

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA499/2014
[2015] NZCA 213**

BETWEEN S M HEAZLEWOOD
Appellant

AND JOIE DE VIVRE CANTERBURY
LIMITED
Respondent

CA644/2014

AND BETWEEN S M HEAZLEWOOD
Appellant

AND MEMORIAL AVENUE INVESTMENTS
LIMITED
Respondent

Hearing: 14 April 2015

Court: Ellen France P, Randerson and Miller JJ

Counsel: A M Corry for Appellant
J E Bayley for Respondent

Judgment: 5 June 2015 at 4.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B Costs are to lie where they fall.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] A person who claims an “interest” pursuant to the Property (Relationships) Act 1976 (the PRA) in any land may lodge a notice of claim against the title to that land, as if the notice were a caveat lodged under the Land Transfer Act 1952.¹

42 Notice of interest against title

- (1) A claim to an interest, pursuant to this Act, in any land subject to the Land Transfer Act 1952 shall be deemed to be a registrable interest for the purposes of that Act.

Such notice must be lodged in the prescribed form. The form contemplates that the applicant may claim an interest by marriage, civil union or de facto relationship, in land of which his or her partner is a registered proprietor, or to which the partner is “entitled” or in which the partner is “beneficially interested” by virtue of, inter alia, “an express or implied trust” or “some other circumstance”.²

[2] Over the span of their 25 year relationship Susan and Graeme Heazlewood conducted a successful property investment business that was characterised by their use of a long series of separate trusts and companies to hold a succession of properties. The respondent Joie de Vivre Canterbury Ltd (JDV) is such an entity. It was until very recently the registered proprietor of a commercial property at Russley Rd, Christchurch,³ which it held as trustee for the Robinsons Bay Trust, a Heazlewood family trust.

[3] In July 2012 JDV sold the Russley Rd property to another trustee company, LNV Trustees Ltd, which is to hold it in trust for another family trust, the Boulder Trust.⁴ The purchase price of \$3.94 million was left owing to JDV, which held the debt in trust for the Robinsons Bay Trust. Mrs Heazlewood is among the discretionary beneficiaries of the Robinsons Bay Trust, but not the Boulder Trust. The Robinson Bay Trust has since resettled the debt on the Heazlewood Family Trust, of which she remains a beneficiary — so long as she is married to

¹ Property (Relationships) Act 1976 (PRA), s 42.

² Property (Relationships) Forms Regulations 2001, sch 1.

³ The property comprises two addresses and titles.

⁴ The trustee at the time was actually Canterbury Trustees (2012) Ltd. LNV Trustees was appointed trustee subsequently.

Mr Heazlewood. The present value of the property is much greater than \$3.94 million.

[4] Memorial Avenue Investments Ltd (MAIL) is also a family entity. It is the registered proprietor of several properties at Memorial Avenue,⁵ which it acquired in a single transaction in 2008 from various Heazlewood entities. At the time of the acquisition the director and shareholder of MAIL was a Mr van Schaijik. In 2013 he sold the shares in MAIL to Restart Trustee Ltd, which is another Heazlewood entity. It holds the shares in trust for a family trust, the Restart Trust. Mrs Heazlewood is not among the discretionary beneficiaries of the Restart Trust.

[5] In 2013 Mrs Heazlewood lodged notices of interest against the Russley Rd and Memorial Avenue titles. Title to Russley Rd had not been transferred to LNV Trustees Ltd at the time. She maintains that she has an interest under the PRA because the properties are held on constructive trust for her and Mr Heazlewood; alternatively, because the trusts are shams and he is beneficially entitled to the properties.

[6] Mrs Heazlewood failed to sustain her notices in the High Court and the MAIL notice has now been removed.⁶ The High Court judgment in the JDV proceeding has been stayed pending the judgment of this Court.⁷ On JDV's application, we varied the notices affecting Russley Rd to permit the transfer to LNV, registration of a mortgage, and the payment of external creditors.⁸ It is common ground that the property's development requires external mortgage financing which was precluded by the notice of interest, and that LNV had outstanding creditors, some of whose debts predated her notices of interest, which it could not pay from its own resources.

[7] The question is whether the interest that Mrs Heazlewood asserts through her relationship with Mr Heazlewood is sufficient in law to sustain the notices of interest pending disposition of their relationship property litigation. It is not in dispute that,

⁵ The property comprises four adjoining addresses and titles.

