IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S216 of 2019

ON APPEAL FROM THE FULL COURT

OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

FRANZ BOENSCH AS TRUSTEE OF THE BOENSCH TRUST

Appellant

HIGH COURT OF AUSTRALIA
FILED
27 SEP 2019
THE REGISTRY SYDNEY

And:

SCOTT DARREN PASCOE

Respondent

APPELLANT'S REPLY

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PART I: CERTIFICATION FOR PUBLICATION ON THE INTERNET

1. We certify that this Reply is in a form suitable for publication on the internet.

PART II: CONCISE REPLY TO THE RESPONDENT'S ARGUMENT ON THE APPEAL

2. In reply to RS [10], Mr Boensch stands by the recital at FC [116]-[117] (CAB 103) of *what* the Full Court understood he was challenging regardless of *how* he challenged it.

3. In RS [11], Mr Pascoe overlooks the fact that Mr Boensch's principal case is that there was no caveatable interest in Rydalmere, that it is only *if* that case is not upheld that the value of such an interest is relevant, and that disproving the value of something is reliant on the party asserting its existence to identify it and give it content in the first instance.

4. An objective test of "without reasonable cause" mandates a requirement to value the interest claimed in the caveat (*cf.* RS [12]). If Mr Pascoe held a bare legal estate subject to the Trust, it will be of negligible value as Mr Boensch's divisible property. Mr Pascoe concedes a right of indemnity (*if any*) to be of insufficient value to warrant maintaining the caveat after 4 years. Neither can justify statutorily injuncting the Trust property for 4 years. *Beca* contains no considered reasoning for elevating a caveatable interest to the status of a complete answer to a claim under s. 74P(1). *Beca* (pp. 474.G-475.A) merely adopted what *Bedford Properties* said (at p.108) and overruled *Young* (esp. p.1013-1014). Mr Boensch contends that *all* the case law focusing on a test with a "*wrongfully*" requirement pre-1997 (as it was repealed during 1997) is irrelevant to a test of objective reasonableness of statutory conduct. The existence of a caveatable interest is an aspect of a test of honest belief based on reasonable grounds. But its correctness is challenged.

5. In *Amos* (cited in RS [15]), this Court accepted the historical meaning of ss. 26(1) and 10(1)(d) of the *Limitation of Actions Act 1974* (Q) to resolve a dispute about competing interpretations which were open under principles enunciated by this Court on statutory interpretation. But *Amos* is not authority for a perpetuation of an historical interpretation which, in the case of s. 74P(1), flies in the face of its text and derives no support from its legislative purpose or context in Part 7A of the *Real Property Act 1900* ("the Act").

6. The attempt in RS [17]-[19] to distinguish s. 151A(5)(c) of the *Workers Compensation Act* from s. 74P(1), and thus, distinguish the statement of principle in *Taylor*, has several problems. First, the connection of s. 74P(1) to objective acts or omissions in contrast to the connection of s.151A(5)(c) to an objective bystander's "*belief*" is a distinction made without substance. The plurality in *Taylor* held at [10]: "*[s. 151A(5)(c)] is expressed in objective and impersonal terms*" (and so is s. 74P(1)) and the text of s. 151A(5)(c) "*does not require a search for the belief of any particular individual*" (and nor does s. 74P(1)).

7. Secondly, RS [16] line 9 ("*the acts or omissions are those of the caveator*") is wrong. Section 74P(1) *also* addresses acts by the registered proprietor: see s. 74P(1)(b) and AS [67]. Section 74P(1) addresses conduct by *two* classes of person: the caveator *and* the registered proprietor. Section 74P(1) must accommodate the acts and omissions of *both*.

8. RS [17] line 4 ("*the identified belief 'causes' a person to lodge a caveat*") is redrafting s. 74P(1). "Cause" is *not* a substitute for "belief"; rather "cause" means "ground, reason, motive" (*The Macquarie Dictionary*, 3rd ed.). The ground or reason for engaging in the conduct "*causes*" the conduct rather than the actor's belief as to *why* a step is taken. Mr Pascoe's "belief" analogue for "cause" *negates* a focus on objective acts and omissions.

