IN THE COURT OF APPEAL OF NEW ZEALAND

CA173/2015
[2016] NZCA 151

BETWEEN	HILARY JANE CALVERT AND HGW TRUSTEES LIMITED AS TRUSTEES OF THE FRONGOPOULOS TRUST AND ANOR First Appellants
AND	CHRIS JAMES Second Appellant
AND	GRANT BRUCE REYNOLDS AS LIQUIDATOR OF JAMES DEVELOPMENTS LIMITED (IN LIQUIDATION) Respondent

Hearing:	16 March 2016
Court:	Harrison, Stevens and Miller JJ
Counsel:	M R Sherwood King and MAF Gilkison for Appellants M J McCartney QC and A C Sorrell for Respondent
Judgment:	22 April 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed to the extent that:

(1) judgment is entered for the respondent against the second named appellant for the sum of $740,000 plus interest at the rate prescribed by the Judicature Act 1908 from 6 July 2009; and

(2) interest is payable by the first named appellants on the sum of $740,000 also from 6 July 2009.

C The order for stay of judgment in the High Court is discharged.

D The respondent is entitled to costs for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The liquidator of James Developments Ltd (JDL), Grant Reynolds, sued the trustees of the Frongopoulus Trust (the trust) to recover a debt of $740,000 together with interest. The trustees did not deny their indebtedness but defended the liquidator's claim on the ground that it was time barred.

[2] Dunningham J rejected the trustees' defence following a trial in the High Court at Christchurch.[1] She found that the trustees had fraudulently concealed the claim from the liquidator. The commencement of the limitation period was deferred accordingly. She entered judgment against the trustees for $740,000 plus statutory interest from the date of the liquidator's demand for repayment.

[3] The trustees appeal against the Judge's decision to enter judgment against them. JDL's sole director, the second named appellant Chris James, appeals against findings that he breached his duty to the company to act in good faith, even though judgment was not entered against him. The liquidator cross-appeals against (1) the Judge's dismissal of other causes of action against the trustees and Mr James and (2) her decision on the date from which interest is payable.

Facts

[4] The relevant facts are not in contest. Mr James is a property owner in Dunedin and Central Otago with interests in a variety of commercial entities. In early 2006 Mr James settled the trust for the benefit of himself and his family.

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[1] *Reynolds v Calvert* [2015] NZHC 400 [HC decision].

[5] The original trustees of the trust were HGW Trustees Ltd, the second named first appellant (HGWT), and Brocal Trustees Ltd (Brocal). HGWT is a trust company in Dunedin. It is owned and controlled by Harvie Green Wyatt Ltd, a firm of chartered accountants in Dunedin. Among HGWT's directors are Douglas Harvie and Todd Miller. Mr Miller is the partner primarily responsible for accounting work for Mr James and his interests including JDL and the trust.

[6] Brocal is also a trustee company. Its directors are Hilary Calvert, the first named first appellant, and her husband, Alistair Broad. Both are Dunedin solicitors. Ms Calvert has also acted as a lawyer for the trust.

[7] Mr James is JDL's sole director. Anderson Lloyd Trustee Co Ltd is its sole shareholder.

[8] Sometime in 2006 the trust agreed to buy land at Jack's Point in Queenstown for $2.6 million. On 3 October 2006 JDL loaned the trust $740,000 to be applied towards the purchase price. The advance was recorded in JDL's accounts as an asset and correspondingly in the trust's accounts as a liability. Settlement of the transaction occurred on 1 December 2006. The trustees then constructed a substantial residence on the land.

[9] In April 2009 a company called Mana Property Trustee Ltd entered summary judgment against JDL for $4 million. Shortly afterwards, on 1 July 2009, Mr James met with his professional advisors including Messrs Miller, Colin Withnall QC and a solicitor, Michael Van Aart. During the meeting, Mr James signed this resolution on behalf of JDL:

> Background:
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> On 3 October 2006 a cash withdrawal of $740,000 was made from the company bank account. This withdrawal was incorrectly narrated in the company computer ledger, and subsequently in the company financial statements, as an advance to the trust. The correct treatment of this advance was as a repayment of earlier advances from Chris James ($500,000) and Heriot Holdings Limited ($240,000). Heriot Holdings Limited is wholly owned by Chris James.

