IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA147/2021
[2022] NZCA 218

BETWEEN	GREEN & MCCAHILL HOLDINGS LIMITED Appellant
AND	ARA WEITI DEVELOPMENT LIMITED First Respondent
	ARA WEITI BAY DEVELOPMENT LIMITED Second Respondent

Hearing:	20 October 2021 (further submissions received 27 January, 8 and 25 February, 5 March, 6 and 7 April 2022)
Court:	Kós P, Cooper and Brown JJ
Counsel:	J W A Johnson, K C Francis and W L Porter for Appellant D J Chisholm QC, M H L Morrison and L R Green for Respondents
Judgment:	1 June 2022 at 9 am

JUDGMENT OF THE COURT

A The appellant's application for leave to adduce further evidence is granted.

B The appeal is allowed.

C The re-imposition of caveats and the conditions therefor are remitted to the High Court.

D Costs are reserved.

REASONS OF THE COURT

(Given by Kós P)

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[1] The appellant, a participant in a complex property development, contributes the land, which is then mortgaged to a third-party lender. The development fails. The lender sells the land by mortgagee sale to the respondents, who are associates of the other participant in the development. The question in this appeal is whether the appellant may

now sustain caveats asserting a proprietary interest in its former land, based upon an alleged constructive trust.

Background

[2] The background is set out in some detail in the judgment appealed.[1] The essential facts are uncontested, although the inferences to be drawn from them are. We need only provide a summary at this stage. In subsequent sections of the judgment we will look in more detail at the contracts entered between 2010 and 2018 governing the respective parties' interests in the Weiti land development project, the breakdown of their relationship, and the caveats imposed which are the subject matter of the appeal.

[3] The appeal concerns two caveats over 29 titles within a subdivision development in Weiti Bay, near Stillwater, just north of Auckland. They were lodged by the appellant, Green & McCahill Holdings Ltd (GMHL).

[4] GMHL was incorporated in 1956. It owned approximately 900 ha of land in Weiti Bay. In 1991 the Green family sold GMHL to members of Mr Tong-Kuang (Peter) Liu's family. GMHL is now owned by Orere Farms Ltd, which in turn is owned by the Liu family.

[5] On 7 December 2005, GMHL entered an option agreement with Williams Capital Ltd (WCL), a company controlled by Mr Evan Williams. Under that agreement, GMHL granted WCL an option to purchase the land in exchange for a non-refundable payment of $5 million. The purchase price was to be between $155 and $295 million depending on the number of residential lots for which consent was obtained. A second agreement entered into on the same day granted GMHL a put option under which it could require WCL to purchase the land — so a put and call arrangement applied. Delays ensued and these arrangements were extended.

[6] In September 2010, Mr Liu and Williams Capital No 1 Ltd (WCNL, another company controlled by Mr Williams) entered a master sales agreement establishing a

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1 *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd* [2021] NZHC 219, (2021) 21 NZCPR 844 [Judgment appealed].

sales programme for the Weiti Bay land and obligating WCNL to develop that land. In February 2011 GMHL and WCNL entered an agreement to develop Weiti Station.

[7] In June 2012, a limited partnership was entered and registered, establishing Weiti Development Limited Partnership (WDLP). Under a development agreement entered around the same time, WDLP became the purchaser and developer of the Weiti land. The limited partners were Weiti Trustee Ltd (as to 60 per cent and controlled by Mr Liu) and Weiti General Partner Ltd (as to 40 per cent and controlled by Mr Williams). Weiti Development General Partner Ltd (WDGPL) (controlled by Mr Williams) was appointed general partner of WDLP and was responsible for day-to-day management, though Mr Liu was a member of an advisory committee.

[8] GMHL then made land available as security for WDLP to borrow funds for development at the request of Mr Williams and provided mortgages over parcels of land at Weiti over the next five years. In 2015 a quadripartite deed was entered into under which GMHL granted mortgages to the Bank of New Zealand (BNZ). In July 2018 the finance arrangements were varied, with a term loan agreement being entered into with Lambton Quay Properties Nominee Ltd (Lambton) as junior creditor, and another quadripartite deed entered into under which GMHL provided mortgages in favour of BNZ and Lambton.

[9] In early 2019, Mr Liu advised that GMHL would not provide further security to finance the developments without being paid a share of proceeds from future sales. Mr Liu expected, Mr Williams says, that GMHL be paid such proceeds on a first priority basis. This resulted in development work ceasing. In June 2019, BNZ assigned its rights to Lambton.

[10] In June and July 2019, WDLP and WDGPL did not meet their obligations under the facility agreement (as amended) and term loan agreement, leading to Lambton serving Property Law Act 2007 (PLA) notices on GMHL. A mortgagee sale process followed.

[11] In October 2019, Mr Williams gave an interview with *Stuff* regarding the mortgagee sale process. We return to this later.[2] In May 2020, Ara Weiti Developments Ltd and Ara Weiti Bay Development Ltd, the respondents, were incorporated by Mr Williams. In June 2020, Lambton sold the properties to Ara Weiti Developments, which then sold some of the properties on to Ara Weiti Bay Development. Lambton also assigned rights under various instruments to Ara Weiti Investments Ltd — a sister company to the respondent companies.

[12] In July 2020, GMHL lodged the caveats at issue. Then, in August 2020, GMHL brought substantive proceedings against Mr Williams and the respondent companies alleging (as the first cause of action) a breach of fiduciary duty by Mr Williams and knowing receipt by the respondent companies. In short, GMHL alleges it and Mr Williams were party to a joint venture and that Mr Williams owed it fiduciary duties. Among other things, it alleges he breached those fiduciary duties by acting contrary to GMHL's interests by procuring the sales of the properties by the mortgagee to his own companies.

[13] Also in August 2020, GMHL applied to the High Court for orders pursuant to s 143 of the Land Transfer Act 2017 (LTA) that the caveats not lapse.

[14] Associate Judge Andrew declined to make the orders. The Judge accepted it was reasonably arguable there was a fiduciary relationship between Mr Williams and GHML.[3] But the Judge did not consider it reasonably arguable that the properties were acquired by the respondents as a result of, and in knowing receipt of, a breach of those duties.[4]

[15] GMHL appeals. In doing so it advances, in the alternative, an argument based on the respondent companies being fiduciaries in their own right, as well as being subject to liability as recipients knowing of Mr Williams' breaches of duty.

[16] The caveats had lapsed before the appeal was heard. This raises a number issues about timing, further evidence and the orders that might be made if the appeal succeeds.

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2 At [43] below.
3 Judgment appealed, above n 1, at [52].
4 At [111]–[113].

The contracts

[17] It is necessary to now set out in some detail the contractual relationships established between 2010 and 2018 governing the respective Liu and Williams' interests in the Weiti land development project. Four contracts require our attention here. We will summarise their key provisions.

Master agreement for the sale of Weiti Station

[18] The master agreement was entered into by Mr Liu as agent for a company of his yet to be formed (referred to as Liu) and Williams Land Ltd in September 2010. Clause 1 records Liu shall be the owner of Weiti Station and is to sell land for each stage of development. But Liu retains the ultimate right of veto of a stage plan or a stage agreement and is not required to provide funding for construction of a stage of development. Clause 2 obligates Williams Land to design each stage, develop each stage according to the relevant stage agreement signed by Liu, manage the overall development and market the development. Clause 6 then reiterates that Williams Land is not to commence construction of a stage without prior signature of a stage agreement satisfactory to Liu, and that Liu is not obligated to provide funding for construction or transfer title to the land prior to the issue of individual titles.

[19] Clause 7 records that the master agreement does not represent a commitment by Liu to sell the whole or any part of Weiti and that Liu has the ability to decline to enter a stage agreement if Liu is not satisfied with the cost structure, finance arrangements or other terms. That decision is in Liu's "absolute discretion". Clause 8 set out how prospective returns are to be shared. The first $180 million from sales is to go to Liu, with profits split in agreed shares between the parties thereafter.

[20] Williams Land is obligated to report to Liu monthly on development progress (cl 9). Clause 13 sets out other general obligations, including a sub-clause regarding cooperation between Liu and Williams Land:

> **Co-Operation**: Liu and [Williams Land] will co-operate with each other to enable each to obtain the benefits of this agreement and Liu and [Williams Land] will do all things reasonably necessary to give effect to this agreement.

Development agreement

[21] GMHL and WCNL then entered a development agreement for Weiti Station in February 2011. The development agreement is the first "stage agreement" referred to in the master agreement and sets out the agreement reached as to stage 1 of the development.

[22] The development agreement sets out various matters agreed as to the development of stage 1. In it, GMHL also grants WCNL an option to purchase the land that was to be developed (cls 24–26). It includes similar reporting obligations to the master agreement in cl 23 and an agreement to co-operate. Clause 37 provides WCNL will not receive any return until GMHL has received $180 million from the sale of the development land.

