IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-000899
[2014] NZHC 2018

BETWEEN	ROSEBUD CORPORATE TRUSTEE LIMITED Plaintiff
AND	PAUL NEVILLE BUBLITZ First Defendant
	CHRISTOPHER GIL COOK Second Defendant
	HUNTER GILLS ROAD LIMITED (in liquidation) Third Defendant

Hearing:	28–31 July and 1 August 2014
Appearances:	A Swan for the Plaintiff J K Goodall for the First and Second Defendants S Barter for the Third Defendant
Judgment:	25 August 2014

[RESERVED] JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 25 August 2014 at 4.00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

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Introduction

[1] The plaintiff, Rosebud Corporate Trustee Limited ("Rosebud"), has sued the defendants for sums of money it alleges are owing to it pursuant to an agreement dated 10 May 2012 ("the buyout agreement"). Rosebud asserts that the claim is straightforward and that the obligations of the defendants are clear.

[2] The defendants have denied any liability and they argue that the claim is anything but straightforward.

[3] The first and second defendants ("Mr Bublitz" and "Mr Cook" respectively) plead various affirmative defences, namely:

(a) that Rosebud is trustee of a sham trust ("the Rosebud Trust"), that the trust was void ab initio, that Rosebud has no standing to bring the proceedings, and that it has done so on behalf of an undischarged bankrupt, a Mr Rod Neilson;

(b) that an agreement dated 18 October 2010, (the "Hunter Sterling agreement"), was entered into by Mr Nielsen in his personal capacity, that Rosebud could only acquire an interest in it by taking an assignment, and that because Mr Nielsen was a bankrupt at the time, all of his rights, including such rights as he acquired under the Hunter Sterling agreement, were vested in the Official Assignee under s 102 of the Insolvency Act 2006; and

(c) that an assignment dated 22 October 2010 which Mr Nielsen entered into in favour of Rosebud was ineffective to vest any interest in the Hunter Sterling agreement in Rosebud, and that Rosebud, as a consequence, was unable to perform its obligations under the buyout agreement.

[4] In the alternative, and if the affirmative defences fail, Mr Bublitz and Mr Cook plead that various provisions contained in the buyout agreement only bound the companies that owned land in a development known as "Albany Heights",

and did not bind them personally. They also plead that there has been no loss to Rosebud, and that such guarantee as was given by Mr Bublitz applied only to "payments due". They argue that there were and are no payments due.

[5] The third defendant – Hunter Gills Road Limited (in liquidation) – supports the affirmative defences advanced by Mr Bublitz and Mr Cook. It also advances its own affirmative defence – namely that a guarantee contained in the buyout agreement is not enforceable against it.

[6] I have concluded that:

(a) The Rosebud Trust was a sham trust from the outset;

(b) Mr Nielsen did not enter into the Hunter Sterling agreement as agent or trustee for the Rosebud Trust, but rather in his own right;

(c) Such property as Mr Nielsen had prior to the "Hunter Sterling" agreement, or that he acquired under the agreement, vested in the Official Assignee;

(d) Mr Nielsen could not therefore assign the Hunter Sterling agreement to Rosebud; and

(e) Rosebud has no standing to sue on the buyout agreement.

Given these conclusions, it is inappropriate for me to go on and deal with the very many other matters raised by counsel. I am mindful that the claim made in these proceedings may be taken up by the Official Assignee.

[7] I now set out my reasoning. To understand my conclusions and the reasons for them, it is necessary to first discuss the factual background.

Factual Background

Mr Nielson

[8] These proceedings focus attention on the activities of Mr Nielsen, a sometime property developer. I was told by his wife, Sirene Neilsen, who gave evidence before me, that he has not worked for a number of years. Mr Nielsen was originally based in New Zealand, but he now lives in Las Vegas, Nevada, in the United States of America.

[9] Mr Nielsen was adjudicated bankrupt by Heath J on 23 September 2009,[1] after a judgment was sealed against him in May 2008 for $13,691,041.15. In the course of his judgment, Heath J considered various transactions undertaken by Mr Nielsen. He concluded as follows:

> The way in which Mr Nielsen conducted his business interests suggests that there is good reason, on grounds of commercial morality, for the Official Assignee to inquire into his behaviour. Restrictions on his business activities, triggered by bankruptcy, are desirable. The amount of debt incurred by Mr Nielsen means that there is a public interest in investigating his financial affairs to determine whether post-bankruptcy restrictions are appropriate.

Rosebud and the Rosebud Trust

[10] At all relevant times, Mr Nielsen had two trusted advisors in this country – a Mr Ken Whitney, who is a solicitor and a partner in the law firm Ross and Whitney, and a Mr Robert Foster, a chartered accountant and a partner in BDO, Auckland. Both were in frequent contact with Mr Nielsen at all relevant times.

[11] Mr Whitney acted for Mr Nielsen in the bankruptcy proceedings and he was aware that Mr Nielsen had been adjudicated bankrupt. He was also contacted by the Official Assignee on 16 October 2009 in this regard, and asked for all books and records relating to Mr Nielsen's personal affairs. This request was made pursuant to s 171 of the Insolvency Act. Mr Whitney did not then respond to this request.

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1 *Bridgecorp Ltd (in rec & in liq) v Nielsen* [2010] 1 NZLR 820 (HC) at [63].

[12] Notwithstanding the bankruptcy, on 17 December 2009, Rosebud was incorporated. Mr Nielsen gave instructions for the company to be set up and he chose its name. It was incorporated by Mr Whitney and he and his firm were, at least initially, intertwined with it. The firm's trust management company, Ross & Whitney Trustee Company Limited, held all of the shares in Rosebud, and Mr Whitney and his partner, Mr Ross, were Rosebud's directors.

[13] The following day, on 18 December 2009, Rosebud settled the Rosebud Trust. Again, the legal work was done by Mr Whitney. The Rosebud Trust was a blind trust. The discretionary beneficiaries were either charities or any person or persons appointed by "the protector". The protector was Ross & Whitney Trustee Company Limited. It also had the power to remove any person or class of person from the class of discretionary beneficiaries, to consent to a resettlement of the trust fund, and to appoint and remove the trustee. It had an absolute discretion in the exercise of its powers and it could give consent on such terms and conditions as it saw fit.

[14] By separate deed, also signed on 18 December 2009, Ross & Whitney Trust Company Limited appointed Mr and Mrs Nielsen as discretionary beneficiaries of the Rosebud Trust. There was no evidence called before me suggesting that any charity or any other person has ever been appointed as a discretionary beneficiary. Nor is there any evidence to suggest that either Mr or Mrs Nielsen was removed as a discretionary beneficiary.

[15] On 12 July 2010, the Official Assignee sent an email to Mr Whitney, again requesting that he disclose all information held by him to enable the Official Assignee's office to undertake its investigation into Mr Nielsen's affairs. Mr Whitney again did not reply, and on 19 August 2010, the Official Assignee advised Mr Whitney that if he would not comply voluntarily, a summons would be issued. Mr Whitney then responded immediately, advising that he did not have any documents for Mr Nielsen personally, that most of the companies and trusts that Mr Nielsen was interested in were already in liquidation and that his files had been uplifted by the various liquidators.

[16] On 23 August 2010, the Official Assignee wrote to Mr Whitney thanking him for his response, but going on to ask a number of questions in relation to Mr Nielsen's interests in trusts. Inter alia, the Official Assignee asked what assets were held in trusts and what assets Mr Nielsen had transferred to trusts. The Official Assignee asked about specific named trusts. The Rosebud Trust was not one of the named trusts. Mr Whitney responded that all of the trusts which had been listed by the Official Assignee were defunct and that they had no assets. He recorded as follows:

> Mr Nielsen's mode of operation was to set up a development company owned by a separate trust for each project. He did not inject any funds himself but was able to obtain 100% finance for each project. It was hoped that there would be a surplus which would be the property of the relevant trust. Unfortunately, I don't think any of these projects were profitable so the trusts never accumulated any assets…

[17] Mr Whitney did not disclose the existence of the Rosebud Trust to the Official Assignee, notwithstanding the breadth of the initial request in October 2009, the further request in July 2010 and the more pressing demand on 19 August 2010. Nor did he volunteer that Mr and Mrs Nielsen had been appointed discretionary beneficiaries of that trust.

The Albany Heights Development

[18] Sometime in 2010, Mr Nielsen, Mr Bublitz, Mr Cook, and a Mr Peter Chevin, entered into discussions about collaborating in the real estate sector. They decided to come together as equal partners and to set up an investment house under the name Hunter Sterling and Company. It was intended that the investment house would focus on property development, commodities, funds management, and potentially the retail sector. The idea was for the business to focus initially on property development activities in New Zealand, but then to move into South-East Asia, and ultimately, the United States of America.

[19] At the time of these discussions, Mr Nielsen was a bankrupt. According to Mr Bublitz, the parties discussed Mr Nielsen's bankruptcy, and Mr Nielsen said that he had permission from the Official Assignee to carry on business in New Zealand.

This was not the case,[2] and if Mr Nielsen made that assertion, he was not telling the truth. Also according to Mr Bublitz, Mr Nielsen asserted that he could acquire assets, because he was based overseas, and because his bankruptcy only applied in New Zealand.[3]

[20] The parties prepared a document to summarise their discussions. It was headed up "Hunter Sterling and Company – Investment House". It recorded that each of them, Mr Nielsen, Mr Bublitz, Mr Cook and Mr Chevin, were to be equal partners in Hunter Sterling and Company. It also recorded that each brought with him a certain amount of "baggage". It was noted that Mr Nielsen had debts totalling approximately $4 million; Mr Bublitz – debts of approximately $10 million; Mr Cook – debts of approximately $15.5 million; Mr Chevin – $2 million due by 31 October 2011, and a current debt of $500,000. The document went on to record as follows:

> Agreement was reached in respect of drawings initially at $20,000 per month per partner, climbing to $100,000 per partner.
>
> Basic principle or premise is to ensure that [Mr Bublitz/Mr Cook] remain solvent and it is a business expense to insure (sic) this up to a limit of $1.5 million per annum and if this amount is exceeded then it overdraws the respective parties current account.
>
> Current account or the extent which an account can draw is $1 million per annum and this is to be reviewed regularly by the partners.
>
> In terms of structure moving forward it is proposed that special purpose companies or trusts are established for each location and that a master trust arrangement would exist whereby the appointer of that master trust is a company in a offshore jurisdiction which has four directors and four shareholders with the four directors being [Mr Bublitz, Mr Cook, Mr Chevin and Mr Nielsen] and for their four respective trusts to be the shareholder in the offshore entity. This offshore entity is to be non searchable and would own the local companies or trusts where [Mr Cook] and [Mr Bublitz] can be the directors of. Diagrams to be prepared.