⁶ *Mrs X v Company B* [2014] NZHC 2125 [JDV High Court judgment]; and *Mrs X v Company A* [2014] NZHC 2126 [MAIL High Court judgment].

⁷ *Heazlewood v Joie de Vivre Canterbury Ltd* [2014] NZCA 550 [JDV stay judgment].

⁸ *Heazlewood v Joie de Vivre Canterbury Ltd* [2015] NZCA 127 [JDV variation of stay judgment].

if the interest is sufficient in law, she need only demonstrate an arguable case that it exists in fact.

Narrative

[8] The parties' business dealings were long-running, numerous and complicated. The selective account that follows will suffice for our purposes. We record that substantial parts of the evidence given by Mrs Heazlewood are not contested at this stage, Mr Heazlewood having chosen not to swear affidavits. It also appears that entities associated with Mr Heazlewood have taken a restrictive and selective approach to discovery; this evidently affected, for example, Mrs Heazlewood's attempts to trace to relationship property the source of funding for Russley Rd.⁹ We observe that, as this Court recently warned in *Clayton v Clayton*, parties to relationship property proceedings must make full disclosure and adverse inferences may be drawn if they do not.¹⁰ It seems implausible that Mr and Mrs Heazlewood are unable to procure access to documents held by the trustees of their family trusts or by the professional advisors to such trusts. Such evidence as there is does not preclude Mrs Heazlewood's claim that relationship property is the source of the family's wealth.

[9] The Heazlewoods married in 1990 following a two-year de facto relationship. There are six children of the marriage. They separated for six weeks in 2011, and separated finally on 2 April 2013.

[10] Throughout the marriage the couple bought and sold properties, sometimes after rezoning them. On Mrs Heazlewood's account, they were investors rather than developers; they acquired properties with rezoning potential, usually on a low deposit and with extended settlement, and resold them in due course. Throughout they used separate discretionary trusts which were established for each acquisition or series of acquisitions. There are said to be more than 40 such entities. The primary reason for using so many trusts appears to have been tax avoidance; the Heazlewoods did not wish to attract the income tax that would have been payable

⁹ We recognise that there has been a notable exception: a good deal of information has been forthcoming about commitments affecting the Russley Rd property.

¹⁰ *Clayton v Clayton* [2015] NZCA 30 at [186].

had they been in the business of property investment.¹¹ In the first three years of their marriage Mr Heazlewood was also a bankrupt. The Heazlewoods owned no assets in their own names.¹² Not only the investment properties but also their homes from time to time and their vehicles and household assets were held by trusts. Mrs Heazlewood's evidence is that Mr Heazlewood controlled all of these trusts, in which he typically held the power to appoint and remove trustees, and the couple freely made use of trust assets to fund a luxurious lifestyle, without reference to the relevant trustees, who have performed a purely instrumental function to the extent that they do anything at all. She says that:

In all our time together [Mr Heazlewood] has never asked anyone at all for a distribution or advance from any of the more than 40 trusts. He has not needed to as he has controlled the entire portfolio and financing.

[11] Mrs Heazlewood maintains that she made direct contributions to the acquisitions which created the "seed money" used for later investments, including those at Russley Rd and Memorial Avenue. She says that from 1988 she and Mr Heazlewood worked together in the business. She negotiated the acquisition of numerous properties, sometimes by door-knocking with a real estate agent in tow. Occasionally she bought in her own name but usually she did so for various trusts. These properties included a number at Shirley¹³ and one of 27 acres at Hills Road which were later sold at a considerable profit, realising funds which were invested in other properties including, eventually, those the subject of these appeals. Her case is that she contributed her efforts in the expectation that she was acquiring an interest in these properties. It is immaterial, as she sees it, that they have actually been vested in trusts employed for tax reasons: the substance is that they were property that Mr Heazlewood was free to and did deal with as he chose.

¹¹ The Commissioner of Inland Revenue did in fact allege, successfully, that the National Investment Trust was in the business of property investment: *Heazlewood v The Commissioner of Inland Revenue* TRA Christchurch 23/2000 1 December 2000 [taxation decision].

¹² This appears still to be the case for Mr Heazlewood, who has sworn an affidavit dated 17 December 2014 in support of an application to vary a stay of the judgments under appeal. He says that he receives no income and has no personal assets, and that his expenses are met by advances from trusts.

¹³ Details of these dealings may be found in the taxation decision, above n 11. Mrs Heazlewood acquired, in her former name but as agent for the National Investment Trust, some seven properties.

