

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA265/2023
CA433/2023
[2025] NZCA 117

BETWEEN

BOON GUNN HONG
Appellant

AND

DOUGLAS MURRAY KINNON AND
AVRYL MARGARET KINNON AS
TRUSTEES OF THE CEDAR LODGE
TRUST
First Respondents

DOUGLAS MURRAY KINNON
Second Respondent

JAALA FERNANDE DYER
Third Respondent

NOMINEES AND TRUSTEES LIMITED
Fourth Respondent

Hearing: 21 May 2024

Court: Courtney, Muir and Cull JJ

Counsel: Appellant in person
M C Nicholls for First, Second and Third Respondents
No appearance for Fourth Respondent

Judgment: 14 April 2025 at 2:00 pm

JUDGMENT OF THE COURT

A The appeal against the judgment of Jagose J in CA265/2023 is allowed in part. We uphold the findings of Jagose J in respect of Mr Hong’s claims of perjury, equitable fraud and breach of good faith. We otherwise allow the appeal and remit the proceeding to the High Court for determination

of an application by Mr Hong to amend his statement of counterclaim to address his right to indemnity.

- B** The appeal against the judgment of Harvey J in CA433/2023 is dismissed. We remit the proceeding to the High Court for determination of the account of profits.
- C** We make no order as to costs.
-

REASONS OF THE COURT

(Given by Courtney and Muir JJ)

	Para No
Introduction	[1]
Issues on appeal	[6]
Background	[9]
<i>The Trust and the Property</i>	[9]
<i>The High Court proceeding</i>	[21]
Appeal against decision of Jagose J	[26]
<i>Alleged breach of fiduciary duty through perjury</i>	[26]
<i>Alleged equitable fraud and breach of good faith</i>	[28]
<i>Observations on possible limitation defence to Mr Hong's counterclaim</i>	[45]
Appeal against decision of Harvey J	[56]
<i>Judgment of Harvey J</i>	[56]
<i>Did the Judge err in determining the causes of action in respect of which Mr Hong had filed a statement of defence?</i>	[60]
<i>The Judge's finding that the Trust is the equitable owner of the property</i>	[68]
<u>Hearsay evidence</u>	[70]
<u>Notes of evidence from the Tribunal hearing</u>	[72]
<u>Reliance on Jagose J's findings as to the nature of the payment</u>	[77]
<u>Was the Judge's conclusion as to ownership correct?</u>	[82]
<i>Did the Judge err in finding Mr Hong breached his fiduciary duties?</i>	[83]
<i>Did the Judge err in relation to the remedies granted?</i>	[86]
Costs	[89]
Result	[91]

Introduction

[1] These appeals arise from the 2008 purchase of a property in Kerikeri (the Property) by the Cedar Lodge Trust (the Trust). The trustees of the Trust were the settlor, Mr Kinnon Snr, his daughter-in-law, Ms Dyer, and the lawyer for the trust, Mr Hong. It was Mr Hong who provided the bulk of the purchase price.¹ The basis on which he did so was not the subject of any written agreement and is disputed.

[2] The trustees were later replaced by a trustee company controlled by Mr Hong, Nominees and Trustees Ltd (NTL).² Later still, Mr Hong transferred the property into his own name.³ In 2021 the current trustees of the Trust (Ms Dyer's former husband Douglas Kinnon and Avryl Kinnon) brought a proceeding to recover the property. Mr Hong counterclaimed against both the current trustees and against Ms Dyer and Mr Kinnon personally. The claim and counterclaim were heard separately, before different Judges. The claim was the subject of a formal proof hearing some months before the hearing of the counterclaim. However, the decision on the counterclaim was delivered first in time.

[3] In the counterclaim, Mr Hong asserted he had advanced the funds for the purchase of the property to Ms Dyer and Mr Kinnon personally. He had not been repaid, so he was the equitable owner of the property and neither Ms Dyer and Mr Kinnon, nor the trustees, had any equity in the property. Mr Hong pleaded two causes of action: (1) equitable fraud by the trustees, Ms Dyer and Mr Kinnon, as a result of not having been repaid; and (2) breach of fiduciary duty by Ms Dyer and Mr Kinnon through perjury during subsequent disciplinary proceedings against

¹ The money was provided by a company controlled by Mr Hong.

² NTL is the fourth respondent in these proceedings. It was a defendant in the High Court proceedings, but abided the High Court's decisions. Mr Hong purported to file these appeals on behalf of NTL as well as himself. Mr Hong was not granted leave to represent NTL as required: *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [33]; and *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 310. We have treated NTL as a respondent, but given our conclusions that is of no moment.

³ This obvious breach of trust led to Mr Hong being struck off the roll of barristers and solicitors: see *Auckland Standards Committee 5 v Hong* [2020] NZLCDT 5 [liability decision]; and *Auckland Standards Committee 5 v Hong* [2020] NZLCDT 12 [penalty decision]. Mr Hong's appeal against those decisions was dismissed by the High Court: *Hong v Auckland Standards Committee No 5* [2020] NZHC 1599. His application for leave to bring a second appeal was declined by this Court: *Hong v Auckland Standards Committee No 5* [2021] NZCA 85.

Mr Hong.⁴ Jagose J found that Mr Hong had not advanced the funds to Ms Dyer and Mr Kinnon. Rather, the payment was the discharge of his personal liability as a trustee of the Trust to settle the purchase for the benefit of the beneficiaries.⁵ However, despite recognising that Mr Hong was entitled to reimbursement of the funds, Jagose J dismissed the counterclaim because it was based on the incorrect assertion that Mr Hong had advanced the funds to Ms Dyer and Mr Kinnon.

[4] The trustees' claim against Mr Hong alleged breach of fiduciary duty and fraud under the Land Transfer Act 1952 and, against NTL, knowing receipt. It proceeded by way of formal proof. Harvey J agreed with Jagose J's characterisation of Mr Hong's payment to settle the purchase.⁶ However, reimbursement of Mr Hong was not in issue in the trustees' claim. Harvey J held that Mr Hong had breached his fiduciary duty when he transferred the property to himself. NTL had therefore also breached its fiduciary duties. He made a declaration that Mr Hong holds the property on a constructive trust for the Trust and ordered an account of profits.⁷ However, Harvey J found land transfer fraud was not made out.

[5] Mr Hong appeals both decisions.

Issues on appeal

[6] At the heart of the dispute are Mr Hong's complaint that he has never been repaid and his assertion that he is the equitable owner of the property. However, the precise issues for determination in this Court have been difficult to discern because Mr Hong's notices of appeal and written submissions did not clearly identify specific

⁴ *Kinnon v Hong* [2023] NZHC 1052 [judgment of Jagose J]. The counterclaim was pleaded poorly. It identifies as the "First Cause of Action ... Equitable Fraud". There are then subsequent headings, "Commission of Perjury ..." and "Counterclaim Cause of Action – Commission of Equitable Fraud AND breach of good faith and fiduciary duty ...". There is only one prayer for relief (at the conclusion of the document), the only relevant part of which is for a "[j]udgment order that the Plaintiff and the Counterclaim Defendants are also liable for the total indebtedness as owed to [Mr Hong] ...". It does not refer to the previous claim(s) as such. We consider Jagose J to have made the best he could of the pleading by identifying the two discrete claims.

⁵ At [25(a)], citing Trusts Act 2019, ss 26 and 81; and *Re O'Donoghue* [1998] 1 NZLR 116 (HC) at 121–122.

⁶ *Kinnon v Hong* [2023] NZHC 1988 at [57] [judgment of Harvey J].

