IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA259/2023
[2025] NZCA 109

BETWEEN	ISMAIL RAHIMAN KHAN First Appellant
	FARHAZ ASHIK REHMAN Second Appellant
	AZAD ALI Third Appellant
	MOHAMMED ATIK Fourth Appellant
AND	NEW ZEALAND MUSLIM ASSOCIATION First Respondent
	REGISTRAR OF INCORPORATED SOCIETIES AT AUCKLAND Second Respondent

Hearing:	26 September 2024 (further materials received 27 September 2024)
Court:	Courtney, Cooke and Collins JJ
Counsel:	M C Smith for Appellant P C Murray for First Respondent B M Finn and J L Schwarcz for Second Respondent
Judgment:	10 April 2025 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed. The High Court judgment is set aside.

B The first respondent is directed to transfer the land and dwellings at 45 Cartwright Road, Kelston, and associated chattels and funds in bank

accounts to the appellants in this Court and the first respondents in the High Court proceedings, to be held by them under the terms of the Kelston Trust.

C **The claim against the Registrar of Incorporated Societies at Auckland concerning restoration of the Kelston Trust to the register pursuant to s 26(4) of the Charitable Trusts Act 1957 is remitted to the High Court.**

D **Leave is reserved to the parties to seek directions from the High Court to give effect to these orders.**

E **The first respondent must pay the appellants costs for a standard appeal on band A basis together with usual disbursements.**

F **The order for costs in the High Court is set aside. The question of costs in the High Court is to be reconsidered by that Court in light of this judgment.**

REASONS OF THE COURT

(Given by Cooke J)

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[1] The appellants appeal from a decision of the High Court dismissing their claim to recover the Kelston Mosque and Islamic Centre and associated assets from the first respondent to whom they had been transferred.[1]

Background

[2] The appellants were four of the trustees of the Abu Hurairah Trust Kelston (the Kelston Trust).[2] The Trust was founded in 2003, and operated a mosque and associated Islamic centre in Cartwright Road, Kelston, Auckland. There were seven founding trustees, including the four appellants.

[3] Over the years disputes had developed between the trustees. They included disagreements about how to deal most effectively with issues concerning youth. In early 2004, two further trustees were appointed to the Trust, bringing the total to nine. Then, on 19 April 2014, five of the trustees purported to remove the second to fourth appellants, as well as Mr Muntaj Ali, who was one of the five applicants in the High Court, as trustees. Later, on 29 April 2016, the first appellant was removed by the remaining four trustees. The effect of these decisions was that four of the trustees (the remaining trustees) had purportedly removed the other five.[3]

[4] The five removed trustees then challenged their removal. No notice had been given to the removed trustees at the first meeting, and no quorum had been present at the second meeting in accordance with the Kelston Trust's Trust Deed. Solicitors were instructed and draft proceedings were prepared and sent to the remaining trustees.

[5] On 30 July 2018, these five trustees, four of whom are the appellants, filed these proceedings in the High Court. At about the same time, on 27 July 2018, the remaining trustees resolved to transfer all of the assets of the Kelston Trust to the New Zealand Muslim Association (the NZMA), the first respondent, including the mosque and Islamic Centre. The NZMA agreed to receive these assets. Deregistration documents dated 30 July 2018 were then filed with Charities Services | Ngā Ratonga

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1 *Khan v Hussain* [2023] NZHC 802 [judgment under appeal].

2 In the High Court, there were five applicants: the four present appellants, and Mr Muntaj Ali. Mr Ali has since passed away and is not a party to this appeal.

3 These four trustees were named as the first respondents in the High Court proceedings.

Kaupapa Atawhai advising that the Kelston Trust was merging with another registered charity.

[6] The appellants became aware of the purported transfer as these steps were being taken. An NZMA representative was then provided with a letter dated 10 August 2018 from the appellants' counsel to the NZMA advising of the High Court proceedings, advising the NZMA that the transfers should not proceed as they were not lawful, and seeking an undertaking that they not proceed. This letter was circulated amongst NZMA representatives on 14 August 2018. Initially, the NZMA's lawyer recorded a decision of the NZMA to put the transfer on hold, but the President of the NZMA responded indicating that, in his view, no undertaking should be given, that it was in the best interests of the community the transfer should proceed, and that if the Court at a later stage wanted to cancel it, then this could be worked through. A deed of transfer was then executed on 14 August 2018 and the Kelston Trust was purportedly wound up.

