Court of Appeal
Supreme Court

New South Wales

Case Name:	Cam & Bear Pty Ltd v McGoldrick
Medium Neutral Citation:	[2018] NSWCA 110
Hearing Date(s):	16 March 2018
Decision Date:	23 May 2018
Before:	McColl AP at [1]; Macfarlan JA at [2]; White JA at [107]
Decision:	(1) Note that the Court will in due course make orders allowing the appeal and entering judgment for the appellant. (2) Direct that the parties attempt to agree upon the amount of damages to be awarded to the appellant. (3) Direct that within 21 days of this judgment the parties file and serve draft orders that they submit should be made to give effect to the terms of this judgment.
Catchwords:	NEGLIGENCE – breach of duty by auditor of self-managed superannuation fund – negligence in failing to identify and report doubts as to recoverability of assets described in financial statements as cash – primary judge erred in failing to have regard to the breadth of the appellant's case – breach of duty caused loss NEGLIGENCE – contributory negligence – appellant lacked financial sophistication – respondent auditor engaged to prevent the kind of loss that occurred – appellant's damages reduced by 10% for its contributory negligence NEGLIGENCE – proportionate liability – claim against superannuation fund's auditor – damages of appellant

not reduced by reason of directors' concurrent liability to the appellant – the same acts of the directors resulted in the appellant's damages being reduced for its contributory negligence – to permit both reductions would result in a double deduction for the same acts

NEGLIGENCE – proportionate liability – claim against superannuation fund's auditor – company which compiled the fund's financial statements not proved to be also liable to appellant – no evidence as to the basis on which the company was engaged

Legislation Cited:

Australian Consumer Law (NSW), s 236
Australian Securities and Investment Commission Act 2001 (Cth), s 12GF
Civil Liability Act 2002 (NSW), ss 5D(3), 5R, 34, 35
Fair Trading Act 1987 (NSW), s 68
Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 5
Law Reform (Miscellaneous Provisions) Act 1965 (NSW), s 9

Cases Cited:

Astley v Austrust Ltd (1999) 197 CLR 1; [1999] HCA 6
Boral Bricks Pty Ltd v Cosmidis (No 2) (2014) 86 NSWLR 393; [2014] NSWCA 139
Daniels v Anderson (1995) 37 NSWLR 438
Duke Group Ltd (in liq) v Pilmer (No 2) (2000) 78 SASR 216; [2000] SASC 418
Joslyn v Berryman (2003) 214 CLR 552; [2003] HCA 34
Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq) [2011] NSWCA 367
Podrebersek v Australian Iron & Steel Pty Ltd [1985] HCA 34; (1985) 59 ALJR 492
Rogers v Whitaker (1992) 175 CLR 479; [1992] HCA 58
T & X Company Pty Ltd v Chivas [2014] NSWCA 235; (2014) 67 MVR 297
Wingecarribee Shire Council v Lehman Brothers Australia Ltd (ACN 066 797 760) (in liq) [2012] FCA 1028; (2012) 301 ALR 1

Texts Cited:

D Villa, Annotated Civil Liability Act 2002 (NSW) (3rd ed, 2018)

Category:

Principal judgment

Parties:	Cam & Bear Pty Ltd (Appellant) John McGoldrick (Respondent)
Representation:	Counsel: D L Cook SC (Appellant) C R C Newlinds SC / P A Horvarth (Respondent) Solicitors: Kent Attorneys (Appellant) Esplins Solicitors (Respondent)
File Number(s):	CA 2017/161367; 2017/218433
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Common Law
Citation:	Cam & Bear Pty Ltd v McGoldrick [2016] NSWSC 1894
Date of Decision:	3 May 2017
Before:	Rothman J
File Number(s):	SC 2013/40165

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant, Cam & Bear Pty Ltd, is the trustee of a self-managed superannuation fund ("the Fund") established in about 1985 for the benefit of Dr Lance Bear and his wife, Ms Jennifer Campbell. At the material times, the trustee was Landav Pty Ltd, the directors of which were Dr Bear and Ms Campbell. Mr John McGoldrick, the respondent, was an accountant who

audited the accounts of the Fund, including for the financial years ended 30 June 2003 to 2007.

This appeal arose out of a claim for damages for negligence and misleading and deceptive conduct brought by Cam & Bear against Mr McGoldrick in the Common Law Division. It was alleged that Mr McGoldrick had breached his duty of care and engaged in misleading and deceptive conduct: first, by failing to qualify the audit reports as to the possibility that those assets described in the Fund's financial statements as "cash" may not be recoverable, they being in fact unsecured loans to a company associated with Dr Bear's friend, Mr Anthony Lewis; and, secondly, by including in the audit reports a statement to the effect that the financial statements "presented fairly…the financial position of the Fund and the results of its operations and its cashflows".

After a seven day hearing, Rothman J found that Mr McGoldrick had been negligent and engaged in misleading and deceptive conduct, but that his conduct had not caused any loss to the appellant: [2016] NSWSC 1894.

On appeal, the appellant argued:

(i) That when considering the issue of causation, the primary judge erred in failing to have regard to the breadth of the appellant's case on negligence which, it contended, his Honour had accepted elsewhere in his judgment; and

(ii) The primary judge erred in his findings as to contributory negligence and proportionate liability.

***Held*, allowing the appeal**:

In relation to (i):

(1) The primary judge determined the issue of causation, and as a result dismissed the appellant's claim for damages, without taking into account the breadth of the findings of negligence that his Honour had previously made: [64]-[67].

(2) Contrary to Mr McGoldrick's submissions on appeal, the appellant had conducted a case below that Mr McGoldrick breached his duty to the appellant by not concluding that there was doubt as to the recoverability of the assets

described in the financial statements as "Cash" and by failing to communicate that fact to the appellant: [42]-[53]; [68]-[71].

In relation to (ii):

As to contributory negligence,

(1) Even a person with Dr Bear's lack of financial sophistication should reasonably have considered the prudence of depositing significant amounts of money with Mr Lewis' company. Mr McGoldrick's negligence was however of significantly greater importance in causing the appellant's loss than that of the appellant, and responsibility for the loss should be apportioned 10% to the appellant and 90% to Mr McGoldrick: [80]-[82], [85]-[91].

Astley v Austrust Ltd (1999) 197 CLR 1; [1999] HCA 6; *Daniels v Anderson* (1995) 37 NSWLR 438; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (ACN 066 797 760) (in liq)* [2012] FCA 1028; (2012) 301 ALR 1; *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] 34; (1985) 59 ALJR 492 referred to.

(2) Without knowing the contractual basis upon which Databank Pty Ltd was engaged to compile the Fund's financial statements, it could not be concluded that it was liable to the appellant in respect of the appellant's loss. Mr McGoldrick therefore did not establish that Databank was a concurrent wrongdoer to which a share of the loss should be apportioned: [92]-[96].

Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq) [2011] NSWCA 367; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (ACN 066 797 760) (in liq)* [2012] FCA 1028; (2012) 301 ALR 1; *Annotated Civil Liability Act 2002* (NSW) (3rd ed, 2018) referred to.

