

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA730/2015
[2019] NZCA 26**

BETWEEN	JANFERIE MAEVE ALMOND Appellant
AND	BRUCE JAMES READ First Respondent
	ETHNE GLADYS READ Second Respondent
	CHRISTOPHER JOHN READ Third Respondent

Hearing: 29 August 2018

Court: Winkelmann, Duffy and Peters JJ

Counsel: S I Perese for Appellant
G D Stringer and A Dhanji for First Respondent
N W Woods for Second and Third Respondents

Judgment: 1 March 2019 at 12 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant must pay the respondents one set of costs for a standard appeal on a band B basis.**
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REASONS OF THE COURT

(Given by Winkelmann J)

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Introduction

[1] The parties dispute the basis upon which a rural property in Drury South Auckland (the Property) was bought and developed, and the basis on which it is owned. The parties are all members of one family. The appellant, Ms Almond, is the sister of Bruce and Christopher Read and the daughter of Mrs Ethne Read — the latter three, the respondents.

[2] Although Ms Almond is the sole registered proprietor of the Property, the respondents allege they helped pay for the Property and the construction of the two houses now on it (one for Ms Almond and one for her parents, Mrs Ethne and Mr Fred Read). They allege these contributions were made pursuant to an agreement that each of the parties would have a beneficial interest in the Property proportionate to their respective financial contributions. The respondents say Ms Almond holds title in the Property as constructive trustee for their individual interests and nominated shares. Mrs Read further alleges that Ms Almond misused an enduring power of attorney that she had under the Protection of Personal and Property Rights Act 1988 in respect of Mrs Read, misapplying Mrs Read's funds for her own personal benefit.

[3] In the High Court, Ms Almond maintained that she provided all of the purchase money for the Property.¹ She argued that, while her brothers may have made contributions to the cost and maintenance of the Property after purchase, those contributions were made in recognition of care she would provide to her parents — the rationale, she argues, for them living on the same piece of land. As to the regular payments she received from her parents, she claimed these were rent and not mortgage payments.

[4] Thomas J rejected Ms Almond's evidence that the money used to purchase the land was hers.² She found that Ms Almond had agreed with the respondents that the Property was to be owned by the parties in proportion to their respective financial contributions to the overall project. This included the cost of the land, construction of the dwellings and other improvements.³

¹ Although she accepted her parents provided a deposit, she said she later paid it back.

² *Read v Almond* [2015] NZHC 2797 at [84], [85] and [104] [High Court judgment].

³ At [84].

[5] On appeal, Ms Almond shifts the focus of her argument. She does not challenge the findings of the High Court Judge as to the fact or source of contributions toward the purchase of the Property, mortgage payments and construction of the houses. Instead she argues that the High Court Judge erred in finding that all parties had a common intention to pool resources to buy the Property and develop it in return for a proportionate share in the Property. She invites us to take a different approach to the Judge as to the legal basis on which the respondents made their payments. Properly construed, she argues, this was an arrangement between her and her parents whereby it was agreed her parents would help her buy and develop the Property but with no expectation of a proprietary interest in the land. Instead, in return they would receive Ms Almond's commitment to care for them as they aged.

[6] Ms Almond argues that even if the Judge was correct to recognise a constructive trust, the principles were not applied correctly. In a family arrangement such as this, focused on the provision of care for the parents, Ms Almond's non-financial contribution to the care of her parents should have been recognised.

[7] Finally, in relation to Mrs Read's claim that Ms Almond misused the power of attorney, Ms Almond submits the Judge had an inadequate evidential basis to make what was in substance a finding of dishonesty.

Background facts

[8] In July 2002, Ms Almond settled the purchase of bare land located in Drury for \$190,000. After the purchase was settled, a garage was built on the land and used at the time to store Ms Almond's possessions whilst construction of the dwelling was underway. Two houses were then built. A larger house for Ms Almond and her two daughters, and a smaller house, referred to as a subsidiary dwelling, for Mr and Mrs Read.

[9] The Almonds and Mr and Mrs Read lived side by side in this way for a number of years between late-2003, when the construction of both dwellings was completed, and June 2009, when Mr Fred Read died. Following Mr Read's death, Bruce Read moved into the smaller house to live with his mother.

[10] Over time, relations between Bruce Read and Ms Almond, and Mrs Read and Ms Almond deteriorated. In January 2013, Ms Almond made an allegation of assault against Mr Read and obtained, on an ex parte basis, a temporary protection order against him — an order that was later discharged. She then served a trespass notice on Bruce Read and had him removed from the Property by the police. The police were also involved in the removal of Mrs Read from the Property into a rehabilitation facility. Mrs Read later moved into a retirement home where she lives to this day. Family relations have entirely broken down.

Arrangements to purchase

Ms Almond's account

[11] In the High Court, Ms Almond's evidence was that caring for her mother and father had always been her responsibility. The respondents do not dispute that, prior to the break-down in family relations, Ms Almond was a loving daughter who provided support and care to her mother following the death of her father. But Ms Almond also claimed that while she was close to her parents, overall the Reads were not a close family — an allegation that is disputed. On her evidence, her relationship with her brother Bruce was particularly poor such that she would not have been willing to buy a property with him or have him live on the property, and equally he would not have been prepared to help her out. Ms Almond said that, if anyone provided help and support within the family, it was her; citing occasions when she had been supportive of Chris Read while he trained for his medical career.

[12] Ms Almond said that in the early part of 2000, she was recently divorced and considering purchasing a property. Her parents asked that she buy a large property so that they could build a dwelling on the land and she would be able to care for them. They agreed that if that occurred, they would pay \$200 a week in rent, and that Chris Read would pay this on their behalf. Ms Almond said there were further conditions to the agreement; she would not be required to work, her brothers would make contributions to the Property to assist her in caring for their parents, and Bruce Read would never be permitted to live on the Property. However there was no arrangement that anyone other than Ms Almond would have a proprietary interest in the Property.

[13] As to payment of the purchase price, her evidence was that she paid a deposit of \$10,000. While she accepted that money came from her parents, she said it represented repayment by them to her of two loans she claimed to have made to them when they owned a business in Napier.⁴ The rest of the purchase price, she said, was intended to come from the realisation of investments her brother Bruce had made on her behalf in the early 1970s. At the time of purchase, those investments were worth \$180,000. However, her father, who handled getting this money back from Bruce for her, told her that Bruce could only manage to give her \$130,000 and would pay the rest later.

[14] Ms Almond said that because of the late repayment of the balance of \$50,000, she still required a loan from the bank to make up the balance of the purchase price. The loan of \$60,000 was \$10,000 more than needed but she borrowed the extra amount because Mr Read asked her to so that he and Mrs Read could use the money for improvements to the Property. She denied that she received any money from her brothers to help fund the purchase.

Bruce Read's account

[15] Bruce Read's account of events was very different to Ms Almond's. He said he had a good relationship with his sister, which only began to deteriorate when he challenged her over her handling of his mother's money. From an early stage, he was involved in general discussions with his parents and Ms Almond about buying a lifestyle block with two houses on it — one for Ms Almond and her daughters, and the other for Mr and Mrs Read. He was asked to "go in" with them if they found a suitable place because they did not think they would be able to get enough money together to fund the purchase themselves. He said that he was told by both Ms Almond and her parents that Ms Almond was not in a position to make any contribution towards the purchase price, as she had not yet sold her existing home following her divorce. These discussions developed over time, but generally took place when he went to his parents' home in Tuakau for Sunday lunch, a weekly event, or on the odd occasion they went to Ms Almond's house for Sunday lunch. There were also discussions with Chris Read, who would phone his parents from the United States most Sundays.

⁴ We note that Ms Almond also says in evidence that she repaid this money on 29 May 2003.

[16] Bruce Read said while he generally discussed arrangements with his father, he also discussed them directly with Ms Almond. Initially, his father told him that ownership of the Property would be recorded in the names of each member of the family in the proportion to the financial contributions each made to the Property. However, a few weeks after the initial discussion, he was told by his father that in order for his sister to raise the necessary money by way of a mortgage, title to the Property had to be taken in her sole name. But his father told him that once his sister had repaid the mortgage, title to the Property would then be changed to record all of the family as owners of the Property in proportion to their contributions. Mr Read said he would keep a record of everybody's financial contributions so that everyone was clear about who had paid what.

[17] These arrangements were not formally documented, Bruce Read claimed, because they were family and trusted each other. He said he was content to rely on a record his father kept of contributions in a notebook. The uncontested evidence was that Mr Read did indeed keep records of expenditure on the Property but with his death those records have been lost.

[18] Bruce Read said that he paid \$130,000 to enable the purchase to proceed. This was his own money and not money he invested for his sister. He said that throughout Ms Almond's adult life she regularly sought financial assistance from the family, including him. He said she never had any spare money, so the notion that she gave him spare cash to invest in shares was "ludicrous".

