IN THE COURT OF APPEAL OF NEW ZEALAND

CA494/2013
[2014] NZCA 400

BETWEEN	MARK STEPHEN HOTCHIN Appellant
AND	THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED First Respondent
AND	PERPETUAL TRUST LIMITED Second Respondent

Hearing:	24 June 2014 (further submissions received 9 July 2014)
Court:	Harrison, White and French JJ
Counsel:	N S Gedye QC and J McGillivray for Appellant R G Simpson and J G Wilson for First Respondent M C Smith for Second Respondent
Judgment:	15 August 2014 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay costs to each respondent for a standard appeal on a Band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Contents

Question

[1] This appeal from a judgment of the Chief High Court Judge, Winkelmann J,[1] raises an important issue which arises frequently in multi-party litigation: is the phrase "the damage", for which a defendant (B) may be liable on a claim to one party (A) in terms of s 17(1)(c) of the Law Reform Act 1936 (LRA), "the same damage" as that for which another party (C) may be liable to A, justifying B's joinder of C as a third party in a proceeding brought by A?

Claims

[2] The Financial Markets Authority (FMA) is a statutory body charged with enforcing the provisions of the Securities Act 1978 and its associated regulations. The appellant, Mark Hotchin, and others were directors of the Hanover Group of companies – Hanover Finance Ltd (HFL), United Finance Ltd (UFL) and Hanover Capital Ltd (HCL). All three Hanover companies carried on business as finance companies by raising money from the general public for lending to third parties. In July 2008 the companies ceased trading.

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1 *Financial Markets Authority v Hotchin* [2013] NZHC 1611 [*Hotchin*].

[3] The FMA has issued a proceeding in the High Court against the Hanover directors claiming financial compensation under s 55G of the Securities Act for investors in the three Hanover companies for losses of about $35 million. The FMA alleges that: (1) in a seven and a half month moratorium period before they ceased trading: the Hanover companies made untrue statements about their liquidity in prospectuses and published statements when offering debt securities to the public; and (2) the directors who signed the documents, including Mr Hotchin, are responsible for the financial losses suffered by members of the public who invested by reason of the untrue statements. The FMA also alleges that the directors signed untrue certificates. Mr Hotchin has filed a defence to the FMA's claim.

[4] The debt securities offered by the Hanover companies were issued under three different trust deeds. New Zealand Guardian Trust (NZGT) was the trustee under HFL's deed; Perpetual was the trustee under UFL's and HCL's deeds.

[5] Mr Hotchin has joined both trustees as third parties to the FMA's proceeding on the ground that each is liable to contribute to any compensation which he is ordered to pay to investors. That is because, Mr Hotchin is alleged, the trustees owed and breached tortious or equitable duties of care to the same investors to which he owed duties, albeit of a different legal nature. Each trustee is accordingly liable for the same damage suffered by the investors as a result of any breaches of duty by the directors.

[6] Winkelmann J allowed an application by both trustees to strike out Mr Hotchin's third party claims essentially because he and the trustees could not be liable in respect of the same damage. He now appeals against the Chief Judge's decision on the ground that she erred in law.

Background

[7] All investments for which the FMA claims compensation were made between 7 December 2007, when the last Hanover prospectus was registered, and 23 July 2008, when the companies suspended the offers of securities contained in those prospectuses. Within this moratorium period, on or about 31 March 2008, the companies supplied directors' extension certificates to the Registrar. Before then,

the FMA pleads, on 3 September 2007 the companies had stopped lending for the purpose of assisting immediate liquidity. Also, it pleads that between 30 June 2007 and 31 March 2008 there was a decline in the companies' reinvestment rate, from 81 per cent to 28 per cent. Within that time, there was an increase of 1201 per cent in past due loans – those being overdue and impaired.

[8] All investments made in this moratorium period were for terms of between six months and five years. There was a high level of reinvestment, up to 80 per cent of existing deposits.

[9] Mr Hotchin's particularisation of the duties allegedly owed by both trustees is found in the terms pleaded against NZGT:

> 9. NZGT owed a duty of care in tort to the depositors of HFL, including prospective depositors, and existing or rollover depositors, to exercise reasonable diligence, care and skill:
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> (a) In reviewing and deciding whether or not to approve the form and content of the HFL prospectus;
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> (b) To ascertain whether or not any breach of the terms of the deed or of the terms of the offer of the debt securities had occurred, or was likely to occur, including by taking reasonable steps to ascertain whether the statements made in the HFL prospectus were true;
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> (c) To ascertain whether or not the assets of HFL that were or may have been available, whether by way of security or otherwise, were sufficient or likely to be sufficient to discharge the amounts of HFL's debt securities as they became due;
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> (d) To monitor and identify matters relating to HFL's financial position that were likely to have a material and adverse effect on the interests of the depositors;
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> (e) To ascertain whether HFL's business was being conducted in a prudent and businesslike manner;
>
> (f) To take timely and appropriate action in relation to any matters of concern with regard to the above matters.

[10] These particular duties derive from the trust deed and the statutory framework, giving rise to alternative obligations in tort and equity. Mr Hotchin pleads that if the FMA succeeds in its claim against him it will necessarily follow

that the trustees will have breached one or more of their duties to depositors by: (1) failing to detect various related party transactions entered into in breach of the trust deeds; (2) allowing the companies to issue and distribute prospectuses containing untrue statements; and (3) failing to take timely and appropriate steps to protect existing and future depositors – in particular by failing to suspend the companies' operations to prevent them from taking further deposits. These breaches, Mr Hotchin alleges, contributed to the depositors' losses and caused the same damage as that which he allegedly caused – the loss of value of the investors' deposits.