9. Reliance in RS [18] on a passing observation of Griffith CJ in *Coles* is misplaced. His quoted statement finds no support from the other members of the Court. Furthermore, it is contrary to the characterisation by Barwick CJ in *J & H Just* at 552.D (see AS [59]) of a caveat as a statutory injunction to the Registrar-General which is imposed extra-curially. It was approved by three other members of the Court at 557.A; 557.E; 559.G.

10. Proposed analogues in RS [19]-[20] for "reasonable cause" in industrial litigation and the costs discretion (both litigious contexts) are inapt. A caveat is a statutory injunction imposed *without* any court approval. In s. 347(1) of the *Workplace Relations Act 1996*, "*without reasonable cause*" is interpreted in a context of "*vexatious*". In s. 99(1) of the *Civil Procedure Act 2005*, "*without reasonable cause*" is interpreted in a context of "*serious neglect, serious incompetence or serious misconduct*" and "*improperly*". But such a context has been absent from s. 74P(1) ever since "*wrongfully and*" was removed from its terms in 1997. Neither is an appropriate analogue. Mr Boensch adheres to his reliance upon the test enunciated by the plurality in *Taylor* as the appropriate analogue.

11. The criticism of Mr Boensch's application of the objective test which he contends for in AS [74]-[89], insofar as it relies on findings about what Mr Pascoe knew or his state of mind is, with respect, erroneous. In AS [69]-[70] (as acknowledged in RS [21] lines 2-5), Mr Boensch contends that the caveator's state of mind (or it could be the registered proprietor's, in the case of par (1)(b)) is irrelevant. But his reliance on Mr Pascoe's state of mind when applying the objective test in AS [74]-[89] requires a recognition of two subtle factors which escape Mr Pascoe. First, Mr Boensch is not relying on Mr Pascoe's state of mind but rather on concessions in his evidence found by the primary judge to establish its uncontroversial character. Secondly, Mr Pascoe conducted *only* a defence founded upon his honest belief based upon reasonable grounds. The primary judge *only* found the facts upon that basis. No alternative "objective-test-basis" for fact-finding was undertaken. Mr Boensch has no choice but to work with available factual findings

in applying an objective test. The proposition in RS [21] that an objective test can have regard to no factors other than the existence of a caveatable interest is wrong. The value of the caveatable interest is critical to the existence of a reasonable cause. See pars 3-4 above. They answer criticism in RS [38] of AS [83]. *Taylor* held the test is informed by what a judge hearing the compensation claim considers to be objectively reasonable.

12. In reply to RS [23]-[27] the *ratio* is, firstly, the "statutorily-vested interest" (a bare legal interest subject to a trust which vested *in equity* pending registration pursuant to s. 90 of the Act (SC [99] (CAB 33); *Lewis* [91]-[92])), as affirmed at FC [107] (CAB101) ("*the caveatable interest he found was held by Mr Pascoe was described in the caveat*") and, secondly, the fee simple unencumbered by any trust, as affirmed at FC [108] (CAB 101) ("*the caveat covers ... also a full legal interest, that is, an interest not subject to a trust*"). The *only* equitable interest recognised is a *vesting in equity* of *that* legal interest pending its registration. However, no equitable interest referable to a right of indemnity was claimed in the caveat (FC [142] (CAB 111)). Contrary to RS [27] (submitting that FC [142] is limited to a finding that no reference to "*a right of indemnity*" is made "*in terms*" in the caveat), the Full Court found ("*Nevertheless*") that what was claimed in the caveat is *not* what was pleaded in the Defence at [7(e)] (AFMB 14). This finding involves a recognition that *inconsistent legal and equitable interests cannot be claimed* under s. 74F(1), even if *inconsistent legal interests can be claimed*: see FC [108] (CAB 102). In *Morgan v Swansea* (1875) 9 Ch. D. 582 at 585.G, Jessell MR said that "a 'bare trustee' ... meant a trustee without any beneficial interest." Accordingly, a bare legal interest, *and also* an equitable interest due to a right of indemnity, in the trust property are *inconsistent* interests as a matter of equitable doctrine for the purposes of s. 74F(1).

13. In reply to RS [28]-[31], this Court is invited to take vesting of trust property by s. 58 of the *Bankruptcy Act* back 277 years to the principle in *Scott v Surman* (1742) Willes 400 at 402-403; 125 ER 1235, as it did in *Foots v Southern Cross* (2007) 234 CLR 52 at 76 [66] by taking the status under s. 82 of that Act of post-sequestration costs orders back 203 years to the principle in *Ex parte Hill* (1804) 11 Ves. Jun. 646; 32 ER 1239.

