Federal Court of Australia

Primary Securities Ltd as Trustee of the Baker Partners Founders Fund v Warburton [2024] FCA 382

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| File number: |  |
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| Judgment of: | **JACKSON J** |
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| Date of judgment: | 17 April 2024 |
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| Catchwords: | **CORPORATIONS** - application for directions by trustee - whether trustee justified in continuing or commencing proceeding against certain respondents and discontinuing proceeding against other respondents - claims for alleged receipt of misappropriated property - commercial trustee - opinion of counsel tendered - directions given |
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| Legislation: | *Trustees Act 1962* (WA) ss 92, 95 |
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| Cases cited: | *Barnes v Addy* (1874) LR 9 Ch App 244  *Black v S Freedman & Co* (1910) 12 CLR 105  *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66  *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198  *Plan B Trustees Ltd v Parker (No 2)* [2013] WASC 216  *Primary Securities Ltd (Trustee), in the matter of Baker Partners Founders Fund* [2021] FCA 1247  *Re Ansett Australia Ltd and Korda (No 3)* [2002] FCA 90; (2002) 115 FCR 409  *Re* *Challis (dec)* [2010] WASC 333  *Re Equititrust Ltd (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) (No 4)* [2017] FCA 1133  *Re Pasminco Ltd (Subject to Deed of Company Arrangement) (No 2)* [2004] FCA 656  *Re Perpetual Investment Management Ltd as Responsible Entity for 10 Schemes listed in the Summons* [2014] NSWSC 784 |
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| Number of paragraphs: | 57 |
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| Date of hearing: | 19 March 2024 |
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| Counsel for the Applicant: | Mr AP Young KC with Mr PH Murray |
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| Solicitor for the Applicant: | K&L Gates |
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| Counsel for the Second, Third, Fourth, Fifth, Sixth and Seventh Respondents: | The second, third, fourth, fifth, sixth and seventh respondents did not appear |

ORDERS

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|  | | WAD 31 of 2022 |
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| BETWEEN: | PRIMARY SECURITIES LTD (ACN 089 812 635) AS TRUSTEE OF THE BAKER PARTNERS FOUNDERS FUND  Applicant | |
| AND: | JUSTIN NEIL WARBURTON  Second Respondent  MICHLANGE PTY LTD (ACN 009 140 998)  Third Respondent  **NATALIE GRACE ANDRE**  Fourth Respondent  **PARADISE BAY INTERNATIONAL PTY LTD (ACN 159 462 227)**  Fifth Respondent  **KERRY J WARBURTON**  Sixth Respondent  **HATINI GONCALVES**  Seventh Respondent | |

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| order made by: | JACKSON J |
| DATE OF ORDER: | 17 aPRIL 2024 |

THE COURT ORDERS THAT:

1. Pursuant to s 92 of the *Trustees Act 1962* (WA), the applicant, as trustee of the Baker Partners Founders Fund, would be justified and acting properly in:
   1. maintaining this proceeding and prosecuting its claims against the third, fourth, sixth and seventh respondents;
   2. discontinuing its claims in this proceeding against the second and fifth respondents; and
   3. commencing and prosecuting its claim against LR Warburton Pty Ltd.
2. The applicant has liberty to apply for further directions pursuant to s 92(1) of the *Trustees Act*.
3. The applicant's reasonable costs of the interlocutory application for directions accepted for filing on 24 November 2023 are to be paid from the property of the Baker Partners Founders Fund.
4. The matter is listed for a case management hearing at 9.30 am AWST on 6 May 2024.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKSON J:

