

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2014-404-002991  
CIV-2014-404-001278  
[2015] NZHC 2797**

BETWEEN                      BRUCE JAMES READ  
   First Plaintiff

AND                              ETHNE GLADYS READ  
   Second Plaintiff

AND                              CHRISTOPHER JOHN READ  
   Third Plaintiff

AND                              JANFERIE MAEVE ALMOND  
   Defendant

Hearing:                      7 - 11 and 17 - 18 September 2015

Appearances:                J Airey/A Dullabh for the First Plaintiff  
   N Woods/S Rhind for the Second and Third Plaintiff  
   D Law for the Defendant

Judgment:                    11 November 2015

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**JUDGMENT OF THOMAS J**

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*This judgment was delivered by me on 11 November 2015 at 4.00 pm  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

Solicitors:

Rice Craig, Auckland.  
Law & Associates, Manukau.

## **Introduction**

[1] The first plaintiff, Bruce Read, the third plaintiff, Chris Read, and the defendant, Ms Almond, are all children of the second plaintiff, Mrs Read, and her late husband, Fred Read.

[2] Ms Almond is the sole registered owner of a property at 152 Ramarama Road, Drury (the Property). The plaintiffs claim there was an oral agreement between all members of the family at the time the Property was purchased in 2002 to the effect that they would each own shares in the Property based on their respective financial contributions to the purchase price and improvements subsequently made to the Property. They claim to have made other financial contributions on the same understanding.

[3] The plaintiffs seek orders declaring that Ms Almond holds shares in the Property on trust for them.

[4] The plaintiffs bring five causes of action: constructive trust, resulting trust, unjust enrichment, knowing receipt and, in relation to Mrs Read, breach of an enduring power of attorney under the Protection of Personal and Property Rights Act 1988 (PPPR Act).

## **The pleadings**

### *Bruce Read*

[5] Bruce Read alleges that he made financial contributions to Ms Almond for the purchase of the Property by way of an initial payment of \$130,000 in July 2002 towards the acquisition of the Property and a further contribution of \$6,000 on or about 25 July 2002.

[6] Bruce Read claims that both of these payments were made on the understanding that, when Ms Almond had completed construction of her house and subject to the approval of Ms Almond's mortgagee, he would receive a share of the

Property based on his contribution. In the absence of such consent, the Property would be divided upon repayment of Ms Almond's mortgage.

[7] Bruce Read also alleges that he made a further payment of \$50,000 which Ms Almond agreed was to be treated as his purchase of a share in the Property then owned by one of Ms Almond's daughters, Rebecca.

[8] On this basis, Bruce Read claims an entitlement to 40.3 per cent of the Property. This interest is claimed by way of constructive trust, or, in the alternative, by way of knowing receipt or resulting trust.

[9] In each case, he claims relief by way of an order that Ms Almond holds a 40.3 per cent share of the Property on trust for him and an order under s 399 of the Property Law Act 2007 that the Property be sold and the proceeds divided according to the respective shares. He also seeks costs.

*Chris Read and Mrs Read*

[10] Mrs Read says that, together with Chris Read, it was agreed that she and her late husband would contribute \$30,000, Chris Read would contribute \$30,000 (including \$25,000 by way of a forgiveness of debt Ms Almond owed him) and Bruce Read would contribute the remaining \$130,000 in order to purchase the Property. Ms Almond would then build a dwelling on the Property for herself and her children, Rebecca and Sharlene (the girls), while Mr and Mrs Read would build at their cost a second dwelling for themselves (the subsidiary dwelling) on the Property.

[11] They agreed that Ms Almond was to be the registered proprietor in order to allow her to obtain finance but that once the mortgage was repaid, the Property would be transferred into all of their names with shares according to their respective contributions.

[12] Mrs Read and Chris Read also allege that Ms Almond claimed that she was unable to make the mortgage repayments and, as a result, Chris Read agreed to make the mortgage payments in return for a greater share in the Property.

[13] Mrs Read alleges that Ms Almond made payments to herself from Mrs Read's bank account. Mrs Read further alleges that she also made payments to Ms Almond, and that it was understood that the payments were in return for an increased share of the Property.

[14] A claim that Ms Almond sold a vehicle owned by Mrs Read for \$5,000 but did not account to her for the proceeds was withdrawn in light of Mrs Read's evidence.

[15] On this basis, Mrs Read and Chris Read each claim an order that a share of the Property is held by Ms Almond on remedial constructive trust in favour of each of them in shares the Court sees fit and an order under s 339 of the Property Law Act for the sale of the Property and the division of the proceeds. In the alternative, Mrs Read and Chris Read claim in unjust enrichment and knowing receipt. Finally, Mrs Read also makes an alternative claim under the PPPR Act for part of the amount which, she says, Ms Almond transferred to herself from Mrs Read's bank account at a time when Ms Almond was acting under a power of attorney.

*Ms Almond's statement of defence*

[16] Ms Almond denies the claims. She says that, following her divorce, she was considering purchasing a property when her parents asked that she buy a larger one so they could build a dwelling on the land and she would be able to care for them. She says, on this basis, Mr and Mrs Read agreed to pay \$200 a week in rent. Further conditions of this agreement were that Ms Almond would not be required to work, her brothers would also make contributions to the Property to assist her in caring for their parents and Bruce Read would never be permitted to live on the property. Ms Almond alleges Chris Read agreed to make the rent payments required under this agreement.

[17] Ms Almond alleges the rent payments were not made in full and Bruce Read commenced living with Mrs Read in about June 2009 and did not pay rates or other outgoings on the Property.

[18] Ms Almond accepts that the \$10,000 deposit for the Property was paid by Mr and Mrs Read, but says she later repaid this sum.

[19] She further says that the purchase of the Property and the building of her dwelling were funded entirely by her. She says the claimed contributions from Bruce Read actually consisted of the proceeds of shares of which she was the beneficial owner. She notes that many of the claims made by Bruce Read are at odds with the claims he made in his original statement of claim and appear to be based on information she provided in her initial disclosure. She also says that the shares calculated by Bruce Read ignore the substantial improvement in value for which she was responsible. Finally, she says, the relationship between herself and Bruce Read is so acrimonious that neither would agree to such an arrangement as that he alleges.

[20] Ms Almond also denies receiving money from Bruce Read for the construction of a garage and says that this money was borrowed by Mr and Mrs Read without her involvement. She notes the allegation that this was a contribution to the Property is at odds with Bruce Read's earlier statements that it was a debt to be repaid on demand.

[21] Ms Almond also raises affirmative defences of laches and says that the causes of action are time barred under the Limitation Act 1950.

*Plaintiffs' response*

[22] Bruce Read accepts he lived at the Property but denies that he did not pay any expenses. He also denies the allegations about how the money he contributed to the Property was obtained and maintains the allegations in his amended statement of claim. He also denies that there was delay such as to justify the affirmative defences raised by Ms Almond.

[23] Mrs Read and Chris Read accept that they did not insist on a written agreement and say that they relied on the trust which existed within the family. They accept that the delay in bringing proceedings has made evidence more difficult to obtain but say that the records of the various bank accounts and of the solicitors involved should be sufficient.

### **Factual issues in dispute**

[24] The factual issues to be explored in respect of each of the plaintiffs are extensive and require determination prior to a consideration of the legal issues. They are:

- (a) What, if anything, did the parties agree about the purchase of the Property?
- (b) Bruce Read:
  - (i) Did the \$130,000 contribution to the purchase price for the Property belong to Bruce Read or Ms Almond?
  - (ii) What was the basis upon which Bruce Read paid \$6,000 towards the cost of a garage constructed on the Property?
  - (iii) Did Bruce Read purchase Rebecca's share in the Property for \$50,000?
- (c) Mrs Read:
  - (i) Did Mrs Read make three payments of \$10,000 towards the purchase of the Property, and if so, were they made in the expectation of obtaining a proportionate interest in the Property?
  - (ii) Was construction of the subsidiary dwelling and contributions to improvements to the Property made in expectation of obtaining a proportionate interest in the Property?
  - (iii) Were contributions allegedly to the mortgage over the Property made in the expectation Mrs Read would obtain a proportionate interest in the Property?

- (iv) Did Ms Almond act contrary to her duties as Mrs Read's attorney in relation to the payment of money to her from Mrs Read's bank account?
- (d) Chris Read:
  - (i) Did Chris Read pay \$25,000 or \$30,000 towards the purchase of the Property and, if so, was that payment made in the expectation of obtaining a proportionate interest in the Property?
  - (ii) Did Chris Read make contributions to Ms Almond's mortgage and, if so, were the contributions made in the expectation of obtaining a proportionate interest in the Property?

**What, if anything, did the parties agree about the purchase of the Property?**

*Background*

[25] In many ways, the case boils down to the nature of the family relationship. Was it, as the plaintiffs described, a relatively close, trusting one or was Ms Almond distanced from her siblings, lacking trust in them, and someone who therefore would never have purchased a property together with them?

[26] Bruce and Chris Read maintained they had a happy childhood with a loving home, all family members looking out for one another. Ms Almond's evidence was markedly different, claiming she experienced a troubled childhood particularly given her relationship with Bruce Read who, she maintained, bullied her.

[27] Ms Almond said she had always lived close to her parents, even after having a family of her own and she had always tried to be there for them and care for them. She disputed the idea that Mr and Mrs Read had helped her out financially, saying they did not have the money to do so. This is in contrast to the evidence of the plaintiffs that it was Mr and Mrs Read who spent a considerable portion of their lives

adapting or moving in order to support and help Ms Almond through her various marriage breakups and long periods of having to cope with a very sick child.

[28] The parties are, however, united in their description of Fred Read. He was the head of the household, his word was his bond and the three siblings trusted him. All the parties recall him recording financial details in a notebook (or perhaps more than one) but any such books have vanished, each side blaming the other for their disappearance. Fred Read died on 13 June 2009.

[29] By late 2012, by which time Bruce Read and Ms Almond were both living on the Property, the relationship between them had significantly deteriorated. The most distressing aspect of this was that Mrs Read was the victim of disputes between them. Ms Almond trespassed Bruce Read from the Property in December 2012 and Mrs Read also left. Mrs Read was heartbroken at the deterioration in the family relationships.

[30] Ms Almond suspected that Mrs Read was under the influence of Bruce and Chris Read and they were the driving force behind her mother's claim. Ms Betsy, a social worker who was involved in Mrs Read's care in late 2012 through to early 2013, for a period of about two months, gave evidence of her concern about how difficult Mrs Read found it to choose between Bruce Read and Ms Almond. While Ms Betsy had some concerns, she was possibly influenced by her discussions with Ms Almond. In any event, this decision does not involve which sibling was the better carer for Mrs Read but rather what had been agreed years earlier.

[31] In January 2013, Ms Almond complained to the Police that Bruce Read had assaulted her. She obtained a temporary order on an ex-parte basis in mid January 2013. Bruce Read successfully applied for the order to be discharged. After hearing evidence (including from Mrs Read), the Judge said:<sup>1</sup>

[M]y view is that emotions associated with that property dispute have very much coloured the siblings' interactions and perceptions of each other to a degree that I found neither of their evidence to be particularly compelling or impressive.

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<sup>1</sup> *JMA v BJR* [2013] NZFC 3917 at [8].



[32] In the Judge's opinion:<sup>2</sup>

[t]hese Domestic Violence Act proceedings would not have come about were it not for the dispute over property. It seems to me that is the real issue between the parties, not safety concerns.

[Ms Almond] has not proven to the required standard that domestic violence has occurred...

[33] After he had to leave the Property and experienced difficulties making arrangements to return to collect his possessions, Bruce Read said it became apparent to him that he was going to have to take steps to protect his interest in the Property. Ms Almond began to assert he had no right to live there and that Mrs Read did not own any interest in the Property either. In March 2014, he instructed solicitors to correspond with Ms Almond's lawyer, lodged a caveat against the title to the Property and, in June 2013, commenced the proceedings.

## **Evidence**

### *Rationale for joint purchase*

[34] Bruce Read's evidence was that he was involved at an early stage in general discussions about the idea of Mr and Mrs Read and Ms Almond buying a lifestyle block with two houses on it, one for Ms Almond and the girls, and the other for Mr and Mrs Read.

[35] He said he discussed the concept with both Ms Almond and Mr and Mrs Read and they were all keen on the idea. These conversations commenced soon after Ms Almond separated from her third husband, which was about two years before her matrimonial home was eventually sold. He said he was asked whether he would "go in" with them if they found a suitable place because they did not think they would be able to get enough money together to fund the purchase of a suitable property themselves. He said at that stage, his proposed involvement was approximately \$100,000.

[36] The discussions developed over time and took place when he went to his parents' home in Tuakau for Sunday lunch, which he did every week, and on a

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<sup>2</sup> At [11]-[12].

couple of occasions when he and his parents went to Ms Almond's house for Sunday lunch. He also discussed the arrangement with Chris Read when he phoned his parents from the United States most Sundays.

