IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S223 of 2015

BETWEEN:

ROBERT WILLIAM FISCHER
First Appellant
JOHN JULES FISCHER
Second Appellant
ANDREA JULIANA FISCHER MUSSER
Third Appellant
SYLVIA BETH FISCHER KRAMER
Fourth Appellant

and

NEMESKE PTY LTD (ACN 002 870 797)
First Respondent
LORAND LOBLAY
Second Respondent
KAREN LOBLAY
Third Respondent
LAURA MUSSER SLOAT
Fourth Respondent
TOBIAS MUSSER
Fifth Respondent
EVE FISCHER GREGG
Sixth Respondent
SETH DAVID FISCHER
Seventh Respondent
TODD MUSSER
Eighth Respondent
KATHLEEN ELIZABETH FISCHER
Ninth Respondent
WILLIAM GEORGE MARCEL FISCHER
Tenth Respondent
CORINNE AYERS
Eleventh Respondent
AARON KRAMER
Twelfth Respondent
MARIANNE FISCHER
Thirteenth Respondent

APPELLANTS' SUBMISSIONS

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PART I FORM OF SUBMISSIONS

1 These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2 *First*, whether the Court of Appeal erred in finding that the resolution of the directors of Nemeske Pty Ltd (**Nemeske**) in its capacity as trustee of the Nemes Family Trust (**Trust**) made 23 September 1994 (**1994 Resolution**) was a valid and effective exercise of Nemeske's power "to advance or raise" and "to pay or to apply" the capital or income of the Trust under clause 4(b) of the trust deed of the Trust.

3 *Secondly*, whether the Court of Appeal erred in concluding:

a) that the effect of the trustee making the 1994 Resolution and recording a liability of $3,904,300 to Mr and Mrs Nemes in the accounts of the Trust was that Mr and Mrs Nemes could thereafter have maintained an action for money had and received against the trustee for that sum; and

b) that the trustee covenanted to repay the debt recoverable by such action for money had and received in a Deed of Charge executed on 30 August 2005 (**Charge**).

PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4 The appellants certify that they have considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

PART IV JUDGMENT OF COURT BELOW

5 The medium neutral citation of the decision at first instance is *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203. The medium neutral citation of the decision of the Court of Appeal is *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6.

PART V FACTS

6 The Trust is a discretionary trust created by a Deed of Settlement dated 24 June 1974 (**Trust Deed**): J[2]. The first respondent, Nemeske, has been the trustee of the Trust since 4 May 1987.

7 The appellants are four of the "Specified Beneficiaries" of the Trust under the Trust Deed.

8 The second and third respondents are the current directors of Nemeske and also the executors of the estate of Mr Emery Nemes (**Executors**). As this

litigation is, in essence, a dispute between the interests of Nemeske in its capacity as trustee and those of Mr Nemes' estate, the appellants represented the interests of Nemeske both at trial and on appeal: J[6]. Nemeske has entered a submitting appearance in this Court.

9 The fourth to thirteenth respondents were joined as parties to the proceedings below in connection with a claim that is no longer advanced in this Court. That argument concerned whether the Trust had vested on 3 May 1994, prior to the events now in issue: see J[5(e)], [17]-[19], [39], [117]-[146]. The fourth to thirteenth respondents are each persons who would have been entitled to a share of the trust property if the Trust had vested on or around 3 May 1994: see Trust Deed, First Schedule, paragraph (d). Each has entered a submitting appearance in this Court.

10 Although the evidence as to the contemporary events is sparse (J[7]), there was no factual dispute below as to the critical events.

11 The powers of the trustee under the Trust Deed include, in clause 1, a general power "to invest the proceeds in any investments hereby authorised with power from time to time to vary and transpose such investments into others hereby authorised". A wide class of authorised investments is specified in clause 3 of the Trust Deed. Clause 8 of the Trust Deed gives the trustee the power to sell the whole or part of the settled fund, and to invest the proceeds of sale in any authorised investment.

12 At all material times, the only assets held by Nemeske on trust were 10 B class shares in Aladdin Ltd (**Shares**): J[8]. At no relevant time did the trust assets include any money: J[8], [54].

13 In or around July 1994, the Shares were revalued and Nemeske recorded an "asset revaluation reserve" in the accounts of the Trust in the amount of $3,904,300. This "reserve" represented substantially the whole of the value of the Shares, save for $1,000 which was recorded as representing the Settlement Sum: J[8].

14 Clause 4(b) of the Trust Deed invests the trustee with a power of advancement in the following terms (J[34]):

> The Trustee may from time to time exercise any one or more of the following powers that is to say: - ...
>
> (b) At any time or times to advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay or to apply the same as the Trustee shall think fit for the maintenance education advancement in life or benefit of any of the Specified Beneficiaries...

15 The term "Trust Funds" is defined in the recitals to the Trust Deed as comprising the settlement sum ($200) "and all other assets from time to time

held by the Trustee hereunder": J[22]. It follows that, at all material times, the Shares comprised the whole of the "Trust Funds".

16 At a meeting of the directors of Nemeske held on or around 23 September 1994, the directors passed a resolution in the following terms (**1994 Resolution**) (J[9]):[1]

> RESOLVED that pusuant [sic] to the powers conferred on the Company as Trustee in the Deed of Settlement of the Nemes Family Trust:-
>
> That a final distribution be and is hereby made out of the asset revaluation reserve for the period ending 30th September, 1995 [sic][2] and that it be paid or credited to:- the beneficiaries in the following manner and order:
>
> The entire reserve if any, to be distributed to:-
> Emery George Nemes & Madeleine Nemes as joint tenants.

17 It was common ground that no money was in fact paid to Mr and Mrs Nemes pursuant to, or following, the 1994 Resolution. Instead, the distribution was purportedly effected by creating a non-current liability of $3,904,300 to Mr and Mrs Nemes in the accounts of the Trust: J[11]. This is confirmed by a letter from Mr and Mrs Nemes' accountant in April 1995: J[13].

