IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2013 03929

ASCOT VALE SELF STORAGE CENTRE PTY LTD (IN LIQUIDATION) (ACN 092 643 939) & ANOR
(According to attached Schedule of parties)

Plaintiffs

and

NOM DE PLUME NOMINEES PTY LTD (ACN 006 750 090) & ANOR
(According to attached Schedule of parties)

Defendants

and

ANTHONY JOHN SHAW MELVILLE & ORS
(According to attached Schedule of parties)

Third Parties

JUDGE:	McDONALD J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	28 April 2020
WRITTEN SUBMISSIONS:	8 April, 17 April and 24 April 2020, 1 May and 6 May 2020
DATE OF JUDGMENT:	11 May 2020
CASE MAY BE CITED AS:	Ascot Vale Self Storage Centre Pty Ltd v Nom De Plume Nominees Pty Ltd & Ors
MEDIUM NEUTRAL CITATION:	[2020] VSC 242

PRACTICE AND PROCEDURE - Application for insolvent trading exoneration defence to be heard separately – Application for third party proceeding to be heard separately – Utility, economy and fairness of trial of separate questions not beyond question – Applications dismissed – Application by defendants for leave to commence derivative proceeding in the name of the plaintiff – Allegations of breach of trust and fiduciary duties by receivers – Potential delay of trial – Derivative proceeding inutile if Court rejects aspects of defence and counterclaim – Application dismissed – Application by third parties for summary judgment – Second defendant claiming equitable contribution in respect of

liability for insolvent trading – Questionable whether limitation period prescribed by s 24(4) *Wrongs Act 1958* (Vic) applies to claim for equitable contribution – Allegations of unconscionable conduct potentially relevant to application of s 24(4) *Wrongs Act 1958* (Vic) – Appropriate to determine issue at trial – Application dismissed – *Corporations Act 2001* (Cth) ss 588G, 588M, 1317S, 1318 – *Wrongs Act 1958* (Vic) ss 23B, 24(4) – *Civil Procedure Act 2010* (Vic) ss 7, 62, 63 – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 11.12, 11.13, 47.04.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Ms R Zambelli	Piper Alderman
For the Defendants	Mr P Bick QC	SBA Legal
For the First, Second and Fourth Third Parties	Mr D Williams QC	Millens
For the Third Third Party	Mr M Farquhar (Solicitor)	Clarendon Lawyers

HIS HONOUR:

Introduction

1 The trial in this proceeding ("**NDP proceeding**") is to commence on 15 June 2020. On 27 March 2020 during a directions hearing, the parties foreshadowed a number of interlocutory applications. In the aftermath of the hearing, the following applications have been filed:

(1) an application by the plaintiffs pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) for the "exoneration defence" in paragraph [31](f) of the defence to be heard separately;

(2) an application by the defendants for leave to commence a derivative third party proceeding against Fingal Developments Pty Ltd ("**Fingal**"), or to counterclaim against Fingal Developments Pty Ltd, in the name of the first plaintiff;

(3) applications for summary judgment by the third parties in respect of the third party proceeding commenced 4 March 2020, on the grounds that the third party notice is out of time and has no real prospect of success; and

(4) applications by the third parties, in the alternative to their application for summary judgment, for the third party proceedings to be heard separately, at the same time as the hearing of the defendants' exoneration defence.

Background

2 The factual background to this proceeding is set out in the recent judgment of the Court of Appeal in *Nom de Plume Nominees Pty Ltd v Ascot Vale Self-Storage Centre Pty Ltd (No 2)*[1] as follows:

> 3 In around 2000, Mr Leggo, John Crozier, Anthony Melville and Geoffrey Turner decided to undertake a joint venture to acquire and develop a property in Ascot Vale.
>
> 4 The joint venture was conducted through the medium of a unit trust.

[1] [2020] VSCA 70.

The first respondent, Ascot Vale Self Storage Centre Pty Ltd ('AVSS') was incorporated as a special purpose vehicle and appointed trustee of the unit trust.

5 In 2000, AVSS became the registered proprietor of the land situated at 8–11 Burrowes Street, Ascot Vale. The property was initially developed as a self-storage facility. In 2003, a decision was made to convert it into a residential apartment complex.

6 When the property was purchased, the units in the trust were held by a company controlled by Mr Crozier, as to 60 per cent, and by companies controlled by Mr Turner and Mr Melville, each as to 20 per cent. It is convenient to refer to Messrs Crozier, Turner and Melville, and the companies controlled by them, as the 'Melville interests'.

7 In December 2001, after the making of various loans, there was a redistribution of Mr Crozier's initial share. Mr Crozier's share reduced to 35 per cent, and Mr Leggo and Robert McNab acquired 15 per cent and 10 per cent shares respectively. Mr Turner and Mr Melville, through their respective companies, still held 20 per cent each.

8 There were four sources of funding for the development project.

9 First, Suncorp-Metway Ltd provided a first mortgage facility of $14,031,091, secured by a first ranking registered mortgage over the property and a first ranking registered mortgage debenture over the assets and undertaking of AVSS.

10 Secondly, DBR Corporation Pty Ltd provided a second mortgage facility of $1,620,000, secured by a second ranking registered mortgage over the property and a fixed and floating charge over the assets and undertaking of AVSS. That mortgage and charge were later assigned to Nom de Plume.

11 Thirdly, the unitholders or persons or entities associated with them made loans totalling $1,396,538 during the period 1 November 2000 to 1 September 2007, comprising the following amounts:

(a) Mr Crozier $500,000;

(b) Mr Turner $312,788;

(c) Mr Melville $228,000;

(d) Mr Leggo $212,750; and

(e) Mr McNab $143,000.

12 Finally, there were a series of loans totalling $500,000 to AVSS from a group of lenders from Albury. The total amount invested by the unitholders and the Albury investors was $1,896,538.

13 Mr Melville was initially the sole director of AVSS. He was shortly replaced as sole director by Mr Crozier in November 2000. Mr

Crozier remained the manager and sole director of AVSS until Mr Leggo was appointed as a second director in April 2008. After Mr Crozier resigned as director on 1 June 2009, Mr Leggo remained as sole director.

