FEDERAL COURT OF AUSTRALIA

Condon (Trustee), in the matter of Rayhill (Bankrupt) v Truthful Endeavour Pty Ltd [2015] FCA 7

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| Citation: | Condon (Trustee), in the matter of Rayhill (Bankrupt) v Truthful Endeavour Pty Ltd [2015] FCA 7 |
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| Parties: | **IN THE MATTER OF THE BANKRUPT ESTATE OF COLLEEN ANNE RAYHILL (ALSO KNOWN AS COLLEEN ANNE LEWIS); SCHON GREGORY CONDON (AS TRUSTEE OF THE BANKRUPT ESTATE OF COLLEEN ANNE RAYHILL (ALSO KNOWN AS COLLEEN ANNE LEWIS)) v TRUTHFUL ENDEAVOUR PTY LTD ACN 155 107 734** |
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| File number: | NSD 1923 of 2013 |
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| Judge: | **JAGOT J** |
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| Date of judgment: | 23 January 2015 |
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| Catchwords: | **TRUSTS AND TRUSTEES** – trustee’s right of indemnity and creditor’s right of subrogation – whether bankrupt was creditor of trust by reason of payments by or on behalf of bankrupt in respect of trust property.  **BANKRUPTCY AND INSOLVENCY** – whether trustee in bankruptcy entitled to balance of proceeds of sale. |
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| Legislation: | *Bankruptcy Act 1966* (Cth) s 58(1) |
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| Cases cited: | *ANZ Banking Group Ltd v Intagro Projects Pty Ltd* [2004] NSWSC 1054  *Ample Source International Limited v Bonython Metals Group Pty Ltd (No 6)* [2011] FCA 1484  *Ashby v Slipper* [2014] FCA 973  *Baker v Palm Bay Island Resort Pty Ltd (No 1)* [1970] QWN 25  *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477; [1999] QCA 2  *Blair v Curran* (1939) 62 CLR 464  *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (1998) 192 CLR 226  *Coates v McInerney* (1992) 7 WAR 537  *Davies v Littlejohn* (1923) 34 CLR 174  *Dimos v Dikeakos Nominees Pty Ltd* (1996) 68 FCR 39  *Dowse v Gorton* [1891] AC 190  *Ex parte Garland* (1804) 10 Ves Jun 110  *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271  *Hewett v Court* (1983) 149 CLR 639  *Jennings v Mather* [1901] 1 KB 108  *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; [2008] NSWSC 1344  *Lewis v Condon* [2013] NSWSC 120  *Lewis v Condon* (2013) 85 NSWLR 99; [2013] NSWCA 204  *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128  *Melbourne Tramways Trust v Melbourne Tramway & Omnibus Co Ltd* (1887) 13 VLR 487  *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360  *Official Assignee of O’Neill v O’Neill* (1898) 16 NZLR 628  *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589  *Re Enhill Pty Ltd* [1983] 1 VR 561  *Re Exhall Coal Co Ltd* (1866) 55 ER 970  *Re Morgan; Pillgrem v Pillgrem* (1881) 18 Ch D 93  *Re Pumfrey* (1882) 22 Ch D 255  *Re Stucley* [1906] 1 Ch 67  *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99  *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170  *Smith v NSW Bar Association* (1992) 176 CLR 256  *Southern Wine Corporation Pty Ltd (in liq) v Frankland River Olive Co Ltd* (2005) 31 WAR 162; [2005] WASCA 236  *Tennant v Trenchard* (1869) LR 4 Ch App 537  *Trim Perfect Australia Pty Ltd (in liq) v Albrook Constructions Pty Ltd* [2006] NSWSC 153  *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471  *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319  *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* (1987) 18 ATR 893 |
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| Date of hearing: | 21 and 22 October, and 18 December 2014 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 116 |
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| Counsel for the Applicant: | S Golledge |
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| Solicitor for the Applicant: | Russo & Partners |
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| Counsel for the Respondent: | P Finch |
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| Solicitor for the Respondent: | DC Legal Pty Ltd |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1923 of 2013 |

IN THE MATTER OF THE BANKRUPT ESTATE OF COLLEEN ANNE RAYHILL

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| BETWEEN: | SCHON GREGORY CONDON (AS TRUSTEE OF THE BANKRUPT ESTATE OF COLLEEN ANNE RAYHILL (ALSO KNOWN AS COLLEEN ANNE LEWIS))  Applicant |
| AND: | TRUTHFUL ENDEAVOUR PTY LTD ACN 155 107 734  Respondent |

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| JUDGE: | JAGOT J |
| DATE OF ORDER: | 23 JANUARY 2015 |
| WHERE MADE: | SYDNEY |

THE COURT:

1. Dismisses the respondent’s application for leave to re-open, heard on 18 December 2014.
2. Declares that the proceeds of sale of the property known as 9 Robson Road, Kenthurst (the **proceeds of sale**) are subject to an equitable charge in favour of the applicant to secure repayment to the applicant of the debt due from the Kenthurst Investment Trust to the bankrupt, Colleen Lewis (the **debt**).
3. Orders that the proceeds of sale be paid to the applicant in discharge of the debt.
4. Orders that the respondent pay the applicant’s costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| BETWEEN: | SCHON GREGORY CONDON (AS TRUSTEE OF THE BANKRUPT ESTATE OF COLLEEN ANNE RAYHILL (ALSO KNOWN AS COLLEEN ANNE LEWIS))  Applicant |
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| JUDGE: | JAGOT J |
| DATE: | 23 JANUARY 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

## The issues and the competing cases

1. The issues in this matter are whether the bankrupt, Colleen Lewis, is a creditor of a trust known as the Kenthurst Investment Trust and whether the applicant, Schon Gregory Condon, is estopped from making that claim.
2. Mr Condon is Colleen Lewis’s trustee in bankruptcy. Mr Condon’s case is that Colleen Lewis is a creditor of the Kenthurst Investment Trust by reason of various payments said to have been made by her in respect of a property at 9 Robson Road, Kenthurst (the **9 Robson Road property**), which was an asset of the Kenthurst Investment Trust, in an amount which substantially exceeds the proceeds of sale of the property. It is contended by Mr Condon that the consequence is that the whole of the remaining sale proceeds (currently held on trust by the Supreme Court of New South Wales pending the resolution of this matter) should be transferred to him in his capacity as Colleen Lewis’s trustee in bankruptcy.
3. Truthful Endeavour Pty Ltd (**Truthful Endeavour**), the respondent, is the current trustee of the Kenthurst Investment Trust. Truthful Endeavour contends that Colleen Lewis is not a creditor of the Kenthurst Investment Trust. According to Truthful Endeavour, the payments relied upon by Mr Condon were not made by Colleen Lewis, but by three other corporate entities. If any person is a creditor of the Kenthurst Investment Trust, it is those three companies. If it is permissible to examine the circumstances in which those companies paid the various amounts (which Truthful Endeavour denies), then the circumstances show that the ultimate source of the funds used was not Colleen Lewis but another trust of which Colleen Lewis was trustee, now called the Paris King trust. Accordingly, Colleen Lewis may have a right of indemnity against the Paris King trust and the Paris King trust may be a creditor of the Kenthurst Investment Trust, but Colleen Lewis is not a creditor of the Kenthurst Investment Trust. Further, insofar as payments were made by one company, Syfurn Pty Ltd (**Syfurn**), at a time when Colleen Lewis was also the trustee of the Kenthurst Investment Trust, those payments were made for the benefit of the company Paris King Investments Pty Ltd (**Paris King Investments**) and Louise Lewis, the daughter of Colleen Lewis, pursuant to a deed of settlement of earlier proceedings in the Family Court of Australia and Supreme Court of New South Wales (the **deed of settlement**). Colleen Lewis made no payments herself when she was trustee of the Kenthurst Investment Trust and therefore cannot claim a right of indemnity as trustee either pursuant to the deed of trust or at general law.
4. Truthful Endeavour also contends that Mr Condon is estopped from bringing this proceeding.

