Supreme Court

New South Wales

---

| | |
|---|---|
| Case Name: | Cam & Bear Pty Ltd v McGoldrick |
| Medium Neutral Citation: | [2016] NSWSC 1894 |
| Hearing Date(s): | 3 – 5 March 2015, 9 April 2015, 12, 25 June 2015, 24 July 2015 |
| Date of Orders: | 3 May 2017 |
| Decision Date: | 3 May 2017 |
| Jurisdiction: | Common Law |
| Before: | Rothman J |
| Decision: | (1) Judgment for the defendant;<br><br>(2) The plaintiff shall pay the defendant's costs of and incidental to the proceedings, not previously covered by a costs order;<br><br>(3) The parties have liberty, within seven days, to make application for a different or special order as to costs by submission of no more than three pages in length, accompanied by any document upon which the application relies that is not otherwise in evidence. Any party affected by such application may respond within a further seven days by submission of no more than three pages in length, accompanied by any other document not otherwise in evidence;<br><br>(4) Proceedings dismissed. |
| Catchwords: | NEGLIGENCE – breach of duty by auditor – discussion of duty of auditor to self-managed superannuation fund – causation – breach of duty did not occasion loss – action dismissed;<br><br>TRADE PRACTICES – misleading or deceptive |

| | |
|---|---|
| | conduct – audit certificate represents fair state of affairs reported in financial statements – misleading and/or deceptive – no loss occasioned by misrepresentation. |
| Legislation Cited: | Australian Consumer Law (NSW)<br>Australian Securities and Investments Commission Act 2001 (Cth)<br>Civil Liability Act 2002 (NSW)<br>Fair Trading Act 1987 (NSW)<br>Superannuation Industry (Supervision) Act 1993 (Cth) |
| Cases Cited: | Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem (2009) 239 CLR 420; [2009] HCA 48<br>Chappel v Hart (1998) 195 CLR 232; [1998] HCA 55<br>Dovuro Pty Limited v Wilkins (2003) 215 CLR 317; [2003] HCA 51<br>New South Wales v Fahy (2007) 232 CLR 486; [2007] HCA 20<br>Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492; [1985] HCA 34<br>Rosenberg v Percival (2001) 205 CLR 434; [2001] HCA 18<br>Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5<br>Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62 |
| Category: | Principal judgment |
| Parties: | Cam & Bear Pty Ltd ACN 139 844 741 (Plaintiff)<br>John McGoldrick (Defendant) |
| Representation: | Counsel:<br>G Drew / C Lee(Plaintiff)<br>P A Horvath / N Oreb (Defendant)<br><br>Solicitors:<br>Licardy & Company Lawyers (Plaintiff)<br>Esplin Solicitors (Defendant) |
| File Number(s): | 2013/40165 |

## JUDGMENT

1 By Statement of Claim, the plaintiff, Cam & Bear Pty Ltd ("Cam & Bear") sues the defendant, John McGoldrick ("Mr McGoldrick") for damages. Essentially,

the plaintiff is the corporate trustee of the Lance Bear Pty Ltd Superannuation Fund ("the Fund") of which Mr McGoldrick, a qualified accountant and member of the Institute of Chartered Accountants, practising amongst other things as an auditor, was the auditor for the financial years ending 30 June 2003, 2004, 2005, 2006, 2007 and 2008.

2 The plaintiff alleges that the defendant breached his duty of care and/or was negligent and relies for its relief on common law, s 12GF of the *Australian Securities and Investments Commission Act 2001* (Cth) ("*the ASIC Act*") and s 68 of the *Fair Trading Act 1987* (NSW) or alternative to the last mentioned provision, pursuant to s 28 of the *Fair Trading Act*, under s 236 of the *Australian Consumer Law* (NSW) depending upon the time of the breach of duty. The alteration to the statute does not affect liability for conduct that may be relevant to these proceedings or the relief that can be granted.

3 At the core of the claim against the defendant is the plaintiff's allegation that the relevantly unqualified audit performed by the defendant misrepresented the nature of certain "assets", as a consequence of which the plaintiff relied upon the liquidity of the Fund and losses were incurred.

**Evidence**

4 The directors of the plaintiff and the beneficiaries of the Fund were Lance David Bear and Jennifer Anne Campbell. Prior to the incorporation of the plaintiff and its appointment as trustee of the Fund, the trustees of the Fund were the beneficiaries or members of the Fund.

5 The Fund was established by Deed dated June 1990 and, as would be expected, has been amended. Between its establishment and the appointment of the individual trustees on 27 March 2009 there was an earlier Corporate Trustee, namely Landav Pty Ltd ("Landav"). The directors of that earlier corporate trustee were, again, Dr Bear and Ms Campbell.

6 The foregoing formal issues are uncontentious. It is also uncontentious that the defendant audited the accounts between 2003 and 2007 (inclusive) and carried out an audit of the financial statements for the Fund in respect of each of those years. There is some contention relating to the financial year ending 30 June 2008, but it matters little in the resolution of the issues before the Court. Lay

evidence was adduced, which I summarise, as neutrally as possible, hereunder.

*Lance Bear*

7 Dr Bear's evidence in chief was adduced by Affidavits dated 28 March 2014, 10 February 2015, and 2 March 2015. It is appropriate to set out a simplified chronology of events, in order to understand the context in which the evidence was adduced. The chronology is taken from the evidence and is, generally, uncontroversial.

8 On 25 March 1996, agreement was reached between Landav and Lewis Securities Ltd in relation to an investment portfolio and the implementation of a plan of investment. On 29 June 1996, the Fund was established, with Landav as the trustee (Exhibit JM1, p 46).

9 On 27 March 1999, Dr Bear and Ms Campbell were appointed as trustees and on 6 October 1999 the plaintiff, Cam & Bear, was appointed as the trustee of the Fund.

10 Audit reports were prepared for the financial year ending 30 June in the years 2001, 2002, 2003, 2004, 2005, 2006 and 2007. Each of the foregoing reports was signed by the defendant, Mr McGoldrick. The reports can be found, respectively, at pp 24, 149, 196, 234, 300, 346 and 388 of Exhibit JM1. The audit report for the financial year ending 30 June 2008 can be found at Exhibit JM1 at pp 461-476 and 491-520.

11 On 29 October 2008, Lewis Securities and LSL Holdings Pty Ltd ("LSL Holdings") were placed into voluntary administration and on 6 February 2009 were placed into liquidation (Exhibit LB1, Annexure 12). Annexure 12, to which reference is made in the immediately preceding sentence, contains a report to creditors by the liquidators to LSL Holdings, dated 5 October 2010, and amended proofs of debt were lodged with LSL Holdings' liquidators on 23 May 2011 and 26 May 2011.

12 Dr Bear, as earlier stated, is a director of the plaintiff and of Landav. So too is his wife, Ms Campbell. Although not strictly relevant, Dr Bear is a medical

practitioner, specialist dermatologist and practised in that capacity since about the late 1970s.

13 During the 1970s, Dr Bear met Anthony Lewis, whom, during these proceedings, and during his relationship with Mr Lewis, Dr Bear called Tony, as did all other witnesses. Mr Lewis was met through his brother with whom Dr Bear had attended high school.

14 Dr Bear was made aware that Mr Lewis had his own business, being a finance business and fixed interest specialist. They became friends and Dr Bear attended several social functions with him.

15 In about 1990, Dr Bear attended Mr Lewis' wedding and Mr Lewis and his wife moved to the same suburb as Dr Bear, about 1 km away.

16 In June 1993, Dr Bear married his wife and the four of them socialised regularly, at least until late 2008. They socialised, amongst other places, at each other's home and their children were friendly, notwithstanding an age difference. They even holidayed together, on one occasion in the United States.

17 Dr Bear attended Mr Lewis' office in the city once or twice during the aforementioned period.

18 Shortly after completing his specialist studies, being about 1985, as a result of conversations with colleagues in the medical profession about managing income effectively, Dr Bear commenced a self-managed superannuation fund.

19 As Dr Bear's medical practice became busy, he desired that someone else manage and administer his Super Fund and, for that purpose, he had a conversation with Mr Lewis who suggested that he appoint Austrust Ltd ("Austrust") as the trustee. On or about 29 June 1990, Austrust was appointed the trustee of the Fund and the previous Superannuation Fund was rolled over into the Fund with Austrust as its trustee.

20 In or about 1996, Mr Lewis suggested, in a conversation, that Dr Bear could move the Fund over to him and that Lewis Securities could manage the investments and Databank Investment Services Pty Limited ("Databank") could

do the administration. Mr Lewis informed Dr Bear that he (Mr Lewis) owned 35% of Databank.

21 This suggestion was effected by the execution of certain documents. The execution was processed by the documents being placed in the possession of Dr Bear with Mr Lewis indicating to Dr Bear where he needed to provide his signature.

