IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2011-470-000898
[2013] NZHC 503

BETWEEN	RAIMAPAHA LINES AS ADMINISTRATOR OF THE ESTATE OF RAUKAWA NORA HURIHANGANUI Plaintiff
AND	ROGER HAARE CHARLES PIKIA First Defendant
AND	MIO RIRI Second Defendant
AND	ROGER HAARE CHARLES PIKIA AND REDOUBT TRUSTEES LIMITED Third Defendant
AND	BANK OF NEW ZEALAND Fourth Defendant

Hearing: 18-20 February 2013

Appearances: D M O'Neill for Plaintiff
J Temm for Defendants

Judgment: 15 March 2013

JUDGMENT OF VENNING J

This judgment was delivered by me on 15 March 2013 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date...............

Solicitors: Foster & Milroy, PO Box 207, Hamilton
East Brewster, PO Box 1742, Rotorua for First Defendant
Copy to: J Temm, PO Box 1124, Rotorua
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Introduction/parties

[1] The plaintiff is a daughter of Raukawa Nora Hurihanganui (the deceased) and the executrix and administratrix of the deceased's estate. The first defendant (the defendant) is one of the deceased's grandchildren.

[2] The defendant held a power of attorney for the deceased. The defendant used the power of attorney to transfer property belonging to the deceased to himself. The plaintiff alleges that, in doing so, he breached the fiduciary duty he owed the deceased.

[3] The defendant subsequently transferred the property to the second defendant (his father-in-law) who at the time was the trustee of the defendant's family trust. The second defendant in turn transferred the property to the third defendants. The third defendants are the current trustees of the defendant's family trust.

[4] The plaintiff has discontinued the proceedings against the second and fourth defendants.

Background

[5] The deceased had 11 children. Apart from the plaintiff and a brother Nuku, who died in 2004, the deceased had the following children: Haana (Girl) Mavourneen-Pikia, Tupaea Hurihanganui, Harold Hurihanganui, Tupuku Hurihanganui, Areta Rita Hohua, Heni Jane Tuaupiki, Molly Ngahaka Hurihanganui, Mabel Tahu, and Aoreke Alice Riini.

[6] The deceased also had a number of grandchildren including the defendant and Errolena Tamawhainga (Errolena). The defendant is Haana's son. Errolena is Molly's daughter.

[7] The property in issue comprises two blocks of land at Reporoa on State Highway 5, Reporoa. The deceased's home was on the first block (the home block). The second block was a bare block of land behind the home block. It was used for

grazing (the grazing block). Both were Māori freehold land until 1968. The deceased retained an interest in some further adjoining land which remained as Māori freehold.

[8] The deceased, together with Molly (and Molly's children, including Errolena) lived in the house on the home block for several years. The defendant also spent time there with the deceased and was, partly at least, brought up by her.

[9] From 1993 (when she was in her late sixties) until 2000 (when she was in her mid to late seventies), the deceased went to Australia and lived in Brisbane with Haana, the defendant's mother. Molly remained living on the home block.

[10] During the time the deceased lived in Australia, she returned to New Zealand regularly, often once or twice a year.

[11] On one of her visits home in 1994, the deceased made a will. She appointed Molly and the defendant as her trustees. The will provided for Molly to have a life interest to live on the home block on certain conditions. It divided the residue of the estate between the defendant and Errolena. The deceased's wider family have always understood that the deceased was close to the defendant and Errolena because they had lived with her as young children.

[12] In 1995, the deceased granted the defendant an enduring power of attorney with general authority to act on her behalf in relation to the whole of her property.

[13] The solicitor who acted for the deceased in preparing both her will and the power of attorney was Paul Burdett, who at that time was practising at Taupo.

[14] The defendant used the power of attorney to act on the deceased's behalf at a hui discussing her beneficial interests in the Māori land that adjoined the home and grazing blocks. Also, on 25 July 1997, acting as attorney for the deceased, the defendant executed a deed of lease for the grazing land. The lessee, Ms Hathaway agreed to pay rental of $9,000 per annum.

[15] Then, on 16 February 1999 (while the deceased was still in Australia) and using the power of attorney, the defendant executed a transfer of both the home and grazing blocks to himself. The transfer recorded the consideration was $200,000. On the same day, the defendant executed a declaration of non-revocation of the power of attorney.

[16] The defendant then used the home and grazing blocks to enable him to purchase a pig farm at Springs Road, Reporoa. On 24 November 1999 the transfer from the deceased to the defendant was registered, together with a mortgage to the Bank of New Zealand (BNZ). The mortgage was secured against both the home and grazing blocks and also against the land at Springs Road.

[17] The deceased and Haana returned to live in New Zealand in 2000. The deceased did not return to the home block, but went to live with Haana in Cambridge. Sometime after that, the plaintiff became aware that the deceased was not receiving any money from the rental of the grazing block. In 2002 the plaintiff also became aware the home and grazing blocks had been transferred to the defendant. The plaintiff arranged for the deceased to see a solicitor, Mr Milroy. The deceased learned what the defendant had done. As a result the deceased revoked the appointment of the defendant as her attorney and on 30 May 2002, she made a new will. In that will, she left her estate (apart from her interest in the Māori land over which she created a whānau trust) equally to all her children.

[18] On 5 November 2002, the deceased registered a caveat against both the home and grazing blocks. That caveat was subsequently withdrawn on 20 May 2004. On the same day, the defendant replaced the mortgage from the BNZ with a mortgage to private lenders Mr and Mrs Anderson.

[19] In September 2005, the defendant transferred the properties to the second defendant, the trustee of the defendant's family trust. At the same time the property was refinanced by Basecorp Finance Ltd (Basecorp). On 13 September 2007 the second defendant retired as trustee and the defendant appointed the third defendants as trustees of his family trust in place of the second defendant. The next day, 14 September 2007, the property was transferred from the second defendant to the third

defendants as trustees of the defendant's family trust. On the same day, a further mortgage securing a further refinancing arrangement with Basecorp was registered. In July 2008, the third defendants refinanced the property, this time with BNZ again.

[20] On 6 September 2010, at the age of 86, the deceased died at Hamilton. On 22 October 2010 probate of the deceased's will was granted to the plaintiff.