18 On 30 August 1995, approximately eleven months after the 1994 Resolution was made, Nemeske executed the Charge in favour of Mr and Mrs Nemes: J[14]. The recitals of the Charge state that Nemeske was "indebted" to Mr and Mrs Nemes in the sum of $3,904,300 (referred to in the Charge as both the "principal monies" and "principal moneys"), and that the Charge was executed "[f]or the purpose of securing repayment of the principal moneys": J[14].

19 By clause 5 of the Charge, Nemeske purported to covenant to pay Mr and Mrs Nemes "the principal moneys" on demand: J[15]. By clauses 1 and 2 and recital C of the Charge, Nemeske purported to charge the Shares to secure that amount: J[14], [15].

20 The records of the Trust are incomplete, but the accounts of the Trust for the financial year ended 30 June 2003 were in evidence. Those accounts record a liability to Mr and Mrs Nemes in the same terms as that recorded in the September 1994 accounts: J[11], [104].

21 On 28 September 2011, Mr Nemes died (Mrs Nemes having predeceased him). At the time of Mr Nemes' death, no steps had been taken by either Mr or Mrs Nemes to seek payment of the amount said to be owing as a result of the 1994 Resolution or the Charge.

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[1] The only copy of the 1994 Resolution in evidence was unsigned. There was, however, no dispute between the parties that the 1994 Resolution was made: *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 at [33].

[2] It was common ground that the reference to 1995 in the resolution was a typographical error and that the correct year was 1994: J[10].

22 On 11 June 2013, the appellants commenced proceedings seeking, inter alia, declarations that Nemeske was not indebted to Mr Nemes' estate in the amount of $3,904,300. By amended cross-claim filed 22 October 2013, the Executors alleged that Nemeske was so indebted and sought judgment against Nemeske for that amount.

23 At first instance, Stevenson J dismissed the appellants' claim and ordered judgment for the Executors on their cross-claim: *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 at [91]-[98].

24 On 11 February 2015, the Court of Appeal of the Supreme Court of New South Wales (Beazley P, Barrett and Ward JJA) dismissed the appellants' appeal: [2015] NSWCA 6.

25 Following the Court of Appeal's judgment, the appellants filed a motion in the Court of Appeal seeking to re-open the appeal on the basis that the Court had determined the appeal on a basis not argued by the parties. On 7 April 2015, the Court of Appeal dismissed that motion: *Fischer v Nemeske Pty Ltd (No 2)* [2015] NSWCA 79.

PART VI ARGUMENT

A. The Reasoning of the Court of Appeal

26 On the matters now in issue in this Court, Barrett JA (with whom Beazley P and Ward JA agreed) reasoned as follows:

a) *First*, the capital or income of the Trust which was the subject of the 1994 Resolution was the unrealized accretion in the value of the Shares that was recorded as the "asset revaluation reserve" in the July 1994 accounts of the Trust (J[54]);[3]

b) *Secondly*, the 1994 Resolution "advanced" and "applied" that capital or income by first determining that it should be used immediately, and then by effecting a "specific setting aside or appropriation", albeit one which "did not result in any cash payment or change in ownership of specific property" (J[62]). The result of that appropriation was to cause the "the trustee's obligations with respect to the trust assets to change so that, to the extent of $3,904,300, the trustee was required to recognize and accommodate an immediate and vested interest of Mr and Mrs Nemes" (J[62]). The obligation to pay that amount to Mr and Mrs Nemes thereafter

[3] There was no issue in these proceedings as to whether the accretion in value of the Shares was properly characterized as "income" or "capital": cf. *Clark v Inglis* [2010] NSWCA 44; 79 ATR 447. It is apparent that the directors of Nemeske believed that they were distributing capital as they recorded a "Capital Distribution" of $3,904,300 in the September 1994 accounts of the Trust. That was a matter not referred to by Barrett JA, who proceeded on the basis that the distribution was one of either income or capital: J[54]. A determination as to whether it was income or capital was unnecessary because clause 4(b) empowered Nemeske to deal with both: J[35], [54].

"prevailed regardless of the nature and composition of the trust assets" (J[63]).

c) *Thirdly*, by recording a debt to Mr and Mrs Nemes in the accounts of the Trust in the amount of $3,904,300 following the 1994 Resolution, Nemeske "admitted and acknowledged itself to be indebted" to Mr and Mrs Nemes, with the effect that Mr and Mrs Nemes could thereafter have maintained an action for money had and received against Nemeske for that amount (J[89). That was the "pre-existing debt" that Nemeske promised to repay in clause 5 of the Charge (J[89]).

27 The errors made by the Court of Appeal arise at each step of the analysis. Put shortly, those errors are as follows:

a) *First*, the Court of Appeal erred in concluding that the 1994 Resolution was a valid and effective exercise of the power "to advance" and "to pay or to apply" the capital or income of the Trust because the 1994 Resolution did not alter the beneficial ownership of any property held on trust. The 1994 Resolution did not identify any property held on trust that was to be 'paid' or 'applied'; rather, it was a resolution to distribute an unrealized and unspecified portion of the value of the Shares, notwithstanding that those shares at all times continued to be held on the terms of the original settlement. In circumstances where the Shares comprised the whole of the capital and income of the trust property, title to the Shares had to be altered in some way in order for the capital or income of the Trust to be 'paid' or 'applied'. This submission is the subject of Ground 2 of the Notice of Appeal

b) *Secondly*, if the preceding analysis is incorrect, the Court of Appeal nevertheless erred in concluding that, following the 1994 Resolution, Mr and Mrs Nemes could have maintained an action for money had and received against the trustee, such that there was an indebtedness that the trustee could covenant to repay in the Charge. On the Court of Appeal's analysis, the effect of the 1994 Resolution was that the Shares remained held on trust on the terms of the original settlement, but subject to an obligation to pay Mr and Mrs Nemes $3,904,300 therefrom. Even if that is correct, it is apparent that the trustee continued to have active duties as trustee in relation to the whole of the trust fund following the 1994 Resolution; that is, it was not a bare trustee in respect of any property held on trust. In such circumstances, Mr and Mrs Nemes' remedies against the trustee were exclusively equitable and a money had and received claim could not arise. As such, the trustee was not indebted to Mr and Mrs Nemes at law in August 1995, and the covenant to repay any such indebtedness in the Charge is void. This is the subject of Ground 3 of the Notice of Appeal.