[7] The appellants then applied to add the NZMA as a second respondent to the proceedings on 18 September 2018. The NZMA did not oppose joinder and it was formally joined on 19 November 2018.

[8] The appellants' claim against the remaining trustees was scheduled to be heard by the High Court on 5 June 2019. At that stage, the appellants and the remaining trustees were able to reach settlement, and orders were made by consent that the removal of the appellants as trustees had been invalid.[4]

[9] The remaining trustees later applied to set aside the consent orders, and the proceedings continued. But in July 2022, the appellants and the remaining trustees (identified as the first respondents in the excerpt below) entered a settlement agreement. The terms of the settlement were as follows:

> 1 The First Respondents will withdraw their application to set aside the 5 June 2019 consent order.
>
> 2 The First Respondents will not seek costs from the applicants in relation to this litigation.

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4 *Khan v Hussain* HC Auckland CIV-2018-404-1648, 5 June 2019.

3 The First Respondents will have no liability to the applicants arising out of the facts relating to this litigation.

4 The applicants' claims against the First Respondents will be withdrawn and they will not renew those claims nor make any other claims arising out of the same facts (except to the extent that the claims relate to any need to explain or justify the consent orders).

5 The applicants will not seek costs from the First Respondents in relation to this litigation.

6 The applicants will indemnify the First Respondents.

7 The First Respondents will all be immediately reappointed to the [Kelston] Trust. None of them will be subsequently removed from the [Kelston] Trust, or any successor trust, for any reason predating their re-appointment.

8 The First Respondents will have no further involvement in the litigation (unless they are summonsed to be witnesses by another party).

9 The applicants will not apply to summons the First Respondents to be witnesses.

10 If the applicants succeed in their claims against [the] NZMA, and assets are returned to the [Kelston] Trust (or any successor trust), or if assets are returned to the [Kelston] Trust (or any successor trust) for any other reason, the First Respondents will work with the applicants as trustees in the running of the [Kelston] Trust/the new trust.

11 There will be a new trust/trust deed, with the remaining applicants and First Respondents (wishing to remain as trustees) all being trustees of that new trust.

12 The settlement presumes the return of all assets (property and funds) from [the] NZMA to the [Kelston] Trust or any successor trust but is not conditional on that.

[10] The NZMA was not a party to this settlement. As the settlement contemplated, the proceedings continued against it. Jagose J dismissed the claim against the NZMA when it was heard before him in September 2022 and April 2023.[5]

The claim in the High Court and the issues on appeal

[11] There were two causes of action pleaded against the NZMA — in knowing receipt and alleging equitable estoppel. The relief sought was a declaration that the

[5] Judgment under appeal, above n 1, at [26].

NZMA held the property and cash on trust (implied, resulting or constructive), and an order directing the return of the assets. There was also a claim against the Registrar of Incorporated Societies at Auckland seeking revocation of the deregistration of the Trust. Jagose J dismissed them all. In this Court only the knowing receipt claim remains relevant — the allegation of equitable estoppel is not pursued, and the Registrar abides by the decision of the Court.

[12] Jagose J dismissed the claim in knowing receipt for a series of interrelated reasons which are now challenged on appeal. In particular he held that:

(a) the settlement agreement prevented the appellants from pursuing the claim against the NZMA;[6]

(b) the NZMA did not have knowledge of the breach of the Kelston Trust by the remaining trustees so that a claim against the NZMA in knowing receipt must fail;[7] and

(c) the High Court orders declaring that the appellants had been improperly removed did not have retrospective effect, and that the Kelston Trust had the power to dispose of its property when it did so.[8]

[13] On appeal, four issues arise:

(a) Was the High Court right to dismiss the appellants' claims because of the settlement agreement between the appellants and the remaining trustees?

(b) If not, was the High Court right to find that the appellants' claims against the NZMA could not be established because the NZMA had insufficient knowledge of the breaches of trust?

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6 At [15]–[19].
7 At [18]–[20].
8 At [20]–[21].

(c) If not, does indefeasibility of title under the Land Transfer Act 2017 defeat the appellants' claim in relation to the mosque given that the NZMA now has registered title under that Act?

(d) If not, what should the appropriate orders by way of relief be in the circumstances?

Does the settlement agreement preclude the claim against the NZMA?