Mrs Read's account

[19] Mrs Read's evidence was that she and her husband undertook the shared purchase primarily to help out Ms Almond. They had always been very supportive of Ms Almond through a number of personal difficulties she faced. Ms Almond's daughter [S] had long-term health issues and, because of this, they had provided a lot of support to Ms Almond. Following Ms Almond's divorce they wanted to ensure that Ms Almond and her daughters had settled living arrangements. Mrs Read also acknowledged that part of her thinking was that as she and her husband got older they

would also require some help and it would be convenient if they lived on the same property as Ms Almond.

[20] She said that she and her husband paid \$10,000 to fund the initial deposit on the Property and denied that Ms Almond had earlier lent that amount to them. As to the overall arrangement, although she could not remember the exact amount each party contributed to the Property, she was sure the idea was that the family would own the Property, “all of us”, in proportion to their contributions.

Chris Read’s account

[21] Chris Read’s evidence corroborated that of his brother and mother. He said that during a Christmas family holiday in the Bay of Islands in 2001, his parents and Ms Almond discussed buying a piece of land. His father told him that he and Bruce would have to pay for most of the land value as Ms Almond did not have the money to do so and their parents had yet to sell their home in Tuakau. Mr Read said it was important to do this as Ms Almond was undergoing a divorce, was on a benefit, had little money and there was no way she could buy her own house. His father wanted to see Ms Almond and her children settled and thought a family-owned property would be a good investment for everyone. According to Chris Read, Mr Read had mentioned the idea that Bruce could live in the Property when he got older.

[22] Chris Read said he told his parents and Ms Almond he was interested in contributing to the land, but only if he received an ownership interest in the Property. Ms Almond “readily agreed”. He knew Ms Almond would need a mortgage to pay for the construction of her house and Mr Read alerted him to the possibility of further funds being required for property improvements. Although he thought there would be some property sharing agreement put in place, he was content to leave that to his father. Sometime after the purchase he learned that there was no such agreement but was not concerned. His father reassured him that he would keep an accurate record of all contributions in order to finalise ownership shares. Chris Read said he knew his father was both careful and prudent in the way he would record everyone’s contributions. It was apparent from the evidence of all three children that they loved and trusted their father. They regarded him as competent, loving and a man of his word.

[23] Chris Read accepted that Ms Almond told him she would look after their parents, but he says that was not fundamental for him as he had no confidence in her fulfilling that commitment. Rather it was the trust and confidence he had in his father that was critical to him investing in the Property in anticipation of his contributions being reflected in a share of equity.

[24] As to his contribution to the initial purchase, Chris Read said that it was intended to be \$30,000: a payment of \$5,000 drawn by his parents from his New Zealand cheque account and a further \$25,000. As to the latter amount, Chris Read said that in about 2000 he lent Ms Almond money to buy a property in New Plymouth. It was agreed that when that property was sold, rather than paying that \$25,000 to him, that money would be used to purchase the Property, on the basis that he received a corresponding equity interest.

[25] The evidence was that the \$25,000 from the sale of the New Plymouth property was paid to Ms Almond shortly before the purchase of the Property settled. It was not used by her for the purchase because she took out the \$60,000 loan. In 2002 the sum of \$8,590 was withdrawn from his New Zealand cheque account Mr and Mrs Read operated for Chris and paid to Ms Almonds cheque account. This payment, he claimed, included the further \$5,000.

[26] Ms Almond denied the \$25,000 was an equity contribution by her brother. She claimed that the money her brother contributed to the New Plymouth property was in substance a payment from him to her in recognition of the help she had provided when he was studying.

Settlement

[27] Bruce Read contributed \$130,000 towards the purchase. Ms Almond obtained a loan of \$60,000 from the ASB Bank, which was secured over the Property. That loan, plus the deposit paid by Mr and Mrs Read of \$10,000, made up the total purchase price of \$190,000. There was a surplus after a payment of legal costs of almost \$8,000 which was paid by the solicitors to Ms Almond, although Mrs Read said she did not know of this.

Construction of dwellings

[28] Shortly after the Property purchase settled, Ms Almond received \$105,805.77 from her relationship property settlement. She also obtained money from her daughters' inheritance from their father, with the executors of his estate investing \$60,000 in the Property.⁵ These funds were used to build the larger of the two houses, which Ms Almond and her daughters resided in.

[29] Mr and Mrs Read paid for the construction of the subsidiary dwelling. Mrs Read claimed that they also paid for other improvements to the Property in expectation that their share in the Property would increase to reflect this expenditure. In addition, Mrs Read made a claim in respect of two further payments of \$10,000 each, made in February and September 2003. Ms Almond denied they were contributions to the Property, claiming both that one of the 2003 payments was made in respect of a car for her daughter R and also that it was made to enable Ms Almond to make repayments on her own car. She maintained that the September 2003 payment was a donation by Mr and Mrs Read to the Seventh Day Adventist Church.

[30] Finally Mrs Read claimed \$12,500 for money paid by her for the Property's driveway and landscaping works. The evidence was that the money to fund the driveway was received by Mrs Read on the death of her sister, Mavis.

[31] Ms Almond's evidence was that Mrs Read, honouring her sister's wishes, wanted the girls to have half of the money Mrs Read inherited from her sister. The remaining half was split between her and Ms Almond. Ms Almond accepted that this half was used toward the driveway.

Garage and purchase of R's share in the Property

[32] Bruce Read alleged he paid a further \$6000 to assist with the construction of a garage on the Property. This was primarily for the benefit of Ms Almond, as it was to be used to store her furniture which had been in the matrimonial home. Bruce Read said that Ms Almond expressed her gratitude for his assistance. Later she encouraged

⁵ Her daughters are from an earlier marriage. Their father died, leaving his assets in trust for them.

him to increase his share in the Property by buying out her daughter [R's] share, when her daughter wanted to buy a property of her own. He said he paid the \$50,000 for that purpose.

[33] Ms Almond maintained that any contribution by Bruce Read to the garage was pursuant to a private arrangement with their father and did not involve her. She denied the garage was for her benefit.

[34] As to Bruce Read's claim to have purchased [R's] share in the Property, Ms Almond denied there was any such agreement. She said the \$50,000 he paid was the balance of the money Bruce Read had invested for her; in substance he was repaying an amount he owed her.

Payments by the respondents toward mortgage and outgoings

Bruce Read

[35] Bruce Read claimed to have paid \$1,300 to Ms Almond and \$26,901 to Mrs Read between June 2002 and December 2012, of which approximately \$24,552 was paid between 9 October 2009 and 28 December 2012 when Bruce Read was living on the Property. He understood that he paid half the mortgage and Mrs Read paid the other half, and that this arrangement was reached when Chris Read stopped paying the mortgage. He said that Ms Almond expected him to contribute towards the mortgage and other expenses associated with the Property. He was asked to pay his share of outgoings into Mrs Read's bank account so that Ms Almond could then transfer those funds, together with Mrs Read's share, to her own bank account.

[36] The evidence was that, from at least February 2012, each month Ms Almond would present Bruce Read with a slip of paper on which she had written expenses she claimed should be paid to her. These listed items such as MTGE (mortgage) and outgoings both for her parents and the Property.

[37] Ms Almond's evidence was that any payments made by Bruce Read into his mother's bank account were simply payments made to support his mother, and not pursuant to any over-arching agreement regarding ownership of the Property.

[38] Bruce Read makes no claim in respect of these payments in these proceedings.

Mrs Read

[39] Mrs Read said that from 19 March 2008 to 31 December 2012, Ms Almond began taking money from her account or asking for cheques towards the mortgage. The sum of \$114,807 has been traced from Mrs Read's account to Ms Almond's account over this time period and that was the sum claimed in respect of the mortgage.

[40] Ms Almond claimed those payments represented rent which her parents agreed to pay for their occupation of the smaller dwelling on the Property, expenses associated with the subsidiary dwelling (rates and utilities) and reimbursements for payments made by Ms Almond on Mrs Read's behalf.

Chris Read

[41] Chris Read denied that he funded rental payments by his parents. He said that shortly after her house was built he was approached about meeting Ms Almond's mortgage payments. His parents and Ms Almond wanted him to service the mortgage and he agreed that he would on the basis that his contributions would increase his ownership share. For that reason, he agreed that his parents could take money from his New Zealand bank account to pay the mortgage but on condition that the payments were part of his contribution to the Property. He understood the payments to be about \$1000 per month, servicing a 20-year loan. He agreed that other money from his account could also be put towards the Property on this basis.

[42] Pursuant to this arrangement, between July 2003 and June 2009, \$105,206 was transferred from Chris Read's account to Ms Almond's account. Chris Read said he agreed to this informal arrangement because he knew the payments occurred under Mr Read's oversight, and that his father was keeping an accurate account.

[43] Mr Read died on 13 June 2009. Bruce Read moved in with his mother at that point, and it seems that the arrangement that Chris Read would pay the mortgage also then came to an end, although there does not seem to have been evidence as to the exact circumstances of this.

