IN THE SUPREME COURT OF NEW ZEALAND

SC 92/2014
[2016] NZSC 24

BETWEEN	MARK STEPHEN HOTCHIN Appellant
AND	THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED Respondent

Hearing:	26 March 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	N S Gedye QC and J A MacGillivray for Appellant D J Cooper and J Q Wilson for Respondent
Judgment:	15 March 2016

JUDGMENT OF THE COURT

A The appeal is allowed.

B Costs of $25,000 plus usual disbursements are awarded to the appellant. We certify for second counsel.

C The costs orders in the High Court and the Court of Appeal are set aside.

REASONS

GLAZEBROOK J

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Introduction

[1] Mr Hotchin was a director of a number of finance companies which ceased trading in July 2008.[1] The Financial Markets Authority (FMA) filed proceedings against him and various associates alleging that the prospectuses and advertisements distributed by the companies contained untrue statements and that this had caused loss to investors. Similar allegations were made with regard to the directors' certificates issued to obtain extension of the prospectuses. The FMA proceedings settled after the oral hearing of the appeal in this Court.

[2] The New Zealand Guardian Trust Company (Guardian Trust) was the trustee

[1] Hanover Finance Limited (Hanover Finance), United Finance Limited (United Finance) and Hanover Capital Limited (Hanover Capital).

for the securities issued by one of the companies, Hanover Finance Ltd (Hanover Finance). Mr Hotchin claimed that Guardian Trust was liable to contribute to any compensation that he was required to pay to the FMA (for the benefit of certain investors in debt securities issued by Hanover Finance). He therefore joined Guardian Trust as a third party to the proceeding. Guardian Trust applied to strike out Mr Hotchin's third party claim against it.[2] It was successful in the High Court and the High Court decision was upheld by the Court of Appeal.[3]

[3] The issue in this appeal[4] is whether Mr Hotchin can claim contribution from Guardian Trust for any part of the settlement sum paid to the FMA. Mr Hotchin says that he is entitled to do so on two alternative bases:

(a) under s 17(1)(c) of the Law Reform Act 1936 (the 1936 NZ Act); and

(b) under the common law regime for equitable contribution.

[4] Before discussing those alternatives, I first summarise the relevant statutory provisions and provide more factual background, including a summary of the documentation relating to the role of Guardian Trust. Secondly, I analyse the nature of the claims against Mr Hotchin as a director of Hanover Finance and Mr Hotchin's pleadings relating to Guardian Trust. I then discuss the basis of the contribution claim and summarise the decision of Winkelmann J, in particular as it relates to the nature of possible liability of Guardian Trust, as well as providing a brief summary of the Court of Appeal decision.

[5] After this, I analyse the effect of the settlement with the FMA, before assessing in what circumstances contribution may be ordered under the 1936 NZ Act

2 The application was made under r 15.1 of the High Court Rules. Perpetual Trust Ltd (Perpetual), which was the trustee for the securities issued by United Finance and Hanover Capital was also an applicant. Mr Hotchin settled the proceedings with Perpetual before argument in this Court.

3 The case in the High Court and the Court of Appeal was different in that at that stage there had been no settlement with Perpetual or the FMA (both settlements occurred in early 2015): see *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 (Winkelmann J) [*Hotchin* (HC)]; and *Hotchin v The New Zealand Guardian Trust Company Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 (Harrison, White and French JJ) [*Hotchin* (CA)].

4 Leave to appeal was granted on whether the Court of Appeal was correct to uphold the striking out of Mr Hotchin's third party claims against Guardian Trust and Perpetual: *Hotchin v The New Zealand Guardian Trust Ltd* [2014] NZSC 156. As noted above the proceedings concerning Perpetual settled before the hearing of the appeal in this Court.

and whether it could be ordered in this case. I then deal with equitable contribution and some other matters that may impact on both bases for contribution.

Statutory background

Issue of securities

[6] Under s 33(1)(c) of the Securities Act 1978, no offer of securities to the public could be made without a registered prospectus.[5] No registered prospectus could be distributed if it was false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances (defined as an untrue statement).[6] It did not matter if the prospectus was misleading from inception or if it became misleading as a result of a change in circumstances after the date of the prospectus.

[7] Under ss 55A and 55G of the Securities Act, where a prospectus containing an untrue statement was distributed (a civil liability event),[7] the court could make a compensation order, on the application of either the FMA or a depositor (investor). Pecuniary penalties could also be imposed but only on the application of the FMA.[8]

[8] Sections 56 and 57 of the Securities Act dealt with the persons and experts who were liable for untrue statements in advertisements and registered prospectuses. In addition to the issuer of a registered prospectus,[9] liable persons included those who have signed the prospectus as a director.[10]

Trustee

[9] Section 33(2) of the Securities Act provided that no debt security was to be offered to the public for subscription unless the issuer of the security had appointed a

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5 The Securities Act 1978 was repealed on 1 December 2014 by s 4(1) of the Financial Markets (Repeals and Amendments) Act 2013. It was, however, the legislation in force at the time covered by these proceedings. The offer of securities to the public is currently governed by both the Securities Act 1978 and the Financial Markets Conduct Act 2013 on a transitional basis until 30 November 2016, after which it will be governed by the Financial Markets Conduct Act 2013.

6 See ss 34(1)(b) and 55(a)(ii).

7 Section 55B(a).

8 Section 55A(1)(a).

9 Section 56(1)(a).

10 See s 56(c)(i).

person as a trustee for the security, both the issuer and the trustee had signed a trust deed related to the security and a copy of the trust deed had been registered by the Registrar under the Act.[11]

[10] By virtue of s 45 of the Securities Act, every trust deed required for the purposes of the Act had to contain the matters prescribed in the regulations made under the Act.[12] Clauses 1–11 of sch 5 of the Securities Regulations 1983 (the Regulations) were deemed to be incorporated into trust deeds.[13] Clause 1 of sch 5 of the Regulations provided that:

> **1 Duties of trustee**
>
> (1) The trustee shall exercise reasonable diligence to ascertain whether or not any breach of the terms of the deed or of the terms of the offer of the debt securities has occurred and, except where it is satisfied that the breach will not materially prejudice the security (if any) of the debt securities or the interests of the holders thereof, shall do all such things as it is empowered to do to cause any breach of those terms to be remedied.
>
> (2) The trustee shall exercise reasonable diligence to ascertain whether or not the assets of the borrowing group that are, or may be available, whether by way of security or otherwise, are sufficient or are likely to be sufficient to discharge the amounts of the debt securities as they become due.

[11] There were also information seeking powers given to trustees. Under cl 2(3) of sch 5 of the Regulations the issuer was required, if requested to do so in writing, to make available for inspection the whole of the accounting and other records of the issuer.

[12] Further, various information had to be provided to the trustee. Under cl 4(1) of sch 5, the issuer was obliged to provide to the trustee within 30 days of the end of

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11 As the Privy Council explained in *Christchurch Pavilion Partnership No 1 v Deloitte & Touche Tohmatsu Trustee Co Ltd* [2002] UKPC 4, [2002] 3 NZLR 289 at [7], the Securities Act represented the response to the collapse of a group of New Zealand companies known as the Securitibank Group. In introducing the Bill, the then Minister of Justice, the Hon David Thomson, said that "[t]he Bill ... will require commercial entities offering securities to ... appoint an independent person to look after the interests of investors ...": (14 December 1977) 416 NZPD 5339.

12 Part 4 of the Financial Markets Conduct Act 2013 now requires a licensed supervisor to be appointed as a trustee under the trust deed for a debt security and sets out the powers and duties of such supervisors.

13 By virtue of reg 24 of the Regulations.

each month the monthly management report prepared for the directors of the issuer. Pursuant to cl 4(2) of sch 5, it was also obliged to provide a monthly report on the liquidity of the issuer, the asset quality, reinvestment rates and any breaches by members of the borrowing group of financial covenants in financing arrangements with third parties. Finally, every three months the issuer had to provide a certificate signed by at least two directors[14] on behalf of the board certifying that the prospectus remained up to date and was not false and misleading in a material particular and that the issuer had complied with the provisions of the trust deed.[15]

[13] Schedule 2 of the Regulations stipulated the matters required in a registered prospectus for debt securities. Clause 13 of sch 2 required brief particulars of the provisions of the trust deed to be contained in any prospectus. Also required was a statement by the trustee that the offer of securities complied with any relevant provisions of the trust deed and that the trustee did not guarantee the repayment of securities or the payment of interest.

[14] Clause 10 of sch 5 of the Regulations, provided for the right of the trustee (under certain circumstances)[16] to appoint an independent auditor to audit the financial statements of the borrowing group. Under cl 11, the trustee had the right to engage an expert (such as an auditor, investigating accountant, valuer, or actuary) to assist the trustee to determine the true financial position of the issuer if the trustee considered, on reasonable grounds, that it required the assistance of the expert.

Factual background

[15] On 7 December 2007 Hanover Finance registered a prospectus containing an offer of secured debenture stock under a trust deed between Hanover Finance and Guardian Trust dated 18 July 1985.[17] Mr Hotchin was one of the signatories of the prospectus. The securities offered were term investments of varying lengths, with no option for repayment before the term had expired. There does not appear to have been a secondary market for the stock.

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14 Or, if only one director, then by that director.

15 This requirement was contained in cl 4(3) and (4) of sch 5 of the Regulations.

16 Stipulated in cl 10(1) of sch 5 of the Regulations.

17 This had been amended a number of times and there were also three supplemental trust deeds two dated 31 March 2004 and one dated 17 April 2008.

[16] On 31 March 2008, Hanover Finance registered a directors' certificate extending the period in which the securities could be allotted. This certificate was deemed, pursuant to s 55(c) of the Securities Act, to be included in and therefore form part of the Hanover Finance prospectus.

[17] The prospectus was continuously distributed between 7 December 2007 and 23 July 2008, when Hanover Finance suspended the offer of securities contained in the prospectus. Some 16,500 investors[18] have not been repaid the full amount of their investments, the assets of Hanover Finance not being sufficient to meet its obligations.

Documentation

The trust deed

[18] Under the trust deed, Hanover Finance covenanted to provide the trustee with its financial statements (including half-yearly accounts and monthly management accounts), directors' reporting certificates (which required extensive information such as matters that may have materially and adversely affected the interests of investors, an assurance that all interest and principal due and payable on the deposits had been paid or otherwise satisfied in accordance with the terms of issue, and a description of any material trading or capital loss sustained which had caused a material loss to the charging group), auditors reports, and notices if financial limits stipulated in the trust deed were exceeded.

[19] In the period that is the subject of the FMA's claim against the directors, four certificates under cl 4(3) and (4) of sch 5 of the Regulations were provided to Guardian Trust.

[20] Hanover Finance provided numerous other covenants to Guardian Trust in the trust deed. These included covenants to: conduct its business in an efficient, prudent and businesslike manner; maintain the shareholders' funds of the charging group above a particular level; not purchase any assets from a related company

[18] This figure is taken from Mr Hotchin's submissions and is the figure for the whole of the Hanover group. The subscriber figure for Hanover Finance is 4,691; see Elias CJ's judgment at [112].

otherwise than for fair and reasonable consideration; comply with the terms of each deposit; comply with statutes and laws (including the Companies Act 1993 and Securities Act); and not declare dividends without the consent of the trustee. Hanover Finance also covenanted that it would not register a prospectus until the trustee approved the form and the content of that prospectus.

[21] As to enforcement powers, sch B of the trust deed gave the Trustee wide enforcement powers (such as the ability to call up and demand immediate payment of secured liabilities) in the event of default. Schedule B provides that "an event of default" shall be deemed to have occurred on the happening of any one of fourteen stipulated events. One of the events, stipulated in cl B.01(c), is "if default is made by the Company or any Charging Subsidiary in the performance or observance of any obligation under this Deed or any undertaking given to the Trustee ... and such default [continues] for more than fourteen (14) days after receipt by the Company of a notice from the Trustee specifying the default and requiring the same to be remedied".[19]

Summary of trust deed in prospectus

[22] In compliance with the Regulations,[20] the Hanover Finance prospectus contained a summary of the particulars of the trust deed. The prospectus said:

> The Trustee represents the interests of all current and future holders of Secured Deposits invested with Hanover Finance. The Trustee is under a duty to exercise reasonable diligence to:
>
> - ascertain whether or not the Company or the Charging Subsidiary has committed any breach of the Trust Deed or any of the conditions of the issue of the Secured Deposits and, except where it is satisfied that the breach will not materially prejudice the security of the Secured Deposits or the interests of the holders of the Secured Deposits, to do all such things as it is empowered to do to cause any breach to be remedied; and

[19] Mr Hotchin pleads, in his draft statement of claim against Guardian Trust, that this could include breaches of the covenants given by Hanover Finance to Guardian Trust in the trust deed to carry on its business in an efficient and prudent and businesslike manner and to comply with the requirements of the Securities Act.

[20] See above at [13].

- ascertain whether or not the assets of the Charging Group that are or may be available, whether by way of security or otherwise, are sufficient or likely to be sufficient to discharge the amounts of the Secured Deposits as they become due.

[23] There is then a summary of the terms of the trust deed, including the reporting requirements to the trustee and the events of default and enforcement provisions. There is also a statement by the Guardian Trust, pursuant to cl 13(3) of sch 2 of the Regulations, dated 7 December 2007 stating that the offer complies with the provisions of the trust deed. The statement makes it clear that it only relates to the trust deed. It also makes it clear that the Guardian Trust relies on the information supplied to it by Hanover Finance pursuant to the trust deed and does not carry out an independent check of the statements or the figures supplied to it in that information and that the Guardian Trust does not guarantee repayment of the securities or the payment of any interest.

FMA's claim against the directors

[24] The first amended statement of claim filed by the FMA on 29 August 2014 alleged that the directors distributed a prospectus containing untrue statements, including making false representations as to Hanover Finance's liquidity position.[21] In particular, it alleged that the prospectus omitted to disclose the deterioration of Hanover Finance's liquidity between 30 June and 7 December 2007, including declining secured deposits, reinvestment rate and cash holdings. It was also not mentioned that Hanover Finance had almost completely stopped new lending to non-related parties from 3 September 2007 in order to assist immediate liquidity.

[25] It was alleged that there was a further decline in Hanover Finance's liquidity between 30 June 2007 and 31 March 2008. For example, the increase in overdue and impaired loans as a percentage of all loans had reached 40 per cent as at March 2008. There had also been a substantial fall in cash holdings. Between 1 April 2008 and 23 July 2008, it was alleged that there was yet further declining

21 This was filed after the release of the Court of Appeal judgment and quantified the claim for the first time.

liquidity, including a significant increase in impaired loans and loans overdue by more than 60 days.[22]

[26] The statement of claim also alleged that there had been untrue statements on other matters, such as the principal source of funds, the existence of a seven per cent liquidity buffer, correlation between maturing loans and deposits, related party transactions and the management of risk (failure to forecast in the manner set out in the prospectus), as well as statements that would have misled investors into thinking there were no forecasted deficit positions (which was untrue).

[27] It alleged that, as a result of the distribution of a prospectus with untrue statements, a civil liability event occurred in the period 7 December 2007 to 23 July 2008 ("the relevant period"). It said that not only did the prospectus contain the specific untruths summarised above (including as to the liquidity position) but overall the prospectus conveyed a misleading impression as to Hanover Finance's financial position and failed to refer or give proper emphasis to matters material to the risks of subscribing for Hanover Finance's secured deposits.

[28] It was pleaded that the moratorium and the suspension of the offer of securities on 23 July 2008 meant that the Hanover Finance subscribers would not be repaid their secured deposits when they fell due. This was alleged to have caused approximately $93.6m of losses (not including interest). Compensation of that sum was sought.[23] As an alternative, compensation of $56.16m was claimed. On 18 December 2009 all Hanover Finance secured investors had received (at the instigation of one or more of the defendants) shares in Allied Farmers Ltd (Allied). This gave investors their first opportunity to exit by selling their new shares on the NZX. The $56.16m figure was calculated on the basis of the 6 cents in the dollar

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22 From 15 per cent at December 2007 to 39 per cent as at May 2008. Over that whole period Hanover Finance had also provided liquidity support to United Finance, another company in the Hanover Group.

23 As noted above at n 21, at the time of the High Court and Court of Appeal hearing the claim was not quantified.

already paid to each Hanover Finance investor and the average share price of Allied.[24] The FMA also sought pecuniary penalties of $500,000.

[29] In summary, the FMA's claim was that Hanover Finance's prospectus was continually distributed over the whole of the relevant period, despite the progressive decline in the company's financial position, including the liquidity and impaired debt issues outlined above. This meant that the prospectus had become progressively more untrue as time went on because of the worsening position of Hanover Finance over that period.

[30] Both the $93.6m and the $56.16m of damages claimed assume that the whole of the loss of the investors is payable as compensation. It was not suggested in the statement of claim that one possible measure of loss might be the difference between the price paid and the value of the investment as at the date of subscription. This means that it has never been asserted by the FMA that the loss may be limited to the $60 in William Young J's simplified example.[25]

[31] The FMA's statement of claim was framed first on the basis of reliance by the 4,691 subscribers who subscribed for the secured deposits during the relevant period.[26] It was also pleaded that, if the prospectus had not been issued, there would have been no subscription for the securities during the relevant period.

[32] It seems to me, therefore, that the claim for the whole loss (assuming the claim is based on reliance) rested on the issuing, and continued distribution, of a prospectus with untrue statements. The wrongful distribution of the prospectus meant that new and rollover investors were allowed to invest. As the prospectus continued to be distributed, despite the worsening position of the company, there was a continuing misrepresentation as to the truth of the prospectus relied on by investors

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24 The average share price of Allied for the first six months of NZX trading was less than 10 cents per share, which represented approximately 34 cents in value for every $1 of Hanover Finance investment.

25 As William Young J indicates at [170], the "$60" issue was discussed but not determined in the High Court and Court of Appeal.

26 Reliance was either direct or through financial intermediaries or on market information generally which in turn was reliant on the overall impression given by the prospectus.

throughout the relevant period.[27] In any event, there was no market for the securities or early redemption option which meant that the investors were locked into their investments.

[33] Alternatively, the claim for the whole loss was on a "but for" basis, based on the pleading that, if the prospectus had not been issued, there would have been no subscription for the securities at all.[28] The claim would be on the following lines. A prospectus with untrue statements cannot be distributed. Therefore in this case the prospectus should not have been distributed.[29] If it had not been, the investors could not have invested as a prospectus is needed before debt securities are issued to the public. So all losses flowing from the investments are claimable as compensation, without needing to prove actual reliance on the contents of the prospectus, or a direct relationship between the untrue statements and the value of the investments, or indeed, whether or not there was any third party "causation breaking" event.

Mr Hotchin's draft amended statement of claim

[34] In Mr Hotchin's draft amended statement of claim[30] it is alleged that, during the whole of the relevant period, Guardian Trust owed a continuous duty of care to the investors of Hanover Finance, including both existing and prospective investors:

(a) to exercise reasonable diligence, care and skill to ascertain, among other things, whether the assets of Hanover Finance were sufficient to discharge the amounts owing under the debt securities and whether there had been breach of the terms of the trust deed or of the offer of securities; and

(b) to take timely and appropriate action in relation to any matters of concern (the powers in sch B of the Trust Deed are referred to).[31]

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27 On this basis it would not have mattered if there had been a secondary market as the fact the prospectus had remained in circulation could well have induced investors to keep hold of the securities, despite the fact that the prospectus was in fact becoming more untrue as the company's financial situation declined.

28 I disagree with O'Regan J's statement, at [261], that the FMA claim was based on reliance only.

29 Nor should the extension certificate referred to at [16] have been provided.

30 Mr Hotchin's statement of claim was amended to accord with Winkelmann J's judgment.

[35] The duty is said to be based on the trustee's statutory purpose, the statutory scheme and the fact that Guardian Trust had approved the section in the prospectus where the duties were set out and which contained representations to prospective investors about the role and duties of the trustee. It is pleaded that it was reasonably foreseeable that, if Guardian Trust were to breach one of more of its duties, it would cause loss to investors. It is pleaded that, if the FMA succeeds against Mr Hotchin, this necessarily means that Guardian Trust will have failed in its duties and will have contributed to the losses suffered by the investors, namely loss of value of their deposits.

[36] Finally, in the draft amended statement of claim, it is said that Mr Hotchin could have been sued for negligent misstatement or deceit in relation to the allegations that are made on the basis that directors of a company owe a duty of care in tort to take care to make accurate statements and an ongoing duty of care to correct any statements made in a prospectus (including by withdrawing it) if they later become inaccurate.

[37] Mr Hotchin's prior amended statement of claim (dated 28 February 2013) alleged very similar duties were breached but there was an additional and separate one relating to an alleged duty for Guardian Trust to approve the form and content of the Hanover Finance prospectus as well as a duty to ascertain "whether the statements made in the [Hanover Finance] prospectus were true". This claim has been removed in the current draft statement of claim in accordance with Winkelmann J's strike out decision.[32]

The contribution claim under the 1936 NZ Act

[38] Section 17(1)(c) of the 1936 NZ Act provides:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)–

[31] It is also claimed that there was a duty to monitor the financial performance of Hanover Finance, to consider the reports provided and to ascertain whether or not the Hanover Finance business was being conducted in a prudent and businesslike manner.

[32] See the discussion of her judgment below at [43].

…

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[39] To come within s 17:

(a) Mr Hotchin must be liable to the FMA/investors in tort;[33]

(b) that liability must be in respect of damage suffered as a result of his tort;

(c) Guardian Trust must be liable to the FMA/investors in tort; and

(d) Guardian Trust's liability must be in respect of the same damage as that caused by Mr Hotchin.

[40] The first three requirements were accepted for the purposes of the strike out application, which meant that the case stood or fell on the last requirement, namely whether Guardian Trust's liability to the FMA/investors is in respect of the "same damage" as Mr Hotchin's liability.

[41] The issue of whether it would be just and equitable to award contribution or whether Guardian Trust should be exempted from liability to contribute also arises. I make some comments on these issues at the end of the judgment.[34]

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33 For the purpose of the appeal we have been asked to assume that the claims against the directors by the FMA under s 55G of the Securities Act 1978 are the equivalent of claims in negligent misstatement by the investors.

34 See below at [98]–[107].

[42] The High Court did deal with the exception in s 17(1)(c) for the situation where the person from whom contribution is sought is entitled to be indemnified by the parties seeking contribution. Winkelmann J held that it was not possible to say that Mr Hotchin was liable to indemnify Guardian Trust with the certainty required to strike out his contribution claim.[35] That issue is not pursued before us and will be a matter for trial.

Judgments below

Winkelmann J's judgment

[43] In the High Court, Winkelmann J concluded that the damage resulting from the alleged breaches of duty by the directors and that resulting from the alleged breach of duty by Guardian Trust were not the same damage.[36] She said that Guardian Trust could not be liable for the loss independently caused by the directors, assuming the FMA's claim against the directors succeeds. That conclusion related both to equitable contribution and the 1936 NZ Act.[37]

[44] Winkelmann J's findings with regard to the possible basis of liability for the Guardian Trust are relevant to the issues in the appeal It is thus necessary to analyse her judgment in this regard in some detail.

[45] Winkelmann J noted that trustees owe duties to existing investors that are enforceable pursuant to the trust deed. She held that trustees can also be liable to investors in tort.[38] Although it is not explicitly stated, this presumably means, for example, that the Guardian Trust could be concurrently liable in tort if it had negligently failed to ascertain that the assets of the Charging Group (including Hanover Finance) were insufficient to discharge the secured deposits as they became due,[39] and as a result, had negligently failed to exercise such enforcement powers as were available to it.[40] As a shorthand I agree that it is appropriate to say that there

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35 *Hotchin* (HC), above n 3 at [74]–[85].
36 At [69].
37 At [69] and [71].
38 See *Hotchin* (HC), above n 3, at [36] and [37] relying on *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA). There was no appeal against that finding.
39 See above at [10].
40 See *Hotchin* (HC), above n 3, at [37] and [41].

could be liability to investors if the Guardian Trust had failed to pull the plug[41] at the appropriate time.

[46] Mr Hotchin had argued, however, not just for a duty to existing investors. He argued that the Guardian Trust's duty extended to prospective and rollover investors. This was on the basis that the summary of the main points of the trust deed included in the prospectus did not state that the duties were owed only to existing investors. To the contrary, the trustee was said to represent all current and future holders of secured deposits. It was argued that this, together with the recitation of duties, could foreseeably cause prospective investors to rely on the trustee's representation that it had been monitoring the affairs of the company to ensure there was no breach of the trust deed and that sufficient assets were available to discharge the amounts due under the deposits. This may well have persuaded prospective or rollover investors to invest or to reinvest. Winkelmann J appears to have accepted that this could create sufficient proximity for the imposition of a duty.[42]

[47] Winkelmann J considered that extending the trustees' duty to prospective and rollover investors would be to recognise a duty not previously imposed by the courts.[43] She concluded, however, that, at least in this case, there is a tenable argument that such a duty exists.[44] Winkelmann J said:[45]

> It can be argued that the quoted passage from the UFL [United Finance][46] and HFL [Hanover Finance] prospectuses contained a representation that the trustee had ascertained that the assets available to the company were sufficient to allow repayment of the "secured deposits", to which the offer contained in the prospectuses related. This impression could have been reinforced by the statement that the trustee represented the interests not just of current depositors, but also those of future depositors. It is at least arguable that these are matters a prospective investor could have reasonably taken into account when deciding whether to invest, and as a consequence, that there is a level of proximity between prospective depositors and the trustee.

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41 The term "pulled the plug" is used by Winkelmann J at [9] and [69] of her judgment. The term is also used by O'Regan J at [250], [325] and [327] of his judgment.

42 See *Hotchin* (HC), above n 3, at [37].

43 At [38].

44 At [41].

45 At [45].

46 As stated above at n 22, United Finance is another company in the Hanover Group.

[48] Mr Hotchin had argued, in relation to rollover investors, that there is an even stronger case for proximity, because rollover investors make the decision to reinvest in the knowledge that the trustee, under the duties that it has imposed upon it by the trust deed and the regulatory regime, is continuing to allow the company to trade and accept deposits. Winkelmann J said that there was little of significance, at least for these purposes, to distinguish new prospective investors from rollover investors but that was not an issue she had to decide on the strike out application.[47]

[49] Winkelmann J outlined a number of policy factors that could operate both for and against a duty to prospective and rollover investors being upheld but did not consider that those factors pointing against the imposition of a duty were so compelling that it was possible to hold Mr Hotchin's argument untenable.[48] There was no appeal against that finding.

[50] Mr Hotchin also argued for a duty to monitor the prospectus for the truthfulness of its contents.[49] He argued that this arose from cl 1 of sch 5 to the Regulations which provide that trustees must exercise reasonable care to ascertain whether a breach of the terms of offer of the debt securities has taken place. He argued that this should be given a fair, large and liberal meaning to encompass a duty to monitor whether the contents of the statements in those documents were or remained true. He also attached significance to the statement in the trust deed that trustee approval must be obtained before the registration of the prospectus.

[51] Winkelmann J held that there was no tenable argument that the trustees owed prospective or rollover investors a duty of care in respect of the accuracy of the statements contained within the prospectuses.[50] This was on the basis of both of a lack of proximity and policy factors that weighed against imposing such a duty of care on Guardian Trust.[51] There was no appeal against that finding.