[37] Bruce Read confirmed that Fred Read was essentially acting as a "go between" on behalf of Ms Almond but said he also discussed the arrangement with her. She expressed her gratitude to him for his assistance on a number of occasions, he said. Subsequently, she encouraged him to increase his share in the Property by buying out Rebecca's share when Rebecca wanted to buy a property of her own.

[38] Mrs Read described the rationale for the shared purchase as her and Fred Read wanting to help Ms Almond with Sharlene, who had serious health problems and whom they had helped so much in the past, while acknowledging that, as they got older, they would require some help too.

[39] Mrs Read might not have been able to remember the exact amount each party contributed to the Property but she was sure the idea was that the family was to own the Property – "all of us".

[40] Chris Read described a holiday in December 2001 in the Bay of Islands with his parents and Ms Almond. It was then they discussed buying a piece of land to accommodate a house for Ms Almond and Mr and Mrs Read. Chris Read said his father told him that he and Bruce would have to pay for most of the land value as Ms Almond did not have the money to do so and Mr and Mrs Read had not sold their then home in Tuakau. Chris Read said Fred Read described it being important to do this for Ms Almond as she was undergoing a divorce, on a benefit, had little money and there was no way she could buy her own house. Chris Read said his father wanted to see Ms Almond and her children settled and thought a family-owned property would be a good investment for everyone. He also endorsed the idea that Bruce Read could live on the Property when he got older.

[41] Chris Read described discussing this with Ms Almond who was extremely enthusiastic, he said. He knew from her that she would need to get a loan and she was hoping to use money held on trust for the girls.

[42] Chris Read's evidence was that Ms Almond readily agreed to everyone's interest being defined by the percentages attributable to their financial contributions. At that time, no one knew the exact amount of contributions required as a suitable property had not been identified, building costs were unknown and properties had yet to be sold.

[43] Chris Read said he made it clear to his parents and Ms Almond that he would be interested in contributing to the land and any mortgage only if he received an ownership interest. He said he did not want Ms Almond to receive handouts.

[44] After Chris Read returned to the United States, the plan took better shape and he agreed to contribute. Chris Read knew Ms Almond would need a mortgage to pay for the construction of her house. Fred Read alerted Chris Read to the possibility of further funds being required for property improvements and advised him that he would keep an accurate record of all contributions in order to finalise ownership shares.

[45] Chris Read said before he finally agreed, he expressly confirmed the basis on which he was doing so with both Bruce Read and Ms Almond. He specifically remembered discussing Bruce Read's contribution with him because he was not prepared to invest unless everyone was participating in the arrangement.

[46] Chris Read was positive that all members of the family were agreed on the approach that contributions to the Property would be reflected in ownership shares in proportion to the amount contributed. He wanted to ensure that everybody was "on the same page". He was confident there was no discrepancy or disagreement. Chris Read described Ms Almond as absolutely in agreement with the basis of the arrangement.

[47] Ms Almond's version of events was that it was Fred Read who insisted they find a property on which two houses could be built. She said she agreed to his proposal on the condition that Bruce Read would never be allowed to move in with them. She said her parents agreed.

[48] Ms Almond said the only agreement she had in relation to the Property was with her parents to the effect that they could build a house on it so she could look after them in their old age. She pointed out that hers was the only name on the sale and purchase agreement, the mortgage was solely in her name and there were no other borrowers. The only involvement of her parents was paying the deposit and ensuring they were able to build the subsidiary dwelling, which was always to be removed.

*Financial arrangements*

[49] When the Property was purchased, it was bare land and the purchase price was \$190,000.

[50] Bruce Read said he was told by Ms Almond and Mr and Mrs Read that Ms Almond was not in a financial position to make any contribution towards the purchase price. Ms Almond had still not sold her matrimonial home. Fred Read asked him to contribute \$130,000 on the basis that his contribution would be recognised in the form of a proportionate share in the Property. At that stage, the intention was that the Property would be registered in the name of Mr and Mrs Read, Ms Almond and Bruce Read in proportion to their financial contributions. It was on that basis, Bruce Read said, he agreed to contribute towards the purchase price.

[51] All the plaintiffs had a different understanding from Ms Almond as to where the balance of the purchase price would come from. The plaintiffs understood that \$30,000 would come from Chris Read. It is not in dispute that Mr and Mrs Read paid the deposit of \$10,000 (although why they did so is in dispute). They were to take out a loan for a further \$10,000 and then pay \$10,000 from the proceeds from the sale of their Tuakau Property, although Ms Almond disputed this. Bruce Read said that he was present when this was discussed and agreed with Ms Almond.

[52] Bruce Read said he relied on his father's assurances he would keep a record of everyone's financial contributions. For that reason, and because he believed the family trusted one another, Bruce Read said he did not require any further formality about the arrangement.

[53] Settlement took place on 19 July 2002 and on 31 July 2002, Ms Almond received \$105,000 as her relationship property settlement.

[54] Ms Almond also obtained money from the girls' inheritance from their father. The executors of his estate provided \$60,000 on behalf of the girls as an investment in the Property. The arrangement was that the Property was to be valued after Ms Almond's house had been constructed on it and the girls' share was formally to be recorded on the register. A 2003 valuation valued the Property (with only Ms Almond's house on it) at \$407,000, the land value then being \$200,000. This meant that the girls were noted as having a 14.745 per cent share of the Property. I note that this was never registered.

[55] Ms Almond obtained a mortgage of \$60,000 from ASB Bank. That loan, plus the deposit paid by Mr and Mrs Read and Bruce Read's payment of \$130,000, made up the total land price of \$190,000. There was a surplus after payment of legal costs of almost \$8,000 which was paid by the solicitors to Ms Almond.

#### *Mortgage*

[56] Bruce Read said that Fred Read asked him to pay the mortgage which he understood would be over a period of 20 years at \$1000 a month. He said Fred Read told him that Ms Almond would not be able to pay it and "we" had to. Bruce Read said he was not interested in doing so.

[57] He said he was then told by Fred Read that, as Ms Almond needed a mortgage to pay the cost of building her house, title to the Property had to be taken in her name only. Fred Read said that once the mortgage was repaid, the title would be changed recording all parties as owners in proportion to their contributions. In other words, said Bruce Read, title being in the sole name of Ms Almond was an interim measure only and she would own the Property on behalf of them all in proportion to their contributions.

[58] Mrs Read confirmed it was always the intention that the Property would be transferred proportionally to everyone's name once Ms Almond's mortgage was paid off.

[59] Chris Read knew his name was not to be on the title, saying he thought it would be an unnecessary hassle given he was a resident in the United States. Furthermore, as he was a businessman, if the Property were not in his name, it would not be vulnerable to any creditors' claims. When he discovered in 2005 that the Property was registered in Ms Almond's name only, Fred Read advised him it was because otherwise Ms Almond would not have been able to obtain a mortgage. Fred Read assured Chris Read that there was no problem and everyone agreed it was a joint family ownership supported by Fred Read's record of each input.

*Written record*

[60] Bruce Read claimed the agreement to buy and share the Property was an oral one but partly written in Fred Read's notebook which detailed the dates and amounts paid by each party. It was constantly updated as further payments, for example, in relation to the garage built on the Property, were made.

[61] The defence maintains that Bruce Read changed his position once he received the solicitor's conveyancing file through the discovery process, noting that in his initial statement of claim, Bruce Read referred to an oral agreement but the amended statement of claim alleged the agreement was partly written. If Fred Read's notebook was so pivotal, said the defence, then surely Bruce Read would have referred to it in the first statement of claim.

[62] Mrs Read was asked whether there was an agreement in relation to the Property. It was clear from her answers that she assumed the question referred to a written agreement. She said it was a family affair, although she described Ms Almond as wanting people to think she owned the Property. She confirmed the details were recorded in Fred Read's notebook.

[63] Chris Read supports the evidence of Fred Read's records, saying he inspected the notebook each time he returned to New Zealand from the United States. He satisfied himself that his father was constantly updating the notebook and recording all the contributions.

## **Findings**

[64] Ms Almond has tried to paint a picture of her parents being elderly and disabled at the time of the original purchase and, therefore, it was in their interests to buy a property which could be occupied by Ms Almond and Mr and Mrs Read. That does not, however, accord with the other evidence. Bruce, Chris and Mrs Read all maintained that Mr and Mrs Read may have been elderly but they were not inactive. At the time of purchase, it was not so much Mr and Mrs Read wanting Ms Almond to look after them as it was their wanting to be on hand to help Ms Almond after her marriage breakup, particularly given Sharlene's ill health. I accept that evidence.

[65] By 14 December 1999, Ms Almond's relationship property proceedings were at the stage where the matrimonial home was to be sold. Ms Almond must have been contemplating the sale by the end of 2001 which is when the plaintiffs said the discussions about a joint purchase began.

[66] Ms Almond denied that there was ever an intention for anyone beside herself to contribute to the purchase of the Property (aside from the deposit to be made by her parents). She said that once she knew she was getting \$130,000 from her shares (which Bruce Read claims were his), she knew she would need a \$60,000 loan from the bank. However, the sale and purchase agreement for the Property was conditional on Ms Almond selling her matrimonial home but it was not conditional on finance.

[67] Ms Almond's account of events presumes that she was in a position to afford to buy the Property independently (without family assistance) and build a home. Ms Almond had only \$25,485.72 in her bank account at the time of purchase. Even with the \$90,575.26 she was to receive from her relationship property, she would not have been in a position to buy the land and build her house. A mortgage would still have been required, even if \$130,000 from the shares did belong to Ms Almond. Ms Almond, being in receipt of social welfare, was not, in my assessment and despite her protests to the contrary, in a position to pay the mortgage without assistance.

[68] Ms Almond claimed she needed no financial assistance at all to buy the Property and build a house on it and that she would have been in a position to lend her parents money. However, she also asserted that she needed help to pay her rent. The two positions are mutually inconsistent.

[69] The conveyancing solicitor who acted on the purchase of the Property, Mr Scott, gave evidence and his file notes made at the time were produced. In his brief of evidence, Mr Scott said he had an appointment with Mr and Mrs Read in 2002 concerning their “building a unit on land Ms Almond was purchasing”. Mr Scott’s file notes, however, record that he spoke to Fred Read regarding a property he was buying “in conjunction with” Ms Almond and that he spoke to Ms Almond regarding land “they” were purchasing. He made a file note to discuss the idea of a property sharing agreement or licence to occupy with Mr and Mrs Read.

[70] Mr Scott described Fred Read as “very decisive”. Mr Scott said that, from what he knew of Fred Read, he thinks he would have declined any advice about a property sharing agreement as it would be more expense and he would have considered it unnecessary. Mr Scott said that when he discussed the matter with Fred Read (Mrs Read not being present) he was told they did not need any agreement, that it was Ms Almond’s property and they could trust her. No file note of this discussion was produced. Furthermore, Mr Scott said that Fred Read was always of the view that it was Ms Almond’s property. I have some difficulty with these statements given that they are not reflected in any file note. This is somewhat surprising particularly given that Mr Scott was clearly meticulous in his file notes, even file noting the reminder to himself to discuss the possibility of a property sharing agreement with Mr and Mrs Read. Telephone messages recording missed calls were also retained on the file.

[71] By the same token, I have difficulty reconciling the claimed recollection that the \$130,000 in fact represented Ms Almond’s money which Bruce Read had invested for her (discussed later) with the file note which states:

She also mentioned money from shares and I would think that these were her brother’s shares.



[72] While Mr Scott said there is no way he would have allowed the transaction to proceed without formally documenting any arrangement which involved others having shares in the Property, he also conceded that Fred Read declined or would have declined any such advice in any event. He also said he considered it unusual for families not to document arrangements properly, but, on his own evidence, this was clearly a case where the family did not want the arrangement documented. Mr Scott conceded that, were he aware of any other interest in the Property, he would have been obliged to inform Ms Almond's mortgagee, ASB Bank, when he acted for it on the mortgage.

[73] Mr Scott had the impression Fred Read was "head of the house" and made all the financial decisions for Mr and Mrs Read, yet he saw them once only in 2002 and, in his brief of evidence, made an observation about Fred Read on the basis of "what little I knew of him". For these reasons, it is difficult to attach much weight to his recollection some 13 years later and given the significant number of conveyancing transactions in which Mr Scott has since been involved.

[74] After Mr Scott had given evidence and during the evidence of Ms Almond, it became apparent that Ms Almond had spoken to Mr Scott a number of times in connection with events surrounding those relevant to these claims. When Bruce Read's solicitor wrote a letter of demand in respect of his contributions, Ms Almond telephoned Mr Scott who then referred her to Ms Law, who acted in these proceedings. When Ms Almond gave evidence about the trespass notice which she issued against Bruce Read, she referred to conversations she had with Mr Scott and said she had spoken to him a number of times. She had also written to him in connection with Mrs Read's powers of attorney, saying that she had been advised by the social worker that any attempt by her brothers to change those powers, which were in her favour, should be challenged in court. From all of this, I infer that Ms Almond had essentially given her side of the story to Mr Scott. It may well be that those conversations influenced Mr Scott's recollection of what occurred in 2002.

