IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-463-000403
[2014] NZHC 1631

BETWEEN	KERRY BRYAN DOBSON Plaintiff/Counterclaim Defendant
AND	HUGH MILLOY and HELEN RUTH MILLOY as Trustees of the HUGH MILLOY FAMILY TRUST First Defendants/Counterclaim Plaintiffs
	HUGH MILLOY and HELEN RUTH MILLOY as Trustees of the HELEN MILLOY FAMILY TRUST Second Defendants/Counterclaim Plaintiffs
	CLUSEVAU HOLDINGS LIMITED Counterclaim Defendant

Hearing:	24 to 31 March 2014, 1 April 2014
Appearances:	Paul Dalkie and Greg Stringer for the Plaintiff/Counterclaim Defendant Robert Hollyman for the First and Second Defendants/ Counterclaim Plaintiffs
Judgment:	11 July 2014

RESERVED JUDGMENT OF MOORE J

This judgment was delivered by on 11 July 2014 at 3:00pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

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I INTRODUCTION

[1] Despite the complexity of the underlying facts, the central issue for determination in respect of the plaintiff's claim is the proper apportionment of liability under a bank loan.

[2] The plaintiff, Kerry Dobson, was required to sell his house due to his liability under a Westpac guarantee. Some of the funds obtained by the house sale were allocated by Westpac to the account of Hugh and Helen Milloy in their capacities as trustees of the Hugh Milloy Family Trust and Helen Milloy Family Trust (the defendants), who were also guarantors under the Westpac guarantee. Mr Dobson seeks to recover, in part or in full, the amount of the house sale proceeds. He makes this claim under the laws of contribution, a so-called 'no loss' agreement, ss 85 and 86 of the Judicature Act 1908, or alternatively under agreements made in 2007 and 2009.

[3] The defendant trustees have brought a counterclaim which relates to a different business venture. It relates to litigation which involved two New Zealand companies with connections to Mr Reid and Mr Milloy. The dispute centres on what happened to funds connected with the litigation. The defendant trustees claim that Mr Dobson dishonestly received the funds or, alternatively, knowingly assisted in the distribution of the funds in breach of the fiduciary duties owed to the MRW Trust of which the Milloy family trusts were beneficiaries.

II THE PLAINTIFF'S CLAIM

Background

[4] Kerry Dobson, John Reid and Hugh Milloy had been business colleagues since the late 1980s. Messrs Reid and Milloy, with others, ran a number of companies and related trusts known as the Milloy Reid Wong group ("MRW"). Mr Dobson, an accountant, provided the group with taxation and general accounting services.

[5] In 1999, Digitech (Australia) Limited ("DTAL"), a company in the MRW group, became involved in substantial litigation in New South Wales.

[6] The defendants in the New South Wales litigation successfully applied for security for costs in the sum of AUD$2,000,000. Mr Reid approached Viking Capital Limited ("Viking") who agreed to assist in funding the amount for security for costs, subject to having 75% of its exposure underwritten by Mr and Mrs Milloy as trustees of the family trusts, Mr Reid's family trust and Mr Dobson.

[7] Legal advice on the litigation risk indicated the plaintiffs had a strong case. Posting security for costs was viewed as a means to ensure the potential financial benefits arising out of a successful outcome were preserved. It was thus decided that Messrs Reid, Milloy and Dobson, together with Viking, would approach Westpac to negotiate a bond facility to meet the security for costs order.

[8] Westpac was willing to provide the bond facility of AUD$1,340,000 to Viking but required security in the form of a guarantee and indemnity from the defendant trustees; John and Robyn Reid and Tim MacAvoy, as trustees of the R M Reid Trust ("Reid Trust") and Mr Dobson ("the 2007 guarantors").

[9] Westpac also required registered mortgages over the properties owned in New Zealand by Messrs Milloy, Reid and Dobson.

[10] Viking was recorded as the customer on the loan agreement. However, Mr Dobson, the Reid Trust and the defendant trustees agreed to assume 75% of the liability for the total bond facility in a separate agreement with Viking ("the Security Agreement").

[11] Under the Security Agreement, the maximum liability was set at AUD$2,000,000. The guarantors agreed to share the risk between themselves and Viking in the following proportions:

(a) Mr Dobson 13%;

(b) the Milloy trusts 31%;

(c) the Reid Trust 31%;

(d) Viking 25%.

[12] A separate Deed of Contribution and Indemnity ("the 2007 DOCI") was entered into by the guarantors of the Westpac security to record the proportions of their respective liabilities relative to each other in the event their guarantee to Westpac was called upon. The agreed proportions (out of 100%) were as follows:

(a) Dobson 17.33%;

(b) Milloy trusts 41.33%;

(c) Reid trust 41.33%.

[13] In September 2008, the New South Wales litigation was lost at first instance and Westpac's bond for the security for costs was called on.

[14] In anticipation, Mr Reid initiated discussions with Westpac to explore the possibility of rolling the debt facility over as none of the parties was in a position to repay the debt in full.

[15] Messrs Reid and Dobson claim it was at about this time an oral agreement, known and referred to in these proceedings as the 'no loss' agreement, was reached between the Reid and Milloy interests and Mr Dobson. Its purported effect was that Mr Dobson's proportion of the shared liability was extinguished and Messrs Reid and Milloy would assume liability in equal proportions for the full amount. Mr Milloy denies such an agreement ever existed.

[16] Westpac did not agree to roll the bond debt over. Instead, the bank required the parties to enter into a new loan facility and a new guarantee. In particular, Westpac wanted the Milloy, Reid and Dobson interests to assume full responsibility for the debt. Mr Reid negotiated with Viking to make a cash payment of $147,000 (which Viking reduced to $75,000) with regular monthly payments to pay off the

25% share. It is not in issue that the 2009 loan was incurred to pay off the 2007 bond debt.

[17] The arrangements for the new loan were agreed in December 2008. They were as follows:

(a) $725,000 from the Reid Trust;

(b) $725,000 from the Milloy trusts;

(c) $73,400 from Mr Dobson;

(d) a release of a term deposit of $117,000 held by MRW & Co Ltd ("CMW"); and

(e) a cash settlement of $78,763.71 paid by Viking.

[18] The release of the term deposit reduced the principal amount owing. It is not disputed that this money came from CMW, a company associated with Messrs Reid and Milloy.

[19] On 4 February 2009 a new guarantee was executed. The terms of the 2009 guarantee were materially different from its 2007 predecessor. First, it was unlimited as to the amount. Secondly, the pool of guarantors was widened to also include guarantees from each of the following: Mr Milloy, Mr Reid, and CMW ("the 2009 guarantors").

[20] The new loans were secured by the existing securities given in 2007, namely the three properties owned by Mr Dobson, the Reid trust and the Milloy trusts.

[21] On 4 February 2009, following discussions about the loan documentation and the guarantee, Mr Pasley, an Auckland lawyer who acted for the Reid and Milloy companies, sent an email to Messrs Milloy, Dobson and MacAvoy (a lawyer and trustee of the Reid Trust), recording that as the new guarantee was in place, "to tidy things up" the trusts and Mr Dobson should sign a new deed of contribution "as was

the case with the previous guarantee". He attached for signing and return an agreement which recorded each guarantor's proportional liability in the same ratios as the 2007 DOCI. This came to be known as the 2009 DOCI.

[22] Mr Milloy claims he signed this document. Messrs Reid and Dobson claim they did not sign it. No signed version of the 2009 DOCI was produced in evidence.

[23] In December 2008 Viking made an agreement as to its liability for 25% of the debt. Payments were made over time to CMW and the money was applied towards the interest on the debt. There is no evidence of the amount paid to CMW nor the amount paid in interest but the former is suggested to be somewhere between $300,000 and $400,000.

[24] In August 2009 Mr Dobson created a spreadsheet which set out the liabilities of the parties if Viking did not follow through with their payments. This was sent to Mr Milloy in September 2009. Out of 100% it recorded Mr Dobson's liability as 17.33% and Messrs Reid and Milloy each at 41.33%.