14 On 5 October 2007, a loan agreement and debenture charge was executed by AVSS and Fingal Developments Pty Ltd ('Fingal'). At that time, Mr Crozier was the sole director of both Fingal and AVSS and he executed the loan agreement and charge on behalf of each of them. By the loan agreement and charge, Fingal purported to advance funds to AVSS on behalf of the unitholders and the Albury investors, and to take a third-ranking security over the assets and undertaking of AVSS.

15 The Melville interests were aware of AVSS's entry into the Fingal loan and charge but Mr Leggo, Mr McNab and the Albury investors were not. The effect and operation of the Fingal loan and charge has been the subject of a longstanding and ongoing dispute between the parties.

16 In July 2008, Nom de Plume (which Mr Leggo effectively owned, and of which he was director) took a novation of the DBR facility and assignment of its second-ranking mortgage and charge. Nom de Plume and Mr Leggo, being the present applicants, are conveniently referred to as the 'Leggo interests'.

17 The development struggled, and disputes arose between the unitholders. A deed of settlement was entered into on 23 March 2009. The parties to the deed of settlement were AVSS, Nom de Plume and Fingal, as well as the unitholders. Relevantly for present purposes, because it forms part of the basis of the proceeding sought to be stayed, cl 3.1 of the deed recorded that the Leggo interests had agreed to advance further funds to or for the benefit of AVSS as and when required to meet the costs of building the apartments.

18 On 16 June 2010, AVSS satisfied its debt to Suncorp, and Suncorp's security was discharged.

19 On 21 June 2010, Fingal appointed receivers and managers to AVSS pursuant to its charge. The next day, Nom de Plume appointed a receiver and manager to AVSS pursuant to its own mortgage and charge.

20 Between October and December 2010, the receiver appointed by Nom de Plume repaid Nom de Plume all but around $16,000 of the amount which Nom de Plume said it was owed under its mortgage and charge. On 14 December 2010, the Nom de Plume mortgage and charge were redeemed by Fingal for the sum of $16,000.74.

21 On 26 November 2010, the developer of the property, Galvin Constructions Pty Ltd ('Galvin Constructions') applied to wind up AVSS. On 2 February 2011, AVSS was ordered to be wound up in insolvency. The second respondent, Simon Wallace-Smith, was appointed as liquidator.

22 On 8 March 2012, Fingal commenced a proceeding against Nom de Plume ('the Fingal proceeding'). In broad terms, the proceeding raised issues including the validity of the Fingal charge, the amount secured by the Nom de Plume charge, whether Nom de Plume had over-recovered at Fingal's expense, and whether Fingal had standing to recover from Nom de Plume any amount over-recovered.

23 On 15 April 2013, the liquidator conducted a public examination of Mr Leggo, funded by the Melville interests. As a result of these investigations, the liquidator deposed that he had identified claims against Mr Leggo and Nom de Plume.

24 On 1 August 2013, AVSS and the liquidator commenced a proceeding against Mr Leggo and Nom de Plume ('the Nom de Plume proceeding'), and filed an affidavit in support. The affidavit exhibited a 31 July 2013 'Insolvency Report' prepared by the liquidator and a draft statement of claim.

25 In the draft statement of claim, AVSS and the liquidator claimed an amount not exceeding $6,246,821 from Nom de Plume and Mr Leggo as either a debt under, or damages for breach of, the settlement deed, and a further amount not exceeding $2,711,090 from Mr Leggo for insolvent trading contrary to s 588G of the Corporations Act 2001 (Cth).

3 The NDP proceeding was commenced on 1 August 2013. The delay of more than six years in the proceeding being set down for trial is largely attributable to applications which have successfully challenged agreements to provide the liquidator with funds to conduct the proceeding. Two funding agreements, initially approved by Associate Judges, were subsequently set aside.[2] A third funding agreement was approved by Riordan J on 4 December 2019[3] when upholding an appeal from an order of an Associate Judge permanently staying the proceedings as an abuse of process.[4] An appeal from Riordan J's judgment was dismissed on 27 March 2020.[5]

4 It is also necessary by way of background to refer to the "Fingal proceeding". On 25 October 2019, Sifris J delivered judgment in *Fingal Developments Pty Ltd v Nom de Plume Nominees Pty Ltd & Anor*.[6] The Fingal proceeding arose out of the same

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2 *Re Ascot Vale Self Storage Centre Pty Ltd (in liquidation)* (2014) 98 ACSR 243 (Robson J); *Ascot Vale Self Storage Centre Pty Ltd (in liquidation) v Nom de Plume Nominees Pty Ltd* [2015] VSC 751 (Judd J).

3 *Ascot Vale Self Storage Centre Pty Ltd (in liquidation) v Nom de Plume Pty Ltd* [2019] VSC 794.

4 *Ascot Vale Self Storage Centre Pty Ltd (in liquidation) v Nom de Plume Nominees Pty Ltd (No 2)* [2019] VSC 285.

5 *Nom de Plume Nominees Pty Ltd (ACN 006 750 090) & Ors v Ascot Vale Self Storage Centre Pty Ltd (receivers and managers appointed) (in liquidation) (ACN 092 643 939) & Ors (No 2)* [2020] VSCA 70.

6 [2015] VSC 44.

property development which underpins the competing contentions in the statement of claim, defence and counterclaim and third party notice in the NDP proceeding. The background to the Fingal proceeding was summarised by Sifris J as follows:

