' claim for contribution from the respondents. The first argument failed and needs no further consideration.

140 With respect to contribution, Stein JA reviewed a number of recent cases, including *Cockburn v GIO Finance Ltd (No 2)*[111], in which it was held that a common obligation giving rise to co-ordinate liability can only arise in cases in which the parties are liable to perform substantially the same obligation, and the liabilities are of the same nature and to the same extent:

> "The liability of [the appellants] to [the respondents] arose out of the breach by the solicitors of the trust arising under the Subscription Agreement and by reason of the appointment of the solicitors as [the Perpetual Companies'] agent on settlement, as well as for negligence in the performance of their trust obligations.
>
> These were different trusts and different breaches. They were simply not 'of the same nature and the same extent'. There was no common obligation owed to the beneficiaries. Indeed, the obligation of the solicitors was to [the Perpetual Companies] ... The transactions were related, however this is not sufficient. Something more is needed to enliven the right to contribution.
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> It cannot be said that the solicitors and [the Perpetual Companies] are liable to perform substantially the same obligation.
>
> Indeed, they are liable with respect to different obligations and the liability is not a common one. The solicitors had no liability which was capable of being co-ordinate with [the Perpetual Companies'] liability to [their] beneficiaries."

141 Davies AJA agreed generally with Stein JA. On the issue of contribution, his Honour noted that the claim was pursued under s 5 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) or s 23B of the *Wrongs Act*, each of

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111 (2001) 51 NSWLR 624.

which is relevantly to the same effect, and also, on the basis of an entitlement to contribution in equity. On any basis, his Honour held, although he did not deal in detail with those two Acts, the claim failed.

> "[The Perpetual Companies], on the one hand, and the solicitors, on the other, were not under co-ordinate liabilities in respect of the damages awarded. The damages which the solicitors were ordered to pay ... were awarded because they flowed from the solicitors' breach of their duty to those parties. One party who has been ordered to pay monies to another party, by way of compensation for breach of trust, may not rely upon principles of contribution to recover back some of the damages which it has been ordered to pay ...
>
> [The Perpetual Companies], on the one hand, and the solicitors, on the other, were not persons whose liability was 'of the same nature and the same extent'. These words were used by Lord Chelmsford in *Caledonian Railway Co v Colt*[112] and by Lord Ross in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*[113]. They were adopted by Gummow J in *Street v Retravision (NSW) Pty Ltd*[114] and by Mason P in *Cockburn v GIO Finance Ltd*[115]. Mason P said that this requirement 'emphasises the need for the two parties to be liable to perform substantially the same obligation'."

142 The Perpetual Companies subsequently moved the Court for orders to lead to a full and proper consideration of the appellants' submission founded on s 23B of the *Wrongs Act*. The Court indicated that it would provide supplementary reasons in response to written submissions in respect of that section.

143 Stein JA adhered to his opinion that the appellants were not entitled to an order for contribution, whether under the *Wrongs Act* or otherwise. His Honour concluded that on the proper construction of s 23B(1) and s 23A(1) of the *Wrongs Act*, the appellants could only recover contribution from any other person liable in respect of the same damage if the parties who suffered the damage (the plaintiff beneficiaries) were entitled to recover compensation from the appellants in respect of that damage. His Honour held that such a condition could not be satisfied in this case because the beneficiaries of a trust do not have a right of action for compensation against a third party who may have been in

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112 (1860) 3 Macq 833 at 844.

113 1987 SLT 345 at 347.

114 (1995) 56 FCR 588.

115 (2001) 51 NSWLR 624 at 632 [28].

breach of an obligation owed to the beneficiaries' trustee: because the appellants' liability was solely to the respondents who alone had a liability to the beneficiaries, the appellants were not entitled to contribution. The authorities upon which his Honour relied appear from the following passages in his judgment:

> "Section 23B(1) has to be understood in the light of the definitional provision in s 23A(1). The latter provision says that 'a person is liable in respect of any damage' (the same words as in s 23B(1)) 'if the person who suffered that damage ... is entitled to recover compensation from the first mentioned person in respect of that damage ...'.
>
> Substituting the parties to this litigation into the provision means that the appellant solicitors may recover contribution from any other person liable in respect of the same damage *if* the beneficiaries (who suffered the damage) are entitled to recover compensation from the appellants with respect of that damage.
>
> For s 23B to apply it is therefore essential that the beneficiaries are entitled to recover compensation from the appellants.
>
> This requirement cannot be here satisfied because, as a general proposition, beneficiaries of a trust do not have a right of action for compensation against a third party who wrongly breached an obligation owed to the trustee of the beneficiaries. See, for example, *Hayim v Citibank NA*[116]. ...
>
> There are some circumstances where beneficiaries may be entitled to join their trustee in proceedings against a third party, but the rationale is to enforce the trustee's rights as against the third party. It is only in an exceptional case, such as *BT Australia Ltd v Raine & Horne Pty Ltd*[117], where beneficiaries, on particular facts, have a direct right of action against a third party. Such a situation does not arise in the present case.
>
> In the instant case the appellants' liability was solely to the respondents and the respondents alone had a liability to the beneficiaries ..." (original emphasis)

