

Re CANBERRA BABINGTON PTY LTD
BC202104062

Unreported Judgments NSW · 66 Paragraphs

Supreme Court of New South Wales — Equity — Corporations List

Emmett AJA

2018/27127

3, 4, 15 December 2020, 20 May 2021

In

the matter of Canberra Babington Pty Ltd [2021] NSWSC 552

Headnotes

EQUITY — Trusts and trustees — Beneficiaries — Standing to bring proceedings —
Derivative suit in name of trustee — One group of beneficiaries seeking leave to sue another group in
the name of trustee — Special or exceptional circumstances — Trustee refuses to cross-claim but
received judicial advice that defending claims justified — Whether proposed action is meritorious.

CORPORATIONS — Members' rights and remedies — Oppression — Where conduct is
oppressive to, unfairly prejudicial to, or unfairly discriminatory against minority — Dilution of
shareholding via rights issues.

(ACT) Companies Ordinance 1962 s 186

(CTH) Corporations Act 2001 s 601WBI

(NSW) Corporations Law, s 260 (under the Corporations Act 1989 Cth))

(ACT) Legislation Act 2001 s 23

(NSW) Limitation Act 1969 s 23

(NSW) Trustee Act 1925 ss 9, 75

; *Chanwan v Euphoric Pty Ltd* [2009] NSWSC 805 ; *Hayim v Citibank NA* [1987] AC 730 [☞](#) ; *Hunt v Summerharvest Pty Ltd* [2007] QSC 210 ; *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560 ; *Pearson v Commission of Taxation* (2001) 116 FCR 357; [2001] FCA 1427 ; *Porker v Richards* [2016] SASC 98 ; *Ramage v Waclaw* (1988) 12 NSWLR 84 ; *Re Perpetual Trustee Company Ltd (as trustee for the Joseph Babington Davis Settlement)* [2020] NSWSC 1574 ; *TAL Life Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 ; *Yeatman v Yeatman* (1877) 7 Ch D 210 [☞](#) , cited

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Introduction

[1] These proceedings (**the 2018 Proceedings**) are concerned with the affairs of the first defendant, Canberra Babington Pty Limited (**the Company**), and the affairs of the Joseph Babington Davis Settlement Trust (**the Trust**). The only property of the Trust has been shares in the capital of the Company.

[2] The Trust was established by indenture made at Canberra in the Australian Capital Territory on 19 March 1934 (**the Trust Deed**). By the Trust Deed, Joseph Babington Davis (**the Settlor**) settled the sum of £26,500 on Alexander Paterson and Michael Fleming (**the First Trustees**) to be held by them on trust to purchase and acquire 26,500 fully paid up “B” ordinary shares of £1 each in the capital of the Company, which was then known as Canberra Babington Trust Limited. The First Trustees subsequently acquired shares in the Company accordance with the terms of the Trust.

[3] There have been changes of trustees since the First Trustees were appointed. The First Trustees were succeeded by Permanent Trustee Company (Canberra) Limited (**PTCCL**). By a deed dated 25 May 2005, PTCCL was replaced as trustee of the Trust by The Trust Company (UTCCL) Limited (**UTCCL**) and, on 1 March 2015, UTCCL was replaced as trustee by the sixth defendant, Perpetual Trustee Company Limited (**Perpetual**). Perpetual is the present trustee of the Trust.

[4] Under the terms of the Trust, upon the death in May 2014 of Veronica Lees (née Davis) (**Veronica**), a daughter of the Settlor, the grandchildren of the Settlor became entitled in equal shares to the *corpus* of the Trust. The Settlor had eight grandchildren by two of his four children. The five plaintiffs in the proceedings (**the Davis Descendants**), who are the children of Maurice Davis, a son of the Settlor, are four of the eight grandchildren and the executor of the estate of another of the grandchildren. The second, third and fourth defendants in the proceedings (**the Lees Descendants**), who are the children of Veronica, are the other three grandchildren. The fifth defendant is an entity associated with the Lees Descendants.

[5] Until November 1961, the shares in the Company acquired by the First Trustees on behalf of the Trust represented 54.6% of the issued capital of the Company. However, as a consequence of four rights issues made by the Company from November 1961 to 1997 (**the Rights Issues**), the proportion of the share capital in the Company held on behalf of the Trust was reduced to 14.2%. The Davis Descendants complain that the Rights Issues were made at par rather than for the true value of the shares issued and therefore at a substantial discount from their true value. They complain that each of the Rights Issues was oppressive and was made for an improper purpose. They also make complaints about

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other aspects of the conduct of the affairs of the Company that are alleged to have reduced the value of its shares and, accordingly, the value of the shares held on behalf of the Trust.

[6] The Trust Deed was created in the Australian Capital Territory, the sole asset of the Trust was a fund to be invested in a parcel of shares in the Company, which was incorporated in the Australian Capital Territory and PTCCL, the trustee from 1940 to 25 May 2005, was incorporated in the Australian Capital Territory and conducted its business as a trustee in the Australian Capital Territory. Having regard to the place of administration of the Trust, the *situs* of the assets of the Trust and the place of business of the Trust, the Trust was more closely connected with the Australian Capital Territory than with New South Wales and the law of the Trust was therefore the Australian Capital Territory.