[21] The joint venture partners had been looking for development opportunities in the Auckland area, and in early-to-mid-2010, they identified an area of vacant land at Gills Road in Albany. The area was known as Albany Heights. The land was in three separate lots and it was envisaged that it would be developed in two stages.

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2 And see, *Bridgecorp Ltd (in rec and in liq) v Nielsen* [2013] NZHC 1848 at [54] and [55].

3 The same argument was advanced by Mr Whitney to Mr Bublitz's solicitor, a Mr Foley, in a letter dated 25 July 2012.

Stage 1 was to comprise 2.5 hectares of land which was in one lot. It was intended to develop this land by subdividing it and building 128 terraced houses. Stage 2 was to comprise 4.98 hectares, and at the time, it was in two lots. The idea was to subdivide those lots and build over 300 residential units.

[22] The third defendant – Hunter Gills Road Limited (in liquidation) – was incorporated to undertake the development. It was incorporated on 15 June 2010, and it became the trustee of an entity known as the Gills Road Village Trust. The beneficiaries of that trust were the four joint venture partners.

[23] The initial director of Hunter Gills Road Limited was a Mr Alistair Brown – also a property developer and a close friend to Mr Nielsen. He was appointed at Mr Nielsen's request. According to Mr Nielsen in an email sent on 27 October 2010, Mr Brown was suitable because he was "100% squeaky clean with no google profile or any liquidations or receiverships". Mr Nielsen said that he had used Mr Brown on a number of occasions "to front for various companies".

[24] The land in Gills Road was owned by a company called Sanctuary Albany Limited, and in June 2010, Hunter Gills Road Limited entered into an agreement with Sanctuary Albany Limited to purchase the stage 1 land. Settlement was to be deferred until July 2011.

[25] Pending settlement, Hunter Gills Road Limited sought resource consent in regard to the stage 1 development.

[26] While the resource consent process was underway, future units were marketed for sale off plans which had been prepared. Much of the marketing took place in South-East Asia.[4] There were two different offerings:

(a) Some units were sold off the plans. Agreements in this regard were conventional sale and purchase agreements, conditional on resource consent being obtained. A 10 percent deposit was payable, and it was to be held in trust pending completion of the development.

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[4] According to the "Hunter Sterling" and Company – Investment House" document, staff were to be trained "using the Jordon Belfort principles around selling".

(b) Option agreements were sold. The option agreements were known as "FRRs". They required the payment of a fee in return for an option to enter into a sale and purchase agreement in the future for a specific unit. If the option was ultimately exercised, the option holder then entered into an agreement to purchase the unit at a discount. If the option was not exercised, the option holder had the right to have the initial fee refunded together with a premium. The fee was not required to be held in trust.

[27] The marketing campaign was successful and, according to Mr Bublitz, approximately $12 million was obtained from the sale of the FRR option agreements. Mr Bublitz also told me that the idea was that funds raised through the option agreements would be deployed to advance the Albany Heights development. However, a large part of the funds raised were used to pay commissions, to fund office and administration expenses, and to make cash "advances" to the individual joint venture partners or to persons or entities associated with them. It was only the balance that was used to advance the proposed development.

[28] The FRR option agreements were entered into between prospective purchasers and Hunter Gills Road Limited. It received the option fee. It, in turn, paid the fee over to a company known as Hunter Capital Limited, and it made the advances to the joint venture partners or to persons or entities associated with them. Mr Bublitz was a director of and shareholder in Hunter Capital Limited. Control of the finances rested largely with Mr Chevin.

[29] Advances from Hunter Gills Road Limited to the joint venture partners commenced in mid-2010. The first advance to interests associated with Mr Nielsen was made on 18 October 2010. It was in the sum of $5,000 and it was paid to Mrs Nielsen. Thereafter, advances were made on an intermittent basis, accelerating quickly in early-2011. In total, $510,989 was advanced in cash, initially to Mrs Nielsen, and then into an account held by the Rosebud Trust, over the period 18 October 2010 to 3 June 2012. The monies that went into Rosebud Trust's account were paid out, in large part to Mrs Nielsen, but also to other persons and entities as directed by Mr and Mrs Nielsen. I return to this below.

[30] Mr Bublitz's evidence was that in reality, the funds were called for, and spent, by Mr Nielsen. He stated that Mr Nielsen was constantly requesting draw downs. This was borne out by various emails which were produced. Mr Bublitz also stated that Mr Nielsen used the funds:

(a) to buy a car;

(b) to meet repayments due to ASAP Finance pursuant to a mortgage it held over a residential property owned through one of his trusts at Elam Street in Auckland;

(c) to meet repayments to Guardian Trust in respect of a house in Queenstown which was owned through another of his trusts;

(d) to meet the tax debts for one of his companies – Little Rock Management Company Limited;

(e) to meet costs (including rates and legal fees) associated with one of his private development projects in Fernhill, Queenstown;

(f) to address personal issues he had in the United States;

(g) to repay family members – in this regard, Mr Nielsen advised in an email that he would be paying $5,000–$10,000 a month from "my monthly fee";

(h) to pay legal fees;

(i) to pay off his American Express card debt.

Again, these various assertions are borne out by contemporaneous emails, and it is noted that Mr Bublitz was not cross-examined in relation to these matters.

[31] Mrs Nielsen said that the advances were made into her personal bank account, and that she was the only person who had access to that account. She said

that she withdrew money from her personal account when she needed it, and put it into a household account in the United States. She confirmed that Mr Nielsen did have access to the household account. Although she stated that Mr Nielsen did not use any of the monies paid into the household account to settle his debts or obligations, I do not accept her evidence in this regard. Mrs Nielsen's assertion was inconsistent with contemporaneous documentation where Mr Nielsen made repeated demands for money and consistently referred to it and treated it as "his" money. It was also inconsistent with another answer Mrs Nielsen gave, namely that there was nowhere else that monies used to meet the mortgage payments due on the property in Elam Street could have come from. Mrs Nielsen clearly had an interest in protecting her husband and I formed the clear view that she was very keen to protect her and Mr Nielsen's position insofar as she was able. The evidence suggested that she has become involved in a number of companies/trusts in Mr Nielsen's stead following his bankruptcy. I did not consider her to be a reliable witness. Rather, she was in the thrall of Mr Nielsen.

The Hunter Sterling Agreement

[32] The four joint venture partners decided to document their joint venture, and to this end, they signed the Hunter Sterling agreement. The document is dated 18 October 2010. However, the evidence from Mr Bublitz, and the documentation which he provided, compelled the conclusion that the agreement was backdated. The evidence established that Mr Bublitz instructed his solicitor, a Mr Harkness, to prepare the agreement in March 2011. A draft of the agreement was circulated in June 2011, but it was not finalised until 30 June 2011. The joint venture partners were asked to sign it on 4 July 2011, and Mr Bublitz signed it sometime in July 2011. Mr Nielsen was chased up on 18 July 2011. He signed shortly thereafter. Mr Cook was based in Singapore and he was the last person to sign. Eventually, the document was returned to New Zealand. It was then backdated, probably by Mr Bublitz. The date inserted on the agreement was 18 October 2010. It is noteworthy that this is the same date as the first advance was made by Hunter Capital Limited to Mrs Nielsen from monies raised by the sale of FRR option agreements. Nevertheless, Mr Bublitz said that he could not recall any discussion

about backdating the agreement and he could not tell me why the agreement was backdated, or why the date, 18 October 2010, was chosen.

[33] The Hunter Sterling agreement is between Messrs Bublitz, Chevin, Cook and Nielsen, and it was signed by each of them in their personal capacities. It recorded that the parties would, in the course of achieving their goals, establish other entities – either companies, trusts, or similar. The business of the joint venture was described as follows:

> Business means all business and activities to be undertaken collectively by the Board and/or the entities and/or their agents or representatives for the purposes of achieving the goals and objectives.

The Board meant Mr Bublitz, Mr Cook, Mr Chevin, and Mr Nielsen acting together. The goals and objectives were those detailed in the "Hunter Sterling and Company – Investment House" document which I have referred to above at [21]. This document was annexed as an appendix to the Hunter Sterling agreement.

[34] The parties agreed that they each held 25 percent in the business of the joint venture, and in all entities established for the purpose of conducting and carrying on that business. Clause 2.3 provided as follows:

> The shares of ownership… may be held by a trust or trusts established for or on behalf of each party or a trust or trusts over which such party has control of or can obtain control in respect of such trust or trusts. The parties shall ensure that any such trust or trusts shall execute and complete all necessary documentation whereby the trustees of such trust or trusts shall acknowledge and agree that they are bound by the terms and conditions of this Agreement.

[35] It was recorded that the parties, acting as a Board, were responsible for the overall governance and direction of the business. Relevantly, cl 8 provided as follows:

> 8.1 Subject to the remainder of this clause no party may sell or transfer or agree to sell or transfer (conditionally or otherwise) any legal or beneficial interest in this Agreement, the Business or any Entity held by him ("Interest") unless otherwise agreed by the other parties in writing.
>
> …

> 8.4 Nothing in clause 8.1 will apply to a transfer of an Interest by a party (or by the trustees of a trust created by that party) to the trustees of any trust which is in the opinion of all of the parties hereto exclusively or principally for the benefit of all or any of the selling party, any child or other issue of that party and the spouse of that party.

The Deed of Assignment

[36] On 26 October 2010, Mr Bublitz sent Mr Nielsen an email asking for the name and details of the trust Mr Nielsen was intending to use to hold his interest in the joint venture. Mr Nielsen replied confirming that the Rosebud Trust would be the legal owner of the assets. He cited comments made to him by Mr Whitney:

> This is a blind trust with no named beneficiaries. Subsequently you and [Mrs Nielsen] were appointed beneficiaries so as not to show up on the trust deed.