[21] On 26 November 2010 the plaintiff registered a caveat. She then commenced these proceedings on 26 October 2011.

The issues

[22] The defendant admits the deceased granted him an enduring power of attorney in relation to her property and that he exercised that power to transfer both blocks of land to himself in 1999. He further accepts that the power of attorney created a fiduciary relationship between the deceased and himself.

[23] The following issues are, however, in dispute:

(a) Whether the defendant transferred the property to himself with the knowledge and consent of the deceased or whether, in effecting the transfer, the defendant acted in breach of the fiduciary relationship?

(b) In the event the first issue is determined against the defendant he raises a number of positive defences. The issues raised are:

(i) The application of the Limitation Act 1950;

(ii) Whether the plaintiff is estopped from asserting the present claim by the actions of the deceased during her lifetime;

(iii) Whether the plaintiff's claim is met by the defence of laches, and

(c) In the event the plaintiff succeeds on the above issues the remaining issue is what relief, if any, is appropriate in the circumstances of this case.

[24] The defendant also pleaded that as the property was not part of the estate at the time the will was made in 2002, there can be no relief in relation to it. However, I understood that during the course of submissions Mr Temm accepted that, as the deceased's executrix and administratrix, the plaintiff was able to pursue any legal claim the deceased could have herself pursued. That must be correct. The deceased could have pursued a claim in relation to the property during her lifetime, even though it was registered in the third defendant's name. The deceased's estate vests in the plaintiff. That includes real and personal property including things in action.[1] Subject to the positive defences raised above, there is no legal bar to the plaintiff, acting as administratrix, pursuing the present claim.

[25] However, the fact the property is held by the third defendant and is subject to a mortgage security held by the BNZ is relevant. In taking the mortgage to secure its advances to the third defendant, the BNZ had no knowledge of the alleged default of the defendant (or third defendant). That is relevant to the issue of the appropriate and available relief, a matter to which I return later in this judgment.

The witnesses

[26] The plaintiff gave evidence. She was supported by her sister Alice who gave evidence of the first meeting with Mr Milroy. Donald Lines, the plaintiff's son, also gave evidence of a family meeting in February 2011 called to discuss the issues and attended by the defendant. Mr Milroy, the solicitor who acted for the deceased in 2002, also gave evidence of the meetings in 2002 and his dealing with the deceased, and her family.

[27] The defendant gave evidence in response. His evidence was supported by his mother, Haana, his aunts Molly and Jane and three other grandchildren of the deceased, all of whom spoke about their contact with the deceased. Haana, Molly

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1 Administration Act 1969, s 2(1).

and Jane also gave evidence of the deceased's knowledge of the transfer of the properties to the deceased and going to Mr Milroy's office for the meeting in May 2002.

Decision

The circumstances of the transfer

[28] As the donee of the power of attorney granted by the deceased, the defendant was her agent and owed her fiduciary duties.[2] The defendant admits that in his pleading.

[29] A fiduciary, such as the defendant was in this case, may not enter arrangements that give rise to a conflict between his personal interest and his duty to his principal, in this case the deceased.[3]

[30] The defendant's use of the power of attorney to transfer the properties to himself would be a clear breach of those fiduciary duties, unless the transfer was made with the deceased's informed and effective consent. If the transfer was made without the deceased's informed and effective consent the defendant, and his assigns who took the property with knowledge (in this case the third defendant), hold the property as constructive trustee for the deceased.[4]

[31] The issue is whether the deceased gave her informed and effective assent to the transfer of the properties to the defendant. In *Collier v Creighton*,[5] the Court of Appeal cited with approval the following statement of the law by Deane J in *Chan v Zacharia*[6] on this point:

> Many of the statements of the general principle requiring a fiduciary to account for a personal benefit or gain are framed in absolute terms — 'inflexible', 'inexorably', 'however honest and well-intentioned', 'universal application' — which sound somewhat strangely in the ears of the student of

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2 *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 (CA).
3 *Cook v Evatt (No 2)* [1992] 1 NZLR 676; *Boardman v Phipps* [1967] 2 AC 46.
4 *Dickie v Torbay Pharmacy (1986) Ltd* [1995] 3 NZLR 429.
5 *Collier v Creighton* [1993] 2 NZLR 534 at 541.
6 *Chan v Zacharia* (1984) 154 CLR 178.

> equity and which are to be explained by judicial acceptance of the inability of the courts, 'in much the greater number of cases', to ascertain the precise effect which the existence of a conflict with personal interest has had upon the performance of fiduciary duty: see per Lord Eldon, *Ex parte James* [(1803) 8 Ves Jr 337, at p 345 [32 ER 385, at p 388]]; per Rich, Dixon and Evatt JJ, *Furs Ltd v Tomkies* [(1936) 54 CLR 583, at pp 592-593]. The principle is not however completely unqualified. *The liability to account as a constructive trustee will not arise where the person under the fiduciary duty has been duly authorized,* either by the instrument or agreement creating the fiduciary duty or by the circumstances of his appointment or *by the informed and effective assent of the person to whom the obligation is owed, to act in the manner in which he has acted.* The right to require an account from the fiduciary may be lost by reason of the operation of other doctrines of equity such as laches and equitable estoppel: see, eg *Clegg v Edmondson* [(1857) 8 De GM & G, at pp 807-810 [44 ER, at p 602]].
>
> (emphasis added)

[32] The defendant's case is that the deceased agreed to and authorised the transfer of both blocks of land to him, to assist him to buy the pig farm at Springs Road because he was going to receive the property in due course in any event. However, his evidence about the deceased's knowledge of the transfer and her consent is very general. The defendant said in his evidence-in-chief:

> 23. At this time in 1999 my grandmother remained living in Australia. I was negotiating the purchasing of a pig farm in Reporoa. There was a discussion between me and my grandmother that the Reporoa property be used as security. My Grandmother directed that the property be transferred to me on the basis that it was coming to me anyway. She also reminded me that Errolena was to have a share in the house block of the Reporoa property and that Molly retained her life interest. I was aware of both of these things.
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> 24. Although the transfer was signed in February 1999 it was not lodged until November 1999. It took the balance of the intervening eight months to agree the farm purchase and due diligence and to arrange finance with the Bank of New Zealand.
>
> ...
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> 27. All of this occurred with my Grandmother's knowledge and consent and she was fully aware of what had happened. Paul Burdett, acting for my grandmother, prepared all the documents and undertook the registration of the transfer.
>
> 28. This was done in the form of some kind of loan and gifting back arrangement. It was never intended to be other than a family arrangement. The consideration of $200,000.00 contained in the transfer was put there by the lawyer, Paul Burdett. I understood it was paid by way of gifting back, or forgiveness of debt.