> Resolved that:
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> The 2009 company financial statements be amended to correctly record the $740,000 withdrawal on 3 October 2006 as a repayment to the advances made by Chris James $500,000 and Heriot Holdings Limited $240,000.

[10] This resolution purported to convert an asset in JDL's ownership — a loan to the trust of $740,000 — into a payment made in settlement of an existing liability to Mr James and one of his companies.

[11] On 6 July 2009 JDL was placed into voluntary liquidation by a shareholders resolution. Messrs Iain Nellies and Paul (Gus) Jenkins were appointed as JDL's first liquidators.

[12] On 10 November 2009 Ms Calvert was appointed a trustee of the trust in place of Brocal; HGWT remained as the other trustee.

[13] On 25 November 2010 Mr Reynolds replaced Messrs Nellies and Jenkins as JDL's liquidator. He started an investigation into JDL's financial position. Dunningham J found that he was given little financial information, apart from the company's accounts for the years ending 31 March 2008 and 2009 and its 1 July 2009 resolution.[2] Mr Reynolds then embarked upon what the Judge called "a drawn out process" of requesting information from Mr James and JDL's advisers to verify the 1 July 2009 resolution.

[14] Mr Reynolds was finally able to interview Messrs James and Miller on 30 May 2012 by resorting to the liquidator's coercive power under s 261 of the Companies Act 1993. As a result, Mr Reynolds was satisfied that the 1 July 2009 resolution was incorrect; and that, based on JDL's own bank statements, the company had paid $740,000 to the trust through a conduit entity on 3 October 2006. On 26 June 2012 he made demand on the trustees to repay the advance plus interest calculated from 4 October 2006.

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2 At [34].

[15] Despite the clear evidence of their liability to repay the $740,000 to JDL, the trustees rejected the liquidator's demand. Mr Reynolds issued this proceeding in November 2012 as a consequence.

High Court

[16] The liquidators' statement of claim pleaded multiple causes of action against Mr James and the trustees. Apart from a claim on the debt, he sued on a resulting or constructive trust, for breach of fiduciary duty, for dishonest assistance, for breaches of duties owed under the Companies Act (including s 131) and for dispositions prejudicial to the liquidator and/or creditor.

[17] By the time of trial in August 2014 the trustees accepted that the 1 July 2009 resolution was wrong. Nevertheless, they raised two affirmative defences to the contract claim. The first affirmative defence, and the only one now pursued, is that the liquidator's claim was time barred by operation of s 4(1) of the Limitation Act 1950 because it was filed in the High Court on 20 November 2012, more than six years after the cause of action arose on 3 October 2006.

[18] In answer Mr Reynolds pleaded that the trustees had acknowledged the debt,[3] which the Judge rejected,[4] or that the cause of action was fraudulently concealed. Mr Reynolds relied on s 28 of the Limitation Act which materially provided:

> **28 Postponement of limitation period in case of fraud or mistake**
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> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
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> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
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> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
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> (c) the action is for relief from the consequences of a mistake,—

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3 Limitation Act 1950, ss 25 and 26.

4 HC decision, above n 1, at [76].

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
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> …

[19] The Judge found that the liquidator's right of action was concealed by the fraud of the trustees;[5] and that the concealment was not reasonably discoverable until 6 January 2011, some 18 months after JDL's liquidation.[6] Accordingly, the limitation period did not start running until that date. The proceeding was filed on 20 November 2012, well within the limitation period. Judgment was entered for the liquidator on the debt claim accordingly.

