IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2012-412-000910
[2015] NZHC 400

BETWEEN	GRANT BRUCE REYNOLDS as liquidator of JAMES DEVELOPMENTS LIMITED (in liquidation) Plaintiff
AND	HILARY JANE CALVERT and HGW TRUSTEES LIMITED as Trustees of Frongopoulos Trust First Defendant
AND	CHRIS JAMES Second Defendant

Hearing:	18 - 22 August 2014 Further submissions received on 29 September 2014
Appearances:	M J McCartney QC and A Sorrell for Plaintiff M R Sherwood King and M Gilkison for Defendants
Judgment:	9 March 2015

JUDGMENT OF DUNNINGHAM J

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Introduction

[1] Mr Chris James is a successful businessman with interests in property in Dunedin and Central Otago. In early 2006, the Frongopoulos Trust (Trust) was settled by Mr James for the benefit of his family. Soon after, the Trust acquired land at Jacks Point in Queenstown on which it constructed a substantial family home.

[2] Professional trustees with accounting and legal expertise were appointed as trustees of the Trust. The first defendants are the current trustees.

[3] One of Mr James' companies, James Developments Limited (JDL), advanced $740,000 to the Trust to assist it with purchase of the Jacks Point land. That advance was recorded as an asset in JDL's accounts.

[4] On 8 April 2009, summary judgment was entered against JDL for a sum exceeding $4 million. JDL appealed the judgment but the shareholders also resolved to place JDL into liquidation.

[5] Shortly before liquidation, Mr James, as director of JDL, resolved to amend the company records to "correctly record the $740,000 withdrawal" as "repayment" of earlier advances from him and another of his companies. The Trust's accounts were also amended so that the $740,000 became part of the debt owed to Mr James, and the liability to JDL was removed.

[6] When the plaintiff was appointed as liquidator, he made enquiries which eventually revealed the history of the $740,000 asset, despite the "correction" of the company's and the Trust's accounts. He took the view the "correction" was no more than a device to remove this asset from the company and this litigation was commenced to recover that sum as a debt due to the company for the benefit of the creditors.

[7] The defendants now admit the sum of $740,000 was owed to JDL, and the recoding of it from an advance to a repayment was incorrect. Their defence is

simply that recovery is now statute barred, and none of the circumstances which may extend the statutory time limits apply.

[8] The liquidator also pursues the following additional causes of action:

(a) the Jacks Point land is held by trustees on a resulting/constructive Trust as the funds were advanced to the Trust for the purpose of purchasing the property so no limitation period applies to it;

(b) relief from prejudicial dispositions pursuant to part 6, subpart 6 of the Property Law Act 2007;

(c) breach of fiduciary duty by Mr James as director of JDL;

(d) dishonest participation in the breach of fiduciary duty referred to above, by the trustees of the Trust; and

(e) breaches of the Companies Act 1993 by Mr James, with relief sought under s 301 of that Act.

[9] The defendants deny all causes of action. In addition to the limitation defence they argue:

(a) they have a defence to the plaintiff's claim for interest on the sum advanced because the non charging of interest was approved; and

(b) the plaintiff is acting without the authority of the creditors of JDL.

[10] The key issues for me to determine are:

(a) whether the $740,000 is recoverable by the liquidator from the first or second defendants, either because the claim for repayment is not statute barred, or because he can succeed on one or more of the other causes of action pleaded; and

(b) whether any interest is recoverable on that sum.

Procedural housekeeping

[11] Shortly before trial, the plaintiff sought leave to file, outside the close of pleadings date, a further amended statement of claim. It was initially foreshadowed that two minor changes would be made. However, what was filed contained six changes to the statement of claim which, the defendants submitted were "aimed at plugging holes in the plaintiff's case which Ms McCartney has already had five attempts at pleading since November 2012". The plaintiff's response was that the latest amendments were simply responding to further material filed by the defendant, and caused no prejudice or unfairness to the defendants.

[12] Rule 7.7 of the High Court Rules provides that an amended pleading may not be filed after the close of pleadings without leave of a Judge. In exercising that discretion, I am, of course, balancing the importance of ensuring that the "real controversy goes to trial so as to secure the just determination of the proceeding" [1] against any prejudice or injustice that arises to the defendants from the amendment. In determining whether there is prejudice or injustice to the defendants, I should have regard to the magnitude of the amendment, the explanation for the delay and the merits of the amended pleading.[2] Logically, of course, the more significant the amendments are to the party seeking leave, the more likely it is that the other party is prejudiced.

[13] Looking at the amendments, they are not amendments of significant consequence or prejudice to the defendants. They simply further particularise the factual background to the allegations in the statement of claim, or reword the claim to better reflect the relevant statutory provision or legal test. I was satisfied they did not introduce new concepts or allegations which the defendants were not already alive to. Furthermore, the plaintiff had signalled in advance it intended making minor changes to clarify his pleadings and, although the charges were numerous than signalled, the amendments were of the type indicated.

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1 *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* (1989) 3 TCLR 249, [1989] 3 NZLR 304.

2 *Fordham v Xcentrix Communications Ltd* (1996) 9 PRNZ 682 (HC).

[14] Accordingly, while late amendments to pleadings are not to be encouraged, particularly where, as here, there have been multiple prior versions of the pleadings, I have decided to allow the amendments to ensure that the plaintiff's claim against the defendants is fully and accurately articulated in this hearing.

How did the disputed transaction occur?

[15] The disputed transaction relates to an advance made by JDL to the trustees of the Trust on 3 October 2006.

[16] At the time, the trustees were Brocal Trustees Limited (Brocal), a trustee company, whose directors were Ms Hilary Calvert, a solicitor in the firm Anderson Lloyd, and her husband, Mr Alistair Broad. The other trustee was HGW Trustees Limited, a trustee company owned and controlled by Harvie Green Wyatt Limited (HGW), a firm of chartered accountants based in Dunedin. The directors of HGW include Mr Douglas Harvie and Mr Todd Miller. They provide accounting services to Mr James and various other entities related to him, including JDL and the Trust.

[17] By agreement dated 10 October 2006, the trustees agreed to purchase a .89 hectare block of land at Back Shed Road, Jacks Point, Queenstown. The purchase price was $2,600,000. On 3 October 2006, JDL transferred $740,000 via another of Mr James' companies, Campbell Stores Limited, to the Trust. It is now accepted that JDL lent this sum to the Trust, and the movement of the funds via Campbell Stores Limited is of no significance.

[18] Settlement of the purchase of the Jacks Point land took place on 1 December 2006 with funds which included the $740,000 advanced by JDL.

[19] Over the period 2009 to 2012 a substantial home was built on the property which is now occupied by Mr James and his family.

[20] On 8 April 2009, summary judgment was entered against JDL for non-performance of an agreement to purchase property from Mana Property Trustee Limited (Mana). As a consequence, JDL owed Mana approximately $4,000,000 plus

GST. JDL appealed the judgment and a stay was granted pending appeal, subject to certain payments being made. Faced with paying the judgment debt, and with no certainty that the appeal would be successful, Mr James and his advisers met on 1 July 2009 to discuss the suggestion of JDL entering into liquidation. The meeting was attended by Mr James, his accountant Mr Miller, Mr van Aart from the law firm van Aart Sycamore, and Mr Colin Withnall QC.