22 The initial agreement between Landav and Lewis Securities, referred to earlier in the chronology, is an agreement entitled "Custodian Services Authority", signed by Dr Bear on 25 March 1996. Dr Bear was directed that the cheques into the Fund should be made out to "Lewis Securities".

23 Thereafter, commencing in 1996, Dr Bear paid contributions to the Fund by drawing a cheque in which the payee was Lewis Securities. These cheques were written from Dr Bear's St George account, which was Dr Bear's business account, although one or two transactions came from his personal cheque account.

24 Cheques written to Lewis Securities were usually written at Dr Bear's residence and Mr Lewis would collect them from Dr Bear's home or Dr Bear would deliver them to Mr Lewis' home on the day each was written or shortly thereafter. Generally, Dr Bear would deliver the cheque during his evening walk (a regular habit) and do so with words to the effect:

> "Here's some money for the Super Fund."

25 Dr Bear made regular monetary contributions to the Fund between 1996 until late 2008 in accordance with the practice described in the immediately preceding paragraph. There were usually about 8 to 10 payments a year. The statements from the cheque account are in evidence.

26 The bank statements from the cheque account were provided by Dr Bear to his accountant and the details recorded in software on Dr Bear's home computer.

27 After 1996, Dr Bear dealt with Mr Lewis exclusively in relation to matters about the Fund. Mr Lewis would ask him to sign documents concerning the Fund through which Dr Bear would glance and then sign the documents. On some

occasions, if Dr Bear were unsure about a particular matter that he noticed, he would ask Mr Lewis a question which would be answered.

28 According to Dr Bear, from about 1996 until late 2008 (the relevance of which later date will become obvious, if not already) Dr Bear understood that the Fund consisted of cash amounts and shares. This understanding was obtained by and from conversations with Mr Lewis as well as from reading some of the documents relating to the Fund. Dr Bear referred ([30] of the Affidavit of 28 March 2014) to the balance sheets which referred to "Cash at the end of period" and "Net increase in Cash". Dr Bear says that he understood that he had cash in the Fund based upon these types of references, and on the conversations with Mr Lewis.

29 Dr Bear was also informed that one of Mr Lewis' companies was LSL Holdings and Dr Bear understood that LSL Holdings were holding the cash amounts for the Fund, based on the documents presented and the reference to "Loan – Lance Bear Pty Ltd Superannuation Fund" under the reference to LSL Holdings.

30 At no time did Mr Lewis or anyone else, at least prior to late 2008, tell Dr Bear that the money or some of the money that was contributed to the Fund was being used for unsecured loans. Nor did Dr Bear understand, from any entry in the documentation that there were unsecured loans between Lewis Securities and LSL Holdings or any other company.

31 Apart from not recalling any conversation with Mr Lewis or anyone else relating to unsecured loans, Dr Bear was clear in his view that he did not want, at any time, any of the money in the Fund to be used for an unsecured loan.

32 From a period commencing about 2005, Dr Bear decided to restructure the investment amounts in the Fund, and opting to have more of the assets in cash. Dr Bear had two main reasons for this: first, he was concerned about the insecurity of shares; and, secondly, he wanted to keep cash in his Super Fund because of the absence of any life insurance policy. This decision was relayed to Mr Lewis in a way that expressed the desire that Dr Bear wanted more cash amounts in the Fund.

33 Dr Bear has, independent of the Fund, an accountant who completes, on his behalf, his tax returns. Dr Bear provides to his accountant copies of the source documents and/or records on computer of the cheques provided to the Fund, being cheques made out to Lewis Securities.

34 Each year Dr Bear would receive (usually by mail to his home address, collected by Ms Campbell) a bundle of financial documents. Each such document was signed or authorised under the name of the defendant, Mr McGoldrick. These documents related to the audit of the Fund and certain Australian Taxation Office forms.

35 Dr Bear took the view, from the documents, that Mr McGoldrick was the auditor and had prepared the Fund's financial accounts, had audited the Fund and had prepared the Fund's ATO returns. He had not, at that stage, met Mr McGoldrick. Nor had he had a conversation with Mr Lewis in relation to Mr McGoldrick.

36 The evidence of Dr Bear is that, on receipt of the financial documents, he would read the documents in the order they were prepared, with particular interest in the shares that had been purchased and the amount of cash that was in the Fund, for reasons to which the Court has earlier referred.

37 The documents usually consisted of originals and a copy. The originals were marked for Dr Bear to sign. They were marked with a "post-it note" or flag requiring a signature. The documents were signed and returned.

38 In or about July 2008, Dr Bear agreed, in principle, to commence a combined medical practice with another practitioner whom he had known for several years. They were both dermatologists.

39 In or about September 2008, and to Dr Bear's best recollection on 22 September 2008, Dr Bear spoke to Mr Lewis about Dr Bear's intention to withdraw cash from his Super Fund in order to purchase the medical practice with the other doctor. The establishment of the joint medical practice required some capital cost and this was indicated to Mr Lewis who told Dr Bear:

> "It's not a good idea to withdraw cash from the Fund."

40 Later that year, on about 19 October 2008, Dr Bear had a conversation with Mr Lewis in which the following was said:

> "Mr Lewis: You are better off focusing on developing the Fund.
> Dr Bear: I need the cash for the new premises."

41 On 22 October 2008, Dr Bear reiterated and stressed that desire when speaking with Mr Lewis, who had visited Dr Bear at home. Ms Campbell was present during the conversation. Mr Lewis, once more, attempted to dissuade Dr Bear from the course and informed him that the medical practice was a bad investment but, if he insisted, Mr Lewis would obtain a cheque for him in a few days. Dr Bear never received any such cheques or amount.

42 As stated in the short chronology above, in early November 2008, Lewis Securities went into voluntary administration and within three months was placed into liquidation.

43 Dr Bear was the subject of cross-examination over two days. The foregoing recital of evidence is taken largely from Dr Bear's first Affidavit. I do not repeat or summarise the subsequent Affidavits of 10 February 2015 and 2 March 2015.

44 The cross-examination established that Dr Bear and Mr Lewis were good friends, would speak at least fortnightly or thereabouts and had known each other for 30 or 40 years. Dr Bear accepted, as he did in his Affidavits, that during the course of his conversations with Mr Lewis, Dr Bear was told that one of Mr Lewis' companies was LSL Holdings, but Dr Bear can recall little else about the conversation and did not keep notes of the conversation.

45 Dr Bear confirmed that his desire that none of "my money" be in an unsecured loan, was a reference to money in the Fund, in Landav (or any subsequent trustee), his personal accounts and his wife's personal accounts.

46 Dr Bear was shown the Custodian Services Agreement that he and Ms Campbell executed with Lewis Securities in March 1996. Dr Bear agreed that at the time of signing the agreement he had understood that Lewis Securities would hold the shares and assets on behalf of his Super Fund; would receive dividend payments or interest; keep a record of the account; and

that Lewis Securities was entitled to a debit from the Fund's account for fees, which deduction was 1/12 of 0.25% of the portfolio each month.

47 At the time of signing the March 1996 agreement, Dr Bear did not know what the assets or liabilities of Lewis Securities Nominees Pty Ltd ("Lewis Securities Nominees") were. Nor did Dr Bear know anything else about the entity. He signed the agreement in March 1996, because he considered that Mr Lewis was a "good friend". He was aware at that time that Mr Lewis was the principal of Lewis Securities and was associated with various companies in the Lewis Securities Group, including Lewis Securities; LSL Holdings and Lewis Securities Nominees.

48 During the cross-examination, Dr Bear had discussed his evidence with his wife (who was not to be called as a witness) and volunteered that he wanted to change an answer given earlier, because he was concerned about how it might impact upon his case. He considered that his answers to the earlier question reflected the fact that he was flustered.

49 The correction was to his understanding of the term "my money" to which an earlier reference has been made (see Transcript, pp 44, 48-54, summarised at [45 Ref481412944] above). His clarification was that the reference to "my money" in his earlier answer was a reference to the money in the Fund.

50 On questioning in relation to the financial documents that Dr Bear had identified, Dr Bear accepted that he would have received those documents within a limited time after the last date on each document and no more than a couple of months later. He also accepted that the document showed the interest rates that the Fund was receiving on the balance at any particular time.

51 Dr Bear in his evidence (Transcript, p 57) accepted that the balance of the Fund was held in Lewis Securities and, at a later time, moved to LSL Holdings. The documents put to Dr Bear reminded him (Transcript, p 61) that he commenced putting money from his Super Fund in LSL Holdings (as well as Lewis Securities).

52 Dr Bear recalled that Lewis Securities paid 1% less interest than LSL Holdings. Further, Dr Bear accepted that there were transfers (Exhibit, p 184) from Lewis Securities to LSL Holdings and in one instance left the balance at zero dollars.