1. The applicant, Primary Securities Limited (**PSL**), is the trustee of a fund known as the Baker Partners Founders Fund (**BPF Fund**). By an interlocutory application in this proceeding, PSL seeks judicial directions under s 92(1) of the *Trustees Act 1962* (WA) as to three propositions. The first is that PSL would be justified and acting properly in maintaining this proceeding and prosecuting its claims against the third, fourth, sixth and seventh respondents. The second is that it would be justified and acting properly to discontinue its claims against the second and fifth respondents. The third is that it would be justified and acting properly in commencing and prosecuting a claim against a party that is not yet a respondent to this proceeding, LR Warburton Pty Ltd.
2. None of the present respondents wished to be heard on the interlocutory application. Pursuant to directions made by the Court, persons with investments in the BPF Fund (directly and indirectly through a managed investment scheme described below) were notified of the interlocutory application and its basis. Only one such investor, Mr Michael Georgeff, sought to be heard, and after the nature of the application was explained to him, he supported it.
3. For the following reasons, orders in the terms sought by PSL will be made.

## Background

1. This is not the first time the applicant has sought judicial directions in relation to this matter. In *Primary Securities Ltd (Trustee), in the matter of Baker Partners Founders Fund* [2021] FCA 1247, Colvin J made directions that PSL would be justified in commencing and prosecuting proceedings against the first respondent in this proceeding, an insurer, **Munich Re** Syndicate Singapore Pty Ltd, and in refraining from prosecuting arbitral proceedings against a company, Warburton Investment Management Pty Ltd (**WIM**), and against Leon Warburton. While much of the background is set out in that judgment, it is appropriate to canvass it again here, in view of the potential interest that beneficiaries of the BPF Fund have in understanding the outcome of this application for directions, and the potential interest of investors in a further investment vehicle mentioned below (the Primary Investment Board).
2. Most of the following appears from an affidavit of a director of PSL, Robert Garton Smith, affirmed on 10 November 2023 in support of the interlocutory application, as well as an affidavit of PSL's solicitor, Nicholas Brown, affirmed on 24 November 2023. Mr Garton Smith's affidavit deposes to the events said to give rise to the current litigation, and associated events, in considerable detail. But it is not appropriate on an application of this kind to make firm findings of fact; what follows sets out the factual basis put forward by PSL for the directions it seeks. That basis has not yet been the subject of any contested hearing.
3. The BPF Fund was established in March 2019. It was then named the Warburton Global Macro Fund. It was designed to be a vehicle by which so-called wholesale investors could make certain kinds of investments.
4. At the same time PSL was the responsible entity for a different fund which was structured as a managed investment scheme under Chapter 5C of the *Corporations Act 2001* (Cth), known as the Primary Investment Board. In broad terms, that fund appears to have operated as a platform by which retail investors could invest in various 'wholesale funds', which were allocated to various classes under the umbrella of the Primary Investment Board. Of immediate relevance is Class S, subscribers to which ended up holding an interest (through a different trustee) in the BPF Fund.
5. WIM was a company associated with Leon Warburton. It was party to agreements with PSL in relation to the BPF Fund under which, it appears, WIM could direct PSL to make particular investments.
6. The events that gave rise to the present litigation occurred in March through to December 2019. It is not necessary to describe them in detail; suffice to say that PSL alleges that:
7. in March 2019 the Warburton Global Macro Offshore Fund (**Cayman Fund**) was incorporated and in May 2019 it was registered as a registered mutual fund, under laws of the Cayman Islands which appear to permit such things;
8. on or around 26 April 2019, Mr Warburton executed a loan agreement on behalf of the Cayman Fund and on behalf of WIM, under which the Cayman Fund agreed to lend WIM US$3,000,000;
9. on 1 July 2019, WIM directed PSL to invest the BPF Fund's assets in the Cayman Fund and in accordance with that, the BPF Fund subscribed and paid for A$8,445,394.56 worth of 'seed shares' in the Cayman Fund;
