58/08; [2008] VSC 561

SUPREME COURT OF VICTORIA

BRIDGMAN v THOMPSON

Hollingworth J

7 May, 15 December 2008

CIVIL PROCEEDINGS – CLAIM BY BENEFICIARY OF A SUPERANNUATION FUND AGAINST OTHER TRUSTEE FOR TRUSTEE TO DELIVER UP ALL OF THE TRUST PROPERTY – CLAIM NOT COMPLIED WITH – COMPLAINT ISSUED BY BENEFICIARY AGAINST TRUSTEE TO DELIVER UP CERTAIN DOCUMENTS AND THAT TRUSTEE WRONGFULLY CONVERTED CERTAIN SHARES OF THE FUND AND BREACHED HIS FIDUCIARY DUTIES – FINDING BY MAGISTRATE THAT CLAIM MADE OUT – ORDERS MADE AGAINST TRUSTEE – INFERENCES DRAWN BY MAGISTRATE AGAINST TRUSTEE – WHETHER MAGISTRATE IN ERROR.

1. Where a magistrate found that the trustee of a Fund had retained funds invested in accounts and had failed to hand over trust property, the magistrate was in error given that the evidence was not sufficient to justify the findings and orders made. Further, as there was no evidence as to what moneys were in the accounts between certain dates, there was no legal basis for the magistrate to have ordered that the trustee pay penalty interest.

2. In relation to orders made by the magistrate about investments made by the Fund in two unlisted trusts, the magistrate fell into error by treating the trustee's further and better particulars and the documents attached to them as if they were either evidence or admissions which removed the need for evidence. Whilst a court may act on admissions in pleadings without requiring evidence of the admitted facts, the particulars of the trustee did not contain admissions in the relevant sense. They were merely assertions made by way of pleading and should not have been treated as admissions.

3. The unexplained failure by a party to give evidence, call a witness or tender documents may, in appropriate circumstances, lead to an inference that the uncalled material would not have assisted that party. This arises from what is referred to as the rule in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395. In the present case, there was no evidence called to explain the trustee's failure to give evidence. Even if the reason he did not give evidence was because he believed that the beneficiary's evidence was insufficient to require him to do so, that would not prevent an adverse inference being drawn. However, a *Jones v Dunkel* inference can only be drawn where the court can be certain that there was some evidence that could have been given and on what subject matter. Furthermore, the rule cannot be used to fill in gaps in the evidence, or to convert conjecture and suspicion into inference. No inference can be drawn unless evidence is given of facts "requiring an answer". So, if the party bearing the burden of proof has tendered no evidence in support of an issue in dispute, the opponent is not required to answer. In the present case, the inference drawn by the magistrate was clearly impermissible.

HOLLINGWORTH J:

Background to this appeal

1. Until about April 2003, the appellant, Mr Bridgman, was a licensed financial planner. The respondent, Ms Thompson, had known him for some years through personal contacts, and through his advising her about various investments. He advised Ms Thompson to set up her own "self-managed" superannuation fund. In May 2002, the Thompson Superannuation Fund was created, and Ms Thompson and Mr Bridgman were appointed as joint trustees. Ms Thompson was the only beneficiary of the Fund. Almost $80,000 was transferred into the Fund.

2. Ms Thompson became dissatisfied with Mr Bridgman's performance and, in July 2004, she removed Mr Bridgman as a trustee and became sole trustee of the Fund. Since then, she has made a number of attempts to compel Mr Bridgman to deliver up all of the trust property to her.

3. In 2004, Ms Thompson issued the first Magistrates' Court proceeding against Mr Bridgman (complaint S02758017). In December 2004, consent orders were made in that proceeding, which required Mr Bridgman to deliver up all documents in his possession relating to the Fund, within

21 days.

4. In May 2006, Ms Thompson issued the second Magistrates' Court proceeding against Mr Bridgman (complaint U01259788). Ms Thompson alleged that Mr Bridgman had wrongfully converted certain shares belonging to the Fund, and breached his fiduciary duties in relation to investments by the Fund in two unit trusts. On 14 June 2007, a magistrate gave judgment in favour of Ms Thompson.

5. By notice of appeal issued on 16 July 2007, Mr Bridgman appeals against most of the magistrate's orders, pursuant to s109 of the *Magistrates Court Act* 1989. The primary ground of appeal is that the learned magistrate erred in law, in that there was simply no evidence upon which the magistrate could make various critical findings. The precise grounds are set out in an amended notice of appeal dated 21 August 2007. Mr Bridgman abandoned any appeal based on ostensible bias by the magistrate.

The trial below

6. Ms Thompson's case proceeded on 4 and 5 April 2007. She gave oral evidence, as did Charles Seagar, a financial planner.

7. At the close of Ms Thompson's case, Mr Bridgman's counsel made a "no case" submission, without being required to elect whether or not to call evidence. The magistrate rejected the submission.

8. As a result of criticisms made by Mr Bridgman's counsel during the "no case" submission, Ms Thompson's counsel sought and obtained leave to amend her complaint. A further amended statement of claim was filed on 5 April 2007 ("the amended claim"). He was also permitted to tender a few additional bank statements.

9. Mr Bridgman chose not to give or call any evidence.

10. Closing submissions were made orally on 10 April 2007 and also in writing.

11. The magistrate gave oral reasons for decision on 14 June 2007, which run for some 20 pages of transcript ("the reasons below"). Thereafter, the parties agreed a form of orders to reflect the reasons below.