(3) Responsibility for a proportionate share of the appellant's loss should not be attributed to the appellant's directors. To hold otherwise would not be "just" within the meaning of the proportionate liability statutory provisions because the appellant's damages would be reduced both by reason of its contributory negligence resulting from the negligent acts of its directors and by reason of the apportionment of a share of responsibility for the appellant's loss to the directors because of those very same acts and omissions: [97]-[103].

Daniels v Anderson (1995) 37 NSWLR 438; *Duke Group Ltd (in liq) v Pilmer (No 2)* (2000) 78 SASR 216; [2000] SASC 418 considered.

JUDGMENT

1 **McCOLL AP**: I agree with Macfarlan JA's reasons and the orders his Honour proposes.

2 **MACFARLAN JA**: This appeal arises out of a claim for damages for negligence and misleading and deceptive conduct brought by Cam & Bear Pty Ltd, the appellant, against Mr John McGoldrick, the respondent, in the Common Law Division. The appellant is the trustee of a superannuation fund established for the benefit of Dr Lance Bear and his wife, Ms Jennifer Campbell. At the material times, the trustee was Landav Pty Ltd, the directors of which were Dr Bear and Ms Campbell. Mr McGoldrick was an accountant who audited the accounts of the fund, including for the financial years ended 30 June 2003 to 2007.

3 After a seven day hearing and the reservation of judgment for a lengthy period, Rothman J found that Mr McGoldrick had been negligent and engaged in misleading and deceptive conduct, but that these defaults had not caused any loss to the appellant ([2016] NSWSC 1894).

4 On appeal, the appellant contended that when considering the issue of causation of loss the primary judge failed to have regard to the breadth of the appellant's case on negligence which, it contended, his Honour had accepted elsewhere in his judgment. For the reasons given below, I agree with these contentions. As a result, the appeal should be allowed.

5 The appeal also raises issues of contributory negligence and proportionate liability. In this regard the appellant challenged the primary judge's indication that, if otherwise in the appellant's favour, he would have found Mr McGoldrick only liable for 21⅔% of the appellant's loss.

6 It is unnecessary to deal with a summons filed by Mr McGoldrick seeking leave to appeal against the primary judge's costs judgment ([2017] NSWSC 789) as that judgment was premised upon the correctness of his Honour's first judgment dismissing the appellant's claim.

7 As Mr McGoldrick's response to the appeal was to contend that the appellant's broader case to which I have referred in [4] above was neither litigated at first instance nor the subject of findings by the primary judge, it will be necessary, after giving a brief outline of the presently relevant evidence, to refer to the manner in which the hearing at first instance proceeded.

8 I note at this point that the appellant sued on causes of action that arose in favour of its corporate predecessor as trustee of the fund. As Dr Bear and Ms Campbell were the sole directors of both companies at all material times, it is convenient throughout this judgment to treat the appellant as if it had been the trustee of the fund when the events in question occurred.

THE EVIDENCE AT FIRST INSTANCE

Dr Bear's evidence

9 In about 1985 Dr Bear, a dermatologist, established the fund referred to above as a self-managed superannuation fund (the "Fund"). Some years later, a close friend, Mr Anthony Lewis, who conducted a finance business, suggested that his company, Lewis Securities Ltd, manage the Fund's investments and that a company in which he held a 35% interest, Databank Investment Services Pty Ltd, undertake its administration. This then occurred, with Dr Bear making regular contributions to the Fund by way of cheques payable, at Mr Lewis' request, to "Lewis Securities". According to Dr Bear, from about 1996 until 2008, he understood from his conversations with Mr Lewis, and from financial accounts that he received from time to time, that the Fund's assets consisted of cash amounts and shares. He believed that another of Mr Lewis' companies, LSL Holdings Pty Ltd, held the cash.

10 In about 2005 Dr Bear decided to restructure his investments in the Fund to have more of its assets held as cash. He made this decision because, first, he was concerned about the insecurity of shares and, secondly, he wanted cash in the Fund as an alternative to having a life insurance policy. Dr Bear said that he informed Mr Lewis of this decision.

11 The financial accounts that Dr Bear received each year had audit reports attached. He said that his practice was to scan the audited reports and that:

> "At no time did I notice any special warning about the Fund or any note that was a cause for concern. [Each audit report] contained usual materials for an audit report. I assumed that everything was in order with the Fund."

12 As a result, Dr Bear continued to make contributions to the Fund.

13 The annual financial statements were in a similar form to each other. For example, in the Statement of Financial Position at 30 June 2003, investments of $614,541.05, mainly comprising fixed interest securities and shares in listed companies, were identified. Under the heading "Other Assets" the following appeared:

	2003 $	2002 $
Cash – LSL Holdings P/L (Lance)	320,877.91	76,871.65
Cash – LSL Holdings P/L (Jenny)	150,633.36	147,588.37

14 Dr Bear said that he assumed that "LSL Holdings P/L" was "holding the cash amounts for the Fund" and said that Mr Lewis had told him that one of his companies was "LSL Holdings".

15 Each year Mr McGoldrick signed and certified the audit reports, without qualification. They stated that the financial statements fairly reflected the financial position of the Fund. At no stage did Mr McGoldrick have any direct communication with Dr Bear.

16 On about 22 September 2008 Dr Bear told Mr Lewis that he wished to withdraw cash from the Fund. Mr Lewis attempted to dissuade him from taking this course but Dr Bear insisted. The cash Dr Bear requested was not provided and in early November 2008 Lewis Securities went into voluntary administration. Its winding up followed some months later.

17 In his second affidavit Dr Bear said that:

> " … if, when I received the Financial Documents, … I had been made aware that the 'cash' reported in the financial statements either was not held as cash **or was in the form of an unsecured loan that may not be able to be repaid,** I would have promptly caused the trustee of the Fund to take steps to immediately get the money back. I would certainly not have permitted any

more of the Fund's money to be placed with LSLH thereafter" (emphasis added).

18 In cross-examination, Dr Bear confirmed that he believed that the references in the financial statements to "Cash – LSL Holdings P/L" referred to cash held by LSL Holdings. His cross-examination concluded as follows:

> "Q. I suggest to you that if the accounts had said, instead of 'cash LSLH' but rather had said loan to LSLH payable at call, that it would have made no difference to the way you as director of the trustee ran your fund. Do you agree or disagree?
>
> A. I keep going back, that the person who audited it said it was cash, I thought it was cash, so why should I argue.
>
> HIS HONOUR
>
> Q. Dr Bear, what you're asked is not what happened, you're asked what would have happened if instead of saying 'cash LSLH' it said loan to LSLH, and what is being suggested to you is that it would have made no difference to what you did or didn't do in relation to your accounts or the moneys?
>
> A. Your Honour, I didn't realise the difference in the terminology at that stage. Loan, cash - to me, cash was cash.
>
> HORVATH
>
> Q. So does that mean you agree that it would have made no difference to the way you ran your fund as director of the trustee company?
>
> A. Because I thought it was cash, yes."