[7] The 2018 Proceedings were commenced on 25 January 2018. In the course of the proceedings, the Lees Descendants contended that the Davis Descendants do not have standing to bring proceedings making claims about the conduct of the affairs of the Company because they were not members of the Company. The Davis Descendants did not accept the correctness of that contention but, in order to guard against the possibility that it is correct, the Davis Descendants now seek leave to make the same claims in right of Perpetual, as the present trustee of the Trust.

[8] By Interlocutory Process filed on 18 November 2020 (**the Interlocutory Process**), the Davis Descendants applied for leave to file and serve a third further amended originating process and a second further amended statement of claim in the form exhibited to the affidavit of Andrew Young sworn on 17 November 2020. Since that time, the proposed amended pleadings have been through several iterations. The current iteration of the proposed third further amended originating process and second further amended statement of claim (**the Amended Pleadings**) was served at 4.08pm on 4 December 2020.

[9] When the Interlocutory Process first came on for hearing, numerous pleading complaints were raised by the defendants in respect of the earlier iterations of the proposed amended pleadings. Those complaints have now been resolved and the question remaining is whether the Court should grant leave to the Davis Descendants to file the Amended Pleadings in so far as they make claims against the Company in right of Perpetual as the present trustee of the Trust.

[10] Some delay was occasioned after the first hearing of the Interlocutory Process to enable Perpetual to make a final decision as to whether or not it would file a cross-claim in the proceedings seeking the relief that the Davis Descendants wish to seek by the Amended Pleadings. Ultimately, as appears below, Perpetual has declined to file a cross — claim.

[11] The relief sought in the Interlocutory Process is opposed by all defendants other than Perpetual. I have had the advantage of written submissions from the parties as follows:

- Davis Descendants — 26 November 2020;
- The Company — 2 December 2020;

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- Lees Descendants — 1 December 2020;
- Perpetual — 1 December 2020;
- Davis Descendants submissions in reply — 2 December 2020;
- Lees Descendants further submissions — 3 March 2021; and
- Davis Descendants in reply — 10 March 2021.

[12] On 1 May 2020, the Davis Descendants commenced separate proceedings (**the 2020 Proceedings**) against Perpetual, UTCCL and PTCCL, as well as certain underwriters at Lloyds (**the Insurers**). In the 2020 Proceedings, the Davis Descendants allege that, if the defences raised in the 2018 Proceedings by the Company and the Lees Descendants succeed, the following consequences flow:

- PTCCL, the trustee of the Trust, at the time of the respective Rights Issues, is liable for breach of trust failing to object to, prevent or take proceedings to set aside, the Rights Issues;
- The Insurers are liable for the conduct of PTCCL pursuant to s 601AG of the Corporations Act 2001 (Cth) (**the Corporations Act**); and
- Each of PTCCL and UTCCL, as former trustees of the Trust, and Perpetual, as current trustee of the Trust, is liable for breach of trust in failing to seek relief against the Company, Veronica and the Lees Descendants in respect of each of the Rights Issues.

[13] On 9 November 2020, Perpetual was given judicial advice by Robb J that it was justified in defending the 2018 Proceedings and in defending the 2020 Proceedings.¹ Perpetual originally indicated it would defend the claims made by the Davis Descendants in the 2018 Proceedings and in the 2020 Proceedings on various grounds, including two grounds additional to those raised by the Company and the Lees Descendants. The additional grounds proposed by Perpetual were as follows:

- the claims of breach of fiduciary duty on the part of the directors of the Company at the time of the respective Rights Issues are barred by the application of a six year limitation period; and
- the members of the Company at the time of each of the Rights Issues knew of, acquiesced in and consented to the respective Rights Issues, founding a defence of unanimous assent or ratification.

The Claims Concerning the Rights Issues

[14] The relief claimed in the Amended Pleadings to which exception is taken by the defendants is as set out in **Appendix 1** to these reasons. Thus, the Davis Descendants, in right of Perpetual as trustee of the Trust, seek orders for

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the purchase of shares in the Company held by them and Perpetual or shares held by Perpetual on trust for the Davis Descendants on the basis set out in paragraph 143 of the proposed second further amended statement of claim, which is set out in **Appendix 2** to these reasons. Alternatively, the Davis Descendants seek declarations that each of the purported allotments of shares pursuant to the Rights Issues was invalid and an order that the share register of the Company be rectified to reflect the actual number of shares that would be held by each member if the allotments are declared to be invalid.

[15] As at November 1961, 54.6% of the issued shares in the capital of the Company was held on behalf of the Trust. The shares held on behalf of the Trust were “B” class shares, which did not have voting rights. Accordingly, the holding of the shares held on behalf of the Trust did not give control of the Company.

[16] On 14 November 1961, the different classes of shares in the capital of the Company were abolished, with the consequence that the votes attached to the shares held on behalf of the Trust constituted the majority of the votes that could be cast at a general meeting. On 25 January 1962, Veronica and Veronica’s mother, Mabel Davis (**Mabel**), the two directors of the Company, passed a resolution for a “ten for one” offer to be made to existing shareholders, with shares not applied for by existing shareholders to be dealt with at the discretion of the Directors (**the First Rights Issue**). The shares in the First Rights Issue were to be offered at the price of £1 per share.