[33] The defendant was very vague in his explanation of the actual transaction itself. He said that it "was done in the form of some kind of loan and giving back arrangement". He was not able to provide any explanation as to how the parties arrived at the consideration of $200,000 recorded in the transfer. He said it was put there by the lawyer, Mr Burdett. He also says it was paid by way of gifting back or forgiveness of debt but, even on his evidence, only a limited form of gifting was carried out.

[34] The defendant's answers in cross-examination on this important issue were also vague and general. In cross-examination the defendant was asked directly about the deceased's consent to the transaction:

> Q. When did you get authority from your grandmother to transfer the land into your name?
>
> A. Oh, I don't recall the exact time or the year in fact, my grandmother often travelled back and forth from Australia to New Zealand and we would've had a series of conversations each time that she would have returned home, so she would return back to New Zealand for holidays, ah, as much as at least once a year and so on all of those occasions we would have discussed many things and the, ah, the future of those properties would also have featured in those discussions.

[35] Despite his assertion that the deceased was fully aware of the transaction, the defendant was unable to provide any details to support that general assertion, either in his evidence-in-chief or when cross-examined.

[36] As noted, the transfer document was executed in February 1999 although not registered until November 1999. There is no evidence of the particular discussions between the defendant and his grandmother at the relevant time. There is no detail of the information the defendant gave the deceased, how it was imparted, what, if any advice she had about the matter (bearing in mind she was about 75 years old at the time) and exactly what it was she agreed to.

[37] The defendant's evidence about the gifting he relied on to support his case that the deceased authorised the transfer was also general and confused. He said he believed Mr Burdett constructed the gifting programme for the deceased and that it was contemplated there would be a retirement of $27,000 (the maximum then

allowed) per year by way of gifting. He said he believed that he received documents relating to three separate gifts, but that he showed the documents to Mr Milroy and that he has not been able to find his copies of the documents. When asked by the Court whether the record of gifting he had referred to on three occasions were documents signed by his grandmother, the defendant said no, that was not what he was saying. He then went on to say:

> … I don't know, ah, what happened post the original arrangement of 1999. So I have now learnt that there is meant to be – have been an execution on an annual basis of the, ah, $27,000 gifting per annum, ah, so I don't know if – what transactions took place post 1999. But I do recall Mr Burdett making the recommendation that a gifting arrangement where there is debt retirement of $27,000 per annum be the most appropriate mechanism to put in place for the gifting and, ah, the, ah, retirement of the $200,000 consideration.

[38] It is on that basis the defendant considered that by 2002, three years would have passed and $81,000 would have been gifted.

[39] Mr Milroy said the papers presented to him by the defendant were not deeds of gift, nor was there an acknowledgement of debt. There were no stamped IRD gift statements as one would expect. Mr Milroy recalled there was only a paper ruled in ledger form with three amounts of $27,000 written on it. He said:

> I remember asking Nora [the deceased] if she had seen the papers before to which she replied "no". I dismissed the papers as a fabrication. I challenged [the defendant] about the papers. Though [the defendant] did not concede the gifting issue, he did agree to transfer Nora's land back to her. The meeting concluded at that point.

[40] The defendant presented generally as an unconvincing witness. He expressed a lack of recollection about certain important issues and sought to maintain propositions which could not be sustained. I do not accept his evidence that the deceased understood the nature of the transaction and authorised him to transfer the properties to himself.

[41] The other witnesses called for the defence failed to provide any further detail as to the level of knowledge or understanding of the deceased on the issue. The defendant's mother Haana said:

> 15. I know that the property was transferred into Roger's name with my mother's knowledge and consent. This happened in 1999 when Roger and his then wife, Johanne, were purchasing a piggery in Reporoa. Although initially it was just part of a security arrangement, it ultimately was my mother's desire that the property be transferred, because that was what she intended to have happen in the long run, anyway. …

And later:

> 23. Roger's continued ownership was on the understanding that it would pass to him in conjunction with Errolena.

[42] Molly Hurihanganui's evidence was:

> 9. I am aware that the properties transferred to Roger Pikia in 1999. I was living on the property at the time and was made aware of the change. This transfer happened with my mother's knowledge and consent. It was what she had always intended to do. …

[43] Jane Tuaupiki said:

> 8. I was aware of the transfer of the Reporoa properties into Roger's name in 1999. This was done with my mother's knowledge and consent. My understanding was that it helped with his purchase of the pig farm in Reporoa.

[44] The statements as to the deceased's knowledge and consent are again assertions, without any detailed evidence to support them.

[45] There is then the evidence of the three grandchildren about their discussions with their grandmother. None of them provide any detail about the state of the deceased's knowledge at the time of the transfer of the property to the deceased in 1999. For instance Karyn Pikia says that when she talked to her grandmother about the way things were at Reporoa, the deceased said "that's how it is". Kaare Kawenga said that when his grandmother spoke about the issue, she would "just say something, just to agree with it, just to move on". That evidence says nothing about the deceased's knowledge at the time of the transfer by the defendant and is at best ambiguous about her attitude to it after the event.

[46] There is a further difficulty for the defendant on this issue. The common theme of the defence evidence is that it was always the deceased's intention that the

defendant and Errolena were, because of their relationship with the deceased, her favourites, and that ultimately the home and grazing blocks would pass to them. That is consistent with the will that the deceased made in 1994, which provided the life interest for Molly in the home block, with that and the grazing block passing with the rest of her residuary estate to the defendant and Errolena equally.