High Court

[11] In the High Court Winkelmann J was required to address a number of questions arising on the trustees' application to strike out. In that context she outlined the source and nature of the trustees' duties. We gratefully adopt her summary as follows:

> [27] Section 33(1) of the Securities Act provides that no debt security may be offered to the public without a registered prospectus. During the time with which these proceedings are concerned, s 33(2) provided that no debt security was to be offered to the public for subscription unless the issuer of the security had appointed a person as a trustee for the security, both the issuer and the trustee had signed a trust deed related to the security, and a copy of the trust deed had been registered by the Registrar under the Act.
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> [28] The Regulations made pursuant to the Securities Act, the Securities Regulations 1983, prescribe content for registered prospectuses. At the time of the alleged breaches, cl 13 of sch 2[2] required that each prospectus contain brief particulars of the trust deed, including particulars of limitations as to asset ratios and the granting of prior ranking or pari passu securities, and any particular duties of the trustee. It also required a statement by the trustee that the offer of securities complied with any relevant provision of the trust deed, and that the trustee did not guarantee the repayment of deposits or interest thereon.
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> [29] Section 45(1) of the Securities Act provides that every trust deed required for the purposes of the Act has to contain the information and matters prescribed in the Regulations. At the time relevant to these proceedings, cls 1-11 of sch 5 of the Regulations were deemed to be incorporated into the trust deeds.[3] Of most relevance is cl 1, which provided:

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2 For the provision currently in force, see cl 14 of sch 2 of the Securities Regulations 2009.

3 By reason of reg 24 of the Securities Regulations 1983. This is now covered by reg 5 of the Securities Regulations 2009.

1 Duties of trustee

(1) The trustee shall exercise reasonable diligence to ascertain whether or not any breach of the terms of the deed or of the terms of the offer of the debt securities has occurred and, except where it is satisfied that the breach will not materially prejudice the security (if any) of the deed securities or the interests of the holders thereof, shall do all such things as it is empowered to do to cause any breach of those terms to be remedied.

(2) The trustee shall exercise reasonable diligence to ascertain whether or not the assets of the borrowing group that are, or may be available, whether by way of security or otherwise, are sufficient or are likely to be sufficient to discharge the amounts of the debt securities as they become due.

[30] The other potential source of trustees' duties is of course the terms of the various trust deeds. The trust deeds between Perpetual and UFL, and between Perpetual and HCL, are silent as to the trustees' duties. However the trust deed between NZGT and HFL contains the following clause:

C.04 Supplemental powers of trustees

In addition to the provisions of the law relating to trustees and to facilitate the discharge of its duties hereunder but subject always to Section 62 of the Securities Act IT IS HEREBY EXPRESSLY DECLARED THAT:

…

(e) notwithstanding any other provisions of this Deed the Trustee shall exercise reasonable diligence to ascertain whether or not the Company or the Charging Subsidiaries has committed any breach of the provisions of this deed or any breach of any of the terms or conditions of issue of any Deposit;

[31] The trust deeds are not identical, but as with most trust deeds for debt securities they share fundamental characteristics. The critical covenants given by the companies and their charging subsidiaries required them to:

- maintain assets at a certain level;
- limit liabilities so that total liabilities did not exceed a stipulated percentage of total tangible assets;
- refrain from entering into certain kinds of transactions with related companies without the trustees' prior consent;
- refrain from granting any charge ranking in priority to or pari passu with the charges granted in favour of the trustees for the benefit of the depositors;
- comply with the terms of the offer;
- carry on their business in an efficient and businesslike manner; and
- provide information to the trustees on request but otherwise on a regular basis.

[12] It is significant that there are no appeals or cross-appeals against the Chief Judge's threshold findings that when exercising their functions the trustees arguably owed duties of care to prospective or rollover depositors,[4] but not of such a nature as to ascertain or monitor whether, as Mr Hotchin alleges, statements made in the prospectuses were true.[5] Nor is there any challenge to her identification of the essential nature of the trustees' duty as being to monitor the Hanover companies for compliance with the trust deeds and to use enforcement powers wherever necessary to protect investors.[6] For reasons which will become apparent, these unchallenged findings about the trustees' duties have significantly limited the scope of argument available to Mr Hotchin on appeal.

[13] Winkelmann J summarised her reasons for finding that Mr Hotchin's claim in tort under s 17(1) was untenable as follows:[7]

> [68] The expression "the same damage" in s 17 therefore refers not to quantum of loss, or damages, but rather to the harm suffered by (for present purposes) the depositors, for which they are entitled to compensation.
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> [69] In this case the position is as follows. If it can be established that the trustees failed in their duty to monitor the affairs of the company for insolvency or breaches of the trust deeds, the damage resulting will be the losses incurred by depositors while the trustees wrongfully failed to act. If it can be established that the directors made untrue statements, the damage resulting will be that the depositors invested in a company in reliance on untrue statements. These are different losses. Even if the trustees ought to have "pulled the plug" sooner, the trustees cannot be liable for the loss independently caused by the directors.
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> [70] I heard argument also as to the precise measure of damages for each of the wrongs. For example, issue was joined between the parties as to whether the measure of damages under s 55G should be the whole of the depositor's loss on investment (Mr Hotchin's case) or the difference between the price paid for the securities on investment and their true value, also estimated as at that date. The assumption informing this argument is that if the measure of loss is the same, contribution is available. I think that a mistaken view. The focus is upon whether the liability is of "the same nature and to the same extent" to use the language adopted in *Burke* cited earlier.

