IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-003009
[2018] NZHC 782

BETWEEN	ROSS RONAYNE REID Plaintiff
AND	BARRY ROSS LAURENCE CASTLETON-REID Defendant

Hearing:	12-15 and 22 February 2017
Appearances:	S Abdale for the Plaintiff M J Matthew for the Defendant
Judgment	24 April 2018

JUDGMENT OF GORDON J

This judgment was delivered by me
on 24 April 2018 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:	Clive Gardner Law, Tauranga Rennie Cox, Auckland
Counsel:	S Abdale, Auckland

Introduction

[1] The plaintiff, Ross Reid, is the father of the defendant, Barry Castleton-Reid. Mr Reid seeks various equitable remedies against Mr Castleton-Reid in relation to $1,700,000 which Mr Reid deposited into a share trading account in Mr Castleton-Reid's name in 2009. Mr Reid says that the agreement with his son was that Mr Castleton-Reid was simply to be the nominee owner of shares purchased with the $1,700,000.

[2] Mr Castleton-Reid, on the other hand, says that his father gifted him the money.

[3] The statement of claim contains three causes of action, namely breach of fiduciary duty, breach of trust and restitution.

[4] As well as disputing his father's claim, Mr Castleton-Reid pleads three affirmative defences, namely abuse of process, estoppel and change of position.

The main issue

[5] The main issue arises from a discussion between father and son in March 2009 which resulted in Mr Castleton-Reid opening a share trading account with ABN AMRO Craigs Ltd (Craigs). The key considerations in this case are the terms on which Mr Reid paid the money into the share trading account; and whether Mr Reid's share trading activities through Craigs, again in the name of Mr Castleton-Reid, were for the benefit of Mr Castleton-Reid, or whether Mr Reid retained the beneficial interest in the money and the proceeds of investments.

[6] All causes of action depend on a determination of these issues.

[7] There is a preliminary issue, namely the character of the $1,700,000 before Mr Reid deposited it into the share trading account in his son's name. I will address that issue after setting out the overall background.

Background

Mrs Reid's will

[8] Mr Castleton-Reid was the principal beneficiary under his mother's will and codicil to that will dated 1 October 2002 and 3 November 2008 respectively. Mr Castleton-Reid's mother, Esme Reid, died on 22 November 2008. Probate was granted on 30 June 2009 and Mr Reid was the executor. He did not benefit under his wife's will.

[9] Under the will, Mr Castleton-Reid's sister, Dee-Ann Castleton-Reid,[1] received furniture, books, jewellery and other chattels, as well as the right to live in the principal residence owned by Mrs Reid at the date of her death. In the event that Dee-Ann did not wish to live in that residence, it was then to be conveyed to Mr Castleton-Reid.

[10] The principal residence was the family home at 47 Verbena Road, Birkdale, known as "the Castle". Mr Castleton-Reid was also left the property next door at 21/55 Verbena Road, two vehicles, namely a classic Rolls Royce and a Honda Jazz, and a specific bequest of $50,000. Mr Reid's position was that the estate had no funds to make the $50,000 bequest to his son.

[11] Mr Castleton-Reid was also the residuary beneficiary. The residue comprised Air New Zealand and Auckland Airport shares, which Mr Reid sold. On 8 July 2009, he deposited $477,267.34 from the sale into the share trading account. Mr Reid does not dispute that his son was entitled to the benefit of the sale of those shares.

The March 2009 discussion

[12] Mr Reid's case is that after his wife's death, he asked his son and his son's wife, Lisa Castleton-Reid, to come and live with him in the family home at 47 Verbena Road. They did so (Dee-Ann did not wish to live there as she had her own home). During March 2009, when they were still living together, Mr Reid made a proposal to his son in the following terms. Mr Reid would purchase shares with most of his cash assets and put those shares in Mr Castleton-Reid's name as nominal owner to facilitate

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[1] I will use Dee-Ann Castleton-Reid's Christian name because of the common surname.

the signing of share transfers during Mr Reid's long absences in Australia. The shares, share proceeds and any profits were to be held by Mr Castleton-Reid on behalf of Mr Reid.

[13] In recognition of this service, Mr Reid promised Mr Castleton-Reid upon his death that, as the shares and proceeds of the share trading account would already be in Mr Castleton-Reid's name, they would become his. Mr Reid pleads that he recalls saying to Mr Castleton-Reid that "there are no pockets in a shroud".

[14] Mr Reid says that his son agreed to participate in the arrangement and undertook to act as requested as his nominee. He did not tell his son that the money was his inheritance.

[15] Mr Castleton-Reid, on the other hand, describes the discussion with his father in March 2009 very differently. He says his father called him into his bedroom upstairs and told him that Mr Castleton-Reid had an "inheritance". Mr Reid indicated it was a large amount of money and that he had a proposal for his son. Mr Reid said he would like to put Mr Castleton-Reid's inheritance into shares and he would manage it for his son. Mr Reid intimated that the purpose of the fund would be to obtain medium to longer term dividends. Mr Reid said he would only sell to prevent market losses.

[16] Mr Reid said to his son, "All I ask is that you let me borrow some money to buy an apartment in Australia". Mr Reid further said that he wanted to buy two apartments, one to live in and one to rent out. He said he could get a mortgage on the second one and that the rent would cover it. Mr Reid also asked his son if he could use some of the money for his personal bills. Mr Castleton-Reid said, from memory, the figure stated was $2,000-$3,000 and he agreed to this. Mr Reid said he had no idea at this point what his mother's will said or what his father's own personal financial situation was.

[17] Mr Castleton-Reid said he spoke to his wife immediately after this discussion with his father, and his wife questioned why the two of them would put all their money into shares. Mr Castleton-Reid told her that he thought his father was bored and it

would give him something to get involved in. He said that neither he nor his wife had any need for the money at the time, and they both just accepted the situation.