[12] Mrs Heazlewood maintains that relationship property was used to fund the purchases of the Russley Rd property. As noted, discovery is incomplete, but there is evidence that a substantial portion of the equity of \$1.94 million that was contributed to the purchase of Russley Rd came from accounts of the National Investment Trust, a family trust settled by Mr Heazlewood's mother in 1990. Mrs Heazlewood is among the discretionary beneficiaries so long as she remains married to Mr Heazlewood, who is also a beneficiary. The trust deed vests in him the power to appoint trustees, and it empowers the trustees to appropriate at any time all or any of the trust's income or capital to any discretionary beneficiary. The trustees are Mr Heazlewood and a company of which he is the sole director and shareholder. In its 2000 decision, the Taxation Review Authority found that Mr Heazlewood controlled the National Investment Trust.¹⁴

[13] As noted, JDV presently holds the Russley Rd property as trustee for the Robinsons Bay Trust. The company was appointed sole trustee in 2003. The sole director of JDV is Andrew Mason. Mrs Heazlewood describes him as her husband's right hand man, long accustomed to doing Mr Heazlewood's bidding. She gives instances of this. Mr Mason denies her claims, saying that he is an independent consultant to Mr Heazlewood's entities. He maintains that Mr Heazlewood is "simply one of a number of potential beneficiaries" of the Robinsons Bay Trust. We are unable to resolve this conflict on the materials available but assume Mrs Heazlewood's evidence to be correct for present purposes, especially considering her evidence is not contradicted by Mr Heazlewood.

[14] The Robinsons Bay Trust, apparently named after the family's first holiday home, was settled by Mr Heazlewood's mother in 1996. Mr Heazlewood has the sole power to appoint and remove trustees. He is also a discretionary beneficiary, as is Mrs Heazlewood. JDV as trustee may advance capital and income to any beneficiary, and may in their "absolute and uncontrolled discretion" resettle the trust on any beneficiary. Were Mr Heazlewood to appoint himself trustee, however, he could not exercise these powers in his own favour. The trust deed provides that:

¹⁴ The taxation decision, above n 11, at [115].

Subject always to any express provision to the contrary contained herein every discretion vested in the Trustees shall be absolute and uncontrolled and every power vesting in them shall be exercisable at their absolute and uncontrolled discretion PROVIDED HOWEVER that no person who for the time being is both a Trustee of any of the trusts hereof and a beneficiary hereunder may exercise the discretionary powers contained herein in his or her own favour AND the remaining Trustee or Trustees alone shall have the power to exercise the said discretionary powers in favour of a Discretionary Beneficiary who shall for the time being be a Trustee hereunder.

[15] The Russley Road property was acquired in 2003, in a joint venture with Calder Stewart Industries Ltd, which took title and executed a declaration of trust in favour of JDV as to a half share. The land was subsequently partitioned.¹⁵ The significance of this is that Mr Mason and Mr Sissons (an accountant who acted for the Heazlewoods and has sworn his affidavits for the respondents) both say that the subsequent transfer to LNV and the Boulder Trust was designed to ensure that JDV is not seen for tax purposes to be an associate of Calder Stewart. To that end it is evidently intended that the Robinsons Bay Trust will be wound up. Its remaining assets, which may be confined to the loan of \$3.94 million to the Boulder Trust, have been settled on the Heazlewood Family Trust, the terms of which are relevantly similar to the National Investment Trust. Notably, Mrs Heazlewood is a discretionary beneficiary so long as she remains married to Mr Heazlewood.

[16] Mrs Heazlewood accepts that there may have been good tax reasons to transfer the property from JDV, but she contends that the particular vehicle chosen, the Boulder Trust, is being used to defeat her claims. It is one of six trusts established since the couple first separated in 2011 in which she is not a discretionary beneficiary. She points out that the purchase price of \$3.94 million paid by Boulder Trust was far less than the property's present value and maintains that Mr Heazlewood will see to it that she does not benefit from the transaction. We were advised from the bar that he is pursuing a dissolution of marriage, at which point she will cease to be a discretionary beneficiary of the Heazlewood Family Trust.

¹⁵ Mrs Heazlewood relied on the declaration of trust to lodge her notice of interest in 2013. She removed her notice of interest to permit partition and subsequently re-lodged notices against the titles held by JDV.