47 See *Hotchin* (HC), above n 3, at [46].
48 At [47] and [48].
49 See above at [37] where we note that this was set out separately in the original statement of claim, but removed from the amended statement of claim.
50 See *Hotchin* (HC), above n 3, at [51].
51 See [52]–[58].

[52] What is clear from Winkelmann J's judgment is the recognition that prospective investors could have been induced to enter into the investments as a result of a representation in the prospectus that the trustee had monitored compliance with the trust deed, including ensuring that the assets of Hanover Finance sufficed to meet liabilities. This laid the foundation for the Guardian Trust being potentially liable for the whole of the loss of prospective and rollover investors on the basis that they would not have invested at all, had the Guardian Trust performed its monitoring obligations properly and "pulled the plug" earlier as it should have done. Under this scenario Guardian Trust would be liable for the whole $100 in William Young J's example and not just the $40.[52]

[53] This duty to prospective and rollover[53] investors recognised as arguable by Winkelmann J must be a separate duty from that owed to existing investors. If it only applied after prospective investors became investors, there would be no need for the separate head of duty. I therefore disagree with William Young J's comments that it is "not entirely clear … that Winkelmann J intended to leave such a claim on the table".[54]

[54] I also disagree that this head of liability somehow contradicts Winkelmann J's judgment. This is because the duty to rollover and prospective investors was based (as was the duty to actual investors) on not pulling the plug earlier. For prospective and rollover investors the duty to pull the plug arose before the prospective depositor invested (and the rollover depositor re-invested).[55] For existing investors, the duty was to pull the plug before the situation worsened further. All the summary given by Winkelmann J at [69] says is that the breach by the directors was different (here, it was the untrue statements) and that therefore contribution was not available because there was not the necessary added element of coordinate or common liability.

52 See William Young J's judgment at [169].
53 This term was defined by Winkelmann J at n 18 where she said they are "investors whose deposits are due for repayment, but decide to re-invest": see *Hotchin* (HC), above n 3.
54 See William Young J's judgment at [176].
55 This is clear from the fact that Winkelmann J said "[i]t is at least arguable that these are matters a prospective investor could have reasonably taken into account when deciding whether to invest": *Hotchin* (HC), above n 3, at [45].

The Court of Appeal judgment

[55] The Court of Appeal undertook a full review of the relevant authorities and its conclusion on the 1936 NZ Act was as follows:[56]

> [66] Mr Hotchin owed the investors a duty to make accurate statements in prospectuses and certificates. The damage suffered by the Hanover investors as a result of Mr Hotchin's alleged breach of duty was the loss of their deposits made in reliance on those statements or the excessive prices paid. The trustees' duties were of a very different nature, to protect investors against the harm arising from breaches of the companies' obligations under the trust deeds. The trustees cannot be liable in respect of the damage suffered by the investors where they did not owe a duty to protect them against the harm of inaccuracies in the directors' statements. They did not assume substantially the same obligations towards the investors as those performed by Mr Hotchin. The obligations they each assumed were not of the same nature or extent.
>
> [67] Mr Hotchin and the trustees do not share a co-ordinate liability, even in a loose sense, to pay compensation for inflicting the same harm. The investors could not recover from the trustees any or all of the loss caused by investing in reliance on a misleading statement. Any liability on the trustees' part would be directly and independently for the different damage caused by failing to intervene earlier. While in its most general sense the damage in both cases is loss of all or part of an investment, the trustees could not be independently liable for damage which they did not cause.
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> [68] The liabilities of the directors and trustees for breaching their respective duties would not be of the same nature and to the same extent. As noted, each was performing a different obligation. It is not enough for Mr Hotchin to identify at a level of generalised abstraction the existence of breaches of separate duties owed to the same group of investors and arising out of the operations of the same group of companies. He must identify something more specific by way of a common or shared obligation giving rise to common liabilities where the nature of the harm resulting is the same or indivisible. He has failed to do so here.

[56] For similar reasons, the Court was satisfied that the claim for equitable contribution must fail. The Court considered that Winkelmann J had applied the correct test in finding that Mr Hotchin and the trustees (Perpetual and Guardian Trust) did not share a coordinate liability to the investors. Something more than the fact that any loss recovered from one party would tend to reduce the loss recoverable from another was required.[57] A common interest or burden was required.[58]

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[56] *Hotchin* (CA), above n 3 at [66]–[68] (citations omitted). The Court of Appeal's references to "trustees" refer to Guardian Trust and Perpetual.

[57] At [69].

[58] At [70].

The effect of the settlement

[57] As noted above, after the hearing of the present appeal, Mr Hotchin entered into a settlement with the FMA of all the FMA's claims relating to the three Hanover companies. He and other defendants in the FMA claims paid $18 million but did so without admission of liability. We have not been told how much of that sum related to investors in Hanover Finance. Nor have we been told how much was paid by Mr Hotchin. When we became aware of the settlement we sought submissions on its impact on the present appeal. Mr Hotchin maintained that it did not affect the appeal.

[58] Rule 15.25 of the High Court Rules provides for continuation of third party proceedings where a plaintiff and defendant have settled the principal proceeding. As pointed out by counsel for Mr Hotchin, Mr Gedye QC, there are a number of High Court authorities for the proposition that a settlement of a claim by a plaintiff and defendant does not inhibit the continuation of the defendant's claim for contribution against a third party.[59] This is because the word "liable" where it first appears in s 17(1)(c) of the 1936 NZ Act means "responsible in law", rather than "found to be liable by a Court".[60]

[59] In *Baylis v Waugh*, McGregor J made it clear that a defendant who wishes to continue a third party action after settling with the plaintiff will, in the trial between the defendant and the third party, have to prove that the defendant was a tortfeasor and was liable to the plaintiff at the time he or she paid the settlement amount.[61] This approach is consistent with cases in other jurisdictions. For example, in *Stott v West Yorkshire Road Car Co Ltd*,[62] the Court of Appeal of England and Wales held that defendants can settle a claim and then make a claim for contribution but must prove that, had the claim been defended, they would have been held responsible in law and liable to pay all or some of the damage.[63]

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59 *Baylis v Waugh* [1962] NZLR 44 (SC); *Foodstuffs Properties (Wellington) Ltd v Institute of Geological & Nuclear Sciences Ltd* HC Wellington CP512/93, 27 May 1999 (Master Thompson) and *Crichton v Harteveld* HC Christchurch CP178/99, 15 June 2001 (Panckhurst J).

60 *Baylis v Waugh*, above n 59, at 49.

61 At 49.

62 *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651 (CA).

63 At 657.

[60] The Privy Council, in an appeal from the Bahamas, *FFSB Ltd (Formerly known as Fortis Fund Services (Bahamas) Ltd) v Seward & Kissel LLP*[64] (*FFSB Ltd*), confirmed that contribution was not barred by a settlement. It expressed no definitive view on the burden of proof issue but it did indicate reservations, saying that a settlement may raise "at least an evidential burden which requires the other tortfeasor to adduce some evidence to show that the party who paid was mistaken or in bad faith and was actually not liable at all".[65]

[61] In my view, where the matter has settled, there is a burden on the party seeking contribution to prove responsibility in law. Settlements occur for a variety of reasons, including the cost and burden of the litigation process. Litigants can therefore settle in circumstances where they would have succeeded had they gone to trial. This means that, if Mr Hotchin's contribution claim against Guardian Trust under s 17(1)(c) of the 1936 NZ Act proceeded to trial, he would need to prove that he would have been responsible in law for the amount he paid to the FMA under the settlement for negligent misstatement (or so much of it as relates to investors in Hanover Finance). In other words he would need to prove that he was liable as a tortfeasor.

[62] Counsel for Guardian Trust, Mr Cooper, provided us with a copy of the agreement recording Mr Hotchin's (and his fellow defendants') settlement with the FMA. Two aspects of this are significant. The first is recital M, which says:

> In the Proceeding the Defendants [including Mr Hotchin and other directors of Hanover Finance] say that the offer documents were accurate with respect to the financial position of the companies, particularly in respect of liquidity; disclosure about forecasting; disclosure about funding, funding arrangements and the funding relationships between the Hanover Finance Companies; and disclosure about related party transactions. The Defendants further say that they had a reasonable basis for believing in the accuracy of the offer documents and acted reasonably in approving those documents. Each of the Defendants considers it likely that a Court would accept that he did not breach the Act.

[63] The second is cl 13, which says:

64 *FFSB Ltd (formerly known as Fortis Fund Services (Bahamas) Ltd) v Seward & Kissel LLP* [2007] UKPC 16, [2007] 5 LRC 224 at [35].

65 At [36].

> While the FMA remains of the view that the Defendants have likely breached the disclosure obligations under the Act, as alleged in the Proceeding, none of the Defendants admits any liability as claimed by the FMA in the Proceeding, or otherwise, and each of the Defendants disputes that a civil liability event within the meaning of section 55B of the Act has at any time occurred in respect of any of the Hanover Finance Companies. …

[64] Mr Cooper also provided us with a copy of a press statement made after the settlement, in which the denial of liability was repeated. In that statement, Mr Hotchin (and his fellow defendants) said the FMA would not have succeeded in its claim against them at trial. They said:[66]

> We, and the experts we had retained to report on Hanover affairs, thought it was clear that there had been no breach of the Securities Act, and that any fair and expert assessment, free of any political considerations, would lead the FMA to close its file.
>
> …
>
> We decided to settle because of the cost and burden of litigation lasting for many more years, and because our insurers and former insurance broker made it possible to provide a payment which will go to the investors.

[65] Mr Cooper argued that the effect of the settlement was to render Mr Hotchin's claim against the Guardian Trust untenable, because the claim is conditional on the FMA's claim against Mr Hotchin succeeding and that has become an impossibility.

[66] Mr Gedye accepted Mr Hotchin's pleadings would need to be amended to reflect the settlement if the case were to proceed. He would need to plead that his payment to the FMA under the settlement resulted from his being "responsible in law" for the loss to the Hanover Finance investors as the FMA alleged. Mr Gedye said Mr Hotchin was aware of this.

[67] Mr Gedye said it would be for the High Court to decide whether Mr Hotchin's denials of liability affected his ability to prove that he was, in fact, liable to the Hanover Finance investors, if his contribution claim is allowed to

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66 Hamish Fletcher "FMA wouldn't have won at trial: Hanover directors" *The New Zealand Herald* (online ed, Auckland, 6 July 2015).

proceed to trial.[67] He said this Court should not attempt to address this. He also said it was important that the present appeal was determined because it affected Mr Hotchin's liability for costs in the High Court and Court of Appeal.

[68] It is hard to reconcile Mr Hotchin's pursuit of the claim against Guardian Trust, which involves a requirement that Mr Hotchin prove that he was a tortfeasor, with the statements in the settlement agreement and press statement to the contrary. This dissonance between those statements and the underlying basis of Mr Hotchin's claim against Guardian Trust creates an air of artificiality about the continuation of the present appeal. I return to this issue later.[68]

[69] In the context of a strike out application, it is, however, necessary to proceed on the basis that Mr Hotchin will amend his pleading and that he will be able to prove liability to the FMA.[69]

Test for contribution under the 1936 NZ Act

[70] I agree with William Young J's analysis of the approach of the courts below[70] and of O'Regan J's judgment in this Court and, in large part, with his reasons for disagreeing with it.[71] As will be apparent, however, I do not consider that the potential claim against Guardian Trust is limited to the $40 in his example. The claim against Guardian Trust with regard to prospective and rollover investors would likely be the whole $100. Nor was it suggested by the FMA that the claim against Mr Hotchin could be limited to the $60.[72] The whole of the loss suffered by the investors was claimed.

[71] I also agree with William Young J's exposition of the law at [182]–[228] of his judgment. In my view the cases to date on the circumstances in which

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67 If the approach outlined in the judgment of William Young J were adopted, it seems that Mr Hotchin would also need to prove that the amount paid by Mr Hotchin in settlement of the FMA's claim involved payment of part of the overlapping amount ($40) in the example set out at [169] below.

68 See below at [106].

69 I agree with O'Regan J, at [239], that the artificiality becomes even greater if the FMA's allegations can be categorised as deceit (which I too doubt).

70 See below at [172].

71 At [178]–[181].

72 While this was raised in the Courts below, it was not determined: see above at [30] and n 25.

contribution can be recovered have been confusing, drawing fine distinctions that are hard to understand, let alone justify. The approach of William Young J is simple and principled and therefore preferable to the current position.[73] The main concern that I have with the test in the courts below and in the judgment of O'Regan J is that their approach would necessarily deny contribution from the directors in the situation where investors might choose (as they would be fully entitled to do) to bring an action against the trustee rather than one against the directors. On any view of the matter the directors who released (and failed to withdraw) a prospectus containing untrue statements must be the primary wrongdoers and it would be most unjust if the trustee (the secondary wrongdoers) could not claim contribution from the directors, should the investors be successful in such an action against the trustee.[74]

[72] I acknowledge that William Young J's approach may mean that there will be much more scope for claims of contribution[75] and not all cases will be able to be dealt with on the "just and equitable" ground at a strike out stage – see my discussion below.[76] This could have the effect of drawing in more third party claimants to lengthy trials and perhaps lengthening trials for plaintiffs. It may be that some of these cases could be dealt with by requiring separate trials (with contribution issues following the main hearing) but that will not always be the case. For cases where that cannot occur, it may just be the price necessary to secure conceptual simplicity and a just result.

[73] In my view, the words of the statute require only the same damage. These words should not be given a strained or narrow meaning but be interpreted in line with the policy of the 1936 NZ Act, which was a remedial statute intended to provide a broad basis for contribution. Admittedly, this was passed before there were extensive economic torts, including negligent misstatement. But that is no reason not to interpret the words in line with the original policy.

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73 I accept that there remains an element of "line drawing" even using William Young J's test.

74 Of course in this case there may be independent proceedings that could be brought by the trustees against Mr Hotchin – for example a claim for indemnity as discussed by Winkelmann J in *Hotchin* (HC), above n 3, at [74]–[75] or a claim for breach of any of the warranties set out in the trust deed.

75 He does, however, indicate a number of situations where it would not be available, including in situations like that in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 [*Royal Brompton*]: see below at [208]–[210].

76 See below at [99]–[107].

[74] As William Young J sets out in his judgment,[77] this policy can be traced to the Law Revision Committee Report which led to the Law Reform (Married Women and Tortfeasors) Act 1935 (1935 UK Act).[78] The language of s 6 of the 1935 UK Act was replicated in s 17 of the 1936 NZ Act. As William Young J highlights, the UK Law Revision Committee, when discussing the right of contribution, said that "such a right might with advantage also be conferred where the tort is not joint (that is, the same act committed by several persons) but where the same damage is caused to the plaintiff by the separate wrongful acts of several persons".[79] To my mind, the Committee's recommendations (and recommended legislation) which formed the basis of the 1935 UK Act strongly weigh against any requirement for commonality of liability and against any narrowness of approach.

[75] Turning now to William Young J's valiant attempt to make reasonable sense of the case law,[80] I am in general agreement with his analysis. I do, however, have reservations as to whether there is a category of claims where contribution cannot be ordered because there are what can be seen as primary and secondary wrongdoers.[81] I would rather in such cases use the alternative approach postulated by him whereby a claim for contribution by a primary wrongdoer would in appropriate cases be denied on the basis that an order for contribution is not just and equitable.[82]

[76] There will be a category of cases he includes in his primary/secondary wrongdoers category, however, where contribution will not be available. I would put those cases into the category set out at [225]–[228] of William Young J's judgment and change the heading to "*Damage not the same: failure to mitigate".* I would not limit the cases to where B is liable for personal injury or physical damage and C for economic loss but would include cases where B also is responsible for economic loss.[83] Taking the failure to insure cases as an example, the failure to insure by C would merely be a failure to mitigate the loss already caused by B. The liability of B

77 See his judgment at [163]–[165].
78 Law Reform (Married Women and Tortfeasors) Act 1935 (UK) 25 & 26 Geo V c 30.
79 At [163].
80 At [190]–[228]. I also agree with the analysis of *Royal Brompton*, above n 75, at [208]–[210] of William Young J's judgment.
81 See William Young J's judgment at [225]–[228], and above at [71].
82 See his comments at the end of [227].
83 Indeed, I would not see the distinction between physical loss and economic loss as the relevant distinguishing factor – it is that the losses are independent of one another in the example given.

would remain, however, whether there was insurance or not.[84] In that example the damage caused by B and the damage caused by C can be seen as independent of one another.

Application of the test to this case

[77] The claim against the directors (in terms of the FMA statement of claim) is that they issued the prospectus with misleading and untrue statements as to the financial position of the company (including statements as to the liquidity of the company and the level of impaired loans). They then continued to distribute the prospectus over the whole of the relevant period, despite the worsening position of the company. The claim against Guardian Trust (in terms of Mr Hotchin's draft amended statement of claim) for both existing and prospective investors is based on a failure of Guardian Trust to exercise its enforcement powers under the trust deed earlier.

[78] The claims against the directors and Guardian Trust both relate to the loss in value (either total or partial) of the investments.[85] I therefore agree with William Young J that both claims relate to the same damage, although noting that the loss is not necessarily limited, on Winkelmann J's findings, to the $40 in his example.[86] This is because of the duty she found Guardian Trust arguably owed to prospective and rollover investors, which could conceivably mean that the whole $100 could be claimed.[87]

[79] This case bears some resemblance to the Privy Council decision in *FFSB Ltd*.[88] In that case the appellant was the administrator of a fund that issued tax sale

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84 And I agree with William Young J that the fact that the insurer would have a subrogated claim against B would render a result whereby C pays contribution to B perverse – see at [226] of his judgment.

85 Contrary to what O'Regan J says at [263]I do not see this as merely "lost money" in a generic sense. The loss is specifically related to the loss in value of the particular investments.

86 I believe that the Chief Justice postulates the same as William Young J, at [141]–[145] of her judgment.

87 Indeed, it could even be the case for existing investors that intervention should have occurred straight after they had become investors.

88 *FFSB Ltd*, above n 64.

certificates.[89] The respondent acted as legal advisor to the fund. After the fund went into liquidation, the liquidators issued proceedings against the appellant claiming breach of the administration agreement, breach of the Mutual Funds Act 1995 (Bahamas), and a breach of a common law duty of care to the fund by allowing funds to be improperly invested in various companies.[90] The appellant issued a third-party notice against the respondent seeking contribution on the basis that the law firm was liable for the same damage and owed the fund a duty to advise the fund as to the propriety of its investment policy.

[80] In considering whether the appellant and the respondent were liable for the same damage, and applying the principle in *Royal Brompton*, the Privy Council (which included Lord Hope who also sat on *Royal Brompton*) held that the damage was the same, being the loss of the funds invested.[91] The Board said:[92]

> Like [the appellant] and the directors, [the respondent is] alleged to have been in breach of a duty to take steps which would have prevented the Fund from making improper investments. In the case of [the respondent], it is said that they should have given the directors appropriate advice about the unsecured nature of the Fund's loans, which might have resulted either in the Fund obtaining security or in it not making the loans. *In either case, the alleged damage is the loss of the funds invested. The Board therefore considers that the alleged damage is the same.* (Emphasis added).

[81] In O'Regan J's view, the damage is different in Mr Hotchin's case because the damage caused to investors through the actions of the directors was the loss of their investments or the receipt of a debt security that had a lower value than it would have had if the misstatements in the offer documents on which investors relied had been true.[93] By contrast, he says that Guardian Trust's negligent monitoring of Hanover Finance caused a deterioration in the net asset position of

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89 As the Privy Council explained at [1], the tax sales certificates involved in the case were issued by local authorities to raise money by assigning, at a discount rate, "their rights to arrears of property taxes, secured by liens over the properties."

90 At [8].

91 At [27]. The Court of Appeal of the Bahamas held that the damage for which the appellant was liable was the loss of the realisation of its improper investments, while the damage for which the respondents were alleged to be liable was the value of the security over the tax sale certificates and other assets which it should have been advised to obtain: *Oracle Fund Ltd (in liq) v FFSB Ltd* 2004-71, 23 June 2005 at [16]–[17]. However, the Privy Council disagreed and said that the Court of Appeal's characterisation of the damage alleged to have been caused by the negligence of the respondent was too restrictive: *FFSB Ltd*, above n 64, at [27].

92 *FFSB Ltd*, above n 64, at [27].

93 See O'Regan J's judgment at [261].

Hanover Finance leading to a lower level of return from the liquidation of Hanover Finance than would otherwise be the case.[94] As well as being a very subtle distinction,[95] it seems to me that saying that there was a lower level of return from the liquidation is the same as saying that the value of the securities was lower than it otherwise would have been.

[82] O'Regan J reached his view that the same damage requirement had not been met by performing a legal analysis of the claims to determine whether there was a common liability.[96] I do not consider that this step is required by the wording of the statute. As stated above at [73], the statutory wording only requires the same damage (in that there is intersection of liability as explained by William Young J)[97] and it does not have any added overlay of analysis of the same damage as analysed on the basis of the same liability (and certainly no added overlay of a requirement for the same liability).

[83] In any event, even if the requirement of commonality had been necessary (as O'Regan J says it is), in my view it is difficult to draw a meaningful distinction between the claims against the directors and the potential claims against Guardian Trust. In Mr Hotchin's amended statement of claim, the claim against Guardian Trust for contribution relates to a potential liability of Guardian Trust to both current and prospective investors. Although the arguable breach of duty to all investors found by Winkelmann J was a failure to monitor,[98] this was effectively on the basis that investors were at least partially induced to invest (or re-invest) on the basis of a representation by Guardian Trust that it had ascertained that there were sufficient

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94 At [261].

95 And I agree with William Young J's comment at [232] that, where cases are within the policy of s 17 of the Law Reform Act, courts should not be making fine distinctions. See above at [71]–[73].

96 Below at [259]–[263]. He does not see this as superimposing an additional requirement over and above liability for the same damage but merely the method by which the court determines the same damage question.

97 See at [182] of his judgment.

98 *Hotchin* (HC), above n 3, at [94](a). As an aside, I do not see this (or the summary referred to by William Young J at [172] of his judgment) to preclude an argument that, if the trustee had intervened earlier (as it was under a duty to prospective investors to do), then those investors would not have invested at all (and therefore the losses would be the whole $100 in William Young J's simplified example at [169] of his judgment). Indeed, that was the very argument Winkelmann J accepted (as is clear from the summary of Mr Hotchin's argument to her and her response). See above at [43]–[54] for my discussion of her judgment.

assets to repay the deposits.[99] This provided the basis for the imposition of the duty on Guardian Trust to prospective and rollover investors to monitor the performance of Hanover Finance and to exercise its enforcement powers in the Trust Deed if necessary.[100]

[84] Like the claim against Mr Hotchin, the claim against Guardian Trust relates to misrepresentation on matters relating to the financial position of Hanover Finance, admittedly in different words but both contained in the same document: the prospectus.[101] Both could have contributed to the investors deciding to purchase the debt securities. Even though the decision to invest would almost inevitably have been more influenced by the directors' statements than those of Guardian Trust, this would not mean that contribution is not available. Equality of responsibility is not required.

[85] I do not see this as inconsistent (and nor did Winkelmann J given she made both findings) with the holding that Guardian Trust is not responsible for the statements in the prospectus. Winkelmann J's finding on this point must refer to the issuer's statements in the prospectus (pleaded in the alternative) and not Guardian Trust's own statements in the letter of 7 December 2007 or in the passages in the prospectus about the role of the trustee that Winkelmann J held could have been taken into account when deciding to invest.

[86] Further, even if the claim against Guardian Trust is characterised as negligent monitoring with the consequence that the enforcement powers were not used at the

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99 As noted above at [47] Winkelmann J held it to be arguable that a prospective and rollover depositor could have taken this representation into account when deciding whether or not to invest or, in the case of a rollover depositor, re-invest.

100 This finding was framed in the context of an analysis of proximity and this is the way it is currently expressed in Mr Hotchin's statement of claim; but I would not rule out Mr Hotchin, on the basis of Winkelmann J's judgment, being able to amend his pleadings to allege negligent misstatement as a separate claim. I agree that a tortfeasor seeking contribution must take the case against him as it is, rather than as it could have been, so that a near miss (such as in *Royal Brompton*, above n 75) cannot be turned into a hit by arguing that the claim in relation to which contribution is sought could have been different. But that is no reason for not applying the normal strike out principles to the claim for contribution itself such that, if the claim against the third party can be re-pleaded to allow a claim for contribution, then it should not be struck out.

101 It seems to me that this would bring the case squarely within *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642. And I note that the Court of Appeal's reason for distinguishing *Eastgate* from this case was that there had been no representations as to the financial position of Hanover Finance by Guardian Trust: see *Hotchin* (CA), above n 3, at [39].

appropriate time, there was commonality. It seems to me that the claim for the $40 in William Young J's example, for both the directors and the trustee, can be characterised as failing to "pull the plug" earlier: the directors by not withdrawing the prospectus and, indeed, extending it, and Guardian Trust by not using its enforcement powers.[102] In terms of damage, both would be responsible for the diminution of the value of the investment from the time they failed to fulfil their duties.

[87] It must be remembered that it is only in respect of the common liability that the same damage requirement subsists. The issue is whether there is commonality, in the sense of the same damage, in the area where the claims overlap (in William Young J's example the $40[103] and see also the timeline in the appendix to this judgment). To illustrate this point, consider the employer/doctor example given by William Young J.[104] The same damage requirement is only required for the amputation. The doctor is not responsible in any way for the accident.[105] The employer likewise is not directly responsible for the amputation. He or she could, however, depending on there being no break in causation and foreseeability, be responsible for the economic and other consequences of the amputation. To the extent that is the case, there is common liability and common damage with regard to the amputation.

[88] In this case, even assuming no liability for the prospectus (and the wrongful investment) on the part of Guardian Trust, the common liability has only to be in respect of the worsening of the position of the company and therefore the loss in value of the security after the failure to act (in the case of the employer/doctor example, the exacerbation of the injury). Like in the case of the doctor, it matters not that there is no common liability with regard to the prospectus (accident).

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102 I am assuming that if the plug had been pulled earlier then the loss to investors would have lower (in other words, that the investors would have received more return on their investments through an earlier liquidation).

103 See William Young J's judgement at [169].

104 See William Young J's judgment at [193].

105 So the fact that Guardian Trust is not responsible for the misstatements made by the directors in the prospectus is not the issue, contrary to what is said at [261] of O'Regan J's judgment.

[89] Finally, however, I reiterate that, in any event, in my view the only requirement is for the same damage with no further overlay.[106] Thus, it would not matter if Mr Hotchin is liable for negligent misstatement because of the untrue statements in the prospectus and Guardian Trust is only liable for negligently failing to monitor and undertake enforcement action. In the words of Lord Hope, there would still be a single harm (loss in value of the investments) to which the directors and the trustee have contributed in different ways.[107] Contribution would therefore be available.

Equitable contribution claim

[90] Mr Hotchin's alternative argument is that equitable contribution would be available if, for example, it is held at trial that the FMA's claims against him are not tortious and therefore s 17 of the 1936 NZ Act does not apply.[108] I am essentially in agreement with the Chief Justice on the issue of equitable contribution.[109] I elaborate on my reasons for this agreement below.

[91] Lord Bingham in *Royal Brompton* said that the "same damage" requirement in the 1935 UK Act essentially employed the test for contribution before the Act was passed.[110] I consider that should also be the case in New Zealand, meaning that the same damage test discussed above should apply equally to equitable contribution. It

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106 I agree with William Young J's comment at [179] that, despite O'Regan J saying s 17(1)(c) does not require coordinate or common liability *in addition* to being in respect of the same damage, the test proposed by O'Regan J subsumes the concept of commonality of liability within the "same damage" requirement. As William Young J indicates, and I agree, the difference of approaches involves a distinction without a difference.

