IN THE COURT OF APPEAL OF NEW ZEALAND

CA441/2014
[2016] NZCA 25

BETWEEN	HUGH MILLOY AND HELEN RUTH MILLOY AS TRUSTEES OF THE HUGH MILLOY FAMILY TRUST First Appellant
	HUGH MILLOY AND HELEN RUTH MILLOY AS TRUSTEES OF THE HELEN MILLOY FAMILY TRUST Second Appellant
AND	KERRY BRYAN DOBSON First Respondent
	CLAUSEVAU HOLDINGS LIMITED Second Respondent

CA608/2014

BETWEEN	KERRY BRYAN DOBSON Appellant
AND	HUGH MILLOY AND HELEN RUTH MILLOY AS TRUSTEES OF THE HUGH MILLOY FAMILY TRUST First Respondent
	HUGH MILLOY AND HELEN RUTH MILLOY AS TRUSTEES OF THE HELEN MILLOY FAMILY TRUST Second Respondent

Hearing:	17 November 2015
Court:	Ellen France P, Randerson and Stevens JJ
Counsel:	R J Hollyman and P M C Gibbs for First and Second Appellants in CA441/2014 and First and Second Respondents in CA608/2014 M J W Lenihan for First and Second Respondents in CA441/2014 and Appellant in CA608/2014

Judgment: 25 February 2016 at 3.00 pm

JUDGMENT OF THE COURT

CA441/2014:

A **The application for leave to raise a new point on appeal, relating to the counterclaim, is declined.**

B **The application for leave to adduce further evidence in relation to the same point is declined.**

C **The appellants must pay the respondent costs in the sum of $2,500 plus reasonable disbursements in relation to both applications.**

D **The appeal is dismissed.**

E **The cross-appeal is dismissed.**

F **On the appeal and cross-appeal there is no order as to costs.**

CA608/2014:

G **The appeal is dismissed.**

H **The cross-appeal is dismissed.**

I **On the appeal and cross-appeal there is no order as to costs.**

REASONS OF THE COURT

(Given by Stevens J)

Table of Contents

Introduction

[1] This appeal concerns a challenge to some of the findings made by the High Court in a dispute about the obligations of contribution between co-guarantors of a bank loan. The normal rule as to the right to contribution in equity is that co-guarantors will share equally, but the ultimate determining factor as to liability between guarantors is what a just apportionment should be.[1] The dispute came before Moore J, who delivered two judgments dealing respectively with liability and quantum.[2]

[2] The dispute arose when Kerry Dobson was required to sell his house to meet obligations under a guarantee given by him and two business associates, Hugh Milloy and John Reid. The guarantee supported a loan advanced to their business in 2009 by Westpac. This loan was held by the three of them, across different facilities in different proportions. Some of the proceeds from the sale of Mr Dobson's house were allocated by the bank to the account of Hugh and Helen

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1 *Trotter v Franklin* [1991] 2 NZLR 92 (HC); *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562 (PC); and *Laws of New Zealand* Guarantees and Indemnities (online ed) at [157].

2 *Dobson v Milloy* [2014] NZHC 1631 [High Court liability judgment] and *Dobson v Milloy* [2014] NZHC 2339 [High Court quantum judgment].

Milloy as trustees of the Hugh Milloy Family Trust and Helen Milloy Family Trust (collectively, the Milloy interests). Mr and Mrs Milloy were also guarantors under the Westpac guarantee.

[3] Mr Dobson sought to recover the amount of proceeds from the sale of his house applied by the bank to the portion of the loan liability held by Mr Milloy:

- Initially he sought to recover the entirety of the proceeds of sale on the basis of a "no loss" agreement he argued had been made between himself and Mr Reid.
- Alternatively he claimed under contribution and indemnity agreements made between the co-guarantors in 2007 and 2009; and
- Under the equitable rules of contribution.

[4] The Milloy interests in turn brought a counterclaim concerning a different business venture involving two other companies, both in the broader corporate structure. Litigation to which the companies were parties had settled. The Milloy interests claimed Mr Dobson had dishonestly received those settlement funds or, alternatively, dishonestly assisted in the distribution of the funds in breach of fiduciary duties owed to the Milloy family trusts as discretionary beneficiaries of the trust holding the settlement funds.

[5] The Milloy interests were largely successful in defending several of the claims by Mr Dobson. Moore J rejected Mr Dobson's claim based on the existence of a "no loss" agreement. The Judge held, however, the parties had agreed to share the obligation of contribution unequally, Mr Dobson assuming 17.33 per cent of the debt obligations, with both the Milloy interests and Mr Reid each liable to 43.33 per cent. The counterclaim by the Milloy interests was dismissed.

[6] In his separate quantum judgment, Moore J determined the amount Mr Dobson was entitled to recover from the Milloy interests. The Judge ascertained Mr Dobson's liability for the interest and the principal, comprising a 17.33 per cent share of the total, and determined the amount owing to Mr Dobson in light of the

manner in which Westpac had applied the proceeds of sale to the various liabilities. Costs were held to lie where they fell in both the substantive claim and the counterclaim. Judgment was entered for Mr Dobson in the sum of $80,096.50 plus Judicature Act 1908 interest from 19 June 2012 until 30 September 2014.

[7] The factual background is somewhat complex. We describe first the circumstances in which the bank loan and guarantee came into being, then summarise the High Court findings and issues on appeal, before turning to our reasons for judgment.

Factual background

[8] The broad factual outline is not in dispute. Counsel for the Milloy interests, Mr Hollyman, confirmed the facts are "concisely summarised" in the High Court liability judgment.[3] Counsel for Mr Dobson similarly accepted this summary. Our description draws largely on the Judge's unchallenged findings.

[9] Mr Milloy and Mr Reid were in business together with Mr Wong in the late 1980s.[4] Mr Dobson became involved with them, having given them accounting and tax advice. Mr Dobson eventually shared offices with them and performed a large amount of work. The business in question was originally known as Milloy Reid Wong & Company (MRW), and in recent years became CMW & Company (CMW).[5] The underlying business of CMW was diverse and involved over 40 subsidiary companies. Mr Milloy and Mr Reid had different focuses within the business, and different levels of involvement in the various subsidiaries.

[10] One such subsidiary was DigiTech (Australia) Ltd (DigiTech). It became involved in substantial litigation in New South Wales. The defendants in the litigation successfully applied for security for costs in the sum of AUD2 million. Messrs Milloy, Reid and Dobson (and other individuals involved in the proceeding) considered the potential outcome of the litigation to be financially promising, following positive legal advice about the litigation prospects, and resolved to cover

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3 High Court liability judgment, above n 2, at [4]–[30] (in respect of Mr Dobson's claim) and [100]–[113] (for the counterclaim by the Milloy interests).

4 Mr Wong departed the business in the late 1990s.

5 The entity will be referred to hereafter as CMW, even though at times it was known as MRW.

the security sum. In August 2007 Mr Reid approached Viking Capital Ltd (Viking), which agreed to assist in funding the amount required for security for costs. This assistance was contingent on CMW underwriting 75 per cent of Viking's exposure. Messrs Reid, Milloy and Dobson, together with Viking, then approached Westpac to negotiate a bond facility to meet the security for costs order.

Westpac bond facility and guarantee

[11] Westpac agreed to provide a bond facility of AUD1,340,000 in December 2007. The bank required security in the form of a guarantee. The parties were Mr and Mrs Milloy as trustees of both the Hugh Milloy Family Trust and the Helen Milloy Family Trust; Mr Reid and Mr Tim McAvoy, as representatives of the A R M Reid Trust (the Reid Trust); and Mr Dobson (together, the 2007 guarantors). Westpac required registered mortgages over the properties in New Zealand owned by each of Messrs Milloy, Reid and Dobson.

[12] Viking was recorded as the customer on the loan agreement with Westpac. Separately, however, Mr Dobson, the Reid Trust and the Milloy interests agreed with Viking they would assume 75 per cent of the liability for the total bond facility, assigning Viking only 25 per cent (the Viking security agreement). The maximum liability under this security agreement was set at AUD2,000,000. It provided for the parties to share the risk as follows:

(a)	Mr Dobson:	13%
(b)	The Milloy interests:	31%
(c)	The Reid Trust:	31%
(d)	Viking:	25%

[13] Separate again from the Viking security agreement, Mr Dobson, the Milloy interests and the Reid Trust signed a Deed of Contribution and Indemnity as co-guarantors of the Westpac security (the 2007 Deed). This document recorded their individual liability for the bond debt, in the event it was called upon. The agreed proportions of the 2007 guarantors were:

(a)	Mr Dobson:	17.33%

(b) The Milloy interests: 41.33%

(c) The Reid Trust: 41.33%

[14] In September 2008, the litigation was unsuccessful and the bond for security for costs was called upon. Mr Reid entered into discussions with Westpac to explore the possibility of rolling over the debt facility.[6] Westpac was unwilling to roll over the existing debt facility and required the parties to enter into a new loan facility and corresponding guarantee. The bank required the guarantors to assume full responsibility for the debt and Viking paid out its 25 per cent portion of the original bond facility liability. It is accepted between the parties that these new 2009 loan facilities were incurred to pay off the 2007 bond debt.

[15] In December 2008, Viking made an arrangement with the parties to the Viking security agreement as to the payment of its liability for 25 per cent of the debt. Payments were made by Viking over time and the money was applied towards the interest on the Westpac debt. It was not established definitively through evidence in the High Court the precise amount paid by Viking, but it is suggested to have been somewhere between $300,000 and $400,000.[7]

The 2009 loan facilities

[16] Westpac offered a facility of NZD1,523,400, divided into three sub-facilities (the 2009 loan agreement). The first and second sub-facilities were to the Reid Trust and Milloy interests, each in the amount of $725,000.[8] The third was $73,400 to Mr Dobson.[9] The remaining bond liability was met by the various cash payments from different sources (including release of a term deposit of $117,000 held by CMW, a cash settlement of a proportion of Viking's liability, and an additional $30,000 loan to CMW from Westpac).[10]

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6 None of the parties was able to repay its proportion of the debt in full. It was in this context that Mr Dobson alleged he and Mr Reid had agreed that Mr Dobson would not be exposed to any loss (the "no loss" agreement). This claim was dismissed by Moore J and there is no appeal. It is not therefore necessary to describe the relevant facts in relation to the allegations.