12. Even making full allowance for the fact that it was a Magistrates' Court complaint, not a Supreme Court statement of claim, Ms Thompson's pleading below was confusing and defective in a number of respects, which will be discussed later in these reasons. Unfortunately, the confusion and defects were not remedied by the way in which Ms Thompson's lawyers prepared for and conducted the trial.

13. It is clear from the reasons below that the magistrate was, quite understandably, frustrated by the state of the evidence, which he variously described as sparse, incomplete or non-existent.[1] He was also highly critical of Mr Bridgman's actions in respect of certain interlocutory steps, labelling him as recalcitrant and dilatory.[2] Although all the details are not before me, it is clear that there had been at least 4 interlocutory applications, apparently involving various attempts by Ms Thompson's lawyers to obtain further information or documents from Mr Bridgman.

14. What is not clear to me is why, given such a history of conduct on the part of Mr Bridgman, Ms Thompson's lawyers apparently took no steps to obtain evidence from other parties, for example, by using witness summonses for the giving of evidence or the production of documents.[3] Ms Thompson's lawyers could also have interrogated Mr Bridgman.[4]

15. As plaintiff, Ms Thompson clearly bore the onus of proving her case. A defendant is not required to call evidence unless the plaintiff at least raises a case to be answered. Ms Thompson's counsel was well aware during the course of the trial of the possibility that Mr Bridgman may not give evidence[5], but it is not clear how he thought his client's case could be proved in that event.

16. The magistrate's orders in relation to certain shares owned by the Fund are not the subject

of any challenge by Mr Bridgman. However, the orders against Mr Bridgman include the following, which are the subject of appeal:

> (1) Judgment for the sum of $10,628.33, together with statutory penalty interest thereon, being $3,177.41 from 28 November 2004 until 4 July 2007, and $3.49 per day thereafter ("the first MLC account order");
>
> (2) Judgment for the sum of $7,506.73, together with statutory penalty interest thereon, being $1,541.49 from 16 September 2005 until 4 July 2007, and $2.47 per day thereafter ("the second MLC account order");
>
> (3) Orders effectively requiring Mr Bridgman to personally pay Ms Thompson $41,000, and her to transfer to him all of the Fund's interest in two specific investments ("the unit trust orders").

The first MLC account order

17. It is clear from the reasons below that the first MLC account order relates to an MLC Master Key Cash Management Trust account number 675, held in the joint names of Ms Thompson and Mr Bridgman.[6]

The pleadings

18. The amended claim makes no reference at all to account number 675 or to the sum of $10,628.33 (being the principal specified in the first MLC account order).

19. Paragraph 12 of the amended claim pleads that by certain financial statements, Mr Bridgman represented that the Fund had certain specified assets as at 30 June 2003, including an item described as "cash at bank" in the sum of $14,222.44. There is no subsequent pleading based on any misrepresentation, that is to say, paragraph 12 does not appear to go anywhere as a representation claim. However, from the transcript below, it seems that counsel[7] and the magistrate did not regard paragraph 12 as a pleading of representation, rather, as a pleading of facts (that is to say, as pleading that the Fund did in fact have those assets as at 30 June 2003); I will read it in the same way for present purposes.

20. There is no subsequent pleading about the cash at bank, until paragraph H of the prayer for relief, which simply seeks an accounting for, amongst other things, "the money at bank as set out in paragraph 12 hereof". For instance, there is no pleading that there is still any money in that account, or that Mr Bridgman has failed or refused to account for the cash at bank to the sole trustee. That is to say, there is no cause of action pleaded in relation to the money.[8]

21. Mr Bridgman's defence admits paragraph 12, but otherwise denies being indebted to Ms Thompson.

The evidence

22. During the course of Ms Thompson's evidence, her counsel sought to tender a copy of a bank statement showing a closing credit balance in this MLC account as at 28 November 2004 of $10,628.23. When objection was taken to the tender through Ms Thompson, the statement was simply marked for identification as "MFI-1".

23. After Mr Bridgman's counsel had pointed out in the course of his "no case" submission that there was simply no evidence about this MLC account, Ms Thompson's counsel sought to tender some additional bank statements. After some argument, Mr Bridgman's counsel eventually did not oppose their tender. Unfortunately, the bank statements were not put in evidence before me, so I am not aware of precisely what documents were tendered. However, from what was said by counsel and the magistrate, I am satisfied that the bank statements only showed transactions in the account between June 2002 and November 2004, and did not show any transactions after November 2004.

24. Ms Thompson's counsel did not call any oral evidence about either of the MLC accounts. He did not ask Ms Thompson relevant questions about the accounts, including whether the moneys in them had been paid to her at any stage, or what, if any, steps she had taken to try to recover the moneys (particularly in the case of the first MLC account, which was in joint names).

25. There is nothing before me which indicates why Ms Thompson's lawyers had not simply

served witness summonses on MLC, requiring it to produce all relevant bank records, and possibly also to give oral evidence, so that the court could work out (in the absence of any explanation from Mr Bridgman) what had actually happened with the MLC accounts.

