29/00; [2000] VSC 72

SUPREME COURT OF VICTORIA

PURVES CLARKE RICHARDS (a firm) & ANOR v STATE TRUSTEES LIMITED

Eames J

17, 18 February, 10 March 2000

CIVIL PROCEEDINGS – CONTRACT – SOLICITORS AND COUNSEL ENGAGED BY STATE TRUSTEES TO ACT IN RELATION TO PROTECTED PERSONS – NOTHING SAID IN CORRESPONDENCE ABOUT LIABILITY FOR PAYMENT OF LEGAL FEES – STATE TRUSTEES ASKED TO PAY LEGAL FEES – REQUEST DECLINED – WHETHER STATE TRUSTEES PERSONALLY LIABLE FOR LEGAL FEES – STATUTORY NATURE OF STATE TRUSTEES – FINDING BY MAGISTRATE THAT STATE TRUSTEES ACTED FOR PROTECTED PERSONS AS MERE MANAGER – FINDING THAT STATE TRUSTEES NOT AN AGENT – WHETHER MAGISTRATE IN ERROR: *STATE TRUSTEES (STATE OWNED COMPANY) ACT* 1994, SS1,13, 14, 18, 21-23; *GUARDIANSHIP AND ADMINISTRATION ACT* 1986, S48(3), 52(1), 58B(2)(1), 58D.

ST. was appointed administrator of the estates of two persons. S, an administrator with ST wrote to PCR, solicitors, "that legal action be instituted immediately ... for vacant possession of our client's property." A conference was held soon after. Nothing was said on either side concerning the payment of legal fees for PCR and those of counsel briefed to draw the legal process. A few months later, PCR were requested by ST. to take action in relation to another matter. Again, nothing was said as to liability for the legal fees. After the termination of the appointment of ST as administrator for the estates of the two persons, the question of liability for fees became an issue. ST. asserted that when engaging PCR it had acted solely as manager of the affairs of the protected persons, its role being the same as that of its predecesssor, Public Trustee. ST. stated that it had not created any personal liability under any contract with PCR or counsel. Subsequently, PCR and counsel pursued claims for legal fees against ST. in the Magistrates' Court. In dismissing the claims, the magistrate found that ST. acted solely as a manager; alternatively, it was an agent acting for a disclosed principal and could not be personally liable as an agent. Upon appeal—

HELD: Appeals dismissed.

1. A review of the relevant legislation shows that ST. could contract both in its own name (thus incurring personal liability under the contract) or solely as administrator, that is, when acting as a mere manager for the protected person. As a corporation engaged in business, ST. could contract to have work performed on its own behalf and thus be solely and personally liable for those costs. Also, it might contract with a third party for the provision of services on behalf of the protected person in a manner which made it clear that it was incurring personal liability to meet the costs of the third party. The question in the present case was whether ST. manifested an intention that it was personally contracting, rather than merely acting as manager, in the name of the protected persons.

***Pisak v Hegedus* [1983] VicRp 99; [1983] 2 VR 386, followed.**

2. The intention of the parties must be determined objectively having regard to the terms of the document and the surrounding circumstances. The parties made different assumptions as to the nature of the engagement of PCR. However, even if the objective construction of the contract did not accord with the subjective expectation of one of the parties, it was the objective interpretation which was to be given effect.

***Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; 149 CLR 337; (1982) 41 ALR 367; (1982) 56 ALJR 459, applied.**

3. When viewed objectively, the terms of the first contract letter manifested an intention that ST. would not be personally liable for the fees of PCR and counsel for the following reasons:

(i) There was no phrase or single word in the letter which expressly stated that ST. was personally liable for the fees

(ii) There were direct indications that ST. was acting solely in its managerial capacity including the use of its own letterhead, that ST. was acting for the protected persons named in the letters, that words such as "administrator" and "on behalf of" were used and the enclosure of a copy of the order of appointment of ST. by the relevant Board.

(iii) PCR ought to have known that ST. need not incur personal liability but could act merely as administrator/manager, imposing liability solely on the protected person.

4. In the absence of evidence that ST. made itself personally liable under contract with PCR, it contracted solely as a manager. Given that conclusion, it was unnecessary to determine the questions raised as to principle of agency because this was not an agency situation.

EAMES J:

1. These appeals, brought pursuant to s109 of the *Magistrates Court Act* 1989, arise from orders made in the Magistrates' Court at Melbourne on 23 August 1999 by Mr Franich, Magistrate, who dismissed claims brought by Purves Clarke Richards ("PCR"), solicitors, and barrister Craig WR Harrison ("Harrison") for costs incurred in giving advice, drawing documents and conducting litigation concerning the affairs of two persons for whom State Trustees Limited ("State Trustees") had been appointed administrator.

2. On 28 July 1994 State Trustees was appointed administrator of the estate of Cicely Constance McDougall, pursuant to the *Guardianship and Administration Board Act* 1986 (the title to the legislation was changed by Act No. 52 of 1998, to remove the word "Board"). On 8 March 1995 a similar appointment under the same Act was made so that State Trustees were appointed administrator of the estate of Denis Nally.

3. On 8 August 1995 Peter Sier of State Trustees telephoned Patrick Walsh, a solicitor with PCR, and requested that he act in respect of the matter concerning Mrs McDougall. By letter dated 9 August 1996, on the letterhead of State Trustees (hereinafter called "the first contract letter"), Sier wrote to Walsh. In the heading of the letter Sier was described as being a "Client Liaison Officer". The letter was in the following terms:

> "Dear Sir, Re: Cicely Constance McDougall State Trustees was appointed Administrator of the legal and financial affairs of Cicely Constance McDougall by an Order of the Guardianship and Administration Board, dated 28 July 1995. We ask that you advise us, on behalf of Mrs McDougall, in relation to a dispute that has arisen over the future of Mrs McDougall's farm property at Numurkah. Mrs McDougall is resident in a Hostel and her farm is occupied by her son, Mr Quintin McDougall. By way of preliminary background we provide a copy of: * Guardianship and Administration Board Orders dated 28 July 1995 and 2 November 1995, * State Trustees report to the Guardianship and Administration Board for the review hearing on 2 November 1995, * File notes of the review hearing, * The Boards Statement of Reasons relating to the 2 November 1995 review, * Internal Memorandum dated 23 May 1996, including financial reviews, * Medical reports from Dr John Wright-Smith dated 22 April and 8 May 1996, * Certificate of Title to Mrs McDougall's farm, * Sharefarming agreement with R.A. & SL. Lawless, * Maurice May & Co letter to the Office of the Public Advocate dated 6 August 1996, * Mrs McDougall's will dated 31 March 1995. The Guardian has confirmed that there is no thought to move Mrs McDougall from the Goulburn Valley Community Hostel. Mr Quintin McDougall, the represented person's son, is currently represented by Maurice May & Co, solicitors, 79 Liverpool St Sydney. State Trustees must ensure that Mrs McDougall's tenure is not jeopardised by the non-payment of the balance of the ingoing entry contribution fee. We therefore instruct that legal action be instituted immediately against Mr McDougall for vacant possession of our client's property. We look forward to meeting with you to discuss this matter in more detail. We can make our file available to you if necessary. Yours sincerely, PETER SIER ADMINISTRATOR"

4. The above letter was handed to Walsh by Sier at a conference held on 9 August 1996. On 13 August 1996 Walsh wrote to "Mr Peter Sier, Administrator, State Trustees Ltd". The letter was headed "Cicely Constance McDougall" and commenced as follows: "We thank you for your instructions in this matter."

