**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2012-404-1771**
**[2013] NZHC 1611**

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| UNDER | Sections 55-57 of the Securities Act 1978 |
| BETWEEN | FINANCIAL MARKETS AUTHORITY<br>Plaintiff |
| AND | MARK STEPHEN HOTCHIN<br>First Defendant |
| AND | GREGORY JOHN MUIR<br>Second Defendant |
| AND | TIPENE GERARD O'REGAN<br>Third Defendant |
| AND | BRUCE PATRICK GORDON<br>Fourth Defendant |
| AND | ERIC JOHN WATSON<br>Fifth Defendant |
| AND | DENNIS JOSEPH BROIT<br>Sixth Defendant |
| AND | THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED<br>First Third Party |
| AND | PERPETUAL TRUST LIMITED<br>Second Third Party |

Hearing: 11 and 12 March 2013

Counsel: R G Simpson and SPH Elliott for New Zealand Guardian Trust First Third Party Applicant
C T Walker for Perpetual Trust Ltd Second Third Party Applicant
N S Gedye and J A MacGillivray for First Defendant/Respondent Mr Hotchin

Judgment: 28 June 2013

## JUDGMENT OF WINKELMANN J

*This judgment was delivered by me on 28 June 2013 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/ Deputy Registrar*

Solicitors:
Bell Gully, Auckland
Gilbert Walker, Auckland
Tompkins Wake, Hamilton

Counsel:
N S Gedye, Barrister, Auckland

## A. Introduction

[1] These strike out applications raise issues as to the existence and nature of duties owed by trustees of debt security trust deeds to prospective and existing investors, and as to the elasticity of the doctrine of contribution both in equity and under the Law Reform Act 1936.

[2] Mr Mark Hotchin was a director of Hanover Finance Ltd, United Finance Ltd and Hanover Capital Ltd at the times when each of those companies (HFL, UFL and HCL respectively) issued prospectuses and published advertisements in connection with offers of debt securities to the public. The plaintiff, the Financial Markets Authority (FMA), alleges that during 2007 and 2008, various prospectuses, investment statements and advertisements distributed by UFL, HCL and HFL contained untrue statements, as did directors' certificates issued to obtain extensions of those prospectuses. Mr Hotchin and other directors signed or authorised each of these documents and advertisements. The FMA now seeks compensation under s 55G of the Securities Act 1978 for subscribers who invested in debt securities in reliance on the untrue statements. Under s 55G, compensation may be ordered for the loss or damage that subscribers have sustained by reason of the untrue statements.

[3] The allegedly untrue statements mainly related to the liquidity of each company, and included:

(a) a failure to provide relevant but adverse information that showed deteriorating liquidity (including reducing re-investment rates);

(b) false claims that the companies adopted various prudential management techniques; and

(c) a failure to disclose various related party transactions.

[4] The debt securities were issued under the HFL, UFL and UCL debt security trust deeds. The first third party, the New Zealand Guardian Trust Ltd (NZGT), was

appointed as a trustee by HFL pursuant to the HFL trust deed in 1985.[1] The second third party, Perpetual Trust Ltd (Perpetual), was appointed as a trustee by UFL pursuant to the UFL trust deed in 2002, and by HCL pursuant to the HCL trust deed in 2005.

[5] Mr Hotchin says that, as trustees under these various trust deeds, NZGT and Perpetual are liable to contribute to any compensation he is ordered to pay to the FMA to the extent that each of NZGT and Perpetual are responsible for the same losses suffered by the subscribers (who are referred to in the pleadings as depositors). Mr Hotchin has joined both trustees as third parties to the proceeding. The trustees have applied to strike out his claim against them.

## B. Mr Hotchin's claim for contribution

*The pleading*

[6] Mr Hotchin's claim for contribution is brought on two alternative bases, pursuant to s 17(1)(c) of the Law Reform Act or in equity. I set out the critical part of Mr Hotchin's claim against NZGT (the pleading against Perpetual repeats the same essential allegations):

> 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:
>
> (a) In reviewing and deciding whether or not to approve the form and content of the HFL prospectus;
>
> (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;

[1] At that time HFL was named Elders Rural Finance Ltd.

(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;

(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. That duty was based on the following:

(a) The trustee's statutory purpose is to protect and represent the interests of the depositors.

(b) HFL was a finance company accepting deposits from the general public.

(c) The statutory scheme provides for broad rights and obligations by trustees in relation to acquiring knowledge of, and monitoring finance company affairs, ensuring compliance by HFL with its obligations under the trust deed and taking action in the event of breaches by the finance company of obligations or other adverse circumstances;

(d) NZGT accepted responsibility for approving the form and content of prospectuses issued by HFL, and did so approve Prospectus 36, including as particularised below in subparagraph 10 (j) hereof.

(e) NZGT approved the 5 page section of the prospectus headed: "Main Points of Trust Deed" and permitted HFL to include that section in the prospectus. That section contained representations to prospective depositors about the role and powers and duties of the trustee.

(f) In particular, the trustee approved and permitted the statement : "*The Trustee represents the interests of all current and future holders of Secured Deposits…*" and the reference to "future holders" conveyed to a prudent but non-expert prospective investor the meaning that his or her interests prior to making an investment would be represented by the trustee.

(g) There was a relationship of proximity between NZGT and depositors, including prospective depositors of HFL.

(h) NZGT's obligations under the HFL Trust Deed including recital C, clauses 3.01(e)(x), 7.01, B.03, B.11, Schedule C, Schedule E, and as particularised at paragraphs 7 and 8 above.

(i) It was reasonably foreseeable that if NZGT were to breach one or more of the duties pleaded at paragraph 9 above, this would cause loss to depositors.

(j) NZGT's conduct in relation to the approval of the contents of HFL Prospectus 36, which comprised a detailed review of all of the text of the prospectus and the requiring of changes to that text, and the investigation and monitoring of HFL's operations and finances. Particulars of such conduct include that it:

(i) Obtained (M Knowles) from HFL (G Scott) on 13 November 2007 a draft of HFL Prospectus 36 and a draft Investment Statement for the purpose of reviewing and approving them.

(ii) Provided comments and requests for changes in the text (by M Knowles) to HFL (Mr Scott) in relation to the content of the draft offer documents.

(iii) Obtained legal advice (Bryan Connor) from NZGT's solicitors Bell Gully (Murray King) on 29 November 2007 in relation to the proposed 7 December 2007 offer documents, and made this legal advice available to HFL, such advice taking the form of detailed suggested amendments to the text of the offer documents.

(iv) Obtained formal legal "sign-off" from Bell Gully on 6 December 2007 in relation to the HFL offer documents.

(v) Approved the content of Prospectus 36 on 6 December 2007.

(vi) Conducted monthly reviews of HFL's financial statements and prepared detailed written reports of such reviews (in the period of several months before 7 December 2007, these were carried out by Harry Koprivcic).

(vii) Prepared detailed and comprehensive written annual reviews of the operations and finances of HFL, the most recent annual review prior to 7 December 2007 being a 22 page review conducted by Harry Koprivcic and Michael Knowles between 29 October 2007 and 16 November 2007.

(viii) From time to time raised detailed queries with HFL about wide-ranging aspects of its operations and finances, for example email from M Knowles to David Bryan 12 November 2007, further particulars to be provided after discovery.