B. Ground 2: The 1994 Resolution was not a valid exercise of the clause 4(b) power

28 The Court of Appeal found that the 1994 Resolution was a valid and effective exercise of the trustee's power under clause 4(b) of the Trust Deed: J[62]-[64]. The correctness of that conclusion turns on both a consideration of the terms of the 1994 Resolution itself and the proper construction of clause 4(b).

The Terms of the 1994 Resolution

29 By the terms of the 1994 Resolution, the directors of Nemeske resolved to make a "final distribution... out of the asset revaluation reserve" for the year ended 30 September 1994, and that "[t]he entire reserve" be "paid or credited to", and "distributed to", Mr and Mrs Nemes: J[9].

30 Two aspects of the terms of the 1994 Resolution should be noted.

31 *First,* the directors of Nemeske believed that the resolution was effecting something called a "final distribution". In this regard, the directors appear to have had in mind that they were doing something akin to declaring a "final dividend" for company law purposes. This may explain why the directors of Nemeske believed that they could simply create a debt upon making the 1994 Resolution. That is because, as a matter of company law, the declaration of a final (as opposed to interim) dividend immediately creates a debt in favour of shareholders.[4]

32 An exercise of a power of advancement is fundamentally different to the declaration by a company of a dividend. An advancement removes the property advanced from the original settlement altogether and vests it in the object of the advancement.[5] The position is described in the current edition of *Lewin on Trusts* as follows:[6]

> The general purpose of a power of advancement is to enable trustees in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By doing so they release it from the trusts of the settlement and accelerate the enjoyment of his interest...

The mechanism by which an advancement operates is therefore altogether different to that which gives a shareholder a right to sue for the debt created by a final dividend. Rather than creating any debt in favour of the beneficiary, an advancement operates by altering the proprietary interests in the property advanced, such that that property is removed from the original trust.

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4 *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 at [20]; *South Brisbane Gas Light & Co Ltd v Hughes* (1917) 23 CLR 396 at 405.

5 *Re Gosset's Settlement* (1845) 19 Beav 529 at 535 [52 ER 456]; *Re Fox* [1904] 1 Ch 480 at 484; *Pilkington v IRC* [1964] AC 612 at 639.

6 L Tucker, N Le Poidevin & J Brightwell, *Lewin on Trusts* (19th ed 2014), at [32-001].

33 Barrett JA recognised that the language of the 1994 Resolution was "obviously drawn from a company law context", but emphasised that the Court was nevertheless required to determine whether such words "had meaning in the trust context in which they were employed": J[56]. So much may be accepted. Nevertheless, in determining whether the 1994 Resolution was effective as a matter of trust law, the fact that the trustee was proceeding on a mistaken premise as to the nature and effect of the resolution is instructive. The directors of Nemeske appear to have believed that, by making the resolution, they could both create a debt in favour Mr and Mrs Nemes and continue to hold all of the trust property on the original trust. That was an outcome that one can readily understand given the analogy which they incorrectly drew to company law. At the same time, however, the outcome the directors sought to achieve was wholly at odds with the true nature of the power being exercised because that power could not itself be used to create debts at law and necessarily operated by altering property rights in the trust property. That being the case, it would be a surprising result if the directors fortuitously achieved the outcome they intended through the complex legal and equitable mechanisms found by the Court of Appeal.

34 *Secondly*, the 1994 Resolution purported to distribute "out of the asset revaluation reserve", and was a distribution of "[t]he entire reserve". The asset revaluation reserve was obviously not an asset of the Trust; it was merely an accounting treatment given in the books of the Trust to the unrealized accretion in the value of the Shares. For this reason, it was a nonsense to speak of a distribution "out of the asset revaluation reserve" as if it were a pool of funds from which amounts could be withdrawn and paid. The reserve was a way of accounting for the value of a portion of the trust assets, but was not an asset itself.

35 In this context, it is necessary to address Barrett JA's conclusion that the "unrealized... accretion in the value of the shares" was "part of" the capital or income of the Trust: J[54]. The correctness of that statement depends upon the meaning given to the words "part of".

36 If one were to determine the total value of the capital and income of the Trust, such an unrealized gain would doubtless be included. In that sense, one can perhaps speak of that unrealized increase in value as forming 'part of' the Trust's income and capital. At the same time, however, the unrealized gain in the value of the Shares was not itself property held on trust. It could not be realized unless the Shares were used or dealt with in some way. In this context, describing the unrealized gain in value as "part of" the capital or income of the Trust is apt to mislead because it suggests that what is being described is a portion of the trust property that could somehow be separately dealt with. It could not. To access the value recorded in the "asset revaluation reserve", one

had to deal with the underlying assets to which the accretion in value related, namely, the Shares.

The Proper Construction of Clause 4(b)

37 The power conferred by clause 4(b) of the Trust Deed is a power "to advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay or to apply the same" for the maintenance, education, advancement in life or benefit of Mr and Ms Nemes.[7]

38 Barrett JA held that clause 4(b) was a single composite power permitting a number of alternatives: J[51]. In each case, the power was to be exercised by either raising or advancing the capital or income of the trust, and then either paying or applying it: J[51]. Thus, there were four possible alternative means by which the power could be exercised: (1) advance and pay; (2) advance and apply; (3) raise and pay; and (4) raise and apply. In the case of the 1994 Resolution, Barrett JA held that alternative engaged was the trustee's power "to advance" and "to apply" trust capital or income: J[62].

39 Barrett JA construed the term "raise" to mean the process by which money is obtained by means of property, usually through sale or mortgage: J[52]. So much may be accepted.

