HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND GORDON JJ

ROBERT WILLIAM FISCHER & ORS APPELLANTS

AND

NEMESKE PTY LTD & ORS RESPONDENTS

Fischer v Nemeske Pty Ltd
[2016] HCA 11
6 April 2016
S223/2015

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

N C Hutley SC with A B Edington and R A Yezerski for the appellants (instructed by S Moran & Co Solicitors)

Submitting appearance for the first respondent

C J Birch SC with B DeBuse for the second and third respondents (instructed by Curwoods Lawyers)

Submitting appearance for the fourth to twelfth respondents

CATCHWORDS

Fischer v Nemeske Pty Ltd

Trusts – Trustees' powers – Power of advancement – Where trust property included shares in a company – Where value of shares recorded in "asset revaluation reserve" – Where trustee made resolution to distribute entire asset revaluation reserve to specified beneficiaries – Where trustee covenanted to pay specified beneficiaries on demand – Whether valid exercise of power to "advance" and "apply" trust capital or income – Whether trustee indebted to specified beneficiaries – Whether action for money had and received maintainable.

Words and phrases – "advance", "apply", "pay", "pay or apply", "raise".

Trustee Act 1925 (NSW), s 44.
Trustee Act 1925 (UK), s 32.

FRENCH CJ AND BELL J.

Introduction

1 This appeal, from a decision of the Court of Appeal of New South Wales[1], primarily concerns the power of the trustee of a discretionary trust to advance and apply to two designated beneficiaries, by resolution and entry in the trust accounts, an amount of money representing the value of unrealised trust assets comprising shares in a company. Also in issue is the effect of a deed reciting the alleged indebtedness of the trustee to the designated beneficiaries in that amount and purporting to charge the shares in their favour. The detailed facts are set out in the judgments of Kiefel J and Gordon J[2].

2 The trust was the Nemes Family Trust ("the Trust"). Nemeske Pty Ltd was its trustee ("the Trustee"). The designated beneficiaries were Mr Emery Nemes and his wife, Madeleine. The shares were in a company, Aladdin Ltd ("Aladdin"). The value of the shares in September 1994 was recorded in an "Asset Revaluation Reserve" in the amount of $3,904,300, created as an entry in the accounts of the Trust. The entry did not describe an asset or a fund from which amounts could be withdrawn or paid. On 23 September 1994, the Trustee passed a resolution in the following terms:

> "RESOLVED that pusuant [sic] to the powers conferred on the Company as Trustee in the Deed of Settlement of the Nemes Family Trust:-
>
> That a final distribution be and is hereby made out of the asset revaluation reserve for the period ending 30th September, 1995 [sic] and that it be paid or credited to:- the beneficiaries in the following manner and order:
>
> The entire reserve if any, to be distributed to:-
> [Mr and Mrs Nemes]
> as joint tenants."[3]

3 The "Beneficiaries Accounts" prepared for the period ending 30 September 1994 showed the Asset Revaluation Reserve diminished by a "Capital Distribution" out of that reserve of $3,904,300. The balance sheet of the

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1 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6, on appeal from Stevenson J, *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203.

2 Reasons of Kiefel J at [35]-[47]; reasons of Gordon J at [116]-[145].

3 It is not in dispute that the reference to the year 1995 was a typographical error and should have been 1994.

Trust as at 30 September 1994 showed "non-current liabilities" comprising secured loans from "EG & M Nemes" amounting to $3,904,300, leaving a net asset position of $1,000 which was shown as being the original settlement sum[4]. The primary judge found that the loan account entry was created to give effect to the distribution by purporting to create an enforceable debt owed by the Trustee to the beneficiaries named in the resolution[5].

4 Mr and Mrs Nemes were named in the Deed of Settlement establishing the Trust as Specified Beneficiaries. So too were the appellants, who are siblings of the Fischer family ("the Fischers"). Their mother was a cousin of Mr Nemes. The Fischers did not benefit from the resolution of 23 September 1994.

5 The power relied upon by the Trustee to support the resolution appeared in cl 4(b) of the Deed of Settlement. That provision was relevantly in the following terms[6]:

> "The Trustee may from time to time exercise any one or more of the following powers that is to say:-
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> ...
>
> (b) At any time or times to advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay or to apply the same as the Trustee shall think fit for the maintenance education advancement in life or benefit of any of the Specified Beneficiaries ..."

6 This appeal was also concerned with the effect of a deed dated 30 August 1995 made between the Trustee and Mr and Mrs Nemes whereby the Trustee purported to charge the shares in Aladdin in their favour ("the Deed of Charge"). The Deed of Charge recited the indebtedness of the Trustee to them in the sum of $3,904,300 ("the principal monies"). By cl 5 of the Deed of Charge, the Trustee covenanted that it would pay the principal monies to Mr and Mrs Nemes on their demand. Clause 7 provided that the principal monies would become payable without demand or notice upon the happening of any one of thirteen events of

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4 The settlement sum in the Deed of Settlement was $200. The difference between the figures was not material in this appeal.

5 [2014] NSWSC 203 at [101].

6 A proviso requiring written notice to other beneficiaries of the Trustee's intention to advance and apply a sum greater than $10,000 is not reproduced, as it was not in issue in the appeal to this Court.

default. The charge was registered with the Australian Securities Commission on 20 March 1996.

7 Madeleine Nemes died on 9 November 2010 and Emery Nemes, who was the sole beneficiary under her will, died on 26 September 2011. He bequeathed all the shares in the Trustee and in Aladdin to the Fischers. The residuary estate was left to a number of other persons. Accounts for the financial years ending 30 June 2003 and 30 June 2007, which were before the primary judge, were to the same effect as the accounts of 1994.

8 The adverse effect on the Fischers' bequest of a debt of $3,904,300 owed by the Trustee to Mr Nemes' estate was apparent[7]. On 9 April 2013, solicitors acting for the Fischers sent a letter to the directors of the Trustee, Lorand and Karen Loblay[8], denying the debt. The Loblays, who were also the executors of Mr Nemes' will, suggested by their solicitors that the Fischers bring an action for a declaration as to the validity of the loan and the enforceability of the charge. In the event, the Fischers instituted proceedings against the Trustee, the Loblays and other beneficiaries of the Trust in the Equity Division of the Supreme Court of New South Wales on 11 June 2013. The resolution was found to be effective by the primary judge[9] and by the Court of Appeal[10] and the Deed of Charge was found, again by both the primary judge[11] and by the Court of Appeal[12], to have created a debt payable on demand. The Fischers appealed to this Court by special leave granted by French CJ and Bell J[13].

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7 The contest in the Supreme Court was between "Mr Nemes' estate ... and the persons who, as 'Specified Beneficiaries', stood to gain if there had been no effective exercise of the power in favour of Mr and Mrs Nemes": [2015] NSWCA 6 at [6].

8 Mr Loblay was an old friend of Mr Nemes. Karen Loblay was his daughter. Neither was a beneficiary under the Trust.

9 [2014] NSWSC 203 at [142].

10 [2015] NSWCA 6 at [64], [73]-[74].

11 [2014] NSWSC 203 at [173].

12 [2015] NSWCA 6 at [100].

13 [2015] HCATrans 262.

9 For the reasons that follow, the Court of Appeal was correct to find that the Trustee had validly exercised the power conferred on it by cl 4(b) of the Deed of Settlement. The appeal should be dismissed with costs.

The decision of the primary judge

10 The Fischers' statement of claim, so far as relevant to this appeal, included allegations that the purported distribution of the Asset Revaluation Reserve and the associated creation of the loan account in favour of Mr and Mrs Nemes were void and of no effect. The Fischers claimed declarations accordingly. The Loblays joined issue and contended that on entry into the Deed of Charge the Trustee and the Fischers were estopped from disputing the debt recited in it[14]. The Loblays filed a cross-claim against the Trustee and Mr Robert Fischer, the first appellant, alleging that the Trustee was indebted to them, as executors of Mr Nemes' estate, in the amount of $3,904,300.

11 The parties agreed at trial that all purported actions and transactions reflected by documents in evidence (even though some were unsigned) were to be accepted as genuine and effective according to their terms. The primary judge, who proceeded on that basis, relevantly found in favour of the executors that:

1. The resolution of 23 September 1994 should be construed as written in the Minutes with the last sentence to read[15]:

> "*An amount equal to* the entire reserve ... to be distributed to [Mr and Mrs Nemes] as joint tenants."[16]

That construction was not disturbed by the Court of Appeal nor challenged on appeal in this Court.

2. The Trustee had resolved to make an advance or distribution to Mr and Mrs Nemes pursuant to cl 4(b) of the Deed of Settlement of an amount equal to the recently created Asset Revaluation Reserve, namely

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14 The other defendants entered submitting appearances. They have taken no active role in the proceedings.

15 [2014] NSWSC 203 at [84].

16 The emphasised words were read into the minuted text.

$3,904,300, and gave effect to that resolution by crediting Mr and Mrs Nemes' loan account with the Trustee in the same amount[17].

3. In the result Mr and Mrs Nemes became creditors of the Trust rather than discretionary objects. As creditors they had the ability, at any time, to call on the Trustee to repay the debt; a result which conferred a "benefit" on them within the meaning of cl 4(b) of the Deed of Settlement[18].

The Court of Appeal

12 The judgment of the Court of Appeal, dismissing the appeal against the decision of the primary judge, was given by Barrett JA, with whom Beazley P and Ward JA agreed. His Honour's reasoning, so far as relevant to this appeal, involved the following steps:

1. Clause 4(b) of the Deed of Settlement conferred on the Trustee a single composite power "to earmark or assemble capital or income for use and to use it ... 'for the maintenance education advancement in life or benefit of' any of the specified beneficiaries". That power extended to the "unrealized but expressly recognized accretion in the value of the shares to the extent of $3,904,300" as it was part of the income or capital of the "Trust Funds" as defined in the Deed of Settlement[19].

2. The resolution of 23 September 1994 caused the Trustee's obligations with respect to the trust assets to change so that, to the extent of $3,904,300, the Trustee was required to recognise and accommodate an immediate and absolute vested interest of Mr and Mrs Nemes[20]. The Trustee on 23 September 1994 had thereby exercised its power under cl 4(b) to advance and apply capital or income of the Trust Funds to the extent of $3,904,300[21].

3. The powers and duties of the Trustee with respect to the sum so advanced and applied were those applicable to and consistent with holding the Trust

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17 [2014] NSWSC 203 at [101].

18 [2014] NSWSC 203 at [109]-[110].

19 [2015] NSWCA 6 at [53]-[54].

20 [2015] NSWCA 6 at [62].

21 [2015] NSWCA 6 at [64].

Funds upon trust to pay thereout $3,904,300 to Mr and Mrs Nemes in satisfaction of an absolute entitlement on their part[22].

4. In order for an action at law to be maintainable by the beneficiary against the trustee, something more was necessary than the unconditional and absolute equitable obligation upon the trustee to account to the beneficiary. It had to be found that the trustee had "stated an account" or "admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely"[23]. In this case, an action for money had and received was available against the Trustee by reason of the resolution and account entries.

5. There was no power under the Deed of Settlement or the *Trustee Act* 1925 (NSW) to subject the shares to the purported security under the Deed of Charge. The Trustee did, however, have the power to confirm by separate covenant, as it did in cl 5 of the Deed of Charge, that the debt created was payable on demand[24]. That finding was relevant to a limitation argument which was not pursued in this Court.

6. Due to the conclusion reached on the availability to the estate of a cause of action in debt, it was not necessary to deal with the estoppel arguments raised by the executors[25].

The issues

13 The issues raised in this appeal were:

1. Whether the "Capital Distribution" effected by the resolution of 23 September 1994 and the subsequent entry in the trust accounts was a valid and effective exercise of the Trustee's powers under cl 4(b) of the Deed of Settlement to advance and apply capital or income for the benefit of any of the Specified Beneficiaries.

2. Whether the resolution and the subsequent recording in the Trust's accounts of a loan of $3,904,300 would have entitled Mr and Mrs Nemes

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22 [2015] NSWCA 6 at [76].

23 [2015] NSWCA 6 at [83], citing *Bartlett v Dimond* (1845) 14 M & W 49 at 56 per Pollock CB [153 ER 385 at 387].

24 [2015] NSWCA 6 at [92], [100].

25 [2015] NSWCA 6 at [115].

to bring an action for money had and received against the Trustee for the amount of the loan.

3. Whether, in any event, the covenant contained in the Deed of Charge imposed a binding obligation on the Trustee to pay the amount of the advancement to Mr and Mrs Nemes.

4. Whether the Trustee is estopped by the Deed of Charge or by representation from denying the existence of the debt.

5. Whether the Trustee is entitled to an indemnity from the trust assets.

14 The Fischers conceded that there was no issue about the characterisation of the appreciation in value of the shares as capital or income. The Beneficiaries Accounts of 30 September 1994 referred to a "Capital Distribution". The power in cl 4(b) applied equally to "capital or income". For present purposes the purported exercise of the power may be taken as an exercise with respect to the capital of the Trust. There was no contention in this Court that the resolution was made other than bona fide or that if valid it did not confer a "benefit" on Mr and Mrs Nemes within the meaning of cl 4(b).

15 Having regard to the reasons that follow, issues 3, 4 and 5 above are not reached.

Trust and debt

16 It was submitted for the executors that the combination of the Trustee's resolution of 23 September 1994 and the entry in the accounts of the Trust for the period ending 30 September 1994 created an unconditional vested equitable interest and a debt enforceable at law owing by the Trustee to Mr and Mrs Nemes. It is a long established proposition that no action at common law for money had and received lies against a trustee in respect of its equitable obligations even if those obligations extend to the payment of money[26]. The same authorities which established that proposition also established the proposition that a trustee can end a trust with respect to capital or income in whole or in part and create a creditor/debtor relationship with a beneficiary. In *Edwards v Lowndes*, Lord Campbell CJ said[27]:

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26 *Bartlett v Dimond* (1845) 14 M & W 49 at 56 per Pollock CB [153 ER 385 at 387]; *Pardoe v Price* (1847) 16 M & W 451 at 458-459 per Rolfe B [153 ER 1266 at 1269]; *Edwards v Lowndes* (1852) 1 El & Bl 81 at 89 per Lord Campbell CJ [118 ER 367 at 370].

27 *Edwards v Lowndes* (1852) 1 El & Bl 81 at 89 [118 ER 367 at 370].