[75] I place weight on the file notes made at the time which must have reflected Mr Scott's understanding of the situation. These confirm that the shares were "her brother's shares"; that Ms Almond said "**they** initially wanted to buy lot 4... but **they**

are now very happy with lot 5”; that Mr and Mrs Read saw him to discuss proposals “for buying a property in **conjunction with** their daughter”; that he spoke to Ms Almond regarding the land “**they** were purchasing”; that he spoke to Fred Read and he said that “**they** were entitled to build a big house on the Property which would be [Ms Almond’s] and that they were also entitled to build a second house”; and that Fred Read said “he had a bypass some years ago although he was in very good health and would expect to last a considerable time yet”.

[76] The evidence supports the conclusion that, notwithstanding Ms Almond’s assertions:

- (a) Fred Read was in good health in 2002 at the time of the purchase of the Property;
- (b) the shares were Bruce Read’s shares;
- (c) Ms Almond was buying the Property with Mr and Mrs Read; and
- (d) the big house on the Property would belong to Ms Almond.

[77] The defence referred to the situation with the girls’ executor, Guardian Trust, and asked the Court to infer that there would have been no problem for others to be registered on the title to the Property. However, there is no evidence of ASB Bank’s approval of that transaction and I note that the ownership interest of Guardian Trust on behalf of the girls was never in fact registered. For these reasons, I decline to draw the inference the defence suggested. In fact, in my assessment, it is entirely possible that the title to the Property was taken in Ms Almond’s name so she could obtain a mortgage. Mr Scott accepted that, had he been aware of the interests of others in the Property, he would have been obliged to inform Ms Almond’s mortgagee. Given that Ms Almond was then in receipt of social welfare, if she had next to no equity in the Property because the money belonged to other parties who claimed an interest, she might well have experienced considerable difficulty obtaining a loan which was to be secured by the Property.

[78] Ms Almond's claim that she was strenuously opposed to any idea of Bruce Read living on the Property is undermined by two crucial pieces of evidence. The first is Fred Read's letter to the Franklin District Council received on 24 July 2003. The letter was signed by Mr and Mrs Read. Mrs Read said she was responsible for the writing but, given the tenor of the letter, it was written primarily from the perspective of Fred Read. Relevantly, the letter states:

The land was purchased by myself & daughter so that a main house could be built for her. ...Also a second small retirement home for myself & my wife (I am 82 and my wife is 78). ...My son who is single, will probably be retired when we have finished with the home and the plan is for him to occupy the house and he & my daughter can look after each other. ...

The retirement home when we have finished with it could be turned into a granny flat if required (or so a young lady from your planning dept told us about 9 months ago when this plan was first thought of).

[79] The letter contradicts Ms Almond's evidence to the effect that she had always held considerable antipathy towards Bruce Read, saying he partially contributed to a breakdown she had in her early 20s, and she confided in her father about that. Furthermore, the letter undermines Ms Almond's assertions that Fred Read would never allow Bruce Read to live on the Property and that Ms Almond's agreement with Mr and Mrs Read in May 2002, that they could build the subsidiary dwelling, was subject to the proviso that they never allow Bruce Read to live in it.

[80] This letter supports the evidence of the plaintiffs, in particular Mrs Read, that it was never intended that her house would in fact be moved from the Property. Fred Read obviously had it in mind from the start that, when his family had finished with it, the house could stay on the Property as a granny flat.

[81] The letter also notes that Mr and Mrs Read had purchased the Property with Ms Almond.

[82] The second piece of evidence which undermines Ms Almond's defence is that Bruce Read moved into the Property after Fred Read died in June 2009 and remained there without any evidence of antipathy between him and Ms Almond (at least to the level as alleged by Ms Almond) until some time in 2012. In June 2011, Bruce Read and Ms Almond together took Mrs Read to sign the enduring powers of attorney in

respect of Mrs Read's property, personal care and welfare. Ms Almond was appointed as attorney. This demonstrates a degree of trust between them, particularly on the part of Bruce Read who, at that time, clearly trusted Ms Almond to look after his mother's affairs. It was not until November 2012 that there was clear evidence of a breakdown of the relationship between Bruce Read and Ms Almond resulting in the trespass notice Ms Almond served on Bruce Read on 2 December 2012.

[83] I accept the plaintiffs' evidence that the conflict between Bruce Read and Ms Almond was only really apparent when Bruce Read began to challenge Ms Almond's use of their parents' money. I therefore reject Ms Almond's evidence that she would never buy a property with Bruce Read because of their longstanding conflict.

[84] I am satisfied that all the parties, including Ms Almond, agreed that the Property was to be owned by the parties in proportion to their respective financial contributions to the cost of the land and improvements, and this was clearly understood by all involved. The evidence of all three plaintiffs was consistent on this arrangement and Ms Almond's own conduct (until they fell out) was consistent with such an agreement being made.

[85] I am satisfied Chris Read accurately described the arrangement when he said:

My father had the calculations in his head. \$130,000 from Bruce, \$30,000 from me, \$30,000 from my parent's [sic] for the land. The money was going to be pooled. Everyone was to receive their slice of the cake when it was to be divided up later after the mortgage was repaid. This is what we had all agreed. This is what we as a family were doing together. I felt that my father would be bound by his word, and he commanded our respect and trust such that we were all so bound.

### **Bruce Read**

*Did the \$130,000 contribution to the purchase price for the Property belong to Bruce Read or Ms Almond?*

[86] Bruce Read paid \$130,000 to the solicitors acting on the purchase. He had no dealings with them but was simply requested to deposit the money in their trust

account. He did not receive any independent legal advice. It was not suggested to him that he should and, in any event, he did not think it necessary.

[87] Bruce Read said that the \$130,000 came from selling shares he owned. Ms Almond maintained the money was hers and was a return on an investment in shares Bruce Read had made on her behalf.

[88] Ms Almond said that when she was about 22, in 1974/1975 (which is when her first marriage came to an end), she had approximately \$60,000 which Fred Read gave to Bruce Read to invest in shares on her behalf for her retirement. Ms Almond said the money came from the proceeds of sale of the matrimonial home and from working since she was about 11 years old.

[89] Bruce Read said his first investment in the share market occurred just prior to the 1987 share market crash when he lost about 90 per cent of his investment. He returned to the share market in 1988 and from then until 2002, invested any spare money he had in the share market so that by 2002 his share portfolio was worth in the vicinity of \$200,000 to \$250,000.

[90] He described Ms Almond's version of events as completely untrue. In support of that, he pointed out that he himself did not begin investing in the share market until late 1986/early 1987 and at no time was he ever given any money by any of his family to invest in the share market, either on their own behalf or on behalf of anyone else. He said the sole source of funds he used to purchase shares was his own income and savings.

[91] Bruce Read considered the idea that Ms Almond had \$60,000 to invest when she was about 22 years old as ludicrous. He said she has never had spare money and, on the contrary, seeks financial assistance regularly from other members of the family. In his recollection, she has never been in regular employment and has been supported by her husbands or social welfare.

[92] Mrs Read said that she and Fred Read discussed their finances throughout their marriage of 61 years and that, if Fred had been investing Ms Almond's money

in shares through Bruce then she, Mrs Read, would have known about it. Mrs Read said that neither Fred Read nor Ms Almond ever said anything about money invested in shares by Bruce Read on Ms Almond's behalf. She said Fred Read told her everything and they did not have secrets.

[93] Ms Almond said she started working when she was 11 years old at a cake shop to earn pocket money and that Bruce Read often took any pocket money she had. She said she would often work two jobs and worked as a model, waitress and dressmaker. She said she always worked and stopped only when she was 33 years old and was very sick when pregnant. When her second husband died, she worked part-time sorting and planting calla lilies and, in Auckland, she worked part time making trellises.

[94] Ms Almond maintained it was only when she sought a protection order against Bruce Read that he made any claim in connection with the Property and, even then, claimed he had contributed \$100,000 and her parents and Chris Read contributed the balance of \$90,000. Ms Almond maintained that his evidence was changed to refer to \$130,000 once he received disclosure of the conveyancing file.

[95] It was put to Ms Almond that she did not trust Bruce Read and hated him, yet was prepared to allow him to invest a large amount of her money. Ms Almond said she knew her father had recorded her investment in his red journal; she and her father signed the journal whenever dividend payments came in, and she trusted her father. She said because Bruce Read thought he was dealing with Fred Read's money, he would have looked after it. She said her father never said anything to her after the stock market crash to the effect that her shares had reduced in value.

### *Findings*

[96] Ms Almond's evidence on this issue is not credible. She has materially changed her position. In her first statement of defence of July 2014, Ms Almond said that her investment in shares occurred in or about 1979 or 1980. In evidence, she said it occurred in 1974/1975.

[97] Ms Almond was referred to some notes she made in December 2012 at the time when the tension between her and Bruce Read had escalated out of control. In that, she noted that years ago, she had given Bruce Read \$60,000 to invest in shares and he did not give her any dividends. This is different from her version of events now which is that the money was given to Fred Read to give to Bruce Read to invest on her behalf and that, had Bruce Read known the money was hers, he would not have taken care of it.

[98] At the time Ms Almond said the money was given to him to invest, Bruce Read was in Australia.<sup>3</sup> This makes it, in my assessment, even more unlikely that Fred Read would have given Bruce Read \$60,000 to invest on Ms Almond's behalf.

[99] If Ms Almond's evidence is correct, it would mean that Fred Read was involved in a substantial deception in his dealings with Bruce Read. This does not accord with the other information from witnesses, including Ms Almond, about Fred Read's trustworthy nature.

[100] Ms Almond described the \$60,000 as her retirement fund and said, therefore, she did not call on that amount at any time between the money being given to her father and using it in 2002 to purchase the Property. She had no knowledge of where it was invested, what any dividends were or how it was impacted by the 1987 stock market crash. If, indeed, the sum represented Ms Almond's retirement fund then it defies belief that she would not have been anxious as to the state of that fund at the time of the stock market crash.

[101] Ms Almond was in receipt of welfare payments for considerable periods. Despite all of this, however, Ms Almond said that she did not ask her father or Bruce Read for her investment or any part of it. Yet she did draw on those funds in 2012 when she purchased the Property. Ms Almond then said that all she was able to obtain from Bruce Read at the time was \$130,000 because that was all he could give her. Again, that defies credibility. If the shares were hers, she was entitled to all of them. What Bruce Read might have been able to afford at the time was irrelevant. If

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<sup>3</sup> Bruce Read moved to Australia in 1971 and returned to New Zealand in late 1977.

money was invested in shares, then the shares could have been sold, Ms Almond could have received all of her funds invested by Bruce Read and she would have not have required a mortgage of \$60,000.

[102] Given what Ms Almond said was the relationship between the parties, it is highly improbable that Ms Almond would simply accept that the amount she received from Bruce Read was the total due to her without any supporting details. It would have been untenable for her to entrust Bruce Read with such a significant amount of money to invest on her behalf given her evidence that she did not trust him, hated him (even in childhood) and wanted nothing to do with him after he left home at the age of 16.

[103] Furthermore, Ms Almond maintained that her father ensured tax was paid. She said the investment was not declared in any of her relationship property proceedings on her lawyer's advice and that she was not required to do so because the shares were not held in her name. This is despite one disclosure form to which she was referred clearly requiring disclosure of any assets held by someone else on her behalf.

[104] For all these reasons, I am satisfied that the sum of \$130,000 paid in part payment of the purchase price for the Property in 2002 belonged to Bruce Read.

*What was the basis upon which Bruce Read paid \$6,000 towards the cost of a garage constructed on the Property?*

[105] Bruce Read paid \$6,000 at Fred Read's request towards the cost of a garage to be constructed on the Property, he claimed, on the same basis as he made his initial contribution.<sup>4</sup> Ms Almond dealt with the garage company and the payment for the garage was made from her account.

[106] Bruce Read said the garage was primarily for Ms Almond's benefit in order for her to store furniture which had been in her matrimonial home. She was moving

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<sup>4</sup> Bruce Read also purchased a tractor and other accessories for use on the Property. There is no claim in this regard but Bruce Read mentioned it as confirmation of his involvement in the Property.



from a four bedroom house to a two bedroom flat. He said she had most of the matrimonial chattels and therefore wanted the garage.

[107] Ms Almond's position was that any contribution towards the garage was a private arrangement between Fred Read and Bruce Read and did not involve her. She said the garage was for Fred Read and it was he who paid for it.

[108] Ms Almond made an insurance claim around 2002 after there had been a burglary at the Property. She received approximately \$20,000 as a result of her claim which related to items stolen from the garage. The purpose of the questions was designed to show that Ms Almond stored her possessions in the garage in support of the proposition that she was the one who wanted it.

### *Findings*

[109] I accept that the garage was required primarily to meet Ms Almond's needs.

[110] The \$6,000 garage payment was made within a week of the purchase of the Property. Ms Almond's home was built first and she had to move out of her matrimonial home. Conversely, Mr and Mrs Read had no need to store their possessions at that time.

[111] In any event, at whose instigation the garage was constructed does not much matter. It was an improvement to the Property.