Limited partnership agreement

[23] As already outlined above, in June 2012, Messrs Williams and Liu agreed to form a limited partnership, WDLP, under the Limited Partnerships Act 2008. The initial general partner was Weiti Development General Partner Ltd (controlled by Mr Williams). There were two limited partners: Weiti Trustee Ltd (controlled by Mr Liu, with a 60 per cent share in the limited partnership) and Weiti General Partner Ltd (controlled by Mr Williams, with a 40 per cent share in the limited partnership). Pursuant to cl 6, those shares were agreed in recognition of the contributions of the parties towards the development so far. Clause 10.2 provides the general partner may be removed by a special resolution of WDLP or by a resolution at a limited partners' meeting if the general partner acted fraudulently, negligently, or was wound up.

[24] Clause 13 concerns the advisory committee. Clause 13.1 established the advisory committee. The committee was to be consulted by the general partner, with reports every eight weeks. But members of the advisory committee are not, under cl 13.2, to take part in the management of the partnership in their capacity as a limited partner. That is commonplace in such agreements: participation by a limited partner in management of the partnership imperils the limited liability of a limited partner.[5]

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5 Limited Partnerships Act 2008, ss 30 and 31.

By cl 13.5, each member of the advisory committee has one vote and resolutions are passed by simple majority. Clause 13.10(a) provides advisory committee members be appointed by each partner holding a 10 per cent or greater share in the partnership — each partner could appoint one member for each 10 per cent shareholding it held in the partnership. Clause 13.9 provides advisory committee members do not owe duties (fiduciary or otherwise) to any partner in respect of the activities of the advisory committee.

[25] Clause 14 sets out the rights and duties of partners. Clause 14.1 provides the general partner has responsibility for the management and control of the business of the partnership — the development of the Weiti land. Specific powers and responsibilities are listed, including the cl 14.1(i) duty to operate the partnership "in accordance with consultation with the Advisory Committee". Clause 14.2 sets out the authority and powers of the general partner. Important for present purposes are cls 14.9–14.11. Clause 14.9 provides the general partner and advisory committee members may exercise powers and discretions notwithstanding any conflict of interest. Clause 14.10 states:

> **Exclusion of fiduciary duties**: Except as specifically outlined in this Agreement, no Partner owes fiduciary duties or any other duties at law or in equity to another Partner or [WDLP], and the application of section 49 of the Act is excluded.

Clause 14.11 provides the general partner must act in the best interests of the partnership.

[26] Clause 15 deals with liability and indemnification. Clause 15.1 is titled: "Liability generally and exclusion of fiduciary duties". It and cl 15.2, provide the general partner is not liable for damages under the partnership agreement, in negligence, or otherwise at law, to the partnership or other partners except for liability arising from fraud, breach of the partnership agreement, or negligence entitling the partners to remove the general partner under cl 10.2. Clause 15.3(a) records that each partner made its own independent investigations in relation to the partnership and did not rely on any representations by the general partner, any other partner, "or any of their respective Affiliates, officers, directors, partners, employees or agents". Clause 15.3(c) records the partners acknowledge none of the same listed parties had given any representations or warranties in connection with the partnership.

[27] The day after the execution of the limited partnership agreement, GMHL and WCNL amended the development agreement. That amendment, with the agreement of WDLP, meant WDLP took over the rights and obligations of WCNL under the development plan, as well as cl 8 of the master plan.

Quadripartite deeds

[28] GMHL and WDLP entered into three quadripartite deeds with BNZ and various other parties. The first quadripartite deed was executed in September 2015. Under the 2015 quadripartite deed, GMHL granted mortgages in favour of BNZ and another lender, Capitalgroup (Weiti) Ltd. GMHL was not entitled to recover any amounts owing by WDLP under an earlier GMHL loan agreement until WDLP's liabilities to BNZ and Capitalgroup (Weiti) Ltd were fully discharged. The mortgages in favour of BNZ and Capitalgroup (Weiti) were registered against the Weiti land.

[29] A second quadripartite deed was executed in 2017.

[30] The third and last quadripartite deed was executed in July 2018 by GMHL, WDLP, WDGPL, BNZ, and Lambton. Lambton had become a junior creditor financing the development earlier in July 2018. The 2018 quadripartite deed dealt with security arrangements between the parties.

[31] Under cl 2, GMHL agrees to grant mortgages over the Weiti land to BNZ and Lambton. Clause 4 sets out the enforcement rights of BNZ and Lambton. Clause 4.1 provides the lenders may not take steps to enforce the mortgage (by way of mortgagee sale) without giving GMHL notice of default — and GMHL may have up to 90 days to enter into an unconditional agreement for sale and purchase of the land in an amount sufficient at least to clear the debt. Clause 4.5 further provides that so long as BNZ or Lambton comply with cl 4.1:

> … it may accept any offer for the Land (or part of it) which is acceptable to it in its sole discretion, notwithstanding that GMHL may object to that offer.

[32] Under cl 4.10, GMHL and WDLP agree to do everything reasonably necessary to enable the issue of the titles to land. Further, each agree to act promptly to carry out its obligations under the clause, but that obligation expressly does not require GMHL to

provide funding for development work; its obligation is "to assist with documents, consents and signatures".

[33] Under cl 10, GMHL and WDLP agree that WDLP's indebtedness to GMHL is subordinated to the loans granted by BNZ and Lambton. Clause 11.5(b) records GMHL's acknowledgement that the development agreement and any other agreements between it and WDLP concerning the development represent "the entire agreement between it and [WDLP]". Finally, cl 13 records the parties' acknowledgment that the master sale agreement (see [18] above) is superseded by the development agreement (see [21] above) "and is of no further practical effect or relevance".

The relationship breaks down

[34] Mr Williams says that in 2018, Mr Liu indicated to him that he wanted WDLP to release cash to GMHL from any refinancing or find an outside investor to take him and GMHL out. Most investors and financiers talked to in 2018 would not support the release of funds to GMHL without the rest of the Weiti land being put up as security. Mr Williams says that the tone of Mr Liu's communications changed from August 2018 onwards — he felt Mr Liu was more interested in exiting the development.

[35] In 2019 WDLP began negotiations with Lambton to extend all finance facilities beyond July 2019 on a reduced interest basis. An indicative offer was presented to Mr Liu in February 2019. Mr Liu declined the offer, and subsequently advised Mr Williams that he had appointed solicitors, as well as insolvency expert Michael Stiassny and lawyer John-Paul Rice to represent his interests.

[36] By early 2019, GMHL had confirmed it was seeking to exit the development and/or have funds released in its favour. On 25 February 2019 WDLP's solicitors received a letter from Mr Liu's solicitors advising that GMHL would not agree to any further drawings under the facilities and would not give any signatures for any purposes unless and until GMHL started being paid on a first ranking basis a share of amounts received from sales. GMHL recognised at the time that this amounted to a demand that the 2018 quadripartite deed be renegotiated and communicated that it expected Mr Williams would do so.

[37] From this date Mr Williams says that Mr Liu and GMHL ceased co-operating with WDLP. GMHL refused to respond to requests to sign documents to enable the last of the titles to be issued and made it clear it would not consent to financing required to be undertaken to ensure that WDLP could continue to pay its creditors. Within a very short time of what Mr Williams characterised as GMHL's "ultimatum" in February 2019, physical construction stopped, work on the plan change stopped and the remaining 33 Weiti Bay lots became unsaleable.

[38] Mr Williams says Mr Liu's advisors made it clear that Mr Liu was unconcerned with the need to protect the Weiti assets and with whether WDLP made a total loss. In an email sent on 7 March 2019, Mr Liu's solicitors confirmed GMHL would not agree to further funding until its conditions were met. In a meeting attended by Mr Williams on 17 May 2019, Mr Liu's solicitors and Mr Stiassny reiterated that GMHL expected to be paid in priority to Lambton and that Mr Liu's position was that he did not care if the project went broke — he would take steps to block the development. He expected Lambton to take a loss.

[39] From March to early April 2019 Lambton — to whom BNZ later assigned its rights under the facility agreement and the 2018 quadripartite deed in June 2019 — was willing to consider a solution which resolved issues with GMHL. In early April 2019 it confirmed it was willing to consider a solution whereby money would be paid to GMHL. Lambton enquired as to security issues surrounding the development to the Village 1 land (mortgaged to Lambton) and the Village 2 land (subject only to an encumbrance in favour of Lambton). A further offer was made to GMHL which did not progress.