⁷ The declaration was specifically that Mr Hong holds the Property on constructive trust for the Trust. We take "the Trust" here to refer to both the beneficiaries and the trustees insofar as they would have any equitable interests in the Property and use the same terminology in this judgment. The order for an account of profits was that Mr Hong was "liable in principle for an account of profits", with the quantum to be determined later: at [130].

grounds of challenge. Nor did he agree with the lengthy statement of issues filed by the respondents. On the basis of Mr Hong's notices of appeal and submissions, and the respondents' statement of issues and submissions, we see the following issues as requiring determination.

[7] In relation to Jagose J's decision on the counterclaim, the issues are whether the Judge erred in:⁸

- (a) dismissing the cause of action for breach of fiduciary duty through perjury;
- (b) concluding that Mr Hong's payment of the balance of the purchase price of the Property was made in fulfilment of his duties as trustee and he is entitled to be indemnified for that payment;
- (c) concluding that payments by Mr Kinnon and Ms Dyer to Mr Hong were payments to the Trust for their use of the Property;
- (d) concluding that a payment of \$50,000 by Mr Kinnon and Ms Dyer to Mr Hong at his request should be applied against the payment made by Mr Hong; and
- (e) dismissing the counterclaim, notwithstanding the conclusion that Mr Hong may be entitled to be indemnified for his payment.

[8] In relation to Harvey J's decision on the claim, the issues are whether the Judge erred in:

- (a) determining the causes of action (breach of fiduciary duty and knowing receipt) in respect of which Mr Hong had filed a statement of defence by way of formal proof;

⁸ The respondents' list included further issues which were not the subject of any determination by Jagose J because of his conclusion regarding Mr Hong's payment of funds to settle the purchase. There is no cross-appeal. We therefore do not need to consider these further issues.

- (b) finding that the Trust is the equitable owner of the property and Mr Hong holds the property on a constructive trust for the Trust, in part by relying on hearsay evidence, the notes of evidence from the disciplinary hearing and Jagose J's findings as to the character of Mr Hong's payment;
- (c) finding that Mr Hong owed fiduciary duties to the respondents and that he breached those duties; and
- (d) the remedies he granted.

Background

The Trust and the Property

[9] Mr Hong was Mr Kinnon and Ms Dyer's lawyer from the 1990s until approximately 2012. Mr Kinnon and Ms Dyer were the beneficiaries of the Trust, which was settled in 2001 by Mr Kinnon's father, Mr Kinnon Snr. The original trustees were Mr Kinnon Snr, Ms Dyer and Mr Hong. The trust deed provides for the remuneration of a professional trustee, recognises wide trustee powers and limits trustees' liability.

[10] On approximately 28 September 2005,⁹ the Trust entered into an agreement to purchase the Property for \$645,000 and a deposit of \$40,000 was paid to the vendor on 3 October 2005. Settlement was to occur on 4 November 2005.

[11] There was a dispute between the vendor and a third party who also claimed to have purchased the Property.¹⁰ As a result, clear title could not be provided and settlement was delayed. Mr Kinnon and Ms Dyer were however granted possession of the Property on 4 December 2005. After living in it for a period, they rented it out before returning to the Property and then eventually separating. Mr Kinnon has continued to reside in the Property from the point of separation.

⁹ The precise date of the agreement was at issue in a proceeding relating to the dispute between the vendor and a third party, but is not important to this case: see *Keogh v Lund* HC Auckland CIV-2005-404-7151, 28 June 2006 at [7]–[15].

¹⁰ The other party had lodged a caveat, alleging there was a prior unconditional agreement. The vendor applied for removal of the caveat, which was ordered on 28 June 2006: at [31].

[12] Because of the delays, Mr Kinnon and Ms Dyer decided to purchase another home. This meant that they did not (apparently) have the resources to pay the balance of the purchase price of the Property. Mr Hong instead stepped up to assist, paying the balance of the purchase price of \$590,274.68 to the vendor's solicitor.

[13] The balance of the payment appears to have ultimately been sourced from Orano Developments Ltd (ODL), a company under Mr Hong's control. ODL is not a party to these proceedings, which have proceeded on the basis that Mr Hong contributed his own funds.

[14] In his judgment, Harvey J notes payment of the \$590,274.68 was made on 31 July 2008,¹¹ but in Mr Kinnon's and Mr Hong's affidavits and the recreated accounts provided by Mr Hong, the payment is recorded as made on 1 August 2006. The position appears to be that although the payment was made in August 2006, settlement of the property was not effected until 31 July 2008 because of an intervening dispute about the purchase price.¹² That dispute was over a difference in price of \$15,000 and involved an appeal to the High Court, which was not finally resolved until 2009.¹³ But earlier settlement of the Property was possible as a result of payment of the disputed \$15,000 into Mr Hong's trust account pending determination of the proceedings.¹⁴

[15] Because of their initial difficulties in funding the purchase, Mr Kinnon and Ms Dyer had discussed with Mr Hong the possibility of the Trust and Mr Hong buying the Property in half shares. At a further point Mr Kinnon and Ms Dyer suggested that Mr Hong buy the property in his own right. None of these suggestions came to fruition. Moreover, although Mr Kinnon deposed that in July 2008 he had organised

¹¹ Judgment of Harvey J, above n 6, at [2].

¹² The Trust's initial offer for the property was \$630,000. A dispute arose because, in error, the vendor's solicitors rendered a settlement statement identifying the purchase price as \$630,000 rather than sum agreed: \$645,000. This dispute was ultimately resolved against the trustees.

¹³ See *Dyer v Grove Darlow & Partners* HC Auckland CIV-2008-404-8136, 17 July 2009.

¹⁴ Mr Hong deposes that \$5,000 was taken from a credit retained from another matter involving Ms Dyer and Mr Kinnon, another \$5,000 came from an additional payment by Ms Dyer and Mr Kinnon made following the increase in the purchase price during the original negotiations and that he advanced the rest. He also deposes to advancing a further \$15,311.41 (in addition to the interest which had accrued on the earlier \$15,000) to pay the eventual judgment debt totalling \$30,807.29 ordered against the trustees.

finance to cover the purchase price, pending sale of a farm owned by the Trust, no refinancing occurred at that stage.

[16] Subsequently the parties agreed that the property should be transferred from Ms Dyer and Mr Hong to BGH Trusteeship Ltd (BGH), a company controlled by Mr Hong and his wife, Ms Chan, and which had replaced Mr Hong as trustee on 13 June 2007. That transfer took place on 6 August 2008. No dispute arises in respect of it. However, on 4 August 2011 the Property was further transferred from BGH to NTL and then, on 12 December 2012, transferred again from NTL to Mr Hong. A mortgage with ASB Bank Ltd was registered on 17 December 2012. It is not in dispute that the two latter transfers and the mortgage were never authorised by the respondents.

[17] In February 2009 Mr Kinnon and Ms Dyer made a one off payment of \$50,000 to Mr Hong at his request. Over the years they also paid sums to Mr Hong styled as “rent”. Mr Kinnon says that those payments totalled approximately \$170,000, in addition to the \$50,000. Mr Hong says that those payments totalled just over \$130,000, including the \$50,000. The exact number is not material for present purposes.

[18] Mr Hong says that in April 2010 he demanded that the respondents repay the full sum he had paid to the vendors. He also now claims that as of 30 September 2019 they were liable to him for additional “rent” totalling \$138,965.

[19] BGH was removed as trustee on 21 March 2019 and replaced by Ms Avryl Kinnon. Demands were made to Mr Hong to transfer the Property to the trustees unencumbered.

[20] A complaint was made to the New Zealand Law Society. This led to proceedings in the Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) as a result of which Mr Hong was found guilty of misconduct and struck off the roll.¹⁵

¹⁵ Liability decision, above n 3; and penalty decision, above n 3.