It is noteworthy that this email was not copied to Mr Whitney. Rather Mr Nielsen seems to have assumed that Mr Whitney and Mr Ross as directors of Rosebud would agree to the company entering into a deed of assignment for the benefit of the Rosebud Trust.

[37] By deed dated 22 October 2010, Mr Nielsen purported to assign the agreement to Rosebud. The deed of assignment was prepared by Mr Whitney. It recorded that Mr Nielsen, as assignor, had entered into the Hunter Sterling agreement and went on to provide that he assigned his right, title and interest in that agreement to Rosebud as assignee. Mr Whitney dated the document.

[38] Again, the evidence compelled the conclusion that this document was backdated:

(a) The deed of assignment pre-dates Mr Nielsen's advice to Mr Bublitz that Rosebud would become the owner of the assets.

(b) The deed of assignment must logically come after the Hunter Sterling agreement and, on the evidence, that that agreement was not signed until July/August 2011.

(c) It was signed on behalf of Rosebud by Mr Foster. Mr Foster did not become a director of Rosebud until 5 November 2010 – some two weeks after the agreement was dated.

(d) A resolution approving the assignment was signed by Mr Foster and dated 10 November 2010. Normally, one would expect that a resolution approving a document would be passed before the document was signed – not some two and a half weeks later. Mr Foster accepted that belated approval to a document already signed was not good practice. His explanation for this was that "accounting firms are not always good at their documentation…".

(e) Mr Foster said that the assignment was dated "around the time" Mr Nielsen signed it. He accepted that he should have changed the date to the date he signed it.

(f) When Mr Whitney was asked whether it was backdated, he accepted that it is possible he did backdate it and said that this "does get done sometimes".

[39] The position is not satisfactory.

Rosebud – Change of Directors/Bank Account/Accounts

[40] On 5 November 2010, Mr Foster consented to act as a director of Rosebud, and he was appointed a director on the same day. There days later, on 8 November 2010, Messrs Whitney and Ross resigned as directors.

[41] Acting on instructions from Mr Nielsen, Mr Foster then opened a bank account for the Rosebud Trust on 24 November 2010. However, until 8 August 2011, none of the regular advances being made by Hunter Capital Limited pursuant to the "Hunter Sterling" agreement, which according to the documentation had then been assigned to Rosebud, went into Rosebud Trust's bank account. Mr Foster was not even aware of any of these payments. Nor was Mr Whitney aware of the

payment which was made to Mrs Nielsen prior to his resignation as a director of Rosebud.

[42] Between 18 October 2010 and 8 August 2011, approximately $332,000 was advanced by Hunter Capital Limited to Mrs Nielsen. Mr Foster accepted that this money had gone into Mrs Nielsen's bank account. She confirmed this, and said that she received the money "as a beneficiary" of the Rosebud Trust.

[43] Mr Foster told me that this "accounting discrepancy" was corrected when financial statements were prepared for the Rosebud Trust. He was wrong. The financial statements for the year ended 31 March 2011, which Mr Foster signed on behalf of Rosebud on 25 September 2011, did not record any payments to the Rosebud Trust. The financial statements for the year ended 31 March 2012 showed that the Rosebud Trust was in receipt of "partnership income", but only in the sum of $128,500. The financial statements for the year ended 31 March 2013 did not show any income being received by the trust. The 2012 and 2013 financial statements were both signed by Mrs Nielsen. They were not dated. She became the sole director of Rosebud on 24 July 2012. In the course of cross-examination, it transpired that these financial statements were produced belatedly, and only when discovery was sought by the defendants.

[44] Mr Foster also told me that the monies coming in from Hunter Capital Limited were a "consulting fee", payable to Mr Nielsen in return for consultancy services which he was providing to the joint venture. This assertion begs two questions – why were the monies paid to Mrs Nielsen and why were they recorded by Hunter Capital Limited as being advances. Mr Foster accepted that there was no consultancy agreement in place. When it was put to him that the payments were being recorded as advances, which could potentially be re-called, he sought to describe the payments going out to Mrs Nielsen as "drawings against other revenue coming in". This failed to acknowledge that the "drawings" going out greatly exceeded the revenue coming in – at least according to the financial statements prepared by Mr Foster's firm. Ultimately, Mr Foster acknowledged that, because the monies were coming out of the Rosebud Trust as from August 2011, they were distributions. He insisted, however, that the monies did not need to be a distribution

from the outset, and that they could be treated as drawing and as an advance. He acknowledged that there were no resolutions passed by Rosebud as trustee in regard to any of the payments made from the trust to Mrs Nielsen or to others.

[45] Again, the position is far from satisfactory. Clearly, there was little or no oversight by Rosebud as trustee.

Progress with the Albany Heights Development

[46] While Mr Nielsen was living in Las Vegas, according to Mr Bublitz, he frequently travelled to New Zealand. As Mr Bublitz put it:

> Although [Mr Nielsen] was based overseas, he was across all the issues and was constantly on the telephone to staff in New Zealand and sending emails to us, or telephoning or texting, in order to give his input. It would not be uncommon to receive 5 to 10 emails a day from [Mr Nielsen]. He took a particular interest in the option agreements and the marketing of those agreements. He saw them as his IP that he introduced to the group.

Mr Bublitz also told me that, at no stage, was anyone other than Mr Nielsen involved in the business operations, and that Messrs Whitney, Ross, Foster and Mrs Nielsen, who were all, at one stage or another, directors of Rosebud, were never involved in any aspect of the business operations.

[47] Hunter Gills Road Limited completed the purchase of the stage 1 land in July 2011. It borrowed money from a second-tier lender, Spinnaker Capital Limited, for this purpose.

[48] Also in July 2011, a contract was entered into in relation to the stage 2 land. The purchasing company was an entity formed for that purpose, Albany Heights Villas Limited. Mr Bublitz was a director of this company. It paid an initial deposit of $500,000 to secure the purchase.

[49] There were delays in obtaining resource consent for the stage 1 development. Consent was initially declined and Hunter Gills Road Limited appealed to the Environment Court. The appeal was settled in May 2012. Hunter Gills Road Limited had to agree to remove a number of the units, and to create a larger central park in the proposed development.

[50] Cashflow was tight and Mr Nielsen was insisting on further substantial advances being paid, ostensibly to the Rosebud Trust, but, as I have noted, until August 2011, direct to Mrs Nielsen.

[51] The project started to run into financial difficulties towards the end of 2011. Progress was slow. There was a falling out between the joint venture partners and Mr Brown. Albany Heights Villas Limited was having difficulty securing funding to complete the purchase of stage 2 from Sanctuary Albany Limited. Initially, it managed to obtain an extension to the settlement date, but to do so it had to pay a further $200,000 by way of additional deposit.

[52] Eventually, Mr Bublitz negotiated a further agreement between Albany Heights Villas Limited and Sanctuary Albany Limited in relation to the stage 2 land. Albany Heights Villas Limited agreed to purchase the stage 2 property for $6.7 million, and to pay a deposit of $410,000. It was also agreed that a further deposit totalling $1 million would be paid in three tranches, commencing with a $500,000 payment on 30 March 2012, and that final settlement would take place on 29 June 2012.

[53] In the event, Albany Heights Villas Limited was unable to pay the additional $500,000 deposit due on 30 March 2012. Mr Bublitz then negotiated with Sanctuary Albany Limited to vary the agreement, so that the tranche payment was reduced to $100,000, with payment deferred to 10 April 2012.

[54] Notwithstanding this arrangement, Albany Heights Villas Limited could not pay the additional $100,000 by 10 April 2012. Sanctuary Albany Limited cancelled the sale and purchase agreement and forfeited the monies paid.

[55] It was against this background that the buyout agreement was concluded.

The Buyout Agreement

[56] Relationships between the joint venture partners were becoming fraught. Mr Nielsen was constantly demanding more money from the sale of the FRR option agreements. Emails exchanged record that the joint venture partners began to

explore a way to resolve their differences from about October 2011. Mr Nielsen first suggested to Mr Bublitz that a buyout should be explored in an email dated 5 October 2011. He recorded that he was hoping to have the other three joint venture partners buy him out. He said, "I will accept the following, which I think is a fair outcome…". Notably, he did not copy this email to Mr Foster as a director of Rosebud, which, on the documents, then owned the asset which Mr Nielsen wanted the other joint venture partners to buy. Mr Foster did say in evidence that the email was copied to him "afterwards". Mr Foster also told me that he was liaising with Mr Nielsen on a daily basis and that he told him to negotiate the "exit strategy" and then "roll it" past him.

[57] Mr Bublitz told me that Mr Nielsen's price expectations were "wildly optimistic" and that, at one stage, Mr Nielsen wanted over $18 million for his share of the joint venture business. Emails suggest that Mr Nielsen was initially looking to obtain $2.5 million for a 10 percent share in the joint venture arrangement, plus various ongoing payments.

[58] The buyout agreement, on which Rosebud has based its claim, is dated 10 May 2012. It is between Mr Bublitz, Rosebud as successor to Mr Nielsen, Mr Nielsen, Hunter Gills Road Limited, Albany Heights Villas Limited and Mr Cook. It records that Messrs Bublitz, Cook and Neilsen and/or entities associated with them or controlled by them, were parties to the Hunter Sterling agreement, and that Rosebud had agreed to sell, and Mr Bublitz had agreed to purchase, Rosebud's interest in that agreement, including all intellectual property rights that Rosebud had to the FRR development funding model in New Zealand.