> "If ... the trustee, by appropriating a sum as payable to the cestui que trust, or otherwise, admits that he holds it to be paid to the cestui que trust, and for his use, the character of the relation between the parties is changed; and the trustee does not hold it as a trustee properly so called, but as a receiver for the plaintiff's use".

The general proposition was set out in the third edition of Bullen and Leake's *Precedents of Pleadings*[28]:

> "A *trustee* who has received trust-money is accountable for it to the *cestui que trust* in the Court of Chancery, but in the courts of law he is treated for most purposes as the absolute owner, and no action can in general be maintained by the *cestui que trust* against him to recover trust money. ... If, however, he admits to the *cestui que trust* that he holds such money as the money of the *cestui que trust* to be accounted for to the latter, he is debarred from setting up his character of trustee, and becomes liable at law to the *cestui que trust* for money received to his use."

17 The executors also relied upon the observation by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd*[29] that by the time *Edwards v Lowndes* was decided it was settled that only when nothing remained for the trustee to do except to pay over money to the beneficiary, or when the trustee had admitted the debt, that an action for money had and received might lie at the suit of the beneficiary against the trustee. Otherwise, at law, the trustee was treated as the absolute owner and the beneficiary's remedy was exclusively equitable, with the possibility that the court might give effect to equitable set offs and other equitable defences available to the trustee.

18 That being accepted, the question is whether in this case the power conferred on the Trustee by cl 4(b) of the Deed of Settlement empowered the Trustee to create a debt reflecting all or part of the value of the share capital at a particular time as a mechanism by which the capital could be said to be advanced and applied within the meaning of the provision.

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28 Bullen and Leake, *Precedents of Pleadings*, 3rd ed (1868) at 46-47.

29 (2001) 208 CLR 516 at 541 [67]; [2001] HCA 68.

The power to advance and apply

19 Statutory provisions in Australia[30] and New Zealand[31] conferring what has been called a "power of advancement"[32] on trustees have been modelled on s 32 of the *Trustee Act* 1925 (UK) ("the UK Act") which itself reflected common form provisions in books of conveyancing precedents[33]. The statutory provisions typically confer on a trustee a power to "pay or apply" income or capital for the "advancement or benefit" of any person entitled to the income or capital. Section 32(1) of the UK Act authorised trustees to "pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ..."[34]. Section 44(1) of the *Trustee Act* 1925 (NSW) ("the NSW Act") is expressed in similar terms. Clause 4(b) of the Deed of Settlement is broader in its language than those provisions and differs in its logical structure. Its construction may be informed, but is not to be determined, by generalisations about statutory powers of advancement and common form provisions.

20 Clause 4(b) uses "advance", "raise", "pay" and "apply" to denote the actions which it empowers the Trustee to take. It uses "maintenance", "education", "advancement in life" and "benefit" to describe the purposes and necessary effects of those actions. It makes a distinction between actions and purposes. Thus, "advance" and "advancement" are used in different senses. One is an action, the other is the purpose it serves defined by reference to its effect. The term "advancement" in common form clauses and statutory provisions conferring powers on trustees to "pay or apply" capital or income for the "advancement" of beneficiaries has been used in judicial exegesis and textbook

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30 *Trustee Act* 1925 (NSW), s 44; *Trustee Act* 1958 (Vic), s 38; *Trustee Act* 1936 (SA), s 33A; *Trusts Act* 1973 (Q), s 62; *Trustees Act* 1962 (WA), s 59; *Trustee Act* 1898 (Tas), s 29; *Trustee Act* (NT), s 24A; *Trustee Act* 1925 (ACT), s 44.

31 *Trustee Act* 1956 (NZ), s 41.

32 See eg Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at [32-001]-[32-046]; Ford and Lee, *The Law of Trusts*, 4th ed (2010, updated February 2014) at [12.12510]-[12.12630]; Hayton, Matthews and Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th ed (2010) at [63.1]-[63.10]; Thomas and Hudson, *The Law of Trusts*, 2nd ed (2010) at [14.29]-[14.55]; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at [2057]-[2068].

33 *In re Pilkington's Will Trusts* [1964] AC 612 at 634 per Viscount Radcliffe.

34 The provision was amended in 2014: see footnote 62.

commentary in a way that sometimes conflates actions taken by the trustee and their effect or purpose[35]. The term "advance", not appearing in the statutory provisions, has nevertheless been used as a synonym for "pay" or "apply"[36], which do appear in those provisions. The use of "advancement" to refer to the actions of a trustee in the exercise of powers conferred by common form and statutory provisions is of some assistance in understanding the application of the terms "advance" and "apply" in cl 4(b). However, the necessary starting point is the ordinary meaning of those words and the logical structure of the provision.

21 The relevant ordinary meaning of the word "advance" is to "[p]ay (money) before it is due"[37]. That may be generalised to the creation, in advance of any entitlement under the terms of the trust, of equitable and legal rights binding on the trustee and depending for their enforceability on the trustee's ability to resort to trust capital or income. As appears below, that extends, in this context, to the creation in favour of beneficiaries of a vested, absolute equitable interest, realisable by payment out to the beneficiaries or by an action for money had and received and, as in this case, supported by a covenant to pay the amount the subject of the resolution out of the trust capital in favour of the beneficiaries. The closest relevant meaning of "raise" is to "collect (rents, funds, etc); bring together, obtain, procure"[38]. "Apply" in this setting may be taken as meaning "[p]ut to use; employ; dispose of"[39]. Barrett JA's construction of cl 4(b) in essence applied those ordinary meanings and the sequential logic of the text, identifying "advance and pay", "advance and apply", "raise and pay" and "raise and apply" as alternative aspects of the power. His Honour proposed that the phrase "advance or raise" "contemplates immediate deployment of any portion of the capital or income that, in the absence of that action, would remain to be dealt with in the future in some other way"[40]. He also recognised that the purpose for which the power is to be used "is ... limited by the words 'for the maintenance

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35 See eg the discussion of "advancement" in Jacobs, *The Law of Trusts in New South Wales*, (1958) at 350-353, referring inter alia to *Re Aldridge; Abram v Aldridge* (1886) 55 LT 554 at 556 per Cotton LJ.

36 See eg *Molyneux v Fletcher* [1898] 1 QB 648; *In re Pauling's Settlement Trusts* [1964] Ch 303; *In re Clore's Settlement Trusts* [1966] 1 WLR 955; [1966] 2 All ER 272.

37 *The New Shorter Oxford English Dictionary*, (1993), vol 1 at 31, "advance".

38 *The New Shorter Oxford English Dictionary*, (1993), vol 2 at 2468, "raise".

39 *The New Shorter Oxford English Dictionary*, (1993), vol 1 at 100, "apply".

40 [2015] NSWCA 6 at [52].

education advancement in life or benefit of' any of the specified beneficiaries"[41]. It is perhaps of some importance to observe that no particular form of words is required nor any particular mechanism specified for the exercise of the power conferred by cl 4(b).

22 The purposive usage of the term "advancement", appearing in s 32 of the UK Act and like statutory and common form provisions, is broad. The collocation "advancement or benefit" in s 32 was described in the leading case in the House of Lords, *In re Pilkington's Will Trusts*, as designed to achieve a "wide construction of the range of the power, which ... did not stand upon niceties of distinction provided that the proposed application could fairly be regarded as for the benefit of the beneficiary who was the object of the power"[42]. The same may also be said of the collocation "advancement in life or benefit" in cl 4(b). Viscount Radcliffe, with whom the other Law Lords agreed, adverted to the distinction between authorised actions and their purposes. He spoke of the need to avoid confusion between the idea of advancing money out of a beneficiary's expectant interest and the "advancement" of the beneficiary. He said[43]:

> "The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession ... the other refers to the status of the beneficiary and the improvement of his situation."

The term "advance", which does not appear in s 32, seems to have been used in *Pilkington* as a synonym for the term "pay or apply", which does. Nevertheless, the distinction between "pay" or "apply" and "advancement" was emphasised by Viscount Radcliffe[44]:

> "The power to carry out the operation of anticipating an interest is not conferred by the word 'advancement' but by those other words of the section which expressly authorise the payment or application of capital money for the benefit of a person entitled 'whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion,'".

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41 [2015] NSWCA 6 at [53].

42 [1964] AC 612 at 634-635.

43 [1964] AC 612 at 635.

44 [1964] AC 612 at 635.

23 The express authority conferred by cl 4(b) in the Deed of Settlement to "advance" capital or income is not found in the Australian statutory powers derived from s 32. Neither is the word "raise". As discussed earlier they are used in cl 4(b) in a way that is logically anterior to the words "pay or apply". What is advanced or raised can then or later be paid or applied.

24 Authorities on the term "pay or apply" in common form and statutory provisions, used with caution, can also provide some guidance about the range of trustee actions authorised by cl 4(b). In *In re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara*[45], cited by Barrett JA, the trustees declared by resolution that a part of the income of the trust should "belong" in specified shares to infant beneficiaries whose interests were contingent or discretionary. The income the subject of the declaration was to be accumulated rather than paid over. The declaration was nevertheless held to be an exercise of the power to "pay or apply" the income for the benefit of those beneficiaries[46]. *Vestey* was applied by the Court of Appeal of New Zealand in *Commissioner of Inland Revenue v Ward*[47], another decision cited by Barrett JA in the present case. The New Zealand court, by majority, held that a declaration by a trustee that it held a stated amount of the trust income for each of four infant beneficiaries constituted an application of the income for the children, who became absolutely entitled to the sums allocated to them. North P, with whom McCarthy J generally agreed, held that the term "pay or apply" could embrace the retention and accumulation of income[48]. The constructional question arose in relation to a provision of taxation legislation directed to the case in which a trustee was empowered to "pay or apply income derived by him to or for the benefit of specified beneficiaries"[49]. That constructional conclusion applies a fortiori to the exercise of the threshold power to advance or apply under cl 4(b). It does not require an immediate transfer of the asset to the beneficiaries. The question is whether it requires a change in the ownership of the trust assets or extends to steps which create legal rights that do not have that effect but will ultimately lead to that outcome.

25 It is true that North P in *Ward* made a distinction between an advance of capital and an advance of income. In so doing he accepted a submission, not

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45 [1951] Ch 209.

46 [1951] Ch 209 at 220 per Evershed MR, Asquith and Jenkins LJJ agreeing.

47 [1970] NZLR 1.

48 [1970] NZLR 1 at 15, rejecting the more restrictive approach of Barrowclough CJ in *Montgomerie v Commissioner of Inland Revenue* [1965] NZLR 951.

49 *Land and Income Tax Act* 1954 (NZ), s 155.

essential to his reasoning, that it was of the very essence of the exercise of the power of advancement with respect to a capital sum that the capital sum so advanced ceased to form part of the trust property. In that respect he relied upon *Pilkington*, which involved a resettlement of part of the trust fund[50]. However, *Pilkington* and therefore *Ward* should not be taken as limiting the means by which an advance and application of capital can be effected pursuant to a specific provision such as cl 4(b). More particularly, they should not be taken as excluding from the ambit of the power of advancement the creation of a creditor/debtor relationship between trustee and beneficiary by the creation of a vested, absolute equitable interest in capital realisable by an action for money had and received or otherwise. Indeed, so much was recognised by the dissentient in *Ward*, Turner J, who held that an application could be achieved by the creation of a creditor/debtor relationship between the trustee and the specified beneficiaries[51].

26 In 2007 in the Court of Appeal of Western Australia in *Chianti Pty Ltd v Leume Pty Ltd*[52], Buss JA, with whom Martin CJ and Pullin JA agreed, referred to *Vestey* and *Ward* and concluded that distribution resolutions coupled with account entries constituted an admission by a trustee of an obligation to pay the money distributed on demand. The ultimate issue in that case was whether the beneficiary's claim was an action for money had and received and thereby a "personal action" within the jurisdiction of the District Court of Western Australia. The trust deed empowered the trustee to determine "to pay, apply or set aside the income to or for any one or more of the General Beneficiaries living or in existence at the time of the determination". The word "pay" was defined to include "transfer, convey and assign" and the word "set aside" to include "placing sums to the credit of the beneficiary in the books of account of the Trust"[53]. The word "apply" was not defined. Buss JA observed that on an assessment of the authorities it did not appear to be essential, for there to be a binding admission in relation to an amount owing by a trustee to a beneficiary, that the relevant amount was held as, or represented by, cash at bank or some other monetary sum when the alleged admission was made[54]. Barrett JA, in the present case, referred to *Vestey*, *Ward* and *Chianti* as authority for the proposition that a resolution deliberately arrived at and recorded can of itself be sufficient to effect an

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50 [1970] NZLR 1 at 16.

51 [1970] NZLR 1 at 20.

52 (2007) 35 WAR 488.

53 (2007) 35 WAR 488 at 495 [22].

54 (2007) 35 WAR 488 at 515 [77].

immediate vesting of a specific part of the trust income[55]. That general proposition may be accepted as also applicable to capital. The question is whether the resolution in this case, coupled with what appeared in the trust accounts, constituted the actions of advance and application contemplated by cl 4(b).

27 Plainly there are many ways of achieving an advancement for the benefit of beneficiaries. The range of options available in any particular case depends upon the scope of the power conferred by the trust deed or by statute. In *Pilkington*, the trustees proposed to apply up to half of an infant beneficiary's expectant share in the trust fund by making it subject to a new settlement of which they would also be the trustees[56]. The "advancement" involved appropriation of a block of shares under a new settlement with the same trustees and in favour of an infant beneficiary. That was not the only way of achieving that result.

28 In support of a submission that the exercise of an "advancement power" could only be effected by the removal of the property advanced from the original settlement altogether and its vesting in the object of the advance the Fischers relied upon the observations of Romilly MR in *Re Gosset's Settlement*[57]:

> "an advancement has a definite meaning, distinct from an appointment. It means that a certain portion of the fund is actually taken out of the settlement altogether, and paid over to the object of the power."

Lewin on Trusts was also quoted for its description of the general purpose of a power of advancement as[58]:

> "enabl[ing] trustees in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they release it from the trusts of the

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55 [2015] NSWCA 6 at [59]-[61].

56 [1964] AC 612 at 631. See also *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452 — a case in which an advancement was permitted under the power on the terms that the money was to be secured by settlement.

57 (1854) 19 Beav 529 at 535 [52 ER 456 at 458], quoted in *In re Fox; Wodehouse v Fox* [1904] 1 Ch 480 at 484-485.

58 Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at [32-001].

> settlement and accelerate the enjoyment of his interest". (footnote omitted)

There is, however, more than one way of advancing and applying trust property to a beneficiary.

