

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA191/2022  
[2023] NZCA 222**

BETWEEN DANILO STANISLAV LENDICH  
Appellant  
AND ADRIAN CAMPANA CODILLA  
Respondent

Hearing: 16 February 2023  
Court: Katz, Whata and Davison JJ  
Counsel: P H Thorp for Appellant  
N P Tetzlaff for Respondent  
Judgment: 9 June 2023 at 10:00 am

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**JUDGMENT OF THE COURT**

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- A The appeal is dismissed.**
- B Order that caveat 12225785.1 lodged by Mr Lendich on record of title NA52A/443 shall lapse.**
- C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**
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**REASONS OF THE COURT**

(Given by Davison J)

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### Introduction

[1] Mr Danilo Lendich (the appellant) appeals the decision of Associate Judge Sussock declining his application for an order that a caveat he lodged on 27 August 2021 on the title of a property situated at 188 Fred Taylor Drive, Whenuapai West Auckland (the property), not lapse.<sup>1</sup>

[2] Just over forty years ago in July 1982, Lendich Heavy Equipment Limited (LHEL) transferred the 188 Fred Taylor Drive property to a long-term company employee, Mr Tihomir Posa. At that time the appellant was the governing director of the company and he and his wife were the shareholders of LHEL. As well as being

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<sup>1</sup> *Lendich v Codilla* [2022] NZHC 758 [High Court judgment].

employed by Mr Lendich's business, Mr Posa was also a close personal friend of his. The transfer was proposed and implemented by Mr Lendich in his role as governing director of LHEL. Consideration for the transfer was one dollar, receipt of which was acknowledged in the memorandum of transfer.

[3] Mr Posa died on 2 October 2018, and Mr Adrian Codilla (the respondent) is the executor of his deceased estate.

[4] Mr Lendich claims an interest in the property under a resulting trust. He says that it was never his intention that Mr Posa would become the beneficial owner of the property and be able to sell it or bequeath it. He says that he only effected the transfer to provide Mr Posa with somewhere to live for the rest of his life, and to enable him to use the property as security for any borrowing he wished to undertake.

[5] The respondent opposes Mr Lendich's appeal against Associate Judge Sussock's order that the caveat is to lapse, and disputes Mr Lendich's claim that he has an interest in the property under a resulting trust.

[6] On 14 April 2022 the appellant and Lendich Construction Limited (LCL) commenced a separate proceeding against the respondent in which they seek a declaration that the property is held by the respondent pursuant to a resulting trust for either the appellant or LCL on the same grounds as relied on in this proceeding. An application by the respondent for summary judgment in that proceeding is presently stayed pending determination of this appeal.<sup>2</sup>

## **Law**

[7] Mr Lendich appeals as of right to this Court.<sup>3</sup> This is a general appeal by way of rehearing.<sup>4</sup> The appellant bears an onus of satisfying this Court that the decision under appeal was wrong and that this Court should differ from the decision under appeal. Only when the appellate court considers the appealed decision is wrong, is it

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<sup>2</sup> *Lendich v Codilla* [2022] NZHC 1655.

<sup>3</sup> Senior Courts Act 2016, s 56(4).

<sup>4</sup> Court of Appeal (Civil) Rules 2005, r 47.

justified in interfering with it, and as the appellate court we have the responsibility of making our own assessment of the merits of the case.<sup>5</sup>

[8] An applicant seeking an order pursuant to s 143(4)(a) of the Land Transfer Act 2017 that a caveat not lapse bears an onus of showing they have a reasonably arguable case for the interest claimed.<sup>6</sup>

[9] There is no dispute between the parties as to the legal principles applicable to a court's consideration of an application for an order that a caveat not lapse as set out by the Judge. Those principles were summarised by this Court in *Philpott v Noble Investments Ltd* as follows:<sup>7</sup>

[26] The applicable legal principles which governed the application to sustain the caveats, and which now govern this appeal, are as follows:

- (a) The onus is on the applicants to demonstrate that they hold an interest in the land that is sufficient to support the caveat, but they need not establish that definitively;
- (b) It is enough if the applicants put forward a reasonably arguable case to support the interest they claim;
- (c) The summary procedures involved in applications of this nature are not suited to the determination of disputed questions of fact. An order for the removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained – either because there is no valid ground for lodging it in the first place, or because such a ground no longer exists; and
- (d) When an applicant has discharged the burden upon it, the Court retains discretion to remove the caveat which it exercises on a cautious basis. Before it does so the Court must be satisfied that the caveator's interest would not be prejudiced by removal.

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<sup>5</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5].

<sup>6</sup> *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 660.

<sup>7</sup> *Philpott v Noble Investments Ltd* [2015] NZCA 342 (footnotes omitted). Recently confirmed in *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2021] NZCA 184 at [19] and [36], and upheld on appeal in *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 60, [2022] 1 NZLR 59 at [56]; and *Wallace v Studio New Zealand Ltd* [2021] NZCA 392 at [40].

[10] We also note with approval, the following observations of Master Gambrill in *Bacher v Bacher* regarding the Court's approach to the assessment of affidavit evidence filed in support of an application to sustain a caveat:<sup>8</sup>

[Counsel] acknowledged that while the Court cannot resolve legitimate disputes as to factual matters in affidavit evidence, it is well established that the Court does not have to accept the affidavit evidence submitted by the caveator uncritically. The Court is entitled to take a robust view in view of vague, contradictory and implausible assertions in the affidavit evidence of the caveator. In particular, the Court is entitled to take an adverse view of the credibility of assertions made by the caveator that are clearly contradicted by unequivocal contemporary documentation ... and the Court is entitled to take into account the evidence of an independent professional witness. It is accepted that the Court may scrutinise the affidavit evidence to see it passes the threshold of credibility. ...

### *Resulting trusts*

[11] The elements of a resulting trust were outlined by this Court in *Potter v Potter*:<sup>9</sup>

[14] In the present context the essence of a resulting trust is that a person providing or contributing to the purchase price of a property conveyed partly or wholly into the name of another retains a beneficial interest in the property to the extent of his or her contribution if there is nothing to indicate that he or she intended to confer the beneficial interest on the legal transferee. ... The settlor must have expressed no intention to dispose of his or her beneficial interest. To fill the vacuum, the law presumes an intention to retain the beneficial interest which the settlor has never effectively alienated. The trust "results" from the lack of effective disposition to another.

[15] A refinement to that principle is that where the settlor transfers the legal title to a property for an express purpose, the transferee receives it subject to a trust for the attainment of that primary purpose. ...

[16] In either case the rationale is that notwithstanding the disposition of legal title, the settlor has retained the beneficial interest throughout, in the former case without qualification, and in the latter subject to the contingency that it would be superseded by fresh beneficial interests if and when the stated primary purpose were attained.

...

[19] Central to a resulting trust is the absence of any expression of intention on the part of the settlor that the beneficial interest pass to the legal transferee

...

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<sup>8</sup> *Bacher v Bacher* (2002) HC Auckland M187-IM02, 21 May 2002 at [9].

<sup>9</sup> *Potter v Potter* [2003] 3 NZLR 145 (CA).

[12] In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Lord Browne-Wilkinson explained the two situations where a resulting trust arises:<sup>10</sup>

... (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer ...

(B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest ...

[13] The authors of *Equity & Trusts in New Zealand* referring to the rebuttal of the presumption regarding the existence of a resulting trust say:<sup>11</sup>

The presumption of a resulting trust will be rebutted by evidence of an intention to make a gift, loan or trust, or where consideration has been provided, or where there is any other evidence of any intention inconsistent with the trust.

[14] And in *Crampton-Smith v Crampton-Smith*, this Court referring to the weight to be given to the presumption, observed that both the weight of the presumption and the nature of the evidence required to displace it, will differ according to the circumstances of the case.<sup>12</sup> Regarding the transferor's intention, this Court said:<sup>13</sup>

[43] ... We are satisfied that the Judge correctly identified the key issue as being what was intended at the time of the transaction. The Judge had clearly noted that the presumption was the starting point but that it could be rebutted by evidence. In most cases, the presumption alone will not determine the case and evidence of intention will be highly relevant. We do not view the Judge's reference to the common intention of the parties as anything other than signalling that, ordinarily, the evidence of both parties and all the surrounding circumstances is to be considered when determining whether a trust was intended.