> 1 Ascot Vale Self Storage Centre Pty Ltd ('AVSS') is in receivership and liquidation. It is trustee of the AVSS Trust ('the AVSS Trust'). In this capacity it is the registered proprietor of the land situated at 8-11 Burrowes Street, Ascot Vale ('the Property'). AVSS developed and constructed residential apartments on the Property ('the Project').
>
> 2 Funding for the Project was obtained from various sources. For present purposes the following loans and securities are relevant
>
> (a) Suncorp-Metway Limited Bank ('Suncorp') loan ($14,031,091) First registered mortgage over the Property and first registered mortgage debenture over the assets and undertaking of AVSS.
>
> (b) DBR Corporation Pty Ltd ('DBR Corporation') loan ($1,620,000) Second ranking mortgage debenture over the assets and undertaking of AVSS ('NDP Charge') assigned to the plaintiff ('NDP').
>
> (c) Fingal Developments Pty Ltd ('Fingal') loans ($1,896,538 as at 5 October 2007) Third ranking mortgage debenture over the assets and undertaking of AVSS in favour of Unitholders and other lenders ('Fingal Charge').
>
> 3 This dispute is between the second (NDP) and third (Fingal) ranking mortgage debenture holders.
>
> 4 On 21 June 2010, acting pursuant to the Fingal Charge (third ranking), Fingal appointed Stirling Lindley Horne ('Horne') and Peter Vrsecky ('Vrsecky') as Receivers and Managers of AVSS ('the Receivers and Managers of AVSS').
>
> 5 The next day, on 22 June 2010, acting pursuant to the NDP Charge (second ranking) NDP appointed Avitus Thomas Fernandez ('Fernandez') as receiver and manager of AVSS. Fernandez retired in December 2010.
>
> 6 Having recovered the full amount allegedly owing pursuant to the NDP Charge, Fernandez made payment of the sum of $1.9 million to Horne and Vrsecky as the Receivers and Managers of AVSS (appointed by Fingal), in reduction of the amount secured by the Fingal Charge. Fingal alleges that a substantial amount is still owing and is secured by the Fingal Charge. The amount owing is yet to be determined.
>
> 7 Fingal claims that not all of the funds that NDP recovered and allocated to the NDP Charge were in fact subject to and fell within the NDP Charge and that in such circumstances the excess amount recovered and not subject to the NDP Charge should be paid directly

to Fingal as the next ranking security holder. Other claims are also made.

8 NDP denies that it recovered and allocated any amounts that were not properly the subject of its charge and contends that the Fingal Charge is a sham and is not valid and enforceable. Further, NDP contends that Fingal does not have standing to make such a claim.

9 Fingal denies this assertion and contends that the Fingal Charge is valid and enforceable and that in any event both AVSS and NDP are estopped from challenging the Fingal Charge.

5 Sifris J concluded that the Fingal charge was valid and enforceable, and that Fingal had standing to recover amounts in excess of the amount secured by the NDP charge, as well as the amounts that NDP, by its conduct, caused to be wasted or not paid in accordance with the relevant priorities. NDP was ordered to pay Final the sum of $886,309.50. Sifris J also made a declaration that the Fingal charge:

(a) is valid and enforceable; and

(b) secures the loans provided by the Albury Investors to the second defendant (Ascot Vale Self Storage Centre Pty Ltd) and the unitholder loans made to the second defendant.

6 NDP sought leave to appeal. The Court of Appeal upheld Sifris J's finding that the Fingal loan and charge were valid and enforceable.[7] However, the Court of Appeal varied paragraph (b) of the declaration made by Sifris J in respect of the Fingal charge. The Court of Appeal concluded that as the Albury Investors and the unitholders were not parties to the proceeding, the declaration should not have stated that their loans were secured by the charge. The Court of Appeal determined that paragraph (b) of the declaration should be amended by omitting any reference to the loans of the Albury Investors and the unitholders, and substituting a reference to Fingal as lender.[8] As varied, the declaration in respect of the Fingal charge is as follows:

The Fingal charge:

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7 *Nom de Plume Nominees Pty Ltd v Fingal Developments Pty Ltd & Anor* (2016) 337 ALR 303, 305-6 at [6].

8 Ibid at [211]-[212].

(a) is valid and enforceable; and

(b) secures the loans provided by Fingal to the second defendant.

7 In addition to varying the declaration, the Court of Appeal reduced the amount which Nom de Plume had been ordered to pay Fingal from $886,309.50 to $137,756.81.[9]

The NDP proceeding

8 The plaintiffs claim against the defendants for a debt, or alternatively, damages pursuant to a deed of settlement dated 23 March 2009 between AVSS, NDP, Mr Leggo and others. The plaintiffs allege that under the deed, the defendants are liable to pay:

(a) interest on the Fingal loan in the sum of $493,648;

(b) debts incurred by AVSS post March 2009 relating to the cost of building and selling the apartments in the development project ("**post March debts**").[10]

9 In the alternative, the plaintiffs allege that Mr Leggo allowed AVSS to incur debts at a time when he knew the company was insolvent or would become insolvent by virtue of those debts and thereby engaged in insolvent trading in breach of s 588G of the *Corporations Act 2001* (Cth) ("***Corporations Act***").

10 In their defence, the defendants plead, *inter alia*:

- that from 30 April 2008 Mr Leggo was a director of AVSS and from 1 June 2009 the only person appointed to the position of director. Until 21 June 2010 when the relationship between Messrs Leggo and Crozier, Melville, Turner and McNab (the unitholders) broke down and receivers were appointed to AVSS, Crozier, Melville, Turner and McNab were 'shadow' *or de facto* directors of AVSS. Mr Leggo acted upon their instructions and wishes;[11]
- Mr Leggo caused AVSS to enter into a building contract with Galvin

9 *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* [2016] VSCA 233 at [6]-[8].
10 See paras [8]-[21] of the statement of claim.
11 See para [7](b) of the defence and counterclaim.

Constructions on 3 July 2009 acting on the instructions and wishes of the unitholders;[12]

- each of the contracts of sale of the apartments which gave rise to a GST liability was executed on the instructions and wishes of the unitholders;[13]
- the Fingal loan agreement and charge were created by Mr Crozier without the knowledge of Messrs McNab or Leggo and in breach of Mr Crozier's duties as a director of AVSS;[14]
- the Fingal charge only secured advances made by Fingal to AVSS as lender;[15]
- the defendants deny that Fingal advanced any money to AVSS as lender or that the Fingal charge in fact secured any debt;[16]
- many of the post March 2009 debts were incurred at a time when Mr Leggo was not a director of AVSS;[17]
- many of the post March 2009 debts were incurred at a time when Mr Crozier was a director of AVSS;[18]
- if Mr Leggo has contravened s 588G of the *Corporations Act* (which is denied), at all material times he acted honestly and having regard to all of the circumstances of the case ought fairly be excused from the contravention by reason of s 1317S or s 1318 of the *Corporations Act*;[19] and
- in circumstances where Messrs Crozier, Melville and Turner, or interests associated with them, caused the post March debts to be incurred, adversely affected the financial position of AVSS by creating the Fingal loan and charge and acquired the debts of Galvin, MBIC or others for substantially less than the face value of the alleged debts, the loss suffered by creditors whose debts have been acquired by the unitholders ought to be limited to the amount paid by the unitholders for those debts. Alternatively, Mr Leggo ought fairly to be excused under s 1317S or s 1318 of the *Corporations Act* for any liability for