The High Court proceeding

[21] The trustees filed their statement of claim in January 2021. They pleaded one cause of action against Mr Hong for breaches of fiduciary duty in transferring the property to NTL and then to himself, and in granting a mortgage of the property in favour of ASB. A second cause of action against NTL for knowing receipt related to the transfer of the property to it and then allowing the property to be transferred to Mr Hong. The trustees sought declarations that the transfers were fraudulent, orders for the repayment of any commission or remuneration paid to Mr Hong, disgorgement of unauthorised profits, an inquiry into equitable losses, and exemplary damages with interest.

[22] There was no mention in the statement of claim of Mr Hong's payment. In his statement of defence and counterclaim, Mr Hong pleaded that the respondents "no longer had any equity left and therefore no interest in the Property" because they had not repaid the balance of the purchase price and because of the "rent arrears". He counterclaimed in the terms previously identified.¹⁶ He sought a variety of remedies, including, relevantly, a declaration that the plaintiffs and the counterclaim defendants no longer had any interest in the property and an order that they were "liable for the total indebtedness as owed to [Mr Hong] being all of his advances to them ...".

[23] In their statements of defence to the counterclaim, the trustees, and Ms Dyer and Mr Kinnon personally denied Mr Hong's allegation that he had "advanced funds to assist [Ms Dyer and Mr Kinnon] to settle". For reasons that are not clear to us, a direction was made that the counterclaim be heard in April 2023, separately from the claim. It was not until the first amended statement of claim was filed on 30 June 2022, that there was any acknowledgement of Mr Hong having provided the funds to settle the purchase, with the payment said to have been "an unsolicited benevolence on the conscience fund loan to Douglas Kinnon whose quantum was equivalent to the balance of the purchase price".¹⁷ The only substantive change introduced by the first amended

¹⁶ Above at [3], n 4. The statement of defence filed by Mr Hong was filed on behalf of both himself and NTL, along with a memorandum advising of NTL's intention to abide the decision of the court and seeking leave to be excused from further attendance.

¹⁷ Jagose J did not accept this assertion: judgment of Jagose J, above n 4, at [23]–[25]. He was undoubtedly right, given Mr Kinnon's evidence that at the time of the payment he did not know the basis on which the payment was made.

statement of claim was a pleading of fraud under the Land Transfer Act. A day later the trustees filed a second amended statement of claim. The only changes were new allegations to the effect that the terms of the “benevolence on the conscience” loan precluded Mr Hong from making demand for repayment of the money.

[24] Mr Hong did not respond to the amended statements of claim. This led to the claim being set down for hearing in September 2022 by way of formal proof.¹⁸

[25] Mr Hong’s counterclaim was heard by Jagose J after the formal proof hearing before Harvey J but, as noted, the decision on the counterclaim was delivered first.

Appeal against decision of Jagose J

Alleged breach of fiduciary duty through perjury

[26] Mr Hong alleged that Mr Kinnon and Ms Dyer committed perjury in the Tribunal and that this amounted to unconscionable conduct. The Judge dismissed this cause of action on the basis that, as witnesses in a civil proceeding, Mr Kinnon and Ms Dyer had immunity from suit in respect of the evidence they had given.¹⁹

[27] The Lawyers and Conveyancers Act 2006 provides that every person giving evidence, information or records to the Tribunal has the same privileges as “witnesses have in a court of law”.²⁰ This Court has said:²¹

[67] Those who give evidence or make submissions to a court enjoy immunity from suit. The purpose of this immunity is not to encourage dishonest or defamatory submissions or perjury; rather it is to protect parties to litigation, along with their counsel and witnesses, from vexatious litigation. There is also an associated purpose of limiting the scope for re-litigation. ...

Jagose J was therefore correct in holding that Ms Dyer and Mr Kinnon had immunity in respect of the evidence they gave before the Tribunal. This ground of challenge fails.

¹⁸ Harvey J summarised the procedural difficulties: judgment of Harvey J, above n 6, at [9]–[14], quoting *Kinnon v Hong* [2022] NZHC 1828.

¹⁹ Judgment of Jagose J, above n 4, at [19]–[21].

²⁰ Lawyers and Conveyancers Act 2006, s 260 and sch 4 cl 9.

²¹ *New Zealand Defence Force v Berryman* [2008] NZCA 392, citing *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL); and *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462.

Alleged equitable fraud and breach of good faith

[28] The Judge summarised Mr Hong’s complaint under this cause of action as being that “the trustees (presumably meaning Ms Dyer then as his co-trustee) and Ms Dyer and Mr Kinnon misled him into advancing some \$600,000 to them to settle acquisition of the Kerikeri property” and that “the relationship of mutual trust between the three of them was breached by their failure to repay him as a priority to funds becoming available to them”.²² He held, however, that Mr Hong had not made any advance or loan either to the trustees or to Mr Kinnon or Ms Dyer personally. Rather, Mr Hong made the payment to the vendors of the Property in fulfilment of his personal obligation as trustee to settle the purchase, for which he was entitled to reimbursement from the trust property.²³ The “rent” payments made by Ms Dyer and Mr Kinnon (apart from the \$50,000) were payments made to the Trust for use of the Trust property rather than in repayment or in servicing of the sum paid by Mr Hong.²⁴

[29] Having identified the nature of Mr Hong’s payment — and his right to be indemnified for it — the Judge proposed to the parties that they consider resolution of the counterclaim on this basis. However, Mr Hong rejected this suggestion. The Judge dismissed the counterclaim, explaining that:²⁵

[26] During his closing submissions for the trustees and Ms Dyer and Mr Kinnon, I enquired of [Mr] Nicholls if his clients might consider resolution based on trustees’ statutory entitlement to reimbursement. I had in mind appointment of a Court expert, to calculate Mr Hong’s entitlement to reimbursement from the trust property on the evidence before me after taking into account the time value of money. Mr Nicholls flatteringly considered, although possibly without consideration of the time value calculations, I would not need a Court expert’s assistance to make the calculation. Of course, all turned on Mr Hong’s attitude to such a proposal. I enquired similarly of Mr Hong during his closing submission. He rejected the proposal, preferring to maintain his counterclaim.

[27] Given my finding Mr Hong did not advance money to Ms Dyer and Mr Kinnon, I also will dismiss the balance of Mr Hong’s counterclaim.

[28] As no factual foundation has been established for Mr Hong’s counterclaim, meaning no disrespect for Mr Hong’s and Mr Nicholls’ diligence in addressing other characterisations of the parties’ dealing, I am not prepared to consider the parties’ respective arguments in the abstract.

²² Judgment of Jagose J, above n 4, at [22].

²³ At [25(a)].

²⁴ At [25(b)].

²⁵ Footnotes omitted.

[30] In this Court, Mr Hong maintained that he made the payment by way of a loan to Ms Dyer and Mr Kinnon and says that the Judge erred in characterising his payment as having been made in fulfilment of his personal obligation as a trustee. For their part, the respondents also say that the Judge’s conclusion was wrong. However, they characterise Mr Hong’s payment as having been made from Mr Hong’s “Benevolence on the Conscience Loan Fund”. They resist the suggestion that they agreed to any loan.

[31] The respondents’ position is difficult to reconcile with the fact that they were unaware of Mr Hong’s “Benevolence on the Conscience Loan Fund” at the time the payment was made and only became aware of it as a result of Mr Hong’s 2018 and 2019 tax proceedings.²⁶ Nor is Mr Hong’s view consistent with the evidence. There is nothing in the record to suggest that Ms Dyer and Mr Kinnon personally agreed to borrow the amount. At the least, there would have to have been independent advice for Mr Kinnon and Ms Dyer.

[32] We agree with Jagose J’s characterisation of the payment, which is consistent with the evidence. The consequence, as Jagose J recognised, is that Mr Hong is entitled, as a matter of law, to be indemnified. Trustees are not permitted to make a profit out of their trust and generally are not compensated, but nor are they expected to carry out the trust at their own cost. Lord Lindley in *Hardoon v Belilios* said:²⁷

The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burdens unless he can shew some good reason why his trustee should bear them himself.