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<sup>10</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 708 (emphasis omitted), adopted and applied in *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5 at [35].

<sup>11</sup> Andrew Butler *Equity & Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [12.5.2] (footnotes omitted).

<sup>12</sup> *Crampton-Smith v Crampton-Smith*, above n 10, at [41].

<sup>13</sup> *Crampton-Smith v Crampton-Smith*, above n 10.

## **Factual background**

[15] Mr Lendich's ancestry is Croatian and he is fluent in the Croatian language. Mr Posa emigrated to New Zealand from Croatia in 1964 and he and Mr Lendich met one another through the Croatian Community in West Auckland. In the late 1960s Mr Lendich employed Mr Posa to work for him in his business which carried out earthmoving, construction and heavy haulage work. Thereafter, apart from a period of approximately six months when he returned to Croatia, Mr Posa worked for Mr Lendich or one of his companies, until he retired in the early 2000s.

### *Hailes Road*

[16] Sometime around July 1979 Mr Lendich decided to purchase a 4 hectare property in Hailes Road, Whenuapai, and relocate his business to a new depot to be established there. The Hailes Road property was subsequently transferred to Mr Lendich on 2 August 1979.

[17] There was an existing house on the Hailes Road property which was tenanted when the property was purchased. Mr Lendich says that as Mr Posa was renting a property in Swanson at the time, it was agreed between them that Mr Lendich would subdivide off a 2000m<sup>2</sup> section containing the house and provide it to Mr Posa free of charge, so that he could be the on-site caretaker of the depot when the business relocated there. Mr Lendich says that he wanted a trusted caretaker living on the property to keep an after-hours watch over the heavy machinery and vehicles which would be kept at the depot.

[18] Mr Lendich says that he and Mr Posa agreed that the subdivided property would be transferred into Mr Posa's name to enable him to use it as security to borrow against the property, and on 24 November 1980 Mr Lendich as "vendor" and Mr Posa as "purchaser", entered into a written agreement for sale and purchase of a section of land at Hailes Road on which the house was located, which was to be subdivided off the main title. The agreement stated that the purchase price for the property was \$8,000, with a deposit of \$1.00 being payable on signing of the agreement and the balance payable on settlement. The agreement provided that the area of land to be transferred would be the minimum size allowed by Waitemata City ordinances, and

settlement was to be effected 14 days after deposit of the Land Transfer plan of subdivision. The agreement further provided that:

The vendor hereby confirms that the consideration for this purchase shall be provided by him by way of gift.

...

Existing tenancy to carry on with purchaser receiving rental from date of possession.

[19] Mr Lendich says that the purchase price of \$8000 was provided for in the agreement to ensure that when seeking to borrow using the property as security, Mr Posa could demonstrate that he had equity in it. Mr Lendich says that the clause in the agreement referring to the existing tenancy was included so that Mr Posa would receive the rent until he occupied it himself. As regards Mr Posa's ownership of the property Mr Lendich says:

Although this was never specifically discussed as I recall, it was not intended that [Mr Posa] be able to sell the intended lot or dispose of it as his own. I wanted a trusted caretaker for my depot in a caretaker's cottage on or adjacent to the depot site. I also wanted [Mr Posa], as a highly valued employee, to be able to be secure and settled with a place to live for as long as he wished and the use of an asset he could borrow against and improve if he wished.

[20] However, Mr Lendich's plans to establish a new depot on the Hailes Road property and subdivide off a section on which the house was located did not proceed. He found what he considered to be a more suitable property at 194 Fred Taylor Drive, and so the Hailes Road property was sold in July 1981.

*Fred Taylor Drive — the property*

[21] The 194 Fred Taylor Drive property was purchased in November 1981. Mr Lendich used his company LHEL to make the purchase. Mr Lendich says that in order to honour the arrangement he had made with Mr Posa in relation to the Hailes Road house and section, and because he "still wanted a trusted caretaker in a caretaker's cottage on site to look after [his] depot", he decided to subdivide a section off the property for Mr Posa, put it in his name free of charge, and build a caretaker's cottage on it for him to live in, also free of charge. Mr Lendich says:



As with Hailes Road, [Mr Posa] could live at the property for as long as he wished and, with the property in his name, he could use the asset to borrow against and improve [it] if he wished. As also with Hailes Road, it was not intended that [Mr Posa] be able to sell the property or dispose of it as his own.

Again I do not recall specifically discussing that with [Mr Posa], but I am sure that he did not believe he could sell the property or dispose of it as his own because he did not attempt to sell or ask that the property be sold when he decided to return to Croatia to live and took all his tools and belongings with him ...

[22] In July 1981 Mr Lendich and LHEL applied for town planning consent to establish a depot and to construct a caretaker's cottage on the Fred Taylor Drive property. On 18 November 1981 the Waitemata City Council granted consent to LHEL to establish a depot and to subdivide a dwelling house site at the property, and in December 1981 LHEL engaged a surveyor to prepare a subdivision plan to be submitted to the Council for approval and lodging in the Land Transfer Office.

[23] By memorandum of transfer dated 20 July 1982, and signed by Mr Lendich as its Governing Director, LHEL transferred the land comprising 1858m<sup>2</sup> in Certificate of Title 52A/443 (North Auckland Registry) to Mr Posa. The consideration was one dollar, the receipt of which was acknowledged in the memorandum of transfer.

[24] The memorandum of transfer stated that LHEL transferred the land to Mr Posa subject to a fencing covenant as follows:

PROVIDED ALWAYS that it shall not be liable nor be called upon to erect or repair or contribute towards the cost of erection or repair of any dividing or boundary fence between the land hereby transferred and any land adjoining thereto owned by it but this proviso shall not enure to the benefit of any purchaser or transferee from it of any such adjoining land.

AND IT IS HEREBY DECLARED that for the purposes of the duty payable under The Stamp and Cheque Duties Act 1971 no agreement in writing has been entered into between the parties hereto in respect of the foregoing transaction.

[25] The Land Transfer Office issued a certificate of title naming LHEL as the registered owner of the land on 8 September 1982. The memorandum of transfer was registered on the title on 20 October 1982.<sup>14</sup> The fencing covenant contained in the memorandum of transfer was also registered on the certificate of title.

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<sup>14</sup> The street address of the property is noted as being "188 Fred Taylor".

[26] Mr Lendich says that the reason that there was no written agreement for sale and purchase of the property was because there was no need, as he was honouring the arrangement he had previously made with Mr Posa regarding Hailes Road, but in respect of a different property and with the construction of a caretaker's cottage to be included. Following the LHEL transfer of the property to Mr Posa, construction of the caretaker's cottage was commenced. However, although plans for a new depot for the business had been prepared and a building permit issued, construction of the depot buildings did not proceed, and after two years the planning consent lapsed. Mr Lendich says that the reason LHEL did not proceed to construct the depot buildings was because he had managed to resolve some planning issues relating to his business's existing Moire Road depot with the result that the business was able to remain at that site for longer than had previously been anticipated. Because urgency to relocate the depot was no longer a factor, it appears that progress with construction of the cottage was slow.

[27] Some months prior to October 1985 Mr Posa returned to live in Croatia. Mr Lendich says that he was disappointed but supportive of Mr Posa's decision. Mr Lendich says he assisted Mr Posa to pack all his personal belongings into a 40 foot container for shipping to Croatia, including his Morris Minor car. Mr Lendich says that by October 1985, \$35,000 had been spent on construction costs and the caretaker's cottage was three-quarters complete.

[28] Mr Lendich says some months after relocating back to Croatia, Mr Posa contacted him and asked for his help to return to New Zealand. Mr Posa asked Mr Lendich if he would pay the cost of his return to New Zealand and said that if Mr Lendich provided him with somewhere to live he would work for him for the rest of his life. Mr Lendich says that he was pleased that Mr Posa was returning, and that the arrangements they had previously made would continue, and he paid the full cost of Mr Posa's transport and relocation back to New Zealand.

[29] In a letter dated 21 October 1985 which Mr Lendich wrote to Mr PT Cavanagh, a barrister who was dealing with the town planning application for the Fred Taylor Drive property, he said that the company's caretaker-mechanic, who was overseas, was expected to take up residence in the cottage prior to March 1986.