10. on 15 July 2019, WIM drew down on the loan to the extent of A$3,500,000 (or US$2,900,000 - different figures are given at different points in the evidence, but the difference is not presently material);
11. over 15 to 19 July 2019, WIM transferred a total of A$3,629,000 to bank accounts held by Mr Warburton and to the third respondent, Michlange Pty Ltd, a company associated with his father;
12. over the rest of July 2019, Mr Warburton made funds transfers summarised in the paragraph below; and
13. on 26 September 2019, WIM transferred a further A$150,000 to LR Warburton Pty Ltd.
14. The alleged funds transfers in July 2019 that form the basis of the proposed claims against the current respondents to the proceeding can be summarised as follows:
15. A$334,000 to the third respondent, Michlange Pty Ltd;
16. A$300,000 to the fourth respondent, Natalie André, who appears to have worked for Mr Warburton as his personal assistant and as office manager for WIM;
17. A$1,425,030 to the sixth respondent, Kerry Warburton, Mr Warburton's mother; and
18. A$720,030 to the seventh respondent, Hatini Goncalves, who is described in the evidence as having been in a relationship with Mr Warburton at the time.
19. The BPF Fund also alleges that Leon Warburton transferred A$100,000 to his brother, the second respondent Justin Warburton, and A$70,000 to the fifth respondent Paradise Bay International Pty Ltd, a company controlled by Justin Warburton. These allegations are the basis of the claims which the BPF Fund proposes to discontinue.
20. On 17 December 2019 the Cayman Fund paid A$4,410,470.69 to PSL. According to Mr Garton Smith, this comprised all the remaining assets in the Cayman Fund. As a result, PSL was approximately A$4,000,000 out of pocket on its A$8,445,394.56 'investment' in the Cayman Fund.
21. There were other transactions involving the purchase by the Cayman Fund of shares in a company formed by Mr Warburton called Baker Partner Holdings Ltd (**BPHL**). It is alleged that the net effect of those transactions was that in place of the debt owed to the Cayman Fund by WIM, the Cayman Fund held shares in BPHL which may have been worthless. Nominally, the Cayman Fund paid A$4,000,000 for shares in BPHL which, it is alleged, had been issued to Mr Warburton. It also paid a further A$8,000 to be issued shares in BPHL. It is not necessary to describe these transactions in more detail, as they are not the subject of the proposed claims on which judicial advice is sought. But it is necessary to note that, as a result of these transactions, another way of assessing the loss that the BPF Fund has suffered is by attributing to it, as a loss, the total of A$4,008,000 which the Cayman Fund paid for allegedly worthless shares in BPHL.
22. PSL originally commenced this proceeding on 14 February 2022 against its insurer, Munich Re, to recover under a policy said to indemnify against the A$4,008,000 loss. The insurer was the first respondent in this proceeding. But it reached a settlement to pay PSL A$2,500,000, and is no longer a respondent.
23. On 10 March 2023, orders were made dismissing the claim against the insurer (as a result of the settlement) and joining the second to seventh respondents. On the same date, PSL filed an amended concise statement articulating claims to recover the alleged funds transfers mentioned above in [10] and [11]. The claims are mainly said to be based on principles stated in *Black v S Freedman & Co* (1910) 12 CLR 105, which concern the formation of constructive trusts over stolen funds.
24. The second to sixth respondents are legally represented in the proceeding; the seventh respondent, Ms Goncalves, is not. No concise statements in defence have been filed yet, although correspondence from the second to sixth respondents' lawyer suggests that the claims will be resisted.
25. In addition to those existing claims, there is a dispute with another company associated with Leon Warburton, LR Warburton Pty Ltd. That company is the only unitholder in a different trust of which PSL was trustee, known as the Baker Partners Master Fund. LR Warburton Pty Ltd subscribed for A$150,000 in units in that fund on 27 September 2019, being the day after the alleged transfer of an identical amount to it from Mr Warburton as mentioned above.
26. LR Warburton Pty Ltd subsequently sought to redeem that investment from the Baker Partners Master Fund. PSL has resisted that redemption. LR Warburton Pty Ltd commenced proceedings against PSL in the Supreme Court of Western Australia to attempt to recover the $150,000 in December 2022. Those proceedings have since been transferred to this Court and given the matter number WAD 318 of 2023.