[44] Ms Almond acknowledged that Chris Read helped her parents financially but maintained that her parents paid rent to her and did not make mortgage payments. She was told by her parents that it was Chris Read's way of contributing because he could not be present to help with the care of his parents. Her evidence was that none of Chris Read's money went towards the mortgage. Some of it paid her parents' rent, and some of it was spent on things like ride-on lawn mowers or Christmas presents. She maintained that she alone paid the mortgage on the Property.

Further borrowing by Ms Almond

[45] As Ms Almond was the sole proprietor of the Property, and had been granted a mortgage over it, she was able to draw down further amounts which were and are secured over the Property. Ms Almond's evidence was that the later loans were loans her father had asked her to take out and, in the case of a \$30,000 loan, that her mother had asked her to borrow after Bruce moved in and did not pay anything. At the date of the hearing, the loan secured by the Property was \$92,265.

The judgment

[46] In the High Court, the Judge addressed the following factual issues:⁶

- (a) What, if anything, did the parties agree about the purchase of the Property?
- (b) Bruce Read:
 - (i) Did the \$130,000 contribution to the purchase price for the Property belong to Bruce Read or Ms Almond?
 - (ii) What was the basis upon which Bruce Read paid \$6,000 towards the cost of a garage constructed on the Property?
 - (iii) Did Bruce Read purchase [Ms Almond's daughter's] share in the Property for \$50,000?
- (c) Mrs Read:
 - (i) Did Mrs Read make three payments of \$10,000 towards the purchase of the Property, and if so, were they made in the expectation of obtaining a proportionate interest in the Property?

⁶ High Court judgment, above n 2, at [24].

- (ii) Was construction of the subsidiary dwelling and contributions to improvements to the Property made in expectation of obtaining a proportionate interest in the Property?
 - (iii) Were contributions allegedly to the mortgage over the Property made in the expectation Mrs Read would obtain a proportionate interest in the Property?
 - (iv) Did Ms Almond act contrary to her duties as Mrs Read's attorney in relation to the payment of money to her from Mrs Read's bank account?
- (d) Chris Read:
- (i) Did Chris Read pay \$25,000 or \$30,000 towards the purchase of the Property and, if so, was that payment made in the expectation of obtaining a proportionate interest in the Property?
 - (ii) Did Chris Read make contributions to Ms Almond's mortgage and, if so, were the contributions made in the expectation of obtaining a proportionate interest in the Property?

[47] In terms of the parties' agreement as to the purchase and development of the Property, the Judge found that the family arrangement was as the respondents alleged.⁷ She rejected Ms Almond's evidence that there was never an intention for anyone beside herself to contribute to the purchase of the Property.⁸ She also rejected Ms Almond's evidence that her parents were elderly and disabled at the time of the initial purchase, so it was in their interests to buy a property where they could live together and she could look after them.⁹ The Judge preferred the respondents' evidence that, although elderly, Mr and Mrs Read were not inactive. She was satisfied that at the time of the purchase it "was not so much Mr and Mrs Read wanting Ms Almond to look after them as it was their wanting to be on hand to help Ms Almond after her marriage breakup, particularly given [S's] ill health".¹⁰

[48] Regarding the nature of the family relationship, the Judge found that there was a degree of trust between Bruce Read and Ms Almond prior to the breakdown of their relationship following the death of their father.¹¹ She accepted the respondents' evidence that the conflict between Bruce Read and Ms Almond was only really

⁷ At [84].

⁸ At [84].

⁹ At [64].

¹⁰ At [64].

¹¹ At [82].

apparent when Bruce Read began to challenge Ms Almond's use of their parents' money.¹² She therefore rejected Ms Almond's evidence that she would never buy a property with Bruce Read because of their longstanding conflict.

[49] The Judge considered that Ms Almond's version of events was dependent upon her having sufficient funds to buy the house independently, without family assistance, and to then build her home.¹³ The Judge founds she was not in a position to do this.¹⁴

[50] Ultimately, the Judge was satisfied that all parties, including Ms Almond, agreed that the Property was to be owned by the parties in proportion to their respective financial contributions to the cost of the land and improvements, and this was clearly understood by all involved.¹⁵ The evidence of all three respondents was consistent with this arrangement and Ms Almond's own conduct (prior to the relationship breakdown) was consistent with such an agreement having been made. The Judge found there was therefore an express common intention shared by Ms Almond and the respondents that each would own an interest in the Property in proportion to their contribution to it, such that it would be unconscionable for Ms Almond to deny the respondents' interests.¹⁶

[51] Applying the principles set out in *Lankow v Rose* and *Gormack v Scott*, the Judge was satisfied that an institutional constructive trust arose by operation of law, enforceable by the respondents.¹⁷ The Judge then went on to determine each party's contribution as a basis for that conclusion as follows.

Bruce Read

[52] In respect of Bruce Read's claims, the Judge found that he contributed the following money in exchange for a proportionate share in the Property:

¹² At [83].

¹³ At [67]–[68].

¹⁴ At [68].

¹⁵ At [84].

¹⁶ At [232].

¹⁷ At [227]; referring to *Lankow v Rose* [1995] NZLR 277 (CA); and *Gormack v Scott* [1995] NZFLR 289 (CA).

- (a) \$130,000 in July 2002 as a contribution to the purchase price.¹⁸ She rejected Ms Almond's evidence on this point as "not credible".¹⁹
- (b) \$6,000 for the cost of building the garage, as it was an "improvement" to the Property.²⁰ She also accepted that it was built primarily to store Ms Almond's belongings.²¹
- (c) \$50,000 for the purchase of Ms Almond's daughter's share in the Property.²² Again the Judge preferred the evidence of Bruce Read on this point, describing Ms Almond's version of events as "not convincing".²³

[53] She concluded that Bruce Read was entitled to a 26.58 per cent share in the Property.²⁴

Mrs Read

[54] The Judge found that Mrs Read contributed the following to the purchase of the Property.²⁵

- (a) \$20,000 accounting for the initial \$10,000 deposit and further payment of \$10,000 in February 2003. The Judge said that Ms Almond's evidence about the initial \$10,000 deposit and the February 2003 payment of \$10,000 "was inconsistent and not credible".²⁶ The Judge did not however allow the claim in respect of the September 2003 payment, noting that there was no record of it being received into Ms Almond's bank account.²⁷ Whilst she agreed that a \$10,000 donation to the Seventh Day Adventist Church "seems excessively generous

¹⁸ At [104].

¹⁹ At [96].

²⁰ At [111]–[112].

²¹ At [109].

²² At [121].

²³ At [119].

²⁴ At [251].

²⁵ At [251].

²⁶ At [142].

²⁷ At [143].

when one is paying for a house to be built, and it seems unlikely this is where the \$10,000 went” she could not be satisfied that the money was in fact paid to Ms Almond.²⁸

- (b) \$136,970 for the cost of construction of the second dwelling.²⁹
- (c) \$3,125 for Mrs Read’s contribution toward the cost of the driveway.³⁰
The Judge reduced the award in respect of this amount because of Mrs Read’s concession, during her evidence, that some of the money might have been meant for Ms Almond’s daughters.³¹

[55] The Judge did not allow Mrs Read’s claim for an increase in proprietary interest to reflect mortgage repayments.³² While she rejected Ms Almond’s claim that her parents paid rent, she found it more likely that the mortgage payments were made with the intention of helping Ms Almond out without necessarily expecting an ever-increasing proprietary interest as a result.

[56] The Judge found Mrs Read was entitled to a 24.8 per cent share in the Property.

Chris Read

[57] In respect of Chris Read, the Judge found that he made the following contributions:

- (a) \$30,000 made up of a cash transfer of \$5,000 to Ms Almond, and in substance, the transfer of an existing loan of \$25,000 to this Property.³³
The Judge found that this money had been lent at an earlier time by Mr Read to Ms Almond for the purchase of a property at New Plymouth. The Judge preferred Chris Read’s evidence of an agreement with Ms Almond that on the sale of the New Plymouth

²⁸ At [143].

²⁹ At [156]–[157], [248] and [251].

³⁰ At [158], [248] and [251].

³¹ At [158].

³² At [180].

³³ At [188]–[189].

property, \$25,000 of the sale proceeds which would otherwise go to Chris Read to repay the loan would be applied to the Property and treated as his contribution, giving him a proprietary interest in return.³⁴ The Judge found the fact Ms Almond directed the funds away from the Property did not alter that agreement as to the basis on which they were paid; that the payments would entitle Chris Read to a proportionate share in the Property.³⁵

- (b) \$91,061 in payments made directly to Ms Almond on account of mortgage payments for the Property.³⁶ The Judge rejected Ms Almond's evidence that all money she received from Chris Read was for costs (including rent) associated with her parents.³⁷ She also rejected Ms Almond's evidence that she alone paid the mortgage, finding that she did not have sufficient independent means.³⁸ The Judge arrived at the figure of \$91,061 after deducting the cost of a ride-on lawn mower and airfares for Ms Almond and her daughters to visit the United States at Chris Read's invitation and cost.³⁹
- (c) \$33,034 in money paid by Chris Read to Mrs Read, on account of mortgage payments, which were on-paid to Ms Almond.⁴⁰

[58] On that basis, the Judge awarded Mr Chris Read a 23.88 per cent share in the Property.⁴¹

Ms Almond

[59] Finally, Ms Almond's share was explained as follows:

³⁴ At [182]–[183] and [189].