107 See *Royal Brompton*, above n 75, at [46].

108 Unlike the 1935 UK Act, the 1936 NZ Act does not apply if a tortfeasor is seeking contribution from a person who is not a tortfeasor (and, unless the rule in *Merryweather v Nixan* (1799) 8 D & E 186, 101 ER 1337 (KB) is overruled, neither is equitable contribution available). Nor does the 1936 NZ Act apply to non tortfeasors seeking contribution from tortfeasors or where neither party is a tortfeasor. This lack of coverage is one of the reasons two of the judges in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 [*Altimarloch*] suggested that legislative attention is needed: see Blanchard J at [77] and Tipping J at [128] and [152].

109 The one reservation is that I am not sure that the "same damage" requirement will always follow Kirby J's approach in *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282. I see the "mutual discharge" requirement as a condition for contribution (see at [171] of William Young J's judgment) rather than necessarily encompassing the whole test. I do agree, however, that there is probably not much of substance that separates the approach of Kirby J in *Burke* from that of McGrath J in *Altimarloch*: see at [158] of the Chief Justice's judgment.

110 *Royal Brompton*, above n 75 at [5].

would be most odd if the test under the 1936 NZ Act was wider than that for equitable contribution.[111]

[92] This Court considered the issue of equitable contribution in *Marlborough District Council v Altimarloch Joint Venture Ltd*.[112] The dispute in *Altimarloch* involved the purchase by Altimarloch of a block of rural land. The vendors' agents misrepresented the quantity of water rights to be transferred with the land. *Altimarloch* had sought a Land Information Memorandum (LIM) from the Marlborough District Council, which effectively made a similar misrepresentation. The vendors in *Altimarloch* were liable for damages under s 6(1)(a) of the Contractual Remedies Act 1979. The Council was liable in negligence for the misleading statement in the LIM. The measure of damages was, however, different because of the differing bases of liability (contract for the vendors and tort for the Council).[113] The vendors claimed equitable contribution from the Council. The claim failed in this Court by majority: Elias CJ, Blanchard and Tipping JJ.[114] McGrath and Anderson JJ would have ordered contribution.

[93] Blanchard and Tipping JJ effectively adopted the same test for contribution as O'Regan J does in this appeal, requiring that there be a similar basis for liability.[115] Elias CJ agreed with Blanchard and Tipping JJ on the result but decided the case on

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111 I agree (see O'Regan J's judgment at [341]) that this was not the position adopted by Mr Gedye in his submissions. The position of Guardian Trust was, however, that the test for equitable contribution and the approach under the 1936 NZ Act are the same (albeit arguing for the interpretation of the test adopted by O'Regan J). Mr Gedye did, however, argue, based on the judgments of Elias CJ, McGrath and Anderson JJ in *Altimarloch*, above n 108, that there should be a more flexible approach to equitable contribution with a "greater focus on responsibility for the same damage rather than a focus on the legal basis of liability". This Court must in any event decide the case according to the law and cannot be limited to Council's submissions, subject to natural justice issues. In this case the appropriate approach to equitable contribution, including that taken by the various members of the Court in *Altimarloch*, was fully argued.

112 *Altimarloch*, above n 108.

113 The Court by majority upheld the measure of damages payable by the vendors in the courts below, Elias CJ and Anderson J dissenting. The majority held that the cost of curing the lack of water rights, through acquiring substitute water rights and building a dam ($1,055,907.16) was the correct measure of damages: see at [66] per Blanchard J, at [167] per Tipping J and at [193] per McGrath J. The minority would have awarded damages on the basis of the difference between the valuation of the property with and without the water rights ($400,000): see at [45] per Elias CJ and at [236] per Anderson J.

114 In addition, two of those judges (Elias CJ and Tipping J) would have held that the Council's negligence had caused no loss: see at [56] per Elias CJ and at [107] per Tipping J. The remaining judges held that the Council's negligence had caused loss: see at [69] per Blanchard J, at [209] per McGrath J and at [235] per Anderson J.

115 See at [75] per Blanchard J and at [129], [135], [146] and [148] per Tipping J.

the particular facts and did not endorse their reasoning. She considered that contribution would not be available in the particular case but essentially for reasons of sequence.[116] She left open the question of whether in a case not involving s 6 of the Contractual Remedies Act a different position regarding contribution would have been reached.[117] All three judges (Elias CJ, Blanchard and Tipping JJ) also considered that contribution should not be available as it would have meant that the vendors would have been overpaid for their property.[118] This reason for denying contribution effectively mirrors the just and equitable ground for denying contribution under the 1936 NZ Act.

[94] I accept that my approach to equitable contribution is not consistent with that taken by Blanchard and Tipping JJ in *Altimarloch.* As there was no majority agreement on the appropriate test in *Altimarloch*, however, I do not consider that decision to be an impediment to adopting my preferred approach. In any event, I consider my approach to be consistent with the approach taken by McGrath J as I explain below.[119] Anderson J agreed with McGrath J on this aspect of the case.[120] McGrath J cited with approval the judgment of Gaudron ACJ and Hayne J in *Burke v LFOT Pty Ltd*.[121] In that case Gaudron ACJ and Hayne J said that the requirement for equitable contribution was "contribution between parties who share 'coordinate liabilities' or a 'common obligation' to 'make good the one loss'".[122] They went on to say that, more recently, the requirement has been articulated as requiring that the

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116 See at [57].

117 At [58].

118 See at [57] per Elias CJ and [76] per Blanchard J. Tipping J comments on this point at [139]–[141].

119 In the postscript to his judgment at [144], Tipping J said that he considered that his views and those of McGrath J differed not so much on the legal approach to be adopted to contribution but rather on the application of that approach to the facts of the case. I agree with the Chief Justice that the approach taken by Tipping J was in fact different from that taken by McGrath J. Tipping J, in application of the "nature and extent" test, effectively reverted to a cause of action analysis: see at [154]–[155] of the Chief Justice's judgment.

120 At [235].

121 At [219], citing *Burke v LFOT Pty Ltd*, above n 109, at [15]–[16]. That case concerned the purchase of land and premises from LFOT by Hanave. LFOT misrepresented the position relating to tenants. LFOT claimed equitable contribution from Mr Burke on the basis that, as Hanave's solicitor, he breached his duty to exercise reasonable care and was negligent in relation to the purchase of the premises: at [1]–[4]. The argument of LFOT was essentially that if Mr Burke had not been negligent, LFOT's misleading conduct would have been exposed: at [19]–[21].

122 *Burke*, above n 109, at [15].

liabilities be of the same nature and extent.[123] This latter articulation of the test was used by McGrath J in his judgment. McGrath J also said, however, that it was important to keep the essential concept of contribution in mind and not to allow the principle to be defeated by too technical an approach.[124] The basic concept of contribution is one of "natural justice" so that, where several persons have a common obligation, they should contribute proportionately to it.[125]

[95] Despite the fact that the liability of the Council was tortious and that of the vendors was contractual, McGrath J considered that both had made the same error of communication with the same result, causing the purchaser loss which was of the same nature.[126] The damages were also of the same extent. The fact that the Court had decided expectation damages should be awarded against the vendors should not rule out contribution.[127] McGrath J considered that the test requiring damage to be of the same nature and extent before contribution can be ordered equates to the requirement that there be the same damage. He said:[128]

> Liability need not be predicated on the nature of the cause of action. It is now recognised that application of the "nature and extent" test is on the parties' liability for the same *damage*.[129] Here that inquiry establishes that the parties made the same error in their representations which, in each case, induced the purchaser to enter the contract under a mistaken belief that the water rights were of the extent the parties had stated to the purchaser.

[96] I acknowledge that the quoted paragraph does refer to the same error but in my view this was in order to assess the nature of the damage. This was the same in

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123 At [15]. They added, at [16], that the latter formulation imported notions of equal culpability and equal or comparable causal significance. In the event, Gaudron ACJ and Hayne J did not have to explore notions of culpability and causation in depth. They noted that the misleading conduct of LFOT was a positive inducement to Hanave's entry into the contract, whereas Mr Burke's omission to advise further inquires merely resulted in the conduct remaining undetected. Further, Mr Burke himself had been misled. As the doctrine of equitable contribution is founded on concepts of fairness and justice, they considered that it would be unfair for LFOT to receive contribution from Mr Burke. If it did, it would receive an amount in excess of the true value of the premises: see at [22] of *Burke*. As to whether equality of culpability and causal significance is required, I agree with the Chief Justice that equitable contribution permits contribution whether two parties are equally or proportionally liable: at [133].

124 *Altimarloch*, above n 108, at [224].

125 At [214]–[217], citing *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350–352 per Kitto J and *Mahoney v McManus* (1981) 180 CLR 370 at 378 per Gibbs CJ.

126 *Altimarloch*, above n 108, at [228].

127 At [230].

128 At [226].

129 *BP Petroleum Development v Esso Petroleum Co Ltd* (1987) SLT 345 (OH) at 346–347.

both cases ("inducement to enter into the contract under a mistaken belief as to water rights"). I do not consider that McGrath J's assessment would have differed had there been different errors or a different breach of duty as long as these errors or breaches caused the same damage.[130] To have held otherwise would have been to take the overly technical approach he warned against.

[97] In summary, the test for contribution under s 17(1)(c) of the 1936 NZ Act and that for equitable contribution is the same.[131] Both require that there be the same damage, with no additional requirement. Proportionate contribution is also available for both.[132]

Other matters

[98] While the above conclusions on the 1936 NZ Act and equitable contribution mean that I would allow the appeal, I would do this without prejudice to the Guardian Trust's ability to file a further strike out application dealing with the following matters:

(a) whether it could conceivably be just and equitable for a contribution order against the Guardian Trust to be made in light of:

  (i) the respective roles of the directors and the trustee; and

  (ii) the statutory scheme;

(b) whether the claim for contribution is an abuse of process, given the statements made by Mr Hotchin in relation to the settlement with the FMA; and

(c) whether in all the circumstances the Court should exempt Guardian Trust from liability to make contribution.

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130 The nature of the error would of course be relevant in assessing whether there was the same damage. A misrepresentation about something else altogether, even if it induced entry into the contract, may well have led to different damage.

131 See above at [91].

132 This is essentially the Chief Justice's approach. My one reservation is set out at n 109.

[99] It is clear that, under s 17(2) of the 1936 NZ Act, the courts have a discretion under the 1936 NZ Act to order no contribution even in cases where the same damage requirement is met if that would be the just and equitable result taking into account the extent of responsibility for the damage. As a separate matter, the courts could exempt a tortfeasor from liability if that would be the appropriate result in all the circumstances. The same would apply to equitable contribution. I accept that, because of the wide variety of circumstances that can be taken into account, it would often be inappropriate to consider these issues at a strike out stage. This case may, however, be different.

[100] It is Mr Hotchin, as a director, who is seeking contribution. Directors have a continuing obligation to ensure prospectuses do not contain untrue statements and are not misleading. If a statement in a prospectus becomes untrue while the prospectus is in circulation, it must be withdrawn. Mr Hotchin has now accepted that he will have to prove his negligence in this regard.[133] Essentially therefore he is seeking contribution on the basis that Guardian Trust did not stop his wrongdoing soon enough.[134] This is against the background that he, as a director, was in charge of Hanover Finance, with access to all the company information needed for that task (including from management). The responsibility for the accuracy of the prospectus was his (and not that of Guardian Trust). This responsibility was on an ongoing basis while the prospectus was in distribution.

[101] Further, as noted above, on any view of the matter the directors were the primary wrongdoers.[135] While Guardian Trust was provided with a wide range of financial information and had information gathering powers, all information was essentially provided by the directors. In addition, the trust deed contains a number of representations and warranties which, given that Mr Hotchin now accepts that he was liable to investors, must have been breached. The three-monthly certificates

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133 See above at [61]–[69].

134 As noted below at [106], for the purposes of this appeal, Mr Hotchin asserts that he would be able to prove that the prospectus contained untrue statements.

135 A claim for contribution from the primary tortfeasor (the directors) by the secondary tortfeasor (the trustee) had the trustee had been sued by an investor would clearly be just and equitable. The converse does not follow. See also the discussion, in Ben Prewett “Wrongdoers’ Rights to Contribution in Mixed Liability Cases” 2012 NZ L Rev 643 at 662–664, of the example of the thief and a trustee.

certifying that the prospectus remained true provided to Guardian Trust must also have been misleading.

[102] The indemnity argument which was rejected in the High Court is different. That argument was that there could be no contribution where there was a right to indemnity. The argument made above is that, in light of the limited role of the Guardian Trust, the information imbalance and the warranties in the trust deed, ordering contribution would not be just and equitable.

[103] In any event, the settlement with the FMA takes away one of the reasons Winkelmann J rejected the argument on the indemnity issue. I note too that Winkelmann J, in rejecting the indemnity argument, may have overlooked the fact that the directors' certificates were provided every three months (four in the relevant period). She said that the certificates "speak to only one particular point in time whereas statements in prospectuses continue to speak during the offer period".[136] As cls 4(3) and (4) of sch 5 of the Regulations made clear, the certificates were required to certify that "at all times during the period covered by the report" the prospectus was up to date, not false or misleading in a material particular, and that the issuer had complied with the trust deed. Thus, subsequent certificates covered the period since the publication of the prior certificate, rather than a single point in time.

[104] Further, it seems to me highly arguable that it would be contrary to the statutory scheme to order contribution from a trustee in favour of a director who has distributed (and continued to distribute) a prospectus containing untrue statements. Securities are not able to be issued without a valid prospectus. If a prospectus containing an untrue statement is distributed, the statute provides not only for compensation but also for pecuniary penalties for those responsible for the distribution – in this case Mr Hotchin (and not Guardian Trust). An order for contribution would relieve Mr Hotchin partially from the statutorily imposed consequences of his wrongdoing.[137]

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136 *Hotchin (HC)*, above n 3, at [84].

137 This would be even more the case if the FMA alleged Mr Hotchin was fraudulent or criminally liable; however, the FMA has not asserted that in this case.

[105] Taking into account all of the above, and subject to any other arguments Mr Hotchin might raise in the High Court, it is difficult to see how it could be just and equitable to make an order for contribution against Guardian Trust, even if it were held to have been negligent in the performance of its duties.

[106] As a separate and unrelated matter, I note the very strong public statements made by Mr Hotchin (and his fellow directors)[138] that, despite the settlement with the FMA, they would not have been found liable had they gone to trial. As noted above, when submissions were sought on the effect of the settlement, Mr Hotchin said that it would not affect the contribution claim and that he would prove at trial that the prospectus did contain untrue statements. At best, this is hypocritical. But the suspicion must be that this may be a cynical attempt to force a settlement with Guardian Trust. If this is the case, the courts should not be party to what would be a misuse of the court processes.[139]

[107] For completeness, I note that at any trial the duty to prospective and rollover investors, which Winkelmann J held arguable at the strike out stage, may be held not to exist. Nevertheless, if there is held to have been a breach of duty by Guardian Trust to existing investors there will also be the issue, as William Young J points out, as to whether the settlement figure paid includes any of the overlapping damage (in William Young J's example, the $40). If it does not, then there could be no claim for contribution.[140]

Result and costs

[108] In accordance with the view of the majority, the appeal is allowed. Mr Hotchin's claim for contribution against Guardian Trust can proceed.

[109] I would have let costs lie where they fall in this Court, given the formidable obstacles to Mr Hotchin ultimately succeeding and, in particular, those set out at [99]–[106] above. I would have set aside the costs orders in the High Court and the

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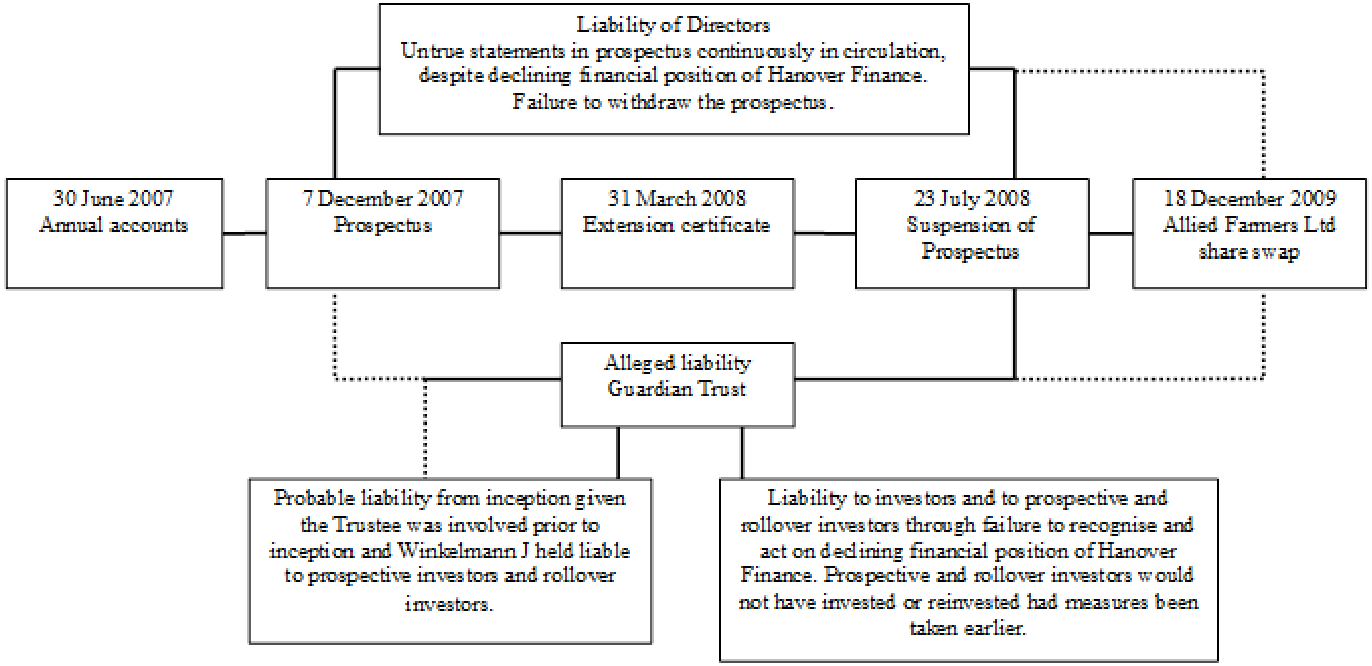
138 See above at [62]–[64].
139 I would not have had the same concern if the public statements had been more temperate – for example merely recording what was said in cl 13 of the Settlement Agreement that there had been no admission of liability.
140 It would have been for Mr Hotchin to prove this given he is the one seeking contribution.

Court of Appeal. I would have ordered that those costs be determined once the substantive proceedings are concluded.

[110] The other members of the Court are of a different view. Thus costs of $25,000 plus usual disbursements are awarded to the appellant. We certify for second counsel. The orders for costs in the High Court and the Court of Appeal are set aside. Costs in those courts should be determined by those courts.

Appendix

Timeline



ELIAS CJ

[111] The appeal concerns the availability of contribution between the appellant, a defendant in proceedings brought in the High Court, and a third party said by him to be also liable to the plaintiff. Section 17(1)(c) of the Law Reform Act 1936 permits such contribution when tortfeasors are "liable in respect of the same damage". The court is empowered by s 17(2) to permit contribution in the amount it finds to be "just and equitable" and to exempt someone from liability to make contribution. Alternatively, should it be found at trial that s 17(1)(c) does not apply because the claim against the defendant for compensation under statute does not make him a tortfeasor, the defendant seeks contribution against the third party in equity. The issue on the appeal is whether the claims available to the plaintiff against both defendant and third party are claims "in respect of the same damage".

Background to the appeal

[112] The Financial Markets Authority (FMA) brought a claim against Mark Stephen Hotchin and other directors of Hanover Finance Limited for compensation under s 55G of the Securities Act 1978 on behalf of 4,691 subscribers for debenture securities issued by Hanover Finance in a public offering.[141] It alleged that the prospectus for the offering, published on 7 December 2007, and other offer documents contained untrue and misleading statements, for which Mr Hotchin and the other directors were responsible. In particular, it was claimed that the prospectus failed to disclose serious deterioration in the liquidity of Hanover Finance from June 2007 to 7 December 2007 and the extent of its related company lending. The distribution of offer documents containing misleading and untrue statements is said to constitute a "civil liability event" under s 55B(a) of the Securities Act, giving rise to liability for loss to subscribers either at the suit of the FMA or the subscribers. The compensation sought in the proceedings was the full value of the subscriptions excluding interest or, alternatively, that sum adjusted for value obtained by the

[141] The FMA also filed proceedings against Mr Hotchin and the directors of two other Hanover companies, United Finance Limited and Hanover Capital Limited. Mr Hotchin sought contribution from the trustee, Perpetual Trust Limited. That claim was dealt with in the same judgments of the High Court and Court of Appeal but has settled.

subscribers in a later share swap and in recovery of 6 cents for every dollar subscribed.[142]

[113] The FMA claim is that subscriptions were made in reliance on the prospectus of 7 December 2007, as extended by certificate of the directors on 31 March 2008 (itself deemed to be an offer document).[143] Subscriptions under the offer documents were made from 7 December 2007 until 23 July 2008 by new subscribers and by subscribers who rolled over their investments. It was further claimed that the liquidity of Hanover Finance continued to decline in the period to 31 March 2008 and from then until 23 July 2008. On 23 July 2008 Hanover suspended the offer and announced a moratorium on repayments of the secured deposits as they fell due. The suspension and moratorium on 23 July 2008 effectively destroyed any possible secondary market in the securities (although it is doubtful whether any such secondary market existed in fact). No repayments under the terms of the debt securities were made.

[114] By third party notice, Mr Hotchin sought contribution from New Zealand Guardian Trust, the trustee under a debenture trust deed first entered into between Guardian Trust and Hanover Finance[144] in 1985 but modified in the years since. He claimed in his statement of claim against Guardian Trust that it was under a duty of care to the investors to check the statements made in the prospectus and other offer documents for accuracy and also had duties to investors arising from its functions of monitoring and enforcement under the trust deed.[145] If the directors were to be found liable to the investors for misleading and inaccurate statements in the offer

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142 The damages claimed by the FMA in respect of Hanover Finance are calculated on alternative bases at $93.6 million (the full amount subscribed excluding interest) and at $56.16 million (arrived at by deducting the value obtained by the subscribers following an exchange of the debt securities for shares in Allied Farmers Limited in December 2010 (at a value equivalent to approximately 34 cents of each dollar subscribed) and in the recovery of 6 cents for every dollar subscribed).

143 Securities Act 1978, s 55(c).

144 Then named Elders Rural Finance NZ Limited.

145 The duties of trustees imposed by the Securities Act and regulations made under it are helpfully set out in the reasons given by Glazebrook J at [9]–[14]. The duties arising under the Guardian Trust trust deed with Hanover Finance (and the covenants provided by Hanover Finance to Guardian Trust) are described by Glazebrook J at [18]–[23]. They include duties to exercise reasonable diligence to ascertain breach of the trust deed or of the terms of the offer of the debt securities and, where material, to take remedial action and to exercise reasonable diligence to ascertain whether the assets of the borrower are "sufficient or likely to be sufficient to discharge the amounts of the debt securities as they become due".

documents, Mr Hotchin contends so too was Guardian Trust for not ascertaining that the assets of Hanover Finance were insufficient to cover their liabilities under the debenture securities and taking action (thus effectively preventing the continued subscriptions for the securities during the period 7 December 2007 to 23 July 2008, both new and rollover, and preventing loss to investors attributable to further erosion of their security). These claims to contribution were put forward under s 17 of the Law Reform Act and, alternatively, (should it be held that the FMA claim was not to be treated as one in tort), on the basis of equitable contribution.

[115] Guardian Trust applied to strike out the third party notice against it. In the High Court, it was agreed that the application for strike out should proceed on the assumption that the FMA's claim for compensation was properly treated as a claim in tort for the purposes of contribution under s 17(1)(c) of the Law Reform Act, leaving that live issue to be determined at trial.[146]

[116] Winkelmann J, who heard the strike out application, was also prepared to accept for the purposes of the preliminary hearing that the trustee under a debenture trust deed could owe duties of care in fulfilling its responsibilities under the trust deed not only to existing investors in securities subject to the trust deed, but also (in what she acknowledged would be a development of the existing law but a development that could not be said to be unarguable on strike out) to prospective and rollover investors.[147]

[117] Winkelmann J concluded that there was no tenable duty of care owed by Guardian Trust to prospective investors to monitor the accuracy of statements made by directors in the prospectus.[148] She came to that conclusion for reasons of proximity: nothing in the trust deed, the Securities Act or regulations, or the offer documents suggested trustee responsibility or assumption of responsibility to prospective depositors for the truth and accuracy of the statements made in the offer documents.[149] And she considered that policy considerations too pointed away from

146 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 (Winkelmann J) at [14].
147 At [37]–[41].
148 At [51].
149 At [52].

any such duty of care: such a duty would cut across the statutory responsibilities under the Securities Act; and the scheme of the legislation was that trustees were entitled to rely on the auditors and directors to satisfy themselves of truth and accuracy in the offer documents.[150]

[118] Despite this determination, Winkelmann J went on to consider a second basis on which liability had been put – that the trustees owed a duty of care to existing, rollover, and prospective investors in the securities to discover and report non-compliance with the trust deed. On this, she decided that it was not possible on strike out to hold that there was no tenable cause of action.[151]

[119] It was argued by Mr Hotchin that, had the duty been fulfilled, subscriptions could not have continued to be obtained and the deterioration in the financial position of Hanover Finance (and therefore the loss to investors) would have been limited by disclosure of the true position. Winkelmann J described this as "pulling the plug".[152] Winkelmann J did not think such claim could be dismissed as "untenable" on preliminary examination in the pre-trial strike out application.[153]

[120] That conclusion made it necessary for Winkelmann J to consider whether the claim for contribution made by Mr Hotchin fell within the terms of s 17. Although recognising that there was a live issue whether the FMA claim for compensation was properly treated as a claim in tort, Winkelmann J was prepared to accept for the purposes of the preliminary strike out application that the directors and Guardian Trust were both "tortfeasors" for the purposes of s 17(1)(c).[154] It was therefore necessary for the Judge to consider whether the liability of the directors in the FMA claim was for "the same damage" as the claim the investors arguably had against Guardian Trust.

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150 At [54]–[55].
151 At [41].
152 At [9].
153 Applying the well-settled approach described in cases such as *Attorney-General v Prince* [1998] 1 NZLR 262 (CA): at [16] and [47].
154 At [14].

[121] Winkelmann J accepted that the matter was not determined by whether the measurement of loss or damages was the same. That was a "mistaken view".[155]

[122] Nevertheless, after considering the judgments delivered in *Royal Brompton Hospital NHS Trust v Hammond*,[156] Winkelmann J concluded that the claim against the Guardian Trust was not "for the same damage" as the claim brought by the FMA:[157]

> [69] In this case the position is as follows. If it can be established that the trustees failed in their duty to monitor the affairs of the company for insolvency or breaches of the trust deeds, the damage resulting will be the losses incurred by depositors while the trustees wrongfully failed to act. If it can be established that the directors made untrue statements, the damage resulting will be that the depositors invested in a company in reliance on untrue statements. These are different losses. Even if the trustees ought to have "pulled the plug" sooner, the trustees cannot be liable for the loss independently caused by the directors.