[17] PTCCL, the then trustee of the Trust, did not take up the shares offered to it and those shares were then offered to Veronica. Veronica took up 4,471 shares, one more than was required to give Veronica and Mabel together the majority of votes. The proportion of issued shares held by Veronica and Mabel was 50.0009% and the proportion of the shares held on behalf of the Trust fell to 49.9972%. The Davis Descendants contend that the true value of the shares then issued was some three times the price at which they were issued to Veronica. They assert that the dominant purpose of the directors in making the First Rights Issue was to confer control on Veronica and Mabel following the change in the voting rights of the shares held on behalf of the Trust. They say that it was no part of the function of the directors of the Company to issue shares for such a purpose.

[18] From 1969 to 1979 several thousand dollars were credited each year to loan accounts with the Company in the name of each of the Lees Descendants (**the Child Loan Accounts**). The combined balance of the Child Loan Accounts at the end of 1979 was \$75,472.51. That sum was recorded in the financial statements of the Company for the year ended 30 June 1979 as unsecured loans. On 8 March 1980, the two directors of the Company, Veronica and Mr Stuart Henderson (**Mr Henderson**), passed a resolution to offer to shareholders in the Company as at 14 March 1980, 26,997 shares at par in the proportion to the respective holdings of the shareholders as at that date (**the Second Rights Issue**). The resolution of 8 March 1980 recorded that funds were required for the construction of a swimming pool for the tenants of a building owned by the Company and to satisfy the unsecured loans repayable on demand, totalling all the sum of \$110,000.

[19] At the time of the Second Rights Issue, Vesta Pty Ltd (**Vesta**), the fifth defendant, which is a trustee of a family trust, held all of the shares previously held by Veronica and Mabel. Vesta had paid \$6.94 per share for those shares in April 1973. Neither PTCCL, the then trustee of the Trust, nor Vesta, took up the Second Rights Issue. However, each of the three Lees Descendants applied for 8,999 shares, being one third of the total number of shares offered to all existing shareholders. Although none of the Lees Descendants was a shareholder at the time (aside from one who held one share), the applications were accepted. None of the Lees Descendants paid money for their shares. Rather, a debt of \$17,998 was recorded in the respective Child Loan Accounts for the Lees Descendants. Thus, the Second Rights

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Issue did not raise any fresh capital for the Company despite the purpose recorded in the resolution of 8 March 1980.

[20] The Davis Descendants assert that the shares that were so issued to the Lees Descendants for \$2 per share had a true value of \$40.22 per share. That is to say, each of the Lees Descendants received shares in the Company worth approximately \$360,000 in return for a debit to their respective Child Loan Accounts of \$17,998. As a consequence of the Second Rights Issue, the proportion of the issued shares in the Company held on behalf of the Trust fell from 49.99% to 33.1%. The Davis Descendants assert that the dominant purpose for the Second Rights Issue was improper, namely, to appropriate for the benefit of the Lees Descendants part of the value that the shares held on behalf of the Trust would have had but for the Second Rights Issue.

[21] From 1989 to 1994, dividends were declared by the Company. However, the dividends payable to the third defendant, Venetia Babington Lees (**Venetia**), and to Vesta were not paid but were credited to their loan accounts with the Company. The effect was that, by 14 June 1994, the Company owed Vesta \$64,598.70 and owed Venetia \$18,328.62.

[22] On 14 June 1994, the two directors of the Company, Veronica and Mr Henderson, passed a resolution to offer to shareholders 80,000 ordinary shares of \$2 each on the basis of one share for each share held as at that date (**the Third Rights Issue**). The stated purpose of the Third Rights Issue was to reduce the external funding of the Company. Venetia and Vesta took up the offers made to them but no other shareholders did so. The amounts standing to the credit of Venetia and Vesta were credited towards the payment of the shares so taken up. The consequence was that a debt of \$17,998 was recorded in the Child Loan Accounts in respect of Venetia and a debit of \$53,994 was established in a separate loan account in the name of Vesta. Accordingly, no capital was actually raised to reduce the external funding of the Company.

[23] The Davis Descendants assert that the effect of the Third Rights Issue was that Venetia received shares in the Company worth approximately \$1.25 million in return for a debit of \$17,998 and Vesta received shares in the Company having a value of approximately \$3.7 million in return for a debit of \$53,004. The proportion of shares in the Company held on behalf of the Trust fell from 33.1% to 22.9%.

[24] On 6 June 1997, the two directors of the Company, Veronica and Mr Henderson, passed a resolution to offer shareholders one new share at par for each share held at that date (**the Fourth Rights Issue**). In order to do so, it was resolved that the nominal capital of the Company be increased from \$300,000 to \$600,000 divided into 300,000 shares of \$2 each.

[25] The second defendant, Anthony Lees (**Anthony**), the fourth defendant, Jeffrey Lees (**Jeffrey**) and Vesta, applied for the shares offered to them. No money was paid for the shares. Rather, the Company lent to Anthony and Vesta the funds necessary to purchase their shares and lent funds to Pendlebury Pty Ltd, a Company controlled by Veronica and the Lees Descendants, which lent to Jeffrey the funds necessary to pay for his shares.