## The claims

1. Mr Brown's affidavit annexes a detailed written opinion as to the merits of PSL proceeding as against the second to seventh respondents, signed by senior counsel for PSL, Anthony Young KC, and a solicitor employed by Mr Brown's firm, Philip Murray. It is not necessary to go into the opinion in detail. It considers *Barnes v Addy*-style knowing receipt cases against each of the respondents listed above as having allegedly received funds from Mr Warburton (*Barnes v Addy* (1874) LR 9 Ch App 244).
2. Counsel's conclusions can be summarised as follows:
3. the claims against the second and fifth respondents, being Mr Warburton's brother and Paradise Bay International Pty Ltd, have, respectively, no reasonable prospects of success and uncertain prospects of success;
4. the claim against the third respondent, Michlange Pty Ltd, has reasonably good prospects of success and should be pursued;
5. the claim against the fourth respondent, Ms André, has reasonably good prospects of success and should be pursued;
6. the claim against the sixth respondent, Ms Warburton, has good prospects of success and should be pursued; and
7. the claim against the seventh respondent, Ms Goncalves, has good prospects of success and should be pursued.
8. Counsel's opinion also addresses the possibility of a claim against LR Warburton Pty Ltd. It does not condescend to detail as to the precise cause of action, but it concludes that a proposed claim by PSL against the company to recover the A$150,000 allegedly misappropriated from the BPF Fund has reasonably good prospects of success and should be pursued.

## Principles

1. Section 92(1) of the *Trustees Act 1962* (WA) provides:

Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.

1. In *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66 (the ***Macedonian Church* case**) at [54]‑[76], Gummow ACJ, Kirby, Hayne and Heydon JJ made a number of general points about a similar power conferred by s 63(1) of the *Trustee Act 1925* (NSW), including the following:
2. There are no express or implied limitations on the power which prevent it being exercised in relation to certain kinds of proceedings - the only jurisdictional bar is that the applicant must point to the existence of a question respecting the management or administration of the trust property, or the interpretation of the trust instrument.
3. There are no express words or implications in the provision which mean that some discretionary factors are more important or controlling than others. The discretion to give or withhold judicial advice is confined only by the subject matter, scope and purpose of the legislation.
4. There is no general first principle that where there is a contest or where there are adversaries, it is not appropriate to give judicial advice.
5. The procedure is summary in nature. It operates as an exception to the court's ordinary function of deciding disputes between litigants, and affords a facility for giving private advice.
6. The function of that private advice is to give protection to the trustee. Their Honours referred in that regard to s 63(2) of the *Trustee Act 1925* (NSW), which is similar to s 95(1) of the *Trustees Act 1962* (WA). The latter provides that any trustee acting under any direction of the Court shall be deemed, so far as regards its own responsibility, to have discharged its duty as trustee in the subject-matter of the direction. The plurality said that the equivalent New South Wales provision precludes a trustee who has acted in accordance with the court's advice from being held liable for breach of trust in the event that in conventional (i.e. adversarial) proceedings, it is later held that the legal position does not correspond with the advice given.
7. The application of the provision will tend to vary with the type of trust involved. As a scenario where it might not be correct to give judicial advice, the plurality gave the example of a non-charitable private trust where there is a conflict between beneficiaries, or between beneficiaries who are alleging a breach of trust in which the trustee seeking advice has profited. Their Honours drew a contrast between that and the position of a charitable trust. Their Honours also emphasised the origins of the jurisdiction against the background of the conception that the office of trustee is a gratuitous one unless special provision is made. They said (at [71], emphasis in original):

In short, provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses *properly* incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.

1. The merits of any particular decision made under the judicial advice provision must depend on the particular circumstances of the case. Later, at [105], their Honours confirmed that the court's sole purpose in giving judicial advice is to determine what ought to be done in the best interests of the trust estate.
2. To these matters can be added three propositions accepted as correct by Jagot J in *Re Equititrust Ltd (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) (No 4)* [2017] FCA 1133 at [7] (propositions (g) to (i), citations removed):

The usual form of order is that the trustee 'would be justified' in taking the relevant course of action.