The share trading account

[18] Consequently, on 12 March 2009, Mr Castleton-Reid went into Craigs in Takapuna to open a share trading account with them. He also needed to sign documentation to give his father management rights enabling his father to carry out share transactions on his behalf. He said he went back into Craigs on 17 March 2009 with his father to sign a document which made it clear that Mr Castleton-Reid would not be relying on the advice of Craigs. Mr Castleton-Reid said at the time he signed the document on 17 March 2009, it was his understanding, based on what his father had told him, that the money which was going to be put into the share trading account was Mr Castleton-Reid's money and that his father had no claim on it. Mr Castleton-Reid opened the share trading account on that basis.

[19] On 2 April 2009, Mr Reid transferred $1,700,000 into the share trading account in his son's name. That sum was part of a term deposit of $1,750,000 with Kiwibank held in the joint names of Mr Reid and his wife as at the date of Mrs Reid's death. I refer to the character of those funds in the next part of this judgment.

[20] Mr Reid proceeded to trade shares, giving Mr Lock of Craigs buy and sell orders. Mr Reid's evidence was that profits of around $1,135,000 were directed back into the share trading account. Mr Castleton-Reid accepts his father made a profit but does not accept the amount stated by his father.

[21] On 8 July 2009, Mr Reid transferred $477,267.34, derived from the sale of shares that had been held in his wife's name, into that same account. As noted in [11] above, Mr Reid accepts that his son is entitled to the proceeds of the sale of those shares under Mrs Reid's will.

[22] There were also withdrawals from the account. On 25 September 2009, Mr Reid transferred $800,000 out of the account into his son's ASB cheque account. The purpose of this, as agreed between Mr Reid and Mr Castleton-Reid, was so that Mr Castleton-Reid could then make a payment of that same sum to his sister, Dee-Ann,

who was dissatisfied with what she had received under her mother's will. Mr Castleton-Reid made that payment to Dee-Ann.

[23] Mr Reid also withdrew certain amounts for his own use, totalling approximately $578,667.[2] This was made up, in particular, of two large withdrawals which were for the purpose of Mr Reid purchasing apartments in an apartment block in Townsville, Queensland, Australia.

[24] A further sum of $333,914.93 was used by Mr Castleton-Reid to complete the purchase of an "Eclipse" apartment in Vincent Street, Auckland. Before his mother died, Mr Castleton-Reid had committed to the purchase. Settlement was on 18 November 2009.

[25] On or about 5 May 2010, Mr Castleton-Reid sold approximately half of the shares and transferred the proceeds of $781,224.45 into the account of his solicitors, Rennie Cox. On or about 10 May 2010, Mr Castleton-Reid sold the balance of the shares and transferred the proceeds, namely $775,832.84, into the account of Rennie Cox for his benefit. Mr Castleton-Reid stopped Mr Reid's access to the share trading account in May 2010.

[26] The catalyst which led to Mr Castleton-Reid withdrawing money from the share trading account in May 2010, and blocking his father's access to that account, was Mr Castleton-Reid's discovery in late April 2010 that there was a $40,000 mortgage registered against the title to the Castle.

[27] Mr Castleton-Reid said that he and his wife decided that they needed to take charge of his financial situation and revoke his father's authority to manage his shareholding account, as he said his father's recent activities were becoming increasingly suspect. Mr Castleton-Reid said his father had been dealing with Mr Castleton-Reid's inherited property as if it was his own, paying himself more than Mr Castleton-Reid had agreed to out of dividends earned on the shareholding account and using the Castle as security for his debts when he was only registered in his

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[2] This sum was made up of withdrawals in both Australian and New Zealand dollars. Hence the amount is approximate.

capacity as an executor. He informed his father that he was taking control of his inheritance as he was alarmed at the potential implications of his father's management.

[28] The background in brief to the mortgage against the title to the Castle was that Mr and Mrs Reid had committed to purchasing two "Eclipse" apartments in Vincent Street (these were separate from the one purchased by Mr Castleton-Reid referred to in [24] above). The value of any unpaid deposits was secured by an agreement to mortgage in favour of New Zealand Home Bonds Limited (Home Bonds) over the Castle. No mortgage was registered against the title at the time of Mrs Reid's death.

[29] After his wife's death, Mr Reid committed to an agreement to vary the original purchase agreements. Home Bonds then registered a mortgage against the title after Mrs Reid's death, but before title was transferred to Mr Castleton-Reid.

[30] Mr Reid did not settle the purchase of the two "Eclipse" apartments and Mr Castleton-Reid received a demand from Home Bonds for (by that time) $50,147.71.

[31] Also, by that stage, the vendor had cancelled one of the agreements for sale and purchase, and was proceeding against Mr Reid in relation to the remaining agreement.

[32] Mr Reid engaged a lawyer, Cushla Webster, and obtained legal aid claiming he had no assets. Mr Castleton-Reid was copied in on correspondence between Ms Webster and Mr Reid. In an email dated 18 May 2010, Ms Webster stated that Mr Reid had no defence. Mr Reid, however, responded that proceedings should have been issued against Home Bonds without delay.

[33] The eventual outcome was that Mr Castleton-Reid took over his father's obligations as purchaser and the proceedings the vendor had brought against Mr Reid were settled. Mr Castleton-Reid then settled the purchase on 21 June 2010 for $358,338.40, which included penalty interest of $39,843.80. He used funds that had derived from the share trading account to settle the purchase.

[34] Mr Reid says that he now has very limited means and no assets. He contrasts that with his situation prior to 2009 when he says he had a very comfortable standard of living. He and his brother, Emslie Reid, established a house building firm in Auckland called Reidbuilt Homes Ltd. He has been living mostly in Queensland, Australia since 2009 and has returned to New Zealand each year from December to March.

[35] Efforts to settle the dispute arising from the operation of the share trading account failed and Mr Reid filed this proceeding in December 2015.