Mr McGoldrick's evidence

19 Mr McGoldrick gave evidence of the steps he took to audit the Fund's financial statements.

20 He said that he queried with Mr Lewis the description of the amounts held on the Fund's behalf by LSL Holdings as "cash". He said that Mr Lewis led him to believe that Dr Bear and Ms Campbell were "happy with the Fund's financial reports describing the monies in the LSL Holdings account that way". Mr McGoldrick said that he had a conversation to similar effect with Mr McIver of Databank. As noted earlier, Mr McGoldrick did not have any direct communications with Dr Bear (or Ms Campbell).

21 Mr McGoldrick gave evidence that he accepted the description of the relevant assets as "cash" because he believed that the assets comprised funds on deposit with LSL Holdings repayable at call and that LSL Holdings was backed by Lewis Securities which was a non-bank financial institution.

The expert auditing evidence

22 The appellant called Mr Richard Rassi, and Mr McGoldrick called Mr Dumbrell, to give expert auditing and accounting evidence.

23 The experts agreed that accounting standards applicable at the time of the subject audit reports defined "cash" as "cash on hand and cash equivalents". In turn, "cash equivalents" were defined as "highly liquid assets [with] short periods to maturity which are readily convertible to cash on hand at the investor's option and are subject to **an insignificant risk of changes in value** … (AAS 28 para 14.1)" (emphasis added).

24 As described by the primary judge:

> "135 Mr Rassi (Riclin Consulting) expressed the opinion that a competent auditor, faced with the entry in the financial statements, would be required to make appropriate enquiries and undertake adequate procedures to ascertain the nature, existence and **valuation** of the item described as 'Cash' in the statements of LSL Holdings, and that Mr McGoldrick should have performed such functions" (emphasis added).

25 Mr Rassi considered that Mr McGoldrick should have sought and considered the financial statements for LSL Holdings and that if he had done that he would have ascertained that LSL Holdings had a significant deficiency in assets. On obtaining this information, Mr McGoldrick should have undertaken either a further investigation or qualified his audit reports. Both experts agreed that it was likely that a competent auditor would have made enquiries about the financial condition of LSL Holdings.

26 Both experts also agreed that the items described in the Fund's financial statements as "Cash – LSL Holdings P/L" did not satisfy the definition of "cash" according to the definitions set out at [23] above.

THE JUDGMENT AT FIRST INSTANCE

Breach of duty

27 The primary judge noted that Mr Rassi considered that Mr McGoldrick was required to qualify his report if "there was an inability to obtain sufficient and appropriate audit evidence in regard to the disclosure, existence or **valuation** of the 'Cash' entry". If Mr McGoldrick had examined the financial statements of LSL Holdings, according to Mr Rassi, he would have discovered a growing deficiency in its assets from year to year which would "have created sufficient

concerns and doubt in the mind of the auditor as to the **recoverability** of the balances before 2008" (Judgment [143]-[144]; emphases added).

28 His Honour then noted that the experts agreed that a competent auditor would have requested and reviewed the financial reports of LSL Holdings and communicated to the trustee any concerns that resulted.

29 His Honour concluded his discussion of the expert evidence as follows:

> "155 Ultimately, each of the experts agreed that an auditor performing an audit on the Fund, prior to 2008, had no information that would allow the drawing of an inference that the assets described as 'Cash - LSL Holdings P/L', either referable to Lance or Jenny, were highly liquid assets with short periods to maturity, readily convertible to 'cash on hand' at the investor's option **with an insignificant risk of changes in value**. As a consequence, neither expert accepted that the definition of 'Cash' in Note 9 of the Fund financial statements was satisfied" (emphasis added).

30 His Honour found that Mr McGoldrick "owed a duty of care to the plaintiff to take reasonable care and exercise reasonable care, skill and diligence to ensure that the financial report that is audited has presented a fair description of the circumstances therein described" (Judgment [165]). His Honour found that if the financial statements did not give a fair representation of the affairs of the company, "it would be incumbent upon the auditor to draw that fact to the attention of the Trustee and either to qualify the report or to draw to the attention of the Trustee the basis upon which the view had been formed" (ibid).

31 His Honour then found that the amounts described in the financial statements as "Cash – LSL Holdings P/L (Lance)" and "Cash – LSL Holdings P/L (Jenny)" did not have "the qualities described by the term 'Cash'", and continued:

> "168 As already stated, the conclusion is inevitable that the defendant has breached his duty of care towards the plaintiffs."

32 It is not entirely clear to what his Honour's phrase "As already stated" was intended to refer. It was probably intended to include reference to what his Honour had said about the expert evidence but at least, in my view, it embraced the finding of breach implicit in the following earlier paragraph in his Honour's judgment:

> "164 The test of causation is subjective, not objective. In other words, the Court must determine whether the plaintiffs would have acted differently, in this case, were the financial statements for the Fund in the years leading up to 2008 qualified or a note provided as to the possibility that the **'Cash' would be**

> **unrealisable**: *Rosenberg v Percival* (2001) 205 CLR 434; [2001] HCA 18 at [24]-[25] and the *Civil Liability Act*, s 5D(3)(a)" (emphasis added).

33 The implicit finding in this paragraph was that Mr McGoldrick breached his duty of care in not qualifying audit certificates or providing a note "as to the possibility that the 'Cash' would be unrealisable".

34 In paragraphs [169] to [184] of the judgment, under the heading "Actions in Negligence, Including Actions for Breach of a Duty of Care and Misrepresentation", the primary judge appeared to find that Mr McGoldrick breached his duty of care by not making adequate enquiries as to the recoverability of the amounts described as "Cash" in the financial statements. His Honour then continued:

> "185 Further, apart from negligence, in the common law sense, the defendant's audited reports necessarily contain a statement by the auditor to the effect that the financial statements 'presented fairly, in accordance with the accounting policies described in the notes thereto, the financial position of the Fund and the results of its operations and its cash flows'. Given the misstatement as to 'Cash', that opinion was incorrect in that it provided an imprimatur to the recording in the financial statements of substantial amounts of cash on hand or in banks being held by the Fund. The statement was a representation that was misleading or deceptive.
>
> 186 In the foregoing respect, the Court accepts the submissions of the Plaintiff as to the breach of duty and negligent misstatement and misleading or deceptive conduct."

35 In these paragraphs, the primary judge made it clear that his findings were not confined to ones of negligent misstatement of the relevant account items as "Cash" but included findings of breaches of Mr McGoldrick's duty of care. These breaches of duty included Mr McGoldrick's failure to qualify his audit report, or otherwise communicate to the trustee of the Fund, that there was uncertainty as to the recoverability of the amounts described as "Cash" in the financial statements. To the extent that there is any doubt about whether his Honour made those ultimate findings, this Court should (subject to Mr McGoldrick's procedural argument addressed below) make them because they clearly flow from his Honour's primary findings concerning the circumstances of the case and the expert evidence. I note in this respect that Mr McGoldrick's sole argument on appeal was that such findings were, or would be, beyond the appellant's case at first instance. He did not put forward a fallback position that the findings were not justified by the evidence.

Causation

36 Under the heading "Causation and Third Party Liability", the primary judge then stated:

> "199 … The issue of causation … arises because the audited statements from 2003 through to 2007 (inclusive) were not qualified and there was no allowance for impairment and/or the audited account misstated that the amounts, to which reference has been made earlier, were 'Cash'".