## The Paris King trust issue

1. Apart from one matter, the relevant primary facts are not in dispute. The fact in dispute concerns the Paris King trust. Mr Condon contends that Truthful Endeavour has not proved the existence of the Paris King trust. Truthful Endeavour contends to the contrary.
2. The evidence supporting the existence of the Paris King trust consists of:

* a statement by Colleen Lewis that a property at 42A Bay Street, Beauty Point (also known as Mosman) (the **42A Bay Street property**) “was property of a trust set up by my first husband, John Lewis”;
* a statement by Louise Lewis that her father (now deceased) said to her, at a time after Colleen Lewis had married her second husband Michael Rayhill, that he wanted Louise and her brother (the children of the first marriage) to be able to live in the 42A Bay Street property and that “because I have put it all in the family trust, I know you and your brother are going to get it all anyway”.
* a deed executed on 8 May 2000 (the **8 May 2000 deed**)by Colleen Lewis, which defines her as “the trustee” and contains provisions as follows:

WHEREAS the trustee was the holder of (a) class and (b) class shares in a company known as Karan Holdings Pty Limited (herein called the company) which shares entitled her to all the voting rights at shareholders meetings but to no capital or dividend distributions.

AND WHEREAS the company owned a property situated at 42A Bay Street, Beauty Point in the state of New South Wales (herein called “Bay Street”).

WHEREAS the trustee married one MICHAEL NORMAN RAYHILL (herein called the Husband) on the 5th of November 1977.

AND WHEREAS the property at Bay Street was at the date of the marriage occupied by the trustee as her home and the husband joined her in the occupation of same.

AND WHEREAS the husband was then and still is a Solicitor of the Supreme Court of New South Wales.

AND WHEREAS the children of Trustee's previous marriage to Paul John Quentin hereis [sic] namely Paul and Louise were the holders of all shares in the company which were entitled to any capital and dividend distributions.

AND WHEREAS on the advice of her husband Michael Rayhill who is a solicitor, the trustee transferred the property at 42A Bay Street, Beauty Point, into her name to avoid the liability of Land Tax without paying any money to the company in regards to her acquisition of the property.

AND WHEREAS on the advice of her husband, the trustee allowed the company to be struck off the register.

AND WHEREAS since transferring Bay Street into her name the trustee received funds owned by the company being insurance monies with which she has (a) lent the sum of $800,000.00 to Syfurn Pty Limited and purchased property 405A The Entrance Road, Erina (herein called Erina).

AND WHEREAS the trustee, jointly with her husband, commenced proceedings against Mosman Municipal Council partly relating to losses of asset value of the Bay Street property, which money if recovered should have belonged to Karan Holdings Pty Limited.

AND WHEREAS the trustee has been advised that she holds all such property namely Bay Street, Erina the Mortgage monies due from Syfurn Pty Limited, in trust for the company and any proceeds of the said Court proceedings against Mosman Council.

NOW THIS DEED WlTNESSETH in consideration of the premises the trustee hereby declares she holds the following assets in trust for the company once it is restored to the register.

1. 45A Bay Street, Beauty Point

2. 405A The Entrance Road, Erina

3. Mortgage to Syfurn Pty Limited

4. Any proceeds recovered relating to a case against Mosman Municipal Council which may relate to property (if any) beneficially owned by the company.

1. It is common ground that the 42A Bay Street property was held in the name of the company Karan Holdings Pty Ltd (**Karan Holdings**) and (on 15 November 1980) was transferred into the name of Colleen Lewis as set out in the deed. It is also not in dispute that Karan Holdings, when reinstated, changed its name to Paris King Investments Pty Ltd. Accordingly, the Paris King trust which Truthful Endeavour asserts exists is the one trust initially in the name of Karan Holdings and subsequently in the name of Paris King.
2. I consider that the evidence set out above, in particular the 8 May 2000 deed, is sufficient to establish the existence of a trust, which may conveniently be called the Paris King trust, the trustee of which is or was Colleen Lewis. The beneficiary of the trust is or was the company formerly known as Karan Holdings and now known as Paris King Investments. Assets of the trust include or included the property at 42A Bay Street and a mortgage to Syfurn in the sum of $800,000. There is a separate issue in the proceeding about whether the Paris King trust continued to exist after entry into the deed of settlement of earlier proceedings.
3. The deed of settlement was executed on 14 July 2006. This deed settled proceedings commenced in the Family Court of Australia and Supreme Court of New South Wales. In summary, Colleen Lewis and her second husband, Michael Rayhill, had or were about to be divorced. A property settlement by the Family Court of Australia of their assets was required.
4. Louise Lewis and Paris King Investments had commenced separate proceedings in the Supreme Court of New South Wales (No 2564 of 2005) in which Louise asserted the existence of a trust (which she called the “**Louise Lewis trust**”) of which Colleen Lewis was the trustee and that Colleen Lewis had acted in breach of trust, aided and abetted by Michael Rayhill. In particular, Louise Lewis and Paris King Investments claimed that Colleen Lewis had caused the 42A Bay Street property to be transferred from the company (formerly Karan Holdings and subsequently Paris King Investments) to herself in breach of the Louise Lewis trust.
5. Louise Lewis also made claims in the proceedings against the company Syfurn. In particular, Louise Lewis and Paris King Investments claimed that Colleen Lewis had lent $800,000 to Syfurn secured by a mortgage over a property at Dulwich Hill owned by Syfurn and the mortgage was an asset of another trust of which Paris King was the beneficiary (that is, the trust I have referred to as the Paris King trust).
6. Louise Lewis and Paris King Investments, in their claims, referred to the 8 May 2000 deed executed by Colleen Lewis in which Colleen declared she held both the 42A Bay Street property and the mortgage to Syfurn on trust for Paris King Investments.
7. Amongst other things, Louise Lewis and Paris King Investments claimed an entitlement to orders including that Colleen Lewis and Michael Rayhill pay to Paris King the current monetary value of the 42A Bay Street property and that Syfurn execute a registrable mortgage in favour of Colleen Lewis, such mortgage to be declared to be held on trust for Paris King Investments.
8. By the 2006 deed of settlement the parties to the deed, being Colleen Lewis (also referred to as Colleen Rayhill), Michael Rayhill, Louise Lewis, and the companies Syfurn and Paris King Investments, agreed that the proceedings commenced in the Family Court of Australia and Supreme Court of New South Wales would be dismissed by consent on certain steps taking place. It is common ground that the proceedings in the Family Court of Australia and Supreme Court of New South Wales were dismissed by consent in accordance with the deed.
9. The deed of settlement otherwise provides for a release in cl 17 as follows:

Save and except for the rights and obligations provided for in this deed, each of the parties releases and discharges the others from all claims, actions, demands, suits, proceedings, liabilities and expenses which, but for this deed, he, she or it may have had or asserted against any other of the parties, whether at law, in equity or by virtue of any statute and whether presently, prospectively or contingently with the intent that this deed may be pleaded in bar to any such claim.

1. The deed also contains the following provisions:

(b) By proceedings in the Family Court of Australia nod. SY 6709 of 2000 Michael has claimed orders against Colleen for the settlement of property under section 79 of the Family Law Act 1975 (which proceedings are referred to in this deed as “the Family Court proceedings”);

…

(d) By proceedings in the Supreme Court of New South Wales nod. SC 2564/05 Louise and Paris King have claimed certain orders against Michael, Colleen and Syfurn (which proceedings are referred to in this deed as “the Supreme Court proceedings”);

(e) In the Supreme court proceedings Louise alleges that she is a beneficiary of a trust known as “the Louise Lewis trust”, that Colleen is the trustee of that trust, that Colleen has acted in breach of her duties as such trustee and that Michael has been knowingly concerned in the breaches of trust (which latter allegation is denied by Michael);

(f) In the Supreme Court proceedings Paris King alleges that Colleen as its sole director has acted in breach of her duties as such and that Michael has been knowingly concerned in those breaches of duty (which latter allegation is denied by Michael);

(g) Syfurn is the owner of properties described in folio identifiers B/108585, 4/16303 and 5/16303 located at and known as 553, 565 and 567 New Canterbury Road Dulwich Hill (which are referred to in this deed is [sic – as] “the Dulwich Hill properties”);

(h) Syfurn has granted mortgages over the Dulwich Hill properties to secure the repayment of loans totaling [sic] onemillion three hundred and fifty thousand dollars ($1,350,000:00) (which mortgages are referred to in this deed as “the existing mortgages”);

(i) Michael and Colleen are the sole shareholders in Syfurn, each having one fully paid share in its capital;

(j) Michael is the sole director of Syfurn;

…

(m) The parties hereto have agreed to settle the disputes the subject of the Family Court proceedings and the Supreme Court proceedings upon and subject to the terms and conditions of this deed.