[14] The Judge relied on similar grounds to find that an alternative claim by Mr Hotchin for equitable contribution was untenable as follows:

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4 At [41]–[48].
5 At [51]–[58].
6 At [59].
7 Footnotes omitted.

> [71] As one would expect, these same principles underlie the law of equitable contribution, and Mr Hotchin's claim for equitable contribution therefore confronts the same difficulties. The principles of equitable contribution were at issue in the Supreme Court decision of *Altimarloch*. Although there are five judgments in that case, there was a common thread in respect of the issue of contribution that equitable contribution is available when the parties' liability is of the same nature and extent. The judgment of Tipping J contains a reasonably extensive discussion of the issue. He draws heavily on the judgments of the House of Lords in *Royal Brompton Hospital*, and also on the joint judgment of Gaudron ACJ and Hayne J in *Burke* …

Law Reform Act

[15] Section 17 of the LRA materially provides:[8]

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
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> (1) *Where damage is suffered by any person as a result of a tort* (whether a crime or not)—
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> (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage:
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> (b) if more than 1 action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, civil union partner, de facto partner, parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action:
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> (c) *any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise*, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
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> (2) In any proceedings for contribution under this section the amount of *the contribution recoverable from any person shall be such as may*

[8] Emphasis added.

> *be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage*; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Appeal

[16] Before addressing the merits of Mr Hotchin's appeal we note there is no dispute between counsel that as in all strike-out applications of this nature the pleaded facts are admitted or are assumed to be true, and the trustees must show that Mr Hotchin's claim against them is clearly untenable.[9] However, that statement of the applicable test does not exclude consideration of difficult questions of law which, as in this appeal, have required extensive argument.

[17] Also, we shall consider together Mr Hotchin's appeal against Winkelmann J's findings that he had no arguable claim for contribution whether in tort or equity, for the reason that, as will become apparent, we are satisfied the same principles apply to each. Our primary focus will be on Mr Hotchin's claim in tort for contribution under s 17(1), as it was in argument before us.

[18] We accept for these purposes that the first three elements of s 17(1)(c) are arguably satisfied: that is, (1) Mr Hotchin is liable to the FMA in tort as Winkelmann J found (even though he is sued under a statutory provision);[10] (2) Mr Hotchin's liability is in respect of damage suffered as a result of his alleged tort; and (3) the trustees owed duties to investors for which they may also be liable to the FMA in tort. What is in issue here is whether the fourth element is arguably satisfied: are Mr Hotchin and the trustees "liable in respect of the same damage"?

[19] The scope of our inquiry is defined by the essence of the competing arguments advanced by counsel. Mr Gedye's support of Mr Hotchin's appeal is based upon a wide or general interpretation of the word "damage" where used in s 17(1)(c). He submitted that Winkelmann J erred because she confused the same cause of action or measure of loss with the words "the same damage" and that she

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9 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267–268, *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

10 At [23].

wrongly focused on a comparison between the nature and extent of the directors' potential liability instead of on the correct question of whether the damage for which they and the trustees could be liable – the harm or loss to the investors – would be the same in each case.

[20] Mr Gedye submitted "the damage" for which both Mr Hotchin and the trustees may be liable in this case is simply the loss in value of money invested by members of the public in the Hanover companies – a specific sum paid as an investment and not fully repaid following the moratorium. The damage occurred because the companies could not repay investments when due. Irrespective of how the claim against them is framed, whether in tort or otherwise, the trustees would be liable for that same damage – the loss in value of all or part of the investments. The trustees were intimately involved with the depositors and their duties included protection against the same loss.

[21] Alternatively, Mr Gedye submitted, the directors may be found liable to the FMA in negligence on what is called a "locked in" basis – that is, all losses subsequently suffered by investors until they were able to exit the investment.

[22] In support of Mr Hotchin's alternative challenge to Winkelmann J's finding that he had no right to claim an equitable contribution, Mr McGillivray submitted that the Judge erred in concluding that Mr Hotchin and the trustees could not face liability of the same nature and to the same extent. While accepting that at trial Mr Hotchin would have to establish a sufficient commonality between the nature and extent of both liabilities, Mr McGillivray submitted that the question should not be resolved at this interlocutory stage.

[23] Mr Simpson's interpretation of s 17(1)(c) for NZGT necessarily introduced more specificity by importing considerations of the nature of liability, the element of causation and their consequences. He submitted that the misleading statements allegedly made by the directors in the offer documents caused investors to purchase debt securities which they might not have otherwise purchased and to pay an inflated price for them. However, those statements did not of themselves diminish the value of the securities. By contrast, any lack of diligence by the trustees may have resulted

in the Hanover companies trading on at a loss when they should have been prevented, causing a diminution in value of the securities.

[24] In Mr Smith's submission for Perpetual, Mr Hotchin's liability for damage by reason of his negligent misstatements is not of the same nature and extent as the trustees' liability for failure to detect breaches of the trust deed or terms of the offer or to ascertain the sufficiency of assets. He said that, even on a "locked in basis", the damage for which Mr Hotchin would be liable would not extend to loss suffered by reason of any subsequent and independent breaches of duties by a trustee.