37 His Honour then stated that "Dr Bear wanted cash in the Fund because of the absence of a life insurance policy and because of his concern as to the insecurity of shares" (Judgment [206]) and continued:

> "207 Nevertheless, the Court would need to be satisfied that, if the defendant had not been negligent, nor misstated the description of the 'Cash' amounts, Dr Bear would have discontinued the practice [of making further contributions to the Fund]. In other words, if the amounts had been accurately described in the financial statements of the Fund, or the accountant had qualified the audit or described in Note 9 that 'Cash' included unsecured loans to LSL Holdings, the plaintiff would have insisted on the amounts being held in a bank in cash or otherwise in a different form than the unsecured loans."

38 His Honour then reached the following conclusions in relation to causation:

> "210 As Dr Bear stated, prior to October 2008, he 'had a great deal of trust in Mr Lewis' and that trust was a reason why he did not take steps to look in to the financial health of LSL Holdings (Transcript, p 128). Further, Dr Bear accepted that it would have made no difference to him, in terms of his investment policy, if, instead of the description 'Cash', the accounts had said 'Loan to LSL Holdings'. Dr Bear did not appreciate the difference.
>
> 211 Thus, if that which is required of the defendant Mr McGoldrick, is to ensure that the financial statements fairly represent the state of affairs of the Fund and had he required an alteration of the description 'Cash to LSL Holdings' to the term 'Loan to LSL Holdings', it would have made no difference to Dr Bear, in terms of the future investments that he made. Moreover, given the level of trust that Dr Bear reposed in Mr Lewis, that comment (Transcript, p 129) is consistent with Dr Bear's general approach.
>
> 212 In other words, the level of trust reposed in Mr Lewis prior to 2008, together with the conceded lack of understanding as to the difference between the description 'Cash - LSL Holdings' and 'Loans - LSL Holdings' leads to the necessary conclusion that the misdescription in the financial statements was not the cause, nor a contributing factor, to the losses incurred. Rather, it seems, the losses were occasioned by an inappropriate level of trust in Mr Lewis, an inappropriate arms' length relationship between the Trustee and Mr Lewis, which trust was misplaced and/or abused."

39 These conclusions assume that the "misdescription in the financial statements" was the appellant's only justifiable cause for complaint. They did not address the question of whether the appellant suffered loss by reason of Mr

McGoldrick's failure to inform the trustee, by qualification of the audit certificate or other communication to the trustee, of uncertainty as to the recoverability of the items shown as "Cash" in the financial statements. A similarly confined approach to breach at this point in the judgment was contained in his Honour's next paragraph, which summarised his conclusions and said the following in relation to breach:

> "The breach of duty of care involved the failure to take reasonable and appropriate steps to consider the definitions of cash in Accounting Standard AAS 28 and to determine whether the balance is fairly described as 'cash', including 'cash equivalents'".

40 Before leaving this topic, I note that the first sentence of his Honour's paragraph [210] quoted in [38] above does not fully capture what Dr Bear said (in fact, at transcript p 129 rather than p 128). When asked by his Honour why he did not "take steps to look into the financial health of LSLH", Dr Bear replied:

> "Your Honour, it was motivated in that every year I see my accountant and he tells me that, 'Everything has to be audited in your super fund', and I took great credence and comfort in that."

It was after that answer that he accepted that the trust he placed in Mr Lewis was also a factor.

Contributory negligence and proportionate liability

41 The whole of what his Honour said on this topic was as follows:

> "215 If the Court, as presently constituted, is wrong on the causation aspect, then on its face Databank and Mr Lewis would be joint tortfeasors (and/or subject to contribution, if contribution is appropriate to the particular cause of action) and the plaintiff has engaged in contributory negligence. To the extent necessary and utilising the principles in *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492; [1985] HCA 34, the plaintiff would be liable for contributory negligence to the extent of 35% and of the remaining liability Databank would be responsible for 60% and the defendant, Mr McGoldrick, 33⅓% (or 33.33%), meaning, if the Court were satisfied as to causation, the defendant Mr McGoldrick would be liable for 21⅔% (or 21.66%) of the loss incurred."

THE COURSE OF THE HEARING AT FIRST INSTANCE

42 As noted at [4] above, Mr McGoldrick argued on appeal that the hearing at first instance was conducted on the basis that the appellant's complaint was confined to one of negligent misstatement of the items relating to "Cash" in the financial statements, and did not extend to breaches of duty in not reporting the existence of doubts as to recoverability of the amounts represented by those

items. In these circumstances, it is necessary to describe as follows what relevantly occurred at that hearing.

43 In the Further Amended Statement of Claim, Mr McGoldrick's negligence was particularised as including failures to detect substantial deficiencies in LSL Holdings' assets, to assess the recoverability of the items shown in the financial statements as "Cash", to assess whether any "impairment losses ought to have been recognised and brought to account" in relation to those items, and to "appropriately qualify audit opinions and report to the Fund's trustee". It alleged that if Mr McGoldrick had exercised reasonable care, skill and diligence he would have "identified a risk of impairment" of those assets and communicated it to the Fund's trustee.

44 In its Outline of Submissions served prior to the hearing at first instance, the appellant asserted, *inter alia*, that Mr McGoldrick should have ascertained that there was a "significant risk" that the items described in the financial statements as "Cash" may not be recoverable and communicated this to the trustee. The appellant made similar assertions in its written opening submissions, provided at the commencement of the hearing, by both referring to the relevant portion of the Further Amended Statement of Claim and stating that it intended to lead evidence from Mr Bear that:

> "If he had been made aware that the 'cash' reported in the financial statements either was not held as cash or was in the form of an **unsecured loan that may not be able to be repaid**, he would have promptly caused the Trustee to take steps to immediately get the money back" (emphasis added).

45 This causation evidence was contained in Dr Bear's second affidavit (see [17] above).

46 Soon after the commencement of the hearing, the primary judge suggested to the appellant's counsel that the only issue between the experts seemed to be the appropriateness of the description "Cash" for the relevant items in the financial statements. There was then the following exchange:

> "DREW: No, that's one of the issues your Honour but it's actually less significant than what - whether they ought should [sic] have detected whether it's cash or cash equivalent or otherwise, the recoverability to [sic] attaches to that sort of loan and the risk of loss that should have been alerted to the plaintiff.

> HIS HONOUR: Well I should have included that in my general statement about cash."

47 Later the appellant's counsel relied, in the course of his opening, upon the parts of the Further Amended Statement of Claim, to which I have referred above in [43], and said that Mr McGoldrick had failed in his duties because he did not alert the trustee to the fact that the assets referred to in the financial statements by the description "Cash" were in the nature of unsecured loans that were "at significant risk of not being fully recovered".

48 A Schedule of Issues utilised at first instance included issues as to whether Mr McGoldrick should have ascertained that the assets referred to as "Cash" in the financial statements were in fact unsecured loans to LSLH "which had a substantial deficiency in net assets and substantial operating losses", and communicated that to the trustee of the Fund.