The preliminary issue – payment from the Hallmark Trust

[36] In her lifetime, Mrs Reid had received payments as a discretionary beneficiary under the Hallmark Trust (the Trust). Mr Reid and his brother, Emslie Reid, were the settlors of the Trust, which was established for the benefit of their wives and families in October 1986. Emslie Reid was a trustee along with (at the relevant times) Alan Butch Riechelmann, an accountant. Mr Reid was neither a trustee nor a beneficiary.

[37] On 21 June 2007, following the sale of the Trust's only asset, a commercial property (the Hallmark Building), Emslie Reid paid a sum of $2,200,000 into an account in the sole name of Mr Reid, which Emslie Reid opened with the HSBC, Takapuna branch, for the purpose of making the deposit. It is the nature of that payment which gives rise to the preliminary issue.

[38] On 29 June 2007, Mr Reid and his wife opened a joint account, also at HSBC.

[39] The following month, Mr Reid closed the HSBC account in his sole name which Emslie Reid had opened and, on 17 July 2007, he transferred the funds to the HSBC joint account which had been opened in his and his wife's name. He and his wife together spent several hundred thousand dollars from that account.

[40] On or about 31 March 2008, Mr Reid and his wife closed the HSBC joint account and transferred the account balance of $1,924,890 to their joint account with

the BNZ in Birkenhead. Between them, they spent a further $150,000 from the money in that account.

[41] In April 2008, Mr Reid and his wife opened a joint account with the Kiwibank, Birkenhead branch. They transferred the remaining funds from the BNZ joint account, in the sum of approximately $1,770,000, into the Kiwibank joint account. On 16 April 2008, Mr Reid and his wife transferred $1,750,000 from their Kiwibank joint account into a term deposit with Kiwibank in their joint names. At the time of Mrs Reid's death on 22 November 2008, those funds were still on term deposit with Kiwibank.

[42] It is necessary to determine the nature of the payment into Mr Reid's account. This was a matter raised by Associate Judge Doogue in his decision on an application for security for costs.[3]

[43] Mr Reid's position was that, of the $2,200,000 paid into his account by his brother Emslie Reid, $1,806,039 was a final capital distribution to his wife as a beneficiary of the Trust.

[44] There are four documents that have a bearing on this issue. All were included in the common bundle. In chronological order, they are as follows.

[45] The first is the financial statements for the Trust for the year ended 31 March 2009. They were prepared by Riechelmann C.A. Ltd, Chartered Accountants. The first page is titled "Compilation Report to the Trustees". There is a signature above the name "Riechelmann C.A. Limited Chartered Accountants". That first page is either dated "31/3/10" or "31/8/10". Under the heading "Current Assets", there is recorded under the transaction "Advances – RR & ED Reid",[4] a sum of $1,806,039 carried through from the 2008 financial year. The accounts are not signed by the trustees.

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3 *Reid v Castleton-Reid* [2016] NZHC 1609 at [30]-[32].

4 That is the plaintiff, Ross Ronayne Reid, and his wife, Esme Dede Reid.

[46] A statement in the accounts that this sum was an asset is inconsistent with that amount being a capital distribution to Mrs Reid as a discretionary beneficiary under the Trust.

[47] The second document is an email dated 26 August 2011 from Mr Riechelmann to counsel for Mr Castleton-Reid. In the first paragraph of his email, Mr Riechelmann makes it clear that he was not present at meetings when:

> … [Emslie] Reid proceeded to pay out the half share of the Trust's cash assets (being the proceeds from the sale of the Trusts (sic) only asset the Hallmark Building) to Ron and Esme Reid he did so at a number of meetings he had with Ron Reid. I was not present at any of these meetings …

[48] The email further records as follows:

> There were a number of payments made to Ron and Esme Reid, so when I was eventually given the information required for the preparation of the Trust's financial statements, I first applied (that is to say debited) $615,000 of the payments in satisfaction of The Trusts mortgage debt owed to Ron Reid, a further part was applied in satisfaction of monies owed to ED Reid and the balance over and above all amounts owing, was treated as an advance to Ron and Esme Reid.
>
> You will recall that I advised that I did not have the figures in front of me but believed that the mortgage owing to Ron was around about $625,000 it was [a]ctually $615,000. [Emslie] Reid had a mortgage for the exact same amount and both [Emslie] and Ron Reid were paid interest on these mortgages in accordance with the loan agreements executed for these mortgages.
>
> As the financial statements stand at the present point in time the total amounts standing as having been advanced to Ron and Esme Reid stand at approximately $1,800,000 (i.e. being payments made to Ron and Esme over and above what was owed to them) and technically this is still a debt owed to the trust.
>
> …
>
> When all matters between Barry and Ron are resolved [Emslie] and I will fortmally (sic) document the distributions and close the trust down.

[49] The contents of that email are also inconsistent with there being a capital distribution to Mrs Reid as a discretionary beneficiary under the Trust.

[50] The third document reads as follows:

TO WHOM IT MAY CONCERN.

I, the undersigned hereby confirm that, as trustee for the Halmark [sic] Trust on the completion of the sale of their principal asset in Orewa, I paid $2,300,000 into the account of Ross R. Reid in H.S.B.C. bank Takapuna. I am further able to confirm that the bulk of the payment was applied to accrued interest charges and mortgage repayment. No further payments from the Trust are due either to Mr. Reid or his wife.

Signed: Emslie Blatchfard Reid.

[51] There is then a signature below Emslie Reid's name. There is no typed date on the document but there is a handwritten date which appears to be 03/03/14 or 03/08/14.

[52] Mr Reid has accepted that his brother Emslie did not in fact create or sign that document and that he, Mr Reid, prepared and signed it as Emslie. I return to that act later in this judgment in the context of my assessment of Mr Reid's credibility and reliability.

[53] The fourth document is a resolution of Trustees dated 20 January 2015 which I set out in full:

THE HALLMARK TRUST

RESOLUTIONS OF TRUSTEES

This 20th day of January 2015, signed for the purpose of becoming an entry in the Minute Book of the Trust:

Background:

Following the receipt of the deposit from and the final settlement of the sale of the Trust's Commercial Property in Orewa the trustees made the following payments to the Account of Ross Ronayne Reid & Esme Dede Reid.