7 High Court liability judgment, above n 2, at [23].

8 $710,000 principal, $15,000 establishment fee.

9 $72,000 principal, $1,400 establishment fee.

10 The 2007 guarantors were liable to Westpac for the underlying bond debt, so while the loan facilities were advanced afresh, these cash settlements affected their total liability to Westpac.

[17] A new guarantee was required to cover the bond liability. On 4 February 2009, the guarantors executed a new guarantee in favour of Westpac, unlimited as to amount (the 2009 guarantee). The pool of guarantors was widened from the 2007 guarantors, to include Mr Milloy and Mr Reid personally and CMW. Further, the new loan facility was secured by existing securities given in 2007, namely over the three properties owned by Mr Dobson, the Reid Trust and Milloy interests. Each of these properties had existing mortgages over them in favour of Westpac and had to be refinanced.

[18] Also on 4 February 2009, following discussions about the loan documentation and guarantee, Mr Pasley (a solicitor acting for CMW) noted that given a new guarantee was in place, the trusts and Mr Dobson should sign a new deed of contribution and indemnity, reflecting the previous 2007 Deed. He attached for signing an agreement for proportional contribution of the guarantors in the same ratios as the 2007 Deed (the 2009 Deed).

[19] Mr Milloy said he signed this document. Messrs Reid and Dobson said they did not sign it. There was no signed version of the 2009 Deed produced in evidence. Mr Dobson had, however, in August 2009, created a spreadsheet setting out what he believed to be the respective liabilities of the parties, ostensibly for the purpose of ascertaining their differential liability if Viking did not follow through with its payments. That document (which was made known to Mr Milloy at least) recorded Mr Dobson's liability as 17.33 per cent, the same proportion as the 2007 Deed (and draft 2009 Deed).

[20] In October 2009, Westpac served Property Law Act 2007 notices on all the 2009 guarantors. It was agreed that the Milloy interests would pay $50,000 to Westpac on 12 November 2009 to prevent mortgagee sales. This was applied to the interest across the three loan facilities. It seems Mr Milloy agreed with Westpac that the security held in the mortgaged properties would be realised and applied to the loans. It was increasingly evident the parties could not service the loans. Mr Milloy agreed with Westpac that some work would be undertaken on Mr Dobson's and his own properties to enhance their market value.

[21] In 2011, the Reid Trust's property was sold for $1,150,000. Westpac applied the net proceeds to both the Reid Trust's mortgage over that property, and then to the bond-related debt. After these payments, Mr Reid still had an outstanding bond-related liability to Westpac of $200,736.[11]

[22] In February 2012, Mr Dobson's Mt Eden property was sold for $805,300, comprising net proceeds of $777,405. Westpac applied these proceeds as follows:

(a) $273,348.33 applied to Mr Dobson's personal mortgage and credit card debt (account 00);

(b) $200,736 applied to cover the Reid Trust's outstanding bond-related debt (account 01);

(c) $69,019.66 applied to account 91 of Mr Dobson;

(d) $7,924.25 applied to "CMW Ltd"; and

(e) $226,377.17 applied to the Milloy interests' bond-related debt (also account 01).

[23] These payments did not completely discharge the bond debt. It continued to be subject to the guarantees of Messrs Dobson, Milloy and Reid.[12] Mr Reid was bankrupted on 18 July 2013. The final loan debt was discharged entirely, following payment by the Milloy interests, later in 2013.

[24] In June 2012, Mr Dobson made a number of claims seeking recovery from the Milloy interests, in whole or in part, the amount of the house sale proceeds applied to their portion of the bond-related debt.

Counterclaim — background

[25] Two companies within the CMW corporate structure are n-Tech Ltd (n-Tech) and St Lucia Investments Ltd (St Lucia). Both companies were involved in New

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[11] This figure was calculated based on the 2007 Deed proportions, and the expert evidence of Mr Hussey filed for the quantum hearing.

[12] High Court liability judgment, above n 2, at [28].

Zealand litigation.[13] The litigation settled and a settlement sum was owed to the two companies. The funds were held and distributed by an Auckland law firm, Gilbert Walker. The balance of the funds, following an initial distribution split equally between the parties, was $183,561.21. The Milloy interests claim they are entitled to 50 per cent of this sum in their capacity as beneficiaries of the MRW Technology Trust (MRW Trust). The facts giving rise to this claim are as set out below. A diagram of the corporate structure described is annexed to this judgment.

[26] n-Tech is a company within a broader network of CMW companies and trusts. The relevant entities for present purposes are as follows. Clusevau Holdings Ltd (Clusevau) is the corporate trustee of the MRW Trust and the 100 per cent shareholder of a subsidiary company, MRW Technology Ltd (MRW Tech). Clusevau also owns 100 per cent of the shares in n-Tech. n-Tech owed MRW Tech more than NZD8 million in the form of a debenture security, created in 1999.

[27] The MRW Trust was settled on 17 March 1995. It established three sub-trust funds, pertaining to each of Mr Milloy, Mr Reid and Mr Wong. The assets of the trust were allocated proportionally between the three sub-trust funds. The Trust Deed defined the term "Discretionary Beneficiary", including in it a list of individuals in respect of the particular sub-trust fund (listing, for example, the "Principal Family Member", their wife, brothers or sisters or parents), and included any trust that included as its beneficiary any of those listed beneficiaries in the Trust Deed.

[28] The MRW Trust is mirrored by another trust, the Tara Trust, which was settled on 15 November 1996. The corporate trustee of the Tara Trust is Andrews Holdings Ltd (Andrews Holdings). The Tara Trust was structured somewhat differently from the MRW Trust, attributing a one-third share of the trust fund to each of Messrs Milloy, Reid and Wong, and defining as beneficiaries the trustees of their respective family trusts and any other person or persons who may be declared as beneficiaries from time to time. Andrews Holdings owns 100 per cent of the shares in a further company, Segundo & Company Ltd, which in turn holds

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[13] The essential facts are not in dispute. Our summary draws on the outline of Moore J, which counsel for the parties endorsed.

25 per cent of the shares of St Lucia (the other company involved in the litigation). The evidence suggests n-Tech Ltd owns $62.7m redeemable preference shares in St Lucia. A further company, New Zealand Investors Ltd (NZIL), established in 1992, holds 100 per cent of the shares of Andrews Holdings.

Events of December 2011 and January 2012

[29] Prior to December 2011, each of these companies was directed by a combination of Mr Dobson, Mr Reid and Mr Milloy. On 14 December 2011, Mr Dobson, as sole director and shareholder of Clusevau, removed Mr Milloy as director of n-Tech, Clusevau and MRW Tech. This had the effect of shutting Mr Milloy out of the control of these companies. On 11 January 2012, Mr Dobson appointed Mr Reid as new director. The following day, Mr Reid caused Clusevau (as corporate trustee of MRW Trust) to resolve that the Milloy trusts' interests in the MRW Trust should be applied in their totality to NZIL Ltd (owned by Andrews Holdings). On 14 December 2011, Mr Milloy was removed as director of Andrews Holdings and NZIL, following which Mr Reid caused Andrews Holdings to declare 11 January 2012 as the date of final distribution in relation to the Milloy interests under the Tara Trust.

[30] The circumstances in which Mr Milloy was removed from positions in the CMW corporate framework and his trusts interests dissolved gave rise to his claim that Mr Dobson was barred from relief in equity due to his unclean hands. The Milloy interests contend that Mr Dobson engaged in disentitling conduct by removing Mr Milloy from these various positions and Mr Dobson should be barred from recovery in equity.

Distribution of the DigiTech settlement funds

[31] Separately, the counterclaim advanced by the Milloy interests arises from a number of steps taken in 1995 and 1996 by way of Deed in relation to the MRW Trust:

(a) Mr Milloy, Mr Reid and Mr Wong, each as "principal family members" and therefore discretionary beneficiaries as defined under

the MRW Trust Deed, consented to the revocable removal of all persons listed in cl 1.1(a)–(j) of the trust deed as discretionary beneficiaries of the respective sub-trust funds on 20 March 1995.[14]

(b) On the same day, Clusevau, by way of Deed, removed as discretionary beneficiary all persons listed in cl 1.1(a)–(j) of the MRW Trust Deed on 20 March 1995.

(c) Clusevau was incorporated on 22 March 1995.

(d) NZIL was appointed a discretionary beneficiary of the MRW Trust on 24 July 2000 (by consent of Messrs Wong, Reid and Milloy).

[32] On 21 December 2011, Mr Reid instructed Mr Dobson to receive the settlement funds totalling $183,561.21 on behalf of MRW Tech, which at the time did not have a bank account. At the time of distribution of those funds owing to n-Tech and St Lucia, Mr Dobson and Mr Reid were either jointly or solely the only directors and shareholders (or directors of the shareholders) and controlling parties of all the companies and corporate trustees in control of those two companies. Mr Reid, as sole director of n-Tech, determined the settlement funds should be applied to pay down the debenture security debt n-Tech owed to MRW Tech. Mr Reid asked Mr Dobson to receive the payment from n-Tech on MRW Tech's behalf, until receiving instructions from MRW Tech as to its further distribution.

[33] Mr Milloy was not a director of n-Tech or MRW Tech at this time, due to his recent removal. In an email to Mr Milloy on 12 December 2011, two days before his removal, Mr Reid proposed a distribution of the funds between three of them, $100,000 to Reid interests, $35,000 to Milloy interests and $35,000 to Dobson interests. Mr Milloy responded that there was a need to clarify whether the money was required to be used to repay third party lenders. There appears to have been two key lenders who had advanced $100,000 and $50,000 respectively to n-Tech, but no further details of these loans were provided in the High Court. Mr Milloy suggested, by email to Mr Reid, they obtain legal guidance as to their obligations as directors of n-Tech. He was not aware until 21 December 2011 that he had been removed as

[14] This removal was ostensibly for tax reasons, to facilitate transfer between their related companies.

director of these companies. He had previously offered to resign, but had not done so by the time of the disbursement of these funds. He was not consulted on the eventual disbursement.