12 Ibid para [11](a)(i).
13 Ibid para 11](b)(ii).
14 Ibid para [12](a)(i) and (v).
15 Ibid para [12](b).
16 Ibid para [12](c).
17 Ibid para [31](a).
18 Ibid para [31](b).
19 Ibid para [31](f).

losses that exceed the amount in fact paid by the unitholders for each debt.[20]

11 The defendants counterclaim against the plaintiffs seeking:

(1) a declaration that the Fingal charge secures no debt;

(2) alternatively, a declaration that the Fingal charge secures no more than $141,500 being the sum advanced by Mr Crozier to AVSS on 8 October 2007, 26 October 2007, 4 November 2007 and 4 December 2007;

(3) a declaration that because the Fingal charge secures no debt, there are no interest costs and charges to Fingal as mortgagee within the meaning of cl 3.1 of the deed of settlement; and

(4) alternatively, a declaration that because the Fingal charge secures only the sum of $141,500 advanced by Mr Crozier on 8 October 2007, 26 October 2007, 4 November 2007 and 4 December 2007, interest, costs and charges to Fingal as mortgagee, within the meaning of cl 3.1 of the deed of settlement, are limited to interest, costs and charges associated with those advances.

12 By his third party notice,[21] Mr Leggo claims that in his capacity as sole director of AVSS he acted at all times in relation to important matters on the instructions or wishes of the unitholders. He claims that each of the third parties is a 'shadow director' or de facto director, and each of them is equally liable to contribute or indemnify Mr Leggo, in the event that he is found liable to pay compensation to the second plaintiff pursuant to s 588M of the *Corporations Act*.

Plaintiffs' application for the exoneration defence to be heard separately

13 The plaintiffs allege that the defendants are indebted to them in the sum of $3,110,661 for breaching a deed of settlement executed in March 2009. In the alternative, the second plaintiff alleges that the second defendant is liable to account to him for the sum of $2,617,013 pursuant to s 588M of the *Corporations Act* by reason

20 Ibid [32].
21 Filed 4 March 2020.

of the second defendant having engaged in insolvent trading.

14 In response to the insolvent trading claim, the second defendant pleads an exoneration defence pursuant to ss 1317S or 1318 of the *Corporations Act*. The plaintiffs submit that the exoneration defence arises only if the second defendant is found liable for insolvent trading. They submit that it will not arise if he is found liable for breach of the deed of settlement.[22] The plaintiffs submit that the exoneration defence involves a very substantial and far-reaching factual inquiry which may prove to be entirely unnecessary.[23]

15 The power conferred by r 47.04 to order a separate trial should only be exercised with great caution and only in a clear case. Separate trials should only be embarked upon when their utility, economy and fairness to the parties are beyond question.[24] I am not satisfied that it is appropriate to order a separate trial of the exoneration defence. The proceedings have been on foot since August 2013. It is highly desirable that the matter be heard and determined as soon as possible. It is correct that if the plaintiffs succeed in their claim based on the deed of settlement and/or the second defendant is found not to have engaged in insolvent trading, the exoneration defence will not arise. However, these considerations must be weighed against the possibility that the plaintiffs will not succeed in their claim based on the deed of settlement and/or the second defendant will be found liable for insolvent trading. In these circumstances, a separate trial of the exoneration defence will result in further delays.

16 Further, the second defendant has brought third party proceedings against Messrs Melville, Crozier, McNab and Turner. Mr Leggo contends that the third parties are equally liable to contribute to any compensation which he is ordered to pay the liquidator arising from the insolvent trading claim. Mr Leggo's claim for contribution cannot be heard and determined until the exoneration defence has been

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22 See the plaintiffs' submissions filed 8 April 2020 at para [2].
23 Ibid para [20].
24 *Murphy v Victoria & Anor* (2014) 45 VR 119, 126 at [28].

determined. Accordingly, any order to hear the exoneration defence separately would potentially delay the third party proceeding. If the exoneration defence fails and Mr Leggo is found to be *prima facie* liable to account to the liquidator in respect of insolvent trading, it would then be necessary to hear and determine his claim for contribution from the third parties in respect of that liability.

17 Further, I accept that there is potential overlap between the factual issues in dispute in the proceeding. The plaintiffs claim, both by way of alleged breach of the settlement deed and pursuant to s 588M, that the defendants are liable in respect of post March debts of $2,617,013. The defendants dispute that the post March debts were incurred on the dates alleged. They contend that many of the alleged debts were incurred prior to March 2009 when the second third party, Mr Crozier, was the sole director of AVSS and other third parties were unitholders. The circumstances in which the post March debts were incurred is also in issue in the third party proceedings. Mr Leggo alleges that the debts were incurred on the instruction or in accordance with the wishes of the third parties. That same matter is relied upon in aid of Mr Leggo's exoneration defence.[25]

18 The plaintiffs submit the facts relied upon by Mr Leggo which are said to enliven ss 1317S and/or 1318 of the *Corporations Act* go well beyond the circumstances of the alleged contravention and concern events unconnected with them.[26] Questions of relevance and admissibility of evidence are properly left for determination at the trial. If the plaintiffs wish to object to matters relied upon by Mr Leggo in aid of the exoneration defence on the grounds that such matters are not relevant, they shall have an opportunity to do so at trial.