[47] However, there is a significant difference between the deceased's intention as to what was to happen to the property after her death and her agreeing to the transfer of the properties to the defendant (and therefore taking them out of her estate, during her lifetime). Nor was the defendant able to satisfactorily address how the deceased's wish to provide a life interest for Molly in the home block and to leave Errolena a half-share in both blocks could be provided for, once the property was transferred to him. In re-examination, the defendant suggested that if Errolena moved back to New Zealand permanently, he understood his obligation to transfer the home block to her and would do so because that was what the deceased wanted. However, the defendant has put himself in a position where he cannot do that. He transferred the land to his family trust. Errolena is not a beneficiary of that trust. Further, the land is subject to a mortgage. The defendant is not in any position to provide for Errolena which, he says, he made a commitment to the deceased to do.

[48] A further theme that emerges from the evidence is that from time to time, the deceased made the property available by way of security to assist family members to purchase assets or when they needed to borrow money. The defendant confirmed that was the position. In fact, it was when Tracey Pikia had wanted to buy a four-wheel drive truck and proposed using the property as security in May 2002 that the plaintiff and deceased learned the properties were no longer held in the deceased's name.

[49] It may be that if the deceased had been approached by the defendant, she would have agreed that he could use the property as a form of security to assist him to purchase the piggery at Springs Road, Reporoa. But that is a quite different matter to her agreeing to an absolute transfer of the property from her name into that of the defendant. There is a significant difference between allowing the land to be used as security and its absolute transfer.

[50] Against the very general defence evidence given and called by the defendant about the transaction which, on its own, falls short of establishing the transfer was made with the deceased's informed and effective consent, there is direct evidence to the contrary.

[51] Independent advice can be an important factor when determining whether a person in the deceased's position fully understood and consented to the transaction. It appears from the deceased's will in 1994 and the power of attorney in 1995 that Mr Burdett was her lawyer and acted for her at that time. However, it also appears from the transfer documents that Mr Burdett acted on behalf of the defendant in lodging the transfer, Bank of New Zealand mortgage and accompanying documents for registration in November 1999. It appears that Mr Burdett certified the transfer and later the mortgage as correct. In doing so he was not acting for the deceased, but the defendant. Perhaps more significantly, when the District Land Registrar raised an issue about the power of attorney, Mr Burdett wrote on the defendant's behalf in response. There is no evidence the deceased received any advice at all, let alone any independent legal advice at the relevant time. Of course, the deceased did not need to be involved at all, because the defendant was able to effect the transfer by signing the documents himself using the power of attorney.

[52] Perhaps the most telling evidence is that of Mr Milroy, who the deceased consulted in 2002. Mr Milroy's evidence was that he recalled showing the title search of the properties to the deceased and explaining to her that the defendant was now the registered owner. He said:

> I remember her being both annoyed and disappointed at being told that she was no longer the owner of her property. Nora [the deceased] told me that Roger had been a favourite of hers and that heightened her sense of disappointment. She was annoyed because she had put her trust in him. Nora was shocked that Roger, her own grandson, had done that to her.

[53] Molly said that following the meeting the deceased said words to the effect that she did not know what it was about, but I prefer the evidence of Mr Milroy, which is supported by the letter he wrote at the time. Following the meeting in May 2002 Mr Milroy wrote to the defendant on 21 May 2002. That letter records his instructions from the deceased at that time as follows:

> I have also been informed by your grandmother that she has been deeply hurt by you exercising the Attorney to transfer the property at … Reporoa to yourself solely. Your grandmother had only ever intended that the Power be exercised to pay rates and other costs associated with the property. She never imagined that you would take over ownership of the property and mortgage it for personal gain. It was originally her desire to gift 1/2 the property to you and the other 1/2 to another in accordance with her Will but your actions have voided her Will in that respect.
>
> Consequently, your grandmother has instructed me to inform you that the Power of Attorney is revoked effective immediately.

Mr Milroy then invited the defendant to a meeting.

[54] The defendant says he never received that letter but, whether he received it or not, I accept Mr Milroy's evidence that the letter was sent and recorded the deceased's instructions to him at that time.

[55] Mr Milroy was not moved from his evidence in cross-examination. When it was put to him that at the second meeting, (attended by, inter alia, the deceased and the defendant), there was no request from the deceased to transfer the land back, he totally rejected it.

[56] Mr Milroy's evidence is supported by other contemporaneous documentation. His advice to the deceased to revoke the power of attorney, caveat the property and invite the defendant to a meeting with her and other family members to require him to explain why he had transferred the land to himself was followed up and implemented. The deceased revoked the defendant's power of attorney. On her instructions, Mr Milroy caveated the property. The deceased executed a new will.

[57] On the evidence, I find that the deceased was not fully informed about the defendant's intention to transfer both the properties to himself and did not consent to the transfer. When he transferred the properties to himself in reliance on the power of attorney, the defendant did so in breach of the fiduciary duty he owed the deceased.

[58] That leads to consideration of the defences raised on the defendants' behalf.

The Limitation Act defence

[59] Counsel are agreed that, to the extent the statute of limitations is relevant in this case, the applicable Act is the Limitation Act 1950 (the Act).

[60] Mr Temm submitted that the plaintiff's claim was out of time. He submitted that by at least 30 May 2002, after the two meetings with Mr Milroy and by the time the deceased had signed her new will, all of the elements of the present cause of action were known and complete. I accept that, by 30 May 2002, the deceased had received independent advice from Mr Milroy and had been fully informed about the defendant's actions.

[61] Mr Temm then submitted that s 4(9) of the Act applied so that the statutory limitation period of six years applied by analogy.

[62] Mr O'Neill submitted that there was no statutory limitation in the present case because s 21(1) of the Act applied to the claim:

> **21 Limitation of actions in respect of trust property**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> ...