29 In *Pilkington* no actual transfer of the shares the subject of the advancement was proposed because of the identity of the trustees of the settlement and of the will. Viscount Radcliffe attached no importance to those factors, observing[59]:

> "To transfer or appropriate outright is only to do by short cut what could be done in a more roundabout way by selling the shares to a consenting party, paying the money over to the new settlement with appropriate instructions and arranging for it to be used in buying back the shares as the trust investment."

That observation reflects a general approach, relied upon by the executors, which does not require a trustee to go through circuitous formalities in the exercise of the power. By way of example, *In re Collard's Will Trusts*[60] concerned trustees who would have been empowered by s 32 of the UK Act to advance £20,000 in cash to an expectant contingent beneficiary to enable him to purchase a farm which was part of the trust estate. The court held that the trustee could convey the farm directly to the beneficiary on the principle that "the court will not insist on circuity of action if the same result can be achieved by direct action which legitimately could be achieved by more circuitous action"[61]. In that case a purpose of the conveyance was the avoidance of estate duty on the farm[62].

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59 [1964] AC 612 at 639.

60 [1961] Ch 293.

61 [1961] Ch 293 at 300 per Buckley J.

62 Section 32(1) of the UK Act was amended by s 9(2) of the *Inheritance and Trustees' Powers Act* 2014 (UK) to insert the italicised words below:

> "Trustees may at any time or times pay or apply any capital money subject to a trust, *or transfer or apply any other property forming part of the capital of the trust property*, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ..."

(Footnote continues on next page)

30 On the face of it the creation of a debt to be satisfied out of the property of the Trust was a means of effecting an advance and application of the capital of the Trust. The provision of a covenant to pay the debt supported the advance and application thus made.

31 The Fischers, relying upon the proposition that it was necessary to effect an immediate removal of the property advanced from the original settlement and its vesting in the object of the advance, made the point that the Trustee in this case did not purport to confer any absolute beneficial interest on Mr and Mrs Nemes in any property held in the Trust. On that basis they distinguished each of *Vestey*, *Ward* and *Chianti.* They pointed to a finding by Barrett JA that the resolution of 23 September 1994 "did not result in any cash payment or change in ownership of specific property"[63]. It may be accepted that each of *Vestey*, *Ward* and *Chianti* involved resettlements of actual property held on trust and that, as the Fischers contended, none was authority for the proposition that a power to "apply" trust capital could be exercised without altering the beneficial ownership of the property the subject of the advancement. As already observed, those cases are not authorities for the proposition that the mechanisms by which an advance and application can be achieved are limited to an immediate resettlement of trust property. Moreover the Fischers were relying upon general descriptions of the operation and purpose of generically designated "powers of advancement". As observed earlier, they may properly inform, but not necessarily determine, the construction of the particular power set out in cl 4(b).

The effect of the resolution and the account entries

32 It was not in dispute that the resolution of 23 September 1994 was badly worded. It seems likely that it was framed by reference to declarations of dividends payable by companies, which create debts due to their shareholders[64]. There was no fund represented by the Asset Revaluation Reserve from which to make a distribution to give effect to the resolution. The text of the resolution, however, disclosed a clear intention, indicated by the use of a form of words

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The explanatory note to that legislation states that the amendment "clarifies and extends the effect of existing case law", citing *In re Collard's Will Trusts*. The amendment was thus designed to enshrine in statute the avoidance of unnecessary circuitous action.

63 [2015] NSWCA 6 at [62].

64 *South Brisbane Gas and Light Co Ltd v Hughes* (1917) 23 CLR 396 at 405 per Barton J; [1917] HCA 37; *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 578 per Mason J; [1977] HCA 59; *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 at 609 [20]; [2007] HCA 54.

appropriate to the declaration of a dividend, to create a debt due by the Trustee to Mr and Mrs Nemes to the extent of the amount shown in the accounts of the Trust relating to the Asset Revaluation Reserve. The entry in the accounts was an action by the Trustee which further demonstrated and gave effect to its intention. In so doing, the Trustee adopted a mechanism which, without altering the ownership of the Aladdin shares, provided a basis for the application of the trust capital to Mr and Mrs Nemes by sale of the shares to meet the debt. The resolution and the entry in the accounts by creating a creditor/debtor relationship constituted an advance and application within the meaning of cl 4(b). The interest thus conferred on Mr and Mrs Nemes could be realised by the sale of the shares and remittance of the proceeds or by direct transfer of the shares to them. We agree with Gageler J that the power conferred by cl 4(b) should be read in light of the ancillary powers conferred by cl 4(e), cl 4(f) and cl 8 of the Deed of Settlement, and with his Honour's observations in respect of those ancillary provisions. Either course was permitted by the ancillary powers read in conjunction with cl 4(b). What is clear is that at the times of the resolution, account entries and covenant, the debt could only have been satisfied out of the assets of the Trust comprising the shares. The Trustee, of course, took the risk that the value of the shares might fall below the amount of the debt acknowledged in its accounts. Given that it was created as a trust company and that its only asset of any substantial value was the shares, it was hardly a risk of any significance.

33 We should add that we agree with Gageler J's rejection of the Fischers' argument that a trustee's liability to an action at law for money had and received can only arise where the trustee holds the relevant assets on a bare trust.

Conclusion

34 For the preceding reasons the Court of Appeal was correct to conclude that the Trustee had advanced and applied capital of the Trust Funds to Mr and Mrs Nemes by creating a debt reflecting the value of the shares comprising that capital at the time that the advance was made. That advance and application was complete by 30 September 1994 when the relevant entries were made in the books of account of the Trust, and was supported by the covenant in the Deed of Charge. On any view, a creditor/debtor relationship existed between the Trustee and Mr and Mrs Nemes. The appeal should be dismissed with costs.

35 KIEFEL J. Mr Emery Nemes and Mrs Madeleine Nemes were two of a number of "Specified Beneficiaries" in the Nemes Family Trust ("the Trust"), a discretionary trust which had been settled by a deed ("the Trust Deed") in 1974. The current trustee of the Trust (who was also the trustee at all relevant times) is the first respondent, Nemeske Pty Ltd ("the Trustee"). The "Trust Funds" of the Trust comprise the settlement sum and "all other assets from time to time held by the Trustee hereunder". At all relevant times the only assets of the Trust, apart from the settlement monies, were 10 B class shares in Aladdin Ltd ("the Shares"), a company which held investments in shares in other companies.

36 On 23 September 1994, a meeting of the directors of the Trustee resolved:

> "that pursuant to the powers conferred on the Company as Trustee in the Deed of Settlement of the Nemes Family Trust:-
>
> That a final distribution be and is hereby made out of the asset revaluation reserve for the period ending 30th September [1994] and that it be paid or credited to:- the beneficiaries in the following manner and order:
>
> The entire reserve if any, to be distributed to:-
> Emery George Nemes & Madeleine Nemes
> as joint tenants."

("the Resolution")

37 The "asset revaluation reserve" referred to in the Resolution appears in the Beneficiaries Accounts for the period ended 30 September 1994 as follows:

	BENEFICIARIES ACCOUNTS	
	SETTLEMENT SUM	
1,000	Opening Balance	1,000.00
	ASSET REVALUATION RESERVE	
-	Assets Revalued	3,904,300.00
-	Capital Distribution	3,904,300.00
-		-
1,000	TOTAL TRUST FUNDS	1,000.00

38 The reference to an "asset revaluation reserve" was not to a fund of monies nor to property which had been set aside, as the ordinary meaning of the word "reserve" implies. It was merely the accounting treatment given to an unrealised accretion in the value of the Shares. No monies apart from the settlement sum were ever held by the Trust and no monies were in fact paid to Mr and Mrs Nemes. The only substantial assets of the Trust, the Shares, remained under the ownership of the Trust and were not dealt with or allocated in any way which would detract from the Trust's title in them.

39 The Balance Sheet as at 30 September 1994 listed the assets and liabilities of the Trust as:

	BENEFICIARIES FUNDS	
1,000	Settlement Sum	1,000.00
	REPRESENTED BY	
	INVESTMENTS	
	Shares in Public Companies at Cost	
1,000	Aladdin Ltd 10 "B" Class Shares of $1 Fully Paid	3,905,300.00
	NON-CURRENT LIABILITIES	
	Loans – Secured	
-	EG & M Nemes	3,904,300.00
1,000	NET ASSETS	1,000.00

40 The reference to a loan from Mr and Mrs Nemes being secured at this time was erroneous and is the result of the accounts having been prepared in 1995, after a charge had been taken over the Shares.

41 Some explanation is given for the book entries in a letter written by Mr Elliott, the accountant for the Trustee, to Mr and Mrs Nemes' solicitors on 26 April 1995, providing information which had been requested of him:

> "• Most of the assets of Mr and Mrs Nemes are owned by companies the asset shares of which are owned by Aladdin Limited, a Norfolk Island company, the shares of which are owned by [the Trust].
>
> ...
>
> • The assets in the whole group of companies has been revalued as at 1st July, 1994, this has led to an asset revaluation reserve being created in [the Trust] ...
>
> • [The Trustee] held a meeting at which it was resolved to distribute the asset revaluation reserve to Mr and Mrs Nemes jointly …
>
> • The above distribution was made by way of crediting the loan account of Mr and Mrs Nemes in [the Trust].
>
> Mr and Mrs Nemes would like to secure their loan to [the Trust], and ... require your assistance, as follows:-
>
> • Make a debenture over the shares in Aladdin Limited which [the Trust] owns as security for the loan by Mr and Mrs Nemes …

> The purpose of these transactions is for Mr and Mrs Nemes to secure control of their assets or estate."

42 On 30 August 1995, the Trustee and Mr and Mrs Nemes entered into a deed whereby the Trustee charged the Shares in favour of Mr and Mrs Nemes ("the Charge"). The Charge recited:

> "D. [The Trustee] is indebted to [Mr and Mrs Nemes] as joint tenants in the sum of [$3,904,300] (the principal monies).
>
> E. For the purpose of securing repayment of the principal moneys [sic] [the Trustee] has agreed with [Mr and Mrs Nemes] to execute this Deed of Charge pursuant to which [the Trustee] charges [the Shares] as hereinafter set forth in favour of [Mr and Mrs Nemes] as joint tenants."

43 By cl 5 of the Charge, the Trustee covenanted with Mr and Mrs Nemes that the Trustee would pay them the principal monies on demand. As mentioned above, Mr and Mrs Nemes did not receive the monies from the Trust and there is no suggestion that they paid any monies to it. Mrs Nemes died in 2010 and Mr Nemes in 2011. At no time prior to Mr Nemes' death was repayment of the "loan" required by either of them.

44 The most recent accounts of the Trust, prepared for the year ended 30 June 2012, continue to refer to the whole of the assets of the Trust as the Shares, having a value of $3,905,300. The accounts continue to refer to there being a non-current loan from Mr and Mrs Nemes of $3,904,300. At no time have the accounts shown the capital or assets of the Trust as reduced, or otherwise affected, by any interest of Mr and Mrs Nemes.

45 Mr Nemes had been the sole shareholder in the Trustee. Pursuant to his will, the appellants were to become the shareholders of the Trustee. Because of their interest in the Trust as beneficiaries, the appellants were permitted to bring proceedings on behalf of the Trustee in the Supreme Court of New South Wales.

46 In these proceedings at first instance, the appellants sought declarations that the Trustee was not indebted to Mr Nemes' estate in the sum of $3,904,300. The executors of his estate, the second and third respondents to this appeal ("the executors"), cross-claimed for that sum as a debt. The appellants' claim was dismissed at first instance by Stevenson J and judgment was given on the executors' cross-claim[65]. The Court of Appeal of the Supreme Court of New

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65 *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203.

South Wales (Beazley P, Barrett and Ward JJA) dismissed the appeal[66] from that decision.

47 Barrett JA, with whom the other members of the Court agreed, concluded[67] that, by the Resolution, the Trustee advanced and applied capital or income of the Trust to the extent of $3,904,300 by the due exercise of the power conferred by cl 4(b) of the Trust Deed.

The Resolution and cl 4(b) of the Trust Deed

48 The primary question in this appeal is whether the Resolution was an exercise of the power of advancement provided by cl 4(b) of the Trust Deed, which is in the following terms:

> "4. The Trustee may from time to time exercise any one or more of the following powers that is to say:-
>
> ...
>
> (b) At any time or times to advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay or to apply the same as the Trustee shall think fit for the maintenance education advancement in life or benefit of any of the Specified Beneficiaries".

49 A power of advancement enables trustees to provide some permanent benefit or advantage in life to the beneficiary in question[68]. Its general purpose is "to enable [trustees] in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit"[69]. Property of a trust may also be "applied" under the power of advancement. An application of monies or property is not to be equated with a payment or distribution to the beneficiary. Monies or property may be applied by allocating

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66 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6.

67 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [64].

68 Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at 1458 [32-002].

69 *Pilkington v Inland Revenue Commissioners* [1964] AC 612 at 633. See also Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at 1458 [32-001].

them in some way so that they are removed from the trust. A payment or distribution may therefore be postponed through the exercise of this power.

50 The question whether the power given by cl 4(b) was exercised is a question which requires investigation of the intention of the Trustee[70], which can be gleaned from the terms of the Resolution and the circumstances in which it was made. Regard may also be had to how the Trust property was dealt with following the Resolution, as evidence of what was intended to occur.

51 Where it is said that a trustee has exercised a particular power given by the trust instrument over particular property, it may be expected that the relevant power and property will be identified in some way. Whilst identifying statements of this kind, made in a resolution or other declaration of a trustee, are not conclusive of the question of intention, they provide some evidence of what the trustee was undertaking.

52 The Resolution does not identify cl 4(b) as the source of the power which is sought to be exercised by making it. It does not identify the purpose of the power purporting to be exercised as one for the "advancement in life or benefit" of Mr and Mrs Nemes, which could be the only purpose in cl 4(b) relevant to them as adult Specified Beneficiaries. Indeed, the Resolution does not mention the purpose of what is sought to be undertaken save that a "final distribution" is to be made.

53 The Resolution does not say that this "distribution" is to be made out of the capital or income of the Trust, but rather out of the "asset revaluation reserve". This does not identify any property of the Trust as the subject of the exercise of any power. As previously explained, the "asset revaluation reserve" does not represent any asset of the Trust as such, but merely the accounting treatment of the increase in value of the Shares at the time a new revaluation was undertaken.