The reasons below

26. The magistrate found that:

(a) The balance in the first MLC account as at 28 November 2004 was $10,628.23;

(b) Mr Bridgman had not given a satisfactory account of, or delivered up to Ms Thompson, "the moneys, if any, remaining in the MLC accounts";[9]

(c) Ms Thompson's evidence is that "these moneys have not been accounted to her";[10]

(d) There is no evidence as to the present balance in this account;[11]

(e) Even though Ms Thompson's name appears with Mr Bridgman's on the account, "the means of giving a proper accounting for these investments remain solely with [Mr Bridgman]" and that "in breach of his duty as a trustee has failed to make a proper accounting and to deliver up these assets;"[12] and

(f) There has been no accounting to Ms Thompson in respect of these funds and Ms Thompson will have judgment in the amount which was in the account on 28 November 2004.[13]

Errors by the magistrate

27. Even assuming in favour of Ms Thompson that there had been some cause of action properly pleaded in respect of the amounts in the MLC accounts, to the effect that Mr Bridgman had wrongfully retained the funds after he ceased to be trustee, the evidence was not sufficient to justify the findings and orders which were made.

28. In particular, I am satisfied that there was simply no evidentiary basis for the magistrate to find that:

(a) Mr Bridgman had retained the funds invested by the Fund in the first MLC account, particularly having regard to the magistrate's (correct) finding that there was no evidence as to the present balances (if any) in the MLC accounts;

(b) Despite his removal as trustee in July 2004, and the fact that Ms Thompson's name was also on the account, Mr Bridgman continued to have effective control of the first MLC account;

(c) Mr Bridgman was liable to account to Ms Thompson in respect of the Fund's investments in the MLC accounts; and

(d) Mr Bridgman ought to pay penalty interest on the balance in the first MLC account as at 28 November 2004, from that date until the date of trial.

29. Even if, contrary to the above, there had been evidence to the effect that Mr Bridgman had failed to hand over trust property held in the first MLC account, there are several problems with the relief which the magistrate ordered.

30. In paragraph H of the prayer for relief, and in her counsel's submissions below, Ms Thompson had sought the taking of an account in respect of the moneys in the MLC accounts. However, the magistrate did not order the taking of an account. Nor did he order that Mr Bridgman take all steps necessary to transfer to Ms Thompson any balance remaining in the first MLC account, or to resign as an account holder, which might also have been appropriate remedies, with a proper pleading. Instead, he ordered that Mr Bridgman personally pay to Ms Thompson the sum of $10,628.23, being the amount which was in the first MLC account as at 28 November 2004, together with statutory interest since that time.

31. Given that, in so far as there is any evidence, it suggests that the beneficial interest in the account has always been and remains held by the Fund, and in the absence of any allegation or evidence of defalcation or relevant wrongdoing, I do not know on what legal basis the magistrate purported to make an order for payment by Mr Bridgman personally. The same comment may be made of the order that Mr Bridgman personally pay interest in respect of the first MLC account.

32. There are further problems with the order that interest be paid on the balance, at penalty

interest rates or at all. First, the magistrate acknowledged that there was no evidence as to what, if any, moneys were in the account between November 2004 and the trial in April 2007. I do not know on what legal basis he could have ordered interest, without knowing what the correct principal figures were at relevant times. Secondly, the moneys had been invested in a cash management account. If, as may well have been the case, interest was being paid on those moneys by MLC, a court should have had regard to that fact, in deciding what, if any, interest to order.

33. It follows that the first MLC account order must be set aside.

The second MLC account order

34. It is clear from the reasons below that the second MLC account order relates to part of an amount originally invested by the Fund in MLC account number 102353406.

The pleadings

35. The amended claim does not allege that moneys were in fact invested in this particular MLC account. Rather, paragraph 12, already discussed above, pleads that Mr Bridgman represented that as at 28 January 2004, there was $12,428.75 in an unidentified MLC Cash Management Trust.[14] However, as with the first MLC account, the pleading was treated below as a pleading that the Fund did in fact have that amount in an MLC Cash Management Trust account as at 30 June 2003; accordingly, I will read it in the same way.

36. The only other mention of MLC is in paragraph H of the prayer for relief, which seeks an accounting for "the MLC account" as set out in paragraph 12. So, once again, there was no cause of action pleaded in respect of these moneys.

37. As already mentioned, Mr Bridgman's defence admits paragraph 12, but otherwise denies being indebted to Ms Thompson.

The evidence

38. Ms Thompson's counsel did not seek to tender any documents or lead any oral evidence in relation to this MLC account during her case.

39. It seems from the reasons below that some of the additional bank statements tendered after the close of the plaintiff's case may have related to this account.

40. Ms Thompson's counsel did say from the bar table that the pleaded amount of $12,428.75 had been invested in two different MLC funds: an Australian Bond Fund and a Global Share Fund. He also conceded[15] that in September 2005, Mr Bridgman had paid to Ms Thompson the proceeds of the Australian Bond Fund, being $6,573.32 (although the magistrate referred to this[16] as $6,573.22).[17]

41. The difference between $12,428.75 (the amount pleaded in paragraph 12 of the amended claim) and $6,573.32 (the amount said to have been paid to Ms Thompson from the Australian Bond Fund) is $5,855.43, not $7,506.73 (the amount in the magistrate's orders). From what Ms Thompson's counsel said in closing address[18], it appears that the last balance shown on a Global Share Fund statement was $6,598.35, as at 30 June 2005. I am unaware of any explanation for these different amounts.