In order to ensure the protection of the trustee, it is necessary that the statement of facts fully discloses the relevant matters, but it is not necessary for the trustee to 'prove' the facts to a certain standard of proof as would be the case in adversarial litigation.

The practice of the Court has been to look for, and in appropriate cases, rely upon, a memorandum of opinion from counsel. Such an opinion is not mandatory and is not necessary in every application, but it may have practical importance.

1. In *Plan B Trustees Ltd v Parker (No 2)* [2013] WASC 216 at [40]‑[53], Edelman J explained that the function of obtaining counsel's opinion is not necessarily to establish that a proceeding has reasonable prospects of success, as it is doubtful that an opinion could serve as admissible evidence of that. Rather, its purpose is to show that the trustee has taken reasonable steps to investigate and consider the matter properly including, where appropriate, by obtaining counsel's opinion.
2. Counsel for PSL appropriately drew to the Court's attention the question of whether PSL, as a professional trustee being reimbursed for its commercial judgment, was impermissibly seeking to shift its functions to the Court. In relation to point (6) above taken from the *Macedonian Church* case, in *Re Perpetual Investment Management Ltd as Responsible Entity for 10 Schemes listed in the Summons* [2014] NSWSC 784 at [53], Robb J pointed out that the plurality's observations were made in the context of 'specifically considering the situation of gratuitous trustees whose right to reimbursement of legal costs will depend upon the effectiveness of their entitlement to be indemnified out of the trust assets; and also the particular situation of trustees of charitable trusts'.
3. Robb J went on at [56]-[65] to review the position of the trustee before him in that case, which was a professional trustee acting for reward in pursuance of a commercial strategy. However, even in those circumstances, at [66] his Honour concluded:

Notwithstanding these considerations, a responsible entity is entitled to seek judicial advice under s 63 of the Act: see *Re Mirvac Ltd* [1999] NSWSC 457; (1999) 32 ASCR 107 per Austin J at [41]. Perpetual has made the present application. Whether or not the true effect of the *Macedonian Church* case is that Perpetual was obliged to make the application, nothing in that case suggests that the court should decline to give the advice sought in the present circumstances.

1. Perpetual, the applicant, was not only seeking advice on whether it was justified in defending proceedings, which can engage different considerations to a decision about whether to proceed with a claim. It was also seeking advice on whether it would be justified in causing a nominee company to institute and prosecute a cross-claim. At [69], Robb J drew from the *Macedonian Church* case the proposition that the opinion of counsel 'must address the facts necessary to support the legal conclusions reached and must demonstrate that the propositions of law relied upon for those conclusions are properly arguable'. At [70], his Honour cited *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 at 201 in relation to 'the entitlement of "a trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions" to seek judicial advice'. In light of those principles, Robb J had reservations about giving unqualified judicial advice because he considered that Perpetual had failed to fulfil those two considerations, that is, to obtain counsel's advice that appropriately addresses the facts, and to demonstrate that it held genuine doubt about the proposed course of action.
2. As to the considerations that can be relevant in deciding whether a trustee would be justified to bring litigation, in *Re* *Challis (dec)* [2010] WASC 333 at [30], Allanson J said (citations removed):

The court is not bound to investigate the evidence and make a finding as to whether the proposed proceedings would be successful. The question is whether the litigation is justified. There are competing considerations: the prospect of success; the potential to deplete the estate; costs should the application be unsuccessful; and what will be gained if the action is to succeed.