Walsh enclosed a draft reply to a letter which Sier had received from Mr McDougall's solicitors, but otherwise nothing was expressly said in Walsh's letter as to the nature of the instructions which he had received.

5. On 12 August 1996 Harrison, of counsel, was instructed by Walsh to draw an originating motion for the recovery of possession of Cicely McDougall's farm from her son.

6. It is apparent (and is not in dispute) that at the time of the initial discussion between Walsh and Sier nothing was said on either side concerning the payment of the fees of PCR or those of counsel, save that Walsh said in his evidence that he might have indicated to Sier the range of fees that Harrison would charge.

7. In mid-August 1996 Quintan McDougall reinstituted proceedings which challenged

State Trustee's appointment as administrator, and as a result of those proceedings the claim for possession was held in abeyance pending the resolution of the dispute as to the appointment of administrator. It was submitted on behalf of the appellants that from this time PCR's role was principally that of adviser to State Trustees in relation to it defending the challenge brought by Quintin McDougall against State Trustees' own appointment as administrator.

8. On 5 February 1997 Walsh was telephoned by Sier and instructed to take action in relation to a new matter, concerning the affairs of Dennis Nally. Those instructions were confirmed in writing by State Trustees by letter of the same date (that letter hereinafter referred to as "the second contract letter"). The letter to Walsh was signed by Jenny Borg, "Assistant Administrator", and was on State Trustees' letterhead. At the top of that letter, also, Ms Borg was identified as being a "Client Liaison Officer". The letter was headed "Re: Dennis Nally - AAT Hearing - 7 February 1997", and enclosed, amongst other papers, the Guardianship and Administration Board orders. Once again, nothing was said in this letter as to liability for the fees Walsh replied, by letter dated 7 February 1997, to Sier of State Trustees Limited, and said that the firm took this opportunity "to thank you for your instructions ..."

9. The Nally matter was an appeal to the Administrative Appeals Tribunal from a decision of the Guardianship and Administration Board, that appeal being prosecuted by the firm of solicitors, Wards, in the name of Nally, himself. At the preliminary hearing before the AAT on 7 February 1997 two questions were identified for the hearing, namely, whether Nally had a disability and, if so, who should be his administrator. In the event that it was determined that he required an administrator Nally (or, at least, those other persons who accompanied him when instructions were given to Wards) was seeking to remove State Trustees from that position.

10. Wards wrote to State Trustees on 12 February 1997 advising that it had received instructions from certain people, of whom Nally was one, and noting that both State Trustees and the Board had been represented at the preliminary hearing. Wards submitted that Dennis Nally should also be legally represented, and sought authorisation to act, and to engage counsel. In his reply, Sier stated that "your firm is authorised to represent Mr Nally at (the AAT hearing) ..." but said, as to their costs, that Nally already had outstanding costs which he had to meet, and that his financial situation was such that it could not be said when he could meet Wards' costs. State Trustees authorised the payment of $1500 for the costs of counsel, and added "you are to account to us for his costs". It was submitted on behalf of the appellants that this letter to Wards made it clear that State Trustees was not accepting any personal liability for the costs incurred by Wards, and it was submitted that when contrasted with the letter instructing PCR it was plain that State Trustees did not exclude personal liability for costs incurred by PCR. I will address that contention, later.

11. At the hearing before the magistrate it was common ground that there was no difference in the contractual arrangements for the McDougall matter and the Nally matter, so that the case was fought on the basis that if State Trustees was personally liable for costs in the McDougall matter it was equally liable in the Nally matter.

12. Walsh forwarded interim accounts to State Trustees over the period from 21 October 1996 to 23 September 1997 with respect to the two matters, but State Trustees was not pressed for payment by PCR, the reticence reflecting the recognition that it was a significant corporate client. It was only after the termination of the appointment of State Trustees as administrator for the estates of the two persons that the question of the liability for fees became an issue, and State Trustees then declined to pay the fees, itself. State Trustees asserted to the lawyers that when engaging PCR it had acted solely as manager of the affairs of the protected persons, its role being the same as that of its predecessor, Public Trustee, which was recognised by the Full Court in *Pisak v Hegedus*[1] to be a manager only. It had not, therefore, created any personal liability under any contract with PCR or Harrison. State Trustees successfully made the same argument before the learned magistrate, and succeeded, too, on an alternative argument.

13. Although it maintained that it was solely a manager, State Trustees submitted to the magistrate that were it held not to be a mere manager, then it was an agent acting for a disclosed principal, and could not be personally liable as an agent, either.

14. It is a reasonable inference to draw from events described to me, that upon termination of its administration, in both cases, State Trustees failed to withdraw from the estates sufficient funds to cover these legal expenses, so as to use those funds to pay the accounts. Not only was State Trustees probably entitled to have made such a deduction, but it undoubtedly considered itself to have been so entitled. Why it failed to do so I do not know, but possibly accounts had not been rendered by PCR at the times of the termination of the appointments of State Trustees

15. On behalf of PCR and Harrison it was submitted that the term of engagement of PCR and of Harrison was that State Trustees contracted to be personally liable for their costs. The terms of the contract, as reflected by the first and second contract letters, demonstrated that intention, so it was submitted, and in finding otherwise the learned magistrate was wrong in law. As to the alternative argument, the lawyers contended that State Trustees could not have been acting as agent for a disclosed principal because in both instances the "principal" was not legally competent. Accordingly, if State Trustees was not a mere manager when it dealt with Walsh then it was contracting on its own account.

16. The starting point for consideration of the competing contentions is to examine the statutory role of State Trustees. Ms Sparke, counsel for State Trustees, submitted that it remained a mere statutory manager, which contracted only on behalf of the person under a disability, because that person was incapable of entering contracts in his or her own name. State Trustees was entitled to recover from the estate costs and charges incurred when performing that role, including, she submitted, costs incurred in resisting an application to remove the company from the position of administrator. The role of State Trustees was the same as that of the Public Trustee under earlier legislation, she submitted, and that role was one of a mere manager. The decision of the Full Court in *Pisak v Hegedus*, she submitted, still applied, notwithstanding the fact that there had been changes subsequently made in the statutory regime.