[63] In submitting s 4(9) applied and that the claim for breach of fiduciary duty was barred by analogy, Mr Temm referred to and relied upon the following passages from the Court of Appeal decision of *Johns v Johns*:[7]

> [68] The principal issue in relation to this cause of action was whether the plaintiff's equitable claim for breach of fiduciary duty was barred by analogy with s 21(2) of the Act. As it is an equitable claim, the Act does not apply directly to the claim for breach of fiduciary duty. But s 4(9) of the Act preserves the ability of the Courts to apply to any claim for equitable relief an analogous time bar corresponding to one provided for in the Act. Broadly speaking the basis for doing so is that the equitable claim is sufficiently analogous to the statute-barred claim to make it inequitable to allow it to proceed.
>
> [69] The leading case on the doctrine of limitation by analogy is *Knox v Gye* (1872) LR 5 HL 656. Lord Westbury said at p 674:
>
> > "[W]here the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point in time by the Statute of Limitations, the Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation."
>
> The doctrine only applies, of course, if there is no specific statutory limitation on the equitable cause of action. It is generally referred to as an example of equity following the law.

[64] I understood Mr Temm to submit that the case of *Johns v Johns* is authority for the proposition that if the breach is a breach of fiduciary duty, then s 21 does not apply to it. I am not able to accept that submission or that interpretation of *Johns v Johns*.

[65] In *Johns v Johns* the plaintiff had raised two causes of action, breach of trust and breach of fiduciary duty. In the High Court the Judge had struck out the breach of trust claims in reliance on s 21(2) and by applying s 4(9) by analogy to strike out the claim for breach of fiduciary duty.

[66] The issue of whether s 21 applied to a breach of fiduciary duty did not require a final determination by the Court of Appeal because the Court found that the plaintiff's claim for breach of trust was saved by the proviso to s 21(2). As the first cause of action for breach of trust was not statute barred the second, alleging breach of fiduciary duty, could not logically be barred by analogy with it.

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[7] *Johns v Johns* [2004] 3 NZLR 202.

[67] Mr Temm's reliance on the above paragraphs from *Johns* also overlooks the importance of the latter part of [68] and the Court's reference to Lord Westbury's statement in *Knox v Gye*.[8] Those passages confirm where the equitable claim is sufficiently analogous to another statute barred claim, it would be inequitable to allow the equitable claim to proceed. That is not the situation in the present case. There is no analogous common law claim.

[68] In delivering the judgment of the Court of Appeal in *Johns*, Tipping J returned to that point at [79] by reference to the decision of *S v G*.[9] In *S v G*, the plaintiff had pleaded trespass to the person, negligence and breach of fiduciary duty. As Tipping J observed:[10]

> [79] … The Court of Appeal, in a judgment delivered by Gault J, held that as the first two causes of action were statute-barred, the breach of fiduciary duty claim should be barred by analogy. This was on the basis that "the pleaded claims are really alternatives in respect of essentially the same conduct". ...
>
> [80] ... The fiduciary claim will always prima facie survive the statutory barring of an allied common law or indeed equitable claim. There will be a bar by analogy only when the fiduciary claim parallels the statute-barred claim so closely that it would be inequitable to allow the statutory bar to be outflanked by the fiduciary claim. ...

[69] The pleadings confirm there is no analogous common law claim in this case. The claim pleads that the transfers were made without the deceased's authority and consent and then alleges:

> 23. The First Defendant as attorney for [the deceased] and by alienating the properties from her in transferring them to himself and subsequently to the Second Defendant, and by arranging a further transfer of the properties to his family trust, has breached all of his fiduciary obligations to [the deceased]. …
>
> 24. As a result of the [defendant's] breach of fiduciary duty to [the deceased] the Plaintiff has suffered loss, and conversely [the defendant], [has] gained.

The plaintiff then seeks by way of relief:

> …

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8 *Knox v Gye* (1872) LR 5 HL 656.

9 *S v G* [1995] 3 NZLR 681 (CA).

10 *Johns v Johns* above n 7, at [79]-[80]

> c. Account by way of decree that he hold any proprietary interest in the fiduciary assets (the properties) on constructive trust for the Plaintiff; and
>
> d. Such other equitable compensation as determined by this Court including exemplary damages … .

[70] There is no common law analogy for the plaintiff's claim for breach of fiduciary duty in the circumstances of this case. It cannot be statute barred by s 4(9).[11]

[71] I turn to consider the effect of s 21 in this case.

[72] Under the Act "trust" and "trustee" have the same meanings respectively as in the Trustee Act 1956. As a consequence "trustee" in s 21 of the Act includes a constructive trustee.

[73] The section distinguishes between actions for breach of trust or to recover property under s 21(2) and claims by a beneficiary against a trustee for the acts referred to in s 21(1). The breaches contemplated by s 21(2) fall short of fraud or cases where the trustee has received or converted the trust property to him or herself. For a "simple" breach under s 21(2), the six year limitation period applies. However, there is no limitation period in the case of a fraudulent breach (s 21(1)(a)), or where the trustee takes or converts to him or herself the trust property (s 21(1)(b)). The intent is to hold the trustee liable for such serious breaches of his or her obligations.

[74] The issue is whether the breach of fiduciary duty in the present case falls under s 21(1)(a) or (b) or s 21(2).

[75] Mr Temm noted that the pleading does not expressly allege fraud as against the defendant and submitted that, as a consequence, s 21(1)(a) did not apply.

[76] However, for this purpose the fraud in question need not amount to dishonesty.[12] The law imposes a constructive trust requiring the plaintiff to account

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[11] *Cohen v Cohen* [1929] 42 CLR 91; *Manufacturers Mutual Insurance Ltd v GIO* (1993) 7 ANZ Ins Cas 61-158.

[12] *Thorne v Heard* [1895] AC 495 at 504; *McDonald v McFarlane and Gore* (1900) NZLR 427.

for the benefit he has obtained as a consequence of his, in this case, deliberate breach of duty.

[77] On the facts as I have found them, the actions of the defendant could be described as a fraudulent breach of trust for this purpose because the defendant, as a fiduciary of the deceased, deliberately dealt with the deceased's property in such a way as to personally benefit from that property in breach of the acknowledged fiduciary duty.

[78] However, even if s 21(1)(a) does not apply in the present case, s 21(1)(b) does. The defendant is a constructive trustee in relation to the proceeds of the deceased's property, which he took and converted to his own use by disposing of the property when he transferred it to his family trust.