[59] Relevantly, cl 2 provided as follows:

> 2.1 Rosebud agrees to sell and [Mr Bublitz] agrees to purchase all of Rosebud's right title and interest in the Hunter Sterling Agreement and the business and any entities created to carry out the business for a total consideration comprising the following ("the total consideration"):
>
> (a) the sum of $270,000 in cash ("the cash consideration");
>
> (b) deferred payments payable out of the sale of lots in the development;

(c) the transfer to Rosebud or its nominee of one unencumbered house in Stage 1 and a further unencumbered house in stage 2 of the development pursuant to clauses 3.1 (b) and 3.1(d) of this agreement;

(d) a further payment of $3,000 from each of the FRR payments;

(e) a further payment of $3,000 from each sale effected within 5 years of the date of this agreement of a First Right of Refusal or any comparable right to purchase a property in any land or development anywhere in the world in which [Mr Bublitz or Mr Cook] has any interest whether direct or indirect and whether beneficially held or as consultant, director, officer or in any other capacity either personally or through any entity in which they or their families have any direct or indirect beneficial interest

The balance of the clause went on to detail how the cash consideration of $270,000 was to be paid from FRR option agreement sales. It was envisaged that the total sum would be paid in full within 90 days, but there was provision for deferral if there were insufficient sales. Once the cash consideration had been paid, Rosebud and Mr Nielsen were to transfer their interests to Mr Bublitz.[5]

[60] Clause 3 provided for the deferred payments required by cl 2.1(b)–(e). They were to be paid on the sale of each lot in stages 1 and 2 and the transfer to Rosebud of a completed house in each stage. Clause 3.3 provided as follows:

> Other than sales of lots or houses to individual arms-length cash buyers no part of the land comprising either stage 1 or stage 2 of the development shall be sold unless all payments due to Rosebud under clauses 2.1(a) to 2.1(d) of this agreement have been paid to Rosebud.

[61] Clause 5 required Mr Bublitz, Mr Cook, Albany Heights Villas Limited and Hunter Gills Road Limited to take all steps reasonably necessary to carry out and complete the development, and to use their best endeavours to secure sales of FRR option agreements and/or sites in the development.

[62] Clause 6 provided as follows:

6.1 All payments due to Rosebud or its nominee under this agreement are guaranteed jointly and severally by [Mr Bublitz, Mr Cook,

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[5] It is not clear what Mr Nielsen was going to transfer. Under the deed of assignment, all rights in the "Hunter Sterling" agreement belonged to Rosebud.

Albany Heights Villas Limited and Hunter Gills Road Limited] and as such are a debt due and owing from [Mr Bublitz, Mr Cook, Albany Heights Villas Limited and Hunter Gills Road Limited] to Rosebud. This guarantee shall be a continuing guarantee and no delay, granting of time or other indulgence given by Rosebud to the Guarantors shall release, prejudice or affect the liability of the Guarantors under this guarantee until the debt has been repaid in full.

6.2 Notwithstanding clause 6.1, the guarantee of [Mr Bublitz] in respect of the payments described in clause 3.1 but excluding payments described in clause 2.1(e) will not be enforceable in the following circumstances:

(a) If [Mr Bublitz] is declared bankrupt;

(b) If the company or companies carrying out the development are placed into receivership or liquidation unless:

(i) [Mr Bublitz] or any entity in which [Mr Bublitz] or any associated person has a beneficial interest has taken management fees greater than $20,000 per month; or

(ii) [Mr Bublitz] has paid or distributed to himself or any entity in which he or any associated person has a beneficial interest an amount that is greater than the value of payments made to Rosebud under this agreement or in accordance with the formula in clause 5.2 of this agreement.

[63] Clause 9.1 provided as follows:

This agreement contains all the terms, representations and warranties made between the parties and supersedes all prior discussions and agreements covering the subject matter of this agreement.

[64] The agreement was signed by all of the named parties.

[65] Mr Whitney purported to witness Mr Nielsen's signature. Mr Whitney acknowledged in cross-examination that he was not present when Mr Nielsen signed the document. Mr Nielsen signed it in Las Vegas, and Mr Whitney witnessed Mr Nielsen's signature when the document was later returned to New Zealand. When it was put to Mr Whitney that the words "In the presence of…" required that he be present when Mr Nielsen signed it, Mr Whitney offered the explanation that he had:

> taken it to mean also if you know the person's signature and you've discussed it with them and they acknowledge it then that's fine.

[66] Again, this is far from satisfactory.

[67] The buyout agreement is reflected in Rosebud Trust's financial statements for the year ended 31 March 2013. The sum of $3,224,000 was recorded as being a capital gain arising from the sale of the partnership interest.

Subsequent Developments

[68] As I have noted above at [54], Sanctuary Albany Limited had cancelled the sale and purchase agreement in respect of the stage 2 land.

[69] In June 2012, Mr Bublitz reached yet a further settlement with Sanctuary Albany Limited. A new sale and purchase agreement was entered into between Sanctuary Albany Limited and a new entity – Albany Heights Residential Limited – as purchaser. The purchase price was $5.8 million, which took into account the deposits which had previously been paid and forfeited. Settlement was due to take place on 29 June 2012.

[70] Albany Heights Residential Limited could not raise the funds to complete settlement, and on 28 June 2012, it entered into an agreement with another entity, MH Gill Limited, which was owned by two other unrelated property investors. Albany Heights Residential Limited agreed to on-sell the stage 2 land to MH Gill Limited for $5.8 million, and to use the funds to complete the purchase from Sanctuary Albany Limited. Albany Heights Residential Limited would take title, and then immediately transfer the land to MH Gill Limited. Albany Heights Residential Limited was to have an option to purchase back the property by 1 October 2012 for $7.3 million, the difference between the $5.8 million being paid and the $7.3 million being essentially a financing fee.

[71] This agreement proceeded and the stage 2 land was purchased from Sanctuary Albany Limited. It soon became clear that Albany Heights Residential Limited could not exercise the option, and the agreement with MH Gill Limited was renegotiated. The option agreement was cancelled and replaced with a joint venture

agreement, whereby both companies agreed to work together to subdivide, develop and then sell the stage 2 land.

[72] In September 2012, the boundaries of the stage 2 land were adjusted, and new titles were issued.

[73] On 20 November 2012, the joint venture with MH Gill Limited was terminated. MH Gill Limited agreed to sell one of the titles to Albany Heights Residential Limited for $5.5 million. Albany Heights Residential Limited was unable to settle. The settlement date was extended to 30 December 2012, but again, it was unable to settle. Ultimately, the transaction fell over, and Albany Heights Residential Limited (and the ongoing joint venture partners) lost the stage 2 land. It was ultimately purchased by an entity controlled by another unrelated investor, a Mr Tan.

[74] The stage 1 land was also lost.

[75] By the time the buyout agreement was signed in May 2012, there were no further sales of the FRR option agreements in regard to the stage 1 land. The joint venture partners had stopped offering the product because of delays with the stage 1 development, and because of negative publicity in Asia. As a result, there were major cashflow difficulties. The joint venture partners were under significant pressure from their lender, Spinnaker Capital Limited, and it was threatening a mortgagee's sale.

[76] Mr Nielsen saw this as a major threat to his (and presumably Rosebud's) rights under the buyout agreement, and he threatened to lodge a caveat over the title to the stage 1 land.

[77] Mr Bublitz managed to refinance the Spinnaker Capital mortgage advance. Hunter Gills Road Limited remortgaged the property to an entity known as Crown Finance Limited – another second-tier lender – and it took a first mortgage over the land.

[78] Hunter Gills Road Limited still had to raise finance for the development works. It had obtained resource consent, but the earthworks and construction had not commenced and there were also a number of outstanding creditors. Mr Bublitz instructed an insolvency firm – Waterstone Insolvency – to prepare a compromise proposal for the creditors. He also approached a number of lenders and a consulting company in an endeavour to raise additional finance. The consulting company suggested that the stage 1 land should be sold to a new and clean entity, and that the parties should seek a sponsor who would introduce additional capital into that entity.

[79] Mr Bublitz told me that Mr Nielsen opposed any restructuring, because he considered that he would lose control. Mr Foster, however, was supportive. In a text message sent on 24 July 2012, Mr Foster told Mr Bublitz that Mr Nielsen was "being extremely belligerent", and that "he would not listen to [him] at all". Mr Foster then resigned as a director of Rosebud. Mr Foster's decision to resign was made following discussions between him and Mr Nielsen. Mr Foster also told me that he was conflicted because he was also giving advice to Mr Bublitz and Mr Cook. In any event, Mrs Nielsen became the director of Rosebud in Mr Foster's stead. She confirmed in evidence that she "discussed" her appointment as a director with Mr Nielsen.

[80] In the event, Mr Whitney, acting on Mrs Nielsen's instructions, lodged a caveat over the stage 1 land.

[81] Messrs Bublitz and Cook tried to salvage the development. They found an investor, a Mr Yan, who was prepared to put $3 million into the development. As part of the refinancing agreement, it was agreed that a new partnership would be formed to continue the development of the stage 1 land. This was to be done through a new company – 125 Gills Limited. It was to purchase the development from Hunter Gills Road Limited, as trustee of the Gills Road Village Trust, for $6 million. The Gills Road Village Trust was to continue as one of the partners, and it was to contribute $2 million towards the purchase price as its contribution.

[82] In December 2012, a sale and purchase agreement was concluded between Hunter Gills Road Limited and 125 Gills Limited, for the sale of the stage 1 land for

$6 million. Rosebud's caveat was withdrawn by agreement following a payment into court by Hunter Gills Road Limited, and the sale and purchase was settled.

[83] On 27 March 2013, Hunter Gills Road Limited was placed into voluntary liquidation. Option holders who had purchased FRR option agreements from Hunter Gills Road Limited then started lodging caveats over the land. This put existing and prospective funding lines in jeopardy. One of the secured lenders became nervous, and demanded repayment of its loan, and Mr Yan took steps to protect his position. He required that the $3 million he had contributed to the new partnership should be formalised as a loan with security. Further, he purchased the mortgage secured over the stage 1 land. One of the caveats lodged by an option holder proceeded to hearing.[6] Although it was held that the caveat had to be removed, leave was granted to allow a fresh caveat to be lodged. Mr Yan was not interested in becoming involved in litigation over the property, and on 21 November 2013, he exercised the rights held by him as mortgagee to sell the property. It was sold for $4.3 million. The sale was settled in February 2014. The development then came to an end, as did the new partnership formed to undertake the development.

[84] Deposits paid by those persons who had entered into sale and purchase agreements and had their deposits held in a solicitor's trust account, were, in large part, refunded. However, no repayments have been made to the option holders.

Extension of Mr Nielsen's bankrupt

[85] Mr Nielsen was due to be discharged from bankruptcy on 23 November 2012.[7] The Official Assignee objected to his discharge, and this proceeded to a hearing before Venning J. Mr Nielsen was summoned for public examination, and he attended by video link from Las Vegas.