[17] As noted, the trustee of the Boulder Trust is LNV Trustees Ltd. It is employed to act as trustee for Heazlewood interests only, but its directors are partners of Lane Neave. One of them, Michael Wolfe, deposes that the company acts independently of Mr Heazlewood and would not defer its trustee decision-making to him or anyone else. We accept that LNV Trustees Ltd is independent of Mr Heazlewood.

[18] However, the Boulder Trust is ultimately controlled by Mr Heazlewood. He settled it on 13 July 2012, about the time the couple separated. He has the power to appoint and remove trustees, so he is free to remove LNV Trustees Ltd at any time.¹⁶ He may appoint himself a trustee. Trustees may act although they are interested and distributions may be made to, or the trust resettled upon, a trustee who is also a beneficiary, whether or not such actions are in conflict with the trustee's duty to the trust fund or discretionary beneficiaries: however, such action may not be taken during any period when the trustee concerned is a sole trustee. Mrs Heazlewood is not among the discretionary beneficiaries of the Boulder Trust. They comprise the trustees of yet another trust, the Ozone Trust, and anyone else appointed by Mr Heazlewood, who also has the power to remove beneficiaries. The first discretionary beneficiaries listed in the deed establishing the Ozone Trust are Mr Heazlewood and his children. Its terms are otherwise relevantly identical to those of the Boulder Trust.

[19] Mrs Heazlewood contends that relationship property was also used to fund the purchase of the Memorial Avenue land. There are four titles at Memorial Avenue. Each of them was formerly held by an entity associated with the Heazlewoods.¹⁷ Mrs Heazlewood says that proceeds of the Shirley properties and Hills Rd were used to acquire two of the four titles. There is evidence from Richard Sissons that the National Investment Trust previously owned one of the

¹⁶ It was a condition of our judgment varying the stay that he should undertake not to exercise that power pending this judgment. See the JDV variation of stay judgment, above n 8, at [7].

¹⁷ The properties were held at the time of sale to MAIL by the Runaway Trust, the Memorial Family Trust, Global Estates Ltd and the Avonhead Investment Trust. We do not have documents constituting most of these entities, but we note that Mr and Mrs Heazlewood were both discretionary beneficiaries of the Avonhead Investment Trust and he had the power to remove both trustees and beneficiaries. The property owned by this trust, 520 Avonhead Rd, was at one time the matrimonial home.

properties and that the Trust appears to have been the source of funds used to purchase three of them.

[20] The Memorial Avenue land was sold to MAIL in December 2008, a time when the Heazlewoods were evidently under financial pressure. They needed to realise assets, but Mr Heazlewood was anxious to retain Memorial Avenue because of its potential for rezoning. According to Mrs Heazlewood, a businessman named Frank van Schaijik came to their assistance. He agreed to purchase the properties through MAIL, of which he was director and shareholder. The following terms may be noted:

[21] The purchase price, \$25 million, was funded as to \$17 million by the vendors (secured by second mortgage) and the balance by way of a first mortgage from Southland Building Society.

[22] Interest on the second mortgage was payable "as demanded" and the purchaser's obligations under the mortgage were not personal but rather were limited so far as the property extended.

[23] Rezoning was to be pursued, to permit commercial uses. In the event of rezoning the price would increase by \$20 million, also to be secured by the vendor mortgage.

Mrs Heazlewood says that MAIL held the property for Mr Heazlewood, who retained control. She says that he made the payments due under the loan to Southland Building Society.

[24] On 15 December 2012 Mr van Schaijik agreed to sell his shares in MAIL to Canterbury Trustees (2012) Ltd, the trustee for a trust settled by Mr Heazlewood called the Mozart Trust. The purchase price was \$600,000. For reasons that have

not been explained, that transaction did not eventuate; rather, the shares were sold to Restart Trustee Ltd.¹⁸ As the Associate Judge recorded:¹⁹

[40] Settlement of the van Schaijik/Mozart agreement never took place. MAIL has produced no evidence as to why the sale to Mozart did not proceed. Andrew Mason, who gave the only evidence for MAIL in opposition, did not refer to the agreement between Mr van Schaijik and Mozart at all, jumping in his narrative directly from 2008 to late-2013.

[41] Companies Office records then show on 2 December 2013 that Mr van Schaijik sold the MAIL shares to Restart for \$600,000. Andrew Mason is also shown in the Companies Office records at that time as being the sole shareholder and director of Restart. Mr Mason does not produce a copy of the van Schaijik/Restart agreement. Equally, he has not provided to the Court or to Mrs Heazlewood a copy of the deed settling the Restart Trust. Rather, he simply deposes that Mrs Heazlewood is not a beneficiary and Mr Heazlewood only a discretionary beneficiary of that trust. He deposes that Restart Trust's only interest in MAIL is as a shareholder, not a landowner.