40 Next, his Honour construed the power to "advance" to mean "the process of using immediately money that is to hand but would, in the normal course, not be outlaid until some future time": J[52]. With respect, that construction was in error. "Advance" is a term susceptible to a number of meanings and it is not used in clause 4(b) in that sense.[8] So much is demonstrated by the alternatives posited by the phrase "advance or raise"; it is implicit that one of these two alternative processes must occur in order for trust capital or income to be paid or applied. In circumstances where the word "raise" must mean "raise a money sum from", the term "advance" must similarly refer to a process by which the capital or income of the Trust is readied to be paid or applied, and one which operates where there is no need to first raise money. The term "advance" must therefore refer to the process of assembling and separating out the relevant portion of trust income and capital from the corpus of the Trust so that it can thereafter be paid or applied. For example, had the Trust held money, the power to "advance" would be a means by which the portion of that money that was to be paid or applied would be separated from the balance of the fund.

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[7] There is no issue between the parties as to whether the 1994 Resolution, if otherwise valid, was for the 'benefit' of Mr and Mrs Nemes: J[43].

[8] As to the various possible meanings of "advance", see, generally, *Burnes v Trade Credits Ltd* [1981] 1 NSWLR 93 at 95; *Pilkington v Inland Revenue Commissioners* [1964] AC 612 at 635; *Lincolnshire Sugar Company Ltd v Smart* [1937] AC 697 at 704; *Treadwell v Hitchings* [1925] NZLR 519 at 523; *London Financial Association v Kelk* (1884) 26 Ch 107 at 136.

Again, this is consistent with the nature of a power of advancement as a power which permits trust property to be removed from the original settlement.

41 Barrett JA characterised the composite power to "raise or advance" as a power to 'earmark' or 'assemble' income or capital for use and to use it: J[53], [55]. It is not altogether clear what his Honour meant by "earmarking" in this context. The act of 'raising' trust capital or income certainly involves more than notionally identifying property for possible future use. As his Honour recognized, raising in the relevant sense involves conversion of trust property into money so that it may be paid or applied. Similarly, the power to "advance" must mean something more than a notional 'earmarking' of property. It must mean the actual process by which specific trust property is separated out of the corpus of the trust fund so that it can be paid or applied.

42 With regards to the phrase "to pay or to apply", Barrett JA's analysis focused on the construction of the term "apply", there having been no actual payment to Mr and Mrs Nemes. In construing that term, his Honour drew two principles from the decisions in *Re Baron Vestey's Settlement; Lloyds Bank Ltd v O'Meara* [1951] Ch 209 (*Vestey's Case*),[9] *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 and *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488. The first was that "income may be 'applied' by a process of crediting" it to a beneficiary: J[59]. The second was that a resolution to 'apply' trust income by crediting it effects "an immediate vesting of a specific part of the trust income" in the beneficiary: J[61].

43 Respectfully, on a close reading of *Vestey's Case*, *Ward* and *Chianti*, those cases do not support either of the principles identified by Barrett JA expressed at the level of generality with which his Honour identified them.

44 *Vestey's Case* concerned a trust settled by Sir Edmund Vestey. Seven of Sir Edmund's children were discretionary objects of a power of advancement in the trust deed, but none otherwise had an immediate right to possession of any asset of the trust.[10] Clause 7 of the trust deed conferred a mandatory power requiring the trustees to:[11]

> pay or apply the income of Edmund's fund... unto or in any manner for the support or benefit of all or any one or more of the following persons for the time being in existence...

In February 1949, the trustees met with a view to determining how to exercise the power with respect to a sum of money "which had come to the hands of the trustees" in the preceding period and which was held "in hand".[12] The trustees resolved that a specified proportion of that money "shall belong" to Sir

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[9] The case is more comprehensively reported as [1950] 2 All ER 891.

[10] [1951] Ch 209 at 219; [1950] 2 All ER 891 at 894E.

[11] [1951] Ch 209 at 210; [1950] 2 All ER 891 at 894A.

[12] [1950] 2 All ER 891 at 894H. See also at 897H.

Edmund Vestey's children under the age of twenty-one,[13] and an issue in the proceedings was whether that resolution was a valid and effective exercise of the power to "apply" in clause 7.

45 The English Court of Appeal (Evershed MR, Asquith and Jenkins LJJ), held that the resolution was an effective exercise of the power to "apply" the income of the trust. Sir Raymond Evershed MR (with whom Asquith LJ agreed) explained that result as follows:[14]

> The first effect of the resolution of the trustee was to give each infant *a specific portion* of the income; and without that resolution the infant was entitled to no part of it at all... In other words, I think that the effect of each of the resolutions was so to exercise the discretion that in each case each one of these infants became *absolutely entitled to a particular sum of money so appropriated,* and... those appropriated sums have now become part of the infants' respective estates. (Emphasis added.)

Again, it is to be recalled that the income advanced in *Vestey's Case* was an actual sum of money held by the trustees.[15] In this context, the conclusion reached by Evershed MR was that the resolution to vest the beneficial ownership of that money in the children absolutely was a valid exercise of the power to "apply" the income of the trust in circumstances where, prior to the resolution, the children had no right to the possession of that money whatsoever. Jenkins LJ expressed the same view on this point.[16]

46 *Vestey's Case* therefore does not stand for a general principle that a trustee can "apply" income (or capital) simply by crediting it to a beneficiary in the accounts of a trust. Rather, it stands for the more limited proposition that a trustee can "apply" the income or capital of a discretionary trust by resolving to vest the absolute beneficial ownership of property held on trust in one or more of the discretionary objects of the trust. In this way, *Vestey's Case* is merely an example of the principle later accepted by the House of Lords in *Pilkington v Inland Revenue Commissioners* [1964] AC 612, that a power to "apply" trust property is sufficiently broad to permit a trustee to resettle part of the trust for the benefit of one or more discretionary objects.[17]

47 *Ward* can be similarly explained. That case involved a trust settled by a mother in favour of her children. The trust deed included a power of advancement whereby the trustee could "pay the whole or any part of the trust property... for the benefit of" any of the children.[18] In 1963, the trustee resolved that certain

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[13] [1951] Ch 209 at 212; [1950] 2 All ER 891 at 895.