[21] Prior to the meeting Mr Miller and Mr Harvie discussed the fact that "If the company were to be liquidated, it would have issues with the asset advance to [the Trust], and the liabilities that existed to Chris James and Heriot Holdings Limited". Mr Miller accepted a key purpose of the meeting was to deal with the "asset on the books of JDL which if the company went into liquidation would be recovered by the liquidator".

[22] The resolution that was then drafted and signed by Mr James as a consequence of that meeting, read as follows:

> Background:
>
> On 3 October 2006 a cash withdrawal of $740,000 was made from the company bank account. This withdrawal was incorrectly narrated in the company computer ledger, and subsequently in the company financial statements, as an advance to the Frongopoulos Trust. The correct treatment of this advance was as a repayment of earlier advances from Chris James ($500,000) and Heriot Holdings Limited ($240,000). Heriot Holdings Limited is wholly owned by Chris James.
>
> Resolved that:
>
> The 2009 company financial statements be amended to correctly record the $740,000 withdrawal on 3 October 2006 as a repayment to the advances made by Chris James $500,000 and Heriot Holdings Limited $240,000.

[23] Mr James' evidence was that the steps he took in relation to the $740,000 advance and the amendment to how that advance was recorded in the books of JDL and the Trust, were "steps taken entirely relying on professional advice". He said "I would never take any such steps of my own volition as I am not qualified to understand all the ramifications". The implication was that the legal and accounting advisers present at the meeting recommended this action and he simply accepted their advice as appropriate.

[24] However, responsibility for the advice leading to the disputed resolution was passed around as something of a hot potato between the witnesses. Mr Miller made a brief note of the meeting which recorded:

> Remove advance
>
> See Page 4
>
> (FINISH) As advised by Colin Withnall

Mr Withnall QC was subpoenaed to give evidence on his role in the meeting. He had no recollection of the meeting, nor of giving advice to Mr James or JDL as to accounting entries in the accounts for JDL. He also said that it would be most unusual if he had been asked to, because his brief was concerned solely with the conduct of the litigation with Mana.

[25] Similarly, Mr van Aart, another lawyer, was called and he denied giving advice as to the treatment of the $740,000 advance shown on the accounts of JDL. He did not even recall discussing the proposal to set off that advance against the advances for Mr James and Herriot Holdings Limited.

[26] In the end, it was acknowledged by Mr Miller that the decision to draft and pass a resolution to "reclassify" the $740,000 loan was an option he proposed, albeit with express reservations. I accept that the legal advisers attending the meeting were not instrumental in giving advice about the steps taken to remove the $740,000 loan as an asset of the company. That advice was given by JDL's accountant, Mr Miller. However, Mr Miller, disclaimed any suggestion he endorsed the proposal, saying he made it clear to Mr James that he "was far from certain that the set off and subsequent adjustments to the accounts would stack up to scrutiny by a liquidator or another interested party". However, he rejected any suggestion that the "adjustments" were dishonest or were an attempt to conceal the true position.

[27] Mr Miller was cross-examined on the drafting of the resolution. He accepted that the background explanation to the resolution was not true, but was more evasive about acknowledging that he knew it at the time he drafted it. However, he was well aware of the source of the advance to the Trust from JDL, acknowledging it came

from the sale of land owned by JDL at Speargrass Flat and that it was being advanced to the Trust. I am therefore satisfied that when he drafted the resolution, he knew there had not been advances from Mr James of $500,000, or Heriot Holdings Limited of $240,000 to JDL, which were being repaid.

[28] The draft accounts for JDL for the year to 31 March 2009 were amended on or about 2 July 2009 to reflect the terms of the resolution by removing the asset of $740,000 and reducing advances from Mr James by $500,000 and from Heriot Holdings Limited by $240,000. Mr Miller also accepted that he had to make a corresponding entry in the Trust accounts to "recode" the $740,000 liability of the Trust, as being a liability to Mr James, and that this amendment was made to the Trust's accounts on 21 September 2009, which was shortly after liquidation.

[29] On 6 July 2009 JDL was placed into voluntarily liquidation by shareholder resolution which appointed Mr Iain Nellies and Mr Gus Jenkins as liquidators.

What happened when JDL went into liquidation?

[30] The liquidators were provided with a draft JDL balance sheet for the period ending 30 June 2009 but, of course, the balance sheet did not show the advance from JDL to the Trust.

[31] In mid November 2009, there was a change to the trustees of the Trust, with Ms Calvert replacing Brocal as a trustee, but HGW Trustees Limited remaining as the other trustee.

[32] On the appointment of JDL's liquidators, their primary focus was pursuing the litigation with Mana. On 19 October 2009, the Court of Appeal delivered a judgment in favour of JDL (in liquidation).[3] However, the litigation then proceeded to the Supreme Court where a judgment reversing the Court of Appeal's decision, and reinstating judgment in favour of Mana, issued on 23 July 2010.[4]

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3 *James Developments Ltd v Mana Property Trustee Ltd* [2009] NZCA 483.

4 *Mana Property Trustee Limited v James Developments Limited* [2010] NZSC 90; [2010] 3 NZLR 805.

[33] Following delivery of the Supreme Court judgment, the first liquidators resigned as they had supported the JDL position in the litigation against Mana, and now Mana was the main creditor of JDL. They were replaced by the present liquidator, Mr Reynolds.

[34] Following his appointment on 25 November 2010, he commenced an investigation of JDL's financial position. He had received from the first liquidators the JDL accounts for the years ending 31 March 2008 and 2009, and the resolution of 1 July 2009 which, of course, set out the position as amended by the pre-liquidation resolution. He had little else. He did not have documents which pre-dated the amendment, and which would demonstrate whether the background explanation to the amendment was correct or not.

[35] The liquidator's first six monthly report dated 24 February 2011 signalled an intention to "investigate the actions of the Officers of the Company and in particular any breaches under the Companies [A]ct 1993 or relevant law along with any recent transactions that may be insolvent", but concluded that "[a]t this stage the Company has no tangible assets".

[36] The liquidator then began a drawn out process of requesting information from JDL's director, Mr James, and its advisers for the purpose of, in particular, verifying the resolution amending the status of the $740,000. In response to this line of questions, I am satisfied that there was a deliberate stance adopted to delay providing answers, and then to provide the minimum material possible in response to the liquidator's requests.

[37] For example, on 15 December 2010, the liquidator emailed Mr James chasing up responses to some queries. That was not replied to until 9 March 2011 by Mr Miller, where his summary of the company debt owed to Chris James included the $500,000 referred to in the 1 July 2009 resolution but described it as being to "Offset Campbell Stores Limited advance dated 3 October 2006". This was clearly misleading. Campbell Stores Limited was nothing more than a conduit for the advance of $740,000 from JDL to the Trust.

[38] By 27 May 2011, the liquidator was understandably frustrated at the lack of information he had received. On that date he made a request pursuant to s 261(3) of the Companies Act 1993, for a number of documents from Mr Miller, including:

> 1. copies of all documents and records (including any electronic files and email correspondence) held by you that relate directly or indirectly to the cash withdrawal of $740,000 from JDL's company bank account on 3 October 2006 ("the Withdrawal");
>
> ...
>
> 4. copies of all documents and records (including any electronic files and email correspondence) held by you that relate directly or indirectly to the "earlier advances from Chris James ($500,000) and Heriot Holdings Limited ($240,000)" referred to in the Resolution;

He also sought answers to a number of detailed questions about the resolution including:

> 5. ...
>
> (iv) is the Resolution consistent with your own understanding/knowledge of the Withdrawal?
>
> (v) what prompted the Resolution and why was the error not picked up earlier?
>
> (vi) did your firm provide any advice to JDL/JDL's director prior to and concerning the Resolution and, if so, what precisely was the advice given?