17. Mr Crutchfield, for the appellants, submitted that *Pisak v Hegedus* was distinguishable on its facts, but that, in any event, the legislation which applied to the Public Trustee differs significantly from that now governing State Trustees. The statutory regime which now pertains demonstrates, he submitted, that State Trustees, in engaging solicitors and counsel with respect to the affairs of persons whose estates they administer, may contract personally to be liable for costs (for which they could then be reimbursed by the estate). Thus, unless State Trustees made it clear that it was not engaging the solicitors and counsel on a personal basis, it would be held liable. The contracts here did not suggest that the intention was otherwise than to engage the lawyers on a personal basis, so it was submitted.

18. In support of his contentions counsel for the lawyer-appellants submitted that the nature of some of the work performed could be said to have been work done solely in the interests of State Trustees, not of the beneficiaries, because State Trustees was endeavouring to retain its position as administrator, a position from which it derived profits by way of charges against the estate. Ms Sparke objected to the argument being presented in this way, because the case was not conducted on this basis before the magistrate and no ground of appeal was based upon such a distinction as to the purpose for which the costs were incurred. No effort had been made in the hearing to isolate those items in the accounts of the lawyers which related to work performed which had a direct and predominant benefit to State Trustees, personally, from items which related to work performed exclusively in the interests of the beneficiaries.

19. I note that in the outline of submissions presented to the learned magistrate counsel for the lawyers did submit that State Trustees was a named party to the AAT proceedings "and the work done by the plaintiffs related to defending the right of the defendant to act as the administrator of the estate ..." It does appear, however, that that contention did not involve an analysis of the extent to which the quantum of each claim related to costs in that category; nor was the case conducted on the basis that the contractual situation varied according to the type of work performed. In my view, the objections to this argument should be upheld. I will not allow the appellants to pitch their case on appeal on grounds not argued below, on issues which had not been the subject of any findings of fact by the magistrate, and where the issues are not the subject of grounds of appeal. In any event, it does not follow that the resistance of an administrator to efforts to remove it from that position (even when the attempt to remove it was made by the person under a disability) might not also be regarded as being work done in the interests of the

protected person: see *EGM v Guardianship & Administration Board of Victoria*, per Young J[2]. The costs of such resistance would most likely be recoverable from the estate as costs reasonably incurred as part of the administration. That is not to say that the question of the nature of the work to be performed by the lawyers could never have been a relevant consideration. However, I do not believe that the outcome of these appeals would have differed had that question been taken into account.

THE DECISION IN *PISAK v HEGEDUS [1983] VicRp 99; [1983] 2 VR 386*

20. *Pisak v Hegedus* was an action brought by the plaintiff for the recovery of a deposit paid under a contract of sale of land. The first defendant, Hegedus, was a protected person whose affairs were administered by the Public Trustee under the *Public Trustee Act* 1958. The Public Trustee was the second defendant. The contract of sale was in the names of and purported to be between the plaintiff, as purchaser, and Hegedus, as vendor, but the address of Hegedus was given as care of the Public Trustee. A special condition of the contract of sale noted that the sale was subject to the granting of leave to sell the land by a judge of the Supreme Court pursuant to s53(1) of the *Public Trustee Act* 1958. In due course, leave was given but the plaintiff sought to withdraw from the contract, and upon being refused repayment of the deposit sued both Hegedus and the Public Trustee. The Public Trustee applied to a judge of the County Court for an order that he had been improperly joined as a party, and sought an order that the claim against him be struck out. The judge refused to make those orders, and the matter was appealed to the Full Court.

21. McInerney J (with whom Murray and Jenkinson JJ agreed) examined the terms of the *Public Trustee Act* 1958 in some detail. (The terms of the *Public Trustee Act* which were the subject of analysis in that case were those in force in 1980, at the time of the hearing, of the appeal in *Pisak v Hegedus*). Whilst much of that legislation is similar to that which now applies to Public Trustees, there are important differences.

22. By virtue of s49(1) of the *Public Trustee Act* (as set out in the judgment of McInerney J) the Public Trustee was obliged to undertake the general care, protection and management of the estates of all protected persons in Victoria whom the Tribunal directed it to represent. That is the first departure to be noted from the present legislation. Section 47(1)(a) of the *Guardianship and Administration Act* 1986 had also enabled the Tribunal to appoint State Trustees as administrator for such persons as the Tribunal deemed appropriate, and State Trustees had no choice but to accept that role. While that section continued to apply, the position of State Trustees was therefore the same as had been that of the Public Trustee, but the section was repealed by Act No. 52 of 1996. State Trustees now has the same entitlement as any other trustee company to decline to accept appointment as administrator by the Tribunal.

23. By s49(2) of the *Public Trustee Act* 1958 the Public Trustee was under a duty to administer the property of all protected persons in Victoria, and generally to manage their affairs and to exercise all rights, statutory or otherwise, which the protected persons might themselves exercise if they were of full capacity. Save for the right of State Trustees to decline appointment, a similar provision also applies to State Trustees (as it does to any other person acting as administrator under the present legislation). An equivalent to s49(2) can now be found in s58B(1)(b) of the *Guardianship and Administration Act* 1986, as introduced by s35 of Act No. 45 of 1994, being the *State Trustees (State Owned Company) Act* 1994.

24. Section 50 of the *Public Trustee Act* 1958 provided that among the powers and duties of the Public Trustee was a power to bring and defend actions and other legal proceedings in the name of a protected person. The Public Trustee was also empowered by s50 to apply moneys from the estate for the purposes of the Act. The powers and duties conferred on State Trustees by s58B(2) of the *Guardianship and Administration Act* are similar to those found in s50 of the earlier legislation.

25. By s53 of the *Public Trustee Act* 1958 the Public Trustee was prohibited from selling any freehold land in excess of $4,000 in value except by leave of a judge. By s54H of the *Public Trustee Act* 1958 a protected person was "deemed incapable of dealing with or transferring or alienating or charging his moneys or property or any part thereof or of becoming liable under any contract without the order of the court or the written consent of the Public Trustee..." A similar provision

to s54H of the *Public Trustee Act* is s52 of the *Guardianship and Administration Act* 1986.

26. By s61(1) of the *Public Trustee Act* 1958 all expenses incurred by or on behalf of the Public Trustee in the control or management of an estate were to be charged against and paid out of, and recoverable, from the estate. By ss61(2), insofar as the Public Trustee was unable to recover his costs from the estate then his costs and expenses were to be defrayed and paid out of such moneys as Parliament appropriated for that purpose. The responsibility for meeting the expenses of State Trustees, when the expenses cannot be recovered from an estate, is somewhat different, as I will later discuss when considering sections 21, 22 and 23 of the *State Trustees (State Owned Company) Act* 1994.