[14] [1951] Ch 209 at 219-222; [1950] 2 All ER 891 at 899.

[15] See [1950] 2 All ER 891 at 894H, 897H.

[16] [1951] Ch 209 at 224; [1950] 2 All ER 891 at 902E-F.

[17] See *Pilkington v Inland Revenue Commissioners* [1964] AC 612 at 635-639 (Viscount Radcliffe, Lord Jenkins, Lord Hodson and Lord Devlin agreeing).

[18] [1970] NZLR 1 at 6.

money should "be held for the credit of" the children in equal shares.[19] Book entries were made in the accounts of the trust to reflect the resolution, but the money not in fact paid to the beneficiaries until some years later.[20] The New Zealand Commissioner for Inland Revenue assessed the trustee to income tax for the whole of the income and the issue whether the resolution was effective to vest part of the income in the children.[21]

48 The New Zealand Court of Appeal (North P and McCarthy J, Turner J dissenting) held that the resolution was an effective exercise of the power to "apply" trust income. North P reached that conclusion on the basis that the effect of the resolution was to make the money the "separate property" of the objects of the advancement:[22]

> I read *Vestey's* case therefore as laying down the principle that if a trustee takes the necessary step of exercising a power 'to pay or apply' income for the benefit of infants, who only have a contingent interest in the income, it is immaterial whether the income is immediately used for the benefit of the infants and *is sufficient if it is allocated to them in terms which makes the parts of the income so allocated the separate property of each infant.* (Emphasis added.)

This is on all fours with *Vestey's Case*. Income will be "applied" where it ceases to be held under the prior trust and becomes the absolute property of the object of the advancement. North P went on to find that the resolution in *Ward* "did have the effect of immediately vesting a specific portion of the income" in the children, and that "in result there was a change in title from a contingent interest to an absolute interest in the sums allotted to them".[23] This brought the facts in *Ward* within the principle identified in *Vestey's Case*.

49 Turner J proceeded on the same basis as North P on the question of principle, but found that the resolution did not vest an absolute interest in any of the income in the children. Like North P, Turner J read *Vestey's Case* as having been resolved on the basis that the resolution in that case "was sufficient to constitute a declaration of trust" over the moneys advanced.[24] He differed from the President only in finding that, on the evidence, the resolution at issue in *Ward* was insufficient to constitute a declaration of trust over the sums advanced.[25] Thus, two of the three judges in *Ward* agreed that, in order for a trustee to exercise a power to "apply" trust income, it was necessary that that income be dealt with in a manner which removed it from the corpus of the trust.

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[19] [1970] NZLR 1 at 7.
[20] [1970] NZLR 1 at 7.
[21] [1970] NZLR 1 at 6.
[22] [1970] NZLR 1 at 15.
[23] [1970] NZLR 1 at 17.
[24] [1970] NZLR 1 at 25.
[25] [1970] NZLR 1 at 21-22.

50 It is unclear the extent to which the third member of the Court in *Ward*, McCarthy J, adopted a more expansive view. His Honour said that the moneys advanced were "basically" held on "the trusts created by the original deed" both before and after the relevant resolution, while also acknowledging that it was not incorrect to describe the resolution as giving rise to a "new trust".[26] Even if McCarthy J's judgment is read as endorsing a more expansive view of the construction of the power to "apply", it was one which was unnecessary to the decision in *Ward* and which did not command a majority.

51 *Chianti* was a different case to *Vestey's Case* and *Ward* in a key respect. The relevant trust power was "to pay, apply or *set aside*" trust income (emphasis added).[27] The power to "set aside" was defined to include "placing sums to the credit of the beneficiary in the books of account of the Trust".[28] The trust deed also expressly provided that amounts set aside in this manner would "cease to form part of the Trust Fund and... [would] henceforth be held by the Trustee as a separate trust fund on trust for that person absolutely".[29] Thus, while *Chianti* involved the exercise of a power of advancement by crediting trust income, it did not turn on the construction of a power to "apply" trust capital or income given the specific power to "set aside".

52 More fundamentally, Buss JA's discussion in *Chianti* is consistent with the principles identified above from *Vestey's Case* and *Ward*. Indeed, Buss JA explained that the result in *Ward* turned on the fact that the resolution in that case effected "a change in the title of the four contingent beneficiaries, from a contingent to an absolute interest, in the amounts allocated to them".[30] This again correctly reflects the relevant principle from *Vestey's Case* and *Ward*, being that, in the case of a discretionary trust, income or capital may be 'applied' by vesting an absolute title to the assets being advanced in a discretionary object of the trust.

53 For present purposes, the fundamental difference between each of *Vestey's Case*, *Ward* and *Chianti* and the present case is that, here, the trustee did not purport to confer an absolute beneficial interest in Mr and Mrs Nemes in any property held on trust by exercising the power of advancement. Indeed, Barrett JA expressly held that the 1994 Resolution "did not result in any cash payment *or change in ownership of specific property*" (emphasis added) (J[62]). As such, the case was distinguishable from *Vestey's Case*, *Ward* and *Chianti*, each of which involved resettlements of actual property held on trust. None of these cases is authority for the proposition that a power to "apply" trust capital or income can

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[26] [1970] NZLR 1 at 30.
[27] (2007) 35 WAR 488 at [22].
[28] (2007) 35 WAR 488 at [22].
[29] (2007) 35 WAR 488 at [25].
[30] (2007) 35 WAR 488 at [72].

be exercised without altering the beneficial ownership of the property the subject of the advancement.

54 Returning to the two principles identified by Barrett JA from *Vestey's* Case, *Ward* and *Chianti*, each was expressed at too high a level of generality. These authorities do not stand for the proposition that trust capital or income will be applied whenever it is "credited" to the beneficiary in the accounts of a trust (cf J[59]); rather, what is required is that there be some alteration to the beneficial ownership of the trust property being advanced such that it ceases to be held on the original trust. Similarly, these authorities do not stand for the proposition that crediting trust capital or income to a beneficiary "is of itself sufficient to effect an immediate vesting of a specific part of the trust income" in the beneficiary in all cases (cf J[61]); again, what is necessary is that the resolution has the effect of immediately vesting absolute title to some property held on trust in the beneficiary.