53 Dr Bear agreed that he transferred the remainder of the money in his Super Fund into LSL Holdings in or about 2000 and that perhaps one of the reasons was because of the higher interest rate. However, Dr Bear never saw any financial statements for LSL Holdings and does not recollect asking Mr Lewis for any such statements.

54 Dr Bear denied ever writing cheques to LSL Holdings and denied knowing that LSL Holdings did not have a bank account. Dr Bear maintained that he continued to write cheques to Lewis Securities. Dr Bear also agreed that between 1997 and 2008 (at least before the Lewis Group went into administration), he had never asked Mr Lewis what LSL Holdings was investing in, to enable it to pay the Fund interest, or any greater interest, than Lewis Securities was paying.

55 Dr Bear reiterated, during the course of cross-examination (Transcript, p 68) that he would examine, when he received the financial accounts for the Fund, the number and type of shares in which investments were held, the cash balance and the auditor's report. Dr Bear understood that it was his responsibility as the director of the trustee company to review the financial statements and added that the understanding of his responsibility was the reason he had paid monies to have the Fund managed and audited (Transcript, p 69).

56 Dr Bear understood that the description "Cash - LSL Holdings (Lance)" and "Cash - LSL Holdings (Jenny)" referred to amounts held by LSL Holdings and not Lewis Securities, but did not recall what his understanding of Note 9 (the definition of cash) to the accounts meant.

57 The signing of the Trustee Declaration, in Dr Bear's understanding, was that he, Dr Bear, had to be satisfied that the financial statement gave a fair and true result of the Fund and, in that regard, he relied upon the auditor's reports (Transcript, p 72).

58 Eight thousand dollars was withdrawn from the Fund in fees for Lewis Securities/LSL Holdings to manage the Fund and for Databank to prepare the financial statements. Databank was a company for which Peter McIver ("Mr McIver") was the managing director and of which Mr Lewis owned 35% (Dr Bear was aware of this). Mr McIver had been introduced to Dr Bear by Mr Lewis. Dr Bear received the financial accounts only after they had been audited.

59 On questioning in relation to the $8,000 in fees, Dr Bear accepted that he knew the audit fee was about $350 but that he did not recall to where the $8,000 in fees were distributed. His process as a director of the Trustee Company (i.e. both corporate trustees) and in signing the Trustee Declaration was that he would take steps to satisfy himself as to the accuracy of the accounting records, for which purpose, he would check that the monthly statements reconciled with the yearly financial statements and reports.

60 In that regard, Dr Bear checked that his record of the amounts paid to the Fund reconciled with the yearly financial statements as to receipts. Dr Bear did not recall asking Mr McIver any questions about the financial statements.

61 Dr Bear understood that it was the trustee's duty, not the auditor's duty or responsibility, to prepare the financial statements. He paid little or no regard to the disclaimer on the auditor's report.

62 Cross-examination then referred Dr Bear to the Memorandum of Resolution, which he had executed. The steps that he took in relation to that Resolution were to have the Fund managed and audited.

63 Further, Dr Bear understood that the $147,000 to which he was referred (Exhibit, p 718) was money held by LSL Holdings (Transcript, p 81). Likewise, he had understood (Transcript, p 82) that the $224,000 was money held by LSL Holdings. Once more, Dr Bear reiterated that he did not recall, or did not recall understanding, Note 9 in relation to the auditor's reports and did not understand the definition of cash that was defined in that note.

64 Dr Bear considered that he was entitled to sign the Trustees' Declaration in each of the years from 2002 to 2009, on the basis that he had satisfied himself

that the statement of the financial position of the Fund gave a true and fair view of the operation of the Fund. This was done on the basis of his "reliance" on the auditor's report. Further, Dr Bear satisfied himself that the Fund kept correct accounting records; that the financial statements had been prepared by a competent person; and that such a person was Databank, not Mr McGoldrick (Transcript, pp 84-85).

65 At Transcript, pp 86-87, Dr Bear expressed the view that he understood that the "money" (by which I take to mean cash) in the Fund was in LSL Holdings and he relied on the auditor to tell him about the financial position of LSL Holdings, as he was paying "handsomely" to have his Super Fund managed. Dr Bear then answered equivocally about whether he knew, at the time, that the auditor was only paid $350 for his report.

66 Ultimately Dr Bear considered he was entitled to sign the Trustee's Resolution in each of the years 2002 to 2009 because he was satisfied that the documents were all correct on the basis of those who managed the Fund and who audited it (Transcript, p 88).

67 During the next part of the cross-examination, Dr Bear confirmed (Transcript, pp 95-99) that he understood the term "cash at the end of the reporting period" were amounts held by LSL Holdings; that it recorded the amounts held by LSL Holdings, when it used the term "Cash - LSL Holdings"; that the auditor was examining bank statements in relation to items listed as "Cash - LSL Holdings"; that the auditor was checking whether such amounts existed in the various companies; and that in some accounts the item listed as "Cash - LSL Holdings" referred to interest paid by LSL Holdings to the Fund.

68 According to Dr Bear, the Statement of Financial Position for the financial year ending 30 June 2008 was provided to him (Transcript, p 100) and, in this regard, there is a controversy between the evidence of Dr Bear and the evidence of Mr McGoldrick as to the form of the 2008 Statement. There was cross-examination as to the use of the term "loan" in which Dr Bear referred to his belief that the term was synonymous with the term "Cash" (Transcript, p 106, 108).

69 Dr Bear's understanding was that Lewis Securities placed money from the Fund into secure products and that LSL Holdings held the secure products. He was not aware of the formality of how the money was transferred from the Fund to LSL Holdings or from Lewis Securities to LSL Holdings.

70 Dr Bear was advised after 2008 that the money was lent by Lewis Securities to LSL Holdings as an unsecured loan (Transcript, p 109). Further, Dr Bear could not remember whether he was, at the time, aware that his wife had lent $206,000 to LSL Holdings in the year ending 30 June 2003. He does recall that there was a loan between Landav, but does not recall the amount of the loan or the timing of it (Transcript, p 110).

71 During further cross-examination, Dr Bear reiterated that all cheques would be written to Lewis Securities and never to LSL Holdings. Interest was paid by LSL Holdings on the loans from Landav and at no stage did Dr Bear ask for financial statements in relation to LSL Holdings. Nor did he review financial statements for Lewis Securities.

72 Dr Bear further reiterated that his understanding was that the money given by Landav, Ms Campbell and the other entities to LSL Holdings was "Cash" and not by way of loan. The interest received, according to Dr Bear, was interest received from the cash and was not by way of interest on a loan.

73 Cross-examination then referred to monies received from Interest Investments and Dr Bear again referred to his understanding that the investment was cash going from LSL Holdings to Interest Investments and not a loan. Nor did he understand that the amount was unsecured. Dr Bear did know that Interest Investment was one of Mr Lewis' companies (Transcript, p 121, 123).

74 Dr Bear accepted that he had a great deal of trust in Mr Lewis, prior to October 2008, and the level of trust he had in Mr Lewis was a reason why he did not take steps to look into the financial health of LSL Holdings (Transcript, p 128). Dr Bear also accepted that it would have made no difference, prior to October 2008, to his view, if the accounts would all have said "Loan to LSL Holdings" instead of "Cash to LSL Holdings", as he did not, at that stage, appreciate the difference. Notwithstanding the description of him to Mr McGoldrick, Dr Bear was not a sophisticated, nor an experienced, investor.

*Otim Oluk*

75 Mr Oluk is a senior manager at Jirsch Sutherland, the liquidator of LSL Holdings and he has carriage of that liquidation. LSL Holdings did not have any bank accounts.

76 In cross-examination, Mr Oluk gave evidence that, on his investigation, the companies within the Lewis Securities Group were managed as separate companies. However, it appeared that bank accounts of Lewis Securities were also used from time to time by LSL Holdings, with journal entries and intercompany loans accounting for the movements of money (Transcript, p 132).

77 Mr Oluk accepted that the first report to creditors, dated 28 November 2008, indicated that LSL Holdings and/or Lewis Securities had maintained adequate financial records. Later reports indicated otherwise.

*John McGoldrick*

78 In some respects the evidence of the defendant, Mr McGoldrick, did not dispute much of the evidence adduced on behalf of the plaintiff. On the contrary, it dealt with different issues.

79 The defendant gave his background and training as an accountant and auditor over many years; the perception that he would not be offered a partnership in his then firms; and the ultimate establishment of a business as a sole practitioner, performing work for clients who operated self-managed superannuation funds.

80 Later, the defendant operated in partnership with Mr John Crow. Mr McGoldrick's evidence was that for reasons associated with the growing size of his corporate clients and the pressure on them to use auditing and accounting services of large national practices, many moved from that partnership and the partnership ended. Mr McGoldrick took up employment/engagement with a funds' management company named Funds Management Limited of which he was a director.