1. It might be thought that in weighing up these competing considerations, the Court is being asked to make a judgement about the commercial advisability of a course of action. In similar contexts, courts have consistently warned against applications for judicial advice being used as a way of obtaining an endorsement of a business judgement: see e.g. *Re Ansett Australia Ltd and Korda (No 3)* [2002] FCA 90; (2002) 115 FCR 409 at [46]‑[65] (Goldberg J); *Re Pasminco Ltd (Subject to Deed of Company Arrangement) (No 2)* [2004] FCA 656 at [1]‑[9] (Finkelstein J). But two matters persuade me that that is not what is being sought in this case.
2. First, the exercise of legal judgment is called for here, since the question concerns whether legal proceedings should be pursued or not pursued. Second, and more fundamentally, it must be appreciated that what is being sought is a direction that the trustee would be justified in pursuing or not pursuing the proceedings. It is being sought by way of protection against any suggestion that the trustee is not entitled to indemnity out of the trust estate for the costs of doing so.
3. That is in a context where, under cl 22.14 of the trust deed for the BPF Fund, PSL as trustee is entitled to an indemnity out of the trust fund for any costs, fees, disbursements, expenses and 'out-of-pockets' which it may reasonably and properly incur relating to the trust, its administration or management, or otherwise in relation to the proper performance of PSL's duties under the trust deed. The question, then, is whether PSL as trustee would be acting reasonably and properly in the best interests of the trust in pursuing or not pursuing the relevant claims (as the case may be). The question is not whether the Court, standing in the shoes of the trustee, would make the same commercial decision based on its view of what is the best or the correct course to take.
4. I am satisfied therefore that it is appropriate for the Court to consider the request for judicial advice that PSL makes in the present case. Senior counsel for PSL acknowledged in oral submissions that if there were a significant change in circumstances, his client may need to come back to the Court for further advice.

## Is PSL justified in proceeding against the third, fourth, sixth and seventh respondents?

1. In the context of the points just made, several matters that appear from the evidence (as it presently stands) should be noted.
2. First, PSL has put on evidence of communications it has conducted with unitholders concerning the proposed litigation, which Mr Garton Smith summarised in his affidavit as follows:

Taken together, the communications received by PSL from the Unitholders, and the results of the meeting held on 14 April 2023, suggest that Unitholders wish for PSL to take steps to recover the lost [A]$4,008,000, but, at the same time, they are concerned about the costs of doing so, and do not wish for the Trust Funds' remaining assets to be expended in the pursuit of legal action that is (a) without merit or (b) unlikely to bear fruit.