[20] Two other findings made by the Judge are also relevant. First, she dismissed the liquidator's claim for interest on the judgment debt running from a date before Mr Reynolds' formal demand for repayment. Second, she found that in approving the 1 July 2009 resolution Mr James had breached his duty to act in good faith as a director of JDL under s 131 of the Companies Act.[7] But she dismissed this cause of action on the ground that Mr James' breach did not cause any loss.[8]

Decision

[21] The trustees appeal the judgment on a number of grounds which we shall address in the same order as they were raised by Mr Sherwood King who appeared for Mr James as well.

(1) Fraud

[22] First, Mr Sherwood King submitted that the Judge erred in finding that the trustees fraudulently concealed the liquidator's right of action against them by passing the 1 July 2009 resolution, by taking steps to implement the fraudulent resolution in the 2009 financial statements of both JDL and the trust, and by subsequently misleading the liquidator. Dunningham J described the 1 July 2009

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5 At [79] and [84].
6 At [91].
7 At [118].
8 At [119]–[120].

resolution as "a deliberate, if unsophisticated, device to remove the asset from JDL's balance sheet to avoid relinquishing it to JDL's main creditor".[9] She found that:

> [79] Having heard both Mr James and Mr Miller give evidence, I am satisfied that neither the trustees nor JDL genuinely believed there was a proper basis for the recoding of the transaction and for the consequent amendments to the accounts. Indeed, both the trustees and Mr James knew that the $740,000 was an advance by JDL to the Trust, but the liquidator was not so aware. Furthermore, when the liquidator made inquiries about the transaction, there was a deliberate failure to provide full answers which would have demonstrated that the terms of the resolution were false.
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> [80] Given their knowledge of the true circumstances, the combination of the trustees' resolution confirming the accounts, including the recategorisation of the $740,000 as owing to Mr James, not JDL, coupled with the changes to JDL's accounts, was fraudulent. The steps taken to implement the resolution were intended to remove an asset of JDL from the accounts of JDL and the Trust so that the creditor would not be aware of it and would be deprived.
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> …
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> [84] In my view, there can be little doubt that the removal of the $740,000 liability from the accounts of the Trust was dishonest. First, I am satisfied that at the time the resolution was drafted there was no evidential basis for the explanation provided for it and both the drafters and the signatory knew it to be untrue. Second, it is now accepted by all parties that the recoding of the $740,000 should never have taken place. Its only purpose was, at least superficially, to ensure the $740,000 was removed as an asset of the company, and was done so in a way that avoided the application of the voidable preference regime. Although the dishonesty was, with diligence, found out, it certainly led the liquidator, for a considerable period of time, to assume the company had no assets to meet its creditors.

[23] The fraud effectively operated as a concealment, the Judge found, when Mr Miller altered the trust 2009 financial statements on 21 September 2009.[10] This was the last of the steps necessary to implement the process started by the 1 July 2009 resolution.

[24] The 1 July 2009 resolution was plainly intended to mislead JDL's liquidator in the event that the company was wound up. At trial Messrs James and Miller had sought to pass blame onto each other and also to the lawyers for fabricating the document. Dunningham J found that Mr Miller was primarily responsible for

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9 At [51].
10 At [86].

advising about the steps to be taken to remove the $740,000 loan from JDL's accounts as an asset.[11]

[25] The Judge found that Mr Miller was an evasive witness.[12] She was satisfied that he drafted the resolution, that the lawyers present were not involved and, most significantly, that when he drafted the resolution Mr Miller knew Mr James and his associated company had not made the advances which JDL purported to repay. As the Judge found:

> [28] The draft accounts for JDL for the year to 31 March 2009 were amended on or about 2 July 2009 to reflect the terms of the resolution by removing the asset of $740,000 and reducing advances from Mr James by $500,000 and from Heriot Holdings Limited by $240,000. Mr Miller also accepted that he had to make a corresponding entry in the Trust accounts to "recode" the $740,000 liability of the Trust, as being a liability to Mr James, and that this amendment was made to the Trust's accounts on 21 September 2009, which was shortly after liquidation.