27. After considering those provisions of the *Public Trustee Act* 1958, McInerney J held:[3]

> "Those provisions indicate that the Public Trustee is not in the strict legal sense a trustee of the estate of a protected person. He exercises on behalf of and pursuant to the authority conferred on him by the statute, namely, the *Public Trustee Act* 1958, all such powers, rights and privileges as he is enabled by that statute to exercise. It may be doubted whether it is even correct to speak of him as a statutory agent of the protected person. In some of the cases he is referred to as a manager, and in one of the cases which was cited to us this morning, *Isaacs v Chinery* 12 TLR 302; (1896) 74 LT 320, it was held that a person who was the committee authorized to carry on the business of a lunatic under the direction of the court for the benefit of the lunatic was to be regarded as being in the position of a bailiff and not in that of an agent, receiver, manager or other officer appointed by the court who would be held personally liable. That term, bailiff, seems to have derived from language used in *Drury v Flitch* (1619) Hutton's Reports 16, in which the opinion of the Court was that the committee was but as bailiff and had no interest."

28. The Full Court held that the County Court judge was wrong to have refused to strike out the action against the Public Trustee. After noting that there was no provision in the Act which invested the estate of the protected person in the Public Trustee, McInerney J held[4]:

> "He cannot, as already stated, be regarded as a trustee within the ordinary concept of a trustee. It is trite law that there cannot be a trustee unless there is trust property which he holds on trust, either for some persons or some purpose. The position of the Public Trustee being merely that of a manager, it would not, in my view, have been proper for Judge Martin to have ordered that the proceedings be amended so as to make it appear that the Public Trustee was sued in a represented capacity, as representing the estate. No estate is vested in the Public Trustee, he is merely as I have said before, a statutory manager of that estate.
>
> I am, however, of the view that Judge Martin ought to have acceded to the submissions made by the Public Trustee that the Public Trustee had been improperly joined. He was not a party to the contract of sale, and, as such, should not, in my view, have been sued on that contract of sale. If in so far as the particulars of demand are intended to assert a cause of action in contract, it is not a cause of action which could be asserted against the Public Trustee."

29. Mr Crutchfield submitted that *Pisak v Hegedus* turned on its own facts, and depended on the terms of the legislation as it then existed. The most important factual difference to which counsel pointed was that Public Trustee was not a party to the contract of sale whereas here, so it was submitted, State Trustees was a party to the contract whereby the lawyers were engaged. Mr Crutchfield submitted that the Public Trustee may well have been held liable by the Full Court had he been a party to the contract of sale; he referred to a passage in the judgment of McInerney J, at 394, in which his Honour said:

> "Whether the plaintiffs would be able to make out any case against the Public Trustee on other particulars I need not determine."

30. I accept that McInerney J did leave open the possibility that Public Trustee, although a mere manager when acting on behalf of the estate of the represented person, might attract personal liability by virtue of the manner in which it dealt with a third party. Such a possibility was contemplated, too, by the Court of Appeal in *Plumpton v Burkinshaw*[5], a decision to which McInerney J referred.

31. In *Plumpton v Burkinshaw* the Court of Appeal was concerned with a situation where the defendant, Burkinshaw, a chartered accountant, had been appointed under the *Lunacy Act* 1890

to carry on the business of Arthur Ellershaw who had conducted a business in the name of J. Ellershaw & Sons. The solicitors for the protected person wrote to the plaintiffs, who were creditors of the firm, advising that the defendant, Burkinshaw, had been appointed by the court to carry on the business of the firm. Thereafter, Burkinshaw dealt with the plaintiffs, who supplied goods upon orders given in the name of the firm. The plaintiffs then sued the defendant, Burkinshaw, claiming that he was personally liable to pay the costs of the goods supplied to the business. Sir Gorell Barnes P held that the defendant was not personally liable, but was only: "... carrying on the business on behalf of the person incapable of managing his affairs, that is, in other words, that he was merely substituted for that person. That, in my opinion, leaves a simple point to be decided. There is no suggestion in this case that there was anything to show that the defendant expressly undertook any personal obligation."

32. Sir Gorell Barnes noted, at p332, that the plaintiffs had received a circular from the defendant, Burkinshaw, advising them that he was carrying on the affairs of the protected person and was therefore authorised to employ the assets of the protected person. Sir Gorell Barnes continued, at 333 (2 KB 576):

> "That being so, there was a clear intimation to the plaintiffs that the defendant was only carrying on the business under the powers given by the statute and the order. The only question, therefore, is whether by the effect of the statute the defendant has incurred any personal liability by carrying on the business under the order. In my opinion the matter is plain and clear, and the defendant is in the position, not of a person who is responsible personally, but of a person who is acting for and in the name of the person incapable of managing his own affairs".

33. In reaching the same conclusion Fletcher Moulton LJ observed, at 333 (2 KB 577), that under the *Lunacy Act* the person appointed to conduct the affairs of a person incapable of looking after himself, acts on behalf of that person and "is really an agent appointed by the Tribunal". His Lordship noted that:

> "No question has been raised of the defendant having held himself out as being personally liable in respect of contracts made in the course of carrying on the business, if his legal position had not made him so liable, because the defendants were at once informed of his position under the order made under the *Lunacy Act* in April, 1901."

34. Mr Crutchfield submitted that *Plumpton v Burkinshaw* supported his client's contention, in that it turned on the fact that the defendant in that case had not held himself out as being personally liable in respect of the contracts which he had entered, whereas, he submitted, State Trustees had held itself out as being personally liable in the present case. Mr Crutchfield contended that these cases demonstrated that the onus was on State Trustees to expressly state that it was not personally liable, if it was to avoid personal liability. Thus, he submitted, unlike the situation in *Plumpton v Burkinshaw*, nothing had been done by State Trustees by way of a "clear intimation" to the appellants that State Trustees were not contracting on a personal basis, but solely on behalf of the protected person.

35. In my opinion, however, in neither case was the onus cast in that way. The judgments in *Pisak v Hegedus* do not do so and in *Plumpton v Burkinshaw* both Sir Gorell Barnes and Fletcher Moulton LJ, in my opinion, adopted the position that there would not be personal liability unless the person acting as administrator positively held himself out to be personally liable. The reference by the President to the "clear intimation" was merely emphasising that not only had the agent not held himself out to be personally liable (which would have been sufficient to avoid personal liability) he had positively warned the creditors that he was not to be liable. However, even if a "clear intimation" was required, then in the present case State Trustees (as I will later discuss) did intimate with sufficient clarity that it was acting only in its capacity as administrator.

36. As the Full Court in *Pisak v Hegedus* concluded, therefore, under the legislation governing the position of the Public Trustee he was a mere manager when acting on behalf of the represented persons, but could, by some positive statement or conduct, also render himself personally liable under a contract. The question, then, is whether the legislation which now applies alters that situation.

THE SCOPE OF THE LEGISLATION GOVERNING STATE TRUSTEES

37. By s1 of the *State Trustees (State Owned Company) Act* 1994 State Trustees is a company under the *Corporations Law*, and is capable of being sued.