- On the 20th of December 2006 $ 160,000 (from the deposit received)
- On the 21st day June 2007 $ 2,200,000 (from the net settlement proceeds)

The payments made were applied as under:

i) In the first instance in settlement of all moneys owing to Ross Ronayne Reid and Esme Dede Reid under their Mortgage over the Trust's Property $515,000.

ii) In settlement of Current Account Balances owing to Ross Ronayne Reid and Esme Dede Reid being unpaid interest and management fees owing $38,961.
iii) As a final Capital Distribution to Esme Dede Reid as a Beneficiary of Trust $1,806,039.

The Trustees now wish to formally record the final Capital Distribution made to Esme Dede Reid as described at iii) above.

Resolved That:

After consideration of the overall interests of all the beneficiaries and, in exercise of the powers contained in the Trust Deed, the trustees hereby approve the final capital distribution of $1,806,039 made to Esme Dede Reid in her Capacity as a beneficiary of the trust and they now direct that the financial statements of the trust for the year ended 30 March 2008 be amended to reflect the said distribution.

[54] The resolution is signed by both trustees, Emslie Reid and Mr Riechelmann.

[55] Neither party called Emslie Reid or Mr Riechelmann as a witness.

[56] The first three documents count against the payment of $1,806,039 as being a distribution to a discretionary beneficiary. However, the fourth document, the resolution, records that the payment on 21 June 2007 included a payment to Mrs Reid as a beneficiary.

[57] Ms Mathew, appearing for Mr Castleton-Reid, submits that the payment of Trust funds into Mr Reid's account in 2007 was not, and could not have been, a trust distribution to Esme Reid, based on the 2015 trustee resolution. She submits that when Mr Reid received the funds from the Trust, to the extent that the funds were in his name, he continued to hold those funds subject to the terms of the trust deed for all the beneficiaries of the Trust. In other words, the transfer was made to Mr Reid under the shared assumption that Mr Reid would act as a de facto trustee for the trust in electing how to distribute the funds to the beneficiaries.

[58] I do not accept those submissions. In the absence of evidence from Emslie Reid or Mr Riechelmann, the Court is left with a resolution in the common bundle and which, on its face, appears valid. It corrects the (unsigned) accounts that had been signed by Mr Riechelmann in his capacity as the accountant preparing the

accounts, but which had not been adopted by the trustees, Mr Riechelmann and Emslie Reid.

[59] That resolution records that of the total $2,200,000 paid out, $1,806,039 was a final capital distribution to Mrs Reid as a beneficiary of the Trust. There is one aspect of the resolution that is inaccurate and that is the statement that the money was paid into a joint account of Mr and Mrs Reid. It was in fact paid into an account in the sole name of Mr Reid. However, I do not consider that inaccuracy detracts from the clear statement that the $1,806,039 was a capital distribution to Mrs Reid.

[60] The money was then transferred into a succession of joint accounts in the names of Mr and Mrs Reid. The evidence was they both spent the money liberally on themselves until the balance of $1,750,000 was invested in a term deposit on 16 April 2008.

[61] A question also arises as to whether the funds became Mr Reid's beneficially by right of survivorship when Mrs Reid died on 22 November 2008.

[62] Generally, joint bank accounts are held as joint tenants and each party can use the funds within equally.[5] As a result, the funds will pass to the surviving party via the right of survivorship, subject to any will or testamentary disposition.

[63] However, just because the parties have a joint bank account, that does not necessarily mean that they want the ordinary consequences of joint ownership to follow.[6] In *Fisher on Matrimonial and Relationship Property*, there is the following:[7]

> … These peculiarities of joint bank accounts make it unsafe to assume that by opening or funding such an account the parties necessarily intend the normal consequences of joint ownership.
>
> … the question will still remain whether and to what extent both parties are beneficial owners of the funds in equity. Given that a depositor has the beneficial interest in funds immediately prior to depositing them in a joint bank account, the key factual question in every case must be why he or she

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5 *Torbay Holdings Ltd v Napier* [2015] NZHC 2477 at [176].

6 *Clarke v Clarke* HC Auckland M354/86, 2 December 1987.

7 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [4.41].

> deposited them in a joint account rather than an account in his or her own name.

[64] Essentially, each case must be analysed carefully to determine what the parties intended on setting up the joint account. They may have intended that the funds pass to the surviving party. Or they may have intended the funds to be held on a resulting trust for the estate of the deceased. As Barker J stated in *Re Gibson (dec'd)*:[8]

> It may be, for example, that one party holds property on trust for the other, despite being a joint owner at law. In any particular case, it is necessary to ascertain the actual intention implicit in the conduct of the couple in question …

[65] Here, there is no evidence to suggest that the parties intended for Mr Reid to hold the funds on resulting trust for Mrs Reid's estate. As Robert Fisher states in respect of joint ownership:[9]

> In the absence of contrary evidence (paras 4.42 and 4.43) the most likely intention when a modern couple opens a joint account seems to be full beneficial joint interests in the conventional sense, whether their relationship is a married, civil union or de facto relationship. This seems a particularly strong inference if the account is used as a common pool to which each contributes as he or she is able and from which each withdraws according to his or her needs and the needs of the household. In such cases the couple probably intend that:
>
> (i) upon the death of one, the other should take the then current credit balance beneficially;
>
> (ii) upon separation each is to take half; and
>
> (iii) during the relationship either party can acquire sole beneficial ownership of such minor personal items as he or she purchases by withdrawal from the accounts.
>
> (Citations omitted)

[66] The evidence in this case was that before the money was placed in term deposit in their joint names, Mr and Mrs Reid spent money from their account jointly and in ways to benefit each and both of them. On the basis of this evidence, and the lack of any evidence to suggest that the intention was for Mr Reid to hold the funds on resulting trust for Mrs Reid's estate upon Mrs Reid's death, Mr Reid was entitled to the proceeds of the joint account, and no part of it formed part of Mrs Reid's estate.