[26] The Davis Descendants assert that the shares acquired as a result of the Fourth Rights Issue for a consideration of \$2 each had a true value of \$174.75 each. Thus, Anthony and Jeffrey received shares worth approximately \$1,570,000 in return for a payment of approximately \$18,000 each and Vesta received further shares having a value of approximately

\$9,250,000 in return for a payment of \$106,008. The consequence was that the proportion of shares in the Company held on behalf of the Trust fell from 22.9% to 14.2%.

Applicable Principles as to Derivative Proceedings

[27] Save in special or exceptional circumstances, a beneficiary under a trust has no cause of action against a third party in relation to injury to trust property.² However, if a trustee fails to sue to protect trust property, a beneficiary may, in special or exceptional circumstances, sue to enforce the trustee's right of action against a third party for injury to the trust property, joining the trustee as a defendant in the proceedings.³ Special or exceptional circumstances embrace failure, excusable or inexcusable, by the trustee, in the performance of the duties that are owed by a trustee to beneficiaries to protect the trust estate or to protect the interests of the beneficiaries in the trust estate by, for example, suing on a cause of action that the trustee has against a third party. Relevant exceptional circumstances involve no more than a failure by the trustee, excusable or inexcusable, to sue on a cause of action against a third party available to the trustee, in performance of the trustee's duty to protect the trust estate or to protect the interests of the beneficiaries in the trust estate.⁴ The requisite special or exceptional circumstances will be satisfied by a failure by the trustee to sue on a cause of action in the performance of the duties owed by the trustee to the beneficiaries to protect the trust estate or to protect the interests of the beneficiary.⁵

[28] However, before the Davis Descendants are entitled to the grant of relief sought in the interlocutory Process, they must establish not only that Perpetual is unable or unwilling to bring the action contemplated by the Amended Pleadings, in special or exceptional circumstances, but also that that the proposed action is "meritorious". That requires at least that there is a serious question to be tried as to the claims that the Davis Descendants wish to have ventilated. In particular, the "meritorious" requirement would not be satisfied if there were defences available that are bound to succeed. Clearly, it is not necessary to establish that the proposed claims will succeed. However, the Davis Descendants must establish that the Amended Pleadings disclose good causes of action and that there is material capable of supporting the claims alleged in the Amended Pleadings.

[29] In a sense, the two requirements of special or exceptional circumstances and a "meritorious" claim are interconnected. Special or exceptional circumstances to prosecute a derivative action will not be established unless a case of sufficient strength or prospects of success has been demonstrated.⁶ If the Court concluded that the claims were not "meritorious", the requirement for special or exceptional circumstances could not be met. On the other hand, if the proposed claims were found to be particularly strong, the hurdle for reaching the conclusion that special or exceptional circumstances exist would be relatively low.

[30] The stance adopted by Perpetual might be characterised as unusual. However, while it has received judicial advice that it would be justified in defending the claims against it for breach of trust, there has been no judicial advice one way or the other as to whether it would be justified in bringing the claims that the Davis Descendants now wish to ventilate.

Special or Exceptional Circumstances

[31] On 6 July 2020, Black J refused an application by the Davis Descendants for leave to amend their pleadings in the 2018 Proceedings to seek, in their own right and not in the right of Perpetual, relief similar to that contained in the Amended Pleadings. On 9 September 2020, Rees J refused a further application by the Davis Descendants for leave to amend their pleadings to seek such relief in their own right.

[32] On 25 September 2020, Perpetual's solicitors wrote to the solicitors acting for the Davis Descendants setting out the difficulties said to exist with the claims that the Davis Descendants wished to bring and identifying several defences to those claims. Perpetual indicated that the claims were defective, and that Perpetual was not willing to seek the relief in question. On 9 November 2020, Robb J gave judicial advice to Perpetual that it was justified in defending the proceedings on the grounds stated in its draft defence.⁷

[33] On 18 November 2020, the Davis Descendants filed the Interlocutory Process, together with the first iteration of the Amended Pleadings. A draft defence of Perpetual dated 30 November 2020 contained defences outlined in Perpetual's solicitors' letter of 25 September 2020. On 1 December 2020, Perpetual filed comprehensive written submissions in relation to the Interlocutory Process opposing the application, including on the ground that the proposed pleading did not disclose a reasonable cause of action.

[34] The hearing of the Interlocutory Process commenced on 3 December 2020 and continued on 3 December 2020. On 4 December 2020, the Davis Descendants served a second iteration of the Amended Pleadings. At 4.08pm on 4 December 2020, the Davis Descendants served the third iteration of the Amended Pleadings. The successive iterations took account of pleading complaints by the defendants.

[35] Perpetual indicated that, in the light of the third iteration, it would reconsider whether it would file a cross-claim and, on 15 December 2020, Perpetual was directed to serve any proposed cross-claim that it might wish to bring in the 2018 Proceedings and the proposed cross-defendants were directed to serve proposed defences. Perpetual indicated its intention to seek judicial advice as to whether it would be justified in bringing such a cross-claim.