[33] As a result, a trustee is entitled to an indemnity from the trust for any liability personally discharged by him or her. The indemnity has received statutory recognition in s 38(2) of the Trustee Act 1956 and s 81 of the Trusts Act 2019. However, the

²⁶ See *Hong v Commissioner of Inland Revenue* [2018] NZHC 2539, (2018) 28 NZTC ¶23-073 at [18(c)]; and *Hong v Commissioner of Inland Revenue* [2019] NZCA 336, (2019) 29 NZTC ¶24-015 at [7]–[8].

²⁷ *Hardoon v Belilios* [1901] AC 118 (PC) at 123.

indemnity is not one that can be enforced in personam. In *S and S Ltd v XYZ Ltd*, the relevant principles were summarised as follows:²⁸

[38] ...

- (a) As against a third party, a trustee is personally liable for debts and liabilities incurred as a trustee;
- (b) The trustee has a right of indemnity out of the trust assets for expenses or liabilities incurred by the trustee by recoupment of expenditure and exoneration of liability;
- (c) The right of indemnity is secured by an equitable lien over the trust assets, which arises by operation of law, confers a proprietary interest by way of security in the trust assets and takes priority over the claims of beneficiaries;
- (d) The lien extends to all the trust assets, except for those specifically excluded by the trust deed;
- (e) As the lien is equitable, the trustee can enforce it only by judicial sale or appointment of a receiver, not by sale out of court;
- (f) The right of indemnity accrues at the time the obligation is incurred;
- ...
- (h) If the trust property is transferred to a new trustee, the lien survives and the new trustee takes subject to the lien of the old trustee — except in the case of a bona fide purchaser for value;
- (i) A trustee is entitled to retain possession of trust property against a beneficiary until its indemnity is exercised.

[39] These are general principles only, not specific rules. Their application may turn on the circumstances in which the indemnity is invoked. It is important to bear in mind that a trustee's indemnity has different aspects: reimbursement, exoneration, retention and realisation. A trustee who incurs a liability may discharge it out of his own pocket and then reimburse himself from the trust fund. Alternatively, he may discharge the liability by paying directly from the trust fund, so as to exonerate himself. A trustee may retain the trust fund until he has been indemnified for present liabilities and for contingent or future liabilities. A trustee may realise trust assets to meet his expenses and liabilities.

²⁸ *S and S Ltd v XYZ Ltd* [2016] NZHC 26 (footnotes and emphasis omitted), citing *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344, (2008) 74 NSWLR 550 in which Brereton J in turn drew on *Trim Perfect Australia Pty Ltd (in liq) v Albrook Constructions Pty Ltd* [2006] NSWSC 153.

[34] In *Equity Trust (Jersey) Ltd v Halabi*, the Privy Council recently considered the scope of trustee's indemnities. Lord Richards JSC and Sir Nicholas Patten, for the majority of the Board, summarised the position as follows:²⁹

[109] The right of indemnity enjoyed by a trustee does not ... impose any personal obligation on any party to make payment. The trustee's right is to payment out of the trust fund. It is a right to have the fund applied in reimbursement of liabilities already paid by the trustee or in exoneration of liabilities which the trustee is required to pay, net in either case of any amounts for which the trustee is accountable. It is a right that the court will enforce by an order for payment out of the fund, in effect an order for specific performance.

[110] It is the consequence of that right to equitable enforcement of the indemnity out of the trust property that the trustee has a proprietary interest in the trust property. This is not security for the payment of a debt, as in the case of an unpaid vendor's lien or a solicitor's lien, because there is no debt payable by any party to the trustee. The trustee's right, enforceable in equity, is no more and no less than the right to have the trust property applied in indemnifying the trustee against liabilities properly incurred. Where such a right exists for payment out of a fund, which the court will enforce, the fund is subject to an equitable charge in favour of the person entitled to payment and it will in equity create a proprietary interest in the fund in favour of that person. This is a longstanding equitable principle, summarised by the Privy Council in *Palmer v Carey* ... where Lord Wrenbury ... referred to the "familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a court of equity will decree specific performance".

[35] In *Re Pumfrey*, the trustees bought a property at a price exceeding the available funds of the trust, with one of the beneficiaries promising to make good the shortfall.³⁰ At the point settlement was due, the beneficiary could not make good on his promise so one of the trustees borrowed the shortfall and paid it to the vendor. The Court held the trustee was entitled to be indemnified out of the trust's assets for the amount borrowed.³¹

His utmost claim is indemnity. It is plain, I think, from a letter I have read, that he advanced this money for the purpose of completing a purchase which was within the trust, a trust which had properly arisen at the request of the husband and wife, and which purchase could not, I conclude, have been made at all (the property being a small household property) unless the money to make up the amount of £3050 had been provided somehow or other. Therefore it appears to me that this is simply a case of a trustee who, without the slightest chance of benefit to himself, for the convenience of his cestuis que trust,

²⁹ *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, [2023] AC 877, citing *Palmer v Carey* [1926] AC 703 (PC) at 706–707.

³⁰ *Re Pumfrey* (1882) 22 Ch D 255 (Ch).

³¹ At 260.

advanced a sum of money of his own to complete a purchase which otherwise was entirely within the trust, and within his power to make. Therefore, quite apart from all these transactions of attempted mortgage (which I treat as being no more than an assignment of such equity as he might have, to the bank), it seems to me that he has *prima facie* an equity to be indemnified in respect of this advance.

[36] Kay J addressed the argument that such a trustee had mixed their funds with those of the trust and was therefore barred from recovery:³²

But then a suggestion was made that the rule ... that where a trustee mixes his own money with trust funds the whole heap resulting from that admixture belongs to the trust, must be applied in this case. ... Well, I cannot conceive that in this case the doctrine of admixture can be applied for this purpose. In strictness it only ought to be applied where it is impossible to make out how much was the trust fund and how much was the trustee's money. Here there is no difficulty at all upon this point. The exact figures are perfectly well known, and it is quite possible to make the separation which the trustee now desires to have made, the claim being made against him or upon his right against the trust estate.

[37] The right of indemnity gives rise to an equitable proprietary interest in the trust property generally, sometimes referred to as a “beneficial interest”.³³ Although various authorities also refer to the creation of an equitable charge or lien over the trust assets, this is not a charge or lien in the typical sense. As the High Court of Australia observed in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia*:³⁴

... the beneficiaries cannot compel the trustee to exercise the trustee's powers as legal owners of the trust assets for their benefit. A court of equity will assist the trustee to realise trust assets to satisfy the trustee's right of indemnity, in priority to the beneficiaries' interests, and thus it is said that the trustee has an equitable charge or lien over the trust assets. It is not, however, a charge or lien comparable to a synallagmatic security interest over the property of another. It arises endogenously as an incident of the office of trustee in respect of the trust assets.

[38] Like the Privy Council in *Equity Trust*, we consider a simple reference to “proprietary interest” sufficient.³⁵ Such a proprietary interest does not defeat the equitable ownership by the Trust but co-exists with it.³⁶

³² At 260–261.

³³ See the discussion in *Equity Trust (Jersey) Ltd v Halabi*, above n 29, at [143].

³⁴ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* [2019] HCA 20, (2019) 268 CLR 524 at [83] (footnotes omitted).

³⁵ *Equity Trust (Jersey) Ltd v Halabi*, above n 29, at [143].

³⁶ As we will come to later, it follows that Harvey J was correct to find that the Trust remains the equitable owner of the property.

[39] In this case, the nature of the payment was squarely in issue before Jagose J. Even though Mr Hong pleaded that he had advanced the money to Ms Dyer and Mr Kinnon, the evidence supported the Judge’s finding that Mr Hong had made the payment to settle the purchase in his capacity as a trustee and was entitled to be indemnified in respect of it. The more difficult issue is whether, having made these findings, the Judge was correct to dismiss the counterclaim.