[25] In October 2009, Westpac served Property Law Act 2007 notices on all the 2009 guarantors. The defendant trustees paid $50,000 on 12 November 2009 to prevent mortgagee sales. This money was applied to the interest on the three loan facilities.

[26] In 2011 the Reid property was sold for $1,150,000 and the net proceeds applied to reduce the liability to Westpac.

[27] In February 2012 Mr Dobson's home was settled and the net proceeds of sale applied to the Westpac loan as follows:

(a) payment of $273,348.33 to account "00" (to discharge Mr Dobson's mortgage);

(b) $69,019.66 to account "91" (Dobson);

(c) $7,924.25 (CMW Limited);

(d) $200,735.52 to "01" (Reid Trust);

(e) payment of balance of $226,377.17 to account "01" (Milloy trusts).

[28] The bond account was thus not reduced and it continued to be guaranteed by Messrs Dobson, Milloy and Reid. Mr Reid was bankrupted on 18 July 2013.

[29] There are two bases for the plaintiff's claim. The first relies on the existence of the 'no loss' agreement which would have the effect of extinguishing Mr Dobson's obligation to Messrs Reid and Milloy to contribute to any outstanding liability to Westpac. The result would be that the proceeds of the sale of Mr Dobson's house should be repaid in full to him. Alternatively, and in the event I was find the 'no loss' agreement did not exist, the plaintiff claims he is entitled to a full contribution to the extent of the full amount paid by Westpac to the Milloy trusts account. It is also claimed that Messrs Reid and Dobson reached an agreement between themselves for repayment of the amount paid by Westpac to Mr Reid's trust account.

[30] In response, Mr Milloy claims that the 'no loss' agreement never existed. He says the sharing obligations between the parties are dictated by the 2007 and 2009 DOCIs.

Law of Guarantees

[31] Counsel for all parties are agreed as to the applicable law.[1] The law can be succinctly summarised as follows:[2]

> As equity is normally equality, the prima facie rule is that there should be equal sharing of the relevant obligation between co-guarantors. However, as the right to contribution is founded in equity, the ultimate question is what the just apportionment should be.

[1] Although in agreement as to common law principles, Counsel were in disagreement over the application of ss 84-86 of the Judicature Act. In *Official Assignee v Tizard* HC Dunedin CP44/92, 19 August 1993 it was held that the sections only apply to persons who have paid the entirety of a debt or performed the whole of a duty, not merely part. In the cases of part payment, the rules of equity are applicable. I adopt this reasoning.

[2] *The Laws of New Zealand*, Guarantees and Indemnities (online ed) at [157].

[32] In considering what share each party should be required to contribute, sharing may be found to be unequal if:[3]

(a) There is an agreement (express or implied) to effect unequal sharing;

(b) The Court can discern by clear implication that this is was what the parties must have intended; and/or

(c) The Court can discern that such unequal sharing is necessary to do justice in the particular case.

Issues

[33] The plaintiff's claim raises the following issues:

(a) Is there an express or implied agreement for unequal sharing?

(i) Did a 'no loss' agreement exist between Messrs Reid, Milloy and Dobson?

(ii) If a 'no loss' agreement did not exist, is the 2007 DOCI or the 2009 loan agreement an agreement for unequal sharing?

(b) Is there a clear intention of unequal sharing?

(c) Is unequal sharing 'just' in the present case?

(d) What is the appropriate contribution owed to Mr Dobson in light of the:

(i) Agreement between the Reid Trust, Mr Reid and Mr Dobson;

(ii) $50,000 interest payment paid by Mr Milloy;

[3] *Trotter v Franklin* [1991] 2 NZLR 92 (HC).

(iii) CMW payment.

(e) Is Mr Dobson entitled to relief?

Is there an express or implied agreement for unequal sharing?

'No Loss' Agreement

[34] Counsel agree that one of the key issues in determining the appropriate sharing arrangements in respect of the 2009 loan is whether a 'no loss' agreement existed between Mr Dobson and the Reid and Milloy interests.

[35] The 'no loss' agreement was allegedly concluded between late October 2008 and early November 2008. This was contemporaneous with the negotiations which Mr Reid was conducting with Westpac which resulted in the loan facilities and guarantee in February 2009.

[36] The 'no loss' agreement was allegedly an oral agreement between Mr Reid and Mr Dobson, in which Mr Reid was acting as an agent (either actual or ostensible) on behalf of Mr Milloy and the Milloy interests. The agreement as described by Messrs Reid and Dobson incorporated a large number of terms relating to the framework of the 2009 loan. However, the critical essence of the agreement was that Mr Dobson was to have no exposure in respect of the bond loss. This was to be the sole responsibility of the Milloy and Reid interests and Viking. This meant that the Milloy and Reid interests were responsible on a 50/50 basis for 75% of the bond exposure.

[37] Mr Dalkie for the plaintiff submitted that the 'no loss' agreement was put in place due to the considerable amount owed by the Reid and Milloy businesses to Mr Dobson for consultancy work he had carried out for their companies and trusts. On Mr Reid's and Mr Dobson's evidence, by March 2011 Mr Dobson was owed in excess of $400,000 by the Reid and Milloy interests. This amount was made up of outstanding accounting fees, creditor unpaid bills and $200,000 invested in Kay Investments Ltd. The plaintiff's evidence was that the 'no loss' agreement

acknowledged that Mr Dobson only ever had a minor interest in any successful outcome of the Australian litigation.

[38] In support of the existence of the 'no loss' agreement Mr Dalkie emphasised the conduct of the parties from October 2008 as providing the evidence to test and prove the proposition, namely:

(a) The original offer of the 2009 guarantee was directed solely to the Reid and Milloy interests.

(b) The structure of the 2009 guarantee.

(c) All of the $300,000-$400,000 of payments received by Viking went to the Milloy/Reid businesses with none being paid to Mr Dobson.

(d) The unsigned 2009 DOCI.

[39] Mr Dalkie submitted that Mr Dobson agreed to borrow the third facility on the basis he would not be liable for it. He contended it was agreed that replacement funding would be obtained within six months, which explained why Mr Dobson's loan was for six months while the terms of Messrs Reid and Milloy's loans were twelve months.

[40] Mr Dalkie also referred to an email sent from Mr Reid to Mr Milloy on 12 December 2011 as supporting the existence of a 'no loss' agreement. The email states:

> And then there is the position of Kerry after 93A [Mr Dobson's Epsom home] is sold.
>
> Under our sharing arrangements, Kerry is going to be owed $ by you and I… At this time Kerry has contributed $850,000 to repay Westpac which is way in excess of what he should. You and I will owe the $ as we have sharing arrangements in place. The amount of your liability to Kerry is likely to be in the order of $200,000.

[41] The defendant trustees strongly deny the existence of a 'no loss' agreement. They argue the shareholding arrangements continued to be governed by the proportions set out in the 2007 DOCI.

[42] On the balance of the evidence, I am not satisfied a binding 'no loss' agreement existed. My reasons are set out below.

Reasons for finding a binding 'no loss' agreement did not exist

[43] First, and in my view importantly, there is no evidence of Mr Milloy's consent or agreement to be party to such an arrangement. I accept that Mr Reid assumed the role of negotiator with Westpac on behalf of Mr Milloy. However I am not satisfied Mr Reid had the required authority to bind Mr Milloy and his interests in relation to a discrete arrangement with Messrs Dobson and Reid outside the parameters and context of the negotiations with Westpac. In cross-examination Mr Reid accepted that Mr and Mrs Milloy could have refused to be bound by the agreement negotiated with Westpac by Mr Reid on their behalf. In that event the agreement would have failed. Mr Dobson conceded he could not recall any occasion when Mr Reid had previously bound the Milloy trusts.