[14] The High Court held there was an "immediate difficulty" with the appellants' pleaded claims.[9] The Judge considered that the allegations advanced by the appellants anticipated success on the first cause of action against the remaining trustees.[10] He then said, with reference to cl 4 of the settlement agreement between the appellants and the remaining trustees:

> [17] But, under the settlement agreement, if [the] allegation is a claim against the [remaining trustees], it is to "be withdrawn" and not renewed or made as "any other [claim] arising out of the same facts". If not a claim against the [remaining trustees] directly (but against the NZMA), it nonetheless is another claim arising out of the same facts.

[15] The appellants argue that the settlement agreement did not settle any claim against the NZMA — which was not a party to the settlement — and that the agreement contemplated the continuation of the litigation against the NZMA. The first respondent supported the analysis of the High Court Judge on the basis that, in the absence of any established claim against the remaining trustees, there could be no claim against the NZMA, so the claim fell at the first hurdle.

[16] We disagree with the High Court Judge's analysis. We consider it clear from the terms of the settlement agreement that the appellants could continue with their claim against the NZMA. The NZMA was not a party to the agreement, and it would not be able to plead reliance on the agreement as a consequence (and indeed it did not do so in its statement of defence). The remaining trustees were no longer parties to the proceedings, and no claim was continued against them in breach of the agreement.

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9 At [15].
10 At [16].

[17] Further, there were specific clauses included in the agreement regulating how the continuation of the proceedings against the NZMA would occur. Clause 8 limited the involvement that the remaining trustees could have in the continuing litigation and cl 10 then created obligations on the remaining trustees if the claim succeeded. Clause 4, on which the Judge relied, did no more than provide that the claims against the remaining trustees would be withdrawn and not renewed. It was not purporting to prevent the appellants from making allegations against the NZMA, even if they included allegations that the remaining trustees had acted in breach of trust in transferring the assets to the NZMA. The other clauses directly contemplated the claim against the NZMA continuing. Indeed, cl 12 recorded that the parties contemplated that the claim against the NZMA would succeed.

[18] For these reasons, we are satisfied that the terms of the settlement agreement between the appellants and the remaining trustees did not settle, or otherwise preclude the appellants advancing their claims against the NZMA.

Was the claim against the NZMA rightly dismissed because of lack of knowledge?

[19] Notwithstanding his findings about the effect of the settlement agreement, Jagose J also concluded that he would have dismissed the claim on its merits. He held:[11]

> [18] … Even if the NZMA can be taken at the time of the transfer to have known the applicants alleged such breach of trust is insufficient. That is knowledge only of the allegation. I pressed Mr Hutcheson in closing to identify the 'fact' of which the NZMA was alleged to have known, and understood him to concede there was no fact established for [the] NZMA to know (to some requisite degree, including wilful blindness) as a breach of trust.
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> [19] The concession was responsible. All there then was to know were the disputed alterations to the trust's deed and disputed termination of the applicants' trusteeships. No level of enquiry by [the] NZMA could elevate those disputes to determinations of invalidity, as eventually occurred by consent; still less, any consequent breach of trust.

[20] We consider these findings give rise to two questions which we address in turn:

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[11] Judgment under appeal, above n 1, citing *McLennan v Livaja* [2017] NZCA 446, [2018] NZAR 405 at [38] and [41]–[45] (footnotes omitted).

(a) Was there a requirement for knowledge for the claim to succeed?

(b) Were the Judge's conclusions in relation to knowledge correct?

Is there a requirement for knowledge?

[21] For the appellants, Mr Smith argued that there was no requirement for knowledge at the time of receipt for a claim against the NZMA to succeed, and that the characterisation of the relevant cause of action as "knowing receipt" was a misnomer as the claim was properly treated as an equitable proprietary claim. For the first respondent, Mr Murray supported the Judge's analysis, and he also submitted that it had not been argued in the High Court that there was no knowledge requirement and that it was now procedurally unfair to allow this argument to be advanced for the first time on appeal.

[22] We do not accept that it is unfair to allow the appellants to advance the argument on appeal. Whilst the case was not advanced before the High Court Judge on the basis now articulated, it is an available argument on the appellants' second pleaded cause of action. Whilst Mr Murray argued that there would have been additional evidence the first respondent would have relied upon if the claim had been advanced on this basis, he did not identify what that was. The factual circumstances surrounding the events were fully explored in the evidence. Moreover, the argument now advanced was squarely identified in the appellants' submissions for this appeal. For these reasons we are satisfied the argument is fairly addressed on its merits.