[26] We interpolate to observe that the Judge's adverse findings of knowledge against the trustees were on the unarticulated premise that Mr Miller, acting in his capacity as a director of HGWT, was the trustees' agent for these purposes. We shall return to this point later.

[27] Mr Sherwood King did not challenge or attempt to engage with the Judge's primary and decisive finding that both Messrs James and Miller knew the 1 July 2009 resolution was false when preparing and signing it. Instead he advanced a submission that the resolution could not have been fraudulent because it was prepared in reliance on professional advice. He referred to a file note made by Mr Miller on the front of JDL's draft 2009 accounts when he returned to his office after the meeting on 1 July. It was, Mr Sherwood King said, the only contemporaneous record of the meeting, and supported a proposition that the trustees acted on advice from Mr Withnall QC. Such conduct was, he submitted, inconsistent with fraud.

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11 At [26].
12 At [27].

[28] Mr Miller's note recited:

> Remove advance
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> See Page 4
>
> (FINISH) As advised by Colin Withnall

[29] Mr Withnall was subpoenaed to give evidence at trial. He had no recollection of the meeting or of advising Mr James or JDL about accounting entries. It would, he said, have been most unusual if he had been asked to advise on such issues, given that he was instructed solely on the conduct of JDL's litigation with Mana.[13] Mr van Aart also denied giving any advice about JDL's accounting treatment of the $740,000.[14]

[30] Mr Sherwood King accepted that the findings of fraud made by the Judge were open to her. Indeed, in our view, they were the only findings open to her. There was overwhelming evidence of Mr Miller's advice to Mr James to sign what they both must have known was a false and misleading company record and of his alteration of the financial statements of both parties to the transaction to implement the underlying falsehood. An oblique file note is not, on its own, of any evidential value. Its evidential inconsequence was put beyond doubt, as Ms McCartney QC pointed out, by Mr Miller's acknowledgement at trial that his note was not intended to convey that Mr Withnall advised Mr James to alter JDL's accounts. Mr Miller's own admission is an emphatic answer to Mr Sherwood King's submission.

(2) Concealment

[31] Second, Mr Sherwood King submitted that Dunningham J erred in finding that the trustees concealed the right of action from the liquidator. There was no concealment, he said, because the asset — JDL's loan of $740,000 to the trust — appeared in the 2008 financial statements given to the liquidator and in the comparable column in the 2009 financial statements. He referred also to a Post-It note made by Mr Harvie allegedly attached to the resolution in JDL's minute book provided to the original liquidators in August 2010. The note purported to advise:

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[13] At [24].
[14] At [25].

> Background not correct. Minute is factual and authority for the journal entry. Okay.

[32] This submission is misconceived. By falsely altering JDL's financial statements to give effect to a fabricated resolution the participants removed evidence of an asset from the company's balance sheet. As the Judge found, the steps taken to implement the resolution were intended to conceal, and did in fact conceal, the truth from the liquidator and deprive the creditor of its remedy.[15] It is no answer to say that another document or documents might have given a clue to the existence of this fraud. That goes to the separate question of whether the liquidator could with reasonable diligence have discovered the concealment. And it must follow that concealment of the evidence of the company's asset necessarily concealed a cause of action for its recovery.

[33] Moreover, Mr Harvie's Post-It note does not assist the trustees. As Ms McCartney observed, the notation is itself misleading and dishonest and perpetuates the underlying fraud. It purported to transmit a mixed and confusing message. But by affirming the operative part of the resolution Mr Harvie, who knew of Mr Miller's deception, was assuring the liquidators that the resolution was in fact accurate.