IT IS AGREED, DECLARED AND ACKNOWLEDGED by and between the parties as follows:

1. Michael and Colleen will as soon as practicable use their best endeavors [sic] to arrange for Syfurn to borrow the sum of an additional amount of $500,000:00 (“the loan”) on the security of the Dulwich Hill property.
2. Upon receipt of the loan, Syfurn will pay the balance of the legal costs owing by Louise as at the date hereof up to a maximum of $100,000:00 and, in addition to the payment of mortgage installments due on the Dulwich Hill properties, will commence to pay thereout so much of it as shall be required to meet the monthly installments [sic] payable with respect to the first mortgages currently registered on the titles of the properties known as 9 Robson Road, Kenthurst (being the land in folio identifier 1/613606 registered in the name of Appinville Pty. Ltd), 405A the Entrance Road, Erina Heights (being the land in folio identifier 12/12103 registered in the name of Colleen) and 13 Ellis Street, Condell Park (being the land in folio identifier ### registered in the name of JCL Investments Pty. Ltd), all of which properties are hereinafter referred as “the non-Syfurn mortgages”.

…

1. Upon settlement of the temporary loan, Michael shall have Colleen or Louise appointed as a director of Syfurn and thereafter Syfurn will ensure that any cheques, leases or other documents which have the effect of substantially altering any of the company’s legal rights or of its financial obligations are signed by both of the company’s directors.

…

1. Following the settlement of the loan, Colleen and Louise shall have the right by notice in writing to require Michael to resign as director of Syfurn and to transfer his shares in the company to Louise, PROVIDED HOWEVER that no such notice shall be given until Syfurn Pty. Ltd has executed a second mortgage by way of security for the payment to Michael of the sum of $500,000:00 referred to in condition 14 below the security for such mortgage to be ~~either the 553 New Canterbury Road property being the land in Folio Identifier B/108585~~ or the 565 and 567 New Canterbury Road properties respectively being the land in Folio Identifiers 4/16303 and 5/16303. [(strikeout in original)]

…

1. Subject to the proviso contained in covenant 15 below, the parties agree that the Dulwich Hill properties shall not be sold unless their total sale price is sufficient to yield an amount which will, at the date of completion of such sale, be less than [sic – not less than] the total of:-

14.1 The amounts which will be required discharge the existing mortgages over all of the Dulwich Hill properties and the aforesaid mortgages over the non-Syfurn properties or of any of such mortgages which may be “rolled-over” or re-financed PROVIDED HOWEVER THAT, in the event that any of the principal sums owing under any of these mortgages is greater than the amounts which are currently payable under them, then the provisions of this condition shall not apply to any such increases in the principal sums,

14.2 An amount of $500,000:00 which will, upon settlement of the said sale, be paid by Colleen to Michael,

14.3 An amount of $285,000:00 which will, upon settlement, be paid to Colleen,

14.4 All of the company’s selling expenses related to the aforesaid sale.

1. I am not satisfied that the deed of settlement had the effect of terminating the Paris King trust. The deed of settlement does not say that it terminates any trust, let alone the Paris King trust.
2. That said, the deed of settlement has effect according to its terms. By those terms the parties agreed to settle the Supreme Court and Family Court proceedings and released each other from all claims they may have had or asserted against each other in the proceedings, including a claim by Paris King Investments and Louise Lewis that the 42A Bay Street property was held in trust (apparently, the Louise Lewis trust) and that the Syfurn mortgage were assets of a trust under which Colleen Lewis was the trustee and Paris King Investments the beneficiary.
3. Accordingly, it cannot be asserted by Paris King Investments, Syfurn, Colleen Lewis, or Louise Lewis against each other that, amongst other things, Colleen Lewis held the 42A Bay Street property and the Syfurn mortgage on trust for Paris King Investments (or, to the extent it was asserted, for the so-called Louise Lewis trust). Moreover, Colleen Lewis and Paris King Investments released each other from any further claims they “may have had or asserted against any other of the parties”. This is relevant because Truthful Endeavour’s contention is that Paris King Investments is the beneficiary and Colleen Lewis the trustee of the Paris King trust, the assets of which include the 42A Bay Street property and the Syfurn mortgage. In circumstances where Paris King Investments, Louise Lewis and Colleen Lewis released each other from these claims, I am satisfied that Truthful Endeavour cannot assert in this proceeding that Paris King Investments is the beneficiary and Colleen Lewis the trustee of the Paris King trust insofar as its assets are asserted to include the 42A Bay Street property and the Syfurn mortgage. Nor can the so-called Louise Lewis trust be asserted to any similar effect (although, I should note, Truthful Endeavour’s case did not assert any trust other than the Paris King trust).
4. While Truthful Endeavour is not a party to and thus is not bound by the deed of settlement, Truthful Endeavour seeks to rely upon the existence of a particular legal relationship between Colleen Lewis and Paris King Investments (trustee and beneficiary in respect of the 42A Bay Street property and the Syfurn mortgage) and Louise Lewis when the mutual releases embodied in cl 17 of the deed of settlement have altered that legal relationship. Clause 17 releases and discharges all of the parties from “all claims, actions, demands, suits, proceedings, liabilities and expenses … with the intent that [the] deed may be pleaded in bar to any such claim” and, thereby, irrevocably alters the legal relationship between the parties.
5. Mr Condon contended that the deed took effect from the date of its execution on 14 July 2006. On one level, this must be correct. However, cl 17 of the deed involves a release and discharge of all claims and liabilities (etc) that any party “may have had or asserted against any other of the parties”. Clause 17 operates from the time any party may have had a claim. The relevance of this is that Truthful Endeavour’s alternative case is that payments made in respect of the 9 Robson Road property before 14 July 2006 were made using the funds of the Paris King trust because the source of the funds was security raised against the 42A Bay Street property with the consequence that Paris King Investments, not Colleen Lewis, is the creditor of the Kenthurst Investment Trust. Once the effect of cl 17 of the deed of settlement is taken into account, it is apparent that this cannot be accepted. Paris King Investments, Louise Lewis and Colleen Lewis, by the deed of settlement, released and discharged each other from all such claims and liabilities they “may have had or asserted”, which is an effective release and discharge at all times. Accordingly, and again because the relevant issue is the legal relationship between Paris King Investments, Louise Lewis and Colleen Lewis who are all parties to and bound by the deed of settlement, the effect of the deed cannot be ignored. Although not a party to and not bound by the deed of settlement, Truthful Endeavour cannot assert that a legal relationship existed as between Colleen Lewis and Paris King Investments or Louise Lewis (insofar as the so-called Louise Lewis trust is concerned) before 14 July 2006 when the deed of settlement has irrevocably altered that relationship. The same conclusion applies to the Louise Lewis trust.
6. For these reasons, insofar as Truthful Endeavour’s case included the alternative proposition that the true source of the funds for payments made in respect of the 9 Robson Road property was the Paris King trust, and not Colleen Lewis, that case should not be accepted. The legal relationship between Paris King Investments (as the asserted beneficiary of the Paris King trust) and Colleen Lewis (as the asserted trustee of the Paris King trust) in respect of the assets asserted to be assets of that trust (the 42A Bay Street property and the Syfurn mortgage) is governed by the deed of settlement and, in particular, by cl 17 of that deed. No person can assert the existence of a legal relationship between Paris King Investments (as the asserted beneficiary of the Paris King trust) and Colleen Lewis (as the asserted trustee of the Paris King trust) in respect of the assets asserted to be assets of that trust (42A Bay Street and the Syfurn mortgage) different from that provided for in the deed of settlement.