Principles

[25] Two recent decisions of high authority influence our inquiry. In *Royal Brompton Hospital NHS Trust v Hammond* the House of Lords examined the history and interpretation of the English equivalent of s 17(1)(c) and the principles governing rights of contribution between joint tortfeasors.[11] In *Marlborough District Council v Altimarloch Joint Venture Ltd* our Supreme Court considered similar principles in a claim for equitable contribution between wrongdoers.[12] We agree with Winkelmann J that the same principles apply in both tort and equity.[13]

[26] The speeches of Lords Bingham, Steyn and Hope in *Royal Brompton*,[14] and the judgments of Blanchard, Tipping and McGrath JJ in *Altimarloch* articulate these principles relevant to Mr Hotchin's appeal:

(1) Section 17 of the LRA was enacted as a remedial measure. Its purpose was to cure the injustice resulting where one wrongdoer was able to escape liability to a third party which elected to sue another wrongdoer liable for the same damage, regardless of relative causative potency or moral blameworthiness between the two wrongdoers.

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11 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 [*Royal Brompton*].

12 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 111, [2012] 2 NZLR 726 [*Altimarloch*].

13 *Hotchin*, above n 1, at [70] and [71].

14 Lords Mackay and Rodger agreed with the reasons given by Lords Bingham and Steyn: at [9] and [49] respectively.

Section 17(1)(c) did not, however, alter the underlying common law principles.[15]

(2) The phrase "damage" in this context means loss, harm or injury.[16] By comparison, "damages" represent the measure of loss and amount of money recoverable by way of compensation for the damage suffered. The composite phrase "the same damage" does not mean substantially or materially similar damage.[17] The words mean the identical damage.

(3) The requirement of a common or shared liability, often expressed as being of a co-ordinate nature, underlies the right of contribution and operates as the medium for apportioning responsibility between two or more wrongdoers. The words "in respect of the same damage" confirm that the loss or damage caused by concurrent wrongdoing must be one indivisible loss ("the whole of the damage") to be apportioned between those liable.[18]

(4) On this basis, parties which are jointly or concurrently liable on a common demand to a claimant are accountable for their respective shares of the damage – the common demand being predicated upon the direct and independent liability of each for the damage suffered by the plaintiff.

(5) Liability between wrongdoers must be of the same nature and to the same extent, thereby incorporating the concepts of equal or comparable culpability and causal significance. The question of whether liability is of the same nature "requires a comparison of the nature of the liability of each party, not the consequences" – that is, each party has to perform substantially the same obligation. The question of whether the liability is to the same extent simply requires

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15 *Royal Brompton*, above n 11, at [1]–[5] per Lord Bingham.
16 *Royal Brompton* above n 11, at [6] per Lord Bingham.
17 *Royal Brompton* above n 11, at [27] per Lord Steyn.
18 *Royal Brompton*, above n 11, at [5] per Lord Bingham, at [47] per Lord Hope; *Altimarloch*, above n 12, at [210] per McGrath J.

a comparison of that requirement between each party but a right of contribution is unavailable to the extent that there is no common liability.[19]

(6) A tortfeasor is not liable to contribute to a loss of a character for which it can have no liability to the claimant. The same level of liability is required, and it is not enough that the respective liabilities arose out of similar relationships or related transactions. Similarly the fact that two or more wrongs lead to a common result does not of itself mean that they have caused the same damage. So the test of whether one tortfeasor's liability will reduce the others' liability is not governing.[20]

[27] On one available view, Mr Hotchin's claim could be determined simply by reference to the relevant principles without consideration of the leading authorities. However, we are satisfied that those authorities provide essential context and give precedential guidance, although our examination of them serves to confirm the conceptual obstacles standing in Mr Hotchin's path.

Authorities

Royal Brompton

[28] Counsel cited a number of authorities to support their respective arguments. *Royal Brompton* is of particular significance. In that case a hospital employed a contractor to develop and construct new hospital premises. The contract was in standard form and, significantly for these purposes, it also provided for the engagement of architects to carry out a supervisory role. The relationship was, as Lord Steyn described it, of a tripartite nature.[21]

[29] The contract provided a fixed date for completion of the works but the contractor sought and the architect granted lengthy extensions of time, thereby relieving the contractor of its obligations to pay liquidated and ascertained damages

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19 *Altimarloch*, above n 12, at [141] and [147] per Tipping J, at [224] per McGrath J.
20 *Royal Brompton*, above n 11, at [46] and [47] per Lord Hope.
21 At [10]–[12] per Lord Steyn.

for the delay. The architect also issued instructions to the contractor to lay a damp-proof membrane. The contractor claimed further amounts in an arbitration proceeding which the hospital settled and agreed to indemnify the contractor against claims by others including the architect.

[30] The hospital later sued the architect for negligence in granting the contractor extensions of time and issuing the membrane instructions, claiming to recover losses which would have been claimable from the contractor as liquidated damages. As Lord Steyn observed, the essence of the hospital's case was that the architect's breach of duty changed its contractual position detrimentally as against the contractor.[22] Its negligence allowed the contractor a defence which would otherwise have been unavailable to it in a straightforward claim for breach of contract.