[44] This view is consistent with the previous negotiations, such as the 2007 loan. This was negotiated by Mr Reid but required Mr Milloy's agreement before he was bound. Mr Dalkie referred briefly to the principle of ostensible agency as proof of authority to act. This could only apply if Mr Milloy led Mr Dobson to believe that Mr Reid had the authority to enter transactions on Mr Milloy's behalf. There is no evidence of this before me nor was this argument fully pursued. Without such authority and with no evidence before me of any communication with Mr Milloy indicating he agreed to be bound, I am not satisfied there was a binding agreement of the sort which Messrs Reid and Dobson claim.

[45] Furthermore, it must be significant that on the evidence, despite being relieved of his liability, Mr Dobson was not forgiving any of the debt in consideration of Mr Milloy and Mr Reid assuming his liability under the loan estimated to be in the order of AUD$260,000.

[46] Although the structure of the 2009 loan is consistent with the existence of a 'no loss' agreement, it is similarly consistent with the explanation advanced by Mr Hollyman for the defendant trustees. Mr Dobson's precarious financial position at the time of the negotiations provides a plausible explanation for his significantly smaller loan. A bank is unlikely to offer a substantial loan facility if there is a low probability of repayment and the borrower represents a significant credit risk. In his evidence Mr Reid accepted that Mr Dobson would have been unable to make repayments. I thus consider the structure of the 2009 loan to be a neutral factor in determining whether the 'no loss' agreement existed.

[47] Another contraindication of the existence of a 'no loss' agreement is to be found in the timing around when the existence of a 'no loss' agreement was first referred to. The first mention of the existence of a 'no loss' agreement in these proceedings is to be found in Mr Reid's affidavit dated 21 February 2013. The fact that the agreement was not mentioned in Mr Dobson's earlier affidavit in support of his application for summary judgment nor his affidavit in reply to Mr Milloy's affidavit of 12 August 2012 must raise considerable doubt as to its existence. In the summary judgment proceeding Mr Dobson was seeking to recover the $226,377.17 which had been paid into Mr Milloy's bank account by Westpac from the proceeds of the sale of his house. Mr Dobson argued that the Westpac guarantee prescribed the parties' obligations and that the proceeds paid a portion of Mr Milloy's liability under that guarantee which Mr Dobson is entitled to recover. The failure to mention the existence of the 'no loss' agreement until relatively late in the evolution of these proceedings is unexplained.

[48] Moreover, while surprising, I do not find the lack of a written agreement in itself determinative, particularly in the context of the long history of the commercial relationship between the parties. However, the detailed nature of the agreement containing numerous terms, in addition to the sharing arrangements as claimed by Messrs Reid and Dobson, creates doubt that such a fulsome arrangement would not have been recorded.

[49] I also find it significant that Mr Dobson was aware Mr Milloy had signed the 2009 DOCI, a written agreement outlining the proportionate liabilities, yet took no

steps to correct Mr Milloy's understanding of the proportions or to change the terms of the DOCI to reflect the terms of the 'no loss' agreement. Mr Milloy emailed Mr Dobson on two occasions in May and June 2009 enquiring whether he had signed the 2009 DOCI, thus demonstrating an expectation that Mr Dobson would sign the agreement. Mr Dobson did not respond. Mr Dobson also registered no objection to Mr Pasley when the 2009 DOCI was sent to him for signing. Had he believed the 'no loss' agreement was in force and thus dictated the *inter se* arrangements I would have expected him to have raised it with Mr Pasley at least and corrected him on how the proportions should have been recorded.

[50] Furthermore, I do not accept that the email dated 12 December 2011 referred to earlier supports the existence of a 'no loss' agreement in the way suggested by Mr Dalkie. The email refers to the need to pay Mr Dobson after the sale of his house, as the sale proceeds were likely to be "in excess" of his share. The use of the words "in excess" indicates the existence of a share of some proportion and certainly not the zero share the 'no loss' agreement would have created.

[51] I also find it surprising that despite numerous opportunities to do so, Mr Dobson apparently never spoke to Mr Milloy about the 'no loss' agreement. When Mr Dobson's home was about to be sold and the proceeds paid to Westpac in reduction of the loan he might have been expected to raise this with Mr Milloy. He accepted in cross-examination that no such discussion took place. Furthermore, during October and November 2011 Mr Milloy was spending up to five days a week at Mr Dobson's home assisting Mr Dobson in preparing it for sale. Yet, despite the context and the ample opportunity to do so, Mr Dobson did not discuss the 'no loss' agreement with Mr Milloy. If the 'no loss' agreement did exist I find it most unlikely Mr Dobson and Mr Milloy would not have discussed it particularly during the second half of 2011 when Westpac was making demands, mortgagee sales were being discussed between Messrs Dobson and Milloy and Westpac, and the sale of the Dobson home was imminent.

[52] This leaves for consideration the "HM10" spreadsheet created by Mr Dobson in August 2009. This document was prepared by Mr Dobson for the purpose of calculating and explaining the exposure of the co-guarantors in the event Westpac

called up its loan. It was described by Mr Dobson as a "worst case scenario". It was sent to Mr Milloy by email on 11 September 2009. Mr Dobson said it was a coincidence he sent the link that day to Mr Milloy. He said he was experimenting with his computer and playing with the new mechanism of sending a link. He did not believe the reason he sent the link to Mr Milloy was because they were discussing their respective contributions given that the Australian litigation had collapsed. In my view this explanation is untenable on the evidence. The Australian litigation had failed. Westpac were active in terms of protecting their interests under the loan. The link was sent nine days after Westpac had made formal demand on the Milloy trusts and approximately one month before Property Law Act Notices were issued to Messrs Dobson, Milloy, Reid, the Milloy Family trusts and the Reid Trust.

[53] Obviously it was a time when the imminence of Westpac enforcing its powers under the guarantee was becoming evident. The spreadsheet sets out the parties' share of liability (excluding Viking's liability) with Mr Dobson's proportion recorded at 17.33% and Messrs Milloy and Reid at 41.33% each. If, as the plaintiff says, the 'no loss' agreement came into existence in late October or early November 2008, the question is begged as to why in August 2009, when he created this spreadsheet, Mr Dobson is not only apparently accepting his own liability under the loan, but also setting out the contributions of the other two. Mr Dobson's evidence that the spreadsheet was for his use only and not intended to be shared; that he did not put zero percent in his share of liability because there would be no point and that Messrs Milloy and Reid could have produced their own spreadsheets is unconvincing in the circumstances.

[54] Mr Milloy was extensively cross-examined about the fact that the spreadsheet, when initially included in Mr Milloy's affidavit, was not printed in full. The first few lines were cropped out and it was suggested this was deliberate in order to remove reference to the contribution proportions between the parties, including Viking. The cropped spreadsheet exhibited to Mr Milloy's affidavit commenced with the assumption that the Viking contributions were not part of the calculation. This had the result of increasing the respective liability proportions for Messrs Dobson, Reid and Milloy. However, the cropped document still conveys the correct proportions *inter se*. The fact that the Viking liability proportion was not part

of the calculation is expressly stated on the face of the document. Furthermore, the utility of the document, whether it is viewed in whole or in part, is that it demonstrates, as far as Mr Dobson was concerned, he understood the differential liability proportions between the three men to be as stated in the spreadsheet.

[55] Had Mr Dobson sincerely believed he had no liability; any liability to be equally shared by Messrs Reid and Milloy, even in a "worst case scenario" he would have been expected to record his exposure as zero in HM10.

[56] Finally, it was submitted by Mr Hollyman that I should draw an adverse inference from the plaintiff's failure to call certain witnesses. Relying on *Ithaca (Custodians) Limited v Perry Corporation*,[4] it was submitted that in the context of the 'no loss' agreement, i.e. whether it existed and what its terms were, Mr Pasley and Mr MacAvoy might have been expected to have been called by the plaintiff. Had this occurred, they would have explained the circumstances around the claim that a 'no loss' agreement existed. It was submitted that the absence of the witnesses is unexplained.