The 1994 Resolution Did Not "Advance" and "Apply" the Capital or Income of the Trust

55 Barrett JA concluded that the 1994 Resolution was a valid exercise of the power to "advance" the capital or income of the Trust Funds because it was a determination to use the unrealized accretion in the value of the Shares immediately, and an exercise of the power to "apply" trust capital or income because it effected a "specific setting aside or appropriation" of that value (J[62]).

56 With respect, that conclusion was in error. As to the power to "advance", the power was not exercised because no trust property was separated from the corpus of the trust to be paid or applied.

57 As to the power to "apply", the power was not exercised because there was no change in the beneficial ownership of any trust asset. The accretion in value of the Shares was not an asset of the Trust. That being so, the trustee could not vest an immediate and absolute beneficial title in Mr and Mrs Nemes in that accretion in value. In order for Mr and Mrs Nemes to take an absolute interest in some property previously held on trust, it would have been necessary for the trustee to deal with the Shares in some way. As Barrett JA recognised, the 1994 Resolution did not purport to have such effect: J[62].

58 Indeed, even if the trustee had purported to effect the distribution by settling a new trust for Mr and Mrs Nemes absolutely for $3,904,300 worth of the Shares, such a trust would fail for want of certainty of subject matter.[31] The value of the Shares was inherently mutable. That being so, the proportion of the value of the

[31] See generally *Kauter v Hilton* (1953) 90 CLR 86 at 97 per Dixon CJ, Williams and Fullagar JJ; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 604 [29] per Gaudron, McHugh, Gummow and Hayne JJ; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 524 [116] per Bell, Gageler and Keane JJ.

Shares accounted for by the amount of $3,904,300 was subject to change from time to time (a fact reflected by the very nature of the asset revaluation reserve). For that reason, a trust for $3,904,300 worth of the Shares would be inherently uncertain because one could not know at any time which of the Shares was covered by the trust and to what extent.[32] That is, the money value alone would be an insufficiently certain criterion to identify a specific portion of the Shares held on the new trust.[33]

59 Rather than finding that the 1994 Resolution was effective as a resettlement, Barrett JA appears to have concluded that its effect was to give rise to a new equitable obligation to pay Mr and Mrs Nemes $3,904,300, which qualified the trustee's existing obligations under the Trust Deed (J[62], [63], [75], [114(2)]). That proposition, however, is unsupported by authority. With the possible exception of McCarthy J's judgment in *Ward*, there is nothing in *Vestey's Case*, *Ward* or *Chianti* to support the proposition that a power to "apply" trust income or capital can be validly exercised by creating a new and supervening equitable obligation which operates over the head of the original trust.

60 Indeed, to describe the creation of such an obligation as an 'application' of trust property is to focus upon the consequences of the obligation rather than the obligation itself. The obligation is nothing more than a bare obligation to pay a specified amount of money. While that obligation can, as a practical matter, only be fulfilled by realising trust property, it is a nonsense to suggest that the obligation is itself created by the 'application' of such trust property. That is because the trust property is left untouched by the obligation's creation and is not affected until the relevant obligation is satisfied.

61 It follows that the Court of Appeal should have found that the 1994 Resolution was not supported by the power in clause 4(b) because it did not "advance" and "apply" the capital or income of the Trust. As that resolution was not otherwise supported by any clause of the Trust Deed, it was *ultra vires* and void. That being so, the covenant in clause 5 of the Charge to repay any indebtedness arising from the 1994 Resolution was likewise void.[34]

C. Ground 3: An action for money had and received did not arise

62 Having found that the 1994 Resolution altered the trustee's obligations with respect to the Trust, the Court of Appeal reasoned that the trustee's subsequent

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[32] Such a case would be distinguishable from cases such as *White v Shortall* (2006) 68 NSWLR 650, *Hunter v Moss* [1994] 1 WLR 452; [1994] 3 All ER 215 and *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch) (affirmed [2011] EWCA Civ 1544) because the issue in those cases was whether a trust over a specific *number* of shares out of a larger pool of identical shares was sufficiently certain. A trust for a particular money value's worth of shares, by contrast, would always be uncertain because one could not even know the number of shares falling within the trust with any certainty.

[33] Compare *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at [29]-[31].

[34] See *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680 at 726 [258].

conduct in recording a debt to Mr and Mrs Nemes in the accounts of the Trust was sufficient to enable Mr and Mrs Nemes to maintain an action for money had and received against the trustee for that amount (J[83], [85], [89]). That conclusion was essential to the ultimate result because the Court of Appeal identified that legal cause of action as constituting the indebtedness to which the recitals of the Charge referred, and repayment of which was secured by clause 5 of the Charge (J[92]).

63 Barrrett JA's conclusion that Mr and Mrs Nemes could have maintained an action for money had and received against the trustee once it had recorded the debt in its accounts was principally based on the Buss JA's analysis in *Chianti*. There, Buss JA held that a beneficiary could maintain an action for money had and received against a trustee where one of two conditions was met: (1) where there remained nothing for the trustee to do except to pay over the money to the beneficiary; or (2) where the trustee admitted itself to be indebted to the beneficiary.[35]

64 On Barrett JA's analysis, only the second of these alternatives could have operated in the present case because the 1994 Resolution did not vest any asset of the Trust in Mr and Mrs Nemes absolutely (J[62]). Thus, whether an action for money had and received could be maintained by Mr and Mrs Nemes against Nemeske turned on the correctness of Buss JA's alternative analysis, applied by Barrett JA, that such an action is maintainable wherever a trustee admits itself to be indebted to a beneficiary.