81 While working for Funds Management Limited, by virtue of the work performed by Mr McGoldrick for Investment Advisers of Australia Pty Limited ("Investment

Advisers") as an accountancy client, Mr McGoldrick first met Mr McIver, a financial adviser working for Investment Advisers.

82 Ultimately, Mr McGoldrick took up a role, introduced through work, within another investment company called Baden Pacific Limited, of which Mr McIver was a director and of which Mr McGoldrick became a director.

83 In or around 1998, Mr McGoldrick decided that he wanted to establish a self-managed superannuation fund for his personal superannuation. As a consequence of his previous relationship with Mr McIver, and his knowledge of Mr McIver's businesses advising clients on the administration and structure of self-managed superannuation funds, Mr McGoldrick approached him to help establish his own self-managed superannuation fund. Mr McGoldrick engaged Mr McIver's company, Databank, to take over administration of the self-managed superannuation fund (Affidavit of Mr McGoldrick, sworn 28/08/2014, [12]).

84 At or about the same time, Mr McIver enquired of the defendant, Mr McGoldrick, whether Mr McGoldrick was still a registered auditor and whether he would perform work auditing other self-managed superannuation funds which Databank administered.

85 Mr McIver advised Mr McGoldrick that each of the self-managed superannuation funds was managed by trustees and all investments of the Funds were decided by, or approved by, the trustees of the self-managed superannuation funds. Databank, according to the conversation Mr McGoldrick had with Mr McIver, did not have control of the assets of the Funds, because they were each self-managed superannuation funds. The trustees had the responsibilities of managing and choosing the investments (Affidavit of Mr McGoldrick, sworn 28/08/2014, [13]).

86 On the basis of the information conveyed to Mr McGoldrick, Mr McGoldrick agreed to audit other self-managed superannuation funds, which Databank administered. Mr McGoldrick performed the audit work by arrangement with Mr McIver and the work was generally performed after he had finished day work for another company. Mr McGoldrick attended Mr McIver's offices in the

city at or around 5.30pm and worked there on a couple of evenings per week (Affidavit of Mr McGoldrick, sworn 28/08/2014, [14]).

87 Completed financial reports were left by Mr McIver for Mr McGoldrick to review during the Christmas holiday period. For the purposes of obtaining information and access to documents, Mr McGoldrick had a key to Databank's offices.

88 On Mr McGoldrick's insistence, he had understood that the financial statements, which had previously borne his name, were amended so that his name did not appear. Nevertheless, it is not in contest in these proceedings that Mr McGoldrick audited the accounts of Cam & Bear and, in particular, the Lance Bear Pty Ltd Superannuation Fund. However, on Mr McGoldrick's understanding, Databank was responsible for and prepared the financial information and accounts, which Mr McGoldrick then audited.

89 On Mr McGoldrick's estimate, he audited approximately 70 self-managed superannuation funds for Databank, all of which were managed by Databank and most of which were small funds. Databank shared its offices with Mr Lewis, who ran several companies, as noted in previous evidence. Mr Lewis had an interest in Databank, as well as Lewis Securities, LSL Holdings and Lewis Nominees Pty Ltd.

90 The process for auditing a self-managed superannuation fund included a process whereby Mr McGoldrick would physically sit in Databank's offices and Mr McIver would make available to him the file for that self-managed superannuation fund. That file included documents such as financial statements and reports for that financial year and for previous financial years, correspondence, contract notes for share transactions, investment reports, bank statements, dividend advices, minutes and other documents.

91 The financial statements report generally included: the statement of financial position as at balance date; operating statement for the financial year; statement of cash flows for the year; statement of taxable income for the year; investment summary report as at balance date; investment income report for the year; investment disposals summary report for the year; trustees' declaration; audit report; and income tax return.

92 Mr McGoldrick testified that the first step on his part was that he would read through the entirety of the financial statements and reports for the financial year for the particular self-managed fund that he was auditing. During the course of this he would note the financial state of the Fund and note any items which would need checking or required further information or explanation (Affidavit of Mr McGoldrick, sworn 28/08/2014, [24]).

93 Primarily, the latter-mentioned items would include anything unusual or new, including property, which the Fund may have bought and for which the auditor would require a valuation or rates notices. Mr McGoldrick would then discuss the Fund with Mr McIver and any changes in investments, the value of investments or the identity of the trustees or the trust deed itself.

94 As would be expected, Mr McGoldrick checked all of the figures in the notes to ensure that the figures which appeared in the notes correlated with the figures in the financial statements. On occasion, Mr McGoldrick would check the trial balance, which Mr McIver usually provided to him in printed form (Affidavit of Mr McGoldrick, sworn 28/08/2014, [25]).

95 Mr McGoldrick had observed staff at Databank enter transaction details into a computer and knew that Databank utilised the BGL software to compile the transaction reports. Mr McGoldrick was familiar with BGL software and described its process. The trial balances and other documents provided to Mr McGoldrick were printed from the Databank computers.

96 The process undertaken by Mr McGoldrick is outlined in detail in his Affidavit and I do not repeat the details. It is sufficient for present purposes that, according to Mr McGoldrick, he examined the records and any changes that had occurred from the year previously and examined the records to determine whether there had been any breaches in the *Superannuation Industry (Supervision) Act 1993* (Cth). Mr McGoldrick made handwritten notes and produced some of them, but did not retain, according to his evidence, the remainder of the notes.

97 When introduced to audit the Fund the subject of these proceedings, Mr McGoldrick was informed by Mr McIver that the Fund operated in the same way as the other funds that Mr McGoldrick had audited and was managed by

Databank. According to Mr McGoldrick's evidence, he audited the Fund applying the process he describes otherwise in his Affidavit.

98 According to Mr McGoldrick, having been requested by Mr McIver to audit the Fund, the first year's audit was completed on or about 25 September 2002. Mr McGoldrick testified that he reviewed the Trust Deed of the Fund, dated 29 March 1996, and a Custodian Services Authority, dated 25 March 1996, by which Landav, as trustee of the Fund, authorised Lewis Securities to act as the Fund's settlement agent and trustee custodian of investments.

99 Mr McGoldrick testified that he also looked at the increase in assets and checked the ownership of shares in listed companies by examining the dividend notices and the purchase and sales records in the file. At all times, it seems Mr McGoldrick dealt with either Mr McIver or Mr Lewis and at no stage dealt with either Dr Bear or Ms Campbell (Affidavit of Mr McGoldrick, sworn 28/08/2014, [43]).

100 In examining the assets of the Fund, other than shares in listed companies, Mr McGoldrick noted that funds were held by LSL Holdings and, in particular, as at 30 June 2001, the Fund had deposited approximately $148,000 with LSL Holdings of which $33,000 was allocated to Dr Bear and $115,000 to Ms Campbell.

101 During the audit, Mr McGoldrick enquired of Mr McIver as to what documents were available to confirm the money with LSL Holdings, to which Mr McIver referred Mr McGoldrick to Mr Lewis. Mr McGoldrick asked Mr Lewis as to the documents available to confirm the money with LSL Holdings, to which Mr Lewis responded that he would show Mr McGoldrick the LSL Holdings computer records for the particular accounts.

102 Apparently, and importantly, Mr McGoldrick enquired of Mr McIver why the funds held in the Fund and the financial statements for the Fund disclosed that there were funds held by LSL Holdings described as "Cash - LSL Holdings P/L (Lance)" and "Cash - LSL Holdings P/L (Jenny)". The question was answered by Mr McIver that Mr Lewis had advised him (Mr McIver) that these are the "cash accounts for the Fund and this is how the cash accounts are mentioned

in his regular meetings with the trustees" (Affidavit of Mr McGoldrick, sworn 28/08/2014, [45]).

103 No further check was done by Mr McGoldrick, except a conversation with Mr Lewis, during which Mr McGoldrick asked why the financial statements described the money held by LSL Holdings as "Cash".

104 According to Mr McGoldrick, Mr Lewis advised of a suggested conversation between Mr Lewis and Dr Bear and Ms Campbell. The course of that conversation included information that suggested that Dr Bear and Ms Campbell were "happy with the Fund's financial reports describing the monies in the LSL Holdings account that way". The reason for their "happiness" was that "it's the only cash account the Fund has and every payment and receipt must go through it. In addition, LSL Holdings pays interest on the balance in that account". Mr Lewis does not give evidence of such a conversation with either Dr Bear or Ms Campbell (Affidavit of Mr McGoldrick, sworn 28/08/2014, [46]).

105 Mr McGoldrick stated that, he had further discussions with Mr Lewis as to the trustee's involvement in the management of the Fund. He was informed that there were monthly meetings between Mr Lewis and Dr Bear and/or Ms Campbell.