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8 *Re Gibson (dec'd)* HC Auckland M146/86, 20 April 1989.

9 Fisher (ed), above n 7, at [4.44].

Facts consistent with Mr Reid's claim

[67] Ms Abdale, for Mr Reid, submits there are some factual matters that are consistent with Mr Reid's claim that Mr Castleton-Reid was simply to be the nominee owner of the shares purchased with the $1,700,000. They include the following:

(a) That the funds paid into the share trading account came from Mr Reid's personal cheque account with Kiwibank;

(b) That Mr Reid exercised complete control over the share trading account in making all buy and sell orders to Craigs from April 2009, when the $1,700,000 deposit was paid into the share trading account, until May 2010, when Mr Reid's access to the account was blocked by Mr Castleton-Reid;

(c) It was Mr Reid who authorised payments from the share trading account including payments to himself, to Mr Castleton-Reid and payment of $800,000 to Mr Castleton-Reid to then pay to Dee-Ann to settle any claims she may have had against her mother's estate; and

(d) That Mr Reid's applications for finance in 2009 for the purchase of three apartments in Australia were approved on the basis of financial information provided by Craigs to the ANZ in Townsville, Australia.

[68] I accept Ms Abdale's submission that (a) and (b) above tend to support Mr Reid's claim. However, they should not be seen in isolation. They need to be set against all the other matters that count against Mr Reid. I refer to these below.

[69] In relation to (c) it is necessary to consider the context of the $800,000 payment. That is referred to below. Similarly, the context for payments to Mr Castleton-Reid and Mr Reid's payments to himself are relevant. The payment to Mr Castleton-Reid is referred to in [24] above. As to Mr Reid's payments to himself, at the outset Mr Castleton-Reid said he had agreed that his father could borrow some of the money to buy an apartment or apartments and to use some of the money for

personal bills. Even on Mr Castleton-Reid's account, Mr Reid's authorising of payments is consistent with his simply managing the account.

[70] The submission recorded in (d) above requires further examination and I do so later in this judgment.

Analysis

General assessment of Mr Reid

[71] There are a number of reasons why I do not accept the evidence of Mr Reid and I refer to each of these below. However, I first set out my general assessment of Mr Reid. His age, at 96, was no indicator of his mental faculties. I found him to be intelligent and quick witted.

[72] That is not to say Mr Reid did not make conflicting statements on a number of issues, both in writing and in the course of his evidence. However, in my view, these are issues that go to Mr Reid's credibility and/or reliability, and they are not as a result of any lack of mental acuity because of his age or otherwise. I make that finding notwithstanding Mr Reid's comment in an email on 25 July 2010 to Mrs Castleton-Reid that a few years ago his doctor had diagnosed him with "incipient Alzheimers". Ms Abdale did not seek to make anything of that comment and did not advance Mr Reid's case on a basis other than that he was of sound mind.

[73] Mr Reid's only apparent infirmity relative to these proceedings is some hearing loss. This was apparent but did not cause any particular difficulty during Mr Reid's evidence-in-chief. However, his difficulty in hearing counsel's questions became much more obvious during cross-examination, even though counsel for Mr Castleton-Reid moved to plaintiff's counsel's bench and was positioned at the end of the bench nearest the witness box. Further, Mr Reid was provided with headphones and counsel for Mr Castleton-Reid wore an additional microphone clipped to her bar jacket. These measures did not seem to assist Mr Reid in hearing counsel's questions under cross-examination.

[74] However, Mr Reid's hearing appeared to improve again after he had completed his evidence and when Mr Castleton-Reid was giving evidence. At that point, Mr Reid was seated at the back of the Court. He was apparently able to hear Mr Castleton-Reid, who had a relatively quiet voice, sufficiently well so as to be able to call out responses to evidence he disagreed with on at least two occasions.

[75] It therefore appeared to me that Mr Reid was prepared to exaggerate his hearing loss simply to make things more difficult for counsel cross-examining him.

Forged document

[76] There is another matter which reflects adversely on Mr Reid's credibility. I have already mentioned a document in the common bundle which reads as follows:

> TO WHOM IT MAY CONCERN
>
> I, the undersigned hereby confirm that, as trustee for the Halmark (sic) Trust on the completion of the sale of their principal asset in Orewa, I paid $2,300,000 into the account of Ross R. Reid in H.S.B.C bank Takapuna. I am further able to confirm that the bulk of the payment was applied to accrued interest charges and mortgage repayment. No further payments from the Trust are due either to Mr. Reid or his wife.
>
> Signed: Emslie Blatchfard Reid.

[77] There is a signature below the typed name. The document bears a handwritten date which is either 03/03/14 or 03/08/14.

[78] There is a further document which refers to the above document and which also purports to be signed by Emslie Reid. It includes the following:

> I did not write this document.
>
> I did not sign this document. The signature is a forgery.
>
> I do not agree to its contects [sic] and agree with previous correspondence by Alan Riechelmann.

[79] Mr Reid accepted that he typed out and signed the document referred to in [76]. I agree with the observation of Associate Judge Doogue that this is a "substantial

contra-indication concerning the veracity of [Mr Reid]".[10] Compounding the concern was Mr Reid's casual response when asked about this document. He said that his brother "was out of sorts" to prepare it; that he, Mr Reid, therefore did it; that it was a fairly simple statement that Emslie Reid had paid the money into HSBC; and that he "should have put 'pp' because I just scrawled a signature at the bottom of it".

Untrue statements

[80] Under cross-examination on three topics, Mr Reid volunteered that he had made untrue statements in emails to Mr Castleton-Reid and to Dee-Ann.

[81] Mr Reid was asked about his transfer of the Australian apartments to his female friend Yue Pui. He said he made the transfer in exchange for the money he owed to the bank on the condition that he have the use of one of the apartments for the rest of his life.