19 The plaintiffs submit that the issue of exoneration will require an assessment of Mr Leggo's honesty. They submit that it is "inapt" to have such issues tried when parties are operating by video remotely in the present COVID-19 environment.[27] In

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25 See paras [31](f)(EEE)-(FFF) and [32] of the defence and counterclaim.
26 See para [13] of the plaintiffs' written submissions filed 8 April 2020.
27 Ibid para [33].

support of this proposition, the plaintiffs cite *David Quince v Annabelle Quince*.[28] I do not accept that this case is authority for the proposition that a trial conducted by video link should not proceed wherever there is a question of credit to be determined. Whether trial by video link is appropriate is a matter to be determined on a case by case basis.[29] I am not satisfied that, if it is necessary for the trial to be conducted by way of video link, the proceedings cannot be fairly and properly conducted.[30]

20 The plaintiffs' application is dismissed.

The defendants' application for leave to commence proceedings against Fingal Developments Pty Ltd in the name of the plaintiff

21 By their counterclaim dated 4 March 2020, the defendants allege that:

- the Fingal charge secures only those funds which were in fact advanced by Fingal as lender;
- no funds were in fact advanced by Fingal;
- alternatively, only the sum of $141,500 was advanced to AVSS after the creation of the Fingal charge by Fingal as lender;
- as the Fingal charge secured no debt, there were no interest costs and charges to Fingal as mortgagee, within the meaning of cl 3.1 of the deed of settlement; and
- alternatively, the interest, costs and charges to Fingal as mortgagee include only interest accrued on $141,500.[31]

22 The foundation of the allegations in the counterclaim is the Court of Appeal's judgment in *Nom de Plume Nominees Pty Ltd v Fingal Developments Pty Ltd & Anor*.[32] The Court of Appeal varied a declaration made by Sifris J regarding the Fingal charge. As varied, the Court of Appeal declared:

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28 [2020] NSWSC 326.
29 Ibid at [19].
30 Cf *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486 at [19] (Perram J).
31 See paras [34]-[36A] of defence and counterclaim dated 4 March 2020.
32 (2016) 337 ALR 303.

The Fingal charge:

(a) is valid and enforceable; and

(b) secures the loans provided by the plaintiff (Fingal) to the second defendant (AVSS).

There is a significant dispute between the parties as to the effect of this declaration.

23 There does not appear, on the material presently before the Court, to be any dispute that Fingal did not, in its own right, advance funds to AVSS. Rather, Fingal acted as a bare trustee on behalf of the Albury investors and interests associated with the unitholders who collectively advanced $1,896,538 to AVSS prior to the execution of the charge,[33] as well as Mr Crozier who loaned $141,500 to AVSS after the execution of the charge.[34]

24 The plaintiffs and the third parties contend that insofar as the Court of Appeal declared that the Fingal charge secured "the loans provided by the plaintiff", this is a reference to the loans provided to AVSS in Fingal's capacity as bare trustee. Fingal acted as a conduit for the funds loaned to AVSS by the Albury investors and the unitholders. Nevertheless, these funds were secured by the Fingal charge and the defendants are liable under the deed of settlement to pay the interest which has accrued on the funds advanced to AVSS secured by the charge.

25 The defendants contend that the Court of Appeal varied the declaration made by Sifris J to delete the reference to the charge securing loans provided by the Albury investors and the unitholders.[35] The defendants contend that in light of the declaration as varied, the Fingal charge secures *only* loans provided by Fingal. The defendants contend that as no loans were actually provided by Fingal, the defendants have no liability to pay any interest to AVSS. Alternatively, the Fingal charge secures $141,500 advanced by Mr Crozier after the execution of the charge.[36]

26 The determination of the parties' competing contentions as to whether or not the

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33 *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd & Anor* (2016) 337 ALR 303, 308 [17].
34 Defendants' written submissions filed 8 April 2020 at para [16](c).
35 Ibid para [18].
36 Ibid para [29].

Court of Appeal's variation of the declaration made by Sifris J regarding the Fingal charge relieves the defendants of any liability to pay interest on the Fingal loan, is a matter appropriately left for trial.

27 By summons filed 8 April 2020, the defendants seek leave to bring the proceeding, by way of third party notice on their counterclaim, in the name of the plaintiff against Fingal. During a hearing on 28 April 2020, I raised with Mr Bick QC, counsel for the defendants, whether, rather than bringing a proceeding by way of third party notice on the counterclaim, Fingal could be joined as a defendant to the counterclaim filed on 4 March 2020. In response, on 29 April 2020, the defendants forwarded to my chambers a proposed amended counterclaim incorporating claims brought in the name of AVSS against Fingal Developments Pty Ltd.

28 The allegations against Fingal in the amended counterclaim travel well beyond the allegations concerning the enforceability of the Fingal charge in the in the counterclaim filed 4 March 2020. In particular, the allegations include alleged breaches of trust and fiduciary obligations by receivers appointed by Fingal to AVSS in June 2010.

29 I do not consider it appropriate to grant leave to the defendants to bring a claim against Fingal in the name of AVSS, either by way of third party notice or amendment to the existing counterclaim.

30 The utility of the claim against Fingal turns on the defendants succeeding at trial in their contention that the Fingal charge secures no debt, or alternatively, the sum of $141,500 advanced by Mr Crozier subsequent to the execution of the charge. The claims in the proposed third party notice and amended counterclaim include allegations related to the conduct of the receivers appointed by Fingal on 21 June 2010. Those allegations include allegations that the receivers transferred moneys to Fingal in breach of trust and in breach of fiduciary duties which they owed to AVSS. Orders are sought requiring Fingal to pay AVSS $1.1 million, being an amount allegedly paid to Fingal by receivers in excess of the sum secured by the Fingal

charge.