(ix) Met with HFL personnel (D Bryan, L Janse, S Stubbs, G Scott, M Ross) from time to time to discuss and obtain briefings on wide-ranging aspects of its operations and finances, for example NZGT

file note of meeting by H Koprivcic dated 13 November 2007.

(x) Reviewed and expressed views on specific aspects of HFL's operations from time, for example email from M Knowles to G Scott in relation to FX Hedging dated 16 November 2007.[2]

[7] Mr Hotchin alleges that if the FMA succeeds in its claim against him, it necessarily follows that the trustees will have breached one or more of their duties to depositors, because they will have:

(a) Failed to exercise reasonable care by failing to detect various related party transactions entered into in breach of the trust deeds, cash flow and solvency issues, and that the businesses were being conducted in an imprudent and unbusiness like manner.

(b) Failed to exercise reasonable care by allowing the companies to issue and distribute on an ongoing basis prospectuses containing untrue statements, by approving the form and content of the prospectuses.

(c) Failed to exercise their powers to take timely and appropriate steps to protect existing and future depositors, including by exercising the powers available to them, and in particular by failing to suspend the operation of the companies to prevent them from taking in further deposits.

[8] Mr Hotchin alleges that these breaches will have contributed to the losses suffered by depositors. The trustees are therefore tort feasors who, if sued by the depositors, would be liable in respect of at least some of the same damages as claimed by the FMA from Mr Hotchin. Mr Hotchin says that the FMA could have sued him in tort. The FMA's claim could have been recast as a deceit claim and pursued under s 34 of the Financial Markets Authority Act 2011. Contribution under the provisions of the Law Reform Act is therefore available to him. Alternatively, he is entitled to contribution in equity from the trustees.

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2 It is alleged that Perpetual also undertook detailed textual reviews and revisions of the text of UFL's prospectus No 7. In respect of HCL's prospectus No 4, it is only alleged that Perpetual approved it. There is no allegation of detailed textual review and comment.

[9] Although it is by no means clear from the pleading, it became apparent during the course of argument that Mr Hotchin intends to formulate the claim for contribution on two different bases. First, Mr Hotchin says it is settled law that trustees of debt security trust deeds owe depositors a duty of care in tort to exercise reasonable care when performing their duties to monitor the solvency of the company and the company's compliance with its covenants in the trust deeds, and when deciding to exercise the powers conferred on them under the trust deeds to protect the interests of depositors, It is argued that this duty ought to be extended to prospective and roll-over depositors.[3] The trustees' breach of duty in this case, it is said, caused damage that is at least partially co-extensive with the damage the FMA alleges was caused by the directors' untrue statements in the prospectuses and associated documents. This is because investments in debt securities were accepted for longer than they would have been if the trustees had "pulled the plug" earlier.

[10] Secondly, it is alleged that each of the trustees owed a duty of care in tort to existing, prospective and roll-over depositors to exercise reasonable care in reviewing and deciding whether or not to approve the form and content of the various prospectuses. It is alleged that the trustees should have taken reasonable steps to ascertain whether the statements made in the prospectuses were true.

*Contribution principles*

[11] Section 17 of the Law Reform Act provides in relevant part:

> **17 Proceedings against, and contribution between, joint and several tort feasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …..
>
> (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

[3] A roll-over depositor is a depositor which reinvests rather than receives repayment of its principal on maturity of the investment.

respect of the liability in respect of which the contribution is sought.

[12] To succeed in his claim under s 17(1)(c) Mr Hotchin must prove that:

(a) he is liable to the plaintiff in tort;

(b) in respect of damage suffered as a result of his tort;

(c) that the trustees are liable to the plaintiffs in tort; and

(d) in respect of the same damage.

[13] Section 17(1)(c) applies even where the claim against the party seeking contribution is not in tort, provided that there is concurrent liability in tort. That was the finding at both first instance and on appeal in *Dairy Containers Ltd v NZI Bank Ltd*.[4] In *Dairy Containers* the defendant had been sued only in contract. Thomas J held:[5]

> I am therefore prepared to hold that the phrase "tortfeasor liable in respect of that damage" includes a wrongdoer who is actually liable in tort, although that wrongdoer may have been sued and held liable in contract.

[14] The trustees accept that this Court is bound to follow the Court of Appeal's decision in *Dairy Containers*, but reserve the right to argue on appeal, if necessary, that s 17(1)(c) only applies if the party seeking contribution is sued in tort. The trustees also accept, for the purposes of this argument, that Mr Hotchin could have been sued in tort by the FMA under s 34 of the Financial Markets Authority Act.

[15] Mr Hotchin pleads in the alternative, a claim for equitable contribution. The following passage from the joint judgment of Gaudron ACJ and Hayne J in *Burke v LFOT Pty Ltd* contains a succinct survey of the concepts underpinning the doctrine of equitable contribution:[6]

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4 *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (HC) at 122-124 per Thomas J; see also *ANZ Banking Group (New Zealand) Ltd v Dairy Containers Ltd* CA 156/92, 17 December 1992 at 6 per Cooke P.

5 At 124.

6 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at 292-293. Note that *Burke* was cited with approval by the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2010] NZSC 82, [2012] 2 NZLR 726 at [219].

In general terms, the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the compensation payable in respect of that loss or damage, either equally where they are liable in the same amount or proportionately, where the amount of their liability differs. The principle has regularly been applied between co-sureties, co-insurers, partners, co-owners, where payment is made by one in discharge of a common liability, and co-trustees who are in pari delicto.

The doctrine of equitable contribution applies both at common law and in equity. It is usually expressed in terms requiring contribution between parties who share "co-ordinate liabilities" or a "common obligation" to "make good the one loss". More recently, in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*, the right to contribution was said to depend on whether the liability was "of the same nature and to the same extent".

(footnotes omitted)

## B. Strike out principles

*The jurisdiction to strike out a third party claim*

[16] The principles governing strike out applications are not in dispute. They are as stated by the Court of Appeal in *Attorney-General v Prince*[7] and approved by the Supreme Court in *Couch v Attorney-General*:[8]

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The jurisdiction to strike out is to be exercised sparingly and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of the trial.

(c) The cause of action or defence must be clearly untenable, and it may be appropriate to give the opportunity to amend where a claim can be saved.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

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

(e) The Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in new situations. In *Couch v Attorney-General* Elias CJ put the matter as follows:[9]

> It is often not easy to decide whether a duty of care not previously recognised by authority is owed to the plaintiff, as Woodhouse J in *Takaro* acknowledged and as is amply demonstrated on the authorities. It may be unrealistic to expect that the pleadings and arguments to support a claim will always be adequate at an early stage of the proceedings. Caution in disposing of such cases on a summary basis is necessary both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts.

Nevertheless, as observed by William Young J in *Attorney-General v Body Corporate 200200*:[10]

> On the one hand, the Court should not lightly deny the plaintiffs the opportunity to proceed to trial on novel issues of law. Moreover, a trial will present a more favourable forum to assess the issues involved in establishing a duty of care. On the other hand, however, defendants ought not to be subjected to the substantial costs, much of which is usually unrecoverable, in defending untenable claims.

## C. The strike out applications in this case

[17] The trustees' applications to strike out the third party claim is primarily based upon three propositions: first, that contribution is precluded because the claim against Mr Hotchin is brought by the FMA under s 55G. Secondly, that the trustees do not owe duties of the nature alleged. Finally, even assuming they did, any claims in respect of breach of those duties could not found a claim for contribution by the directors. The arguments are as follows.