[23] We also accept that the second cause of action can and should be addressed as an equitable proprietary claim. We agree with the appellants' submissions on the elements of that cause of action. The important point is that the NZMA were, and still are, in possession of the relevant property — the mosque and associated chattels, and the funds in the bank accounts. In those circumstances, the basis of the claim is a simpler one. The NZMA is in possession of the appellants' property, and are obliged to return it if the NZMA was not a bona fide purchaser. The relevant authorities,

including the decision of the House of Lords in *Foskett v McKeown*,[12] were discussed in this Court's decision in *Enright v Newton*.[13] Courtney J said for the Court:[14]

> [139] The principle discussed and applied in *Foskett v McKeown* has been acknowledged (we think correctly) as part of New Zealand law in commentary and in a handful of High Court decisions. We therefore summarise the position as follows. Where misapplied trust money is traced into the hands of a third party who is not a bona fide purchaser for value without notice, the equitable owner of the money is entitled to the return of the property (where a new asset has been purchased entirely with trust money) or to the proportion of the property that the value of its equitable interest bears to the whole (in the case of mixed substitution). Given that this response is one occurring by operation of the principles of equity, it is not a matter for the Judge's discretion but for the claimant to elect.

[24] The position was further explained in a subsequent article by David Goddard, writing extrajudicially:[15]

> … The basic rule can be briefly stated: if trust property can be followed into the hands of a third party, the beneficiary may continue to assert their equitable property interest in those assets against the third party unless that third party is a bona fide purchaser for value without notice.
>
> The beneficiary's claim seeks to vindicate their equitable property rights. It is based on their surviving property interest. All they need allege is that they had an equitable property interest in certain assets, and those assets (or their traceable proceeds) are now in the hands of the defendant. (They may also wish to allege, pre-emptively, that the defendant did not receive the assets as a bona fide purchaser for value without notice.) It is neither necessary nor helpful to frame such claims by reference to the law in relation to claims for "knowing receipt" of trust property. The label *knowing receipt* is best confined to personal claims for equitable compensation against a person who has received, or dealt with, trust property that the trustee has disposed of in breach of trust. There is no need to engage with the law relating to knowing receipt claims where there is property that is identifiable as trust property in the hands of a third party: the simple position is that the third party holds the property subject to the beneficiary's equitable interests unless the third party is a bona fide purchaser of that property for value without notice.

[25] It is accordingly not necessary for the appellants to prove any knowledge held by the NZMA when it received the property. It is sufficient for the trustees to establish that the property held by the NZMA was transferred in breach of trust. The NZMA

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12 *Foskett v McKeown* [2001] 1 AC 102 (HL).

13 See *Enright v Newton* [2020] NZCA 529, [2021] 2 NZLR 412.

14 Footnote omitted.

15 David Goddard "Trusts Update: Beneficiaries' Proprietary Remedies" [2022] NZ L Rev 81 at 95–96 (footnote omitted; emphasis in original). See also Lynton Tucker and others *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [42-023]–[42-025].

could only then resist the claim if it was a bona fide purchaser for value. The case was not presented to the High Court Judge on that basis, and he addressed the claim as one of knowing receipt. But the claim has now been correctly articulated on appeal as an equitable proprietary claim.

[26] As to whether the property was transferred in breach of trust, the removal of the appellants as trustees was not authorised by the Trust Deed, and the remaining trustees had no authority to transfer trust property to the NZMA, or to wind up the Kelston Trust. The business of the Kelston Trust had to be conducted in valid meetings of its Board, and under the terms of the Trust Deed a quorum of 70 per cent of trustees was required (cl 5.4) and all decisions had to be made by consensus (cl 5.5). It follows that the decisions purportedly made by the remaining trustees excluding the five other trustees (including the four appellants) were invalid and that the remaining trustees had no authority to transfer all the trust property to the NZMA.

[27] We do not accept Mr Murray's argument that there was no breach of trust because the mosque is still being held for the benefit of the local Muslim community. That may be so, but it is not being held for the beneficiaries by the trustees of the Kelston Trust in accordance with the terms of the Trust Deed. Indeed, the difference between the views of the trustees on how the mosque should be administered is at the heart of this dispute. The transfer of the trust property away from the Kelston Trust was a technique to allow the property to be administered otherwise than in accordance with the Trust Deed, and in breach of trust.