[40] Clearly, Mr Hong has not been defrauded of his interest and his counterclaim, as pleaded, would inevitably fail. On that view, the Judge was entitled to dismiss the counterclaim. But dismissing the counterclaim created a real risk that, despite the clearly correct factual and legal findings as to Mr Hong’s rights, he would be left without any recourse because a subsequent proceeding would be open to challenge as an abuse of process.³⁷ The likelihood of this happening is clear from the memorandum filed after the appeal hearing on behalf of the respondents in which counsel pointed out that during the formal proof hearing they had submitted that if Mr Hong wanted to be repaid he should file an appropriate claim but that Mr Hong had not done so.³⁸

[41] This unsatisfactory situation was capable of being remedied through an amendment of the pleadings under r 1.9(2) of the High Court Rules 2016. Rule 1.9(2) allows the court, on application or its own initiative, to amend pleadings at any stage of a proceeding when necessary to determine “the real controversy between the parties”.³⁹ It is an expansive power, not limited to defects or errors.⁴⁰ The amendment must be in the interests of justice, not cause significant prejudice to the other party and not cause significant delay. This Court has suggested that it is inappropriate to refuse to make an amendment to denounce a party’s conduct.⁴¹

[42] In our view, it would have been in the interests of justice for the Judge to have exercised the power to amend the pleading in this case. The real controversy in the counterclaim was the status of Mr Hong’s payment and what, if any, rights he acquired as a result of it. This was known to all the parties. Mr Hong had proved the facts

³⁷ *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch); and *Anura Ltd (formerly Orion Marine Ltd) v Sealegs International Ltd* [2024] NZCA 538, (2024) 181 IPR 286.

³⁸ Mr Hong did not respond to this memorandum.

³⁹ See also Court of Appeal (Civil) Rules 2005, r 48(2).

⁴⁰ *Wright Stephenson and Company Ltd v Copland* [1964] NZLR 673 (SC) at 678–679.

⁴¹ *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA) at 385.

necessary to succeed on a properly pleaded claim (subject to any limitation issues). Further, it is evident from Mr Nicholls' response to the Judge's suggested approach to resolving the counterclaim that the respondents did not perceive any prejudice from the Judge addressing the issue at that time.

[43] Mr Hong's rejection of the Judge's suggested basis for resolving the claim was properly viewed against his difficulties in conducting this litigation — Mr Hong was unrepresented and unwell, his pleadings were confused and his grasp of important aspects of the relevant law inadequate.⁴² If the Judge had exercised the power to amend the pleadings, Mr Hong's right to an indemnity would have been preserved and a claim for enforcement determined. That was the proper course to advance the interests of justice in this case. For this reason, although we uphold the Judge's findings in respect of Mr Hong's claims of perjury, equitable fraud and breach of good faith, we consider that the appeal should be allowed.

[44] While the power to amend pleadings can be exercised on a court's own motion (including by this Court), amendment would ordinarily follow a formal application and allow the parties to consider draft amended pleadings and, if necessary, be heard on them.⁴³ It is not appropriate for us to grant an amendment in the absence of draft pleadings and without having been addressed by the parties on it.⁴⁴ We consider that the best course is to remit the counterclaim to the High Court for Mr Hong to make an application to amend his pleading to enforce his proprietary interest by seeking an order that the trustees of the Trust apply the Trust property to pay the amount due under Mr Hong's right of indemnity for the balance of the purchase price of the Property. The respondents would be free to assert any limitation defence they may have in response to the amended claim.

⁴² In an affidavit of 18 February 2022, which was before Jagose J, Mr Hong explained that he had suffered ill-health from about 2013 and was diagnosed with a serious medical condition in 2018. This had affected his ability to concentrate and to attend to his personal affairs, including the counterclaim. We infer that Mr Hong's failure to file a properly pleaded claim at the time of the formal proof hearing was attributable to these factors.

⁴³ *J Leavey & Company Ltd v George H Hirst & Company Ltd* [1944] KB 24 (CA) at 27.

⁴⁴ See at 27; and *James v Wellington City* [1972] NZLR 978 (CA) at 983 per Richmond J.

Observations on possible limitation defence to Mr Hong's counterclaim

[45] The respondents say that any claim brought now to enforce the right of indemnity to which Mr Hong is entitled would be barred by either of the Limitation Act 1950 or Limitation Act 2010. However, neither Jagose J nor Harvey J considered this aspect and we were not addressed on it, beyond the respondents' bare assertion. The issue is properly addressed in the context of any subsequent hearing in the High Court and pursued on appeal if necessary. However, we do make some obiter observations to assist the parties.

[46] The right to indemnity arose when Mr Hong made the payment on 1 August 2006. Limitation is therefore governed by the Limitation Act 1950. Section 20 of that Act provides:

20 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

- (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land (not being the proceeds of the sale of land held upon trust for sale), after the expiration of 12 years from the date when the right to receive the money accrued.

...

[47] This is in terms substantially similar to s 20 of the Limitation Act 1980 (UK) which provides:

20 Time limit for actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.

- (1) No action shall be brought to recover—
- (a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal); or
- (b) proceeds of the sale of land;
- after the expiration of twelve years from the date on which the right to receive the money accrued.

...

[48] In respect of that provision *Halsbury's Laws of England* suggests:⁴⁵

It seems that an equitable lien should be regarded as a charge within the meaning of the Limitation Act 1980. Thus no claim may be brought to recover any principal sum of money secured on real or personal property by an equitable lien after the expiration of 12 years from the date when the right to receive the money accrued.

[49] The issue does not appear to have been directly addressed in any English or New Zealand case. *The Laws of New Zealand* says:⁴⁶

Unlike common law possessory liens, which are essentially defensive, equitable liens depend on enforcement by the Courts and accordingly may be barred by the lapse of time.

[50] Likewise in an essay on equitable liens, "The Equitable Lien Rediscovered: A Remedy for the 21st Century", the author references *Halsbury's* and says "it has been suggested that the equitable lien cannot be sustained outside the limitation period set by statute".⁴⁷

[51] However, *Lewin on Trusts* says:⁴⁸

[50-049] A trustee's right of recourse to the trust assets for expenses properly incurred in the administration of the trust is ordinarily given effect by his discharging the expense directly out of the assets or else reimbursing himself from the assets if he has paid the expense out of his own pocket. If he is a sole trustee then while he holds office it is neither necessary nor possible for him to sue for the expenses, since the trust fund is vested in him, and so no question of limitation will arise. If he is one of several trustees, then while he holds office he can still have recourse to the trust assets without suing unless his co-trustees wrongly decline to join in the payment; even then a claim to compel them to do so will not be a claim to enforce a personal liability of theirs and no period of limitation prescribed by the 1980 Act appears to apply to it. The same will remain true when one or more beneficiaries have become absolutely entitled to the trust assets but the trustees are entitled to make a retention out of them against a possible liability.

[50-050] Once the trustee has left office, however, he will have handed over the trust assets and will have lost the opportunity to discharge the expenses out of the trust assets or reimburse himself from them; but a liability may crystallise thereafter. The lien of the former trustee persists and will entitle the former trustee to require the present trustee to meet the liability of

⁴⁵ *Halsbury's Laws of England* (5th ed, 2021, online ed) vol 68 Lien at [986] (footnotes omitted), citing the Limitation Act 1980 (UK), s 20(1).

⁴⁶ Maurice Casey *The Laws of New Zealand* Lien (online ed) at [19].

⁴⁷ Fiona R Burns "The Equitable Lien Rediscovered: A Remedy for the 21st Century" (2002) 25 UNSWLJ 1 at 11, citing *Halsbury's Laws of England* (4th ed reissue, 1997) vol 28 Lien at [784].