We add that Mr Heazlewood has stood guarantor for an \$8 million advance from ASB Bank Ltd, which has refinanced the Southland Building Society loan. The ASB loan documentation records that of the sum advanced, \$1.53 million was to be made available to repay advances that interests associated with Mr Heazlewood had previously made to MAIL. This appears to be a reference to payments made under the Southland Building Society loan.

[25] The Associate Judge was not provided with documents relating to the Restart Trust. However, the trust deed has been produced on appeal. As noted, Mr Mason is the sole director and shareholder of Restart Trustee Ltd. We were advised that he is also the sole director of MAIL. The company holds the MAIL shares for the Restart Trust, which was settled by Mr Mason on 11 July 2013. The discretionary beneficiaries of that trust include Mr Heazlewood but exclude Mrs Heazlewood. He has the power to appoint trustees, including himself, but he may not appropriate the trust fund to himself at any time when he is the sole trustee.

¹⁸ We observe that Mrs Heazlewood agreed to the refinancing, which required that her notice of claim be withdrawn and re-lodged, in circumstances where she was not told that the shares in MAIL changed hands as part of the same transaction. For present purposes we put this to one side on the footing that she appears to be no worse off.

¹⁹ The MAIL High Court judgment, above n 6.

[26] Mrs Heazlewood’s allegations about the sale to MAIL are resisted. MAIL asserts that it was a bona fide transaction, but there is very little evidence about it from the respondent’s side. Mr Heazlewood has not given evidence, and as the Associate Judge observed, Mr Mason seemed to think it was a sufficient answer to the claim that Mrs Heazlewood is not a beneficiary of the Restart Trust.²⁰

[27] The Associate Judge was not persuaded, however, that there existed any arrangement under which Mr Heazlewood retained control throughout. He highlighted the absence of any direct evidence about such arrangement. Mrs Heazlewood simply asserts that it was known to all involved that Mr Heazlewood retained control. That is to beg a number of questions. Before us, Ms Corry could point only to a file note of a meeting between Mr Heazlewood and Mr Sissons on 4 April 2003, in which there are cryptic references to a new, unrelated, company purchasing one or perhaps more of the properties and “shareholder sells shares back to [Mr Heazlewood]”. She candidly described as “plausible speculation” the suggestion that when negotiating the sale of the land to MAIL in 2008 he retained a right to purchase the shares in MAIL in due course.

[28] We agree with the Associate Judge that, on the evidence before us, it is not sufficiently arguable that beneficial ownership of the land remained with Mr Heazlewood, or that he retained the right to call for MAIL shares. The other aspects of the 2008 sale to MAIL are consistent with it being an arm’s length transaction undertaken some four years pre-separation for the good commercial reason that the Heazlewoods were in financial difficulty. We add that it appears from evidence given by Mr Heazlewood in the Family Court that he did not make payments under the Southland Building Society mortgage initially, but rather began doing so about a year after the purchase, when Mr van Schaijik in turn got into difficulty.²¹ It may be that that difficulty explains why the shares have now been acquired by Heazlewood interests.

²⁰ The MAIL High Court judgment, above n 6, at [41].

²¹ The Associate Judge stated that Mr Heazlewood guaranteed the Southland Building Society loan. We were advised from the bar that this was an error.

[29] We observe, however, that the vendor mortgage from the Heazlewood entities remains registered against the MAIL titles. Further, the source of the consideration paid for the MAIL shares, \$600,000, in December 2013 has not been identified.

The notices of claim

[30] The Russley Rd notices of claim assert that Mr Heazlewood is the beneficial owner of the land under an arrangement with JDV which amounts to a constructive trust in his favour. They contend that such interest is relationship property. The MAIL notice of claim asserts that Mr Heazlewood is the beneficial owner of the land under an arrangement with MAIL, and claims an interest through a constructive trust; alternatively, on the ground that that the ownership structure is a sham and the land is owned by Mr and Mrs Heazlewood jointly.