[34] We add that the concealment practised by Messrs James and Miller did not end with the fabricated resolution and falsified accounts. It was a continuum through until 30 May 2012. The Judge recited extensive evidence of a deliberate stance adopted by Messrs James and Miller over a nine month period in giving delayed, evasive and misleading answers to the liquidator's enquiries about the status of the $740,000.[16] One significant example is Mr Miller's advice to the liquidator on 11 August 2011 in his capacity as director of HGWT. He said that the trust's accounts had been amended to rectify an incorrect narration in the "client computer ledger as advance to Frongopoulus Trust"; and that the trust's financial statements now showed the $740,000 as an advance from Mr James which was "consistent with the [JDL] resolution dated 1 July 2009".[17]

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15 At [80].
16 At [36]–[45].
17 At [44].

[35] Mr Sherwood King did not attempt to challenge the Judge's findings that throughout this period Messrs James and Miller pretended to the liquidator that the 2009 financial statements of both JDL and the trust accurately recorded that the latter was not indebted to the former for $740,000 when they knew the truth, which they concealed, was otherwise.

(3) Reasonable diligence

[36] Third, Mr Sherwood King submitted that the Judge erred in finding that the liquidator could not with reasonable diligence have discovered the fraudulent concealment until 6 January 2011. In her judgment it would have taken a reasonably diligent liquidator 18 months from the time of appointment to uncover the truth.[18] She treated that date as the commencement of the six year limitation period, rather than as suspending the limitation period during the period of concealment.[19] Counsel did not address argument on which approach is correct — whether the concealment has an absolute or suspensory effect — and in any event determination of the point would be academic because on either approach the legal requirements of s 28 of the Limitation Act would be satisfied.

[37] The real question, to be determined objectively, is whether the liquidator "*could* with reasonable diligence have discovered" the fraud within a few months of his appointment.[20] This standard requires reasonable, not exceptional, diligence. The touchstone is how a notionally competent liquidator with adequate resources would act if motivated by a reasonable sense of urgency.

[38] The thrust of Mr Sherwood King's argument is that if Mr Reynolds or his predecessors had made competent and informed inquiry, by resorting to statutory powers where necessary, they would have discovered the truth — the real facts — immediately upon or shortly after appointment. He relies on the evidence of Shaun Adams, an insolvency expert who was a witness at trial, to the effect that:

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18 At [91].

19 At [94]. See also *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 (HL) at 145 per Lord Browne-Wilkinson.

20 *Paragon Finance Plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 (CA) at 418, cited in *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [155].

(1) because JDL's 2008 financial accounts had not been changed the true position was obvious;

(2) the 2009 financial statements and the 1 July 2009 resolution showed the trustees owed JDL $740,000 on 31 March 2008 but the advance had been reduced to a nil balance by 31 March 2009; and

(3) a competent liquidator could have challenged JDL's removal of the asset by issuing a notice under s 294 of the Companies Act or by earlier resorting to the power to obtain documents and information under s 261.

[39] We do not accept Mr Sherwood King's submission. An inconsistency between entries in JDL's financial statements for 2008 and 2009 was only evidence of that fact. It did not disclose the fraud. The same observation applies to the disappearance of an asset between two financial years, for which there may have been an innocent explanation as Messrs James and Miller later pretended there was. At best, these events might have put a competent liquidator acting reasonably on inquiry. However, as the Judge found, being on notice of a line of inquiry is not the same as having a proper factual foundation for bringing a claim for payment of the debt.[21]

[40] We need only to consider Mr Reynolds' actions. By 27 May 2011, about six months after his appointment, he was on notice that JDL's financial statements were unreliable. On that date he resorted to his powers under s 261(3)(b) of the Companies Act to obtain documents and information from Mr Miller. Mr Miller's replies were misleading or, as the Judge found them, "evasive".[22] Mr Miller continued to mislead Mr Reynolds for a further year. It was not until 30 May 2012 when the liquidator invoked his power under s 261(3)(c) to examine Messrs Miller and James on oath that the truth emerged.

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21 HC decision, above n 1, at [85].
22 At [40].

[41] Mr Sherwood King's proposition is that, if Mr Reynolds had been more proactive, Messrs Miller and James would have admitted their fraud earlier. Mr Sherwood King said that Messrs Miller and James would always have responded truthfully when on oath even though they had misled Mr Reynolds earlier. In other words, the liquidator and not them or the trustees should bear responsibility for the consequences of any delays in forcing them to concede their wrongdoing.