[28] We do not agree with the Judge's point that allowing the claim to succeed involves giving retrospective effect to the orders made by the High Court in 2019 that the removal of the appellants as trustees was invalid.[16] That is to introduce a complication arising from the form of relief the Court can grant in judicial review cases. The appellants had also advanced a private law claim for return of trust property as their second cause of action, and they were entitled to succeed on that claim if the elements of the cause of action were established. One of the elements involved proving that the property rightly belonged to the Trust, and it had been illegitimately

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16 Judgment under appeal, above n 1, at [20].

transferred to the NZMA in breach of trust. That element was satisfied once it was shown that the appellants were unlawfully removed as trustees, and the property improperly transferred remained in the NZMA's possession. No issue of retrospective invalidity arises.

[29] For these reasons, and subject only to the issue concerning indefeasibility addressed below, the appeal should succeed.

Were the Judge's conclusions in relation to knowledge correct?

[30] Because of its potential relevance to the question of indefeasibility, we address the appellants' challenge to the Judge's conclusions in relation to knowing receipt.

[31] The appellants acknowledged that the requirements for knowledge were unsettled, but argued that whatever the standard was it was satisfied on the facts. The respondents argued that there was need for wilful blindness of the kind described in *McLennan v Livaja*, and that this was not established on the facts as the Judge found.[17]

[32] There has been debate about the requirements for establishing knowledge for the purposes of a knowing receipt claim, including whether one of the five categories of knowledge described in *Baden v Société Générale Pour Favoriser le Developpement du Commerce et de l'Industrie en France*, as applied by this Court in *Westpac Banking Corp v Savin*, still apply.[18] The differing views were summarised by Mallon J in *Scott v ANZ Bank New Zealand Ltd.*[19]

[33] Whilst it has subsequently been questioned by the United Kingdom Supreme Court in *Byers v Saudi National Bank*,[20] we see force in the view expressed by the Court of Appeal of England and Wales in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*.[21] There, Nourse LJ said:[22]

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17 *McLennan v Livaja*, above n 11.

18 *Westpac Banking Corp v Savin* [1985] 2 NZLR 41 (CA) at 52, citing *Baden v Société Générale pour Favoriser le Developpement du Commerce et de I'Industrie en France SA* [1993] 1 WLR 509 (Ch).

19 *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906, [2020] 3 NZLR 145 at [109]–[134].

20 *Byers v Saudi National Bank* [2023] UKSC 51, [2024] AC 1191 at [81]–[82].

21 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 (CA).

22 At 455.

> All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.
>
> For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.

[34] This allows the various factual circumstances that can arise to be measured against the standard of unconscionability. But, in any event, we agree that the claim does not require actual knowledge of a breach of trust, and extends to circumstances where there is a duty to inquire. As Lord Sumption said in *Papadimitriou v Crédit Agricole Corpn and Investment Bank*:[23]

> [33] … Ultimately there is little to be gained from a fine analysis of the precise turns of phrase which judges have employed in answering these questions. They are often highly sensitive to their legal and factual context. The principle is, I think clear. We are in the realm of property rights, and are not concerned with an actionable duty to investigate. … There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in his hands) which calls for inquiry. …

[35] We consider that these views are consistent with this Court's decision in *McLennan v Livaja*, which identified the claim as one based on unconscionability.[24]

[36] Here, we are satisfied that the NZMA was put on notice that the transfer to it was potentially in breach of trust, that this allegation was being formally advanced in the High Court, that it decided to push on with the transaction notwithstanding, and that it is unconscionable for it to retain the property in those circumstances once it is established that the transfer was in breach of trust.

[37] We do not agree with the Judge's distinction between facts and allegations in that respect. Before receiving the property, the NZMA knew of the history of disputes between the trustees, that the mosque and associate property was being gifted to them in the context of those disputes, that the appellants had been trustees and alleged that they had been improperly removed to allow the transfer to occur, and that the appellants were bringing proceedings in the High Court challenging these steps. Those

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23 *Papadimitriou v Crédit Agricole Corpn and Investment Bank* [2015] UKPC 13, [2015] 1 WLR 4265.

24 *McLennan v Livaja*, above n 11, at [38]–[40].

matters could not be dismissed as mere allegations. In some circumstances, allegations might be able to be dismissed as not warranting further inquiry, but here they could not be reasonably dismissed. Indeed, the NZMA knew they were to be advanced in proceedings filed in the High Court.