[112] Bruce Read contributed the \$6,000 specifically for the purpose of a garage. Ms Almond knew that and it was exactly the type of contribution to improvements on the Property which the parties agreed should increase Bruce Read's ownership share.

### *Did Bruce Read purchase Rebecca's share in the Property for \$50,000?*

[113] Bruce Read said that in April 2007, Fred Read asked him if he would take over Rebecca's share of the Property for \$50,000 in return for an increased share in

ownership and he agreed to pay that amount on that basis. Again, Bruce Read did not consider there was any need formally to document the arrangement.

[114] Ms Almond denied that there was any such agreement. She said the \$50,000 represented the balance of the shares held on her behalf by Bruce Read at Fred Read's request. Ms Almond pointed out that Bruce Read initially claimed the payments of \$50,000 and \$6,000 were a loan. She cited this as an example of Bruce Read changing his version of events to suit his purposes.

[115] Chris Read's evidence was that, on his visit to New Zealand in 2007, Fred Read and Ms Almond asked him if he wanted to buy Rebecca's interest in the Property. He was told her share was by that time worth around \$50,000. Chris Read was later told that Bruce Read had agreed to buy Rebecca's share in return for a greater share of the ownership. This made sense to Chris Read because he knew Bruce Read spent a lot of time working on the Property. Chris Read said Ms Almond confirmed to him that Bruce Read had taken over Rebecca's share.

[116] Banking records show that on 26 April 2007, \$50,000 was withdrawn from Bruce Read's account and deposited into Ms Almond's account. It appears that Ms Almond gave Rebecca just over \$30,000 and then purchased some bonus bonds.

[117] In March 2014, Bruce Read's lawyers wrote to Rebecca seeking a return of the \$50,000, saying it was always intended it was to be repaid because it was a loan. A letter of demand for payment of the \$50,000 was then sent to Ms Almond on 3 April 2014 (as Rebecca's partner had told Bruce Read's solicitors that Rebecca had not received any money from Bruce Read). Bruce Read did not accept he had changed his position, saying he had always purchased Rebecca's share and the demand was simply the strategy adopted by his lawyer at the time.

[118] Ms Almond was asked a number of questions about the notations she made in her cheque book reconciliations and bank statements. Essentially, it was put to Ms Almond that she had rewritten history in order to support her case. Not only had she written comments on her bank statements but altered her cheque reconciliations by adding comments later. An example of this was the entry in her cheque book

reconciliation in respect of receipt of \$50,000. It was put to her that the words “final payment of shares” was written at a different time from the rest of the entry. Ms Almond denied that proposition, saying she had no reason to write such a clarification whereas the plaintiffs maintained that she had every reason, that is, to support her case.

### *Findings*

[119] Again, Ms Almond’s version of events is not convincing. Bruce Read’s records show he sold no shares between 29 December 2005 and 25 February 2008, something which would have been expected if the payment came from the sale of shares.

[120] If the \$50,000 indeed represented the balance of the shares Bruce Read held on her behalf, there could have been no justification for that money not being available on settlement of the purchase. It was no answer for Bruce Read to have maintained, as Ms Almond alleged, that he did not have the money in 2002. If the money was invested in shares, they could have been sold.

[121] I reject Ms Almond’s version of events. I accept the evidence that Ms Almond asked Bruce Read to increase his share of ownership of the Property by buying Rebecca’s share for \$50,000. Bruce Read’s claim is supported by Chris Read’s evidence and by the reality of what took place at the time – Rebecca did own a share of the Property, she did want to buy her own home and a substantial amount of the \$50,000 was paid to her by Ms Almond.

### *Monthly payments*

[122] Although Bruce Read does not claim any relief in connection with the monthly payments he made to Ms Almond, there was evidence about this and it is relevant to the claims of Mrs Read and Chris Read. For this reason, I address the evidence and my findings at this stage of the decision to assist in providing context for the claims of Mrs Read and Chris Read.

[123] Bruce Read said Ms Almond expected him to contribute towards the mortgage and other expenses associated with the Property. He was asked to transfer his share of outgoings into Mrs Read's bank account so that Ms Almond could then transfer those funds, together with Mrs Read's share, to her own bank account. Bruce Read paid \$1,300 to Ms Almond and \$24,552 to Mrs Read between June 2002 and December 2012, of which approximately \$24,052 was paid between 9 October 2009 and 28 December 2012 when Bruce Read was living at the Property.

[124] Bruce Read said he did not have any particular difficulty making a contribution towards the expenses associated with the Property. Indeed, he said the fact he was charged for a share of the mortgage, rates and other expenses was consistent with his understanding that he owned a share of Property. He maintained he kept a record of these payments but when he returned to the Property after being trespassed from it, the relevant pages had been torn out of the book in which he recorded those details.

[125] Bruce Read said he paid half the mortgage and he understood Mrs Read paid the other half. The arrangement was reached when Chris Read stopped paying the mortgage when Fred Read died. It was then agreed that Bruce Read would take over paying part of the mortgage.

[126] Ms Almond said that any payments made by Bruce Read were made to Mrs Read and did not come to her. He was not paying the mortgage.

[127] Mr Naylor, who lives next door to the Property, gave evidence in support of Ms Almond and in particular her disputes with Bruce Read. It was clear, however, that he had formed an unfavourable view of Bruce Read primarily as a result of what he was told by Ms Almond. In any event, his evidence does not relate to the issue which I need to determine in respect of contributions to the Property. The only real point about Mr Naylor's evidence was that he was able to support Ms Almond's description of the steps taken by Bruce Read to prevent Ms Almond having access to the subsidiary dwelling.

## *Findings*

[128] There is a most peculiar letter dated 20 November 2012 signed by Mrs Read and Ms Almond which reads:

To whom it may concern

My son Bruce James Read has said that he will pay no more rent to me unless I sign this letter to say I will repay him the rest when this Property is sold, and I receive my money. He pays no mortgage, he is paying rent to me for being in my home.

I pay the mortgage and can't pay it unless I get someone into rent.

The rent is \$400.00 a month, this will start November 2012 as requested by him, he will pay this at 1<sup>st</sup> of each month in advance, he needs to pay me \$400.00 for November as soon as possible.

He still has to pay, half sky, half phone, half power and if he wants his contents to come under my insurance he has to pay half contents insurance, pay for his own food, none of this will be refunded, only the \$400.00 a month for rent will be refunded.

If he does not want to pay any more rent to me then he will have 2 weeks to find another place and leave my house so I am able to get someone in who will pay rent.

[129] Mrs Read said that she did not use the computer. The obvious inference is that the letter was typed by Ms Almond. Mrs Read had no recollection of the letter and certainly did not remember preparing it for the purpose of obtaining monthly payments from Bruce Read. She did not agree that Bruce Read refused to pay anything unless it was called a mortgage.

[130] It is not in dispute that Ms Almond presented Bruce Read each month with a slip of paper on which she had written expenses which she claimed should be paid to her. It is unclear when the notes started but it was at least by February 2012. The first item on each of the notes was "MTGE \$402", which must be short hand for "mortgage". Other items were rates, power, internet, petrol/mowing, mum or mum's care, alpaca shearing, septic tank, food and weed spray. On some of the notes, some of the expenses (petrol, alpaca food, water filter) had been crossed out as had the entries relating to "mum" and petrol. However, on some of them, they remained.

[131] It is clear from the notes that, notwithstanding the letter of 20 November 2012, Ms Almond had been seeking a contribution from Bruce Read for mortgage payments.

[132] The notes also demonstrate that, for a period anyway, Bruce Read was contributing towards the Property and its upkeep.

### **Mrs Read**

*Did Mrs Read make three payments of \$10,000 towards the purchase of the Property, and if so, were they made in the expectation of obtaining a proportionate interest in the Property?*

[133] Mrs Read claimed she and Fred Read made three separate payments of \$10,000 towards the purchase of the Property.

[134] Mrs Read refuted Ms Almond's explanation that the \$10,000 deposit, paid by Mr and Mrs Read direct to the estate agents in May 2002, was in repayment of two loans Ms Almond made to Mr and Mrs Read when they ran a shop in Napier. Mrs Read said that she and Fred Read never borrowed any money from Ms Almond, who never had any money anyway.

[135] Mrs Read claimed she made another contribution to the Property of \$10,000 on 13 February 2003. On this date, Mr and Mrs Read drew down a loan of \$10,000 and transferred it to Ms Almond. In her statement of defence, Ms Almond simply denied the claim. In her evidence, she claimed it was money to assist her car instalments referring to an annotation in her cheque account next to the \$10,000 credit which states "Dad – Car Jan's Car". However, the \$7,000 received was then transferred to Ms Almond's Visa account.

[136] In September 2003, Mr and Mrs Read's account was debited by \$10,000, the payment being by cheque. There is no record of this sum being received into Ms Almond's account although the plaintiffs' forensic expert, Mr Hussey, was not convinced he had received disclosure of all Ms Almond's accounts. Ms Almond maintained this was a \$10,000 donation made by Mr and Mrs Read to the Seventh Day Adventist Church. Mrs Read did not accept that she and Fred Read would have

done that, saying they might have donated a few hundred dollars but not the sum of \$10,000. Bruce Read also rejected that proposition, pointing out that it was particularly unlikely that they would make a donation of that size at the time they were embarking on a house building project.

[137] Ms Almond maintained a somewhat confusing position regarding Mrs Read's claim to have contributed \$30,000 to the Property. Ms Almond said that the deposit, which she acknowledged was paid by her parents, was either repayment to her of loans she had made them in the late 1970s or repayment of \$10,000 over and above what she would otherwise have borrowed as a result of a request from her parents so the money could be used for improvements to the Property. She also maintained that another payment by her parents of \$10,000 was in respect of a car for Rebecca and there was a separate payment of \$10,000 by them to enable Ms Almond to make repayments on her car.

[138] On 29 May 2003 (the date which Ms Almond initially claimed she had repaid her parents the deposit), she received a \$10,000 loan from the bank. On the loan document, Ms Almond has written "Dad wanted me to get". On her bank statement, Ms Almond wrote "Have chq information. Dad – car for Rebecca". On the cheque butt itself, what appears to be "Mum mortgage" has been twinkled over and replaced with "Bank Bex Car Dad". The \$10,000 is recorded in the cheque column and has been crossed out and moved to the deposit column. The allegation is that the cheque butt has been altered to accord with Ms Almond's changed evidence. Ms Almond therefore, seemed to suggest she received this payment from her parents yet the records show it was a bank loan.

### *Findings*

[139] Significant parts of Ms Almond's evidence referred to agreements she had reached with her father, Fred Read: the \$130,000 paid by Bruce Read, the number of loans she took out at Fred Read's request to enable him to do improvements to the Property to which Ms Almond claims Mrs Read would not agree, and a \$10,000 payment made in May 2003 which she maintained was from her father for a car for Rebecca.

[140] Mr and Mrs Read paid the deposit of \$10,000 on 17 May 2002. In Ms Almond's first statement of defence, she claimed that the deposit was repaid to Mrs Read on or about 29 May 2003. This did not occur. The difference in Ms Almond's position on this issue is difficult to reconcile.

[141] I accept the submission that, if Mr and Mrs Read felt they owed Ms Almond \$10,000, they would be clear that the deposit was a repayment of that loan. They would not, as Ms Almond appeared to contend, hand over \$10,000 and say it could either be repayment of an earlier loan or could be repayment of a loan which did not yet exist.

[142] Ms Almond's evidence about her parents' February 2003 loan of \$10,000 which they transferred into her account was inconsistent and not credible. I accept the deposit and \$10,000 was a contribution to the Property and made on the basis of the agreement between Ms Almond and her parents that the payments would be reflected in a share of ownership of the Property.

[143] The sum of \$10,000 was debited from Mr and Mrs Read's account in September 2003 when Mrs Read said she paid her third \$10,000 contribution to the purchase price. However, there is no record of this being received into Ms Almond's account and Ms Almond suggested her parents donated that money to the church. While I agree that a \$10,000 donation to the church seems excessively generous when one is paying for a house to be built, and it seems unlikely this is where the \$10,000 went, I cannot be satisfied to the required standard that this money was in fact paid to Ms Almond.

*Was construction of the subsidiary dwelling and contributions to improvements to the Property made in expectation of obtaining a proportionate interest in the Property?*

[144] The issue here is whether Mr and Mrs Read built the subsidiary dwelling and paid for other improvements to the Property in expectation that their share in the Property would increase. Ms Almond's case relies heavily on the terms of the resource consent for the subsidiary dwelling, which relevantly provides:



### Restrictions on use

That the subsidiary dwelling accommodate on a permanent basis only the aged and infirm relative(s) of the occupants of the principal dwelling.

### Removal of Dwelling

That within 2 calendar months after the subsidiary dwelling ceases to be used to accommodate the aged and infirm relative(s) of the occupants of the principal dwelling the subsidiary dwelling is to be removed from the site to the approval of the Team Leader: Regulatory.