49 The appellant's written closing submissions referred to Mr McGoldrick's failure, first, "to obtain sufficient appropriate audit evidence to support the classification, valuation **and recoverability** of the Fund's other assets described as '*cash*'" and, secondly, to "communicate with the Trustee about material or significant matters concerning the Fund" (emphasis added). The submissions alleged that "upon any reasonable inquiry the defendant would have ascertained that there was a significant risk that those unsecured loans [that is, the items described as 'cash'] **may not be recoverable**" (emphasis added). They also referred to the causation evidence of Dr Bear to which I referred above.

50 In referring to his duty, Mr McGoldrick's written closing submissions stated:

> "A reasonable description of the risk of harm is the risk that the Fund would suffer loss if Mr McGoldrick did not explain to the trustees (when he performed each audit) that the balance of the Fund, described as 'cash' was in fact unsecured loans to LSLH, which **may not be recoverable**" (emphasis added).

51 Mr McGoldrick maintained in these submissions that he had "reasonable grounds for believing that the balance was readily convertible to cash at the relevant balance dates".

52 In its written Outline of Submissions in Reply, the appellant referred to the risk of harm as including, as Mr McGoldrick conceded, "that the Fund would suffer

loss if the defendant did not explain to the trustee that the balance of the Fund, described as '*cash*' was in fact unsecured to LSLH, *which may not be recoverable*".

53 Counsel for the appellant did not give an oral closing address. He indicated that he would rely on his written submissions, subject to responding to what counsel for Mr McGoldrick had to say. In reply, he emphasised that Dr Bear's causation evidence clearly indicated the importance to him of the recoverability of the assets described in the financial statements as "Cash".

THE SUBMISSIONS ON APPEAL

54 In its written submissions on appeal, the appellant submitted that the primary judge made two fundamental errors. The first was said to be in "narrowing the scope of the counterfactual enquiry to what reaction Dr Bear would have had had the financial statements recorded 'Loan to LSL Holdings' instead of 'Cash to LSL Holdings'". In oral argument, the appellant elaborated on this by submitting that the primary judge had wrongly confined his consideration of causation to the effect of negligent misstatements and not other negligence of Mr McGoldrick, in particular not reporting that the assets constituted by the items "Cash" may not be recoverable.

55 The appellant submitted that his Honour's second error was in concluding that Dr Bear gave evidence that a change in wording in the accounts of the items "Cash to LSL Holdings" to "Loans to LSL Holdings" would have made no difference to him. The appellant submitted in this regard that the primary judge placed too much weight on Dr Bear's trust in Mr Lewis and the effect that would have had on any disclosure that Mr McGoldrick may have made to Dr Bear.

56 In his written submissions on appeal, Mr McGoldrick contended that the case propounded in the appellant's written submissions on appeal was not open to it, first, because Dr Bear did not give any causation evidence relevant to that case, secondly, because it was inconsistent with the appellant's closing submissions at first instance and, thirdly, because it was "not the way the case was put at trial".

57 In its written submissions in reply, the appellant joined issue with these contentions and pointed out, correctly, that Mr McGoldrick did not put, in the

alternative to his contention that the case the appellant sought to run was not open to it, any submissions dealing with the merits of that case.

58 In the course of the appeal hearing, an issue arose as to whether the primary judge had made findings that Mr McGoldrick breached his duty of care, first, by not concluding there was doubt as to the recoverability of the assets described as "Cash" and, secondly, by failing to inform the trustee of this. Although maintaining that his Honour did implicitly make these findings, the appellant sought, and was granted, leave to amend its Notice of Appeal to seek findings to that effect from this Court in case it found that the primary judge did not make them.

59 After the hearing, Mr McGoldrick provided additional written submissions, pursuant to leave given at the hearing. He contended that:

> "This Court ought not make the breach findings sought because, in the absence of corresponding causation findings, they have no utility. The Court ought not make corresponding causation findings because that would be inconsistent with the case that the appellant ran below and to allow that change at this stage would cause real prejudice to the respondent."

60 He did not make any alternative submission that if this Court considered that the appellant's broader case had in fact been litigated at first instance, the Court should nevertheless not make the breach and causation findings sought by the appellant.

61 The appellant joined issue with these contentions in its written submissions in reply.

62 To a limited extent, the parties' written submissions on appeal also addressed the primary judge's findings of contributory negligence and proportionate liability. I shall refer to these when I come to deal with those topics.

63 The parties' submissions did not deal in any detail with the assessment of the damages that should be awarded if the appeal were upheld.

DETERMINATION OF THE APPEAL

Breach of duty and causation

64 The appellant's first contention as to error on the part of the primary judge (see [54] above) must be upheld as his Honour determined the issue of causation,

and as a result dismissed the appellant's claim for damages, without taking into account findings of negligence that his Honour had earlier made.

65 The primary judge found that the appellant did not suffer any loss, and was therefore not entitled to damages, because its principal, Dr Bear, gave evidence that it would not have made any difference to him if the relevant assets in the financial statements had been described as "Loans to LSLH" rather than as "Cash to LSLH". I do not accept that his Honour erred in concluding that this was the effect of Dr Bear's evidence (see the appellant's second contention as to error referred to in [55] above). Dr Bear said it in so many words (see [17] above) and his other evidence does not suggest that he misunderstood the questions he was asked. Moreover, the evidence was not in fact surprising given Dr Bear's trust in Mr Lewis and his belief that LSL Holdings was part of Mr Lewis' group of companies (see Judgment [51]-[53]).

66 There was a critical assumption that was however missing from the questions put to Dr Bear during his cross-examination on this topic. This was that the auditor had informed him, by qualification of the audit certificate or other direct communication with Dr Bear, that, having made enquiries, he had doubts as to the recoverability of the loans to which the items described as "Cash" referred. Dr Bear's affidavit evidence on causation directly addressed that issue, whilst the cross-examination did not. Dr Bear said that if he had been "made aware that the 'cash' reported in the financial statements either was not held as cash or was in the form of **an unsecured loan that may not be able to be repaid**" he would have promptly arranged for steps to be taken to get the money back (see [17] above, emphasis added). This evidence was not contradicted, nor challenged, in cross-examination. Moreover, it made good sense as Dr Bear undoubtedly wanted the Fund to hold substantial assets in the form of cash because he was concerned about the security of other forms of assets (see [9] above). His Honour so found (see [37] above).

67 I note that neither party argued that any part of Dr Bear's evidence on causation was rendered inadmissible by s 5D(3)(b) of the CLA, no doubt at least because Dr Bear was not giving evidence of a loss that he claimed that he had suffered, as distinct from the loss suffered by the plaintiff in the action,

Cam & Bear Pty Ltd (see *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (ACN 066 797 760) (in liq)* [2012] FCA 1028; (2012) 301 ALR 1 at [1124]).

68 For these reasons, Dr Bear's evidence on this topic must be accepted. However, Mr McGoldrick's contention that a case reflective of this evidence was not litigated at first instance, and is not therefore open to the appellant on appeal, remains to be addressed, as follows.