[40] WDLP met with GMHL's advisors over the next few months. At a meeting on 17 May 2019 at the Weiti site Mr Liu's solicitors and Mr Stiassny advised Mr Williams that Mr Liu was playing a long game and would wait everyone out. GMHL could block any development of the land and would do so for as long as it took. Given the interest rates, WDLP would fail, Lambton would give up and Mr Liu would retake control of the land. Further, Mr Liu would no longer deal with Mr Williams on any basis. A file note made by Mr Williams following this meeting records that Mr Stiassny made it clear that the "[b]reak down [was] almost certainly irretrievable". One of Mr Liu's solicitors — Mr Thompson — is recorded as saying "ideally this may be an unhappy divorce

where two parties have to live under [the] same roof", to which Mr Stiassny reportedly said Mr Liu would not permit that. Substantiating his threat to no longer deal with Mr Williams, Mr Liu refused to meet or talk with Mr Williams other than one video call in June 2019. No compromise or solution with respect to the development was forthcoming from GMHL.

[41] By that point more than 80 per cent of the 150 stage 1 lots had been sold. In what was now a slow market, Mr Williams says word spread there was a money problem with the Weiti development, sales enquiries stopped and it became a distressed asset.

[42] In June and July 2019, WDLP and Weiti Development General Partner failed to meet their obligations under the facility agreement and the term loan agreement. Lambton served a notice of default and demand on GMHL. Lambton later served Property Law Act 2007 notices on GMHL — leading to the commencement of the mortgagee sales process in September 2019.

[43] In August 2019 Mr Williams continued to talk to GMHL's advisers in an attempt to involve Mr Liu in a solution that could prevent a mortgagee sale. Mr Liu did not engage and when he eventually did his position did not change.

[44] In October 2019, Mr Williams gave an interview to the news website *Stuff*. He was quoted as saying:

> The sale was in order to resolve an issue related to the shareholding and landownership, and was not a "regular mortgagee sale", Williams said.
>
> The land owner and development company were separate, he said.
>
> Williams Land was the manager of the development company, Weiti Bay, and was assisting the lender with resolving issues with the ownership structure of the property, he said.
>
> The land is owned by Green & McCahill Holdings Ltd.

[45] In early 2020 Lambton had still not sold the property under mortgagee sale despite the property being advertised on the open market. We may pick up the narrative from the judgment appealed:

> [31] In May 2020, the two respondent companies were incorporated. Mr Williams says that this was for the express purpose of purchasing the Weiti properties.
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> [32] In June 2020, [Lambton] sold the properties to the first respondent, [Ara Weiti Developments Ltd], which immediately sold some of the properties to the second respondent, [Ara Weiti Bay Development Ltd]. The total purchase price was $35 million and funded by Clearwater Capital Partners Direct Lending Opportunities Fund LP … Clearwater now has first mortgages over the properties. In addition to the sale of the properties, [Lambton's] rights under various transaction documents were assigned to Ara Weiti Investments Ltd … a sister company of the current respondents.
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> [33] In July 2020, [Ara Weiti Investments Ltd] served GMHL with a statutory demand for $20,133,278 alleged to be owed by GMHL to [Ara Weiti Investments Ltd] under personal covenants in the GMHL mortgages granted to [Lambton]. The demand was later withdrawn and shortly before the application to set it aside was to be heard. [Ara Weiti Investments Ltd] continues to pursue the alleged debt by counterclaim in the [substantive proceeding].

The caveats imposed

[46] In July 2020, GMHL lodged two separate caveats over titles to the Weiti land. The first was lodged against 25 titles held by Ara Weiti Bay Development; the second was lodged against four titles held by Ara Weiti Development. The caveats assert a proprietary interest in the properties claimed as a "beneficial interest [on] the records of title as a beneficiary under a constructive trust of which the Registered Proprietor is trustee".

[47] On 7 August 2020 Land Information New Zealand informed GMHL that Ara Weiti Development and Ara Weiti Bay Development had applied to lapse the respective caveats. Two weeks later (1) an originating application seeking orders that the caveats not lapse, and (2) substantive proceedings, were filed. As the judgment appealed arises under the former proceeding, we focus on that.

The case made before the Associate Judge for a proprietary remedy

[48] In its originating application filed in the High Court, GMHL alleged it and Mr Williams were parties to a joint venture giving rise to fiduciary duties owed by Mr Williams to GMHL: "GMHL and/or its principal, [Mr] Liu, are party to a joint venture with Mr Williams and/or companies associated with Mr Williams".

The pleading that follows is vague and disconnected from the agreements entered by the parties. The joint venture is alleged to be evidenced by GMHL (1) reposing trust and confidence in Mr Williams (including by relying on his representations as to prospects), (2) allowing Mr Williams to take day-to-day control of the development, and (3) subordinating its own interests in furtherance of the alleged joint venture. There are subordinate pleadings, but that is the gist of it. The consequence is said to be fiduciary duties owed by Mr Williams to GMHL.

[49] GMHL then alleged Mr Williams breached those fiduciary duties in various respects. Most relevantly to the claim of a propriety remedy in the relevant properties was that Mr Williams allegedly procured the respondent companies to purchase the properties at the mortgagee sale. The respondent companies were said to have knowingly received the properties which were obtained in breach of fiduciary duties owed to the purported joint venture because, as a director, Mr Williams' knowledge was attributable to the respondent companies.

[50] The Associate Judge understood GMHL as pleading that the alleged primary liability for breach of fiduciary duty was that of Mr Williams — in procuring the respondent companies to purchase the properties.[6] GMHL did not plead that the respondent companies owed any direct duties to it. Rather, its claim against the respondent companies was one of liability as knowing recipients. (It should be recorded that the respondent companies were only incorporated in May 2020, well after the relationship between Messrs Williams and Liu had broken down.)

[51] As will become clear, GMHL pursues the same arguments on appeal. But it now also advances a claim of primary liability on the part of the respondent companies.

[52] GMHL does not allege fraud (particularly in the LTA sense). Instead, it relies on broader allegations of unconscionability in reliance on the principles set out in *Keech v Sandford* and *Attorney-General for Hong Kong v Reid*.[7]

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6 Judgment appealed, above n 1, at [63] and [65].

7 *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223 (Ch); and *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC).

The judgment appealed

[53] The Associate Judge accepted it was reasonably arguable that there was a fiduciary relationship between Mr Williams and GMHL, or that at least some aspects of the relationship were fiduciary in nature.[8] But the Associate Judge noted that, to show a tenable proprietary claim to sustain the caveats, GMHL must establish a breach of relevant fiduciary duties as well as a basis for liability of the respondent companies.[9]

[54] As to the first requirement — breach of relevant fiduciary duties — the Associate Judge considered it significant that the relevant transaction was a mortgagee sale of properties held legally and beneficially by GMHL, in circumstances where GMHL knowingly entered into the mortgage and had defaulted in its obligations under the mortgage. Even if Mr Williams were a custodial trustee in the sense he was in day-to-day control, the respondent companies acquired the properties under a mortgagee sale he did not control.[10] There was no probative evidence of how Mr Williams engineered the sale. Such a claim cast doubt on the legality of Lambton's actions but Lambton was not a party to the proceedings. Regardless, the parties engaged in extensive negotiations to try and save the development.[11]

[55] The Associate Judge distinguished the case from *Keech v Sandford* and *Attorney-General for Hong Kong v Reid*.[12] In those cases the trustees controlled the properties in question and the breach was the act of transfer. Here, Mr Williams did not require the authority of GMHL to purchase the properties and GMHL had lost any control over the properties now under the control of the independent mortgagee.[13] In a commercial case such as the present, the Associate Judge doubted there was some open-ended prohibition on Mr Williams purchasing the properties. Any arguable joint venture was clearly at an end well before the respondent companies acquired the properties, the

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8 Judgment appealed, above n 1, at [52].
9 At [53].
10 At [73].
11 At [74].
12 *Keech v Sandford*, above n 7; and *Attorney-General for Hong Kong v Reid* above n 7.
13 Judgment appealed, above n 1, at [75].

development project having come to a halt and the parties' relationship having irreparably broken down.[14]

[56] The Associate Judge also considered it was not a case of Mr Williams jumping ship to defeat the interests of the joint venture partner — rather, he took significant steps to right the ship. GMHL could not credibly claim that it was cheated out of any interest in the land when its interests were always subject to significant mortgage debt and its own default caused the sale.[15] Mr Williams' comments to *Stuff* needed to be read against this background as referring to his working with financiers to avoid a sale.[16]

[57] Finally, the Associate Judge rejected an assertion that Mr Liu was not actively involved in financing and strategic decisions regarding the development. He may have relied heavily on advisers but there was no evidence he was ill-informed or duped, nor that Mr Williams procured him to change lawyers.[17]

[58] As to the second requirement — liability for knowing receipt — the Associate Judge began by setting out the five requirements for liability for knowing receipt.[18] He had previously recorded there was no dispute that Mr Williams' knowledge could be imputed to the respondent companies.[19] The Associate Judge considered the requirement that the impugned transfer be in breach of trust was decisive.[20] Following an extensive analysis of authorities, he concluded this required the transfer itself be in breach of trust, rather than merely following a breach of trust.[21]

[59] The Associate Judge held the present case was in substance the same as in *Courtwood Holdings SA v Woodley Properties Ltd* and *Brown v Bennett*.[22] GMHL's claim for knowing receipt failed because the transfer from Lambton to the respondent

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14 At [76]. The Associate Judge did accept that it may be arguable that Ara Weiti Investments acquiring the overhang of the debt and then trying to use that to liquidate GMHL may have been a breach of fiduciary duty, but that did not equate to a proprietorial claim necessary to establish a caveat.