[145] Ms Almond's position is that the terms of the resource consent mean the subsidiary dwelling could be occupied only by Mr and Mrs Read and, once they ceased living on the Property, it was to be removed. On that basis, Ms Almond said that Mr and Mrs Read were to pay the construction costs and then remove the house when they no longer lived there, and that they would pay her rent for doing so, at \$200 per week as agreed with Fred Read. Ms Almond said she did not receive the full rent all the time and sometimes they paid about \$100 per fortnight and other times \$170 per fortnight.

[146] Mrs Read rejected the idea that she would have been paying any rent to Ms Almond, asking why she would do so as it was her home. She understood she was paying the mortgage. Bruce Read does not recall any such discussions.

[147] As Chris Read put it, the problem with Ms Almond's approach (that the subsidiary dwelling should be removed) is that it ignores the contribution Mr and Mrs Read made to the Property over the years.

[148] Ms Almond acknowledged that she did not appreciate at the time that the resource consent for the subsidiary dwelling would make such a difference. She accepted that her mother believed she would receive about \$250,000 were the Property sold. Ms Almond confirmed her opinion that her mother would be entitled to that.

[149] Ms Almond paid all outgoings in respect of the Property and said she took out loans so that her father could do things on the Property such as building a shed and fencing. Ms Almond said she paid the mortgage and rates which her parents would pay part of when they could afford to.

[150] There were additional costs incurred in the construction of Ms Almond's house which related to the subsidiary dwelling. For example, an additional water tank was required and a bigger septic tank was also required. Ms Almond's evidence was that Fred Read agreed to repay some of those additional costs and was also to pay her for the drive and other items such as extra cables, the double meter board, plumbing and the septic tank.

[151] Ms Almond's position is that, if the plaintiffs' claims are allowed:

The effect will be that my parents could build their house on my property, not have to pay for any power or other utilities, not pay for any food, petrol, doctor's visits and the numerous purchases they made me make on their behalf, and at the same time I would be their full time carer. Mum, Chris and Bruce are now trying to claim for every payment that mum and dad made to me even though these were reimbursements for expenses, they are also trying to claim back presents and gifts made for Sharlene and Rebecca.

[152] Expert evidence assessed the market value of the Property as \$1,135,000. The value of improvements is \$540,000. The land value is \$580,000 and the chattels \$15,000. The value of the subsidiary dwelling is assessed at \$140,000 in an open market sale situation.

[153] The value of the subsidiary dwelling for removal purposes is \$20,000. Remedial work of around \$15,000 to \$25,000 would then be required to remove the concrete pad and water tanks associated with the subsidiary dwelling.

[154] As the expert, Mr Hopping, accepted, if the Property were sold, an incoming purchaser could make an application to the Auckland Council for use of the subsidiary dwelling for elderly or infirm relatives.

[155] Mr Hopping also confirmed that he had seen examples of resource consent having been granted in this situation for a subdivision which would then allow the subsidiary dwelling to be sold as a separate lot.

### *Findings*

[156] It is clear that the construction of the subsidiary dwelling, a substantial house, was intended to increase the value of the Property rather than, if it has to be

removed, result in a break even situation whereby the \$140,000 construction cost would be effectively lost. It defies belief that was the intention of the parties.

[157] I am satisfied that Mrs Read and Fred Read would not have sold a property they owned and put all the money they had into building a house that they would then need to pay rent to live in. Further, that they would have intended to lose their investment in construction of the subsidiary dwelling because it was to be moved from the Property when they ceased living there.

[158] There was quite some discussion about payment for the driveway and whether the \$12,500 cost should be added to Mrs Read's share of the Property. It appears the money was received by Mrs Read when her sister, Mavis, died. The sum of \$6,000 went to the girls and the rest went to the cost of the driveway. Ms Almond's evidence was that Mrs Read wanted the girls to have half and the other half was split between her and Mrs Read and used towards the driveway. Mrs Read seemed to concede that the money might well have been for the girls. I cannot be satisfied to the required standard in respect of this claim given Mrs Read's concession.

*Were contributions allegedly to the mortgage over the Property made in the expectation Mrs Read would obtain a proportionate interest in the Property?*

[159] As a result of a funds tracing exercise between the bank accounts of Bruce Read, Chris Read, Mrs Read and Ms Almond, the plaintiffs' financial expert, Shane Hussey, concluded that funds totalling \$323,997 went into Ms Almond's bank account and credit card account between 27 June 2002 and 31 December 2012. In addition, \$67,586 went into Mrs Read's account from Chris Read and Bruce Read. Mrs Read paid \$217,491 to Ms Almond.

[160] Mrs Read's evidence was that from 19 March 2008 to 31 December 2012, Ms Almond began taking money from her account or asking for cheques towards the mortgage. Ms Almond's handwritten notes support the allegation that Mrs Read was being asked to pay the mortgage. The sum of \$114,807 has been traced from Mrs Read's account to Ms Almond's account over this time period and that is the sum claimed in respect of the mortgage. No allowance has been made for

supermarket shopping, rates, utilities or any other expenditure Ms Almond might have incurred on behalf of Mrs Read.

[161] Ms Almond's position was that the money represented rent which Mr and Mrs Read were to pay for the subsidiary dwelling being on the Property, expenses associated with the subsidiary dwelling (rates and utilities) and reimbursements for payments made by Ms Almond on Mrs Read's behalf.

[162] Ms Almond explained that all connections to the subsidiary dwelling are from her house as it did not have its own power board, telephone main line or sewage tank. She said it was agreed, therefore, that her parents would pay for their share of the utilities.

[163] Ms Almond said she paid for everything for her parents, including doctors' bills and presents for the grandchildren, such as computers and plastic surgery.

[164] Bruce Read confirmed that Ms Almond provided a great deal of comfort, support and assistance to Mr and Mrs Read and expressed his gratitude to her for that. He said, however, that this also enabled her to exert a good deal of influence over them and he became increasingly concerned that this was not always used for their benefit and there was a degree of exploitation involved.

[165] As an example, Bruce Read referred to the petrol reimbursements made to Ms Almond by his parents and did not consider they were anywhere near an appropriate apportionment of the actual cost of petrol used for their benefit over the same period.

[166] Bruce Read recalled an argument a few days before his father died in June 2009 after Chris Read expressed some concerns about financial management of his parents' affairs. Bruce Read maintained Ms Almond confirmed to him she had drawn \$4,200 from her parents' account when she had discovered she was short of money. He said it was as a result of challenging Ms Almond about these issues that they have fallen out.

[167] Ms Almond's evidence was that her father insisted on paying that money to her to cover expenses she was likely to incur when all the family were in New Zealand in Fred Read's last days and following. Despite this, however, Ms Almond transferred \$3,000 into her savings account around this time. She said she incurred some costs because she did all the shopping and cooked all the meals. By anyone's standards, a payment of over \$4,000 to cover food costs for a relatively small family was exceptional.

[168] Bruce Read said it became increasingly apparent that Ms Almond did not like his questioning her about her finances and the fact she no longer had complete freedom over her mother's finances as she had done in the past. He believed it was these issues which caused Ms Almond to trespass him from the Property in December 2012 as a result of which Mrs Read decided she could not live there on her own.

[169] Mrs Read accepted that Ms Almond did some grocery shopping on her behalf but said certainly, in the early days, she and Fred Read would do the shopping. She accepted that the power connection to her home was through Ms Almond's house and that Ms Almond paid the utilities and rates and Mrs Read would reimburse her in respect of her share.

[170] Mrs Read did not remember asking Ms Almond to buy presents for Chris Read's family in the United States but accepted she would have asked her to buy presents for the girls and that she was generous towards the girls although she did not accept all the payments Ms Almond alleged, for example, a makeup course for Rebecca.

[171] Mrs Read was very fair in acknowledging that certain payments might have been authorised and that she would not have expected others, for example, money spent on the girls, to be reflected in her share of the Property.

[172] Mrs Read rejected the proposition that Ms Almond borrowed money from the bank on behalf of Mr and Mrs Read.

## *Findings*

[173] I have no doubt that Ms Almond was a good daughter to Mr and Mrs Read in many ways. No one disputes that she cared for Fred Read while he was on dialysis and drove him to and from the hospital as required. She obviously cared well for Mrs Read when she lived on the Property. It may well be that she was a better carer for Mrs Read than Bruce Read was and, in saying that, I am sure Bruce Read did his best. It is distressing that the issues between siblings impacted on Mrs Read's care.

[174] The parties referred to the wills made at various times by Mrs Read as evidence of the other side's influence on Mrs Read. I have considered the various changes Mrs Read made to her wills but conclude there is no need to make any further reference to them.

[175] Ms Almond's evidence about her various loans was somewhat confusing. She maintained she took out an additional loan because, first, her father asked her to and then, she said, Mrs Read asked her to take out a further loan of \$30,000 after Bruce Read moved in and refused to pay her anything. Ms Almond's current borrowings stand at \$92,265. Ms Almond said she paid \$341 per fortnight in mortgage payments and received \$798 per fortnight from social welfare. She said it was a struggle to manage but, as long as her parents paid rent, it was manageable.

[176] The financial records, however, paint a very different picture. No matter what the purpose of the various payments, it cannot be disputed that significant sums of money have gone into Ms Almond's account, even allowing for her reimbursement for items purchased in connection with the Property, which must have been primarily incurred before 2007, which is when the time period in the claim in respect of the mortgage begins.

[177] Ms Almond sought to justify payments to her by saying her parents often offered to pay for things for the girls as gifts. This included surgery, medical bills, glasses and a car. This is in contrast to her other evidence that they did not have the money to help her financially.

[178] Even accepting Ms Almond's evidence that she paid for utilities and household items for her parents, which she put on her credit card and for which her parents reimbursed her, and the \$9,700 the Ministry of Health paid Mr and Mrs Read for costs incurred by Ms Almond, this cannot explain the very large sums of money which went into Ms Almond's account.

[179] In June 2010, Mrs Read wrote to Bonus Bonds requesting repayment of her bonus bonds, then worth approximately \$6,000. A hand written note on that letter made by Ms Almond records that the repayment was to be for the girls. This payment, therefore, would need to be deducted from Mrs Read's claim.

[180] I accept that a substantial part of the regular payments made by Mrs Read to Ms Almond was intended to be for the mortgage although until June 2009, Chris Read was paying the mortgage. I reject the proposition that Mr and Mrs Read were to pay rent to Ms Almond. What I am not satisfied about, however, is that Mrs Read's payments were made with the intention of acquiring an interest in the Property. On the evidence, it seems to me more likely that the mortgage payments were made with the intention of helping Ms Almond without necessarily expecting an ever increasing property interest as a result.

[181] The final factual determination in relation to Mrs Read's claim relates to Ms Almond's duties as Mrs Read's attorney between June 2011 and March 2013. This is best considered in the context of a legal analysis and is set out at paragraphs [263] – [275] below.

### **Chris Read**

*Did Chris Read pay \$25,000 or \$30,000 towards the purchase of the Property and, if so, was that payment made in the expectation of obtaining a proportionate interest in the Property?*

[182] Chris Read said his father talked to him in or about 2000 about Ms Almond's problems and asked him to contribute \$25,000 to enable Ms Almond to buy a bach near New Plymouth, which Fred Read believed would be beneficial for Ms Almond and her family. Chris Read said that, whilst he was not particularly enthusiastic, he agreed to his father's request on condition that the money was to be handled and

monitored by his parents. He said there were no formal documents in relation to the loan because they were a family, looked out for one another and trusted one another. This evidence provided the foundation for Chris Read's behaviour in relation to the Property.

[183] Chris Read understood his initial contribution of \$30,000 to the Property was by effective repayment of that loan (\$25,000) and a further payment of \$5,000 to be drawn from his cheque account. He also agreed to contribute a further \$3,000 towards improvements to the Property. He now knows that the transaction did not eventuate in the way anticipated. The sum of \$25,000 went to Ms Almond shortly before the purchase of the Property but not applied towards it because Ms Almond took the loan of \$60,000. In 2002, the sum of \$8,590 was withdrawn from his cheque account and paid to Ms Almond's cheque account. However, in fact, none of the money was directed as part payment of the purchase price of the Property as he believed was agreed.

[184] Chris Read completely rejected the proposition that the payment of \$25,000 to Ms Almond when she purchased the bach was in recognition of the assistance Ms Almond had provided him and his family when he went to medical school. He acknowledged that, from time to time, she had sent fruit parcels and presents for his children but that, he said, was the extent of it.

[185] Ms Almond's evidence was that Chris Read gave her \$25,000 in repayment of help she had provided when he was studying. She maintained that Chris Read always told her that he would pay her back for all the help and assistance she gave to him and his family when no one else did. She acknowledged that on two occasions, Chris Read paid for her airfares to the United States but said that was because she had done so much for Chris Read when he was younger.

[186] In any event, she then said there was never any intention that the \$25,000 for the bach was a loan or that it required any repayment. Ms Almond denied there was any discussion between her and Chris Read that this was to be a contribution towards the purchase of the Property and he would acquire a share as a result.