[86] In the course of his judgment,[8] Venning J noted that one of the business ventures the Official Assignee asserted had been undertaken by Mr Nielsen,

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6 *Berenice v 125 Gills Ltd* [2013] NZHC 2779.
7 Mr Nielsen filed his statement of affairs with the Official Assignee on 23 November 2009.
8 *Bridgecorp Ltd (in rec & in liq) v Nielsen*, above n 2.

notwithstanding his bankruptcy, was the Albany Heights development. Venning J stated as follows:

> On the information before the Court, it appears Mr Nielsen has had a controlling hand in relation to that development through the Rosebud Trust… One of Mr Nielsen's former partners under the original Hunter Sterling agreement says that Mr Nielsen received money under it which he has not disclosed to the Official Assignee. Mr Nielsen denies that and says the monies were received by Rosebud Trust, not him.[9]
>
> …
>
> It seems from the documentation disclosed that Mr Nielsen has had an involvement in its business of property development in New Zealand even if he has used the vehicle of the Rosebud trust to do so.[10]
>
> …
>
> On the information before the Court, I infer that Mr Nielsen was effectively using the Rosebud trust as a vehicle… Mr Nielsen appears to have been the controlling force behind the trust. Through it he was involved in the property development at Albany.[11]

[87] The Judge made an order extending Mr Nielsen's bankruptcy until at least 23 November 2015. He observed as follows:[12]

> On the information before the Court, I am satisfied that the cause of Mr Nielsen's bankruptcy was his commercial irresponsibility. It is apparent from his evidence and attitude during the course of the examination that Mr Nielsen still does not understand the responsibilities involved in operating a company or borrowing money. Further, he has not regarded himself bound to comply with the restraints applying to a bankrupt. His personal circumstances at present are hopeless. If Mr Nielsen was to be discharged from bankruptcy now, I consider it almost inevitable, despite his suggestion otherwise, that he would engage in further commercial property development in New Zealand, with further loss to banks, financial institutions, their investors and other creditors.

Was the Rosebud Trust a Sham?

Trusts/Sham Trusts

[88] In order for a valid trust to be created, three certainties must be satisfied – first, certainty of intention, secondly, certainty of subject matter, and thirdly,

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9 At [48].
10 At [56].
11 At [58].
12 At [62].

certainty of object. The absence of any of these certainties results in a failure to create an express trust.[13]

[89] A court cannot hold that a trust exists unless it is satisfied that there was an intention to create the trust. Where a sham is alleged, the question is whether, in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a trust was manifested.[14]

[90] A trust will be a sham where the intention was to create the appearance of a legitimate trust, but there was no intention to effect the rights and obligations of the relevant parties in the way that a valid trust would.[15] A sham will exist where there is an intention to conceal the true nature of a transaction,[16] and a trust will be held to be a sham where there is an intention to have an express trust in appearance only.[17] There is then an intention to mislead and the trust is void for lack of intention to create the trust.[18] The settlor has to intend, at the inception of the trust, to give third parties, or the court the appearance of creating rights and obligations different from the legal rights and obligations actually intended.[19]

[91] Generally, there has to be a common intention to create a sham (that is by the settlor and by the trustee). In *Official Assignee v Wilson*, Robertson and O'Regan JJ, considered whether the intention has to be that of the settlor alone, or also the intention of the trustee(s). Their Honours expressed the view (obiter) that there is a half-way house between these two possibilities. They drew a distinction between unilateral and bilateral trusts. They considered that unilateral trusts (that is where the

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13 *Official Assignee v Wilson* [2007] NZCA 112, [2008] 3 NZLR 45 at [42].

14 At [43].

15 Andrew Butler (ed) *Equity & Trusts in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [15.2.2]; and see, N Richardson (ed) *Nevill's Law of Trusts, Wills and Administration* (11th ed, LexisNexis, Wellington, 2013) at [5.3.1] and [5.3.2]; Greg Kelly and Chris Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at [10.28]–[10.32].

16 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA) at 802.

17 *Official Assignee v Wilson*, above n 13, at [26]. In this case, the Court of Appeal held that the Official Assignee had no standing to make a claim that the trust there in issue was a sham, because it stood in the shoes of the bankrupt settlor. The Court's observations are therefore obiter. They are nevertheless entitled to significant weight. *Wilson* is the leading New Zealand authority on the issue of sham trusts.

18 At [26].

19 At [125]; and see *Snook v London & West Riding Investments Ltd*, above n 16, at 802.

trust is settled and managed by the same person), do not require a common intention between the settlor and the trustee, but only an intention on the part of the settlor.[20]

[92] In considering what the settlor's (or in the case of a bilateral trust, the settlor's and the trustee's) intention was, the court can look behind the objective appearance of the trust, so as to ascertain the true nature of the transaction.[21] Control by another person does not of itself provide justification for invalidating a trust. However, evidence of control can be relevant to the question of whether the trust is a sham. It can evidence a lack of true intention to form the trust at the outset. A finding of effective control by another may help establish that a trust is a sham if it indicates that it was not intended that the trust took effect according to its terms, and evidence of effective control of the trust post settlement can be used to infer the requisite intention.[22] Contemporary evidence of the actions and words of the relevant parties showing that the trust was not intended to be genuine can be taken into account, as can subsequent conduct where that conduct enables the court to ascertain the objective intention that the trust was to be a sham at the time it was set up.[23] Evidence that a sham was intended from the outset can include looking at why the trust was set up in the first place,[24] the degree of de facto or actual control over the trust,[25] whether trust property has been used for personal benefit,[26] and whether there has been poor administration of the trust.[27]

[93] Where there is a valid trust at the outset, it may be that a trust can still be a partial sham with respect to an item of property later transferred to the trust. The trust could be a sham with respect to that property only, but the remainder of the trust would remain valid.[28]

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20 *Official Assignee v Wilson*, above n 13, at [40]–[41] and [51].
21 At [50] and [108]; and see, *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (CA) at 167–168.
22 *Official Assignee v Wilson*, above n 13, at [71].
23 At [57] and [110].
24 At [123].
25 At [126].
26 At [90].
27 At [92].
28 At [57] and [110]; and see Butler, above n 15, at 405 citing *Re Esteem Settlements* [2003] JLR 188 (Royal Court of Jersey) at 224.

[94] If there is a sham, the trust will be void.[29] Such a finding does not invalidate the trust. Rather, the trust does not exist and it is the trust documentation that is a sham.[30]

[95] I now turn to apply these various principles to the present case.

What was intended at the outset by Rosebud?

[96] As I have noted, Mr Nielsen was adjudicated bankrupt in September 2009. Rosebud was incorporated on 17 December 2009, and the Rosebud Trust was settled by Rosebud on 18 December 2009 – just under three months later. It was a unilateral trust – Rosebud was both the settlor and the trustee.

[97] Rosebud was a corporate entity. Its intentions are those of its directors, Messrs Whitney and Ross. They, in turn, were solicitors carrying out the instructions of their client, Mr Nielsen. There was no evidence suggesting that they formed any independent intention at the time the Rosebud Trust was settled. In reality, it is Mr Nielsen's intentions which are in issue.

[98] The evidence established that Mr Nielsen was a prolific user of trusts. Mr Whitney told me that trusts were used by Mr Nielsen to "ring fence" each development from potential claims. Each development was undertaken by a company, with a trust arrangement "sitting over the top" and Mr Nielsen used a different trust for each development. If a development was successful, then liabilities incurred in undertaking the development would be met, and there would be a net asset sitting in the trust, which would be protected from creditors owed money in relation to other developments. If Mr Nielsen was involved in another development which failed, and if he had given personal guarantees in relation to that development and was bankrupted as a result, creditors and the Official Assignee would not be able to access the profit from any successful development, because it would be sitting in a separate trust. Mr Whitney accepted that this justification for Mr Nielsen establishing a trust fell away once Mr Nielsen was bankrupted. He acknowledged as follows:

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29 *Wilson* at [26] and [48].
30 At [48].

Q So if Mr Nielsen is already bankrupted, then that sort of justification for setting out that type of structure falls away then, doesn't it?

A Yes I guess so.

[99] Mr Whitney also accepted in cross-examination that the Rosebud Trust was set up as a vehicle to allow Mr Nielsen to set up a business, notwithstanding his bankruptcy. Mr Goodall, appearing for Mr Bublitz and Mr Cook, put a number of questions concerning the incorporation of Rosebud and the settlement of the Rosebud Trust to Mr Whitney. The following exchanges took place:

Q. And we see again, don't we, the typical, the hallmark of Mr Nielsen's operation. He sets up a company and then there's a trust structure over the top of it and that trust structure in this case involves your trustee company, correct?

A. Yes, but this one was a little bit different to the others.

Q. Yes, why was that?

A. When – at the time when it was set up there was no particular transaction involved. Mr Nielsen I can recall him saying to me at the time that he'd just been bankrupt and he didn't have any money and he needed to something, find some business opportunity to support his family and it would need to go into a trust because he couldn't, you know, actively involved himself. So the trust was set up in anticipation of a business opportunity being found so that it was ready to go.

Q. And so why does that mean that you have to have the double-layer corporate structure?

A. Well obviously the – whatever the business opportunity was that was found couldn't be done in his name, so it had to be through a trust.

…

Q. You must have had concerns about Mr Nielsen operating that type of structure, given that he had just been bankrupt?

A. No not particularly. It's a common thing for people to do. It may not be morally as white as it could be but it's normal practice.

Q. But he was prevented from running a company, you understood –

A. Yes.

Q. – under the insolvency provisions?

A. Yes, yes.

Q. And wouldn't it be concerning that he could just use a structure to achieve exactly the same thing?

A. No 'cos he wasn't personally in a management role in terms of being a director.

Q. Well –

A. Or trustee.

Q. – not nominally, but your expectation would be that he would bring some activity to the company, right?

A. Yes absolutely.

Q. And then he would run it?

A. Well he would be a consultant and would produce deals for us to consider as trustees…

[100] As I have already noted at [14], the Rosebud Trust was a blind trust, and the appointment of Mr Nielsen and his wife as beneficiaries was made in a separate deed. As is recorded in the email which I have referred to in [36], this was done, "so as not to show up [their names] on the trust deed". Indeed, Mr Whitney accepted in cross-examination that this was done to maintain secrecy as against all parties, including the Official Assignee. The following exchange took place:

Q. Let's have a look at the Deed of Appointment, where you appointed the beneficiaries of the trust… Are you familiar with that document?