14. Contrary to RS [32], Mr Pascoe lacked reasonable cause for lodging *and* maintaining the caveat whether the test is wholly objective, as Mr Boensch contends, or is partly subjective, partly objective, as Mr Pascoe contends. AS approaches Issues 6-7 that way.

15. RS [34]-[35] misunderstand Mr Boensch's case on Issue 6. Viewed as at the date of the lodgment of the caveat, Mr Pascoe did not merely *know* about a claim of a trust over Rydalmere; he knew that a trust *existed* over Rydalmere. It was documented in terms of the trust documents annexed to the Registrar-General's caveat obtained by search by

Mr Moretti before the caveat was lodged. See SC [23] (CAB 12); AFMB 57. Mr Pascoe *also* held legal advice to apply to have the Trust declared invalid and, if that failed, to apply to set it aside as a voidable transaction. See SC [21] (CAB 12). On his own case, he allowed for validity of the Trust despite his sanguine expectation that he could have it set aside. Although Mr Johnson of Counsel treated the Trust as a "purported trust", it was plainly a fully-constituted, fully-documented express trust until set aside (if ever).

16. RS [36] ignores the fact that a fully-constituted and fully-documented express trust was created 6 years before the sequestration. The circumstances of its creation bespeak bona fides (AFMB 307 [28]-[32]). Mr Pascoe held *both* Trust documents. See par 15 above. Contrary to RS [36], neither the primary judge (SC [20] (CAB 12)) nor Full Court (FC [21] (CAB 79)) found that Ms McLean became Mr Pascoe's solicitor. Her lodgment of the caveat for him was *not* found to constitute the retainer of her by him (SC [25]-[30] (CAB13-14); FC [24]-[26] (CAB79)). The absence of any evidence that Mr Johnson or Ms McLean held the Trust documents obtained by Mr Pascoe *before* lodgment of the caveat deprive his reliance upon their advice at lodgment of objective reasonableness: *New Galaxy Investments* [2017] NSWCA 153 at [121], [329], [341] (cited in AS [82]).

17. Reply on the first request addressed in RS [39]-[40]: Mr Pascoe lists in RS [39]-[40] a series of "concerns" about the validity of the Trust which justified his maintenance of the caveat as at 15 November 2005, in response to the first formal request to remove it. If these concerns were truly genuine, one would expect a professional trustee to raise them with Mr Boensch's solicitor in explaining his refusal to accede to this request. But none of these alleged concerns were *ever* raised by Mr Pascoe with Mr Mullette. Indeed, this request was ignored. See SC [41] (CAB 18); AFMB 167, 169. The proposition that there were two solicitors representing the Trust is quite incorrect. Mr Mullette acted for Mr Boensch and the Trust (see SC [37] (CAB 16); AFMB149) whereas Mr Leong acted for Mrs Boensch and the beneficiaries of the Trust (see SC [47] (CAB 19); AFMB 241).

18. Contrary to RS [40], Mr Pascoe had no reasonable basis for thinking that he had a prima facie right of indemnity from Rydalmere based upon a title search disclosing a mortgage and Statement of Affairs disclosing Commonwealth Bank as a secured creditor. First, these facts alone do not constitute a right of exoneration (see par 29 below). Secondly, Mr Boensch was in possession of Trust property rent-free since the Trust was created 6 years earlier under the mutually beneficial arrangement he disclosed in his Statement of Affairs. See AFMB 124, Q. 4; 129, Q. 19; and 134, Q. 38. Thirdly, RS [40] assumes the correctness of the *Beca* test in which Mr Pascoe's *honest belief* is the subject matter of "without reasonable cause" rather than *his objective act* of maintaining the caveat.