³⁵ At [188].

³⁶ At [214]–[215] and [251].

³⁷ At [211].

³⁸ At [202]–[204].

³⁹ At [212]–[214] and [251].

⁴⁰ At [209], [211] and [251].

⁴¹ At [251].

- (a) \$172,000 for the cost of construction of Ms Almond's home, including her daughters' contribution of \$60,000;⁴²
- (b) \$60,000 being the money borrowed by Ms Almond for the initial purchase;⁴³ and
- (c) \$3,125 for Ms Almond's share of the cost of the driveway.⁴⁴

The Judge found that Ms Almond was entitled to a 30.24 per cent share in the Property but adjusted that downward to 24.74 per cent after deducting 5.5 per cent to reflect Bruce Read's purchase of R's share in the Property.⁴⁵

[60] Thomas J arrived at those findings after an extensive review of the evidence. We observe that on multiple occasions, the Judge preferred the respondents' evidence to that of Ms Almond.

The law

[61] Before considering the arguments raised on appeal, it is helpful to set out the relevant law, particularly in relation to constructive trusts.

[62] The starting point is that this dispute concerns an entitlement to an interest in land registered in the name of Ms Almond alone. Section 49A of the Property Law Act 1952 (which applied at the time) provides in material part:⁴⁶

49A Certain instruments to be in writing

- (1) No legal interest in land may be created or disposed of except by writing signed by the person creating or conveying the same or by his agent lawfully authorised in writing in that behalf, or by will, or by operation of law.
- (2) A declaration of trust respecting any land or any interest in land shall be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.

⁴² At [244] and [251].

⁴³ At [244] and [251].

⁴⁴ At [246] and [251].

⁴⁵ At [251].

⁴⁶ This provision is now contained in s 25 of the Property Law Act 2007.

- (3) A disposition of an equitable interest or trust subsisting at the time of the disposition shall be in writing signed by the person disposing of the same or by his agent lawfully authorised in writing in that behalf, or by will.
- (4) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

...

[63] In this case, the Judge found a constructive trust made out bringing the case within the scope of s 49A(4).

[64] Constructive trusts can be divided between institutional constructive trusts and remedial constructive trusts. In *Fortex Group Ltd (in rec and liq) v MacIntosh* Tipping J formulated the distinction in the following way:⁴⁷

An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.

The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any order of the Court. Such order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the order of the Court; such order being creative rather than simply confirmatory.

[65] The learned authors of *Equity and Trusts in New Zealand* describe the more common examples of institutional constructive trusts, and note:⁴⁸

The common factor in all of these scenarios would appear to be the unconscionability of the defendant in denying the plaintiff an equitable interest in the relevant property because of a previous understanding, whether subjectively agreed upon between the parties or more commonly deemed by the law to have been appropriate in the circumstances. It is the element of consent or intention (or lack of either of these, as the case may be) that triggers the institutional constructive trust which arises to reverse the defendant's unconscionability.

⁴⁷ *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 171–172. See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

⁴⁸ Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers NZ, Wellington, 2013) at [13.21].

[66] One common category of constructive trusts is where contribution has been made to the acquisition, improvement or maintenance of property, or its value by a party other than the registered proprietor.⁴⁹

[67] In *Lankow v Rose*, the essential requirements of that type of constructive trust were described as follows:⁵⁰

... that the plaintiff contributed in more than a minor way to the acquisition, preservation, or enhancement of the defendant's assets, whether directly or indirectly; and that in all the circumstances the parties must be taken reasonably to have expected that the plaintiff would share in them as a result.

[68] Tipping J set out the elements a claimant needs to prove in order to establish that equity should regard as unconscionable a defendant's denial of claimant's interest:⁵¹

- (a) contributions, direct or indirect to the property in question;
- (b) the expectation of an interest therein;
- (c) that such an expectation is a reasonable one; and
- (d) that the defendant should reasonably expect to yield the claim and interest.

[69] Where a contribution is made on the basis of a pre-existing common intention that the contribution will result in a proprietary interest, there will be no difficulty in establishing a reasonable expectation. In *Gormack v Scott*, Cooke P added to the principles by making the following observations:⁵²

First, ... where there has been an express common intention applicable to the circumstances that have arisen, it is unnecessary to fall back on reasonable expectations.

⁴⁹ Although we acknowledge this type of trust commonly arises within the context of relationships, there is no reason why it cannot extend beyond that if the central elements of the claim are made out.

⁵⁰ *Lankow v Rose*, above n 17, at 282.

⁵¹ At 294.

⁵² *Gormack v Scott*, above n 17, at 47–48.

Secondly, if (as the Judge thought here) the common intention was too vaguely expressed to receive implementation as such, the evidence bearing on common intention may still be relevant in considering the reasonable expectation of the parties.

Thirdly, in considering reasonable expectations, attention is not to be confined to the inception of the relationship or the time when any property in question was purchased. The inquiry extends to the whole circumstances and history of the relationship...

[70] Finally, as Glazebrook J observed in *Commonwealth Reserves I v Chodar*, the purpose of a constructive trust is generally not to create an ongoing trust relationship, but to force the disgorging of money or property by the constructive trustee.⁵³ In this way, “a constructive trust is a means to an end”.⁵⁴

[71] It flows from the principles outlined in these cases that what is sometimes referred to as a “common intention constructive trust” simply describes one type of situation in which a reasonable expectation will be found to exist.⁵⁵

[72] We now turn to address each of Ms Almond’s arguments on appeal.

Arguments on appeal

[73] On appeal, Ms Almond continues to maintain that she and her parents agreed that she would own all of the equity in the Property, and that her parents would own the subsidiary dwelling, in which they could live out their days which, on their death, could be sold for removal. However, in a significant departure from how her case was advanced in the High Court, Ms Almond abandons her claim to have paid all of the purchase price of the Property, and to have made all of the mortgage payments. She accepts that her parents made substantial contributions to each but on the understanding they would be looked after by Ms Almond, the genesis of the whole arrangement, not in return for a proprietary interest. She says she lived up to her part of the bargain by cooking them meals and cleaning for them, and that this arrangement should be honoured by this Court. Mr Perese for Ms Almond submits that this case

⁵³ *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374 (HC) at 382.

⁵⁴ At 382.

⁵⁵ We note the concept of a “common intention” constructive trust was discussed in the recent decision of *Harvey v Beveridge* however this Court declined to find such a trust existed on the facts, preferring to leave to issue of constructive trusts arising by common intention for another day. See *Harvey v Beveridge* [2014] NZCA 72, [2014] NZAR 677 at [46].

was not, as the Judge found, about a close-knit family entering into a property development together. Rather, it was about arrangements between a daughter and her elderly parents for their care. In these circumstances, the Judge erred in finding a common intention to share ownership.

[74] Ms Almond now argues that while her parents' contribution may have been funded in large part by her brothers, she was not party to those arrangements, and those payments cannot give Bruce and Chris Read an interest in land.

[75] Because Ms Almond's appeal is advanced on such a different basis to how she defended the respondents' claim, it has at times been difficult to follow her argument, especially since only part of it was captured in the written synopsis. In oral argument, Mr Perese submitted the following in respect of the payments of which the respondents' claim an equity interest:

- (a) Bruce Read: In respect of the \$130,000 paid by Bruce Read, Mr Perese says that Ms Almond's position in respect of this contribution is now as follows. At best, this was a loan from Bruce Read to Mr Read. Ms Almond was not party to the arrangements for it, and so the payment cannot give rise to an equity interest in the Property. The payments in respect of the garage and the purchase of [R's] interest in the Property were similar arrangements reached between Bruce and his parents, and could have no effect on the basis of the ownership of the Property as agreed between Ms Almond and her parents. Mr Perese argues the Judge's acceptance of Bruce Read's evidence as to the basis on which the payments were made lacked adequate factual foundation because his evidence was not credible.
- (b) Mrs Read: Mr Perese confirms the following position for Ms Almond in respect of Mr and Mrs Read's contributions. Although Mr and Mrs Read paid the deposit, that was largely refunded. It was not used to purchase the Property. Ms Almond accepts however that Mrs Read is entitled to an interest of about \$140,000 in the land, calculated as

the sum of the cost of construction of the subsidiary dwelling, and the \$3,125 for the driveway.

- (c) Chris Read: Ms Almond now contends that the \$30,000 used in the initial purchase was a loan to her parents, did not involve her and therefore cannot result in an equity interest in the Property. She claims that the same is true of the mortgage repayments; these were simply gifts or loans Chris Read made to his parents because he did not want his parents paying the mortgage.