[18] The trustees say first that Mr Hotchin cannot bring a claim for contribution in this proceeding. Section 55G is a unique statutory provision which precludes the possibility of a contribution claim. If that argument is not accepted, they say that contribution is not available to Mr Hotchin under the provisions of the Law Reform

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9 At [32].

10 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [51].

Act because there is no arguable case that the depositors could sue the trustees in tort:

(a) The trustees did not owe a duty at tort to perform their obligations under the trust deeds. That duty arose only under the terms of the trust deeds, and was owed only to existing depositors, not to prospective or roll-over depositors.

(b) The trustees had no duty to monitor the contents of the prospectuses to ensure that the information contained there as to the business and financial position of the companies, was accurate. Such a duty has never been recognised by the courts and there are good reasons why it should not be.

[19] The trustees also say that there is no arguable case that Mr Hotchin can claim contribution from the trustees, either at equity or under the provisions of the Law Reform Act, because the nature of the claim against Mr Hotchin is fundamentally different to the nature of any tenable claim against the trustees. The FMA's action against Mr Hotchin is in respect of the allegedly untrue statements made in the prospectuses and associated documents. Any potential liability the trustees have relates to a failure to monitor for, and take appropriate action in respect of, breaches of the trust deed and the companies' financial position. The trustees and Mr Hotchin do not therefore share the co-ordinate liability necessary to give rise to a right of contribution either at equity, or under the provisions of the Law Reform Act.

[20] In any case Mr Hotchin is precluded from seeking contribution because the trustees are entitled to be indemnified by Mr Hotchin (and other directors) in respect of the liability for which the contribution is sought.

[21] The issues that arise are as follows:

(1) Does the fact the claim is brought by the FMA under s 55G preclude the claim for contribution?

(2) If not, do the trustees and Mr Hotchin share co-ordinate liability sufficient to allow a claim for contribution from the trustees? This issue involves consideration of:

(i) the nature and the extent of the duties owed by the trustees to existing and prospective and roll-over depositors;

(ii) whether any tenable claims are for the same damage;

(3) In any event, does the existence of a right to indemnify preclude a claim for contribution?

## D. The issues

### 1. Does the fact the claim is brought by the FMA under s 55G preclude the claim for contribution?

[22] The trustees argue that s 55G is a unique statutory mechanism to recover compensation for the benefit of depositors who have subscribed in reliance upon an untrue statement, and have thereby suffered loss. The right of action lies with the "FMA or a subscriber". Where the FMA brings the claim, it is not a truly representative action whereby one entity or person brings a claim on behalf of others. Rather it is a statutory cause of action where the order sought is to "pay compensation to the subscribers". Thus, when the FMA acts as plaintiff there is nothing to stop depositors from independently bringing their own causes of action, the potential for over recovery to be worked out at the relief phase. For these reasons, the FMA is the plaintiff not only in form, but also in substance. As the trustees are not liable to the FMA, there can then be no claim for contribution.

[23] It is obviously relevant to this issue that the FMA seeks to recover these amounts on behalf of depositors. It is acting on their behalf to bring the claim, thus relieving the depositors of the burden of funding and pursuing the claim. That is the substance of what is occurring, so that the fact that the FMA brings the claim on behalf of depositors ought not to exclude rights of contribution. To hold otherwise would produce capricious results. For example, if the depositors themselves brought

a claim against directors under the common law, or even under s 55G, rights of contribution would be available to the directors. Those rights would be lost forever, on the trustees' case, if the FMA steps in and brings the claim. I am not persuaded that the claims to contribution should be struck out on this basis.

## 2. Do the trustees and Mr Hotchin share co-ordinate liability sufficient to allow a claim for contribution from the trustees?

### *(i) What is the nature and the extent of the duties owed by the trustees to existing, prospective and roll-over depositors?*

[24] In order to consider the issue of co-ordinate liability, it is necessary to identify first whether the causes of action as formulated by Mr Hotchin are tenable. The trustees accept that for the purposes of this application I should proceed on the basis that there is a tenable argument that at some point they breached their duty to depositors to exercise reasonable care when monitoring for ability to repay depositors and for breach of the trust deed. They say, however, that it was a duty arising under the terms of the trust deed only (which include those terms implied by statute), and a duty owed only to existing depositors. It was not a duty arising in tort. Nor was it one owed to prospective or roll-over depositors. It therefore did not include a duty to ascertain, in advance of the issue of a prospectus, whether or not the company's assets were sufficient to discharge liabilities incurred to depositors pursuant to that offer of debt securities.

[25] The starting point in determining the content and extent of the trustees' duties is the Securities Act and Securities Regulations 1983 (the Regulations).

[26] The genesis of the Securities Act was described by the Privy Council in *Christchurch Pavilion Partnership No 1 v Deloitte & Touche Tohmatsu Trustee Co Ltd*:[11]

> [7] The Securities Act 1978 represented the response of the New Zealand legislature to the collapse of a group of companies known as the Securitibank group. When introducing the Bill the then Minister of Justice, the Hon David Thomson, said that:

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[11] *Christchurch Pavilion Partnership No 1 v Deloitte & Touche Tohmatsu Trustee Co Ltd* [2002] UKPC 4, [2002] 3 NZLR 289 at [7].

> "The Bill … will require commercial entities offering securities to the public to do so by way of a registered prospectus, to appoint an independent person to look after the interests of investors, to keep and disclose adequate financial information and to be subject to official scrutiny."

and that

> "The Bill is aimed at redressing the balance in favour of the investor, who, in many of the financial collapses in recent years, had had little or no way of ensuring that his investment has been responsibly and properly managed."

[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.

[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[12] 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.

[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.[13] Of most relevance is cl 1, which provided:

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

[13] 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.

*Duty to monitor for compliance with trust deed and terms of offer*

[32] The trustees say that the duty found in cl 1 of sch 5 (and, for HFL, in cl C.04 of the trust deed) describes the full extent of the trustees' duty, and it is a duty arising only under the trust deeds, not in tort. They rely upon *Fletcher v National Mutual Life Nominees Ltd*[14] to support this argument.

[33] The issue in *Fletcher* was very similar to the issue in this proceeding. Following the liquidation of a finance company, AIC Securities Limited, Mr Fletcher brought a representative action on behalf of himself and other depositors against National Mutual Life Nominees Ltd (National Mutual), the trustee. National Mutual accepted that it had acted negligently and in breach of its duties under s 45 of the Securities Act and reached settlement with the depositors. It then sued the auditors for contribution, alleging the auditors owed common duties to the depositors. The third cause of action pleaded breach of a duty of care owed by the auditors to National Mutual in respect of the accuracy of the accounts in the prospectus.

[34] It was common ground that contribution under s 17(1)(c) could only be invoked if National Mutual could establish that it was a tortfeasor vis-a-vis the depositors. In determining that issue Henry J said that the trust deed imported all of the duties implied by the Securities Act, so that any breaches by National Mutual were of express provisions of the trust deed. National Mutual's liability therefore was based on breaches of trust.

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[14] *Fletcher v National Mutual Life Nominees Ltd* [1990] 1 NZLR 97 (CA).