## *Findings*

[187] On Ms Almond's version of events, she extracted a very high price for what she said was some support she gave Chris Read when he was studying some 20 years ago. Even if she had supported him as alleged, to claim that he was then obliged to pay her \$25,000, as well as fund two trips to the United States for her and her family, defies belief. In any event, I prefer the evidence of Chris Read as to his circumstances when he was at university, which is that he was funded in most part by savings from prior employment, his wife working part time, and an inheritance from his wife's father. It may well be that Ms Almond sent them fruit parcels but that would hardly entitle her to the reward she claims.

[188] I am also satisfied on the balance of probabilities that Chris Read contributed a further \$5,000 towards the purchase of the Property. While this amount might not have been paid in one lump sum, it does not change the intention and that this was part of his contribution to the Property. The fact that Ms Almond might have directed those funds for some other purpose, for example, payment of rent while her new house was being built, does not alter the agreement.

[189] Chris Read contributed \$30,000 towards the purchase of the Property. It was the intention of both Chris Read and Ms Almond that the contributions would entitle him to a proportionate share in the Property.

*Did Chris Read make contributions to Ms Almond's mortgage and, if so, were the contributions made in the expectation of obtaining a proportionate interest in the Property?*

[190] Chris Read said he was approached about Ms Almond's mortgage payments shortly after her house was completed. He said his parents and Ms Almond wanted him to service the mortgage and those payments would become part of his ownership share. He said he agreed because he knew if he did not, his parents would pay the mortgage. For that reason, he agreed that his parents could take money from his New Zealand bank account to pay the mortgage on condition that the payments were considered part of his contribution to the Property. He said that this was agreed to by his parents and Ms Almond. He said he understood the mortgage payments would be approximately \$1000 per month and that it was a 20 year loan. The first payment

was made on 24 July 2003. Although there was some variation, the payments were largely round sums of either \$1000 or \$2000.

[191] Chris Read's evidence was that Ms Almond often told him that the more money he put into the mortgage, the sooner it would be paid off and, on that basis, he allowed higher payments to be directed from his account than were likely to be the base mortgage requirement. However, he never knew the exact amount of the mortgage, the term or the required payments. Between 24 July 2003 and 2 June 2009, \$105,260 was transferred from Chris Read's account to Ms Almond's account.

[192] Chris Read said money from his account could also be put towards the Property but was not to be used for Ms Almond's personal benefit. He candidly acknowledged he would not have agreed to any of this were it not for the oversight of Fred Read. Chris Read described Fred Read showing him the notebook where he had recorded all the contributions made by everybody, each time he travelled to New Zealand. He said it gave him an assurance that Fred Read was recording each and every transaction.

[193] Over the years, Ms Almond took out further loans, partly rolling over her original loan of \$60,000, with the result that the amount of her borrowings secured against the Property currently stand at approximately \$92,000.

[194] Ms Almond acknowledged that Chris Read helped her parents but said he never had any agreement with her that the money given to his parents, which they in turn gave to her, would be a contribution to the Property or to provide him with an interest in the Property. Ms Almond maintained she was told by her parents that it was Chris Read's way of contributing because he could not be present to help with the care of his parents. None of his money went towards the mortgage, she said. Ms Almond said Chris Read's claim includes money used for airfares for her and the girls to the United States, a television and a ride-on mower for her parents, Christmas presents for Mr and Mrs Read and the girls, outdoor furniture and a car for his parents.

[195] She said Chris Read paid her rent while her house was being built in 2002. Chris Read denied this but, in any event, his claim involves payments made from July 2003 so this issue is irrelevant.

[196] Mrs Read accepted that Chris Read might have paid rent for her and Fred Read for a 17 week period while the subsidiary dwelling was being constructed. Chris Read was surprised at that concession. He did not recall having done so, saying that Mr and Mrs Read did accept help in connection with the Property but otherwise maintained their independence.

[197] Mrs Read also accepted that Ms Almond paid for other items on her credit card, which were costs incurred by Mr and Mrs Read, for example, doctors' visits, prescriptions and outdoor furniture. Mr and Mrs Read would then reimburse her. Other payments were made in connection with the subsidiary dwelling, such as a television, indoor furniture, fridge, fountain and flooring. Mrs Read acknowledged that Chris Read paid some medical and dentistry expenses for the girls.

[198] A considerable amount of time was taken in cross-examination of Chris Read about a cheque from his account for \$7,945. He acknowledged paying for his parents, Ms Almond and the girls to visit the United States to see him and his family. He did not accept that the cheque was so that Ms Almond could pay the airfares because he thought he had paid for them by credit card. Eventually, after Ms Almond produced a receipt from the travel agency (which had not been provided in discovery), he accepted the position. Nevertheless, he always maintained that the cost of the airfares was not to be included in his claim in respect of the Property. The airfares in fact were for \$7,345 and Chris Read maintains his claim for the additional \$500.

[199] Chris Read was asked about a payment of \$20,000 out of his account in May 2006. Shortly after that, there was a payment out of Mrs Read's account for just over \$8000 with the bank notification "closing account entry". It was put to Chris Read that Mrs Read had used this money to repay her own loan and, therefore, the money could not be claimed as owing from Ms Almond. Chris Read did not accept that proposition.

[200] The point was explained by the plaintiffs' accounting expert, Mr Hussey. He said it was not simply a matter of equating payments made close in time. The correct approach is to consider the total payments in and total payments out of the account and, on that approach, there was still considerably more money which was debited from Chris Read's account and credited to that of Ms Almond. I agree this is the correct approach.

[201] Pursuant to a deed of family arrangement in November 2010, the loan of \$60,000, which Ms Almond had taken out in 2003 against the girls' inheritance, was forgiven in recognition of Ms Almond's having made "capital advances which are far in excess of the amount owed" which, by the date of the Deed, were calculated to be \$130,128. It was put to Ms Almond that the Deed was evidence that Ms Almond had "siphoned off" money to the girls and this money represented the investment which the plaintiffs believed they were making in the Property. The plaintiffs said Ms Almond was on a benefit and could not herself provide these amounts to the girls. Ms Almond refuted that proposition saying it was in recognition of the care she gave the girls over the years.

### *Findings*

[202] If Ms Almond is to be believed, she has been extremely financially successful from a very young age. She has owned a number of properties and invested money in bonds and shares. It was difficult to achieve any clarity as to her reliance on welfare but she accepted she was receiving some payments anyway around 1997 when her daughter Sharlene was very ill. Her investment in Bonus Bonds currently stands at \$26,000 although she maintained she holds this for the benefit of Sharlene.

[203] Mrs Read's evidence was that Ms Almond had previously undergone periods of financial instability, particularly surrounding matrimonial breakdowns and as a solo mother with two daughters, one of whom was seriously ill for a period. She was surprised when it was put to her that Ms Almond had spent about \$220,000 of her own funds paying for her house to be built. Mrs Read did not think that Ms Almond had that kind of money.

[204] In fact, Ms Almond did not have that kind of money. She had the proceeds from her matrimonial property settlement (about \$90,000) and the remainder was borrowed from the bank, came from the girls' inheritance and from the plaintiffs.

[205] From 2003, Ms Almond was receiving social welfare payments at \$670 per fortnight (\$335 per week). In 2007, this increased to approximately \$385 per week added to which, on Ms Almond's evidence, she was able to earn up to \$3000 per annum without it impacting her benefit. On that basis, the maximum yearly income Ms Almond would have received throughout that period was \$23,000. On Mr Hussey's calculations, Ms Almond's mortgage repayments increased from \$5,134 per annum (\$428 per month) in 2003 to \$9,560 per annum (\$796 per month) in 2010. It was put to her that she would not have been able to afford the mortgage payments and other expenses and that she had used payments from the plaintiffs to supplement her income. Ms Almond rejected that proposition, saying she could survive and still pay her mortgage. She maintained her additional borrowings were instigated by Fred Read because her parents needed the money but could not take a mortgage as the Property was registered in Ms Almond's name. When it was put to her that her parents received national superannuation and had relatively modest needs, Ms Almond contended that Mrs Read would not allow Fred Read to do certain things on the Property so Fred Read was able to do them by Ms Almond taking out a loan.

[206] Ms Almond's evidence that all the money she received from Chris Read was for costs associated with her parents does not bear scrutiny. Chris Read paid \$105,206 to Ms Almond between July 2003 and August 2009 (and now claims \$97,861) and \$43,034 to Mrs Read between 27 June 2002 and 31 December 2012. Importantly, between June 2002 and March 2008, Mrs Read paid Ms Almond \$107,384. There is no claim in respect of this amount except for the \$43,034 which is included in Chris Read's claim. The total amount received by Ms Almond from Chris Read and Mrs Read between June 2002 and December 2012 was \$322,697, \$255,702 of which is claimed by them in these proceedings. \$60,000 of the \$107,384 paid by Mrs Read to Ms Almond prior to March 2008 has not been claimed as it is taken to represent the reimbursement to Ms Almond of sums she paid in connection with the furnishing of and improvements to the subsidiary dwelling and other outgoings paid by her for Mr and Mrs Read.

[207] As far as the payments by Chris Read direct to Ms Almond are concerned (\$105,206), even treated as seven full years, this equates to \$15,000 per annum or \$1250 per month. Given that Mrs Read paid more than twice that amount to Ms Almond over a slightly longer period (\$217,491), it cannot possibly be said that those amounts were solely for the purposes of expenses incurred in relation to Mr and Mrs Read. They were an elderly couple who had paid in cash for their own house to be built and who, by all accounts, lived a relatively frugal existence. It is simply not credible that the situation was as Ms Almond claimed.

[208] The sum of \$322,697 was received by Ms Almond from Chris Read and Mrs Read over nine and a half years (114 months). After deducting the \$66,995 not claimed, the remaining \$255,702 equates to approximately \$2,243 per month. Ms Almond's own calculations of outgoings are recorded on the slips of paper she gave to Bruce Read. The monthly figures for food, rates and items attributable to the upkeep of the Property such as septic tank, weed spray, alpaca's food and shearing, vary from \$842 to \$1050, \$442 to \$648 net of amount claimed by Ms Almond for the mortgage. If the sum attributed to the mortgage is deducted, then the maximum of Ms Almond's entitlement per month for reimbursement of expenses was \$648, which is approximately 29 per cent of the amounts which went into her bank account.

[209] Not all payments from Chris Read, which he alleged were to the benefit of Ms Almond, were paid directly to Ms Almond. Some went through the bank account of Mr and Mrs Read. Chris Read explained that his parents were directed to make payments to Ms Almond.

[210] Chris Read denied that he contributed towards the cost of construction of his parents' home, pointing out that they had sold their property in Tuakau for a good price and did not need any additional help from him. It was pointed out to him that he paid for certain items which Ms Almond purchased on behalf of Mr and Mrs Read, who then reimbursed her. The purpose of such questions was to demonstrate that the money advanced by Chris Read was used to benefit Mr and Mrs Read rather than Ms Almond. However, because the money which went into Ms Almond's account did not come solely from Chris Read but was also from Mr and Mrs Read, that approach does not assist Ms Almond.

[211] In order to accept Ms Almond's defence in this regard, I would need to be satisfied that Mr and Mrs Read spent a great deal of money on themselves using Chris Read's money. I reject that proposition. It is not supported by the bank records which show Mr and Mrs Read's money, as well as that which originated from Chris Read, going into Ms Almond's account. It also does not accord with the evidence about Mr and Mrs Read, the way in which they lived their lives and their approach to financial matters. I accept Chris Read's description that they were not of the generation to "just buy things" and they always asked him before they spent his money.

[212] Despite Chris Read's unwillingness to concede the likelihood that the payment of \$6,800 was in respect of the ride-on mower, I cannot be satisfied on the balance of probabilities, given the coincidence of timing of its purchase and its price, that the payment of \$6,800 was in connection with the mortgage or the Property and therefore, this part of the claim is rejected.

[213] The schedule of payments produced on behalf of Chris Read in connection with his claim includes all money which flowed from Chris Read through his parents' account to that of Ms Almond (\$43,034). If any of that money were in respect of items purchased by Ms Almond for Mr and Mrs Read, and which Chris Read had agreed to buy for them, then they should be deducted from the claim. It was put to Chris Read that it was impossible to calculate payments made between 2002 and 2012 to Ms Almond which were a reimbursement of items she purchased for Mr and Mrs Read. Chris Read conceded certain payments, for example, the airfares.

[214] Ms Almond maintained that she, alone, paid the mortgage on the Property. While the payments might have come out of her account, it is clear she was able to pay the mortgage because of money received from Chris Read and, latterly, Mrs Read. The amounts Chris Read paid occurred at regular intervals and for rounded numbers. The intended purpose of payments of such regularity was as a contribution to the mortgage.

[215] What might be the correct way to calculate an interest in property acquired through making mortgage payments is immaterial. The issue is what was agreed by the parties. I am satisfied it was agreed that Chris Read's contributions were to entitle him to an ever-increasing interest in the Property.