[31] The argument has been advanced on several bases: so comprehensive are Mr Heazlewood's powers over the entities involved that his interest is tantamount to ownership; the entities involved, or some of them, are shams; Mrs Heazlewood has an interest in the land under a constructive trust; and some of the transactions affecting the properties were designed to defeat her interests. To the extent that these interests are framed differently from those specified in the notices or advanced in the High Court, Mr Bayley sensibly did not object to them being advanced before us. We observe that the notices of claim pre-dated this Court's judgment in *Clayton v Clayton*.²²

Constructive trust

[32] The elements of an institutional constructive trust are: the applicant has made contributions, direct or indirect, to the property in dispute; she did so in the reasonable expectation that she would gain an interest in the property; and the respondent should reasonably be expected to yield the claimant an interest.²³ These elements having been made out, equity will intervene to force the owner of the legal estate to account to the applicant for her beneficial interest.

²² *Clayton v Clayton*, above n 10.

²³ *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294–295 per Tipping J.

[33] The Associate Judge held that Mrs Heazlewood had not established a sufficiently arguable case for either the Russley Rd or the Memorial Avenue properties. In relation to Russley Rd, he focused on the source of the funds used to buy the properties, emphasising that the funds came from various Heazlewood trusts. He appears to have concluded that the acquisition was fully financed by borrowings, in which he included borrowings from the family trusts.

[34] We accept Ms Corry's submission that these findings overlook Mrs Heazlewood's active contribution to the acquisition of the properties that supplied the funding used to purchase Russley Rd. As noted, her evidence that she negotiated the purchases is presently uncontradicted. Such direct contributions are capable of giving rise to a constructive trust.²⁴ Mr Heazlewood appears to be in the same position. It must also be assumed, on the state of the evidence at present, that some of the funds channelled through the National Investment Trust may have been relationship property.

[35] It is also arguable, for the same reasons, that Mrs Heazlewood contributed to the acquisition of the Memorial Avenue properties by the Heazlewood entities that owned them until 2008.

[36] The Associate Judge rested his decisions in both cases primarily on the proposition that Mrs Heazlewood did not make her contributions in the expectation that she would acquire an interest in the properties.²⁵ He accepted that she had in fact expected to share in the assets being accumulated. But he observed that Ms Corry rested her argument on the proposition that Mr Heazlewood was the beneficiary of a constructive trust, in which Mrs Heazlewood was entitled to share. He observed that throughout their relationship they employed trusts and companies, taking professional advice about the establishment and administration of these entities. Decisions were taken for tax reasons. Accounts were kept. He held that there was no feature of the trusts and other entities used that would reasonably give rise to an expectation that someone other than the registered owner would have a beneficial interest in the land. Mrs Heazlewood did not identify particular instances

²⁴ *Lankow v Rose*, above n 23, at 295.

²⁵ MAIL High Court judgment, above n 6, at [69]; and JDV High Court judgment, above n 6, at [71].

where she or her husband overrode the decisions of trustees or directors. In relation to Russley Rd, he noted that funds advanced by other family trusts to JDV were recorded as advances. In relation to Memorial Avenue, he found that the sale was a genuine business transaction, albeit with special features.

[37] This is, in our opinion, to overlook the uncontested evidence that although trusts were used for tax reasons the assets were in fact under the immediate control of Mr Heazlewood, who treated them as personal property. It is arguable that, as Ms Corry submitted, there is no evidence of trustees' decisions being overridden because the trustees never made independent decisions in the first place. We have referred to Mrs Heazlewood's evidence that never did her husband ask anyone for a distribution from any of the trusts. As the Associate Judge found, she evidently acted in the expectation that she would obtain an interest in her own right. We respectfully differ from him in that we consider it arguable, on the evidence as it stands, that her expectation was reasonable having regard to the way in which the trusts were used in fact. It follows that the assets may have been held on constructive trust for both parties. Mrs Heazlewood has a claim both in her own right and to a share in Mr Heazlewood's interest under the PRA.

[38] It is also arguable that the present owner of Russley Rd, LNV Trustees Ltd as trustee of the Boulder Trust, should be required to account to Mrs Heazlewood for her interest. We have noted that Mrs Heazlewood is not a beneficiary of that trust, but it is a family trust and her exclusion qua beneficiary must be taken to be a consequence of separation.²⁶ Insofar as her claim rests on her own contributions under a constructive trust it may sustain a caveat under the Land Transfer Act, but it will not sustain notices of interest under the PRA.²⁷ Insofar as it rests on her claim under the PRA to share in Mr Heazlewood's beneficial interest in the property, however, it will sustain the notices.

[39] We have accepted that her claim to an interest through Mr Heazlewood is genuinely arguable. For that reason we decline to order that the notices of interest attaching to Russley Rd be removed from the titles.