## Are the circumstances surrounding the payments relevant?

1. Leaving aside the burden on Mr Condon to prove by adequate evidence that Colleen Lewis is a creditor of the Kenthurst Investment Trust, the conclusions set out above leave two issues raised by Truthful Endeavour for resolution. The first is the contention that as Colleen Lewis did not herself make any payments in relation to the 9 Robson Road property that is an end to the matter, it being asserted that the Court cannot or should not examine the circumstances in which three companies made such payments to ascertain whether they were, in fact, payments by or on behalf of Colleen Lewis. The second is the related contention that as Colleen Lewis did not herself make any payments in relation to the 9 Robson Road property while she was the trustee of the Kenthurst Investment Trust, she cannot have a right to be indemnified under the deed of trust or at general law. In substance, this involves the same point, albeit raised in two different contexts.
2. There is no doubt that Colleen Lewis did not directly make any of the payments in question. Instead, four classes of payments can be identified. First, payments from a bank account of a company JCL Investments Pty Ltd (**JCL Investments**) were made between August 2001 and January 2002. Second, payments were made in May and June 2003 from the trust account of a solicitor. Third, payments were made between January and April 2006 from a bank account of Paris King Investments. Fourth, payments were made between July 2006 and October 2007 by Syfurn.
3. As noted, Mr Condon contends that all of these payments were made by or on behalf of Colleen Lewis. According to Mr Condon, the money in the bank accounts of JCL Investments and Paris King Investments was beneficially owned by Colleen Lewis. She must be inferred to have had sole control of the accounts. The payments out of those accounts were made at her direction and to satisfy her personal liabilities to the trustee of the Kenthurst Investment Trust. Her money being held in bank accounts in the name of JCL Investments and Paris King Investments was a mere convenience for her. Those accounts functioned as a mere holding place and conduit for Colleen Lewis to deal with her own money. As a result, when money was paid out of those bank accounts to cover Colleen Lewis’s personal liabilities to the trustee of the Kenthurst Investment Trust, Colleen Lewis became a creditor of that trust. The companies who were the account holders were immaterial.
4. Insofar as Syfurn is concerned, as noted, the payments were made by Syfurn directly. Mr Condon contends that Colleen Lewis also beneficially owned the money of Syfurn used to make the payments, and that the payments should be understood to have been made on the direction of Colleen Lewis, again, in order to satisfy the personal liabilities of Colleen Lewis to the trustee of the Kenthurst Investment Trust.
5. Truthful Endeavour’s primary contention (its alternative case that the Paris King trust was the true source of the funds used to make all of the payments having been rejected above) is that it is not permissible to examine the circumstances in which the payments were made. It simply must be accepted that the payments were made by JCL Investments, Paris King Investments and Syfurn in their own right. Accordingly, those companies may be a creditor of the Kenthurst Investment Trust, but not Colleen Lewis.
6. Neither party provided the assistance of any authority to support their competing positions.
7. Mr Condon’s position, however, is orthodox. The issue is whether Colleen Lewis is a creditor of the Kenthurst Investment Trust. The substance, not merely the form, of the transactions by which payments were made for the Kenthurst Investment Trust is relevant to that question. The fact that the payments were made from bank accounts in the name of or by persons other than Colleen Lewis is not determinative. It is relevant to consider a range of circumstances. For example, and leaving aside the nature of the legal relationship created between the bank and its customer for this purpose, money in a bank account of party X may be beneficially owned by party Y. If a payment to party Z is made from the bank account of party X under the direction of party Y, party X may be acting in a number of capacities. Party X may be a mere conduit for the payment with the result that the only legal relationship created is between party Y and party Z. Party X may be the agent of party Y for the purpose of making the payment with the result that more than one legal relationship is created, one of those relationships again being between party Y as the principal and party Z as the person with whom the principal dealt through the agency of party X.
8. Whatever the position in respect of the present case, what this means is that the circumstances in which the payments were made must be examined in order to answer the question whether Colleen Lewis is a creditor of the Kenthurst Investment Trust. The contrary submission of Truthful Endeavour must be rejected.

## The circumstances surrounding the payments and conclusions based on them

1. Leaving aside the significance of the Paris King trust (dealt with above), the primary facts about the payments are not in dispute.

### JCL Investments

1. After Colleen Lewis and Michael Rayhill separated in 2000, JCL Investments was incorporated. The directors were Colleen Lewis and her daughter Louise Lewis. Louise Lewis and other members of Colleen Lewis’s family (but not Michael Rayhill) were the shareholders.
2. JCL Investments opened two bank accounts. One account was known as the JCL Investments (No 1) account. The other was known as the JCL Investments (No 2) account. Louise Lewis gave evidence about JCL Investments and the accounts. She said JCL Investments owned a property at Condell Park. Apart from that it had no other business. Louise Lewis used the JCL Investments (No 1) account for her purposes. Her mother, Colleen Lewis, used the JCL Investments (No 2) account for what Louise Lewis described as “trust purposes”, this answer reflecting Louise Lewis’s belief that her mother held all moneys on behalf of the Paris King trust.
3. Colleen Lewis entered into a deed of loan with Challenger Managed Investments Limited (**Challenger**) on 16 June 2000 for $1,000,000. Given my conclusions above it is not strictly necessary to note, but I do in any event, that Colleen Lewis warranted that she was not the trustee of any trust in so doing. The loan was secured over the 42A Bay Street property.
4. On 20 April 2001, Colleen Lewis took out a further loan from Challenger for an additional $200,000. The 42A Bay Street property was again used to secure this loan. Colleen Lewis used the $200,000 loan to lend money to another company, Lucky Jade Pty Ltd (**Lucky Jade**), to purchase a boat. She entered into a loan agreement with Lucky Jade on 3 May 2001 in respect of this loan.
5. On 11 July 2001, Colleen Lewis obtained a loan facility from Investec Australia Limited (**Investec**) for $3,300,000.
6. On 1 August 2001, Colleen Lewis agreed to lend to Appinville Pty Ltd (**Appinville**) (which was shortly to become the trustee of the Kenthurst Investment Trust) up to $1,000,000 for the purchase of the 9 Robson Road property. The verbal agreement was confirmed in writing on 11 April 2002. Pursuant to the loan agreement (as made and as confirmed subsequently) Colleen Lewis agreed to pay “any interest or fees incurred by [Appinville] to service any loans applied for the purchase of the Kenthurst property”.
7. On 24 August 2001, Colleen Lewis drew down $3,200,000 against the Investec loan. She placed $1,025,214.60 in the account of JCL Investments (No 2).
8. On 27 August 2001, the Kenthurst Investments Trust trust deed was signed. Appinville was appointed the trustee. Clause 8 of the trust deed provides that:

The Trustees shall be entitled to be reimbursed from the Trust Funds for all expenses incurred or payments made by them in respect of the Trust including interest on any credit accommodation procured by them for the Trust; and shall be entitled to be paid and receive commission for acting as Trustees of the Trust at the rate not in excess of the income and corpus commission as charged from time to time by the Permanent Trustee Company of New South Wales Limited. Where one or more of the Trustees is a solicitor or accountant or the Trustees or one of the Trustees is a corporation a director of which is a solicitor or accountant such solicitor or accountant shall be entitled to receive ordinary professional fees for professional work in connection with the Trust and the administration thereof but in such case the Trustees or corporation as the case may be shall not be entitled to receive commission.

1. The Kenthurst Investments Trust had no funds other than $20 provided as the settlement money.
2. On 28 August 2001, the Kenthurst Investments Trust (properly, Appinville as trustee) purchased the 9 Robson Road property. The counterpart contracts do not match but nothing turns on that for the purpose of this proceeding. The purchase price was $1,700,000. The deposit of $170,000 was paid out of the JCL Investments (No 2) account, the source of the funds in that account being the $1,025,214.60 deposited there by Colleen Lewis from the Investec loan.
3. Other payments for the purchase of the 9 Robson Road property were made from the JCL Investments (No 2) account, being for a valuation ($2,206.50), stamp duty ($79,000.50), and legal fees ($3,811.50).
4. On 24 September 2001, Appinville applied to Howard Finance Ltd (associated with Challenger) for a loan of $1,190,000 to be secured over the 9 Robson Road property and by a guarantee from Colleen Lewis. The loan application was supported by a statement of the assets and liabilities of Colleen Lewis. Her assets were said to include the 42A Bay Street property, $850,000 in a St George bank account, and the deposit of $170,000 paid for the 9 Robson Road property. The JCL Investments (No 2) account should be inferred to be the St George account.
5. Settlement of the sale of the 9 Robson Road property occurred on 19 October 2001. For that purpose a cheque for $478,693.50 was drawn on the JCL Investments (No 2) account. The balance of the purchase price, $1,085,000 was paid by Appinville from the money it borrowed from Challenger secured over the the 9 Robson Road property and by a guarantee from Colleen Lewis (the **Appinville loan**).
6. It will be recalled that Colleen Lewis had agreed with Appinville that she would pay all interest and other fees owed by Appinville under the Appinville loan. On 18 October 2001 she signed a direct debit authorising interest payments to be deducted from the JCL Investments (No 2) account. Thereafter, $6,329.17 was deducted in December 2001 and January 2002 from that account to pay the interest on the Appinville loan.

### Dennis & Co

1. On 30 May 2003 a firm of solicitors, Dennis & Co, transferred $25,736.79 from a trust account they held in the name of Colleen Lewis to pay interest on the Appinville loan. Another payment was made from the same trust account on 30 May 2003 in the sum of $11,600.24 for interest and water rates, the interest (I infer) being that payable under the Appinville loan and the water rates being owed on the 9 Robson Road property. A third payment for “payment of costs … Appinville loan”, in the sum of $770.00, was paid out of the same trust account on 11 June 2003.