[57] Mr MacAvoy, as one of the trustees of the Reid Trust, was involved from at least July 2007 in discussions between Messrs Reid, Dobson and Milloy on the question of a bank loan and guarantee to support the Australian litigation. Even at this early stage the relative exposures of the parties were being considered. He was copied into emails and he attended meetings to discuss these issues. As trustee of the Reid trust Mr MacAvoy signed the loan documents, the guarantees and the 2007 DOCI. In February 2009 he signed Westpac's guarantee and indemnity on behalf of the trust. Following this, he was included as a party to various emails including one from Mr Pasley concerning the creation of a new DOCI. Mr MacAvoy responded by requesting a clause be inserted limiting his liability. This reply made no mention of any new agreement which would limit Mr Dobson's liability. This infers Mr Reid had not mentioned any change in the sharing arrangements to him notwithstanding its claimed effect on the trust's liability. In these circumstances I would have expected Mr MacAvoy to have been called by the plaintiff. He would, it is expected, have been in a position to support the existence of a 'no loss' agreement given his

[4] *Ithaca (Custodians) Limited v Perry Corporation* [2004] 1 NZLR 731 (CA) at [144]-[153].

long connection with the loan and guarantees in his role as trustee. If the liability of the Reid trust was increased due to a new agreement around sharing arrangements, it is expected he would have known. His absence as a witness is unexplained.

[58] A similar submission was made in respect of Mr Pasley, the solicitor who appears to have initiated the drafting of the 2009 DOCI. Plainly he was unaware of any agreement or intention to change the sharing arrangements between the parties. He attended a meeting on 2 February 2009 when Mr and Mrs Reid and Mr Dobson signed the loan and guarantee. It is unclear whether sharing arrangements were discussed then.

[59] I am not satisfied that Mr Pasley could have provided much assistance in explaining or elucidating whether the 'no loss' agreement existed. Certainly, on the evidence, it would seem he was not aware of any changes in the sharing arrangements since 2007, a factor which, in itself, adds to the pool of evidence accumulating against the existence of such an agreement. The decision to draft the new DOCI seems to have been taken by him without consultation. In the circumstances it is unlikely, in my view, he could have added much if anything to the issue of the 'no loss' agreement beyond the inference available on the evidence as referred to above.

[60] In the end, while I am prepared to draw an adverse inference that Mr MacAvoy's evidence if called, would have harmed the plaintiff's case, I do not place a great reliance on it. At its highest it simply adds some strength to the weight of the evidence of the defendant trustees' case.

[61] It follows that on the balance of probabilities the plaintiff has not satisfied me a 'no loss' agreement ever existed.

2007 DOCI and 2009 loan agreement

[62] After determining that the shareholding arrangements are not governed by a 'no loss' agreement the next issue is whether the 2007 DOCI or the 2009 loan agreement operate to define the respective *inter se* liabilities of the co-guarantors.

[63] In regards to the 2007 DOCI the termination clause provides it will remain in force until it is terminated by the written agreement of all guarantors. It was common ground no such written termination agreement was ever executed.

[64] The real issue is whether the 2009 loan and guarantee was simply a rollover of the 2007 arrangements, and thus 'replaced' the 2007 loan for the purposes of cl 1.2(f)[5] of the 2007 DOCI, in which case the 2007 DOCI would continue to apply.

[65] While the 2009 loan facilities originated from the bond for security for costs that had been secured by the 2007 guarantee, the 2009 loan stands apart as it is a separate agreement involving a different customer, additional guarantors and different terms.

[66] Therefore, even if the 2007 guarantee had not been terminated and thus remained in force, I am satisfied it did not apply to the 2009 loan and guarantee.

[67] In supplementary submissions Mr Dalkie suggested that the common law presumption of equal sharing was displaced by the 2009 loan agreement. It was submitted that the parties designed the facilities to reflect an altered apportionment of liability. The plaintiff rejected the defendant trustees' submission it was the bank which insisted on the proportions. This approach would result in Mr Dobson's liability being limited to $75,000.

[68] However, there is no evidence the parties reached a decision that the liability proportions set out in the loan facilities would reflect their actual liability. I find it 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.

[69] Overall I am satisfied that there was no express or implied agreement governing the shareholding arrangements between the parties.

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[5] Clause 1.2(f) provides: "Reference to any document includes reference to that document (and, where applicable, any of its provisions) as amended, novated, supplemented, or replaced from time to time."

Is there a clear intention of unequal sharing?

[70] If there was no express agreement governing the apportionment of liability either in the form of the 2007 DOCI or the 2009 loan agreement, it is then necessary to consider if, on the facts, a clear intention to displace the presumption of equal sharing may be inferred.

[71] Mr Hollyman submitted that the 2007 DOCI recorded the terms on which the parties agreed to share liability should the guarantee be called upon. It was his submission that the 2007 DOCI provides clear and uncontradicted evidence of the sharing arrangements agreed between the parties if they were required to pay the bond debt. He argued that despite the refinancing, repayment of the original bond debt is, in essence, what occurred and therefore the proportions of the 2007 DOCI should govern the parties' liability as the plaintiff clearly considered the sharing arrangements set out in this document would continue to apply.

[72] I am satisfied that the evidence demonstrates a clear intention to be bound by the proportions in the 2007 DOCI. This finding is based on the following evidence:

(a) The 2009 loan was used to repay the bond debt, which was governed by the DOCI proportions. 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 DOCI and in the 2009 DOCI.

(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 DOCI 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.

[73] Cumulatively this evidence provides a strong inference that all parties intended to be bound throughout both loan agreements by the 2007 DOCI proportions. The only evidence which may tend to contradict such an intention is that the 2009 DOCI was not signed by all parties following the arrangement of the second loan. However, while this may indicate that Mr Dobson was possibly considering altering the arrangements, it is clear from HM10, the 2009 spreadsheet, that he accepted he remained bound by these proportions. Furthermore, his failure to correct Mr Milloy's belief as to the ratios supports my finding that Mr Dobson intended to be bound by those proportions.

Is unequal sharing just?

[74] Even if I am wrong in finding a clear intention existed between the parties, under the principles in *Trotter* it is enough that on the facts I am satisfied unequal sharing is necessary to do justice in the particular case. As Tipping J stated "the ultimate question is what is a just apportionment between the co-sureties."[6]

[75] The only express agreement I am satisfied existed between all parties as to the proportion of the guarantee is the 2007 DOCI. Although the DOCI document ceased to have legal application, the evidence is at best equivocal as to any subsequent departure from the DOCI proportions. Therefore I am of the view that it is just to return to the last point of agreement which existed between the parties, particularly in light of the fact that Mr Milloy was under the impression as late as June 2009 that such proportions applied and Mr Dobson acknowledged through his HM10 spreadsheet that it was a possibility, albeit a "worst case scenario", when he emailed Mr Milloy in September 2009. Further, the DOCI proportions reflect what the parties, on first entering this venture, considered were just proportions to take into account.

[76] My finding that the DOCI proportions represent the just apportionment in this case is strengthened by considering the alternative. If there was no agreement, intention or reason for unequal sharing, then equal sharing between co-guarantors would apply. There is no evidence the parties ever considered the consequences of

[6] *Trotter v Franklin*, above n 3, at 98-99.

sharing liability in equal proportions or the effect of the application of the common law in the absence of an agreement. Under the 2009 loan there were seven guarantors. Yet the reality is that there were only ever three key individuals involved, Messrs Dobson, Reid and Milloy. To consider liability spread across the seven separate guarantors to the 2009 Westpac guarantee focuses on form rather than substance. The seven guarantor entities are simply different corporate and trust manifestations of the original three. If I were to treat the seven guarantors as three, as was suggested by Mr Hollyman, and order equal sharing between them this would result in a significantly higher liability proportion for Mr Dobson than under the proportions identified above. It would result in an injustice to Mr Dobson. There is no evidence he ever agreed to this higher liability proportion. The circumstances of this case require liability to be spread across the three persons involved. The proportions set out in the 2007 DOCI represent the intention in 2007 and there is no cogent evidence to suggest the parties ever departed from an understanding those proportions would endure.