[35] National Mutual argued that it was also concurrently and independently liable in tort, either for breach of statutory duties or in negligence. Henry J rejected the argument that liability could arise for the tort of breach of statutory duty, because a breach of any of the relevant duties was in fact a breach of the trust deed, and not of any obligation imposed by statute. Henry J also considered that there was a conceptual difficulty in imposing a common law duty of care in the same terms as the duties outlined in the trust deed. The relationship between the parties existed only by reason of National Mutual having entered into the trust deed. The deed defined the duties, and confined them to those expressed in the deed or which could properly be implied, whether by statute or as a matter of construction. Aside from the trust deed, there was no relationship between National Mutual and any depositor which could give rise to a duty of care. He saw this approach as consistent with the principle (now no longer part of the law of New Zealand) that there could not be concurrent liability in contract and tort.

[36] As counsel for Mr Hotchin submits, the law has moved on since *Fletcher* to the extent that it should no longer be regarded as good law on this issue. *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*[15] was a case in which it was alleged that the trustee of a debenture trust deed was negligent in carrying out its duties as trustee. In the Court of Appeal Gault J said:[16]

> Historically the law has tended to place emphasis on the classification of the relationship giving rise to the obligation. But more recently, for certain purposes at least, there has been a shift of emphasis from the classification of the nature of the obligation, or duty, as it is usually called. Thus the nature of the duty which has been breached can often be more important, when considering issues of causation and remoteness, than the particular classification or historical source of that duty. What matters is not so much the historical source, be it equity or the common law, fiduciary duty or tort, but rather the nature and content of the obligation which has not been fulfilled. For example, duties of care are owed both in equity and at common law. But as a matter of policy it will not usually be appropriate, if the nature and content of the duty are the same, to have different approaches to causation and remoteness, according to its historical source.

Tipping J said to similar effect:[17]

> The duty in the present case is that imposed upon the trustee by cl 7.05(e)

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15 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).
16 At 686-687.
17 At 683-684.

> of the debenture trust deed. There has been no suggestion that the duty on which NAB relies has any other source. The clause does not state to whom the duty is owed by the trustee. It merely imposes the duty to exercise reasonable diligence to ascertain whether there has been any breach of the provisions of the deed by Comsec or any of its charging subsidiaries. It is not argued that the duty does not extend to the stockholders nor that it does not carry the further duty to advise them in the event of a breach being discovered. *That duty upon the trustee is enforceable in equity. There is doubtless the same duty in tort.*
>
> (emphasis added)

[37] It is clear then that trustees can owe duties to depositors enforceable pursuant to the trust deed but also in tort. Mr Hotchin argues that this duty also extends to prospective and roll-over depositors.[18] He makes the argument for an expanded duty as follows. The prospectuses that were approved by the trustees included a summary of the main points of the relevant trust deed, including a summary of the trustees' duties. The summary did not state that the duties were owed only to existing depositors. In the case of each prospectus, the trustee was said to "represent the interests of all current and future holders of secured deposits".[19] This, accompanied by the recitation of duties, could foreseeably cause prospective depositors to rely upon the trustees' representation that it had been monitoring the affairs of the company to ensure there was no breach of the trust deed, and that there were sufficient assets available by way of security or otherwise to discharge the amounts of deposits as they fell due. Those statements may well have persuaded them to invest. This is enough to create sufficient proximity for the imposition of a duty.

[38] To extend the trustees' duty to prospective and roll-over depositors would be to recognise a duty not previously imposed by the Courts. The two-stage inquiry applicable to determining whether a new duty should be recognised is well established, though the overall question is whether it is just and reasonable to impose a duty in the particular circumstances.[20] The first step requires the court to ask whether the defendant should reasonably have foreseen injury to his or her "neighbour", in the sense of a person who is closely and proximately affected by the

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[18] Roll-over investors are investors whose deposits are due for repayment, but decide to re-invest.

[19] In the case of HCL, the investors were bondholders, rather than holders of secured deposits, but that difference is not material for this application.

[20] *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

defendant's conduct.[21] Determining proximity requires consideration of the physical, circumstantial and causal connections between the parties. In this case, relevant considerations are the regulatory framework, the terms of the trust deed, and any representations made in the prospectus and authorised by the trustees.

[39] Second, the court assesses the policy considerations for and against the imposition of a duty. As a matter of policy, the courts are slow to impose legal liability for omissions, with the general principle being that a person is not bound to take care to prevent harm to or confer a benefit on another.[22] A duty may be imposed however, if a person has undertaken to act or induced reliance on him or her doing so,[23] or where there is an assumption of responsibility by taking on a task. An assumption of responsibility demonstrates the necessary proximate relationship.[24]

[40] Another relevant consideration is whether recognition of a duty would undermine existing principles within the law.[25] In this case, a critical consideration is whether the duty sought to be imposed is consistent with the Securities Act and the Regulations.

[41] I have concluded that in this case at least there is a tenable argument that the trustees owed a duty of care to prospective investors including roll-over investors. In reaching this view I have taken into account a number of factors.

[42] There are indications in the trust deeds that the trustees' duties, at least under the deeds, are owed to existing depositors. The recitals refer to the trustees acting as trustees for depositors.[26] Although there is some variation between deeds, in broad terms depositors are defined as the persons whose names are entered in the register of deposit holders, and the trustees are expressed to hold the security for those depositors. These provisions indicate what was agreed between the issuer and the

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21 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294.

22 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1060.

23 *Stovin v Wise* [1996] AC 923 (HL) at 944.

24 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [5.6.08].

25 Todd, above n 24, at [5.4.04] *South Pacific Manufacturing*, above n 21.

26 Bondholders in the case of HCL.

trustee as to the scope of the trustees' duty. Although they tend to weigh in the balance against the imposition of a duty, they are not decisive.

[43] The trustees' duties also include the cl 1 duty. The Securities Act does not state to whom that duty is owed and there is nothing in the Act or Regulations which is inconsistent with the extension of that duty to roll-over and prospective depositors.

[44] In compliance with cl 13 of sch 2 to the Regulations, the prospectuses contained the summary of the particulars of the trust deed. In the HFL and UFL prospectuses the relevant passage is as follows:[27]

> The Trustee represents the interests of all current and future holders of Secured Deposits invested with Hanover Finance. The Trustee is under a duty to exercise reasonable diligence to:
>
> - ascertain whether or not the Company or the Charging Subsidiary has committed any breach of the Trust Deed or any of the conditions of the issue of the Secured Deposits and, except where it is satisfied that the breach will not materially prejudice the security of the Secured Deposits or the interests of the Secured Deposits, to do all such things as it is empowered to do to cause any breach to be remedied; and
>
> - ascertain whether or not the assets of the Charging Group that are or may be available, whether by way of security or otherwise, are sufficient or likely to be sufficient to discharge the amounts of the Secured Deposits as they become due.

In both prospectuses "secured deposits" is defined to mean the deposits offered under the particular prospectus.

[45] It can be argued that the quoted passage from the UFL and HFL prospectuses contained a representation that the trustee had ascertained that the assets available to the company were sufficient to allow repayment of the "secured deposits", to which the offer contained in the prospectuses related. This impression could have been reinforced by the statement that the trustee represented the interests not just of current depositors, but also those of future depositors. It is at least arguable that these are matters a prospective investor could have reasonably taken into account

[27] The statement also appears in the HCL prospectus, but lacking the last bullet point.

when deciding whether to invest, and as a consequence, that there is a level of proximity between prospective depositors and the trustee.