15 At [77].

16 At [78].

17 At [79].

18 At [80], citing Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol 2 at [42-023].

19 At [64].

20 At [82].

21 At [81]–[102].

22 At [103], citing *Courtwood Holdings SA v Woodley Properties Ltd* [2018] EWHC 2163 (Ch); and *Brown v Bennett* [1999] BCLC 649 (CA).

companies as a result of the mortgagee sale was not in breach of any fiduciary obligations owed to GMHL. The respondent companies acquired the properties as a result of the mortgagee sale which GMHL had not challenged.[23] Even if Mr Williams procured the respondent companies to purchase the properties, the focus is on the disposer and Lambton did not act in breach.[24] For the same reasons, the corporate opportunity cases — where the trustee in breach of duty was on both sides of the disposition transaction — did not assist GMHL.[25]

[60] In summary, the Associate Judge considered there was no credible evidence that Mr Williams somehow took GMHL's land for his (or his respondent companies') own gain — rather, it was sold due to GMHL's withdrawal of support for the project and hard-line negotiating position taken by Mr Liu.[26] GMHL therefore failed to establish a reasonably arguable claim of knowing receipt against the respondents.[27] Accordingly GMHL could not rely on an *in personam* claim as an exception to indefeasibility as it had proved no recognised cause of action.[28]

The caveats lapse

[61] In accordance with the judgment appealed, the caveats lapsed.[29] As Mr Johnson observes in his submissions, there is no statutory mechanism to restore the original caveats. So instead GMHL seeks an order under s 146 of the LTA that it may lodge second caveats over the properties specified in the lapsed caveats. Similar orders have been made in other cases, although in rather different circumstances from the present.[30]

Issues on appeal

[62] Despite more detailed lists tendered by counsel, we are satisfied the issues we need to address on this appeal come down to four in number:

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23 At [103].
24 At [104].
25 At [105]–[110], referring to *Brown v Bennett*, above n 22, at 656–657; *Symphony Group Ltd v Heritage Developments (Hobson Street) Ltd* HC Auckland M751/98, 6 July 1998; and *Torbay Holdings Ltd v Napier* [2015] NZHC 2477, [2015] NZAR 1839.
26 At [111]–[112].
27 At [113].
28 At [114].
29 At [116].
30 *Lu Trustee Ltd v Parklane Infrastruct Ltd* [2020] NZCA 682, (2020) 21 NZCPR 740 at [66]; *Cowan v Cowan* [2021] NZCA 31 at [16].

(1) Issue 1: Is liability of the respondents for knowing receipt reasonably arguable?

(2) Issue 2: Is primary liability of the respondents as a fiduciary reasonably arguable?

(3) Issue 3: If a proprietary right is reasonably arguable, should discretion be exercised against re-imposition of the caveats?

(4) Issue 4: If the caveats are sustainable, what relief should be ordered in this appeal?

Some issues of timing, further evidence and background material

[63] This is a general appeal by way of rehearing. The principles set out in *Austin, Nichols & Co Inc v Stichting Lodestar*, as further explained by this Court in *Green v Green*, apply.[31] The appellant is entitled to judgment in accordance with the independent opinion of this Court even where the issue involves an assessment of fact and degree and entails a value judgment. If this Court's opinion differs from the Judge below, the appeal must be allowed even if it was a conclusion on which reasonable minds might differ.[32]

[64] We proceed on the evidence before the Judge below, with such further evidence as we direct be admitted. The appellant sought to adduce further correspondence between the solicitors for the appellant and those acting for Lambton. Formally opposed, and admitted provisionally, we heard little more about content or opposition at the hearing. Formally also, the application to adduce is granted.

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31 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [27]–[32].

32 *Austin, Nichols & Co Inc v Stichting Lodestar* above n 31, at [16].

[65] Informally, the parties have on a number of occasions updated the Court as to the pleadings and progress in the related substantive proceeding.[33] That proceeding represents the contest in which ultimately the caveats, if re-imposed, will stand or fall. To that extent, it is relevant background information we should take into account in reaching our decision. However, the present appeal is from a decision made within the originating application with which we are seized. That unamended application must be our focus. It represented the state of affairs on which we received submissions and engaged with counsel in the oral hearing.

[66] Because the caveats have lapsed, we are effectively called upon to determine the entitlement of the caveator afresh, as at date of judgment, on the evidence and background information just described. No one suggested we should declare the matter moot and make the caveator start again. Nor did they suggest we simply put ourselves in the shoes of the Associate Judge and decide the case purely on the material available to him in February 2021.

[67] We now turn to the four issues before us.

Issue 1: Is liability of the respondents for knowing receipt reasonably arguable?

[68] We start with counsel's submissions.

Submissions

[69] For GMHL, Mr Johnson submits the Associate Judge erred in making contested factual findings, and in particular that noted at [55] above: that any arguable joint venture was clearly at an end well before the respondent companies acquired the properties, with any fiduciary duties having clearly come to an end.[34] As a matter of law, a "conscious uncoupling" was needed.[35]

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33 *Green McCahill Holdings Ltd v Williams* CIV-2020-404-1385. With effect from 31 March 2022, the defendants other than Mr Williams are the respondents in this appeal, Ara Weiti Investments Ltd, Williams Management Trustee Ltd, Lambton, Clearwater Capital Partners Direct Lending Opportunities Fund LP, and Clearwater NZ1 SMA Ltd. The last three were added on that date by Harvey J: *Green v McCahill Holdings Ltd v Williams* [2022] NZHC 643.

34 Judgment appealed, above n 1, at [76].

35 Referencing *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433, at [93].

[70] Further, Mr Johnson submits the Judge erred in holding knowing receipt requires that the disposition be committed in breach of trust. Reliance on *Brown* and *Courtwood Holdings* was misplaced as they do not engage with the principles set out in *Keech v Sandford* and *Attorney-General for Hong Kong v Reid*.[36] In most *Keech*-type cases the fiduciary never holds the relevant property in their capacity as fiduciary and there is no disposal in breach of duty — the rule against "personal profit" is not so narrow. For this reason, purchase from an innocent third party cannot shield an errant fiduciary. In any case, the operative breach was the acquisition by Mr Williams and the respondents, not the sale by the mortgagee, Lambton. Interposition of "alter ego companies" controlled by the defaulting fiduciary cannot throw off a proprietary remedy sticking to the land, because their knowledge and association means they may be liable either primarily as fiduciaries themselves, or secondarily for knowing receipt.

[71] Mr Johnson also submits the Associate Judge wrongly stated GMHL had not challenged the mortgagee sale. The appellant has reserved its rights against Lambton. The (fresh) evidence suggests the mortgagee sale was conducted so that Mr Williams could take control of the land — rather than a sale to realise its security — and Lambton has become more exposed to the Weiti development through its lending to entities associated with Mr Williams. The Judge was also wrong to say there was no evidence of Mr Williams being involved in the mortgagee sale process. Even reading Mr Williams' comments to *Stuff* in context as the Judge did,[37] they suggest he worked very closely with the mortgagee sale and was provided $15 million in vendor finance for the purchase by Lambton. The Court at trial would need to scrutinise the mortgagee sale with some care.

[72] For the respondents, Mr Chisholm QC largely adopts the reasons of the Associate Judge. To that extent we may be briefer in summarising his argument. Mr Chisholm submits that unlike a trustee or a director, Mr Williams did not hold any property on trust for GMHL and could not deal with any of its property. He was never an agent for GMHL; and could never represent or bind GMHL to anything. GMHL was at all times separately represented. Mr Williams had patently conflicting duties as the director of the general partner of WDLP. The interests of WDLP and GMHL were not

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36 *Keech v Sandford*, above n 7; and *Attorney-General for Hong Kong v Reid*, above n 7.
37 See [56] above.

aligned. They were often counter-parties and always separately represented. It is impossible, Mr Chisholm submits, to reconcile the alleged duties with the sophisticated corporate structures that independently advised parties had agreed to.

[73] As to Mr Johnson's submission that the "conscious uncoupling" was needed for the alleged fiduciary duties to end — see [69] above:

> … it [took] credibility beyond breaking point to suggest that there remained some uncertain [joint venture] with uncertain fiduciary obligations still in existence between GMHL and Mr Williams personally (one year later) that still required yet further conscious uncoupling.

As Mr Chisholm puts it:

> By early 2019, Mr Liu was acting at all times to advance GMHL's interests to the detriment of WDLP and the financiers. The relationship was plainly over. The parties were no longer working together.