The claim for contribution under s 17(1)(c) was therefore struck out.

[123] The decision that the liability claimed against Guardian Trust was not in respect of "the same damage" as the claim against the directors was also, Winkelmann J held, fatal to the claim for equitable contribution. Equitable contribution was said to require "co-ordinate liability" of the same nature and to the same extent.[158] The claim for contribution on the alternative basis of equity was also therefore struck out in the High Court.

[124] Mr Hotchin appealed to the Court of Appeal against the determination that contribution was not available under s 17(1)(c) or in equity because the claims on behalf of the investors made against the directors and available against Guardian Trust were not for the "same damage". He did not however appeal against the finding that Guardian Trust owed no duty of care to monitor the accuracy of statements made in the prospectus and so did not seek to argue that contribution was

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155 At [70].

156 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397, discussed by Winkelmann J at [64]–[67].

157 Citations omitted.

158 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 at [71]–[73], citing the judgment of Tipping J in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

available because both claims were based on the false and misleading statements in the prospectus.[159] Nor did Guardian Trust appeal against the determination that, for the purposes of strike out, it should be assumed that it owed duties of care in discharging its responsibilities under the debenture trust deed to prospective or rollover depositors who relied on the prospectus and offer documents.[160]

[125] In the Court of Appeal it was argued on behalf of Mr Hotchin that Winkelmann J had erred in treating the "the same damage" in s 17(1)(c) as if equivalent to "the same cause of action or measure of loss" and had focussed wrongly on a comparison between the nature and extent of liability instead of the correct question – whether the harm or loss to investors was the same.[161] Mr Hotchin maintained that the damage for which the directors and Guardian Trust were liable was the same because in both claims it was the loss of all or part of the investments in Hanover Finance.[162]

[126] The argument was rejected by the Court of Appeal. Writing for the Court, Harrison J assessed the arguments against principles drawn from the decisions of the House of Lords in *Royal Brompton* and the separate judgments of Blanchard, Tipping and McGrath JJ in this Court in *Marlborough District Council v Altimarloch Joint Venture Ltd*[163] (which he said had cited the judgment of Lord Bingham in *Royal Brompton* "with apparent approval").[164] The Court of Appeal considered that *Royal Brompton* illustrated "the extent to which commonality of liability with its focus on relative causal potency underpins one party's right to claim contribution from another".[165] What is required is "a comparison of the nature and extent of the liability of each party, not its consequences".[166] The case law was said to establish that trustees could not be liable for losses suffered through investing in reliance on directors' statements, but only "for losses directly attributable to a failure to exercise reasonable care in monitoring the Hanover companies' compliance with the

159 *Hotchin v New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 (Harrison, White and French JJ) at [12].
160 At [12].
161 At [19].
162 At [20].
163 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] NZLR 726.
164 At [36].
165 At [35].
166 At [40].

deeds".[167] Contribution would be available only "if both the directors and trustees were responsible to the investors for the duty on which the claim is brought – ensuring the accuracy of the directors' statements to investors".[168] That claim had been stuck out, and the decision on the point had not been appealed. The appeal was accordingly dismissed.

The appeal

[127] Mr Hotchin appeals with leave to this Court against the striking out of his claim to contribution against Guardian Trust.[169] After the hearing of the appeal, the Court was advised that the claim brought by the FMA had settled, but that the issue of contribution remains live and that judgment is still sought.

[128] Two matters require immediate comment. The first concerns the somewhat artificial appearance of the appellant's position. The second concerns the assumptions on which the strike out determination has proceeded.

[129] First, despite the apparent incongruity, the appellant is not prevented from claiming contribution on a basis inconsistent with his denial of responsibility in the proceedings and indeed in the settlement entered into with the FMA.[170] It is accepted that at trial of his claim to contribution he cannot succeed unless he is held liable as tortfeasor. In a case where the plaintiff and the defendant have settled the proceedings and where any admission of liability by the defendant (not so far made) would not bind the third party, the defendant would have to prove his own liability to the plaintiff.

[130] Secondly, the appellant faces other hurdles. Because the appeal follows a pre-trial strike out application, it has proceeded on some assumptions which could prove to be well astray on finalisation of the pleadings and determination of

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[167] At [53].
[168] At [56].
[169] *Hotchin v The New Zealand Guardian Trust Company Ltd* [2014] NZSC 156.
[170] Rule 15.25 of the High Court Rules provides for continuation of third party proceedings where a plaintiff and defendant have settled the principal proceeding. See also *Baylis v Waugh* [1962] NZLR 44 (SC); *Foodstuffs Properties (Wellington) Ltd v Institute of Geological & Nuclear Sciences Ltd* HC Wellington CP512/93, 27 May 1999; and *Crichton v Harteveld* HC Christchurch CP178/99, 15 June 2001.

questions of fact and law not yet resolved. One assumption on which the parties were agreed for the strike out determination only (leaving the matter to be contested at trial) is that the claim by the FMA is properly characterised as a claim in tort for the purposes of s 17(1)(c) of the Law Reform Act. Another is that there is no impediment to the proposed claim by Mr Hotchin as director for contribution against Guardian Trust under the exception in s 17(1)(c) (set out at [134]) which prevents a person seeking contribution from someone entitled to be indemnified by him.

[131] It may be that at least the first of these assumptions ought to have been addressed in the strike out proceedings because it is a question of law, even if one of some difficulty, which might properly have been determined before trial. The second matter was thought by Winkelmann J to require investigation of the facts at trial.[171] It might well prove to be a formidable obstacle to the claim for contribution at any trial.

[132] These matters mean that the claim for contribution may be viewed with some scepticism. The parties are however agreed that these circumstances do not absolve the Court of the responsibility to determine the appeal.

Contribution

[133] When two parties are liable to a third for the same harm (whether equally or proportionally), the principle of equitable contribution applied by the common law as an aspect of natural justice[172] has long permitted contribution.[173] Although a principle of general application, applied by common law courts as well as the courts of equity, the decision in *Merryweather v Nixan* denied its application to tortfeasors

171 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 at [81]–[85].

172 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350 per Kitto J, citing Lord Mansfield in *Godin v London Assurance Co* (1758) 1 Burr 489, 97 ER 419 (KB) and *Newby v Reed* (1763) 1 Bl W 416, 96 ER 237 (KB).

173 *Dering v Earl of Winchelsea* (1787) 1 Cox 318, 29 ER 1184 (Exch); *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [5] per Lord Bingham, at [27] per Lord Steyn, and at [46] per Lord Hope. For the history of equitable contribution see the judgments of Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, and Lord Bingham in *Royal Brompton*. The ability to apportion responsibility is discussed in *Burke v LFOT Pty* (2002) 209 CLR 282 from 292 per Gaudron ACJ and Hayne J and was touched on in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [57]–[58] per Elias CJ, at [75] per Blanchard J, from [124] per Tipping J and from [210] per McGrath J.

until statutory reform, now contained in New Zealand in s 17(1)(c) of the Law Reform Act.[174]

[134] Section 17(1)(c) extends the circumstances in which the common law permits contribution to cases where tortfeasors (whether jointly or independently liable) are liable in respect of "the same damage" to the same party:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[135] In other jurisdictions, including the United Kingdom and Australia,[175] further statutory extensions permit contribution or apportionment in respect of "the same damage" suffered by the same party, irrespective of whether the liability is in tort or on some other basis. In New Zealand, despite Law Commission recommendations for further reform, contribution under s 17(1)(c) remains limited to tortfeasors.[176]

[136] The matter for determination on the appeal does not turn on the limitation of s 17(1)(c) to tortfeasors, since for the purposes of this strike out determination it is common ground that both Mr Hotchin and Guardian Trust must be treated as owing duties of care in tort to those who subscribed for the debt securities. Rather, the appeal turns on the meaning of "the same damage", a phrase also used in the more expansive legislation in other jurisdictions. Decisions in the United Kingdom, Australia and Canada bearing on the meaning of "the same damage" are therefore

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174 *Merryweather v Nixan* (1799) 8 D & E 186, 101 ER 1337 (KB).
175 See Civil Liability (Contribution) Act 1978 (UK); and Wrongs Act 1958 (Vic).
176 See Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

persuasive in application of s 17(1)(c) when considering whether the liability of two tortfeasors is in respect of the "same damage".

[137] "Same damage" does not mean damage that is "substantially or materially similar".[177] Still less does it mean damage arising out of the same circumstances.[178] Nor does sameness of damage require that those in respect of whom contribution is available be liable for the same measure of damages.[179] Although a "practical" test sometimes applied turns on whether payment or satisfaction to a claimant by one party would reduce or extinguish another's liability to the same claimant,[180] the "safest course" is to apply the statutory language directly.[181] The meaning of "same damage" is not a term of art. That is not to say that the application of the statutory test is always easy, as the differences of opinion in this Court in the present case indicate.

[138] Care is needed, as Keene LJ cautioned in *Hurstwood Developments*, not to be over-influenced by the possibility of the different formulations which are readily to hand where causes of action differ.[182] Under s 17 the liability of concurrent tortfeasors for the same damage may arise out of different fault and circumstances.[183] The wrongs which give rise to liability in tort and the extent of liability may not be coextensive. I consider therefore that the Court of Appeal was wrong to hold that contribution was available only if "both the directors and trustees were responsible to the investors for the duty on which the claim is brought".[184]

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177 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [27] per Lord Steyn.

178 *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675 (CA) at 680 per Sir John May.

179 *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675 (CA) at 682 per Roch LJ; *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [6] per Lord Bingham.

180 See the judgment of Scott VC in *Howkins & Harrison v Tyler* [2001] Lloyd's Rep PN 1 (CA) at [17] and Longmore LJ's further explanation in *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642 at [19].

181 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [28] per Lord Steyn.

182 *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd* [2001] EWCA Civ 1785, [2002] Lloyd's Rep IR 185 at [19].

183 See for example *Mahony v Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 530–531 and the cases cited by William Young J at [190]–[216].

184 *Hotchin v New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 at [56].

[139] Contribution does not turn on the cause of action. It is available between tortfeasors under s 17(1)(c) whenever liability is in respect of "the same damage". The question is one of fact and degree: whether the harm for which claim is made is in substance the same. To some extent that is a matter of impression, as was recognised by Longmore LJ in *Eastgate Group Ltd v Lindsey Morden Group Inc*.[185]

[140] The policy of the law is that it is unfair that someone liable in common with another to a plaintiff for the same damage should have to carry the entire burden. Where the plaintiff chooses to proceed against one defendant alone rather than another liable in respect of the same damage, contribution is equally available between the potential defendants.[186] Any other result would, as Glazebrook J says at [71], be unjust. The injustice does not however arise unless the claims are in respect of the same damage. Contribution is therefore not available where damage is distinct or sequential, as in the cases concerning expired limitation periods,[187] or as I considered to be the case in relation to the liabilities of the vendor and the Council in *Altimarloch.*[188] Such sequence is illustrated by the facts in *Royal Brompton* (where the architects were liable not in respect of the harm caused to the owner by the builder's delay in construction but for the distinct and consequential harm of compromising the owner's claim against the builder for delay).[189]

[141] The harm in the present case was the same for which the defendant and third party were liable on the claim set up by the defendant and regarded as tenable by Winkelmann J: the loss of the investments made or held because of the breaches of the directors and the Guardian Trust. The case is comparable with that considered by the Privy Council in *FFSB Ltd v Seward & Kissel LLP*, where the liquidators of a fund brought proceedings against its administrator for losses to the fund through investments made in breach of duties of care.[190] The administrator sought contribution from the lawyers to the fund on the basis that they had been in breach of

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185 *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642 at [18].

186 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [2] per Lord Bingham.

187 *Wallace v Litwiniuk* 2001 ABCA 118, (2001) 281 AR 115.

188 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [57].

189 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397.

190 *FFSB Ltd (formerly known as Fortis Fund Services (Bahamas) Ltd) v Seward & Kissel LLP* [2007] UKPC 16, [2007] 5 LRC 224.

duties of care owed to the fund to advise that the investments were unsecured (with the consequence either that security would have been obtained or the investments would not have been made). The Privy Council held that in both claims the damage was the same: "the loss of the funds invested".[191]

[142] It does not matter that the liability of the defendant and the third party may not be coextensive. There may be overlapping liability in respect of part only of the same damage.[192] In such a case it is the overlap only that constitutes the "same damage" in respect of which contribution is available. That was the case in the illustration given by Lord Steyn in *Royal Brompton* where contribution was available between a valuer who negligently valued shares and the vendor, who warranted the value of the shares to the plaintiff at the sale price, which exceeded the valuer's valuation. Contribution was limited to the £2.5 million difference between the valuation of £7.5 million and the warranted sale price of £10 million. Similar overlap occurs in the example given by William Young J at [193] of the work injury for which an employer is liable which is exacerbated by negligent medical treatment, if harm through treatment is foreseeable and not too remote.

[143] Potentially, the extent of liability of Guardian Trust to the investors here was for the loss of the whole investment, at least in respect of the new investors and rollover investors, as Glazebrook J points out at [70]. With respect to the existing investors, I also agree with Glazebrook J that the claim is for so much of the loss on the investments as is attributable to the deterioration in the security after Guardian Trust should have "pulled the plug". It is not inconceivable that too could amount to the entire loss on the securities, if breach of a duty to report arose before 7 December 2007. But, in any event, if harm is suffered it will be for some part of the amount invested and contribution will be available to the extent of the overlap with the liability of the defendant because it is for the same harm.

[144] It follows that I am unable to agree with the decision of Winkelmann J in the High Court that the losses "incurred by depositors while the trustees wrongfully failed to act" and the losses resulting from the fact that "the depositors invested in a

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191 At [27].
192 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [29] per Lord Steyn.

company in reliance on untrue statements" amount to "different losses".[193] The harm in both cases was the loss of funds invested. The different basis of liability in tort is irrelevant, as has already been discussed. The damage for which liability is claimed is the same damage claimed against Guardian Trust, even if it is likely that the damage attributable to the fault of the two potential defendants is not coextensive. In that case, contribution will be available in respect of the overlap.

[145] Similarly, since the "nature and extent of the liability of each party" is not the focus of the s 17(1)(c) requirement of "the same damage", I consider that the Court of Appeal was wrong to look to the basis of liability as determining whether liability was in respect of "the same damage". It was also in error in the views it expressed that common or shared liability must be "co-ordinate" in the sense of being "of the same nature and to the same extent", "incorporating the concepts of equal or comparable culpability and causal significance".[194] As already indicated, the extension of contribution to cases of concurrent tortfeasors makes it inevitable that liability under s 17(1)(c) will often not be "coordinate" and will often not entail "equal or comparable culpability and causal significance".[195] There will also be cases where a more extensive claim against one tortfeasor will not preclude shared responsibility in overlap damage that is the same. Once tortfeasors have a common liability to a plaintiff in respect of the "same damage", no further commonality is necessary.

The claim to equitable contribution

[146] Since it remains to be determined whether the FMA claim is properly treated as one in tort, allowing application of s 17(1)(c) on the basis that the directors and Guardian Trust are concurrent "tortfeasors", it is necessary to deal with the alternative claim for equitable contribution. I do so briefly because this important point was not the focus of argument before us and because it is clear from the different views taken in this Court that the decision in this case is not likely to be the last word on this vexed topic.

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193 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 at [69].
194 *Hotchin v New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 at [26].
195 Compare the approach taken by the Court of Appeal at [26](5).

[147] Liability for equitable contribution (that is to say, contribution as a matter of common law doctrine outside s 17(1)(c) of the Law Reform Act) was considered by this Court in *Altimarloch*.[196] The appeal in the present case raises such liability on the contingent basis of a strike out application where it is not yet clear whether contribution is available under s 17(1)(c). As was noted in *Altimarloch*, the question of contribution where the damage is caused by separate wrongs (in that case the independent inducements of two defendants) was one that had also divided the High Court of Australia in *Burke v LFOT Pty Ltd*.[197]

[148] On the view I took in *Altimarloch* that the damage claimed against the Council was consequential on net loss in the contract, no question of contribution arose. I indicated my opinion however that contribution at common law is available where liability is "in substance co-ordinate although the legal basis of the claim differs" and a preference for the view that "a just distribution of responsibility in a case where two or more parties are liable to the plaintiff in respect of damage which is in substance the same" could equally be achieved outside s 17(1)(c), in application of the common law principle.[198] Since it was unnecessary for me to consider equitable contribution further (because of the view that liability in *Altimarloch* was not in respect of the same damage), I reserved my position on the availability of contribution where "two defendants separately induce the plaintiff to enter into a contract".[199] On that point Tipping J, with whom Blanchard J expressed agreement, concluded that contribution was not available.[200] McGrath J, with whose reasons on the point Anderson J agreed, would have allowed the claim for contribution because he considered that the damage was for loss of the same nature and to the same extent.[201] Although the result in *Altimarloch* was that contribution was not available (since my opinion that the damage for which the Council was liable was distinct and consequential meant that I concurred in the order allowing the appeal against contribution), there was no majority in the reasons.

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196 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [57]–[58] per Elias CJ, at [75] per Blanchard J, from [124] per Tipping J, and from [212] per McGrath J.

197 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282.

198 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [57]–[58].

199 At [58].

200 At [75] per Blanchard J and at [139] per Tipping J.

201 At [225]–[231] per McGrath J and at [235] per Anderson J.

[149] In the High Court and Court of Appeal in the present case, it was held that the conclusion that the damage for which the defendant and the third party was responsible was not the same was also fatal to the claim to equitable contribution because it meant that the liabilities were not "co-ordinate".[202] I agree that a conclusion that damage for which two parties are liable is not the same precludes contribution in equity. I am however also of the view that a conclusion that the damage is "the same" is sufficient justification to decline to strike out a claim to contribution, which remains subject to the assessment of the Court at trial that an order is just and reasonable in the circumstances.

[150] The approach I favour accords with that taken by Kirby J in *Burke v LFOT Pty Ltd*[203] for reasons which seem to me to be compelling and which it would be superfluous to repeat. The approach is inconsistent with the view expressed by Tipping J in *Altimarloch.* He indicated it would require legislation, as the Law Commission has recommended, extending s 17(1)(c).[204] In what follows I indicate why I do not agree with that view.

[151] The approach I prefer is also however further than McGrath J was prepared to go in *Altimarloch*. McGrath J had sympathy for the position taken by Kirby J in *Burke* and, in application of the slightly more restricted test taken from the judgment of Gaudron ACJ and Hayne J in the same case (that liability must be "of the same nature and extent"), he thought it important to avoid "too technical an approach".[205] In result, McGrath J concluded that contribution was appropriate in *Altimarloch* despite the different causes of action and despite different equitable considerations bearing on responsibility for the damage (which he thought could be addressed in the order made).[206] I do not think that in substance the approach I prefer will lead to a different outcome than the approach adopted by McGrath J (just as I think the differences between the approaches taken by Gaudron ACJ and Hayne J and Kirby J

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202 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 at [71]–[73]; and *Hotchin v New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 at [69]–[70].

203 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 from [87] per Kirby J.

204 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [128] and [139].

205 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [224].

206 At [231].

in *Burke* may be more apparent than real in result), but I think it is simpler and better accords with principle.

[152] Whether contribution is available ought not to turn on close classification of wrongs or measurement of damages, although inquiries in the cases into "coordinate liability" and "common obligation" have often prompted such analysis and have led to confusion in the case-law, perhaps because words such as "liability" and "obligation" may equally be used in relation to harm and in relation to source of responsibility. Contribution is an equitable principle which expresses natural justice in its recognition that it is unjust for the burden of meeting a loss for which others share responsibility to be borne by one party, to the benefit of those who escape liability. The obligations need not be identical in their source or extent. Nor is it necessary that they have the same legal character.[207] It is enough that the responsibility for the harm is shared. This is an inquiry that is practical and directed at the substance of the matter in the particular case. Although the basis on which contribution is made has often been elaborated in "particular pockets of doctrine" (such as in respect of co-insurance, co-sureties, and trustees), as Kirby J noted in *Burke v LFOT Pty Ltd*,[208] the cases rest on more general principles of justice.[209]

[153] I consider that the statutory requirement of liability for the "same damage" adopted in s 17(1)(c) of the Law Reform Act, reflects the principles of the common law of contribution, from which it was derived.[210] "Coordinate liability" in this context is liability for the same harm. It is sufficient for contribution if parties are liable to another person in respect of the same damage. On that view, the reform achieved by s 17(1)(c) and its predecessors was simply to remove the impediment formerly presented by *Merryweather v Nixan*, leaving the principles on which contribution is based equally applicable whether contribution falls within s 17(1)(c) or the common law.

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207 See *BP Petroleum Developments Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 (OH).

208 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [88].

209 As explained in *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 323, 29 ER 1184 at 1185 (Exch). See also *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350–351 per Kitto J. See also JD Heydon, MJ Leeming and PG Turner *Equity: Doctrines & Remedies* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2015) at [10-005]; and Andrew Beck "Contribution" in Peter Blanchard (consulting ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 605 at [15.2].

210 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [5] per Lord Bingham.

[154] In *Altimarloch*, Tipping J (with whose statement of law Blanchard J expressed agreement), relied for the principle to be applied in a case of equitable contribution on the judgments in *Royal Brompton*, indicating that he considered the critical question for equitable contribution was, as with contribution under s 17(1)(c), whether the damage was "the same".[211] In an addition to his judgment, in response to a draft of the reasons of McGrath J, he suggested that his difference with McGrath J was "not so much on the legal approach to be adopted to contribution issues but rather on the application of that approach to the facts of the present case".[212] He considered it was necessary to look to the nature of the liabilities, not simply their extent.[213] That statement is not inconsistent with contribution depending on liability for the "same damage" (which looks to nature of the harm and its extent). In concluding however, in application of the approach, that the liabilities were not the same in *Altimarloch*, Tipping J relied on the fact that "[d]ifferent duties underlie the two liabilities" and that the "liabilities … are neither conceptually nor actually of the same extent", referring to the different measurement of damages.[214]

[155] I am of the view that, in application, the approach taken by Tipping J reverted to cause of action analysis despite his earlier acceptance that the basis of liability was irrelevant. I consider that this was misapplication of the "same damage" approach for which he had earlier cited *Royal Brompton*.

[156] In *Altimarloch*, McGrath J was attracted to the simpler approach of Kirby J in *Burke*, which he thought effectively achieved the position proposed for further legislative reform in New Zealand by the Law Commission.[215] He considered that result could be achieved now only by legislation. McGrath J applied instead the approach of Gaudron ACJ and Hayne J in *Burke.* They had not limited contribution to cases where the parties were involved in a common enterprise (as McHugh J in *Burke* had done).[216] They considered however that contribution was available only where liability was "of the same nature and to the same extent". They left open

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211 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [134]–[138].
212 At [144].
213 At [145].
214 At [146]–[147].
215 At [224].
216 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [48] per McHugh J.

whether that required equal culpability and causal significance,[217] although in *Altimarloch* McGrath J (with whose reasons Anderson J agreed) thought equity would permit apportionment in contribution.

[157] I accept that equity permits apportionment of contribution to take account of matters of culpability and causal connection (in the manner explicitly provided for in s 17(2)). I expressed that view tentatively in *Altimarloch* at [58], indicating sympathy with the approach adopted by McGrath J, but it seems to me on reflection that it must be right. Contribution is an equitable remedy to right what would otherwise be an injustice, but only to that extent. Section 17(2) seems to me to reflect the approach of equity in achieving substantive justice in the particular case, equally applicable in a common law claim to contribution.

[158] In *Altimarloch*, the question of contribution was considered at trial. On application to strike out a claim to contribution, the question for the Court is not apportionment of responsibility between contributors but whether the claim for contribution is arguable. For the reasons given, I consider that unless it can be said that the claims are not in respect of the "same damage", the claim to contribution cannot be struck out. I do not think that this is to adopt an approach that now requires legislation. There is in my view likely to be little difference in result in the approach taken by Kirby J in *Burke* and by McGrath J in *Altimarloch* (in adoption of Gaudron ACJ and Hayne J in *Burke*) because questions of culpability and causal significance can be reflected in the eventual orders made. The simpler approach expressed by Kirby J reduces the capacity for confusion through over-refinement of terms by making it clear that the jurisdiction arises where two parties are liable in respect of the same damage. It has the merit of ensuring that contribution under s 17(1)(c) and at common law continues on the same principles from which s 17(1)(c) was derived and achieves practical justice. I would therefore allow the appeal on this ground also.

[217] At [16] per Gaudron ACJ and Hayne J.

Conclusion

[159] I would allow the appeal. I consider that the Courts below were wrong to strike out the claims for contribution both under s 17(1)(c) and for the fall-back claim of equitable contribution. I would allow costs to the appellant on the usual basis.

WILLIAM YOUNG J

The contribution claims

[160] In issue are claims by the appellant for (a) contribution under the Law Reform Act 1936 and (b) equitable contribution. In these reasons, my primary focus will be on the former claim. Such claim can arise only if the appellant (as a director) and respondent (as trustee) are both liable in tort to the investors. We must approach this appeal on the basis that both are so liable. Assuming, as I must, that this is so, I am of the view that the appellant has a tenable claim for contribution against the trustee under the Law Reform Act 1936. I am also of the view that, in the alternative – that is assuming that their liabilities are not both in tort – a claim for equitable contribution is available. On the latter issue (equitable contribution) I am in complete agreement with what the Chief Justice has said. So in these reasons, I deal only with contribution under the Law Reform Act.

The legal landscape – equitable and statutory claims for contribution

[161] Rights of contribution between those with common liabilities have long been recognised both at law and in equity. For procedural reasons, the underlying principles were primarily developed by courts of equity. Both at law and in equity, contribution was seen as turning on the liabilities of the parties between whom contribution was sought being coordinate in nature.[218]

[162] Rights of contribution did not generally arise as between tortfeasors. This was established in *Merryweather v Nixan*.[219] The parties had been defendants to a claim in tort which resulted in judgment against them for £840. The plaintiff looked only to Merryweather for payment and, having met the judgment, Merryweather sued Nixan, at common law, for contribution. At trial he was non-suited by Thomson B and this non-suit was upheld by the Court of King's Bench. The reasons of Lord Kenyon CJ (reported in the third person) are commendably succinct:

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[218] See JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, Chatswood, 2015) at [10-005]–[10-050].

[219] *Merryweather v Nixan* (1799) 8 D & E 186, 101 ER 1337 (KB).

> [T]here could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought, where the former recovery was for a tort: that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit: and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

As equity in this respect followed the law, the practical effect of *Merryweather v Nixan* was to preclude the development of both common law and equitable principles as to contribution between concurrent tortfeasors.[220]

[163] The rule in *Merryweather v Nixan* was never entirely popular and by the twentieth century was seen as anomalous. Law reform occurred first in the United Kingdom with the Law Reform (Married Women and Tortfeasors) Act 1935 (UK).[221] The UK statute was enacted as a result of the report of the Law Revision Committee which recommended as follows:[222]

> We think that the common law rule should be altered as speedily as possible. The simplest way of altering the law would seem to be … to give a right of contribution in the case of wrongs as in cases of contract. If this were done, joint tortfeasors in the strict sense would be given a right of contribution inter se. We think, however, that such a right might with advantage also be conferred where the tort is not joint (ie, the same act committed by several persons) but where the same damage is caused to the plaintiff by the separate wrongful acts of several persons. This is the position which frequently arises where the plaintiff sustains a single damage from the combined negligence of two motor car drivers, and recovers judgment against both … We think therefore that when two persons each contribute to the same damage suffered by a third the one who pays more than his share should be entitled to recover contribution from the other.