[36] On 4 February 2021, Perpetual served on the proposed cross-defendants a proposed cross-claim in accordance with the direction. The form of cross-claim so served reproduced the text of part of the third iteration of the Amended Pleadings. There was no new text in the proposed cross-claim that was not already in the third iteration.

[37] However, on 25 February 2021, Perpetual's solicitors wrote to the solicitors for the other parties indicating that Perpetual was not willing to seek the relief set out in the proposed cross-claim, saying that Perpetual had taken the view that it would be in the interests of the Trust as a whole if the Davis Descendants prosecuted all claims as formulated in the Amended Pleadings. Perpetual indicated that it would consent to the Davis Descendants being granted leave to file and serve the Amended Pleadings, in the form of the third iteration.

[38] The letter from Perpetual's solicitors of 25 February 2021 makes clear that the position of Perpetual had changed and that that change of position involved Perpetual no longer advancing defences to the claims by the Davis Descendants that Perpetual has received judicial advice that it would be justified in advancing. There is no evidence of new or different advice having been received by Perpetual as to the prospects of the claims proposed by the Davis Descendants succeeding or as to the prospects of Perpetual's foreshadowed defences succeeding. It is not insignificant, the Lees Descendants say, that Perpetual stands to benefit from its change of position because a condition of the change of position is that the Davis Descendants will release claims that they have made against Perpetual. The Lees Descendants complain that, in the circumstances, Perpetual is supporting one group of beneficiaries of the Trust against

another group of beneficiaries of the Trust.

[39] The Lees Descendants assert that Perpetual had apparently decided that the proposed claims on the part of the Davis Descendants had insufficient prospects of success for it to be in the interests of beneficiaries for those claims to be pursued. They refer to the fact that Perpetual had received judicial advice that it would be justified in defending the proceedings on the grounds stated in its earlier draft defence. In its submissions of 1 December 2020, Perpetual opposed the relief sought in the Interlocutory Process on grounds including a contention that the Amended Pleadings did not disclose a reasonable cause of action.

[40] The Lees Descendants contend that Perpetual's position and contention, that no reasonable cause of action was disclosed, was taken on advice, including judicial advice and that it is open to conclude that the decision not to make the claims was available to Perpetual on the material available to it. Therefore, they say, the Davis Descendants have not established that Perpetual is in breach of duty by failing to commence and prosecute the claims propounded in the Amended Pleadings. However, there have been substantial pleading amendments, as a consequence of which it is accepted by all parties that the Amended Pleadings disclose triable causes of action.

[41] The Lees Descendants contend that the Davis Descendants have not established exceptional or special circumstances for bringing proceedings in a derivative capacity. First, the Lees Descendants say, it is not sufficient for the Davis Descendants to show simply that Perpetual is unwilling or unable to bring the claims in its own name. They assert that the true grievance of the Davis Descendants is that they disagree with Perpetual's opinion as to the prospects of success of the proposed claims. That, the Lees Descendants assert, does not demonstrate special or exceptional circumstances. Otherwise, any beneficiary who disagrees with a trustee who refrains from commencing proceedings against a third party in accordance with legal advice would have a basis for making a derivative claim against that third party.

[42] Rather, the Lees Descendants say, one of the prerequisites for the commencement and prosecution of a derivative action is that the proposed plaintiffs in the derivative action can demonstrate that the trustee is, in effect, acting in breach of trust in failing to commence and prosecute the proceeding. They say that the Davis Descendants must establish that Perpetual is in breach of duty by failing to prosecute the claims that they wish to make in a derivative capacity and that mere refusal to sue on the part of a trustee is insufficient to demonstrate special or exceptional circumstances, including where Perpetual may have decided that the proposed claims are without substance. Finally, they say, unless a beneficiary can establish that the trustee is acting in breach of duty, proceedings should not be permitted to proceed as derivative proceedings.⁸

[43] The Lees Descendants point out that the change in position taken by Perpetual in its solicitor's letter of 25 February 2021 does not disclose any change in the opinion of Perpetual as to the prospects of success of the claims propounded in the Amended Pleadings. Thus, they say, Perpetual remains unwilling to pursue the proposed claims because of its opinion, which is an opinion that is reasonably available to it. The Lees Descendants assert that, seemingly as a matter of expediency, Perpetual has now agreed to the Davis Descendants pursuing the proposed claims at their own risk and cost. That, the Lees Descendants assert, does not establish special or exceptional circumstances.

[44] The Lees Descendants assert that the Davis Descendants have identified no authority for the proposition that it is sufficient, for the purpose of establishing special or exceptional circumstances, for a beneficiary to prove that the

beneficiary can plead a claim that would not be summarily dismissed or struck out, being a claim that the trustee is unwilling to bring. That proposition, the Lees Descendants assert, proceeds in disregard of the prospects of the success of the claim.