[76] Mr Perese submits that the evidence before the Judge was such that she was wrong to find a common intention to share the equity. He argues the ownership arrangements Ms Almond contends for are supported by contemporaneous documents which were not adequately addressed by the Judge: specifically, the lawyer's file notes, a letter from Mr Read to support an application for resource consent and, finally, various wills made by Mrs Read. These documents, he says, contradict the respondents' case. He also argues the Judge was wrong to accept the evidence of Bruce and Chris Read as the basis for her findings, when that evidence was obviously inconsistent and/or not credible. He invites us to take a different view of the evidence.

[77] If this Court accepts that the Judge erred in her finding of common intention, then Mr Perese argues that it is necessary to consider whether the respondents can otherwise rely on a constructive trust as a remedy in circumstances concerning family care arrangements. He contends that an institutional constructive trust (based on reasonable expectations as articulated in *Lankow v Rose*) does not apply to family care arrangements for elderly parents. And if it does, allowance needs to be made for the care actually provided by Ms Almond.

[78] Finally, Mr Perese argues that the Judge erred in finding a breach of fiduciary duty because the evidence does not support a very serious finding, on account of dishonesty, on Ms Almond's part.

[79] The respondents say that Ms Almond cannot simply step away from the case as run in the High Court. They say that this new submission that the initial

contributions of the individuals were gifts as part of a “care arrangement” for Mr and Mrs Read is inconsistent with the evidence Ms Almond gave at trial, and her overall case.

First ground of appeal: the finding of common intention

[80] Before we address these arguments under this ground of challenge we highlight fundamental difficulties with Ms Almond’s appeal.

[81] First, the appeal depends upon a version of events which was not covered in Ms Almond’s evidence and which, in some respects, conflicts with the evidence she gave. Secondly, Mr Perese asks us to conclude the Judge erred in her finding that there was a common intention, based upon our reconsideration of isolated pieces of evidence. But the Judge’s conclusion on the key issue of the nature of the agreement, and who was party to it, was based on her review of all of the evidence and, most importantly, credibility findings made in respect of Ms Almond and the respondents. Mr Perese does not attempt to grapple with these two difficulties. We see them as critical and return to them shortly.

[82] For now, we review the evidence Mr Perese refers us to.

The solicitor’s file notes

[83] Mr Bryan Scott was the conveyancing solicitor acting for Ms Almond. In his evidence, Mr Scott said that Mr and Mrs Read came in to see him about “building a small unit on land [Ms Almond] was purchasing”. Overall, the oral evidence he gave tended to support Ms Almond’s account that Ms Almond alone was buying the Property, and that all of the money used in the purchase, including the \$130,000, was her money.

[84] However, as the Judge found, the file notes Mr Scott made at the time do not sit well with his evidence at the hearing.⁵⁶ Two file notes use language which suggests multiple purchasers. Mr Scott’s file note of a conversation with Mr Read on the 31 May 2002 contained the following preamble:

⁵⁶ High Court judgment, above n 2, at [70]–[75].

Fred and [Mrs Read] had initially been in to see me to discuss proposals for buying a property in conjunction with their daughter so that they could have two houses on that property.

[85] The file note of a telephone conversation with Ms Almond taken the day before also records Ms Almond as saying “they initially wanted to buy Lot 4 and were keen on it but they are now very happy with Lot 5”. And further “She also mentioned money from Shares and I would think that these were her brother’s Shares”.

[86] In his evidence-in-chief, Mr Scott attempted to add a gloss to that note. He said:

My understanding was that these were in fact [Ms Almond’s] investment held by Bruce and she was getting some money back from an investment which had been made through her father.

He claimed he understood that it was Ms Almond’s money coming back to her. Mr Scott’s recollection on this point was challenged on cross-examination. It was put to him that given the passage of time and his involvement in multiple other conveyancing transactions, he would have no recollection independent to the content of the file notes. He denied that was so.

[87] Mr Scott also made a further note to himself to discuss the possibility of a property sharing agreement or licence to occupy with Mr and Mrs Read. In evidence, Mr Scott said of this discussion:

Fred was a very decisive man and from what little I knew of him I would think that he would have declined this advice as it would have been more expense for them and he would have considered it unnecessary. This was the case. I was not instructed to formally document the arrangement. When I raised the matter with Fred, he told me that they didn’t need any sort of agreement. That it was [Ms Almond’s] property and they could trust her and when they both had gone the house had to go.

[88] Thomas J placed weight upon these file notes, preferring the account recorded there to Mr Scott’s oral evidence.⁵⁷ She noted that Mr Scott had acted on many transactions since this 2002 purchase, and some 13 years had elapsed since then.⁵⁸ She also noted that, since the dispute about ownership had arisen, Ms Almond had

⁵⁷ At [75].

⁵⁸ At [73].

spoken to Mr Scott in connection with these events.⁵⁹ The Judge concluded that Ms Almond had essentially given her side of the story to Mr Scott and that this may well have influenced his recollection.⁶⁰ We agree with the Judge that, after all this time and in the context of this litigation, the most reliable guide to the content of Mr Scott's instructions from Ms Almond and Mr Read is the file notes.

[89] The Judge concluded that overall Mr Scott's evidence and file notes supported the conclusion that:⁶¹

- (a) Mr Read was in good health at the time of the purchase of the Property in 2002;⁶²
- (b) the shares were Bruce Read's shares;
- (c) Ms Almond was buying the Property with Mr and Mrs Read; and
- (d) the big house on the Property would belong to Ms Almond.

[90] Nevertheless, Mr Perese claims that the file notes do support Ms Almond's new version of events advanced on appeal. He relies on the absence of any mention in those file notes of Bruce and Chris Read's contribution to the purchase or that they were to have an equity interest. He submits that given the assurances Mr Read had given his sons that they would have an equity interest, this omission is significant. He argues that if this assurance had been given, it would surely have been communicated to Mr Scott by Mr Read.

[91] We do not accept that these file notes provide significant support for either of Ms Almond's versions of the agreed basis for the purchase. The evidence of both Bruce and Chris Read was that their father told them they could not be on the title. In Bruce's case, he knew it was because Ms Almond was borrowing money against the Property, and so needed to be the sole registered proprietor. There was therefore

⁵⁹ At [74].

⁶⁰ At [74].

⁶¹ At [76].

⁶² There is a note in the file note of 31 May 2002 that this was Mr Read's assessment of his own health.

good reason, within the logic of the transaction and in the particular context of this family, for Bruce and Chris Read not to be recorded on the title.⁶³

[92] Mr Scott's evidence was to the effect that Mr Read decided not to formally document the family arrangement, so there clearly was an undocumented family arrangement.⁶⁴ It is true that the file notes suggest that Mr Scott was not told of the detail of the arrangement. But since Mr Scott was not asked to document it, there was no reason to give him detail of that arrangement. There is also the corroborating detail in the file note of 30 May 2002 recording that money from the sale of "her brother's shares" was being used in the purchase. In the High Court, Ms Almond said this was her money. On appeal she argues, in conflict with her own evidence in the High Court and in conflict with the context of this file note, that whatever the arrangement was regarding that money, it was between Bruce and her parents and she had no part in it.

[93] In fairness to Mr Perese, he accepts the file note evidence is not in and of itself a "silver bullet" for Ms Almond's cause. But he says it nevertheless is evidence that can be added to other pieces of evidence, casting doubt on the validity of the respondents' claim of a common intention as to equity sharing.

Mr and Mrs Reads' letter to the Franklin District Council

[94] Mr Perese places more weight upon the next piece of evidence; Mr Read's letter to the Council. He says it was written at a time when there was no dispute between the parties and so was entitled to significant weight.

[95] Relevantly, the letter stated:⁶⁵

⁶³ Chris Read's evidence was that he initially thought the land would be registered in the names of his parents, Bruce Read and Ms Almond only. He understood his name would not be registered on the title because he was resident in the United States and having his name on the title would cause hassle for his parents and expose them to creditor claims. His evidence was he found out the property was registered in Ms Almond's name only in 2005. Mr Read then explained that this was for the purpose of obtaining finance.

⁶⁴ Mr Scott gave evidence that there clearly was an undocumented family arrangement between Ms Almond and her parents, but also gave evidence that he was not aware of any other purchasers. Had he known this "there is no way I would have allowed the transaction to proceed without formally documenting the arrangement".

⁶⁵ At [78].

The land was purchased by myself & daughter so that a main house could be built for her. This now exists and my daughter, Mrs Jan Almond and family are living in it. Also a second small retirement home for myself & my wife (I am 82 and my wife is 78). ... My son who is single, will probably be retired when we have finished with the home and the plan is for him to occupy the house and he and my daughter can look after each other (my daughter's husband and the children's' father died several years ago so help is needed in both cases). ...

The retirement home, when we have finished with it, could be turned into a granny flat if required (or so a young lady from your planning dept told us about nine months ago when this plan was first thought of).

Mr Read went on in the letter to seek consent for the installation of a full concrete floor and brick cladding.