42. Once again, I have not seen the bank statements which were tendered in evidence in relation to these funds or accounts. But it is clear from the transcript and the reasons below that they did not show the position after the end of 2005.

43. As with the first MLC account, it is not apparent on the material before me why Ms Thompson's lawyers had not issued summonses to MLC, and asked Ms Thompson a few simple questions, which would have enabled her to lead the evidence necessary to prove her case (assuming it had been pleaded).

The reasons below

44. The magistrate found that:

(a) The balance in the Global Share Fund account as at 16 September 2005 was $7,560.73 (the fact

that his actual order was for $7,506.73 may be due to a typographical error by the solicitors who prepared the minute);[19]

(b) Mr Bridgman had not given a satisfactory account of, or delivered up to Ms Thompson, "the moneys, if any, remaining in the MLC accounts";[20]

(c) Ms Thompson's evidence is that "these moneys have not been accounted to her";[21]

(d) There is no evidence as to the present balance in the MLC accounts;[22]

(e) "The means of giving a proper accounting for these investments remain solely with [Mr Bridgman]" and that "in breach of his duty as a trustee has failed to make a proper accounting and to deliver up these assets;"[23] and

(f) Mr Bridgman has not accounted to Ms Thompson for either of the sums of $6,573.22 or $7,560.73 and Ms Thompson will have judgment for both of those sums.[24]

Errors by the magistrate

45. Thankfully, the parties' solicitors realised that the finding in paragraph (f) above was wrong in relation to the sum of $6,573.22, which had in fact already been paid to Ms Thompson in September 2005. Accordingly, they did not include the payment of that amount in the final orders.

46. Otherwise, the errors identified in relation to the first MLC account order apply *mutatis mutandis* to the second MLC account order.

47. It follows that the second MLC account order must be set aside.

The unit trust orders

48. The unit trust orders arise out of Ms Thompson's complaint about investments made by the Fund in two unlisted trusts, being the 506 Nepean Highway Unit Trust ("the Nepean Trust") and the Reserve Street Unit Trust ("the Reserve Trust").

The pleadings

49. Paragraph 19 of the amended claim alleged that by reason of Mr Bridgman acting as Ms Thompson's investment advisor, and as trustee of the Fund, he owed both her and the Fund "a duty of care":

(a) To act honestly and in good faith;

(b) To act for the benefit of beneficiaries;

(c) To avoid conflicts of interest; and

(d) To avoid making a secret profit or gain.

It is said that "each of the duties is implied by law."

50. Paragraph 19 is confusing, in so far as it mixes concepts such as "duty of care" (which may arise in negligence, contract or under legislation), with the concepts in paragraphs 49(a) to (d) above (which may arise in fiduciary relationships).

51. The amended claim includes the following factual allegations in paragraphs 20 and following:

(a) Diamond Developments (Vic) Pty Ltd was the trustee of the Nepean Trust;
(b) Mr Bridgman and his domestic partner were directors of Diamond Developments and controlled at least 25% of the shares in that company;
(c) The Nepean Trust has no assets or alternatively, the investment made by Mr Bridgman on behalf of the Fund was of diminished value. The particulars of this allegation appear to say that the Fund invested $21,000 in the Nepean Trust which, if it had been properly invested elsewhere at a rate of 13.25% per annum from 18 May 2002 to 3 April 2007, would now be worth $39,121.04;
(d) Tara Services Pty Ltd was the trustee of the Reserve Trust;
(e) Mr Bridgman was one of the two directors of Tara Services and controlled at least 50% of the

shares in that company;
(f) The Reserve Trust has no assets or alternatively, the investment made by Mr Bridgman on behalf of the Fund was of diminished value. The particulars of this allegation appear to say that the Fund invested $20,000 in the Reserve Trust which, if it had been invested elsewhere at a rate of 13.25% per annum from 18 May 2002 to 3 April 2007, would now be worth $37,258.13;
(g) Mr Bridgman, by reason of "his purported purchase of shares" in the two unit trusts breached his fiduciary duties to Ms Thompson (in her own right, and as trustee on behalf of the Fund), and to the Fund, by reason of which they have suffered loss and damage. The particulars of loss and damage mirror the previous allegations, namely, that if invested elsewhere, the total sum of $41,000 would now be worth $76,379.17;
(h) The prayer for relief sought $41,000, being the total "capital invested" by the Fund, and what was described as "deemed income on the capital" of $35,379.17 to 3 April 2007 and continuing. It did not seek anything described as damages in respect of these investments, notwithstanding the earlier substantive pleading of loss and damage.

52. Until the trial, Ms Thompson's claim had simply alleged that the two investments were of no value. In the amendments made after the close of Ms Thompson's case, the alternative plea was made to the effect that the investments were of "diminished value".

53. The amended claim does not explain the following: when the investments were made; what their current "diminished" value was said to be; why they were inappropriate investments; why making the investments was in breach of any, and which, fiduciary or other duties.

54. The defence admits the identity of the trustees of the two unit trusts, and some but not all of the directorships and ownership allegations. However, it denies that the unit trusts have no assets or that the investments are of diminished value. The defence also says that the investment of funds in the unit trusts has yielded assets for the Fund in the value of or in excess of the value of the funds invested, full particulars of which would be provided prior to trial.