[30] Mr Lendich says that by the time Mr Posa returned from Croatia in early 1986, the cottage being built at Fred Taylor Drive was at, or close to, the stage of being closed in and habitable. He says that Mr Posa, who was a musician, wanted to make some alterations to the house by installing soundproofing. And because he also undertook some work as a panel-beater, he also built a small panel beating and spray-painting shed on the property. However, apart from the construction of a large storage shed on the LHEL property, nothing further had been done to relocate Mr Lendich's business depot to Fred Taylor Drive.

[31] In August 1986 a mortgage to Westpac Bank was registered on the title of the property to secure Mr Posa's borrowing to finance this building work. In her affidavit Mr Posa's long-term partner, Ms Lale Nelson says that when Mr Posa returned from Croatia, he did not have a job for about three months, and spent his time working at building the house and landscaping the lawn and garden. She says that to her knowledge Mr Posa repaid Mr Lendich the money he or his companies had advanced Mr Posa to meet his travel costs and expenses to relocate back to New Zealand, and that he paid for all of the building materials that he used for work at the cottage. Ms Nelson says that despite often talking with Mr Posa about the house, he never said that Mr Lendich had continued with the building work on the house during the time he was away in Croatia.

[32] In 1996 Mr Lendich purchased the neighbouring property situated at 186 Fred Taylor Drive. As the property was previously owned by the Whenuapai Bus Company, that company's existing use rights meant that it was not necessary for Mr Lendich's company to obtain a resource consent in order to use it as a depot. Mr Posa's property has a long driveway which separates the properties owned by Mr Lendich's companies. As the cottage at 188 Fred Taylor Drive shares a boundary with the Whenuapai Bus Company site, it could serve as a caretaker's cottage for the LHEL depot which was established on the Whenuapai Bus Company site.

[33] On 21 October 1998 Mr Lendich and his wife as the shareholders of LHEL passed a resolution that the company be wound up, with all its assets and liabilities, as appearing in the company's financial accounts, to be sold or transferred to LCL. The

company was subsequently removed from the Register of Companies on 24 January 1990.

[34] Mr Lendich says that in the early 2000s when Mr Posa was in his late sixties or early seventies he abruptly retired. He nevertheless continued to reside in the cottage next door to Mr Lendich's business at 186 Fred Taylor Drive. Mr Lendich says that although he was no longer working for him, he was happy for him to remain living at the property and to live out his life there.

*Mr Posa's will*

[35] On 30 April 2012 Mr Posa made a will in which he bequeathed his estate to Ms Xiao Ling Wang with whom he was in a relationship at the time. The will was prepared by his solicitor Mr Anthony Vlatkovich who says that he acted for Mr Posa between 2005 and 2012. He produced Mr Posa's 30 April 2012 will as an exhibit. Mr Vlatkovich says that during all his discussions with Mr Posa he did not refer to 188 Fred Taylor Drive as being anything other than his absolute property to deal with as he wished. The relevant clause of Mr Posa's will states:

I GIVE DEVISE AND BEQUEATH the house and land owned by me at the date of this my will situate at and known as 188 Fred Taylor Drive, Whenuapai, free of all mortgages and other charges together with fitted carpets or other fitted floor coverings, blinds, drapes, curtains and light fittings in my house at my death to my friend XIAO LING WANG (LINDA) if she survives me for a period of one (1) calendar month.

[36] Mr Posa made a further and subsequent will dated 12 May 2016 by which he bequeathed the whole of his estate to his carer at the time Ms Ortencia Tenchavez, and appointed the respondent as his executor and trustee of his estate. This will was prepared by another solicitor, Mr Luke Kemp. Mr Kemp says that he met with Mr Posa on 10 May 2016 to take his instructions regarding the preparation of a will and again on 12 May 2016 when Mr Posa executed the will.

[37] Mr Kemp says that in the course of taking Mr Posa's instructions he discussed with him whether there were any potential claims on his estate, and that Mr Posa told him that there were none. In a file note made by Mr Kemp dated 12 May 2016 he recorded the measures he took to satisfy himself that Mr Posa had testamentary

capacity, which included arranging and obtaining a report from Mr Posa's general medical practitioner. He noted that Mr Posa:

... appeared to understand what it meant to make a will and that this involved disposing of his Whenuapai property to [Ms Ortencia Tenchavez] - and that he had the freedom to do so if there were no other family who had a claim on his estate.

[38] Mr Kemp says that in his discussions with Mr Posa before he executed the will, it was clear that Mr Posa believed he owned the 188 Taylor Drive property outright, and that he had no obligations to anyone else and could leave the property to whomever he wished — namely Ms Tenchavez.

[39] Following Mr Posa's execution of his will Mr Kemp wrote a letter to him on 12 May 2016 in which he said:

As discussed, you have told us that you have no children, grandchildren, partner, or any person who would have had a claim on your estate. This therefore gives you the freedom to make your will as you have done. ...

*Mr Lendich offers to buy 188 Fred Taylor Drive*

[40] As noted above, Mr Posa died on 2 October 2018. On 11 October 2018 Mr Lendich's solicitor, Mr Bernie Allen of Davenports West Auckland, wrote to Mr Kemp's law firm. Mr Allen said:

Hi [Mr Jones]

We act for [Mr Lendich] who has consulted us following your client [Mr Posa]'s passing.

Just by way of background around 1980-81 [Mr Lendich] gave [Mr Posa] the land and built a house for him on it in conjunction with bringing him back from Croatia (Yugoslavia) to New Zealand to work for Lendich Construction. In so doing [Mr Lendich] arranged for a subdivision of the land now comprised in 188 Fred Taylor Drive (see NA52A/443 attached).

The Lendich family own the adjoining land on title NA 119D/240 (attached) and it would be of quite some advantage to them to be able to purchase back the property originally given to [Mr Posa] at a fair market value (notwithstanding the original beneficence). It seems only right and just that that opportunity be given to them and we place the request on record with you for the executors of [Mr Posa's] estate.

Kindly acknowledge receipt of our request and we look forward to an initial response from you when you have had an opportunity to take instructions.

[41] Mr Kemp says that Mr Lendich also telephoned him after Mr Posa's death. He says that during a conversation that lasted about 10 minutes, Mr Lendich said that Mr Posa had worked for him and that he had originally helped Mr Posa with accommodation. Mr Kemp says that during their conversation, Mr Lendich did not say that he had any residual rights to Mr Posa's property at 188 Fred Taylor Drive but only that he wanted to buy it back and would like first right of refusal. Mr Kemp says that Mr Lendich explained that one of the reasons he wished to purchase the property was that his access to and from his own property would be facilitated by having the use of Mr Posa's property.

[42] Referring to the period following Mr Posa's death, Mr Lendich says:

Later in October, I reconsidered that buy back suggestion and decided that I should not have to pay to buy back what I had paid for already and that some form of trust must apply.

[43] Mr Lendich says that on 26 February 2019 Mr Allen followed up his letter to Mr Kemp of 11 October 2018, and was advised that Mr Kemp was no longer acting for Mr Posa's estate, and that the firm GoLegal were now acting. GoLegal advised that probate of Mr Posa's will had been granted and said that they would respond to the proposal by Mr Lendich regarding purchase of the property in due course. However, on 8 March 2019 GoLegal advised Mr Allen that it was no longer acting for the estate and the law firm, Corban Revell, was now acting. Mr Allen accordingly wrote to Corban Revell on 26 March 2019 saying that he would like to discuss Mr Lendich's position in relation to the Fred Taylor Drive property once Corban Revell had received the file.

[44] On 18 April 2019 Corban Revell advised Mr Allen that the respondent was overseas, and that efforts were being made to have Ms Nelson, who was living at 188 Fred Taylor Drive, vacate the property. Having not heard anything further from Corban Revell, Mr Allen wrote to them on 22 May 2021. Corban Revell responded advising that they were no longer acting for the respondent and advised that Mr Richard Connell of the law firm Connell and Connell were now acting for Mr Posa's estate. On 31 May 2021 Mr Allen sent an email to Mr Connell. He said:

Hi [Mr Connell],

I understand that you are now acting on this Estate and have files from previous firms, including Corban Revell. Kindly confirm.