[45] The Davis Descendants reject the proposition that it must be demonstrated that Perpetual's failure to take action constitutes a breach of trust. A failure by the trustee to sue on the cause of action is not, they say, the same thing as a failure to meet the obligations of the trustee to beneficiaries. The Davis Descendants contend that it is sufficient for them to demonstrate that Perpetual is unable or unwilling to bring the claim. The Davis Descendants accept that they must show that Perpetual is unwilling to bring the proposed claims but that it does not matter why Perpetual has been unwilling to bring the claims itself at various points in time.

[46] In the present circumstances, there are, in effect two distinct interests, represented by the Lees Descendants, on one hand, and the Davies Descendants, on the other. Perpetual is in a position where it would be enforcing the interests of one group of beneficiaries against the interests of the others, if it were to endeavour to enforce the causes of action that the Davies Descendants now seek leave to enforce. In a sense, Perpetual's decision is to stand back and allow the two groups of beneficiaries to fight between themselves, rather than take the side of one or the other.

[47] That is to say, by filing a cross-claim, Perpetual would be supporting the Davies Descendants against the Lees Descendants. On the other hand, if Perpetual does not file a cross-claim, the Davies Descendants would be deprived of the opportunity of pressing the claim that they assert is available to Perpetual as trustee. I consider that that situation renders the present circumstances exceptional and, therefore, that it is appropriate to grant the leave sought by the Davies Descendants.

[48] The position might have been different if there had been a plurality of differing interests vested in varying categories of beneficiaries. However, where there is a clear dichotomy between two groups of beneficiaries, it is not inappropriate for Perpetual, as trustee, to take a neutral stance and to side with neither group.

Meritorious Claims

[49] The Davis Descendants accept that they must show that the proposed claim is "meritorious". The Company and the Lees Descendants oppose the relief sought on the basis that there would be good defences to the claims sought to be brought by the Davis Descendants, such that the claims are bound to fail.

[50] Thus, the Company says, PTCCL, the trustee at the times of the respective Rights Issues, was given notice of each of the Rights Issues and the terms upon which shares would be issued and knew all of the relevant circumstances, but took no action to challenge the Rights Issues. Therefore, the Company says, PTCCL elected to waive whatever rights it might have had arising out of the Rights Issues. The Company says that, by failing to object or complain about the Rights Issues on or before between 23 and 58 years, and proceed in relation to the Company on the basis that the shares had been validly issued, PTCCL would be estopped from asserting that the issues of shares were improper or invalid.

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[51] Alternatively, the Company says, any action to challenge the Rights Issues would be defeated by the operation of s 23 of the Limitation Act 1969 (NSW) in circumstances where the assertion that a share issue was made for an improper purpose is analogous to a claim in tort or a claim in contract arising out of the memorandum and articles of association of the Company. In further alternative, the Company says, laches would have, by the time that Perpetual became trustee of the Trust, have prevented any of the earlier trustees from pursuing such rights. The Company contends that it would not be possible to frame orders that would put all relevant persons into the positions they would have been but for the impugned issues of shares. Further, the Company says, any asset of the Trust consisting of the right to challenge the Rights Issues ceased to exist long before Perpetual became the trustee of the Trust in March 2015, such that, even if there had been an effective transfer of all of the assets of the Trust to Perpetual, that transfer would not have operated in relation to the rights that the Davis Descendants now seek to pursue.

[52] The Lees Descendants accept that it is necessary, but not sufficient, to establish that the proposed claims are “meritorious”, to demonstrate that the Amended Pleadings would survive a strike out or summary dismissal application. They accept that the Amended Pleadings would survive a strike out or summary dismissal application. The Lees Descendants assert that the Davis Descendants appear to be proceeding on the basis that the requirement that their claim is “meritorious” is satisfied if they can produce a pleading that would survive a strike out application or an application for summary dismissal.

[53] The Lees Descendants assert that the Davis Descendants have not discharged the onus of establishing that their proposed claims are “meritorious”. They point to the absence of any evidence of advice as to the prospects of success of the claims made in Amended Pleadings. That absence they say is more significant in the light of the judicial advice obtained by Perpetual that substantive defences to the proposed claims would be justified.

[54] However, I do not consider that any adverse inference should be drawn from the absence of written advice on behalf of the Davis Descendants as to the prospects of success of the proposed claims. Whether the proposed claims are “meritorious” is a matter for the Court. Further, for several reasons, no significance should be attributed to the judicial advice obtained by Perpetual.

[55] First, judicial advice was sought only after Perpetual had taken the position that it would not oppose the Davis Descendants suing in right of Perpetual as trustee. Secondly, Perpetual has never sought or obtained advice that it would be justified in defending the 2018 Proceedings, rather than allowing the Davis Descendants to sue in the right of Perpetual, as trustee. Rather, Perpetual sought and obtained advice that it would be justified in filing a defence in the 2018 Proceedings despite the fact that it was not going to object to the Davis Descendants suing in right of Perpetual, and was only intending to file a defence so as to ensure that its pleadings in the 2018 Proceedings were the same as those in the 2020 Proceedings.