69 The review at [42] to [53] above of what occurred at first instance indicates that such a case was in fact run below. This is evident from the references above to the Further Amended Statement of Claim, the written and oral openings, the Schedule of Issues, Dr Bear's evidence and the written and oral closing addresses. The appellant continuously maintained that Mr McGoldrick breached his duty to the appellant by not concluding that there was doubt about the recoverability of the assets referred to by the relevant "Cash" items in the financial statements and by not reporting that fact to the appellant.

70 In support of his submissions that the appellant's case on appeal was inconsistent with that which the appellant pursued at first instance, Mr McGoldrick referred to two passages in the appellant's submissions at first instance, one in its closing written submissions and one in its oral address. Both passages however refer to the presently critical feature of Dr Bear's causation evidence that he would have taken action to have the "loans" recovered if he had known that they "may not be able to be repaid". They therefore support the appellant, not Mr McGoldrick, on this issue.

71 For this reason, the appellant proved breaches of duty that caused it to continue to make payments to LSL Holdings that it would otherwise not have made.

Contributory negligence

72 As indicated earlier, the primary judge addressed the topics of contributory negligence and proportionate liability in a single paragraph (see [41] above). His Honour did not however give any reason for finding in that paragraph that the appellant was guilty of contributory negligence reflecting responsibility for its loss to the extent of 35%, nor for holding that "of the remaining liability

Databank would be responsible for 60% and the defendant, Mr McGoldrick, 33⅓%, meaning, if the court were satisfied as to causation, the defendant Mr McGoldrick would be liable for 21⅔% of the loss incurred".

73 As the parties' submissions on appeal concerning contributory negligence were limited, it is necessary to refer as follows to what was pleaded and argued on that topic at first instance.

74 In his Defence to the Further Amended Statement of Claim, Mr McGoldrick simply pleaded that the appellant had been guilty of contributory negligence, without supplying particulars. In his written Outline of Submissions, provided at first instance, he contended, leaving aside allegations not pressed on appeal, that the appellant was contributorily negligent in approving the allegedly inaccurate financial statements for the years 2003 to 2008 and, in particular, in approving them when they did not contain an appropriate provision, or "write off", for impairment losses.

75 In his closing written submissions, Mr McGoldrick submitted that the appellant was contributorily negligent in the following respects:

(a) Approving the allegedly inaccurate financial statements of the Fund for the years 2003 to 2007;

(b) Failing to take any steps to investigate the security of its investments in LSLH;

(c) Choosing to move the balance of the Fund from a public company to LSLH, knowing that in doing so it "would be investing in less safe investments but at a higher interest rate";

(d) Continuing to deposit monies with LSLH while "not understanding that the Fund's balance held by LSLH was an unsecured loan";

(e) Failing to properly review Mr McGoldrick's audit reports; and

(f) Entering into a Management Agreement which gave Lewis Securities a broad power to "deal with" the Fund.

His counsel did not add anything of significance on this topic in oral address.

76 In its Outline of Submissions in Reply, the appellant submitted that it had no reason not to accept Mr McGoldrick's professional opinion that the audited accounts were accurate, that there was no evidence to support Mr McGoldrick's submission that Dr Bear knew that he "would be investing in less

safe investments but at a higher interest rate" and that "Dr Bear's failure to properly understand that the Fund's balance held by LSLH was an unsecured loan did not contribute to the loss". As to the last of these matters, the appellant further submitted that the risk of harm was not merely that the "Cash" described in the financial accounts in fact comprised unsecured loans, but that the loans may not be recoverable. It submitted that, in light of the unqualified audit reports, Dr Bear was entitled to assume that "everything was in order with the Fund" and that the "Cash" amounts were recoverable. These submissions were repeated in oral address.

77 In its written submissions on appeal, the appellant complained about the primary judge's lack of reasoning concerning contributory negligence and submitted, without significant elaboration, that "it is difficult to see how the Plaintiff was negligent in any respect".

78 In his written submissions on appeal, Mr McGoldrick contended that the judgment below is "replete with evidence as to the appellant's negligence" and referred to some 16 paragraphs of the judgment. These paragraphs deal with Dr Bear's trust in Mr Lewis, with Dr Bear's knowledge, or lack of knowledge, of how the Fund's assets were invested and with his failure to read the financial statements carefully. Submissions to this effect were also made in oral address, in the course of discussion of the topic of proportionate liability.

79 The appellant's Further Amended Statement of Claim stated that it claimed damages at common law, damages pursuant to s 12GF of the *Australian Securities and Investment Commission Act 2001* (the "ASIC Act") and "[d]amages pursuant to section 68 of the *Fair Trading Act 1987* (NSW) (as in force before the commencement of the *Australian Consumer Law* (NSW) ("ACL")) or, alternatively, section 236 of the ACL". On appeal, neither of the parties suggested that the appropriate approach to contributory negligence, or indeed proportionate liability, was dependent upon which cause of action succeeded. As a result, it is sufficient to refer as follows to the principles applicable to an action at law for damages for negligence, without referring to the substantially identical principles applicable to the statutory causes of action just referred to.

80 Section 9 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) provides that if a claimant for damages in a negligence action is guilty of contributory negligence, its damages are to be "reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". Section 5R(1) of the *Civil Liability Act 2002* (NSW) ("the CLA") provides that the principles applicable to determining whether a defendant has been negligent also apply to determining whether a claimant has been contributorily negligent in failing to take precautions against the risk of harm to the claimant. Section 5R(2) stipulates that the relevant standard is that of a reasonable person in the position of the claimant and is to be applied on the basis of what the claimant knew or ought to have known at the time.

81 In *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6 at [23], the majority justices referred to earlier decisions suggesting that "contributory negligence cannot be made out in circumstances where the very purpose of the duty owed by the defendant was to protect the plaintiff's property". They proceeded however at [29] and [30] to hold that there was no rule that apportionment legislation did not operate in such circumstances. As an example, they said that "a plaintiff who carelessly leaves valuables lying about may be guilty of contributory negligence, calling for apportionment of loss, even if the defendant was employed to protect the plaintiff's valuables". Their Honours stated that, whilst there was no "absolute rule", the "duties and responsibilities" of the defendant were to be taken into account in determining whether, and to what extent, the plaintiff was guilty of contributory negligence. Their Honours found that the plaintiff in that case, a public trustee company, had been guilty of contributory negligence (in failing to inquire whether certain borrowings and interest could be repaid), notwithstanding that that subject matter fell within the defendant solicitors' retainer to provide advice to the plaintiff. Their Honours did not proceed to quantify the extent of the plaintiff's responsibility for its own loss as their Honours held that contributory negligence was not available as a defence in light of the statutory provisions (since amended) applicable in the circumstances of that case.

82 *Astley v Austrust* was applied by Rares J in *Wingecarribee v Lehman Brothers* in an action brought by local councils against their investment adviser. His Honour declined to make a finding of contributory negligence, stating, in respect of one of the councils:

> "[1138] If a professional recommends or advises a client to take, or takes on the client's behalf, a particular step or decision based on the professional's expertise, ordinarily the client will not be equipped to analyse, and certainly not with the same degree of expertise, the basis on which the recommendation or advice was given or the step or decision taken. Grange [the advisor] knew that Swan [a local council] lacked financial sophistication: s 4.2.6. After all, one might ask rhetorically, *first*, if the councils had those skills, why would they have needed to retain Grange and, *second*, why did it see a significant commercial opportunity in positioning itself as an expert financial adviser for local government councils?"