[31] The architect joined the contractor as a third party to the hospital's proceeding, claiming contribution towards any amount it might be held liable to pay the hospital. The architect asserted that the contractor would be liable conjointly with it for any sums paid by the hospital to the contractor in consequence of its alleged negligence. The architect's third party claim was struck out in the High Court. Both the Court of Appeal and House of Lords dismissed appeals.

[32] Lord Bingham expressed the ratio of the decision in *Royal Brompton* in these terms:[23]

> Approached in this way, the claim made by the architect against the contractor must in my opinion fail in principle. It so happens that the employer and the contractor have resolved their mutual claims and counterclaims in arbitration whereas the employer seeks redress against the architect in the High Court. But for purposes of contribution the parties' rights must be the same as if the employer had sued both the contractor and the architect in the High Court and they had exchanged contribution notices. The question would then be whether the employer was advancing a claim for damage, loss or harm for which both the contractor and the architect were liable, in which case (if the claim were established) the court would have to apportion the common liability between the two parties responsible, or whether the employer was advancing separate claims for damage, loss or harm for which the contractor and the architect were independently liable, in which case (if the claims were established) the court would have to assess the sum for which each party was liable but could not apportion a single

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22 At [23] per Lord Steyn.

23 At [7] per Lord Bingham.

> liability between the two. It would seem to me clear that any liability the employer might prove against the contractor and the architect would be independent and not common. The employer's claim against the contractor would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost it incurred, the sums it overpaid and the liquidated damages to which it was entitled. Its claim against the architect, based on negligent advice and certification, would not lead to the same damage because it could not be suggested that the architect's negligence had led to any delay in performing the contract.

[33] Apart from *Royal Brompton*'s articulation of the relevant principles governing a claim for contribution under s 17(1), the facts and the result are unhelpful to Mr Hotchin. In *Royal Brompton* the three parties were linked under one contractual framework. The architect and the contractor were required to perform interconnected duties to the hospital, but of a different nature, in relation to the same project. By comparison to the facts of the present case, while also owing duties to the same parties, the investors, the directors and trustees operated under unrelated instruments. As Mr Simpson submitted, the trustees are further remote from conjoint liability with Mr Hotchin than the contractor was with the architect in *Royal Brompton*.

[34] Mr Gedye sought to distinguish *Royal Brompton* on the facts. He submitted that the losses caused by each tortfeasor were plainly different. The losses claimable from the contractor were the increased costs resulting from delay, contractual overpayments and liquidated damages. The losses claimed from the architect were additional losses which could not be claimed from the contractor, resulting from the architect's wrongful extension certificates. If the loss claimed could not be recovered from the contractor, then it could not be claimed from the architect. The losses were distinct and did not overlap.

[35] We agree with Mr Gedye that the damage suffered by the hospital as a result of the architect's negligence was not the same as that caused by the contractor. But we disagree with his interpretation of the ratio of the decision. The architect's negligence in giving extension certificates and issuing negligent instructions deprived the hospital of its right to recover from the contractor losses caused by its delays. But, the architect's negligence was not the cause of the contractor's delays. As these facts illustrate, the liabilities of the architect and contractor were not shared

but were independent because the damage caused by each was of a different nature; there was no single liability for apportionment between the two tortfeasors, The decision illustrates the extent to which commonality of liability with its focus on relative causal potency underpins one party's right to claim contribution from another.

[36] Mr Gedye suggested that Lord Bingham wrongly held that the right to contribution under s 17(1)(c) rested on a common liability arising on a common demand. We are unable to agree, for a number of reasons not the least being that in *Altimarloch* Tipping J referred to Lord Bingham's speech with apparent approval.[24] Furthermore, as we shall explain, Lord Bingham's analysis is consistent with the text and purpose of s 17(1).

Eastgate

[37] Mr Gedye relied on an earlier English decision, *Eastgate Group Ltd v Lindsey Morden Group Inc.* That was the not unfamiliar case of a vendor giving financial warranties in a share purchase agreement about the accuracy of accounts. The purchaser sued the vendor for alleged breaches.[25] The vendor joined as a third party its accountants on the ground of their negligence in preparing the financial statements on which the warranties were based. The High Court struck out the vendor's joinder of its accountants.

[38] In allowing an appeal in *Eastgate*, the Court of Appeal was satisfied that both the vendor and its accountants were liable in respect of the same damage. The vendor had sold a company worth substantially less than the warranted value. And the accountants, if liable, had caused the purchaser to buy a company worth substantially less than the price paid. Both were potentially joint tortfeasors for the same damage or loss as against the buyer.

[39] Mr Gedye submitted that the vendor's liability for breach of warranties in *Eastgate* is conceptually similar to the liability of a director who makes

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[24] *Altimarloch*, above n 12, at [134]–[135] per Tipping J.

[25] *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642 [*Eastgate*].

misstatements in a prospectus to sell an investment in a company; and the liability of an accountant who properly failed to investigate or check the state of the accounts is similar to that claimed against the trustees here. We disagree with this analogy. In *Eastgate* the vendor and the accountant each gave assurances to the purchaser about the accuracy of the financial statements. Here, as Winkelmann J found, the trustees did not assume any duties in relation to the accuracy of the directors' statements whether in prospectuses or periodic certificates.