[34] The removal of Mr Milloy as director and the Milloy interests as beneficiaries was explained by Mr Dobson on the basis that the Milloy business had failed, the DigiTech litigation had ended, and the parties all expected Mr Milloy and the Milloy interests would not be involved in any new business. Mr Milloy had voluntarily resigned from CMW in September 2011. Mr Dobson indicated that when Mr Wong had left the business previously, he too had been removed as director and his interests removed from association with all the businesses in a similar manner. Mr Dobson contended that when Mr Milloy found out he was removed, he did not object or register his disapproval.

[35] The counterclaim is advanced on the basis the Milloy interests were entitled to the funds Mr Dobson received and that Mr Dobson, in receiving them, breached obligations as a fiduciary he owed to the Milloy interests as discretionary beneficiaries of the MRW Trust. Mr Dobson and Mr Reid contend, in turn, given the process described above at [31], the Milloy interests and Mr Milloy were no longer discretionary beneficiaries, were not entitled to any of the funds, and no breach of trust occurred, and, even if breach had occurred, no loss could be pointed to.

High Court findings as to liability

The "no loss" agreement

[36] Moore J found against the existence of the "no loss" agreement contended for by Mr Dobson.[15] The Judge was not satisfied there could be a binding agreement. The evidence did not support the existence of a "no loss" agreement, and the absence of written confirmation of the agreement pointed against its existence. Moreover, Mr Dobson had compiled a spreadsheet noting his personal liability as 17.33 per cent, rather than no liability, which was inconsistent with a "no loss"

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[15] High Court liability judgment, above n 2, at [61]. Although the Judge's finding as to the "no loss" agreement is not challenged by Mr Dobson on appeal, the reasons for the Judge so concluding are germane to issues arising on appeal.

agreement. Failure on the part of Mr Dobson to call witnesses who would have been able to support the existence of such an agreement also pointed against the finding.

Intention for unequal sharing?

[37] On the issue whether the 2007 Deed and/or the 2009 Deed governed the liabilities of the guarantors, the key question was whether the 2009 loan and subsequent guarantee was merely a rollover of the 2007 arrangements and therefore replaced the 2007 loan for the purposes of the 2007 Deed. Moore J found the 2009 loan stood apart from the 2007 guarantee, and so the 2007 Deed could not automatically apply to the new 2009 loan and guarantee.[16] Moore J also concluded there was no evidence suggesting the parties had decided the liability proportions set out in their respective loan facilities with Westpac should reflect their actual liability. The 2009 loan was structured to meet the bank's requirements, specifically the bank's concerns over Mr Dobson's deteriorating liquidity.[17] In the absence of either the 2007 Deed or the loan facilities governing the apportionment of liability, Moore J concluded there was no express or implied agreement between the parties as to their liability.

[38] Given the equitable presumption that co-guarantors contribute equally, this in turn raised the question whether there was a clear intention of unequal sharing to displace that presumption. Moore J found the evidence demonstrated an intention between the guarantors that they be bound by the proportions in the 2007 Deed.[18]

Is unequal sharing just?

[39] The final question was whether unequal sharing in the 2007 Deed proportions was just, in all the circumstances. Moore J found that even if he were wrong about the existence of an intention to share unequally, on the basis of *Trotter v Franklin*, unequal sharing was necessary to ensure justice in the circumstances of this case.[19] The express agreement represented in the 2007 Deed had ceased to have legal force, but, nonetheless, the evidence was at best equivocal as to any clear departure from

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16 At [62]–[66].
17 At [67]–[68].
18 At [72].
19 *Trotter v Franklin,* above n 1

these proportions. It was just, in the circumstances, to return to the last point of agreement in force between the parties.[20]

[40] The Judge found the justice of the unequal proportions was supported by a consideration of the alternative: there was no evidence equal sharing was ever considered to be a possible or acceptable outcome by the parties. The 2009 loan had seven guarantors, but these represented various legal entities relating to the same three key individuals. To spread liability equally across these seven separate guarantors would have been to focus on legal form over the substance of agreement between the parties and would have resulted in injustice.[21] It was therefore just for the 2007 Deed proportions to prevail.

Appropriate amount of contribution

[41] The final question concerned the actual liability of each party, in light of this finding as to the appropriate contribution of each guarantor. This fell to be considered in the light of a number of separate payments and obligations, namely:[22]

(a) Mr Dobson's paying the balance of the Reid Trust mortgage over Mr Reid's house, which was the subject of a subsequent indemnity agreement between those two parties (the Dobson-Reid agreement);

(b) the payment of $50,000 in interest by the Milloy interests; and

(c) Mr Dobson's contribution to the CMW loan principal payment.[23]

[42] In summary, Moore J held:

(a) The Dobson-Reid agreement did not relate to Mr Reid and Mr Dobson as co-guarantors, but was an entirely separate arrangement with Mr Reid being a debtor to Mr Dobson for an amount paid on Mr Reid's specific loan facility from Westpac.[24] This should not alter

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20 High Court liability judgment, above n 2, at [75].
21 At [76].
22 At [77].
23 At [78].
24 At [84].

Mr Dobson's legal liability under the 2007 Deed. Nor should it be included in assessment the actual liability.

(b) As to the Milloy interests' payment of $50,000, it was artificial to separate liability for the principal and interest in determining individual liability. Moore J calculated the appropriate proportion of total interest to each guarantor and that constituted their interest liability. The bank's apportionment of interest payments to the varying loan facilities should be disregarded in the calculation of liability for those payments between the guarantors.

(c) In respect of the CMW payment, the Milloy interests contended Mr Dobson had not contributed to the $117,000 payment to reduce the outstanding principal prior to the refinancing of the loan and was liable to account for 17.33 per cent of that. Moore J accepted that the paying down of the overall principal was for the benefit of all co-guarantors, of which Mr Dobson was one. The Judge found Mr Dobson was liable to account for a 17.33 per cent share of this amount.[25]

[43] Moore J found that Mr Dobson was entitled to relief. He rejected the Milloy interests' submission, noted above, that Mr Dobson should be disentitled from recovery because Mr Dobson did not come to equity with clean hands:

> [96] Mr Hollyman submitted that if it was found that Mr Dobson is entitled to relief under the principles of contribution the Court should exercise its discretion and refuse to grant relief because Mr Dobson excluded Mr Milloy from his position of ownership and control in the MRW group, assisted Mr Reid in diverting the proceeds of the New Zealand litigation (which is relevant to the counterclaim) to their mutual benefit and is seeking to claim funds from that which he has already made arrangements to collect.
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> [97] Although I accept that an overly technical or dogmatic approach to considerations of a nexus is not appropriate in resolving matters of conscience, I am not satisfied that Mr Dobson's actions in excluding Mr Milloy as director and diverting the proceeds of the New Zealand litigation, both matters which relate to the counterclaim, are sufficiently and directly relevant to the relief sought under the guarantee. The guarantee was a completely separate business transaction relating to the Australian DTAL

[25] At [93].

> litigation. It is remote in that sense. Other than the same parties being involved there is no other relationship or logical connection between the actions of Mr Dobson and the relief claimed under this cause of action.

[44] The Judge directed the parties to confer and endeavour to agree on quantum in the light of the liability judgment.[26] As events transpired, no agreement was achieved.

Counterclaim

[45] Moore J rejected the Milloy interests' counterclaim. On Mr Reid's contention, the funds were in the nature of a gift to him from Gilbert Walker and were not available to third party creditors. The Judge found this evidence was "implausible":[27]

> [128] However, irrespective of their nature, it is clear that the funds were paid out by Gilbert Walker pursuant to the agreement which required the funds to be paid to n-Tech or nominee. Mr Hollyman, while not conceding the funds were anything other than litigation proceeds, accepted on the face of the documents and notwithstanding the evidence given by Mr Reid, n-Tech was entitled to pay the funds to MRW Tech. In being paid to n-Tech the obligation to repay [third party creditors] was not triggered. The obligation would only have been triggered if litigation proceeds were directly or indirectly paid to Andrews or Clusevau.

[46] While it was common ground that n-Tech was entitled to receive the money, the Judge considered the arrangements to have been "deliberately structured" to avoid any payment to Andrews Holdings or Clusevau. Because MRW Tech held a debenture security over n-Tech for more than $8 million, n-Tech was entitled to pay out the funds to MRW Tech, whether or not the funds were litigation proceeds.[28] Accordingly, the question for Moore J was whether the distribution of the funds constituted a violation of obligations operating upon n-Tech (or its parent companies or corporate shareholders) or Messrs Reid or Dobson. He concluded, having been paid it by n-Tech, MRW Tech was able to deal with the funds. Hence, the claim by the Milloy interests was that the funds were available to MRW Tech's shareholder, Clusevau. Any money available to the shareholder then was available to the

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26 At [99].
27 At [128].
28 At [129].

discretionary beneficiaries of the MRW Trust, of which Clusevau is the corporate trustee.[29]

[47] As to the claim Mr Dobson was liable to account to MRW Trust, having knowingly received and applied the funds in a manner inconsistent with Clusevau's trustee obligations, Moore J found Mr Dobson did not receive the money on behalf of Clusevau, but rather in his personal capacity. While Mr Dobson may have breached duties in his capacity as director of n-Tech, MRW Tech and/or Clusevau, this did not necessarily amount to a breach of Clusevau's duties as trustee of the MRW Trust.[30] Moreover, the funds belonged to MRW Tech; it could not be assumed that funds received by a company were automatically the property of and subject to the claims of a shareholder and subsequent further companies. It was open to Mr Reid to transfer the funds to Clusevau as director of MRW Tech, but there was no obligation on him to do so.[31]

[48] As to the alternative claim that Mr Dobson had dishonestly assisted in a breach of trust by Clusevau, by participating in the various transactions removing Mr Milloy from his positions in the various companies, Moore J found, in summary:

(a) The majority of these transactions did not amount to breaches of fiduciary duties by Clusevau.[32]

(b) While the removal of Mr Milloy as a director of Clusevau was no doubt not in the best interests of Mr Milloy, as he lost his ability to influence where the funds would be distributed, a shareholder's decision to remove him does not equate to a fiduciary breach on the part of the corporate trustee of the trust of which the Milloy interests were discretionary beneficiaries.[33]

(c) Clusevau was not directly involved in Mr Dobson: receiving the funds; removing Mr Milloy as a director of Andrews Holdings;

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29 According to the practice of equal distribution to the beneficiaries.
30 High Court liability judgment, above n 2, at [132].
31 At [133].
32 At [135].
33 At [136].

allocating the Milloy Trust's interests in the Tara Trust; or removing Mr Milloy as a director of NZIL. As Moore J found:

> [137] … When, on Mr Reid's instructions, Mr Dobson distributed the funds to Mr Reid for his personal use and to himself for his own purposes, this was a breach of Mr Reid's fiduciary obligation to MRW Tech not to profit as director of that company.[34] Conceivably it also amounts to a breach of Mr Dobson's duty of loyalty and fiduciary duty to act in the best interests of Clusevau. It was not, however, a breach of Clusevau's duties …

(d) The transfer by Clusevau of the Milloys' interests in MRW Trust to NZIL was entirely within the permissible exercise of discretion by Clusevau, as NZIL was appointed by Mr Milloy as a discretionary beneficiary on 24 July 2000.[35]

(e) The Judge accepted that, although Mr Milloy had decided to withdraw from the various companies, his "abrupt removal" suggested the step was taken by Messrs Reid and Dobson to ensure Mr Milloy could not frustrate the distribution of the funds to Mr Reid and Mr Dobson.[36]

(f) Nevertheless, the final distribution to the Milloy interests under the Tara trust, on 12 January 2012, was a distribution to a discretionary beneficiary. It only affected the capital in the Milloy sub-trust on the date of allocation and did not affect any ongoing interest in the sub-trust.[37]

[49] Accordingly the Judge was satisfied that "the combination of removing Mr Milloy's beneficial interest in and control of NZIL and the decision to allocate that sub-trust capital fund was designed and intended to dishonestly deprive Mr Milloy of any entitlement to the sub-trust's funds".[38]

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34 A director may, under the constitution, be entitled to a salary. However it is apparent from his evidence that Mr Reid was not taking the money as a salary. Further, it is clear that it was not intended as a loan as he now claims.

35 High Court liability judgment, above n 2, at [138].

36 At [141].

37 At [142]–[143].

38 At [144].

[50] On the question of loss, the Milloy interests claimed the loss from Clusevau's breach of duty amounted to 50 per cent of the funds. However, on the date the money was transferred, the sub-trust in question (the Milloy sub-trust of the MRW Trust) did not hold any part of the funds, because they were never transferred to the MRW Trust and thence the sub-trust. The capital allocated to the sub-trust was unrelated and unconnected to the funds distributed to n-Tech.[39]

[51] The Judge also found that, even if the above analysis was wrong, he was nevertheless not satisfied the entitlement by the Milloy interests as beneficiaries was established. Moore J reasoned that while the thrust of the Milloy interests' claim was that they were beneficially half-owners of all the various corporate entities (through the MRW Trust), this was not supported by the corporate structure. Indeed, the Milloy trusts were not beneficiaries under the MRW Trust because the Deed dated 20 March 1995 removed the various specific individuals and trusts from beneficiary status.

[52] Sub-clause 1.1(k) of the MRW Trust Deed included as a discretionary beneficiary "any trust which includes for the time being among its beneficiaries (contingent or otherwise) any Discretionary Beneficiary or any issue of any Discretionary Beneficiary". The effect of this was that, at December 2011, there had to be at least one beneficiary common to both a trust constituting the Milloy interests and to the MRW Trust in order to qualify within subcl 1.1(k). As the definitions bringing Mr Milloy or his family within that ambit were revoked in 1995, the trusts could not themselves be discretionary beneficiaries.[40]

[53] Moore J therefore determined there was no loss to the Milloy trusts flowing from any breach.[41] The outcome of the liability judgment was accordingly:

(a) There was no express or implied agreement for unequal sharing.

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39 At [145].

40 At [149]. The Milloy trusts were no longer "trusts which includes among its beneficiaries any discretionary beneficiary", because Mr Milloy and his family had been removed from the definition of discretionary beneficiary by the Deed, as mentioned at [31](a) above.

41 At [150].

(b) A "no loss" agreement did not exist between Messrs Reid, Milloy and Dobson.

(c) The just outcome was that Mr Dobson's liability as co-guarantor was for 17.33 per cent of the loan liability (including interest).

(d) The counterclaim by the Milloy interests failed.

Quantum judgment

[54] The total loan liability under the bond debt to Westpac was $1,553,400. This comprised:

(a) $725,000 [advanced to Reid];

(b) $725,000 [advanced to Milloy];

(c) $73,400 [advanced to Dobson]; and

(d) $30,000 [advanced to CMW].

[55] Mr Dobson's liability under the guarantee was 17.33 per cent of $1,553,400, namely $269,204. Moore J received submissions as well as further evidence as to interest.[42] He had determined in the liability judgment that Mr Dobson was liable for 17.33 per cent of the total interest owed on the loan. Taking the interest calculation to February 2012 (being the date at which Westpac took the sale proceeds of Mr Dobson's home) the total interest paid was calculated to be $437,767,[43] 17.33 per cent of which is $75,865. Mr Dobson's total liability therefore (principal and interest) was: $269,204 + $75,865 = $345,069.[44]

[56] The Judge was required to assess the impact of the payments from Viking, both as to interest and principal. The Viking payments amounted to $205,739.37. Taking into account the portion of this figure applied to interest, Moore J adopted the sum of $35,661, being the figure calculated by counsel for the Milloy interests as

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42 By way of an affidavit from Shane Hussey, a chartered accountant called by the Milloy interests.

43 This was a figure suggested by the Milloy interests, which Moore J noted was to Mr Dobson's advantage: High Court quantum judgment, above n 2, at [18].

44 This is excluding the CMW liability, which is dealt with separately.

Mr Dobson's entitlement. This sum was to be deducted from Mr Dobson's outstanding liability.

[57] Consistent with his findings as to contribution, Moore J found Mr Dobson was also liable to CMW for 17.33 per cent of the term deposit it had applied to the principal. That figure being $117,000, Mr Dobson's liability for that payment was $20,276.

[58] Moore J also noted the figure of $14,180, which had been paid to Westpac by CMW and applied by the bank to pay down Mr Dobson's personal mortgage. He had obtained the benefit of this amount, which needed to be factored into his overall remaining liability.[45] Moore J considered this amount was owing to CMW.

[59] Finally, Mr Milloy had made the $50,000 interest payment, for which Mr Dobson owed 17.33 per cent or $8,665. Both counsel agreed this needed to be repaid. However, Moore J considered this had already been taken into account, because he had calculated Mr Dobson's proportionate liability for the entire interest figure.[46] To require repayment of that figure would be to double-count Mr Milloy's interest payment in Mr Dobson's liability.[47]

[60] Turning to assess the proceeds of sale of Mr Dobson's house Westpac had applied to Mr Reid's personal mortgage, Moore J concluded the amount paid to Mr Reid's account should not be deducted. It was appropriate to treat that Dobson-Reid agreement, whereby Mr Reid would repay Mr Dobson for the amount advanced against his mortgage debt, as a separate arrangement for the Reid Trust to compensate Mr Dobson for what he was owed. To exclude the amount paid to the Reid interests in terms of assessing Mr Dobson's entitlement would undermine the global approach taken by Moore J, assessing the debt over all facilities.[48]

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45 High Court quantum judgment, above n 2. at [23].
46 At [15].
47 At [24].
48 At [25].

[61] Moore J's conclusions are summarised as follows:[49]

	Bond debt	**Dobson share**	
Bond debt	$1,533,400.00	$269,204.00	
Interest	$437,767.00	$75,865.00	
Total debt	**$1,991,167.00**	**$345,069.00**	
Viking payments	($205,740.00)	($35,661.00)	
Mortgage payment		$14,180.00	
CMW Deposit	$117,000	$20,276.00	
Subtotal	**$1,902,427.00**	**$343,864.00**	
Amount repaid		($504,057.00)[50]	
Amount owing by Dobson			($160,193.00)
Amount owing by Milloy interests			**$80,096.50**

Costs

[62] Moore J approached the question of costs by addressing the substantive claim and counterclaim separately. Mr Dobson had sought indemnity costs, and increased costs in the alternative. The Milloy interests had rejected these claims and sought for themselves payment of actual solicitor and client costs or alternatively increased costs, plus an uplift of 50 per cent. Moore J concluded costs should lie where they fell for the substantive claim, and rejected each party's respective positions.[51]

[63] As to the counterclaim, the Milloy interests contended adverse costs against Mr Dobson should be awarded in light of the finding that he intentionally deprived Mr Milloy and the Milloy interests of their trust entitlements. Despite this, Moore J determined it was appropriate for costs to lie where they fell, as the substance of the counterclaim had been largely unsuccessful.[52]

Issues on appeal

[64] The Milloy interests appeal against some of Moore J's findings on the substantive claim and his dismissal of the counterclaim; Mr Dobson cross-appeals on

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49 At [26].

50 This is the total proceeds applied to various loan facilities from the sale of Mr Dobson's home, less the payment on his personal mortgage and debt.