[74] In the present case, the properties had not been sold "as a result of a breach of trust or fiduciary duty", but rather were legitimately sold by a mortgagee with any rights of GMHL as a mortgagor extinguished pursuant to s 103 of the LTA.

[75] Mr Chisholm submits that to succeed GMHL must conflate primary and secondary (or accessory) liability and ignore the separate legal personalities of the respondent companies. *Keech v Sandford* involved a trustee negotiating a lease for his own benefit, having failed to renew it for the benefit of a minor beneficiary. *Attorney-General for Hong Kong v Reid* involved a fiduciary accepting a bribe. In these cases the proprietary remedies imposed depended upon a prior finding that the defaulting fiduciary held title to the contested property, or that the property could still be traced. But the respondent companies hold title and had never owed fiduciary obligations to GMHL. Mr Chisholm submits the argument that the respondent companies are "alter egos" of Mr Williams is unsustainable; they have two directors (Mr Williams and his son) and are owned by a family trust of which Mr Williams is not a discretionary beneficiary. Mr Chisholm relies on this passage from *Meagher, Gummow and Lehane's Equity Doctrines & Remedies*:[38]

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[38] JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2015) at [5-255] (footnotes omitted).

> There is a precondition to the availability of most remedies for breach of fiduciary duty: causation. Thus even if the defendant is a fiduciary, and even if the defendant obtains a benefit at the expense of the principal, the defendant will not be in breach of fiduciary duty if the fiduciary position had no operative part in the gaining of the benefit. Similarly, equitable compensation for breach of fiduciary duty is not recoverable where the fiduciary shows that the loss or damage would have occurred even if there had been no breach. To obtain an account of profits it is necessary to establish causation, though not 'but for causation'.

[76] Mr Chisholm also submits any proprietary interest by way of knowing receipt would be extinguished by s 103 of the LTA. Mr Chisholm submits that GMHL will not be entitled to rely on the *in personam* exception to s 103 because knowing receipt could not be proved against the respondent companies, they had not acted unconscionably and to allow an equitable claim to impress land transferred pursuant to mortgage in this circumstance in the absence of fraud would be inconsistent with the objects of the Torrens system.[39]

[77] Finally, Mr Chisholm submits that even if a caveatable interest was established, the Court had a residual discretion not to uphold a caveat, but GMHL's best position would be that its claim for interest in the properties would still be subject to BNZ and Lambton mortgages. Further, Lambton and Clearwater mortgages now registered on the titles are indefeasible and each should be entitled to receive the proceeds of sale to repay their mortgages.

Discussion

[78] The essential prerequisites for liability for knowing receipt are described in these broad terms by *Lewin on Trusts*:[40]

> (1) There is property subject to a trust.
>
> (2) The property is transferred.
>
> (3) The transfer is in breach of trust.
>
> (4) The property (or its traceable proceeds) is received by the defendant.
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> (5) The receipt is for the defendant's own benefit.

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[39] Relying on the decision of Toogood J in *JEB Management Ltd v Grubz United Whanau Trust* [2015] NZHC 157, (2015) 15 NZCPR 705 at [43]–[46].

[40] *Lewin on Trusts*, above n 18, at [42-023].

(6) The defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust, or if not a *bona fide* purchaser of a legal estate without notice, retains the property, or deals inconsistently with the trust, after acquiring such knowledge.

These six elements have given rise to much debate, including the famous analysis in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* which focuses on the last of them.[41] The ones most relevant to the present discussion are the first and third, however.

[79] We now address five sub-issues:

(1) What legal principles govern applications to sustain caveats?

(2) Did Mr Williams arguably owe fiduciary duties to GMHL?

(3) Did any fiduciary duties arguably exist still as at June 2020?

(4) Was the transfer to the respondents arguably in breach of trust?

(5) Does s 103 of the LTA exclude proprietary rights against the respondents?

(1) What legal principles govern applications to sustain caveats?

[80] The core principles covering applications to sustain caveats under s 143 of the LTA are those set out in this Court's decision in *Philpott v Noble Investments Ltd* (drawing in turn on our earlier decision in *Sims v Lowe*):[42]

(a) The onus is on the applicants to demonstrate that they hold an interest in the land that is sufficient to support the caveat, but they need not establish that definitively;

(b) It is enough if the applicants put forward a reasonably arguable case to support the interest they claim;

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41 *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 (Ch); see Tim Clarke "Knowing Receipt and Accessory Liability" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 575 at [18.2.2].

42 *Philpott v Noble Investments Ltd* [2015] NZCA 342 at [26] (footnotes omitted); *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 659–660. *Philpott* was referred to with approval by the Supreme Court in *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 60 at [56].

> (c) The summary procedures involved in applications of this nature are not suited to the determination of disputed questions of fact. An order for the removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained — either because there is no valid ground for lodging it in the first place, or because such a ground no longer exists; and
>
> (d) Where an applicant has discharged the burden upon it, the Court retains discretion to remove the caveat which it exercises on a cautious basis. Before it does so the Court must be satisfied that the caveator's legitimate interest would not be prejudiced by removal.

[81] It should be noted that the LTA differs from the Land Transfer Act 1952 with which *Philpott* and *Sims v Lowe* were dealing. In particular, the LTA now places the onus squarely on the person who imposed the caveat to apply to sustain it, rather than requiring application by the person seeking its removal.[43] However, that merely confirms the prior reality that the onus always lay on the caveator to justify the imposition, by demonstrating a reasonably arguable case for a proprietary interest.[44]

[82] It may be doubted there is any material difference between the "reasonably arguable" test for sustaining a caveat, and the "serious question to be tried" test for an interim injunction.[45] The latter requires the applicant to satisfy the court that there is a real prospect of succeeding in the substantive claim, albeit the court should not try to resolve genuine conflicts of affidavit evidence or very difficult questions of law which require full contextual analysis and thorough argument — matters that should be reserved for trial.[46] Indeed, as the passage from *Philpott* cited above makes clear, an order for the removal of a caveat should only be made if it is patently clear that the caveat cannot be maintained, either because there was no valid ground for lodging it in the first place, or because such a ground no longer exists.[47]

[83] Although summary process does not permit close engagement with contested facts, the court must still assess the arguability of the asserted case of a proprietary right

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43 Land Transfer Act 2017, s 143(3).

44 *Sims v Lowe* above n 42, at 660; and *New Zealand Limousin Cattle Breeders Society Inc v Robertson* [1984] 1 NZLR 41 (CA) at 43.

45 *Castle Hill Run Ltd v NZI Finance Ltd* [1985] 2 NZLR 104 (CA) at 106; and *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 335–337, as cited in *McLennan v Livaja* [2017] NZCA 446, [2018] NZAR 405 at [29]. See also *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 (CA). Indeed, caveats have been likened to unilaterally-imposed injunctive relief: Stephen Kós "Freezing and Seizing Orders" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 301 at [7.3.1].

46 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 407.

47 Drawing on *Sims v Lowe* above n 42, at 659–660.

realistically and interrogate the documentary record. As the Privy Council said in *Eng Mee Yong v Letchumanan*, a court is not required:[48]

> … to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[84] Four further points might usefully be noted here. First, balance of convenience considerations do not ordinarily enter the picture with caveats, save that the court has a residual discretion not to uphold a caveat where it could serve no useful purpose or alternative protection is available.[49] We return to that subject later in the judgment.[50]

[85] Secondly, nor is there any requirement for an undertaking as to damages. Rather, s 148 of the LTA provides a statutory basis for a claim for compensation where a caveat has been imposed "without reasonable cause". It does not follow that a failed application to sustain will result in a right to compensation: s 148 requires the claimant to prove a lack of honest belief, based on reasonable grounds, in a proprietary right.[51]

[86] Thirdly, a s 143 order sustaining a caveat may be made subject to conditions as to the caveator initiating and prosecuting with diligence substantive proceedings to sustain its alleged proprietary rights to the land concerned.[52] That would plainly be necessary here. Moreover, it was accepted by Mr Johnson, in the event the appeal was allowed. We will return to this topic later in the judgment also.[53]

[87] Fourthly, although the normal course is that costs in an originating application to sustain a caveat are resolved according to success or failure in that proceeding, costs remain discretionary. Where the caveat is sustained only on condition that the claimed proprietary right must be the subject of resolution by substantive proceedings, the s 143

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48 *Eng Mee Yong v Letchumanan*, above n 45, at 341.

49 *Orams Marine (Auckland) Ltd v Ports of Auckland Ltd* (1994) 6 TCLR 88 (CA) at 92; and *Pacific Homes Ltd (in rec) v Consolidated Joineries Ltd* [1996] 2 NZLR 652 (CA) at 656.

50 At [127] below.

51 *Couchman v Taylor* (1996) 3 NZ ConvC 192,341 (CA) at 192,345.