[164] The Committee recommended legislation along the following lines:[223]

> (II) Any person who is adjudged to be liable to make any payment … in respect of an actionable wrong may recover contribution … from any other

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220 There were limited circumstances in which contribution might be recovered, between tortfeasors. See the discussion in Heydon, Lemming and Turner, above n 218, at [10-015] citing with approval the historical overview provided in *Belan v Casey* (2003) 57 NSWLR 670 at [88]–[101] and [135]–[137]: “The exceptions which developed to the general rule in *Merryweather v Nixan* were ones where the tortfeasor had a legal liability, but arising from circumstances where the conduct of the tortfeasor was not so reprehensible that a court would not help him.”

221 Law Reform (Married Women and Tortfeasors) Act 1935 (UK) 25 & 26 Geo V c 30, s 6.

222 Law Revision Committee *Third Interim Report* (Cmd 4637, 1934), as quoted in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [3] per Lord Bingham.

223 Law Revision Committee, above n 222.

> person who has been made liable in respect of the same wrong, or who, if sued separately, would have been so liable …
>
> (III) Where two or more persons have committed independent wrongful acts which have been the cause of the same damage they shall have the same right to contribution among themselves but subject to the same exception as in the case of persons liable in respect of the same wrong.

[165] The recommendations of the Committee resulted the enactment of s 6 of the 1935 UK Act, the language of which was replicated in s 17 of our Law Reform Act 1936 (the 1936 NZ Act). This now provides:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
>
> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Similar legislative provisions were enacted in many Commonwealth jurisdictions.[224] I will refer to such legislation as addressed to liability between concurrent tortfeasors.

[166] In some jurisdictions, including England and Wales, statutory rights of contribution are now not confined to concurrent tortfeasors. Thus s 1(1) of the Civil Liability (Contribution) Act 1978 (UK) provides:

> Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

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224 See the overviews provided in *Halsbury's Laws of Australia* (2011, online ed) Negligence at [300-135]; and *Halsbury's Laws of Canada* (2014, online ed) Negligence at [HNE-9].

It will be noted that the expression "the same damage" remains part of the text. I refer to statutory schemes of this kind as involving contribution between concurrent wrongdoers.

[167] There has been a related reform in Australian jurisdictions involving schemes of proportionate liability in respect of "apportionable claims" under which the liability of a "concurrent wrongdoer" is limited to the proportion of the damage or loss which the court considers just, having regard to that wrongdoer's responsibility. The practical effect is that the risk of wrongdoer insolvency is with the plaintiff. An example of such a scheme is provided by Part 4 of the Civil Liability Act 2002 (NSW) which was in issue in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*.[225] The rules as to apportionable claims in part cover the circumstances addressed by s 17(1)(c) of the 1936 NZ Act and some of the language and associated concepts are necessarily similar. The cases which address proportionate liability schemes are thus of some materiality to the issue which we must address.

The claims in tort respect of which contribution is said to be available

[168] The claim against the directors was under ss 55–57E of the Securities Act 1978.[226] These sections constituted a statutory regime in relation to misstatements in, inter alia, prospectuses. Under this regime, a director of an issuer became subject to the regime if he or she had authorised the issuing of a prospectus that included an untrue statement.[227] The issuing of such a prospectus was a "civil liability event" and, in respect of such an event, the Securities Commission (and its successor, the Financial Markets Authority (FMA)) was entitled to seek declarations of civil liability and pecuniary penalties.[228] Section 55G provided:

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225 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10, (2013) 247 CLR 613.

226 Since repealed by the Financial Markets (Repeal and Amendments) Act 2013, and replaced by the Financial Markets Conduct Act 2013. The provisions of the Securities Act 1978 were in force at the relevant times and these proceedings were brought under those provisions.

227 Securities Act, s 56(1)(c).

228 Securities Act, ss 55B and 55C.

55G Compensation orders

(1) The court may, on the application of the FMA or a subscriber, order a liable person to pay compensation to all or any of the persons who subscribed for any securities on the faith of an advertisement or registered prospectus that includes an untrue statement, for the loss or damage that the persons have sustained by reason of the untrue statement.

The claim against Mr Hotchin was under this section. It was, however, agreed that we should approach the case on the basis that those who invested on the prospectus also had claims against the directors for negligent misrepresentation. It is also common ground that we should assume that the investors (a) have a claim against the trustee in tort for not safeguarding the investments which they made; but (b) do not have a claim against the trustee in tort in respect of the contents of the prospectus. We have been invited to deal with the case as if the directors had faced not a claim by the FMA but rather one by the investors in negligence.[229]

A simplified version of the facts

[169] In order to simplify my discussion of the issues raised by the case, I propose to assume a distinctly simplified version of its facts. It highlights the facts which I see as relevant and puts to one side those which I see as merely distracting. On this version:

(a) An investor invests $100 on the basis of a false prospectus.

(b) The value of the security when acquired is $40 (meaning that the immediate loss is $60).

(c) Nothing is ultimately realised on the security.

(d) The investor has a claim against the directors for either the full loss (of $100) or perhaps just for $60 (on the basis that only the immediate loss is recoverable because losses associated with subsequent

[229] The assumption is that the claim under s 55G is not in tort. I have reservations whether that is necessarily so, see the discussion as to liability under the Fair Trading Act 1986 at n 284 below.

deterioration of the company's position were not caused by the falsity of the prospectus). And:

(e) The trustee ought to have intervened earlier. Had there been an appropriately timed intervention, the amount realised on the security would have been $40. The investor thus has a claim against the trustee for $40.

It follows that if the investor's claim against the directors is confined to the immediate loss of $60, there is no overlap with the claim against the trustee. But if the investor can recover the full loss against the directors, that is the $100, there is an apparent overlap with the claim against the trustee in relation to the last $40.

[170] The question whether the liability of the directors was confined to the immediate loss of $60 (see [169](b)) was addressed in argument before Winkelmann J in the High Court[230] but not determined by her. It was also discussed in the judgment of the Court of Appeal.[231] This was in terms which were distinctly sceptical of the entitlement of my postulated investor to recover the last $40 against the directors but I do not read the judgment as reaching a conclusion on the issue. The argument was touched on in the submissions before us but not developed at any length. For myself, I think it distinctly arguable that the investor does have a claim against the directors for the last $40[232] and propose to approach the case on that basis; that is that the investor has a claim against both the directors and the trustee in relation to the last $40.

[171] If the trustee were to pay the investor compensation of $30, the investor's claim against the directors would be reduced by $30 (to $70). Likewise if the

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230 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 (Winkelmann J) [*Hotchin* (HC)] at [70].

231 *Hotchin v The New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 (Harrison, White and French JJ) [*Hotchin* (CA)] at [23] and [65]–[70].

232 See *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets* [2008] NSWCA 206, (2008) 73 NSWLR 653. As the Court of Appeal noted, the first was a case in deceit: *Hotchin* (CA), above n 231, at [60]. However, *Ingot Capital* involved liability of kind broadly akin to that relied on by the Financial Markets Authority. As Glazebrook J has noted, there does not appear to have been a secondary market for the securities and in those circumstances, investments once made were "locked in": see at [32].

directors were to pay the investor compensation of $70, the investor's claim against the trustee would be reduced to $30. So what is sometimes described in the cases as "the mutual discharge" condition for contribution – that is that a payment by one tortfeasor would, pro tanto, discharge the liability of the other – is satisfied.[233] As well, there would be nothing incongruous if a judge hearing claims against both parties gave judgment against the directors for $100 and the trustee for $40. In the sense that such judgments would overlap as to the last $40, there would be a common liability as to that amount. Indeed, if the directors were to accept liability to the investor in respect of the immediate loss (of $60) and the case went to trial against both directors and trustee only in relation to the last $40, there would be nothing incongruous about a single judgment against both for $40. It might be thought to follow that the liability which the directors and trustee have in respect of the last $40 is thus for the "the same damage" for the purposes of s 17(1)(c) of the 1936 NZ Act.

[172] The High Court and Court of Appeal did not analyse the facts in quite the same way as I have and in particular, in neither judgment is there specific identification of a shared liability in relation to the last $40. I suspect, however, that both Courts may well have arrived at the same result even if the shared liability in relation to the last $40 had been recognised. This is because both Courts proceeded on the basis that:[234]

(a) Shared liability in tort for the same damage is not necessarily enough to engage s 17(1)(c) which applies only where that liability is also "coordinate" or "common" in some additional respect.

(b) The shared liability of the directors and trustee in respect of the last $40 is not coordinate or common as the responsibilities of directors (not to make false representations in the prospectus) and the trustee (essentially supervisory in nature) are so different.

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233 See for instance the discussion in *Howkins & Harrison v Tyler* [2001] Lloyd's Rep PN 1 (CA), at [17]–[18].

234 *Hotchin* (HC), above n 230, at [69]–[73]; *Hotchin* (CA), above n 231, at [26] and [65]–[70].

(c) In any event, the damage each is liable for is not the same, even in respect of the last $40 (despite the measure of damages being the same) because, in the case of the directors, the damage for which they are liable consists of the adverse consequences of an investment made on a the basis of a false prospectus, whereas the damage for which the trustees are liable consists of the adverse consequences of their negligent supervision.

An alternative approach to liability

[173] As is apparent I am of the view that on the simplified version of the facts postulated there is an entitlement to contribution. I also recognise that there is an alternative approach to liability which is more favourable from the point of view of the appellant than the one just discussed.

[174] Let us assume that the investor's investment is not made until, or is perhaps rolled over after, the point at which the trustee, if acting diligently, would have intervened. Such an investor might have a claim against the trustee for the amount invested on the basis that, but for the trustee's negligence, the investment would not have been made. Such claim would be for exactly the same damage as the corresponding claim against the directors (which of course would be advanced on the basis that, but for the directors' negligence, the investment would not have been made). In each case the damage is the making of the investment. If a claim along these lines is tenable, I can see no escape from the conclusion that the same damage requirement is satisfied.

[175] Such a claim is:

(a) pleaded in the amended statement of claim in terms of a duty said to be owed by the trustee to "depositors … including prospective depositors, and existing or rollover depositors" and alleged breaches including the trustee's failure to suspend the operation of the company "to prevent it from taking in further deposits"; and

(b) not inconsistent with the strike out decision of Winkelmann J.

[176] I nonetheless have distinct reservations as to whether the implications of the argument have been thought through. It is, for instance, not entirely clear to me that Winkelmann J intended to leave such a claim on the table. When summarising the claims against the directors and trustee, she said:[235]

> If it can be established that the trustees failed in their duty to monitor the affairs of the company …, the damage resulting will be the losses incurred by the depositors while the trustees wrongfully failed to act. If it can be established that the directors made untrue statements, the damage resulting will be that the depositors invested in a company in reliance on untrue statements. There are different losses. Even if the trustees ought to have "pulled the plug" sooner, the trustees cannot be liable for the loss independently caused by the directors.

This passage is expressed in terms which suggest that the Judge did not have in mind the basis of liability which I have outlined. That she did not engage with such a case might suggest that she did not envisage that such a claim was available.

[177] This line of argument was touched upon in the submissions of the appellant, but was not developed in great detail. It was also not addressed in any depth by counsel for the trustee In those circumstances and because I think that contribution is available on the simplified version of the facts already outlined, I propose to leave this issue to one side.

Where I disagree with the approach proposed by O'Regan

[178] Unlike the Court of Appeal and High Court, O'Regan J does not approach the case on the basis that the 1936 NZ Act requires that the liability of parties between whom contribution is proposed is coordinate or common in addition to being in respect of the same damage.[236] To this point, I agree with him. I see a shared liability in tort in respect of the same damage as sufficiently coordinate or common to satisfy s 17 of the 1936 NZ Act and consider that no additional element is required.

[179] It is clear, however, that O'Regan J considers that the concept of common liability provides the test, at least in the circumstances of this case, for determining

[235] *Hotchin* (HC), above n 230, at [69].
[236] See below at [260].

whether the same damage requirement has been met.[237] I confess to difficulty in distinguishing between approaches under which:

(a) common liability in respects which go beyond liability for the same damage is not required; but

(b) the same damage requirement is not met unless there is some such additional commonality of liability.

As will become apparent, I see references in the cases to "common liability" as denoting nothing more than shared liability in relation to the same damage. As well, I consider that faithfulness to the text of the statute requires the focus to be only on whether the damage each is liable for is the same and not on the nature of the liabilities – for instances in negligence cases whether the underlying duties of care were the same.

[180] The differences between us become acute in relation to the point summarised in [172](c). It is clear that the liability of the directors in the postulated tort claim is for the loss suffered by the investor as a result of investing on the basis of the prospectus. On my simplified version of the facts, this is either $60 or $100. On the other hand, the liability of the trustee is for the negligent supervision. The obligations were thus different in character and this permits the damage caused by them to be categorised differently. On this basis the damage caused by the negligence of the directors was the making of an unwise investment and the loss caused by the trustee was the diminution to the value of the investment resulting from the failure to intervene earlier. This essentially is the view favoured by O'Regan J.

[181] I disagree with this approach. It seems to me that in each case the relevant damage consists of the consequence for the investor (in the one case of making an unwise investment and, in the other, of failure by the trustee to safeguard that investment). The damage for which the directors and trustees are liable includes all the consequences in respect of which compensation is payable. To the extent that

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[237] See below at [263].

those consequences overlap (ie on my simplified facts in respect of the last $40), the damage for which each is liable is the same. I see any other approach as contrary to the policy underlying the 1936 NZ Act, which envisaged that contribution would be available in such circumstances.

Shared liability

[182] A claim for contribution under s 17(1)(c) is available where the parties are liable in respect of the same damage. One could say, without any abuse of language, that in respect of that damage:

(a) the liability of the parties is "shared"; and therefore:

(b) the parties are under a "common liability"; and, as well:

(c) their liabilities (being in respect of the same damage) are "coordinate".

On my interpretation of the speeches in *Royal Brompton*, the expression "common liability" (two words only) is used as a shorthand for "shared liability in respect of the same damage" (eight words).[238] The approach proposed by O'Regan J is different. He attributes to the expression as used in *Royal Brompton* a connotation that the same damage requirement cannot be met unless the liabilities of the parties are also common, albeit that no precise test is proposed for determining when this test will be satisfied.[239]

[183] Against this background, and to avoid semantic confusion, I will use the expression "shared liability" to denote the liabilities which two wrongdoers have in respect of the same damage.

[184] The text of s 17(1)(c) provides that contribution depends upon two parties being liable in tort for the same damage and there is nothing in the statutory language used to suggest that such liability must also be additionally "common" or

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238 *Royal Brompton*, above n 222.
239 See below at [287].

"coordinate" (whether as a further requirement, or as a test for determining whether the same damage requirement is met). This is not accidental. It will be recalled that the recommendation of the Law Revision Committee was twofold: first, for a right of contribution between those responsible for "the same wrong" and secondly, in relation to those responsible for "independent wrongful acts" which caused the same damage.[240] Both s 6(1) of the 1935 UK Act and s 17(1)(c) of 1936 NZ Act conflated the two proposed rights of contribution but the intended effect was plainly in accord with the recommendation. It follows that the legislature envisaged that contribution would be available between those responsible for "independent wrongful acts", a conclusion which does not leave scope for a requirement of commonality as the basis of liability.

[185] When the cases on which the respondent relies are examined closely, they do not support the view that there is an additional requirement that shared liability in relation to "the same damage" must also be additionally common or coordinate before statutory contribution is available. Thus in *Royal Brompton* all references to common liability in relation to statutory rights of contribution are consistent with shared liability for the same damage being sufficient and the primary focus in the speeches was on the expression "the same damage".[241] O'Regan J primarily relies upon *Royal Brompton*. As I will explain later, the issue in *Royal Brompton* was very straight-forward. To my way of thinking, the result arrived at was inevitable on any conceivable approach to the same damage requirement. I therefore do not see the judgment of the House of Lords as depending on the subtle and not expressly articulated approach attributed to it by O'Regan J.[242]

[186] For these reasons, I will proceed on the basis that shared liability for the same damage is sufficient to warrant a claim for contribution.

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[240] See above at [164]. Although the illustration the Committee gave of such "independent wrongful acts" involved a single motor accident caused by the negligence of two drivers, there is no reason to think that it had in mind only so simple a situation.

[241] *Royal Brompton*, above n 222.

[242] See below at [287].

Does it matter that the directors and trustee would be liable for different amounts of money?

[187] On my simplified facts, the directors are liable for up to $100 and the trustee for only $40. There is, however, an overlap of liability in relation to the last $40 (the amount for which the trustee is responsible). If both were sued and the directors admitted liability for, and paid, $60, there could be a single judgment against both for $40.[243]

[188] It is well established that, in respect of an overlap of this character, the liability of the tortfeasors is in respect of the same damage. This was recognised by Lord Bingham in *Royal Brompton* in remarks which assumed a claim by A and against B and C:[244]

> When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage *or some of it*? At the striking-out stage the questions must be recast to reflect the rule that it is arguability and not liability which then falls for decision, but their essential thrust is the same. I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of "damage" or of "loss" or "harm", provided it is borne in mind that "damage" does not mean "damages" (as pointed out by Roch LJ in *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675, 682) and that B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (*even if in part only*) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not.

[189] As will become apparent, this approach has been adopted in cases in which personal injury has been exacerbated by negligent medical treatment and where contribution has been assessed between the negligent first tortfeasor (who was responsible for the accident) and the negligent health professionals.

[243] See above at [171].
[244] *Royal Brompton*, above n 222, at [6] per Lord Bingham (emphasis added).

The "same damage" requirement: the cases

Personal injury cases

[190] Statutory regimes for contribution between concurrent tortfeasors have often been addressed in the context of personal injury. For present purposes, the relevant cases involve:

(a) the consequences of a personal injury being aggravated by subsequent medical negligence; and

(b) missed limitation periods.

[191] Where the ultimate condition (including death) of a particular person has resulted from, or been contributed to by, successive independent acts of different tortfeasors, there may be an issue whether the first tortfeasor is responsible for that ultimate condition. In approaching this issue, the courts have resorted to concepts of causation (whether the actions of the second tortfeasor broke the chain of causation), foreseeability (whether the ultimate condition of the subject person was foreseeable by the first tortfeasor) and, at times, indivisibility of damage.[245]

[192] In cases of this sort, a right of contribution arises only if the two tortfeasors share a common liability in relation to some component of the plaintiff's ultimate condition. Where the first tortfeasor is not responsible for the adverse consequence of the second tortfeasor's negligence, there is no occasion for a claim for contribution because there is no shared liability. On the other hand, where the first tortfeasor is liable for the ultimate condition of the plaintiff, there is shared liability and rights of contribution follow.

[193] So if a plaintiff suffers injury as a result of an industrial accident (say a broken arm), the consequences of which are aggravated by a doctor's negligence (say resulting in amputation of the arm), the employer whose negligence caused the initial injury may well be liable in damages in respect of the amputation of the arm.

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[245] See for instance Douglas Hodgson "Intervening Causation Law in a Medical Context" (2013) 15 U Notre Dame Austl L Rev 22; and, more generally, Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [20].

Those responsible for negligent medical treatment will also be responsible for the amputation (although the calculation of any award of compensation will start from the premise of the arm being broken). In such a case, contribution is available between the negligent employer and the negligent doctor; this notwithstanding that the obligations of the employer (to provide a safe system of work) and the doctor (to treat the plaintiff with reasonable professional care) are entirely different.[246]

[194] Also of interest are cases in which a plaintiff, whose claim for damages for personal injuries against say a negligent driver has become barred by limitation resulting from a lawyer's negligence, sues the lawyer who then joins the negligent driver as a third party seeking contribution. Where this situation has arisen, Canadian courts have held that there is no right of contribution for reasons which include the conclusion that the lawyer and driver are not responsible for the same damage.[247] The liability of the lawyer is for prejudice to the economic rights of the plaintiff in relation to the recovery of damages, whereas the liability of the negligent driver is for personal injury. That the damages payable by the lawyer will be referable to the damages which might have been recovered against the negligent driver does not mean that each is liable for the same damage.

[195] In the cases in which this issue arose, the claims against the first tortfeasor and the solicitor were true alternatives in the sense that a right of action against the solicitor was premised on the assumption that there was no claim against the first tortfeasor.[248] It follows that requiring the first tortfeasor to contribute to damages which the solicitor must pay would be to impose on that tortfeasor a liability other than that provided for by the law.

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246 See for instance *Mahony v Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 530; *Hughes v Meters* (1992) 201 AR 297 (Alta Master), affirmed on appeal in *Hughes v Meters* (1993) 200 AR 335 (ABCA).

247 See for instance *Wallace v Litwiniuk* [2001] ABCA 118, (2001) Alta LR (3d) 249; *Sorenson v Abrametz* [1988] 1 WWR 609 (SKCA). Other reasons include the approach of the Canadian legislatures and courts under which a limitation defence available to a tortfeasor against a plaintiff excludes contribution against that tortfeasor: see *Wallace* at 259.

248 I am not aware of cases in which a contribution has arisen where a claim against the first tortfeasor was settled at a discount because of negligently caused limitation issues. Such a case would be rather like *Royal Brompton* and would probably have the same result.

Failure to insure in physical damage or loss cases

[196] An illustrative example of such a case is provide by *Coutts v Davenports Harbour Lawyers*.[249] The plaintiffs' building had been extensively damaged by fire while it was being renovated. Their insurance policy did not respond to the loss because it contained an exclusion which had been triggered by the renovation exercise. The plaintiffs sued their solicitors for negligently failing to arrange appropriate insurance and the solicitors applied to join the builders as third parties on the basis that it was their negligence which had caused the fire. The High Court held that on these facts, and assuming liability, the solicitors and builders were not responsible for the same damage. The builders were liable for damage consisting of the destruction of the building, whereas the solicitors were liable for the plaintiffs' inability to receive insurance.[250]

Failure to insure in economic loss cases

[197] An issue very similar to that in *Coutts*, albeit involving economic and not physical loss, was decided the other way by the English Court of Appeal in *Hurstwood Developments Ltd v Motor & General and Andersley & Co Insurance Services Ltd*.[251] The plaintiff had constructed a building using a foundation system recommended by consultants. The foundation failed and the plaintiff was required to carry out remedial works. It then sued its insurance brokers alleging that they, negligently and in breach of contract, had failed to secure insurance cover. The Court of Appeal concluded that it was open to the insurance brokers to seek contribution against the consultants.[252] This judgment, however, was disapproved in

249 *Coutts v Davenports Harbour Lawyers* [2012] NZHC 862. This case closely correlates to the bank theft/negligent insurer example postulated in *Hunt & Hunt*, above n 225, at [39]–[40].

250 At [35].

251 *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd* [2001] EWCA Civ 1785, [2002] Lloyd's Rep IR 185.

252 At [27].

Royal Brompton on the basis that consultant and insurance brokers were not liable in relation to the same damage.[253]

Defective building cases

[198] Contribution issues often arise in respect of claims in relation to defective buildings and, particularly in New Zealand, leaky buildings. In a typical New Zealand case, the owner of a leaky building will have claims against the builder (which New Zealand courts accept can be brought in tort).[254] As against the builder, the claim in tort will be based on breach of a duty of care associated with compliance with the Building Code.[255] As against the local authority, the claim will be for breach of a duty of care associated with its inspection and certification functions. The damage suffered by the plaintiff will be a combination of (a) the laying out of money for a defective building and (b) the cost of ensuring that the building complies with the Building Code.

[199] In this situation, the obligations of the builder and local authority are different in character; the obligations of the former being addressed to the construction of a Code-compliant building and those of the latter primarily to withholding certification in respect of non-compliant buildings. In practice, claims for contribution in such circumstances have been accepted without much analysis.[256]

[200] A somewhat more technical approach was taken by the English Court of Appeal in *Birse Construction Ltd v Haiste Ltd*,[257] the facts of which warrant brief discussion. Birse had constructed a reservoir for a water authority, Anglian. The reservoir was defective and Birse replaced it. It then sued Haiste, the consulting engineers who had advised Birse on the construction of the reservoir. In issue was

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253 *Royal Brompton*, above n 222, at [33] per Lord Steyn. The House of Lords approved *Bovis Construction Ltd v Commercial Union Assurance Co plc* [2001] 1 Lloyd’s Rep 416 (QB), (see *Royal Brompton* at [34]) which involved a similar situation, a defectively constructed building (for which Bovis was responsible to the building owner) and a contention by Bovis that it was entitled to contribution from Commercial Union as it was liable to the building owner under an insurance policy. The Court in *Bovis* had concluded that the postulated liabilities were not in respect of the same damage, at [27]–[28].

254 Todd (ed), above n 245, at [6.4.01(1)].

255 The Building Code is found in the Building Regulations 1992, sch 1 (which continues in force despite the revocation of the Building Regulations 1992, under the Building (Forms) Regulations 2004, reg 8).

256 See for instance *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

257 *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675 (CA).

whether in those proceedings, Haiste could seek contribution from Newton, who had been employed by Anglian as the supervising construction engineer for the project. The claim for contribution was struck out.[258] For the purposes of the case, the Court of Appeal treated Birse as the plaintiff (as it was of course) and considered that the damage suffered by Anglian (being the defective reservoir) for which Newton might have been liable and the damage suffered by Birse (namely the cost of rebuilding the reservoir, for which Haiste was arguably liable) were not the same.

[201] To New Zealand eyes that result seems a little odd. Let us assume a defectively constructed and leaky complex building. The building owner (in effect Anglian) sues the builder (Birse) who remediates or replaces the building and then sues the consulting engineers whom it had retained (Haiste). The consulting engineers seek contribution from an engineer (Newton) employed by the building owner. My impression of the New Zealand cases to date is that a New Zealand court would conclude that the builder, its construction engineer and the building owner's employed engineer were concurrent tortfeasors all of whom were, or could be, liable in relation to the same damage (being the defective state of the building as constructed) and therefore able to seek contribution inter se.

[202] *Birse* was decided as it was because, due to the more restrictive approach to the duty of care taken in England, it was not possible to identify a relevant common liability between Haiste and Newton to which contribution could apply.[259] Treating the claimant as Birse, it had a credible claim against Haiste but not Newton. And treating the claimant as Anglian, it had a credible claim against Newton but not Haiste. For this reason, requiring Newton to contribute to Haiste's liability to Birse would have subjected him to a liability beyond that imposed by the law.[260]

Joining the solicitor/accountant/valuer cases

[203] When A engages in a transaction with B and retains C (usually a solicitor, or accountant or valuer) for advice and the transaction goes wrong as a result of the

[258] There was a further claim that Newton had breached a duty of care independently owed to Birse which was not disposed of by the judgment: see at 681.

[259] See at 680, per Sir John May.

[260] As Longmore J put it in *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642 at [7], what is required is a "tripartite, not a multipartite, situation".

wrongdoing of B, A may have a choice as to whom to sue. In these circumstances B might be seen as the primary wrongdoer and C a secondary wrongdoer.

[204] In some instances contribution will be sought by the primary wrongdoer (B) against the negligent adviser. Cases dealing with this situation go both ways.