[39] The reply received by the requested date of 10 June 2011 was remarkably sparse. The only documents supplied in response to the first request were bank statements showing the movement of the $740,000 from JDL via Campbell Stores to the Trust. In response to the fourth request for documents relating to the $500,000 and $240,000 advances, Mr Miller enclosed "a workpaper we have prepared to show the movement in the requested advances". Again it did no more than record the position which had been created by giving effect to the resolution. No documents were provided to support the two advances.

[40] The answers to the liquidator's questions about the background to the resolution were equally evasive. The explanation given was:

> As shown by the bank statement entries, the withdrawal was made to Campbell Stores Limited in total. As Campbell Stores Limited and Heriot Holding Limited are wholly owned by Chris James it was resolved to offset this advance against other cash advances made by Chris James or Heriot Holdings Limited.

[41] In response to the query about why the "error" recorded in the resolution was not picked up earlier, Mr Miller simply said:

> The miscoding ... was identified when the advance was traced back to bank statements … [when preparing] the 2009 financial statements. We had not traced the advance back to bank statements previously.

This answer entirely avoided giving the true position, which is now acknowledged, that the resolution did not correct an error at all.

[42] Unsurprisingly, on 7 July 2011, another email was sent to Mr Miller from the liquidator requiring answers to further questions, including who prepared the resolution and who the trustees and beneficiaries of the Trust were.

[43] A response was provided in late July 2011. In answer to a further question about whether the resolution was consistent with Mr Miller's own understanding/knowledge of the withdrawal, Mr Miller simply deflected the question saying, "Answered in letter 10th June 2011, paragraph 5(iv)", which is the answer set out in [40] above.

[44] By 5 August 2011 the liquidator was sufficiently concerned about the treatment of the $740,000 that he made inquiry of Mr Miller, in his capacity as a director of one of the trustees of the Trust, for information on how the Trust treated the transaction in their accounts for the period 2006-2009. He also asked for the Trust accounts for that period. On 11 August 2011, Mr Miller responded by simply repeating that "this withdrawal was incorrectly narrated in the client computer ledger as an advance to Frongopoulos Trust" and stated that the financial statements now showed the $740,000 as an advance from Chris James which is "consistent with the James Development Limited resolution dated 1 July 2009".

[45] Further email requests for the financials from the Trust were declined although, behind the scenes, Mr Harvie was acknowledging to Mr Broad, as his

"co-trustee" (although in fact the co-trustee was now Mr Broad's wife, Ms Calvert), that it was "unlikely this matter will simply go away".

[46] Eventually, on 30 May 2012, both Mr James and Mr Miller were interviewed by the liquidator pursuant to s 261 of the Companies Act 1993 with particular focus on the content of the resolution. As the liquidator recorded in a letter to the accountants, "it became apparent during the course of the interviews that JDL advanced $740,00 … to the Frongopolus (sic) Trust".

[47] In a follow up letter dated 26 June 2012, the liquidator wrote to the trustees of the Trust noting:

> I am satisfied that the said resolution of 1 July 2009 is clearly incorrect and that the bank statements for JDL show the payment out of $740,000 on 3 October 2006 such payment out being made in the first instance to Campbell Stores Limited with Campbell Stores Limited immediately on the same day, namely 3 October 2006, paying out the said sum to the Trust.

[48] The letter then went on to say that "[t]he advance … has never been repaid" and "is an asset of JDL" and the liquidator made demand on the Trust for payment of the advance plus interest calculated from 4 October 2006 totalling $472,516.96.

[49] However, the defendants disputed any liability to repay the $740,000, regardless of the status of the resolution. The result is that these proceedings were filed in November 2012.

The issues

[50] In a memorandum filed shortly before trial, the parties filed a comprehensive "agreed statement of issues". In summary, they set out the following issues under each cause of action.

(a) Claim in contract – first cause of action:

(i) whether the advance of $740,000 was made on 3 October 2006 or at some later date;

(ii) whether the advance of $740,000 was repayable immediately or not until and unless demand was made;

(iii) if the advance was repayable immediately, whether the plaintiff's claim was outside the limitation period;

(iv) if the plaintiff's claim is outside the period of limitation, whether the defendants and/or their agents acknowledged the liability;

(v) if there was acknowledgement, the date on which the cause of action accrued;

(vi) whether there was concealment of the right of action by fraud; and

(vii) if there was concealment, the date on which the causes of action accrued.

(b) Claim by way of resulting or constructive trust – second cause of action:

(i) whether the advance to the purchase price of 8 Back Shed Road, Queenstown created a resulting or constructive trust;

(ii) if a resulting/constructive trust, whether the plaintiff's claim is barred under the Limitation Act 1950; and

(iii) the terms of any declaration/order for resulting/constructive trust including quantum of the outstanding liability to Chris James and to ASB.

(c) Dispositions prejudicing liquidator and/or creditor – third cause of action:

(i) Whether there were dispositions (the set off of the advances to the Trust against advances from Heriot Holdings Limited and from Chris James and the recoding/transfer of the liability owed by the Trust to JDL and the agreement between the Trust and ASB to increase the mortgage priority) under part 6, subpart 6 of the Property Law Act 2007;

(ii) if so, the order to which the plaintiff is entitled.

(d) Breach of fiduciary duty – second defendant – fourth cause of action:

(i) whether the second defendant owed fiduciary duties to JDL;

(ii) if so, the nature of those fiduciary duties;

(iii) whether the second defendant breached those fiduciary duties; and

(iv) if so, the orders against the second defendant.

(e) Dishonest assistance to breach of fiduciary duty by first defendant – fifth cause of action:

(i) whether the first defendants dishonestly assisted the second defendant's breach of fiduciary duty; and

(ii) if so, the orders against the first defendants.

(f) Breach of Companies Act 1993 – sixth cause of action:

(i) whether the defendants have breached ss 131 and/or 135 and/or 301 of the Companies Act 1993; and

(ii) if so, the orders in favour of the plaintiff.

(g) Whether interest is payable by the defendants, and the quantum.

(h) Which party bears the onus of proof in relation to each cause of action and to the affirmative defences.

(i) Whether the defendants can succeed on any of their affirmative defences being:

(i) Limitation Act defence;

(ii) defence that plaintiff has suffered no loss; or

(iii) defence of abuse of process.

First cause of action in contract

Was there an advance from JDL to the Trust?

[51] It is now common ground that the advance to the Trust by JDL should not have been reclassified in those entities' respective accounts as the repayment of prior advances made by Mr James and Heriot Holdings Limited to JDL. At a meeting on 29 June 2012 the trustees of the Trust agreed to rectify this, although such rectification has not occurred. That concession is appropriate. At the time the resolution was passed there had not been advances by Mr James and Heriot Holdings Limited that could support the reclassification. It was a deliberate, if unsophisticated, device to remove the asset from JDL's balance sheet to avoid relinquishing it to JDL's main creditor, Mana, upon liquidation. The only defence raised to the claim for repayment is that the claim is statute barred.