31 The proposed claim against Fingal is premised upon the existence of duties owed by the receivers to AVSS which were breached by reason of the receivers:

(a) receiving funds from the sale of AVSS's assets; and

(b) paying more than $1.1 million from those funds to Fingal in circumstances where Fingal charge secured no debt, or alternatively, $141,500.[37]

32 In *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd*[38] (citations omitted) the Court of Appeal addressed the nature of the role of a receiver appointed under a mortgage:

> 140. A receiver is the agent of the mortgagor, not the mortgagee who appointed the receiver. The appointment is facilitated by the mortgagee's powers pursuant to the mortgage instrument (or by statute) for the purpose of enabling the receiver to stand in the mortgagor's shoes for the purpose of realising the security. That may include carrying on the mortgagor's business. To do so it is essential that the receiver acts as the mortgagor's agent. But the receiver is no ordinary agent. The receiver's relationship with the mortgagor is 'special and limited in its character'. The primary duty owed by the receiver as agent to a mortgagor is to exercise the receiver's powers in good faith for the purpose of obtaining repayment of the debt owing to the mortgagee. The appointment is primarily a device to protect the mortgagee, not the mortgagor: '[t]he receiver is a piece of administrative machinery designed to enforce a charge'.
>
> 141. Consistently with the status of a receiver as agent of the mortgagor, the mortgagee has no true power to instruct or direct the receiver in the exercise of its powers, and is not responsible for any breach by the receiver of its duties. These aspects of a receivership enable the mortgagee to obtain the benefits of its security without being subject to the liabilities of a mortgagee in possession. If the receiver breaches their duties, it is the mortgagor who, as principal, is liable at the suit of the mortgagee or a subsequent mortgagee. Further, while the receiver has a duty to apply the proceeds of the company to the debt of the mortgagee, money in the receiver's hands is, until it is applied, money of the mortgagor.
>
> 142. In these circumstances, the analogy for which Fingal contends cannot be sustained. Moneys brought in by a receiver are, in a loose sense, recovered by virtue of the security. But they are recovered on behalf

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37 Defendants' proposed defence and amended counterclaim forwarded to the chambers of McDonald J on 29 April 2020.

38 [2016] VSCA 159.

> of the mortgagor, not the mortgagee. If they are then paid to the mortgagee, that again is done on behalf of the mortgagor. If they are wrongly paid, the mortgagor or a subsequent encumbrancer may have an action against the receiver. But Fingal contends for a fundamentally different result, whereby the mortgagee would be liable for the acts of the receiver by virtue of 'concurring' in those acts. This would turn the legal position of receivers on its head.
>
> 143. The law already provides for an exception to the general position regarding a mortgagee's lack of responsibility for acts of a receiver. Where a mortgagee instructs, directs or interferes with the exercise of the powers of the receiver, the mortgagee may become liable for a breach by the receiver of its duties. The level of involvement required to produce that result was explained in this way by Croft J in *Bank of Western Australia Ltd v Abdul*:
>
> > The evidence must show that the mortgagee, the secured creditor, was so intimately involved in the performance of the receiver's activities as to transform the character of the relationship between the mortgagee, the secured creditor, and the receiver into one of principal and agent.
>
> As already mentioned, consideration of this head of liability can be deferred.

33 The proposed amended pleading disavows any allegation that the receivers acted dishonestly, or fraudulently, or unprofessionally or that the alleged breaches were intentional or negligent. This equates to an acknowledgment that the receivers acted in good faith. As such, there would not appear to be any basis for a finding that the receivers breached the primary duty which they owed AVSS as mortgagor to exercise their powers in good faith for the purpose of obtaining repayment of any debt owing to Fingal as mortgagee.

34 In light of the Court of Appeal judgment, the potential liability of Fingal to account to AVSS for funds paid to it by the receivers appears to be as follows. Fingal had no power to instruct or direct the receivers in the exercise of their powers and, subject to the qualification discussed below, and is not liable for any breach by the receivers of their duties.[39] If there has been a breach by the receivers of their duties it is AVSS, as principal, who is liable at the suit of the mortgagee (Fingal) or a subsequent mortgagee.[40] If monies were wrongly paid to Fingal, AVSS may have an action

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39 Ibid at [141].

40 Ibid at [141].

against the receivers.[41] Fingal can be held liable for the acts of the receiver if it was so intimately involved in the performance of the receivers' activities as to transform the character of the relationship between it and the receivers, into one of principal and agent.[42]

35 The matters set out above record my provisional views only. Nevertheless, even couched as provisional views, they support a conclusion that the proposed derivative proceeding against Fingal is not without complexity.

36 The proposed amended counterclaim does not make any express allegation that the relationship between Fingal and the receivers was that of principal and agent. If it were to be pleaded that this was the relationship, such pleading would reinforce the need for the receivers to be given the opportunity to participate in the proceeding. Further, a detailed factual inquiry would need to be undertaken at trial as to the nature of the relationship between Fingal and the receivers to determine whether Fingal was so intimately involved in the performance of the receivers' duties so as to render the receivers the agents of Fingal.

37 The defendants contend that the receivers are not necessary or appropriate parties as no claim is made against them, nor any relief sought against them.[43] It is not necessary to express any concluded view as to whether this contention is correct. Irrespective of whether the receivers are parties, any finding that the receivers acted in breach of trust and/or fiduciary obligations could cause significant reputational damage. Even if not joined as parties, the receivers would have to be given an opportunity to give their account of the events alleged to constitute a breach of trust and/or fiduciary obligations.

38 The trial of the proceeding is due to commence on 15 June 2020. The proposed derivative proceeding has the potential to delay the commencement of the trial.

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41 Ibid at [142].

42 Ibid at [143].

43 Para [14] of the defendants' submissions concerning the proposed defence and amended counterclaim against Fingal dated 29 April 2020.

Such an outcome would be antithetical to the overarching purpose of the *Civil Procedure Act 2010* (Vic) of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute.

39 If the defendants succeed in establishing, as alleged in their defence and counterclaim, that the Fingal loan secures only the loans actually provided to the plaintiff by Fingal, there would not appear to be any impediment to the defendants seeking leave thereafter to bring a derivative proceeding in the name of AVSS to recover funds paid to Fingal by the receivers in excess of the sum secured by the Fingal charge. If such a proceeding is commenced, it is likely that I will be the trial Judge. As such, the proceeding will be heard by a judicial officer familiar with all of the relevant background.

40 The defendants' application for leave to bring a derivative proceeding in the name of AVSS against Fingal by way of third party notice, or alternatively, amended counterclaim, is dismissed.

41 There remains the question of whether Fingal should be joined as a defendant to the counterclaim as presently pleaded. The question arises because the defendants seek a declaration that the Fingal charge secures no debt, or alternatively, secures no more than the $141,500 advanced to AVSS by Mr Crozier. *Prima facie*, if the Court makes a declaration in the terms sought, this could affect Fingal's legal interests.