55. By a request for particulars dated 1 September 2006, Ms Thompson sought particulars of the assets of the two unit trusts.

56. Mr Bridgman provided the following brief particulars in a document dated 8 December 2006:

(a) The Nepean Trust owns 20% of the units issued in the Bannister Bay Unit Trust, the trustee of which is Bannister Bay Pty Ltd, which is the registered proprietor of Unit 4, 506 Nepean Highway, Frankston;

(b) The Reserve Trust owns approximately 25,000 units in the Nepean Trust, which comprises approximately 9% of the total units in that trust. It also has about $21,000 in an MLC cash management account in the account of Tara Services Pty Ltd as trustee for the Reserve Trust;

(c) The Fund owns approximately 20,000 units in the Reserve Trust (being approximately 28% of the total units in that trust) and 21,000 units in the Nepean Trust.

57. After being ordered to provide a more detailed response to the request for particulars, on 30 March 2007, only a few days before trial, Mr Bridgman gave further information about the assets of the two unit trusts. Those particulars included an assertion that the current value of the Fund's investment in the Nepean Trust was $24,567.90, and in the Reserve Trust was $14,660. Certain documents were attached to the further particulars.

The evidence

58. The evidence given by Ms Thompson as to the unit trust investments was as follows. She had not been consulted about the investments before they were made, and did not receive any explanation about them afterwards. She had no idea about the nature of the investments or whether any income had been produced by them. She did not know how she could sell the units and had no idea if they had any value. She had no knowledge of the value of the units in the Nepean Trust. She had not written to the trustees of the unit trusts asking them for any information about the investments.

59. Ms Thompson did give evidence that she had received the original unit trust certificates from Mr Bridgman in January 2005. That is to say, unlike the money in the MLC accounts, there

was no suggestion that Mr Bridgman was wrongfully withholding any Fund property in respect of the unit trust investments.

60. It appears that Ms Thompson's counsel did tender some historical ASIC company searches of Diamond Developments and Tara Services, the trustees of the two unit trusts. However, he appears not to have tendered any company search for Bannister Bay, the registered proprietor of the Nepean Highway property.

61. The financial planner, Mr Seagar had no personal knowledge about the unit trusts or their assets. He was shown a copy of Mr Bridgman's further and better particulars dated 30 March 2007 and asked certain questions about the particulars and its attachments. He said he could not understand Mr Bridgman's explanation of the process he had used to value the investment in the Nepean Trust. He made the (self-evident) observation that the balance sheets attached to the back of the particulars were not valuations. He explained what sort of information he thought would need to be provided before the assets could be valued, which included a sworn valuation of the real property and any other assets. He conceded that he was neither a valuer nor an accountant.

62. In cross-examination, Mr Seagar acknowledged that he was not aware of the performance of investment properties in Frankston in recent years, and did not even know whether they had gone up or down in value.

63. Based on his investment experience, Mr Seagar would regard an investment in an unlisted property trust as a long-term investment, meaning one that would be for a minimum of 7 years. He agreed that one could not judge the worth of such an investment by its short-term performance. He accepted that an unlisted property trust was at the higher end of the risk spectrum than a listed trust, because of the limited ability to liquidate it, but said that an investor might receive a higher rate of return accordingly. From his knowledge, over the past 7 years, more investors in unlisted property trusts had done well than badly.

64. Importantly, Mr Seagar agreed that just because an investment did badly, that did not mean that an advisor had been negligent or improper in advising that the investment be made. He did not know what information the trustees had before the decision was made to invest in the two unit trusts. Unsurprisingly, given the state of his knowledge, when asked whether he could express an opinion as to whether, back in 2002, the two unit trusts would have appeared to be a good investment for the Fund, he replied "Of course not."[25]

65. There was no evidence before the court as to the terms on which the units were issued, or as to any restrictions on the sale of units. Critically, there was simply no evidence whatsoever as to nature or value of any of the assets of the unit trusts at any time, including at the time of the investments or the time of trial.

66. Although company searches apparently showed that Mr Bridgman was one of the two directors of each of the corporate trustees, there was no evidence as to the extent of Mr Bridgman's connection with Bannister Bay (which owned the real property). It is not clear from the transcript or the reasons below just what evidence the company searches showed as to ownership of the other units in the unit trust.[26]

67. Once again, there is nothing before me which indicates why Ms Thompson's lawyers had not taken steps to obtain evidence as to the assets of the trusts (by serving appropriate summonses on the corporate trustees[27]), or to obtain a valuation of the real property, given that the original pleaded case was that the investments were wholly without value.

The reasons below

68. Although not pleaded in this way in the amended claim (or any earlier versions), the magistrate commenced his discussion of the unit trusts by observing that Ms Thompson's case "in essence" was "that these investments were undertaken in breach of the defendant's duties as a trustee in that they were inappropriate or speculative, that they were undertaken without proper consideration as to the needs and purposes of the [Fund]."[28] Described in that way, the claim sounds like one based on breach of a duty of care, rather than breach of a fiduciary duty.

69. The fact that he primarily regarded this as a case about inappropriate or speculative investments is borne out by the magistrate's lengthy discussion about the nature and extent of a trustee's duties under the *Trustee Act* 1958 and the *Superannuation Industry (Supervision) Act* 1992. In particular, he considered the provisions which impose duties of skill, care and diligence in making investments, and the fact that the law looks to what a reasonably prudent and careful person would have done in the position of the trustee.[29] He did not discuss the law in relation to fiduciary duties.