[79] The plaintiff is a beneficiary of that constructive trust. There is no limitation on an action by a beneficiary under a trust (which for present purposes includes a constructive trust) to recover trust property or the proceeds of it under s 21(1)(b).[13]

[80] In the course of submissions counsel referred to s 28 of the Act. I accept, as Mr O'Neill submitted, that if s 21(1) applies as I have found it does, then s 28 does not apply because s 21(1) excludes the operation of the period of limitation under the Act. The introductory words of s 28 are that the section is only to apply "in … any action for which a period of limitation is prescribed by this Act …".[14] There is no period of limitation prescribed and applicable to the plaintiff's action in this case. Section 21(1) of the Act preserves the plaintiff's right to pursue a claim against the defendant.

Estoppel

[81] The defendant also pleads estoppel. He says that the caveat asserted the same rights as the cause of action now advanced by the plaintiff, namely that the defendant and his assigns were constructive trustees of the property for the deceased. The

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13 *MacKenzie v MacKenzie* (1894) 12 NZLR 590; *Re Loftus Deceased* [2006] 4 All ER 1110 (CA); *Wassell v Leggatt* [1896] 1 Ch 554.

14 *Ecurie Topgear SA v Kerr* (1997) 11 PRNZ 127 (HC).

plaintiff says that by withdrawing the caveat on 30 May 2004 and not taking any further action during her lifetime the deceased would now be estopped by her conduct from pursuing a claim and the plaintiff is similarly estopped.

[82] In his written submissions, Mr Temm expanded the factual basis of this defence to also rely on a letter from Mr Milroy to the defendant dated 19 November 2002. He suggested that letter recognised the defendant's right to the two blocks of land. Mr Temm submitted that, however it was categorised, the deceased had waived her rights. He also submitted that the defendant had relied on the deceased not raising a claim to the properties by refinancing them after 2004 and by accepting that he had obligations to Errolena and Molly in relation to the properties.

[83] The authors of *Civil Remedies in New Zealand*[15] suggest that the various estoppels by representation, including promissory estoppel, are effectively merging into a broad principle generally arising from the statements of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher*.[16] Applying those principles to the present case, an estoppel would apply if the defendant assumed or expected that a particular arrangement existed between him and the deceased, that he acted on that assumption and the deceased played such a part in the adoption of the assumption that it would be unjust, inequitable or unconscionable for the deceased (or the plaintiff as her representative) to revoke that arrangement, or to act in a manner inconsistent with the defendant's assumption, having regard to the nature and extent of the defendant's reliance on it.

[84] Mr Temm submitted that the historical discussion about estoppel by conduct has really been overtaken by the Court of Appeal decision in *Wellington City Council v New Zealand Law Society* where, as a general proposition, Cooke P said:[17]

> Essentially [the defences of estoppel, laches and acquiescence] require consideration of the equities and can be summed up in the question whether it would be unconscionable to grant relief in the light of the reasonable expectations of the parties. ...

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15 Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington 2011) at [19.4.4].

16 *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513.

17 *Wellington City Council v New Zealand Law Society* [1990] 2 NZLR 22 (CA) at 26.

[85] The essential rationale for an estoppel is to prevent a party going back on their word (express or implied) when it would be unconscionable to do so. To make out an estoppel in this case, the defendant has to establish that by her actions or inaction, the deceased represented to the defendant that she did not intend to pursue a claim against him for the return of the property and he relied on it so that it would be unconscionable to allow the plaintiff, as the deceased's personal representative to now go back on that.

[86] As noted, the defendant relies particularly on the withdrawal of caveat and the solicitor's letter, in combination with the deceased's inactivity during her lifetime. The starting point must be that a caveat may be withdrawn without conceding that the substantive claim underlying the caveat will not be pursued. The circumstances in which the caveat came to be withdrawn in this case are important. The defendant's piggery venture had been unsuccessful. He was under considerable financial pressure to refinance. The refinancing could not go ahead unless the caveat was withdrawn. His solicitors at the time, Edmonds Judd, pointed that out to him in an email on 18 March 2004. It appears the defendant then advised his solicitors that he would arrange for the caveat's removal, because by letter of 19 April 2004 the solicitors wrote to the deceased, care of the defendant, stating they had been asked by the defendant to prepare a withdrawal of caveat for her to sign. The solicitors suggested the deceased take independent legal advice, but in any event, told her to make sure her signature was witnessed by an independent witness (not the defendant).

[87] The contemporaneous documents and the defendant's own evidence leads the Court to conclude that the deceased, who at this time in 2004 was 80 years old, was placed under pressure (if not directly by the defendant, indirectly because of his financial position) to agree to sign the withdrawal. The deceased had a close bond with the defendant. She would have found it difficult to refuse him when approached, on his behalf, to sign the withdrawal of caveat.

[88] Despite the reference to it in the Edmonds Judd letter, the deceased did not receive any legal advice. Mr Milroy was unaware of the request that the caveat be withdrawn. Although Mr Milroy's firm was the address for service of the deceased

as caveator, the defendant and his advisors chose to arrange to have the withdrawal sent directly to the deceased, care of the defendant. At the time, she was living with Molly, whose interests coincided in part at least with the defendant. As Molly said in her evidence, when she witnessed the deceased's signature, "It was for Rog".

[89] It is particularly relevant that the caveat was withdrawn because, as the defendant conceded, his solicitors required the caveat to be withdrawn to enable the refinancing. The withdrawal in those circumstances says nothing about whether the deceased accepted the defendant's breach of the fiduciary duty he owed her or whether she had waived her claim for return of the land.

[90] The defendant was not entitled to take the withdrawal of the caveat as a representation that the deceased would not maintain a claim for the return of the land or in relation to the defendant's taking the land to his own benefit.