51 High Court quantum judgment, above n 2, at [43]–[45].

52 At [50].

the central findings as to his liability under the bond-debt. The Milloy interests also seek to raise a new ground on appeal in furtherance of their counterclaim (CA441/2014). Mr Dobson appeals against Moore J's refusal to award him costs on the counterclaim and against the date of the award of judgment interest; the Milloy interests contend their Calderbank offer should have been taken into account in awarding costs (CA608/2014). The parties are agreed the issues arising for determination are:

(a) Whether the appellants should be granted leave to raise a new point on the appeal in relation to the counterclaim;

(b) In respect of Mr Dobson's claim for reimbursement:

(i) Whether the unequal sharing of the liability under the 2009 guarantee should be governed by the 2007 Deed proportions or by the proportions represented by the Westpac facilities; and whether the liability should have extended to include all personal lending secured by the guarantees (including the parties' separate mortgages) in determining the unequal sharing proportions;

(ii) Whether Mr Dobson's payment of $200,735 towards the Reid mortgage should be excluded in calculating the actual contributions made to decreasing liability under the 2009 guarantee;

(iii) Whether there was an error in the quantum judgment by excluding the contribution of $50,000 by Mr Milloy to interest;

(iv) Whether, if any amount is owed to Mr Dobson, he should be denied equitable relief on the grounds of unclean hands;

(v) (Subject to leave being granted to raise the point) if any amount is owed to Mr Dobson, whether he should be entitled

to interest from the date of payment, rather than the date of filing of the proceedings.

(c) In respect of the counterclaim by the Milloy interests (subject to leave being granted to raise the point), what was the effect of the 20 March 1995 Deed of Ceasing to be a Discretionary Beneficiary, in the light of Clusevau's date of incorporation being 22 March 1995.

(d) Whether Mr Dobson should be required to account to the Milloy interests for funds received by him:

(i) on the basis Mr Dobson committed breaches of fiduciary obligations owed to the appellants as discretionary beneficiaries of Clusevau;

(ii) on the basis Mr Dobson knowingly assisted in breaches by Mr Reid of fiduciary obligations owed to the appellants as beneficiaries of Clusevau; and

(iii) on the basis the Milloy interests are beneficiaries of the MRW Technology Trust.

(e) Whether Mr and Mrs Milloy suffered any loss as a result of the actions of Mr Dobson.

(f) Whether the costs orders of Moore J should be upheld.

Application for leave to raise a new point

[65] This issue may be dealt with shortly. It arises from one of the grounds for dismissing the counterclaim, namely, the Milloy interests were not beneficiaries of the MRW Trust. Moore J found they had been removed as beneficiaries by a Deed of Ceasing to be a Discretionary Beneficiary executed on 20 March 1995. The Milloy interests contend this conclusion resulted from an incorrect interpretation of the Deed. This is said to be supported by the fact the parties involved, including Mr and Mrs Milloy and Mr Dobson, believed and acted on the basis that the Milloy interests remained beneficiaries of the MRW Trust.

[66] The Milloy interests contend further that the Deed itself was invalid and therefore a nullity because the Deed establishing the MRW Trust was executed by the settlor (Mr Reid) and signed for Clusevau as trustee on 17 March 1995. The Deed itself was executed by Clusevau (as appointor under the Deed) on 20 March 1995. However, Clusevau was not itself incorporated until 22 March 1995. The Milloy interests submit accordingly the Deed removing the discretionary beneficiaries had no effect and the Milloy interests were still beneficiaries of the MRW Trust at the time Mr Dobson is alleged to have wrongly exercised his powers as director of Clusevau to ensure they received none of the funds.

[67] Counsel for the Milloy interests accept that the point was not raised in the Court below but seek leave to argue it on appeal. Mr Hollyman contends the effect of the invalidity of the Deed is a limited and purely legal argument on which no additional evidence is required. It is claimed there is evidence before the Court to the effect that "the parties treated the appellants as continuing beneficiaries of the MRW Trust as their understanding was that the appellants had not ceased being beneficiaries". Counsel submits there is no material prejudice to other parties in raising the new point.[53]

[68] The application is opposed on the basis that the point has only recently been raised by the Milloys, despite the fact that Mr Dobson and Clusevau sought further particulars on two occasions in the High Court as to how the Milloys were beneficiaries under the MRW Trust. Mr Dobson and Clusevau pleaded the Milloy interests were not beneficiaries of the Trust in the statement of defence to the counterclaim. The point was not raised at the hearing, despite the parties filing a chronology clearly showing Clusevau was incorporated after the Deed was executed. Moreover, Mr Dobson stated in his brief of evidence that the Milloy interests were not beneficiaries of the Trust and he was not cross-examined on this evidence.

[69] Mr Dobson challenges the statement by the Milloy interests that "the parties involved … believed and acted on the basis that the appellants remain beneficiaries under the MRW Trust". Evidence of the parties' former business associate,

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[53] Citing *Foodstuffs (Auckland) Limited v Commerce Commission* [2002] UKPC 25, [2004] 1 NZLR 145 at [8]–[9].

Mr Wong, who was involved in the removal of the beneficiaries at the time, also contradicts this position. Mr Lenihan contends the new point will cause material prejudice to Mr Dobson and Clusevau; Mr Dobson has lost the chance to obtain and lead further documentary evidence and could have asked Mr Reid and Mr Wong to give evidence contrary to the position now contended for by the Milloy interests. Mr Milloy was himself not cross-examined on the point at trial.

[70] We are satisfied the application should be declined, as should the application to adduce further evidence. First, despite the request for particulars by Mr Dobson and Clusevau, the matter was not specifically pleaded by the Milloy interests in the High Court. Nor was it explored in terms of the evidence at first instance. We consider that had the issue been raised, it is likely it would have been necessary to lead evidence as to legal issues relating to estoppel and the post-incorporation status of the Deed. A clear evidential conflict exists between the position now advanced by the Milloy interests and that maintained by Mr Dobson, Clusevau and Mr Wong. These opposing views make it likely that further evidence and cross-examination would have been required.

[71] Moreover, Mr Milloy signed the relevant Deed as a director of Clusevau; there was sufficient material available upon which the Judge was able to conclude the Milloy interests had been validly removed as beneficiaries of the MRW Trust by the Deed (as were the other business associates in the same way) and that they believed this to be the case at the time. Accordingly, even if leave were granted to argue the new point, it is unlikely to have been decisive, given our view as to the wider context of the corporate structure and the position of the Milloy interests within it. The two applications for leave advanced by the appellants are declined.

Contribution obligations

[72] Mr Dobson cross-appeals against Moore J's findings that the obligations of contribution of each guarantor should follow those set out in the 2007 Deed. He contends the 2007 Deed proportions should not have prevailed, because the 2009 guarantee to Westpac was substantively new, and replaced the 2007 Deed of guarantee relating to the bond facility. This was in turn supported by the new

principal debtors being named in the 2009 guarantee, expanding the number of co-guarantors to seven. Further, while the 2007 guarantee only covered the value of the bond debt, the 2009 guarantee was a cross-guarantee, extending to cover the personal lending of each individual guarantor. This added in excess of $1.2 million to the liability guaranteed. Additionally, the 2009 guarantee was unlimited in amount. Mr Dobson contends that this made the context of the 2009 guarantee substantively different to that to which the 2007 Deed applied, and the latter could not be extended in application to the former.

[73] Mr Lenihan submits the Judge failed to analyse the evidence supporting these distinctions. Specifically, he emphasises that the 2007 Deed proportions were arrived at solely to apportion responsibility for the initial bond debt. There was insufficient evidence of an intention by the parties to apply these proportions to the materially different liabilities covered by the 2009 guarantee. The loan security agreement, for example, is irrelevant to the increased lending covered under the 2009 guarantee. Given these differences, the Judge erred in finding there was a common intention that the 2007 Deed proportions would continue to apply under the 2009 guarantee. There was insufficient evidence to support such a finding. The similarity of proportions in the 2007 Deed and draft 2009 Deed is of little assistance. Moreover, Mr Pasley, in drafting the 2009 Deed, does not seem to have turned his mind to the fact there were materially different apportionments of liability for the bond debt entered into by the parties under the 2009 loan agreement.

[74] Further, it was incorrect to find that unequal sharing on the basis of the 2007 Deed proportions was just, in all the circumstances. Rather, Mr Lenihan contends, the Judge ought to have found that each of the three main parties (Mr Dobson, the Reid trust and the Milloy interests) was liable under the 2009 guarantee in respect of the "face value" of the lending (both personal and bond-related) imposed by Westpac. This is because those proportions are what each party agreed to borrow and represent the most reliable evidence of the parties' common intention at the time.

[75] Even if this Court rejects that submission, Mr Dobson contends this Court should still hold the 2007 Deed proportions should not apply across all liability covered by the 2009 Guarantee. There was insufficient evidence to infer agreement

that the 2007 Deed proportions would continue. Mr Dobson contends the spreadsheet he compiled reflecting those proportions should not be given undue weight. To the extent Mr Milloy did not accept the 2007 Deed did not apply, Mr Dobson was under no obligation to correct that misunderstanding.

[76] Mr Lenihan contends, on the basis of the foregoing, that a just apportionment is instead obtained by adopting an alternative debt apportionment scenario. Three potential scenarios are advanced by Mr Lenihan:

(a) Apportionment based on the face value of the 2009 lending to each party. Using this apportionment, a percentage of total debt held by each party can be determined. Mr Dobson is responsible for 11.74 per cent (assessing the sum of $73,400 from the 2009 lending plus his personal loan of $250,000). This is compared with borrowing by the Milloy interests of $1.125 million, by the Reid interests of $1.275 million and CMW of $30,000. Mr Dobson's total liability under this scenario would be $199,415.02.

(b) Apportionment based on the 2007 Deed proportions, applying to all of the parties' lending (both the personal and 2009 lending). Mr Dobson's portion would still be 17.33 per cent. His total liability under this scenario would be $112,787.17.

(c) Apportionment based on the 2007 Deed proportions being applied to the 2009 lending, with the parties being responsible for their personal lending. Assessed as a percentage of the total lending, Mr Dobson's portion is 18.85 per cent. His total liability under this scenario would be $88,415.48.

[77] We reject these alternative scenarios of debt apportionment. First, the inclusion of each party's personal mortgage debt within the ambit of any debt sharing arrangement was not raised in the High Court. Such evidence as does exist provides no indication the parties intended to share (as between themselves) any

liability for each other's personal mortgages. We consider, rather, the question remains what a just apportionment of sharing of the 2009 lending might be.