What is the appropriate amount of contribution?

[77] The circumstances of the case require unequal sharing on the proportions of the DOCI's to allow justice to be achieved. However there are several other factors which must be considered in determining the appropriate contribution, namely:

(a) the agreement between Mr Dobson and the Reid Trust;

(b) the application of the $50,000 interest payment made by Mr Milloy; and

(c) Mr Dobson's contribution to the CMW principal payment.

[78] I turn to consider whether these factors provide a proper basis to alter the DOCI sharing proportions which I have found to be the shareholding arrangements which existed between the parties.

Dobson and Reid Trust Agreement

[79] Mr Hollyman submitted that the Reid Trust, Mr Reid and Mr Dobson reached an arrangement with Mr Dobson for the repayment of the money paid into the Reid account from Mr Dobson's house proceeds. In his affidavit for summary judgment Mr Dobson stated:

> [i]t is correct that an allocation of the sale proceeds has been paid off the Reid interests as well ($200,735.52). I have made separate arrangements with Mr Reid in this regard.

[80] In cross examination both Mr Dobson and Mr Reid confirmed that Mr Reid and the Reid Trust had agreed to pay Mr Dobson from funds received out of later transactions.

[81] As a result of this agreement it was claimed that Mr Dobson was entitled to recover from the Reid Trust the sum of $200,735.52 which was used to reduce Mr Reid's share of the loan from the proceeds of the sale of his home.

[82] The defendant trustees' position was that as Mr Dobson has this entitlement, the benefit should be factored into any calculation of the contribution owed by them. Mr Hollyman argued, in essence, that to ensure justice, unequal sharing was appropriate and Mr Reid's apportionment of the guarantee should be allocated to Mr Dobson.

[83] For the plaintiff, Mr Dalkie argued that the agreement should have no effect on the amount owed. He submitted that the Reid and Milloy interests had an equal share in the balance of the Westpac debt and therefore Mr Dobson is entitled to half the amount he has paid in excess. He claimed that judgment should be entered for Mr Milloy's half of the debt and Mr Reid's half could then be settled under the agreement.

[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. I do not find that it is just to alter the shareholding arrangements as a result of this agreement.

Interest payment ($50,000)

[85] On 12 November 2009 the Milloy interests paid $50,000 towards the interest on the loan to prevent mortgagee sales. Of that amount, $3,781 was paid into Mr Dobson's bond account, and $37,160 into Mr Reid's. This did not reduce the principal owing but the defendant trustees claim it affects the contribution owed. Mr Hussey, a chartered accountant called by the defendant trusteess, gave evidence as to the appropriate quantum. In respect of the interest payments, Mr Hussey identified $3,781 which was transferred to the Dobson accounts, and $37,160 transferred to the Reid accounts. Mr Hussey considered that Messrs Reid and Dobson owed these respective amounts in addition to their share of the loan and therefore these amounts should be added to the total owed by Mr Reid and Mr Dobson.

[86] For the plaintiff Mr Dalkie claimed this interest payment should not be taken into consideration, just as the amounts from Viking paid towards interest were not considered.

[87] In examining this issue it is useful to remind myself of the question I am required to decide; namely what is the just contribution between co-guarantors? It is not disputed that as a guarantor Mr Dobson is liable for both the principal amount and the interest paid to service the principal. It follows it is artificial to consider the interest and the principal amounts separately. To determine the appropriate

contribution all factors must be considered including the payment of interest to service the loan to prevent the loan being called up.

[88] Based on my earlier findings, Mr Dobson is liable for 17.33% of the total amount. It follows he must also be liable for 17.33% of the interest amount. Because I have disregarded the bank's apportionment to the individual facilities in respect of the loan, the same is appropriate for the interest. The amount of interest paid on each facility is irrelevant and I reject the defendant trustees' submission that Mr Dobson owes a further $3,781 as a result of the payment. On my apportionment at 17.33% Mr Dobson's proportion of the $50,000 interest payment amounts to $8,665. However, for a complete understanding of the extent of Mr Dobson's liability the total amount on interest on the loan would need to be determined. I have not received evidence on the total amount of interest.

[89] This must be considered against the Viking payments. Viking paid its share of the loan to CMW and made interest payments on the loan. The payments by Viking were deliberately structured in a way to cover the interest payments. The total amount paid by Viking is not in evidence but was suggested to be somewhere between $300,000-$400,000. There is no evidence as to what proportion of the amount paid by Viking to CMW was applied to interest. I accept that any interest payments made by CMW benefited all parties equally. However, Mr Dobson is entitled to 17.33% of any Viking payments that were not applied towards interest. I accept this is relevant to the determination of contribution owed.

Contribution to CMW payment

[90] Mr Hollyman submitted that as Mr Dobson did not contribute to the $117,000 paid by CMW to reduce the outstanding principal before the loan was refinanced, he is required to account for 17.33% of this amount. This amounts to $20,276 of which Mr Dobson would owe half to the Milloy interests and half to the Reid interests (i.e. $10,138 each).

[91] Mr Dalkie argued this is a *non sequitur* in that the defendant trustees have no legal or factual basis to claim they are entitled to part of the amount paid by CMW.

The defendant trustees did not make this payment; CMW did and CMW is a separate legal entity.

[92] On a strict application of the wording of the Security Agreement and the 2007 DOCI Mr Dobson is not liable for the CMW payment of principal. This is because the agreements are structured as a guarantee and provide how liability would be shared "should the guarantee be called upon."[7] At the point of payment the guarantee had not yet been called upon and thus Mr Dobson is liable for only 17.33% of the reduced amount which existed when the guarantee was in fact called upon. However, I do not think that such an approach would result in a just apportionment between the co-guarantors.

[93] It is clear that the payment made by CMW reduced the principal amount and thus reduced the obligation of all guarantors. It therefore benefited all co-guarantors. At the time of payment, Messrs Reid and Milloy had equal shares in CMW. I do not accept the plaintiff's submission that this amount is owed to CMW. First, there is no evidence of any agreement between Mr Dobson and CMW for repayment of this amount and I thus see no basis for a finding that a contribution is owed to the company. What is in issue is the contribution owed between the three co-guarantors. It is artificial and formulaic to focus on the company and ignore that in reality it was Mr Reid and Mr Milloy, through CMW, who were reducing the principal for the benefit of all guarantors. Therefore I am satisfied that it is necessary in determining the appropriate contribution to take into account that Mr Dobson owes his share of this payment to Mr Reid and Mr Milloy. On the 17.33% calculation basis this amounts to $10,138.

Should relief be ordered?

[94] Having determined in principle the proper apportionment of the contribution, it is necessary to consider whether relief is appropriate.

[95] Under the laws of equity, in which contribution is based, relief is discretionary. Relevant to the current situation, a Court may deny relief to a plaintiff

[7] Clause B of 2007 DOCI.

who has acted with impropriety in a matter pertinent to the suit, as "one who comes to equity must do so with clean hands."[8] The impropriety must be directly related to the relief sought.

[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.

[97] Although I accept that an overly technical or dogmatic approach to considerations of a nexus is not appropriate in resolving matters of conscience,[9] 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.

[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] I consider that Mr Dobson is entitled to relief. I accept Mr Hollyman's submission that due to the number of variables present in the current circumstances and having regard to my determinations on the above issues, it is appropriate for counsel to determine the appropriate quantum. In the event agreement cannot be reached, leave is granted for counsel to make further submissions on the issue of quantum.

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[8] *The Laws of New Zealand* Equity (online ed) at [12].
[9] *Eldamos Investments Ltd v Force Location Ltd* (1995) 19 TRNZ 779 (HC).