19. Reply on the second request addressed in RS [41]-[46]: RS [41]-[42] about subsistence of litigation concerning the subject matter of the caveat as constituting the "*relevant context*" for determining the questions arising under s.74P(1), citing *Gustin v Taajamba* and *Edmonds v Donovan*, is a new contention not previously made. See FC [125]-[136] (CAB 107) reciting the competing arguments to it. Both authorities are distinguishable. First, they assume the correctness of the honest belief test now under challenge in this appeal, notwithstanding Mr Pascoe's resort in RS [46] to an (assumed) test of "*without objective reasonable cause*". See *Gustin* at p. 5.12 ("this demonstrates that the plaintiff then *believed* that he had a reasonable cause ..."); p. 5.14 ("there is no evidence that the plaintiff at any stage *thought* ... he had no reasonable cause") (Emphasis added).

20. Secondly, Mr Pascoe overstates the principle in *Gustin*, as does (with respect) the Court of Appeal in *Edmonds* at [93]. Critical to the reasoning in *Gustin* is the existence of a regime of interlocutory injunctions securing the purchaser's alleged equitable interest in the land pending the determination of his suit for specific performance, including an injunction pending the determination of his appeal from Needham J. See Handley JA at p. 4.40-5.9; Sheller JA agreeing at p. 6.23; Powell JA agreeing at p. 6.25. The history of interlocutory relief was plainly critical in *Gustin* because it supported the caveat. The interlocutory relief involved the judicial recognition of an arguable case for specific performance and, accordingly, judicial recognition of an arguable case for the interest claimed in the caveat. At no stage did Mr Pascoe apply for, or obtain, an interlocutory injunction to support a legal interest in the fee simple in Rydalmere unencumbered by the Trust pending determination of his various challenges to the Trust in various federal courts. Insofar as the Court of Appeal in *Edmonds* elevates the principle in *Gustin* to the proposition of Mr Pascoe in RS [41], it is plainly wrong and should not be followed.

21. Thirdly, Mr Pascoe's belated resort to *Gustin* overlooks the clear distinction between a caveat – a statutory injunction imposed by a caveator *extra-judicially* (see *J&H Just* at 552 per Barwick CJ, as approved in *Black v Garnock* (2007) 230 CLR 438 at [7]) – on the one hand, and an interlocutory injunction supporting the caveat – imposed *judicially* after establishing an arguable case on the balance of convenience – on the other. Strictly speaking, the vendor in *Gustin* did not even need to resort to his compensation claim under s. 98 of the *Real Property Act 1900* because he held an undertaking as to damages.

22. Fourthly, the caveat in *Gustin* was lodged contemporaneously with the commencement of proceedings *and* an application for an interlocutory injunction. Mr Pascoe lodged his caveat in August 2005, almost a year *before* he commenced his proceeding challenging the Trust in July 2006 and indeed, *before* any creditors ever approved of the proceeding.

23. Fifthly, at the level of legal principle and perhaps most fundamentally, litigation by the caveators in *Gustin* and *Edmonds* which was found in both cases to support the caveats was litigation claiming the *same* interest in land as the caveats secured. That is ***not*** what occurred here. Mr Pascoe's caveat claims a "legal interest pursuant to the *Bankruptcy Act 1966*", standard wording under a usual practice that assumes the bankrupt is entitled to the fee simple unencumbered by a trust. See SC [28], [29] (CAB 14). It is consistent with the legal advice from Mr Costin's lawyers to commence a proceeding to set aside the Trust, which Mr Pascoe relied on at that time. The interest he claimed, as found in the Full Court, is a bare legal estate subject to the Trust (FC [106] (CAB 101)). During the life of the caveat, Mr Pascoe worked assiduously to have the Trust declared invalid and, when it was found to be valid, to have it set aside as a voidable transaction, and it all failed. In the Supreme Court and in the Full Court, Mr Pascoe claimed that the caveat claimed a bare legal estate subject to the Trust and, in the alternative, that it (somehow) *also* claimed an (unspecified) equitable right of indemnity in trust property. There is a divergence between what he claimed in the caveat under his standard wording and usual practice, on one hand, and what he claimed in various courts in relation to the Trust, on the other. Logically, Mr Pascoe's proceedings cannot possibly support the caveat – even if *Gustin* stands for what he says that it stands for – because of this objective divergence.