83 In considering contributory negligence, s 5R(2)(a) (quoted in [80] above) requires regard to be had to how a reasonable person "in the position of" the claimant would have acted. There is no doubt that this provision permits the application of the common law principle stated in *Rogers v Whitaker* (1992) 175 CLR 479 at 487; [1992] HCA 58 that "the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill". The extent to which it allows or requires a plaintiff's disabilities to be taken into account when considering contributory negligence has however been the subject of discussion (see for example *Boral Bricks Pty Ltd v Cosmidis (No 2)* (2014) 86 NSWLR 393; [2014] NSWCA 139 at [87]-[88]; *T & X Company Pty Ltd v Chivas* [2014] NSWCA 235 at [48]-[56]; (2014) 67 MVR 297, in each case per Basten JA, referring in particular to *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [32]-[39] per McHugh J).

84 The issue does not arise in the present case as Dr Bear did not have any relevant disability. Certainly, he lacked any special expertise in financial matters but that simply results in it being necessary to treat him as a person of ordinary capabilities in considering the standard of care he ought to have attained. I add that the appellant, correctly, did not contend that it was not responsible for any default on the part of its directors. No doubt, it was so responsible, either because the directors were effectively acting as the

company itself or the directors were persons for whom the appellant was vicariously liable (see *Daniels v Anderson* (1995) 37 NSWLR 438 at 570).

85 Dr Bear was a busy medical practitioner and, as the primary judge said at [74] of his judgment, "not a sophisticated, nor an experienced, investor". When, in about 1985, (see [9] above) he sought to identify ways in which he could manage his income effectively, some colleagues suggested that he establish a self-managed superannuation fund. He became busier with his medical practice over the next few years and he sought to have someone manage and administer the Fund for him. That led to his good friend Mr Lewis suggesting that Dr Bear "move the Fund over with me", with Lewis Securities managing the investments and Databank doing the administration. Dr Bear thereafter paid only limited attention to the Fund, relying heavily on Mr Lewis' care of it.

86 As also noted above, Dr Bear decided in about 2005 that he wanted cash to comprise a greater proportion of the Fund's assets because he wanted to "make sure that [he] had something to fall back on in the event of a market crash" and "wanted to have a reserve in the Fund in lieu of having a life insurance policy". He believed that what he saw in the Fund's financial statements reflected this intent, in particular their references to "Cash – LSL Holdings P/L". The unsurprising effect of his evidence in cross-examination appears to have been that these entries caused him to believe that the "Cash" was held by LSL Holdings.

87 A more experienced and astute investor would have been concerned to know whether LSL Holdings held the cash in a trust account and whether that company was in any event a safe repository of the funds. Dr Bear's thinking was not at this level of sophistication, no doubt at least partly because he had great confidence in Mr Lewis. Equally important, however, his answers in cross-examination suggested that, even by the time of the hearing at first instance, he lacked the experience and expertise to grapple with the concepts involved. (Dr Bear's wife, Ms Campbell, did not give evidence but there was no basis in the evidence to which this Court was referred to conclude that Ms Campbell had any greater level of financial sophistication, or indeed had any involvement with the Fund at all.)

88 On the other hand, Mr McGoldrick was a very experienced accountant and auditor who was engaged for the purpose of protecting the Fund and its trustee against financial risks that included the very type of risk that eventuated, namely that loans forming part of the Fund's assets might not be recoverable because of the poor financial position of the debtors. For the reasons given earlier, Mr McGoldrick was clearly negligent in failing to make proper enquiries as to the recoverability of the amounts held by LSL Holdings and failing to report the results of those enquiries to the appellant trustee.

89 In making an apportionment based on a plaintiff's contributory negligence, the Court must consider "the degree of departure from the standard of care of the reasonable man" and "the relative importance of the acts of the parties in causing the damage" (*Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at [10]). As to the former factor, I consider that the appellant, through its director Dr Bear, did depart from the standard of care that a reasonable person would have applied to protect his or her own interests, but the departure from that standard was very limited. Even a person with Dr Bear's lack of financial sophistication should reasonably have considered the prudence of supplying significant amounts of money to Mr Lewis' company (cf *Wingecarribee v Lehman Brothers* at [1136]). That lack of sophistication and his reliance upon the annual supply of audited accounts however limits the criticism that can be made of him. As he said in cross-examination, he "took great credence and comfort" in the fact that the financial statements were audited each year. On the other hand, as I have said, Mr McGoldrick's departure from the standards of a reasonable person in his position, that is, of an experienced accountant and auditor, was significant. His breaches were not contributed to by his client supplying him with incorrect information or having inadequate internal controls upon which he could reasonably place some, even if not total, reliance. Rather, he defaulted in performance of a central aspect of the duty he undertook to perform.

90 As to the latter factor referred to in *Podrebersek*, Mr McGoldrick's negligence should in my view be regarded as of significantly greater importance in causing the damage than the low-level negligence of the appellant. For reasons I have given above in relation to causation, there can be little doubt that if, as should

have occurred, Mr McGoldrick had told Dr Bear that the Fund's "Cash" assets were at risk, he would have taken steps to eliminate that risk. On the other hand, if it had occurred to Dr Bear to consider LSL Holdings' financial viability, any concern that he formed may have been able to be assuaged by Mr Lewis and the existence of the audit certificates. Whilst attention by Dr Bear to the issue would probably have prompted a change in the way that the "Cash" was held, it is much less clear that the loss would have been avoided if the appellant's negligence had not occurred than if Mr McGoldrick's negligence had not occurred.

91 Taking these matters into account and giving particular, although not determinative, significance to the fact that it was amongst Mr McGoldrick's duties to protect the appellant against the very harm that it suffered, I consider that responsibility for the loss should be apportioned 10% to the appellant and 90% to Mr McGoldrick.

Proportionate liability

92 In his Defence to the Further Amended Statement of Claim, Mr McGoldrick pleaded that if he caused the appellant's loss, Lewis Securities, Databank and the appellant's directors (Dr Bear and Ms Campbell) also caused that loss, and that the appellant's damages recoverable from Mr McGoldrick should therefore be reduced to reflect only his share of the responsibility for the appellant's loss, as distinct from that of those concurrent wrongdoers. On appeal, Mr McGoldrick did not press the contention that Lewis Securities was a concurrent wrongdoer. As with contributory negligence, it is sufficient for the purposes of addressing this topic to refer to the provisions of the CLA.