(a) In *Burke v LFOT Pty Ltd* (which involved a claim for equitable contribution) the vendor of retail premises along with a director of the vendor were sued for misrepresenting to the purchaser the tenants' ability to meet rent payments and sought equitable contribution from the purchaser's solicitor, who had negligently failed to advise the purchaser to make further inquiries as to the tenants.[261] A majority of the High Court of Australia held that contribution was unavailable[262] on the basis that it was appropriate for the vendor to repay the full difference between the price received and the true value of the premises.[263]

(b) In *Eastgate Group Ltd v Lindsey Morden Group Inc* the vendor, who had been sued for breach of warranty, looked to the purchaser's allegedly negligent accountants for contribution under the Civil Liability (Contribution) Act 1978 (UK).[264] The Court of Appeal considered that the damage for which each party was allegedly liable was the same, namely the loss arising from the purchaser buying a company for more than it was worth.[265] *Eastgate* was cited with apparent approval in *Royal Brompton*.[266] As to this, I respectfully disagree with the suggestion by O'Regan J to the contrary.[267]

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261 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282. The case against the vendor and director was for breach of provisions of the Trade Practices Act 1974 (Cth) corresponding to s 9 of our Fair Trading Act 1986 and the postulated claim against the solicitor was for breach of his contract of retainer. It does not appear to have been suggested that they could have been seen as joint tortfeasors, see below n 284. This was presumably because liability under the Trade Practices Act was regarded as not being in tort.

262 Gaudron ACJ, McHugh, Hayne, and Callinan JJ, with Kirby J dissenting.

263 At [22] per Gaudron ACJ and Hayne J, at [67]–[68] per McHugh J and at [143] per Callinan J.

264 *Eastgate*, above n 260.

265 At [17].

266 *Royal Brompton*, above n 222, at [28].

267 See O'Regan J at [313]. The example given by Lord Steyn at [29] of a case where contribution would be available is very close to the facts in *Eastgate*, above n 260.

[205] In other cases A will elect to sue C the negligent professional, who may then seek contribution from B, the primary wrongdoer. Again, there are cases going both ways:

(a) In *Friends' Provident Life Office v Hillier Parker May & Rowden* the plaintiff sued a surveying firm for negligently certifying that the plaintiff owed certain sums to property developers whom they had engaged, with the result that the developers had been overpaid.[268] The surveyors issued third party proceedings against the developers. The Court of Appeal held that the claim for restitution against the developers (as the action for the overpayment was characterised) was a claim for compensation and was in respect of the "same damage" as the claim against the surveyors.[269] The Court also held that potential claims against the developers for breach of trust provided a basis for a contribution claim against them by the surveyors.[270] The view that the restitutionary claim could be categorised as being for "compensation" and in respect of "damage" was rejected by Lord Steyn in *Royal Brompton* but he did not address the breach of trust basis of the contribution claim.[271] More importantly, if there had been a claim against the developers for, say, a breach of warranty as to the accuracy of the claims on which they had been paid,[272] Lord Steyn would have had no difficulty with the result.[273]

(b) The opposite conclusion was reached in *Howkins & Harrison v Tyler*.[274] In that case the plaintiff had overvalued property against which a loan had been secured and, when the borrower defaulted, was sued by the lender before settling. The Court of Appeal rejected the plaintiff's claim for contribution from the borrower, holding that the damage for which the valuer and borrower were liable was not the

268 *Friends' Provident Life Office v Hillier Parker May & Rowden* [1997] QB 85 (CA).
269 At 102–103.
270 At 108.
271 See *Royal Brompton*, above n 222, at [33].
272 Such a contention had been advanced by the surveyors in *Friends' Provident*, above n 268, but was held to be untenable by the Court of Appeal: see at 108–110.
273 This is apparent from the example given by Lord Steyn in *Royal Brompton*, above n 222, at [29].
274 *Howkins & Harrison v Tyler*, above n 233.

> same on the basis that a payment to the lender by either would not reduce the other's equivalent obligation, in other words the mutual discharge condition had not been satisfied.[275]

[206] In cases of this kind there can be closely associated causation issues, for instance whether, given the availability of a claim against B, the wrongdoing of C caused any loss and whether payment by either B or C would automatically reduce the liability of the other, ie whether the mutual discharge condition is satisfied.[276]

The "same damage" problem in other economic loss cases

[207] Sometimes the claims against the two wrongdoers are complete alternatives in the sense that their liabilities are mutually exclusive. Where this is the case, a successful claim for contribution would necessarily result in liability which goes beyond that provided by the law.

[208] I consider that this is illustrated by the leading English case, *Royal Brompton*,[277] the facts of which are discussed below in the reasons of O'Regan J.[278] In dismissing the claim for contribution by the architects, Lord Bingham, just after the passage set out above at [188], went on to say:

> 7 Approached in this way, the claim made by the architect against the contractor must in my opinion fail in principle. It so happens that the employer and the contractor have resolved their mutual claims and counterclaims in arbitration whereas the employer seeks redress against the architect in the High Court. But for purposes of contribution the parties' rights must be the same as if the employer had sued both the contractor and the architect in the High Court and they had exchanged contribution notices. The question would then be whether the employer was advancing a claim for damage, loss or harm for which both the contractor and the architect were liable, in which case (if the claim were established) the court would have to apportion the common liability between the two parties responsible, or whether the employer was advancing separate claims for damage, loss or harm for which the contractor and the architect were independently liable, in which case (if the claims were established) the court would have to assess the sum for which each party was liable but could not apportion a single liability between the two. It would seem to me clear that any liability the employer might prove against the contractor and the architect would be

275 At [18] per Scott VC. The Vice-Chancellor was critical of the reasoning in *Friends' Provident* (above n 268): see at [15]–[17].
276 The cases on this are reviewed by Longmore LJ in *Eastgate*, above n 260, at [11]–[15].
277 *Royal Brompton*, above n 222.
278 See below at [273]–[276].

> independent and not common. The employer's claim against the contractor would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost it incurred, the sums it overpaid and the liquidated damages to which it was entitled. Its claim against the architect, based on negligent advice and certification, would not lead to the same damage because it could not be suggested that the architect's negligence had led to any delay in performing the contract.

[209] The primary complaint of the employer was late completion of the building. That was the claim against the contractor. The claim against the architect was for impairing that claim. A confusing aspect of the case is that the facts would not have had to have been very different for the same damage requirement to have been met, as is apparent from the following passage in the speech of Lord Steyn:[279]

> 22 The characterisation of the employer's claim against the contractor is straightforward. It is for the late delivery of the building. This is not a claim which the employer has made against the architect. Moreover, notionally it is not damage for which the architect could be liable merely by reason of a negligent grant of an extension of time. *It is conceivable that an architect could negligently cause or contribute to the delay in completion of works, eg by condoning inadequate progress of the work or by failing to chivvy the contractor. In such a case the contractor and the architect could be liable for the same damage.* There are, however, no such allegations in the present case.

[210] Despite the contribution claim thus having been a near miss, I think it clear that the postulated liabilities of the architect and contractor were not in respect of the same damage. In my terms, this is because those liabilities were true alternatives. If the hospital had sued both the contractor and architect, there could not sensibly have been a single judgment against them covering the same loss. Such judgment as might have been obtained against the contractor would have been for breach of its contractual obligations whereas the judgment against the architects would only have been for impairing the employer's contractual rights. There would thus have been no overlap. The liability of the architect necessarily stopped where the liability of the contractor started and vice versa. It seems to me that it was in this respect that Lord Bingham considered that they were "independently liable".[280]

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279 *Royal Brompton*, above n 222 (emphasis added).
280 At [7]. Compare O'Regan J at [287].

[211] *Marlborough District Council v Altimarloch Joint Venture Ltd*[281] concerned equitable contribution but *Royal Brompton* featured significantly in the judgments. Two of the judges (McGrath and Anderson JJ) were of the view that the vendor and local authority were subject to liabilities to the purchaser which were "of the same nature and extent".[282] The liabilities of the vendor and local authority to the purchaser arose out of a single mistake which both had made as to the water rights available for transfer. A difficulty with the contribution claim was that the measure of damages was not the same as between the vendor and the local authority. The claim against the vendor was for expectation damages. The claim against the local authority was only for detriment damages. It is distinctly arguable that once the Court held that the vendor was responsible for expectation damages, contribution was off the table on the basis that there was no longer commonality as to the damage for which the parties were liable. I do not have a concluded view on this point. The same situation arose in the *Eastgate* case, albeit before trial, and the claim for contribution was nonetheless allowed to proceed.[283] I note as well that the point is closely associated with the causation question (namely whether, given the claim against the solvent vendor, the negligence of the local authority had caused any loss). I would accept, however, that if the Court had been prepared to award only detriment damages against the vendor – so that both it and the local authority were liable for the difference between the price paid for the farm land and its actual value – the claims against them would have been for the same damage and equitable contribution would have been available.[284]

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[281] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

[282] See at [225]–[231] per McGrath J, with Anderson J concurring at [235].

[283] *Eastgate*, above n 260: see the discussion at [16]–[18]. The point made is that what is required is an identity of "damage" and that the *damage* may be the same even thought the *measure of damages* is different. In that case, despite the starting points being different in legal terms (the value as warranted and the price as paid), they would, in all probability, be the same in monetary terms.

[284] I also think that contribution may have been available under the 1936 Act on the basis that the vendor's misrepresentation as to the water rights could have been characterised as a breach of s 9 of the Fair Trading Act 1986, making the vendor and District Council concurrent tortfeasors. Such analysis presumes that civil liability under the Fair Trading Act is properly characterised as tortious, a view I am inclined to adopt: see JC Campbell "Contribution, Contributory Negligence and Section 52 of the Trade Practices Act" (1993) 67 ALJ 87 (Part I) and 177 (Part II) and the judgment of Hulme J in *Jonstan Pty Ltd v Nicholson* [2003] NSWSC 500, (2003) 58 NSWLR 223 where conflicting views on the issue are reviewed. I have expressed this view previously in *NZ Food Group (1992) Ltd v Amcor Trading NZ Ltd* (1999) 9 TCLR 184 (HC). The contrary view is presented in Todd (ed), above n 245, at [6.5.02(3)] and [24.3.02]. As I have noted, an argument along these lines could have been, but was not, advanced in *Burke*: see above n 261.

Miscellaneous cases

[212] For the sake of completeness I should mention four other cases.

[213] *Dairy Containers Ltd v NZI Bank Ltd*[285] is discussed in the reasons of O'Regan J. The appellant's argument derived some support from the result arrived at in the High Court but I agree with O'Regan J that such support is limited as the issues with which we are dealing were not explored.[286]

[214] In *Alexander v Perpetual Trustees WA Ltd* the plaintiffs were the beneficiaries of trusts (the first level trusts) of which the Perpetual Trustee companies (Perpetual) were trustees.[287] Perpetual placed the beneficiaries' funds with Minter Ellison (Minters) who held them as trustee of trusts in favour of Perpetual (the second level trusts). The funds were paid away by Minters and lost. The claimants successfully sued Perpetual for breaches of the first level trusts and Perpetual successfully sued Minters who were ordered to pay Perpetual what was necessary to replenish the second level trusts so as to make good their breaches of trust. Minters cross-claimed against for contribution under concurrent wrongdoers legislation. This claim depended on Minters showing that (a) it was liable to the beneficiaries and (b) such liability was in respect of the same damage as the liability of Perpetual to the beneficiary. The contribution claim was unsuccessful at trial and on appeal. A further appeal to the High Court was heard by a bench of six judges, three of whom held that Minters were not liable directly to the beneficiaries, a conclusion which was fatal to the contribution claim.[288] The other three judges (McHugh, Kirby and Callinan JJ) would have allowed the appeal on the basis that Minters was liable to the beneficiaries under the Fair Trading Act 1985 (Vic) (which corresponds to our Fair Trading Act 1986) and that such liability was in respect of the same damage (being the loss of the beneficiaries' investments) as the liability of Perpetual.[289] I see their judgments as providing considerable support for the appellant's case, a support

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285 *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (HC); *ANZ Banking Group (New Zealand) Ltd v Dairy Containers Ltd* (CA156/92, 17 December 1992).

286 See below at [291].

287 *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7, (2004) 216 CLR 109.

288 See at [33] and [57] per Gleeson CJ, Gummow and Hayne JJ.

289 At [96] per Kirby J, at [160] per Callinan J, with whom McHugh J agreed (at [67]).

which is not undermined by the approach of the majority which did not engage in any detail with the same damage issue.[290]

[215] *Hunt & Hunt*, also discussed by O'Regan J,[291] was decided in respect of a statutory scheme providing for proportionate liability in which the expression "the same damage" does not occur.[292] But, because the provision in question proceeds on the basis that the wrongdoers must be liable for the same damage,[293] I see this case also as providing some further support for the appellant.

[216] In *FFSB Ltd (Formerly known as Fortis Fund Services (Bahamas) Ltd) v Seward & Kissel LLP*),[294] which is discussed by Glazebrook J,[295] the Privy Council cut through arguments which bear at least some resemblance to those advanced by the respondent by saying that in the case of both claims, "the alleged damage is the loss of the funds invested" and that the same damage requirement was thereby met.[296]

The same damage requirement: an analysis

A preliminary comment

[217] I do not think it possible to lay down a simple template for determining whether claims against tortfeasors are for the same damage. That said, I think it is possible to make reasonable sense of the cases – and perhaps to provide some guidance for the future – by identifying the factors which I consider to have been of primary relevance in determining the outcomes of the leading cases.

[218] As is usual in these reasons, I assume a claimant (A) and two tortfeasors (B and C). I will refer to the party seeking contribution as the contribution plaintiff and

290 The majority discussed the same damage point at [37]–[40], noting that the language of the relevant legislation "suggests that there may be the necessary sameness in the 'damage' for which the two parties to the contribution claim are liable to a third, even without an identical legal basis for that liability".
291 See below at [304].
292 *Hunt & Hunt*, above n 225.
293 See the discussion at [4]–[6] and [16]–[23].
294 *FFSB Ltd (formerly known as Fortis Fund Services (Bahamas) Ltd) v Seward & Kissel LLP* [2007] UKPC 16, [2007] 5 LRC 224.
295 See above at [60] and [79]–[80].
296 *FFSB Ltd (formerly known as Fortis Fund Services (Bahamas) Ltd) v Seward & Kissel LLP*, above n 294, at [27].

the party against whom contribution is sought as the contribution defendant. In circumstances where one of the tortfeasors is the primary wrongdoer, I will refer to that tortfeasor as B.

A common liability to another party

[219] There can be no claim for contribution unless B and C are both liable to A. That this is so is exemplified by *Birse*.[297]

The responsibility of the contribution defendant

[220] A contribution defendant is only liable to contribute in respect of damage for which that defendant would have been responsible if sued directly by A. So if a driver (B) negligently injures A and those injuries are exacerbated by negligent medical treatment on the part of C, C can seek contribution against B if, and only if, B is liable for the ultimate condition of A. Otherwise B is responsible only for the initial injury and C for the later exacerbation of that injury.[298]

[221] The result arrived at in *Altimarloch* could be justified by reference to causation in that the negligence of the Council did not, as events panned out, cause the purchaser any loss.[299]

Damage not the same: B liable for personal injury or physical damage; C liable for economic loss

[222] Where B is liable in respect of personal injury or physical damage and C is liable for economic loss associated with an inability to be recompensed in relation to that injury or damage, it intuitively seems (and it is thus easy to conclude) that they are not liable in relation to the same damage. That this is so is exemplified by the personal injury/limitation and physical loss/insurance cases.[300]

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297 *Birse Construction Ltd v Haiste Ltd*, above n 257.
298 See above at [190]–[193].
299 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 281.
300 See above at [194] and [196].

[223] In this situation, the fact that the measure of damages in respect of C may be calculated directly by reference to the damages to which B is liable is not controlling.

Damage not the same: The liabilities of B and C to A are mutually exclusive

[224] As noted, sometimes the claims by A against B and C are mutually exclusive, in the sense that B can only be liable to A if C is not liable and vice versa. If so, an order that B contribute to damages payable by C (or vice versa) would result in a liability against the contribution defendant which goes beyond that imposed by law. This situation is illustrated by *Royal Brompton*[301] and by the personal injury/limitation cases discussed above.[302]

Claims involving primary and secondary wrongdoers

[225] I assume claims against B who is the primary wrongdoer and C a secondary wrongdoer who has acted either in breach of a duty to protect A either (a) in relation to B, or (b) more generally in respect of risks of the kind which were crystallised by B's conduct.[303] In this situation A has a choice whether to sue B or C, or both B and C, and in that sense (ie viewed from the perspective of A), the claims are alternatives. But they are not completely alternative in that B's liability to A does not limit the legal liability of C to A. This means that there is scope for arguing that B and C share liability in relation to the same damage and that claims for contribution ought therefore to be available.

[226] A contribution claim by B against C will, at least usually, be not very meritorious. Because B is the primary wrongdoer, allowing B to transfer some liability to C will often seem unjust. This is particularly so if the result will be to allow B to retain ill-gotten gains or to avoid a contractual liability. As well, in cases where C's fault is the non-obtaining of insurance for A, ordering C to pay

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301 *Royal Brompton*, above n 222, as discussed above at [208]–[210].
302 At [194]–[195].
303 See above at [203]–[206].

contribution to B would be perverse because if insurance had been arranged, the insurer would have had a subrogated claim against B.[304]

[227] On the other hand, where C (the secondary wrongdoer) is sued and perhaps settles, a contribution claim by C against B might be thought to be more meritorious. Thus in the *Davenports Harbour Lawyers* case, it would have been fair that the burden of the plaintiff's loss should fall on the builder (assuming the fire was the builder's fault).[305] The same damage requirement, however, is not capable of acting as a valve, permitting contribution claims one way but not the other. In the *Davenports Harbour Lawyers* case, the difference in the liabilities to which the solicitors and builder were subject seem to me to have been fatal to contribution.[306] In other cases in this broad category, where the losses attributable to both tortfeasors is economic, the same damage problem is not so obviously fatal, albeit that the decisions that contribution is not allowed sometimes proceed on the basis that the same damage requirement has not been met. This analysis does not sit entirely easily with the approach taken by the majority in *Hunt & Hunt*.[307] An alternative approach which might be preferable would be to accept that the claims against B and C are in respect of the same damage, but to reject contribution claims by a primary wrongdoer under s 17(2) of the 1936 NZ Act on the basis that an order for contribution would not be "just and equitable".[308] This would enable a contribution claim by the secondary wrongdoer against the primary wrongdoer.

[228] At this point it is worth noting that a primary and secondary wrongdoer analysis could have been adopted in relation to leaky buildings. The primary wrongdoer will usually be the builder and building owner on whom the primary responsibility for constructing a Code-compliant building is cast. In practice, such analysis has not been deployed to preclude contribution claims. If contribution was not available, a council sued as the only defendant would have no recourse against a negligent builder.

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304 A point referred to in *Hurstwood*, above n 251, at [26], but not grappled with as it had not been argued. It raises problems as to mutual discharge as the Court in *Hurstwood* recognised.

305 *Coutts v Davenports Harbour Lawyers*, above n 249.

306 The practical problem this presented for the solicitors might have been mitigated by them settling with the plaintiff but taking an assignment of the plaintiff's claim against the builder.

307 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*, above n 225.

308 See Law Reform Act 1936, s 17(2).

My conclusion as to the same damage point

[229] The trustee's duty was not primarily directed towards protecting investors from wrongdoing on the part of the directors. This is because, if there was a primary wrongdoer, it was the company.

[230] The case is reasonably similar to the personal injury/negligent medical treatment cases. The directors' liability for anything beyond the immediate loss of $60 (and thus in respect of the last $40) might turn on concepts of causation and foreseeability which are at least akin to those involved in the personal injury/medical negligence cases.

[231] As will be apparent from my earlier comments, it is possible to envisage a claim by an investor against both directors and trustees which goes to trial against both in relation only to the last $40. In such a case, there could be a single judgment against both for $40. On the basis of the conclusions reached in the Courts below, (a) it would be open to the investor to enforce the judgment against the trustee; but (b) in that event, the trustee could not seek contribution against the directors.

[232] The rule in *Merryweather v Nixan* meant that the ultimate financial consequences of the loss caused by concurrent tortfeasors depended solely on the choice of the plaintiff as to who was sued and against whom judgment was enforced.[309] Section 17 of the 1936 NZ Act is premised on the policy consideration that such an arbitrary outcome is to be avoided. Where cases are genuinely within this policy, the courts should not be astute to distinguish between the harm for which the different tortfeasors are responsible. The present case seems to me to be well within the policy in that:

(a) A payment by either tortfeasor would directly reduce the liability of the other.

(b) In a case brought against both tortfeasors, a judgment in favour of the investor against them would be concurrent in relation to the last $40.

[309] *Merryweather v Nixan*, above n 219.

(c) Requiring the trustee to contribute to damages payable by the directors would not have the practical effect of subjecting the trustee to a liability beyond that imposed by the law.

The merits of the contribution claim

[233] There are a number of reasons for being sceptical about the merits of the claim:

(a) The claim for contribution depends upon Mr Hotchin showing that he is liable for the total loss of the investors' funds. He has to date vigorously denied any liability to the investors and has continued to deny such liability after his settlement with the Financial Markets Authority. His litigation stance as against the trustee is thus diametrically opposite to the position he has, in every other respect, maintained in relation to this litigation.

(b) Given the respective roles of the directors and the trustee and, not least, the reliance which a trustee will place on representations made by the directors, it is far from obvious that Mr Hotchin would have a substantial "just and equitable" claim for contribution against the trustee in respect of any shared liability.[310]

(c) Whether there is any shared liability is at least uncertain and there may be associated difficulties in assessing whether there is such a shared liability, given that the payment made by the directors is presumably well short of being the equivalent of the $60 which I have postulated in the simplified facts.

[234] All of that said, I do not think it would be right to dismiss the appeal on the basis that the claim for contribution is untenable as contribution would not be just and equitable or for any of the reasons just indicated. Save for what I think may have been something of a rhetorical flourish in relation to the settlement and

[310] Law Reform Act, s 17(2).

Mr Hotchin's denials of liability, the trustee did not invite us to do so. A contention that a claim for contribution was excluded because the trustees were entitled to an indemnity from Mr Hotchin was rejected in the High Court[311] and there has been no subsequent challenge to that rejection.

Disposition

[235] I would therefore allow the appeal. I would follow the usual course and award the appellant costs in this Court and in the courts below.

[236] In virtually all cases in this Court there is legitimate scope for argument both ways but we nonetheless almost always direct that costs follow the event. I therefore do not see it as material that there was scope for argument as to the availability of contribution. As well, although I have some reservations as to the merits of the contribution claim, I do not think it right to allow those reservations to control the costs question. Those reservations have not been informed or tested by argument. And, well-based or not, those reservations do not detract from the reality that the trustee chose to pursue arguments in the High Court, Court of Appeal and this Court which were unsuccessful and thereby caused the appellant to incur costs which would otherwise have been unnecessary.

[311] *Hotchin* (HC), above n 230, at [84]–[85].

ARNOLD AND O'REGAN JJ
(Given by O'Regan J)

Introduction

[237] We take a different view from our colleagues on the requirements for contribution under s 17(1)(c) of the Law Reform Act 1936 (the 1936 NZ Act) and for equitable contribution. We consider the Courts below were right to strike out Mr Hotchin's claim for contribution from the respondent the New Zealand Guardian Trust Company (Guardian Trust).

Facts

[238] We adopt Glazebrook J's summary of the factual background.[312]

Settlement

[239] We agree with Glazebrook J that the effect of the settlement between Mr Hotchin (and his fellow defendants) and the Financial Markets Authority (FMA) is that Mr Hotchin would need to plead, and would have the burden of proving, that he is liable at law for the loss to the Hanover Finance Limited (Hanover Finance) investors, as the FMA alleged in its statement of claim against him.[313] His counsel, Mr Gedye QC accepted this was the case. We agree that Mr Hotchin's acceptance of this burden of proving he is liable in tort to investors, and his submission that we should assume for the purposes of the present appeal that he will discharge it, is difficult to reconcile with his public protestations to the contrary.[314] As noted by Glazebrook J, Mr Hotchin's draft amended statement of claim against Guardian Trust pleads that he could have been sued by the FMA as a tortfeasor for negligent misstatement *or deceit* in relation to the allegations made against him by the FMA.[315] We do not think the FMA's claims can be characterised as allegations of deceit, but if we accept Mr Hotchin's pleading, the effect would be that we are being

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312 Above at [15]–[17].
313 Above at [61].
314 Above at [68].
315 Above at [36]. The deceit pleading was not in the statement of claim under consideration by the Courts below but was added into the draft amended statement of claim filed by Mr Hotchin for the purposes of the appeal in this Court.

asked to assume that Mr Hotchin would prove against himself that he was liable for the tort of deceit.

The claims against Mr Hotchin and Guardian Trust

[240] In order to address the essential issue in the case, it is necessary to establish exactly what damage Mr Hotchin would have been liable for, in the event that the FMA's claims against him had succeeded, and what Guardian Trust would be liable for if Mr Hotchin's claim against it succeeded. In doing so we proceed on the conventional basis in a case involving an application for strike out, namely that we assume that the pleaded claims can be substantiated.[316]

[241] The allegations in the FMA's statement of claim against the directors in respect of Hanover Finance alleged that the prospectus issued by Hanover Finance on or around 7 December 2007 and continuously distributed between that date and 23 July 2008 contained a number of untrue statements and omitted to mention adverse financial information about Hanover Finance. A directors' certificate extending the registration of the prospectus beyond 31 March 2008 was similarly misleading. Together, these are the "offer documents" on which the FMA claim is based.

[242] The FMA sought against Mr Hotchin and other directors of Hanover Finance declarations under s 55B(a) of the Securities Act 1978, a pecuniary penalty under s 55C(c) and also orders under s 55G that Mr Hotchin and others were liable to pay compensation to those who invested in Hanover Finance debt securities issued pursuant to the prospectus.

[243] The compensation claimed by the FMA on behalf of investors was the amount invested by the class of investors on behalf of whom the FMA was acting ($93,600,000), on the basis that the investors would not have invested or reinvested in Hanover Finance if the offer documents had been truthful. In the alternative, the FMA claimed $56,160,000, being the amount it said was the difference between the amount the investors paid for the Hanover Finance debt securities and the value

316 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267–268; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

derived by the investors from a transaction that took place after Hanover Finance was forced to stop trading. That transaction involved investors in Hanover Finance swapping their Hanover Finance debt securities for equity securities issued by Allied Farmers Limited.[317]

[244] The FMA's claim is not a claim in tort but, as noted by Glazebrook J,[318] we are asked to assume that, as pleaded by Mr Hotchin in his statement of claim against Guardian Trust, it could have been a claim in tort, making Mr Hotchin a tortfeasor for the purposes of s 17(1)(c). Mr Hotchin's pleading is that the FMA's claim could have been a claim for negligent misstatement. If it were a claim for negligent misstatement, the normal measure of damage would be the difference between the amount paid for the securities and the value of the securities received on the date of investment, whether measured at that time or later.

[245] Mr Gedye argued that it was open to the Court to assess damage at a later date, relying on *Smith New Court Securities Ltd v Citibank NA*.[319] The Court of Appeal rejected this submission, pointing out that *Smith New Court* was dealing with damages for deceit, not negligent misstatement.[320] Mr Hotchin's response to this was to plead in the draft amended statement of claim submitted to this Court that the FMA could have sued him for deceit on the basis of the allegations in its claim against him. No particulars were pleaded and we agree with the Court of Appeal that there is nothing in the FMA's claim that can be fairly characterised as a claim in deceit. And, as noted earlier, we do not think there is any real possibility that Mr Hotchin would try to prove his own deceit.