65 The authorities cited by Buss JA, and referred to by Barrett JA, do not support such a broad proposition. The basal principle is that stated by Baron Rolfe in *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269]:

> It is quite clear that, so long as no other relation subsists between two parties except that of trustee and cestui que trust, no action can be maintained by the latter against the former for any money in his hands. The trustee is, in such a case, the only person entitled at law to the money, and the remedy of the cestui que trust is exclusively in a court of equity. *When, indeed, there is no trust to execute, except that of paying over money to the cestui que trust*, the trustee, by his conduct, as for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the cestui que trust, for money had and received, or for money due on the account stated. Such was the case of *Roper v Holland* (3 Ad & Ell 99),[36] and there are many others to the same effect. But so long as there is no liability except as trustee, the cestui que trust has no legal remedy. *A contrary doctrine would often deprive the trustee of many grounds of defence which would be available to him in equity; equitable set-off for instance, or other equitable claims against the cestui que trust, which in good conscience ought to be available to him, and would be so in a court of equity, but which would afford no legal defence*. (Emphasis added.)

[35] (2007) 35 WAR 488 at [69]-[77].

[36] (1835) 3 Ad & E 99 [111 ER 351].

This passage was approved by Lord Campbell CJ in *Edwards v Lowndes* (1852) 1 El & Bl 81 [118 ER 367 at 370], and cited as authority by Griffith CJ in *R v Brown* (1912) 14 CLR 17 at 25. It is also the authority relied upon by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [67] (see note 95).

66 In *Pardoe*, Baron Rolfe said that the relevant principal was that applied in *Bartlett v Dimond* (1845) 14 M & W 49 [153 ER 385]. In that case, Pollock CB stated the principle as follows:[37]

> *So long as a trust continues, a bill in equity is the only remedy.* We think that the monies received were originally received in trust; and that the trust had not determined at the testator's death. *If that trust was ended,* and the testator had stated an account, or, in other words, had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely, he would, with respect to that sum, be a debtor, not properly a trustee, and then an action would have been maintainable against him. This is the principle upon which *Roper v Holland* (3 Ad & Ell 99; 4 Nev & M 668), and other cases (see *Remon v Hayward,* 2 Ad & Ell 666)[38] referred to in the judgment of this Court in the case of *Pardoe v Price* (13 M & W 282)[39] was decided. (Emphasis added.)

It is apparent from this passage, and the passage from *Pardoe*, that what these authorities stand for is the proposition that no action for money had and received is maintainable by a beneficiary against a trustee until such time as the trustee has come to hold some asset on bare trust for the beneficiary, and has admitted as much to the beneficiary.[40] Where the trustee maintains active duties as trustee, however, a money had and received claim is not available.

67 For purposes of Australian law, so much is confirmed by *Turner v New South Wales Mont de Piete Deposit and Investment Co Ltd* (1910) 10 CLR 539 and *R v Brown* (1912) 14 CLR 17. The issue in *Turner* was whether a claim for money had and received could be sustained against mortgagees in respect of a surplus that remained in their hands after selling the mortgaged goods and satisfying the mortgage debt. In holding that it could, O'Connor J emphasised that once the mortgage debt was satisfied, the mortgagees held the surplus "as bare trustees" so that once they admitted they held the surplus it was recoverable by an action for money had and received.[41] The same conclusion was reached by Isaacs J,

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[37] (1845) 14 M & W 49 at [56] [153 ER 385 at 387]. See, similarly (1852) 1 El & Bl 81 at 89 [118 ER 367 at 370] per Campbell LJ.

[38] (1835) 2 AD & E 666 [111 ER 256].

[39] (1844) 13 M & W 267 [153 ER 110].

[40] See Bullen & Leake, *Precedents of Pleadings* (3rd 1864) at 46-47 (cited by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [67] n 95): "A *trustee* who has received trust-money is accountable for it to the *cestui que trust* in the Court of Chancery, but in the courts of law he is treated for most purposes as the absolute owner, and no action can in general be maintained by the *cestui que trust* against him to recover trust money... If, however, he admits to the *cestui que trust* that he holds such money as the money of the *cestui que trust* to be accounted for to the latter, he is debarred from setting up his character of trustee and becomes liable at law to the *cestui que trust* for money received to his use."

[41] (1910) 10 CLR 539 at 553.

who referred to the passage from *Pardoe* quoted above. His Honour observed that the facts before him fitted the conditions identified by Baron Rolfe "precisely", which conditions included the circumstance that "there is no trust to execute, except that of paying over money"[42]. Shortly after *Turner*, Griffith CJ said in *Brown* that the relevant principle was that the action for money had and received lay against a trustee "when nothing remained to be done except pay over the money."[43]

68 The reason for limiting this principle to cases of bare trust is identified in the passage from *Pardoe* above. Save in the case of a bare trust, a trustee may have equitable defences that it could assert against the beneficiary's claim in equity, but which would not operate as defences to an action for money had and received. Beneficiaries are therefore not permitted to circumvent these equitable defences by bringing actions at law. Further, were the principle to operate in the case of an active trust, the effect would be that the trustee may become personally liable for all of its assets (whether held on trust or not), whereas, absent breach of trust, any equitable claim by a beneficiary would be limited to the assets held on trust.

69 These authorities therefore demonstrate that Buss JA misstated the position in *Chianti* by suggesting that an action for money had and received is maintainable by a beneficiary against a trustee whenever the trustee states an account to the beneficiary, and regardless of whether the trustee continues to have active duties as trustee. The true position is that the necessary preconditions for an action for money had and received are that there is no trust left to execute other than the payment over of money and the admission by the trustee of that state of affairs: see *R v Brown* (1912) 14 CLR 17 at 25.

70 In the present case, the application of the correct principle would compel the conclusion that an action for money had and received was never maintainable by Mr and Mrs Nemes against the trustee. Even on Barrett JA's analysis, the Trust remained on foot at all times. At no time did Nemeske hold a sum of money on bare trust for Mr and Mrs Nemes; any such sum had to be realised from the Shares, and those shares continued to be held on trust by Nemeske. In those circumstances, *Pardoe v Price* and its progeny necessitated the conclusion that an action for money had and received was never maintainable.