### Paris King Investments

1. On 1 November 2005, Colleen Lewis was appointed as the trustee of the Kenthurst Investment Trust in place of Appinville.
2. In December 2005, a bank account was opened in the name of Paris King Investments. At that time the directors of Paris King Investments were Louise Lewis and another family member, and Colleen Lewis was the sole shareholder.
3. On 23 December 2005, Lucky Jade sold the boat. From the proceeds of sale, $272,727.28 was paid to Colleen Lewis and the balance ($27,272,72) to Lucky Jade. The $272,727.28 was deposited into the newly opened bank account of Paris King Investments. Colleen Lewis must be inferred to have deposited that money. No other funds were paid into that account.
4. Paris King Investments then made a series of payments (over $140,000) towards the interest payable under the Appinville loan.

### Syfurn

1. Syfurn granted to Colleen Lewis a mortgage in 1998 in the sum of $800,000. This related to a loan Colleen Lewis asserted she had given to Syfurn many years earlier.
2. By 30 June 2003, Colleen Lewis claimed that Syfurn was indebted to her in the sum of $2,300,000.
3. Before the deed of settlement took effect on 14 June 2006, Colleen Lewis and Michael Rayhill were the shareholders in Syfurn and Michael Rayhill the sole director of Syfurn.
4. As noted, the deed of settlement was executed on 14 July 2006. Relevant terms are set out above.
5. From 8 August 2006, and in accordance with the deed, payments of interest for the Appinville loan were made by Syfurn. Repayments exceeded $170,000.
6. Further, once Syfurn sold the Dulwich Hill property, Syfurn paid $1,712,878.85 to Challenger to discharge the Appinville loan. This payment was made on 12 October 2007. It will be recalled that the 2006 deed of settlement provided for Michael Rayhill to resign as a director of Syfurn and for Colleen Lewis or Louise Lewis to become director. Colleen Lewis became a director of Syfurn on 9 October 2006 (and remained a director until 2009). Michael Rayhill tendered a letter of resignation of his directorship of Syfurn on 24 September 2007, the resignation expressed to be effective from 9 November 2007.
7. Mr Condon was appointed as the trustee in bankruptcy of Colleen Lewis on 14 May 2012.

## Discussion

1. The circumstances surrounding the making of the payments disclose why Mr Condon’s case should be accepted.
2. First, and for the reasons already given, the issues about the Paris King trust cannot be raised as sought by Truthful Endeavour because Truthful Endeavour asserts the existence of a legal relationship between Colleen Lewis as trustee and Paris King Investments as beneficiary different from that agreed to by Colleen Lewis and Paris King Investments in the 2006 deed of settlement. The same applies to the Louise Lewis trust. It also follows from this conclusion that Louise Lewis’s evidence that all money that came into and passed out of Colleen Lewis’s hands was “trust” money cannot be accepted.
3. Second, apart from the issues about the Paris King trust (and, to the extent raised, the Louise Lewis trust), it was not suggested by any party or in any way indicated on the evidence that any person other than Colleen Lewis and the entities and persons referred to above had any interest in or connection to the money used to make the payments.
4. Third, the legal relationship between Colleen Lewis and the entities and persons referred to above cannot be determined in isolation from the legal agreements into which Colleen Lewis entered. Colleen Lewis borrowed money from Challenger. It must also be inferred that it was Colleen Lewis who placed that money (or part of it) in the JCL Investments (No 2) account because, consistent with the evidence of Louise Lewis, Colleen Lewis alone controlled that account. While Louise Lewis believed her mother controlled that account on behalf of the Paris King trust, I have already explained why that case cannot be accepted above.
5. Once the issue about the money all belonging to the Paris King trust (or Louise Lewis trust) is put to one side (as it must be for the reasons already given), it is apparent that there is no person or entity other than Colleen Lewis who owned or was authorised to deal with the money in the JCL Investments (No 2) account. Louise Lewis did not consider that any of the money deposited into the JCL Investments (No 2) account was owned by JCL Investments. The only other person or entity who is asserted to have had an interest in the money in that account, apart from Colleen Lewis, is the Paris King trust or (perhaps) the Louise Lewis trust. Excluding, as necessary, the Paris King trust and the Louise Lewis trust, Colleen Lewis is the only person left with an interest in the money in that account.
6. Not only was the the money in that account deposited by Colleen Lewis, the money taken out of that account was money used to meet Colleen Lewis’s liabilities. Colleen Lewis had agreed with the then trustee of the Kenthurst Investment Trust, Appinville, that she was personally liable to the trustee for the payment of all interest and fees in respect of the 9 Robson Road property. Consistent with that agreement, it must be inferred that Colleen Lewis caused the payments to be made from the JCL Investments (No 2) on account of her own personal liabilities to Appinville. As Mr Condon submitted, once this fact is acknowledged, another independent and complete answer to the Paris King trust issue (and, to the extent it was raised, the Louise Lewis trust) is that it is simply immaterial to the issues in the present case. Colleen Lewis, not the Paris King trust, was personally liable to meet the payments under the Appinville loan. She is the one whose liability existed and was discharged for the Kenthurst Investment Trust.
7. For these reasons, I consider that the JCL Investments (No 2) account was a convenient vehicle by which Colleen Lewis dealt with money that was her own. Colleen Lewis used the account as a conduit for her dealings with what must be taken to have been her money. As such, payments made from that account were not payments made by the company, JCL Investments. They were payments made by Colleen Lewis. More to the point, it is Colleen Lewis alone who incurred and discharged liabilities for the Kenthurst Investment Trust. Her liability in this regard was personal, as are her associated rights against the Kenthurst Investment Trust.
8. Accordingly, it cannot be said that JCL Investments (now deregistered) was a creditor of the Kenthurst Investment Trust. JCL Investments did not own any of the money in the JCL Investments (No 2) bank account. Colleen Lewis owned that money. JCL Investments did not make any payments in relation to 9 Robson Road. Colleen Lewis made those payments using the JCL Investments (No 2) bank account as a conduit by which she controlled her money. JCL Investments did not incur or discharge liability for the Kenthurst Investment Trust. As such, JCL Investments did not accrue any rights as against the Kenthurst Investment Trust. Colleen Lewis did all those things.
9. It follows that Colleen Lewis is a creditor of the Kenthurst Investment Trust in respect of all of the payments made out of the JCL Investments (No 2) bank account in relation to the 9 Robson Road property.
10. The same analysis applies to the payments made from the trust account of Dennis & Co, solicitors. There is no suggestion that Colleen Lewis’s funds were mixed with those of others. The money in the Dennis & Co trust account belonged to Colleen Lewis. When Dennis & Co paid money out of the trust account they held in the name of Colleen Lewis in relation to the 9 Robson Road property, they did so for Colleen Lewis. Dennis & Co had no liability to discharge. Colleen Lewis did. Dennis & Co are not a creditor of the Kenthurst Investment Trust in respect of the amounts so paid. Colleen Lewis is the creditor.
11. The position is the same for the Paris King Investments bank account. It must be inferred that Colleen Lewis caused that account to be opened in the name of Paris King Investments as another vehicle by which she could manage her money. In particular, when she obtained the proceeds from the sale of the boat which Lucky Jade owed her, the full amount was paid, I infer by Colleen Lewis, into the Paris King Investments bank account. Consistent with the analysis above, Paris King Investments did not own that money. Colleen Lewis did. She then caused money to be paid out of the Paris King Investments bank account to pay the interest owing on the Appinville loan, for which she was personally liable to Appinville, using the bank account of Paris King Investments as a mere conduit for her dealings with what what must be taken to have been her own money. In so doing Colleen Lewis became a creditor of the Kenthurst Investment Trust in respect of all such money paid out of the Paris King Investments bank account.
12. I should also note that no party suggested that Colleen Lewis was paying the money described above for the purpose of the Kenthurst Investment Trust as a gift to the trust. The evidence did not support any such suggestion.
13. The situation concerning Syfurn is more complicated. This is because payments were made directly by Syfurn and not from a bank account in the name of Syfurn. I do not know whether Mr Condon’s claim against Syfurn is critical to the outcome of this proceeding. This is because it may be that the amounts paid out of the JCL Investments (No 2) bank account and the Paris King Investments bank account exceed the proceeds of sale of the 9 Robson Road property. If this is so then, as explained below, the rights vested in Colleen Lewis as against the Kenthurst Investment Trust which Mr Condon acquired as her trustee in bankruptcy take priority of those of the beneficiaries of that trust and Mr Condon would be entitled to an order that the whole of the proceeds of sale be transferred to him. It is only if the amounts paid out of the JCL Investments (No 2) bank account and the Paris King Investments bank account are less than the proceeds of sale that the payments made by Syfurn become relevant.
14. I say this because I do not find the issues concerning Syfurn easy to resolve and was not particularly assisted by the parties in the process of resolution.
15. What is clear is this – but for the 2006 deed of settlement there could be no argument that payments made by Syfurn to meet the liabilities under the Appinville loan made Colleen Lewis a creditor of the Kenthurst Investment Trust in respect of those amounts so paid. This is so irrespective of the fact that Colleen Lewis had agreed with Appinville that she was liable to meet all costs and expenses of Appinville under the Appinville loan. That agreement would not transform payments by Syfurn of Syfurn’s money into payments by Colleen Lewis.
16. Mr Condon’s case in respect of the Syfurn payments depends on the deed of settlement.
17. There were three parties that had claims against Syfurn which were settled on the terms of the deed of settlement.
18. Syfurn, it will be recalled, had one director before the deed of settlement (Michael Rayhill) and two shareholders (Colleen Lewis and Michael Rayhill).
19. Colleen Lewis held a mortgage from Syfurn in the sum of $800,000 and claimed to be owed $2,300,000 by Syfurn.
20. Louise Lewis and Paris King Investments claimed that Colleen Lewis held the mortgage and any associated rights to moneys owed by Syfurn in trust for Paris King.
21. The deed of settlement involved the release and discharge of all of these claims. The scheme of the deed was that Michael Rayhill and Colleen Lewis would be paid out some money from the proceeds of sale of Syfurn’s Dulwich Hill properties. The sale of the Dulwich Hill properties would be for an amount which enabled not only the payments to Michael Rayhill and Colleen Lewis but also the paying out in full of, amongst other things, the Appinville loan. Michael Rayhill would cease to be a director and shareholder of Syfurn. Colleen Lewis or Louise Lewis would become the director (in fact, it was Colleen Lewis who became director). Michael Rayhill’s share in Syfurn would be transferred to Louise Lewis (in fact, it seems to have been transferred to another child of Colleen Lewis, but the facts in this regard are not clear). Michael Rayhill would thus cease to have any interest in Syfurn. Colleen Lewis (and her children) would have the continuing interest in and control of Syfurn. However, the release and discharge in cl 17 of the deed of settlement, as discussed, was effective as between Colleen Lewis (on the one hand) and each of Louise Lewis and Paris King Investments (on the other hand). The interest in Syfurn that Colleen Lewis continued to have by reason of her shareholding, on and from the deed of settlement, could not be said to be held on behalf of Paris King Investments. Colleen Lewis held her interest in Syfurn on her own behalf free from any such claim or liability.
22. I do not doubt that all of the payments by Syfurn in respect of the 9 Robson Road property were directed to be made by and were for and on behalf of Colleen Lewis. This is because Colleen Lewis alone was personally liable to Appinville in respect of the Appinville loan. Thus, it was her indebtedness to Appinville, incurred by her for the purpose of the Kenthurst Investment Trust, that was being discharged. Contrary to Truthful Endeavour’s contention, the payments by Syfurn were not for and on behalf of Louise Lewis or Paris King Investments because they had released Colleen Lewis from any claim that Colleen Lewis’s interest in Syfurn was held in trust for Paris King Investments.
23. What is the consequence of the fact that Syfurn paid money to meet liabilities of Colleen Lewis, incurred by Colleen Lewis for the purposes of the Kenthurst Investment Trust? Specifically, does this fact mean that Colleen Lewis became a creditor of the Kenthurst Investment Trust in respect of the amounts so paid?
24. Not without some hesitation, I have concluded that the answer to this question is “yes”. Syfurn was a stranger to the Kenthurst Investment Trust. Syfurn had no liability to or interest in the Kenthurst Investment Trust. It should not be inferred that Syfurn was gifting the money paid to the Kenthurst Investment Trust. It also should not be inferred that Colleen Lewis was gifting the the money paid to Kenthurst Investment Trust. Therefore, by reason of the payments, either Syfurn or Colleen Lewis became a creditor of the Kenthurst Investment Trust. The inference that should be drawn is that Colleen Lewis caused Syfurn to make the payments in order to discharge her liability to the trustee, a liability which she had incurred for and on behalf of the trust. Appinville, which remained the trustee at the time of the payments, knew that the liability was that of Colleen Lewis. As between the trustee of the Kenthurst Investment Trust, Colleen Lewis and Syfurn, Syfurn was a mere conduit for Colleen Lewis to discharge a liability she had incurred for the trust. As between those parties, accordingly, Colleen Lewis became the creditor of the trust. It may be that in using Syfurn as a conduit and treating Syfurn’s money as her own Colleen Lewis breached her duty as a director of Syfurn. That may have vested in Syfurn a claim against Colleen Lewis. However, I do not consider that this affects the conclusion that, in the circumstances described, as between Kenthurst Investment Trust, Colleen Lewis and Syfurn the payments were made by and for Colleen Lewis to discharge her liabilities under the Appinville loan and that, as such, she became a creditor of the trust in respect of the amounts so paid.
25. As was submitted for Mr Condon, having accepted that all of the payments described above after Colleen Lewis became trustee of the Kenthurst Investment Trust were made by her to discharge her liability to Appinville under the Appinville loan, being a liability she incurred for the purposes of the trust, cl 8 of the Kenthurst Investments Trust deed applies. Colleen Lewis has the benefit of the right of indemnity provided for in cl 8 and is entitled to be reimbursed for all such payments.
26. The general law provides for the same right of indemnity. In *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367-368 the High Court said:

We do not understand the general principles concerning the bankruptcy of a trading trustee to be in dispute. It is common ground that a trustee who in discharge of his trust enters into business transactions is personally liable for any debts that are incurred in the course of those transactions: *Vacuum Oil Co Pty Ltd v Wiltshire* [(1945) 72 CLR 319]. However, he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets: *Vacuum Oil Co Pty Ltd v Wiltshire*. The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee's possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorised to use for the purposes of carrying on the business: *Dowse v Gorton* [[1891] AC 190].

In such a case there are then two classes of persons having a beneficial interest in the trust assets: first, the cestuis que trust, those for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied: *Vacuum Oil Co Pty Ltd v Wiltshire*.

The creditors of the trustee have limited rights with respect to the trust assets. The assets may not be taken in execution (*Savage v Union Bank of Australia Ltd* [(1906) 3 CLR 1170 at 1186, *Re Morgan; Pillgrem v Pillgrem* (1881) 18 Ch D 93]) but in the event of the trustee's bankruptcy the creditors will be subrogated to the beneficial interest enjoyed by the trustee: *Vacuum Oil Co Pty Ltd v Wiltshire*; *Ex parte Garland* [(1804) 10 Ves Jun 110 at 120; 32 ER 786 at 789].

These principles lead naturally to the conclusion that the beneficial interests which, by subrogation, the creditors whose claims arise from the carrying on of the business have in the assets held by a bankrupt trustee form part of the property of the bankrupt divisible amongst his creditors: *Savage v Union Bank of Australia* [(1906) 3 CLR 1170 at 1188]; *Jennings v Mather* [[1901] 1 KB 108 at 116]; *Governors of St Thomas’s Hospital v Richardson* [[1910] 1 KB 271]. The definitions of both “property” and “property of the bankrupt” in s 5 of the Bankruptcy Act are apt to include such a beneficial interest.

1. In *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; [2008] NSWSC 1344, Brereton J usefully summarised the relevant principles relating to the trustee’s right of indemnity as follows:

[13] The relevant principles concerning a trustee’s right of indemnity against trust assets include the following, for which I am indebted in large part to the analysis by Austin J in *Trim Perfect Australia Pty Ltd (In Liq) v Albrook Constructions Pty Ltd* [2006] NSWSC 153 at [20].

[14] First, as against a third party, a trustee is personally liable for debts and liabilities incurred in its capacity as trustee: *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367.

[15] Second, however, the trustee has a right of indemnity out of the trust assets for expenses or liabilities incurred by the trustee, by recoupment of expenditure and exoneration from liability: *Octavo Investments v Knight* (at 367); *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (1998) 192 CLR 226 at 245.