54 The Resolution does not speak of doing those acts to which cl 4(b) refers. It does not speak of "raising" part of a fund, in order to pay Mr and Mrs Nemes or to take investments out of the fund[71]. It does not refer to an "advance" of cash or property directly to Mr and Mrs Nemes[72]. It does not mention advancing or

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70 See Thomas, *Thomas on Powers*, 2nd ed (2012) at 357-358 [7.132], especially n 537.

71 See Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at 1475 [32-040].

72 Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at 1475 [32-041].

raising from the capital or income of the Trust fund in order "to pay or to apply" the same to Mr and Mrs Nemes, nor would it make sense to do so when the subject of the purported exercise of the power is not itself property. The concession made in argument by the appellants that the directors of the Trustee intended to exercise the power in cl 4(b) when making the Resolution cannot change the fact that this does not appear from the objective circumstances.

55 The lack of intention of the Trustee to exercise the power given by cl 4(b) is further evidenced by what was done following the Resolution.

Was any Trust capital or income "applied"?

56 Given no monies were ever paid to Mr and Mrs Nemes, the only power given by cl 4(b) that could be relevant is the power to "apply" capital or income.

57 The "distribution", so called in the Resolution, is said to be "paid or credited to" Mr and Mrs Nemes. Nothing is said to be applied for their benefit, which would have been expected had it been intended that property was to be set aside for or allocated to them. In the entries in the accounts of the Trust a notional distribution of the "asset revaluation reserve" is made to Mr and Mrs Nemes and a loan is then notionally made by them to the Trust in order to create the appearance of a debt.

58 Neither the terms of the Resolution nor the entries in the accounts reflect an application under a power of advancement of the property in the Shares representing the capital of the Trust. An important feature of the accounts of the Trust is that at all times the Shares remained intact and subject to the terms of the settlement. The assets were never, in whole or in part, set aside or allocated in any way to suggest that they were "applied" or were to be applied at any time in the future, as a postponed distribution.

59 Barrett JA[73] accepted that there had been no cash payment made to Mr and Mrs Nemes nor any change in ownership of any specific property in the Trust. Nevertheless, his Honour considered that the words "distributed to" in the Resolution caused capital or income to be "applied" for their benefit and that those words effected a "setting aside or appropriation". Whilst this did not result in any change in the ownership of the Trust property, in his Honour's view the words "be distributed to" caused the Trustee's obligations with respect to that property to change, requiring the Trustee to accommodate "an immediate and absolute vested interest" of Mr and Mrs Nemes.

60 In reaching this conclusion, his Honour considered that the words "be distributed to" carried the same connotation as the words "shall belong to", which

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73 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [62].

were considered in *In re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara*[74]. In that case, trustees were directed to "pay or apply" the income of the trust fund for the support or benefit of a named class of persons, in such manner and in such terms as the trustees thought proper. The infant beneficiaries had a contingent reversionary interest in the corpus of the trust. By a resolution stated to have been made under that power, the trustees resolved that, after some payments to the adult beneficiaries, the balance of the income should be made available for immediate distribution and "shall belong" in specified shares to the infant beneficiaries. They proceeded to allocate shares out of the trust fund accordingly, but they then resolved that, as the income was not required for the maintenance of the infants, it should be accumulated.

61 The English Court of Appeal held that the resolution for accumulation should be disregarded. The trustees had exercised the power to apply the monies for the benefit of the infant beneficiaries. The appropriated sums had become part of their estates[75].

62 There were present in *Vestey's Settlement* factors supporting a conclusion that the power for support or benefit had been exercised which are not present in this case, considering the terms of the Resolution and the conduct which followed it. It will be observed that in *Vestey's Settlement* the power being exercised was identified, as was the property the subject of its exercise. The words used in the resolution conveyed an intention on the part of the trustees to apply part of the income for the benefit of the infant beneficiaries. The trustees acted in accordance with their declaration and proceeded to allocate the shares in the accounts of the trust.

63 The question here is not whether "be distributed to" bears the same meaning as "shall belong to", but whether or not the words "be distributed to", in the context in which they are used, are sufficient to show that some allocation[76] of Trust property out of the Trust was intended. It is only in that situation that it may be concluded that capital or income has been "applied".

64 It may be accepted, as Barrett JA pointed out, that an effective exercise of cl 4(b) does not depend upon there being cash in the Trustee's hands in order that

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74 [1951] Ch 209.

75 *In re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara* [1951] Ch 209 at 219-220.

76 Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at 1475 [32-040], referring to *In re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara* [1951] Ch 209.

a payment can be made[77]. However, for a conclusion that capital was applied, there should be a corresponding reduction in the capital of the Trust.

65 *Vestey's Settlement* was referred to with approval by the New Zealand Court of Appeal in *Commissioner of Inland Revenue v Ward*[78].

66 In *Ward*, a trustee made a declaration that she held stated amounts of trust income for that year for each of the infant beneficiaries. The question was whether the trustee should be assessed for tax with respect to that income and it was held that she should not, as the beneficiaries had become absolutely entitled to the monies on the making of the declaration.

67 North P found that the trustee's declaration was carried into effect in the books of account of the trust[79], although the amounts were not actually paid to the infant beneficiaries until some years later. It was nevertheless argued[80] that the monies which had been credited to the beneficiaries continued to be intermingled with capital funds of the trust and that for them to be "applied" required the positive step of providing the income to the beneficiaries then and there. It was not sufficient to make the declaration and credit the income in the books of the trust.

68 North P did not accept the argument and held[81], by reference to *Vestey's Settlement*, that it was sufficient that there was an allocation of the income in terms which made it the property of each infant. The declaration had the effect of immediately vesting a specific portion of the income in the infant beneficiaries[82].

69 In the Court of Appeal in this case, Barrett JA[83] took the decision in *Ward* to be that "a resolution deliberately arrived at and recorded is of itself sufficient

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77 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [55].

78 [1970] NZLR 1.

79 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 7.

80 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 8-9.

81 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 15.

82 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 17.

83 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [61].

to effect an immediate vesting of a specific part of the trust income"[84]. This appears to be a reference to the similar statement by McCarthy J in *Ward*[85].

70 Barrett JA cited the passage in *Ward* referred to above where North P said[86] that he took *Vestey's Settlement* to stand for the proposition that if a trustee exercises the power to "pay or apply" income, it is immaterial whether income is immediately used for the benefit of the infants. North P went on to say that it "is sufficient if it is allocated to them in terms which makes the parts of the income so allocated the separate property of each infant". In this case, it is not possible to say that it was intended that Mr and Mrs Nemes were to become absolutely entitled to any property of the Trust.

71 Again, as in *Vestey's Settlement* and unlike this case, in *Ward* there had been a clear identification of the power which was being exercised and the property which was set aside for the infants. The intention of the trustee was clear. The fact that the beneficiaries did not receive the monies for some years did not detract from a conclusion that the trustee had applied the income for the benefit of the infant beneficiaries.

No new trust

72 When the trustee in *Ward* made the declaration and recorded the application of the funds in the accounts of the trust, the monies were effectively taken from the existing trust and the trustee thereafter held them on a new trust for the infant beneficiaries. McCarthy J in *Ward*, who agreed with North P, made an observation to this effect[87], and noted that this was hardly an unusual occurrence in the administration of trusts.

73 The position which obtained in *Vestey's Settlement* after the exercise of the power of advancement may be viewed in the same way. When the trustees retained the monies, the monies were impressed with a new trust in favour of the infant beneficiaries. The point to be made is that the monies were no longer part of the original trust to be dealt with according to its terms.

74 Such a circumstance may be contrasted with that which prevailed in this case. There is no suggestion that the Trustee held the sum of $3,904,300 on trust

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84 Adopting what had been said in *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488 at 511 [72] per Buss JA.

85 [1970] NZLR 1 at 29.

86 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 15.

87 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 30.

for Mr and Mrs Nemes. It was common ground that there was no resettlement following the Resolution.

Was the application out of "capital or income"?

75 It will be recalled that cl 4(b) requires that any application must be made out of "the capital or income of the Trust". The answer to the question as to what the property was which Barrett JA considered vested in Mr and Mrs Nemes as a result of the Resolution is the asset revaluation reserve. The primary judge had dealt with the problem that the Resolution did not refer to property as such by reading the Resolution as if it contained the words "an amount equal to" that reserve[88]. The difficulty with that approach is that is not the language used by the Trustee. Moreover, it is not possible to infer that those words were intended from any subsequent act of payment or allocation.

76 In comparison, in the Court of Appeal Barrett JA reasoned[89] that the accretion in value represented by the asset revaluation reserve was part of either the income or capital of the Trust. It may be observed that the references in the Resolution to the asset revaluation reserve do not appear to be to only part of the amount of any increase in value since the last valuation, but rather to substantially the total current value of the trust assets (that total value being the increase in value of the Shares, plus $1,000 which is recorded as being the settlement sum). This is confirmed by references to the "entire reserve" and "final distribution" in the Resolution. In any event, the fact is that the asset revaluation reserve did not represent the capital or income of the Trust. It was merely a record of substantially the total value of the Shares.

77 Were it possible to take the reference in the Resolution to the "asset revaluation reserve" as a reference to capital or income of the Trust, more particularly capital, the difficulty in the way of finding that it was intended that $3,904,300 be applied out of capital is that the Trustee did not ever take steps to put that into effect. The accounts reveal that the Trust continued to hold all of its assets subject to the trust settlement.

The effect of the Resolution

78 The most that can be said about the Resolution is that it sought to create the appearance of a distribution of something out of the Trust, but that something was not property. The Trustee cannot be taken by the Resolution to have intended to set aside, allocate or otherwise "apply" Trust property. Rather, it was intended at all times that the whole of the property of the Trust continue to be

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88 *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 at [84]-[85].

89 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [62].

owned by it. This is borne out by the accountant's letter of 26 April 1995, the Charge and entries in the accounts of the Trust concerning trust assets.

79 In argument on this appeal, the executors embraced the possibility that there was something of a "round robin" transaction in the book entries which were made following the Resolution. This was explained in various ways, but essentially came down to characterising the transaction as the Trustee making an advance of monies to Mr and Mrs Nemes and Mr and Mrs Nemes lending it back. However, this is not an exercise of the power of advancement in cl 4(b). Nor was any other provision of the Trust Deed identified as providing a power to make transactions of this kind, one by which the Trust property was charged with a notional debt in favour of Mr and Mrs Nemes, who, after all, were only two of a number of Specified Beneficiaries.

Money had and received?

80 Barrett JA also found[90] that the Trustee, by book entries made in consequence of the Resolution, admitted and acknowledged itself to be indebted to Mr and Mrs Nemes in the sum of $3,904,300; that an action for money had and received was accordingly maintainable; and that there was therefore a pre-existing debt, as the Charge recited. His Honour clearly considered that such an admission by a trustee was itself sufficient to found an action for money had and received and, inferentially, that this might be so regardless of whether the monies were in fact owed.

81 His Honour had earlier referred in this regard to what had been said by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd*[91]. Gummow J discussed the circumstances in which a beneficiary could bring an action for money had and received against the trustee of the trust for monies to which the beneficiary is entitled. Generally speaking, the action will not lie whilst a trustee has duties yet to perform with respect to the trust, for the reason that equitable defences and set-offs remain available until the completion of the trust. In *Pardoe v Price*[92], a case to which Gummow J referred, Rolfe B explained how an admission by the trustee may operate:

> "When, indeed, there is no trust to execute, except that of paying over money to the cestui que trust, the trustee, by his conduct, as for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law

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90 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [89].

91 (2001) 208 CLR 516 at 541 [67]; [2001] HCA 68.

92 (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269].

at the suit of the cestui que trust, for money had and received, or for money due on account stated."

82 Assuming for present purposes that the executors were seeking payment of the monies due to Mr Nemes in his capacity as a beneficiary who was the object of the exercise of the power under cl 4(b), the admission by the Trustee that the monies were due might provide a basis for an action for money had and received, but only if the Trustee had otherwise completed what was required under the Trust.

83 Neither *Pardoe v Price* nor *Roxborough v Rothmans* suggest that an admission of this kind has the effect of creating a debt which did not otherwise exist. A trustee would be entitled to defend the action for money had and received. Whilst the trustee's admission would be evidence against it, the trustee could rebut it by showing that there were in fact no monies owed.

84 In any event, these matters do not arise for consideration in this case. The debt which is acknowledged in the Charge as owing is one resulting from a notional loan. It is not one said to be due to Mr Nemes as a beneficiary entitled to monies under the Trust.

Estoppel

85 The executors sought to establish that the Trustee was estopped from denying that it was indebted to Mr Nemes and therefore his estate. In the event that the Trustee lacked power to bind the beneficiaries to the representation or acknowledgment in the Charge and particularly cl 5 of that document, because that representation did not reflect the true facts, it was contended that the Trustee was personally liable but that it was nevertheless entitled to be indemnified out of the Trust estate.

86 An argument based upon promissory estoppel was not developed by the executors beyond an assertion that Mr and Mrs Nemes relied upon the acknowledgment of the debt when making their wills. None of the difficulties which attend such an argument were dealt with. The executors' case on estoppel was limited to one based on an estoppel by deed or convention. In relation to the latter, the necessary assumed state of affairs[93] pursuant to which the parties conducted their affairs was said to be the creation of the debt.

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93 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244; [1986] HCA 14.

87 However, as the appellants point out, where in fact there had been no payment, a purported acknowledgment of one cannot create an estoppel[94]. At its highest, such a statement is evidence against the party said to be indebted, which that party can rebut by showing that the amount had never actually been advanced[95], as is the case here. So far as concerns estoppel by convention, it is somewhat difficult to accept that the parties conducted their affairs on the basis that the debt was real.

Conclusion and orders

88 None of the terms of the Resolution, the circumstances surrounding it or the conduct of the Trustee thereafter support an inference that the powers given by cl 4(b) of the Trust Deed were intended to be exercised by the Trustee. In particular, there was no setting aside or allocation of any property for Mr and Mrs Nemes which would amount to an application of capital or income within the meaning of that clause. The Trust property remained just that at all times, as the Trust accounts confirm. The importance of the accounts, not only for those having an interest in the Trust and its property, but also for third parties who may need to deal with the Trustee or rely upon Trust records, should not be lost sight of.

89 The appeal should be allowed, and the order of the Court of Appeal made on 11 February 2015 should be set aside. In lieu thereof there should be the following orders:

1. The appeal should be allowed.

2. Set aside orders 1, 2 and 4 of the Short Minutes of Order made by Stevenson J on 24 March 2014 and in lieu thereof order and declare that:

   (i) Nemeske Pty Ltd as trustee of the Nemes Family Trust is not indebted to the executors of the estate of Emery Nemes;

   (ii) the resolution of 23 September 1994 is of no effect;

   (iii) the charge dated 30 August 1995 does not secure any monies owed by the trustee to the executors of the estate of Emery Nemes; and

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94 *Petersen v Moloney* (1951) 84 CLR 91 at 100; [1951] HCA 57; *Burchell v Thompson* [1920] 2 KB 80 at 86.