⁴⁸ Thomas Fletcher (ed) *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol 2 (footnotes omitted; emphasis added).

trust assets in their hands. *Such a claim is proprietary, in that the present trustee is not personally liability by virtue of the lien, and no period of limitation prescribed by the 1980 Act appears to apply to it. ...*

[52] The observations in *Lewin* are consistent with the more recent discussion in *Equity Trust* and the approach of the High Court of Australia in *Carter Holt Harvey*. We do not consider the “equitable charge” in favour of a trustee, who meets the liabilities of a trust from their own resources, to be sufficiently analogous to the type of charge referenced in s 20 for that limitation period to apply. As the Privy Council observed in *Equity Trust*, the proprietary interest which the trustee acquires is not security for the payment of a debt as in the case of an unpaid vendor’s lien or solicitor’s lien because there is no debt payable by any party to the trustee. The trustee’s right, enforceable in equity, is no more nor less than the right to have the trust property applied in indemnifying the trustee against liabilities properly incurred, in turn giving rise to a proprietary interest in the trust property.⁴⁹

[53] Finally, we note that if we are wrong in that provisional assessment, the parties would need to consider the implications of s 25(4) of the Limitation Act 1950 having regard to the payments made by Ms Dyer and Mr Kinnon. We express no view in that respect.

[54] On that basis it seems to us unlikely that the interest acquired by Mr Hong is defeated by limitation. Nor was such interest abandoned (for example, by taking a formal security).⁵⁰ Nor did he disburse property to the beneficiaries and thereby implicitly disclaim his indemnity.

[55] Finally, we note that we do not have any information on the current status of ASB’s loan(s) and cannot therefore express any view about the extent to which the Bank might be subrogated to Mr Hong’s right of indemnity.

⁴⁹ *Equity Trust (Jersey) Ltd v Halabi*, above n 29, at [110].

⁵⁰ An equitable lien will be abandoned if that is the intention of its holder. This intention may be inferred from the lienholder’s conduct and the surrounding circumstances. Generally, an inference will arise if the lien claimant takes additional security as there is a presumption against a creditor obtaining double security: see *The Laws of New Zealand Lien*, above n 46, at [20] citing *Bank of Africa Ltd v Salisbury Gold Mining Co Ltd* [1892] AC 281 (PC) at 284; *Smith v Evans* (1860) 28 Beav 59, 54 ER 288 at [19]; and *Nairn v Prowse* (1802) 6 Ves 752, 31 ER 1291.

Appeal against decision of Harvey J

Judgment of Harvey J

[56] Harvey J held that the Trust obtained legal and equitable ownership of the Property upon settlement and that, despite the subsequent transfers, its equitable ownership remained. He said Mr Hong's belief that the Trust no longer had any equity or interest in the Property was "plainly incorrect".⁵¹ He agreed with Jagose J's finding that Mr Hong had paid the balance of the purchase price in fulfilment of his duty as a trustee to settle the Trust's purchase. He noted that Mr Hong was entitled to be reimbursed for the amount advanced, but that this did not defeat the Trust's equitable ownership. The Property continued to be held on trust when it was transferred to BGH.

[57] Harvey J was satisfied that Mr Hong had breached his fiduciary duties by prioritising his interest in being repaid or reimbursed over the respondents' interests, by not keeping parties sufficiently informed, and by breaching the rule against self-dealing.⁵² He considered that the confused and inconsistent nature of the factual evidence was the "result of Mr Hong taking matters into his own hands to secure his interests, which he saw as paramount, without properly explaining to the plaintiffs his proposed arrangements".⁵³ He also concluded that NTL had knowingly received the Property and had breached its fiduciary duties as trustee when it transferred the Property to Mr Hong.⁵⁴ However, the Judge dismissed the cause of action based on land transfer fraud because the respondents had not shown Mr Hong intentionally and dishonestly sought to defeat the Trust's interest in the Property or that his actions were inconsistent with innocence or mere negligence.⁵⁵ The respondents do not challenge that finding by way of cross-appeal.

⁵¹ Judgment of Harvey J, above n 6, at [56]–[58].

⁵² At [73]–[76].

⁵³ At [73].

⁵⁴ At [121]–[122].

⁵⁵ At [107]–[116].

[58] As to remedies, the Judge:

- (a) declared that Mr Hong had acted in breach of trust and therefore fraudulently in equity and that the Property was held on constructive trust for the Trust;⁵⁶
- (b) declined to make orders for the conveyance of the Property, because this would, in his view, have cut across the land transfer scheme;⁵⁷
- (c) declined to make an order for the return of any commission or remuneration paid to Mr Hong, because there was no evidence of any such commission or remuneration;⁵⁸
- (d) declined to grant an “inquiry into equitable losses” or exemplary damages but held that Mr Hong and NTL were, “in principle”, liable for an account of profits;⁵⁹ and
- (e) given quantum was to be determined separately, directed that interest on the plaintiffs’ claim should be determined “at the second stage” of the proceeding.⁶⁰

[59] Again, there is no cross-appeal in relation to any of these orders.

Did the Judge err in determining the causes of action in respect of which Mr Hong had filed a statement of defence?

[60] Mr Hong says that because he had filed a statement of defence to the causes of action for breach of fiduciary duty and knowing receipt, Harvey J was only entitled to determine the land transfer fraud cause of action by formal proof. The respondents did not identify this ground of appeal in their list of issues, nor address it in their submissions.

⁵⁶ At [80]–[81] and [129].

⁵⁷ At [82].

⁵⁸ At [83].

⁵⁹ At [89], [90], [96] and [130].

⁶⁰ At [126]–[127] and [131].

[61] Rule 15.9 of the High Court Rules provides for formal proof of various claims. Rules 15.9(1) provides:

- (1) This rule applies if, or to the extent that, the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, and the plaintiff seeks judgment by default for other than a liquidated demand.

[62] Although the Judge set out r 15.9 in his judgment,⁶¹ he did not identify the effect of r 15.9(1),⁶² which is to preclude determination of causes of action to which a statement of defence has been filed.⁶³ Mr Hong had filed a statement of defence to the original statement of claim which pleaded breach of fiduciary duty and knowing receipt. He was entitled to adduce evidence and be heard on it at trial. We agree that the Judge erred in determining these causes of action. That error does not, however mean that the judgment should be set aside.

[63] Mr Hong could have applied under r 15.10 to set aside the decision. Rule 15.10 allows a judgment obtained by default to be set aside if it appears that there has been, or may have been, a miscarriage of justice. It is quite possible that such an application would have been granted. In *EA v Rennie Cox Lawyers*, this Court affirmed the longstanding approach that — although not an inflexible rule — where a judgment has been irregularly obtained, there will almost always be a miscarriage of justice such that the judgment should be set aside without considering the merits.⁶⁴ Relevantly:

A judgment obtained by default will often be entered by an administrative act and without judicial scrutiny. In any event, it does not represent a determination of the claim on its merits. A default judgment that has been irregularly obtained without compliance with the procedural requirements is a judgment to which the plaintiff was not entitled and which ought not to have been entered on the court record. Justice can almost inevitably be said to have miscarried in these circumstances.

[64] However, instead of applying to set aside the judgment, Mr Hong chose to exercise his right of appeal. On appeal, the question is not whether there was a

⁶¹ At [40].

⁶² Nor, apparently, was this appreciated when the matter was set down for formal proof.

⁶³ *Body Corporate 324371 v Clark Brown Architects Ltd* [2021] NZHC 2379 at [19]; and *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511 at [5].