42 On 24 April 2020 an email was forwarded to the parties from my chambers with a request that the parties be in a position to address a number of questions at the hearing listed for 28 April 2020. Question 7 was as follows:

> There are a number of allegations in the defence and counterclaim and reply concerning the Fingal Loan and the Fingal Charge. Should Fingal be joined as a party to the proceeding on the basis that its interests may be adversely effected by the determination in its absence of allegations regarding the Fingal Loan and the Fingal Charge?"

43 On 27 April 2020, Mr Melville, the sole director and shareholder of Fingal wrote to my chambers. He stated in that correspondence that he did not consider that Fingal

should be joined as a party to the proceeding:

> For the reasons set out below I do not consider that Fingal should be joined in this proceeding.
>
> As the court is aware from the various proceedings and submissions there has been a long history of litigation regarding the plaintiff company, the defendants and Fingal.
>
> In particular, Fingal as plaintiff and Nom De Plume Nominees Pty Ltd (NDP) and Ascot Vale Self Storage Centre Pty Ltd (In Liquidation) (AVSS) as defendants were parties to proceedings before Sifris J and a subsequent appeal to the full Court [S APCI 2015 0041].
>
> A proper synopsis of the decisions is set out succinctly in paragraph 7 of the Plaintiff's Reply to the Defence and Counterclaim, and paragraphs 9 to 13 of the submissions by the First Second and Fourth third parties opposing the representative proceeding.
>
> The current proceedings attempt to relitigate those issues notwithstanding the findings of both Sifris J and the Court of Appeal, which included findings that the Fingal Charge and associated Loan Agreement were both valid and binding as between AVSS and Fingal, and that AVSS and NDP are estopped from contending otherwise. Those findings preclude the possibility that the Fingal Charge secures nothing, or only a modest sum, as NDP and Mr Leggo now wish to contend. I do not understand how any attempt to relitigate those issues can be anything other than a waste of court resources and those of the parties (and Fingal).

44 Mr Melville is the first third party in the third party proceeding. He is represented by senior and junior counsel. By reason of Mr Melville being a party in the third party proceedings both he and Fingal are squarely on notice of the relief sought in the counterclaim and are able to make their own assessment of whether Fingal should make an application to be joined as a defendant to the counterclaim.

Third parties' application for summary judgment on the third party notice

45 The third parties apply pursuant to ss 62 and 63 of the *Civil Procedure Act 2010* (Vic) and r 22.24(2) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) for summary judgment on the third party notice.

46 By his third party notice, the second defendant contends that if the Court finds that he breached s 588G(2) of the *Corporations Act* by failing to prevent AVSS from incurring the post March debts (which is denied), then each of the third parties

likewise breached s 588G(2) by failing to prevent AVSS from incurring the post March debts. The second defendant contends that if he is liable to pay the liquidator a sum equal to the post March debts, each of the third parties are equally liable to contribute to any compensation for which he is found liable to pay.

47 The second defendant claims equitable contribution and in the alternative, common law contribution. He expressly disavows any claim for contribution pursuant to s 23B of the *Wrongs Act 1958*.[44]

48 The third parties contend that the limitation period in s 24(4)(a) of the *Wrongs Act 1958* applies to the claim for contribution. They submit that the limitation period expired on 1 February 2017 and that the claim for contribution therefore has no real prospect of success.[45]

49 The power to order on a summary judgment pursuant to s 63 of the *Civil Procedure Act* must be exercised to caution and should not be exercised unless it is clear that there is no real question to be tried.[46] In *Wardley v Western Australia*,[47] the High Court considered the approach to summary judgment based on non-compliance with a limitation period. The plurality stated:

> … in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases.[48]

50 The observations of the High Court in *Wardley* predate the *Civil Procedure Act*. In *D'Aquino v Trovatello*,[49] McLeish JA stated:

> it may therefore be that the admonition of the court in *Wardley* regarding the determination of limitation questions only 'in the clearest of cases' may not be applicable, in terms, to decisions under s 63. However, in my opinion it remains the case that, in interlocutory proceedings, insufficient is often

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44 Para [3](b) of the second defendant's written submissions pertaining to the third parties' summary judgment application dated 17 April 2020.

45 Para [24] of the first, second and fourth third parties' written submissions filed 8 April 2020.

46 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27, 40 [35] per Warren CJ and Nettle JA.

47 (1992) 175 CLR 514.

48 Ibid at 533.

49 (2015) 47 VR 31.

> known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify coming to the conclusion that the claims of the plaintiff have no real prospect of success by reason of limitation of actions defences.[50]

51 The third parties submit that the limitation period prescribed by s 24(4) of the *Wrongs Act* applies by analogy to a claim for equitable contribution. In support of this submission, the third parties cite the judgment of the New South Wales Court of Appeal in *Gerace v Auzhair Supplies Pty Ltd (in liq)*.[51] In *Auzhair*, the Court of Appeal accepted that the six year limitation period prescribed by s 1317K of the *Corporations Act* applied to defeat an equitable claim. Meagher JA (with whom Beazley P and Emmett JA agreed) stated:

> The authorities referred to above, and in particular *R v McNeil*, show that in purely equitable proceedings, where there is a corresponding remedy at law in respect of the same matter and that remedy is the subject of a statutory bar, equity will apply the bar by analogy unless there exists a ground which justifies its not doing so because reliance by the defendant on the statute would in the circumstances be unconscionable.[52]

52 *Auzhair* did not involve consideration of the application of a limitation period in respect of a claim for equitable contribution. In *Amaca Pty Ltd v CSR Limited*,[53] Macaulay J rejected a submission that a claim for contribution under s 23B of the *Wrongs Act* was analogous to a claim for equitable contribution, thereby enlivening the limitation period prescribed by s 24(4).[54] His Honour concluded that the appropriate analogy for a claim for a claim for equitable contribution was the limitation period applying to an implied contract said to arise from the overpayment by one partner in a partnership. The limitation period commenced from the date of overpayment.[55]

53 The orders made by Macaulay J were varied on appeal. However, his Honour's findings as set out above were not disturbed. The third parties submit that Macaulay J's decision in *Amaca* is distinguishable. They submit that Macaulay J's

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50 Ibid 42 at [49].
51 (2014) 87 NSWLR 435.
52 Ibid at 456, [70].
53 [2015] VSC 582.
54 Ibid at [450].
55 Ibid at [461]-[462].

findings turned on the particular facts of the case involving a claim for contribution between partners pursuant to ss 10 and 12 of the *Partnership Act 1958* (Vic). It is unnecessary to express a concluded view regarding this submission. It is sufficient that I record my satisfaction that the judgment of Macaulay J calls into question the third parties' contention that the limitation period prescribed by s 24(4) of the *Wrongs Act* should be applied by analogy to the second defendant's claim for equitable contribution. Whether s 24(4) does apply by analogy is a matter properly to be determined at trial.