52 See for example *Varney v Anderson* [1988] 1 NZLR 478 (CA).

53 At [129]–[132] below.

court *may* instead order costs be reserved to be resolved when the substantive proceeding itself is determined.[54] Whether that course should be taken may also depend on whether the s 143 claim to right is demonstrably strong (in which case it may be more appropriate to order costs on the application) or weak (in which case costs might better be determined in the round). We will return to this also.[55]

(2) Did Mr Williams arguably owe fiduciary duties to GMHL?

[88] We turn to the first element in the *Lewin* synthesis at [78] above — whether the property is subject to a trust.

[89] In a contractual context, equity acts in reserve. The fact that the parties may have regarded the relationship between them as a "joint venture" does not mean the relationship between the parties is fiduciary, or that equity may legitimately be called upon to supplement the bargain reached. Joint ventures, particularly where reduced to a sophisticated commercial contract, are seldom fiduciary in nature.[56] As the Supreme Court observed in *Paper Reclaim Ltd v Aotearoa International Ltd*, where the parties have formed a contract the Court must first decide exactly what they have agreed upon, before it can go on to consider whether particular aspects of the relationship give rise to fiduciary obligations. In that case it said that "joint venture" was a label "apt to distract".[57]

[90] Where the essential legal relationship is contractual, primacy must be given to the contract. As Blanchard J observed in *Paper Reclaim*:[58]

> When parties have formed a contract the correct approach is first to decide exactly what they have agreed upon. Only then should the court consider

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54 Compare the discussion in DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) at [10-020A].

55 At [133] below.

56 For example *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169; *Arklow Investments Ltd v MacLean* [2000] 2 NZLR 1 (PC); *Offshore Mining Co Ltd v Attorney-General* CA116/86, 28 April 1988; *Auag Resources Ltd v Waihi Mines Ltd* [1994] 3 NZLR 571 (HC); and *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* [2007] NZCA 586, [2008] 2 NZLR 418 all concerned contractual joint ventures found to lack a fiduciary component. See Peter Blanchard "Fiduciary Obligations Between Parties to Unincorporated Joint Ventures" and Stephen Kós "Joint Ventures: The Collision Between Contractual and Fiduciary Obligations" in Maree Chetwin and Philip A Joseph (eds) *Joint Ventures Law* (Centre for Commercial & Corporate Law, Christchurch, 2008) at 1 and 23 respectively.

57 *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 56, at [31].

58 At [31].

> whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require cooperation.

That approach was confirmed by this Court recently, in *Dold v Murphy.*[59]

[91] In this context, three points assume prominence. The first is that, as Mr Chisholm submitted, in a transaction of this kind, conflicting interests are inherent. The conflicts that did emerge, for instance as to provision of capital and security, and as to repayment priorities, were always broadly predictable ones. As in any ordinary long-term relational transaction, these conflicts of interest are managed by the contract. Anticipated by the parties, they are managed by a combination of provision (for example the advisory committee established under the limited partnership structure) and exclusion (of inconsistent obligations). By what justification, then, ought those clear, contractual obligations be supplemented by equity?

[92] The second is that at least some of the sophisticated contractual arrangements entered sought expressly to exclude fiduciary duties, and to exclude or limit the scope of inconsistent obligations. These are contractual choices that ought to be respected. The power to do so in the context of a limited partnership is confirmed by s 49(2) of the Limited Partnerships Act. It is true GMHL is not party to the limited partnership, but the "and/or" pleading at [48] above demonstrates that exactitude is not of the essence in this pleading, and that what we really are dealing with is an alleged joint venture, and associated duties, between what might be called "the Liu camp" and "the Williams camp". The essential engagement from June 2012 focused on a limited partnership, in which the Liu camp was very much a participant, and in which fiduciary duties were excluded. We very much doubt that exclusion is to be confined to the limited partnership alone. The critical quadripartite deed entered in July 2018 expressly references, and is built upon, the limited partnership — the general partner being the borrower. It is that contract that saw GMHL assign an interest by way of security in the

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59 *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [56].

properties and imperil its title in the event of default and mortgagee sale. It is difficult to see this carefully articulated agreement giving rise to fiduciary duties when the preceding partnership agreement expressly excluded them.

[93] The third, which leads on to the next major subject, is that it is difficult indeed to see GMHL and Mr Liu as occupying positions of vulnerability. They were wealthy, sophisticated and aggressive investors bristling with confidence and competent legal and accounting advice. By what justification in that context ought equity be called from its station in reserve to qualify what sophisticated parties had agreed upon? Where a contracting party is vulnerable, equity might look past express exclusion of fiduciary and other obligations and look to substance over form. The case for doing so, here, is much harder to make.

[94] In this Court's recent decision in *Dold v Murphy* the point was made that fiduciary duties are assumed responsibilities and that fiduciary responsibility may be inferred where the relationship is one of assumed trust, confidence and loyalty.[60] We went on to say:[61]

> We consider the relevant principles can be summarised in this way. Some relationships are inherently fiduciary in nature, involving trust, confidence and a degree of dependence, such as solicitor and client and trustee and beneficiary. In other cases a fiduciary relationship is only likely to be inferred when the legal relationship between parties involves: (1) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary's interests, or to prefer the interests of the beneficiary over those of third parties); and (3) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

[95] It is unlikely that GMHL could make out those indicia in this case. Mr Williams did not hold or control GMHL's land. As Mr Chisholm observed, GMHL retained legal and beneficial title, until qualifying the former by mortgage. Mr Williams was not GMHL's agent in dealing with that land. Mr Liu (and GMHL with him) were not vulnerable or dependent parties. They exercised control over their own land and were capitalised to an extent absent on Mr Williams' side. They had competent legal advice

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60 At [52].
61 At [55].

throughout the process. GMHL knowingly entered into the security instruments by which it gave third parties control over its land in the form of mortgages. There was no suggestion of vulnerability on GMHL's part at that time.

[96] Ultimately, when matters unravelled in mid-2019, GMHL and Mr Liu were fully represented (not only by competent legal firms, but also by Messrs Stiassny and Rice). No step was taken on their part at that time to seek to restrain the mortgagee sales from continuing, to exercise the equity of redemption or to acquire the properties on the open market sale then ensuing. In these circumstances there is simply no reason for equity to move from its reserve remedial position. Ordinary contractual and statutory property rights and powers are free to take effect in their usual way without equitable restraint.

[97] For these reasons, we are disposed to doubt the Associate Judge's provisional conclusion that aspects of the relationship between Mr Liu/GMHL and Mr Williams/his companies may arguably be described as fiduciary in nature.[62]

[98] However, the fundamental difficulty for the respondents is that we cannot conclude that this sub-issue is inarguable, merely that it is weak. An application to sustain under s 143 is not the place to resolve bona fide disputed issues of fact. We repeat what this Court said in *Philpott* in 2015: [63]

> The summary procedures involved in applications of this nature are not suited to the determination of disputed questions of fact. An order for the removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained …

As we have just noted, the Associate Judge considered the existence of a fiduciary (or partly fiduciary) to be at least arguable.[64]

[99] Although the contractual framework and analysis of the indicia for a fiduciary duty are weighted against its inference, the allegation is not one we are able to strike out summarily. Mr Williams had effective control of WDLP via the general partner WDGPL and the significance of Mr Liu's participation in the advisory committee ought not be overstated given that it acted by majority of members and limited partners are prohibited

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62 Judgment appealed, above n 1, at [52].
63 *Philpott v Noble Investments Ltd*, above n 42, at [26(c)].
64 Judgment appealed, above n 1, at [52].

from management under s 20(1) of the Limited Partnerships Act. A representative or protective responsibility assumed by Mr Williams, apart from the quadripartite deed by which GMHL hazarded its land, is a stretch, particularly as he is not in any direct sense a party to it, but his on-the-ground, de facto control of the project cannot be denied, albeit undertaken via corporate and partnership vehicles. That is unlikely to translate into a fiduciary obligation, but that is not the test at this stage.

[100] The claim is not inarguable, and it is not for this Court on a caveat application to resolve bona fide disputed facts or effectively make a final determination of right. We cannot say it is patently clear GMHL will fail on this point. Only that it seems likely it will do so.

(3) Did any fiduciary duties arguably still exist as at June 2020?

[101] The issue here is one of duration of fiduciary duty. As a matter of general principle, if there is no express term governing the duration of a fiduciary relationship, it may be determined at will. That, for instance, is the position in partnership.[65]

[102] GMHL does not suggest there is any express term in this case; rather, it accepts Mr Williams, if a fiduciary, could exit that responsibility but says he needed to do so with what it describes as a "conscious uncoupling". Mr Johnson attributes this juristic proposition to the joint judgment of Blanchard and Tipping JJ in *Chirnside v Fay*:[66]

> [93] The point, in short, is that joint ventures, like partnerships, can generally be brought to an end by appropriate notice. The previous joint venturers must, however, still act equitably towards each other in the steps necessary to bring the affairs of the joint venture to a conclusion which is fair to all concerned. The further the joint venture has progressed the more complex those obligations may be. Once the venture becomes contractual the contract will normally govern what is to happen on the termination of the venture or the withdrawal of a party from it. In the absence of contractual regulation, equitable principles will supply the solution.