[78] The starting point for us, as for Moore J, is equal sharing. Whether that starting point should be displaced is determined not only by whether there is an agreement or an intention to do so, but also whether there is a proper basis for a different sharing arrangement.

[79] If there is no agreement, and no basis for inferring a common intention, the Court must still consider whether the presumption of equal sharing should be displaced as a matter of justice between the co-debtors/co-sureties:[54]

> [Counsel] was inclined to submit that this prima facie rule of equal sharing between co-sureties could only be displaced by express agreement to the contrary. However I do not consider that to be the law. *As the right contribution is founded in equity the ultimate question is what is a just apportionment between the co-sureties*. Ordinarily the justice of the matter will require equality of sharing. Obviously if the parties have expressly provided to the contrary then justice will require such contrary arrangement to be enforced. It seems to me however that equity may well require unequal sharing if the Court can discern by clear implication either that this is what the parties must have intended *or that such unequal sharing is necessary to do justice in the particular case*.

[80] This last point is confirmed expressly in s 86 of the Judicature Act 1908:

> **86 Rights of co-sureties, etc, as between themselves—**
>
> A co-surety, co-contractor, or co-debtor shall not be entitled to recover from any other co-surety, co-contractor or co-debtor by the means aforesaid more than the just proportion to which, as between those parties themselves, such last-mentioned person is justly liable.

[81] As Tipping J emphasised in *Trotter v Franklin*, "as all sureties are equally liable to the creditor it does not lie with the creditor [here, Westpac] to determine upon whom the burden of the guarantee shall be exclusively thrown".[55] The form of the loan does not dictate the sharing of liability. Indeed, Moore J expressly found there was no evidence the parties agreed the liability proportions in the loan facilities would reflect their actual liability:[56]

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54 *Trotter v Franklin*, above n 1, at 98–99 (emphasis added).
55 Citing *Scholefield Goodman v Zyngier*, above n 1.
56 High Court liability judgment, above n 2, at [68].

> [It is] more credible and thus more likely that the 2009 loan was structured to meet the bank's requirements and, significantly, concerns over Mr Dobson's deteriorating liquidity.

[82] The clear assumption of the parties, as reflected in the evidence, was that each would be individually liable for their separate personal mortgage. Accordingly, Moore J dealt solely with the bond debt and the proportions in which it ought to be shared.[57] He held further there was a clear intention to share the debt unequally based on the 2007 Deed proportions and those proportions would allow justice to be achieved.[58] The Judge's findings are summarised as follows:[59]

> (a) The 2009 loan was used to repay the bond debt, which was governed by the proportions [in the Deed]. Mr Dobson's liability for 17.33% of that debt was paid by this loan.
>
> (b) The same proportions derive from the original Security Agreement.
>
> (c) The same proportions are recorded in the 2007 Deed and in the 2009 Deed.
>
> (d) The same proportions are referred to by Mr Dobson in his August "HM10" 2009 spreadsheet.
>
> (e) Mr Dobson was aware that Mr Milloy believed the 2009 Deed proportions applied and did nothing to correct that misapprehension or attempt to alert Mr Milloy to the fact that he, Mr Dobson, was of a different view.

[83] We are satisfied there is ample support in the evidence for these findings. We do not intend to burden this judgment with further detail. It suffices to say we see no proper basis to interfere with the Judge's finding that a just apportionment of debt to Mr Dobson is 17.33 per cent, for the reasons he gave. We reject Mr Dobson's alternative scenarios as inconsistent with the evidence.

[84] This aspect of the cross-appeal by Mr Dobson therefore fails.

The Dobson-Reid mortgage agreement

[85] Mr and Mrs Milloy seek orders that the payment of $200,735.52 by Mr Dobson to the Reid Trust in payment of Mr Reid's mortgage be taken into

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57 The one exception to this is the Reid repayment, which did relate to the Reid separate mortgage and is part of the appeal.

58 High Court liability judgment, above n 2, at [77].

59 At [72].

account in the quantum calculation. They say that given Mr Dobson will recover those funds from the Reid Trust separately, these should affect the outstanding debt balance attributable to Mr Dobson. Mr Hollyman argues, as in the High Court, that to ensure justice, unequal sharing was appropriate and Mr Reid's portion of the guarantee should be allocated to Mr Dobson. It would have the effect of significantly reducing the amount owed by the Milloy interests to Mr Dobson.

[86] Moore J rejected this submission holding it was not just for this separate agreement to alter the arrangements between guarantors:

> [84] The issue with this agreement is that it relates not to Mr Dobson and Mr Reid as co-guarantors under the Westpac loan but separately, with Mr Reid as a debtor to Mr Dobson as guarantor for an amount repaid on Mr Reid's specific loan facility with Westpac. That arrangement sits apart and distinct from the issue before me which requires me to consider the loan as a whole, irrespective of the three facilities covering Westpac's interests. I am satisfied it is appropriate to treat the agreement as an agreement that the Reid Trust will pay Mr Dobson what he is owed as a result of his payment in excess of his liability. It was acknowledged by Mr Hollyman that how the bank apportioned the funds is not strictly relevant; the question is what each party has paid as against that party's liability as a guarantor. In my view to take into account the separate agreement between the Reid Trust and Mr Dobson shifts the focus to the bank's apportionment and distracts focus from the central question of *inter se* liability under the guarantee.

[87] We agree with the Judge's approach and for the reasons he gave. As noted earlier,[60] the way in which the creditor (Westpac) chooses to allocate the funds received is not determinative in assessing the just apportionment amongst co-guarantors. Also, the arrangements between Mr Dobson and Mr Reid concerning the $200,735.52 paid to the Reid Trust were separate from the 2009 guarantee. The Judge's task was to ascertain what constituted a just contribution by Mr Dobson. We see no reason for this separate arrangement to be taken into account. This ground of appeal fails.

Exclusion of contribution to interest

[88] The Milloy interests contend a second error in the quantum judgment exists pertaining to interest. They contend the Judge erred in declining to give the Milloy interests credit for $50,000 in interest, which was paid to prevent mortgagee sales in

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[60] At [81] above.

December 2009. At stake is Mr Dobson's liability to account for the sum of $8,665, being 17.33 per cent of the interest sum paid by Mr Milloy. The Judge determined in the High Court that it was "unnecessary" to take this into account.[61] He determined that interest had already been taken into account in the quantum judgment as a global sum.[62] The expert evidence of Mr Hussey, a chartered accountant who gave evidence on the quantum issue, was that the total interest paid was calculated at $437,767. This was the amount the Judge took into account in his summary of calculations set out at [61] above. If a further amount of $8,665 were taken into account it would, as the Judge found, amount to double-counting Mr Dobson's interest liability.[63]

[89] Mr Hollyman submits this does not constitute double-counting because the total interest paid as calculated by Moore J was correctly used by the Court to calculate the total bond debt, which had to be shared between the guarantors in proportions determined by the Court. Further, the interest payment of $50,000 made by the Milloy interests should have been taken into account as part of their actual contribution towards reducing the debt and therefore part of the accounting in relation to the bond debt.

[90] We are not satisfied that an adjustment of $8,665 is required. When assessing the total debt figure, the Judge was determining how the just apportionment between guarantors should be calculated. In carrying out that exercise, the Judge had to determine the amount of interest that should be added to the bond debt to identify the total liability under the 2009 loan agreement. Because of difficulties Mr Hussey had in obtaining access to the records identifying the precise interest payments on the bond debt, his calculation was put forward as his best estimate.

[91] A review of Mr Hussey's evidence shows that he allowed as a credit in favour of the Milloy interests only the amount of interest actually paid from the $50,000 against Mr Dobson's bond-related debt.[64] In the same calculations, Mr Hussey concluded that Mr Dobson's final position is that he is owed by the Milloy interests

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61 High Court quantum judgment, above n 2, at [24].
62 At [15].
63 At [24].
64 This being 17.33 per cent of the $50,000 interest payment.

the sum of $91,574. The reason this amount is higher than that found by the Judge is because Mr Hussey appears to have attributed various payments against the principal from third party sources (such as CMW) to all parties, and, based on slightly different assumptions about the Reid mortgage quantum, has treated Mr Dobson as having assumed Mr Reid's liability under the bond debt.

[92] We are not disposed to interfere with the Judge's apportionment of interest. Mr Hussey's evidence does not support an allowance of $8,665. He appears to have actually allowed a credit of $3,781, so the difference is *de minimis*. In any event, Mr Hussey was obliged to make a number of assumptions in his calculations due to the inadequacies in some of the accounting information. Assessing a just apportionment does not call for absolute precision. Accordingly this ground of appeal fails.

Clean hands

[93] A key issue for the Milloy interests on appeal is whether, if Mr Dobson is entitled to relief under the principles of contribution, the Court ought to have denied that relief on the equitable principle that a claimant must come to equity with clean hands. The argument in the High Court was: because Mr Dobson excluded Mr Milloy from his position of ownership and control in the MRW group and assisted Mr Reid in diverting the proceeds of the New Zealand litigation (the subject of the counterclaim) to Mr Dobson and Mr Reid's mutual advantage, relief should have been denied.

[94] On appeal, Mr Hollyman submits Moore J erred in declining to deny Mr Dobson's relief because:

(a) Mr Dobson sought relief from the High Court on the basis of false evidence;

(b) Mr Dobson sought to recover funds from the appellant that he was already recovering from Mr Reid; and

(c) Mr Dobson had blatantly and deliberately breached fiduciary obligations of trust and confidence that he owed to the appellants.

[95] The first point relies on the fact that Mr Dobson's case in the High Court turned substantially on the alleged "no loss" agreement, which the Judge rejected.[65] Mr Hollyman submits that these findings involve an "implicit credibility finding of the Court that Mr Dobson and Mr Reid lied about that agreement when giving evidence under oath". The submission is developed to argue that Mr Dobson decided "to take advantage of the lack of assigned agreement to seek contribution from the appellants and to seek to avoid his actual liability in relation to the bond debt".