A. Yes. Yes.

Q. Presumably you've prepared it?

A. Yes.

Q. And that is a separate deed that appoints Mr and Mrs Nielsen as beneficiaries of the Rosebud Trust, correct?

A. Yes, correct.

Q. Now why was it done as separate deed? Why weren't they just named as beneficiaries of the trust?

A. At the time when the trust was set up, Mr Nielsen didn't want his and his wife's name on it for reasons of commercial sensitivity when he was looking at business opportunities, but decided later to put them in.

Q. So you specifically discussed that with him at the time?

A. Yes I did.

Q. But no file note record of that?

A. No.

Q. Can you be more specific. Are you talking about situations where you might want to go and raise funding from somewhere and the trust deed is required to be produced?

A. Yes, yes, and bearing in mind that anything that was likely to come up would be in America, not here.

Q. But why was – what about [Mrs Nielsen]? Why couldn't she just be a beneficiary?

A. Well that would link it back to the Nielsen family, which for some reason he didn't want to do.

Q. Some reason. You didn't know the reason for that?

A. No, no, just commercial confidentiality is what the – how he put it to me.

Q. And that would be confidentiality against everyone, wouldn't it?

A. Yes.

Q. Including the Official Assignee?

A. Yes I guess so.

[101] All of this suggests that there was no intention at the outset to create a valid trust. Rather, the intention was to set up a structure behind which Mr Nielsen could carry on a business venture, notwithstanding his bankruptcy, and without his name being in the public domain.

Control over the Trust

[102] The trust deed purported to vest absolute control of the Rosebud Trust in Rosebud and in Ross & Whitney Trustee Company Limited as the protector. In reality, there was little or no control of the trust at all by either entity. Rather, the evidence suggested that Mr Nielsen controlled the trust, and that he effectively made all decisions for it. His wishes were carried out, first by Mr Whitney, and then by Mr Foster.

[103] As is clear from the passage I have set out in [100] above, Mr Nielsen decided that he and Mrs Nielsen should not be recorded as beneficiaries in the trust deed. Rather, he wanted a separate deed of appointment – apparently to retain "commercial confidentiality".

[104] Mr Whitney told me that Mr Nielsen was to act as a consultant, and "produce deals" for Rosebud to consider as trustee. He said that Mr Nielsen contacted him by telephone to say that he had found an opportunity that would be suitable for the Rosebud Trust, and that he wanted to put it into the trust. He also said that the opportunity was discussed. Mr Whitney told me that he considered that the opportunity did not require any cash injection from the trust, or create any potential liability that he could see, and that it seemed to him that it might generate some money for the beneficiaries. Mr Whitney told me that "it was decided that [Mr Nielsen] should go ahead and sign the agreement on behalf of the trust".

[105] It became apparent, however, that the reality was rather different. In the course of cross-examination, Mr Whitney conceded that his discussion with Mr Nielsen was "only in conceptual terms". While Mr Whitney said that he knew in broad terms that it was proposed that there would be a group of people undertaking developments around the world using the FRR option agreement concept, he knew little else about the proposed joint venture agreement. He had no understanding of the corporate structure intended to be established as part of the joint venture. He did not understand or ask how the FRR option agreement worked. When it was explained to him how the FRR option agreement worked, he accepted that it was a "fairly high risk" form of investment for the entities involved in the joint venture development. When it was further put to him that he should have fully investigated that risk before allowing the trust to go into the joint venture agreement, he accepted that that was the case. He acknowledged that he made no independent assessment of the risks of the arrangement. When he was asked why he did not ask Mr Nielsen how it was going to operate, he stated that he was told by Mr Nielsen that the money would all be held in a solicitor's trust account, and that he assumed that it would be "pretty safe".

This answer was at odds with an earlier answer which Mr Whitney gave. He had earlier stated that he thought that the money coming in from the sale of the FRR option agreements could be used by the developers to fund the purchase and development of the property. When I asked him about inconsistency, he repeated that he "didn't know the operational details". He said that the whole idea was put to him in "sort of a vague state", and that he "didn't have any detail of it". He said that he did not see a draft of the "Hunter Sterling" agreement, that Mr Nielsen went ahead and negotiated the deal, and that it was only sometime later that he received the "Hunter Sterling" agreement. It had already been dated 18 October 2010.

[106] At another stage in his evidence, Mr Whitney said that Mr Nielsen told him that he was entering into the "Hunter Sterling" agreement, and that it related to joint venture property deals where essentially he would get "a cut out of it". This is consistent with a letter Mr Whitney sent to the Official Assignee dated 10 May 2013, where he stated as follows:

> We set up the Rosebud Trust with a corporate trustee called Rosebud Trustee Limited of which our partners were the initial directors. *We were subsequently advised by Mr Nielsen verbally that this entity was to hold an interest in the "Hunter Sterling" agreement which he had entered into on behalf of the trust.* As it appeared that commercial activity was to be undertaken by the Rosebud Trust we advised Mr Nielsen that we did not wish to be directors of the trustee company if this was the case. We then resigned and Mr Robert Foster of BDO Accountants was appointed in our stead.
>
> *At the same time* we were instructed by Mr Nielsen by phone to prepare a deed of assignment of *his interest* in the "Hunter Sterling" agreement to the Rosebud Trust which we did and which was subsequently signed by the various parties without any further involvement from us.
>
> (emphasis added)

[107] As can be seen, there are inconsistencies in Mr Whitney's evidence. Nevertheless, all of his evidence points strongly to the pivotal role taken by Mr Nielsen in relation to the "Hunter Sterling" agreement.

[108] I also note that Mr Whitney did not suggest that he consulted with his fellow director in Rosebud – Mr Ross. Nor did Mr Whitney prepare or pass any resolutions approving entry into the "Hunter Sterling" agreement by the Rosebud Trust.

[109] The "Hunter Sterling" agreement which Mr Nielsen signed and was a party to recorded that his 25 percent ownership of the business of the joint venture could be held in a trust or trust established by him, over which he had control, or which he could obtain control of. It required him to ensure that the trust executed and completed all necessary documentation whereby the trustees of the trust acknowledged that they were bound by the terms and conditions of the agreement.[31] The evidence established that Mr Nielsen did this. He instructed Mr Whitney to prepare the deed of assignment. Mr Whitney did so, and the document was signed by Rosebud. There is nothing to suggest that there was any proper or independent inquiry into whether or not it was appropriate for Rosebud to enter into the deed of assignment, and thereby procure an interest in the "Hunter Sterling" agreement. There was no resolution passed.

[110] Mr Whitney and Mr Ross were replaced as directors of Rosebud by Mr Foster at Mr Nielsen's request. This was confirmed in an email dated 5 November 2010. While Whitney & Ross Trustee Company Limited remained as the shareholder of Rosebud, it seems that it was Mr Nielsen who was effectively determining who Rosebud's directors should be.

[111] Similarly, there was no proper inquiry into the advances being received from Hunter Capital Limited as from 18 October 2010, despite the risks that would arise if the advances were shareholder loans. For a long time, the trustee, and both Messrs Whitney and Ross and then Mr Foster, were unaware that payments were being made which should properly have gone to the Rosebud Trust.

[112] Further, there was no contemporaneous evidence of an independent decision being made in relation to Rosebud's entry into the buyout agreement. Mr Foster, who was the director of Rosebud at the time, was not copied in on much of the relevant correspondence. Mr Whitney, who was acting as Rosebud's solicitor in the process, accepted in cross-examination that it was Mr Nielsen who was giving him instructions in relation to this issue. The following exchange took place:

> Q. Sure, [Mr Foster] may well have been in the loop, but in terms of your experience –

[31] See cl 2.3 noted in [35] above.

A. Yes.

Q. – the person who was instructing you saying do this, change that, reword this, hurry up with that, that was Mr Nielsen, wasn't it?

A. Yes.

[113] It is noteworthy that neither Mr Whitney nor Mr Foster was unable to provide a single example of a situation where they refused a request or direction from Mr Nielsen, other than, in Mr Foster's case, in relation to the lodging of the caveat over the stage 1 land. When Mr Foster eventually disagreed with Mr Nielsen over this issue, he resigned from the trust, but only after first discussing his resignation with Mr Nielsen. Although Mr Foster referred in evidence to a conflict which confronted him, contemporaneous text messages show that Mr Foster resigned as a director, primarily because that was Mr Nielsen's wish. Mr Whitney, in cross-examination, reluctantly accepted that Mrs Nielsen was chosen to replace Mr Foster, because that was what Mr Nielsen wanted.

Q. Now Mr Foster was removed, or he resigned that day, didn't he, as a director of Rosebud?

A. Yes.

Q. And he was replaced with [Mrs] Nielsen?

A. Yes. Yes.

Q. And that was at Mr Nielsen's request, wasn't it?

A. I believe so. Actually no, it was because Mr Foster felt he had a conflict of interest, because he had acted for some of the other parties. I think that was the reason.

Q. Sure. But the decision to put in [Mrs Nielsen], that was Mr Nielsen's wasn't it?

A. Ah, I couldn't comment on where that came from.

Q. So at the time that that change happened your trustee company is the sole shareholder of Rosebud, correct?

A. Ah, yes.

Q. And as a result it has the power to appoint and remove directors?

A. Yes. Yes.

Q. So ordinarily in those circumstances you would expect your trustee company to be passing a resolution in making a decision in relation to the directorship?

A. Yes.

Q. And as part of that you would have to choose the person that was going to replace Mr Foster?

A. Yes.

Q. And the reality was in this case it was Sirene Nielsen, solely because that's who Mr Nielsen wanted to put in?

A. Ah, yes, she was the only available person within, who was available to do the job.

Q. What job was that?

A. As a director of the trustee.

Q. And what was the job going to be?

A. Well to run the trustee company.

Q. But more specifically?

A. Well just to do any administration required.

Q. But what about in relation to the caveat?

A. Well and to give instructions on that too.

[114] Mrs Nielsen became a director of Rosebud as from 24 July 2012. However, she was clearly not treated by anyone as a proper director or trustee. She had little or no knowledge of the accounts she signed for the Rosebud Trust. She was not consulted over serious queries raised in 2013 by the Official Assignee in relation to the Rosebud Trust.