⁶⁴ *EA v Rennie Cox Lawyers* [2018] NZCA 33, [2018] 3 NZLR 202 at [16].

miscarriage of justice that would justify setting the judgment aside, but whether Mr Hong has persuaded us that we should differ from Harvey J’s decision.⁶⁵

[65] We start by noting that the Judge was alive to the fact that Mr Hong had filed a statement of defence and expressly considered the matters raised in it for the purposes of identifying any deficiencies in the claim.⁶⁶ The Judge addressed the factual assertions made by Mr Hong in the statement of defence and in the notes of evidence from the Tribunal hearing.⁶⁷ He approached the claim on the basis that it was for the plaintiffs to “establish each cause of action as far as the burden of proof lies on them” and it is evident from his analysis that he determined the cause of action on the balance of probabilities.⁶⁸

[66] In this Court Mr Hong had the opportunity to fully ventilate the basis for his defence. He did not seek to adduce evidence for the purposes of the appeal. The major factual dispute between the parties was the basis on which Mr Hong advanced the funds to complete the purchase. But that issue had already been determined by Jagose J in the context of the counterclaim.⁶⁹ The issues arising were ones of law. We are therefore satisfied that Mr Hong’s position would have been no better if he had had the benefit of a trial. As a result, the Judge’s error in determining the causes of action to which Mr Hong had responded by way of formal proof does not, in itself, provide a basis on which to set aside the judgment.

[67] We turn to consider the Judge’s analysis of the legal issues and consider whether there is any basis on which to differ from his conclusions.

⁶⁵ *Austin, Nichols & Co Inc v Stitching Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [30].

⁶⁶ Judgment of Harvey J, above n 6, at [5].

⁶⁷ As we come to later, we are satisfied that this evidence was admissible before Harvey J.

⁶⁸ Judgment of Harvey J, above n 6, at [41]. Rule 15.9(4) does not specify a standard of proof but instead requires proof “to the satisfaction of the judge”. This Court has held that does not import notions of the burden of proof or a particular standard of proof: *R v Leitch* [1998] 1 NZLR 420 (CA) at 428. However, in practice this wording has been treated as equating to the usual standard of proof at trial: *Ferreira v Stockinger* [2015] NZHC 2916 at [35]–[36]; and *Wulff v Demarco* [2021] NZHC 3110 at [76]–[79].

⁶⁹ We have already concluded that Jagose J’s findings were correct and, for the reasons we come to later, we consider that Harvey J was entitled — indeed bound — to proceed on the basis of them.

The Judge's finding that the Trust is the equitable owner of the property

[68] In the High Court the trustees maintained that the sale and purchase agreement recorded the Trust as the purchaser and that it obtained an equitable interest in the Property upon settlement which subsists to this day. Mr Hong's position was, essentially, that the arrangement was that, having paid most of the purchase price, he was entitled to hold the property until the trustees "redeemed" it from him by repaying the advance. He submitted that the Trust lost its equitable interest in the Property at some point because of the failure to repay him. The Judge rejected that submission and accepted the trustees' claim that the Trust was, and always had been, the equitable owners of the property.⁷⁰

[69] Mr Hong challenged this finding on the basis that the Judge wrongly (1) took into account hearsay evidence, (2) took into account the notes of evidence from the Tribunal hearing and (3) relied on Jagose J's characterisation of Mr Hong's payment as one made in his capacity as trustee.

Hearsay evidence

[70] The trustees relied on affidavits by Mr Kinnon and Ms Dyer which attributed statements to Mr Hong, relevantly, that he had told Ms Dyer (who in turn told Mr Kinnon) that it was in the Trust's interest that BGH be sole trustee instead of the Property being held jointly by Ms Dyer and Mr Hong as co-trustees. There were also emails between Mr Kinnon and Mr Hong containing discussions about potentially purchasing the Property in half shares.

[71] Harvey J concluded those statements were not hearsay because they were not offered to establish the truth of their contents.⁷¹ In respect of the affidavit evidence, the issue to be determined was whether BGH held the property on trust alone, not whether it was in the Trust's or Ms Dyer and Mr Kinnon's best interests that it did so. We consider that conclusion is correct but, in any event, neither the transfer to BGH nor the proposal for joint ownership were in issue, so the point is immaterial.

⁷⁰ Judgment of Harvey J, above n 6, at [57]–[58].

⁷¹ At [48]–[49].

Notes of evidence from the Tribunal hearing

[72] The Judge admitted the notes of evidence from the Tribunal hearing in which Mr Hong was cross-examined about the settlement of the property and subsequent transfer of it to him personally. Mr Hong made statements that undermined his position that he alone held the equitable interest in the property as a result of the trustees not having repaid him.

[73] The Judge treated the notes of evidence as admissible hearsay because they satisfied the requirements of s 18 of the Evidence Act 2006: the circumstances in which the evidence was given meant it could be considered reliable and the circumstances of the formal proof hearing meant there would be undue delay and expense should Mr Hong be required to give evidence.⁷² This approach was correct in the context of a formal proof hearing, but at a trial (to which Mr Hong was entitled and at which he would have been present) the statements would not have been hearsay. They could, nevertheless, have been relied on as prior inconsistent statements.

[74] In admitting the notes of evidence, the Judge explicitly considered whether this material was inadmissible having regard to s 50 of the Evidence Act. Section 50 codifies the common law in respect of the admissibility of a decision, judgment or finding of fact in a civil proceeding.⁷³ In separate civil cases where issues of fact overlap, the accuracy of a fact proved in an earlier proceeding must be independently established in any later proceeding.⁷⁴ Section 50 provides:

50 Civil judgment as evidence in civil or criminal proceedings

- (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
- (1A) Evidence of a decision or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal.

⁷² At [52]–[53] and [55], citing *Independent Carpets Ltd (in liq) v Carpet Call 2000 NZ Ltd* [2020] NZHC 2757.

⁷³ *Attorney-General v Siemer* [2024] NZCA 435 at [26], citing *Hollington v F Hewthorn and Co Ltd* [1943] KB 587 (CA), the case from which the common law rule (the rule in *Hollington v Hewthorn*) developed.

⁷⁴ *Attorney-General v Siemer*, above n 73, at [41], citing *APN New Zealand v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [33].

- (2) This section does not affect the operation of—
- (a) a judgment *in rem*; or
 - (b) the law relating to *res judicata* or issue estoppel; or
 - (c) the law relating to an action on, or the enforcement of, a judgment.

[75] As Harvey J noted, it has not previously been determined whether s 50 renders transcripts of evidence from a previous civil proceeding inadmissible in another civil proceeding. The Judge noted that s 50 precludes reliance on decisions, judgments or findings of fact and that the notes of evidence did not fall into any of these categories.⁷⁵ He therefore did not consider that s 50 precluded the admission of the notes of evidence. We consider the Judge’s approach correct.

[76] We add that, in considering the correctness of the Judge’s conclusions, we have not needed to rely on the notes of evidence other than as background to the proceedings.⁷⁶

Reliance on Jagose J’s findings as to the nature of the payment

[77] In concluding that the Trust was the equitable owner of the property, Harvey J said:⁷⁷

[57] The sale and purchase agreement records the Cedar Lodge Trust as the purchaser of the Property from the Keoghs. I agree with Jagose J’s characterisation of the payment from Mr Hong, which is that he paid the balance of the purchase price in order to comply with a trustee’s duty to settle the Trust’s acquisition for the benefit of its beneficiaries — a duty for which Mr Hong would be personally liable for breach. Thus, the sole owner (legal and beneficial) at the time of purchase was the Trust. I am satisfied on the balance of probabilities that, despite his belief to the contrary, Mr Hong took no direct, legal interest in the Property upon purchase. Certainly, he is entitled to be reimbursed from Trust property the amount he advanced.

[78] Both parties submitted that Harvey J erred in adopting Jagose J’s characterisation of Mr Hong’s payment. Mr Hong complains that the judgment “was not before the court at the time [Harvey J] heard the [formal proof application]”. The

⁷⁵ Judgment of Harvey J, above n 6, at [54], citing *Craig v Stringer* [2019] NZHC 1363, [2019] 3 NZLR 743 at [27], in which Palmer J left the question open.