95 *Mainland v Upjohn* (1889) 41 Ch D 126 at 136.

(iv) the executors of the estate of Emery Nemes pay the plaintiffs' costs and interest on costs.

3. The second and third respondents pay the appellants' costs in the Court of Appeal.

The second and third respondents should pay the appellants' costs in this appeal.

90 GAGELER J. While it is unnecessary to repeat the facts or the procedural history set out in the reasons for judgment of other members of the Court, it is convenient to restate the two critical steps in the reasoning of the Court of Appeal under challenge in this appeal.

91 The Court of Appeal did not disturb the primary judge's interpretation of the resolution of 23 September 1994 as a resolution by the Trustee "to distribute to Mr and Mrs Nemes an amount of money equal to the value of the asset revaluation reserve, namely $3,904,300"[96]. The Court of Appeal acknowledged that the resolution "did not result in any cash payment or change in ownership of specific property"[97]. The Court of Appeal nevertheless held the resolution so interpreted to have been a proper exercise of the power conferred by cl 4(b) of the Deed to "advance" and "apply" "any part or parts of the whole of the capital or income of the Trust Funds" and, as such, to have given rise to an immediate unconditional equitable obligation on the part of the Trustee to account to Mr and Mrs Nemes in the sum of $3,904,300 out of the Trust Funds[98].

92 The Court of Appeal went on to hold that the Trustee's implementation of the resolution, by recording a liability to Mr and Mrs Nemes in the sum of $3,904,300 in the Trust's balance sheet, was sufficient to have given Mr and Mrs Nemes a cause of action against the Trustee to recover that sum at common law[99].

93 Unable to accept the appellants' challenge to either of those steps in the reasoning of the Court of Appeal, I would dismiss the appeal with costs.

Effect of the resolution

94 In challenging the Court of Appeal's holding concerning the effect of the resolution, the appellants do not dispute that the power conferred by cl 4(b) of the Deed, to advance and apply part or parts of the whole of the capital or income of the Trust Funds, was capable of being exercised by the Trustee resolving to hold some portion of the property comprising the Trust Funds on trust for Mr and Mrs Nemes. What the appellants argue is that the power was so limited that no resolution could have been effective as an exercise of that power unless the resolution manifested an intention to effect an immediate alteration of the

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96 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [47], quoting *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 at [83].

97 [2015] NSWCA 6 at [62].

98 [2015] NSWCA 6 at [62], [64], [75], [114(1) and (2)].

99 [2015] NSWCA 6 at [89], [114(3)].

beneficial ownership of specific trust assets forming part of the capital or income of the Trust Funds. The resolution was not effective as an exercise of that power, they argue, because it purported to give Mr and Mrs Nemes a specific sum of money to be paid out of the Trust Funds instead of purporting to give them beneficial ownership of specific trust assets.

95 The words "advance" and "apply", appearing as integers of the expression of the composite power conferred by cl 4(b) of the Deed "to advance or raise ... and to pay or to apply" part or parts of the whole of the capital or income of the Trust Funds, refer respectively to the "anticipation of an interest not yet absolutely vested in possession"[100], and to means by which that anticipation is achieved. The power, relevantly, is to "apply" any part or parts of the whole of the capital or income of the Trust Funds so as to bring forward the benefit of part or parts of the Trust Funds in respect of which any beneficial interest would otherwise remain future and contingent.

96 Once it is accepted – as it was in *In re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara*[101] and in *Commissioner of Inland Revenue v Ward*[102] – that a trustee can "apply" trust property to the advancement of a specified beneficiary by resolving to allocate trust property unconditionally and irrevocably to the benefit of that beneficiary, it is difficult to see any reason in principle why such an unconditional and irrevocable allocation of trust property must take the form of an alteration of the beneficial ownership of one or more specific trust assets. The allocations in each of those cases were of specified proportions of a single monetary amount which stood to the credit of a bank account which the trustee held as trust property at the time of the resolution. The allocations were held to be sufficient to result in the specified beneficiaries to whom the allocations were made each obtaining an immediate absolute beneficial entitlement to the sums so allocated. It appears that the sums in question in the first case were soon afterwards paid into separate bank accounts, but that fact does not appear to have been treated as relevant to the holding. The sums in question in the second case were not paid into separate accounts for many years.

97 In neither of those cases was there any suggestion that the trustee's exercise of the power to apply trust property involved a resettlement of trust property so as to result in the creation of a new trust. The exercise of the power by way of unconditional and irrevocable allocation of trust property was seen rather to result in the crystallisation of an immediate absolute beneficial entitlement in respect of property which, before and after the resolution of the

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100 Cf *In re Pilkington's Will Trusts* [1964] AC 612 at 635.

101 [1951] Ch 209; [1950] 2 All ER 891.

102 [1970] NZLR 1.

trustee, remained property which the trustee held on trust under the terms of the existing settlement[103].

98 The trustee's power to apply trust property having been held in each of those cases to be available to be exercised by means of an unconditional and irrevocable allocation of trust property, the consequence that the exercise of that power effected an alteration of beneficial entitlements in property which the trustee continued to hold on trust under the terms of the existing settlement was orthodox as a matter of principle. It was also unremarkable as a matter of practice. The power to apply trust property, as interpreted in the cases, was but an example of a power conferred on a trustee by the terms of settlement to bring about an alteration of beneficial entitlements: the power was of such a nature that the exercise of the power was "so to speak, to be read into" the existing settlement with the result that the beneficial entitlements as altered by the exercise of the power were to be recognised and administered by the trustee after the exercise of the power "as if the settlement had actually provided" for them[104].

99 An absolute beneficial entitlement to some part of a fund of property that is held on trust need not be reflected in an absolute beneficial entitlement to the whole or some part of any specific asset within that fund[105]. That must be so whether the absolute beneficial entitlement to some part of a fund of property that is held on trust is defined by the terms of the trust settlement itself, or whether such absolute beneficial entitlement to some part of a fund of property that is held on trust is defined by an exercise of a power conferred on a trustee under the terms of a trust settlement. Whether or not a particular beneficial entitlement to some portion of a trust fund is reflected in a beneficial entitlement to the whole or some part of a specific asset within that fund depends on the terms of the trust settlement.

100 Furthermore, an absolute beneficial entitlement to some part of a fund of property may be defined as an entitlement to be paid a sum of money out of the fund of property that is held on trust, irrespective of whether or not the assets

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103 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 30.

104 Cf *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54 at 65; [1952] HCA 52.

105 *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 313-314; [1990] HCA 45; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246 [48]; [1998] HCA 4; *Kent v SS "Maria Luisa" (No 2)* (2003) 130 FCR 12 at 32-33 [58]-[60]; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 110 [16]-[17], 111 [20], 111-112 [22], 113-116 [29]-[36]; [2005] HCA 53.

within the fund are currently held in monetary form[106]. Again, it depends on the terms of the trust settlement.

101 Turning to the particular terms of the settlement of the Trust as set out in the Deed, the power conferred by cl 4(b) to advance and apply "any part or parts of the whole of the capital or income of the Trust Funds" must be read in light of the definition of "the Trust Funds" as including the settlement sum "and all other assets from time to time held by the Trustee". The power conferred by cl 4(b) was not expressed merely as a power to advance and apply assets which were at the time of advancement and application held by the Trustee as part of the Trust Funds, and no restriction was placed on how any part or parts of the whole of the capital or income of the Trust Funds advanced and applied might have been identified. Nothing in the terms in which the power was expressed excluded such a part or parts of the whole being defined, in a resolution made in the exercise of the power, as one or more specified monetary sums.

102 The power conferred by cl 4(b) must also be read in light of the additional, relevantly ancillary, powers conferred by cl 4(e), cl 4(f) and cl 8 of the Deed. The power conferred by cl 4(e) was "to raise out of any capital or income in the hands of the Trustee any sum or sums from time to time required and in the opinion of the Trustee properly payable thereout for the exercise of any of the powers" contained in the Deed. The power conferred by cl 8 was "to sell the whole or any part of the settled fund or the investments representing the same at any time or times for such price or prices and on such terms as the Trustee may think fit". Each was ample to permit the subsequent liquidation of non-monetary assets in order to meet an entitlement to a part of the whole of the capital or income of the Trust Funds arising from an exercise of power under cl 4(b) specified as a monetary sum. The power conferred by cl 4(f) was "[i]n the division or distribution of the Trust Funds ... to appropriate any part thereof to any person entitled thereto and as to the true value of any part so appropriated to accept the amount sworn by a sworn valuator ... to be in his opinion the value thereof". It was ample to permit the alternative course of allowing an entitlement to a part of the whole of the capital or income of the Trust Funds arising from an exercise of power under cl 4(b) specified as a monetary sum to be met by a distribution of trust assets to the value of that monetary sum.

103 Neither in principle nor in the particular terms of the Deed am I therefore able to discern any basis for confining the power conferred by cl 4(b) so as to limit a resolution made in the exercise of that power to one which manifested an intention to effect an immediate alteration of the beneficial ownership of specific trust assets.

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106 Eg *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494 at 502 [8], 509 [34]; [1999] HCA 51.

104 Adopting the interpretation of the resolution of 23 September 1994 as a resolution by the Trustee to distribute an amount of $3,904,300 out of the Trust Funds to Mr and Mrs Nemes, the Court of Appeal was in my view correct to hold that resolution to have been a valid exercise of the power conferred by cl 4(b). On and from the making of the resolution, the Trustee continued to hold such trust assets as might from time to time comprise the Trust Funds subject to an immediate unconditional obligation on the part of the Trustee to account to Mr and Mrs Nemes in the sum of $3,904,300 out of the Trust Funds. That obligation arose not outside the Deed but under the Deed. It was immediately enforceable in equity by Mr and Mrs Nemes against the Trustee in the same way as if an unconditional obligation to account to Mr and Mrs Nemes in that sum had been expressed as a term of the Deed. In order to perform that equitable obligation, the Trustee had at its disposal the powers conferred by cl 4(e), cl 4(f) and cl 8 of the Deed.

Effect of the balance sheet entry

105 In challenging the Court of Appeal's holding concerning the effect in law of the Trustee going on to record a liability to Mr and Mrs Nemes in the sum of $3,904,300 in the Trust's balance sheet, the appellants do not dispute that a trustee who admits to having an unconditional obligation to pay a specified amount of money to a beneficiary can thereby become liable to an action at law for the recovery of that amount as money had and received to the benefit of the beneficiary, so as to overlay the equitable relationship of trustee and beneficiary with the legal relationship of debtor and creditor. That has been settled since at least the middle of the nineteenth century[107].

106 What the appellants argue is that the trustee's liability to such an action at law can only arise where the trustee "holds the relevant assets on a bare trust". The reasoning in *Chianti Pty Ltd v Leume Pty Ltd* [108], which the Court of Appeal followed in the present case[109], the appellants argue to be wrong.

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107 *Turner v New South Wales Mont de Piete Deposit and Investment Co Ltd* (1910) 10 CLR 539 at 546, 553, 555-556; [1910] HCA 15; *R v Brown* (1912) 14 CLR 17 at 25; [1912] HCA 6 and *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 541 [67]; [2001] HCA 68, referring to *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269] or *Edwards v Lowndes* (1852) 1 El & Bl 81 at 89 [118 ER 367 at 370]. See also Bullen and Leake, *Precedents of Pleadings*, 3rd ed (1868) at 46-47.

108 (2007) 35 WAR 488.

109 [2015] NSWCA 6 at [77]-[85].

107 Like the expression "discretionary trust"[110], the expression "bare trust" is plagued by terminological indeterminacy[111]. The appellants use it in the present context to refer to a trust under which the trustee has no interest in the trust assets other than legal title and no duties other than those which exist by virtue of the office of trustee[112], and thereby to exclude a trustee whose holding of trust assets is subject to terms of settlement. Were the availability of the common law action not confined to an action against a trustee holding assets on such a bare trust, the appellants argue, the common law would have the potential to cut across rights and duties which the trustee might have in equity as well as to circumvent defences which the trustee would have to a claim to enforce the trust in equity which the trustee would not have to an action at law. The argument is put at a high level of generality. No attempt is made to demonstrate actual conflict with any specific right or duty of the Trustee under the Deed. No equitable defence is suggested, much less one which the Trustee would have to a claim to recover the sum of $3,904,300 in equity which the Trustee would not have to a claim to recover that sum in an action for money had and received.

108 The appellants place particular weight on an early statement of principle by Rolfe B in *Pardoe v Price* as picked up by Griffith CJ in *R v Brown*. The holding in *Pardoe v Price* was that the action for money had and received was not available where there was no relationship between the parties other than that of trustee and beneficiary. Rolfe B acknowledged, however, that the trustee would become liable for money had and received if there were "no trust to execute, except that of paying over money" and the trustee made an admission that the trustee had "money to be paid over"[113]. In *R v Brown*, Griffith CJ explained with reference to *Pardoe v Price* that "in the case of an express trust, if nothing remained to be done but pay over money, the trustee by his conduct, as for instance by admitting that he had money to be paid over, might make himself liable to [the] action"[114].

109 Those statements are consistent with the common law action being available in circumstances which encompass the case of an admission of liability to pay made by a trustee who holds trust assets on a bare trust in the sense in

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110 Cf *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8].

111 Cf *Byrnes v Kendle* (2011) 243 CLR 253 at 264-265 [21]; [2011] HCA 26.

112 Cf *CGU Insurance Ltd v One.Tel Ltd (In liq)* (2010) 242 CLR 174 at 182 [36]; [2010] HCA 26.

113 *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269].

114 *R v Brown* (1912) 14 CLR 17 at 25.

which the appellants use that expression. At the same time, they contain nothing to exclude the availability of the common law action in the case of an admission of liability to pay made by a trustee whose holding of trust assets is subject to an unconditional equitable obligation to pay the beneficiary the admitted sum. If the equitable obligation to pay the beneficiary the admitted sum is truly unconditional, the imposition of common law liability for an admitted sum in the latter case would not conflict with any equitable right or duty of the trustee.