[38] The NZMA's state of knowledge is reflected in the initial view of the NZMA's solicitor that the transaction should be put on hold, and the subsequent view of the President that settlement should proceed, but if the High Court later wanted to reverse the transaction that would need to be worked through. In our view, the knowledge element for a knowing receipt claim was clearly satisfied in these circumstances.

[39] But in the end, for the reasons we have already explained, it was not necessary to establish this element for the claim to succeed against the NZMA. There was an equitable proprietary claim that was established against the NZMA as the holder of property transferred to it in breach of trust without being a bona fide purchaser for value.

Indefeasibility

[40] Whilst it was not advanced before Jagose J, in seeking to uphold the High Court judgment Mr Murray argued that the NZMA was now the registered proprietor of the land, and that it was protected from this aspect of the claim by indefeasibility of title.[25] Although he engaged with this argument on its merits, Mr Smith argued for the appellants that indefeasibility had not been pleaded or raised in the High Court and should not be allowed to be pursued now. We accept that, as an affirmative defence, indefeasibility should have been pleaded and advanced in the High Court. We are reluctant to dismiss the argument on that basis, however, particularly given the different way in which the appellants' arguments have been articulated on appeal, which potentially raise an indefeasibility issue.

[41] Mr Murray argued that the exception to indefeasibility arising from an in personam claim did not arise. The claim should not undermine the fundamental

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[25] This argument can only apply to the interests in land, and does not apply to the chattels or the money in the bank accounts.

concepts of the Torrens system. He argued that the Supreme Court's decision in *Regal Castings v Lightbody* could be distinguished because that involved a case where the defendant had actual, rather that constructive, knowledge.[26] He relied on the decision of the High Court in *Jeb Management Ltd v Grubz United Whanau Trust* where Toogood J said:[27]

> [44] … Allowing applicants to attack the indefeasible titles of registered proprietors on the grounds that they had constructive knowledge that the received property was impressed by a trust would undermine the concept of indefeasibility. It would permit a registered interest in land to be set aside on the basis of a lesser extent of knowledge than is required to establish [L]and [T]ransfer [A]ct fraud. Accepting such a proposition would threaten to a create a two-track land transfer system in which land that is held in trust is treated differently to other land.

[42] Indefeasibility of title to land under the Land Transfer Act means that a registered proprietor in the position of the NZMA takes title free from other claims.[28] But it has long been recognised that the indefeasibility of title does not protect a registered proprietor from a personal claim against that proprietor. In *Frazer v Walker* the Privy Council said that indefeasibility:[29]

> … in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a Court acting in personam may grant.

[43] A summary of the authorities recognising this principle can be found in the decision of Randerson J in *Smith v Hugh Watts Society Inc*.[30] It is now reflected in s 51(5) of the Land Transfer Act which provides that the title by registration does not affect "… the in personam jurisdiction of the Court". As Tipping J summarised it in *Regal Castings Ltd v Lightbody*:[31]

> [148] An in personam claim against a registered proprietor looks to the state of the registered proprietor's conscience and denies him the right to rely on the fact he has an indefeasible title if he has so conducted himself that it would be unconscionable for him to rely on the register. Such a claim is concerned

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26 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

27 *Jeb Management Ltd v Grubz United Whanau Trust* [2015] NZHC 157, (2015) 15 NZCPR 705 (footnote omitted).

28 See Land Transfer Act 2017, s 51; and DW McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (online ed, LexisNexis) at [9.006]–[9.007].

29 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1078.

30 *Smith v Hugh Watts Society Inc* [2004] 1 NZLR 537 (HC) at [79]–[86].

31 *Regal Castings Ltd v Lightbody,* above n 26 (footnote omitted).

> with the personal obligations of the registered proprietor rather than with the sanctity of their title. A successful in personam claim indirectly affects the registered proprietor's title, such as when a decree of specific performance is made; but the claim is not a claim to the land as such. …

[44] A registered proprietor who commits an actionable wrong, or is in some other way subject to a personal claim, cannot use indefeasibility of title to defeat that claim. This is not to undermine the principles of indefeasibility, as they have always preserved the in personam jurisdiction. The question is simply whether the proprietor is liable in law or equity under a personal claim, including as a consequence of the existence of a trust, or other fiduciary relationship. That includes potential liability arising from a failure to make inquiries after being put on notice.[32] That is not to put trusts or other fiduciary relationships in a different position in relation to indefeasibility. Rather, it simply recognises that under the principles of law and equity, personal liability can arise as a consequence of this status. It follows that we do not agree with the observations of Toogood J in *Jeb Management*.