²⁶ See the discussion below at [45]–[47].

²⁷ RL Fisher (ed) *Fisher on Matrimonial Property* (looseleaf ed, LexisNexis) at [9.28].

[40] We turn to MAIL. As noted above, we are not persuaded that the sale to MAIL was not a bona fide transaction with a third party, meaning that on sale in 2008 Mrs Heazlewood could no longer point to a reasonable expectation that the registered owner should yield an interest in the land, as opposed to the vendors yielding an interest in its proceeds (or the vendor mortgage). We agree with what the Associate Judge had to say:²⁸

[57] There are significant difficulties with Mrs Heazlewood's contention that contributions to the MAIL properties gave rise to a constructive trust. First, there is the fact of the sale of the MAIL properties to Mr van Schaijik's company, MAIL, in October 2008. MAIL, which is the respondent in this proceeding, became the registered proprietor of the four properties. The vendor entities became creditors of MAIL to the extent that MAIL did not otherwise finance the purchase. At that point, any claim Mr Heazlewood or the four vendor entities had would have been in the proceeds of sale, not in the land. Secondly, when the Mozart Trust looked to buy the MAIL properties (August 2012) and the Restart Trust eventually did (December 2013) the purchase was of the shareholding of MAIL and not of the land itself. Given that the MAIL properties had been owned from 2008 by the company MAIL, any beneficial interest through a constructive trust which Mr Heazlewood acquired when the Restart Trust took its interest in 2013 can only have been through a contribution to the share purchase. Any constructive trust lay in that property, namely the shares.

[41] It follows that, on the evidence before us, Mrs Heazlewood's expectation of an interest in the Memorial Avenue property appears to have been lost. We do not preclude the possibility that such interest will be established at trial, should she establish that Heazlewood family interests never surrendered beneficial ownership of the properties. Nor do we preclude a constructive trust claim to the proceeds of sale, or the vendor mortgage or, having regard to the 2013 acquisition of MAIL by Heazlewood interests, the shares in MAIL, although we express no view about the prospect that such claim will succeed.

[42] Nor do we preclude an application under s 43 or s 44 of the PRA, should there be reason to suppose that any of the MAIL-related assets just mentioned is being or has been disposed of with intent to defeat Mrs Heazlewood's interests.

²⁸ MAIL High Court judgment, above n 6.

Sham trusts from inception

[43] Mrs Heazlewood argued that all of the trusts are shams; Mr Heazlewood intended to create not a trust but the appearance of one, so that he could deal with trust property as his own while avoiding tax and, initially, the attention of the Official Assignee. If so, he is beneficially entitled to the properties and she can claim an interest in them as relationship property.

[44] As this Court observed in *Clayton*, issues have arisen about whether both settlor and trustee must share the mutual intention to create a sham or whether it suffices that the settlor should hold that intention.²⁹ We need not examine that question here. It is clear that a trust requires certainty of intention to create a trust and there will be a sham if the subjective intention of the settlor and trustee is that there should exist the outward appearance but not the substance of a trust.³⁰ A court will not lightly conclude that a trust is a sham.³¹ The settlor's de facto control does not in itself establish that the trust is a sham.³²

[45] On the evidence before us it may be arguable that a number of the Heazlewood trusts are shams, set up to allow Mr Heazlewood to deal in properties as his own while avoiding tax. That tentative conclusion may tend to support Mrs Heazlewood's claims that she contributed to the properties in the reasonable expectation that she would acquire an interest.

[46] However, the sham allegation cannot independently sustain the notices of interest. So far as Russley Rd is concerned, we are not satisfied that the Boulder Trust is arguably a sham. It excludes Mrs Heazlewood as a beneficiary, but that fact speaks not to the bona fides of the trust but rather to her claim that JDV and Mr Heazlewood intended by disposing of the property to defeat her interest in it.³³ In any event, we have sustained her notices on another ground, finding it sufficiently

²⁹ *Clayton v Clayton*, above n 10, at [64].

³⁰ *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45 at [26].

³¹ At [112].

³² At [71] and [126].

³³ We do not lose sight of the suggestion, made by Glazebrook J in *Official Assignee v Wilson*, above n 30, at [129], that for PRA purposes it may be possible to "look through" an alter ego trust, being a trust that is not a sham but serves as the alter ego of an individual who controls it, but that would have the effect not of vesting trust assets in anyone ab initio but of bringing their value into account in subsequent proceedings.

arguable that LNV Trustees Ltd and the Boulder Trust should be required to account to her for her interest under a constructive trust.