[82] The questioning then turned to an undated typed note which Mr Reid sent to Mr Castleton-Reid and Dee-Ann in the course of settlement discussions. The note included the following:

> By the by *she* will not see a red cent of it - because of what she has done I will have to find a new apartment when I go back.

[83] The notes of evidence were then as follows:

> Q. So Yue Pui, is this a reference to Yue Pui?
>
> A. It is but it's not true, this is just for Barry's benefit.
>
> Q. So you were saying something not true for Barry's benefit?
>
> A. Yes.

[84] Then, in relation to Dee-Ann, Mr Reid accepted that he reached an agreement with her in February 2012 that she would pay Mr Reid $1,000 per month. One of the conditions of the payment was that Mr Reid would cease his "crusade" against Mr Castleton-Reid. Mr Reid then said:

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10 *Reid v Castleton Reid*, above n 3, at [33].

A. Oh, well no I might well have said that – to Dee Ann (inaudible 14:20:30) and keep the money coming in, I might have said to her that I'd relinquish claims but I've never waived my attention to get my money back. But what I would tell Dee Ann would be something entirely different.

Q. So are you saying now that you didn't do a deal with Dee Ann under which she agreed to pay you $1000 a month?

A. Oh, I would've, I'd agree to anything with Dee Ann.

…

A. Oh I would agree anything with Dee Ann to get the money from her. I would tell her anything …

[85] The third untrue statement which Mr Reid acknowledged was in an email Mr Reid sent to Dee-Ann in August 2013 after he had instructed Ms Abdale. In that email, he said:

> They've [IRD] appointed a barrister to represent me, for what that will be worth, and will be going over the whole blardy business of my missing assets again.

[86] Ms Abdale was not appointed by the IRD.

[87] Based on the above evidence, it is plain that Mr Reid will make untrue statements to suit his purpose at the time. This counts against Mr Reid in my assessment of his cedibility.

Mr Reid's statements to ANZ

[88] Lest it be thought that Mr Reid's untrue statements were confined to communications to family members, and in the context of trying to achieve settlement, I refer to the evidence of Derek Evans who was called by Mr Reid and who gave evidence by videolink from Australia.

[89] Mr Evans was formerly employed by the ANZ bank in Queensland and handled Mr Reid's applications for loans for the purchase of the apartments in Townsville, Australia.

[90] Mr Evan's evidence was that on his first meeting with Mr Reid, Mr Reid told him that "he had a home in Auckland which was actually a castle of some sort … He suggested I look at … and have a look at the castle online which we did …".

[91] That statement by Mr Reid to Mr Evans was untrue. He did not own the Castle. The statement was made to Mr Evans in the course of Mr Reid's applications for finance. Mr Reid would have known that the ANZ needed to be satisfied as to his assets. The invitation for Mr Evans to look at the property online can only have been calculated to influence Mr Evans in relation to his asset position.

ANZ approval of loan

[92] By way of completeness, and in connection with Ms Abdale's submission at [67](d) above, Mr Reid relies on the fact that ANZ did approve his loan application. In other words, he says the ANZ was satisfied as to his assets (namely the share portfolio) and income. Mr Reid said he put Mr Evans in touch with Mr Lock at Craigs.

[93] However, the documents Mr Evans received from Mr Lock at Craigs were in the name of "Barry Ross Laurence Castleton-Reid". Mr Evans said he noted that, but he accepted that Mr Reid had access to the funds. For his part, Mr Lock said that he had reviewed his correspondence, and said that he would have confirmed that Mr Reid had authority and access to funds, but he did not tell Mr Evans that Mr Reid owned the funds.

[94] The evidence of Mr Lock and Mr Evans taken together does not support Mr Reid's case that he was the beneficial owner of the funds in the share trading account.

Signing of share transfers

[95] One of the explanations given by Mr Reid for putting shares in his son's name as nominal owner was to facilitate the signing of share transfers during his long absences in Australia.

[96] As Associate Judge Doogue observed:[11]

> [24] The observation may be made that transferring a large sum of money, in excess of $1.5 million, to his son to facilitate the ease of making transfers is a surprising way of going about solving the problem. Exactly the same results could have been achieved by giving his son a power of attorney, presumably. However I would accept that considerations of that kind do not necessarily mean that the plaintiff's account of why he set up the arrangement is not to be accepted, merely because there are unusual or inexplicable aspects to the explanation.

[97] However, in the proceedings before me, there was no evidence of Mr Castleton-Reid signing share transfer forms or for the need for this to be done.

Death duties

[98] There was also Mr Reid's evidence about the possible reintroduction of death duties. This was a matter commented on by Associate Judge Doogue:[12]

> [25] Understanding the intentions of the plaintiff was not made any easier by the fact that he also put forward at least one other explanation as to why it was desirable to put the defendant in the position where he was the apparent owner of the shareholding account, even though the plaintiff retained control of the trading activities. The other explanation emerges from his statements expressing concern about the possible reintroduction of death duties in New Zealand. Such an explanation would tell against the plaintiff because it would mean that he saw the need to accomplish a transfer of property during his lifetime – which is more or less what the defendant says the arrangement was intended to achieve anyway …

[99] I agree with those observations and further add that Mr Reid's comment to his son that "there are no pockets in a shroud" supports Mr Castleton-Reid's position that his father had intended to gift the money to him during his father's lifetime.

Loan documentation

[100] There is then the matter of the loan documentation signed by Mr Reid. Both Mr Castleton-Reid and his wife, Lisa, who gave evidence, and who apparently plays an at least equal role with her husband in managing the family finances, were concerned about the potential gift duties that might be payable on the advances that Mr Reid had made to himself from the share trading account. They were also

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11 *Reid v Castleton-Reid*, above n 3.
12 *Reid v Castleton-Reid*, above n 3.

concerned at the way in which Mr Reid had changed his story about the money in the share trading account. For example, there was his claim to be entitled to spend some of it for his own benefit as "executor".