106 At no stage did Mr McGoldrick seek to confirm any of the information provided by Mr Lewis, who held an interest or a controlling interest in Databank and in the Lewis Group companies into which the Funds were "deposited". Mr McGoldrick also accepted Mr Lewis' advice that he operated the Lewis Group companies and that Lewis Securities financially supports the operations and holds an Australian Financial Services Licence and that Lewis Securities supports the overall operations of the other companies. Again, no independent source for that information existed and no further enquiries were made by Mr McGoldrick.

107 At least until 2007, Mr McGoldrick was aware that Mr McIver, on behalf of Databank, did not mail the financial statements and accounts directly to either Dr Bear or Ms Campbell. Rather, an envelope was given to Mr Lewis who then gave it to each of the individual trustees.

108 During the course of the auditing of the Fund accounts, and in particular for the financial year ended 30 June 2004, Mr McGoldrick was privy to the Management Agreement between Dr Bear and Ms Campbell as trustees of the Fund and Lewis Securities. Mr McGoldrick's Affidavit refers, in particular, to clause 4.2 (notes its incorrect numbering) and recites that the terms of the clause provide that Lewis Securities, being the Fund Manager, has the power "in its sole discretion" to purchase, to invest in, to acquire, to sell, to transfer, to exchange, to dispose of, or otherwise to deal with an Authorised Investment in the management of the Fund. An Authorised Investment, as recorded by the defendant, included unsecured deposits at call with Lewis Securities (Affidavit of Mr McGoldrick, sworn 28/08/2014, [58]).

109 The Court shall deal with the documents somewhat separately from the evidence now summarised. The only real issue of controversy as to whether the defendant audited the accounts is in relation to the year ending 30 June 2008. In around January 2009 Mr McGoldrick was informed by Mr McIver that an administrator had been called in for the Lewis Group, following the share market collapse.

110 According to Mr McGoldrick, he signed a statement of audit which included a provision of $950,000 for impairment of the Funds, gave that version of the audited accounts to Mr McIver and required him to hold them until the trustees had signed a minute approving the provision. Mr McGoldrick maintains that he did this because he was conscious of the imminent date for the filing of tax returns and that he trusted Mr McIver to hold the completed audit in escrow.

111 At the same time as signing the qualified audit (by qualified the reference is to the provision for impairment), Mr McGoldrick signed the tax return for the year ending 30 June 2008.

112 Mr McGoldrick attests to the fact that in or about September 2009 he was informed by Mr McIver that Mr McIver received no response to the letter as to the provision for impairment from the trustees. Mr McGoldrick accepts that, as the tax agent, he would have received notice if a tax return had not been lodged by the Fund and he took the view that a tax return had been lodged. It

does not seem that Mr McGoldrick sought or obtained the audited accounts and tax return for the year ending 30 June 2008 supposedly held "in escrow".

113 The cross-examination of Mr McGoldrick confirmed much of what has already been summarised and added a few other matters of relevance. Mr McGoldrick accepted that, to his knowledge, the Fund did not have a bank account, even though it had items described as "Cash" in their accounts. He also agreed that "Cash - LSLH" fell, in the view of Mr McGoldrick, into the category of cash equivalents, but, other than the conversations to which earlier reference has been made, did not verify that asset.

114 At one stage, Mr McGoldrick was referred to the files of Mr Lewis and confirmed that the deposit was in Lewis' records. This is a reference, as is clear from the evidence that was given, to the fact that the deposit matched the receipts and not a reference to "cash equivalents".

115 The defendant also relied upon the fact that he was told, either by Mr Lewis or by Mr McIver, that Mr Lewis and the trustees of the Fund were "very good friends".

116 The defendant was cross-examined as to his classification of the amounts described as "Cash - LSLH" in the statements and did not agree that the amounts were or should have been included in "all other investments". Rather, Mr McGoldrick testified that he defined investments as investments in outside securities and cash as deposits, cash equivalents and cash at bank.

117 Mr McGoldrick considered that the cash in LSLH (so described) was a cash management account. Further, he took the view that the "Cash" in LSL Holdings was equivalent to cash, because it was at call, which, on his understanding, was the terms of a letter between LSL Holdings and the trustees, being a letter sent to trustees of all funds. The defendant could not recall a specific letter in relation to LSL Holdings and the Fund. Nor did he have a copy. Mr McGoldrick was unaware whether LSL Holdings had a bank account.

118 Mr McGoldrick considered his relationship was with Databank, the entity undertaking the management and books for the Fund, not with the trustees.

119 There was further cross-examination in relation to the status of the amounts described as the "Cash" and how Mr McGoldrick understood the amounts to be held. Mr McGoldrick accepted that the item "Cash" in LSL Holdings was not cash on hand, but considered that it could have been a demand deposit as LSL Holdings was part of the Lewis Group and backed by Lewis Securities which was a non-bank financial institution.

120 Mr McGoldrick accepted that he had no independent evidence of the relationship between Lewis Securities and LSL Holdings. Nor did he have independent evidence that the cash was "at call".

121 Further, Mr McGoldrick accepted that the cash in LSL Holdings was an unsecured loan that was also a demand deposit. However, Mr McGoldrick accepted, further, that if LSL Holdings was not supported by Lewis Securities, then the amount could not have been seen and would not be regarded by him as a demand deposit. If the amount were not a demand deposit then, to be a cash equivalent, as he understood the term, it would need to meet the definition to which Mr McGoldrick was referred.

122 Otherwise, Mr McGoldrick believed that the note in the audited accounts, being Note 9, is generic and inaccurate. In that respect, Mr McGoldrick accepted that each of the notes to the financial statements were in the same form and that the money in LSL Holdings was treated in all the statements as cash in hand.

*Tony Lewis*

123 Mr Lewis affirmed an Affidavit dated 27 February 2015, which was read by the defendant in the proceedings, and was not the subject of cross-examination. Mr Lewis referred to Lewis Securities Ltd and Databank as [his] companies and to the fact that the plaintiff transferred the management from Austrust to Databank and Lewis Securities because it could provide a "cheaper service".

124 Mr Lewis advised Dr Bear to open a bank account for his superfund with St George and was rebuffed on the basis that St George would charge bank fees whereas Databank and/or Lewis Securities did not.

125 Further, in a conversation with Dr Bear, Mr Lewis made clear that if Dr Bear made contributions to LSL Holdings, rather than Lewis Securities, he would

obtain an interest rate of approximately 1.0% above the Lewis Securities' rate and gave the reason that a higher rate was paid, being "that the two companies invest in different investments. Lewis Securities' investments are safer as it invests in government bonds and things like that" (Affidavit of Mr Lewis, affirmed 27/02/2015, [4]). There is no mention in that conversation of the risk associated with that alteration. Nor is there a description of the nature of the investments by LSL Holdings. Further, it was not suggested in this conversation that the nature of the "money" held by LSL Holdings was an unsecured loan or of any discussion about the moneys being loans, not "Cash" or any preference. Most importantly Mr Lewis does not deny an expressed preference by Dr Bear and Ms Campbell for money or cash amounts.

126 In that conversation, Dr Bear advised that he would invest at the higher interest rate.

127 On June 30 in each year it was Mr Lewis' usual practice to send a transaction history for the Fund showing movements in the deposits of each beneficiary with LSL Holdings. A monthly account of recent transactions was often given to Dr Bear by hand when they met.

*Expert Reports*

128 Each party qualified an expert in the area of auditing and accounting management. The plaintiff qualified Richard Rassi of Riclin Consulting and the defendant qualified Mr Dumbrell of DFK Laurence Varnay, Accountants and Business Advisors. Each produced a report dated 24 December 2013 (Mr Rassi's Report) and 24 September 2014 (Mr Dumbrell's Report) respectively.

129 On 17 June 2015 the experts reported jointly (Joint Report, Exhibit C) on questions posed by letter dated 19 May 2015 at the direction of the Court, and in accordance with the usual practice. The report discloses continuing differences between each of the experts and, otherwise, the Joint Report stresses the relevant areas in which there is contest.

130 The Joint Report overtakes some of the conclusions and/or opinions expressed in the initial reports. Nevertheless, there are significant areas of agreement and

some of the areas of seeming disagreement in the Joint Report were clarified during the course of examination. The examination occurred in conclave.

131 Notwithstanding the clarification, either in whole or in part, during the course of the proceedings the reports, in their initial form, must be read and understood to understand fully the answers given in the Joint Report and in oral evidence. Included in my description of initial reports is the supplementary report of Mr Rassi of 31 March 2015 (Exhibit B).