III COUNTERCLAIM

Introduction

[100] n-Tech Limited ("n-Tech") and St Lucia Investments Limited ("St Lucia"), both companies in the MRW corporate structure, were plaintiffs in New Zealand litigation unrelated to the DTAL proceedings in Australia. The New Zealand litigation settled and a settlement sum was owed to the companies. The funds were held and distributed by the Auckland law firm Gilbert Walker. The counterclaim relates to the distribution of money received from Gilbert Walker.

[101] The defendant trustees submit that they are entitled to 50 per cent of the funds that were distributed by Gilbert Walker as beneficiaries of the MRW Trust. They claim that Mr Dobson knowingly received the funds in breach of duties owed to the MRW Trust. In the alternative they claim that Mr Dobson dishonestly assisted the corporate trustee to breach its duties, by engaging in conduct designed to exclude the Milloy family trusts from any entitlement to the funds and distributing the funds to himself and Mr Reid.

Background

[102] Funds were paid out to n-Tech under an agreement with Gilbert Walker following the settlement of the litigation. n-Tech is related to a group of companies and trusts centred around the MRW Technology Trust ("MRW Trust"). I set out the structure of these entities below.

[103] Clusevau Holdings Limited ("Clusevau") was the corporate trustee of the MRW Trust and, relevantly, the 100 per cent shareholder of MRW Technology Ltd ("MRW Tech"). Clusevau also owned 100 per cent of the shares in n-Tech. n-Tech owed MRW Tech more than $8 million in the form of a debenture security created in March 1999. The defendant trustees claim to be discretionary beneficiaries of the MRW Trust.

[104] Each of the companies mentioned above was directed by a combination of Messrs Reid, Milloy and Dobson.

[105] The proceeds of litigation totalled $208,561.21. Prior to the contested events Gilbert Walker paid out $25,000 to Mr Reid. Mr Reid distributed $20,000 to Mr Dobson and himself, and $5,000 to Mr Milloy. This left a balance of $183,561.21.

[106] On 14 December 2011 Mr Dobson, as sole shareholder and director of Clusevau, removed Mr Milloy as a director of n-Tech, Clusevau and MRW Tech. On 11 January 2012 he appointed Mr Reid as director of Clusevau. The following day Mr Reid, as the new director, caused Clusevau to resolve that the Milloy trusts' interests should be applied to NZIL (another company from which Mr Milloy had recently been removed as director). NZIL was 100 per cent owned by Andrews Holdings Limited ("Andrews"), which sits at the centre of the St Lucia corporate structure. Andrews was the sole trustee of the Tara Trust, of which the Milloy trusts were beneficiaries. Mr Milloy was also removed as director of Andrews on 14 December 2011 leaving Mr Reid the sole director. Following Mr Milloy's removal, Mr Reid caused Andrews to irrevocably declare 11 January 2012 as the date of final distribution in relation to the Milloy trusts' interests under the Tara Trust.

[107] Mr Reid, as sole director of n-Tech, determined that the funds would be applied to reduce the outstanding debt n-Tech owed MRW Tech. Mr Reid asked Mr Dobson to receive the part repayment from n-Tech and hold it on MRW Tech's behalf to be distributed on MRW Tech's instructions.

[108] On 21 December 2011, as a result of Mr Reid's instructions, Mr Dobson received $183,561.21 into his bank account ("the funds"). It was paid to Mr Dobson's personal account because MRW Tech did not have a bank account.

[109] Mr Milloy would have been director of both n-Tech and MRW Tech at this time had it not been for his recent removal. In an email to Mr Milloy dated 12 December 2011, two days before Mr Milloy's removal and nine days before the funds were paid to n-Tech, Mr Reid proposed that the $170,000 expected from Gilbert Walker be distributed between the three of them in the following proportions:

(a) Reid interests – $100,000;

(b) Milloy interests – $35,000;

(c) Dobson interests – $35,000.

[110] In response, Mr Milloy recommended clarification be sought on the question of whether the money was required to be used to repay certain third party lenders. On 13 December 2011, the day before he was removed from the various directorships, Mr Milloy emailed Mr Reid and said:

> Before we can deal with any distribution issues we need to understand what is happening re the lenders…this needs to be dealt with before any distribution to the three of us can occur.

[111] The lenders he was referring to were, in particular, a Ms Carran and a Mr Keating who, in separate loans, advanced $100,000 and $50,000 respectively to Andrews and Clusevau. In evidence there was a suggestion there were other third party lenders, possibly Hanover, although no details of this or other loans were developed. Messrs Reid and Milloy were guarantors under the Carran loan and Mr Reid was the sole guarantor under the Keating loan. The loans were to be repaid from "litigation proceeds" from the New Zealand litigation received by the borrowers, namely Andrews and Clusevau as the parent companies of n-Tech and St Lucia.

[112] A week later, in an email to Mr Reid, Mr Milloy suggested they engage an independent party to provide legal guidance on their obligations as directors of n-Tech. Mr Milloy was unaware until 21 December 2011 that he had been removed as director from the various companies. He had previously offered to resign as a director but not until the disbursement of the funds had been settled. He was not consulted on the decision regarding the disbursement of the money to Mr Dobson and Mr Reid.

[113] Mr Dobson justified Mr Milloy's removal as director of the companies and the removal of the Milloy interests as beneficiaries on the grounds that as the Milloy business had failed and the Digitech litigation had finished, new business

opportunities needed to be found and there was an expectation that Mr Milloy and the Milloy interests would not be part of that future. This claim is supported by Mr Milloy's voluntary resignation from CMW in September 2011 and the circumstances of his leaving, which resulted in Mr Reid having to deal with business creditors. When Mr Wong, one of the original directors and shareholders of CMW, left the businesses some time previously, he had ceased to be a director of all companies associated with the businesses. It was therefore assumed by Mr Dobson that a similar process would be followed. Once he became aware of his removal as director of the various companies, Mr Milloy did not object or register his disapproval. As indicated earlier, he did however indicate some weeks before he was prepared to resign, but not until the issues around how the trust funds should be distributed were settled.

The claim

[114] It is the defendant trustees' claim this money was used for non-trust purposes, namely:

(a) $30,000 for Mr Dobson's personal needs;

(b) $84,944.64 for Mr Reid's personal needs; and

(c) $14,045 transferred to Magnitude 9 Ltd, a company which Mr Reid and Mr Dobson are directors.

[115] The essence of the counterclaim is that Mr Dobson received the $183,561.21 into his personal bank account and that in doing so he:

(a) was liable to account to the MRW Trust for the funds, having knowingly received and applied the funds in a manner inconsistent with Clusevau's duty as a trustee; and

(b) dishonestly assisted in the breach of trust by Clusevau in participating in specific transactions (namely the removal of Mr Milloy as director of the companies, appointing Mr Reid as director of Clusevau,

receiving the funds, and removing Milloy trusts interests); and applied the funds:

(i) for a variety of non-trust related purposes, principally for his own use or the use of Mr Reid;

(ii) in such a way as to exclude the Milloy trusts from any right or interest in the MRW and Tara Trusts.

[116] If not for the above actions, Mr Milloy claimed that he, along with his wife as trustees of the Hugh Milloy Family Trust and the Helen Milloy Family Trust, would have been entitled to $99,280.60[10] of the funds either under:

(a) The MRW Trust Deed; or

(b) In conjunction with a review order under s 68 of the Trustee Act 1956.

[117] Because the pleadings focus on the breach of Clusevau's duties as a trustee it is necessary to consider Clusevau's role in the transactions and, in particular, any breaches it committed as trustee of the MRW Trust. However, before considering whether there was a breach of trust by Clusevau, it is necessary to consider the nature of the funds and the obligations relating to the funds. This exercise determines whether the funds were available for distribution or were required to be used to repay the loans to Andrews and Clusevau relating to the litigation.