[115] The lodging of the caveat over the stage 1 land is a clear example of Mr Nielsen exerting control over Rosebud and therefore the trust. Mr Nielsen wanted to lodge the caveat, to protect such rights as he thought he (and perhaps Rosebud) had pursuant to the buyout agreement.

[116] Mr Nielsen's actual and effective control over the trust is another factor indicating that it was not intended at the outset that the Rosebud Trust should take

effect according to its terms. It reinforces the view that there was never any intention to create a trust in anything other than appearance.

Lack of Proper Administration of the Rosebud Trust

[117] The trust was virtually ignored at the outset. While it registered for tax purposes with the IRD in late November 2010, it had no bank account. When it did open a bank account, it went into debit because nothing was paid into it, not even the sum of $10 which was, according to the trust deed, the sum initially settled on the trust by Rosebud. Bank fees slowly accrued until the situation was sorted out by Mr Foster. He paid $100 into the bank account from his firm on 8 March 2011.

[118] Until 8 August 2011, payments made by Hunter Capital Limited were paid direct to Mrs Nielsen, and not via the trust, notwithstanding that those payments were generated by a business venture the trust was supposed to own.

[119] There is a more or less complete absence of any resolutions passed by the trustee on any of the key issues. There were few records detailing the administration of the trust. There were no file notes kept by Mr Whitney. Mr Foster asserted that he did have notes, but they had not been discovered and they were not produced.

[120] The absence of proper financial accounts is also significant. Mr Foster had to accept that the financial statements for the year ended 31 March 2011 were inaccurate. Clearly, they were prepared and signed in ignorance of the true position. No contemporaneous financial statements were prepared for the financial years 2012 and 2013. When discovery was ordered, accounts were belatedly prepared. They were signed, but not dated. This of itself is suspicious. As I have already noted, it became apparent in the course of cross-examination, that Mrs Nielsen had little or no knowledge of the contents of the financial statements she signed. Moreover, they were wrong because they did not accurately record the advances that had been made by Hunter Capital Limited.

[121] There are other matters of concern. In particular, I note the backdating of the "Hunter Sterling" agreement. Although there is no evidence linking the backdating

to Mr Nielsen, the document has been backdated to 18 October 2010. That is the same date as the first advance was made by Hunter Capital Limited to Mrs Nielsen, supposedly as a beneficiary of Rosebud. The deed of assignment to the trust has also been backdated. Payments only started to be made to the Rosebud Trust's account at or about the time I have found the "Hunter Sterling" agreement was actually signed. It seems highly likely that the "Hunter Sterling" agreement was backdated to 18 October 2010 to try and capture the payments which had already been made direct to Mrs Nielsen, and to obscure the reality of the situation, despite the façade of the Rosebud Trust.

Use of Trust for Personal Benefit

[122] The evidence strongly suggests that both Mr and Mrs Nielsen used the trust's bank account, and trust assets for their personal benefit.

[123] Mrs Nielsen paid $1,703,767.83 into the trust's bank account on 9 August 2011. Mr Foster and Mrs Nielsen both asserted that this was her personal money, from the sale of a property in Queenstown which she owned. It transpired that the money came from the sale of a property owned by an entity known as Lake View Trust Limited. It owned a house in Edinburgh Drive on Queenstown Hill. While Mrs Nielsen was, at the time, the sole director and shareholder of the company, the house had been built by her and Mr Nielsen. Mr Nielsen and his brother were initially the shareholders in Lake View Trust Limited. When Mr Nielsen was adjudicated bankrupt, the shares were transferred to Mrs Nielsen. She did not pay any money for the transfer of the shares, and she accepted that the shares were transferred to her in a "paper exercise". In any event, the monies paid into Rosebud Trust's bank account were then transferred to the trust's saving account. On 26 August 2011, the sum of $1,026,000 was transferred from the savings account back into the cheque account. On 29 August 2011, $1,035,000 was transferred from the cheque account back into the savings account. On 30 August 2011, $1,026,497.31 was transferred from the savings account back into the cheque account, and on the same day, the same sum was transferred to Ross & Whitney. Mrs Nielsen told me that she used the Rosebud Trust's account because it was a high

interest earning account, and "that was the way it was done". She also told me that she discussed this with Mr Nielsen at the time.

[124] Mr Foster was asked about Mrs Nielsen's use of Rosebud Trust's account in this manner. The following exchange took place:

> Q. …the accounts ...record the monies taken out by Mrs Nielsen as being drawings.
>
> A. Correct.
>
> Q. Can you explain that?
>
> A. Well she's advanced funds into the trust and then she's taken –
>
> Q. That's the 1.7 million?
>
> A. The 1 – well it is 1.8 at that particular point in time.
>
> Q. This is the money that came in from somebody Williams in relation to the –
>
> A. Yes –
>
> Q. – sale of a property in Queenstown?
>
> A. – that's a solicitor trust account, Rick Williams, yes. And then she's taken those funds back out. So she's – the large portion of that is really repayment of funds that she had advanced to the trust. So she put in 1.7 and taken 1.7 out.
>
> Q. But this is a trust, isn't it?
>
> A. That's correct.
>
> Q. The monies are settled on the trust by her –
>
> A. No she loaned those funds to the trust. They weren't settled on the trust. They hadn't been gifted. If she had of gifted those funds to the trust they would form part of trust capital but she hadn't done that, therefore there is a liability that a trust has to her for those funds.

[125] Contemporaneous emails make it clear that Mr Nielsen treated the incoming payments as his. For example, in an email dated 26 October 2010, which Mr Nielsen sent to Mr Chevin, and copied to Mr Bublitz and Mr Cook, he referred to a $20,000 payment to be made to "each of us". The email also records that Mr Nielsen clearly thought that payments should be controlled by him and the other directors. He said that his understanding was that:

> We have agreed the company will pay out only personal issues that have either an immediate and real effect on the company or relates to a potential bankruptcy.

When further payments were proposed by Mr Chevin, Mr Nielsen sent back an email reply recording that he agreed with the payments proposed. He did not consult the trustee. Mr Nielsen requested the advances received from FRR option agreement sales for his personal purposes. He sent an email to Mr Chevin in this regard on 14 January 2011, setting out various "items" that needed to go "into the budget". The items listed Mr Nielsen's personal liabilities, including legal fees and rates over a property in Fernhill, Queenstown, mortgage payments over a residential property in Elam Street, Auckland owned by a trust associated with Mr Nielsen, a car, a winery and monies owing to Guardian Trust. On 13 February 2011, Mr Nielsen emailed Mr Chevin, saying that he had found a car – a Range Rover – and asking him to advance $20,000 to enable the purchase to be completed. In an email on 5 March 2011, he mentioned pressure he was under from his close family. He said that his "only request for funds are when it gets to [a] point where it is critical". He then went on to address payments that he had to make to Guardian Finance. In another email sent on 5 March 2011, he asked whether he was the only partner to have to ask for help with a personal issue. In an email dated 3 April 2011, he said that he had agreed to start paying out some of Mrs Nielsen's family $5,000–$10,000 per month from "my monthly fee". There are a host of other emails, all much to the same end.

[126] The payments made by Hunter Capital Limited, which were generated by the business venture which had purportedly been assigned to Rosebud on behalf of the Rosebud Trust, were paid, until 8 August 2011, direct to Mrs Nielsen, and not via the trust's bank account. As I have already noted, neither Mr Whitney nor Mr Foster were aware of this. Mr Foster sought to suggest that neither Mr nor Mrs Nielsen had access to Rosebud Trust's bank account. However, when he was asked how it worked, he said as follows:

> A. They've discussed with me what they were looking to make payments for and then talked to me about it and then I would make – instigate the payments.
>
> Q. So "they", being both Mr Nielsen –

A. Yes.

Q. – and Sirene?

A. Correct.

[127] Most payments made out of the account were made to Mrs Nielsen's account. However, other payments were made direct to other persons or entities as instructed by Mr Nielsen. For example:

(a) On 4 October 2011, a payment was made out of Rosebud Trust's cheque account of $20,000 to Mutual Finance in relation to a property at 7 Elam Street. This was a residential home owned by the Elam Street Trust. Mr and Mrs Nielsen had lived in the Elam Street house, and they still maintained it as a residential dwelling.

(b) Rates on a property in Slope Hill, Queenstown, were paid directly out of the trust's bank account in the sum of $1,547.97 on 27 October 2011.

(c) On 2 November 2011, $10,000 was paid directly out of the trust's bank account for Rugby World Cup tickets for a M Spring. This was put to Mr Foster in cross-examination:

Q. It's got a reference here to R W C tickets –

A. Yeah.

Q. – Rubgy World Cup?

A. Yes.

Q. So what's the deal? He's shouting him a ticket?

A. Well it's whether he's shouting him a ticket or paying him the cash, it means the same thing.

Q. So this is another example of Mr Nielsen's personal debts being paid?

A. But I was aware of that situation.

Q. No, is that a yes?

A. Yes that's correct.

(d) On 14 November 2011, a payment was made direct to ASAP Finance. It had a mortgage over the Elam Street property.

(e) On 2 December 2011, $21,919.99 was paid out of the cheque account to Avanti Finance. This related to the purchase of a Range Rover. The Range Rover did not become an asset of the trust, and other contemporaneous documentation showed that, effectively, it was being purchased by Mr Nielsen, albeit that he was using Mrs Nielsen's name.

(f) There was a further payment to ASAP Finance of $56,904 on 7 December 2011.

(g) There were payments directly out of the account to a winery, to R Tainui, who was Mrs Nielsen's mother, and to Mr Swan, who was acting for Rosebud.

[128] It is very clear that both Mr and Mrs Nielsen were using the trust's bank account for their own purposes, and to meet their own day-to-day expenses. They were treating the trust's bank account as their own personal cheque account.

Conclusion

[129] Looking at all of these various indicia in the round, in my judgment, the Rosebud Trust was a sham trust from the outset. It was never intended to effect the rights and obligations of the parties in the way that a valid trust would. The intention from the outset was to mislead, to conceal Mr Nielsen's identity and to enable him to carry on business in this country, notwithstanding his bankruptcy. It follows that the trust was void ab initio.

[130] Where legal title to property has been transferred to a trustee of a sham trust, ownership of the property is corrected by way of a resulting or constructive trust. The property is not regarded as being owned by the trustee.[32]

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[32] Butler, above n 15, at [15.5].