132 Before dealing with the content of the reports, the Joint Report and the evidence adduced during oral examination, it is necessary to revert to some detail of the accounts that were audited. It is unnecessary to deal in detail with the entries of which there are many. It is sufficient, for present purposes, to recite (although previously mentioned) that there is, in each year's financial statements, an entry that is in the following terms for each of the beneficiaries of the Fund:

> "Cash - LSL Holdings P/L (Lance) …"
>
> "Cash - LSL Holdings P/L (Jenny) …".

133 Further each such account has an auditor's note, being Note 9, in the following terms:

> "**9. Reconciliation of Cash**
>
> For the purpose of the statement of cash flows, cash includes cash on hand and in banks. Cash at the end of the reporting period as shown in the statement of cash flows is reconciled to the related item in the Statement of Financial Position or Statement of Net Assets as follows …".

134 The experts agreed, in the Joint Report, that the relevant accounting standards applicable at the time that the reports were audited, defined "cash" as "cash on hand and cash equivalents". In turn, the relevant Accounting Standard defined "cash equivalents" as:

> "highly liquid assets 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, and borrowings which are integral to the cash management function and which are not subject to a term facility (AAS 28 para 14.1)" (Exhibit C, question and answer 1).

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.

136 Mr Rassi gives the basis upon which he formed that opinion which, in part, included the deficiency of current assets as compared to current liabilities and loans payable at call in the LSL Holdings statements.

137 Further, a significant proportion of the assets held by LSL Holdings represented unlisted assets, non-performing assets and non-current assets, which, on their face, would not ordinarily be readily realisable. Moreover, there was an excess of liabilities over assets held by LSL Holdings at each of the reporting days between 2003 and 2007.

138 Mr Dumbrell (DFK Laurence Varnay) noted that the Fund is not a reporting entity as it is a self-managed superannuation fund. He noted the capacity to withdraw up to 5% of the Fund value (not exceeding $100,000) after three business days' written notice and a greater amount with at least one week's written notice.

139 The loan movement schedule indicated that the statement for LSL Holdings was used as a "bank account or cash management account" and noted that the term "cash at bank" is not a perfect form of investment, and reminded the reader of the Joint Report of the insolvency of Barings, Northern Rock, Lehman Brothers, similar incidents overseas and the need for the Australian government to underwrite Australian banks.

140 The note as to the overseas issues and the "imperfection" of the term "cash at bank" was not responsive to any question asked of the experts. Further the response did not directly answer the question posed.

141 Of the two experts who gave evidence, I prefer the evidence of Mr Rassi. I do so because Mr Dumbrell acted, both in the opinions expressed in the Joint Report and to a greater extent in the oral evidence, as an advocate, rather than with the independence one would prefer of an expert giving evidence. Further, during the course of the oral examination Mr Dumbrell seemed to avoid direct answers to questions and, instead, tended to give explanations of questions

that had not been asked and which, it seemed, he considered assisted the defendant.

142 Nevertheless, each expert agreed that financial statements were the responsibility of the trustees, as is made clear in the trustees' declaration, and, on behalf of the trustees, the management company. The function of the auditor is to ensure that the financial report of the Fund is presented fairly.

143 Notwithstanding the foregoing, Mr Rassi took the view that the auditor was required to qualify his report under the relevant standards (AUS 702 and AUS 802), if the auditor were to draw a conclusion, based on the results of audit procedures, that the line item "Cash" was materially misstated or there was an inability to obtain sufficient and appropriate audit evidence in regard to the disclosure, existence or valuation of the "Cash" entry.

144 Mr Rassi expressed the view that if the auditor were to have requested and received a set of financial statements from LSL Holdings, he would have noted, as early as 2002, that LSL Holdings had a deficiency of assets, requiring the qualification to which the expert had earlier referred and which is recited above. The deficiency of assets grew each year from 2002 through to 2008, which, in the opinion of Mr Rassi, should and would have created sufficient concerns and doubt in the mind of the auditor as to the recoverability of the balances before 2008.

145 As to whether a competent auditor, exercising reasonable care, skill and diligence, would have concluded that the Fund's Financial Reports should have included a qualification or provision for impairment prior to 2008, Mr Dumbrell expressed the view that it was not probable, seemingly because professional judgement in forming an audit opinion is based on the information available at the time that the audit was performed and, therefore, one is not entitled to utilise hindsight. Mr Dumbrell then suggests that since the only publicly available balance sheets were those for Lewis Securities lodged with ASIC and they showed net assets of an amount over $300,000 from June 2003 to June 2007, no qualification was likely.

146 Mr Rassi took the view that if the auditor had sought and obtained the financial statements of LSL Holdings, then the net deficiency in assets previously

recited, would have been obvious and further investigation or a qualification necessary. In other words, Mr Rassi expressed the opinion that it was insufficient for there to be either/both a verbal undertaking by an interested party as to whether Lewis Securities would back LSL Holdings and an oral expression, from the person who is interested in both the corporate manager of the Fund and the company into which monies are being deposited, as to the relationship and the financial strength.

147 Mr Rassi took the view that the auditor should have sought the financial statements of LSL Holdings, which, if provided, would have disclosed the deficiency in assets and, if not provided, would have given concern as to the lack of transparency and/or availability of assets to underpin the liabilities.

148 Each expert agreed that it is likely or probable that a competent auditor, exercising reasonable care, skill and diligence, would have made enquiries, prior to 29 October 2008, to obtain audit evidence about the financial condition of LSL Holdings for the corresponding financial period (Exhibit C, question and answer 4).

149 The experts differ as to what enquiries a competent auditor, exercising reasonable care, skill and diligence, would have undertaken in order to obtain the audit evidence to which the experts referred and which is recited in the immediately preceding paragraph. Both experts agree (Exhibit C, question and answer 5) that the steps or enquiries would have included (but are not limited to):

(a) communication with those charged with the governance of the Fund, as well as administrators and investment managers as considered necessary;

(b) request and review any agreements relating to the balance, to understand the arrangements including the rights and obligations of the parties;

(c) request and review the financial reports of LSL Holdings;

(d) enquiries about the financial condition and going concern of LSL Holdings, with corroborative evidence and cash flow projection;

(e) written representations from the administrator, custodian, investment manager and Trustee;

(f) the existence of any financial guarantees or letters of financial support, verifying the existence of undertakings between corporate bodies upon which the Fund would need to rely;

(g) communication with the Trustee to alert them to any concerns arising from the audit procedures and the potential impact on the accounts and auditors report from such concerns.

150 The foregoing steps were not undertaken by Mr McGoldrick. The difference between the two experts related to their agreement that sufficient appropriate audit evidence is a matter of professional judgement, as to the procedures to be undertaken to obtain such evidence, and each expert has a different view as to the exercise of that professional judgement. Nevertheless, the auditors agree that there was no **obligation** to consider the financial condition of LSL Holdings, as the decision about what procedures and auditor undertakes is a matter of professional judgement.

151 However, Mr Rassi expressed the opinion that, given the materiality of the balance held in LSL Holdings and the risk of valuation misstatement associated with balances held with related parties, it is probable that a competent auditor would have considered the financial condition of LSL Holdings (Exhibit C, question and answer 7), in order to form an opinion about the recoverability and liquidity of the asset described as "Cash".

152 The auditor is not required to inform the Trustee of the Fund of the financial condition of LSL Holdings, but an auditor is required to communicate with those charged with the government of the Fund (i.e. the Trustees) at the beginning and completion of the audit and, otherwise, during and at the end of the audit process if there were a material matter to report. There was no communication between Mr McGoldrick and the Trustee.

153 Over and above the answers to questions provided in the Joint Report, Mr Dumbrell volunteered, in Appendix A to the Joint Report (Exhibit C) the terms of the Trustees' Declaration for each of the financial reports; and the terms of ss 35B and 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

154 It was a requirement of Commonwealth Legislation that self-managed superannuation funds be audited. The reference, by Mr Dumbrell, to the

"insecurity" in cash at bank is a reference to events overseas. The Australian government acted to ensure that "cash at bank", in relation to any bank in Australia was underpinned and was not "insecure".

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.

**Duty of Care**

156 The provisions of s 113 of the *Superannuation Industry (Supervision) Act 1993* (Cth), as it then existed and after 24 September 2007, s 35C of the aforementioned Act, required the audit of the Fund. The defendant was appointed an auditor and, in carrying out his functions, he dealt solely with the appointed manager of the Fund and the principal thereof, who was also the principal of the corporate entity into which investments were placed.

157 At no stage, during the course of the audit did the defendant deal with the Trustees or attempt to deal with the Trustees. For that matter, the auditor did not ensure that the audited accounts were provided to the Trustees. For all that was known to the auditor, the declarations of the Trustees and all other information, was fraudulently provided.