110 To acknowledge the common law action to be equally available in each case is consistent with the overarching statement of principle by Griffith CJ in *R v Brown*, itself a reflection of the exposition of principle by Lord Mansfield in *Moses v Macferlan*[115], that the action for money had and received "lay whenever the defendant had received money which in justice and equity belonged to the plaintiff and when nothing remained to be done except pay over the money"[116]. To accept the common law action to be available in the case of an admission of liability to pay made by a trustee holding trust assets subject to an unconditional equitable obligation to account to the beneficiary in the admitted sum is also consistent with longstanding practice in New South Wales, where the separate administration of law and equity continued until the last quarter of the twentieth century. In a text on common law pleading in the Supreme Court of New South Wales published in 1961, for example, it was stated in general terms in relation to the action for money had and received that "[a] *cestui que trust* or legatee may sue the trustee or executor under this count where the latter admits that he holds trust moneys or a legacy as a debt payable to the former"[117].

111 That the common law cause of action can arise where the trustee holds the relevant assets on a bare trust is alone sufficient to demonstrate that the coming into existence of the common law cause of action is not inconsistent with the continuing existence of a trust under which the trustee remains subject to fiduciary and other duties of a trustee for so long as the trustee's absolute equitable obligation to pay the admitted sum of money to the admitted beneficiary remains unperformed. Obligations of a trustee which exist by virtue only of that office, having been described as applicable to a bare trustee, include the obligation "to get the trust property in, protect it, and vindicate the rights attaching to it"[118]. There can be no reason in principle why the availability of the

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115 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

116 (1912) 14 CLR 17 at 25, quoted in *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488 at 508 [61].

117 Rath, *Principles and Precedents of Pleading*, (1961) at 28, cited in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 541 [67].

118 *CGU Insurance Ltd v One.Tel Ltd (In liq)* (2010) 242 CLR 174 at 182 [36].

common law action should be excluded in circumstances where some or all of those obligations are spelt out in the terms of settlement.

Conclusion

112 The Court of Appeal was correct for the reasons it gave in concluding that the Trustee was indebted to Mr and Mrs Nemes in the sum of $3,904,300 at the time of entering into the deed of charge under which the Trustee covenanted to pay that sum to Mr and Mrs Nemes on demand. The judgment against the Trustee in reliance on that covenant should stand.

GORDON J.

Introduction

113 A trust's principal asset was a parcel of 10 shares[119]. The trust's balance sheet recorded the shares at cost and credited an increase in their value to an asset revaluation reserve. The trustee, purportedly exercising a power to "advance" and "apply" the capital or income of the trust funds, resolved that a "final distribution" be made out of the asset revaluation reserve and that the entire reserve, if any, be paid or credited to two specified beneficiaries. After the resolution, the trust's balance sheet continued to record the shares as a revalued asset but also recorded, as a non-current liability of the trust, a loan by the specified beneficiaries to the trust of the amount of the purported distribution.

114 Is the trustee indebted to the estate of the first of those specified beneficiaries? The answer is no.

115 These reasons will address the facts, describe the issues and then address the resolution made and the power of the trustee to pass the resolution under the deed of settlement that governed the trust. The reasons will then address two other arguments advanced by those parties who said that the trustee is indebted to the estate – an action for money had and received and estoppel.

Facts

The Trust

116 The Nemes Family Trust ("the Trust") was created by a deed of settlement dated 24 June 1974 ("the Deed"). The first respondent, Nemeske Pty Ltd, is the trustee ("the Trustee"). The appellants are four of the "Specified Beneficiaries" of the Trust. The second and third respondents are the current directors of the Trustee and the executors of the estate of another Specified Beneficiary, Mr Emery Nemes ("the Executors"). The Executors were the only respondents who played an active role in this appeal[120].

117 There was no dispute about the occurrence of critical events even though evidence about them was sparse.

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119 The settlement sum was $200. The trust accounts later recorded it as $1,000. That amount is not in issue and may be put aside.

120 The first respondent and the fourth to twelfth respondents entered submitting appearances. The thirteenth respondent was removed as a party.

118 The Trust was described by the parties as a "discretionary trust". That term "has no fixed meaning and is used to describe particular features of certain express trusts"[121]. Instead, its meaning is "disclosed by a consideration of usage rather than doctrine, and the usage is descriptive rather than normative"[122]. In the case of this Deed, "the identity of those who might receive income or capital, the amounts they might receive, the period or duration of the trusts, the content from time to time of the fund impressed with those trusts, and the very terms of the trusts themselves all depended wholly or significantly upon the exercise of, or the failure to exercise, powers bestowed by the [Deed] upon the [Trustee]"[123].

119 The Deed defined the settlement sum of $200 and "all other assets from time to time held by the Trustee" as "the Trust Funds"[124]. The Trustee held the Trust Funds subject to the Trust's directions and discretions set out in the First Schedule to the Deed[125]. The First Schedule provided the trusts upon which the Trust Funds were to be held. Clauses (a)-(c) of the First Schedule were concerned with income; cll (d) and (e) dealt with the capital of "the Trust Fund" on the vesting day; cl (f) defined the "vesting day"; and cl (g) defined the "Specified Beneficiaries". "Income" and "capital" were not defined in the Deed.

120 Under cl (a)(i) of the First Schedule, the Trustee held the Trust Fund upon trust as to income:

> "to pay or apply the whole or any part of such income for or towards the maintenance education advancement or benefit of all or such one or more of the specified beneficiaries … in such shares and proportions as the Trustee in its absolute discretion may … determine."

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121 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8]; [1998] HCA 4.

122 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8].

123 See *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [9].

124 Recitals of the Deed.

125 cl 2 of the Deed.

If a determination was made and recorded, it was irrevocable for the income year to which it related[126]. Any income not paid or applied pursuant to cl (a)(i) was deemed to be included as Trust Funds[127].

121 Returning to the body of the Deed, its provisions were primarily concerned with the Trustee's powers. Clause 3 dealt with the Trustee's powers of investment. Clause 4 conferred a range of other powers, relevantly:

> "(b) At any time or times *to advance or raise* any part or parts of the whole of the *capital or incom*e of the Trust Funds and *to pay or to apply* the same as the Trustee shall think fit for the *maintenance education advancement in life or benefit* of any of the Specified Beneficiaries …
>
> …
>
> (f) In the division or distribution of the Trust Funds or the investments for the time being representing the same to appropriate any part thereof to any person entitled thereto and as to the true value of any part so appropriated to accept the amount sworn by a sworn valuator … and any division distribution or appropriation made in reliance upon such valuation or certificate shall exonerate the Trustee from any liability or responsibility even though such valuation was in fact incorrect or even though such part may subsequently increase or decrease in value." (emphasis added)

122 In addition to the express powers conferred on the Trustee by the Deed, the Trustee also had all the powers, authorities and discretions conferred on trustees by the laws of the State of New South Wales[128].

Trust Funds, transactions and resolutions

123 The Trust's principal asset was a parcel of 10 "B" class shares in Aladdin Limited ("Aladdin"), a company registered in Norfolk Island ("the Shares"). Aladdin held shares in other companies which owned real property.

124 In July 1994, the Shares were revalued and an asset revaluation reserve was created in the Trust's accounts. This was an accounting or bookkeeping entry only. The primary judge said that the relevant accounting entries were

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126 cl (b) of the First Schedule to the Deed.

127 cl (a)(ii) of the First Schedule to the Deed.

128 cl 5 of the Deed.

"created as a result of an assessment made by someone on behalf of the Trust that the assets of the Trust (being the Shares) should be re-valued"[129]. A valuation statement was prepared as at 31 July 1994.

125 The Beneficiaries Accounts for the Trust as at 31 July 1994 were in the following form:

	BENEFICIARIES ACCOUNTS	
	SETTLEMENT SUM	
1,000	Opening Balance	1,000.00
	ASSET REVALUATION RESERVE	
-	Assets Revalued	3,904,300.00
1,000	TOTAL TRUST FUNDS	3,905,300.00

126 The balance sheet of the Trust as at 31 July 1994 recorded the following:

	BENEFICIARIES FUNDS		
1,000	Settlement Sum	1,000.00	
-	Asset Revaluation Reserve	3,904,300.00	
1,000	TOTAL TRUST CAPITAL		3,905,300.00
	REPRESENTED BY		
	INVESTMENTS		
	Shares in Public Companies at Cost		
1,000	Aladdin Ltd 10 "B" Class Shares of $1 Fully Paid		3,905,300.00

127 On 23 September 1994, the directors of the Trustee resolved ("the 1994 Resolution"):

> "[T]hat pusuant [sic] to the powers conferred on the [Trustee] in the [Deed]:-
>
> That a final distribution be and is hereby made out of the asset revaluation reserve for the period ending 30th September, 1995 [sic] and that it be paid or credited to:- the beneficiaries in the following manner and order:

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129 *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 at [31].

The entire reserve if any, to be distributed to:-
Emery George Nemes & Madeleine Nemes
as joint tenants."

128 There is no dispute that the reference to "30th September, 1995" was a misprint and should have read "30th September, 1994". The error arose because, as described below, the transactions were not documented until 1995.

129 The purported distribution was effected by further entries in the Beneficiaries Accounts and the Trust's balance sheet prepared as at 30 September 1994. The Beneficiaries Accounts as at 30 September 1994 were as follows:

	BENEFICIARIES ACCOUNTS	
	SETTLEMENT SUM	
1,000	Opening Balance	1,000.00
	ASSET REVALUATION RESERVE	
-	Assets Revalued	3,904,300.00
-	Capital Distribution	3,904,300.00
-		-
1,000	TOTAL TRUST FUNDS	1,000.00

130 The balance sheet as at 30 September 1994 recorded the net assets of the Trust. The Shares remained on the balance sheet at full value.

	BENEFICIARIES FUNDS	
1,000	Settlement Sum	1,000.00
	REPRESENTED BY	
	INVESTMENTS	
	Shares in Public Companies at Cost	
1,000	Aladdin Ltd 10 "B" Class Shares of $1 Fully Paid	3,905,300.00
	NON-CURRENT LIABILITIES	
	Loans - Secured	
-	E.G. & M. Nemes	3,904,300.00
1,000	NET ASSETS	1,000.00

In fact, as will be explained below, as at 30 September 1994 the "loan" was not secured.

131 It was common ground that no money was paid to Mr and Mrs Nemes pursuant to, or following, the 1994 Resolution.

132 On 26 April 1995, Mr and Mrs Nemes (through a firm of accountants) engaged solicitors. The letter of instruction relevantly stated:

> "• Most of the assets of Mr and Mrs Nemes are owned by companies the asset shares of which are owned by [Aladdin], a Norfolk Island company, the shares of which are owned by [the Trust].
>
> …
>
> • The assets in the whole group of companies has [sic] been revalued as at 1st July, 1994, this has led to an asset revaluation reserve being created in [the Trust], a copy of the balance sheet is enclosed for your reference.
>
> • [The Trustee] in its capacity as trustee of [the Trust] held a meeting at which it was resolved to distribute the asset revaluation reserve to Mr and Mrs Nemes jointly, a copy of the minute is enclosed for your reference.
>
> • The above distribution was made by way of crediting the loan account of Mr and Mrs Nemes in [the Trust].
>
> Mr and Mrs Nemes would like to secure their loan to [the Trust], and it is in this matter that they require your assistance, as follows:-
>
> • Make a debenture over the shares in [Aladdin] which [the Trust] owns as security for the loan by Mr and Mrs Nemes, together with signed blank share transfers.
>
> • Advise on the stamp duty and legal implications of registering the debenture with the register of deeds.
>
> • Advise [Aladdin] of the debenture on its shares.
>
> …
>
> The purpose of these transactions is for Mr and Mrs Nemes to secure control of their assets or estate. …"

133 As the letter records, the Nemes' instructions were that the asset revaluation reserve had been distributed to Mr and Mrs Nemes by "crediting the loan account of Mr and Mrs Nemes in [the Trust]". Put another way, the distribution was treated as creating a "debt" owed by the Trust to Mr and Mrs Nemes.

134 On 19 May 1995, the solicitors responded to the accountants. The letter from the solicitors recorded the instructions and then asked for further information:

> "[The Trustee] as Trustee of [the Trust] owes monies to Mr & Mrs Nemes. Mr & Mrs Nemes wish to obtain security for the amount owing to them over the shares held by [the Trustee] … and for that purpose to obtain a debenture to be given by [the Trustee] over those shares.
>
> The question arises as to whether that debenture will be a loan security within the meaning of the Stamp Duties Act of New South Wales and so liable for New South Wales loan security duty.
>
> …
>
> To enable us to prepare the necessary documentation would you please advise us:-
>
> (a) The amount of the debt to be secured.
>
> (b) Whether this is to be secured by a debenture to Mr & Mrs Nemes or whether there will be debentures to each of them for separate amounts.
>
> (c) Details of the shares … to be dealt with."

135 On 19 June 1995, the accountants provided written instructions that the amount of the debt to be secured was $3,904,300, the debenture was to be to Mr and Mrs Nemes as joint tenants and the shares in Aladdin to be dealt with were the Shares.

136 On 28 June 1995, the solicitors forwarded documents to the accountants. The form of the transaction had changed. The solicitors stated that they had prepared the following documents for the accountants:

> "1. A Deed of Charge in respect of the sum of $3,904,300.00 to be given by [the Trustee] as Trustee of [the Trust]. The Charge is over [the Shares] and in favour of Mr & Mrs Nemes as joint tenants. …
>
> We have used a full form of Charge as it was easy to do so with less work involved.
>
> …
>
> 2. Transfer of [the Shares] for execution in blank. …
>
> …

> We are returning to you the copies of the Memorandum and Articles of [the Trustee] and [Aladdin] and we also return the original Share Certificate in respect of [the Shares]. This Certificate should be held with the Deed of Charge when that is returned executed from Norfolk Island. …"

137 On 3 July 1995, the directors of the Trustee resolved that the Trustee execute a charge over the Shares in favour of Mr and Mrs Nemes as joint tenants in respect of $3,904,300 "repayable on demand which is the amount presently owing by [the Trust] to [Mr and Mrs Nemes] and also a Transfer in blank" of the Shares in support of the charge ("the Charge Resolution").

138 On 30 August 1995, a deed was made between the Trustee (defined as "the Mortgagor") and Mr and Mrs Nemes (defined as "the Mortgagee") ("the Deed of Charge"). The Recitals of the Deed of Charge relevantly recorded that:

(1) the "Trustee [held] Ten B Class Fully Paid shares in the capital of [Aladdin] (the mortgaged premises)"[130];

(2) the Trustee was indebted to Mr and Mrs Nemes as joint tenants in the sum of $3,904,300[131]; and

(3) for the purpose of securing repayment of that sum, the Trustee had agreed with Mr and Mrs Nemes to execute the Deed of Charge, pursuant to which the Trustee charged the Shares in favour of Mr and Mrs Nemes as joint tenants[132].