[101] Mr Castleton-Reid had solicitors prepare Deeds of Acknowledgement of Debt recording the advances that Mr Reid had received from the share trading account as loans.

[102] Those documents were sent to Mr Reid in Australia, and he signed and returned them.

[103] That is inconsistent with Mr Reid's position that he was the beneficial owner of the share trading account, but yet he acknowledged indebtedness to Mr Castleton-Reid for advances made to him from that account.

[104] Mr Reid attempts to explain this by saying he only signed the Deeds of Acknowledgement of Debt as a result of his son's undue influence on him. Mr Reid explained the undue influence in this way. He said his son wrote him a letter saying that he was having strife with the IRD and asked him to sign loan documents to cover Mr Reid's drawings from the share trading account. Mr Reid said, "Oh well all right, anything to keep you out of trouble with the IRD". That was the influence, Mr Reid said.

[105] I therefore need to address Mr Reid's submission that there was undue influence.

[106] For a transaction to be set aside on the basis of undue influence, the relationship:[13]

> … must involve such degree of reliance and trust as suggests a real risk that a disadvantageous transaction has not resulted from the kind of informed and independent decision to be expected from a person in the position of the party seeking relief but rather from the influence the other party to the relationship has in that position …

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13 *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655 (CA) at 659.

[107] In *Green v Green*, Winkelmann J helpfully summarised the principles relating to undue influence as follows:[14]

> (a) The overall burden of proof rests on the person seeking to establish undue influence.
>
> (b) The burden of proof is the balance of probabilities. I accept Mr Waalkens' submission (counsel for the defendant in the probate proceedings) that where the allegation made is serious (such as an allegation of dishonesty or criminal offending), the Court will require strong evidence to be satisfied on the balance of probabilities that that occurred.
>
> (c) The person asserting undue influence must show that the alleged influence led to the making of the impugned transaction, and that the influence was undue in the sense that the transaction was not the result of the free exercise of an independent will on the part of the person at whose expense the transaction was made.
>
> (d) The question of whether a transaction was brought about by undue influence is a question of fact. A party can succeed in establishing this either directly by proving "actual undue influence" or recourse to an evidential presumption which arises where it is established that:
>
> (i) the person said to have been subject to undue influence placed trust and confidence in the other; and
>
> (ii) the transaction called for explanation.
>
> (e) Whether there is a relationship of trust and confidence can either be established factually or by reference to a class of specific relationships such as lawyer/client; parent/child; doctor/patient. In the latter category the law presumes irrebutably that one party had influence over the other. The presumption is only as to proof of influence. The person alleging undue influence will still need to establish a transaction calling for an explanation.
>
> (f) Whether a transaction calls for an explanation depends on the circumstances of the case. The question is simply whether "failing proof to the contrary, [the transaction] was explicable only on the basis that undue influence had been exercised to procure it".
>
> (g) Once the person claiming undue influence has established both the relationship of trust and confidence and a transaction calling for explanation, the evidential burden shifts to the person seeking to uphold the transaction to show that the transaction was not the result of undue influence. This however should not obscure the position that the overall burden of proof will always rest on the person alleging undue influence.

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[14] *Green v Green* [2015] NZHC 1218 at [100]. See also *Willis v Thompson* [2017] NZHC 1645 at [96].

(h) The presence of independent advice is one of many factors that may be taken into account in determining whether undue influence is proved. Whether the independent advice helps to establish that the transaction was the result of a person's free will depends on the facts of the case. Independent advice can help establish that a person understood the decision they were making. But establishing that a person fully understood the act is not the same as establishing that the act was not brought about by undue influence. A person can fully understand an act and still be subject to undue influence.

(i) Allegations of undue influence may succeed in relation to the exercise of powers not just the transfer of property.

(Citations omitted)

[108] Here, there is a relationship of influence between Mr Reid and Mr Castleton-Reid. They are father and son. However, Mr Reid must also establish a transaction calling for an explanation. In *Equity and Trusts in New Zealand*, Stephen Kós QC (as he then was) helpfully elaborated:[15]

> Secondly, the requirement that the transaction also "call for explanation" should not be invested with too much mystique. It simply defines a modest threshold of scepticism that must be crossed before the onus shifts. All that is required is that the transaction "is not readily explicable by the relationship of the parties". Something must seem to be amiss, calling for explanation. Typically the transaction will in fact be a gift. If that gift in all its aspects appears the product of the natural warmth and affection underlying the relationship, the onus does not move. But if a question is left as to whether the gift is not the product of a healthy relationship, but rather the *abuse* of an unhealthy relationship, then the onus will transfer.

[109] To put it simply, Mr Reid has not provided sufficient evidence to support his claim that Mr Castleton-Reid unduly influenced him to sign the Deeds of Acknowledgment of Debt.

[110] Mr Reid was in Australia at the time and Mr Castleton-Reid was in New Zealand. Mr Reid in fact hurried his son along to send the loan agreements to him. On Friday 21 May 2010, Mr Reid sent an email to the email address shared by his son and his wife which said:

> Hi,

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15 Stephen Kós QC "Undue Influence" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 679 at 696.

> I've been meaning to ask how your new lawyers are doing with those loan documents covering all of the monies advanced from Craigs for financing the apartments here.
>
> I have this feeling that the sooner these are signed, sealed and delivered the better.
>
> Pa

[111] Additionally, when Mr Reid signed the loan documents, his brother, Emslie Reid, was in Australia visiting him and Emslie Reid witnessed Mr Reid's signature on the documents. Although there is no suggestion that Emslie Reid was able to provide legal advice, it is apparent that the two men were close and had worked as business partners for many years. Mr Reid therefore had available support from his brother if necessary.

[112] In the circumstances, the allegation of undue influence has not been established.

[113] I find that the signing of the loan documentation is inconsistent with Mr Reid's claim.