1. I accept that this is a fair summary of the communications, save to note that on the evidence as it presently stands, the proceedings that are the subject of the present application will only recover around A$2,900,000 at most (plus interest and costs), not the 'lost [A]$4,008,000' that was the subject of the claim against the insurer. And as discussed below, that figure might need to be reduced further.
2. In any event, as unsurprising as the unitholder's concerns may be, they show that PSL has real reason to seek judicial advice from the Court so as to afford it a measure of protection, if appropriate. It is not simply seeking the Court's imprimatur on its commercial decision in order to alleviate a sense of unease.
3. Second, the BPF Fund holds approximately A$1,000,000 in cash. It can use that to fund any litigation with which it proceeds.
4. Third, PSL has adduced evidence of considerable investigations that have been conducted to seek to ascertain what has occurred in and surrounding the events summarised above. The two main affidavits that have been mentioned go into substantial detail as to what has been learned.
5. Fourth, PSL has obtained a costs estimate from its solicitors for pursuing the litigation to judgment. It is in the order of A$500,000 based on a five day trial. While such an estimate is a matter on which reasonable minds may differ, the estimate here is itemised and evinces close consideration of what will be required. The solicitors advise that if PSL is successful in the application, it may expect to recover approximately 50% to 66% of its legal costs from the respondents. If PSL is unsuccessful, it will be exposed to paying a portion of the respondents' legal costs, of a similar magnitude.
6. Fifth, PSL has conducted investigations of the asset positions of various respondents in order to ascertain the likelihood that they will be able to satisfy any judgment obtained. It has established that two of the respondents, Michlange Pty Ltd and Ms Warburton, are the registered proprietors of potentially valuable real property. But it has not ascertained the asset position of the other respondents against whom it seeks to proceed.
7. Sixth, the terms of settlement with Munich Re appear to modify what might otherwise be the effect of subrogation arising out of the payment that the insurer has made. PSL submits that the terms of settlement effectively authorise it to seek to recover its net loss (including interest at court rates and legal costs) for its own benefit, and any amount recovered in excess of that net loss for the benefit of Munich Re. PSL has provided the Court with calculations which show that the estimated interest and legal costs mean that the net loss (after deducting the A$2,500,000 received from the insurer) is likely to be in excess of the A$2,900,000 or so it seeks to recover from the remaining respondents. In other words, PSL says it is not likely to be obliged to return any part of what it recovers from the respondents to the insurer, so that any recoveries will be to the full benefit of PSL and so to the unitholders.
8. I am mindful not to make findings as to the correctness of any of that, in case it becomes the subject of dispute with Munich Re, which is not a party to this proceeding. But I am satisfied that PSL has properly taken the issue into account in making its calculations of the likely benefit to unitholders of any recovery from the respondents.
9. Seventh, the impact, if any, of the recovery from Munich Re on the amount of money that can be recovered from the respondents is uncertain. On one view, PSL is only about A$1,500,000 out of pocket, since it paid about A$8,400,000 to subscribe for shares in the Cayman Fund, it received about A$4,400,000 back from the Cayman Fund, and it has received A$2,500,000 from Munich Re. It is possible (I put it no higher) that the latter recovery will have to be taken into account in assessing what can be recovered from the respondents.
10. When I asked counsel for PSL about that, it was suggested that the doctrine of subrogation would mean that the insurance recovery would not need to be taken into account in that way, but in light of the (subsequently received) evidence about the terms of settlement with Munich Re that may not be correct. If not, then it is possible that the recovery could, for example, impact on claims for equitable compensation against the respondents, and possibly on other *in personam* claims. In the absence of clear submissions to the contrary, I will assume that the upper limit of the claim against the respondents is about A$1,500,000. To that may be added interest which, while it has not been calculated with any precision, is likely to increase the quantum of any claim (on the above assumptions) to around A$2,000,000, depending on when any judgment is obtained. To be clear, this is an assumption for the purposes of this application only, and does not imply any view about the correct quantum of PSL's claims.
11. Eighth, although unitholders in the BPF fund and holders of Class S units in the Primary Investment Board were notified of the application for judicial advice, only Mr Georgeff sought to appear at the hearing. He supports the attempt to recover funds from the respondents.
12. Taking all of that into account, the evaluation of whether PSL will be justified in proceeding against the third, fourth, sixth and seventh respondents must encompass the following matters:
13. PSL has advice from senior counsel that the claims against the third and fourth respondents have reasonably good prospects of success and should be pursued, and the claims against the sixth and seventh respondents have good prospects of success and should be pursued. The advice addresses the facts in light of properly arguable propositions of law.
14. It appears likely that the third, fourth and sixth respondents will defend the proceeding. The position of the seventh respondent (who is not legally represented) is unclear.
15. The third and sixth respondents presently hold real property that may permit any judgment sum to be recovered, at least in part. But the asset position of the fourth and seventh respondents is unknown.
16. There will be significant overlap in the forensic contest as between the different respondents, since the claim depends on allegations that Mr Warburton misappropriated the funds on one or two occasions and then distributed them to the various respondents. However there will also be issues specific to each respondent including, speaking broadly, the knowledge of each relevant person as to whether the funds they are said to have received had been misappropriated. This is relevant because it potentially introduces economies of scale, as it were, in that if PSL chooses to proceed against a respondent where the prospects of success are good and the respondent has assets, that may make it comparatively less costly for it to also proceed against other respondents. Given that the issue of knowledge may figure prominently, however, I do not consider that this weighs strongly in favour of proceeding here.
17. PSL has already recovered a considerable proportion of the funds lost, and has distributed much of that to unitholders. It retains some A$1,000,000, which will permit it to fund the litigation if it so chooses.
18. On the advice and assumptions set out above, PSL will be risking approximately half of those funds in order to recover some A$2,000,000 (plus recovery of 50%-66% in costs). But that is a best case scenario (on the above assumptions). The usual risks in litigation all apply here and must be considered: failure to win judgment; failure to recover judgment sums from losing parties; and costs substantially exceeding estimates. If judgment is not obtained, PSL will be liable for the costs of the respondents. On the other hand, the possibility of lower costs, for example due to a negotiated settlement, cannot be discounted.
19. The right commercial decision in those circumstances is contestable. The amounts risked (at least A$500,000 in costs plus exposure to the respondents' costs) are a significant proportion of the best case scenario recovery (around A$2,000,000), and that best case scenario must be discounted for risk. But it is not the role of the Court on applications such as these to substitute its commercial judgment for that of the trustee. The question is whether the trustee would be justified in proceeding with the litigation, in that it would be acting reasonably and properly in the best interests of the trust, a question that must be approached on the principles discussed above.
20. On that basis, I consider that PSL would be acting reasonably and properly in proceeding against the third, fourth, sixth and seventh respondents. PSL has investigated thoroughly, it has received senior counsel's advice that it should proceed, the potential recovery is substantial, it is adequately funded to pursue the proceeding, and at least some of the respondents may have assets to satisfy judgment. It is within the scope of the conduct of a trustee acting responsibly in those circumstances to continue with the proceeding against those respondents.
21. An order that PSL is justified and acting properly in continuing the proceeding against those respondents will be made.