When was the advance made?

[52] The first question which arises on the limitation issue is to determine when the advance was made. The plaintiff says it was not until 1 December 2006 when the funds were applied to the purchase of the Jacks Point land. This is because he asserts the advance was made for the sole and specific purpose of purchasing that land, with the result that the Trust held the funds on trust until it was applied for that

purpose. In support of this contention, the plaintiff relies on the following passage from *Barclays Bank Ltd v Quistclose Investments Ltd*:[5]

> … when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose … when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt …

[53] The defendants say the correct date is 3 October 2006, the date on which the funds were in fact transferred out of the accounts of JDL and received by the Trust.[6]

[54] I do not accept the plaintiff's approach to fixing the date of the advance for two reasons. First, it requires the liquidators to establish that the money was paid to the Trust in circumstances where:

(a) it did not intend to part with the beneficial interest in the money until it was used for the purchase of the Jacks Point land; and

(b) if the Trust did not apply it for that purpose, it would be obliged to return it.

[55] I am not satisfied on the balance of probabilities that the money was advanced in such circumstances. The money was simply transferred to the Trust's bank accounts on 3 October 2006 with no express directions as to its purpose or use. There is nothing in the evidence which is clear enough to override the presumption that this was a conventional loan, where the lender was content to rely on its usual remedies against the borrower in debt, and no more.

[56] More importantly though, recognition of a *Quistclose* trust does not, of itself, alter the date on which money is advanced and therefore, when a cause of action arises for repayment. What it does do is to provide the lender an equitable right in the funds themselves, until and unless they are used for the stated purpose. If they are not applied for that purpose, the lender is able to claw them back. In the present case, even if the funds were advanced for the sole purpose of buying the Jacks Point

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5 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) at 581.

6 It is common ground now that the fact the funds passed through the bank account of Campbell Stores Limited is of no consequence.

land, they were utilised for that purpose and so the equitable rights recognised in the *Quistclose* case are of no relevance. There is nothing to suggest that the recognition of an equitable right in the funds, until they are used for its specified purpose, has the effect of deferring the commencement of the limitation period that the lender has against the borrower in debt.

[57] In short, this attempt to defer the commencement of the date of advance for the purpose of avoiding the limitation defence is misconceived. However, that is not the end of the matter. I still need to consider whether the nature of the advance was such that the limitation period commenced on 3 October 2006 and not when repayment was demanded and, if it did, whether there are circumstances which would extend the usual limitation period.

What was the nature of the advance?

[58] This issue focuses on whether the $740,000 advance, objectively assessed, was a current asset or not. If the former, the limitation period will run from the date of the advance. If the latter however, the limitation period will run from the date on which the repayment obligation was triggered which the plaintiff says is when demand was made for repayment of the advance.

[59] The starting point is *DFC New Zealand Limited v McKenzie*, in which Tipping J stated: [7]

> It has been the law for centuries that if the contract of loan is silent about repayment the lender's right to repayment arises at the time the money is advanced and time for limitation purposes commences to run forthwith. The same applies when the obligation to pay is expressed simply as being "on demand".

[60] It is clear the $740,000 advance was made without any contemporaneous record as to the terms of the advance. Therefore it appears that the default position set out in *DFC* applies. However, the plaintiff asserts that this is a case where the

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[7] *DFC New Zealand Limited v McKenzie* [1993] 2 NZLR 576 (HC) at 582. There is substantial further authority to the effect that where an advance is silent as to repayment, it is repayable on demand. See *Aorangi Securities Ltd (in Stat Man) v Emerald Shores Ltd* [2012] NZHC 149 at [69]; *Lauder v Lauder* HC Rotorua CIV-2003-463-107, 23 April 2004 at [29]; *Morris v Hetaraka* HC Hamilton CIV-2008-419-1607, 27 February 2009 at [36].

qualification to the usual position applies, as described by Tipping J in the following terms:[8]

> … in the case of a loan repayable on demand the liability to repay arises without demand *unless the parties have expressly or by clear and necessary implication made it apparent that they intended the obligation not to arise unless and until a demand is made.*
>
> …
>
> The true distinction is therefore that if the obligation to repay is expressed as "on demand" simpliciter there is no requirement to make demand and time starts to run from the date the monies were advanced. This is because the law has treated the word "on demand' as adding nothing to the implied promise immediately to repay. In a sense the word "on demand" simply reinforce and declare what the law takes to be implicit anyway. *If, however, the parties have either expressly or by necessary implication demonstrated an intention that a demand is required in order to create a liability to repay, time does not start to run until the making of the demand. In the case of a loan on demand simpliciter the demand is not part of the cause of action. The position is otherwise if the demand is intended to be part of the cause of action.*

[61] The plaintiff relies on several factors as creating an evidential basis to displace the presumptive position on an advance which is silent as to its terms. These are:

(a) The advance was made for the sole purpose of contributing to the purchase of the Jacks Point property, which was in turn to have a substantial home built on it. It was clearly envisaged that the advance would not be repayable during the period between purchase of the property and the completion of construction of the home on the property.

(b) The Trust had no assets other than the land holding to which the advance (and other advances) was applied.

(c) The financial records of the Trust treated the advance as a term liability from the outset until the records were reclassified following 1 July 2009. This means that the Trust considered the advance would become due more than 12 months after the relevant reporting period.

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8 At 582-583 (emphasis added).

In other words, the Trust did not treat the advance as a current liability.

(d) While acknowledging that JDL recorded the advance as a current liability, the plaintiff says that this is readily explicable. If JDL had not categorised the advance as a current liability the balance sheet would have shown that JDL was insolvent. Mr Miller acknowledges that JDL would have been insolvent on the measure that it would not have been able to pay its debts as they fell due.

[62] In essence, the plaintiff contends that the amalgam of evidence, objectively assessed, shows the advance was not treated as a current asset by JDL despite it being categorised as such in its accounts. Put another way, the intention of the parties was that the loan would not be repayable unless a specific demand was made, with a reasonable time for the Trust to arrange finance.

[63] The plaintiff also places reliance on the decision *McNeill v Gould*.[9] That case involved a sum advanced from one de facto partner to the other for the purchase of a property. When the relationship came to an end, the partner who lent the money sought repayment and that was resisted on the basis that the advance was statute barred. In the circumstances, the Court held it was an implied term that the loan was not immediately on demand, but repayable in the circumstances of the failure of the relationship.[10] As a consequence, the default position in *DFC New Zealand Ltd v McKenzie* did not apply.

[64] The defendants' response is that the advance was recorded as a current asset by JDL and the accounts of the creditor are more determinative than those of the debtor. Thus the categorisation of the advance as a term liability by the Trust is of no real consequence. This is particularly so because of the different reporting guidelines incumbent on JDL as a creditor compared to the Trust as a debtor. In addition, the mere fact that the funds were to be applied for the purpose of the purchase of property and potentially a substantial development, does not change the

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9 *McNeill v Gould* (2002) 4 NZ ConvC 193, 557 (CA).
10 At [31].

nature of the advance from a current debt payable on demand. In this respect, the fact that it might not be repaid in the short term is of no moment: it was nevertheless repayable from the moment it was advanced.