144 Davies AJA reiterated his view that the respondents were under no liability to contribute under the *Wrongs Act* because there was no co-ordinate liability in respect of the damages awarded. The appellants were ordered to pay

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116 [1987] AC 730 at 748.

117 [1983] 3 NSWLR 221.

damages because of the breach of their duty to the respondents. This was a separate and distinct source of liability from that of the respondents which arose from the breach of their duty to the beneficiaries.

145 Davies AJA further held that in the circumstances it would not be just and equitable for an order for contribution to be made. His Honour referred to s 24(2) of the Act which provides that a court has the power to exempt any person from liability to make a contribution, and concluded that the Perpetual Companies were entitled in the circumstances to be fully indemnified by the solicitors.

146 Ipp AJA agreed with the supplementary reasons of both Stein JA and Davies AJA.

The appeal to this Court

147 The solicitors have appealed to this Court on only one ground, namely that:

> "The Court [of Appeal of New South Wales] erred in holding that the Appellants are not entitled to contribution against the Respondents pursuant to section 23B of the Wrongs Act 1958 (Victoria)."

148 It is necessary to set out the relevant parts of s 23A(1) and s 23B of the *Wrongs Act*:

> "**23A** ***Definitions***
>
> (1) For the purposes of this Part a person is liable in respect of any damage if the person who suffered that damage, or anyone representing the estate or dependants of that person, is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise.
>
> ...
>
> **23B** ***Entitlement to contribution***
>
> (1) 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).
>
> (2) A person shall be entitled to recover contribution by virtue of sub-section (1) notwithstanding that that person has ceased to be

liable in respect of the damage in question since the time when the damage occurred provided that that person was so liable immediately before that person made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person shall be liable to make contribution by virtue of sub-section (1) notwithstanding that that person has ceased to be liable in respect of the damage in question since the time when the damage occurred unless that person ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against that person in respect of the damage was based.

(4) Subject to section 24(2B), a person who in good faith has made or agreed to make any payment in settlement or compromise of a claim made against that person in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not the person who has made or agreed to make the payment is or ever was liable in respect of the damage provided that that person would have been liable assuming that the factual basis of the claim against that person could be established.

(5) Subject to section 24(2B), a judgment given in an action brought by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against that person in Victoria by or on behalf of the person who suffered the damage and it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a place outside Victoria."

149 The appellants contend that on three separate bases under the Act they are entitled to contribution from the respondents: first, that their conduct and that of the respondents, both being breaches of a fiduciary kind, caused the same damage to the same victims; secondly, that both are relevantly, that is co-ordinately, liable in respect of that damage; and, thirdly, that the appellants were in any event, in the unusual circumstances of this case, directly liable to the original plaintiffs, although they were only beneficially entitled to the relevant

funds, and therefore both the appellants and the respondents are liable in respect of the same damage.

150 Because of the view that I take of the third of the appellants' contentions it is unnecessary for me to deal with the other two of them.

151 The appellants' third contention is that, because they were, in the circumstances, directly liable to the plaintiff beneficiaries under s 11 of the *Fair Trading Act*, they were liable in respect of the same damage as the respondents.

152 The respondents argue that liability on this basis is entirely hypothetical: that, for example, it cannot be known whether the plaintiff beneficiaries would have obtained a judgment against the appellants for contravention of the *Fair Trading Act*. But that is precisely the decision which a court construing the *Wrongs Act* has to make, and, as here, sometimes in circumstances in which the plaintiffs have for their own good reasons been selective about whom they have sued, and upon which causes of action they have relied.

153 The respondents' argument does not therefore answer the appellants' contention. Section 23B(6) of the *Wrongs Act* refers to "liability which has been or *could* be established" in respect of a person. It accordingly becomes necessary to determine whether on the facts an action under the *Fair Trading Act* could have been successfully maintained.