Did Mr Nielsen Enter into the "Hunter Sterling" Agreement as Agent or Trustee for Rosebud or the Rosebud Trust?

[131] I have found that the Rosebud Trust was a sham trust, and void from the outset. Nevertheless, Rosebud remained a legal entity. Did Mr Nielsen enter into the "Hunter Sterling" agreement on its behalf?

[132] It is clear from the "Hunter Sterling" agreement itself that it was personal to Mr Nielsen. I note the following:

(a) The parties recorded in the agreement are the four individuals – Messrs Bublitz, Cook, Chevin and Nielsen. The agreement does not record that they were entering into the agreement in anything other than their personal capacities.

(b) It was clearly important that the individual members entered into the agreement in their personal capacities, because the agreement did not just establish the parties' ownership interests, but also regulated their future business conduct and relationships. I refer to cl 3 which defined the objectives, cl 4 which established the broad structure, cl 5 which established the board's procedures, cl 6 which provided for mediation in the event of deadlock, cl 8 which conferred pre-emptive rights, cl 10 which dealt with pre-emptive budgets and business plans, and cl 19 which dealt with the enforcement of standards of behaviour. These various operational provisions could only work if each of the named individual parties was bound by the agreement.

(c) Clause 2.1 provided that the ownership interest was to be "held" by the individuals. In Mr Nielsen's case, cl 2.1 provided for "25% of such ownership by RN". Clause 2.3 envisaged that a party's interest might be transferred to a trust, but that it would then be necessary for the trustee(s) to execute documents agreeing to be bound by the agreement. The assumption underlying cl 2.3 is that any trustees are not parties, and that they will not be bound until they execute a document to that effect.

(d) Clause 8.4 acknowledged that the transfer to the parties' trusts was an exception to the pre-emptive rights. If the parties had been entering into the agreement as trustees on behalf of their trusts, there would be no need to refer to any such transfer.

(e) Clause 22.1 related to the giving of notices. It recorded the parties' personal contact details, and not those of their trustees.

(f) The agreement was signed personally by the individual parties. None of them purported to sign it in any other capacity. The Rosebud Trust had been settled at that stage. Rosebud could have signed the agreement itself if it was bona fide intended that it be the contracting party.

[133] Mr Whitney accepted in cross-examination that the agreement was personal to Mr Nielsen. The following exchange took place:

> Q. So isn't what the [Hunter Sterling] agreement is contemplating is that parties as individuals will enter into this agreement as part of their individual capacities with the ability to transfer an ownership interest subsequently to a trust?
>
> A. Yes.
>
> …
>
> Q. There's no – he's not actually seeking to bind the trust in anything at that point –
>
> A. No.
>
> …
>
> Q. And it could be assignment, the fact of the assignment contemplates there being rights vested in Mr Nielsen which are then transferred to the trust –
>
> A. Yes.
>
> Q. – correct.
>
> A. Yes.

[134] I have accepted Mr Bublitz's evidence that the "Hunter Sterling" agreement was signed in July/August 2011. By that stage, the joint venture had been operating for some time, and Mrs Nielsen had been receiving funds generated by the joint venture direct from Hunter Capital Limited into her personal bank account. This confirms that the individual parties were operating the joint venture for their personal benefit – at least at the outset and until they transferred their interests to trusts.

[135] Although Mr Nielsen, in correspondence with the Official Assignee, and Mr Whitney, in his evidence, has asserted that Mr Nielsen entered into the agreement as "trustee" for Rosebud, I do not accept that evidence. There is no contemporaneous record of any instruction, nor any resolution by Rosebud appointing Mr Nielsen as its "trustee". There is nothing to suggest that Mr Whitney gave authority to Mr Nielsen to enter into the specific "Hunter Sterling" agreement. Any discussions were, at best, vague and conceptual only. Mr Whitney did not see the agreement prior to it being signed. Further, the agreement was backdated from July/August 2011 to 18 October 2010. Mr Whitney was incapable of giving approval on behalf of Rosebud to the specific agreement, because he was not a director of the trustee in July/August 2011.

[136] In my judgment, the "Hunter Sterling" agreement was entered into by Mr Nielsen personally.

Did such rights as Mr Nielsen had, or that he acquired in the "Hunter Sterling" agreement, vest in the Official Assignee?

[137] Mr Nielsen has asserted that he was the mastermind behind the FRR option agreements. He has claimed the intellectual property in the agreements, and was adamant that he had introduced it to the joint venture.

[138] In an email dated 5 September 2011, sent to Mr Chevin, Mr Bublitz and Mr Cook, Mr Nielsen said that the FRR business model was based on an option agreement document, and that the original option agreement document was provided to the joint venture partners by him. He asserted that the document had been used for five years on the international property market prior to its use in regard to the

Albany Heights development, and that the current success of the "Hunter Sterling" partnership and the increase in its cashflow was a direct result of the FRR option agreement. He stated:

> The IP behind this option agreement was created, designed, and put into the marketplace by entities solely connected with myself, based in the UK and the US. I still retain control of these entities. These entities spent both a considerable amount of time and UK pounds on legal fees creating this document. No other person within this partnership has ever seen or been involved in the business model based on this option agreement. The option agreement is one of only a handful of financial instruments ever designed to allow the promoter to take money off the general public in the UK without a registered prospectus. The UK is widely known to be one of the hardest jurisdictions in the world for financial regulation. I take enormous pride in the fact I created this as many top law firms in the UK said it could not be done. I allowed this IP to be used as the base platform for the Hunter Sterling business model… Put bluntly, our business is based solely on a business model which I created and have subsequently brought to the table, for all of our benefit… The business has expanded on a rapid basis, the platform for this growth is the option agreement…
>
> This is the value and benefit I delivered at the outset of our partnership to ensure I had a seat at the table. This was and continues to be for the benefit of all the partners to ensure the company could grow in accordance with our business plans… It is widely acknowledged by my external network, who are aware of our operations, that this is my original business model and one that I have brought to this partnership.
>
> The sole creator of this option agreement, and the legal owner of its IP, and the single person responsible for its introduction and subsequent use throughout the world and now by this partnership has been myself.

[139] Mr Bublitz accepted in evidence that Mr Nielsen had introduced the FRR model to the partnership.

[140] Any intellectual property rights as Mr Nielsen had in the FRR model vested in the Official Assignee. Under the Insolvency Act, on adjudication, all property, whether in or outside New Zealand, belonging to Mr Nielsen or vested in him, vested in the Official Assignee, without the Assignee having to intervene or take any other step in relation to that property, and any rights of Mr Nielsen in the property were extinguished.[33]

[141] The word "property" is widely defined in the Act. It means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and

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[33] Section 101.

includes rights, interests and claims of every kind in relation to property however they arise. It includes choses in action, and every valuable thing. For example, it was held in *Re Keane*,[34] that property encompasses "knowhow" held by a bankrupt, for example, secret formulae and the like. The definition extends to intellectual property rights held by a bankrupt adjudication.

[142] Such powers as Mr Nielsen could have exercised in, over, or in respect of, the intellectual property rights for his own benefit, vested in the Official Assignee. The vesting was instant and absolute. No notice or other action was required to perfect the Official Assignee's title.[35]

[143] Further, any rights or income that Mr Nielsen acquired out of the use by the joint venture partners of his intellectual property, and any other rights he acquired when he entered into the "Hunter Sterling" agreement, vested in the Official Assignee.[36] Mr Nielsen was required to disclose to the Official Assignee the existence of such rights as he acquired under the "Hunter Sterling" agreement, because those rights were acquired while he was still a bankrupt.[37] It follows that Mr Nielsen could not assign rights he acquired under the "Hunter Sterling" agreement to Rosebud as trustee of the Rosebud Trust.

Does Rosebud have standing to sue on the buyout agreement?

[144] Rosebud continues to exist as a company. However, it is not a trustee of the Rosebud Trust, because the Rosebud Trust is a sham, which was void ab initio. Rosebud did not acquire any rights under the deed of assignment, because Mr Nielsen entered into the "Hunter Sterling" agreement on his own behalf, and such assets as he had prior to entering into the agreement, and which he acquired pursuant to the agreement, vested in the Official Assignee. Mr Nielsen had nothing to assign. The consequence is that Rosebud has no standing to sue on the buyout agreement. Any rights under the buyout agreement vest in the Official Assignee,

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34 *Re Keane* [1922] 2 Ch 475.

35 *Re Ingram (a bankrupt)*; *Official Assignee v Public Trustee* [1933] NZLR 219; *Smith v Horlor* [1930] NZLR 537.

36 Insolvency Act 2006, s 102.

37 Section 139; and see s 433.

and Rosebud has no standing to seek to enforce it.[38] These proceedings brought by Rosebud must fail.

Costs

[145] The defendants are entitled to their reasonable costs and disbursements. It may be that there is no point in the defendants pursuing a claim for costs, but in the event they decide to do so, I direct as follows:

(a) Any memoranda in relation to costs on behalf of the defendants are to be filed and served within 10 working days of the date of release of this judgment.

(b) Any memorandum in reply is to be filed and served within a further 10 working days.

(c) Memoranda are not to exceed 10 pages in length.

[146] I will then deal with the question of costs on the papers, unless I require the assistance of counsel.

Further orders

[147] The payment made into Court by the third defendant, Hunter Gills Road Limited (in liquidation), in relation to the caveat filed by Rosebud, should now be released. However, it is appropriate to first give the Official Assignee time to consider this judgment and to take any steps to prevent the monies being paid out to the liquidator of Hunter Gills Road Limited, that are considered to be appropriate. Accordingly, I direct as follows:

(a) The Registrar is to forthwith forward a copy of this judgment to the Official Assignee.

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[38] *De Alwis v Luvit Foods International* HC Auckland CIV 2002-404-1944, 24 March 2010; *Head v Provincial Finance Ltd* HC Christchurch CIV 2005-409-2166, 21 November 2006.

(b) The Registrar is to release to the liquidator of Hunter Gills Road Limited the monies paid into Court, together with accrued interest, 10 working days after release of this judgment, unless the Official Assignee shall, prior to that date, have made application to restrain any payment being made, and either such application has been granted by the Court, or payment out has been stayed until such time as the application can be considered.

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Wylie J