38. Mr Crutchfield pointed to Part 4 of the *State Trustees (State Owned Company) Act* 1994 which, he submitted, demonstrated that a new regime had been introduced by the Parliament for the conduct of business by State Trustees. Whereas the Public Trustee and, until 1994, State Trustees had held a position which was both privileged (having certain rights that other trust companies did not have, and protection by way of guaranteed funding by the State) and carried certain obligations (being obliged to act on behalf of any person whose affairs they were appointed to administer), State Trustees was to be placed in the same position as other trust companies in the State. As part of that change, State Trustees was no longer required to assume responsibility for all persons under a disability in the State, but that responsibility was taken by the relevant Minister.

39. Section 58B of the *Guardianship and Administration Act* 1986 was inserted by s35 of the *State Trustees (State Owned Company) Act* 1994. That section sets out the powers and duties in relation to a represented person which are held by administrators. It is a provision which applies to all administrators, not just to State Trustees. By s58B(1)(b) it is the duty of the administrator to exercise all rights, statutory or otherwise, which the represented person might exercise if the represented person had legal capacity. Section 58B(1)(c) provides:

> "(c) The administrator in the name and on behalf of the represented person may generally do all acts and exercise all powers with respect to the estate as effectually and in the same manner as the represented person could have done if the represented person were not under a legal disability."

40. By s58B(2)(l) the administrator "in the name and on behalf of a represented person" may "bring and defend actions and other legal proceedings in the name of the represented person". By s58B(2)(p) the administrator may "apply any money from the estate which it is necessary to apply for the purposes of this Act".

41. By s58D of the *Guardianship and Administration Act* 1986 (inserted by Act No. 45 of 1994), upon a person ceasing to be a represented person, or dying, the administrator must pay out the balance of the estate to the personal representative of the person, but, by sub-s (2), before doing so may deduct all costs, expenses and liabilities incurred by the administrator in respect of the administration of the estate.

42. By s52(1) of the *Guardianship and Administration Act* 1986 a person subject to an Administration Order is deemed incapable of becoming liable under any contract without an order of the Tribunal, or the written consent of the administrator. By s48(3) of the same Act it is provided that:

> "Where a decision is made, action taken, consent given or thing done by an administrator under an order made by the Tribunal the decision, action, consent or thing has effect as if it had been made, taken, given or done by the represented person and the represented person had the legal capacity to do so."

43. As counsel for the appellants pointed out, s48(3) applies to all administrators, and ensures that the represented person is bound by decisions taken on his or her behalf by the administrator.

44. Mr Crutchfield pointed to s18 of the *State Trustees (State Owned Company) Act* which is a provision titled "Protection of Persons dealing with State Trustees" and provides that:

> "A person is not to be concerned to see or enquire whether—
> (a) any acts, dealings or transactions by or with State Trustees or any officer or agent of State Trustees are or are not within the powers of State Trustees; or
>
> (b) State Trustees has assumed the management or control of an estate or property in accordance with this or any other Act."

45. Mr Crutchfield submitted that s18 should be interpreted so that a person dealing with

State Trustees is entitled to conclude that State Trustees are able to contract on their own behalf. In my opinion, s18 is not directed to that issue, at all, but provides a protection against a situation where there is some anomaly in the powers being exercised by State Trustees under an administration. However, even if the section did spell out the right of State Trustees to contract on a personal basis it would not follow that, in any given case, it was contracting on such basis, rather than in a managerial capacity, only.

46. There was much debate before me as to the effect of ss13 and 14 of the *State Trustees (State Owned Company) Act* 1994. For the appellant-lawyers, Mr Crutchfield submitted that the sections demonstrated that State Trustees was empowered to itself engage solicitors and counsel, as and when required for purposes related to the administration of a person's estate, and, having itself paid the costs incurred, could later recover from the estate those costs and disbursements which it had personally incurred. Ms Sparke submitted, however, that these sections related solely to legal work performed by persons employed by State Trustees (including those engaged on a contract basis), and were not concerned with the question of the engagement of private practitioner solicitors and counsel. As to the engagement of such outside persons, then, she submitted, State Trustees was merely a manager, acting in the name of the protected person, and, accordingly, was not incurring those costs in its own name. Those sections provide as follows:

> "**13. Fees and commissions**
> (1) In addition to the commissions, fees and remuneration it is entitled to charge and receive and the disbursements it is entitled to recover under the *Trustee Companies Act* 1984 and despite anything in section 21(2) of that Act, State Trustees is entitled to charge and receive fair and reasonable commissions, fees and remuneration and recover fair and reasonable disbursements for estate related services provided by State Trustees including, without limitation—
> (a) genealogical services;
> (b) financial planning;
> (c) informal administrations;
> (d) administrations and the examination of administrators' accounts under the *Guardianship and Administration Board Act* 1986;
> (e) subject to section 14, legal services
>
> (2) State Trustees must—
> (a) lodge with the Minister; and
> (b) cause to be published in the *Government Gazette*—
> a copy of its scale of charges in relation to the services referred to in sub-section (1).
>
> **14. Restriction on charging of fees for legal services**
> (1) Except as provided in this section and section 20A of the *Trustee Companies Act* 1984, State Trustees must not directly or indirectly charge or receive a fee or recover disbursements for a service provided by a legal practitioner employed by State Trustees or who shares his or her remuneration with State Trustees unless the beneficiary of any estate which is to be charged has first approved the provision of the service, the charging of a fee and the recovery of disbursements.
>
> (2) Where—
> (a) the beneficiary of an estate cannot reasonably be located; or
> (b) there is no beneficiary; or
> (c) a beneficiary or person—
> (i) is under a disability within the meaning of the *Guardianship and Administration Board Act* 1986; or
> (ii) is a protected person; or
> (iii) is otherwise under a legal disability; or
> (d) an estate has more than one beneficiary—
> State Trustees may charge and receive a fee and recover disbursements for a service provided to the estate or person by a legal practitioner employed by State Trustees or who shares his or her remuneration with State Trustees if the service is reasonably required and the fee and disbursements are fair and reasonable."

47. On behalf of State Trustees it was submitted that the phrase "employed by State Trustees" meant, literally, an employee of State Trustees, and was not intended to be read as meaning "engaged".