139 The charge over the Shares was stated to be a first ranking fixed charge[133]. The Trustee warranted to Mr and Mrs Nemes that, as Trustee, it was the owner of the Shares[134] and had "good right and full power to charge" the Shares and that

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130 Recital C of the Deed of Charge.

131 Recital D of the Deed of Charge.

132 Recital E of the Deed of Charge.

133 cl 2 of the Deed of Charge.

134 cl 3(b)(i) of the Deed of Charge.

the Shares were "free from all encumbrances"[135]. The Trustee covenanted with Mr and Mrs Nemes[136]:

> "(a) That [the Trustee] and all persons having or lawfully or equitably claiming any estate or interest in [the Shares] or any part thereof will from time to time and at all times hereafter upon the request of [Mr and Mrs Nemes] and at the cost of [the Trustee] until sale and afterwards of the person or persons requiring the same make do and execute or cause to be made done and executed all such acts deeds and assurances whatsoever from all such persons for the purpose of more satisfactorily securing to [Mr and Mrs Nemes] the payment of the principal moneys and/or more satisfactorily assuring [the Shares] to [Mr and Mrs Nemes] or as [Mr and Mrs Nemes] may direct and in particular will whenever requested by [Mr and Mrs Nemes] so to do execute in favour of [Mr and Mrs Nemes] such legal mortgages transfers assignments or other assurances of all or any part of [the Shares] in such form and containing (in the case of mortgages or other assurances) such powers (including power of sale) and provisions (including the express exclusion of all Moratorium Acts and/or Regulations) as [Mr and Mrs Nemes] shall require.
>
> (b) That [the Trustee] shall not at any time during the continuance of this security execute or create any mortgage lien charge or encumbrance over or affecting [the Shares] or any part thereof in favour of any person other than [Mr and Mrs Nemes] without the previous consent in writing of [Mr and Mrs Nemes]."

140 The Trustee also covenanted with Mr and Mrs Nemes to pay the sum to them on demand[137].

141 On the same day, 30 August 1995, an Australian Securities Commission "[n]otification of details of a charge" form was signed on behalf of the Trustee. The form recorded the liability as a "debt of $3,904,300.00 presently owing", the chargee as Mr and Mrs Nemes and the charged property as the Shares.

142 Mr and Mrs Nemes did not report the distribution in their tax returns in the 1994/1995 financial year.

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135 cl 3(b)(ii) of the Deed of Charge.

136 cl 4 of the Deed of Charge.

137 cl 5 of the Deed of Charge.

143 The Trust accounts for the year ended 30 June 2003 were dated 25 May 2004. A Directors' Declaration which accompanied the financial statements stated that the Trust was "not a reporting entity" and that the "financial statements and notes present[ed] fairly the [Trust's] financial position as at 30th June 2003". The notes to the financial statements recorded a non-current secured "loan" of $3,904,300 from Mr and Mrs Nemes.

144 On 26 September 2011, Mr Nemes died. Mrs Nemes had predeceased him. No steps had been taken to seek payment of the amount said to be owing as a result of the 1994 Resolution or the Deed of Charge.

145 On 11 June 2013, the appellants commenced proceedings in the Supreme Court of New South Wales seeking declarations that the Trustee was not indebted to Mr Nemes' estate in the amount of $3,904,300. The Executors cross-claimed alleging that the Trustee was so indebted and seeking judgment for that amount.

Previous decisions

146 The primary judge dismissed the appellants' claim and ordered judgment for the Executors on the cross-claim[138]. The primary judge concluded that on the proper construction of the 1994 Resolution, the Trustee resolved to make an advance or distribution to Mr and Mrs Nemes pursuant to cl 4(b) of the Deed of an amount equal to the asset revaluation reserve of $3,904,300 and that the Trustee gave effect to that resolution by crediting Mr and Mrs Nemes' loan account with the Trustee in the same amount, thereby effecting the distribution[139].

147 The Court of Appeal dismissed the appellants' appeal[140]. The Court of Appeal found that the 1994 Resolution was a valid and effective exercise of the Trustee's powers under cl 4(b) of the Deed. Barrett JA (with whom Beazley P and Ward JA agreed) stated[141]:

> "In the present case, [the Trustee], as trustee, expressly identified an unrealized accretion in value arising from revaluation of [the Shares] and therefore a particular share of the *value* of the trust assets. It then determined, by [the 1994 Resolution], that that accretion or share should

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138 *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203.

139 *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 at [101].

140 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6.

141 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [62].

> be used immediately (that is, 'advanced') rather than being left to be dealt with in the fullness of time. *The accretion or share formed part of either the 'capital' or the 'income' of the 'Trust Funds'.* [The Trustee's] resolution that the identified portion of the 'capital' or 'income' (described, perhaps inaptly, as the 'asset revaluation reserve' that stood in the books at $3,904,300) be 'distributed to' Mr and Mrs Nemes caused capital or income to be dealt with in a way contemplated by clause 4(b), that is, by being 'applied' for the benefit of those two persons. The specific setting aside or appropriation that the resolution effected by means of the words 'be distributed to' – which carried precisely the same connotation as the words 'shall belong to' in *Vestey's* case – *did not result in any cash payment or change in ownership of specific property*. But it did cause [the Trustee's] obligations with respect to the trust assets to change so that, to the extent of $3,904,300, *[the Trustee] was required to recognize and accommodate an immediate and absolute vested interest of Mr and Mrs Nemes*." (emphasis added)

148 His Honour concluded[142]:

> "In summary, I am of the opinion that … [the Trustee], on 23 September 1994, advanced and applied capital or income of the Trust Funds to the extent of $3,904,300 by due exercise of the power conferred by clause 4(b)."

149 The approach adopted by the Court of Appeal should be rejected.

Issues

150 Was the 1994 Resolution a valid and effective exercise of the Trustee's power "to advance or raise … and to pay or to apply" the capital or income of the Trust Funds under cl 4(b) of the Deed?

151 If the answer to that question is yes, then two further issues arise: did making the 1994 Resolution and recording a liability of $3,904,300 to Mr and Mrs Nemes in the Trust accounts entitle Mr and Mrs Nemes to maintain an action for money had and received against the Trustee for that sum, and did the Trustee effectively covenant to repay that existing debt in the Deed of Charge?

The 1994 Resolution and the cl 4(b) power

152 Clause 4(b) of the Deed empowered the Trustee "to advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay

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142 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [64].

or to apply the same" for the maintenance, education, advancement in life or benefit of Mr and Mrs Nemes.

153 By the 1994 Resolution, the Trustee resolved that pursuant to the powers conferred on it in the Deed:

> "a *final distribution* be and is hereby made out of the asset revaluation reserve for the period ending 30th September, 199[4] and that it be *paid or credited* to:- the beneficiaries in the following manner and order:
>
> The *entire reserve if any*, to be distributed to:-
> [Mr and Mrs Nemes]
> as joint tenants." (emphasis added)

154 But did the 1994 Resolution "advance or raise any part or parts of the whole of the capital or income of the Trust Funds" and then "pay or … apply" that capital or income of the Trust Funds for the maintenance, education, advancement in life or benefit of Mr and Mrs Nemes? The answer is no.

155 Resolution of this appeal depends on recognising that there is a real and radical difference between an *asset* and its *value*. The conclusions reached by the primary judge and the Court of Appeal and the Executors' argument in this Court depended upon treating the two – *asset* and *value* – as interchangeable concepts. They are not.

No capital or income of the Trust Funds

156 First, it is necessary to identify "the capital or income of the Trust Funds" the subject of the 1994 Resolution.

157 The 1994 Resolution purported to deal with "the asset revaluation reserve" and to distribute "the entire reserve if any". But the asset revaluation reserve was not "part of" "the capital or income of the Trust Funds"[143].

158 The "asset revaluation reserve" was an accounting entry which recorded, in the accounts of the Trust, an unrealised accretion in the *value* of the Shares at a particular point in time. That value was subject to fluctuation given the nature of the underlying assets. Indeed, the 1994 Resolution recognised the uncertain value of the asset revaluation reserve by resolving that "[t]he entire reserve *if any*, [was] to be distributed" (emphasis added). The asset revaluation reserve was not an asset or a pool of funds from which amounts could be withdrawn and paid.

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143 cf *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [54].

159 On 23 September 1994, the date of the 1994 Resolution, the only property relevantly held by the Trust was the Shares. The property available for advancement and removal from the Trust was the Shares and only the Shares. The value of the Shares could not be realised until the Shares were used or dealt with in some way. Of course, as at 23 September 1994, the total capital value of the Trust might be described as about $4 million in the same way one might describe the value of any share portfolio at a particular date. But "value" is not property held by the Trust.

160 However the Trustee described it, the Trustee did not deal with any capital of the Trust Funds. Nor did the Trustee deal with any income from any trust asset. All it dealt with was a bookkeeping entry intended to reflect change in the *value* of an asset. How accountants treat these things is interesting, but irrelevant to the resolution of this appeal. It is not to the point to enquire how accountants would permit or require financial statements to be prepared in such a way as gives a true and fair view of the *value* of an asset at balance date. It may nonetheless be observed that the balance sheet prepared after the impugned resolution showed[144], as was the fact, that the assets of the Trust (relevantly, the Shares) remained unaffected by the 1994 Resolution. The Shares continued to be held on the terms of the original settlement under the Deed.

161 The Court of Appeal, in reliance on *Clark v Inglis*[145], stated that "it must be accepted that an unrealized gain on revaluation is capable of being 'income' as referred to in clause 4(b)"[146]. That statement should not be accepted. As counsel for the Executors correctly submitted, *Clark v Inglis* was no more than an example where an advance was made by a trustee under the terms of a particular deed and which was effected by (and capable of being effected by) a loan back. The discretionary trust there was distinguishable from the Trust here in crucial respects. First, the trustee of the discretionary trust was given a binding discretion to determine whether any property or moneys held by it constituted capital or income. Second, there was no direction which required income and profits to be paid, transferred or handed over to any beneficiary. Third, the terms of the trust deed were in other respects significantly different[147]. This appeal is about the terms of this Deed and the 1994 Resolution. *Clark v Inglis* may be put to one side.

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144 See [130] above.

145 (2010) 79 ATR 447.

146 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [45].

147 *Clark v Inglis* (2010) 79 ATR 447 at 450-451 [14], 455-456 [33], 459 [51]-[53].

Nothing advanced or raised

162 Second, even if, contrary to the view formed, the asset revaluation reserve was capital or income of the Trust Funds, the 1994 Resolution was not an exercise of the power in cl 4(b) of the Deed "*to advance or raise* any part or parts of the whole of the capital or income of the Trust Funds and *to pay or to apply*" that capital or income (emphasis added).

163 By the terms of the 1994 Resolution, the directors of the Trustee resolved to make "a final distribution … out of the asset revaluation reserve" for the year ended 30 September 1994 and that the "entire reserve if any" be "paid or credited to" and "distributed to" Mr and Mrs Nemes. Does that constitute an exercise of the power under cl 4(b) of the Deed "*to advance or raise* any part or parts of the whole of the capital or income of the Trust Funds and *to pay or to apply*" that capital or income (emphasis added)?

164 Clause 4(b) is a composite power. It was common ground that there were four possible alternative means by which the power could be exercised – advance and pay; advance and apply; raise and pay; raise and apply.

165 Under the Deed, the power to raise was distinct from the power to advance. The power to raise was a process by which money or funds could be obtained by dealing with property, usually through sale or mortgage. That construction is reinforced by the other clauses in the Deed[148]. It is accepted that this power was not exercised by the Trustee.

166 The power of advancement in the Deed was directed to a different end. Exercise of the power of advancement removes the property advanced from the original settlement[149]. The power of advancement might be exercised by moving the property to a new trust (a resettlement of part of the trust for the benefit of one or more named objects)[150] or by simply transferring the property directly to the beneficiary without the process of cash advancement and sale[151].

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148 See, eg, cll 4(c) ("to raise money by way of mortgage"), 4(e) ("to raise out of any capital or income … any sum or sums from time to time required"), 4(h) ("to raise money on the security of the Trust Funds").

149 *Re Gosset's Settlement* (1854) 19 Beav 529 at 535 [52 ER 456 at 458]; *Re Aldridge; Abram v Aldridge* (1886) 55 LT 554 at 556; *In re Fox; Wodehouse v Fox* [1904] 1 Ch 480 at 484; *In re Pilkington's Will Trusts* [1964] AC 612 at 634, 638-639; Tucker, Le Poidevin and Brightwell, *Lewin on Trusts*, 19th ed (2015) at 1458 [32-001].

150 *In re Pilkington's Will Trusts* [1964] AC 612 at 635-639.

151 *In re Collard's Will Trusts* [1961] Ch 293 at 300.

But whatever mechanism is adopted, the power operates by altering the proprietary interests in the property advanced so that the property is no longer property of the trust. It involves more than a notional "earmarking" of property for specific beneficiaries[152].

167 What then was advanced (ie removed) from the corpus of the Trust Funds so that it could be paid or applied? The answer is nothing. As noted earlier, the assets of the Trust (the Shares) remained unaffected by the 1994 Resolution. The Shares continued to be held on the terms of the original settlement under the Deed. The Trustee, exercising the power of advancement, did not purport to confer on Mr and Mrs Nemes any interest in any of the Trust Funds.

168 What is necessary is that the resolution effects an immediate vesting of absolute title to some property held on trust in a beneficiary. The 1994 Resolution did not do that. And simply crediting amounts to a beneficiary in the Trust's accounts was not sufficient to effect an immediate vesting of a specific part of the capital or income of the Trust Funds. The power to advance in cl 4(b) was not exercised because no part of the Trust Funds was separated from the corpus of the Trust to be paid or applied.

Nothing paid or applied

169 Did the Trustee exercise the power "to apply", it being common ground that no money was paid to Mr and Mrs Nemes pursuant to, or following, the 1994 Resolution? The answer is no.

170 The power to apply was not exercised because there was no change in the beneficial ownership of any asset of the Trust. The asset revaluation reserve, or the accretion in value of the Shares, was never an asset of the Trust. At all times, the only assets of the Trust recorded in the balance sheet were the Shares and the settlement sum[153].