[56] Thirdly, there is no basis for drawing the inference that Perpetual ever held the view that the proposed claims had insufficient prospects of success for it to have been in the interests of the beneficiaries for the claims to be brought. Had such a view been held at any relevant time, the Davis Descendants say, Perpetual would not have been expected to have proposed in its letter of 25 September 2020 to the Davis Descendants that they sue in the right of Perpetual, or advise that it would not object to that course of action. Even if such an inference were to be drawn, the Davis Descendants say, it would be of no significance in circumstances where counsel for Perpetual, who provided the advice to Perpetual that was provided in confidence to Robb J, informed the Court, on 15 December 2020, that he considered that the claim that the Davis Descendants sought leave to bring was “fundamentally different from the claim in respect

of which judicial advice was sought”.

[57] A contention was advanced that, in the absence of a vesting order in relation to the bare rights to sue vested in the former trustee, PTCCL, which were not transferred to UTCCL or to Perpetual, Perpetual itself has no cause of action such as the Davis Descendants proposed to mount by the Amended Pleadings. Thus, it was said, a right to sue for alleged oppression in respect of the Rights Issues was conferred only on a “member”. PTCCL was the “member” in respect of the shares held on behalf of the Trust at the time of the conduct that is the subject of the complaint by the Davis Descendants. As at the date of the First Rights Issue, there was no oppression remedy available.

[58] Further, it was said, neither UTCCL nor Perpetual has standing to sue for a remedy in relation to oppression in respect of the Second Rights Issue under s 186 of the *Companies Ordinance 1962 (ACT)* or in respect of the Third Rights Issue or the Fourth Rights Issue under s 260 of the Corporations Law. It was said that the bare right to sue for a remedy in respect of oppression was not assignable at law or in equity and, in any event, PTCCL did not purport to assign the bare right to sue for a remedy in respect of oppression either to UTCCL or to Perpetual: the right of PTCCL to apply for a remedy in respect of oppression was not a “thing in action” within the meaning of s 78(5) of the Trustee Act 1925 (ACT) .

[59] While PTCCL may have had a personal right of action to sue as a “member” of the Company for breach of fiduciary duty owed to the Company by its directors, PTCCL knew of, was invited to take up, but took no objection to, the Rights Issues. Further, PTCCL’s bare right to sue for breach of fiduciary duty is subject to the “personal action rule” and PTCCL did not purport to assign to UTCCL or to Perpetual, its personal right of action to sue for breach of fiduciary duty. Accordingly, it may be arguable that neither UTCCL nor Perpetual has had conferred on it the right to sue the Lees Descendants in respect of a personal right of action that may or may not have accrued to PTCCL.

[60] The Davis Descendants respond to the contentions as to the lack of a vesting order by pointing to the deed of appointment dated 25 May 2005 whereby PTCCL was replaced as trustee of by UTCCL. They say that the right to bring an action is included in the assets that vested in UTCCL in 2005, pursuant to s 9 of the *Trustee Act 1925 (ACT)*. While the term “property” is not defined in the Trustee Act 1925 (ACT) , that term is defined in the Legislation Act 2001 (ACT) as meaning “any legal or equitable estate or interest (whether present or future, vested or contingent, tangible or intangible) in real or personal property of any description (including money) and includes a thing in action”.

[61] The Davis Descendants also point to the provisions of s 601WBI of the Corporations Act 2001 (Cth) pursuant to which Perpetual was appointed to replace UTCCL. They say that the right to bring an action was included as part of the assets that were transferred to Perpetual pursuant to s 601WBI of the Corporations Act 2001 (Cth) . The term “asset” for the purposes of that provision is defined in 601WAA(1) as including both, “any chose in action” and “any right, interest or claim of any kind”. The Davis Descendants also reject the contention that the right to apply for a statutory remedy in respect of oppression is not assignable.

[62] In order to demonstrate that their proposed claims are “meritorious”, the Davis Descendants have tendered substantial documentary evidence, being almost all of the evidence that would be tendered at a final hearing, and have made detailed oral and written submissions as to how that material establishes the strength of the proposed claims against the Lees Descendants. I consider that the material demonstrates that there is a serious question to be determined as to whether the Rights Issues should be set aside. That, of course, does not involve a conclusion as to the ultimate

merits of the proposed claims or the prospective defences to them.

Conclusion

[63] There may well be good defences available to the Company and the Lees Descendants if the Amended Pleadings go forward. If the defences outlined above were shown to be extremely strong such that there was no doubt that they would be established, it would be difficult to conclude that the claims were “meritorious”. On the other hand, where defences are arguable such that the Amended Pleadings would not be struck out summarily, the position is different.

[64] I do not consider that such questions as to the standing of Perpetual or the consequences of the replacement of PTCCL by UTCCL or the replacement of UTCCL by Perpetual are appropriately determined in an interlocutory application such as the present. They are matters of considerable legal substance. I do not consider that they are appropriate bases for refusing the leave sought by the Davis Descendants. I do not regard the contentions advanced in opposition to the claims as being unanswerable. I consider that the proposed claims are “meritorious” in the relevant sense, namely, that they are clearly arguable, there is evidence to support the allegations made in the Amended Pleadings and the defences foreshadowed may or may not succeed on full argument.

[65] No contention was advanced that significant time and costs would be saved by resolving, on a summary basis, the questions raised by the Amended Pleadings and by the proposed defences. I do not consider that the interests of justice would be served by endeavouring to resolve at an interlocutory level the questions that would be raised in the proceedings if the Amended Pleadings are allowed. The case will be an essentially documentary one with relatively complex legal questions to be resolved. The consequences for the parties are certainly not insignificant.