Nature of the funds

[118] Mr Reid gave evidence that the 'colour of the money' paid to n-Tech was as a gift from Gilbert Walker, in the form of a fees rebate, to personally assist Mr Reid. It was specifically tagged for his use and not available to third party creditors. He described it as a "write off of fees that would have otherwise been paid to Gilbert Walker". He said that this term of the agreement was not recorded because a third party, SPF, was party to the agreement, so "there's not necessarily the detail of what

[10] Note that the $99,280.60 is 50% of the trust sum, less the $5000 received by the defendants.

Campbell Walker or Gilbert Walker and I agreed in terms of what would happen down the line; the nitty gritty." He was adamant the money was not litigation proceeds claiming that if it were, it would have been required to be paid to the corporate trustees, Andrews and Clusevau, who would have been required to repay the third party interests, particularly the Keating and Carran loans.

[119] Mr Hollyman submitted that this characterisation of the funds flew in the face of reality; the funds were clearly remnant of the proceeds of settlement.

[120] On the evidence before me it is unclear whether the funds were the remnants of the settlement proceeds, or a separate fees rebate given in connection to the litigation. The agreement which sets out the distribution of the settlement proceeds refers to a 'credit note' to be given by Gilbert Walker. Both counsel made reference to the fact that the money was related to Gilbert Walker's fees although the exact nature of the funds was not clear. Overall I am not satisfied on the balance of probabilities that the funds would be classified as litigation proceeds for the purposes of the loan agreements.

[121] I am, however, satisfied on the evidence that Mr Reid's suggestion that the money was a gift in the form of a fees write-off and was "given on an undertaking that it was not to go to third parties" from Gilbert Walker and was to be used by him and not third party creditors is implausible and as Mr Hollyman submitted, flies in the face of reality.

[122] Mr Hollyman urged the Court to draw an adverse inference from the plaintiff's failure to call Mr Campbell Walker of Gilbert Walker on this point.

[123] Had Mr Walker given evidence he would have been expected to be able to identify the nature of the funds. More particularly, he would have been able to give direct evidence on the question of whether the funds paid out to n-Tech were the remnants of the settlement proceeds, a fees rebate or a gift tagged for Mr Reid's use only.

[124] Gilbert Walker paid out the funds despite Mr Milloy's request that this should not occur until independent advice was received on the question of distribution.

[125] The significance of this evidence is that if Mr Walker identified the funds as litigation proceeds, according to Mr Reid any litigation proceeds would have "gone up to the corporate trustees" thus triggering the obligations to satisfy the various third party liabilities. Under the terms of repayment for the Carran and Keating loans alone, the funds received would have been insufficient to meet the loan liabilities in full. No funds would have been available for further distribution to any other party including the Reid and Milloy interests.

[126] Furthermore, Mr Walker's evidence would have demonstrated that Mr Reid's action in paying the funds out to Mr Dobson and himself was contrary to the interests of the third party lenders.

[127] The failure to call Mr Walker in these circumstances is unexplained. It follows I am prepared to draw the inference Mr Hollyman's seeks that had Mr Walker been called by the plaintiff it would have weakened Mr Reid's claim that the funds were a tagged gift to him and it was accordingly open to him to apply them as he wished. This is a further basis for concluding Mr Reid's assertion on this point is implausible.

[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 Ms Carran and Mr Keating (and any other 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.

[129] It seems the agreement was deliberately structured in a way to avoid these obligations. This is consistent with Gilbert Walker's email of 11 November 2011

which stated the payment should be made to John Reid or nominee, as this was preferable "to making it payable to one of the [plaintiffs] in case there were claims by other creditors." Due to the creditor issues, Mr Reid nominated n-Tech or nominee to receive the money. Mr Milloy, in an email sent to Gilbert Walker on 11 November 2011, agreed with this proposal. In argument before me there was no suggestion by any of the parties that the receipt of the money by n-Tech could be interpreted as Clusevau or Andrews 'directly or indirectly' receiving the funds such that the obligation to pay third party interests was triggered under the loan agreements. Therefore it was common ground that n-Tech was entitled to receive the money under the agreement and 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.

Distribution of the funds

[130] As MRW Tech was not trading, it was available to MRW Tech to advance funds, pay dividends, or take other steps in relation to the funds. The defendant trustees claim that as a result of this the funds were available to its shareholder, Clusevau. It is further claimed that any money available to the ultimate shareholder is owed to the Reid Family Trust and the Milly trusts, as any amount was always to be distributed in equal shares between them.

Breach by Clusevau - dishonest receipt

[131] The defendant trustees' claim is that Mr Dobson is liable to account to MRW Trust for the funds, having knowingly received and applied the funds in a manner inconsistent with Clusevau's duty as a trustee.

[132] Mr Dobson received the money in his personal capacity. Clusevau had no control over it. It is not suggested he received the funds on behalf of Clusevau. Thus Clusevau's role in this transaction is unclear. It is possible that Mr Dobson may have breached his duties as director of Clusevau. However it is not necessary to determine this because any breach of Mr Dobson's duties to Clusevau does not amount to a breach of Clusevau's duty to MRW Trust. As a result no breach of Clusevau's duty as trustee is established on the evidence.

[133] If anything, Mr Dobson would be required to account to the MRW Tech because that is the entity the funds belonged to. It cannot be assumed the funds would have been passed on to Clusevau as the sole shareholder of MRW Tech. A shareholder does not have an automatic claim to money received by the company. Although this was an option open to Mr Reid as the director there was no obligation on him to pay the funds to Clusevau.

Breach by Clusevau - dishonest assistance

[134] In the alternative it is claimed that Mr Dobson dishonestly assisted in a breach of trust by Clusevau by participating in the following transactions:

(a) Using his 100% shareholding in Clusevau to remove Mr Milloy as a director of Clusevau by a shareholder's resolution dated 14 December 2011;

(b) Receiving into his personal bank account the funds on 21 December 2011;

(c) On 5 January 2012 removing Mr Milloy as director of Andrews;[11]

(d) On the same day, removing Mr Milloy as a director of NZIL;

(e) As 100% shareholder of Clusevau, appointing Mr Reid as director on 11 January 2012;

(f) Assisting Mr Reid to cause Andrews to declare the date of final distribution under the Tara Trust in relation to the Milloy trusts' interest in that Trust as being 11 January 2012;

(g) Assisting Mr Reid to cause Clusevau to resolve that the Milloy trusts' interests in relation to the MRW Trust should be applied to NZIL.

[11] I note that while it was registered with the Companies Office on the 5 January 2012, the registration states that Mr Milloy ceased to be a director on the 14 December 2011. This applies equally to the removal of Mr Milloy as director of NZIL.

[135] The majority of the transactions listed above do not amount to breaches of fiduciary duties on the part of Clusevau. Mr Dobson, as sole shareholder of Clusevau, removed Mr Milloy as director by shareholder's resolution dated 14 December 2011. This was an act undertaken by Mr Dobson as shareholder. It was not an act undertaken by Clusevau. A shareholder will not normally be subject to judicial scrutiny in the exercise of their powers.[12]

[136] It was submitted by the defendant trustees that the removal of Mr Milloy was deliberate; cynically calculated to exclude the Milloy trusts from any right or interest they might otherwise have enjoyed under the MRW and Tara Trusts. As director of Clusevau, Mr Milloy would have had the ability to influence how the money was distributed to the beneficiaries under the MRW Trust if MRW Tech had distributed the money to Clusevau. However, while his removal as a director of Clusevau was no doubt not in the best interests of Mr Milloy because 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 company.

[137] Additionally, Clusevau was not directly involved in Mr Dobson receiving the money, removing Mr Milloy as director of Andrews, allocating the Milloy trusts' interests under the Tara Trust or removing Mr Milloy as director of NZIL. 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.[13] 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 as pleaded as set out at [134].

[138] Despite this, Clusevau was involved in the transfer of the Milloy trusts' interests in MRW Trust to NZIL. Clusevau resolved that the Milloy trusts' interests as beneficiaries of the MRW Trust should be applied to NZIL. This was entirely

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[12] *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589; *Remrose Pty Ltd v Allsilver Holdings Pty Ltd* [2005] WASC 251, at [66]-[67].