48. These provisions replace s15A and s15B of the *State Trust Corporation of Victoria Act* 1987, which was repealed by s24 of Act No 45 of 1994. When those sections are read with s53 of that same Act, then, so counsel for the appellants submitted, it is clear that the new provisions are

intended to reflect the situation that State Trustees may now engage outside practitioners and become personally liable to pay their costs. I set out below the provisions of the former Act:

> "15A. Preparation of wills
> Despite anything to the contrary in the *Legal Profession Practice Act* 1958, the State Trust may prepare wills and charge a fee and recover disbursements for will preparation and other services in relation thereto, if the wills are prepared under the direction and control of a solicitor who holds a current practising certificate under the *Legal Profession Practice Act* 1958.
>
> 15B. Restriction on charging of fees for legal services
> Except as provided in section 15A, the State Trust cannot directly or indirectly charge a fee or recover disbursements for services provided by a solicitor employed by the State Trust or who shares his or her remuneration with the State Trust unless the beneficiary of any estate which is to be charged has first approved the services to be provided and the amount of fees to be charged.
>
> 53. Use of solicitors
> Unless there is a good reason not to do so, the State Trust must employ the named or usual solicitor of a testator, settlor or other person signing a will, deed of settlement or other document from which the State Trust derives it authority to act to conduct legal business arising in connection with the estate or property."

49. Mr Crutchfield submitted that the use of the word "employed" in s53 of the earlier, repealed, legislation plainly embraces the engagement of outside solicitors, and, accordingly, in the earlier legislation the use of the words, "employed by", in sections 15A and 15B, also embraced the engagement of outside solicitors. Counsel drew similar support by reference to s69 of the repealed *Public Trustee Act* 1958 (which he described as "the father" of the current legislation).

50. Section 69 provided that as to "the employment of solicitors to conduct legal business arising in connexion with the performance of his duties ..." then the Public Trustee "shall employ such solicitor" or shall employ "the usual solicitor" of the protected person. Plainly, the word "employ" there refers to the engagement of outside solicitors.

51. The explanatory paper which accompanied passage of the *State Trustees (State Owned Company) Act* stated that s13 and s14 merely replaced s15A and s15B of the former Act. I do not gain much assistance from the explanatory paper, since, notwithstanding the suggestion that the provisions in the later Act merely replaced those in the former Act, there are significant differences between the two sets of provisions.

52. The extent to which assistance in interpreting the meaning of the current legislation may be gained by reference to earlier, but now repealed, legislation is doubtful: see *Roberts v Collector of Imposts*[6], and *Statutory Interpretation in Australia* by Pearce and Geddes[7]. In any event, whatever meaning may have been attributed to the word "employ" in previous legislation, the meaning of s13 and s14 in the present legislation is plain from a reading of the sections themselves. In that context, in my opinion, it is apparent that "employ" is not used in a sense which would embrace the engagement of outside lawyers.

53. Sections 13 and s14, in my opinion, are intended to apply to the provision of legal services by in-house lawyers (whether employed on a salary or under a contract). Thus, if in providing such services the employee solicitor engages counsel, or for that matter seeks advice of other solicitors, the costs of the latter solicitors and counsel can be charged as disbursements. But in that situation State Trustees would itself be delivering legal services, through its own in-house lawyer. That is not the present case.

54. The present situation is not one to which s13 or s14 applies, but is a case where State Trustees, rather than providing in-house legal services to the protected persons, engaged lawyers for the purpose of those lawyers providing legal services to the protected persons, albeit through State Trustees, which under the legislation assumes the position of the protected persons (who could not engage lawyers themselves for that purpose). Thus (subject to any express assumption of personal liability) State Trustees engaged the lawyers when acting solely in its capacity as administrator. They were engaged "in the name of and on behalf of the represented person" pursuant to the opening words of s58B(2) and the words of sub-section (p). State Trustees was doing something which was incidental or necessary for the purpose of bringing or defending legal

proceedings in the name of the represented person pursuant to sub-sections (l) and (p) of that section. By virtue of s58B(2)(p) when State Trustees does something incidental or necessary for such matters it is entitled to apply any money from the estate which is necessary for that purpose. Thus, when State Trustees engaged the solicitor, Walsh, and authorised him to engage counsel, it was as though the represented person was doing those things, and was incurring liability.

55. The situation which applied here is similar to that which pertained in earlier legislation. Section 50 of the *Public Trustee Act* 1958 conferred much the same powers as s58B of the *Guardianship and Administration Act*, including the power to bring and defend proceedings "in the name of and on behalf of" the protected person. There were some differences, however, in the financial situation which pertained, reflecting the fact that under the new legislation the status of State Trustees was much closer to that of its competitors, that is, a corporation entitled to retain profits, and competing with other trustee corporations.

56. By s61(1) of the *Public Trustee Act* all expenses incurred in the control or management of the estate were to be charged against and be recoverable from the estate, and where not so recoverable the moneys required were to be paid from the funds allocated by Parliament to the Public Trustee. By s60(3) any fees recovered by the Public Trustee were paid into Consolidated Revenue. Mr Crutchfield submitted that a new regime has now been put in place, wherein the State Trustees is no longer in a special position with particular responsibility for persons requiring administration orders, but is competing in the market on the same terms as other trust companies. It can now decline to act as administrator for any person, and while it can charge fees, it is in the same position as any other trustee company, in that it can also keep the fees.

57. Insofar as it has any special role to play for disadvantaged members of the public who need access to such services, then by ss21, 22, 23, of the *State Trustees (State Owned Company) Act* it is now the Minister who is responsible for ensuring such access is obtained, Mr Crutchfield submitted. In order to provide such access those sections provide that the Minister may enter an agreement with State Trustees for it to provide the services. Under that agreement the Minister might provide funding to State Trustees in return for its services, but the Minister might also enter such an agreement with any other trustee company.

58. In my opinion, a review of the new legislation demonstrates that State Trustees could contract both in its own name (thus incurring personal liability under the contract) or solely as administrator, i.e. when acting as a mere manager for the protected person. Certainly, as a corporation engaged in business, it could contract to have work performed on its own behalf, and thus be solely and personally liable for those costs. But, in my view, it might also contract with a third party for the provision of services on behalf of the protected person in a manner which made it clear that it was incurring personal liability to meet the costs of the third party. Whilst it is unnecessary to determine whether that option was also available to Public Trustees under the old legislation, that was probably the case: the judgments in *Pisak v Hegedus* are not inconsistent with that conclusion.

59. If it was open to State Trustees to become personally liable by virtue of contracting with a third party for the provision of services to a protected person in the course of its administration, then the legislation would need to allow State Trustees to be subsequently reimbursed from the estate. The question arises, therefore, whether State Trustees, having an entitlement under s58B(2)(p) "to apply any money from the estate which it is necessary to apply for the purposes of this Act", might be entitled to seek reimbursement from the estate subsequent to its having itself personally contracted to meet the costs of the solicitor and counsel.

60. Section 58D provides that when a person ceases to be a protected person the administrator must pay to the person all money held in the estate, however, by s58D(2) it may first deduct an amount representing all costs, expenses, and liabilities incurred in the administration of the estate. Thus, the section presumes the situation where the costs may have been incurred, and paid, by an administrator, who later sought reimbursement. The terms of s58B(2)(p) would also cover that situation, in my opinion. That adds weight to the contention of Mr Crutchfield, that State Trustees were capable of having assumed personal liability when it engaged the lawyers. As I have said, I agree that State Trustees could have done so. But if it is possible for State Trustees to have personally contracted in this way, did State Trustees in this case manifest an intention

that it was personally contracting, rather than merely acting as manager, in the name of the protected persons?