⁷⁶ See *Wikeley v Kea Investments Ltd* [2024] NZCA 609, [2024] NZCCLR 765 at [112] and [115], citing *Puka v Attorney-General* [2023] NZHC 2686 at [129].

⁷⁷ Judgment of Harvey J, above n 6 (footnotes omitted).

respondents submit Harvey J relied on a finding of fact made by Jagose J — that the payment made by Mr Hong was pursuant to his obligation as trustee — without considering the evidence and that this was contrary to s 50 of the Evidence Act.

[79] We note as a preliminary point that s 50(1) prohibits reliance on a finding of fact from one civil proceeding in “another civil proceeding”. It is generally accepted that a counterclaim is a substantive independent claim,⁷⁸ although it is ordinarily heard simultaneously with or immediately after the original proceeding.⁷⁹

[80] If the two judgments are considered to be products of two separate proceedings, we nevertheless consider the proviso to s 50 — that it “does not affect the operation of ... the law relating to *res judicata* or issue estoppel” — applies.⁸⁰ Harvey J cited *White v Attorney-General* in which this Court set out the relevant law on *res judicata* and issue estoppel.⁸¹

[21] *Res judicata* prevents a party from relitigating the same action. As the Supreme Court noted in *Lai v Chamberlains*, a judgment on the merits is conclusive as between the parties to the litigation and can generally only be challenged on appeal. The author of *Spencer Bower and Handley: Res Judicata*, explains that for *res judicata* to be invoked, the first decision must:

- (a) be “judicial in the relevant sense”;
- (b) have been delivered;
- (c) be from a tribunal that has jurisdiction over the parties and the subject matter;
- (d) be final;
- (e) have been decided on the merits;
- (f) have determined a question raised in the later litigation; and
- (g) be one that involved the same parties (or their privies) as in the later litigation.

⁷⁸ High Court Rules 2016, r 5.58(3); *Star-Kist Overseas Inc v The Ship “MV Fijian Swift”* [1982] 1 NZLR 721 (CA) at 722–723; *Nippon Credit Australia Ltd v Girvan Corp NZ Ltd* (1991) 5 PRNZ 44 (HC) at 52; and Jessica Gorman and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR5.53.03] and [HR5.58.04].

⁷⁹ High Court Rules, r 5.58(1) and (2).

⁸⁰ Evidence Act 2006, s 50(2).

⁸¹ *White v Attorney-General* [2021] NZCA 479 (footnotes omitted). Cited in judgment of Harvey J, above n 6, at [14].

[22] The rationale for res judicata was explained in the following way by Lord Blackburn in *Lockyer v Ferryman*:

The object of the rule of res judicata is always put on two grounds — the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause.

...

[24] As this Court explained in *Shiels v Blakeley*, and reaffirmed in *Beattie v Premier Events Group Ltd*, res judicata may arise through cause of action estoppel, or issue estoppel.

...

[27] A decision will create an issue estoppel if it determined an issue in a cause of action as an essential step in its reasoning. Issue estoppel applies to fundamental issues determined in an earlier proceeding which formed the basis of the judgment.

[81] In our view, the fact that the claims and counterclaims were heard separately and by two different Judges did not require each Judge to determine the same issue independently at first instance.

Was the Judge's conclusion as to ownership correct?

[82] We agree with the Judge's conclusion, for the reasons he gave. In our view, it is beyond argument that the Trust obtained, and retains, its equitable ownership of the Property. We have already confirmed the correctness of Jagose J's characterisation of Mr Hong's payment and of his status as the holder of a propriety interest as a result of his right to indemnification. That right does not alter the status of the Trust as the equitable owner of the Property.

Did the Judge err in finding Mr Hong breached his fiduciary duties?

[83] The Judge held that Mr Hong: put his interest in being repaid ahead of the beneficiaries' interests; failed to give full information to Ms Dyer, who was co-trustee, a beneficiary and Mr Hong's client; and breached the rule against self-dealing.⁸² The Judge accordingly concluded that Mr Hong had acted fraudulently in equity in

⁸² Judgment of Harvey J, above n 6, at [73]–[77].

effecting the transfers and mortgage.⁸³ He also concluded that Mr Hong acted in breach of trust and therefore fraudulently in equity by his transfers of the Property to NTL and then to himself because: (1) when property is conveyed to a person as a trustee, denying the trust and claiming the property to have been received in a personal capacity is fraud; and (2) Mr Hong accepted that NTL held the Property as a trustee.⁸⁴

[84] Mr Hong argues that he was simply assisting Mr Kinnon and Ms Dyer, that there was no self-dealing because there was no intention to make a profit and his motives were benevolent. He says that because the Trust never repaid him, he was free to do with the Property what he wanted.

[85] We can deal with this submission briefly. Harvey J's analysis is unimpeachable, reflecting first principles of trust law.⁸⁵ The proprietary interest Mr Hong acquired in the Trust property did not give him authority to deal with the Property as he wished. He had a right, enforceable in equity, to have the Trust property applied in satisfaction of the indemnity. However, he could not claim Trust property personally, as he has purported to do. The indemnity was capable of enforcement in the High Court's equitable jurisdiction, which he was obliged to invoke if he sought recovery of the moneys paid. The self-help remedies adopted by him and his continued assertion of an ability to deal with the Property as his own represents a denial of the trust he is obliged to uphold.⁸⁶

Did the Judge err in relation to the remedies granted?

[86] Harvey J made a declaration that Mr Hong held the Property on constructive trust for the Trust. We regard that declaration as inevitable. Our conclusion in this respect does not detract from recognition of Mr Hong's co-existent proprietary interest in the Trust property generally, pursuant to his right to indemnity.

[87] The Judge also held that NTL and Mr Hong were liable "in principle" for an account of profits. We agree that recovery may extend to any profits made by Mr Hong

⁸³ At [79].

⁸⁴ At [80].

⁸⁵ At [56]–[58].

⁸⁶ See Fletcher, above n 48, at [17-061]–[17-065]. For a summary of the rights and remedies available to a trustee, including permissible self-help remedies, see at [19-044].

as a result of misapplication of the Trust property, as for example, through the mortgage raised from ASB. Subject to limitation arguments (on which we have already expressed our obiter views) Mr Hong may assert his indemnity by way of set-off against any such liability. Although a trustee is generally not entitled to interest pending reimbursement from the trust property, there is some authority, which Mr Hong will no doubt wish to explore, permitting interest in the court's discretion.⁸⁷ We say no more in that respect because we have not received submissions on the point. His entitlement does not however extend to receipt of rent in a personal capacity. The only proper characterisation of the rental payments is that identified by Jagose J, namely that they were payments to the Trust, not Mr Hong, for use of the Property. Obviously the \$50,000 payment must be accounted for in the context of any claim under the indemnity.

[88] With these observations prudent parties would carefully consider their settlement options in advance of any resumed hearing.

Costs

[89] We consider that costs should lie where they fall, having regard to the opportunity these proceedings have provided to clarify, for the purposes of any further hearing or settlement, the rights and interests of the respective parties.

[90] Accordingly, we make no order as to costs on the appeals. Nor do we interfere with the costs orders made in the High Court.

Result

[91] The appeal against the judgment of Jagose J in CA265/2023 is allowed in part. We uphold the findings of Jagose J in respect of Mr Hong's claims of perjury, equitable fraud and breach of good faith. We otherwise allow the appeal and remit the proceeding to the High Court for determination of an application by Mr Hong to amend his statement of counterclaim to address his right to indemnity.

⁸⁷ At [19-046].

[92] The appeal against the judgment of Harvey J in CA433/2023 is dismissed. We remit the proceeding to the High Court for determination of the account of profits.

[93] We make no order as to costs.

Solicitors:

Martin Nicholls, Kerikeri for First, Second and Third Respondents