[46] In relation to roll-over depositors, Mr Hotchin contends there is an even stronger case for proximity, because roll-over depositors make the decision to reinvest in the knowledge that the trustee, under the duties that it has imposed upon it by the trust deed and the regulatory regime, is continuing to allow the company to trade and accept deposits. In my view there is little of significance, at least for these purposes, to distinguish new prospective investors from roll-over investors. This is not however an issue I have to decide on this application.

[47] As to the policy considerations, it is first worth noting that the imposition of duty in this case would turn upon the particular representations in the prospectuses. A wider formulation of the duty is arguably not inconsistent with the apparent allocation of responsibility contemplated by the regulatory regime. The trustees' focus and duty remains upon monitoring solvency, and compliance by the company with the terms of the offer and covenants in the trust deeds. It is possible that were such a duty imposed, trustees would expend more time considering the impact that the new influx of depositors would have on the security position. That may be a good thing. Of more significance, perhaps, is the possibility that conflicts could arise between the interests of prospective and existing depositors. Overall, however, none of these factors is so compelling that it is possible to say at this point in time that the argument is untenable. These are the type of issues that need to be determined following a hearing with the benefit of evidence and full argument.

[48] Finally, it is relevant that in other cases the Courts have declined to strike out causes of action where a party has attempted to extend the category of persons to whom the duty is owed, arguably in a more unusual direction, than Mr Hotchin contends for.[28] For all of these reasons I consider Mr Hotchin's argument that such a duty exists must be categorised as tenable.

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[28] *G & J Porter v New Zealand Guardian Trust* HC Auckland CP 136/91, 31 July 1996 per Tipping J. In that case, a strike out application was declined where the plaintiffs sued the trustee for breach of duty, although they were unsecured (falling outside of the trust deed's expressed category of beneficiary). The allotment to them of security was invalid because, at the time they

*Duty to monitor prospectus*

[49] Mr Hotchin argues for an alternative duty, a duty to monitor the prospectus for the truthfulness of its content. He says that the trustees are "implicated" in the contents of the prospectuses by cl 1 of sch 5 to the Regulations. The trustees are obliged by that to exercise reasonable care to ascertain whether a breach of the terms of the offer of debt securities has taken place. Mr Hotchin argues that the expression "terms of offer" used in cl 1 should be given a fair, large and liberal meaning, to encompass the whole of the contents of the prospectuses and investment statements by which the offers were made. On that basis, the trustees had an obligation to monitor whether the statements in those documents were or remained true.

[50] Mr Hotchin also attaches significance to the stipulation in the UFL and HFL trust deeds that trustee approval must be obtained before HFL or UFL could register a prospectus. In the case of HFL and UFL the approval provisions are general and not limited to any specific contents of the prospectus.[29] In the case of HCL, the deed provided that the company could not issue a prospectus without prior notice to the trustee, and was not to include any statement concerning the trustee or the trust deed without the trustees' consent.[30] Mr Hotchin argues that this approval carried with it an endorsement of the terms of those prospectuses. It is a small step from there to imposing responsibility on the trustees for the content of the prospectuses. Before approving the prospectus, the argument goes, the trustee should have exercised reasonable care to check the accuracy of the contents. Mr Hotchin has provided particulars of occasions when the trustees had commented on draft prospectuses and made drafting suggestions and requests.

[51] I am satisfied that there is no tenable argument that the trustees owed prospective or roll-over depositors a duty of care in respect of the accuracy of the statements contained within the prospectuses. In reaching that view I have taken into account the following matters.

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provided their funds, there was no current prospectus. Also see *National Finance 2000 Ltd (in rec and in liq) v William Buck New Zealand Ltd* HC Auckland CIV-2010-404-7157, 7 December 2011, where a strike out was declined in the context of an allegation that the trustee for debt securities owed a duty to the issuer to find out whether breaches of trust deed had occurred and to take steps to remedy or to enforce security.

[29] Clause 3.01(e)(x) of the HFL trust deed; cl 6.4(h) of the UFL deed.

[30] Clause 7.3.7 of the HCL trust deed.

[52] Beginning with the issue of proximity, the trustees make no representation to prospective depositors that they should rely upon the trustees' vetting of the accuracy of the statements contained in the prospectuses. There is nothing in the trust deeds, the Securities Act and Regulations, or the prospectuses that suggests that the trustees have responsibility or have assumed responsibility to prospective depositors for the truth and accuracy of the statements in the prospectuses and associated documents.

[53] As to the checking and approval process stipulated by the UFL and HFL trust deeds and undertaken by Perpetual, it was of course prudent for the trustee to check through those documents to ensure the cl 13 material was accurate, and to ensure that the trustee's position was not misstated. The fact that in the course of undertaking this exercise they commented on the proposed text, or became engaged in the detail of the financial information does not support the proposition that they thereby assumed responsibility to depositors for the truth and accuracy of the financial and business information contained therein. A right to approve is not lightly to be converted to an obligation to ensure the truth of all statements contained in the prospectuses.

[54] As to policy considerations, it is significant that the imposition of such a duty would cut across the existing statutory allocation of responsibility. It is true, as Casey J said in *Deloitte Haskins & Sells v National Mutual Life Nominees Ltd*, that: [31]

> In the present case the combination of the Securities Act and the trust deed has created its own kind of special relationship between the directors and the auditor on the one hand and the trustee on the other, forming them into a team to protect the depositors.

Nevertheless each member of that team has its own particular role. Along with other responsibilities, the directors and auditors have responsibility for the accuracy of the contents of the prospectus. The auditors issue a report, required to be included in the prospectus, to the effect that proper accounting records have been kept by the charging group and that the financial statements contained in the prospectus comply with the Regulations and give a true and fair view of the financial position of the

[31] *Deloitte Haskins & Sells v National Mutual Life Nominee Ltd* (1991) 5 NZCBLC 67,418 (CA) at 67,425.

company.[32] They must also certify these matters to the trustee.[33] The directors face civil and criminal penalties if they make false statements in the prospectus. They must also sign the issuer's certificate, certifying that the prospectus is up-to-date and not false or misleading in any material particular.[34]

[55] The apparent legislative intention is that it is for the auditors and directors to satisfy themselves of the truth and accuracy of the statements in the prospectus, with the trustees able to rely upon those certificates. The role of the trustees is to be the "independent person", looking after the interests of depositors.[35] The trustees role in connection with the prospectuses is a limited one. The duties imposed upon the trustees by the trust deeds and, in particular, sch 5 to the Regulations, do not extend to verifying the accuracy of the statements in the prospectuses. The trustees' concern, in terms of the Securities Act and Regulations, is with the accuracy of the expression of the matters required by cl 13 of sch 2 to be included, rather than with the accuracy of the representations as to the financial position of the company, its prospects for repaying depositors and its description of related party transactions.

[56] Mr Hotchin argues that the obligation under cl 1 (to ascertain whether a breach of the terms of offer has occurred) should be read to include checking whether there is anything untrue in the material accompanying the original offers of security. This requires a strained reading of this clause. The natural and (I am satisfied) correct reading is that the trustees' duty is to ascertain whether, having accepted money on certain terms, the company is now in breach of those terms. It would be a strange thing were an obligation of an entirely different nature to that contemplated in the primary legislation imposed on the trustees through a schedule to regulations.