[246] The statement of claim containing Mr Hotchin's claim against Guardian Trust, as it was at the time of the High Court hearing, included an allegation that

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317 In the FMA's press release at the time of the commencement of proceedings, it said its claim was for $35 million in relation to all three Hanover companies: Financial Markets Authority "FMA to file civil proceedings against directors and promoters of the Hanover group" (press release, 15 December 2011). This figure was used in media reports at the time of the settlement: see for example "Hanover settlement some comfort – PM" *The New Zealand Herald* (online ed, Auckland, 6 July 2015). We have not been able to reconcile this with the statement of claim that was before us.

318 Above at [39]–[40].

319 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL).

320 *Hotchin v The New Zealand Guardian Trust Company Ltd* [2014] NZCA 400, [2014] 3 NZLR 685 (Harrison, White and French JJ) [*Hotchin* (CA)] at [59]–[61].

Guardian Trust had a duty to monitor offer documents for the truthfulness of their contents. If Guardian Trust did have such a duty, that would have provided a strong argument that Mr Hotchin and Guardian Trust were liable to investors for the same damage. However, Winkelmann J found there was no tenable argument that Guardian Trust and Perpetual Trust Limited (Perpetual) did have this duty, and there has not been any appeal against this.[321] In this Court, Mr Gedye put before us a draft amended statement of claim deleting this aspect of his claim.

[247] Mr Hotchin's claim against Guardian Trust, as outlined in the draft amended statement of claim, is that Guardian Trust owed a duty of care to the investors and prospective investors. This duty is said to come from ss 33 and 45 of the Securities Act, cl 13 of sch 2 to the Securities Regulations 1983 and all of sch 5 to those Regulations. It goes on to plead that Guardian Trust approved the "main points of trust deed" section of prospectus 36 issued by Hanover Finance including the statement that the trustee "represents the interests of all current and future holders of Secured Deposits" and also provided a letter for inclusion in the prospectus (the "Trustee's Statement") stating that the offer of securities complied with the relevant provisions of the trust deed.

[248] Mr Hotchin pleads that Guardian Trust had a duty to investors to exercise reasonable diligence, care and skill to carry out its monitoring obligations under the trust deed.

[249] Mr Hotchin pleads that if the FMA had succeeded against him, then Guardian Trust would have breached one or more of its duties to the investors of Hanover Finance. He gives these particulars:

(a) failing to identify the misstatements and omissions in the offer documents that were pleaded by the FMA against the directors in the FMA's statement of claim;

321 *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655 (Winkelmann J) [*Hotchin* (HC)] at [49]–[58].

(b) failing to ascertain that Hanover Finance's business was not being conducted in a prudent and businesslike manner, failing to monitor the financial position of Hanover Finance adequately, failing to ascertain matters indicating a serious risk that its securities would not be repaid, failing to ascertain that breaches of the trust deed had occurred and allowing Hanover Finance to issue and distribute a prospectus containing untrue statements by failing to use enforcement powers to halt Hanover Finance's ongoing acceptance of investments in debt securities and require the withdrawal of the relevant Hanover Finance prospectus; and

(c) failing to exercise powers to take timely and appropriate steps to protect existing and future investors, in particular failing to suspend the operation of Hanover Finance and its prospectus and prevent it from issuing further debt securities.

[250] The essence of the allegation is that, to use the words of Winkelmann J, Guardian Trust should have "pulled the plug" earlier.[322]

Matter not in issue

[251] For the purposes of the present strike out proceedings, it is not disputed that the FMA's claim against Mr Hotchin and his fellow defendants could be a tort claim and that Guardian Trust could be liable in tort to investors if Mr Hotchin could establish the allegations in the draft amended statement of claim. So we assume for present purposes that if the claims against Mr Hotchin and Guardian Trust respectively were made out, each will be a tortfeasor for the purposes of s 17(1)(c) of the 1936 NZ Act.

322 *Hotchin* (HC), above n 321, at [9]. We disagree with Glazebrook J (above n 100) that Mr Hotchin could amend his claim to allege that Guardian Trust is liable to investors for negligent misstatement. We think this is clear from what Winkelmann J says at [45], [47] and [94](a) of her judgment. If a prospective investor invests and has a claim to the effect that, but for the trustee's failure to carry out its duty to monitor adequately, he or she would not have invested, why would he or she allege that the trustee had negligently misstated that the trustee had monitored adequately when the same facts found a claim to the effect that the trustee did not in fact monitor adequately?

Judgments of the High Court and the Court of Appeal

[252] In the High Court, Winkelmann J concluded that the damage resulting from the alleged breaches of duty by the directors and that resulting from the alleged breaches of duty by Guardian Trust (including its alleged duty to prospective and rollover investors) were not the same damage. She said:[323]

> If it can be established that the trustees failed in their duty to monitor the affairs of the company for insolvency or breaches of the trust deed, the damage resulting will be the loss incurred by depositors while the trustees wrongly failed to act. If it can be established that the directors made untrue statements, the damage resulting will be that the depositors invested in a company in reliance on untrue statements. These are different losses. Even if the trustees ought to have "pulled the plug" sooner, the trustees cannot be liable for the loss independently caused by the directors.

[253] The Court of Appeal undertook a full review of the relevant authorities and its conclusion in relation to s 17(1)(c) was as follows:[324]

> [66] Mr Hotchin owed the investors a duty to make accurate statements in prospectuses and certificates. The damage suffered by the Hanover investors as a result of Mr Hotchin's alleged breach of duty was the loss of their deposits made in reliance on those statements or the excessive prices paid. The trustees' duties were of a very different nature, to protect investors against the harm arising from breaches of the companies' obligations under the trust deeds. The trustees cannot be liable in respect of the damage suffered by the investors where they did not owe a duty to protect them against the harm of inaccuracies in the directors' statements. They did not assume substantially the same obligations towards the investors as those performed by Mr Hotchin. The obligations they each assumed were not of the same nature or extent.
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> [67] Mr Hotchin and the trustees do not share a co-ordinate liability, even in a loose sense, to pay the compensation for inflicting the same harm. The investors could not recover from the trustees any or all of the loss caused by investing in reliance on a misleading statement. Any liability on the trustees' part would be directly and independently for the different damage caused by failing to intervene earlier. While in its most general sense the damage in both cases is loss of all or part of an investment, the trustees could not be independently liable for damage which they did not cause.
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> [68] The liabilities of the directors and trustees for breaching their respective duties would not be of the same nature and to the same extent. As noted, each was performing a different obligation. It is not enough for Mr Hotchin to identify at a level of generalised abstraction the existence of breaches of separate duties owed to the same group of investors and arising out of the operations of the same group of companies. He must identify

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323 At [69]. See also [94](a). The references to "trustees" refer to Guardian Trust and Perpetual.

324 Citations omitted.

> something more specific by way of a common or shared obligation giving rise to common liabilities where the nature of the harm resulting is the same or indivisible. He has failed to do so here.

[254] Both Courts found the alternative claim for equitable contribution failed for similar reasons.[325]

The s 17(1)(c) test

[255] Mr Gedye argued that both the High Court and Court of Appeal had erred in their articulation of the test for contribution under s 17(1)(c) of the 1936 NZ Act and in the way they applied the test to the facts of the present case. In particular, he argued that the requirements for a claim for contribution based on s 17(1)(c) were different from, and less onerous than, the requirements for a claim for equitable contribution.[326]

[256] Mr Cooper argued that the tests for contribution claims made under s 17(1)(c) and under the regime for equitable contribution were broadly the same.

[257] Mr Gedye argued that all that was required by s 17(1)(c) was that the tortfeasor from whom contribution was sought was liable for the same damage as the tortfeasor seeking contribution. It was common ground that "same damage" does not mean "same damages".[327] He said the Court of Appeal was wrong to find that Mr Hotchin needed to establish that the directors and Guardian Trust had a common or shared obligation giving rise to common liabilities where the nature of the harm resulting is the same or indivisible.[328] He said the Court had asked itself the wrong question, namely whether Guardian Trust had assumed substantially the same obligations towards investors as Mr Hotchin and his fellow defendants.[329]

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325 *Hotchin* (HC), above n 321, at [71]–[73]; and *Hotchin* (CA), above n 320, at [69].

326 Mr Gedye accepted that the test for equitable contribution required the party seeking contribution to establish that its liability and that of the party from whom contribution was claimed were co-ordinate liabilities, contrary to the views of the majority. He strongly resisted the proposition that the tests under s 17(1)(c) and under the common law regime for equitable contribution were the same.

327 *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675 (CA) at 682 per Roch LJ.

328 *Hotchin* (CA), above n 320, at [68].

329 At [66].

[258] Mr Gedye said the effect of the Court of Appeal decision was that there was no relevant distinction in New Zealand between equitable contribution and contribution between tortfeasors under s 17(1)(c). He said this was wrong, and overlaid the wording of s 17(1)(c) with requirements that did not appear in the section itself.

Our approach

[259] The inquiry required by s 17(1)(c) focuses on the "damage" suffered by the relevant plaintiff for which each tortfeasor is liable. The cases interpreting s 17 and its counterparts in other commonwealth jurisdictions are somewhat elusive in their articulation of the framework for determining whether damage caused by a party seeking contribution and a party against whom contribution is sought is the "same damage". Many cases were referred to us by counsel and we will evaluate the most relevant of these below.

[260] Our review of these cases leads us to conclude that the inquiry as to whether two tortfeasors are liable for the same damage requires a legal analysis of the claims against each of them to determine whether the tortfeasors have a common liability to the plaintiff. Applying that approach to the facts of this case, we have reached the view that (assuming the claims as pleaded were substantiated) the damage suffered by investors as a result of Mr Hotchin's negligent misstatements in the offer documents and that suffered as a result of Guardian Trust's negligent monitoring was not the same damage. The reasoning leading us to that conclusion is broadly in line with that of the High Court and the Court of Appeal.

[261] The FMA's claim under s 55G of the Securities Act is that the damage caused to investors by Mr Hotchin was the loss of their investments due to reliance on untrue statements in the offer documents.[330] If that claim is treated as a claim in tort, the damage would be the receipt of a debt security that had a lower value than it

330 Only investors who invested "on the faith of" the offer document that includes an untrue statement (that is, who relied on it) are eligible for compensation under s 55G and the compensation is limited to the damage that the investor sustained by reason of the untrue statement. In any event, reliance on a misstatement would need to be proved in a negligent misstatement claim. We are required to consider the availability of contribution on the assumption that the claim against Mr Hotchin is a claim for negligent misstatement.

would have had if the misstatements in the offer documents on which investors relied had been true. Guardian Trust's negligent monitoring did not cause that damage and it does not have any liability for it. Rather, Guardian Trust's negligent monitoring of Hanover Finance is said to have caused a deterioration in the net asset position of Hanover Finance, leading to a lower level of return from the liquidation of Hanover Finance than would otherwise be the case.

[262] Mr Gedye also argued that it was possible that some investors may have invested or reinvested in the period between the date when Guardian Trust would have taken enforcement action if it had not been negligent and the date when it actually did so. If they did, Mr Hotchin and Guardian Trust would be liable for losses suffered by those investors or reinvestors on the date of investment. He relied on the findings of Winkelmann J that Mr Hotchin's claim that Guardian Trust had a duty of care to rollover investors and prospective investors was tenable.[331] We do not see this argument as assisting Mr Hotchin. At best, it could be argued that the negligence of Guardian Trust had provided the opportunity for Mr Hotchin's allegedly negligent misstatements to continue to mislead investors. It would not lead to Guardian Trust having a common liability for Mr Hotchin's negligent misstatement.

[263] If the damage caused by Mr Hotchin's negligent misstatement is defined in a generic sense as "lost money", then it could be argued that, as Guardian Trust's negligence has, in the broadest sense, caused the investors to lose money, the damage caused by Mr Hotchin and Guardian Trust is the same damage. That is the underlying premise of Mr Gedye's argument and of the approach taken by the majority. We acknowledge that some of the cases provide support for that broad approach to defining "same damage" in cases involving economic loss. For the reasons we will come to when analysing those cases, we consider s 17(1)(c) requires an approach to the "same damage" analysis that assesses the damage caused by each tortfeasor by reference to the claim made against it and asks whether the tortfeasor against whom contribution is sought has a common liability with the tortfeasor

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331 *Hotchin* (HC), above n 321, at [41]–[48]. The finding was not challenged by Guardian Trust on appeal.

seeking contribution for the damage caused by the latter, in which case they will be liable for the same damage.

Limitation Act 2010

[264] Mr Gedye argued that there was Parliamentary confirmation of the distinction between the tests for contribution under s 17(1)(c) and that for equitable contribution in the Limitation Act 2010. In particular he highlighted the different language used in describing contribution claims under s 17(1)(c) in s 34(1) of the Limitation Act as against the language used to describe equitable contribution claims in s 34(2) and (3). He highlighted the fact that s 34(2), when describing equitable contribution claims by a party that is liable in respect of a matter, requires that the party from whom contribution is sought is liable "in a coordinate way in respect of that matter". This is amplified in s 34(3), which provides that the parties seeking contribution and the party against which contribution is sought are liable in a "coordinate way" only if their liability rests on a "common obligation" to the plaintiff. In contrast, s 34(1) uses language reflecting the wording of s 17(1)(c) itself, referring to tortfeasors who are both liable to the same person in respect of "damage".

[265] Mr Gedye said that he had not been able to identify the source of the tests set out in s 34(3) or, more generally, the reason for the structure and content of s 34. But he said the clear difference in the description of contribution claims in tort (under s 17(1)(c)) and those for non-tort contribution claims was legislative recognition of the fact that tortfeasor claims are not trammelled with any additional requirement for proof of coordinate liability or common obligation underlying the liabilities, as claims for equitable contribution are.

[266] The Court of Appeal dismissed this argument. It said that the wording of s 34(1) simply mirrored the essence of s 17 and the fact that s 34(2) and (3) referred to a claim for contribution against a party liable other than in tort, did not assist.[332] We agree with the Court of Appeal's analysis. The interpretation of legislation is rarely assisted by terms of subsequent legislation. In any event, we do not attach to

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332 *Hotchin* (CA), above n 320, at [64].

the differences between s 34(1) and s 34(2) and (3) the same significance as Mr Gedye does.

Case law on s 17 and similar provisions

[267] A number of cases were cited by counsel for both parties in support of their competing arguments about the requirements for contribution under s 17. Some of these were decisions on statutory provisions having wider scope than s 17. The background to these differences can be summarised briefly.

[268] The 1936 NZ Act was passed soon after its United Kingdom equivalent, The Law Reform (Married Women and Tortfeasors) Act 1935 (UK) (the 1935 UK Act).[333] The 1935 UK Act gave effect to the recommendations of a Law Revision Committee[334] that the common law rule forbidding claims for contribution or indemnity between joint or concurrent tortfeasors should be reversed by statute.[335] Similar reforming legislation was enacted in other commonwealth jurisdictions.[336]

[269] The 1935 UK Act and its counterparts in New Zealand and elsewhere dealt only with tortfeasors. It did not apply to other wrongdoers, nor did it apply where only one party was liable in tort. Where both parties committed wrongs other than in tort, equitable contribution could be pursued, but not where one party was a tortfeasor and the other was not. In the United Kingdom, a further reform was recommended by the Law Commission in 1977 to address these problems.[337] This led to the passing of the Civil Liability (Contribution) Act 1978 (UK) (the 1978 UK Act).

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333 Law Reform (Married Women and Tortfeasors) Act 1935 (UK) 25 & 26 Geo V c 30.

334 Law Revision Committee (UK) *Third Interim Report* (1934) Cmd 4637.

335 The rule arose from *Merryweather v Nixan* (1799) 8 D & E 186, 101 ER 1337 (KB) and *The Koursk* [1924] P 140 (CA).

336 See for example Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA).

337 Law Commission (UK) *Law of Contract: Report on Contribution* (Law Com No 79, 1977).

[270] Section 1(1) of the 1978 UK Act provides:

> Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

[271] Section 1(1) extends the statutory provision for contribution from claims between tortfeasors to all claims, regardless of the legal basis for the claims. Similar reforms have occurred elsewhere,[338] and a similar reform has also been proposed for New Zealand but not implemented.[339] The reform effected by the 1978 UK Act extended the statutory contribution provision into the territory previously dealt with by claims for equitable contribution, whereas the earlier more limited reform in the 1935 UK Act (the equivalent of which is still the law in New Zealand) simply provided for contribution among tortfeasors without affecting the law relating to contribution among other wrongdoers. This means that the argument that the statutory provision is intended to simplify and remove complications from the equitable contribution regime is stronger in the UK (post reform) than it is in New Zealand, where s 17 sits alongside the equitable contribution jurisdiction and applies only to contribution claims between tortfeasors.

[272] We now turn to the cases on which counsel relied, bearing in mind the context just outlined.

Royal Brompton Hospital NHS Trust v Hammond

[273] In *Royal Brompton Hospital NHS Trust v Hammond*,[340] the House of Lords was considering a claim for contribution made under the 1978 UK Act.

[274] *Royal Brompton* involved a dispute about a hospital building project. The contract relating to the project provided for a fixed date for completion of the works. The contract also provided for the engagement of an architect to supervise the project. The architect agreed with the contractor to lengthy extensions of the time

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338 For example, the Wrongs Act 1958 (Vic).

339 Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998). The Law Commission's suggested provision provides a definition of "concurrent wrongdoer" and provides for contribution among concurrent wrongdoers.

340 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 .

for completion of the project. This meant that, although the project was completed well outside the fixed date for completion, the hospital did not have a right to liquidated damages for the delay. Instead it was required to embark on an arbitration process in an attempt to have the extensions of time granted by the architect set aside. The prospects for success in that process were uncertain. There was also a dispute about additional work undertaken by the contractor on the architect's instructions.

[275] The hospital and the contractors settled their disputes, but the hospital sued the architect for negligence in granting the extensions of time and issuing the instructions for further works. The claim against the architect was, in essence, for sums that would otherwise have been able to be claimed from the contractor.

[276] The architect joined the contractor as a third party, claiming contribution towards any amount it might be held liable to pay to the hospital. In doing so, it relied on s 1(1) of the 1978 UK Act.[341]

[277] Lord Bingham traced the history of the reform measures leading to the enactment of the 1978 UK Act. He noted that an important object of the Act was to widen the classes of persons between whom claims for contribution would lie but, importantly, he added:[342]

> It is, however, as I understand, a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A. I find nothing in section 6(1)(c) of the 1935 Act or in section 1(1) of the 1978 Act, or in the reports which preceded those Acts, which in any way weakens that requirement. Indeed both sections, by using the words "in respect of the same damage", emphasise the need for one loss to be apportioned among those liable.

[278] That observation that the same damage requirement rests on common liability is in stark contrast to Mr Gedye's argument that all the New Zealand provision requires is that both the parties seeking contribution and the party from whom contribution is sought are liable for the loss of money suffered by the plaintiff. In

341 The section applied because, unlike s 17 of the 1936 NZ Act, it applied to liability on any basis, not just as a tortfeasor.

342 *Royal Brompton*, above n 340, at [5].

Royal Brompton, Lord Bingham summarised the exercise required to determine whether the party seeking contribution and the party from whom contribution is sought are liable for the same damage in these terms:[343]

> The question would then be whether the employer [the hospital] was advancing a claim for damage, loss or harm for which both the contractor and the architect were liable, in which case (if the claim were established) the court would have to apportion the common liability between the two parties responsible, or whether the employer was advancing separate claims for damage, loss or harm for which the contractor and the architect were independently liable, in which case (if the claims were established) the court would have to assess the sum for which each party was liable but could not apportion a single liability between the two. It would seem to me clear that any liability the employer might prove against the contractor and the architect would be independent and not common. The employer's claim against the contractor would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost it incurred, the sums it overpaid and the liquidated damages to which it was entitled. Its claim against the architect, based on negligent advice and certification, would not lead to the same damage because it could not be suggested that the architect's negligence had led to any delay in performing the contract.

[279] Lord Steyn agreed with Lord Bingham that the notion of common liability, and of sharing that common liability, lies at the root of the principle of contribution.[344]

[280] Lord Steyn rejected a submission by the counsel for the architect that "an overly analytical approach" should not taken to the nature of the claims, a submission which bears some resemblance to that made to us by Mr Gedye in the present case. He said that loyalty to the statutory criterion of "the same damage" demanded legal analysis of the claims.[345]

[281] Lord Hope described the circumstances in which contribution is available as being "where two or more persons have contributed, albeit in different ways, to the same harm or damage—that is, where a single harm has resulted from what they have done".[346]

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343 At [7].
344 At [27].
345 At [30].
346 At [46].

[282] Mr Gedye argued that *Royal Brompton* could be distinguished from the present case on the facts, because in that case it was clear that the liabilities of the contractor and the architect did not overlap, but rather were distinct. He argued that the references in the judgment of Lord Bingham to "common liability" should be read down, as referring only to liability for the same damage. He placed particular emphasis on Lord Hope's judgment, and, in particular, the parenthetical words in the following statement:[347]

> I do not detect either in the Law Commission's Report or in the wording of the Act itself an intention to depart from the assumption which has always been made in contribution cases that this relief is available only where two or more persons have contributed, albeit in different ways, to the same harm or damage—that is, where a single harm has resulted from what they have done. Where this occurs it may be said (loosely, as their liability is not common in the strict sense, as in the case of co-trustees or co-owners) that they share a common liability to pay compensation for having inflicted the same harm.

[283] Mr Gedye said the parenthetical words made it clear that common liability should be seen as simply referring to "same damage", rather than the same damage requirement resting on a common liability as Lord Bingham had said. We think that reads more into the words than should be read, and is not reconcilable with the clear outline of the law made by Lord Bingham in his judgment, with which Lord Hope agreed.[348]

[284] Counsel for Guardian Trust, Mr Cooper, pointed out that Lord Hope had emphasised that the mere fact that two or more wrongs lead to a common result does not of itself mean that wrongdoers are liable in respect of the same damage. He said this made it clear that Lord Hope was not disagreeing with Lord Bingham's statement that the same damage requirement rests on parties being subject to a common liability to the same plaintiff.

[285] Mr Gedye accepted that Lord Bingham's judgment created some difficulties for his argument, particularly his Lordship's reference to common liability. However, he drew support from Lord Bingham's identification of the questions that

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347 At [46].
348 At [36].

must be decided where a contribution claim was made. Lord Bingham said these questions were:[349]

> (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?

[286] Mr Gedye said this emphasised the simplicity of the statutory test and the lack of any requirement for common liability.

[287] We think that the application of those questions to the facts of the case by Lord Bingham in the following paragraph makes it clear that common liability is a touchstone of the same damage requirement. Lord Bingham made it clear that the contribution claim in *Royal Brompton* failed because there was no common liability between the contractor and the architect; on the contrary, they were "independently liable".[350] This meant that the Court had to assess a sum for which each party was liable, but could not apportion a single liability between the two of them. This makes it clear that, in order to establish that parties are liable for the same damage, it is necessary to show they have a common liability to the same plaintiff. That is the position under the 1978 UK Act. There is no reason to suggest a different outcome under s 17.[351]

ANZ Banking Group (New Zealand) Ltd v Dairy Containers Ltd

[288] Mr Gedye was on stronger ground in drawing support for his view of the law from the decision of the Court of Appeal in *ANZ Banking Group (New Zealand) Ltd v Dairy Containers Ltd*.[352] That case arose out of a fraud perpetrated by certain employees of Dairy Containers. Different forms of tort liability were asserted against each potential tortfeasor, and contribution notices were served. In general terms, the liabilities of the tortfeasors were:

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349 At [6].

350 At [7].

351 A similar result was reached in *Wallace v Litwiniuk* 2001 ABCA 118, (2001) 281 AR 115 where a lawyer who negligently failed to prosecute a damages claim for a woman who suffered injury in a motor vehicle accident was found not to have caused the same damage as the negligent driver.

352 *ANZ Banking Group (New Zealand) Ltd v Dairy Containers Ltd* CA156/92, 17 December 1992 [*Dairy Containers* (CA)].

(a) banks were sued for conversion in relation to a number of cheques which the fraudsters had improperly endorsed and banked. The banks had a defence to this claim if they had acted in good faith and without negligence, so that the action against them was one requiring proof of negligence on their part;

(b) the auditor of Dairy Containers, the Auditor-General, against whom the negligence was alleged in respect of the audit work and the failure to detect the fraudulent conduct;

(c) certain employees who were said to have been involved in a conspiracy to defraud with those who actually perpetrated the frauds; and

(d) the Dairy Board, the ultimate parent of Dairy Containers, against which were allegations of vicarious liability for the fraudsters' tortious acts and for negligence by interfering in Dairy Containers' affairs.

[289] Mr Gedye pointed out that there was no correspondence or similarities between the elements required to be proved against each of these parties. So it could not be argued that they had coordinate or common obligations. He said the case was accepted by the Court of Appeal as an appropriate case for contribution in an interlocutory appeal against a refusal to strike out the contribution claims. That is not our reading of the case. Rather, all that was in issue in the Court of Appeal decision was whether leave should be given to serve third party notices outside the period permitted under the High Court Rules. In his judgment, Cooke P said it was a point of some importance that leave to join third parties was necessary only because the applications were made out of time and given the complexity of the case the fact that there had not been unreasonable delay, the broad discretion to give leave ought to be exercised.[353]

[290] As Mr Cooper said in his submissions, neither *ANZ Banking Group (New Zealand) Ltd v Dairy Containers Ltd* nor the subsequent High Court decision, *Dairy*

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[353] *Dairy Containers* (CA), above n 352, at 5 per Cooke P.

Containers Ltd v NZI Bank,[354] addresses the question of construction that arises in the present case. It is not helpful to start from the result of those cases and attempt to work backwards to support a theory about the meaning of the s 17(1)(c) test when this was simply not addressed in either decision.

[291] Because the *Dairy Containers* case was essentially procedural in nature, there was, unsurprisingly, no real discussion of the substantive requirements for contribution claims under s 17, and no articulation of the Court's views as to what "liable for the same damage" means in the context of s 17. Mr Gedye said the decision in *Dairy Containers* cannot be explained except by an assumption that the Court considered the same damage caused by the parties to the appeal was simply the loss of money. We do not think this form of reverse engineering assists us. We accept *Dairy Containers* is an example of a case where contribution was ultimately ordered in circumstances that do not meet the more limited articulation of the jurisdiction in *Royal Brompton*. But in view of the lack of any real articulation or analysis of the statutory criteria, we think it is of only limited assistance to us.

Alexander v Perpetual Trustees WA Ltd

[292] Mr Gedye also relied on the judgments of McHugh, Kirby and Callinan JJ in the decision of the High Court of Australia in *Alexander v Perpetual Trustees WA Ltd*.[355] The case was unusual in that there were six Judges who were evenly divided, so the decision under appeal was upheld in accordance with the views of Gleeson CJ, Gummow and Hayne JJ, on the basis that the Chief Justice's opinion prevailed. We were provided with a copy of the judgment a few days before the hearing but there was no reference to the case in the written submissions filed earlier and it does not seem to have been cited to the Court of Appeal or the High Court.