[16] Third, this right of indemnity, recoupment and exoneration is secured by an equitable lien over the trust assets, which arises by operation of law and confers a proprietary interest, in the nature of a security interest, in the trust assets, and takes priority over the claims of beneficiaries: *Octavo Investments v Knight* (at 367, 370); *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (at 246).

[17] Fourth, this equitable lien extends to all of the trust assets, save only those that are specifically excluded by the trust instrument: *Dowse v Gorton* [1891] AC 190; *Octavo Investments v Knight* (at 367).

[18] Fifth, being an equitable lien, the security is enforceable by the trustee only by judicial sale or appointment of a receiver, and not by foreclosure or by sale out of Court: *Tennant v Trenchard* (1869) LR 4 Ch App 537; *ANZ Banking Group Ltd v Intagro Projects Pty Ltd* [2004] NSWSC 1054 at [14]; *Melbourne Tramways Trust v Melbourne Tramway & Omnibus Company Ltd* (1887) 13 VLR 487 at 490; *Re Pumfrey* (1882) 22 Ch D 255 at 265; *Re Stucley* [1906] 1 Ch 67; *Davies v Littlejohn* (1923) 34 CLR 174 at 184; *Hewett v Court* (1983) 149 CLR 639 at 663; E I Sykes and S Walker, *The Law of Securities: an account of the law pertaining to securities over real and personal property under the laws of Australian Jurisdictions*, 5th ed, (1993) Sydney, Lawbook Co at 198.

[19] Sixth, the right of indemnity accrues at the time the obligation is incurred: *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* (1987) 18 ATR 893; *Southern Wine Corporation Pty Ltd (in liq) v Frankland River Olive Co Ltd* (2005) 31 WAR 162 at [30]; and is not subsequently lost by cessation of office, whether by retirement or removal: *Xebec v Enthe* (at 898); *Coates v McInerney* (1992) 7 WAR 537; *Southern Wine Corporation* (at [30]); *Dimos v Dikeakos Nominees Pty Ltd* (1996) 68 FCR 39 at 43.

[20] Seventh, upon bankruptcy or liquidation of a trustee, its right of indemnity vests in its trustee in bankruptcy or liquidator: *Official Assignee of O’Neill v O'Neill* (1898) 16 NZLR 628; *Jennings v Mather* [1901] 1 KB 108 at 117; *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1188, 1196; *Octavo Investments v Knight*; *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 at 109.

[21] Eighth, if the trust property is transferred to a new trustee, the lien survives and the new trustee takes subject to the lien of the old trustee — except perhaps in the exceptional case of a bona fide purchaser for value without notice: *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477 at [20]; *Octavo Investments v Knight* (at 370); *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (at 246); *Re Exhall Coal Co Ltd* (1866) 55 ER 970.

[22] Ninth, a trustee is entitled to retain possession of trust property against a beneficiary until its indemnity is exercised: *Octavo Investments v Knight* (at 369–370); *Chief Commissioner of Stamp Duties v Buckle* (at 246); *Re Exhall Coal Co Ltd* (at 972); *Re Enhill Pty Ltd* [1983] 1 VR 561.

1. Consistent with these principles, Colleen Lewis’s right of indemnity in respect of costs and expenses incurred while she was trustee continues, as does her equitable charge over the assets of the trust, and her rights and interests take priority over the interests of the beneficiaries of the Kenthurst Investment Trust.
2. Further, the costs and expenses she incurred while not the trustee make her a creditor of the trust. By subrogation to the rights of the trustee, Colleen Lewis also had the benefit of a charge over the trust assets in respect of those costs and expenses.
3. By s 58(1) of the *Bankruptcy Act 1966* (Cth), the property of Colleen Lewis vested in Mr Condon when she became bankrupt. That property included her right of indemnity and the associated charge over the assets of the Kenthurst Investment Trust, as well as her right of subrogation to the trustee’s rights of indemnity against those assets. Those rights take priority over those of the beneficiaries of the trust. In circumstances where, as here, it is common ground that the amounts paid (as I have found, by Colleen Lewis using the money of Colleen Lewis) in relation to the 9 Robson Road property, far exceed the proceeds of sale from the 9 Robson Road property, Mr Condon is entitled to the whole of the remaining proceeds of sale.

## The estoppel issue

1. Truthful Endeavour contended that Mr Condon was estopped from claiming the relief sought in this proceeding by reason of either an issue estoppel or an *Anshun* estoppel (*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589) (***Anshun***).
2. The estoppels are said to arise in the following circumstances.
3. When Colleen Lewis was made bankrupt she was the registered proprietor of the 9 Robson Road property (as trustee on behalf of the Kenthurst Investment Trust). Appinville, which remained the registered proprietor after Colleen Lewis had been appointed the trustee of the Kenthurst Investment Trust on 1 November 2005, transferred the 9 Robson Road property to Colleen Lewis in 2009. This was done in accordance with consent orders made in 2006 which settled the proceedings in the Supreme Court of New South Wales (although why it took 3 years for the transfer to take place is unknown). As such, legal title to the 9 Robson Road property vested in Mr Condon as the trustee in bankruptcy of Colleen Lewis.
4. On or about 19 November 2012 Louise Lewis, a beneficiary of the Kenthurst Investment Trust, commenced proceedings in the Supreme Court of New South Wales (proceedings 2012/359743) against Mr Condon seeking a declaration that Mr Condon held the 9 Robson Road property in trust for her and the other beneficiaries under the Kenthurst Investment Trust and an order that Mr Condon transfer the 9 Robson Road property to the (then) trustee of the Kenthurst Investment Trust. In his amended defence Mr Condon admitted that Appinville had purchased the property but contended that the whole of the purchase price had been paid by Colleen Lewis, with the consequence that Appinville held the property on a resulting trust for Colleen Lewis. Mr Condon also contended that the Kenthurst Investment Trust was a sham.
5. Insofar as Mr Condon’s claim that the 9 Robson Road property was held on a resulting trust for Colleen Lewis is concerned, the issue was whether, as claimed by Mr Condon, Colleen Lewis had paid the whole of the purchase price for the property.
6. Mr Condon’s contention was rejected. In *Lewis v Condon* [2013] NSWSC 120 Rein J held as follows at [21]:

[Counsel for Mr Condon’s] contention that Mrs Lewis provided all of the funds for the purchase of the Property is factually inaccurate. Appinville borrowed most of the purchase price from Challenger and Paris King Investments Pty Ltd appears to have provided the balance, albeit, it can be assumed, under the direction of Mrs Lewis. Mrs Lewis was not at the inception of the trust the beneficial owner and although she asserted in her application to the bank from whom she sought refinancing that she was the beneficial owner of the Property, it is not clear how she became such or could have become such.

1. Rein J also rejected Mr Condon’s contention that the Kenthurst Investment Trust was a sham.
2. However, Rein J also held that Louise Lewis, a beneficiary of the Kenthurst Investment Trust, did not have standing to bring the proceedings, with the consequence that they were dismissed.
3. Louise Lewis appealed. The New South Wales Court of Appeal held that Louise Lewis did have standing to bring the proceedings. In *Lewis v Condon* (2013) 85 NSWLR 99; [2013] NSWCA 204 Leeming J (with whom McColl J and Sackville AJA agreed) said at [115]:

I have also made no determination as to whether there have been breaches of trust by Colleen, nor whether there was an entitlement by Colleen, as trustee, to be indemnified from the Property for expenses, if any, incurred by her as trustee (for example, although some of the ANZ Loan moneys may have been used for private purposes, others may have been proper trust expenses). To that extent, Mr Conlon [sic – Condon] may have an entitlement to the proceeds of sale of the Property which takes priority over that of the beneficiaries: see *Lemery* at [20] and the decisions there cited. Nothing in these reasons should be taken as determining those questions one way or the other.