[57] There are also good policy reasons why such a duty should not be recognised. To impose such a duty would be to require that the trustee assume a role quite different to that currently performed by trustees. That would inevitably add to the cost of offering debt securities to the public and for no apparent benefit to debt

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32 Securities Regulations 1983, sch 2, cl 36.
33 Securities Regulations 1983, sch 5, cl 9(2).
34 Securities Regulations 1983, sch 5, cl 4.
35 *Christchurch Pavilion*, above n 11, at [7].

security holders. Adequate and more appropriate protection is provided by the duties imposed upon directors and auditors.

[58] For these reasons I am satisfied that the allegation that the trustees owed such a duty is untenable.

### *(ii) Whether any tenable claims are for the same damage*

[59] In light of this finding, I address the issue on the basis that the trustees' potential liability to existing and prospective depositors is for failure to adequately monitor for compliance with the interest and ability to repay depositors, and to use their enforcement powers to protect depositors.

[60] Mr Hotchin says he is entitled to contribution because the claims against him by the FMA are of the same nature and in respect of the same damage as the claim depositors could make against the trustees. He says that damage for the purposes of either s 17 or equitable contribution means loss or harm. If the FMA's allegations as to the true state of Hanover's finances are proved, then the trustees will also be liable, in whole or in part, for the depositors' losses because they should have acted earlier to protect depositors including, he says, prospective depositors. If they had, the companies would have stopped accepting money pursuant to the prospectuses earlier. It follows that he and the trustees will be responsible for the same damage.

[61] Mr Hotchin further says it is not necessary that tort feasor A and tort feasor B be liable on the same tort cause of action for the same wrong. Contribution is available between concurrent tort feasors liable for different wrongs, as well as between joint tort feasors. It is not necessary for tort feasor A and tort feasor B's liability to have arisen at the same point in time nor for tort feasor A and tort feasor B to be liable for the same damage to precisely the same extent. It is sufficient if the extent of their liability overlaps. Contribution will be available to the extent that their respective liabilities for loss overlap.

[62] The trustees do not dispute that tort feasor A and tort feasor B need not be liable on the same tort, that the liability need not have arisen at the same point in

time, and that the liability need not be to precisely the same extent. But they say the parties must be subject to a common or co-ordinate liability for the same damage, not for the same loss. Here, the claim against the directors is for untrue statements in the prospectuses. No such claim can be brought against the trustees. The trustees say that Mr Hotchin's arguments wrongly rely on "but for" causation. That is, a breach by the trustees caused the same damage because, "but for" that breach, the damage suffered by the depositors would not have occurred. The trustees say that the "but for" test has been rejected, and that instead the Court must identify the scope of the duty and the risk against which the professional had a duty to protect the client.[36] Applying that test, the trustees argue that the parties' respective breaches did not cause the same damage. The obligation of the directors will be to compensate for "the loss or damage the persons have sustained by reason of the untrue statement", which will have been suffered at the time of allotment. The obligation of the trustees, on the other hand, will be to compensate the depositors for the diminution in the value of the investment during any period of wrongful inaction, which could only occur after allotment.

*Relevant principles*

[63] In respect of the claim for contribution under s 17 of the Law Reform Act, a critical issue is what is meant by the use in s 17(1)(c) of the expression "the same damage". Mr Hotchin contends that it means, in essence, the same damages.

[64] This was considered by the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond*.[37] In that case, the claimant hospital sought to recover losses caused by a significant delay in the completion of a building project. It brought proceedings against the architect for negligence in respect of the issue of extension certificates and also for delay, loss and expense arising out of allegedly negligent advice in issuing instructions. The architect issued a notice of contribution against the contractor under the Civil Liability (Contribution) Act 1978 (UK), a statutory provision for all material purposes identical to s 17. The claim for contribution was struck out at each level, with the first instance Judge finding that the claims were not

36 *Bank of New Zealand*, above n 15, at 681.
37 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397.

in respect of the same damage, a finding upheld by both the Court of Appeal and the House of Lords. The claim for contribution failed because the damage caused to the hospital by the contractor arose from a failure to deliver the building on time, whereas that caused by the architect in giving extension certificates was the impairment of the hospital's ability to obtain financial recompense from the contractor. They were not therefore liable for "the same damage" within the meaning of the section.

[65] Lord Bingham of Cornhill considered the background to the enactment of the relevant statutory provisions. That background is the same as the background to the enactment of s 17. It was to reverse the position at common law that contribution was not available between tort feasors. Lord Bingham said:

> [5] It is plain beyond argument that one important object of the 1978 Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is, however, as I understand, a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A. I find nothing in s 6(1)(c) of the 1935 Act or in s 1(1) of the 1978 Act, or in the reports which preceded those Acts, which in any way weakens that requirement. Indeed both sections, by using the words 'in respect of the same damage', emphasise the need for one loss to be apportioned among those liable.
>
> [6] When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it? At the striking-out stage the questions must be recast to reflect the rule that it is arguability and not liability which then falls for decision, but their essential thrust is the same. I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of 'damage' or of 'loss' or 'harm', provided it is borne in mind that 'damage' does not mean 'damages' (as pointed out by Roch LJ in *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675 at 682) and that B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not.

He continued:[38]

> It would seem to me clear that any liability the [hospital] might prove against the contractor and the architect would be independent and not common. The [hospital’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 [hospital'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.

[66] To similar effect Lord Hope of Craighead said:[39]

> The effect of those words is that the entitlement to contribution applies only where the person from whom the contribution is sought is liable for the same harm or damage, whatever the legal basis of his liability. But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely in order to determine whether or not the damage is the same. As Lord Fraser pointed out in *Turnbull v Frame* 1966 SLT 24, 25, each utterance of a slander may be said to lead to a common result in the sense that they each cause damage to a man's reputation. It may be difficult to identify the particular damage caused by each utterance. But that does not mean that they are not separate wrongs, each of which causes its own damage. That is equally true of separate physical assaults by different persons at different but closely consecutive times. Unless they were acting in combination, each would be liable only for the damage caused by his own attack. Those examples may be contrasted with *Arneil v Paterson* [1931] AC 560 where two dogs which were the property of different owners, acting together, attacked a flock of black-faced ewes and killed some of them. It was held that each of the owners was liable jointly and severally for the whole of the damage done to the flock, as the whole of the damage was the result of the action of the two dogs acting together.

[67] Finally, Lord Steyn said:[40]

> ..... the notion of a common liability, and of sharing that common liability, lies at the root of the principle of contribution. …
>
> The [statutory] context does not justify an expansive interpretation of the words “the same damage” so as to mean substantially or materially similar damage.
>
> .....
>
> No glosses, extensive or restrictive, are warranted.

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[38] At [7].
[39] At [47].
[40] At [27].

[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.

[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.[41]

[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.[42]

[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*

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[41] *Bank of New Zealand*, above n 15, 683.

[42] I prefer not to resolve the issue between the parties on the appropriate measure of damages, as I do not see it as a simple issue. See *Potts v Miller* [1940] HCA 43, (1940) 64 CLR 282; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 (HL).