[293] The facts of the case were that Perpetual was trustee of various superannuation funds, which invested large sums of money in preference shares offered by a company called EC Consolidated Capital Limited (ECC). Mr Alexander and his partners were the law firm that acted as lawyers for ECC. As security for the deposits with ECC, a deposit certificate was to be issued by a

[354] *Dairy Containers Ltd v NZI Bank* [1995] 2 NZLR 30 (HC).
[355] *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7, (2004) 216 CLR 109.

reputable bank. Security documents were drafted by the law firm, which also acted as agent for Perpetual. The law firm released the funds to ECC before the deposit certificates were issued, and did not properly check the purported certificates that were subsequently sent. When ECC was placed in liquidation, the investments were lost, and the chance to have recourse to a bank to safeguard the investments under the deposit certificates was lost.

[294] Perpetual was found to have been negligent for permitting the investments without the proper securities. The law firm was found to be negligent in processing the loan without the security certificates. The law firm sought contribution from Perpetual. The contribution claim failed, but would have been upheld by McHugh, Kirby and Callinan JJ. Kirby and Callinan JJ wrote separate judgments, agreeing on the outcome but for differing reasons. McHugh J wrote a short judgment essentially agreeing with that of Callinan J.

[295] The contribution claim was made under s 23B(1) of the Wrongs Act 1958 (Vic), which provides:[356]

> Subject to the following provisions of this section, a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise).

[296] Like the 1978 UK Act, the Wrongs Act provides a statutory regime for contribution applying to any liable person (whether in tort, contract, equity or otherwise), not just tortfeasors as s 17 does. It does, however, use the phrase "liable for the same damage" as s 17 does, though there is some statutory guidance as to the meaning of that phrase that is absent from s 17.[357]

[297] Gleeson CJ, Gummow and Hayne JJ found that the law firm's contribution claim failed on the facts: it had not shown that it was liable to the plaintiffs in respect of the damage which the plaintiffs had suffered and for which the respondents were

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[356] This provision and others dealing with contribution were inserted into the Wrongs Act by the Wrongs (Contribution) Act 1985 (Vic) and largely mirrored the 1978 UK Act.

[357] Wrongs Act 1958 (Vic), s 23A(1).

also liable.[358] This finding meant their judgment did not engage directly with the issue before us in the present case.

[298] Unsurprisingly, Mr Gedye relied heavily on the judgments of McHugh, Kirby and Callinan JJ. He did seek to draw some support from a statement in the judgment of Gleeson CJ, Gummow and Hayne JJ that the issue should not be resolved through reference to common law and equitable principles governing contribution which he said supported his position that the regime for contribution under s 17 was simpler and broader than that of the equitable contribution regime.[359] We think this reliance on the judgment of Gleeson CJ, Gummow and Hayne JJ is misplaced. In fact, they made it clear that a party seeking contribution needed to establish a common liability with the party from whom contribution was sought. They said this requirement arose from the use of the term "in respect of the same damage", which, they said, was a narrower concept than that of liabilities arising out of, or by reason of, the same transactions or related transactions.[360] They added:[361]

> In resolving questions of construction of the legislation, it is not to be assumed that the legislative purpose is always to provide the widest possible sharing of liabilities, actual or potential, real or hypothetical.

[299] We accept that there is much in the judgments of Kirby J and Callinan J that support the approach advocated by Mr Gedye on behalf of Mr Hotchin.[362] In particular, Callinan J argued that the Wrongs Act was intended to "extinguish technical defences based on old equitable and common law rules".[363] Kirby J also emphasised the remedial and reformatory character of the Wrongs Act.[364] He criticised the decision under appeal on the basis that the Judges had failed to analyse the purpose of the reformatory provisions of the Wrongs Act, but had focused on judicial exposition. He added:[365]

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358 *Alexander*, above n 355, at [33].
359 At [25].
360 At [27].
361 At [27].
362 McHugh J agreed with Callinan J.
363 *Alexander*, above n 355, at [166]. The majority's view that the tests for contribution under the statutory and common law regimes are the same contradicts the view that there was anything to extinguish.
364 At [85].
365 At [88]. Again, the majority's approach suggests there were no restrictions to overcome.

> It is important that this Court should not make the same mistake. The amendments to the Wrongs Act introduce deliberate and important reforms to the written law. They require of judges a fresh look at the availability of contribution, freed from restrictions earlier devised by judges which, in part, the remedial provisions were designed to overcome.

[300] Kirby J specifically rejected the need to establish common liability to a common plaintiff.[366]

[301] McHugh J said the law firm and Perpetual were liable for the same damage, being the loss of funds beneficially owned by the plaintiffs.[367]

[302] However, the comments of McHugh, Callinan and Kirby JJ did not carry the day. The case was decided on the basis of the approach taken by Gleeson CJ, Gummow and Hayne JJ, which is consistent with that taken by the High Court and Court of Appeal in the present case. And, as Mr Cooper pointed out, the fact that the State of Victoria had undertaken a broad reform which had occupied the ground previously occupied by the equitable contribution regime provided the context for Kirby J's approach, based on a deliberate attempt by the legislature of the State of Victoria to reform the law. No such reform has happened in New Zealand. Mr Cooper acknowledged that the Victorian statute used the same phrase ("liable for the same damage") as that used in s 17 of the New Zealand Act, but argued that the Victorian statute had a provision giving some guidance as to the interpretation of that phrase which is absent from the New Zealand legislation.[368] We agree that the different legislative context in New Zealand means that the underlying basis for Kirby J's views is absent in New Zealand.

[303] As mentioned earlier, the Victorian statute at issue in *Alexander* mirrored the 1978 UK Act. We accept the arguments for a broader approach where the statutory right of contribution applies to all wrongdoers, not just to tortfeasors, were strongly pressed by Kirby and Callinan JJ in *Alexander*. On the other hand, the approach taken by the House of Lords in *Royal Brompton* appears to have been accepted as correct by Gleeson CJ, Gummow and Hayne JJ in *Alexander*. And, as already noted, the comments of Kirby and Callinan JJ were responding to the Victorian reform that

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366 At [96].
367 At [67].
368 Wrongs Act 1958 (Vic), s 23B.

extended the statutory regime for contribution to all wrongs. No similar reform has yet occurred in New Zealand.

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd

[304] Mr Gedye also drew support from a decision of the High Court of Australia dealing with apportionment (rather than contribution), *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*.[369] Mr Gedye handed up the report of the case at the hearing and made oral submissions on it, but it had not been mentioned in his written submissions and was not cited in either the Court of Appeal or the High Court. Mr Cooper did not make submissions on it.

[305] The case involved a mortgage document on which a mortgagor's signature was forged by the other mortgagor. The mortgagee sued the forger, the lawyer who aided the forger and the mortgagee's own lawyers (Hunt & Hunt), who had negligently prepared a mortgage document that omitted a covenant to repay the stated amount.

[306] The issue before the High Court was whether Hunt & Hunt was a "concurrent wrongdoer" with the forger (and the dishonest lawyer) and thus the claim was apportionable under the Civil Liability Act 2002 (NSW). A majority of the High Court, French CJ, Hayne and Kiefell JJ allowed the appeal. The significance of the case in the present context is that the Court was required to determine whether Hunt & Hunt and the fraudster were "concurrent wrongdoers". That term was defined in s 34(2) of the Civil Liability Act (NSW) as follows:

> In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

[307] The majority found that the loss or damage which the mortgagee suffered was "its inability to recover the monies it advanced".[370] It said that the claims against Hunt & Hunt, the forger and the forger's lawyer were "founded on [the mortgagee's]

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[369] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10, (2013) 247 CLR 613.
[370] *Hunt & Hunt*, above n 369, at [9].

inability to recover the monies advanced and the acts or omissions of all of them materially contributed to [the mortgagee's] inability to recover that amount".[371]

[308] Mr Gedye argued that the approach the High Court took to the identification of damage could equally be applied in the determination of a contribution claim under s 17, where a similar test (the same damage) is applicable. He said that *Hunt & Hunt* was analogous to the present case because the investors in this case had effectively lent money to Hanover Finance on security held by the trustee and that security had not yielded as much as it should have because of the negligence of the trustee (assuming the claim against the trustee succeeds).

[309] *Hunt & Hunt* is notable for a strong dissent by Bell and Gageler JJ. They cited with approval the observations of Lord Bingham in *Royal Brompton*.[372] They defined the damage or harm caused by Hunt & Hunt as being the lack of security arising from Hunt & Hunt's negligent preparation of the mortgage.[373] This deprived the mortgagee of the possibility of recouping the loss that flowed from the fraud – a different harm from the fraud itself. They said that neither the forger nor the forger's lawyer were persons whose acts or omissions caused the loss or harm caused by Hunt & Hunt (the lack of security), and thus Hunt & Hunt was not a concurrent wrongdoer with either of them.

[310] We accept Mr Gedye's submission that the application of the approach taken by the majority in *Hunt & Hunt* in the context of a dispute about apportionment were applied to the contribution claim in the present case, it would support the approach to s 17 that he contends for. But we find the analysis of the minority, which reflects our understanding of the approach taken by Lord Bingham in *Royal Brompton*, compelling.

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371 At [9].
372 At [87].
373 At [100].

Eastgate Group Ltd v Morden Group Inc

[311] Mr Gedye also relied on *Eastgate Group Ltd v Morden Group Inc*.[374] The case arose from a dispute about the sale of shares in a business. The agreement for sale and purchase included warranties by the defendant (the vendor) that the annual accounts showed a true and fair view of the state of affairs of the business. The plaintiff (the purchaser) alleged a breach of this warranty. The vendor claimed contribution against the purchaser's accountants, on the basis that they advised the purchaser negligently.

[312] Longmore LJ concluded that the loss caused by the vendor for breach of warranty and the loss caused by the accountants was the same damage, being the loss arising from the fact that the purchaser bought a company worth less than it reasonably expected it to be worth. He added that this determination was "a matter of impression".[375] He also rejected the statement in the decision under appeal that the difference between the damage for which the vendor was potentially liable and that for which the accountants were potentially liable was reflected by different starting points for the relevant assessment of damages. He rejected any distinction on the basis that the measure of damages would be different in each claim.[376]

[313] Mr Gedye argued that there were parallels between *Eastgate* and the present case and noted in particular the absence of any reference to a need for coordinate liability or liability of the same "nature and extent". He argued that the reference to the *Eastgate* decision in *Royal Brompton* indicated an apparent approval of the result. We do not consider Lord Steyn's reference to *Eastgate* in *Royal Brompton* gives any indication of approval.[377] Even if it does, we see *Eastgate* as distinguishable from the present case.

[314] The Court of Appeal rejected Mr Gedye's analogy between *Eastgate* and the present case. It pointed out that in *Eastgate* the vendor and the accountant each gave assurances to the purchaser about the accuracy of the financial statements, whereas in the present case Guardian Trust did not assume any duty in relation to the

374 *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642.
375 At [18].
376 At [17].
377 *Royal Brompton*, above n 340, at [28].

accuracy of the directors' statements in the offer documents. We agree with the Court of Appeal that this is an important distinguishing factor between the cases.

Re Securitibank (No 38)

[315] Mr Gedye also cited *Re Securitibank (No 38)*[378] and argued it was analogous to the present case. We disagree. That was a claim for contribution by directors accused of reckless trading in relation to a liquidated company against the company's auditors. We agree with Mr Cooper that it may have had some precedent value if the claim against Mr Hotchin in this case had related to a breach of duty of the kind described in ss 131 to 137 of the Companies Act 1993. But that is not the basis of the FMA's claim against Mr Hotchin.

FFSB v Seward & Kissel LLP

[316] Before leaving the case law, we also comment on a case that was not cited in argument, the decision of the Privy Council in *FFSB Ltd v Seward & Kissel LLP*.[379] The facts are set out in the judgments of the Chief Justice and Glazebrook J.[380] The Board defined the damage caused by the respective breaches of duty by the administrator of the fund and the legal advisors as "loss of funds invested", leading to the conclusion that they had caused the same damage.[381] Unfortunately there is no reason given for rejecting the approach of the decision under appeal, perhaps reflecting that the appeal was dealing with a procedural issue. There is no discussion of the issue in *Royal Brompton* and in this case as to whether the requirement for contribution between tortfeasors requires common liability between them: the conclusion reached by the Board indicates it assumed there was no such requirement. We accept the outcome of the case supports the position advocated by Mr Hotchin, but, in the absence of reasoning, we do not see it as a decisive factor against adopting the approach outlined by Lord Bingham in *Royal Brompton*.

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378 *Re Securitibank Ltd (No 38)* [1986] 2 NZLR 280 (HC).

379 *FFSB Ltd (formerly known as Fortis Fund Services (Bahamas) Ltd) v Seward & Kissel LLP* [2007] UKPC 16, [2007] 5 LRC 224.

380 Above at [141] per Elias CJ; and above at [79] per Glazebrook J.

381 *FFSB*, above n 379, at [27].

Practical implications

[317] Glazebrook J acknowledges in her reasons that the broad approach to "same damage" preferred by the majority may mean there is much more scope for contribution claims that will not be able to be addressed at the strike out stage.[382] We see this as a matter of some significance. Glazebrook J suggests this problem is the price necessary to secure conceptual simplicity and a just result.[383] We do not think it can be assumed it will lead to a just result. A plaintiff seeking to pursue a simple tort claim for economic loss against a tortfeasor may be confronted with contribution claims that, however remote and unmeritorious, will not be able to be resolved except at trial.[384] That may reduce the chances of a settlement between the plaintiff and the tortfeasor and may make the resulting litigation more complex, expensive and lengthy. It will also mean that contribution claims will stand or fall on the assessment of what is just and equitable under s 17(2). While that may be conceptually simple, it is inherently uncertain and unpredictable. If the broad approach provides "conceptual simplicity", these consequences are a high price to pay. We agree with the view expressed by Gleeson CJ, Gummow and Hayne JJ in *Alexander* that it is wrong to assume the legislative purpose is to provide the widest possible sharing of liabilities.[385]

[318] We intend to apply *Royal Brompton*, which we think articulates the correct approach to the interpretation of s 17 of the 1936 NZ Act.

Application to the facts

[319] As Lord Steyn observed in *Royal Brompton*, "loyalty to the statutory criterion of 'the same damage' demands legal analysis of claims".[386] We begin with that analysis.

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382 Above at [72].
383 Above at [72].
384 We do not think it would be possible to strike out a contribution claim on the basis that contribution would not be just and equitable or that an exemption should be granted, as Glazebrook J contemplates at [98] of her reasons.
385 *Alexander*, above n 355, at [27], quoted at [298] above.
386 *Royal Brompton*, above n 340, at [30].

[320] We highlighted earlier, the essence of the FMA's claim against Mr Hotchin (expressed as if it were a tort claim) is that the directors negligently misstated certain details about the financial health of Hanover Finance in the offer documents, and the investors invested in Hanover Finance in reliance on those misleading statements.[387] The FMA claims the investors thereby lost all of their investment but makes an alternative claim that reduces the liability by making an allowance for the value derived from the subsequent transaction involving Allied Farmers.

[321] In contrast to that, the basis of the claim made against Guardian Trust is that its negligent failure to intervene earlier and exercise the powers it had under the trust deed to take enforcement action to prevent Hanover Finance from continuing to trade led to a deterioration in the financial position of Hanover Finance. That led, in turn, to a diminution in the value of Hanover Finance's assets, which meant that the pool of assets from which it could make payments to holders of debt securities was smaller and, presumably, that the payments actually made were also therefore lower than they otherwise would have been.

[322] Applying the approach taken by Lord Bingham in *Royal Brompton*, the question is whether the investor (or the party bringing the claim on its behalf) is advancing a claim for damage, loss or harm for which both Mr Hotchin and Guardian Trust were liable. And as Lord Bingham, Lord Steyn and Lord Hope all emphasised in *Royal Brompton*, liability for the same damage arises from common liability to the same plaintiff. So we have to determine whether there is a tenable argument in this case that Mr Hotchin and Guardian Trust share common liability to the investors for whom the FMA was acting when it made its claim against Mr Hotchin. We remind ourselves that, to use Lord Hope's words, "the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage".[388]

[323] In *Royal Brompton*, the House of Lords found that the claim against the architect based on negligent advice and certification was not in respect of the same damage as the claim against the contractor for delayed completion because it could

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387 Above at [241]–[244].
388 At [47].

not be suggested that the architect's negligence had led to any delay in performing the contract. In this case the claim against Guardian Trust for negligent delay in taking enforcement action would not lead to the same damage as that caused by the directors because, as noted by Winkelmann J and the Court of Appeal, it could not be suggested that Guardian Trust's negligence had led to any misleading of the investors who relied on the negligently misleading statements in the prospectus.[389]

[324] We consider Mr Hotchin's claim is untenable because he cannot establish as a matter of law that his liability and that of Guardian Trust (if these had been established) were common liabilities. His case is based on an assertion that he and Guardian Trust have both caused investors to lose money. But, we do not see that as a proper characterisation of the "damage" caused by either Mr Hotchin or Guardian Trust. The claim against Mr Hotchin for negligent misstatements in the offer documents is not in respect of the same damage as the damage for which Guardian Trust is said to be liable for breach of its obligations under the trust deed.

[325] As discussed at [262] above, it was suggested that the claim against Guardian Trust could include a claim to the effect that an investor invested in the period between the date Guardian Trust should have intervened and the date Hanover Finance stopped accepting investments under the offer documents. We accept that, in relation to a claim of that nature, the "lost money" approach to "same damage" is more attractive, because the investor will say he or she would not have invested if the plug had been pulled, and thus would not have been able to be misled by the misstatements in the offer documents. But we do not see this as leading to a conclusion that the damage suffered by the investor is one for which the directors and Guardian Trust have a common liability.

[326] Mr Hotchin's liability in respect of the FMA's claim under s 55G of the Securities Act is the damage "sustained by reason of the untrue statement" in the offer documents. The trustee has no liability for that damage, just as the directors have no liability for damage cause by Guardian Trust's negligent failure to intervene by using its powers under the trust deed. As noted earlier, Guardian Trust's failure to intervene has created the opportunity for the directors' misstatements to mislead the

389 *Hotchin* (HC), above n 321, at [60]; *Hotchin* (CA), above n 320, at [67].

investors but that does not make it liable for those misstatements. As Guardian Trust does not have a common liability with the directors for the damage caused by the directors' misstatements, the directors and Guardian Trust are not liable for the same damage.

[327] We do not agree with Glazebrook J that the liability of the directors can be characterised as failing to pull the plug.[390] That was a phrase used by Winkelmann J to describe the failure by Guardian Trust to take enforcement action under the trust deed. The only basis on which the FMA claimed against the directors was that set out in s 55G, namely liability to investors who invested on the faith of offer documents including an untrue statement for the damage they sustained by reason of the untrue statement.

[328] We conclude, therefore, that the High Court and Court of Appeal were correct to find that Mr Hotchin's claim for contribution under s 17(1)(c) of the 1936 NZ Act was not tenable.

[329] Mr Gedye said this approach to a s 17 claim would mean that, in a leaky building case, a local authority sued in respect of a negligently issued code compliance certificate could not obtain contribution from the builder responsible for the defective building work. The Court of Appeal rejected this argument.[391] It said the local authority and the builder would be liable for the same damage, being the repair costs for the specific defects associated with the failure to meet the code, and their liability would be common. Both the local authority and the builder would have assumed the same duty to protect the owner from that damage. The building owner could sue each of them independently for the repair costs. We agree. As the Court of Appeal pointed out, the analogy between such a case and the present case would arise only if Guardian Trust assumed a duty to ensure the accuracy of the statements in the offer documents. As noted earlier, Winkelmann J found it did not.[392]

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390 Above at [86].
391 *Hotchin* (CA), above n 320, at [55].
392 Above at [246].

[330] Mr Gedye also argued that the striking out of the contribution claim against Guardian Trust would be "repugnant to justice", because it would place all the liability on Mr Hotchin when there is more than one wrongdoer. We disagree. On the contrary, it recognises that any liabilities of Mr Hotchin and Guardian Trust are of a different character and ensures that the FMA's litigation against Mr Hotchin, had it proceeded, would not have been delayed and rendered more complex and expensive because Mr Hotchin's claim against Guardian Trust had to be dealt with at the same trial.

[331] In any event, Mr Gedye's submission was largely based on the observations of Kirby J in *Alexander*, which were made in the context of a statute reflecting a reform of the law that has not yet been followed in New Zealand. It must be remembered that the essence of Mr Hotchin's claim against Guardian Trust is predicated on the proposition that, if he caused loss to investors by his negligence in relation to the offer documents, he should be compensated by Guardian Trust because it failed to stop him from continuing to cause that loss. His claim of repugnance to justice has to be seen in that light.

Equitable contribution

[332] Mr Gedye's fallback argument was that, if Guardian Trust was not liable under s 17, it could be liable for equitable contribution. This Court recently dealt with a claim for equitable contribution in *Marlborough District Council v Altimarloch Joint Venture Ltd*.[393] We will start our evaluation of this aspect of the case by considering that decision.

Marlborough District Council v Altimarloch Joint Venture Ltd

[333] The factual background to the dispute in *Altimarloch* is set out in the judgment of Glazebrook J.[394]

[334] The vendors were liable for damages under s 6(1)(a) of the Contractual Remedies Act 1979 for their misrepresentation about the quantity of water rights.

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393 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] NZLR 726.
394 Above at [92].

The Council was liable for damages for its negligent misstatement in the Land Information Memorandum that mirrored the vendors' misrepresentation. The vendors were liable for the cost of cure (that is, the cost of obtaining the quantity of water equal to that represented by the vendors). The Council was liable for a much lower level of damages: the difference between the price paid for the land and its value with the actual water rights.

[335] The vendors claimed equitable contribution from the Council. The claim failed in this Court, although the Court was divided. Elias CJ and Blanchard and Tipping JJ considered that the claim should fail, although Elias CJ did not adopt the reasoning given by Blanchard and Tipping JJ.

[336] Tipping and McGrath JJ dealt with contribution in some detail. Tipping J said:[395]

> Equity will order contribution when two or more parties are under what is conventionally called a coordinate liability (that is a liability of the same nature and extent) to make good one loss and one of them pays more than his or her proportionate share of that loss. … It is essential to the application of the equitable doctrine that all parties involved in a contribution issue are under a coordinate liability for the same loss.

[337] Tipping J noted that in England and Wales, the statutory right of contribution had been extended to claims other than claims in tort and cited with approval the judgments in *Royal Brompton*.[396] He found, on the facts, that in the *Altimarloch* case, the liabilities of the parties were not coordinate, describing them as "distinctly dissimilar".[397]

[338] McGrath J reached a different view on the facts but adopted essentially the same test as Tipping and Blanchard JJ. As noted by Glazebrook J, he cited with approval the judgment of Gaudron ACJ and Hayne J in *Burke v LFOT Pty Ltd*.[398] In that judgment, Gaudron ACJ and Hayne J had said that the requirement for equitable contribution was "contribution between parties who share 'co-ordinate liabilities' or

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395 *Altimarloch*, above n 393, at [129].
396 At [134]–[138].
397 At [129].
398 *Altimarloch*, above n 393, at [219] citing *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [15]–[16].

a 'common obligation' to 'make good the one loss'".[399] We accept that McGrath J qualified his adoption of the formulation by Gaudron ACJ and Hayne J by observing that it was important to keep the essential concept of contribution in mind and not to allow the principle to be defeated by too technical an approach.[400] He did not, however, adopt the test proposed by Kirby J in *Burke*, (which would allow contribution as long as a claim against one party would reduce the liability of the other) as the Chief Justice has done in this case.[401] The Chief Justice acknowledges that the majority's approach in this case is "further than McGrath J was prepared to go".[402] McGrath J commented that the approach of Kirby J (now adopted by the majority in this case) could be reached only by legislation, as the Chief Justice also acknowledges.[403] That the majority have now adopted that approach is an extension of the scope of equitable contribution from that available under the approach of the majority in *Altimarloch*.

[339] McGrath J dealt with the facts of the case by asking himself "whether the liabilities of the Council and the vendors are of the same nature and extent so as to be coordinate and amenable to a contribution award".[404] He found that contribution was appropriate because, although the Council's liability was tortious and that of the vendors was contractual, both had made the same error of communication with the same result that caused the purchaser loss which was of the same nature.[405]

[340] Tipping J considered that his views and those of McGrath J differed not so much on the legal approach to be adopted to contribution issues but rather on the application of that approach to the facts of the case.[406] He added that in circumstances where the causes of action against the proposed contributing parties are not the same, two questions need to be answered, namely, is the nature of each liability the same and are the liabilities of the same extent?[407]

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399 At [15].
400 *Altimarloch*, above n 393, at [224].
401 *Altimarloch*, above n 393, at [224] per McGrath J; and above at [150] per Elias CJ.
402 Above at [151].
403 Above at [156], referring to *Altimarloch*, above n 393, at [224]. Blanchard and Tipping J both commented on the need for legislative reform in this area of the law: at [77] and [128]. We agree.
404 At [225].
405 At [228].
406 At [144].
407 At [145].

[341] The position taken by the majority is not one that was advanced by any party in this case. While Mr Gedye advanced the interpretation of s 17 that has found favour with the majority, he did not suggest that the test for equitable contribution was the same. He said at the hearing in relation to equitable contribution:

> You do have to establish a co-ordinateness, or a jointness, or a sameness. There's room to argue perhaps that the margins, whether any particular case is sufficiently the same, and I'll come to this when I advance the case in equity, but all the dicta are clear that there must be a co-ordinate element and the decision of this Court, with respect, demonstrate that there is room for differing assessments of whether something is co-ordinate or not. But the principle remains in equity that it must be co-ordinate or joint in some real way.

[342] Mr Gedye's argument in relation to s 17 was that the coordinate liability requirement equitable contribution had not been imported into s 17. He did not suggest that there was no requirement for coordinate liability or that coordinate liability is synonymous with "same damage" as the Chief Justice suggests.[408] His argument based on the Limitation Act was advanced in support of his case that s 17 did not require coordinate liability whereas the equitable contribution regime did.[409]

[343] It seems to us that the effect of the majority decision is to effect a change in the law from that articulated by the majority in *Altimarloch* in circumstances where no counsel asked for that decision to be reviewed. In our view, the High Court and Court of Appeal correctly interpreted and applied *Altimarloch* in the present case.

Application to the facts

[344] Applying the coordinate liabilities approach adopted by McGrath J in *Altimarloch* to the present case, we think it is clear that there is no coordinate liability between Mr Hotchin and Guardian Trust, their liabilities are not of the same nature and are also different in their extent. The present case would have met McGrath J's test if Guardian Trust had been liable to investors for misstatements about the financial position of Hanover Finance (that is, if Guardian Trust had made the "same error of communication" as Mr Hotchin, to use the words of McGrath J).

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408 Chief Justice at [153].
409 At [264]–[266] above.

As noted earlier, that is what Mr Hotchin initially alleged but this was rejected by Winkelmann J and the allegation is no longer pursued.

[345] Because we see the requirement for common or coordinate liability as applying both to s 17 and to equitable contribution, our reasoning in relation to the s 17 claim applies equally in the present context. We conclude, again in common with the Courts below, that the claim for equitable contribution is not tenable.

Result

[346] We conclude that both the High Court and the Court of Appeal were right to find that Mr Hotchin's claim against Guardian Trust for contribution should be struck out. We would therefore dismiss Mr Hotchin's appeal, uphold the order striking out his claim and award costs to Guardian Trust.

Costs

[347] We agree with the Chief Justice and William Young J that, as the successful party, Mr Hotchin should be awarded costs.

Solicitors:
Tompkins Wake, Hamilton for Appellant
Bell Gully, Auckland for Respondent