158 In terms of the claim for negligence, the relevant principles are now described in the *Civil Liability Act 2002* (NSW), which applies to "negligence" as defined in the *Civil Liability Act* and includes any "failure to exercise reasonable care and skill" (s 5 of the *Civil Liability Act*). The *Civil Liability Act* then, largely but not entirely, reflects the common law in relation to duties of care. By s 5B of the *Civil Liability Act* a risk, against which precautions are required, is required to be foreseeable, not insignificant and of a kind that a reasonable person in a defendant's position would have taken precautions to avoid.

159 The Court must enquire as to that which a reasonable person would have done to avoid a reasonably foreseeable risk, not on the basis of hindsight, but on the basis of a reasonable person at the time and examining the matters prospectively: *Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62; *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* (2009) 239 CLR 420; [2009] HCA 48; *New South Wales v Fahy* (2007) 232 CLR 486; [2007] HCA 20.

160 Moreover, the mere fact that a defendant did not take an alternative course of conduct open to the defendant, which would have eliminated the risk of damage, does not necessitate a finding that the defendant was negligent. The plaintiff is required to show that the defendant was not acting reasonably in failing to take the alternative course: *Dovuro Pty Limited v Wilkins* (2003) 215 CLR 317; [2003] HCA 51 at [38].

161 Where a Court is dealing with the duties of an auditor, the provisions of s 50 of the *Civil Liability Act* prevents a professional from being liable in negligence, arising from the provision of professional services, if it is established that the professional acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice, at the time that the service was provided. That does not allow an escape from liability if peer professional opinion is irrational and does not prevent the finding of liability in circumstances where there are differing peer professional opinions widely accepted.

162 Nevertheless, one must take into account that a liability for negligence imposes a burden to avoid a risk of harm, including the burden of taking precautions to avoid similar risks of harm (s 5C of the *Civil Liability Act*) and the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk and the social utility of the activity that creates the risk of harm (s 5B(2) of the *Civil Liability Act*).

163 On the question of causation, the *Civil Liability Act* requires that the negligence was a necessary condition of the occurrence of the harm and that it is appropriate for the scope of the negligent person's liability to extend to the

harm so caused (s 5D of the *Civil Liability Act*): see *Adeels Palace*, supra; *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5.

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).

165 On the basis of the principles established by the *Civil Liability Act,* and under the common law, there can be little doubt that the auditor, being Mr McGoldrick, the defendant in these proceedings, 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. If the auditor were to come to the conclusion, exercising reasonable care, skill and diligence, that the financial statements are not presented fairly (or the auditor were not able to come to a view as to whether the financial reports are presented fairly), 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 Trustees the basis upon which the view had been formed.

166 On the material available to the Court, it cannot be said that the amounts described as "Cash - LSL Holdings P/L (Lance)" and "Cash - LSL Holdings P/L (Jenny)" fairly represented the amounts contained therein, particularly given that the financial statements themselves defined cash in the terms of Note 9 to the financial statements.

167 It would be impossible, and would have been impossible, in any of the years between 2003 and 2007 for an auditor, exercising reasonable care, to come to the conclusion that the amounts described in the foregoing terms have the qualities described by the term "Cash", as that term was defined in the statements.

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

**Actions in Negligence, Including Actions for Breach of a Duty of Care and Misrepresentation**

169 The amount classified as cash in the statements was $471,511.27 (year ending 30 June 2003); $428,594.09 (year ending 30 June 2004); $512,547.52 (year ending 30 June 2005); $717,991.72 (year ending 30 June 2006); $1,236,597.50 (year ending 30 June 2007) and $1,582,469.64 (year ending 30 June 2008). The amount of "loss" that potentially could have occurred as a result of the breach of duty is substantial. It is not, however, the sum of each of the amounts described as "Cash" to which reference has now been made.

170 As to Mr Dumbrell's opinion, recited in his report, there are a number of inadequacies associated with the opinion. First, the opinion is qualified significantly by the Joint Report and even more by the oral evidence of Mr Dumbrell. Secondly, to the extent that Mr Dumbrell expresses the opinion in the Joint Report (Exhibit C, Annexure A) that is an opinion that does not answer any of the questions referred to the experts and, more importantly, the answer does not disclose a basis for the opinion expressed.

171 I accept the submissions of the plaintiff, in this regard, that the Management Agreement (Exhibit CB4, p 1119-27) is an agreement to which LSL Holdings is not a party. Nor, in its own terms, would it allow for a deposit or investment in LSL Holdings by Lewis Securities.

172 Secondly, despite Mr Dumbrell's insistence that the corporate entities, Lewis Securities and LSL Holdings were "related", there is no evidence upon which anyone could uphold such a proposition. It is true, as earlier recited, that Mr Lewis was a director of Lewis Securities and of LSL Holdings. Of itself, that does not render the companies related. Nor does it provide any comfort for the proposition that Lewis Securities would cover any debt or shortfall for which LSL Holdings may become liable.

173 Thirdly, given the known absence of a bank account in the name of LSL Holdings, the three specified transactions upon which Mr Dumbrell relies for his view to indicate that the account was being used as a bank account or cash management account, would, in turn, raise concerns associated with the operation of the account and do not withstand scrutiny.

174 First the amount of $264.55, which was a payment upon which Mr Dumbrell relied, was not paid (as indicated) but, at best, was "paid" (meaning credited) to Lewis Securities or another entity for the purpose of that entity paying the creditor as indicated. Secondly, LSL Holdings did not receive dividends from Wesfarmers (WES) on 31 March 2008 but, at best, received money from Lewis Securities (or some other entity), which were credited to the books of LSL Holdings. Thirdly, the assumption that the ATO was paid was based upon an assumption that Mr Dumbrell made that tax returns were lodged, because "within the group somebody is paying the tax office". That assumes that tax was payable and is an otherwise invalid assumption not requested or required by any of the instructions. Lastly, as earlier stated, Mr Dumbrell was unaware of what assets might stand behind the money described as "Cash".

175 On the contrary, as pointed out by Mr Rassi, the current liabilities exceeded current assets and total liabilities exceeded total assets. There were insufficient funds in LSL Holdings to satisfy its current liabilities, when and if called upon.

176 The comparison by Mr Dumbrell of LSL Holdings with any money at bank is, at a theoretical level, appropriate. However, at anything other than a theoretical level, it is wholly unreasonable.

177 As has been obvious for many years, the political reality in Australia is very different from that which occurred overseas. Australian Governments have regulated banks to a far greater extent than overseas governments have regulated and do regulate financial institutions. Moreover, as a consequence of that regulation and the comfort and confidence Australian Governments have in the financial institutions, Australian Governments have guaranteed monies held in banks and building societies.

178 Nevertheless, the comparison between banks and LSL Holdings is accurate to one extent. Monies held as cash by a bank is not "cash" in any sense of that term. It is the value of a deposit and the client possesses a chose in action that allows the client to demand and/or redeem money, to the value of her or his account at the bank. It is a claim in contract.

179 Ordinarily, there are no trust arrangements and there is no "cash" (being the physical possession of legal tender). If a bank were to fail, a client would be in

no different position than was the plaintiff in relation to LSL Holdings and/or Lewis Securities.

180 The fundamental distinction is the confidence with which an auditor can approach the liquidity of a bank or financial institution of that kind, which confidence is not appropriate for a company such as Lewis Securities or LSL Holdings (assuming, without deciding, that the two are interchangeable).

181 The process of the audit conducted by the defendant was itself problematic. The defendant, as an auditor, realised the difficulties associated with the issues now before the Court. He sought to satisfy those concerns by a conversation with Mr Lewis as to whether the amounts shown as "Cash" were fairly described in that way (including, for this purpose, the term "cash equivalents").

182 That conversation occurred with a principal of the investment company into which funds were placed, who also managed the Fund and produced the financial statements, and who was the "postal conduit" for the information for the auditor, and from the auditor, from and to the trustees.

183 It requires little imagination, and almost no foreseeability, to understand the difficulties associated with such a process and the breach of duty associated with reliance upon such a conversation, without independent documentary material. The auditor, being the defendant in these proceedings, had never met either one of the principals in the Trustee company; had never directly communicated with either of them about any matter; and had been engaged by and communicated with only those people associated with the receipt of the funds from the Fund, being the same people who managed the Fund and compiled their books. The auditor considered that his relationship was with them (Transcript, p 213 line 20-30; p 218 line 50; and p 240 line 40).

184 The manner of the signing of the tax return and the audited accounts for the year ending 30 June 2008 and giving them "in escrow" to another, quintessentially describes the lack of care of the defendant in performing the audit and ensuring appropriate procedures were in place.

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.

**Causation and Third Party Liability**

187 As earlier stated, I prefer the evidence of Mr Rassi to the evidence of Mr Dumbrell. Apart from the reasons already given, the conclusions of Mr Rassi more readily accord with a more rational approach, where a rational approach is not overtaken by particular expertise.