[96] Mr Perese argues first, the letter corroborates the version of an agreement as to ownership of the Property as set out in Mr Scott's file notes; that the Property was being jointly purchased by Mr and Mrs Read and Ms Almond, so that a main house could be built for Ms Almond and a retirement home for Mr and Mrs Read because Mr Read considered himself in need of care. He submits that the Judge failed to reconcile the differences between the plan described in Mr and Mrs Reads' letter to the Council with the family arrangement the respondents contend for. He argues the letter is also evidence that the Property was bought to ensure care for the parents, and not as an investment for the family; Bruce Read is only mentioned as living in the parents' house and there is no mention of Chris Read's interest at all.

[97] Of this letter, the Judge said:

- (a) it contradicts Ms Almond's evidence that she always had antipathy to Bruce Read, and undermines her assertions that a condition of the arrangement was that he was never to live on the Property;⁶⁶
- (b) it supports Mrs Reads' evidence that it was never intended that her house would in fact be moved from the Property once Mr and Mrs Read ceased to live in it;⁶⁷ and

⁶⁶ At [79].

⁶⁷ At [80].

(c) it records that the Property was purchased by Ms Almond and Mr and Mrs Read.⁶⁸

[98] We agree with the Judge's assessment of the significance of this evidence. Again, we do not attach weight to the absence of mention of a broader family arrangement. This was a letter to the Council to assist in obtaining a consent for a second dwelling, not a formal record of ownership arrangements. The letter writer's focus is upon the use to which the dwelling would be put, and for that reason emphasised its secondary nature, thereby addressing any concerns that it was a de facto subdivision as prohibited under the Franklin District Council Scheme. We do not consider that this letter, even if added to the solicitor's file notes, suggests an error in the Judge's assessment of the evidence in finding common intention, or otherwise supports the appellant's case.

[99] We further note that this evidence is not helpful to Ms Almond as it shows a clear intention that the arrangement benefit her, in the same way she claims it was intended to benefit her parents. This is not addressed by Mr Perese but weakens Ms Almond's claim that the genesis of the arrangement was that she provide care and support to her parents as they aged.

Mrs Read's will of 9 June 2010

[100] The third piece of evidence Mr Perese relies upon is Mrs Read's Last Will and Testament dated 9 June 2010, which provides:

If at the date of my death if I still own the house that my late husband and I built on our daughter's property at [Drury] then **IDIRECT** that ownership of the house (not land) is to be vested in my daughter **JAN** as to a one half share and to my sons **BRUCE** and **CHRISTOPHER** as to a one quarter share each. At any time that my daughter **JAN** sells the above property then the value of my house is to be as agreed between my daughter and two sons but if agreement cannot be reached then as determined by a registered valuer. The proceeds of any sale of the house can then be paid to my daughter and sons in the above shares.

⁶⁸ At [81].

[101] Mr Perese submits that this testamentary disposition is entitled to great weight, because it was completed before the present dispute. He submits it supports the view that Mrs Read understood that:

- (a) Ms Almond owned the Property;
- (b) her only claim was to the house and not the land; and
- (c) if Ms Almond sold the Property, then the value of the house was to be distributed between Ms Almond, as to a half share, and to each of her sons, as to a quarter share.

[102] Thomas J said she had considered the various changes Mrs Read made to her wills but concluded there was no need to make further reference to them, recording that Mrs Read's wills had been relied upon by the parties at various times to show the extent of the other party's influence on Mrs Read.⁶⁹

[103] We have reviewed the evidence in connection with these wills. The will relied upon by Ms Almond is one of many made by Mrs Read. Somewhat unusually for cases concerning the effect of testamentary dispositions, Mrs Read was able to give evidence as to the circumstances in which she made this will. Mrs Read's evidence was that she did not understand the significance of the part of the will that related to disposition of the house (and the machinery for that) following her death. Mr Scott attended on Mrs Read for the preparation of her will. Even though Mr Scott said he did explain the contents of the will to her, there is no evidence as to the nature of that explanation.

[104] On the face of it, the particular clause relied upon by Ms Almond is consistent with the arrangement Ms Almond now says was in place. Even so, we are not prepared to place any weight upon it. This will was executed shortly after Mr Read's death. In a later will, the provision relied upon was removed. Mrs Read's will reverted to the style employed in previous wills for both Mr and Mrs Read — directing the distribution of testamentary property without any particular arrangements in respect

⁶⁹ At [174].

of the distribution of the proceeds of the secondary dwelling. Moreover, just as the will relied upon by Ms Almond might be thought to support her case, so might the other wills be thought to support the respondents. Given the family dynamic, we think it unsafe to rely upon the content of a revoked testamentary disposition as post-agreement conduct consistent with either side's case. In that, we take the same approach as the Judge.

[105] We therefore conclude that the three strands of evidence relied upon by Mr Perese do not support Ms Almond's case that the Judge erred in finding a common intention that equity would be shared proportionate to contributions between Ms Almond, Mr Read and the respondents.

Was there sufficient credible evidence to justify a finding of common intention?

[106] There are several parts to this argument. The first attacks the key plank of the Judge's finding of a common intention — that there was a trusting relationship between family members, such that they were prepared to invest significant amounts of money “on trust”. Mr Perese refers to the following passage in the judgment:

[231] I cannot agree with Ms Law's submission that the reasonable expectation of the parties (that the plaintiffs would share in the Property) fails because of lack of documentation. I accept the plaintiffs' evidence that they did not think formal documents were necessary because they thought of themselves as part of a family who trusted one another. ...

[107] Mr Perese submits that on the evidence before the Judge, such a finding was not open to her. Mr Perese points to Chris Read's evidence that he would not have invested were it not for his father's involvement, which he argues suggests a lack of trust when it came to his sister. He also points to an affidavit Chris Read filed in another proceeding in which he said that although his sister could appear kind and generous “she is also very volatile, manipulative, dominating, gets extremely jealous, very dishonest, intolerant, vindictive, has absolutely no problem in lying to suit her purpose, and threatening”. This is clear evidence, Mr Perese submits, of acrimony, not trust, within the family. He therefore asks us to revisit the Judge's finding that this was a family sufficiently functional to agree an arrangement involving large sums of money on trust.

[108] We have reviewed this evidence and are satisfied that the Judge's finding that there was a trusting relationship in the family, providing necessary context to the agreement, was open to her. Chris Read was candid in his evidence that he had reservations about his sister's reliability. But he said he was prepared to go ahead with the transaction because of his father's involvement. We see no inconsistency between Chris Read's reliance upon his father's involvement in agreeing to invest, and the Judge's finding that this was a trusting family. The family, with Mr Read alive and well, did indeed trust each other. It is clear from the evidence that Mr Read was critical to the functioning of the family and that was how all saw him.

[109] The Judge was aware that family relations had broken down. However, she was satisfied that occurred well after the property investment. She had a good evidential basis for that, including Bruce Read's preparedness to spend \$130,000 on the Property, the shared plans that he would one day live there, and the fact he did live on the Property for some time before relationships broke down. As to the affidavit affirmed by Chris Read in other proceedings, it was affirmed after relations between the family had entirely broken down and is not relevant to assessing the context for the formation of the common intention.⁷⁰

[110] Mr Perese argues the Judge erred in her finding that the brothers invested on the basis of an agreement they were to receive a proprietary interest in return for their contributions. He submits that Bruce Read's evidence that had put up the \$130,000 in return for a proportionate share in the Property is improbable for the following reasons:

- (a) There is no reference to that arrangement in the contemporaneous documents.
- (b) In Mrs Read's will made *after* her relationship with Ms Almond had broken down (when she was in the rehabilitation centre), Mrs Read explains her failure to make any provision for her daughter in her will as follows:

because of the failure of my said daughter to recognise or to account for the contributions made towards such property

⁷⁰ The affidavit of Chris Read was affirmed on 28 April 2013.

directly or indirectly by my late husband **FREDERICK JAMES READ** and/or by me ...

- (c) He gave evidence regarding the record of contributions in the notebook which were implausible.

[111] We are not persuaded that much weight is to be attached to the absence of contemporaneous documentation. The arrangement involved large sums of money and so formal documentation would have been advisable. But the arrangements were between family, and so the failure to take this prudent step is not surprising. The parties all agree that a contemporaneous record of contributions was kept by Mr Read, however this notebook has since disappeared or been destroyed.⁷¹

[112] As to the clause in Mrs Read's will, it does refer only to contributions made to the Property by Mr and Mrs Read, a fact Mr Perese submits is inconsistent with a notion that contributions were made directly to the Property by Bruce and Chris Read. We do not agree that this passage in the will supports the argument Mr Perese makes. Mrs Read explains why she makes no provision for Ms Almond, linking that to her and her husband's financial contributions. The contributions that her sons made are simply not relevant to the issue she addresses.

[113] Finally, we come to the criticism that Mr Perese makes of Bruce Read's evidence in connection with the record his father made of contributions. Mr Perese submits that Bruce Read's evidence was that his father noted down the \$130,000 contribution in the book on or about 19 May 2002, and this cannot be correct as he had not paid that amount by then. Some of the other details also cannot be correct, such as receipts from the sale from his parents' property, as that was received a year later. Accordingly, Mr Perese contends that it would not have been possible for Bruce Read to see what he says he saw on 19 May 2002.