70. The magistrate made the following findings of fact about the investments in the unit trusts:

> (a) Mr Thompson was at all relevant times an officer and shareholder of the two trustee companies, Bannister Bay (sic)[30] and Tara Services. He had "effective control" of these trustee companies and the power thereby to order and direct the investments of the unit trusts;[31]
> (b) Mr Thompson was at all relevant times an officer and the holder of half the issued shares, either personally or through his (unidentified) corporate entity, in Diamond Developments;[32]
> (c) Although the paucity of evidence made "a proper and full evaluation of the investments difficult, there are certain pertinent observations that can be made by perusal of the defendant's particulars of 30 March 2007" and the "balance sheets" attached to them. His Honour went on to make various factual observations based on the two documents headed "balance sheet as at 30 June 2006" which were attached to Mr Bridgman's particulars;[33]
> (d) In particular, based on the balance sheets and the fact that Mr Bridgman declined to give evidence, the magistrate concluded that the investment in the Nepean Trust was "a speculative property development";[34]
> (e) It is a "matter of concern" that the Nepean Trust had advanced a loan of $123,290 to [Diamond Developments] "a company associated with, and probably controlled by" Mr Bridgman,[35] which raises the issue of conflict between the personal interests of Mr Bridgman and his obligations as a trustee;[36]
> (f) There was no documentary evidence as to the financial position of the Reserve Trust at any relevant time;[37]
> (g) The evidence as it stands allows "significant doubt and uncertainty as to the real value in terms of the tangible assets of these trusts in which the investment was made, especially the lack of any evidence of a proper valuation of the real estate both at the time of the investment and at the time the share certificates in respect of the units were surrendered to [Ms Thompson];[38]
> (h) The evidence also raises "a real concern that certain [unspecified] dealings in respect of the assets in the unit trusts through the trustee companies controlled by Mr Bridgman may have been made in circumstances which created a conflict between his personal interests and his obligations and duties as a trustee";[39]
> (i) Mr Bridgman's particulars show that "the overall investment in the two unit trusts as at the last date of valuation by [him] shows them to be returning an overall loss. There was no evidence before the court that the real estate underpinning any tangible value in these unit trusts is real estate which returns any income";[40]
> (j) The Fund's investments in the unit trusts are "illiquid".[41] As Mr Bridgman has given no evidence as to the liquidity of the investments in the unit trusts "it is appropriate to draw the inference that his evidence in respect of the appropriateness of the investment in these unit trusts would not assist him;"[42]
> (k) "It can only be a matter of speculation as to why such a complex structure was created in what is essentially an investment in real estate. Again, the failure of [Mr Bridgman] to give evidence, properly allows an adverse inference to be drawn. It may well be that such a structure potentially at least may have had certain advantages for the Fund but again absent any evidence from [Mr Bridgman] no conclusion favourable to him can be reached."
> (l) "My finding in respect of these unit trusts, is that [Mr Bridgman] has failed in his duties as a trustee in respect of the proper consideration of matters to which he must have regard when making an investment on behalf of the Fund";[43]
> (m) The investments in the unit trusts were not investments made properly in accordance with the duties of Mr Bridgman as trustee. "As a consequence [Mr Bridgman] will be liable to pay to [Ms Thompson] the sum of $41,000 representing the amount of these investments";[44]
> (n) Based on Mr Seagar's opinion that 13.25% p.a. would have been an appropriate return on managed investment funds in the relevant periods, interest would be ordered at that rate on the principal sums invested since the date of the investments.[45]

Errors by the magistrate

71. The magistrate was obviously, and understandably, frustrated by the paucity of evidence about the investments, and the attitude which Mr Bridgman had taken to the provision of information at interlocutory stages. Unfortunately, that led to his Honour filling in the gaps in the evidence in at least two impermissible ways. First, he treated Mr Bridgman's further and better particulars, and the documents attached to them, as if they were either evidence or admissions

which removed the need for evidence. Secondly, he went too far in the inferences he drew based on Mr Bridgman's failure to give evidence.

The further and better particulars

72. As mentioned earlier, the magistrate relied in particular upon Mr Bridgman's further and better particulars dated 30 March 2007 and the documents attached thereto. The particulars were particulars of Mr Bridgman's allegation (denied by Ms Thompson) that the unit trusts had assets, and that the Fund's investment had "yielded assets" for the Fund in excess of the amounts originally invested. The particulars made various assertions about the financial position of the trusts as at 30 June 2006, in part by reference to the attached documents.

73. The attached documents were:

(a) Two single-page documents headed "balance sheet as at 30 June 2006", for the Nepean Trust and the Bannister Bay Unit Trust. The "balance sheets" were unsigned and contained handwritten amendments; their authorship is unknown; and

(b) Four pages headed "transactions by account as at 30 June 2006", being two pages for each of the Nepean Trust and the Bannister Bay Unit Trust. These are internal company documents, not bank statements; their authorship is unknown. These appear to show certain payments in and out of those two trusts at various dates between 2002 and 2006, but very little detail is given of transactions.