71 Indeed, this point is demonstrated by the very accounts upon which Barrett JA's analysis relied. Those accounts were accounts of Nemeske in its capacity of trustee of the original settlement. The circumstance that a "non-current" liability was recorded in favour of Mr and Mrs Nemes in those accounts demonstrates that the trustee was not thereby representing to Mr and Mrs Nemes that it held any former asset of the Trust separately from that Trust

[42] (1910) 10 CLR 539 at 556.
[43] (1912) 14 CLR 17 at 25.

and for them absolutely. To the contrary, the accounts make clear that any such debt would have to be realised from the assets of the original settlement, which continued to be held on Trust. The accounts therefore do not admit an indebtedness to Mr and Mrs Nemes as bare trustee. The position is distinguishable to the trust accounts in *Chianti* (referred to at J[83]), because of the specific provision in the trust deed in that case which constituted separate bare trusts over the amounts held in each beneficiary's account.[44]

72 Assuming that the trustee's duties were as Barrett JA described them following the 1994 Resolution, the trustee continued to have duties to the remaining beneficiaries of the Trust in respect of the Trust Funds, while also having a duty to realise $3,904,300 for Mr and Mrs Nemes: J[62]. It is helpful to consider the trustee's duty to the other beneficiaries in this context. Those duties included duties to invest the Trust Funds, and to consider altering the nature of its investments from time to time.[45] If the value of the Shares increased markedly, it might be in the interests of the other beneficiaries that the Shares be sold at that time so as to realise the amount payable to Mr and Mrs Nemes at a time that would ensure that there was a positive balance remaining after that amount was paid. Had the value of the Shares later significantly declined, the trustee and the other beneficiaries may have been able to raise defences in equity in the nature of laches and acquiescence to any attempt by Mr and Mrs Nemes to compel the trustee in equity to transfer the $3,904,300. As the passage from *Pardoe* indicates, the fact that defences of this nature would be available in equity in such circumstances indicates that the relationship between Nemeske and Mr and Mrs Nemes at all times remained one of trustee and beneficiary. As such, Mr and Mrs Nemes could not have maintained an action for money had and received against Nemeske.

73 A further issue in the present case is that, even if the trust accounts rose to the level of an affirmative admission to Mr and Mrs Nemes that the trustee held $3,904,300 on bare trust, that statement was untrue in circumstances where the trustee did not hold any money. In *Chianti*, Buss JA expressed the view in *obiter* that an action for money had and received could arise under the mechanism described in *Pardoe* and similar cases even if the amount is not held by the trustee in fact.[46] Barrett JA agreed with that observation, noting that, in his view, "it was entirely consistent with the nature of the action for money had and received" as a personal action: J[85].

74 Both Buss JA and Barrett JA erred in this regard because they overlooked that the trustee must, in fact, hold the relevant assets on a bare trust in order for the action for money had and received to lie. For so long as they have active duties

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[44] *Chianti* (2007) 35 WAR 488 at [22], [24].

[45] See *Byrnes v Kendle* (2011) 243 CLR 253 at [119] (Heydon and Crennan JJ); *Riddle v Riddle* (1952) 85 CLR 202 at 226 (Webb J), 232 (Kitto J, dissenting on other grounds).

[46] (2007) 35 WAR 488 at [77].

as trustee, the action for money had and received cannot arise. That is so even if the trustee mistakenly states to a beneficiary that it holds the assets on bare trust. If that does not reflect the true state of affairs, the trustee remains entitled to assert all of its equitable defences, and so the beneficiary cannot maintain an action for money had and received.

75 For these reasons, the Court of Appeal erred in concluding that Mr and Mrs Nemes could have maintained an action for money had and received against Nemeske as at 30 August 1995, such that there was a "pre-existing indebtedness" which Nemeske covenanted to repay in the Charge: J[89]. Again, the result is that the covenant in clause 5 of the Charge was void.[47]

76 Furthermore, even if the covenant to repay in the Charge was not void, it would be a legal obligation in respect of which the trustee could not indemnify itself from the assets of the Trust. That is because the trustee had no power under the Trust Deed to covenant to pay a debt that it did not owe and which it did not incur in the proper exercise of its duties as trustee. A trustee has no right to exonerate itself from trust assets for liabilities it incurs through actions beyond its powers.[48] It follows that, even if the convent to repay in the Charge is valid and enforceable against Nemeske personally, Nemeske could not exonerate itself in respect of that liability from the assets of the Trust.

PART VII CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

77 There are no constitutional or statutory provisions that are relevant to the determination of this appeal. Various State trustee statutes confer powers on trustees to "advance" or "apply" trust income or capital in certain circumstances. See the examples in the annexure to these submissions.

PART VIII ORDERS SOUGHT

78 The appellants seek the following orders:

a) Appeal allowed.

b) Set aside the orders of the Court of Appeal made 11 February 2015 and, in lieu thereof, make the following orders:

i) Set aside Orders 1, 2, and 4 of the Short Minutes of Order made by Stevenson J on 24 March 2014 and, in lieu thereof, make the following orders and declarations:

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47 *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680 at 726 [258].

48 L Tucker, N Le Poidevin & J Brightwell, *Lewin on Trusts* (19th ed 2014), at [21-042]; G Thomas and A Hudson, *The Law of Trusts* (2nd ed 2010), at [21.17]; J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7th 2006), at [2104].

(A) A declaration that Nemeske Pty Ltd is not indebted to Lorand Loblay and Karen Loblay as executors of the estate of the late Emery Nemes;

(B) A declaration that the 1994 Resolution was of no effect or was void;

(C) Lorand Loblay and Karen Loblay as executors of the estate of the late Emery Nemes to pay the plaintiffs' costs and interest on costs.

ii) The second respondent and third respondent to pay the appellants' costs in the Court of Appeal.

c) A declaration that Nemeske has no right of exoneration or indemnity out of the assets of the Trust in respect of any liability that Nemske has to Lorand Loblay and Karen Loblay as executors of the estate of the late Emery Nemes under the Charge.

d) The second respondent and third respondent to pay the appellants' costs in this Court.

PART IX ESTIMATE FOR ORAL ARGUMENT

79 It is estimated that 1.5 hours will be required for the presentation of the oral argument of the appellants.

Dated: 4 November 2015

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