We act for [Mr Lendich]/All Seasons Properties – [Mr Lendich] was [Mr Posa's] employer and many decades ago made the land still owned by the Estate available to [Mr Posa] for his house build.

Look forward to hearing from you.

[45] Mr Connell says that during May 2021 he was acting for the respondent in connection with litigation which Ms Nelson had commenced against Mr Posa's estate in which she was claiming that the property at 188 Fred Taylor Drive was her relationship property. Mr Connell says that Ms Nelson's claim had been heard in the High Court before Gordon J over seven days during May 2021, and at the conclusion of the trial, Gordon J had reserved her decision. He says that he recalls Mr Allen telephoning him during May 2021, and that it appeared that Mr Allen was aware of the litigation and the dispute over the property.

[46] Mr Connell says that during their telephone conversation, Mr Allen said that Mr Lendich had sold the land to Mr Posa and that he owned the adjoining property. He said that Mr Lendich would be interested in purchasing the property back from the estate and it would be logical for him to do so. Mr Connell says that Mr Allen did not say that Mr Lendich or any other person associated with Mr Lendich had retained some form of residual right or interest in the land, only that Mr Lendich would be interested in being given the first opportunity of purchasing the land, and commenting that Mr Lendich would be the "logical buyer".

[47] Mr Connell says that his telephone call with Mr Allen concluded on the basis that Mr Allen would wait until the proceedings had been determined and judgment had been delivered, before discussing matters further.

[48] Mr Connell says that had Mr Allen said that Mr Lendich was claiming to have some form of residual interest in the land, he would have immediately raised the matter with the executor of Mr Posa's estate and also with the law firm representing the beneficiary of the estate as well as counsel for Ms Nelson who was making the claim. So far as Mr Connell was concerned the purpose of Mr Allen's phone call was nothing more than to convey Mr Lendich's interest in buying the property at a future date after

the proceedings had been concluded. Mr Connell says that his recollection is that he received Mr Allen's 31 May 2021 email just before or shortly after Mr Allen's phone call.

[49] However Mr Allen has a different recollection of his telephone conversation with Mr Connell. Mr Allen says that he spoke to Mr Connell on 1 June 2021 about the property. He says that he told Mr Connell that Mr Lendich could claim Mr Posa's Fred Taylor Drive property "pursuant to a constructive trust or similar ... because he had given the property to [Mr Posa]", and had built the house on the property for him. Mr Allen says that Mr Connell said that he could not see how Mr Lendich could possibly have any claim to the property. He says that Mr Connell explained that Ms Nelson's claim had recently been heard in the High Court and the parties were awaiting the Judge's reserved decision, and it was agreed that further discussion would follow the Court's decision. Mr Lendich says that until Mr Allen spoke to Mr Connell and then reported back to him, neither he nor Mr Allen were aware of Ms Nelson's proceeding.

[50] Justice Gordon's reserved decision was delivered on 30 July 2021, and Ms Nelson was awarded 65 per cent of the value of Mr Posa's estate, with the remaining 35 per cent retained by Ms Tenchavez.<sup>15</sup>

[51] On 27 August 2021 Mr Lendich lodged a caveat on the title of the property. Mr Lendich's claimed interest in the property is described as follows:

The abovenamed Caveator claims a beneficial interest in the land contained in the above Record of Title pursuant to a Resulting Trust of which the registered proprietor [Mr Codilla] is trustee and the Caveator is a Beneficiary arising out of the transfer of the land to [Mr Posa] by the Caveator free of charge and the building on the land by the Caveator subsequent to that transfer.

[52] Mr Allen says that in their telephone conversation Mr Connell had not explained any details of Ms Nelson's claim and the first detailed information he obtained was from a newspaper article about the case in September 2021, and from Gordon J's judgment.

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<sup>15</sup> *Nelson v Codilla* [2021] NZHC 1958.



[53] On 12 October 2021, Mr Lendich filed an application in the High Court seeking an order that his caveat not lapse. On 19 October 2021 Venning J made an interim order that the caveat not lapse pending further order of the Court.

### **High Court judgment**

[54] By judgment delivered on 12 April 2022 Associate Judge Sussock dismissed Mr Lendich's application, and made an order that his caveat would lapse.<sup>16</sup>

[55] The Judge identified two issues to be determined:<sup>17</sup>

(a) Is it reasonably arguable that Mr Lendich intended to retain a beneficial interest in the property for himself?

(b) If so, does the fact that the property was transferred to Mr Posa by Lendich Heavy Equipment Ltd rather than by Mr Lendich himself prevent the caveat lodged by Mr Lendich being sustained?

[56] Associate Judge Sussock found it was not reasonably arguable that Mr Lendich intended to retain a beneficial interest in the property for himself. She said:<sup>18</sup>

[53] In my view it is not reasonably arguable that Mr Lendich did intend to retain a beneficial interest in the property for himself. Considering all of the evidence together, it is clear that the presumption of a resulting trust would clearly be rebutted in this case.

[54] Mr Lendich's evidence is that the transfer of the property to Mr Posa was "[t]o honour my arrangement with [Mr Posa] ... put it in his name free of charge and build a caretaker's cottage there for him to live in, also free of charge". The arrangement that Mr Lendich was honouring was the arrangement in relation to the Hailes Road property for which a written agreement had been drawn up. The agreement for sale and purchase for the Hailes Road property expressly states that the consideration for the purchase was a gift from Mr Lendich. Mr Lendich does not say that part of the Hailes Road arrangement was not being honoured. Instead he says "[a]s also with Hailes Road, it was not intended that Tim be able to sell the property or dispose of it as his own." But the clear words of the sale and purchase agreement for Hailes Road are that the consideration for the transfer was a gift.

[55] Furthermore, the memorandum of transfer for the Fred Taylor Drive property simply records that the consideration for the transfer was \$1.00. It does not record that the beneficial interest was retained by either Lendich Heavy Equipment Ltd or Mr Lendich personally as would be expected if that

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<sup>16</sup> High Court judgment, above n 1.

<sup>17</sup> High Court judgment, above n 1, at [9].

<sup>18</sup> High Court judgment, above n 1.

was the case. The memorandum contained a detailed fencing covenant so it cannot be argued that it was a standard form agreement with no special terms.

[56] In addition, Mr Lendich's evidence is that he agreed to the property being put into Mr Posa's name so that he was able to borrow against it during his lifetime. This is exactly what Mr Posa did with a mortgage registered over the property by Westpac New Zealand Limited on 18 August 1986.

[57] The Judge found there was no evidence from Mr Lendich, or any of the witnesses who swore affidavits in support of his application, that he or anyone else ever discussed with Mr Posa that the property was to be returned to Mr Lendich.<sup>19</sup> And furthermore, the steps taken by Mr Lendich and his lawyer after Mr Posa's death were not consistent with a beneficial interest having been retained. The Judge considered the "most telling evidence" was that, after Mr Lendich's lawyer contacted the executor's lawyer, Mr Lendich said he "reconsidered that buy back suggestion and decided that [he] should not have to buy back what [he] had paid for already and that some form of trust must apply."<sup>20</sup> The Judge observed that the existence of a resulting trust is all about intention, which is to be ascertained at the time the transfer was made, and it was not until after Mr Posa's death that Mr Lendich first raised that he had always intended to retain the beneficial interest or that the property was to revert to him on Mr Posa's death.<sup>21</sup>

[58] It was not necessary for the Judge to consider the second issue of whether the property being transferred by LHEL rather than Mr Lendich, would prevent the caveat being sustained. However, the Judge said that even if the presumption of a resulting trust was not rebutted by the evidence, Mr Lendich had not established that it was reasonably arguable that he personally had an interest pursuant to a resulting trust.<sup>22</sup> There was insufficient evidence that another associated company took an assignment of the assets and liabilities of LHEL before it was dissolved, and the Judge rejected the argument that form should triumph over substance.<sup>23</sup>

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<sup>19</sup> At [59]–[60].

<sup>20</sup> At [63].

<sup>21</sup> At [64]–[65].

<sup>22</sup> At [71].

<sup>23</sup> At [69]–[70].