74. There was no balance sheet or transaction documents for the Reserve Trust attached to the particulars.

75. Whilst a court may act on admissions in pleadings, without requiring evidence of the admitted facts, these further and better particulars did not contain admissions in the relevant sense. They were merely assertions made by Mr Bridgman by way of pleading, which were hotly contested by Ms Thompson. They were not admissions and should not have been treated as such. Nor were the documents which were attached to the particulars tendered into evidence or able to be treated as if they were evidence; they simply contained unproven and non-admitted assertions.

76. Even if, contrary to the above, the particulars could somehow be treated as admissions or evidence, they only purported to reflect the position as at 30 June 2006. They contained no statement as to the value of the trusts, or the Fund's investments in the trusts, at the date of the investments (when the breaches of duty are said to have occurred). This is a critical fact, which seems to have been overlooked by the magistrate.

77. Furthermore, even if it was permissible for the magistrate to treat Mr Thompson's particulars as some sort of admission that the total value of the Fund's investment in the unit trusts as at the time of trial was approximately $39,000, that does not establish that the total investment of $41,000 in 2002 was imprudent or entered into in breach of fiduciary or other obligation. The same comment may be made if the two investments are considered separately.[46] As Mr Seagar acknowledged, the mere fact that an investment subsequently diminishes in value does not establish any imprudence (let alone impropriety) in the making of the original investment.

Drawing of adverse inferences against Mr Bridgman

78. The unexplained failure by a party to give evidence, call a witness or tender documents may, in appropriate circumstances, lead to an inference that the uncalled material would not have assisted that party. This arises from what is referred to as the rule in *Jones v Dunkel*.[47]

79. Here, there was no evidence called to explain Mr Bridgman's failure to give evidence. Even if the reason he did not give evidence was because he believed that Ms Thompson's evidence was insufficient to require him to do so, that would not prevent an adverse inference being drawn.[48]

80. However, a *Jones v Dunkel* inference can only be drawn where the court can be certain that there was some evidence that could have been given and on what subject matter.

81. Furthermore, the rule cannot be used to fill in gaps in the evidence, or to convert conjecture and suspicion into inference.[49] No inference can be drawn unless evidence is given of facts "requiring an answer".[50] So, if the party bearing the burden of proof has tendered no evidence in support of an issue in dispute, the opponent is not required to answer.

82. The adverse inferences drawn by the magistrate are set out earlier in these reasons. None of them were open to him to draw in this case, for the following reasons.

83. The magistrate concluded that because Mr Bridgman gave no evidence as to the liquidity of the investments in the unit trusts, it was "appropriate to draw the inference that [Mr Bridgman's] evidence in respect of the appropriateness of the investment in these unit trusts would not assist him".

84. Ms Thompson's pleading raised no issue about liquidity. Ms Thompson's evidence was that she knew nothing about the investments, and had not contacted the trustees to ask them for any information about the investments. Her lawyers did not seek to obtain from the corporate trustees, or tender, the trust deeds or any other evidence as to whether there were any limits on transferring the Fund's units to another party. It is not clear to me on what evidence the magistrate purported to find that the investments were in fact illiquid, but I assume for the purpose of this discussion that such a finding could be made. Mr Seagar observed that investments in unlisted property trusts are generally less liquid than in listed trusts, but did not suggest that that fact would make an investment inappropriate; he said that such investments may carry other benefits. In these circumstances, I am not satisfied that there was any case which Mr Bridgman was required to answer in relation to liquidity, such as to enable an adverse inference to be drawn.

85. The magistrate's next inference was clearly impermissible, for several reasons. The magistrate expressly noted that it could "only be a matter of speculation as to why such a complex structure was created." But he also went on to note the possibility that such a structure potentially may have had certain advantages for the Fund. He then impermissibly drew an adverse inference based solely on speculation, and in circumstances where he himself acknowledged that there may be a favourable explanation for the structure.

86. There are also problems with how such an adverse inference was framed. The magistrate variously described the inference (or inferences) which he was drawing as simply "an adverse inference" or an inference that "no conclusion favourable to [Mr Bridgman] can be reached." The rule in *Jones v Dunkel* does not permit such sweeping and ill-defined inferences to be drawn.

87. If Ms Thompson's case is essentially regarded as a case based on speculative or inappropriate investments (which seems to be how the magistrate viewed it), for the reasons discussed above, there simply was not the evidence to support such a claim.

88. On the other hand, if her case in relation to the unit trust investments is based on some unspecified breach(es) of fiduciary duty, the magistrate should have been particularly cautious about drawing any adverse inference, given the serious nature of the allegation against Mr Bridgman and the principles in *Briginshaw v Briginshaw*.[51]

89. Finally, it is not clear to what extent (if at all) the magistrate felt emboldened to draw these adverse inferences by the submissions made by Ms Thompson's counsel about the case of *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation*.[52] In that case, there was a discussion about the evidence required to be called by a plaintiff in a case where the facts are peculiarly within the knowledge of the defendant, and where the plaintiff's case is really in the nature of a negative proposition. Ms Thompson's counsel argued that the facts necessary to prove her case were peculiarly within the knowledge of Mr Bridgman and therefore Ms Thompson did not need to call any (or much) evidence. That simply was not the case, as I have already indicated in discussing the various types of evidence which could have been called on behalf of Ms Thompson. In any event, the *Apollo* decision does not excuse a plaintiff from calling evidence sufficient to require the defendant to call answering evidence.