24. RS [41]-[46], about the second request, has factual impediments to its acceptance. First, Mr Pascoe relied on advice that the Trust was a "purported trust", that is, a mere sham, *before he lodged* the caveat. See SC [21], [22], [29] (CAB 12, 14). Secondly, Mr Pascoe had clearly decided the Trust was a sham on 21 October 2005 when he published his opinion in his first report to creditors that it is a "purported trust" (SC [43] (CAB 18); AFMB 176.15) *before* any facts he relies on from November 2005 until 10 December 2007 (date of the second request) ever came into his possession. Thirdly, Mr Pascoe remained unconvinced about the validity of the Trust following Mr Mullette's reasoned challenge to his published opinion on its invalidity. See SC [48] (CAB 19); AFMB 251. Fourthly, there is no objective reasonableness of Mr Costin's lawyers' advice in the light of judicial findings (RFMB 17.58-18.2; 19.51-20.30; *cf.* AFMB 282-287 [8]-[9] (sham); [10],[11],[18]-[20]; AFMB 304-307 [15]; [19]-[20]; [28]-[36] (imperfect gift)).

25. Reply on the third request addressed in RS [47]-[49]: The evidence of "insolvency" was found to be unconvincing by the Federal Magistrate in 2009 (AFMB 348 [18]-[19]; 423 [107]-[109]). If Mr Pascoe's solvency report drafted on 29 May 2009 did not establish an arguable case to set aside the Trust under the *Bankruptcy Act* – his only remaining basis for challenging the Trust at the date of the third request – maintaining the caveat on that basis cannot have been objectively reasonable as the corollary of that finding.

PART III: CONCISE REPLY TO THE RESPONDENT'S NOTICE OF CONTENTION

26. RS [50] refers to *inconsistent possible* rights of indemnity in Mr Pascoe's affidavit and opening submissions; they do not withstand scrutiny. AFMB 496 [36]; 745 [31] discuss a right of indemnity for the mortgage debt to the Bank. This *first possible* right is a right of *exoneration*. AFMB 503 [64]; 748 [46] refer to Mr Pascoe's statement at a creditors' meeting about a possible right of indemnity for money earmarked for building work but instead paid out for court proceedings for a development application for Rydalmere. This *second possible* right is a right of *reimbursement*. AFMB 503 [65] is a discussion with Mr Williams, representative of TCR Holdings Ltd, a creditor, in which Mr Pascoe advised Mr Williams to claim TCR's debt from the Trust despite it being Mr Boensch's personal debt. This *third possible* right has no basis. AFMB 512 [103]; 752 [61] is an email from Ms Nash, Mr Costin's solicitor, about an unidentified right of indemnity. This *fourth possible* right has no basis. AFMB 513 [106]-[107]; 756 [63] refer to Mr Johnson's "fallback position" to challenging the Trust. It *assumes* that Mr Boensch has a beneficial interest *as a beneficiary* of the Trust rather than being a right of indemnity as *trustee*. This *fifth possible* right is *not* a right of indemnity. AFMB 515 [119(a)]; 753 [69] *assume an unidentified possible* right of indemnity in order to assess it as of limited value as divisible property of the bankrupt estate so the *sixth possible* right is irrelevant.

27. The (unchallenged) evidence of Mr Boensch in reply at AFMB 450 [64]-[68], relied upon in RS [50], addresses the pleaded case of a right of indemnity. It does *not* reply to Mr Pascoe's evidence about his *honest belief* in various *inconsistent possible* rights of indemnity, save for replying to his evidence at AFMB 515 [119(a)] valuing a possible right of indemnity as being inconsequential. Contrary to RS [50], Mr Pascoe's affidavit identifies various possible rights of indemnity, *none* of them coincident, but identifies no sources nor quantifies any of the possible rights. He gave the evidence in support of an *honest belief* in possible, in the sense of theoretical, rights of indemnity. His principal opening submission, AFMB 763 [111], does not rise above the level of *mere theoretical possibility*. Additionally, it has no invitation to make a positive finding of an identified *and* quantified right of indemnity. The debate at trial about a *possible* right of indemnity (AFMB 520.49-521.27) was, firstly, made in the context of Mr Pascoe's motion for the hearing of a separate question at the start of the trial rather than an opening or a response to an opening of cases. Mr Boensch opened his case proper at trial at AFMB 521.23-527.45. Furthermore, the case that Mr Pascoe closed at AFMB 769 [13(a)]-[13(h)]; 780 [45]-[48] is *not* what he opened on at AFMB 763 [111]. The case Mr Boensch answered in chief (AFMB 677.4-.9; 693.25-.34) and reply (AFMB 727.19-.44; 731.32-732.10) is limited to the *theoretical possibility case* that Mr Pascoe opened on at AFMB 763 [111].