[65] Having considered the evidence, I am not satisfied that there is sufficient evidence to support a "necessary implication" that the parties intended the obligation to repay to be deferred until and unless a demand was made. While the fact that the loan was used to purchase an asset of a non-current nature might indicate an intention for it to be a term liability, I accept Mr Adam's evidence that it is not definitive of the terms of the loan in the absence of any other supporting evidence.

[66] I therefore find that the debt was payable "on demand" simplicitor. As a result, unless circumstances arise to postpone the running of the limitation period, the claim for repayment would be statute barred on 3 October 2012, being six years after the funds were advanced.

Was there acknowledgment of the debt by the Trust to extend the limitation period?

[67] In the event that I found the contractual cause of action statute barred, the plaintiff has pleaded both acknowledgement and concealment to postpone the commencement of the limitation period.

[68] Acknowledgement is provided for by ss 25 and 26 of the Limitation Act 1950 which relevantly provide:

> **25 Fresh accrual of action on acknowledgment or part payment**
>
> …
>
> (4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
>
> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

> **26 Formal provisions as to acknowledgments and part payments**
>
> (1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment.
>
> (2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last preceding section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[69] In order for there to be an acknowledgment there must be:

(a) a right of action to recover a debt that has accrued;

(b) an acknowledgement in writing;

(c) the acknowledgment must be signed by the Trust or its agent; and

(d) the acknowledgement must be made to JDL or its agent.

[70] Clearly a right of action to recover the debt has accrued, the debt being repayable from 3 October 2006 onwards when it was advanced. In terms of the requirement for an acknowledgement made in writing, I am satisfied that the Trust's accounts fulfil the requirement of an acknowledgement being in writing and are also capable of amounting to sufficient acknowledgement.[11] This is because the accounts clearly recognise the existence of the debt which is all that is required.[12]

[71] The real dispute in this case is whether the accounts were signed by the Trust or its agent and whether the acknowledgement was made to JDL or its agent.

[72] For the purposes of signing the acknowledgement in writing, the plaintiff asserts that HGW was the agent of the Trust for the purposes of acknowledgement. HGW did, of course, prepare the Trust's accounts and signed the accountant's

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[11] See generally A McGee *Limitation Periods* (7th ed, Sweet and Maxwell, London, 2014) at [18.029] – [18.033], citing *Jones v Bellgrove Properties* [1949] 1 ALL ER 498 (KB). In New Zealand, the possibility of accounts constituting an acknowledgement was accepted in principle in *Anchorage Management Limited v Oldham* (1997) 11 PRNZ 110 (HC).

[12] *Frankton Gateway Apartments (2003) Ltd (in liquidation) v Sullivan* [2012] NZHC 2399 at [54] citing *Wright v Pepin* [1954] 1 WLR 635 (CH).

statement which accompanied the accounts. However, HGW's role was limited to "collection, classification and summarisation of financial information supplied". To that extent, they were effectively in the position of auditors of the Trust's accounts. As was held in *Re Transplanters (Holding Company) Limited*, auditors are not generally agents of a company for the purpose of acknowledging debts. [13] Given the accounting firm's limited role in preparing the accounts, it is difficult to see how it would be competent for the accountants to acknowledge any debt on behalf of the Trust.

[73] However, of course, HGW Trustees Limited (a separate entity) was one of the trustees of the Trust and I accept that after Mr Miller went through all the James' group accounts, including the Trust's accounts, with Mr James, he then signed them on behalf of HGW Trustees Limited and also sent them to the other trustee to sign as well. There can be no doubt that, in this form, the accounts constituted a written acknowledgment.

[74] The real issue is whether the Trust's signed accounts were ever delivered to JDL or its agent before 3 October 2012. While the plaintiff suggested that the annual meetings with Mr James, when the accountants went through the accounts with him, constituted delivery, I accept the defendants' submission that the accounts were not signed by the trustees at that stage. The clear evidence was that the accounts were not signed by either of the trustees until after these meetings. The next route by which the plaintiff asserts that the Trust's signed accounts were delivered to JDL or its agent were by sending, under cover of an email on 10 July 2012, proofs of debt for Heriot Holdings Limited and Chris James which the plaintiff says reflect "an acknowledgement that the asset of $740,000 owing by [the Trust] was restored to JDL, in liquidation". However, these are no more than steps taken by third parties on the assumption that the Trust owes JDL $740,000. That does not transform them into the presentation of a signed acknowledgement from the Trust to the company.

[75] Finally, the plaintiff points to the "further acknowledgement" on 25 October 2012 when Mr Harvie of HGW sent the liquidator the JDL balance sheet, and while saying he was "not authorised to comment on the reconstruction of the

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[13] *Re Transplanters (Holding Company) Limited* [1958] 1 WLR 822.

$740,000 loan to [the Trust]", the plaintiff says that he was acknowledging, on behalf of the Trust, the $740,000 liability owed to JDL.

[76] The short response to this is that even if HGW was an agent of the trustees, which is not clear, by 25 October 2012 on standard limitation principles, the acknowledgement (if this is what it was) came too late to be effective.

Was there concealment of the cause of action?

[77] The plaintiff next argues that the claim and contract is not barred because of the provisions of s 28 of the Limitation Act 1950. That section provides:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—
>
> (d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
>
> (e) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

[78] The circumstances which it was submitted amounted to concealment for the purposes of s 28 rely on the resolution of 1 July 2009 and the subsequent amendment of the Trust's accounts in September 2009 to reflect the terms of that resolution.

[79] Having heard both Mr James and Mr Miller give evidence, I am satisfied that neither the trustees nor JDL genuinely believed there was a proper basis for the recoding of the transaction and for the consequent amendments to the accounts. Indeed, both the trustees and Mr James knew that the $740,000 was an advance by JDL to the Trust, but the liquidator was not so aware. Furthermore, when the liquidator made inquiries about the transaction, there was a deliberate failure to provide full answers which would have demonstrated that the terms of the resolution were false.

[80] Given their knowledge of the true circumstances, the combination of the trustees' resolution confirming the accounts, including the recategorisation of the $740,000 as owing to Mr James, not JDL, coupled with the changes to JDL's accounts, was fraudulent. The steps taken to implement the resolution were intended to remove an asset of JDL from the accounts of JDL and the Trust so that the creditor would not be aware of it and would be deprived.

[81] The fraud exception to the limitation period in s 28(b) encompasses both common law or actual fraud and equitable fraud.[14] Equitable fraud will only be found where there is non-disclosure in breach of fiduciary or another recognised special duty.[15] Actual fraud is defined more broadly. *Blacks Law Dictionary* defines fraud to include "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment".[16]

[82] The Courts have never endeavoured to lay down rigid guidelines as to what amounts to fraud. However, it is clear that the term should be given its ordinary meaning which encompasses "moral turpitude",[17] "something dishonest and morally wrong",[18] and "actual and deliberate dishonesty".[19] It has also been said that there will be fraud where a false representation is made knowingly, without belief in its truth, or recklessly, careless whether it be true or false.[20]

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14 *Inca Limited v Autoscript (New Zealand) Limited* [1979] 2 NZLR 700 (SC) at 711.
15 At 709 and 711.
16 B. A. Garner (ed) *Blacks Law Dictionary* (10th ed, Thomson Reuters, 2014) at 775.
17 *Joliffe v Baker* (1883) 11 QBD 255 at 270.
18 *Re Companies Acts, ex parte Watson* (1888) 21 QBD 301 at 309.
19 *Becker v Anderson* [2013] NZHC 2798 at [75].
20 Derry v Peek (1889) 14 App Cas 337 at 374.