[40] Mr Gedye relied also on the Court of Appeal's rejection in *Eastgate* of an argument that rights of contribution did not arise where the measure of loss might not be the same. In the Court's view that factor did not mean that the vendor and accountants were not liable for the same damage:[26] each was liable on a common demand for what Longmore LJ described as identical damage, even though the measure of the recovery might differ. That view is consistent with *Royal Brompton*. The focus is on the wider concept of damage – that is, loss, harm or injury. What is required is a comparison of the nature and extent of the liability of each party, not its consequences. Significantly in *Eastgate*, the vendor and accountant assumed substantially the same obligations towards the purchaser.

Dairy Containers

[41] Mr Gedye also relied on the New Zealand decisions in the *Dairy Containers* case, both in the Court of Appeal[27] and in the High Court.[28] Dairy Containers Ltd (DCL), a wholly owned subsidiary of the New Zealand Dairy Board, sued the Auditor-General and the ANZ Bank for losses suffered from frauds committed by senior DCL executives. At an interlocutory stage this Court upheld joinder of the Board and two directors of a finance company associated with DCL on third party claims by both defendants. At trial Thomas J subsequently found the third parties liable to contribute to the judgment entered for DCL against the Auditor-General and the bank because all were joint tortfeasors. His judgment was not appealed.

[42] Mr Gedye submitted that in *Dairy Containers*:

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[26] At [16].
[27] *ANZ Banking Group (NZ) Ltd v Dairy Containers Ltd* CA156/92, 17 December 1992.
[28] *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (HC).

(1) The nature of each tortfeasor's liability was different. The bank was liable for the tort of conversion of cheques which the fraudulent employees had improperly endorsed or banked. The Auditor-General was negligent in failing to detect the defalcations. The directors committed the tort of conspiracy to defraud. And the board was vicariously liable for the fraudulent acts of the fraudulent DCL employees.

(2) There were no corresponding or similar elements requiring to be proved against each tortfeasor; and the measure of damages recoverable from each tort was different, involving an assessment of different issues including timing. However, the damage suffered by DCL was the same in all cases – stolen money.

[43] Mr Gedye submitted that this Court's decision in *Dairy Contractors* has acted as a guide to the correct approach under s 17(1)(c), particularly at the interlocutory stage. Its virtues, among others, lie in avoiding a detailed analysis of the respective tort causes of action to determine whether liability is co-ordinate or common.

[44] It is true that in *Dairy Containers* this Court did not subject s 17(1)(c) to close analysis. Counsel's argument on appeal centred on whether the third parties arguably owed duties of care to DCL and were thus joint or several tortfeasors. The real issue was whether rights of contribution could arise where liabilities were not of a concurrent nature, one being in contract and the other in tort. The Court was not apparently required to determine the question of what constitutes liability "in respect of the same damage".

[45] Cooke P expressed the brief opinion that if the bank was liable for the tort of conversion of DCL's cheques and the Auditor-General was negligent in its duties as an auditor, the latter would be a tortfeasor against whom the banks could claim contribution.[29] In other words he was concerned with the cross-claims between defendants and devoted little attention to the third party claims. Gault J referred

[29] At 5.

briefly to s 17(1)(c), but more by way of recital than analysis;[30] and Thomas J also referred briefly to s 17(1)(c), again by way of recital only.[31]

[46] It is unnecessary for us to consider whether this Court's decision in *Dairy Containers*, which predated *Royal Brompton* and *Altimarloch* is correct. *Dairy Containers* may still be good law for the reason, which Mr Gedye accepted, that the third parties together with the defendants were all liable to DCL for its stolen money. The damage was the same even though the measure of loss might have differed between the potential tortfeasors. All joined tortfeasors would have arguably been liable for the same amount on a simple demand. What is most significant for these purposes, however, is that this Court did not determine the question of construction and meaning of s 17(1) which has arisen on this appeal.

Wallacev v Litwiniuk

[47] Mr Simpson relied on the Alberta Court of Appeal's decision in *Wallace v Litwiniuk*.[32] Its significance is twofold. One is in its application of the relevant principles to the facts. The other is that its reasoning was endorsed by Lord Steyn in *Royal Brompton*.[33]

[48] In *Wallace*, the plaintiff, Ms Peake, was injured in a motor accident. She instructed lawyers to sue the driver of the other vehicle involved. However, the lawyers negligently failed to issue proceedings within the limitation period. Ms Peake sued the lawyers who then joined the driver as a third party.

[49] The Court of Appeal struck out the lawyers' third party claim. While there may have been a superficial similarity between the damage caused by the driver and the loss of the right to claim compensation from him relating to that injury, the damage was not the same. That is because the compensation which Ms Peake sought from her lawyers was not damages for her physical injuries. It was loss which she would not have suffered if the original claim had been brought in time. This conceptual difference was shown by the necessity to discount Ms Peake's claim

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30 At 5.
31 At 5–6.
32 *Wallace v Litwiniuk* (2001) 92 Alta LR (3d) 249 (CA).
33 *Royal Brompton*, above n 11, at [29] per Lord Steyn.

against the law firm to allow for the chance that her claim against the driver might not have succeeded. The decision is conceptually analogous to *Royal Brompton* with a closer proximity between the lawyers and the driver than there was between Mr Hotchin and the trustees.

Bank of New Zealand v New Zealand Guardian Trust

[50] Messrs Simpson and Smith relied on this Court's decision in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* for its identification of the nature and extent of a trustee's liability for breach of a tortious duty.[34]

[51] NZGT was the trustee under a debenture deed securing advances to a property investment company. NZGT failed to exercise its duty as trustee to ascertain the borrower's breaches of its obligations in making unauthorised advances to non-charging subsidiaries. The borrower later failed with substantial losses. Its failure was caused by a combination of factors unrelated to the trustee's negligence.