### **Relevant law**

[216] Trusts may be express, constructive or resulting. Briefly summarised:

- (a) An express trust is one which is deliberately established and which the trustee deliberately accepts. It requires the coincidental satisfaction of three certainties: certainty of intention, certainty of subject matter and certainty of object.
- (b) A constructive trust arises by operation of law and possibly through the courts' remedial discretion; it is not directly dependent on the intention of the parties.
- (c) A resulting trust is said to give effect to the presumed intention of the parties.

### *Constructive trust*

[217] A constructive trust usually arises in the context of a de facto relationship but extends to filial relationships.<sup>5</sup>

[218] The decision of *Lankow v Rose* sets out "the essential requirements" of a constructive trust:<sup>6</sup>

[first] that the plaintiff contributed in more than a minor way to the acquisition, preservation, or enhancement of the defendant's assets, whether directly or indirectly; and [secondly] that in all the circumstances, the parties

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<sup>5</sup> See *Stubbs v Holmes* [1999] NZFLR 780 at 789: "the contributions, in order to qualify, must go beyond those contributions to a common household that are adequately compensated by the benefits that the relationship itself confers" and "[a] hidden agenda on the part of the defendant against sharing will not necessarily defeat a claimant if the claimant's expectation that he or she would share was objectively reasonable."

<sup>6</sup> *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 289.



must be taken reasonably to have expected that the plaintiff would share in them as a result.

[219] Tipping J set out the elements a claimant needs to prove in order to establish that equity should regard as unconscionable a defendant's denial of a claimant's interest and so impose a constructive trust on a defendant:<sup>7</sup>

- (a) contributions, direct or indirect to the property in question;
- (b) the expectation of an interest therein;
- (c) that such an expectation is a reasonable one; and
- (d) that the defendant should reasonably expect to yield the claim and interest.

[220] In *Gormack v Scott*, Cooke P added to the principles by making the following observations:<sup>8</sup>

First, ... where there has been an express common intention applicable to the circumstances that have arisen, it is unnecessary to fall back on reasonable expectations.

Secondly, if (as the Judge thought here) the common intention was too vaguely expressed to receive implementation as such, the evidence bearing on common intention may still be relevant in considering the reasonable expectation of the parties.

Thirdly, in considering reasonable expectations, attention is not to be confined to the inception of the relationship or the time when any property in question was purchased. The inquiry extends to the whole circumstances and history of the relationship...

...

The purpose of a constructive trust is generally not to create an ongoing trust relationship, but to force the disgorging of money or property by the constructive trustee. In this way, "a constructive trust is a means to an end".

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<sup>7</sup> *Lankow v Rose*, above n 6, at 294.

<sup>8</sup> *Gormack v Scott* [1995] NZFLR 289, (1995) 13 FRNZ 43 at 47-48.

[221] Within constructive trusts are institutional constructive trusts and remedial constructive trusts. Tipping J in *Fortex Group Ltd (in receivership) v MacIntosh* formulated the distinction in the following way:<sup>9</sup>

An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.

The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependant on any order of the Court. Such order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the order of the Court; such order being creative rather than simply confirmatory.

[222] In *Commonwealth Reserves*, Glazebrook J summarised the distinction as:<sup>10</sup>

The first is that the institutional constructive trust is a mandatory consequence of certain events, while the remedial constructive trust is a discretionary remedy. The second is that the institutional constructive trust exists from the time the events giving rise to it occur, while a remedial constructive trust becomes effective at the time of the Court order.

[223] When discussing the more common examples of institutional constructive trusts, the learned authors of *Equity and Trusts in New Zealand* say:<sup>11</sup>

The common factor in all of these scenarios would appear to be the unconscionability of the defendant in denying the plaintiff an equitable interest in the relevant property because of a previous understanding, whether subjectively agreed upon between the parties or more commonly deemed by the law to have been appropriate in the circumstances. It is the element of consent or intention (or lack of either of these, as the case may be) that triggers the institutional constructive trust which arises to reverse the defendant's unconscionability.

[224] Although the second and third plaintiffs seek an order declaring a remedial constructive trust is held by Ms Almond in favour of the plaintiffs,<sup>12</sup> in my assessment, the issue is whether an institutional constructive trust exists. The

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<sup>9</sup> *Fortex Group Ltd (in receivership and liquidation) v MacIntosh, Cox & Forde* [1998] 3 NZLR 171 (CA) at 173.

<sup>10</sup> *Commonwealth Reserves I, LC v Chodar* [2001] 2 NZLR 374 (CA) at [39].

<sup>11</sup> Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [13.21].

<sup>12</sup> The first plaintiff's cause of action seems to be founded on an institutional constructive trust.

plaintiffs' case is declaratory in nature and the essence of the claims is that Ms Almond has benefitted from an unauthorised profit from her position which has denied the plaintiffs beneficial interest in the Property.

### *Resulting trust*

[225] The two types of resulting trusts are set out in the well-known statements by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington Borough Council*:<sup>13</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 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.

[226] In *Hu v Zheng*, Abbott AJ added:<sup>14</sup>

[32] A resulting trust will be presumed where legal title to land is vested in someone other than the person who is proved to have provided the money for the purchase...

[33] The presumption of a resulting trust may be rebutted by evidence that no trust was intended...

### **Application of the law to the facts**

[227] I am satisfied that, in the circumstances, an institutional constructive trust arises by operation of law. Each plaintiff has clearly contributed in more than a minor way to the purchase of the Property and/or to the improvements on the Property.

[228] Ms Law, who appeared for Ms Almond, submitted that the plaintiffs took no steps to document the purported arrangement, and their evidence on the arrangement

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<sup>13</sup> *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] 2 All ER 961 at 990.

<sup>14</sup> *Hu v Zheng* (2007) 26 FRNZ 501 (HC).

was contradictory and appeared to rely heavily on discussions to which Ms Almond was not a party.

[229] Ms Law relied on *Kwon v Quon* in support of the view that there is a high standard of proof required to show an expectation of sharing in assets and the plaintiffs, she said, have failed to meet that standard.<sup>15</sup> In *Kwon*, the defendant purchased the property with money advanced by the plaintiff brother. The property was in the defendant's sole name. It was intended the mother would live in the house. The defendant argued the money was a gift or her share of an inheritance and not the plaintiff's money even though he advanced it. Allan J found that although the first element of a constructive trust cause of action had been established, there were difficulties with respect to the second element because there was no express or formal agreement about the basis on which the money would be advanced. The Judge noted, “[u]nderstandably enough, finances tend to be discussed only in broad terms during the course of family gatherings”<sup>16</sup> but that “it would have been a simple matter ... to record [the plaintiffs] interest on the title”.<sup>17</sup>

[230] Similarly, Ms Law submitted, Mr and Mrs Read were advised to document the arrangement on which they were to build their subsidiary dwelling on the Property but declined to do so. The defence relies on the evidence of Mr Scott which is that, in his experience, it is highly unusual for a family arrangement involving sums of money and property not to be documented.

[231] I cannot agree with Ms Law’s submission that the reasonable expectation of the parties (that the plaintiffs would share in the Property) fails because of lack of documentation. I accept the plaintiffs’ evidence that they did not think formal documents were necessary because they thought of themselves as part of a family who trusted one another. In any event, the parties agree that the transactions were documented in Fred Read’s notebook (although what was recorded is in dispute) so, to that extent, the comments in *Kwon* are not directly relevant.

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<sup>15</sup> *Kwon v Quon* [2013] NZHC 1431.

<sup>16</sup> At [56].

<sup>17</sup> At [60].

[232] In my assessment, there was an expectation on the part of each plaintiff that he or she would own an interest in the Property and the expectation was a reasonable one. More to the point, however, I have found there was an express common intention shared by the plaintiffs and the defendant and as such, it is unnecessary to fall back on reasonable expectations. The common intention was not too vaguely expressed to receive implementation. In these circumstances, Ms Almond must expect to yield the claim and interest.

[233] Given this finding, it is unnecessary to explore the claims based on knowing receipt and unjust enrichment.<sup>18</sup>

### **Laches**

[234] The question is, then, whether any remedy to which the plaintiffs are entitled should be declined by reason of the doctrine of laches.

[235] The Supreme Court in *Eastern Services Ltd v No 68 Ltd* set out the principles when dealing with the doctrine of laches, in which the following remarks by Lord Selborne in *The Lindsay Petroleum Co v Hurd* were described as “being the classic exposition of the doctrine:<sup>19</sup>

Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

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<sup>18</sup> Knowing receipt is based on breach of fiduciary duty. Its elements are set out in *Equiticorp Industries Group (In Statutory Management) v R* [1998] 2 NZLR 481 (HC) at 541. For the elements of unjust enrichment, see *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [41].

<sup>19</sup> *The Lindsay Petroleum Co v Hurd* (1874) 5 LR PC 221 at 239–240 cited in *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335. Cited with approval in *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at [307].

[236] The Court of Appeal in *Williams v Auckland Council* said what is ultimately required is a balancing of competing rights and equities.<sup>20</sup>

[237] Therefore, for a successful argument against relief, Ms Almond must have an equity which, on balance, outweighs the plaintiffs' rights. In my assessment, she does not. As I have said, the plaintiffs considered that, as a family, they trusted one another and the relationship between the plaintiffs and Ms Almond only broke down completely around the time when Bruce Read was trespassed from the Property in late 2012. By early 2014, it was apparent that the plaintiffs needed to take steps to protect their interests. During that interval, Bruce Read was involved in domestic violence proceedings brought by Ms Almond. It was clear from the Judge's decision that the animosity between the siblings was linked to the Property dispute. It was therefore hardly surprising that the proceedings would be commenced not long after.

[238] Further, I am not satisfied there is any prejudice to Ms Almond by the delay. In fact, the reverse may be true as the Property has continued to increase in value.

[239] I also accept the length of delay is attributed to the difficulty in obtaining evidence given Fred Read's notebook could not be located.

[240] Accordingly, the plaintiffs are not precluded from a remedy by reason of the doctrine of laches.

### **Remedy**

[241] For the purposes of calculating his claim to a proportionate share of the Property, Bruce Read relied on a valuation of the Property undertaken on 18 February 2003 (\$407,000). He added his contribution to the garage of \$6,000, resulting in a total value of \$413,000. He calculated his share given his \$130,000 contribution and then added Rebecca's share of \$30,438.10 (7.37 per cent of \$413,000 on the basis that the girls were recorded as having a 14.745 per cent share of the Property in 2003) bringing him to a total of a 40.3 per cent share of the Property and it is that which he claims in the proceeding.

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<sup>20</sup> *Williams v Auckland Council* [2015] NZCA 479 at [102].

[242] The girls' share of 14.745 per cent was calculated in 2003 based on the valuation which took into account Ms Almond's house but not the subsidiary dwelling which had not been built at the time.<sup>21</sup> With a total Property value (including the subsidiary dwelling at its construction cost) of \$543,970 in 2003, the percentage worth of the girls' investment of \$60,000 represents 11 per cent. If Bruce Read purchased Rebecca's share, he received a 5.5 per cent share of the Property. This share must be deducted from that of Ms Almond given that Ms Almond's share is calculated on the basis of her contributions which included the \$60,000 from the girls.

[243] Mr Woods, acting for Mrs Read and Chris Read, prepared calculations of the contributions by his clients and Bruce Read, as a result of which he claimed their entitlement to shares in the Property are:

- (a) Bruce Read – 28 per cent;
- (b) Mrs Read – 45 per cent; and
- (c) Chris Read – 27 per cent.

[244] In Mr Woods' submission, the end result is that Ms Almond is not entitled to any share in the Property given her disgorgement of funds received. However, this approach does not reflect the contribution that Ms Almond made to the Property. At the very least, she took a mortgage of \$60,000 which was used for the initial purchase. She then paid \$172,850 to build her house, using the \$60,000 from the girls' inheritance.

[245] Mrs Read's second payment of \$10,000 made to Ms Almond and Chris Read's initial contribution of \$30,000, which was effectively paid to Ms Almond, both need to be deducted from Ms Almond's contribution.

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<sup>21</sup> The subsidiary dwelling was not built until 2003 for a cost of \$136,970.

[246] The fact Ms Almond has increased her mortgage is not to be taken into account because there is no evidence that those funds went into the Property. Ms Almond is also entitled to her quarter share of the driveway costs of \$3,125.

[247] Bruce Read is entitled to a share of the Property to reflect his initial contribution of \$130,000 and \$6,000 in respect of the garage. He is then entitled to a 5.5 per cent share from Ms Almond's share in respect of his \$50,000 purchase of Rebecca's interest.

[248] Mrs Read is entitled to a share in respect of her initial contribution of \$20,000 and the funds expended to construct her house, \$136,970, plus her quarter share of her sister's legacy which went towards the cost of the driveway, \$3,125.

[249] Chris Read is entitled to a share of the Property to represent his initial contribution of \$30,000, his payments made directly to Ms Almond of \$105,206 less the money for the airfares (\$7,345) and the ride-on mower (\$6,800). He is also entitled to some of the \$43,034 paid to Mrs Read prior to December 2012. How this should be quantified is extremely difficult because I accept that some money, anyway, was in respect of payments incurred in respect of Mrs Read although Mrs Read does not claim \$60,000 of the amount she paid to Ms Almond prior to April 2008. Given the absence of any evidence and being, in my assessment, generous to Ms Almond, I deduct \$10,000 to reflect this amount.