154 Section 11(1) of the *Fair Trading Act* provided[118]:

> "A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Section 37(1) of that Act provided[119]:

> "A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part II may recover the amount of the loss or damage by proceeding against that other person or against any person involved in the contravention."

155 Rolfe J found that the appellants had engaged in misleading conduct with respect to the statements that they made to the respondents and which gave the

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118 The *Fair Trading Act* 1985 (Vic) was repealed on 1 September 1999. Section 11 of that Act has been re-enacted as s 9 of the *Fair Trading Act* 1999 (Vic).

119 The *Fair Trading Act* 1985 (Vic) was repealed on 1 September 1999. Section 37 has been substantially re-enacted as s 159 of the *Fair Trading Act* 1999 (Vic).

impression that settlement of particular purchases of shares in ECCC had taken place conformably with the Subscription Agreement. The further question therefore becomes whether the conduct that misled the respondents could also be taken to have caused the beneficiaries to have suffered loss, injury or damage. As will appear, in my opinion it did.

156 Reference should first be made to *Poignand v NZI Securities Australia Ltd*[120] in which Gummow J considered the operation of s 87(1A) of the *Trade Practices Act* 1974 (Cth) which has features in common with s 37 of the *Fair Trading Act* and which provides as follows:

> "(1A) Without limiting the generality of section 80, the Court may:
>
> (a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of [relevantly, s 52]; or
>
> ...
>
> make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:
>
> (c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or
>
> (d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person."

157 In that case, beneficiaries who had suffered or were likely to suffer loss or damage because of the conduct of a third party in dealing with the trustee of the relevant trust were themselves able to seek remedies against the third party under the *Trade Practices Act*. This was so because of the operation of s 87(1A) which allowed action to be taken by the beneficiaries even though the conduct which contravened the *Trade Practices Act* was directed to the trustee. In affirming that construction of s 87(1A), Gummow J said[121]:

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120 (1992) 37 FCR 363.

121 (1992) 37 FCR 363 at 372.

> "The result of the operation of the statute law is to confer standing upon the unit holders to act now against the respondents for contravention of the TP Act and to seek various remedies."

158 What his Honour said there, is, in my opinion, apposite here. Section 37(1) of the *Fair Trading Act* in its terms operated to confer standing upon the plaintiff beneficiaries to sue the appellants had they so wished. Had the plaintiff beneficiaries chosen to commence an action against the appellants for breach of the *Fair Trading Act*, they would not, in my view, have had to show that they themselves relied on the misleading or deceptive representations made by the appellants[122]. Rather, they would have needed only to show that the misleading or deceptive conduct of the appellants was a genuine causal factor in their loss.

159 In the present case it cannot be doubted that the plaintiff beneficiaries suffered loss. What was the loss? It was the money that they had provided to the respondents for investment on their behalf. That was what the plaintiffs sought to recover, and it was of no consequence to them who reimbursed them or how, legally, those involved might choose to characterize the plaintiffs' entitlement and those others' obligations. Was the loss of the plaintiffs' money caused by the appellants' misleading and deceptive conduct towards the respondents as well as the respondents' breaches of trust? In my view, the loss was similarly caused by the conduct that misled the respondents and induced them to act in the manner that they did. Had the appellants not misled the respondents as to whether the making of the investments was being done in conformity with the Subscription Agreement, it is likely that the respondents would not have continued to invest the beneficiaries' funds in ECCC and could and would have called for a return of money earlier invested, and at a time when ECCC would have been in a position to refund it. The fact that other money held on behalf of other persons may have also been invested and lost does not mean that other readily quantifiable losses and therefore damages could not be recovered by the plaintiff beneficiaries here, from the appellants.

160 If it be the case that a cause of the beneficiaries' loss was the appellants' breach of the *Fair Trading Act* also, as I think it was, the situation is this. First, the respondents are liable to the beneficiaries to the extent of the funds invested on their behalf in ECCC. Secondly, the appellants were also liable to the beneficiaries to the extent of the money invested in ECCC on their behalf. It follows that the respondents and the appellants are "liable in respect of the same damage", the loss of the beneficiaries' money, for the purposes of s 23B(1) of the *Wrongs Act*. It is not relevant that the beneficiaries did not in fact pursue an

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122 See *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526; *Pacific Coal Pty Ltd v Idemitsu Queensland Pty Ltd* (1992) ATPR (Digest) ¶46-094.

action against the appellants. This follows from the language of s 23B(6) of the Act.