[47] So far as MAIL is concerned, a conclusion that the entities that held the properties in 2008 were shams would not allow Mrs Heazlewood to sustain her notices of interest against the land in circumstances where she has failed to show that the sale to MAIL was not genuine.

Transactions intended to defeat Mrs Heazlewood's interests

[48] As noted, the Russley Rd property has been transferred to a trust in which Mrs Heazlewood is not a beneficiary. We infer that the decision to establish and use that trust rather than any other was that of Mr Heazlewood. Given that the trust was created at about the time the couple first separated, it is arguable that the transaction was designed to defeat her interests.³⁴ There may have been business reasons to transfer the property from JDV and the Robinsons Bay Trust, but that does not explain why the Boulder Trust was used.

[49] It is accordingly arguable that orders may be made under s 44 of the PRA. Jurisdiction under that section extends to an order that an interest in the property should be transferred to Mrs Heazlewood, on the basis that the Boulder Trust has not received the property both in good faith and for valuable consideration. However, no such order has yet been made, and until it is we do not consider that s 44 confers upon her a present interest in the land under the Act.

[50] We turn to MAIL. At the time of separation Mrs Heazlewood had no interest in the Memorial Avenue land, on the evidence before us. She may have an interest in the vendor entities, which own the second mortgage and the right to any increase in the purchase price under the agreement for sale and purchase, but those interests cannot sustain a notice of claim against the land. MAIL itself was owned by Mr van Schaijik's interests. The Restart Trust has acquired MAIL since that time. Any claim to MAIL under s 44 would have to be framed as an interest in the shares,

³⁴ Compare *Clayton v Clayton*, above n 10, in which it was not seriously in issue that dispositions to post-separation trusts that excluded Mrs Clayton were intended to defeat her interests. See [142].

the proceeds of sale or the vendor mortgage. As to the merits of any such claim, we have noted that the Restart Trust also excludes Mrs Heazlewood as a beneficiary.

Mr Heazlewood's powers of appointment as relationship property

[51] *Clayton* establishes that the PRA's extended definition of property reaches powers of appointment under a trust provided they are not in themselves fiduciary in nature; further, such powers having been characterised as relationship property, the net value of the trust assets may be brought into the relationship estate.³⁵

[52] It is arguable, by analogy to *Clayton*, that Mr Heazlewood's powers under some of the trusts are relationship property. We refer for example to the Boulder Trust, which was established before separation. As noted, it reserves to him the power to appoint and remove trustees and beneficiaries. He is a beneficiary. The trust deed provides that the trust fund may not be distributed to Mr Heazlewood at any time when he is the sole trustee, which distinguishes this trust from *Clayton*. Trustees' discretionary powers are said to be absolute and uncontrolled, and trustees may act although conflicted. Those powers are nonetheless fiduciary in nature. The power of appointment is not. It is held not qua trustee (or settlor) but qua "appointor". Mr Heazlewood is able to establish himself as the sole beneficiary.

[53] Assuming for present purposes that Mr Heazlewood's powers under the Boulder Trust and the materially identical Restart Trust are relationship property, the question arises whether Mrs Heazlewood may rely on the powers to assert an interest in land owned by the trusts. It seems to us that she cannot. Until the powers are exercised in Mr Heazlewood's favour, and assuming as noted above that the trusts are not shams, he does not have a present interest in the land to which her claim might attach. At most, she can say that the net value of the trust assets must be brought into the matrimonial estate. That might lead to a remedy under s 43 or s 44, should steps be taken to reduce the value of Mr Heazlewood's powers of appointment by removing assets from the trusts, but that is a separate matter, to be taken up at first instance in need.

³⁵ *Clayton v Clayton*, above n 10, at [99] and [113].

Decision

[54] The appeal is allowed in part. Mrs Heazlewood's notices of interest against the Russley Rd properties are sustained pending trial. Her notices against the Memorial Avenue properties are not sustained and we direct that they are to be removed from the titles. We record for the avoidance of doubt that the stay granted in the JDV proceeding pending this appeal has now expired.

[55] Mrs Heazlewood has succeeded in sustaining her notices affecting the Russley Rd properties as she has established an arguable case that she has an interest in them, and we have not precluded a claim to other assets relating to MAIL. However, she has failed to sustain her notices affecting Memorial Avenue properties. In the circumstances, costs will lie where they fall.

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