1. *Lemery* is a reference to *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; [2008] NSWSC 1344 , extracts from which have been set out above.
2. Truthful Endeavour contends that there is an issue estoppel because the source of both initial contributions to the purchase price of the 9 Robson Road property (and, it was said albeit more faintly, the ongoing payments) was fundamental to the decision of Rein J.
3. This contention must be rejected. All that Rein J determined was that Colleen Lewis was not the source of the whole of the funds for the purchase of the 9 Robson Road property. Having so determined, Rein J held that there was no resulting trust in favour of Colleen Lewis.
4. As pointed out in the submissions for Mr Condon, an issue estoppel only arises in respect of that which was “legally indispensable” to the determination of the earlier proceedings (*Blair v Curran* (1939) 62 CLR 464 at 532). The only thing, relevantly, legally indispensable to Rein J’s judgment was that Colleen Lewis was not the source of the whole of the funds used to purchase the 9 Robson Road property. Insofar as Rein J opined that it appeared that Paris King Investments was another source of funds, the observation is mere obiter dicta and not legally indispensable to the decision. The same observations apply with more force to the contention that Rein J’s decision gives rise to an issue estoppel about the ongoing payment subsequent to purchase. Those payments were not in issue. While the evidence in the proceedings included evidence about those payments, they were not essential to any part of the decision.
5. Truthful Endeavour contended also that an *Anshun* estoppel arises. That contention also must be rejected. In *Anshun* at 602-603, Gibbs CJ, Mason and Aickin JJ said:

In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings, e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. …

It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment.

1. I do not accept Truthful Endeavour’s contention that it was unreasonable for Mr Condon not to have raised in the proceedings before Rein J his claim that Colleen Lewis was a creditor of the Kenthurst Investment Trust.
2. First, the fact that Mr Condon put in issue the question whether the 9 Robson Road property was held on a resulting trust for Colleen Lewis and called evidence about the source of funds used to purchase that property and to pay the ongoing interest as required does not mean that the status of Colleen Lewis as a creditor of the Kenthurst Investment Trust was relevant, let alone “so relevant”, to the subject matter of the earlier proceeding before Rein J such as to make it unreasonable not to have raised that claim. The claims are different both as to fact and law.
3. Second, the fact that the main creditor of Colleen Lewis is a solicitor who had acted for her and may have held documents relevant to some or all of these matters, and that this creditor met with Mr Condon to discuss matters, is neither here nor there.
4. Third, the cross-claim that Mr Condon tried to file before Rein J after the proceedings were remitted by the New South Wales Court of Appeal weighs against any *Anshun* estoppel, not in favour of it. I accept that it should be inferred that this cross-claim raised the same issues as now raised in this proceeding. Louise Lewis, by her counsel, objected to the cross-claim being filed on the basis that it could and should be dealt with as part of a new proceeding. Rein J agreed. Mr Condon accepted this ruling and, thereafter, commenced this proceeding. If (a point discussed below) Louise Lewis is truly a privy of the trustee of the Kenthurst Investment Trust, then – Louise Lewis having opposed the issues being raised before Rein J on the basis that a fresh proceeding could and should be commenced – it is difficult to see how it can be said by the trustee of the Kenthurst Investment Trust (Truthful Endeavour) to be unreasonable for Mr Condon not to have raised the issues before Rein J. The point seems to be that it was too late for the issues to be raised before Rein J – but, as the transcript discloses, that is not the ground on which the objection was taken before Rein J and it was not the ground on which Rein J decided to reject the cross-claim.
5. Fourth, the judgments of Rein J (and the New South Wales Court of Appeal) are not inconsistent with this judgment. They deal with different issues.
6. Fifth, and as Mr Condon submitted, it should not be concluded that there is an *Anshun* estoppel given:

…

(ii) the circumstances attending the commencement and expedited conduct of the earlier litigation and the forensic difficulties faced by the bankruptcy trustee in fully investigating the purchase transaction in preparation of his defence to that claim;

(iii) the limited scope of the issues raised in the earlier proceeding and on appeal and a comparison of the differences between those matters and the legal and factual issues which will be engaged by a determination of Mr Condon’s claims to the money in court;

(iv) the decision by the trial judge on 19 July 2013 to refuse leave to bring any further claim in that proceeding and the statement by the Court that such claims (which would involve a dispute over the proceeds of sale of the Property) should be brought in fresh proceedings[.]

## Application for leave to re-open

1. A further issue remains to be addressed. On 29 October 2014, one week after the hearing of the matter, counsel for Truthful Endeavour sought to have the proceeding relisted. When the parties appeared before me on 3 November 2014, counsel for Truthful Endeavour sought to adduce further evidence. I made it clear that an application for leave to re-open the respondent’s case was required. Subsequently, I listed Truthful Endeavour’s application for hearing and made directions accordingly.
2. The further evidence that Truthful Endeavour seeks to adduce consists of (a) the affidavit of a solicitor, Ms Plotke, who it asserts was the trustee of two separate trusts under which she held shares in Karan Holdings (as Paris King Investments then was) in trust for Louise Lewis and her brother, Paul, respectively, (b) an ASIC company extract and articles of association for Karan Holdings, (c) a deed of settlement in respect of the trust under which Ms Plotke is said to have held shares for the benefit of Paul Lewis, (d) orders made by the Supreme Court of New South Wales in 1976 by which *inter alia* Ms Plotke was removed as trustee of the shares in Karan Holdings and Colleen Lewis appointed in her place, and (e) a transfer dated 15 November 1980 by which Karan Holdings transferred title to the 42A Bay Street property to Colleen Lewis.
3. The purpose for adducing this further evidence is to prove that the payments relied upon by Mr Condon were not beneficially owned by Colleen Lewis, but by the beneficiaries of the Paris King trust and those beneficiaries were the children of Colleen Lewis, not Colleen Lewis herself.
4. The question of whether to grant leave to re-open is a discretionary one. The principles were not in dispute:
5. The “fundamental principle” which determines whether leave should be granted is the interests of justice (*Ashby v Slipper* [2014] FCA 973 at [10] per Flick J, citing *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471 (***Nweiser***)at 478 per Clarke JA (Mahoney and Meagher JJA agreeing)).
6. Where the hearing is complete but judgment not yet delivered, the primary consideration is embarrassment or prejudice to the other side: *Smith v NSW Bar Association (No 2)* (1992) 176 CLR 256 (***Smith***)at 267.
7. In the case of new or additional evidence, it will be relevant to inquire why the evidence was not called at the hearing (*Smith* at 266; *Nweiser* at 478).
8. A deliberate decision on tactical grounds not to call the evidence ordinarily will tell decisively against the application (*Smith* at 266; *Nweiser* at 478).
9. Conversely, an inadvertent failure to call a witness or a deliberate decision based on a mistaken apprehension of the relevance and admissibility of the evidence omitted, or as to the law or facts, may well point to the granting of the application (*Nweiser* at 476 and 478).
10. If the new evidence could not possibly affect the outcome of the trial or is peripheral to the main issues, then the Court may well be justified in declining leave. Conversely, if the evidence is crucial and would, if believed, lead to a different result, the interests of justice may justify the grant of leave, particularly in the case of mistake (*Nweiser* at 476-7; see also *Halsbury’s Laws of Australia* at [195-8160] citing *Baker v Palm Bay Island Resort Pty Ltd (No 1)* [1970] QWN 25).
11. Where judgment has not yet been delivered, the standard is less stringent than that for admitting fresh evidence on appeal (*Smith* at 266-267; *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128 at 138-139 per Neaves, Burchett and Ryan JJ; *Ample Source International Limited v Bonython Metals Group Pty Ltd (No 6)* [2011] FCA 1484 at [355]).
12. The insuperable difficulty for this application is that, based on my reasoning and conclusions above, the additional evidence cannot possibly affect the outcome. Mr Condon’s case, which I have accepted, is that the Paris King trust is simply immaterial. The critical facts, as explained above, are the personal commitments into which Colleen Lewis entered (including borrowing funds, committing to payments to Appinville and the 2006 deed of settlement). For this reason alone, it is not in the interests of justice that leave to re-open be granted.
13. Other considerations support this conclusion. The pleadings squarely raised the issue of the Paris King trust. In Mr Condon’s case, I accept that forensic decisions were made about what questions should be asked of Louise Lewis. While I could require Louise Lewis to be made available for cross-examination as a condition of leave to re-open, the effect of such an order would be almost to set the initial hearing at naught – in circumstances where, as noted, the entire issue of the Paris King trust was raised on the pleadings and the main subject matter of the hearing. The explanation for not seeking to adduce the additional evidence during the hearing also remains unclear. It is said that a submission in reply for Mr Condon prompted the application. That, however, is difficult to understand as the submission in question does not relate to the essence of Mr Condon’s case (it assumes, to the contrary of Mr Condon’s case, that the Paris King trust is relevant).
14. The delay and additional cost that would be caused are also not irrelevant.
15. Accordingly, the application for leave to re-open should be refused.

## Conclusions

1. For these reasons the declaration and order Mr Condon sought as set out in the amended statement of claim should be made.

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| I certify that the preceding one hundred and sixteen (116) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot. |

Associate:

Dated: 22 January 2015