*Hospital*, and also on the joint judgment of Gaudron ACJ and Hayne J in *Burke* cited earlier in this judgment. Tipping J said:[43]

> [145] In *Burke* Gaudron ACJ and Hayne J held that the liabilities of the parties between whom contribution may be ordered must be "of the same nature and to the same extent". McHugh J used the same formulation in the course of his reasons. In this respect I accept that it is not fatal that the causes of action are not the same. But, if they are not, the matter requires careful analysis in answering the two questions inherent in the test: (1) is the nature of each liability the same; and (2) are the liabilities of the same extent?
>
> [146] The first question requires a comparison of the nature of the liability of each party, not of the consequences of that liability. The nature of the liability of the vendors in the present case is a liability to compensate the purchaser for the vendors' failure to perform the promise inherent in a contractual term. By contrast, the nature of the liability of the Council is to compensate the purchaser for the consequences of the Council's negligent misstatement which induced the purchaser to enter into the contract of purchase. I do not consider that it can properly be said that these liabilities are of the same nature. One is based on a broken promise; the other is based on a negligent statement. Different duties underlie the two liabilities.
>
> [147] The second question requires a comparison of the extent of the liability of each party. The extent of the vendors' liability is to compensate the purchaser in money for the absence of the promised water rights. As will appear later, the extent of the vendors' liability in this respect is based on the sum of money necessary to put the purchaser into the same position as if the contract had been properly performed, that is as if the promise had been fulfilled. By contrast the extent of the Council's liability is to put the purchaser into the same position as if it had not entered into the contract at all; that is, to compensate the purchaser for the amount by which it is worse off from having entered into the contract. In the present case the former is $1.05m and the latter $125,000. The liabilities of the vendors and the Council to the purchaser are neither conceptually nor actually of the same extent. The only recognised situation when contribution is ordered in respect of unequal amounts is when there is a pro rata difference in sharing a common liability.
>
> [148] It is, with respect, not sufficient to say that the vendors and the purchaser made the same error in their representations and that each error was an operative cause of the purchaser's entry into the contract. While those propositions are undoubtedly true, they represent a case of independent rather than common liabilities. The necessary commonality of liability is absent.
>
> (footnotes omitted)

[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

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43 *Altimarloch*, above n 6, at [145] – [148].

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:[44]

> 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.

[73] I am therefore satisfied that the parties do not share co-ordinate liability, and the claim ought to be struck out on this ground.

### 3. Does Mr Hotchin have an obligation to indemnify the trustees which precludes a right to contribution?

[74] The passage from *Meagher Gummow & Lehane's* quoted above is also relevant to an additional argument advanced in support of strike out. The trustees argue that contribution is only available where the parties are "at the same level" of liability, and that this is the clearest case there could be of parties not being at the same level. This is because the directors are under an obligation to indemnify the trustees – an obligation arising from their certification to the trustees that the statements in the prospectuses were true and accurate. They say that this right to indemnity is relevant also because under s 17(1)(c) a person has no entitlement to recover contribution from any person entitled to be indemnified by him or her in respect of the liability for which contribution is sought.

[75] Mr Hotchin accepts that a right to indemnity may defeat a claim for contribution under s 17(1)(c), but says that this provision applies to rights arising

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

under contracts of indemnity and there is no such contract in this case. As to the claim to equitable contribution, Mr Hotchin says there is no clear authority to the effect that the existence of a right to indemnity precludes the availability of equitable contribution. Fundamentally, Mr Hotchin says that this is a clear example of the type of issue that should be allowed to proceed to trial because there are factual matters which require resolution.

*Relevant factual background*

[76] The source of the directors' obligation to provide a certificate to the trustee is cl 4(3) and (4) of sch 5 to the Regulations which provides:

> (3) The issuer is obliged to provide a certificate to the trustee, at least once every three months, certifying that at all times during the period covered by the report –
>
> > (a) the current prospectus of the issuer has been up to date and not false or misleading in a material particular; and
> >
> > (b) the issuer has complied with all provisions of the trust deed.
>
> (4) Both the report referred to in subclause (2) and the certificate referred to in subclause (3) must be signed by at least two directors on behalf of the board of the issuer or, if the issuer has only one director, by that director.

[77] In the case of each of HFL, HCL and UFL, the certificates provided were in the following form:

> We, the directors of […] listed below, hereby confirm in relation to the abovementioned prospectus to be registered at the Companies Office on […] ("**Prospectus**"), a copy of which is **attached**, that:
>
> 4. We have undertaken due enquiry to ensure that:
>
> > (a) for the purposes of the Fair Trading Act 1986:
> >
> > > (i) the Prospectus is not misleading or deceptive or likely to mislead or deceive;
> > >
> > > (ii) there has not been any conduct in relation to the preparation of the Prospectus that is misleading or deceptive or likely to mislead or deceive; and

(b) for the purposes of the Securities Act 1978, the Prospectus does not contain any statement that is misleading in the form or context in which it is included, or is misleading by reason of the omission of any material particular; and

(c) all factual statements are correct.

5. In our opinion, having made due enquiry of the performance of the Company since […], other than as noted in the Directors' Statement in the Prospectus, no circumstances have arisen which materially adversely effect:

(a) the trading or profitability of […]; or

(b) the value of its assets; or

(c) the ability of […] to pay its liabilities due within the next 12 months.

[78] It is also relevant to this issue that directors fall within the category of "persons" liable for pecuniary penalty orders (under s 55C) and for compensation orders (under s 55G – the kind of claim here) for untrue statements if they have signed the prospectus or have authorised the inclusion of their name in the prospectus as a director of the issuer.[45] Section 56(3)(c) of the Securities Act provides that it is a defence to such a claim if the directors can prove that as regards:

> … every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he or she had reasonable grounds to believe and did, up to the time of the subscription to the securities, believe that the statement was true,

[79] As Mr Hotchin observes, the certificate is not a contractual indemnity whereby the directors expressly contract to indemnify the trustees for any claims connected with the inclusion of untrue statements in a prospectus.

[80] The issues that arise in connection with this ground of strike out are as follows:

(i) Does a non-contractual right to indemnity preclude contribution claims under the Law Reform Act and at equity?

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45 Securities Act, s 56(1)(c).

(ii) Is the right to indemnity in this case so clear cut that it justifies striking out the claim?

***(i) Does a non-contractual right to indemnity preclude contribution claims both under the Law Reform Act and at equity?***

[81] I start with the argument in connection with s 17(1)(c) of the Law Reform Act. Starting with the text of the legislation, the proviso to s 17(1)(c) is not expressed so as to exclude rights of indemnity other than those based upon a contract of indemnity. Nor does the purpose of the legislation require that. Indeed, in reading the legislation it is to be borne in mind that it was intended to extend the rights to contribution to joint tort feasors. It had been necessary to do that by statute because of existing authority that equitable contribution was not available in respect of joint tort feasors.[46] There is no indication however that the legislation was intended to do other than extend the benefit of the doctrines that had been developed at equity to joint tort feasors. It is therefore helpful to consider the significance of a right to indemnity in relation to equitable contribution.