## **Further proceedings**

[59] On 14 April 2022, Mr Lendich and his company LCL commenced a proceeding against the respondent seeking a declaration that the property at 188 Fred Taylor Drive is held by the respondent pursuant to a resulting trust, and an order that the respondent be directed to transfer it to Mr Lendich. The respondent applied for summary judgment and dismissal of the claim, and Mr Lendich (and LCL ) applied for an order to stay the respondent's summary judgment application which was granted by Venning J on 13 July 2022.<sup>24</sup> Justice Venning found that as the core issues in that proceeding will be determined by this appeal, the interests of justice supported the granting of a stay.<sup>25</sup>

## **Submissions**

### *The appellant*

[60] Mr Thorp for the appellant submits that in order to prevent his caveat from lapsing, Mr Lendich must show that he has a reasonably arguable case for the interest he has claimed in the caveat. He submits that the appellant will succeed unless it is patently clear that the caveat cannot be maintained. He notes that the process undertaken by the court is one which is wholly unsuitable for the determination of disputed questions of fact, and as is the case with regard to applications to strike out proceedings, pleaded facts are to be presumed to be correct, unless demonstrably contrary to indisputable facts, and causes of action, even if disputed, are presumed to be capable of proof unless they are so clearly untenable that they cannot possibly succeed.

[61] Mr Thorp says that from the memorandum of transfer it is clear that the property was transferred to Mr Posa free of charge, as there is no suggestion that the token \$1.00 consideration was ever paid. He therefore submits that the presumption of a resulting trust applies, and it is not necessary for Mr Lendich to prove that he intended to retain a beneficial interest in the property. On the basis that the property was paid for by Mr Lendich, but registered in Mr Posa's name, he submits that there

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<sup>24</sup> *Lendich v Codilla*, above n 2.

<sup>25</sup> At [34].

must be a reasonably arguable case for Mr Lendich having the interest he has claimed in his caveat, unless there is some patently clear reason otherwise.

[62] The appellant says that because of the presumption, the burden is on the respondent to adduce evidence sufficient to rebut the presumption of a resulting trust by, for example, showing that an outright gift was intended. Mr Thorp submits that the respondent failed to do so, whether by proving that the property was transferred to Mr Posa as an outright gift or otherwise. He says that a significant feature of the arrangement was that it made sense for Mr Lendich to provide Mr Posa, as a long-term and trusted employee, with a caretaker's cottage to live in for the rest of his life. However, it would not make sense for Mr Lendich to have made an outright gift of the property and cottage to Mr Posa, thereby enabling him to do what he liked with it, as any sale or other disposition would defeat the underlying purpose of having a caretaker occupying the cottage.

[63] Mr Thorp also notes that despite taking all his personal belongings with him when he returned to Croatia in 1985, Mr Posa made no arrangements to sell the property. He says that had he regarded the property as his to sell he would surely have made some arrangements to sell it at that time. He further submits that it is significant that even when Mr Posa encountered financial difficulties back in Croatia, he did not make any attempt to sell the property or borrow by using it as security, and borrowed from Mr Lendich to pay the costs of returning to New Zealand. Mr Thorp says that there is also conflicting evidence as to who paid for the construction of the cottage on the property. He notes Mr Lendich's evidence that the house was built by his company to the stage of being at, or close to, closed in and habitable by the time Mr Posa returned from Croatia, while in her evidence, Ms Nelson says that the appellant took no part in building the cottage.

[64] Mr Thorp says that for Associate Judge Sussock to have found that it was not reasonably arguable on the evidence that Mr Lendich did intend to retain a beneficial interest in the property, necessarily means that the Judge disbelieved his evidence, and that of other witnesses, including the appellant's witness Mr Joseph Posa who said that his cousin Mr Posa, had given him the impression that the house was his to use, but

not to sell, and Mr Lovrich who said that when Mr Posa left for Croatia he took with him everything he owned.

[65] Mr Thorp says that the consideration of \$8,000 in the Hailes Road agreement for sale and purchase was included so as to enable Mr Posa to demonstrate that he had some equity in the property when using it as security for borrowing money. He says that although the Fred Taylor Drive transaction was substituted for the Hailes Road transaction, it cannot be assumed that all the Hailes Road arrangements were carried forward to that transaction, and the only consideration referred to in the memorandum of transfer was \$1.00. He further submits that the Judge erred by considering that a transfer of the property to Mr Posa was inconsistent with the appellant retaining a beneficial interest in the property because a mortgagee sale could defeat that interest. He says that evidence is an insufficient basis on which to justify rejecting Mr Lendich's evidence and ignoring the evidence of Mr Joseph Posa and Mr Lovrich. He says that given the close relationship that existed between Mr Lendich and Mr Posa, it is unreasonable to conclude that the purpose of providing Mr Posa with security for borrowing would be put at risk by excessive borrowing leading to a mortgage default that either Mr Posa or the appellant were unable to remedy.

[66] Mr Thorp submits that the inclusion of the fencing covenant in the transfer does not provide any basis for the Court to disbelieve Mr Lendich's evidence, as there is no evidence of conveyancing practice regarding the inclusion of such provisions in a standard form of memorandum of transfer, approved by the Registrar-General of Land.

[67] As regards Mr Posa's wills, and the fact that at no stage did Mr Posa tell the solicitors who took his testamentary instructions that he was not able to bequeath the property because of Mr Lendich's retained interest in it, Mr Thorp says that too is not a sufficient basis for the High Court to reject Mr Lendich's evidence. He submits that Mr Posa's actions and his failure to tell the solicitors can be explained by Ms Nelson's evidence that unbeknown to her, he was seeking relationships with other women by telling them that he would leave them the house when he died.

[68] In relation to the appellant's offer to purchase the house from the respondent, Mr Thorp says that him doing so is not a sufficient basis for the Judge to have rejected Mr Lendich's evidence regarding his intention to retain the beneficial interest in the property. He submits that Mr Lendich making an offer to buy back the caveated property is not evidence that he never intended to retain a beneficial interest in the property. Mr Thorp says that soon after making the buy-back offer, Mr Lendich changed his mind and thought that he should not have to buy back what he had already paid for, and that some sort of trust must apply. He says that the principles applicable to resulting trusts are not commonly known, and Mr Lendich's failure to appreciate that a resulting trust could be asserted and his failure to articulate his claim of a resulting trust, should not be regarded as being conclusive evidence that Mr Lendich never intended to retain a beneficial interest in the property.

[69] As regards the Judge's finding that irrespective of whether the presumption of a resulting trust was rebutted, the appellant had failed to demonstrate that he has a reasonably arguable case to show that he is the correct beneficiary of a resulting trust, because he failed to produce evidence to show that LHEL had ever transferred the beneficial interest in the property to the appellant, Mr Thorp says that finding ignores the evidence. He says that from Mr Lendich's evidence it is clear that the arrangements over the property were personal to him and Mr Posa, notwithstanding that so far as Mr Lendich was concerned it was performed on his behalf by his company. Mr Thorp submits that as Mr Lendich was the governing director of LHEL and he and his wife were the sole shareholders, details of how the funds flowed between the parties cannot be of any significance. Nevertheless says Mr Thorp, the public advertisements of LHEL's winding-up in which notice is given that the business operation was to be continued from 1 December 1988 by LCL makes it clear that all of the assets and liabilities of LHEL were transferred to LCL. As a result LCL as a second plaintiff in the substantive proceeding commenced in the High Court, in the alternative claims to be the entitled beneficiary of the resulting trust.

[70] Mr Thorp therefore submits that rather than allow the form of these transactions to prevail over the substance of the claimed resulting trust, the caveat should be sustained until the substantive proceeding is determined and the issue of who is the correct beneficiary is resolved.

*The respondent*

[71] Mr Tetzlaff for the respondent supports Associate Judge Sussock's judgment and findings. He submits that there is well sufficient evidence to rebut the presumption of a resulting trust, and in any event that Mr Lendich does not have a caveatable interest in the property, as any interest in the property that existed would be owned by a company and not Mr Lendich personally.