[83] In *Scott v MPC,* Viscount Dilhorne remarked:[21]

> If, as I think … "fraudulently" means "dishonestly," then "to defraud" ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of fraud be entitled.

[84] In my view, there can be little doubt that the removal of the $740,000 liability from the accounts of the Trust was dishonest. First, I am satisfied that at the time the resolution was drafted there was no evidential basis for the explanation provided for it and both the drafters and the signatory knew it to be untrue. Second, it is now accepted by all parties that the recoding of the $740,000 should never have taken place. Its only purpose was, at least superficially, to ensure the $740,000 was removed as an asset of the company, and was done so in a way that avoided the application of the voidable preference regime. Although the dishonesty was, with diligence, found out, it certainly led the liquidator, for a considerable period of time, to assume the company had no assets to meet its creditors.

[85] The defendants say it cannot be fraud because the prior years' accounts had not been changed and so the true position was "plain as a pike staff". The defendants rely on the evidence of Mr Adams, an insolvency specialist, to support this. However, his evidence does not suggest the amendments to the accounts were not intended to remove an asset from the company, rather that the true position was able to be discovered by a competent liquidator undertaking appropriate investigations. However, even he does not suggest the liquidators could have realised the correct position until the end of November 2010, when the liquidator first received copies of the earlier financial statements and the company's minute book. Even then I consider the liquidator had to make enquiries to resolve the conflict between the earlier statements showing the advance, and the later "correction". Being on notice that there is an issue to enquire into is not the same as having a sufficient factual basis to support a right to claim repayment of an advance.

[86] While there was a pleading of equitable fraud, I consider it was unnecessary to resort to equitable fraud which seemed to rely on a duty of disclosure incumbent on the Trust as a result of the claim. Such an approach over complicated matters.

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[21] *Scott v MPC* [1975] AC 819 (HL) at 839.

The simple position is that there was actual fraudulent concealment perpetrated by altering the relevant accounts, occurring at least on 21 September 2009 when the Trust's accounts were altered, and it is from this date that the concealment began to run.

When was the fraud reasonably discoverable?

[87] Having reached the view that the cause of action in debt was concealed by fraud, the period of limitation does not begin to run until "the plaintiff has discovered the fraud or the mistake … or could with reasonable diligence have discovered it".[22]

[88] I am satisfied the fraud was actually discovered by the liquidator on 8 June 2012 when the interview of Mr Miller under s 261 of the Companies Act 1993 was conducted. The defendants however, argued that if the 2009 accounts did conceal the true position, the true position was always "reasonably discoverable" because the earlier accounts remained unaltered and disclosed the true position.

[89] The principles which apply to reasonable discoverability were set out in *New Zealand Bloom Ltd v Cargolux Airlines Ltd S.A.*:[23]

> (a) The concept of reasonable discoverability introduces an objective element, with the test being:
>
> > ...how a person carrying on a business of a relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency.
>
> (b) The concept requires the exercise of reasonable, not exceptional, diligence.
>
> (c) It is not enough to show that a plaintiff might have discovered a breach by pursuing an enquiry in some collateral matter; a defendant must show that there has been something to put the plaintiff on enquiry in respect of the matter in question, and that if enquiry had been made it would have led to the discovery of the real facts.

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22 Limitation Act 1950, s 28.

23 *New Zealand Bloom Ltd v Cargolux Airlines Ltd S.A.* [2012] NZHC 3012 at [37] (footnotes omitted).

(d) The "matter giving rise to the contravention" refers to conduct in contravention of the Act rather than the legal consequences of those facts (such as loss).

(e) Time will begin to run at the point when reasonable enquiries would have led to knowledge of the relevant facts.

[90] Taking these factors into account I consider that the conduct of Mr Reynolds is an appropriate guide as to the conduct of a liquidator exercising reasonable diligence. He was thorough and persistent in his requests for information to verify the current state of the company's accounts. Mr Reynolds was appointed as liquidator on 25 November 2010. He began querying the transaction involving the $740,000 in late May 2011, which is within six months of his appointment. However, because of the resistance he experienced to his inquiries on that matter, he was not able to fully discern the truth until the conclusion of the second s 261 interview on 8 June 2012, which was just over 12 months later.

[91] I therefore consider that even if the first liquidators had been reasonably diligent (and I make no finding on whether they were or were not), their suspicions would not have been raised for around six months. Six months into the liquidation, the Trust had already altered its accounts by removing the liability to repay JDL, and it took a further 12 months to get to the bottom of it. Based on Mr Reynolds' actions, in the circumstances of this liquidation, I am satisfied it would have taken a reasonably diligent liquidator 18 months to uncover the truth. As the company went into liquidation on 6 July 2009, that means that the concealment was not reasonably discoverable until 6 January 2011.

[92] Section 28 of the Limitation Act provides that:

> The period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it:

[93] An unusual feature in this case is that there was, of course, no concealment of the cause of action for a number of years, but the concealment was effected by the combined "recoding" of the loan in both JDL's and Trust's accounts.

[94] Although the point was not debated before me (the defendants taking the view that the correct status of the $740,000 was always reasonably discoverable), the effect of s 28 is that time, for the purposes of limitation, does not run at all until the fact which has been concealed becomes discoverable. In the present case this means the liquidator had six years from 6 January 2011 in which to file his claim.

[95] An alternate view, but one that is not obviously supported by the language of s 28, is that there is a suspension of the limitation period running during the period of concealment until its discovery or reasonable discovery. The issue was addressed by the House of Lords in *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd*, in relation to the equivalent English legislation.[24] The Court there debated three available options for dealing with subsequent concealment for limitation purposes. The first was that time continued to run despite the subsequent concealment.[25] The second was that the running of time was suspended while the fact was concealed and resumed when the fact became discoverable. The third was that time did not run at all until the fact became discoverable. By a bare majority, the House of Lords concluded that "[o]n the plain meaning of the words any deliberate concealment of relevant facts falls within section 32(1)(b) with the consequence that, in applying the statutory time limits, time does not start to run until the concealment is discovered".[26]

[96] As was concluded by the majority in the House of Lords, I consider that s 28(b) is drafted widely enough to cover both the case where the concealment is contemporaneous with the accrual of the cause of action and when it occurs at a later time (which would be the usual case), and acts to postpone the commencement of the limitation period to the date it becomes discoverable.

Conclusion

[97] The first cause of action succeeds. Although I have found that the date of the advance is 3 October 2006, the advance was repayable on demand simplicitor and, in the ordinary course, the period of limitation would begin running from that date,

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24 *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 (HL).
25 This was the approach adopted in *Tito v Waddell (No. 2)* [1977] Ch. 106.
26 *Sheldon v RHM Outhwaite,* above n 24, at 145 G-H per Lord Brown-Wilkinson.

s 28(b) of the Limitation Act 1950 applies. Because there was fraudulent concealment of the debt effected by the alteration of the accounts of JDL and the Trust and it would have taken a reasonable liquidator, from the date of his or her appointment, 18 months to discover the correct factual position, the concealment was not reasonably discoverable until 6 January 2011, and this was when the limitation period commenced running.