## Is PSL justified in discontinuing its claims against the second and fifth respondents?

1. Answering this question does not require nearly so much deliberation. Counsel's written opinion states that, contrary to an allegation made in the concise statement, it does not appear that the second respondent, Justin Warburton, received any of the A$8,445,394.56 which PSL paid to the Cayman Fund in July 2019 and which was then paid (in part) to WIM as a result of drawdown of the loan from the Cayman Fund. Counsel's opinion is that a claim against Justin Warburton is foredoomed to fail and should be discontinued at the earliest opportunity.
2. In light of that advice, PSL will be justified and acting properly in discontinuing its claim against Justin Warburton. That may expose it to some costs liability but it will be better for that liability to crystallise now, relatively early in the proceeding, than later when more substantial costs will have been incurred on all sides.
3. The fifth respondent, Paradise Bay International Pty Ltd, is a company associated with Justin Warburton. According to counsel's written opinion, there may be a dispute about whether the company received the funds claimed (A$70,000) as a volunteer. Also, it is uncertain whether the company (or Justin Warburton) had the requisite knowledge that the funds had been misappropriated (again, speaking broadly).
4. Counsel's opinion is therefore that the prospects of success against Paradise Bay International Pty Ltd are uncertain. In light of that advice, and the relatively small amount of money that could be recovered if PSL did proceed, PSL would be justified and acting properly to discontinue the proceeding against the fifth respondent at this relatively early stage.
5. Orders reflecting these conclusions will be made.

## Is PSL justified in proceeding against LR Warburton Pty Ltd?

1. Counsel's advice is that the prospects of success are reasonably good for any claim against LR Warburton Pty Ltd to recover the A$150,000 it allegedly received from WIM out of the funds obtained by drawdown of the loan from the Cayman Fund. Also in favour of proceeding with such a claim is the fact that it is already, in effect, the basis on which PSL is resisting LR Warburton Pty Ltd's claim for redemption of its units in the Baker Partners Master Fund.
2. PSL would be justified and acting properly in commencing and prosecuting a claim against LR Warburton Pty Ltd to recover that A$150,000. An order to that effect will be made.

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| I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson. |

Associate:

Dated: 17 April 2024