[91] The defendant now also relies on Mr Milroy's letter of 19 November 2002. In that letter to the defendant Mr Milroy said:

> I have had further discussions with your Grandmother and Aunt and it has been agreed that you will be entitled to retain the land that has been transferred to you **subject to** you paying your Grandmother the balance of monies owed under the gifting programme initiated when you first acquired the land.
>
> It is understood that there is **$119,000.00** outstanding to your Grandmother under the loan arrangement. If you can prove that $81,000.00 was gifted to you by your Grandmother, then $119,000.00 is the amount that you will need to pay in order to square things away with your Grandmother. Once these monies have been paid in full, only then will the Caveat recently registered over the properties be withdrawn. …

[92] A number of issues arise out of the defendant's reliance on that letter. First, the defendant denied receipt of the letter. He said that the first time he saw it was when his counsel referred it to him. If he did not receive it, he could hardly rely on it. However, I do not accept the defendant's evidence that he did not receive it. The letter was correctly addressed. It was sent to the address the defendant and his family lived at, at the time. No other Pikias lived on Maraeroa Road. However, in any event, the defendant apparently did nothing in reliance on the letter. The defendant did not produce evidence to satisfy the requirement that he prove $81,000

had been gifted to him by the deceased nor, importantly, did he pay the $119,000. Any representation in that letter that the deceased would not take matters further was a conditional one. The conditions were not satisfied.

[93] Finally, the defendant relies on the fact that the deceased did nothing herself to advance her claim after 2004. Again, however, as Mr O'Neill submitted, at the time the deceased was 80 years old. She was in a difficult position. As Kaare Kawenga (Molly's son) said, the deceased would say things to keep members of the family happy and to allow matters to move on. In those circumstances, it is not surprising that she left it to others to advance matters on her behalf.

[94] Importantly, the defendant was aware that a number of members of the family who purported to speak on the deceased's behalf did not consider the matter to be at an end. The defendant was pressed from time to time at family meetings about the issue. The defendant knew that other members of the family continued to assert, on the deceased's behalf, that the defendant should return the properties to his grandmother. The plaintiff gave evidence of a meeting in the garage at their farm, following which Nuku was to speak to the defendant. Nuku then died in July 2004.

[95] Next, I infer that one of the reasons the defendant transferred the properties to his family trust was an attempt to put them beyond the claims he knew were made for their return.

[96] After the deceased's death, the plaintiff registered the current caveat promptly after probate was granted. The defendant was aware this claim would be pursued. Shortly after there was the family meeting in February 2011, attended by a number of family members including the defendant and Donald Lines. I accept Donald Lines' evidence that the defendant said he would think about it (returning the property) and come back to them. The defendant accepts he said that but ultimately chose not to.

[97] Importantly, the defendant was not able to explain why, if the deceased had accepted the property should be transferred to him after she learned of the position in

May 2002, the deceased did not complete any further gifting of the debt still outstanding.

[98] While the delay is significant, the defendant has not acted in reliance on the deceased's inaction so that it could be said to be unjust, inequitable or unconscionable for the plaintiff as the deceased's personal representative to now assert her right to the properties. The defendant relies on his refinancing the property and his commitment to Molly and Errolena as actions he undertook in reliance on the deceased's inaction. However, as noted, the defendant refinanced the properties because he was under pressure. He had no choice. If he had not done so, the land would have been sold by the mortgagee. In fact, at the time, the plaintiff had made an offer to buy the land. The other factor the defendant says shows his reliance is his assumption of an obligation to Molly and Errolena. But as discussed above, the defendant has put himself in a position where he cannot satisfy any obligation to them.

[99] The defendant cannot establish an estoppel in this case.

Laches/acquiescence

[100] The last positive defence advanced by the defendant is laches.

[101] Mr Temm submitted that in order to establish the defence the defendant must satisfy the Court:

- the plaintiff had knowledge of the essential facts giving rise to her claim;
- the plaintiff had unreasonably delayed in enforcing those rights, and
- that it was unjust in all the circumstances to grant relief now sought by the plaintiff standing in the place of the deceased.

[102] Perhaps the most succinct statement of the application of laches is to be found in the following passage from Viscount Radcliffe in delivering the advice of the Privy Council in *Nwakobi v Nzekwu*:[18]

> Laches is an equitable defence, and to maintain it and obtain relief a defendant must have an equity which on balance outweighs the plaintiff's right.

[103] In *Eastern Services Ltd v No 68 Ltd*,[19] the Supreme Court referred to that passage in its discussion of the application of the doctrine laches. The respondent purchaser of a right of way had delayed more than 20 years in seeking a registrable transfer from the vendor. In the High Court, Baragwanath J had held that the respondent's predecessors in title had accepted that it had never qualified to call for title to the right of way and that was why the matter was left. The Court of Appeal, however, held that the respondent had acquired an equitable interest in the land and the appellant was not able to show there were circumstances giving rise to an equity that, on balance, outweighed the appellant's rights.

[104] On appeal to the Supreme Court the appellant argued that the length of delay itself was such as to preclude relief. That is, mere delay without actual prejudice could defeat an equitable claim on the grounds of laches and, in any event, the appellant was able to demonstrate actual prejudice.

[105] At [29]-[37], the Supreme Court reviewed the leading texts and authorities on the doctrine before concluding at [37]:

> We share the caution indicated by Cooke P for the Court of Appeal in *Neylon v Dickens* [[1987] 1 NZLR 402] about endorsing an unqualified principle concerning mere delay without prejudice. This is because the doctrine of laches requires a balancing of equities in relation to the broad span of human conduct. In the abstract, facts and the weight to be given to them are infinitely variable. But in a particular case they have to be identified and weighed for what they are, as a singular exercise.

The Court went on to note at [39]:

> Equity has been most reluctant to accept that an equitable interest in land could be "lost or destroyed by mere inaction", [*Fitzgerald v Masters* (1956)

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18 *Nwakobi v Nzekwu* [1964] 1 WLR 1019 (PC) at 1026.

19 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335.

> 95 CLR 420 at p 433 (HCA)] as shown by cases such as *Sharp v Milligan* (1856) 22 Beav 606and *Williams v Greatrex* [[1956] 1 WLR 31 (CA)] which were considered by Baragwanath J. ...

[106] In the end result the Supreme Court dismissed the appeal and confirmed the decision of the Court of Appeal that specific performance was appropriate notwithstanding the respondent had delayed more than 20 years in seeking a registrable transfer recording the right of way.

[107] For present purposes I accept that, as at 30 May 2002, the deceased was aware of the essential facts which gave rise to the claim that she had against the defendant. By then she had been advised by Mr Milroy that the defendant had acted in breach of his duty to her and transferred the properties to himself. She had executed a new will as a consequence and instructed Mr Milroy to lodge a caveat.