[98] These proceedings were filed on 16 November 2012 which is within six years of this date. Judgment is therefore entered in the sum of $740,000 against the first defendants.

Did the advance create a constructive or resulting trust in the Jacks Point land?

[99] The claim that the advance of funds created a constructive or resulting trust in the Jacks Point land is pleaded as an alternative to the contractual cause of action. However, my findings on the first cause of action preclude this cause of action succeeding. All parties now accept that the transaction involved an advance, with the defendants resisting the plaintiff's claim on the grounds of the limitation defence alone.

[100] As the Court of Appeal made clear in *Potter v Potter*: the concept of a resulting trust is incompatible with a loan.[27] The claim could not transform into a quite different specie of claim simply because the limitation defence succeeded. This cause of action accordingly fails.

Does a claim for compensation arise under the Property Law Act 2007?

[101] The third cause of action was under subpart 6 of part 6 of the Property Law Act 2007, claiming there had been dispositions of property by the defendants to the prejudice of creditors.

[102] First, it was claimed that the transfer and recoding of the $740,000 in the JDL and Trust accounts was a prejudicial disposition of property. However, in light of the defendants' acknowledgment that the transfer and recoding is ineffective to remove

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[27] *Potter v Potter* [2003] 3 NZLR 145 (CA) at [13].

the loan as an asset of JDL, and my finding that the liquidator is entitled to repayment of the advance, the result is that there has not been an effective disposition. Consequently, the liquidator and JDL's creditors are not prejudiced and it would be inappropriate to make orders against either of the defendants.

[103] The second disposition claimed is a disposition as defined in s 345(2)(c) of the Property Law Act 2007, by the grant of a variation of mortgage to ASB bank so that ASB has an increased right to equity in the Jack Points property to the level of $17.5 million.

[104] The primary problem with this claim is that it pre-supposes the liquidator has an interest in the Jacks Point property. I have found that is not the case.

[105] The second problem is that while a variation of mortgage increasing the priority amount may have been executed, it has not been registered, nor has any additional money be advanced on the strength of it. Even if there had been an interest in the Jacks Point property, there has been no prejudice to the plaintiff or the company's creditors by the grant of a variation of the mortgage.

[106] Accordingly, this head of claim fails and I decline to make the orders sought.

Has there been a breach of fiduciary duty by Mr James?

[107] There was no dispute that a director of a company owes fiduciary duties to the company. These include:

(a) not to enter into the transactions where the director's interests conflict, or might conflict, with those of the company without disclosing that conflict appropriately; and

(b) not to benefit in any way from their office without appropriate approval of their doing so.

[108] The alleged breaches of fiduciary duty by Mr James to JDL asserted by the plaintiff were:

(a) he arranged and signed the resolutions and arranged for and instructed the set off /recoding transactions to benefit himself and his interests, including the trustees of the Trust. He constructed the set-off to reduce the amounts available to the creditors;

(b) he took JDL property for himself or his interests, just prior to liquidation; and

(c) he entered into the transactions without regard to Mana's or the liquidator's interests, other than to defeat them.

[109] The essence of the claim is that Mr James, or his interests, have received benefits and he now must restore the property and/or disgorge that gain. For completeness, the plaintiff says that the defaulting fiduciary cannot rely on professional advice, and in any event, says that at the time the advice was given, Mr James was expressly told it would not "stack up".

[110] While, for reasons I go on to discuss shortly, I am satisfied there have been breaches of duty by the director, the short point which disposes of this claim is that the defendants recognise that the recoding was a "nullity", and that the sum of $740,000 is owed by the Trust, save for the limitation defences they advance.

[111] As I have found that the limitation defence cannot succeed, no loss flows from the alleged breach and therefore no obligation to account or to make good the default arises, and the plaintiff has no remedy under this cause of action.

Has there been knowing and dishonest assistance of the breach of fiduciary duty by the trustees?

[112] The plaintiff also claims against the first defendants that they knowingly and dishonestly assisted the breach of fiduciary duty. In particular, he says that Mr Miller, as one of the trustee's directors, knew there was no available set-off against the advance of $740,000 but drafted the resolution and amended the accounts of JDL and the Trust. The trustees approved the accounts of the Trust and thereby

participated in the breach of fiduciary duty, receiving the benefit of the release of the debt and are obliged to account to the liquidator for the sum of $740,000.

[113] Again, while the actions of the trustees must attract criticism for allowing the accounts to be amended when there was no factual basis for doing so, there is no loss resulting to the plaintiff because of the findings I have already made as to the status of the $740,000. The relief sought under this head of claim is therefore not available to the plaintiff.

Have there been breaches of the Companies Act 1993 by the first defendant?

[114] The plaintiff claims against Mr James personally, alleging breaches of ss 131, and 135 of the Companies Act 1993 and seeking payment or compensation under s 301. Section 131 strikes me as the most relevant in the circumstances. That section provides:

> (1) Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.
>
> (2) A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
>
> (3) A director of a company that is a subsidiary (but not a wholly-owned subsidiary) may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company and with the prior agreement of the shareholders (other than its holding company), act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
>
> (4) A director of a company **[**that is carrying**]** out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

[115] In my view it is plain on the face of the transaction that Mr James has failed to discharge the duties required of him pursuant to s 131. In this respect, I observe:

(a) The resolution recoding the advance to the Trust came very shortly before the impending liquidation of JDL and after judgment had been entered against it in a substantial sum.

(b) Although Mr James claims he was simply acting on advice, I am satisfied that at the time he signed the resolution he knew there was no factual basis for the recoding. Furthermore, his accountants had told him that, if put to the test, it would not stand up on a legal or accounting basis. The exercise was a clumsy attempt to remove an asset from JDL's balance sheet, and without the liquidator's persistence to verify it, may well have been successful.

(c) The effect of the transaction was clearly to the detriment of JDL. It purported to remove (and for a time succeeded in doing so) a substantial asset from the balance sheet of JDL.

[116] In this context, I am satisfied that the general rule that no duties are owed to the creditors of the company is displaced. The circumstances when the ordinary rule gives way are set out in the judgment of Cooke P in *Nicholson and Permakraft (NZ) Ltd*:[28]

> (iii) The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider inter-alia the interests of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near insolvent, or of doubtful solvency, or if contemplated payment or other course of action would jeopardise insolvency.
>
> …
>
> The recognition of duties to creditors, restricted as already outlined, is justified by the concept that limited liability is a privilege. Is a privilege healthy as tending to the expansion of opportunities in commerce; but it is open to abuse. Irresponsible structural engineering – involving the creating, dissolving or transforming of incorporated companies to the prejudice of creditors – is a mischief to which the Courts should be alive. But a balance has to be struck. There is no good reason for cultivating a paternal concern to protect business people perfectly able to look after themselves.

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[28] *Nicholson and Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA) at [249-250].

[117] The standard to be applied in assessing whether there has been a breach of s 131 is generally accepted to be that articulated and *Sojourner v Robb*:[29]

> … the standard in s 131 is an amalgam of objective standard as to how people of business might be expected to act, coupled with a subjective criterion as to whether the directors have done what they honestly believed to be right. The standard does not allow a director to discharge the duty by acting with a belief that what he is doing is in the best interest of the company, if that belief rests on a wholly inappropriate appreciation as to the interests of the company. If a director believes that the duty to act in the best interests of the company is a duty always to act in the best interest of shareholders, and never in the interests of creditors, in a situation of doubt as to the solvency of the company, the director cannot be said to be in good faith. Creditors are persons to whom the company has ongoing obligations. The bests interests of the company include the obligation to discharge those obligations before rewarding the shareholders.