[72] The respondent says that Mr Lendich's evidence and claim of a resulting trust lack credibility, and it was reasonable for the Judge to reject Mr Lendich's evidence and version of events. Mr Tetzlaff submits that the legal documentation recording the proposed Hailes Road transaction and the limited documentation relating to the Fred Taylor Drive transaction show that Mr Lendich was familiar with legal documentation regarding property transactions. He says that the fencing covenant created in the memorandum of transfer of the Fred Taylor Drive property and registered on the title, demonstrates that the parties to the transaction had turned their minds to their future obligations as owners of the adjoining properties. He submits that the proposition that Mr Lendich and Mr Posa would create a fencing covenant dealing with the respective interests of the two adjoining property owners, but fail to also document an arrangement by which notwithstanding the transfer to Mr Posa, Mr Lendich would retain an interest in the property and Mr Posa was required to transfer it back to him if required, lacks credibility.

[73] Mr Tetzlaff submits that it is also significant that Mr Lendich says that he cannot recall ever discussing the return of the property with Mr Posa despite a period of some 35 years passing between the transfer to him and Mr Posa's death. He submits that the real reason for Mr Lendich's claim being made after such a long time is that Mr Posa's property divides two properties owned by Mr Lendich's companies, and he now regrets disposing of it.

[74] In relation to the issue of whether Mr Lendich in his personal capacity has a caveatable interest in the land, Mr Tetzlaff says that irrespective of whether Mr Lendich has adopted a reasonably relaxed approach to whether he transacted his business personally or through companies that he controlled, the fact remains that

LHEL was the owner and transferor of the property at 188 Fred Taylor Drive that was transferred to Mr Posa. He submits that the Court does not have an unfettered discretion to disregard matters of legal ownership, and any rights to the property retained by LHEL upon its transfer to Mr Posa, would only have been transferred to LCL if they were recorded as an asset in LHEL's financial statements prior to its liquidation. However, those financial statements are not in evidence.

[75] Mr Tetzlaff submits therefore, that any such rights owned by LHEL at the date of the property's transfer to Mr Posa, were the property of the company and not the personal property of the shareholders of the company.

[76] As regards Mr Lendich's actions following Mr Posa's death, Mr Tetzlaff says that his offer to purchase the property from Mr Posa's estate is wholly inconsistent with him believing that he was the beneficial owner of it.

[77] Mr Tetzlaff notes that in the Hailes Road agreement for sale and purchase the sum of \$8000 is stated as being the purchase price, and that it was gifted by the vendor to the purchaser. He submits that as the Fred Taylor Drive transfer was intended by Mr Lendich to honour and be a substitute for the Hailes Road transaction, although consideration of one dollar was stipulated, the balance of the purchase price including the cost of construction of a cottage on the property was in the same manner as was the case with Hailes Road, also gifted by LHEL to Mr Posa.

[78] He submits that this gifting was implemented by Mr Lendich and LHEL, and is evidenced by Mr Posa having made a number of statements to the effect that Mr Lendich had given him the property. He notes that there is no evidence of either Mr Lendich or Mr Posa acting inconsistently with this having been intended and effected by the transfer to Mr Posa. Mr Tetzlaff says that the stated consideration in the memorandum of transfer of one dollar, is not inconsistent with the transfer being a gift, and he submits that having regard to the terms of the proposed Hailes Road transaction, the nominal consideration for Fred Taylor Drive is not inconsistent with Mr Posa regarding the transfer to him of a property valued at \$8000, as a gift to him.



[79] Mr Tetzlaff says in the alternative, should the Court find that the balance of the purchase price of Fred Taylor Drive was not gifted to Mr Posa, he notes that the memorandum of transfer records the transferor's receipt of consideration in the sum of \$1.00, and he submits that the consideration of one dollar, whilst nominal, is nonetheless effective consideration.

[80] Mr Tetzlaff further submits that Mr Lendich's claim that the transfer of the property into Mr Posa's name was simply undertaken to enable him to use it as security for borrowing is inconsistent with the existence of an interest in the property being retained by Mr Lendich. He notes that no restriction was imposed on Mr Posa regarding the level of borrowing he could secure against the property, and any default by Mr Posa as mortgagor could result in a mortgagee sale either during his lifetime or after his death. And he notes that Mr Lendich's interest, if such existed, would be secondary to a registered mortgagee's secured interest. He further submits that as Mr Lendich was an experienced businessman who took care to exclude his company's liability for any future fencing along the boundary of the property, it is not credible to suggest that he would lose the right to recover a valuable property without having taken some steps to record and notify others of his (or LHEL's) retained interest.

[81] As regards the evidence of the appellant's witnesses, Mr Joseph Posa and Mr Lovrich, Mr Tetzlaff says that although the Judge did not specifically refer to their evidence, in the case of Joseph Posa his evidence referred to his "impression" of what Mr Posa understood about whether he was at liberty to sell the Fred Taylor Drive property if he wished, and was not evidence of anything that Mr Posa actually said about that matter. He submits that Mr Lovrich's evidence contains nothing inconsistent with the Judge's findings. Mr Tetzlaff accepts that the Judge did not address the evidence regarding Mr Posa having told the respondent that Ms Tenchavez was to have the use of the property for her lifetime, but was not to sell it. Mr Tetzlaff says that there could be various possible reasons for Mr Posa telling Mr Codilla several days after having made a will leaving all of his estate to Ms Tenchavez, that he did not want him to sell the property. He submits that any conclusions drawn from this evidence by the Judge would have involved speculation, and her omission to address the issue is inconsequential.

## Discussion

[82] As this Court explained in *Potter v Potter*, the essence of a resulting trust in this context is that a person providing or contributing to the purchase price of property conveyed into the name of another retains a beneficial interest in the property to the extent of his or her contribution if there is nothing to indicate that he or she intended to confer the beneficial interest on the legal transferee.<sup>26</sup> Where no intention to dispose of his or her beneficial interest is expressed by the transferor, the law fills the vacuum and presumes an intention on the part of the transferor to retain the beneficial interest which they had never effectively alienated.<sup>27</sup>

*Did Mr Posa provide consideration for the property?*

[83] As noted at [13] above, the presumption of a resulting trust will be rebutted where consideration has been provided.<sup>28</sup> Here, the memorandum of transfer signed by Mr Lendich (in his capacity as the governing director of LHEL) expressly recorded that consideration had been paid in the sum of one dollar, the receipt of which was formally acknowledged in the memorandum of transfer.

[84] Mr Thorp submitted that there was no evidence that the \$1.00 consideration was actually paid and that the Court should therefore proceed on the assumption that it was not, and that the property was transferred to Mr Posa free of charge. On that basis, he submitted, it is reasonably arguable that a resulting trust in Mr Lendich's favour arises.

[85] Contrary to Mr Thorp's submission, however, there is evidence that the \$1.00 consideration was paid. Mr Lendich expressly acknowledged receipt of the consideration in the key contemporaneous document — the memorandum of transfer. There is no evidence which contradicts that acknowledgment. Further, even if the agreed consideration had not been paid, it does not follow that a resulting trust would arise in Mr Lendich's favour. Rather, the agreed purchase price would remain owing as a debt, which would be payable to LHEL on demand by Mr Posa (or his estate).

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<sup>26</sup> *Potter v Potter*, above n 9, at [14]–[19].

<sup>27</sup> At [14].

<sup>28</sup> Butler, above n 11, at [12.5.2] (footnotes omitted).

[86] It has been settled for well over 300 years that the courts will not inquire into the “adequacy of consideration”.<sup>29</sup> It is for the parties to determine the appropriateness or otherwise of the consideration for a bargain. As the courts are not concerned with the adequacy of consideration, a nominal consideration will be sufficient. Hence it is not unusual for contracts to include references to consideration of one dollar,<sup>30</sup> a “peppercorn rental”, or similar.

[87] In this case the agreed consideration, as recorded in the memorandum of transfer, was \$1.00. It is not the Court’s role to inquire into the adequacy of that consideration. There is clear evidence that the agreed consideration was paid and no evidence to the contrary.

[88] On this analysis, Mr Lendich’s claim would fail at the first hurdle, as it is not reasonably arguable that he retained an equitable interest in the property having sold it to Mr Posa for consideration.

[89] We note, however, Mr Lendich’s evidence that the reason that there was no written agreement for sale and purchase of the property was because there was no need, as he was honouring the arrangement he had previously made with Mr Posa regarding Hailes Road, but in respect of a different property and with the construction of a caretaker’s cottage to be included. If that is so, then it is at least arguable that the memorandum of transfer (with its stated consideration of \$1.00) does not provide the full picture. It is also necessary to consider the broader context, including the arrangements reached in relation to the sale of the Hailes Road property in assessing whether it is reasonably arguable that Mr Lendich/LHEL did not intend to confer the beneficial interest in the property on Mr Posa. We address that below, together with various other relevant matters.