171 Even if the Trustee had purported to effect the distribution by a resettlement – settling a new trust for Mr and Mrs Nemes absolutely for $3,904,300 worth of the Shares – that trust would fail for want of certainty of subject matter[154]. The value of the Shares necessarily fluctuated. The money

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152 cf *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [53], [55].

153 See [126] and [130] above.

154 *Kauter v Hilton* (1953) 90 CLR 86 at 97; [1953] HCA 95; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 604 [29]; [2000] HCA 25; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 524 [116]; [2013] HCA 35; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 3 [106], 67 [523], 637 [2401].

value alone would be an insufficiently certain criterion to identify what specific portion of the Shares was held on the new trust. The proportion of the value of the Shares accounted for by the amount of $3,904,300 was subject to change from time to time, as reflected by the nature of the underlying asset, the nature of the asset revaluation reserve and the terms of the 1994 Resolution. A trust for $3,904,300 worth of the Shares would be uncertain because at no time would it be possible to know which of the Shares was covered by the trust and to what extent. In any event, it was common ground that there was no resettlement.

172 It is then necessary to address the propositions that "income may be 'applied' by a process of crediting" it to a beneficiary[155] and that a resolution to "apply" trust income by crediting it effects "an immediate vesting of a specific part of the trust income" in the beneficiary[156]. Those propositions do not assist in the resolution of this appeal.

173 First, as seen earlier, there was no income the subject of the 1994 Resolution and no distribution or advancement of income[157]. Second, the cases cited by the Court of Appeal[158] to support those propositions are not authority for them.

174 *In re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara*[159] is authority for the proposition that a trustee can "apply" the income or capital of a discretionary trust by resolving to vest the absolute beneficial ownership of property held on trust in one or more of the discretionary objects of the trust. *Vestey* is not authority for the more general proposition that a trustee can "apply" income (or capital) simply by crediting it to a beneficiary in the accounts of a trust.

175 In *Vestey*, the discretionary objects of the trust had no immediate right to possession of any asset of the trust under the deed[160]. Clause 7 of the trust deed conferred a mandatory power on the trustees to "pay or apply the income of [the]

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155 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [59].

156 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [61].

157 See [131], [154], [156]-[160] and [162]-[168] above.

158 *In re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara* [1951] Ch 209 at 219-220; *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 15; *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488 at 511-512 [72].

159 [1951] Ch 209 at 219-220.

160 *Vestey* [1951] Ch 209 at 219.

fund … unto or in any manner for the support or benefit of all or any one or more of the following persons for the time being in existence"[161]. A sum of money was held "in hand" by the trustees[162]. The trustees resolved that a specified proportion of that sum "shall belong" to certain beneficiaries[163]. Notwithstanding that resolution, the trustees also resolved to accumulate the amount pursuant to s 31 of the *Trustee Act* 1925 (UK). The issue was whether the first resolution was a valid and effective exercise of the power to apply in cl 7. The Court of Appeal held that the resolution was an effective exercise of the power to apply the income of the trust and that the effect of the resolutions was to "give to each [beneficiary] a specific portion of the income"[164] so that in the exercise of the trustees' discretion "each one of these [beneficiaries] became absolutely entitled to a particular sum of money so appropriated, and … those appropriated sums have now become part of the [beneficiaries'] respective estates"[165].

176 The facts in this appeal are different. Here, the Trustee did not have funds "in hand", there was no change in the beneficial ownership of any asset of the Trust and the Trustee did not resettle part of the Trust Funds for the benefit of Mr and Mrs Nemes.

177 Similarly, in *Commissioner of Inland Revenue v Ward*[166], North P of the New Zealand Court of Appeal held that a resolution that certain money should "be held for the credit of" four children in equal shares[167] effected by book entries in the trust accounts was an effective exercise of a power to "apply" trust income. However, in reaching that conclusion, North P held that the effect of the resolution was to make the money "the separate property" of each child[168]. In other words, the income was "applied" when it ceased to be held under the prior trust and became the absolute property of each child.

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161 *Vestey* [1951] Ch 209 at 210.

162 *Vestey* [1951] Ch 209 at 217.

163 *Vestey* [1951] Ch 209 at 212.

164 *Vestey* [1951] Ch 209 at 219.

165 *Vestey* [1951] Ch 209 at 220. See also at 221-222.

166 [1970] NZLR 1.

167 *Ward* [1970] NZLR 1 at 7.

168 *Ward* [1970] NZLR 1 at 15-17. Turner J agreed with the relevant principles but differed on the application of the principles to the facts: at 24-26.

178 Reference should be made to *Chianti Pty Ltd v Leume Pty Ltd*[169]. It does not assist because the relevant trust power was "to pay, apply or *set aside*" trust income (emphasis added)[170]. The phrase "set aside" was defined in the trust deed to include "placing sums to the credit of the beneficiary in the books of account of the Trust"[171]. The trust deed further provided that amounts set aside in this way would "cease to form part of the Trust Fund and … [would] thenceforth be held by the Trustee as a separate trust fund on trust for that person absolutely"[172]. Accordingly, while *Chianti* involved the exercise of a power of advancement by crediting trust income to a trust account, it turned on the specific power to set aside, not the power to "apply" trust income or capital.

179 As will be apparent, the fundamental difference between *Vestey*, *Ward* and *Chianti* and the present appeal is that whereas in those three cases absolute title to trust assets was transferred or vested, the 1994 Resolution did not have the effect of transferring or immediately vesting absolute title to any of the Trust Funds. That is, the Trustee did not, by the exercise of the power to "advance or raise … and to pay or to apply" in cl 4(b) of the Deed, purport to confer an absolute beneficial interest in Mr and Mrs Nemes in any property held by the Trust. And none of *Vestey*, *Ward* or *Chianti* is authority for the proposition that a power to "apply" trust capital or income can be exercised without altering the beneficial ownership of the property the subject of the advancement. Here, the Shares relevantly comprised the whole of the capital and income of the Trust Funds. Title to the Shares had to be altered in some way in order for the capital or income of the Trust Funds to be paid or applied.

180 Finally, even if the purported distribution of the "entire reserve if any" to Mr and Mrs Nemes recorded in the 1994 Resolution created some equitable obligation in favour of Mr and Mrs Nemes, that would not assist the Executors. It would not assist them because unless a specific power in the Deed can be identified which permitted or empowered the Trustee to take that equitable obligation (however it is described) and convert it into a legal debt owed by the Trust to Mr and Mrs Nemes which would warrant the creation of the charge referred to in the Deed of Charge (with the potential to affect all specified beneficiaries), the legal obligation cannot provide the basis of exoneration out of the Trust for the benefit of Mr and Mrs Nemes (and now the Executors).

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169 (2007) 35 WAR 488.

170 *Chianti* (2007) 35 WAR 488 at 495 [22].

171 *Chianti* (2007) 35 WAR 488 at 495 [22].

172 *Chianti* (2007) 35 WAR 488 at 496 [24].

Conclusion

181 In the case of this Deed, "the identity of those who might receive income or capital, the amounts they might receive, the period or duration of the trusts, the content from time to time of the fund impressed with those trusts, and the very terms of the trusts themselves all depended wholly or significantly upon the exercise of, or the failure to exercise, powers bestowed by the [Deed] upon the [Trustee]"[173]. Here, the Trustee failed to exercise effectively the power to advance and to apply in cl 4(b) by the 1994 Resolution.

182 That the debt recorded in the Trust accounts could only have been satisfied out of a sale of the Shares does not provide an answer to an ineffective exercise of the cl 4(b) power by the Trustee. The "risk" that the value of the Shares might fall below the debt recorded emphasises that nothing was advanced or applied by the Trustee.

183 The text and purpose of cl 4 attaches precise legal effect to dealings with the capital and income of the Trust Funds. That precision is more than a mere formality. Specific legal meaning has been given to terms such as "advance", "raise", "pay" and "apply", so that, upon the exercise of a power such as that contained in cl 4(b), one can ascertain precisely the effect that the exercise of the power has on the capital and income of a trust. Unless provisions such as cl 4 are construed, are exercised and operate according to their terms, the potential for imprecise or wrongful dealings with trust property may be increased. Imprecise and wrongful dealings with trust property concern and affect not only a trust, its trustee and its beneficiaries but also third parties dealing with that trust.

184 It remains to consider the other arguments advanced by the Executors.

Action for money had and received

185 The next issue is whether making the 1994 Resolution and recording a liability of $3,904,300 to Mr and Mrs Nemes in the Trust accounts entitled Mr and Mrs Nemes to maintain an action for money had and received against the Trustee for that sum, and whether the Trustee effectively covenanted to repay that existing debt in the Deed of Charge.

186 The Executors' claim for money had and received to recover the debt secured by the charge referred to in the Deed of Charge cannot succeed. First, there was no effective charge as there was no debt to secure. A charge is a security for a debt or other legal or equitable obligation. As the Court of Appeal

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173 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [9].

acknowledged[174], one cannot have a charge in a vacuum[175]. Here, there was no debt to secure. The Deed of Charge was without legal effect.

187 Second, a beneficiary may maintain an action for money had and received against a trustee only where there remains nothing for the trustee to do except to pay over the money to the beneficiary and the trustee admits itself to be indebted to the beneficiary[176]. But, in this appeal, the first limb was absent because the 1994 Resolution did not vest any asset of the Trust in Mr and Mrs Nemes.

188 Put another way, so long as the Trust continued, no action for money had and received was maintainable by Mr and Mrs Nemes against the Trustee until such time as the Trustee came to hold some asset on bare trust for them and admitted as much to them. At no time did the Trustee hold anything on bare trust for Mr and Mrs Nemes. The Shares continued to be held by the Trust, as recorded in the balance sheet of the Trust.

189 Further, where, as here, a trustee maintains active duties as trustee and does not hold the relevant assets on a bare trust, a claim for money had and received is not maintainable, because otherwise beneficiaries could use the claim to circumvent the equitable defences available to trustees[177].

Estoppel

190 The Executors also relied upon estoppel by deed and estoppel by convention.

191 The Executors submitted that by executing the Deed of Charge (which included Recital D and the cl 5 covenant[178]), the Trustee was estopped from denying the legal effectiveness of the Deed of Charge because the Deed of Charge operates according to its terms as a legally effective instrument or

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174 *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 at [88]-[89].

175 *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680 at 726-727 [258]-[259] citing *Jacobson v Williams* (1919) 48 DLR 51 at 57.

176 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 541 [67]; [2001] HCA 68 and the authorities cited therein.

177 See, eg, *Turner v New South Wales Mont de Piete Deposit and Investment Co Ltd* (1910) 10 CLR 539 at 553, 556; [1910] HCA 15; *R v Brown* (1912) 14 CLR 17 at 25; [1912] HCA 6. See also *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269].

178 See [138] and [140] above.

because, on its execution, the Deed of Charge perfected the creation of a debt owed by the Trustee as trustee of the Trust to Mr and Mrs Nemes or, at the very least, because it constituted the exercise of the power under cl 4(b) of the Deed. These submissions should be rejected.

192 First, estoppel by deed does not arise because, for the reasons set out above[179], the Deed of Charge was legally ineffective. The Deed of Charge was without legal effect because there was no debt to secure.

193 Next, the amount allegedly loaned by Mr and Mrs Nemes was, in fact, never received by the Trust. In equity, no estoppel could arise in respect of a receipts clause in a deed (such as Recital D in the Deed of Charge[180]) where the money recited to have been received was not, in fact, paid or where the loan recited to have been advanced was not, in fact, made[181]. The execution of the Deed of Charge could not, and did not, perfect the creation of a debt owed by the Trust to Mr and Mrs Nemes.

194 Similarly, the Deed of Charge could not perfect the exercise of the power under cl 4(b) of the Deed recorded in the 1994 Resolution. Neither the Deed of Charge nor the Charge Resolution[182] was made in the exercise of the power under cl 4(b) of the Deed.

195 Third, in relation to both estoppel by deed and estoppel by convention, an estoppel by a trustee in relation to *a* beneficiary cannot bind *other* beneficiaries unless the other beneficiaries participate in the conduct giving rise to the estoppel[183]. Here, it was not contended that the other specified beneficiaries of the Trust were precluded from contending that what the Trustee did was beyond power and that the Trustee had no right of indemnity against the Trust Funds.

196 Fourth, there can be no estoppel by convention. Estoppel by convention is a doctrine whereby parties who have conducted their relations with each other on an agreed or assumed state of affairs (adopted as the conventional basis of their

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179 See [186].

180 See [138] above.

181 *Petersen v Moloney* (1951) 84 CLR 91 at 100; [1951] HCA 57; *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497 at 32,522 [162]-[164] citing *Greer v Kettle* [1938] AC 156 at 170-172. See also *Mainland v Upjohn* (1889) 41 Ch D 126 at 136; *Burchell v Thompson* [1920] 2 KB 80 at 86.

182 See [137] above.

183 *Trustee Solutions Ltd v Dubery* [2007] 1 All ER 308 at 320 [50].

relationship) will, in proceedings against one another, be estopped from denying that agreed or assumed state of affairs[184]. It is not dependent on the existence of a deed, or even writing. Here, the Executors seek to take the notion of holding the parties to the Deed of Charge to the "agreed or assumed state of affairs" stated in that Deed of Charge and then extend that "agreed or assumed state of affairs" to the Trust and other Specified Beneficiaries of the Trust. That is not permissible. Estoppel by convention is limited to the parties to the conduct relied upon in proceedings against one another. That is not this appeal.

197 In this appeal, it is both unnecessary and undesirable to address the unresolved debate about whether Australia recognises three categories of estoppel and, if it does, the extent to which this division should remain and how it might be applied.

Conclusion and orders

198 The appeal should be allowed and the Executors should pay the appellants' costs in this Court. The orders of the Court of Appeal made on 11 February 2015 should be set aside and, in lieu thereof, the following orders should be made:

1. Appeal allowed.

2. Set aside orders 1, 2 and 4 of the Short Minutes of Order made by Stevenson J on 24 March 2014 and, in lieu thereof, make the following orders and declarations:

   (A) a declaration that Nemeske Pty Ltd is not indebted to Lorand Loblay and Karen Loblay as executors of the estate of the late Emery Nemes;

   (B) a declaration that the 1994 Resolution was of no effect;

   (C) a declaration that the Deed of Charge was of no effect; and

   (D) Lorand Loblay and Karen Loblay as executors of the estate of the late Emery Nemes to pay the plaintiffs' costs.

3. The second and third respondents to pay the appellants' costs.

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184 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244; [1986] HCA 14. See also *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497 at 32,513 [106] and the authorities cited therein.