54 Further, consistent with the reasoning of Meagher JA in *Auzhair*, even if s 24(4) of the *Wrongs Act* is applied by analogy, the Court would refrain from doing so if reliance on s 24(4) would be unconscionable.[56] The question of whether, as the second defendant contends, the third parties engaged in unconscionable conduct is a matter properly addressed at trial.

55 I am not satisfied that the second defendant's claim for equitable contribution against the third parties does not have a real prospect of success by reason of being out of time. In light of this finding, it is not necessary to consider whether the second defendant's claim for contribution at common law is out of time. The third parties' application for summary judgment is dismissed.

The third parties' application that the third party notice be tried separately after determination of other issues in the proceeding

56 In the alternative to their summary judgment application, the third parties seek an order that the third party notice be tried after the determination of other issues in the proceeding. The third parties submit that the third party notice should be tried at the same time as the exoneration defence. As set out above, I have dismissed the plaintiffs' application that the exoneration defence be heard separately. Insofar as the third parties' submissions are premised on the third party notice being heard concurrently with the exoneration defence, this premise is unsound.

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[56] *Auzhair* at 456 [70].

57 The third parties' application is made pursuant to r 11.12 and/or 11.13 of the *Supreme Court (General Civil Procedure) Rules 2015*. Rule 11.12(b)(ii) provides that, unless the Court orders otherwise, questions between the defendant and the third party shall be tried concurrently with questions between the plaintiff and the defendant. In *AMP Fire & General Insurance Co Ltd v Dixon & Anor*,[57] the Full Court of the Supreme Court held that it is only in exceptional circumstances that the power to order separate trials of the plaintiff's claim against the defendant and the defendant's claim against the third party, should be exercised.[58]

58 The third parties have not established exceptional circumstances which justify the third party claim being heard separately from the plaintiffs' claim against the defendants. The third parties contend that they will have to incur significant expense if required to defend the allegations in the third party notice. They submit that these costs will be thrown away if the first plaintiff is successful in its claim based on the deed of settlement, or alternatively, the second plaintiff fails to establish the insolvent trading claim. In either of these circumstances, the third parties will have the right to seek reimbursement of costs incurred in defending the third party claim.

59 The third third party, Mr McNab, submits that notwithstanding his role in the third party proceedings and those to be determined as between the plaintiffs and the defendants is peripheral and unrelated to the majority of materials to be heard and determined, it will be necessary for him to attend and be present for the entirety of the trial. It is not possible, at this time, to form a concluded view as to whether Mr McNab's role is peripheral and unrelated to the majority of matters to be heard and determined. It is clear that Mr McNab, together with Messrs Crozier, Melville and Turner, is alleged to have been a shadow or de facto director of AVSS whose instructions and wishes Mr Leggo acted upon.[59] I am not satisfied that there is a clear demarcation between the issues in the third party proceeding and those to be

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57 [1982] VR 833.
58 Ibid at 836.
59 See para [7](b) of the defence and counterclaim.

determined as between the plaintiffs and the defendants.

60 The principles governing the exercise of the Court's power under r 47.04 are relevant to the third parties' application for the third party proceeding to be heard separately. The power under r 47.04 is to be exercised with great caution and only in a clear case. Considerations which have informed my decision to reject the plaintiffs' application for the exoneration defence to be heard and determined separately apply to the present application. In particular, the desirability of the Court hearing and determining the issues in dispute as soon as possible.

61 The third parties submit that an order for the third party proceeding to be heard separately would be consistent with the overarching purpose in s 7 of the *Civil Procedure Act* of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute. I reject this submission. I consider that achieving this purpose is best served by the trial of the third party proceedings being heard concurrently with the trial of questions between the plaintiffs and the defendants.

62 Each of the third parties have agreed to be bound by the outcome of the insolvency claims. However, if their applications for a separate trial is successful, each of the third parties also reserves the right to attend and participate in the trial. As such, they seek to preserve the right to contest or support the insolvency claims. In light of this reservation, I do not consider that the agreement to be bound by the outcome of the insolvency claims is a matter which outweighs the considerations which favour the third party proceeding being heard concurrently with the plaintiffs' claims against the defendants.

Conclusion

63 Each of the applications are dismissed. I shall provide the parties with an opportunity to make submission on costs. However, as all parties have been unsuccessful, it may be appropriate to make no order as to costs. Alternatively, it may be appropriate to order that the costs of the applications be costs in the cause.

CERTIFICATE

I certify that this and the 24 preceding pages are a true copy of the reasons for Judgment of McDonald J of the Supreme Court of Victoria delivered on 11 May 2020.

DATED this 11th day of May 2020.

.....
Associate

SCHEDULE OF PARTIES

No. S CI 2013 03929

ASCOT VALE SELF STORAGE CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED)(IN LIQUIDATION)

First plaintiff

SIMON WALLACE-SMITH (IN HIS CAPACITY AS LIQUIDATOR OF ASCOT VALE SELF STORAGE CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED)(IN LIQUIDATION))

Second plaintiff

- and -

NOM DE PLUME NOMINEES PTY LTD

First defendant

RICHARD JOHN LEGGO

Second defendant

- and -

ANTHONY JOHN SHAW MELVILLE

First third party

JOHN LAWRENCE REX CROZIER

Second third party

ROBERT WILLIAM MCNAB

Third third party

GEOFFREY FRANCIS TURNER

Fourth third party