28. RS [52] attributes the absence of any affirmative decision having been made on a right of indemnity to "*the way the case was decided*". But Mr Boensch attributes it to the way *the defence case was conducted* by Mr Pascoe. Because he never conducted a case that rose above the level of a set of *inconsistent possibilities* to support his *honest belief*, his Honour gave it no emphasis. Mr Pascoe first gave it emphasis in the Full Court. RS [52] invites a finding of "a caveatable interest in the land vested in Mr Pascoe by reason of *a* trustee's right of indemnity enjoyed by Mr Boensch". But it is *not* what his Notice of Contention (CAB 139) seeks. It pleads *multiple* unspecified and unquantified rights of reimbursement *and* exoneration, *assuming* various rights of indemnity – unidentified as to doctrinal nature and unquantified – exist unless Mr Boensch (somehow) disproves their existence. But this is *not* how onus of proof in s. 74P(1) operates (AS [52]-[53]).

29. RS [53] misconstrues AS [55(b)]. Furthermore, AS [55] refers only to an alleged right of *reimbursement* but not to an alleged right of *exoneration* because that is not what Mr Pascoe contended at trial. See AFMB 769 [13(a)]-[13(h)]; 782 [46]-[48]: "*exoneration*" gets a mere mention in [48] as an unquantified right. Secondly, there can be no possible right of *exoneration*. Mr Boensch's *only* liability as trustee was to Commonwealth Bank on the mortgage. In his Statement of Affairs, Mr Boensch disclosed the mortgage debt balance as $70,000 and valued Rydalmere in his opinion at $380,000. See AFMB 134, 223. The Bank did *not* lodge a proof of its debt in the bankrupt estate. See AFMB 208 ("Liabilities"). The Bank's debt was merely disclosed as a secured debt. See AFMB 209 (par 1). The Bank was precluded from lodging a proof of debt without surrendering its security over Rydalmere. See s. 90(2) of the *Bankruptcy Act*. It never did so. The mortgage payments continued to be made throughout the bankruptcy, it would seem by Mrs Boensch, who remained a joint mortgagor to the Bank. She remained on title as a joint tenant following the 1999 property settlement because the Bank would not release her from her personal covenant in the mortgage. See SC [18] (CAB 11); AFMB 49, 87.

30. RS [54]-[56] propound a right of *exoneration* sourced in the mortgage debt. However, such a right cannot exist. See par 29 above. No such case was ever opened or conducted.

31. RS [58] embraces the requirement for an accounting in equity and a set-off to address the mutually beneficial arrangement because the objective fact is that Mr Boensch and his children – the Trust's only beneficiaries – at all material times occupied Rydalmere. The recognition of this at AS [47] is a recognition made at the level of legal principle rather than in respect of the facts in this case because no accounting in equity or set-off is possible on the available evidence or findings of fact (see pars 35-36 below). RS [58] fails to address the inability of this Court to undertake *any* accounting in equity in order

to determine a set-off on appeal because the necessary factual findings are not available. RS [58] *also* fails to address the absence of any credibility finding for Mr Boensch (see FC [155] (CAB 113)) as the proponent of the (oral) "mutually beneficial arrangement".