As that passage makes clear, context is everything. Notably, in *Chirnside v Fay* Messrs Chirnside and Fay had not fallen out at all, although the relationship was strained. Mr Chirnside, feeling he had contributed far more time to the project than Mr Fay,

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65 *Moss v Elphick* [1910] 1 KB 846 (CA) at 849; and Roderick I'Anson Banks *Lindley & Banks on Partnership* (20th ed, Sweet & Maxwell, London, 2017) at [9-01].

66 *Chirnside v Fay*, above n 35 (footnotes omitted).

decided to exclude him from it. But he found it difficult to tell Mr Fay about that, and did not.[67]

[103] In, for instance, a partnership at will, notice of dissolution may usually be given by a partner at any time, and without a period of notice.[68] However, that principle must be read subject to the observations quoted from *Chirnside* above. A difficult question often arises where the partnership arrangements have been effectively abandoned, but no formal notice has been given by other parties. As the authors of *Lindley and Banks on Partnership* observe:[69]

> A dissolution of a partnership at will may be inferred from circumstances, e.g. a quarrel, although no notice to dissolve may have been given.

[104] The general principle is also that a partner can act in their own interests in terminating the partnership, and then thereafter.[70] A further, difficult, issue arises then as to whether a fiduciary who has terminated the relationship may then take advantage of a corporate opportunity deriving at least in part from the formal relationship now terminated. In *Ex parte James*, Baron Eldon LC observed that a fiduciary must before taking an advantage from the formal fiduciary relationship shed his or her fiduciary character altogether.[71] So, in the case of a trust, that means not only withdrawing from the trusteeship but totally disassociating from the trust.[72]

[105] We consider it unlikely that by the time Lambton sold the properties to the respondents in June 2020, the alleged joint venture (and any associated fiduciary duties) between the Williams camp and the Liu camp remained extant. At a meeting which took place on 17 May 2019, 13 months earlier, GMHL and Mr Liu's representative, Mr Stiassny, made clear that Mr Williams was "persona non grata with [the Liu] family", and that the breakdown between the parties was "almost certainly irretrievable". Mr Liu was said to be playing a "long game", would "outlast everyone and does not care if everyone goes broke including the project". Mr Liu did not in his affidavit respond or

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67 At [67]–[68].
68 *Lindley and Banks on Partnership*, above n 65, at [24-26].
69 At [24-32], citing *Pearce v Lindsay* (1860) 3 De GJ & S 139, 46 ER 591 (Ch).
70 *Public Trustee of the Australian Capital Territory v Hall* [2003] ACTCA 27 at [31].
71 *Ex parte James* (1803) 8 Ves 338 at 348, 32 ER 385 at 389.
72 Peter W Young, Clyde Croft and Megan Louise Smith *On Equity* (Thomson Reuters, Sydney, 2009) at [7-120].

controvert the remarks attributed to his representative. Indeed, in November 2019, seven months before mortgagee sale of the properties to the respondents, Mr Liu wrote to Mr Williams advising that the "relationship has totally broken down" and that:

> We have done everyone a favour by calling a halt to this nonsense of an ever increasing debt burden.

[106] GMHL's own actions in refusing to pass title without being paid ahead of the secured lenders appear likely to have breached the quadripartite deed in a way inconsistent with the existence of an ongoing joint venture of the sort GMHL itself alleges. Rather, its actions seem likely to have brought the venture to an end, causing the project and assets to become distressed and inevitably bringing upon the alleged venture the intervention of a mortgagee sale by the lenders. GMHL's theory appears to be one of a continuing joint venture, with mutual obligations of loyalty, when the protagonists were glowering at one another across roughly constructed barricades, nothing otherwise was happening and the lenders were becoming restless. It is a curious portrait.

[107] The respondents were incorporated in May 2020. Although Mr Chisholm demurred, we will accept that their control by Mr Williams and his son make them integral members of the Williams camp. But it appears unlikely that by the time the respondents acquired the properties, any fiduciary obligations on the part of Mr Williams (even if one could be inferred originally, which we doubt) remained extant. The far more likely analysis is that the joint venture alleged in the general terms recited at [48] above, had been abandoned, with the parties retaining only any still executory contractual rights and obligations. These were distressed assets, and the argument advanced is seemingly self-defeating: it is that the then-highest bidder in a public sale process could not acquire them from the third party mortgagee, at any price, thereby disadvantaging everyone.

[108] That is the apparent position, but it has yet to be tested at trial. It is not therefore wholly inconceivable that GMHL will yet be able to mount arguments either (1) that any fiduciary duties continued, or (2) that Mr Williams had insufficiently dissociated himself with the venture by the time the respondents — associated with him — came to acquire the properties.

(4) Was the transfer to the respondents arguably in breach of trust?

[109] A further fundamental difficulty lying in the way of GMHL's argument that the respondents are liable for knowing receipt is that no allegation was made in the application to sustain the caveats that the mortgagee Lambton was a fiduciary.

[110] Yet Lambton was the only entity with the relevant control over the properties apart from GMHL and the other lender, BNZ. Mr Liu did not seek to stop the mortgagee sales, and equity assists the vigilant. Sale took place in an open market. There was evidence in the form of a letter from Lambton's solicitors Minter Ellison Rudd Watts dated 3 September 2020 setting out what occurred. It may be summarised:

(1) Lambton engaged a prominent real estate agency, Bayleys, to manage the offer of their secured properties to the public for sale.

(2) A deadline sale process was adopted, closing on 6 November 2019. Lambton negotiated with a number of the offerors, and a conditional agreement was entered into in relation to certain of the properties, but the offer did not ultimately confirm.

(3) "The properties remained on the market with Bayleys for a further six months, with no acceptable offers for purchase received in that timeframe".

(4) Thereafter Lambton accepted the offer for purchase from Ara Weiti Developments Ltd.

The essential provisions governing the enforcement rights of Lambton are set out at [31] above.

[111] Mr Johnson challenges the Judge's conclusion that the decisions in *Brown v Bennett* and *Courtwood Holdings SA v Woodley Properties Ltd* require that the receipt

of the properties by the respondent companies be a direct consequence of the alleged breach of fiduciary duty.[73]

[112] In *Brown v Bennett* the parties were shareholders and directors of a company, Pinecord Ltd, which sold women's fashions under the name "Oasis". Between 1988 and 1990 the Browns' interest reduced to a minority shareholding, and they ceased to be directors. Subsequently Pinecord went into receivership and the receivers sold the business to a new company, Oasis Stores, controlled in part by the Bennetts. Pinecord later went into liquidation. Oasis prospered and was floated on the Stock Exchange, at a considerable profit to the Bennetts. The Browns claimed that Oasis Stores obtained the business of Pinecord with knowing receipt of a breach of trust by the Bennetts.[74] Rattee J at first instance rejected the knowing receipt claim in these terms:[75]

> … it is not alleged that the sale of the company's assets to Oasis was a breach of any trust in relation to those assets. It was carried out for full value by independent receivers. It cannot therefore be said, consistently with the proposed pleading, that Oasis received any trust property as a result of a breach of trust, so as to have become a constructive trustee of it under the "knowing receipt" limb of the *Barnes v Addy* formulation.

[113] Even in the Court of Appeal, counsel for the Browns accepted that he could not and did not allege that the acquisition of the remains of the business by Oasis from the receivers was itself a breach of trust. But he said it was sufficient that Oasis had through the Bennetts knowledge of the breaches of fiduciary duty alleged in the management of the previous business. Oasis could not in those circumstances be a bona fide purchaser without notice.

[114] Morritt LJ referred to the judgment of Hoffmann LJ (as he then was) in *El Ajou v Dollar Land Holdings plc* where that Judge said, pithily:[76]

> This is a claim to enforce a constructive trust on the basis of knowing receipt. For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly,

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73 Judgment appealed, above n 1, at [103].

74 The allegation against the Bennetts was that as directors they caused the company to enter financial difficulties with a view to acquiring the business from the receiver for the benefit of themselves and others: see *Brown v Bennett*, above n 22, at 652–653.

75 *Brown v Bennett* [1998] 2 BCLC 97 (Ch) at 104.

76 *El Ajou v Dollar Land Holdings plc* [1994] 1 BCLC 464 (CA) at 478.

> knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.

Morritt LJ added:[77]

> It is in my view quite plain from that statement of principle (and there are many other similar ones in the books) that the receipt must be the direct consequence of the alleged breach of trust or fiduciary duty of which the recipient is said to have notice.