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<sup>29</sup> Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis NZ, Wellington, 2022) at [4.5]. See also *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All ER 1686 (QB).

<sup>30</sup> See for example *Thomas v Thomas* (1842) 2 QB 851 where the relevant consideration was one pound.

*The intention of Mr Lendich*

[90] As Associate Judge Sussock correctly observed, it is central to the presumption of the existence of a resulting trust, that there is an absence on the part of the transferor of any expression of intention to transfer their beneficial interest in the property to the transferee.<sup>31</sup> The presumption that will arise where there is no evidence of an intention on the part of the transferor to dispose of his or her beneficial interest, will be rebutted by credible and reliable evidence of their intention to transfer their beneficial interest to the transferee.<sup>32</sup>

[91] Having considered the relevant evidence we are satisfied that it was clearly Mr Lendich's intention, both personally and as governing director of LHEL, to transfer the entire beneficial interest in 188 Fred Taylor Drive to Mr Posa, when he executed the memorandum of transfer on 20 July 1982. We are satisfied that it is not reasonably arguable that Mr Lendich intended to retain the beneficial interest in the property for himself or LHEL.

[92] We have reached this conclusion having regard to the following:

The close personal relationship between Mr Lendich and Mr Posa

[93] As explained by Mr Lendich in his evidence, he and Mr Posa had become close friends over the years since Mr Posa commenced working for him in the late 1960s. By 1982 Mr Posa had been working for Mr Lendich for around 15 years, during which time he had come to be regarded by Mr Lendich as a highly valued employee. Having regard to the close personal friendship that existed between them and Mr Posa's trusted and valued position as an employee, there was clearly a context from which a proposal by Mr Lendich to provide Mr Posa with a residence of his own could well have arisen.

[94] Mr Lendich says that when he was looking to purchase the Hailes Road property as a new depot site for his business he wanted Mr Posa to live in the house on that property and act as the caretaker to keep watch over the equipment and

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<sup>31</sup> *Lendich v Codilla*, above n 1, at [14] and [52], citing *Potter v Potter*, above n 9, at [19].

<sup>32</sup> *Lendich v Codilla*, above n 1, at [15]–[16] and [64], citing *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 10; *Butler*, above n 11; and *Pounamu Properties Ltd v Brons* [2012] NZHC 590 at [187].

machinery stored there. In order to give effect to this intention, Mr Lendich says that he decided to subdivide the house site off the depot land, and transfer the subdivided house and section to Mr Posa free of charge so that he would be secure and settled with a place to live as long as he wished, could use it as security for borrowing, and carry out improvements to it if he wished.

[95] An arrangement of that nature that would result in Mr Posa becoming the legal and registered owner of the property appears to be entirely consistent with an intention on the part of the transferee to convey the beneficial ownership of the property to Mr Posa. The creation of a subdivided and separate title for the land on which the Hailes Road house was situated was not necessary if the only purpose was to give Mr Posa somewhere to live rent free. Furthermore, the proposal to subdivide the house site and to transfer it 'free of charge' to Mr Posa would enable him to enjoy the benefits of ownership. It is unlikely that Mr Lendich would go to all that trouble and incur the expense of subdivision if it was never his intention to transfer beneficial ownership of the land, and his purpose for putting the property in Mr Posa's name was so that he could use its security for future borrowings. Mr Lendich says that despite making these arrangements he never "specifically discussed" with Mr Posa that although he would legally transfer the property to him, he did not intend to transfer the beneficial ownership of the property, and that it was not his intention that Mr Posa be able to sell or dispose of the property as his own. We consider that if that was actually Mr Lendich's intention, it is quite implausible that he would not have discussed it with Mr Posa and made his intention to retain the beneficial interest clear to him.

#### The Hailes Road agreement for sale and purchase

[96] Although the Hailes Road transaction did not proceed, its terms are nevertheless of significance and inform an assessment of the intention of the parties as regards the 188 Fred Taylor Drive transaction, as Mr Lendich says that it was entered into in order to honour the arrangements he had previously made with Mr Posa regarding Hailes Road.

[97] The terms of the agreement for the sale and purchase of the Hailes Road property entered into between LHEL and Mr Posa are, in our view, inconsistent with

the existence of an intention on the part of Mr Lendich to retain the beneficial interest in the property to be transferred to Mr Posa. The agreement dated 24 November 1980 describes LHEL as the vendor and Mr Posa as the purchaser. The agreement states that: the purchase price was \$8000; the deposit was \$1.00; and the balance of the purchase price was payable on settlement. The agreement further states that the vendor confirms that the consideration for the purchase price is to be provided by way of gift. These terms are consistent with the intention being to transfer both the legal and the beneficial interest in the property to Mr Posa.

#### The 188 Fred Taylor Drive transaction

[98] While there was no written agreement for sale and purchase in respect of 188 Fred Taylor Drive, Mr Lendich says that his intention was that the same arrangements would be made in respect of the Fred Taylor Drive property, and result in a subdivided title being transferred to Mr Posa ‘free of charge’, and for a caretaker’s cottage to be built on it where he could live ‘free of charge’ for the rest of his life. To implement this arrangement required Mr Lendich and LHEL to first apply for town planning approval to establish the business depot and subdivide a section off the depot site for a caretaker’s cottage.

[99] As with Hailes Road, Mr Lendich says that although the property would be transferred into Mr Posa’s name, he could live at the property for the rest of his life, borrow against it, carry out building work to complete the construction and make improvements to the property. It was never his intention that he would transfer the beneficial ownership of the property to Mr Posa. Once again, despite Mr Posa becoming the legal owner of the property and able to use the property and exercise rights consistent with having full ownership of it, Mr Lendich says that he does not recall specifically discussing his intention to retain the beneficial interest in the property with Mr Posa and telling him that despite being the legal owner, he would not be able to sell or dispose of the property. We consider Mr Lendich’s evidence on that issue inherently implausible. Given the close personal friendship that existed it would be remarkable if such a fundamental and important aspect of the transaction was not clearly explained by Mr Lendich to Mr Posa, if that is what Mr Lendich’s intention actually was.

[100] Furthermore, in our view the inclusion of the fencing covenant in the memorandum of transfer provides a clear indication of Mr Lendich's intention to transfer both the legal and beneficial ownership of the property to Mr Posa. The effect of the fencing covenant is to absolve LHEL as vendor of the property, from any liability to erect, repair or contribute to the cost of a boundary fence between 188 Fred Taylor Drive and any adjoining land owned by LHEL. The benefit to LHEL of the fencing covenant is clearly evident from the title of 188 Fred Taylor Drive which shows the strip of land giving access to the house site from Fred Taylor Drive extends for a considerable distance from the roadside to the very rear of the property. Fencing along this extensive common boundary would be likely to involve substantial cost. A fencing covenant absolving LHEL from contributing to the fencing costs, would not be necessary if the beneficial ownership of 188 Fred Taylor Drive was to remain the property of LHEL and therefore under Mr Lendich's effective control.

#### Subsequent conduct of Mr Lendich and Mr Posa

[101] During the 36 years passing between registration of the transfer of the Fred Taylor Drive property to Mr Posa on 20 October 1982 until shortly after Mr Posa's death in October 2018, at no time did LHEL or Mr Lendich take any steps consistent with having retained beneficial ownership of the property. To the contrary, Mr Lendich observed Mr Posa undertaking building work on the house at his own cost and developing the property in a manner consistent with believing that he owned it outright.

[102] For his part, Mr Posa clearly believed that he had full ownership of the property and that he was not precluded from disposing of it under the terms of his wills made in April 2012 and May 2016. The evidence of both Mr Vlatkovich and Mr Kemp regarding their discussions with Mr Posa confirms that so far as he was concerned Mr Posa was in no doubt that he had full ownership of the property.

[103] In our view, Mr Lendich's evidence that Mr Posa took no steps to sell 188 Fred Taylor Drive when he returned to Croatia in 1985 does not demonstrate that he knew he could not sell it because Mr Lendich had retained the beneficial interest. What his intentions regarding the property were at that time is not known, but what is

clear is that prior to his departure he did not make any arrangements with Mr Lendich to transfer the title back to him, and similarly, Mr Lendich himself took no steps to request Mr Posa to transfer the property back into his or LHEL's name.