[66] Accordingly, I propose to give leave to the Davis Descendants to file the Amended Pleadings. In the circumstances, it is more appropriate to hear submissions of the parties as to costs after the publication of these reasons. In that regard, it is relevant that substantial time and effort has been taken up with pleading questions that were finally resolved with the third iteration of the Amended Pleadings.

Order

Order that:

1. The Plaintiffs be granted leave to file a Third Further Amended Originating Process and Second Further Amended Statement of Claim in the forms that were served at 4.08pm on 4 December 2020.
2. The Plaintiffs file and serve submissions as to costs within 7 days of the publication of these reasons.
3. The Defendants file and serve submissions in response within 7 days of service of the Plaintiffs’ submissions.

Appendix

APPENDIX 1

The [Davis Descendants] in right of [Perpetual] as trustee of the [Trust] seek the following relief:

2A. Relief pursuant to section 233 of the Act together with, or alternatively pursuant to section 186 of the *Companies Ordinance* 1962 (ACT), and also together with, or alternatively pursuant to that section of the Act referred to in paragraph 141C of the statement of claim herein that is incorporated pursuant to section 1401 of the Act, that orders be made for the purchase of shares in the Company held by the [Davis Descendants] and [Perpetual] (or the shares held by [Perpetual] on trust for the [Davis Descendants] if the Court considers that appropriate), on the basis pleaded in paragraph 143 of the statement of claim herein.

2B. Alternatively to paragraph 2A:

- (a) a declaration that the purported allotment of shares pursuant to the resolutions made by the directors of the Company on 25 January 1962 and 15 February 1962 was invalid;
- (b) a declaration that the purported allotment of shares pursuant to the resolutions made by the directors of the Company on 8 March 1980 and 31 March 1980 was invalid;
- (c) a declaration that the purported allotment of shares pursuant to the resolutions made by the directors of the Company on 14 June 1994 and 22 July 1994 was invalid;
- (d) a declaration that the purported allotment of shares pursuant to the resolutions made by the directors of the Company on 6 June 1997 and 4 August 1997 was invalid; and
- (e) an order that the share register of the Company be rectified to reflect the actual number of shares held by each member to the extent that they have been declared to be invalid as set out above.

Appendix

APPENDIX 2

143. In the premises, the [Davis Descendants] claim an order pursuant to section 233 of the Act or, alternatively, s 186 of the 1962 Ordinance and the section of the Act referred to in paragraph 141C that is incorporated pursuant to s 1401 of the Act, for:

- (a) the purchase of Company shares held by the [Davis Descendants] and the sixth defendant on the basis that the shares be valued and purchased by the Company (or alternatively some or all of the [Lees Descendants]) on the basis that the valuation of the Company is as described below, or that the [Davis Descendants'] and [Perpetual's] shares in the Company include an amount to compensate or allow for the conduct of the Company's affairs contrary to, or oppressive to, the interests of the minority shareholders, being:

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- (i) a sum to be determined by the Court for the value:
- (A) of the rent free, or less than market rent, occupation of the Penthouse and other parts of Eynesbury by the Lees Descendants or Lees Family and associated loss of use of such funds by re-investment and distributions;
- (B) of the NSW Plate;
- (C) of the Lincoln Carparks;
- (CA) of the Company's rights under the Additional Consideration Deed which were assigned to the Lees Descendants pursuant to the Deed of the Assignment for no value, or alternatively below fair value;
- (CB) of the Company's loss of the use of monies resulting from the decision to lend the Titanes Loan and any other related party loan(s) identified following discovery or production of the Company's books and records to the plaintiffs on interest free terms by reference to rates of return which the Company otherwise could have attained had the monies not been lent;
- (CC) of any sums not repaid to the Company in respect of the Titanes Loan and any other related party loan(s) identified following discovery or production of the Company's books and records to the plaintiffs;
- (D) of the sums paid by the Company to the Lees Descendants, or Lees Family referred to in paragraph 30 above in excess of the market value for any services rendered; and
- (DA) of the value of capital which would have accrued but for those matters pleaded in subparagraphs (A) to (D) above; and
- (E) such further or other matters as the Court thinks fit to relieve against the effects of the conduct; and
- (ii) on the basis that the valuation for the shares is increased by the amount of the reduction in the value the [Davis Descendants'] and [Perpetual's] shares in the Company by the allotment of shares pursuant to the Rights Issues at par value instead of their then current value, or, alternatively, with an appropriate reduction in the Company's share capital to negate the effects of the Rights Issues at par value in lieu of fair value;
- (iii) alternatively to (ii) on the basis that each of the Rights Issues (or some of them) are set aside;
- (a2) alternatively, that the Company be wound up; and
- (b) such further, alternative or consequential orders as the Court thinks fit.

Counsel for the plaintiffs: *M Hodge QC* with *B Phillips*

Counsel for the first defendant: *C Harris SC*

Counsel for the second to fifth defendants: *M S Henry SC* with *N E Furlan*