[52] The BNZ sued the trustee for the loss of its advance, alleging that but for NZGT's breach it would have withdrawn its loan at an earlier date and received repayment in full. Both Fisher J and this Court were satisfied that, even though the trustee was in a fiduciary relationship with the banks, its obligation to inform them of the borrower's breach of the deed was tortious in nature. NZGT did not assume a duty to protect the BNZ against the risks inherent in its investment arising from causes unconnected with the trustee's breach. Accordingly, the trustee was only liable for losses directly attributable to its negligence.

[53] This Court's decision confirms that the trustees could not be liable to Hanover investors for the losses suffered through investing in reliance on the directors' statements. The trustees could only be liable for losses directly attributable to a failure to exercise reasonable care in monitoring the Hanover companies' compliance with the deeds.

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[34] *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).

Building cases

[54] Mr Gedye also sought support for Mr Hotchin's claim by analogy to claims for contribution between a local authority and negligent builder where both are liable for the costs of repairing defective workmanship. He said in such a case the council will be liable for losses flowing from negligently issuing a code of compliance certificate for which the builder has no liability. The builder will be liable for losses from negligent building work for which the council has no liability. Contribution is available because by different causes of action, different pathways of causation and different measures of loss, the council and the builder are liable for the same damage.

[55] However, as Mr Smith pointed out, an entitlement to contribution could only arise in such cases where the respective torts have resulted in the same damage. An example is where the builder negligently constructs a flashing which the council negligently fails to detect on inspection. Liability would be common or conjoint. The building owner could sue each party independently for the same damage, being the cost of repairs, regardless of the basis of liability. Each had assumed a duty to protect the owner from that damage.

[56] Mr Gedye's analogy with claims against local authorities and builders could only hold true if both the directors and trustees were responsible to the investors for the duty on which the claim is brought – ensuring the accuracy of the directors' statements to investors. We repeat that Winkelmann J struck out this part of Mr Hotchin's claim and he has not cross-appealed.[35]

Smith New Court Securities Ltd v Scrimgeour Vickers

[57] Finally, Mr Gedye sought to overcome the obstacle presented by the weight of this appellate authority by following another route. It was formulated before us on the premise that it answered an argument advanced by Perpetual in the High Court that on a claim against the directors the harm suffered by investors could only be the loss suffered on payment of deposits, and on the day of the investment, which was fixed on the basis of the difference in value between the price paid and

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[35] *Hotchin*, above n 1, at [51]–[58].

the value of securities at the date of breach; that, by contrast, the harm claimable by an investor on a claim in tort against the trustee was different because it could only be the further loss of value that arose after payment by reason of quite different acts or omissions and thus a director and a trustee could not possibly be liable for any part of the same loss suffered by an investor.

[58] We note that Winkelmann J's judgment was not based on acceptance of Perpetual's argument. To that extent, Mr Gedye's argument in answer is tangential. In reliance on the English decision in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*,[36] followed since by the New South Wales Court of Appeal in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd*,[37] he submitted that the directors could be liable to investors both for the difference between the price paid and the true value of the investment on subscription date and the full shortfall in recovery, for the reason that the investors were "locked in" to their investments. In that case the measure of damages appropriate to a claim for deceit which locks a party into an investment would apply.

[59] There are a number of answers to Mr Gedye's submission. First, it is not apparent how the High Court might apply the measure of damages appropriate to a claim in deceit where the FMA has not framed its case in that way and Mr Hotchin certainly does not assert that he acted deceitfully. Second, Mr Gedye's argument falls into the trap which he submitted must be avoided of equating damage within the meaning of s 17(1) with the measure of loss.

[60] Third, and in any event, we cannot see how the measure of damages appropriate for a claim in deceit would be applied to these facts. The rationale for the different measure in deceit was explained in *Smith New Court Securities* as follows:[38]

> In the light of these authorities the old nineteenth century cases can no longer be treated as laying down a strict and inflexible rule. In many cases, even in deceit, it will be appropriate to value the asset acquired as at the

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36 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 (HL).

37 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206, [2008] 73 NSWLR 653.

38 At 778c–h.

> transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale other factors will have influenced the value or resale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired.

[61] In our judgment this argument, based upon applying a measure of damages formulated expressly for claims in deceit, cannot assist in deciding whether the damage suffered by investors as a result of the negligence of Mr Hotchin or the trustee was the same.

Limitation Act

[62] After the appeal was heard, Mr Gedye was granted leave to make a supplementary submission based on s 34 of the Limitation Act 2010, which materially provides:

> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—
>
> (a) by a tortfeasor (**A**) liable in tort to another person (**B**) in respect of damage; and
>
> (b) for contribution from another tortfeasor (**C**) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage.
>
> (2) This section also applies to a claim—
>
> (a) made by a person (**A**) who is liable (otherwise than in tort) to another person (**B**) in respect of a matter; and

> (b) for contribution from a third person (**C**) who is, or would if sued in time by B have been, liable (otherwise than in tort) to B (whether jointly with A or otherwise) in a coordinate way in respect of that matter.
>
> (3) C is liable to B in a coordinate way for the purposes of subsection (2)(b) if, and only if,—
>
> (a) a common obligation underlies C's liability to B and A's liability to B; and
>
> (b) payment or other discharge of C's liability to B would have the effect of relieving A, in whole or in part, from A's liability to B.
>
> (4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

[63] Mr Gedye drew attention to the fact that s 34 prescribes a limitation period for contribution claims, describing and defining those claims arising under s 17(1)(c) differently from other non-tort contribution claims. His point is that, whereas non-tort contribution claims must be based on co-ordinate liability as defined in s 34(3), tort claims under s 17(1) have no such requirement. In his submission, the structure and content of s 34 is consistent with Mr Hotchin's case.