The nature of the relief

90. The actual orders made by the magistrate are to the following effect:

> (a) Mr Bridgman was to personally pay Ms Thompson as trustee of the Fund amounts equivalent to the Fund's initial investments in the two trusts;
>
> (b) Mr Bridgman was to personally pay Ms Thompson as trustee of the Fund interest on those sums, from the respective dates of the original investments, at 13.25% p.a.; and

(c) Within 30 days of Mr Bridgman paying such principal and interest, Ms Thompson was to execute all necessary documents and take all necessary steps to transfer the Fund's interest and entitlement in the two unit trusts to Mr Bridgman.

91. Had there been evidence sufficient to enable the magistrate to conclude that the investments had been made in breach of a duty of care, then the appropriate remedy would have been to assess the damages flowing from that breach.

92. Or, if there had been an evidentiary basis for finding that the investments had been made in breach of fiduciary duty, appropriate relief might have involved the payment of equitable compensation, or an accounting for any profits made in breach of fiduciary duty.

93. But what the magistrate effectively did was to order that Mr Bridgman personally buy the Fund's units in the two unit trusts for the same amount as the Fund's initial investments. The reasons below do not explain on what legal basis the magistrate ordered such relief, and I am not aware of any legal principle which might justify such relief being ordered.

Conclusions

94. For these reasons, I have concluded that there was simply no, or no adequate, evidence to enable the magistrate to make the various findings or draw the inferences which he did. Mr Bridgman has demonstrated errors of law sufficient to require me to allow the appeal.

95. Given her various past attempts to obtain trust property and documents to which she was undoubtedly entitled, like the learned magistrate, I have considerable sympathy for Ms Thompson's position. She is a beneficiary and trustee who, for whatever reasons, still appears to be somewhat in the dark about her superannuation fund.

96. Unfortunately, given the way her case was prepared and run, there simply was not sufficient evidence put before the magistrate to enable him to find in her favour in relation to the MLC accounts or the unit trust investments. Leaving to one side the inadequate pleadings and the failure to lead relevant evidence from Ms Thompson herself, I do not know why the various witness summonses which I have identified in my reasons were not served, why Mr Bridgman was not interrogated, or what evidence such procedures might in fact have produced. Whether Ms Thompson has a possible claim against her lawyers in respect of the such matters is something in respect of which she would need to obtain independent legal advice, and about which I can make no finding.

97. I will hear from the parties as to the precise form of orders and as to costs.

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[1] Reasons below at pp3, 5.
[2] Reasons below at p5.
[3] Under order 17 of the *Magistrates' Court Civil Procedure Rules* 1999.
[4] As of right, under r 12.01, within 28 days after the defence, or by leave thereafter under r12.02.
[5] See for example T 73, T81.
[6] Although counsel referred below to this account as having the number 67141667, no explanation was given as to the discrepancy between these two numbers.
[7] Mr Bridgman's counsel conceded at T133 that paragraph 12 was admitted as representing the position of the Fund as at 30 June 2003, but not subsequently.
[8] The conversion pleading related only to shares, and the breach of fiduciary pleading only to the investments in the unit trusts.
[9] Reasons below at p5.
[10] Reasons below at p6.
[11] Reasons below at p7.
[12] Reasons below at p7.
[13] Reasons below at p18.
[14] It is not clear to me why the pleading referred to this as a cash management trust account, when it appears from the discussion below to have been invested into two other funds.
[15] At T183.
[16] Reasons below at pp6 and 18.
[17] Without seeing the bank statements, I cannot say which is the correct amount.
[18] At T202 and the written outline below.
[19] Reasons below at pp6-7.
[20] Reasons below at p5.

[21] Reasons below at pp6-7.
[22] Reasons below at p7.
[23] Reasons below at p7.
[24] Reasons below at p18.
[25] At T115.
[26] The company searches which were tendered below were not put in evidence before me.
[27] Mr Bridgman was not the sole director of any of the companies.
[28] Reasons below at p8.
[29] Reasons below at pp14-15.
[30] Diamond Developments, not Bannister Bay, is the trustee of the Nepean Trust.
[31] Reasons below at p9.
[32] Reasons below at pp9-10.
[33] Reasons below at pp10-18.
[34] Reasons below at p11.
[35] Reasons below at p11.
[36] Reasons below at p16.
[37] Reasons below at p12.
[38] Reasons below at p13.
[39] Reasons below at p13.
[40] Reasons below at p16.
[41] Reasons below at p12.
[42] Reasons below at p16.
[43] Reasons below at p17.
[44] Reasons below at p18.
[45] Reasons below at p19.
[46] The original investment in the Nepean Trust was $21,000 and the particulars asserted a current value of $24,567.90. The original investment in the Reserve Trust was $20,000, and the particulars asserted a current value of $14,660.
[47] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395.
[48] *Adler v ASIC* [2003] NSWCA 131; (2003) 179 FLR 1; 21 ACLC 1810; (2003) 46 ACSR 504 at [663]-[664].
[49] *Jones v Dunkel op cit* at 308, 312 and 320-1. The numerous other authorities for this proposition are conveniently listed in footnote 24 on p1102 of the loose-leaf edition of *Cross on Evidence* (Australian edition).
[50] *Jones v Dunkel* at 322.
[51] [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; 12 ALJR 100.
[52] (1985) 1 NSWLR 561.

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