[114] In cross-examination Bruce Read said that the particulars of contributions were written down by Mr Read as follows:

⁷¹ While all parties agree a notebook was kept, the parties differ in the form of the notebook. Ms Almond agrees her father kept a notebook but says that the record of her contributions was kept in a different notebook to contributions of the respondents to the Property.

When we bought the property my father wrote down cost of property 190,000. Underneath that Fred and Ethne paid \$30,000, \$10,000 deposit, \$10,000 loan, \$10,000 after they sold their house with full agreement from the defendants. Then Chris Read \$25,000 from the bach plus \$5,000 to make it up to the 30, that's two 30s. Underneath that \$130,000 contributed by Bruce and the appropriate date.

[115] Although this is one of the passages of evidence relied upon, Bruce Read does not assert that all of the details were entered on or around 19 May 2002. We understand Mr Perese seeks to build his argument by linking this passage to Bruce Read's acceptance of a proposition later put to him that details were entered on 19 May 2002:

Q So you would agree with me that if the sale and purchase agreement was entered into on or about 19 May 2002 that that's about the time that he recorded this agreement that you allege?

A Mhm, yeah.

[116] This single exchange, ambiguous as it is, cannot be read in isolation from that other evidence we refer to. For example, Bruce Read had earlier stated that his father wrote down his \$130,000 contribution when he handed him the cheque, and that date was in July. We see nothing in Mr Perese's argument on this point.

[117] Mr Perese also argues that Bruce Read's evidence on purchasing [R's] share was inconsistent and should have been rejected. That was because in evidence Bruce Read claimed to have paid out [R's] share in the Property. But his lawyer had earlier written to Ms Almond seeking to recover this as a loan. When challenged in cross-examination, Bruce Read maintained that the payment of \$50,000 was always made on the understanding that he was purchasing [R's] share. However he was later advised that framing that payment as a loan was the best way to proceed to recover some of the outlay.

[118] The Judge addressed these issues in her judgment, preferring Bruce Read's oral evidence to that of Ms Almond's version of events — that the \$50,000 was the balance of payment by Bruce Read of investments he was handling for her. We agree with the Judge's assessment of the evidence. Ms Almond accepted she held part of her interest in the Property on constructive trust for her daughters. There was evidence that [R] did want to buy her own home and that a substantial amount of

the \$50,000 was paid to her by Ms Almond. Moreover Chris Read gave evidence that Mr Read and Ms Almond had asked him if he wanted to buy [R's] share for \$50,000, and that Ms Almond later confirmed Bruce had taken over that share. While we accept the solicitor's letter is inconsistent with Bruce Read's account, it is also inconsistent with Ms Almond's case (at least as it was put in the High Court). Bruce Read's explanation as to how a demand for repayment of a loan came to be is plausible. We do not see the letter as undermining Bruce Read's credibility, nor the Judge's findings.

Chris Read's payments towards the mortgage

[119] Mr Perese submits that a critical inquiry the Judge failed to adequately address was why Chris Read paid the mortgage — whether it was, as he said in his brief of evidence, that he only paid the money on the condition that those payments would be considered part of his contribution to the Property, or whether the payments were made because of the moral duty he felt to his parents.

[120] Mr Perese relies upon the following evidence in support of the latter:

- (a) Chris Read said in cross-examination that he only paid the mortgage because he was told by his parents that Ms Almond had a mortgage she could not pay — he volunteered to pay it because if he did not do that, then his parents would have had to pay.
- (b) The mortgage payments commenced on 24 July 2003, almost one year after the Property was purchased.
- (c) Chris Read approved \$1,000 per month for the payment of the principal and interest on the mortgage, more than what was required under the loan agreement at the time.
- (d) The agreement that Chris Read pay the mortgage was between him and his father, and only later “confirmed” with Ms Almond.
- (e) He wanted to help his parents out financially because he was not there to help them out day to day.

[121] Mr Perese submits that the overall tenor of Chris Read's evidence was therefore that he was acting on a moral duty to help his parents out. If that view of the evidence is preferred, that he paid the mortgage and interest to help his parents, then the arrangement Chris Read described does not make sense. Mr Perese argues that these two propositions are irreconcilable — the proposition that he paid the money to help his parents is irreconcilable with the proposition that he paid the money in the expectation of receiving a proportionate share of the Property.

[122] We do not see these propositions as irreconcilable. By paying the money as requested by his father, Chris Read enabled his parents to live on the Property. But he nevertheless paid the money in the expectation that ultimately, when the value of the Property was distributed at some future point in time, he would receive a proportionate share. The Judge accepted his evidence to this effect, preferring it to the evidence of Ms Almond.⁷²

[123] Finally, Mr Perese submits that there was an inconsistency in Chris Read's evidence which undermined its reliability. His evidence, Mr Perese contends, was that the land was purchased with the use of his \$30,000 (being \$25,000 credit and a further \$5,000), \$30,000 from his parents and \$130,000 from Bruce Read. However in reality the purchase of the land was funded by the \$130,000 from Bruce Read and the \$60,000 loan raised by Ms Almond.

[124] Again we see no inconsistency in this evidence. Chris Read's evidence was that it had been agreed that the \$30,000 would be used in the purchase of the Property, and that agreement included Ms Almond. The fact Ms Almond did not use the money for the purchase does not bear upon Chris Read's credibility, which is Mr Perese's fundamental submission.

Other difficulties with this ground of appeal

[125] The fundamental issue for us is, did the Judge err in her factual finding that there was a common intention to equity share in proportion to contribution?

⁷² At [215].

Ms Almond's attack on that finding does not succeed on its own terms. But in any case it faces additional difficulties.

Differing narrative

[126] First, Ms Almond puts her case on a basis which differs to the case presented in the High Court and is, as a consequence, unsupported in critical aspects by the evidence. For example, Ms Almond gave evidence in the High Court that the \$130,000 from Bruce was simply the cashed-up investment he had been managing for her for 30 years. The Judge made a credibility finding against her on that. Now Ms Almond argues that even if it is accepted that payment was Bruce's money, it was paid into the Property on the basis of an agreement struck between Ms Almond and her parents that they would pay most of the purchase price in return for her caring for them. But that is inconsistent with her evidence in the High Court.

[127] The same is true of the \$10,000 deposit, which she claimed her parents gave her as repayment of her loan to them. And also true of the \$30,000 paid by Chris Read for the purchase of the Property and construction of the dwellings. Ms Almond claimed \$25,000 was a gift from Chris in recognition of all she did for him; the Judge rejected that evidence.⁷³ Now Ms Almond claims the payment of \$30,000 (\$25,000 plus later payment of \$5000) was a loan by Chris Read to her parents, used by them on the Property pursuant to caregiving arrangement to which Chris was not a party. But that was not her evidence before the High Court. We do not propose to go through each and every recasting of the case by Ms Almond. These examples, we think, are sufficient to make our point.

Ms Almond's credibility

[128] The other difficulty Mr Perese's submissions do not address is the extent of the adverse credibility findings against Ms Almond. The Judge's findings did not turn upon her assessment of the isolated pieces of evidence put forward by Ms Almond's trial counsel. Rather, they turned upon her overall assessment of the evidence given by Ms Almond and the respondents. Ms Almond built her case upon a narrative that

⁷³ At [187].

she paid the entirety of the purchase price and made all the mortgage payments; that her parents were prepared to build at their own expense on her land and pay rent so that she could be their caregiver; that they were old and frail and needed care; that she had a very dysfunctional relationship with her brother Bruce; and that she would never agree to live on the same land as Bruce, let alone enter into a property sharing arrangement with him.

[129] The Judge rejected each of these strands of Ms Almond's case and on several occasions, found Ms Almond's evidence was not credible. And indeed it was not. For example, she claimed to have invested \$60,000 with Bruce Read in 1974 on the sale of a house when she was in her early twenties. But on her own account she had a very poor relationship with him. And, in 1974 that was an improbably large amount of money for a woman in her early twenties to have available for investment, even accepting that Ms Almond was hard working. Even more improbable is that she would have left that investment untouched as she went through the various hardships she recounts in her evidence. The Judge, with full knowledge of Ms Almond's finances and the circumstances of her case, rejected the notion that Ms Almond had the means to pay the full purchase price and service the mortgage.⁷⁴

[130] The Judge found that Mr and Mrs Read were able to look after themselves at the time of the arrangement and that while being close to their daughter as they aged was part of the rationale of the agreement, they were primarily driven by a desire to support Ms Almond and her children. The Judge's finding as to Mr Read's health had good factual foundation. Not just the evidence of the respondents but also Mr Read's own assessment as reported to Mr Scott.