[64] We disagree. As Mr Smith pointed out, the Limitation Act was enacted after the relevant events and only came into effect from 1 January 2011. It does not apply to a claim arising from events occurring in 2007. In any event, s 34(1) simply mirrors the essence of s 17 and the fact that s 34(2) and (3) refer to a claim for contribution against a party which is liable other than in tort, such as an equity, is of no assistance. The requirement of co-ordinate liability in the latter case does not shed any light on whether it is required on a claim for contribution where a defendant must show that the third party is liable to the claimant "in respect of the same damage". This argument does not assist Mr Hotchin's case.

Analysis

[65] The wording of s 17(1) provides the framework for our consideration of the relevant principles and authorities. A right to recover contribution requires that the "damage … [must be] suffered by [the claimant] as a result of a tort" and is available

against another "tortfeasor who is … liable in respect of the same damage". The amount recoverable is "the extent of that [tortfeasor's] *responsibility for the damage*" (emphasis added). In our judgment, the element of contribution is of governing effect. It is, as we have said, the mechanism for apportioning "*responsibility for that damage*" – the same damage – between potential joint or several tortfeasors and can only operate by taking account of the nature of the duties owed and relative causative potency.

[66] Mr Hotchin owed the investors a duty to make accurate statements in prospectuses and certificates. The damage suffered by the Hanover investors as a result of Mr Hotchin's alleged breach of duty was the loss of their deposits made in reliance on those statements or the excessive prices paid. The trustees' duties were of a very different nature, to protect investors against the harm arising from breaches of the companies' obligations under the trust deeds. The trustees cannot be liable in respect of the damage suffered by the investors where they did not owe a duty to protect them against the harm of inaccuracies in the directors' statements. They did not assume substantially the same obligations towards the investors as those performed by Mr Hotchin. The obligations they each assumed were not of the same nature or extent.

[67] Mr Hotchin and the trustees do not share a co-ordinate liability, even in a loose sense,[39] to pay compensation for inflicting the same harm. The investors could not recover from the trustees any or all of the loss caused by investing in reliance on a misleading statement. Any liability on the trustees' part would be directly and independently for the different damage caused by failing to intervene earlier. While in its most general sense the damage in both cases is loss of all or part of an investment, the trustees could not be independently liable for damage which they did not cause.

[68] The liabilities of the directors and trustees for breaching their respective duties would not be of the same nature and to the same extent. As noted, each was performing a different obligation. It is not enough for Mr Hotchin to identify at a level of generalised abstraction the existence of breaches of separate duties owed to

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[39] *Royal Brompton*, above n 11, at [46] per Lord Hope.

the same group of investors and arising out of the operations of the same group of companies. He must identify something more specific by way of a common or shared obligation giving rise to common liabilities where the nature of the harm resulting is the same or indivisible. He has failed to do so here.

[69] Mr Hotchin's alternative claim for equitable contribution must fail for similar reasons. We are satisfied that Winkelmann J applied the correct test in finding that Mr Hotchin and the trustees did not share a co-ordinate liability to the investors. There could not be a common contribution to make good the same loss – the loss of an investor's deposit – because as the Judge found:

> [72] It was suggested for Mr Hotchin that the fact any loss recovered from one would tend to reduce the loss recoverable from another was evidence of co-ordinate liabilities. I do not consider this is a valid indicia of co-ordinate liability. The following passage from *Meagher Gummow & Lehane's Equity Doctrines & Remedies* is helpful on this point:[40]
>
> > In previous editions of this work, it was suggested that contribution might be recovered "where the liabilities of the co-obligors to the principal claimant are such that enforcement by him against either co-obligor would diminish that obligor in his material substance to the value of the liability". That statement requires qualification. It was never intended to suggest that, for example, a thief who steals a trustee's unauthorised investment can obtain contribution from the trustee, notwithstanding that both are liable for the loss suffered by the owner of the stolen goods. The generous approaches to causation at common law, and, especially, in equity against fiduciaries […], produce the result that a wide range of persons may be held liable in respect of the same loss on a variety of causes of action. Added to this are persons rendered liable on statutory causes of action […]. Recent discussions have shown that whether there are "co-ordinate liabilities" depends not merely on whether liability for the same loss is established, but on whether that liability is grounded in a common interest and a common burden.

[70] As we have pointed out, the directors and the trustees did not share a common interest or common burden. The directors' duty was to ensure that the Hanover companies complied with the trust deeds; the trustees' duty was to monitor compliance. The nature and extent of their liabilities was different. Mr Hotchin's claim for equitable contribution is unarguable.

Result

[71] The appeal is dismissed.

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[40] R Meagher, D Heydon and M Leeming *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, LexisNexis, New South Wales, 2002) at [10-030].

[72] Mr Hotchin is ordered to pay costs to each of NZGT and Perpetual for a standard appeal on a Band A basis together with usual disbursements.

Solicitors:
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