[82] In *Burke* the judges discussed the significance of culpability and rights of indemnity to rights of contribution. In the joint judgment of Gaudron ACJ and Hayne J the following passage appears:[47]

> Perhaps because, at common law, there was no general right of contribution between tort feasors … the notion of "co-ordinate liability" has not traditionally been expressed in terms requiring equal or comparable culpability or a requirement that the acts or omissions of the persons in question be of equal or comparable causal significance to the loss in respect of which contribution is sought. However, the requirement that liability be "of the same nature and to the same extent", as stated in *BP Petroleum*, is apt to include notions of equal or comparable culpability and equal or comparable causal significance.
>
> …..
>
> In *Dering v Earl of Winchelsea,* Eyre LCB hypothesised that:
>
>> "If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution."

[46] *Merryweather v Nixan* (1799) 8 TR 186, 101 ER 1337 (KB).
[47] *Burke*, above n 6, at [293].

> That example was given by the Lord Chief Baron in exposition of the requirement that, to obtain contribution in a court of equity, the applicant should have "clean hands". However, the example his Lordship gave is one that directs attention to causation, in the sense of legal responsibility for the loss in question. The same consideration may have some bearing on the law's acceptance that contribution cannot be obtained if the person against whom contribution is sought is entitled to indemnity from the applicant.

[83] It is, of course, common sense that A should not be able to claim contribution from B if A is obliged to indemnify B in respect of that very loss. To allow such a claim would be inconsistent with the concepts of fairness and justice that underpin the law of contribution. In my view it is settled law that a person cannot claim contribution either under the Law Reform Act or in equity from another if obliged to indemnify that other in respect of the damage in respect of which contribution is sought.

*(ii) Is the right to indemnity so clear cut that it justifies striking out the claim?*

[84] In this case the potential causes of action the trustees may bring in reliance upon the certificates are either the tort of deceit or negligent mis-statement – more likely the latter. The allegation would be that the directors did not honestly hold or exercise reasonable care when forming and expressing the opinions recorded in the certificate.[48] On the face of this, these are allegations that raise factual issues appropriately left for trial. In saying that, I bear in mind that should the FMA's claim against Mr Hotchin succeed, there will necessarily be a finding that he did not have reasonable grounds to believe that the statements in the prospectuses were true. I say this because for the FMA to succeed, Mr Hotchin's defence under s 56 will necessarily have failed. Nevertheless, I am satisfied that a negligent mis-statement claim based on the certificates would likely raise other issues not inevitably resolved against Mr Hotchin in the context of the FMA claim. The certificates speak to only one particular point in time whereas statements in prospectuses continue to speak during the offer period. It may be that the opinions were not negligently expressed as at the date of the certificate but that the situation deteriorated thereafter. To these issues must be added the necessary element of proof of reliance by the trustees. This

[48] *Premium Real Estate Ltd v Stevens* [2008] NZCA 82, [2009] 1 NZLR 148; *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 8 TCLR 612 (HC).

issue may also not be straightforward in circumstances where the trustee was also receiving information, reports and certificates from the auditors.

[85] For these reasons, I do not consider that the indemnity issue provides an additional ground upon which the third party notice should be struck out.

## E. Summary and conclusion

[86] The FMA alleges that prospectuses, advertisements and associated documents issued by HFL, HCL and UFL contained untrue statements. It has brought this claim under s 55G of the Securities Act against Mr Hotchin and other directors of the companies, seeking orders that they pay compensation to depositors for the damage they sustained as a result of investing money on the faith of those advertisements and prospectuses.

[87] Mr Hotchin issued third party notices against NZGT and Perpetual, the trustees of the debt security trust deeds issued for the raising of funds from the public. He alleges that if he is liable to pay compensation under the Securities Act, then the trustees are liable to contribute to that compensation either under the provisions of the Law Reform Act or pursuant to the principles of equitable contribution.

[88] Mr Hotchin says that the claims against him are of the same nature and in respect of the same damage as claims the depositors could bring against the trustees. He says the depositors could sue the trustees for failing to adequately monitor the companies' compliance with the companies' obligations under the trust deeds and the terms of the offer. If the trustees had taken reasonable care in discharging those obligations, they would have stopped the companies from trading, thus saving prospective depositors from investing and preventing further losses.

[89] Secondly, it is alleged that each of the trustees owed a duty of care in tort to existing, prospective and roll-over depositors to exercise reasonable care in reviewing and deciding whether or not to approve the form and content of the various prospectuses. It is alleged that the trustees should have taken reasonable steps to ascertain whether the statements made in the prospectuses were true.

[90] The trustees applied to strike out Mr Hotchin's claim against them, first, on the basis that contribution is unavailable in respect of an action for compensation brought by the FMA under s 55G. The trustees say that provision is unique, allowing both the FMA or a subscriber to bring a claim for compensation; a claim by one does not preclude a claim by the other, and an action brought by the FMA is not truly representative. The FMA is, in substance the plaintiff, and as the trustees are not liable to the FMA, there can be no contribution.

[91] If contribution is not so precluded, the trustees say that they do not owe duties of the nature alleged. Any duty to monitor the companies' compliance with the trust deeds and the terms of the offer is owed under the trust deed, not in tort, and does not extend to prospective and rollover depositors; it is owed only to existing depositors. Further, they say there is no duty to monitor the contents of the prospectuses for accuracy.

[92] If a tortious duty is owed to monitor for compliance with the trust deeds and the terms of the offer, however, the trustees say that any liability is not co-ordinate with Mr Hotchin's liability to the FMA. The damage caused by Mr Hotchin's wrongdoing differs from that caused by any breach of the trustees' duties.

[93] The final basis for strike out is that contribution is not available because the trustees have a right to indemnity from Mr Hotchin and other directors, and such a right precludes claims for contribution made both under the Law Reform Act and in equity.

[94] I do not accept that Mr Hotchin's claim is clearly barred by reason of the claim against him being brought by the FMA under s 55G of the Securities Act. To find otherwise would give rise to an anomaly, with contribution available if a s 55G claim is brought by a subscriber, but not if the same claim is brought by the FMA. Nevertheless, the claim for contribution is untenable for the following reasons:

(a) The trustees may owe a duty to monitor for compliance with the trust deed and the terms of the offer in tort, and on the particular facts of this case, this duty may extend to prospective and rollover depositors.

However, the directors and trustees do not share a co-ordinate liability. If the FMA claim succeeds, the directors will be liable for the damage flowing from investments made in reliance on those untrue statements. If the trustees have breached their duties, they will be liable for losses incurred while they failed to act. This is not the same damage.

(b) It cannot be argued that the trustees owed a duty to monitor the prospectuses. The trust deeds, Securities Act and Regulations and the prospectuses do not suggest that the trustees have any responsibility for the overall contents of the prospectuses, and the imposition of such a duty would run contrary to the legislative division of responsibilities between issuers, trustees and auditors.

[95] The additional ground for strike out, that of the trustees' right to indemnity, is not made out. It is true that contribution is not available either under the Law Reform Act or in equity where there is an obligation to indemnify the person from whom contribution is sought. However, a claim for indemnity raises factual issues that cannot be resolved on this application.

**F. Orders**

[96] Mr Hotchin's third party claims against NZGT and against Perpetual are struck out. Mr Hotchin is to pay NZGT's and Perpetual's costs of an incidental to this application.

[97] If the parties cannot agree the issue of costs then memoranda are to be filed as follows:

(a) Trustees' memoranda 20 working days from the date of this judgment.

(b) Mr Hotchin ten working days later.

(c) Trustees' reply within a further five working days.