[250] The obvious difficulty with this approach is there must have been other money expended on making improvements to the Property, the details of which have not been provided. A clear example of this is the balance of the cost of the driveway. The other side of the coin is that Ms Almond, having received funds well in excess of any sum required for her mortgage payments and other outgoings, can be taken to have used at least some of that money towards the cost of improvements to the Property. It is also reasonable to conclude that Mr and Mrs Read over the years contributed to improvements. Indeed, Ms Almond referred to that in her evidence.



[251] The following is the result of this analysis:

Bruce Read:	\$130,000	
	\$6,000	
		\$136,000 (21.08 per cent further adjusted as below to 26.58 per cent)
Mrs Read:	\$20,000	
	\$136,970	
	\$3,125	
		\$160,095 (24.8 per cent)
Chris Read:	\$30,000	
	\$91,061	
	\$33,034	
		\$154,095 (23.88 per cent)
Ms Almond	\$172,000 <sup>22</sup>	
	\$60,000	
	\$3,125	
less	\$40,000 <sup>23</sup>	
		\$195,125 (30.24 per cent further adjusted as below to 24.74 per cent)
		<b><u>\$645,315</u></b>

[252] That calculation results in the entitlement to shares in the Property as recorded. An adjustment is required in respect of Bruce Read's purchase of Rebecca's share (5.5 per cent) which, as explained above, must be deducted from

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<sup>22</sup> \$172,000 is the construction cost of Ms Almond's house and includes \$60,000 from the girls' inheritance.

<sup>23</sup> This reflects the initial contributions from Mrs Read and Chris Read which were paid directly to Ms Almond.

Ms Almond's share, resulting in Bruce Read's share increasing to 26.58 per cent and Ms Almond's share reducing to 24.74 per cent.

### **Court order for the sale of the Property**

[253] Section 339 of the Property Law Act 2007 provides:

#### **339 Court may order division of property**

- (1) A court may make, in respect of property owned by co-owners, an order—
  - (a) for the sale of the property and the division of the proceeds among the co-owners; or
  - (b) for the division of the property in kind among the co-owners; or
  - (c) requiring 1 or more co-owners to purchase the share in the property of 1 or more other co-owners at a fair and reasonable price.
- (2) An order under subsection (1) (and any related order under subsection (4)) may be made—
  - (a) despite anything to the contrary in the Land Transfer Act 1952; but
  - (b) only if it does not contravene section 340(1); and
  - (c) only on an application made and served in the manner required by or under section 341; and
  - (d) only after having regard to the matters specified in section 342.
- (3) Before determining whether to make an order under this section, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.
- (4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.
- (5) Unless the court orders otherwise, every co-owner of the property (whether a party to the proceeding or not) is bound by an order under subsection (1) (and by any related order under subsection (4)).
- (6) An order under subsection (1)(b) (and any related order under subsection (4)) may be registered as an instrument under—
  - (a) the Land Transfer Act 1952; or
  - (b) the Deeds Registration Act 1908; or
  - (c) the Crown Minerals Act 1991.

[254] Any “co-owner” can make an application. The definition of co-owner is in s 4 as a tenant in common or a joint tenant and this extends to the plaintiffs as tenants in common.<sup>24</sup> They therefore have standing to bring this application.

[255] The order sought does not contravene s 340(1) and, since all co-owners of the Property are already parties to this proceeding, the service requirement under s 341 does not apply.

[256] The Court must have regard to the matters set out in s 342. The section provides:

**342 Relevant considerations**

A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:

- (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made:
- (b) the nature and location of the property:
- (c) the number of other co-owners and the extent of their shares:
- (d) the hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order:
- (e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:
- (f) any other matters the court considers relevant.

[257] Although the Court cannot ignore the listed factors, they will not necessarily be decisive in determining whether an order should be made.<sup>25</sup>

[258] If the Court is satisfied that an order should be made, further consequential orders may be made under s 343.

[259] I have regard to the factors listed in s 342, including the shares in the Property as set out above. Ms Almond has had the benefit of occupying the Property

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<sup>24</sup> If the money had been provided in unequal shares, equity presumes the parties took as tenants in common. See *Delehunt v Carmody* (1986) 68 ALR 253 at 256.

<sup>25</sup> *Bayly v Hicks* (2011) 13 NZCPR 568 (HC) at [33].

over the years and to the exclusion of the plaintiffs since January 2013. The other side of the coin, however, is that Ms Almond will suffer hardship if she were to be required to relocate from where she has been living for over 12 years.

[260] The Court has a discretionary power to make an order for the sale of the land so that the proceeds of the sale can then be divided among the former co-owners or, under s 339(1)(c), require one or more co-owners to purchase the share in the property of one or more other co-owners at a fair and reasonable price. Although Bruce Read has applied for the sale of the Property, there is no requirement that the orders made under s 339 can only be those specifically sought by a party.<sup>26</sup> If so driven by one of the factors in s 342, particularly hardship, the Court could make an order for sale although the parties had sought division, for example.<sup>27</sup>

[261] The plaintiffs say the Property should be sold because, given the breakdown of the relationships between the plaintiffs and the defendant, a co-ownership arrangement would be fraught with difficulties. That is clearly the position. The application is granted and, subject to the comments in the remainder of this paragraph, I order the sale of the Property and the division of the proceeds amongst the co-owners in the shares I have determined. The possibility of Ms Almond purchasing the share of the plaintiffs was not addressed and I give leave for the parties to consider whether that is an option they might wish to pursue,<sup>28</sup> although it would seem highly unlikely that Ms Almond will have the necessary funds.

[262] I turn now to the further discretionary powers in s 343 and give leave for the parties to address the matters set out therein to help resolve any practical issues, specifically as to the mode of sale and agent and whether a reserve price should be fixed.<sup>29</sup> The parties are to file memoranda no later than 20 days after the date of this decision and the matter will be dealt with on the papers.

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<sup>26</sup> *Bayly v Hicks* [2012] NZCA 589, [2013] 2 NZLR 401 at [27].

<sup>27</sup> Above n 26, at [26].

<sup>28</sup> *Bayly v Hicks*, above n 26, at [34]; “Of course any consideration on the part of a judge of orders that are different from those actually sought and argued by the parties must be clearly notified to the parties and then, after they have had suitable time to prepare, they must be heard on the new proposal.”

<sup>29</sup> Property Law Act 2007, s 339(4).

**Did Ms Almond act in breach of her duties as Mrs Read's attorney in relation to the payment of money to her from Mrs Read's bank account?**

[263] The final question to be considered is whether Ms Almond acted in breach of her duties as Mrs Read's attorney in relation to the payment of money from Mrs Read's bank account.

*Relevant law*

[264] Section 93A(1) of the PPPR Act enables the donor to grant to another person enduring powers of attorney to act in relation to the donor's property affairs while the donor is mentally capable and if the donor becomes mentally incapable.

[265] An enduring power of attorney under the PPPR Act is a special form of agency and a special form of attorneyship. It is a creature of statute; there is no equivalent common law instrument. The thinking behind the enduring power of attorney under the PPPR Act is summarised in a discussion paper on enduring powers by the Law Commission in 2000.<sup>30</sup>

A power of attorney is simply a formal type of agency under which the donor appoints the attorney as agent, to do certain things that the donor himself has the legal right to do. The law of agency provides that an agent may not have powers greater than those of the donor, which is logical enough. The difficulty in the present context was, however, that if the donor's loss of mental ability was so severe that the donor ceased to possess the capacity to perform the delegated acts, the agent's powers to do those acts also came to an end. Often in the cases of powers of attorney granted by the elderly this meant that the power ceased to be effective in the very situation where it was most needed...

The solution to this problem... was to provide by legislation that the power of attorney would continue in effect despite the donor's supervening incapacity

[266] The following provisions indicate that the duties under part 6 of the PPRA are intended as an added layer of protection to apply in circumstances where the donor is mentally incapable or has, since the creation of an enduring power of attorney, become mentally incapable:

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<sup>30</sup> Law Commission *Misuse of Enduring Powers of Attorney* (NZLC PP40, 2000) at 2.

- (a) The paramount consideration of the power of attorney in relation to property is set out in s 97A which provides:

**97A Exercise of enduring power of attorney in relation to property**

(1) This section applies to an attorney acting under an enduring power of attorney in relation to the donor's property if the donor of the power becomes mentally incapable.

(2) The paramount consideration of the attorney is to use the donor's property in the promotion and protection of the donor's best interests, while seeking at all times to encourage the donor to develop the donor's competence to manage his or her own affairs in relation to his or her property.

(3) This section applies regardless of whether the enduring power of attorney is of the type referred to in section 97(4)(a) or (b).

- (b) Section 97(2) provides:

Where a donor of an enduring power of attorney authorises the attorney to act generally in relation to the whole or a specified part of the donor's affairs in relation to the donor's property, the attorney shall have authority to do anything on behalf of the donor that the donor can lawfully do by an attorney, but subject to sections 100 and 107 and to any conditions or restrictions contained in the enduring power of attorney.

- (c) Section 107 provides that the attorney must not act to the benefit of the attorney or of a person other than the donor, or recover any expenses from the donor's property, unless and only to the extent provided under s 107(1). The section, however, applies only while the donor is mentally incapable.

- (d) Section 99(c) requires the attorney to keep records of each financial transaction entered into by the attorney under the enduring power of attorney while the donor is mentally incapable.

[267] The justification for greater scrutiny under the PPPRA must be that a donor who is mentally incapable is unable to "supervise" the actions of his or her attorney in the way a person who is mentally capable might.

[268] Ms Almond remains mentally capable. The question is whether Ms Almond has breached her fiduciary duties of loyalty and not to profit at the expense of Mrs

Read,<sup>31</sup> who is the person to whom the duty of loyalty is owed.<sup>32</sup> As attorney, her duties were to act with absolute openness and fairness to Mrs Read, exercise reasonable care in all the circumstances (including acting with reasonable prudence in the management of her financial affairs), keep personal and fiduciary property separate and avoid conflicts of interest.<sup>33</sup>

[269] Although Ms Almond was denied access to Mrs Read's bank account shortly after Fred Read's death in 2009, by mid June 2011 she once again had access to the account. In June 2011, Mrs Read gave her power of attorney over all her affairs and this authorised her to act despite Mrs Read being mentally capable.

[270] Ms Almond did not accept that she was acting pursuant to the power of attorney and claimed every payment made from her mother's account was authorised by Mrs Read. Mrs Read did not agree, however, that any internet bank transfers out of her account by Ms Almond were always done in her presence although she did agree that if she had any doubts at the time she would not have allowed Ms Almond to have internet access or given her power of attorney.

[271] Two days after the power of attorney was granted, \$1000 was transferred from Mrs Read's account to Ms Almond's account followed by regular payments of \$1300, \$600 and \$1000. Despite these payments being for round sums, Ms Almond maintained they were simply repayment to her of expenses incurred on her mother's behalf and that they may have been rounded up. In total, \$40,076 went into Ms Almond's account throughout that period (20 months) using internet banking.

[272] On 13 March 2013, Mrs Read revoked the enduring power of attorney in favour of Ms Almond and appointed Bruce Read her attorney for both property and personal care and welfare.

[273] As the attorney for property, Ms Almond had a duty not to profit at the expense of Mrs Read, and to be open and fair. She breached those duties. The fact

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<sup>31</sup> See generally, *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 NZLR 163 (PC).

<sup>32</sup> The relationship of donor and donee is inherently fiduciary, see: *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [73]; and *Public Trust v Veron* [2015] NZHC 1928 at [135].

<sup>33</sup> See *Public Trust v Veron*, above n 32.

that two days after the power of attorney was granted, such a large sum was transferred from Mrs Read's account to Ms Almond's account followed by other large payments raises the irresistible inference that Ms Almond was abusing the power of attorney. From the amount claimed, however, authorised outgoings in relation to utilities and food need to be deducted.

[274] During this 20 month period, approximately \$2,000 per month was transferred from Mrs Read's account to Ms Almond. A reasonable allowance for utilities and food needs to be made on the basis of Ms Almond's handwritten notes, discussed at [208] above. An average of the monthly expenditure net of the mortgage is \$545. If that is taken as the justifiable monthly payment, it equates to \$10,900 over the period. This leaves an unauthorised total payment of \$29,176.

[275] Mrs Read is entitled to separate award of \$29,176 plus interest.

### **Result**

[276] For the reasons given, the plaintiffs' claims succeed in large part. They are entitled to shares in the Property in the proportions set out in paragraph [251]. An order for the sale of the Property is made subject to the comments at paragraphs [261] to [262].

[277] Mrs Read's claim that Ms Almond breached her duties as Mrs Read's attorney succeeds, entitling Mrs Read to compensation of \$29,176 plus interest.

[278] Given the result, the plaintiffs are entitled to costs. If agreement cannot be reached, the plaintiffs are to file a memorandum within 28 days and the defendant's response is required 14 days thereafter.

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Thomas J