[115] Morritt LJ then offered a hypothetical illustration: a house vested in trustees which, in breach of fiduciary duty, is allowed to fall into disrepair. New trustees replace the defaulting trustees, who decide to sell the property. They sell the property to a neighbour who, for the previous 40 years, had watched the house fall into disrepair. No constructive trust liability can be imposed upon the neighbour merely because he had watched the house fall into disrepair before he was enabled to buy it. *Brown v Bennett* was followed by Nugee J in *Courtwood Holdings SA v Woodley Properties Ltd*.[78] As the Judge in the case below noted, the same approach was taken by the New South Wales Court of Appeal, in *Evans v European Bank Ltd.*[79]

[116] Mr Johnson suggests the hypothetical is an imperfect analogy. To an extent that is so; a neighbour could not by simple proximity and observation of deterioration be subject to liability for knowing receipt. But nor was Mr Johnson's reliance on *Keech v Sandford* and *Attorney-General for Hong Kong v Reid* apposite either.[80] Those well-known cases are not ones of knowing receipt, (that is, secondary liability). Rather they concern the primary liability of a fiduciary, profiting by his breach of duty. In *Keech* the trustee was bound to subordinate his personal interest to that of the beneficiary, albeit the third party lessor was unwilling to renew the lease directly to that beneficiary. Similarly, in *Boardman v Phipps* the solicitor fiduciary was bound to entirely subordinate his interest to the trust he acted for — albeit it could not itself have exploited the corporate opportunity devised by the solicitor. He was bound instead to devise something compliant with duty, or not embark on the exercise at all. It is not a knowing receipt case.

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77 *Brown v Bennett*, above n 22, at 655.
78 *Courtwood Holdings SA v Woodley Properties Ltd*, above n 22, at [190]–[203].
79 *Evans v European Bank Ltd* [2004] NSWCA 82, (2004) 61 NSWLR 75 at [160].
80 See [70] above; *Keech v Sandford*, above n 7; *Attorney-General for Hong Kong v Reid*, above n 7.

[117] *Tyrrell v Bank of London* is a similar case, where the solicitor acting for a company in the course of formation acquired land secretly with a view to selling it eventually to the company — profiting from the confidence — and which in due course occurred.[81] The land was found to be held on trust for the company, it mattering not that it was merely nascent at the time of acquisition. Again, it is not a knowing receipt case.

[118] In *Attorney-General for Hong Kong v Reid* the fiduciary, a prosecutor, had received bribes in breach of duty (perhaps the one aspect of that case that was uncontroversial). To the extent Reid had received the bribes via bank accounts held by family members, and transferred proceeds to others, that was done at his direction and there was no suggestion the recipients (his parents, wife and solicitor) were bona fide purchasers for value without notice. Even if notice was absent, so too was value.

[119] Mr Johnson also relied on *Re Stapleford Colliery Co* (*Barrow's case*), that being an exception to the rule that a second purchaser (even with notice) from a first purchaser (without) takes free of a prior trust.[82] *Lewin on Trusts* explains the rule with its customary lucidity:[83]

> A purchaser with notice from a purchaser without notice is exempt from the trust, not from the merits of the second purchaser but of the first; for, if an innocent purchaser were prevented from disposing of the beneficial interest, the result would be a stagnation of property.

The exception identified in *Barrow's case* is where there is trustee *reacquisition*: in other words, where the second purchaser is in fact the defaulting trustee who sold the property to the innocent, intervening purchaser. The rationale for the rule is obvious. In fact, the exception is simply an application of the rule in *Keech v Sandford*: it is a purchase the trustee cannot make for his private benefit. It too does not engage knowing receipt. It simply takes us in a circle back to the first issue: whether Mr Williams owed GMHL a fiduciary duty.

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81 *Tyrrell v Bank of London* (1862) 10 HLC 26, 11 ER 934 (HL). See Peter Watts "Tyrrell v Bank of London - an Inside Look at an Inside Job" (2013) 129 LQR 527; and the discussion of that case in *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [2015] AC 250, at [23]–[25] and [49]–[50] per Lord Neuberger.

82 *Re Stapleford Colliery Co* (1880) 14 Ch D 432 (CA) [*Barrow's case*].

83 *Lewin on Trusts*, above n 18, at [44-143] (footnote omitted).

[120] The interposition of the mortgagee sale is here a substantial obstacle to GMHL's argument that the respondents are liable on the basis of knowing receipt, and that a proprietary interest may be traced to their door. In the ordinary course the exercise by a mortgagee of sale rights breaks the capacity to trace by compromising the third element of knowing receipt. GMHL's argument comes down to a combination of improbable but not entirely impossible arguments: (1) that Mr Williams was a fiduciary, *and* (2) those fiduciary duties continued as at the time of the mortgagee sale (including perhaps because of a failure to dissociate), *and* (3) that the transfer to the respondents by the mortgagee was in breach of trust because *either* Lambton was Mr Williams' instrumentality *or* the respondents are (and transfer then offends the rule in *Barrow's case*).

[121] This is, it must be said, a bold series of propositions. Yet they cannot in our view be dismissed summarily at this stage. And that really is the end of the matter here.

(5) Section 103 of the Land Transfer Act 2017

[122] The preceding findings mean this point must be set quite quickly to one side. Caveats can of course be lodged on the basis of alleged equitable interests arising under a constructive trust. We do not think the respondents can disavow actual knowledge of those arguable equitable interests given Mr Williams is one of their two directors.

Conclusion

[123] While we are largely in agreement with the Associate Judge's analysis, we depart from it at the final step. We are not satisfied it can be said that is patently clear that the caveats cannot be maintained, as principle requires. Accordingly, subject only to the third issue, we must allow the appeal.

Issue 2: Is primary liability of the respondents as a fiduciary reasonably arguable?

[124] GMHL submits that, even if a claim for knowing receipt is unavailable, it is entitled to and will replead its claim in the substantive proceeding. Mr Johnson submits that a caveat proceeding is analogous to summary judgment — alleged defects in pleading should not result in a caveat lapsing where those defects are capable of being

remedied. GMHL can amend its constructive trust claim to plead direct liability on the part of the respondents on the basis of *Keech* (or bring a claim for knowing assistance). The *Keech* principle applies whether or not the properties or opportunities were acquired by the fiduciary personally or by alter egos — that is, the respondent companies.

[125] For the respondents, Mr Chisholm submits GMHL as caveator must claim a reasonably arguable interest as at the date of lodging — an unarticulated cause of action that might be available following discovery cannot support a caveat. The respondents owed GMHL no fiduciary obligations, nor are they Mr Williams' alter ego.

Discussion

[126] It is unnecessary for us to resolve this argument in light of our finding on the first issue, and we decline to do so.

Issue 3: If a proprietary right is reasonably arguable, should discretion be exercised against re-imposition of the caveats?

[127] The respondents submit that, even if a reasonably arguable case is established, no further caveats should be permitted to be lodged, as they will serve no practical benefit to GMHL. Even if the mortgagee sale is reversible, the properties will still be subject to the mortgages under which GMHL owed $55 million in June 2020.

[128] Realistically, this argument received little attention before us. In its own terms it is unpersuasive. But it leads us to the next issue.

Issue 4: If the caveats are sustainable, what relief should be ordered in this appeal?

[129] The substantive proceeding, in which the existence or otherwise of a proprietary interest on GMHL's part would have been determined, was due for trial in June of this year. The latest batch of updating material now informs us that has now been postponed almost two years, to 6 May 2024, following joinder of Lambton, Clearwater Capital Partners Direct Lending Opportunities Fund LP and Clearwater NZ1 SMA Ltd as defendants.[84]

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[84] See n 33 above.

[130] In that seriously impaired context, we are not prepared to contemplate unconditional re-imposition of the present caveats. In fairness, Mr Johnson recognised conditions would have to be imposed, even before the recent delay occurred.

[131] We see the requisite conditions as enabling the development to proceed, with partial release of caveats to enable the sale of marketable lots. We anticipate this involving payment of net proceeds (after standard sale costs, including rates, costs of sale and reasonable commissions) to mortgagees. This suggested condition was considered provisionally by Harvey J in the High Court, when he granted adjournment. Subject to the decision of this Court, it is one he is likely to impose as a condition of adjournment in any case.[85]

[132] The appropriate course for us to take is to allow the appeal and remit the issue of the re-imposition of caveats and the conditions upon which that occurs to the High Court, either in the present proceeding or the substantive proceeding; it matters not which.

Costs

[133] Bearing in mind the discussion of principle at [87] above, we see this as one of those doubtless rare cases where merits are sufficiently balanced for costs to neither be awarded now nor lie where they fall, but rather be reserved for determination once the substantive outcome is known.

Result

[134] The application to adduce further evidence is granted.

[135] The appeal is allowed.

[136] The re-imposition of caveats and the conditions therefor are remitted to the High Court.

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[85] *Green v McCahill Holdings Ltd v Williams*, above n 33, at [36].

[137] Costs are reserved in accordance with [133] above.

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