[13] 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.

within the discretion of Clusevau as NZIL was appointed by Mr Milloy as discretionary beneficiary on 24 July 2000.

[139] A trustee has a duty to act in good faith and in the interests of the beneficiaries. If a beneficiary is aggrieved by a decision of a trustee, application can be made under s 68 of the Trustee Act 1956 for a review of the decision. A decision regarding a discretionary beneficiary is unlikely to be interfered with if made in good faith. To make a decision in bad faith in this context has a broad meaning and includes making a decision for an ulterior motive, taking into account irrelevant considerations, refusing to take into account relevant considerations and acting capriciously.[14]

[140] The principal allegation relative to the act of transferring the interest to NZIL (combined with the prior act of removing Mr Milloy as director of NZIL and removing the Milloy trusts as beneficiaries of the Tara Trust) is that it was undertaken to disentitle the Milloy trusts of their rights and benefits under the corporate structure.

[141] On 13 December 2011 Mr Milloy suggested the money be used to repay the third party lenders. In response, Mr Reid suggested that Mr Milloy should resign from all the companies. On 15 December Mr Milloy agreed to do so "once we sort this out." Mr Milloy was removed as director of Andrews, NZIL, n-Tech, Clusevau, and MRW Tech on 14 December 2011. The funds were paid out to Mr Dobson on 21 December. While I accept Mr Dalkie's submission that Mr Milloy's resignation from CMW and his description of himself as a 'consultant' rather than company director when giving evidence as a witness in the New Zealand litigation in September 2011 infers a decision on his part to withdraw from the businesses in any event, the timing of his abrupt removal strongly suggests that this step was designed to ensure he could not frustrate the distribution of funds to Mr Reid and Mr Dobson.

[142] On 10 January 2012 Mr Milloy emailed Mr Reid and Mr Dobson informing them he knew the funds had been paid out and seeking an explanation. The following day Mr Reid declared 12 January 2012 as the final distribution date for the

[14] *Wrightson Ltd v Fletcher Challenge Nominees Ltd* (1998) 1 NZSC40, 388 (HC).

Milloy's interests under the Tara Trust. On 12 January Mr Reid, as sole director of Clusevau, caused Clusevau to pay, apply or transfer "to New Zealand Investments Limited the whole of the capital of the [Milloy] Sub Trust Fund". It is claimed the removal of the Milloy interests under the Tara Trust and the allocation of his sub-trust under the MRW Trust was undertaken to prevent or frustrate any claim of entitlement. Prior to the final distribution of the Milloy interests under the Tara Trust, as beneficiaries of that trust, the Milloy trusts had an interest in NZIL. However, due to the declaration of final distribution this entitlement was lost. As a consequence it is claimed the decision to declare the date of final distribution under the Tara Trust in relation to the Milloy trusts' interests under that trust was made in bad faith.

[143] This allocation was a distribution to a discretionary beneficiary and only affected the capital in the Milloy sub-trust on the date of allocation. It did not affect any ongoing interest in the sub-trust.

[144] I am satisfied on the evidence 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.

[145] I must be satisfied that a loss flows from this breach.[15] The defendant trustees claim the loss flowing from a breach of Clusevau's duty as trustee is 50 per cent of the funds. The difficulty for the defendant trustees is that on the date the money was transferred, the sub-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 originally paid to n-Tech. It follows that the loss pleaded, the funds, cannot flow from this breach.

[146] Even if I am wrong, I am not satisfied that the entitlement claimed by the defendant trustees is established. Mr Hollyman submitted the Milloy trusts were entitled to a share of the funds for the following reasons:

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[15] *Pryor v Bulley* [2013] NZCA 559 citing *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).

(a) At the time, both Mr Reid and Mr Dobson accepted that the Milloy interests would be entitled to a proportion of the funds.

(b) The corporate group operated largely for the benefit of Mr Milloy and Mr Reid.

(c) There would have been an equal division of the proceeds. In support of this Mr Hollyman referred to:

(i) The equal shareholding in CMW;

(ii) The equal ownership (through Trusts) of the Tara Trust and MRW Trust;

(iii) The equal financial role which the Milloy and Reid interests played in numerous aspects of the corporate businesses;

(iv) Mr Reid's description of Mr Milloy as his business partner;

(v) The lack of indications to the contrary.

[147] The essence of the defendant trustees' claim is that the Milloy interests were ultimately and beneficially half owners of the various corporate entities. While the evidence supports Mr Hollyman's submission that prior to 14 December, when Mr Milloy was removed from the various corporate entities, Mr Reid had indicated that Mr Milloy and Mr Dobson were entitled to a share, Mr Milloy's entitlement is not supported by the corporate structure.

[148] The Milloy trusts are not beneficiaries under the MRW Trust. Under the original MRW Trust Deed of 1995, three sub trusts were created. Each was headed by a 'Principal Family Member', namely John Reid, Jilnaught Wong and Hugh Milloy. The funds were required to be distributed in nominated proportions between the three sub-trusts. Each trust fund had discretionary beneficiaries which included the Principal Family Member and their families. On 20 March 1995 Mr Milloy consented, as did the two other Principal Family Members, to remove the persons

defined in (a) to (j) of the definition of Discretionary Beneficiary. Mr Reid said he believed this amendment was for tax purposes. The persons removed from the definition included the Principal Family Member and his family. Subclause (k) of the definition allowed for "any trust which includes for the time being among its beneficiaries (contingent or otherwise) any Discretionary Beneficiary or any issue of any Discretionary Beneficiary."

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

[150] It follows the counterclaim cannot succeed irrespective of whether fiduciary breaches occurred. No loss flowed to the Milloy trusts from the MRW Trust Deed or under a s 68 review as a result of the breach.

[151] While this may appear an unsatisfactory outcome for Mr Milloy it is the result of the decision to structure his companies and trusts in this manner. The reality is he is not a beneficiary under the MRW Trust, and neither are the trusts related to him. He thus has no legal entitlement to the funds.

IV SUMMARY OF CONCLUSIONS

The plaintiff's claim

[152] I have made the following findings in respect of the substantive claim:

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

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

(ii) The 2007 DOCI and the 2009 loan agreement did not operate as express or implied agreements.

(b) There was a clear intention of unequal sharing based on the 2007 DOCI proportions.

(c) In any event, unequal sharing on the basis of the 2007 DOCI proportions is just.

(d) The agreement between Mr Dobson and the Reid Trust does not alter the shareholding arrangements.

(e) Mr Dobson is required to pay a proportion of the interest payment made by Mr Milloy and a contribution to the CMW payment.

(f) Relief is appropriate.

[153] Based on these findings, counsel are to determine the appropriate quantum owed to Mr Dobson by the defendant trustees. I reserve leave for the parties to apply by way of memoranda for the making of formal orders.

The counterclaim

[154] In respect of the counterclaim, I made the following findings:

(a) the funds were not tagged for the specific use of John Reid;

(b) the only breach of Clusevau's duties was the transfer of the MRW Sub-Trust fund to NZIL;

(c) the claimed loss did not flow from this breach; and

(d) in any event, the Milloy trusts are not beneficiaries under the MRW Trust and therefore have suffered 'no loss'.

[155] As a result, there was no set-off under the counterclaim against the amount owed to Mr Dobson, by the defendant trustees, under the substantive claim. I dismiss the counterclaim.

Costs

[156] Counsel should confer as to costs. If the parties cannot agree, the defendants are to file and serve a costs memorandum in relation to the plaintiff's unsuccessful claim within three weeks of the date of this judgment. The plaintiff will have three weeks from the date of the defendants' filing to file and serve a memorandum in relation to the claim and the counterclaim. The defendants are to file and serve a memorandum in relation to the counterclaim within three weeks of the plaintiff's filing. Unless the Court directs otherwise, costs will then be dealt with on the papers.

Moore J

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