32. The proposition in RS [59] that, until the value of the right of indemnity is ascertained in an accounting in equity, Mr Boensch (somehow) continued to have a lien on the land so that it was not held on trust solely for others (as *Carter* requires), makes a series of unproved assumptions at the levels of evidence and principle. First, it *assumes* payment of 6 years' mortgage payments and outgoings on Rydalmere were met by Mr Boensch, as distinct from Boensch Pty Ltd, Mrs Boensch's company (the subject of unchallenged evidence at AFMB 550.5-.28). Secondly, it *assumes* the value of a right of occupation of the land for 6 years is *less* than the mortgage payments and other outgoings met in the 6-year period preceding the sequestration order, to the extent that they were indeed met by Mr Boensch. This is highly unlikely given the amount of the mortgage relative to the value of the land, as recorded in the Statement of Affairs at AFMB 134. Thirdly, it *assumes* that the objective reasonableness of the caveat does not logically depend in principle upon quantifying this right, assuming a right of indemnity exists. For example, it cannot be objectively reasonable to statutorily injunct land for 4 years to secure the payment of an amount Mr Pascoe concedes at AFMB 515 [119(a)] is of "limited value". Fourthly, RS [59] *assumes* the irrelevance of the fact that at no time during the life of the caveat did Mr Pascoe affirmatively establish the existence of this right or quantify it until he concluded that it was of inconsequential value in the face of a lapsing notice. Fifthly, it *assumes* the irrelevance of the fact that at no stage during the life of the caveat did Mr Pascoe demand a payment to satisfy this alleged right of indemnity from either Mr *or* Mrs Boensch – in their capacity as the joint custodial parents of the beneficiaries of the Trust – in consideration for his undertaking to withdraw the caveat. Sixthly, it *assumes* the irrelevance of the fact that at no stage, in response to the various requests to remove the caveat, did Mr Pascoe ever identify a definite right of indemnity as the "*divisible property*" of the estate which he was seeking to realise to justify the caveat.

33. In RS [60], Mr Pascoe, in his defence under s. 74P(1), seeks to overcome self-evident failures (or elections) he made in the conduct of his case at trial on the alleged right of indemnity by the device of shifting his evidential burden onto Mr Boensch's shoulders by alleging a failure by Mr Boensch to satisfy the onus of proof in s. 74P(1). Mr Pascoe seeks to establish his right of indemnity by contending a failure by Mr Boensch to prove his "off-setting obligation" to the Trust under his "mutually beneficial arrangement" with it. Mr Pascoe gives two reasons for the contention. First, he says Mr Boensch bears

the onus of establishing a set-off under principles of equitable set-off. (More accurately, it is a "netting-off": see *Carter* at [31], citing Lord Walker in *In re Kaupthing* [2012] 1 AC 804 at [8], [13], [43]; *Lane v DCT* (2017) 253 FCR 46 at [54]-[57].) Secondly, he notes that Mr Boensch has the onus in s.74P(1) of proving that lodgment or maintenance of the caveat was made "without reasonable cause". Neither reason should be accepted.

34. The principle of "netting-off" of reciprocal monetary obligations is identified in *Carter* at [31], citing Lord Walker's explanation in *In re Kaupthing* at [8], [13], [43] of the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442, which it relies on. Lord Walker identified a requirement for specific arithmetic integers to calculate a netting-off. Furthermore, a requirement to establish equitable set-off (assuming that Mr Pascoe is correct that it is engaged instead) is a close connection between counter-veiling liabilities, as they must arise out of the same transaction *and* be logically connected (*Rawson v Samuel* (1841) Cr. & Ph. 154; 41 ER 451; *McDonnell v McGregor* (1936) 56 CLR 50, 60). Mr Boensch cannot establish a netting-off or a set-off as the respondent to allegations of *inconsistent possible* rights of indemnity unless he is made aware of precisely what he is netting-off or setting-off his obligations to the Trust against. The proponent of *possible* rights of indemnity must elect *one* definite right of indemnity *and one* legal source for that right *and value* it for the principles of netting-off or equitable set-off to be engaged. Which of Mr Pascoe's *inconsistent possible* rights of indemnity is subject to the counter-claim? How can there be an assessment of unidentified rights for their logical connection? How much does Mr Boensch need to establish as his netting-off or set-off so as to answer it?

35. These pertinent questions cannot be answered on the available findings. Mr Pascoe did *not* conduct that case. He now seeks to justify this failure (or election) by requiring Mr Boensch to prove the negative but without identifying what must be disproved. On the available findings of fact, there is nothing established by Mr Pascoe – in performance of *his* evidential burden as the party propounding a defensive right of indemnity – which could possibly trigger this component of Mr Boensch's (undisputed) onus to prove that the caveat was lodged or maintained "without reasonable cause" for the purposes of s. 74P(1). Contrary to RS [60], the Full Court correctly declined to determine the Notice of Contention to it for the reasons it gave at FC [155]-[158] (CAB 113). It is contended, with respect, that this Court should reject the Notice of Contention filed with it for the same reasons and *also* for the reasons in AS [41]-[54] and in pars 26-35 above in reply.

27 September 2019

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