61. This brings us back to the interpretation of the first contract letter.

THE TERMS OF THE CONTRACTS BETWEEN THE LAWYERS AND STATE TRUSTEES

62. The intention of the parties must be determined objectively, having regard to the terms of the document and the surrounding circumstances: See *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*[8]. There is an element of artificiality in all of this, because it is patently obvious that, without specifically turning their minds to the question, Walsh and Sier made different assumptions as to the nature of the engagement of PCR. Sier thought that (as he had done many times before — with other firms of solicitors) he was merely contracting on behalf of the protected person, and not making State Trustees itself liable for the costs PCR had acted for State Trustees in the past, through its corporate section, but only in providing corporate services, for which State Trustees accepted personal liability. The litigation section of the firm, in which Walsh was engaged, had not previously dealt with State Trustees. Walsh assumed that he was contracting directly with his client, which he considered to be State Trustees, and that State Trustees would be liable to pay the fees (although he would, no doubt, have contemplated that State Trustees would call on the estate for reimbursement). However, even if the objective construction of the contract does not accord with the subjective expectation of one of the parties it is the objective interpretation which is given effect.[9]

63. One finding of the learned magistrate of which complaint was made was that Walsh may have acted for State Trustees before. Even if that finding of fact was made (and I am not at all certain that it was intended to be a positive finding), then I do not consider that it was important for the conclusion which was reached.

64. Mr Crutchfield, for the appellant-lawyers submitted that in the absence of State Trustees expressly stipulating that it was not accepting any personal liability for the fees, it must be regarded as having contracted personally. Ms Sparke submitted, for State Trustees, that, as a matter of law, an administrator acts in the name of the protected person, and that notwithstanding the changes to the legislation it remains in the same position as that described in *Pisak v Hegedus*, namely, that of a manager, without personal liability. If it could have contracted to assume personal liability then there was no evidence that it did so, here; the evidence is all to the contrary, she submitted. The learned magistrate agreed with that contention.

65. I confess that the resolution of this seemingly simple question is not without difficulty. In the end, however, I conclude that the terms of the first contract letter did not manifest an intention that State Trustees would be personally liable for the fees of PCR or Harrison, and, objectively, manifested the contrary intention. It was agreed between the parties, both before me and in the court below, that the answer would be the same with respect to both contract letters, and I also conclude that the second contract letter did not manifest a different intention to have been held, objectively, by the contracting parties as to the liability for the fees.

66. There is no phrase, and not a single word, in the first contract letter which expressly states that State Trustees was to be personally liable for the fees. At the highest, in support of the contention of personal liability, there are the ambiguous words: "We ask you to advise us on behalf of Mrs McDougall ..." and "We therefore instruct that legal action be instituted immediately against Mr McDougall for vacant possession of our client's property."

67. As against those ambiguous phrases (which are certainly not inconsistent with the contentions of State Trustees) there are a number of direct indications that State Trustees was acting solely in its managerial capacity.

68. State Trustees wrote on its own letterhead. Mr Crutchfield submitted that that was evidence that it was acting in its personal capacity, but in my view it demonstrates that it was acting in a managerial capacity, as an administrator, that being the role suggested by its title as well as being the primary role in which it and its predecessors engaged. The role of State Trustees may no longer be unique among trust companies, but (as the review of the legislation demonstrates) when acting as administrator it has a statutory entitlement to contract in the name of the protected

person, as though it were the protected person, and without there being any obligation cast on it by the legislation to use its own funds to meet the costs incurred. It may do so, and later seek reimbursement, or it may simply draw on the estate for the necessary funds. Thus, one relevant circumstance was that PCR, a firm of solicitors, was dealing with a statutory corporation which it ought to have known need not incur personal liability, but could act merely as administrator/ manager, imposing liability solely on the protected person. The first contract letter, in fact, gave many indications that it was only in that role in which State Trustees was acting.

69. In the first paragraph of the first contract letter Sier spelled out the appointment of State Trustees as administrator of the legal and financial affairs of Mrs McDougall, and enclosed a copy of the order of appointment by the Guardianship and Administration Board. Sier employed words consistent with those of a mere manager, in saying that State Trustees must ensure that the tenure of Mrs McDougall was not jeopardised. Finally, Sier signed the letter "Administrator". The use of the words "administrator" and use of the words "on behalf of", in my opinion, support the conclusion that State Trustees, through Sier, was not manifesting an intention to contract otherwise than as a mere manager/administrator. There being no indication to the contrary, and the letter being the only relevant document (save for the documents provided with it) I conclude that that was the intention of the parties. Accordingly, I conclude that the decision of the learned magistrate was correct.

70. In urging that I conclude otherwise, Mr Crutchfield referred to the terms of the letter that Sier sent to the solicitors, Wards, after that firm had sought approval to act for Mr Nally. There is no doubt that the letter sent by Sier to Wards was plainly intended to make it clear that State Trustees would not be personally liable for the fees of Wards. Sier, in his evidence, told the learned magistrate that that was the purpose of the letter. He agreed that a letter in similar terms was never sent to PCR. The difference in the two situations was that Wards expressly raised the question of payment of their fees by requesting "your immediate authorisation to our firm that we be permitted to undertake all necessary and reasonable preparation for the Appeal and to engage appropriate counsel to appear". The terms of the letter suggested, in any event, that Wards expected the funds to come from the estate of Nally, but if there was any doubt about that, Sier removed it by pointing out that Nally already owed money for legal expenses and by suggesting that there might be delay before Wards were paid.

71. The letter to Wards made the situation clear, as to costs, and no doubt Sier could also have made the situation clearer in the case of PCR, by expressly dealing with the question how the costs would be paid to PCR, and by whom. But it does not follow, in my opinion, that the terms of the first contract letter were incapable of manifesting an intention that State Trustees was contracting solely as administrator/manager, and not assuming personal liability. Whilst I would not go so far as the learned magistrate, who considered that Sier clearly spelt out the position, I am satisfied that the position was made sufficiently clear to manifest the intention for which State Trustees now contends.

72. Mr Crutchfield submitted that to reject the appeal would produce an unfair result. The lawyers acted in good faith, performed the work required, and would no doubt have been paid had State Trustees thought to apply funds from the estates at the time when the administration was cancelled in each case. At no time did they have any personal dealings with the protected persons, and dealt solely with State Trustees. Mr Crutchfield submitted that there must now be a question as to whether the lawyers can look elsewhere for their fees, and as to whether their demands are capable of being met. Mrs McDougall apparently made it plain that she would resist any demand made on her to pay fees relating to State Trustees' defence of its appointment as administrator. Be that as it may, the question whether action may now be taken against others can not affect the determination of the issue before me.