161 For the first time, during oral argument in this Court, the respondents sought to rely upon the expiration of the period of limitation stated in s 37(2) of the *Fair Trading Act* which provided as follows:

> "A proceeding under sub-section (1) may be commenced at any time within three years after the date on which the cause of action accrued."

162 Even if the respondents were allowed to set up a previously unheralded limitations defence at this late stage, it would fail for the reason that the *Wrongs Act* is concerned not with whom a plaintiff has chosen to sue or not to sue, but whom it might have sued, at or by the time when the contribution proceedings were actually commenced. The appellants are therefore entitled to contribution from the respondents under the Act.

163 The general rule that beneficiaries may not sue on their own behalf in respect of damage caused by third parties to trustees unless the trustees refuse to sue, in which event they should also be joined as defendants in the beneficiaries' suit, has no relevant application in the circumstance that there is a separate statutory remedy which is not to be constrained, whether by a non-statutory rule, however well established, or otherwise. To that rule in any event there are exceptions and this, it seems to me, would be one of them. As Lord Templeman, in giving the advice of the Privy Council in *Hayim v Citibank NA*[123] said:

> "[The] authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustee in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate."

164 Such an exception is well justified. A beneficiary is entitled to be wary of the enthusiasm and performance in litigation of a trustee, even if the trustee has duly instigated it, in circumstances in which there is obviously much potential for a conflict of interest and the trustee's own conduct is seriously impugned. This provides good reason for an exception of the kind identified by the Privy Council. *Hayim* does not in my respectful opinion stand as an authority in support of the respondents' arguments. Indeed it assists the appellants. The other

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123 [1987] AC 730 at 748. See also the summary of Powell J of other cases which demonstrates that there is no absolute rule of preclusion of action by beneficiaries in *Ramage v Waclaw* (1988) 12 NSWLR 84 at 91-92.

case, *BT Australia Ltd v Raine & Horne Pty Ltd*[124], which Stein JA in the Court of Appeal thought relevant also assists them. It was a case of negligent misstatement. If a negligent misstatement may in principle, and I see no reason why it should not, be equated with any other form of negligent conduct or breach, by misrepresentation or deceptive conduct contrary to the *Fair Trading Act*, then relief in favour of the appellants should be available here. If the unit holders in *BT Australia* could sue the misrepresentor there, then there is no reason in principle why the plaintiff beneficiaries might not sue the appellants here, as misrepresentors under the *Fair Trading Act*.

165 It has been suggested that because some of the plaintiffs were themselves trustees, if the appellants were to succeed here, then by parity of reasoning the plaintiffs' beneficiaries also, and indeed any beneficiaries of beneficiaries, and so on, could also sue: that such a possible consequence provided reason to deny the appellants relief by way of contribution. This is, in a sense, a type of floodgates argument. I would reject it. The general principle stands, and any beneficiaries would, before they could sue, need to bring themselves within an exception to it, assuming that they could in all other respects show that they had a good cause of action.

166 It has also been suggested that in some way the appellants would be placed in an unjustifiable position of advantage if they were entitled to recover contribution, because of a circumstance of a fortuitous kind, the presence of beneficiaries under a trust having a right personally to sue the appellants, rather than being confined to their rights against the respondent trustees. I do not agree with the suggestion. 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*. Furthermore, and in any event, exposure to the possibility of multiple claims is hardly an advantage. The fact that the plaintiffs chose not to make them all is itself entirely fortuitous and has nothing to say about the meaning of the *Wrongs Act*. It is an Act intended to extinguish technical defences based on old equitable and common law rules which denied 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. Contrary to what Rolfe J said, the whole purpose of the Act is to focus on the damage, and not the breaches. The nature of the breaches is irrelevant. Whether there is liability depends upon the identification of the damage and not on the causes of action available or chosen to pursue it.

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124 [1983] 3 NSWLR 221.

The respondents' claim for indemnity

167 Kirby J in his judgment has dealt with the respondents' reliance on s 24AD(4) of the *Wrongs Act*. I agree with his Honour's reasoning and conclusions with respect to that reliance. I need add nothing about it.

168 The appeal should be allowed. The orders of the Court of Appeal should be set aside to the extent that they dismissed the appellants' claim for contribution. In place of those orders the appeal to that Court should be allowed to such extent, with costs. The proceedings should be remitted to the Commercial List of the Equity Division of the Supreme Court of New South Wales for determination of the amount of contribution which the appellants should recover under the *Wrongs Act*. The respondents should pay the appellants' costs of the appeal to this Court. It will be for the Supreme Court of New South Wales to decide the issue of costs in that Court.