[118] Applying that standard, I have no doubt that there was a breach of s 131 at the time the resolution was approved. I am satisfied Mr James knew the resolution was incorrect but intended to prevent this sum being available to JDL's creditors. That transaction was not undertaken in good faith or with the best interests of the company in mind.

[119] However, as under some of the other heads of claim, the real issue here is one of causation and loss. The breach has been cured by the belated admission that the transfer should never have occurred and was ineffectual, coupled with my finding in the first cause of action that the trustees are obliged to pay the company the $740,000 owing.

[120] Accordingly, the relief sought under this head of claim is not available.

Is interest payable?

[121] The plaintiff claims interest on the sum of $740,000, to be paid at the rate set out in annual resolutions by the director of JDL. Those resolutions provide that "the company must charge interest on [advances to any director or shareholder or entity other than to 100 per cent group companies] at a rate determined by the director which is fair value to the company … [and] … shall not be less than the prescribed income tax rates".

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[29] *Sojourner v Robb* [2006] 3 NZLR 808 (HC) at [102].

[122] The plaintiff's expert accountant, Mr Goodall, explained that the Trust is not a related company as defined by s 2(3) of the Companies Act (and by implication, is not a 100 per cent group company) and he provided calculations of the interest he considered would be payable based on IRD late payment interest rates over the period from the date of advance, to the date of hearing.

[123] The defendants on the other hand rely on Mr Harvie's evidence. He said that because the $740,000 was advanced to Campbell Stores Limited and it is a 100 per cent group company, the resolution did not apply. He also gave evidence that the director minutes were simply "standard minutes that come off general account system records" and they were overridden in this case, by shareholder approval. His evidence was that the shareholder's sign off of the accounts approved the non-charging of interest on the loan. He added that JDL owed money to Chris James or his wider group of companies which exceeded the $740,000 so that charging interest was "fair to the company in that it [did] not impose a financial obligation on the company".

[124] In response, the plaintiff says that approval of the accounts without charging interest does not effect a decision to forgo interest. This is because interest does not have to be charged, or even accrued, on an annual basis, it could simply be accounted for when the advance was repaid. He also says it is not correct to address interest on the basis that the advances and liabilities of the James group can be "netted off", as this fails to recognise the separate legal identity of JDL nor does it recognise that some of the other entities which JDL owed money to would fall within the 100 per cent group company exception.

[125] It is obvious that the Trust is not a 100 per cent group company. It is not a company at all. The annual director's resolution, on its face, presumes that interest will be charged on such an advance.

[126] The defendant's contention that the advance was made to Campbell Stores Limited, which is a group company, rather than the Trust, is also readily dispensed with. All parties agreed that Campbell Stores Limited was no more than a "clearing house" or conduit for the funds. The accounts of both JDL and the Trust record the

loan as being to the Trust, and the effect of the director's resolution must be applied in light of that reality.

[127] However, whatever the annual director's resolution said, the real issue is whether interest is recoverable from the Trust. There is no evidence supporting the loan being advanced on terms that included an interest component. Had the Trust been asked to repay the loan prior to JDL's liquidation, there is nothing to suggest that interest could have been claimed as well. While the plaintiff may claim that the loan should have been advanced on terms that expressly included an interest component, the fact is, that it was not. The plaintiff and the company's creditors cannot be in a better position than the compay would have been in prior to liquidation. As the money was not advanced on terms that included interest, the Trust cannot now be required to pay interest on a contractual basis.

[128] This leaves the plaintiff falling back to the position provided for under s 87(1) of the Judicature Act 1908 which empowers the Court to award interest on "the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment".

[129] The discretion given to the Court in s 87 is to be exercised as the justice of the case requires.[30] There is no fixed rule for the commencement date for interest.[31] While generally, justice may require interest to run from the date the cause of action arose down to the date of judgment, in this case that would be inappropriate.[32] First, having interest run from that date would effectively alter the terms on which the money was advanced by making interest payable. Second, it would be inconsistent with the effect of s 28(b) of the Limitation Act 1950, which postponed the cause of action arising until the date it was reasonably discoverable.

[130] In my view, the appropriate point at which a right to interest should arise is after 26 June 2012 when the plaintiff, on behalf of JDL, wrote to the trustees making demand for repayment of the $740,000. When it was not repaid at that time, the

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30 *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1.

31 *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 530.

32 *Day v Mead* [1987] 2 NZLR 443 (CA) per Somers J at 463.

trustees were in breach of their obligation to repay the advance. Interest at the prescribed rate is, accordingly, payable from 27 June 2012 to the date of payment.

No loss established

[131] A further affirmative defence raised in the pleadings is, essentially, that at all times, the sum of $740,000 which had been lent to the Trust, remained an asset of JDL and was available to the plaintiff for recovery before the expiry of the six year period. That defence was raised in relation to the fourth, fifth and sixth causes of action, which had asserted breaches of fiduciary duties and duties under the Companies Act 1993.

[132] Given my finding on the cause of action in contract, I simply record that I do not need to consider that defence to those other causes of action which have, as a consequence, fallen away.

Is the proceeding an abuse of process?

[133] Little needs to be said about this affirmative defence. Essentially, it is pleaded that the only creditors with valid claims in the liquidation were Mr James and Heriot Holdings Limited and they did not authorise or support the bringing of the proceeding. However, that argument relied on me accepting that the contract between Mana Property Trustee Limited and JDL which gave rise to Mana's claim in the liquidation was properly cancelled on 3 November 2007 pursuant to the Contractual Remedies Act 1979. That of course faces the insuperable hurdle, in this hearing, that the Supreme Court has held that the contract between Mana and JDL was not properly cancelled by JDL and that JDL was therefore liable to Mana in damages.[33] It seems this point was raised in anticipation that the position between Mana and JDL might be considered by the Supreme Court again at some stage in the future.

[134] As Mana has a judgment in its favour against JDL and claims in the liquidation, the defence of the proceedings being an abuse of process fails.

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[33] *Mana Property Trustee Limited v James Development Limited*, above n 4.

Conclusion

[135] In summary, the plaintiff's claim in contract against the first defendants succeeds because the cause of action was concealed and time did not start to run until the liquidator, exercising reasonable diligence, could have discovered his entitlement to claim repayment of the amount of $740,000. I have found that the cause of action was reasonably discoverable on 6 January 2011. Judgment is awarded in the plaintiff's favour against the first defendants in the sum of $740,000 plus interest at the prescribed rate under the Judicature Act 1908 from 27 June 2012.

[136] The alternative cause of action asserting a constructive trust therefore fails. Similarly, none of the other causes of actions succeed because there has been no loss suffered by the plaintiff.

Costs

[137] Costs are reserved.

[138] If costs cannot be agreed then:

(a) the plaintiff is to file submissions on costs, not exceeding five pages, within 15 working days of the date of this judgment; and

(b) the defendants are to file submissions on costs, not exceeding five pages, within 20 working days of receipt of the date of this judgment.

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