188 I also considered Dr Bear to be a truthful and, generally, reliable witness. By "generally", I refer to the proposition that the passage of time between many of the events in question and the requirement on Dr Bear to compile his Affidavits (and give oral testimony) led to a failure to recall passing or inconsequential conversations.

189 If I were required to choose (or were able to choose), I would prefer the evidence of Dr Bear to that of Mr Lewis. I have serious doubts that the passing conversations to which Mr Lewis attests were recalled in precise terms, or at all, particularly in circumstances where the result of the conversation is "self-serving". Mr Lewis' Affidavit is replete with self-serving comments.

190 On the other hand, Dr Bear was truthful, in my view at all times, even on those occasions where he could not recall precise conversations or any conversation at all, and was not inclined to give evidence that, even in his view, necessarily assisted his case.

191 The difficulty with a witness who does not recall a conversation, as against a witness who recalls a conversation, is that it is far more difficult to prove that a

conversation did not occur. One has, on the one hand, an absence of recollection, as against, on the other hand, a definite conversation to which the witness attests. If it were not for the fact that Mr Lewis was not cross-examined on his recollection, even to test it, without necessarily putting the opposite, I would have some difficulty accepting the proposition that the conversations to which Mr Lewis attests were genuinely recalled. Nevertheless, I have not heard or seen Mr Lewis give evidence and, for that reason, I do not and cannot consider him untruthful or unreliable.

192 The difficulties in the plaintiff's case are more fundamental. Negligence cannot occur without damage. The breach of duty by the defendant is not actionable unless it has caused damage. Even though there are claims under statutory liability, they too depend upon the proposition that the misrepresentation or breach of duty has caused damage.

193 I have already discussed, as a matter of general principle, the issues associated with causation under the *Civil Liability Act*.

194 In s 5D of the *Civil Liability Act*, the legislature requires that, for damages to be awarded, the negligence must have caused the particular harm which, relevantly, means that the negligence was a "necessary condition" to the occurrence of the harm. In other words, in order for the plaintiff, in these proceedings, to establish that the breach of duty by the defendant caused the damage for which they sue, under s 5D(1)(a) of the *Civil Liability Act*, the plaintiff must establish that they would not have suffered the particular harm but for the defendant's negligence: see *Strong v Woolworths Ltd*, supra.

195 This does not mean that there cannot be more than one cause or a combination of causes for which liability arises. This was made clear by the High Court in *Strong v Woolworths Ltd*, supra. Nevertheless, if damage would have occurred in the absence of the negligence of the defendant, then damages cannot arise from the defendant's conduct.

196 Much was made of the circumstances of the 2008 audit. There can be little doubt that the conduct of the defendant in signing a tax return and an audit statement and providing signed copies to another (not being the Trustee) to hold in "escrow", pending agreement of the Trustee, was extraordinarily

careless. I have absolutely no doubt that it was a breach of the duty of the auditor to the trustee company.

197 But, by the time that the 2008 audit occurred and the steps taken to leave signed copies of the tax return and audited statements with a person other than the Trustee (or to sign them in the first place), the damage had occurred. Assuming, without, for this purpose, deciding, that the 2008 tax return and audit document were prepared without an impairment of $950,000, what, if anything, would have altered?

198 The damage, being the administration of Lewis Securities and LSL Holdings occurred prior to the preparation of the accounts and the inclusion in the accounts of the impairment. As a consequence, the difficulty with obtaining that which was held in "Cash" in the statements of LSL Holdings arose well before any audit was completed.

199 In terms of the damage suffered by the plaintiff, the 2008 audit is wholly irrelevant. No conduct of the Trustee, based upon the 2008 audit, could have altered or ameliorated the damages suffered. The issue of causation, therefore, 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".

200 The financial statements of the Fund were compiled by Databank and/or Mr Lewis. Having been compiled by Databank, the defendant, Mr McGoldrick, audited the accounts to establish whether or not the accounts reflected a fair representation of the financial position of the Fund. The description of the term "Cash" was not a fair description and did not fairly represent (particularly in light of the definition at Note 9) the liquidity of the asset. I accept that the liquidity of the asset was a factor that was important to Dr Bear and Ms Campbell.

201 The difficulty with such a proposition is that monies held in any cash management account represent, to the client, a chose in action, which allows the client to withdraw the amount standing to the credit of the client in the account at the financial institution. However, there is a difference between an account in a major financial institution and an account in an institution, which,

itself, is not a bank, if for no other reason than legislation required minimum liquidity of banks.

202 Once the item "Cash" is understood to be a loan to LSL Holdings, used by them to purchase non-liquid and/or non-current assets, the amount can no longer be described as a cash equivalent and could not be described as "Cash" in the financial statements of the Fund. Nor, if the defendant were abiding by his duty, could he certify that the financial statements represented fairly the state of affairs of the Fund.

203 Nevertheless, the statement that the amounts were "Cash" was a statement made by Databank and/or Mr Lewis. The statement by the defendant was to the effect that the statements by Databank (or Mr Lewis) fairly represented the state of affairs of the Fund. Each was a misrepresentation and, in terms of statutory liability, was false and/or misleading.

204 An audited account, by definition, certifies that the financial statement audited represents fairly the state of affairs of the entity, for the year passed. The question with which the Court has not yet dealt is whether the representation by the auditor was causative of the loss in value in earnings. Necessarily, as earlier stated, an audit occurs after the investments have been made and after the year in which the investments have been made. As a consequence, an audit could not affect the investments undertaken in the year to which the audit relates.

205 The Court has already remarked that, in terms of the losses incurred, the 2008 audit is irrelevant. It issued after the losses had occurred. To the same effect, the audit of the 2003 year is irrelevant to any investment made in the 2003 year. Nevertheless, as I understand the plaintiff's case, it is said that the audits for the 2003, 2004, 2005, 2006 and 2007 years were, at least in part, causative of a continuation of the practice of having unsecured loans to LSL Holdings.

206 Dr Bear attested that if he were to have known that the loans to LSL Holdings were unsecured, it would have been inconsistent with that which Dr Bear had informed Mr Lewis and inconsistent with Dr Bear's motivation. As earlier recited, 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.

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. 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.

208 While the comment of McHugh J in *Chappel v Hart* (1998) 195 CLR 232; [1998] HCA 55 at [32], Note (64), was directed at personal injury claims, it is as relevant to an issue such as this. The finding, which the Court makes, that Dr Bear is a truthful witness does not necessarily require the Court to find that the evidence of Dr Bear, that he would have ceased investing in that way, is reliable. As McHugh J points out, Dr Bear, in light of the subsequent events, would have little doubt that he would have altered his investment policy. That is true. But the Court is required to determine, albeit subjectively, that which the Trustees would have done if the accounts were fair and accurate.

209 As the evidence of Dr Bear makes clear, prior to 2008, Dr Bear trusted Mr Lewis. Indeed, on the evidence, he was a personal friend of Dr Bear. Further, on the evidence before the Court, Dr Bear drew little or no distinction between Lewis Securities and LSL Holdings.

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 Trustees and Mr Lewis, which trust was misplaced and/or abused.

213 Further to the foregoing, the Court makes the following conclusions:

(1) The defendant has breached his duty of care to the plaintiff;

(2) 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";

(3) The failure to take such steps was a failure to take precautions against a risk of harm, which was foreseeable, not insignificant, which precautions are precautions that, in the circumstances present here, an auditor, acting reasonably, would and should have taken;

(4) Further, in not taking those steps, the defendant was not acting in a manner that was widely accepted in Australia by peer-professional opinion as competent professional practice.

214 Further, the Court concludes:

(1) If damage were to have been occasioned by the failure to act with reasonable care, skill and diligence in auditing the financial statements of the Fund from 2002 to 2008, it would be appropriate for the scope of the liability of an auditor to extend to the harm so caused;

(2) Nevertheless, the Court is not satisfied that the failure to act with reasonable care, skill and diligence and/or the failure to ensure no misstatement occurred in the financial statements, was a necessary condition to the occurrence of harm that may have been caused.

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, 33 1/3% (or 33.33%), meaning, if the Court were satisfied as to causation, the defendant Mr McGoldrick would be liable for 21 2/3% (or 21.66%) of the loss incurred.

216 In all of the circumstances, the Court makes the following orders:

(1) Judgment for the defendant;

(2) The plaintiff shall pay the defendant's costs of and incidental to the proceedings, not previously covered by a costs order;

(3) The parties have liberty, within seven days, to make application for a different or special order as to costs by submission of no more than three pages in length, accompanied by any document upon which the application relies that is not otherwise in evidence. Any party affected by such application may respond within a further seven days by submission of no more than three pages in length, accompanied by any other document not otherwise in evidence;

(4) Proceedings dismissed.

**********

**Amendments**

05 October 2017 - corrections to grammatical and typgraphical errors