[96] The second point relies on the fact Mr Dobson sought to recover the sum of $200,736 from the appellants, the amount he contributed to Mr Reid's mortgage, which was already the subject of a separate agreement as to repayment between him and Mr Reid. Mr Hollyman submits this would result in double recovery to Mr Dobson.

[97] The third point relates to the various steps taken by Mr Dobson together with Mr Reid in breach of their fiduciary duties as trustees to secure for themselves the benefit of the payments from the New Zealand litigation in which n-Tech and St Lucia were involved. Taking all these matters together, Mr Hollyman submits that Mr Dobson has not come to the Court with clean hands, which is a prerequisite to the exercise of discretionary equitable relief by the Court.

[98] Moore J found in the High Court:

> [97] Although I accept that an overly technical or dogmatic approach to considerations of a nexus is not appropriate in resolving matters of conscience, I am not satisfied that Mr Dobson's actions in excluding Mr Milloy as director and diverting the proceeds of the New Zealand litigation, both matters which relate to the counterclaim, are sufficiently and directly relevant to the relief sought under the guarantee. The guarantee was a completely separate business transaction relating to the Australian DTAL litigation. It is remote in that sense. Other than the same parties being involved there is no other relationship or logical connection between the actions of Mr Dobson and the relief claimed under this cause of action.

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[65] High Court liability judgment, above n 2, at [43]–[61].

> [98] In respect of the final allegation of impropriety; that Mr Dobson is seeking funds he has already made arrangements to collect under the agreement with the Reid Trust, in light of my findings I also do not see this as a basis to deny relief.

[99] There is no dispute as to the applicable law. The equitable principle is that "He who comes into equity must come with clean hands". The essence of clean hands is that if the petitioner is guilty of impropriety in a matter pertinent to the suit, equity may refuse the decree sought:[66]

> [W]here a person seeks to invoke equitable relief in relation to a particular transaction, he or she *must not have acted improperly in relation to that transaction*. Hence, even if the plaintiff can show a violation of his or her equitable rights, relief to give effect to those rights may not issue if it would allow the plaintiff to derive a benefit from his or her wrong.

[100] Mr Hollyman accepts the conduct complained of must have some relation to the equity sought.[67] An illustration of the required connection is *Euro-Diam v Bathurst*, where the making of false declarations to Customs on exported diamonds did not preclude insurance claims for those diamonds when they were lost.[68] At the same time, it is said that the Court should not be too "dogmatic" about the requirement for a nexus.[69]

[101] We agree with Moore J that there is no sufficient nexus between any of the matters said to give rise to the lack of clean hands by Mr Dobson and the relief from which it is alleged Mr Dobson should be denied. There is no connection between the claims arising out of the guarantee, and the counterclaim by the Milloy interests concerning settlement funds owing from entirely separate litigation. While the parties are the same three business associates, it cannot be said Mr Dobson acted improperly in relation to the bond debt and ensuing guarantees. It is in respect of this that he claims relief.

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66 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [38.2.1] (emphasis added). See also *Angell v Morresey* (HC New Plymouth A33/85, 1 April 1986) where the High Court declined relief because the parties had perpetrated a fraud on the social welfare system.

67 *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 319; *Moody v Cox* [1917] 2 Ch 71 at 85 per Warrington LJ.

68 *Euro-Diam v Bathurst* [1990] 1 QB 1.

69 *Eldamos Investments Ltd v Force Location* (1995) 10 TRNZ 779 (HC) at 788 per Fisher J. See also *Attorney-General v Equiticorp Industries Group Ltd* [1998] 2 NZLR 481 (HC) at 527 per Smellie J.

[102] Our views are strengthened when considering the three grounds advanced by the Milloy interests for invoking the clean hands principle. First, neither the factual findings of Moore J, nor any specific findings as to credibility, demonstrate that Mr Dobson "lied" under oath or can be used to support the submission that Mr Dobson's credibility was generally impugned by the arguments upon which he sought to rely. This conclusion draws further support from the content of a minute issued by Moore J in which the Judge said this about issues of credibility of the parties in the case: [70]

> [4] Given the way I have decided the factual differences between the parties, it has not been necessary for me to make express findings of credibility. Rather, I have relied upon drawing inferences of fact from the evidence, such as the circumstances surrounding the claim a "no loss" agreement existed.

[103] The second ground concerned the claimed "double recovery" as a result of the agreement with Mr Reid concerning the payment of $200,736. That was found by the Judge to be a separate arrangement unrelated to the guarantee. It does not support the claim by the Milloy interests of unclean hands.

[104] The final point relates to the alleged "blatant and deliberate" breach of fiduciary obligations. Mr Hollyman refers to the course of conduct by Mr Dobson and Mr Reid outlined in connection with the counterclaim.[71] More significant, however, is the Judge's assertion that the "combination of removing Mr Milloy's beneficial interest in and control of NZIL and the decision to allocate that sub-trust capital fund was designed and intended to dishonestly deprive Mr Milloy of any entitlement to the sub-trust's funds".[72]

[105] We do not consider this observation establishes a case for denying Mr Dobson's relief on the basis of unclean hands. First, Moore J accepted that none of the actions of Mr Dobson caused any loss to the Milloy interests of something to which they were entitled.[73] We agree with this conclusion. Second, it is unclear to us the extent to which the evidence could be said to establish that Messrs Dobson

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70 Issued on 11 July 2014 contemporaneously with the delivery of the reserved High Court liability judgment, above n 2.

71 High Court liability judgment, above n 2, at [100]–[113].

72 At [144].

73 At [145]–[150], a conclusion that we uphold later in the judgment.

and Reid "intended to dishonestly deprive" Mr Milloy of any entitlement he had. Moore J may simply have been observing that the plan by Messrs Reid and Dobson was calculated to remove Mr Milloy and the Milloy interests from the corporate structure in the context of a signalled intention on the part of Mr Milloy to withdraw from the affairs of the businesses. That plan was indeed carried out without consulting Mr Milloy, but, upon discovering the plan, Mr Milloy took no steps to register his disagreement or to change the outcome. As the judgment does not articulate in any detail the Judge's reasoning about depriving Mr Milloy of any lawful entitlement, we take the matter no further.

[106] It follows that we uphold the Judge's finding that there was no conduct by Mr Dobson disentitling him from relief. This ground of appeal fails.

Calculation of judgment interest

[107] The final question in relation to Mr Dobson's claim concerns his entitlement to interest on the sum of $80,096.50, described in the quantum judgment as "in accordance with the provisions of the Judicature Act 1908 from 19 June 2012 until 30 September 2014".[74] This issue arose on cross-appeal by Mr Dobson and is a matter for which he needs leave.

[108] Mr Dobson seeks leave to argue on appeal that interest should run not from 19 June 2012 (the date ordered by the Judge) but from 15 February 2012, being the date of payment by Mr Dobson and from which point his payments exceeded his contribution.[75] However, Mr Dobson in his statement of claim only sought interest from 19 June 2012. He did not initially seek interest running from an earlier date.

[109] In any event, interest is a matter of discretion. The question of interest was specifically considered by Moore J in the quantum judgment. The date of 19 June 2012 as the start date was open to the Judge. We see no basis for arguing that the Judge exercised his discretion according to a wrong legal principle. Accordingly, the

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74 High Court quantum judgment, above n 2, at [52].

75 O'Donovan and Phillips *The Modern Contract of Guarantee* (2nd ed, Sweet & Maxwell, London, 2010) at 12–247.

application for leave to appeal the date on which interest will start to run is dismissed.

Counterclaim

[110] The circumstances giving rise to the counterclaim are set out at [25]–[34] above. As summarised earlier the Judge rejected the counterclaim by the Milloy interests.[76]

[111] Mr Hollyman submits there are three errors in the Judge's findings. First, the Judge erred in finding there was no breach of trust by Mr Dobson or Clusevau; second, the finding that the Milloy interests were not beneficiaries of the MRW Trust was in error; and third, the finding that the Milloy interests had suffered no loss was wrong. We briefly describe each challenge.

[112] First, in respect of a breach of trust by Mr Dobson and/or Clusevau, Mr Hollyman submits the Court will review the way a trustee reached a decision in respect of a discretionary trustee. Intervention will be justified where the decision was taken in "bad faith". Counsel submits Mr Dobson conspired to disentitle a beneficiary of the MRW Trust when he was sole director of Clusevau, which was the corporate trustee of the MRW Trust. In this role, Mr Dobson was obliged to act consistently with Clusevau's fiduciary obligations as trustee of the MRW trust. This constitutes a breach of those obligations.

[113] Second, Mr Hollyman submits that, on a proper interpretation of the Trust Deed, the Milloy interests were beneficiaries of the MRW Trust at the time of the alleged breach of trust. The effect of sub-cl (k) was that the definition of discretionary beneficiary continued to include the trusts established for the benefit of the people listed in (a) to (j), even though the people themselves were no longer beneficiaries. The appellants contend this was consistent with how the parties understood the decision at the time. The appellant trusts continued to be treated by the parties as discretionary beneficiaries throughout this time.

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[76] At [45]–[53] above.