[108] The issue is whether it can be said that the deceased's failure to take positive steps to assert her position thereafter could amount to an acquiescence on her part so that, when balancing the equities, it would be unjust in all the circumstances to grant the relief sought by the plaintiff at this time.

[109] For part at least of the period after May 2002 and following the lodging of the caveat in November 2002 the deceased, through Mr Milroy in November 2002 sought further information from the defendant. There were also the further meetings within the family. The issue of whether the defendant would return the land was a live issue within the family. The defendant would have been well aware of that.

[110] In assessing the relative equities of the parties, it is necessary to consider the respective positions of the parties. The defendant through his breach of the acknowledged fiduciary obligations, obtained the two blocks of land for a nominal consideration of $200,000 in 1999. That same land now has a value of $438,000. The Government valuation of the home block as at July 2011 is $213,000 and the grazing block $225,000.

[111] Even despite the nominal consideration of $200,000, the defendant did not pay anything for the land. He then charged it by way of mortgage to enable him to purchase the further land at Springs Road, which he sold in 2003.

[112] Then, in 2004, the defendant transferred the land to his family trust. He has not provided any details about that transfer.

[113] It is not clear exactly how much the defendant initially borrowed against the deceased's property in 1999 but, when the property was refinanced in 2004 and the BNZ repaid, he borrowed $114,000 (approximately). Of that, approximately $64,000 was repaid to the BNZ and, after deduction of costs, approximately $49,000 was transferred to the defendant's account for his personal benefit. The most recent mortgage recorded advances of approximately $173,000 when taken out. The defendant (and his interests) has used the land to their benefit since 1999.

[114] Further, it appears that the defendant or his family trust have received the rental from the grazing block since at least 1999.

[115] The defendant cannot point to any detriment arising from the deceased's failure to pursue her claim during her lifetime. Importantly, the defendant put himself in a position where he charged the property as security shortly after the breach of his duty to the deceased. I infer that was his purpose in executing the transfer to himself in February 1999. The defendant and his family trust have then remortgaged the property from time to time for increased sums of money during the course of dealing with the property. All of those transactions were undertaken after the deceased's claim to the land was first raised with the defendant in May 2002.

[116] Laches and acquiescence is not made out on the facts. Given the serious nature of the breach by the defendant and the vulnerability of the deceased during her lifetime it cannot be said that it would be unjust for the defendant and through him his family trust (which has received the property with knowledge of the breach) to have to account to the deceased's estate for his breach of fiduciary duty at this time. The defendant does not have an equity which outweighs the plaintiff's rights.

Relief

[117] The plaintiff has made out her claim. The defendant is not able to make out the positive defences he relies on.

[118] In closing submissions, Mr O'Neill confirmed the plaintiff seeks:

(a) an accounting of the rental received since the property was transferred to the defendant;

(b) that the land be transferred back to the plaintiff in an unencumbered state; or

(c) in the alternative equitable compensation;

(d) exemplary damages, and

(e) interest.

[119] The home and grazing blocks are both held by the third defendant trustees of the defendant's family trust. Mr Temm confirmed the defendant in his capacity as trustee abided the decision of the Court. The third defendants are fixed with the knowledge of the defendant as the defendant is one of the trustees of the family trust. The third defendants took a transfer of the property and received it with knowledge of the defendant's breach of fiduciary duty. The appropriate relief in the circumstances is to impose a trust over the property to the extent of the third defendants' interest in it.[20]

[120] I accept there is no suggestion that the BNZ advanced the monies otherwise than in good faith. To that extent the trust imposed in the plaintiff's favour against the third defendants in relation to the property itself must be limited to the third defendants' interest in the property subject to the interest of the BNZ as mortgagee.

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[20] *AGIP (Africa) Ltd v Jackson* [1990] Ch 265; *Black v S Freedman & Co* (1910) 12 CLR 105; *Brady v Stapleton* (1952) 88 CLR 322 (CHA).

Summary/orders/directions

[121] To recognise the position of the BNZ I direct that the third defendants are to transfer both blocks of land to the plaintiff in an unencumbered state, or if that is not possible, and the plaintiff and BNZ agree to the transfer, they are to transfer both blocks of land to the plaintiff subject only to the BNZ mortgage.

[122] In relation to the plaintiff's claim against the defendant, the defendant has had the benefit of the property. The best evidence before the Court as to the value of the property is the July 2011 valuation, which discloses a combined valuation for both blocks of $438,000. The defendant has had the benefit of property to that value without paying for it. The plaintiff is to have judgment against the defendant in that sum.

[123] The orders against the defendant and third defendants, although different in nature, are intended to be joint and several judgments to the intent that if the third defendants retransfer the property to the plaintiff then the first defendant's liability to account for the value of the property will accordingly be reduced by the net value of the equity of the property transferred by the third defendants. For example, if the property is able to be transferred back unencumbered, the defendant's liability to the plaintiff in relation to the judgment of $438,000 would be extinguished.

[124] The plaintiff also claims the rental received by the defendants for the grazing block. The rental was received either by the defendant and/or the third defendants in breach of the defendant's obligation to the deceased. The rental was $9,000 per annum. On the face of the current evidence it is not clear how much of that rental, if any, was paid to the deceased. The defendants have that information. If the parties are unable to agree on the figure I direct that there be an accounting to determine the rental received by the defendant and/or his family trust. The procedure will generally follow that prescribed in r 16 of the High Court Rules. When the accounting exercise is completed (if necessary), judgment can be entered for the plaintiff for that sum.

[125] I reserve leave to the parties and the BNZ to apply further in relation to any issues that may arise out of the implementation of the above orders.

[126] I decline the application for exemplary damages and interest given the above orders will divest the defendant and his interests of the benefit of his breach. I also take into account that as a consequence of his actions the defendant is no longer a beneficiary of the deceased's will.

Costs

[127] The plaintiff is entitled to costs on a 2B basis for all steps in the proceeding save for the credit that there is to be for the defendants for the wasted costs of the earlier vacated fixture. The defendants may set off the costs of the earlier wasted preparation (which I calculate at three days) against the costs awarded to the plaintiff.

[128] The plaintiff is also to have such disbursements and witness expenses as are certified by the Registrar.

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Venning J