[104] And in 1996 when Mr Lendich and his company purchased the former Whenuapai Bus Company property at 186 Fred Taylor Drive for the purpose of establishing a new depot on it, nothing was done to resolve the situation which then arose, whereby Mr Lendich's two large commercial properties at 194 and 186 Fred Taylor Drive were now separated by a narrow strip of land on the title of the property in Mr Posa's name. Indeed, on Mr Lendich's evidence, the first time that any steps were taken to address the situation of his business depot and premises being separated by Mr Posa's property was following Mr Posa's death when Mr Lendich and his solicitor Mr Allen contacted Mr Kemp who was acting for the respondent as executor of Mr Posa's estate.

[105] We consider that the approaches adopted by both Mr Lendich and Mr Allen are relevant to an assessment of what Mr Lendich's intention was when he had executed the memorandum of transfer in October 1982. Mr Allen's 11 October 2018 email to Mr Kemp's law firm was sent just nine days after Mr Posa's death. In his email Mr Allen does not refer to Mr Lendich having telephoned Mr Kemp, and so it is likely that Mr Lendich's telephone call to Mr Kemp took place on a date sometime after Mr Allen's email.

[106] Mr Allen had obviously obtained Mr Lendich's detailed instruction regarding the history of the 188 Fred Taylor Drive property and its transfer to Mr Posa. In his instructions to Mr Allen, Mr Lendich had told him that he had given the property to Mr Posa, and had built a house on it for him. Mr Allen said in his email that the Lendich family wanted to "purchase back the property originally given to [Mr Posa] at a fair market value (notwithstanding the original beneficence)." The only possible explanation for this expression of interest in purchasing the property from Mr Posa's estate is that Mr Lendich knew that as a result of the transfer to him, Mr Posa had become the owner of both the legal and beneficial interests in the property.



[107] If Mr Lendich had in fact retained the beneficial interest in the property, he could not possibly have forgotten about doing so when instructing Mr Allen; telling him that the property had been gifted to Mr Posa, and instructing him to write to Mr Kemp and propose buying back the property. Mr Kemp's evidence regarding the telephone call he received from Mr Lendich around that time is consistent with the contents of Mr Allen's email, and he says that when Mr Lendich telephoned him he said that he wanted to buy the property back because it would facilitate the use of his business premises located on Fred Taylor Drive, and that he requested a first right of refusal to buy the property.

[108] On the basis of Mr Lendich's own evidence and that of his solicitor Mr Allen, we are satisfied that their communications to Mr Kemp following Mr Posa's death are compelling confirmation that Mr Lendich and LHEL did not retain the beneficial interest in the property when it was transferred to Mr Posa in July 1982.

[109] Mr Lendich's evidence that later in October 2018, he reconsidered the buy-back suggestion and decided that "some sort of trust must apply" and he should not have to pay to buy back what he had already paid for, is implausible having regard to his earlier instructions to Mr Allen, his telephone conversation with Mr Kemp, and Mr Allen's subsequent communications with the respondent's succession of solicitors. In this regard we note in his 31 May 2021 email to Mr Connell, Mr Allen made no mention of Mr Lendich's claim to be the beneficial owner of the property, saying that "... many decades ago [Mr Lendich] made the land still owned by the Estate available to [Mr Posa] for his house build."

[110] Mr Lendich deciding in late 2018 that "some sort of trust must apply" is itself inconsistent with him having intended to retain the beneficial interest at the time of transferring the property to Mr Posa in July 1982. Moreover, in the period of around two and a half years between deciding that "some sort of trust must apply" in late October 2018, and Mr Allen's email to Mr Connell of 31 May 2021, it necessarily follows that Mr Lendich had not instructed Mr Allen that he thought "some sort of trust must apply", as if he had, Mr Allen would inevitably have said something about it in his email to Mr Connell informing him of his client's interest in the property.

[111] In the context of this appeal it is not appropriate for us to determine whether Mr Connell’s account or Mr Allen’s account of their telephone conversation in May or June 2021 is to be preferred, and we have put that evidence to one side.

Mr Posa’s instruction to Mr Codilla regarding sale of the property

[112] In his affidavit Mr Codilla says that several days after Mr Posa had executed his will on 12 May 2016, Mr Posa showed him a copy of it, and said that he did not want Ms Tenchavez to see it. Mr Codilla says that it appeared to him that Mr Posa was afraid that he might die and he was really worried about Ms Tenchavez. Mr Codilla says that Mr Posa told him:

“I don’t want [Ms Tenchavez] to sell this house. She will live here. It is hers. It is for her future”. These are the exact words he used. He told me not to sell the house.

[113] We do not consider that evidence of what Mr Posa said to Mr Codilla as being at all inconsistent with him believing that he was fully entitled to bequeath the property to Ms Tenchavez. In our view it appears from what Mr Posa said that his concern was to ensure that the house was retained as a place for Ms Tenchavez to live in rather than be sold and the proceeds forming part of his estate. Such an approach is consistent with Mr Posa believing that as the owner of the property he was fully entitled to bequeath it to Ms Tenchavez, and wanted Mr Codilla to ensure that although it would be hers, the house would be retained as somewhere for her to live. There is nothing inconsistent in that evidence, and the Judge’s decision rejecting Mr Lendich’s claim regarding the arguable existence of a resulting trust.

*Conclusion*

[114] On the basis of Mr Lendich’s own evidence and the uncontested evidence of Mr Allen we find that it is not reasonably arguable that Mr Lendich intended to retain a beneficial interest in the property for himself or LHEL when he executed the transfer to Mr Posa in July 1982. In our view it is clear from the undisputed evidence that Mr Lendich intended to transfer the property to Mr Posa for the nominal consideration of \$1.00 and construct a cottage on the property for him free of charge. From the evidence it is also clear that there was never any question of Mr Posa having to pay

anything more than the \$1.00 sum provided for in the memorandum of transfer for the land or for construction of the cottage. In our view the circumstances here could not possibly give rise to the existence of a resulting trust, as although Mr Lendich through LHEL provided the property, and construction of the cottage to a closed in stage, consideration for the transfer of the property was specifically addressed and provided by the mechanism of Mr Lendich effectively gifting whatever sum would have been the purchase price, and his acceptance of the nominal sum of \$1.00 paid by Mr Posa as consideration for the transfer.

[115] There is simply no evidence to support Mr Lendich's claim that he intended to retain the beneficial interest. His own actions both prior to and after Mr Posa's death are entirely consistent with Mr Lendich intending to convey the beneficial interest, and having done so, thereafter proceeding on the basis that he had in fact transferred both the legal and beneficial interests to Mr Posa. It was only after Mr Posa's death, and after having offered to purchase the property from Mr Posa's estate, that Mr Lendich says he decided that some sort of trust must apply.

[116] It being quite clear from the evidence that Mr Lendich and LHEL intended to confer the beneficial interest in the property on Mr Posa, this is not a case of the transferor expressing no intention to dispose of his beneficial interest. There is no 'vacuum' as to what Mr Lendich's intention was when transferring the property free of charge to Mr Posa, and therefore no basis for a presumption to apply that Mr Lendich as the transferor, intended to retain the beneficial interest.

[117] We accordingly agree with Associate Judge Sussock that it is clear that were a resulting trust to be presumed it would be readily rebutted by the uncontested evidence which clearly shows that Mr Lendich did intend to transfer both the legal and beneficial interests in the property at 188 Fred Taylor Drive to Mr Posa when, as Governing Director of LHEL, he executed the memorandum of transfer dated 20 July 1982. As we find that Mr Lendich and LHEL could not possibly establish that they have a caveatable interest in the property pursuant to a resulting trust, we are satisfied that the Judge did not err in her decision directing that Mr Lendich's caveat lapse.

## **Result**

[118] The appeal is dismissed.

[119] We make an order that caveat 12225785.1 lodged by Mr Lendich on record of title NA52A/443 shall lapse.

[120] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:  
Davenports West Lawyers, Auckland for Appellant  
Connell & Connell, Auckland for Respondent