[131] The Judge also rejected Ms Almond's account of a poor relationship with Bruce, at least prior to issues arising within the family as to Ms Almond's use of Mrs Read's money. Again the Judge had a proper evidential basis for that. The evidence of the respondents was supported by Mr Read's reference in the letter to the Council that one day his son and daughter might live together on the Property to look after each other. There was also the evidence of the extent of money Bruce was

⁷⁴ At [67].

prepared to pay into a property which was to be registered in the name of Ms Almond. If relations were so poor within the family, it is most unlikely Bruce would have been prepared to provide \$130,000 for the purchase of land to be in the name of Ms Almond alone, however that funding was structured. There is also the evidence of the number of years that Bruce Read lived on the Property before Ms Almond took any steps to have him removed from that land.

[132] We are therefore satisfied that the Judge was correct in her assessment of the evidence.

[133] To conclude:

- (a) Ms Almond's appeal is based on a version of events which differs from that pleaded and argued in the High Court, and which is not supported by the evidence she gave in the High Court.
- (b) In her judgment, Thomas J made a number of critical credibility and factual findings. Those findings were linked to both oral evidence and contemporaneous documents. Having reviewed the evidence, including the evidence Mr Perese has invited us to address, we are not satisfied that she erred in those findings. We have reached the same view, on the basis of our own consideration of the evidence.
- (c) We see no error in the Judge's finding that there was an express family arrangement to which Ms Almond was party, that each of the appellant and respondents would have an interest in the Property in proportion to their contributions to it.

[134] In accordance with the principles set out at [62] to [69] above, we agree with the Judge that an institutional constructive trust arises on the facts, and Ms Almond must yield the Property pursuant to the parties express common intention. This ground of appeal therefore fails.

Second ground of appeal: constructive trusts

[135] Mr Perese’s additional ground of appeal, as articulated in his written submissions, only arises if we are satisfied that the Judge erred in finding the common intention the respondents allege. In other words, should we be satisfied that the Judge erred in finding a common intention between the parties that they would receive a proprietary interest in the Property, then it is necessary to go on to consider whether the respondents can nevertheless rely on a constructive trust based on reasonable expectations as a remedy, invoking the principles set out in *Lankow v Rose*.⁷⁵ Mr Perese submits that if the arrangement was, as he characterises it, one for the care for elderly parents, an institutional constructive trust does not do justice between the parties because it makes no allowance for the care already provided.

[136] Given our factual findings, we do not attempt consideration of this alternative argument. In the absence of factual findings as to the exact nature of this alternative “family care arrangement”, such an analysis cannot be sensibly attempted.

[137] We also note that in the notice of appeal, issue is taken with the Judge’s imposition of a constructive trust on the grounds that the respondents’ expectations were not reasonable. In oral submissions Mr Perese seems to accept that argument is contingent upon his persuading us the Judge’s findings of common intention were in error. We are, in any case, satisfied that the money having been contributed on the basis found by the Judge, pursuant to an agreement to share equity in proportion to contributions, it is unnecessary to consider reasonable expectations.⁷⁶

Third ground of appeal: breach of fiduciary duty

[138] Mr Perese submits that the claim against Ms Almond entailed an allegation that she stole from her mother during the course of her role as Mrs Read’s attorney, and it turned on findings of credibility.

⁷⁵ *Lankow v Rose*, above n 17.

⁷⁶ *Gormack v Scott*, above n 17, at 47–48.

[139] The Judge did not believe that so much money could be spent by Ms Almond on Mrs Read's behalf.⁷⁷ But Mr Perese argues that the evidence did not support a very serious finding of breach of fiduciary duty, on account of dishonesty. He further contends that there is evidence proving that Mrs Read paid amounts to Ms Almond going back to 2002 and that the amounts paid did not vary greatly after the power of attorney was granted.

[140] Mr Woods for Mrs Read submitted that there was no finding of dishonesty and that the cause of action turned upon a failure to account.

Analysis

[141] The cause of action pleaded against Ms Almond did, we consider, contain an allegation that Ms Almond used Mrs Read's funds for her own benefit and that she thereby misused the authority conferred upon her by the power of attorney.

[142] The Judge formulated the issue for herself as to whether Ms Almond breached her fiduciary duties of loyalty and not to profit at the expense of Mrs Read.⁷⁸ She found that Ms Almond breached the duties not to profit and to be open and fair.⁷⁹ We accept that this entailed a finding of dishonesty as well as breach of statutory duty because it entailed a finding that Ms Almond was using her mother's money, without authority, for her own purposes.

[143] As Mr Perese submits, the Judge had to have a proper factual foundation for these findings. But we consider that she did.

[144] In reaching the conclusion that there were unauthorised payments, the Judge took into account the following matters:

- (a) Two days after the power of attorney was granted, \$1,000 was transferred from Mrs Read's account to Ms Almond's account, followed by regular payments of \$1,300, \$600 and \$1,000.⁸⁰ In total

⁷⁷ High Court judgment, above n 2, at [274].

⁷⁸ At [268].

⁷⁹ At [273].

⁸⁰ At [271].

\$40,076 went into Ms Almond's account throughout the period of 20 months using internet banking.

- (b) The fact that two days after the power of attorney was granted, such a large amount was transferred from Mrs Read's account to Ms Almond's account followed by other large payments, raises the irresistible inference that Ms Almond was abusing the power of attorney.⁸¹ However the Judge accepted that authorised outgoings in relation to utilities and food needed to be deducted.
- (c) The payments out of the account were for rounded sums, yet Ms Almond maintained they were simply repayments to her of expenses incurred on her mother's account.⁸²
- (d) During the 20-month period of the power of attorney, approximately \$2,000 per month was transferred from Mrs Read's account to Ms Almond's.⁸³ Based on Ms Almond's own notes of the likely expenditures, the Judge was satisfied that a reasonable allowance for utilities and food was \$545, net of the mortgage. This left an unauthorised total payment of \$29,176.

[145] As to the payments prior to the execution of the power of attorney, that does not logically tend to prove that the payments made under the power of attorney were for a proper purpose and were authorised, at least, not without proof that those earlier payments were all reimbursed or payment of legitimate expenses. There was no such proof.

[146] Accordingly, this ground of appeal must also fail.

⁸¹ At [273].

⁸² At [271].

⁸³ At [274].

Costs

[147] The respondents have been successful in this appeal. Ordinarily, we would make a costs order against Ms Almond in favour of the respondents for a standard appeal on a band B basis and usual disbursements. However, Ms Almond is a legally aided person.

[148] Section 45 of the Legal Services Act 2011 relevantly provides:

45 Liability of aided person for costs

- (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
- (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
- (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
 - ...
 - (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
 - (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
- (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.

...

[149] The starting point is therefore that Ms Almond, as a legally-aided person, has general immunity from an award of costs against her unless this Court is satisfied that "exceptional circumstances" justify an order for costs, and she has the means to meet such an order.

[150] The respondents submit that Ms Almond's pursuit of this appeal was so unreasonable that the threshold of exceptional circumstances is met. They say that the grounds raised in Ms Almond's notice of appeal attacked both the credibility and

evidential findings of the Judge in a wide-ranging and comprehensive manner, and that Ms Almond pursued her appeal on a different version of event from those advanced at trial. This conduct, they say, constitutes an unreasonable pursuit of issues on which Ms Almond ultimately fails.⁸⁴ Further to this, Ms Almond refused to engage in settlement negotiations, despite an open offer being received in writing prior to trial.⁸⁵ Together, the respondents submit, these factors justify a finding of “exceptional circumstances” under s 45(2).

[151] Mr Perese opposed the award of costs against his client. He pointed out she is legally-aided. As to the argument she behaved unreasonably in pursuing the appeal, he submitted that the respondents had behaved unreasonably in opposing Ms Almond’s earlier application for an extension of time to appeal. Mr Perese is correct that the respondents opposed the extension of time and Ms Almond had to pursue the issue to the Supreme Court, where she was successful.⁸⁶ However, Ms Almond received costs on that application.⁸⁷ We do not see that as relevant to this issue.

[152] We are satisfied that Ms Almond did unreasonably pursue her appeal. Her arguments on appeal depend upon a case that conflicts with her own evidence given at trial. While there is little evidence before this Court in relation to the offer of settlement, we consider that Ms Almond’s unreasonable pursuit of issues on appeal is sufficient alone to establish “exceptional circumstances” under s 45(2).

[153] But does Ms Almond have means to meet an order of costs? The respondents’ success on appeal means that the High Court order for the sale of the Property remains in force. The respondents submit that any costs award ordered in their favour pursuant to s 45 can be met by Ms Almond’s share of the ultimate sale proceeds of the Property. It seems to us that is right. Accordingly, taking into account the means of the parties and the exceptional circumstances of the case, it is appropriate for Ms Almond to pay the respondents one set of costs for a standard appeal on a band B basis. Disbursements not being sought, we make no order for disbursements.

⁸⁴ Legal Services Act 2011, s 45(3)(d).

⁸⁵ Section 45(3)(e).

⁸⁶ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

⁸⁷ At [45].

Result

[154] The appeal is dismissed.

[155] The appellant must pay the respondents one set of costs for a standard appeal on a band B basis.

Solicitors:

Law & Associates, Auckland for Appellant

Inder Lynch, Papakura for First Respondent

Rice Craig, Auckland for Second and Third Respondents