WAS STATE TRUSTEES LIABLE AS AN AGENT?

73. The learned magistrate dealt also with an alternative argument advanced on behalf of State Trustees, and concluded that if State Trustees was an agent then it was acting for a disclosed principal, and, thus, was not personally liable on that basis either.

74. The conclusion I have reached is that the principle stated in *Pisak v Hegedus* applied in this case. Thus, in the absence of evidence that State Trustees made itself personally liable

under contract with the lawyers, it contracted solely as a manager. Given that conclusion, it is unnecessary to determine the questions raised as to principles of agency, because this was not, therefore, an agency situation. I will however, set out, broadly, the contentions advanced by Mr Crutchfield as to this question.

75. Mr Crutchfield submitted that if *Pisak v Hegedus* did not apply (as he submitted it did not) then it could only have been that State Trustees was entering a contract in a personal capacity. It was not possible for State Trustees to have been acting as an agent for a disclosed principal, he submitted, because to be a principal a person must have mental capacity: see Fridman, *Law of Agency*[10]. In *Bowstead and Reynolds*, at Article 4, the learned authors state the proposition in the following terms: "Capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal himself to make the contract or do the act which the agent is authorised to make or do"[11]. Accordingly, State Trustees could only have been acting on their own behalf. As Ms Sparke pointed out, it is precisely because of such problems that there is legislation which deems that the administrator is acting in the name of the protected person, so that the agency question does not arise.

76. On the other hand, even if State Trustees were agent for a disclosed principal, it could also make itself personally liable, where the intention to do so is manifest in the terms of the written agreement: see Article 101, *Bowstead & Reynolds on Agency*[12]. There may be factors which indicate that the agent was himself the contracting party and was personally liable: *Bowstead and Reynolds on Agency*, Article 99[13]. Mr Crutchfield submitted that in this case there were such indications. In a passage cited with approval in *Bowstead and Reynolds*, at Article 100, Wright J held in *Montgomerie v UK Mutual SS Assn*[14]: "In all cases the parties can by the express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal". As Ms Sparke pointed out, the many cases cited by the learned authors invariably deal with the situation where the agent signed the contract in his own name.

77. I mention one additional argument. Mr Crutchfield submitted that when the barrister, Harrison, was engaged by Walsh, Walsh was then acting for State Trustees as his principal, and, thus, he was agent for a disclosed principal, having actual or apparent authority to bind the principal. If I concluded that the terms of the contract between PCR and State Trustees was that State Trustees would not be personally liable then, so it was submitted, PCR could make State Trustees liable to the third party, Harrison, because as the agent of State Trustees PCR held out that it had apparent authority: see *Bowstead and Reynolds*, Article 74[15].

78. Ms Sparke submitted that in the hearing below, the learned magistrate was not asked to distinguish the situation of Harrison from that of PCR, and arguments such as this were not advanced, nor were they the subject of any findings, and those questions are not raised in the grounds of appeal. Those contentions were not substantially disputed by counsel for Harrison, although I note that there are two questions of law raised on this appeal by virtue of the order of Master Cain (dated 21 September 1999) which do appear to raise these issues. No argument was directed to the terms of those questions of law during the hearing before me. Grounds (e) and (f) read as follows:

> "(e) Whether the Learned Magistrate erred in law in failing to find that the Plaintiff was retained by Purves Clarke Richards as an agent for a disclosed principal, being State Trustees Limited having regard to the evidence before him.
>
> (f) Whether the learned Magistrate erred in law in failing to distinguish his findings of fact or law in the Harrison proceeding from that of the Purves Clarke Richards proceeding."

79. I was referred to a passage of the evidence of Harrison in which he said that he understood that he was retained by State Trustees, via Walsh, and that his instructing solicitor was Walsh. He denied that he had been retained by either protected person, and said that no suggestion otherwise had been made to him. Apart from that passage of evidence, however, Mr Crutchfield agreed that the cases before the magistrate had been conducted together, and on the basis that the decision as to the retainer of PCR would also determine the outcome of the case concerning Harrison, and a separate argument was not addressed on the basis that Harrison fell into a different situation to that of PCR, vis-à-vis State Trustees' liability.

80. In his reasons for decision the learned magistrate (in a passage which is not entirely clear) held as follows:

> "Mr Harrison, in his evidence, suggested Mr Sier could have suggested, which is more pointed to in the Nally litigation, that he, the son, need not be concerned about his legal fees as Sier would see that State Trustees would meet such costs if the estate of the represented person could not, words to that effect, the suggestion being that State Trustees would be responsible. Sier denied this. He said there could have been talk about the fees at that time. Harrison was very unconvincing on this issue, and in fairness he came over as a person of truth, but he was not certain that conversation took place necessarily in the words as he recited them. Mr Harrison's evidence on this matter has failed to assist me."

81. Apart from that finding, there do not appear to have been any findings made, nor any suggestion that arguments had been advanced on behalf of Harrison, relating to the issues addressed in grounds (e) and (f). It is not appropriate, in those circumstances, that I permit arguments to be raised on appeal that were not raised below. Had those issues been raised before the magistrate, many factual issues would have needed to be addressed and to have been the subject of findings of fact, but there are no such findings. The finding of fact noted, above, suggests that if, in fact, it was the case that the issue was raised then the learned magistrate did not make any finding which would have assisted the case which Harrison now sought to advance.

82. I conclude, therefore, that the appeals in all matters should be dismissed with costs.

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[1] [1983] VicRp 99; [1983] 2 VR 386.
[2] [1999] NSWSC 501, at pars 56, 59.
[3] Ibid, at 388-389.
[4] Ibid, at 392.
[5] [1908-10] All ER Rep 331; [1908] 2 KB 572.
[6] [1919] VicLawRp 93; [1919] VLR 638, at 643; 25 ALR 360; 41 ALT 85.
[7] Fourth Edition, at par 3.17.
[8] [1982] HCA 24; (1982) 149 CLR 337, at 348; (1982) 41 ALR 367; (1982) 56 ALJR 459 per Mason J (See, too, *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VicRp 74; [1990] VR 834, at 840 per McGarvie J).
[9] See *The Laws of Australia*, Ch 7.4, para 70.
[10] *The Law of Agency* by GHL Fridman, 6th Ed, at p49.
[11] *Bowstead and Reynolds on Agency*, 16th Ed, Art 4 at p38.
[12] *Bowstead and Reynolds on Agency*, 16th Ed, Art 101.
[13] *Bowstead and Reynolds on Agency,* 16th Ed, pp548-549.
[14] [1891] 1 QB 370 at 372.
[15] *Bowstead and Reynolds on Agency,* 16th Ed, Article 74

APPEARANCES: For the appellants: Mr P Crutchfield, counsel. Gadens Lawyers. For the respondents State Trustees Ltd: Ms C Sparke, counsel. State Trustees Limited.