[42] In our judgment it is not open to those who have practised a fraud on a third party in circumstances such as these, for the very purpose of misleading him, to say that he failed to exercise reasonable diligence to uncover their deception. An accountant would not readily suspect a fellow professional of falsifying company records or financial statements or of giving evasive answers to unequivocal enquiries. Mr Reynolds was entitled to accept at face value what Mr Miller, a fellow professional accountant, initially told him. It was only as a result of Mr Reynolds' persistence in the face of a strategy designed to obscure the truth that Mr Miller's dishonesty unravelled. And, even when Messrs Miller and James received the liquidator's statutory notice to make themselves available for cross-examination on oath, they did not cooperate or reveal the truth. Instead, they forced the liquidator right to the wire. By any standard, Mr Reynolds was required to exercise exceptional diligence to discover the real facts.[23]

[43] The liquidator would have been unlikely to make progress in uncovering the fraud by resorting to s 294 of the Companies Act. In order to invoke the procedure for setting aside a transaction the liquidator must first establish that the transaction is an insolvent transaction within the meaning of s 292. Apart from issues about whether the 1 July 2009 resolution satisfied the statutory definition of an insolvent transaction, the liquidator would have required a proper evidential basis for the transaction itself before filing an application in the High Court including all the primary documents and records.

[44] The inference readily available from Messrs James and Miller's conduct is that such an application by the liquidator under s 294 would have been opposed, whether by JDL's shareholder or the trustees. It would have been an expensive,

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[23] *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2000] 3 All ER 493 (CA) at 501.

protracted and possibly inconclusive exercise. Mr Adams' suggestion that the liquidators should have followed this course does not merit further consideration.

(4) Trustees' fraud

[45] Fourth, Mr Sherwood King submitted that:

(1) There was no evidence that the trustees themselves fraudulently concealed JDL's right of action against them. In particular, there was no evidence of Ms Calvert's participation in the concealment. She was not appointed a trustee until 10 November 2009, some months after the 1 July 2009 resolution and Mr Miller's alteration of the trust's financial statements.

(2) While Mr Miller's status as a director of HGWT made him an agent of that trustee, he was not acting in his capacity as agent for the trustees collectively when preparing and advising on the 1 July 2009 resolution and subsequently altering the accounts of both parties.

[46] Mr Sherwood King's written synopsis criticised the Judge for not answering these points. But before us he acknowledged that he did not advance or develop this argument in the High Court. His omission explains why the Judge has not addressed it or made factual findings about the state of knowledge of each trustee. We would have had no hesitation in remitting the proceeding back to the High Court for determination of these issues were it necessary to do justice between the parties. However, we are satisfied that we are in a position to address Mr Sherwood King's submission by reference to the undisputed facts.

[47] In terms of s 28 of the Limitation Act, the operative concealment is by "the fraud of the defendant or his agent". This statutory exception to the limitation period will be effective if we are satisfied that the trustees' agent committed the fraudulent concealment. It is sufficient if the person or persons who committed the fraudulent concealment was or were acting for or on behalf of the trustees. Proof that the trustees themselves were guilty of fraudulent concealment is unnecessary.

[48] Our interest is in the conduct of both Messrs Miller and James who appeared to act in concert. Mr Miller wore a number of agency hats. He was a director of HGWT, one of the two trustees. He prepared accounting records and associated documents for JDL. And he performed the same function for the trustees.

[49] It is necessary in this context to briefly recite each material step taken by Mr Miller: (1) he drafted the 1 July 2009 resolution for JDL; (2) he altered JDL's financial statements for the year ending 31 March 2009; (3) he made the necessary journal transfers in the trust's accounts in September 2009; (4) he altered the trust's 2009 financial statements; (5) he drafted the resolutions signed by the trustees confirming that the 2009 financial statements were correct; and (6) he sent letters on 11 August 2011 and 1 September 2011 in answer to the liquidator's enquiries of the trustees.