[45] The issue here is accordingly whether the NZMA is liable in accordance with an in personam claim. Claims of knowing receipt or knowing assistance have been recognised as personal rather than proprietary claims.[33] Claims of knowing receipt requiring the return of trust property notwithstanding registered title have accordingly been upheld by the High Court.[34] There is some uncertainty over whether an equitable proprietary claim of a kind the appellant has now articulated on appeal is a claim in personam, however. This depends on whether the claim is regarded as one that attaches to the conscience of the defendant as a volunteer once it is known that the property has been transferred in breach of trust, or whether it is based on the plaintiff's proprietary interest.[35] In *Arthur v Attorney-General of the Turks and Caicos Islands* the Privy Council explained that claims of knowing receipt were personal and were different from equitable proprietary claims.[36]

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32 See *Papadimitriou v Crédit Agricole Corpn and Investment Bank*, above n 23, at [33].

33 See Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [18.1.2].

34 See for example *Smith v Hugh Watt Society Inc,* above n 30; *Pounamu Properties Ltd v Brons* [2012] NZHC 590 at [194]; and *Mau Whenua Inc v Shelly Bay Investments Ltd* [2019] NZHC 3222, (2019) NZCPR 923 at [52]–[53].

35 See Goddard, above n 15, at 96–100.

36 *Arthur v Attorney-General of Turks and Caicos Islands* [2012] UKPC 30, [2012] All ER (D) 164 (Aug) at [34].

[46] We need not resolve that question, however. That is because we have held that the appellants also established the elements of a claim of knowing receipt on the facts. We accordingly consider that a personal claim was established on the basis that the NZMA knowingly received the property as a consequence of the defaulting trustees' breaches of trust. The NZMA's state of knowledge on receipt means that it would be unconscionable for it to be able to keep the property. An in personam claim accordingly exists, and indefeasibility cannot now be raised to defeat the appellants.

Appropriate remedy

[47] For the above reasons, the appeal should be allowed, and the second cause of action advanced by the appellants should succeed.

[48] A complication arises because steps have been taken to deregister the Kelston Trust, again in breach of trust. That complication is addressed by this Court upholding the claim on the basis that the appellants and the remaining trustees now hold the property under the terms of the Kelston Trust. We also order that the High Court's dismissal of the cause of action against the Registrar of Incorporated Societies is reversed, and that cause of action is remitted to the High Court. If the Registrar restores the Kelston Trust to the register pursuant to s 26(4) of the Charitable Trusts Act, any further steps in that claim may become unnecessary.

[49] In addition, the terms of the earlier settlement agreement reached between the appellants and the remaining trustees still apply, including cls 10 to 12, which contemplate the establishment of a new trust to hold the property. But the property should be held in the meantime in accordance with the terms of the Kelston Trust.

[50] There is a further dimension. The disputes between the two groups of trustees have continued for many years, and in a way that is contrary to the best interests of the beneficiaries, and the wider community. If the trustees are unable to resolve their disputes, then it may well become necessary for applications to be made to the High Court, and/or for the Attorney-General to exercise her role, including through the potential application of s 60 of the Charitable Trusts Act. That may include the

consideration of the appointment of an independent trustee in place of, or as well as, the existing trustees.[37]

Result

[51] The appeal is allowed. The High Court judgment is set aside.

[52] The first respondent is directed to transfer the land and dwellings at 45 Cartwright Road, Kelston, and associated chattels and funds in bank accounts to the appellants in this Court and the first respondents in the High Court proceedings, to be held by them under the terms of the Kelston Trust.

[53] The claim against the Registrar of Incorporated Societies at Auckland concerning restoration of the Kelston Trust to the register pursuant to s 26(4) of the Charitable Trusts Act is remitted to the High Court.

[54] Leave is reserved to the parties to seek directions from the High Court to give effect to these orders.

[55] The first respondent must pay the appellants costs for a standard appeal on a band A basis together with usual disbursements.

[56] The order for costs in the High Court is set aside. The question of costs in the High Court is to be reconsidered by that Court in light of this judgment.

Solicitors:
Gilbert Walker, Auckland for Appellants
Newton Law, Auckland for First Respondent
Luke Cunningham Clere, Wellington for Second Respondent

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[37] See for example *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88 (CA); and *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325 (HC).