[114] The third challenge is to the finding of no loss. Mr Hollyman submits a beneficiary (discretionary or otherwise) has a right to be considered for the exercise of the trustee's discretion and to compel due administration of the trustee's duties.[77] A discretionary beneficiary has a sufficient interest to trace and recover money transferred in breach of trust.[78] Further, the trustee must not exercise their discretion in an irrational or improper way.[79] The Court will set aside a trustee's exercise of a discretion where the trustee has, for example, acted in bad faith or for an improper motive, or reached a decision that is perverse or capricious.[80]

[115] Where there has been a breach of fiduciary obligations, there are a number of remedies open to the Court. Among these, a party that has received funds in breach of such obligations may be required to:

(a) account to the beneficiary for the trust property; this is the appropriate remedy for breach of fiduciary duty. The measure is not what the plaintiff has lost but what the defendant has gained, whether or not that had been realised in monetary terms.[81]

(b) pay equitable compensation for any loss.[82]

[116] The first issue for the Milloy interests in advancing this counterclaim appeal is whether they have standing to make a claim for breach of trust. This requires the Milloy interests to show that the definition of discretionary beneficiaries in the MRW Trust Deed included trusts for the benefit of the Milloys. On this question Moore J found:

> [149] The effect of this provision is that as at December 2011 there had to be at least one beneficiary common to both a defendant trust and to the MRW trust in order to qualify under subclause (k) as a Discretionary Beneficiary. Mr Milloy gave evidence he believed he was not a beneficiary but that his wife and children probably were. As none of the beneficiaries of the Hugh Milloy Trust and Helen Milloy Trust remained beneficiaries under

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77 Relying on *McPhail v Doulton* [1971] AC 424 (HL).
78 *Gartside v IRC* [1968] AC 553 (HL).
79 *Manukau City Council v Lawson* [2001] 1 NZLR 599 (HC) at 617.
80 *Wrightson Ltd v Fletcher Challenge Nominees Ltd* (1998) 1 NZSC 40, 388 at 40, 413.
81 *Chirnside v Fay* [2007] 1 NZLR 433 (SC) at [17]; see also Butler, above n 69, at [31.3.1].
82 *Pounamu Properties Ltd v Brons* [2012] NZHC 590.

> the MRW Trust beyond 20 March 1995 the trusts are not, in themselves, discretionary beneficiaries.

[117] Mr Hollyman acknowledges in his submissions that the 1995 Deed declared that "Discretionary Beneficiaries" would cease to include the persons named in (a)-(j) of the definition. This included the Milloy family members. But Mr Hollyman submits that the category of "Discretionary Beneficiaries" still included trusts for the benefit of the Milloy family. It is unclear in this submission which, or whether both, of the Milloy family trusts could fall within this category. Our attention was not drawn to any evidence on the issue. We therefore see no basis for going behind Moore J's finding that neither the Hugh Milloy Family Trust nor the Helen Milloy Family Trust remained beneficiaries beyond 20 March 1995. We agree with Moore J's construction of the trust deed. On this basis, the Milloy interests do not have standing to argue that any breaches occurred.

[118] Even if we are wrong in this conclusion, we agree with the finding of Moore J that the Milloy interests had not in any case established any breaches of fiduciary duty on the part of Clusevau. Mr Hollyman contends that Mr Dobson, as a director of Clusevau, directly owed the Milloy interests duties. However, a director of a corporate trustee does not owe duties directly to beneficiaries.[83] Clusevau as the corporate trustee owed duties to the beneficiaries. Accordingly it must be established that Clusevau breached the fiduciary duties it owed, by operating as trustee of the MRW Trust in a manner contrary to the fiduciary duties incumbent upon it. This has not been established on the evidence. No decision or action taken by Clusevau has been identified as demonstrating a breach of a fiduciary obligation by Clusevau. The parties structured their affairs in a manner that took advantage of the separate and individual legal position of each corporate body. In these circumstances, we see no principled basis on which to look behind it. At all points, Clusevau took steps within the ambit of its discretion to administer the trust assets how it saw fit and in a manner consistent with its fiduciary obligations as corporate trustee.

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[83] Butler, above n 69, at [16.4.1].

[119] Finally, on the question of loss, we agree with Moore J that the claim by the Milloy interests to an entitlement to the settlement funds in question was "not supported by the corporate structure".[84] Mr Hollyman submits that, had there been no breach of trust, the Milloy interests would have received a share of the settlement funds. There are difficulties with this submission. A discretionary beneficiary has no necessary entitlement to trust funds. Certainly there is no evidence to support a 50 per cent sharing arrangement as suggested by the Milloy interests. Even when some of the settlement funds were paid out earlier, a smaller portion than 50 per cent was paid to the Milloy interests.[85] Moreover, there was no indication this payment was made to Mr Milloy in his capacity as trustee of the Milloy interests, or in some other capacity. While there were proposals that Mr Milloy might receive part of the funds, we agree with the Judge's conclusion that the Milloy interests cannot point to any obligation arising within the corporate structure that *required* a share, let alone a 50 per cent share, to be paid to them.

[120] A final point is that Clusevau had no control or ownership of the settlement funds such that it could distribute them to beneficiaries. Moreover, on Mr Milloy's evidence, had any money been received by Clusevau, it may arguably have been paid out to meet outstanding creditors. If that were the case, there would have been no money left to pay discretionary beneficiaries. That, in turn, presupposes that money held by a company wholly-owned by Clusevau can be sheeted home through that parent company, to the trust of which Clusevau is corporate trustee. That has not been established before us.

[121] We are not satisfied there was any obligation on MRW Tech to account to the Milloy interests. The evidence seems to demonstrate that, as at 11 December 2011, there was no certainty as to who was entitled to the settlement funds. There was no obligation on MRW Tech to account to Clusevau. Even if Mr Milloy had remained a director of Clusevau, he could not direct where the funds would go but only contribute his view as a director.

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84 High Court liability judgment, above n 2, at [147].
85 Mr Milloy was paid $5,000 out of $25,000.

[122] Finally, the Milloy interests contend that Mr Dobson was engaged in a conspiracy (presumably with Mr Reid or possibly Clusevau) to disentitle a beneficiary of the MRW Trust from sharing in the litigation proceeds, constituting a breach of fiduciary obligation. We see no basis in the evidence to support that submission. While Mr Dobson and Mr Reid may have formed and agreed between them an overall plan, none of the individual steps taken to implement the plan involve breaches of a legal rule or breaches of fiduciary obligations owed to the Milloy interests in any capacity.

[123] We dismiss the appeal against Moore J's counterclaim determinations.

Costs

[124] Both the Milloy interests and Mr Dobson appeal against the decision of the Judge on costs.

[125] The Milloy interests challenge Moore J's refusal to award costs in their favour. They submit this is wrong having regard to the substantial "save as to costs" Calderbank offer made by the appellants, exceeding the amount in the judgment. They contend, particularly having regard to the Judge's findings as to Mr Dobson's dishonesty, costs should have been awarded to them.

[126] The Milloy interests point to factors indicating Moore J exercised his discretion on a wrong principle:

(a) The Milloy interests made a "save as to costs" offer to Mr Dobson of $104,220.28. The Judge, however, considered it only in relation to the respondent's claim for increased costs. The offer should have resulted in costs in favour of the appellant.

(b) The Judge was wrong to hold the Milloy interests should not have costs because they did not succeed on liability. The Milloy interests had been successful as to the proportions that should apply.

[127] Mr Dobson also appeals the decision on costs. He submits the Judge's decision not to award him costs in respect of defending the counterclaim was plainly wrong and should be set aside. This was because the Milloy interests never had any standing to sue for the claimed breach of trust. That impediment was always fatal to their claim and yet they persisted with it. Accordingly Mr Dobson ought to have been awarded costs in his favour.

[128] On these issues, Moore J said in the High Court quantum judgment:

> [43] In my view the proper course is to order that costs lie where they fall. While the plaintiff was successful in his claim he was unsuccessful on the principal argument pursued, namely the existence of the "no loss" agreement. The resolution of this issue dominated the trial and accounted for a significant proportion of the evidence. My decision on that issue adopted the defendants' submission that the intention of the parties was the determinate in coming to a decision on what a just apportionment should be.
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> [44] Furthermore, the defendants' argument in relation to the Dobson-Reid agreement was unsuccessful. Despite this, there was substantial evidence adduced which supported the existence of such an agreement. The argument was a valid one to be raised as was the $50,000 interest payment made by Mr Milloy and Mr Dobson's contribution to the CMW payment.
>
> [45] Thus though the final result was that the plaintiff was successful in his claim, I am of the view that it would not be just for costs to follow the event. I order that costs are to lie where they fall.

[129] As to the counterclaim:

> [50] I am of the view that it is appropriate for costs to lie where they fall and for the respective parties to meet those costs themselves. Although the counterclaim was largely unsuccessful, the allegations of dishonest conduct were justified on the evidence. The claim failed only by reason of the technical nature of the corporate structure involved.

[130] We agree with Moore J's conclusion as to costs and uphold the orders he made that, both in respect of the claim and the counterclaim, costs should lie where they fall. We agree with the Judge that, overall, it is fair to conclude that the honours as between the parties were shared. We see no error of principle in the Judge's reasoning.

[131] Dealing with the costs claims of each party separately, we do not accept the Milloy interests making a Calderbank offer alone warrants costs in their favour.

While it is a factor to be taken in to account, we are satisfied Moore J did so. The central dispute between the parties was not merely one of quantum, but also of liability. The discrepancy between the amount eventually awarded by the Judge and the Calderbank offer is not significant. Importantly, the quantum of relief proposed by the expert witness for the Milloy interests was even closer to the final quantum awarded by the Judge.

[132] In this context, we consider it was reasonable, given the factual dispute and the level of disagreement as to narrative between the parties, for Mr Dobson to proceed with his claim. Indeed, the Milloy interests continued with their counterclaim.

[133] Both the appeal and cross-appeal as to costs fail.

Costs on appeal

[134] We have considered the relative success and failure of the parties to the appeal. Again, the balance is even. Neither the Milloy interests nor Mr Dobson was more successful than the other. Accordingly we consider both in respect of CA441/2014 and CA608/2014 costs on the appeals and cross-appeals should in each case lie where they fall.

[135] As to the applications to raise a new point on appeal and to adduce new evidence in support of that point by the Milloy interests, those were unsuccessful. We consider it appropriate that the Milloy interests pay Mr Dobson costs in the sum of $2,500 plus reasonable disbursements in relation to both applications.

Result

[136] The applications of the Milloy interests to raise a new point on appeal and to adduce new evidence relating to the counterclaim in CA441/2014 are declined.

[137] The appellants must pay the respondent costs in the sum of $2,500 plus reasonable disbursements in relation to both applications in CA441/2014.

[138] The appeal and cross-appeal in CA441/2014 are dismissed. There is no order as to costs.

[139] The appeal and cross-appeal in CA608/2014 are dismissed. There is no order as to costs.

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APPENDIX

Relevant corporate/trust entities within the CMW corporate structure