[50] Mr James' participation is equally relevant. He was the settlor of the trust. He is also a beneficiary along with his children and any grandchildren. Without doubt, he exercised effective control over the trust and also acted as its agent whenever it suited him. As Mr Sherwood King tellingly observed in argument, Mr James' participation in the concealment process was driven by his attitude that "it's all my money".

[51] The plan devised by Messrs James and Miller was for the sole and ultimate purpose of benefiting the trust. By concealing from the liquidator the existence of JDL's right of action they would ensure that the trustees were relieved of their contractual liability to repay $740,000. In order to provide the necessary evidential symmetry, the plan required that the records of both parties to the transaction be altered.

[52] When viewed in this light the whole concealment exercise, commencing with the 1 July 2009 resolution through to the 30 May 2012 examination on oath, was undertaken by Messrs James and Miller for and on behalf of the trust. We are satisfied that they were acting as the trustees' agents for the purpose of concealing their liability to the liquidator. Their fraudulent conduct in that capacity achieved the necessary concealment for the purpose of s 28. It does not matter that Mr Miller

was, for example, acting within the formal scope of his agency for JDL when preparing the resolution or altering its financial statements. Nor does it matter that he was acting formally as the trustees' agent when altering its accounting records or financial statements or answering the liquidator's enquiries of the trustees on 11 August 2011. A strict legal analysis of each particular agency function serves no purpose where the trustees were throughout hiding the truth of their liability from the liquidator through those same agents.

[53] Mr Sherwood King's observation about Mr James' attitude confirms that in reality Mr James exercised all powers of control and decision-making for both JDL and the trust, despite his use of separate structures and entities to delineate legal ownership of assets; and that when carrying out Mr James' instructions Mr Miller acted in multiple capacities but throughout for the trustees' benefit.

[54] Mr Sherwood King submitted that, even if Messrs James and Miller were guilty of fraudulent concealment of JDL's right of action against the trustees, Ms Calvert is not bound by their misconduct. That is because she was not appointed as a trustee until 10 November 2009, after Mr Miller had completed the mechanical steps of altering the accounting records and financial statements of both parties. In reliance on this Court's decision in *Hansard v Hansard*,[24] Mr Sherwood King said that Ms Calvert was not bound in the absence of evidence that she has affirmatively ratified Mr Miller's actions.

[55] This submission is misconceived. Questions of ratification only arise where a trust instrument requires trustees to act unanimously and the question is whether one trustee has given his or her informed or conscious consent to the unilateral actions of another trustee. The principle has no application where the question is simply whether for the purposes of s 28 of the Limitation Act the conduct of a third party or parties can be attributed to the defendant. We add that the fraudulent concealment practised by Messrs Miller and James continued through the period of Ms Calvert's appointment, and she has since elected to adopt a defence based upon that concealment.

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[24] *Hansard v Hansard* [2014] NZCA 433, [2015] 2 NZLR 158.

[56] Ms McCartney referred to a body of evidence that Ms Calvert must have known the trust's 2009 financial statements were wrong when she signed them. For example, Ms Calvert, who did not give evidence at trial, had acted as solicitor for the trust on its purchase of the Jack's Point property. However, it is unnecessary for us to embark upon an inquiry into whether Ms Calvert herself was guilty of fraudulent concealment given our finding that the trustees' agents were culpable.

[57] It follows that the trustees' appeal fails.

Cross-appeal

(1) Companies Act 1993

[58] Dunningham J found that Mr James was in breach of his duty to act as a director of JDL in good faith and in what he believed to be its best interests. Mr James' breach was in signing the 1 July 2009 resolution when he knew it was incorrect, intending to place the company's asset — a right to recover a debt of $740,000 — out of the reach of JDL's creditors.[25] However, the Judge declined to grant relief on the ground that Mr James' breach had been cured by his later admission that the resolution was ineffective and by her finding that the trustees are liable to pay the company $740,000.[26] As a result, his breach did not cause the company any loss. Mr Sherwood King does not challenge the findings of breach but supports the Judge's conclusion.