93 Section 35(1)(a) of the CLA provides:

> "**35 Proportionate liability for apportionable claims**
>
> (1) In any proceedings involving an apportionable claim:
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss …"

94 Section 34(2) defines a "concurrent wrongdoer" as "a person who is one of two or more persons whose acts or omissions (or act or omission) caused,

independently of each other or jointly, the damage or loss that is the subject of the claim". Section 35(3) provides that in apportioning responsibility the damage or loss in relation to which the plaintiff is contributorily negligent is to be excluded and that the court may have regard to the comparative responsibility of any current concurrent wrongdoer who is not a party to the proceedings. To be a concurrent wrongdoer, a person must be (or have been) liable in law to the plaintiff in respect of the same damage as that for which the defendant is liable (*Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq)* [2011] NSWCA 367 at [94]; *Wingecarribee v Lehman Brothers* at [1083]; D Villa*, Annotated Civil Liability Act 2002* (NSW) (3rd ed, 2018*)* at 502-3).

Databank

95 In his Defence, Mr McGoldrick alleged, first, that Databank was a concurrent wrongdoer because it was retained to prepare the Fund's financial statements and, as a result, owed the appellant a duty of care and, secondly, that if Mr McGoldrick is found liable to the appellant, Databank should be found to have been negligent in preparing the financial statements and, by issuing them, to have engaged in misleading and deceptive conduct. In his written closing submissions at first instance, Mr McGoldrick contended that Databank owed the appellant a duty to take reasonable care because it "compiled" the annual financial statements "and decided upon the accounting treatment for the plaintiff's financial statements". The terms of Databank's retainer to undertake this work were however not alleged. As noted earlier, the primary judge did not provide any reasons for his finding that Databank was a concurrent wrongdoer and bore a significant degree of responsibility for the appellant's loss (see [41] above). In his written submissions on the appeal, Mr McGoldrick again submitted that Databank was liable to the appellant because it prepared the financial statements, again without alleging the terms upon which it was engaged to do so.

96 Mr McGoldrick did not in my view establish that Databank is liable to the appellant in respect of the appellant's loss and therefore did not establish that Databank was a concurrent wrongdoer. As Mr McGoldrick alleged, Databank compiled the annual financial statements but, without knowing the basis upon which Databank was engaged, it cannot be concluded that, by doing that,

Databank rendered itself liable to the appellant in negligence or for misleading and deceptive conduct. The inaccuracies in the financial statements arose not simply from the alleged literal untruth of the words "Cash – LSL Holdings" (which however suggested, arguably accurately, that the Fund's cash was held by LSL Holdings) but from the fact that, according to accounting standards and proper accounting and auditing practice, those words when appearing in audited accounts carried the implication that the amounts concerned were readily recoverable from LSL Holdings. The evidence did not reveal whether Databank was bound by, or undertook to comply with, such standards or practice and thus should be taken to have conveyed such an implication by producing the accounts. There was no evidence that Databank was more than a "compiler" of the accounts (to use a derivative of the description of Databank's role in Mr McGoldrick's submissions). Moreover, for all the evidence indicated, the terms of Databank's retainer may have included an express and relevant disclaimer of responsibility. I also add that the proposition, asserted in Mr McGoldrick's submissions, that Databank was paid "almost $40,000 in administration fees by the Fund" does not enable any inference favourable to Mr McGoldrick's case to be drawn as to the nature and extent of Databank's responsibilities.

The appellant's directors

97 In his Defence to the Further Amended Statement of Claim, Mr McGoldrick alleged that Dr Bear and Ms Campbell, the directors of the appellant, were concurrent wrongdoers because they breached duties of care and diligence that they owed to the appellant. He alleged that they breached those duties by the same acts and omissions as those for which Mr McGoldrick alleged the appellant was responsible and which rendered the appellant guilty of contributory negligence.

98 In his written closing submissions at first instance, Mr McGoldrick submitted, albeit briefly, that the directors of the appellant were concurrent wrongdoers of whom account should be taken in apportioning responsibility for the appellant's loss. His Honour did not find that the directors were concurrent wrongdoers but did not provide any reason for not doing so (see [41] above).

99 In this Court, Mr McGoldrick did not file any Notice of Cross-Appeal or Notice of Contention contending that the directors were concurrent wrongdoers. Nor did he submit that they were in his written submissions. In the course of oral argument however his senior counsel seemingly put that Dr Bear was a concurrent wrongdoer to whom substantial responsibility should be allocated. The argument should be rejected as it was not raised in an appropriate, formal fashion on appeal. In any event, the argument fails on its merits for the following reasons.

100 I have accepted Mr McGoldrick's argument that the appellant was guilty of contributory negligence and that its damages should be reduced accordingly. Its negligence was however constituted by its responsibility for the acts and omissions of its directors. These are the very same acts and omissions that Mr McGoldrick submits constituted the directors as concurrent wrongdoers and rendered the appellant's damages liable to be reduced because those concurrent wrongdoers bore a share of the responsibility for the appellant's loss.

101 To reduce the appellant's damages for this reason would therefore involve an inequitable double discount of the damages by reason of the same acts and omissions. The appellant's damages would be reduced both by reason of its liability for the negligent acts of its directors and by reason of the apportionment of a share of responsibility for the appellant's loss to the directors because of the very same acts and omissions. Such a double deduction would not, to use the word used in s 35(1)(a) of the CLA (see [93] above), be "just".

102 This conclusion derives support, by way of analogy, from the decision of this Court in *Daniels v Anderson* at 578-80. In that case, damages for negligence, recoverable by a company from its auditors, were reduced by reason of the company's contributory negligence, arising from acts and omissions of its managing director. The auditors were found not to be entitled to contribution from the managing director to payment of those damages (under s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW)) because to permit such recovery would amount to "double compensation" for the auditors. That is,

because of the very same acts and omissions of the managing director, the auditors would have been entitled both to a reduction of damages for contributory negligence and to recovery of contribution from the managing director (at 580). In *Duke Group Ltd (in liq) v Pilmer (No 2)* (2000) 78 SASR 216; [2000] SASC 418 at [13]-[14], the South Australian Full Court, in obiter remarks, treated *Daniels v Anderson* as authority for the approach I have taken in the present case.

103 For these reasons I do not consider that the proportionate liability provisions of the CLA, or corresponding provisions of the other statutes upon which the appellant sued, entitle Mr McGoldrick to an apportionment of the appellant's damages.

CONCLUSIONS

104 For the reasons I have given, the appeal should be allowed and the appellant awarded damages for its loss, less a deduction of 10% for its contributory negligence.

105 As the primary judge did not assess the damages to which the appellant would have been entitled if his Honour had accepted its case on liability, and as on appeal the parties have not, at least not in any detail, addressed the quantification of the appellant's loss, the proceedings should, prima facie, be remitted to the Common Law Division for completion. In additional written submissions of 21 March 2018, Mr McGoldrick however indicated that there is agreement between the parties on at least one significant aspect of the appellant's damages, inferred that there is some prospect of agreement on the remaining issues and requested that the parties be given the opportunity to attempt to resolve these issues. The Court should afford the parties this opportunity.

106 In these circumstances, I propose that the Court makes the following notation and orders:

(1) Note that the Court will in due course make orders allowing the appeal and entering judgment for the appellant.

(2) Direct that the parties attempt to agree upon the amount of damages to be awarded to the appellant.

(3) Direct that within 21 days of this judgment the parties file and serve draft orders that they submit should be made to give effect to the terms of this judgment.

107 **WHITE JA**: I agree with Macfarlan JA.

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