[59] The High Court has a broad statutory power where it has found a director guilty of breach of trust to order that person to contribute such sum to the company's assets by way of compensation as the Court thinks just.[27]

[60] We disagree with the Judge that Mr James cured his breach by an admission that the 1 July 2009 resolution was wrong. His breach remained operative throughout the relevant period. As Ms McCartney submitted, Mr James' breach was effectively that of a fiduciary in misusing his office as JDL's director to prefer the interests of his family members, the beneficiaries of the trust. In removing evidence

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25 HC decision, above n 1, at [118].
26 At [119].
27 Companies Act, s 301. See *Mason v Lewis* [2006] 3 NZLR 225 (CA) at [107]–[110].

of JDL's assets from its financial records, Mr James attempted to give the trust a limitation defence to which it was not otherwise entitled in order to defeat the liquidator's claim to recover its indebtedness. The fact that the loss arising from Mr James' breach is contingent upon an affirmative finding on the limitation defence does not affect the causative nature of his misconduct. He remains concurrently liable with the trustees for the company's loss.

[61] The liquidator is entitled to judgment against Mr James for $740,000 plus interest. Any issues of satisfaction of the judgment as between the appellants can be resolved on enforcement.

(2) Interest

[62] The liquidator claimed interest from the date of liquidation being the date from which he became entitled to JDL's assets. However, the Judge awarded interest at the Judicature Act 1908 rate only from 27 June 2012. She held that it was inappropriate to award interest from the date the cause of action arose down to the date of judgment because (1) it would effectively alter the terms on which the funds were advanced by making interest payable and (2) it would be inconsistent with the terms of s 28(b) of the Limitation Act.[28]

[63] We agree with Ms McCartney that the Judge erred in this respect. A liquidator's principal duty is to realise and distribute the assets of a company to its creditors.[29] If JDL's financial records — including the draft balance sheet for the period ending 30 June 2009 given to the original liquidators — had accurately recorded JDL's loan of $740,000 to the trustees, it must be inferred that the liquidators would in discharge of their statutory duty have made immediate demand on the trustees for repayment. Instead, as a result of the fraudulent concealment practised by Messrs James and Miller, Mr Reynolds was not in a position to prove the trustees' liability for the debt until 26 June 2012 when he made formal demand.

[64] In our judgment interest should run from the date on which the liquidator would have made demand on the trustees but for the fraudulent concealment. The

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[28] HC decision, above n 1, at [129].
[29] Companies Act, s 253(a).

appropriate date is 6 July 2009, the date on which JDL was placed into voluntary liquidation.

(3) Stay

[65] In a subsequent judgment Dunningham J granted the trustees a stay of enforcement of the primary judgment "to the completion of the appeal process".[30] The trustees had applied for a stay pending determination of their appeal to this Court. However, the judgment is open to construction as granting a stay until determination of a possible application for leave to appeal to the Supreme Court.[31] It is plain that the High Court's jurisdiction to order a stay is limited to an appeal to this Court. For the avoidance of doubt, we confirm that the ground for granting the stay is gone and that the order for stay is now discharged.

Result

[66] The appeal is dismissed.

[67] The cross-appeal is allowed to the extent that:

(1) judgment is entered for the respondent against the second named appellant for the sum of $740,000 plus interest at the rate prescribed by the Judicature Act 1908 from 6 July 2009; and

(2) interest is payable by the first named appellants on the sum of $740,000 also from 6 July 2009.

[68] The order for stay of judgment in the High Court is discharged.

[69] The respondent is entitled to costs for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

Solicitors:
Mackay & Gilkison, Wellington for Appellants
Whitlock & Co, Auckland for Respondent

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30 *Calvert v Reynolds* [2015] NZHC 1469 at [21].
31 At [20].