Mr Reid's reference to 'loans'

[114] Mr Reid himself referred to the money he had used from the share trading account as the deposit for the purchase of the Australian apartments as a loan. In an email to Mrs Castleton-Reid on 26 July 2010, he said:

> I agree with Barry's opinion that the apartments are not paying their way and I have put the first of them up for sale. This will reduce my overheads and enable the repayment of your loan. I will sell the second later this year or early next year and see how it goes from there.

Mr Reid's statement that he had no assets

[115] In the course of his communications with Ms Webster referred to at [32] above, Mr Reid wrote the following in an email on 19 May 2010:

> And, to you, and the Trust and the Court, I say, "Listen carefully, I will say this only once – I have no real assets or funds of any kind, none, not any, nil, nix zilch, zero, nowt".

[116] Although by the time of the email Mr Castleton-Reid had made two transfers of the money in the share trading account to his solicitors, Mr Reid's evidence was that he did not become aware of the second sell order, nor that his son had blocked his access to the account until the end of 2010.

[117] Accordingly, the email is inconsistent with his assertion that he was the beneficial owner of the funds in the share trading account.

"Your money"

[118] In an email of 29 May 2010 to Mrs Castleton-Reid, Mr Reid used the expression 'your money' saying the following:

> Lisa,
>
> I do wish that you would not "jump the gun" so.
> [I] set out the "inheritance/earnings" position as something entirely between Barry, you and I. It is strictly not for publication please.
> You have misread the 'criminal offense' in using your money – I have not used up any of your money. You still have the $1,750,000 which was left to you.
> Let's not argue about my ability or non-ability to execute the estate. Settle for the fact that I 'borrowed' the residue and put it to work; and then returned it.
> I find it difficult to believe that, with all of the funds and property you have inherited, you want to keep my 'earnings' as well. And hurry to your lawyer to make sure that you can.
> Please tell me whether or [not] it is your real intention.
> Increasingly disillusioned Pa.

[119] This is inconsistent with Mr Reid's claim.

Money in joint account

[120] Mr Reid gave evidence that at the time he had the discussion with his son in March 2009, he was under the (mistaken) impression that half the money in the term deposit (i.e. $850,000) formed part of his wife's estate. However, Mr Reid made it plain that he did not tell his son of his (mistaken) impression at the time.

[121] However, in an email Mr Reid wrote to Mrs Castleton-Reid on 25 July 2010, he said:

> I feel that I have been pushed under a waterfall in the sudden realization that one half of what has been regarded as my wife's "estate residue' is in fact mine!
>
> …
>
> My half of [the] $1,750,000 term deposit was 'loaned' into the original purchase of the M.A.P shares and can now best be repaid by authorizing James to do an 'off-market transfer' of these into my name.

[122] That begs the question of why, if Mr Reid did believe, in March 2009, that half the money in the term deposit was his and the other half was his wife's, he did not put his half in shares in his own name, as he was suggesting in the 25 July 2010 email.

[123] It is difficult to know where the truth lies in terms of what Mr Reid's belief was at various times as to the ownership of the money in the term deposit.

[124] Whatever Mr Reid's understanding was at the time of the March 2009 discussion on this issue, in my view, he made it clear to Mr Castleton-Reid that all the money that was to be deposited into the share trading account was Mr Castleton-Reid's money. There was no arrangement as asserted by Mr Reid.

[125] I am further reinforced in this view by Mr Reid's evidence that, "Oh I'm sure [Mr Castleton-Reid] believed the money was his, no doubt about that". That belief can only have come from Mr Reid telling him that in March 2009.

Gift?

[126] Therefore, based on the evidence and my credibility and reliability findings set out above, Mr Reid has not established that Mr Castleton-Reid was simply to be the nominee owner of the shares purchased with the $1,700,000. All that remains to be decided is whether Mr Reid gifted the money to Mr Castleton-Reid.

[127] I first set out my assessment of Mr Castleton-Reid.

[128] Mr Reid sought to portray his son as a person who had not had to work at all for most of his adult life to earn a living and who had effectively had things handed to

him on a platter. He had been handsomely rewarded by his mother and was a man of leisure.

[129] There were two matters of evidence which suggested that Mr Castleton-Reid was not living his life in the rather entitled way in which his father appeared to suggest. First, although Mr Castleton-Reid had been left his mother's classic Rolls Royce under her will, he in fact paid his father for it.

[130] Second, Mr Castleton-Reid transferred $800,000 to his sister Dee-Ann, who had received very little under her mother's will. Mr Castleton-Reid instructed his father as manager of the share trading account to transfer $800,000 to Mr Castleton-Reid's ASB account. That transfer occurred on 25 September 2009. Mr Castleton-Reid then transferred that amount to his sister's account on 29 September 2009. That was a payment from Mr Castleton-Reid's own money, as he understood it to be.

[131] Having determined that there was no arrangement as asserted by Mr Reid, the Court is then left with the evidence of Mr Castleton-Reid. I find no reasons to reject his evidence that Mr Reid represented to him that he was giving him the money.

Are the legal requirements for a 'gift' satisfied?

[132] A gift is a voluntary transfer of property of any kind to another made with the intention that the property is not to revert to the donor.[16] A gift may be made by deed or other instrument in writing, by delivery where the subject-matter is open to delivery and by declaration of trust.[17]

[133] In contrast, a loan "is a thing lent for the borrower's temporary use, such as a sum of money lent at interest".[18]

[134] As money is a chattel, three things are necessary for there to be a valid gift:[19]

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16 *Laws of New Zealand* Gifts (online ed) at [1]. See also *Terry Schwass Co Ltd v Marsh* [2017] NZHC 1382 at [13].

17 *Laws of New Zealand*, above n 16, at [4]. See also *Stockco Ltd v Gibson* [2012] NZCA 330 at [119].

18 *N v N* [2010] NZFLR 161 (HC) at [42].

19 *N v N*, above n 18, at [44]; citing *Williams v Williams* [1956] NZLR 970 (SC). See also *Stockco Ltd v Gibson*, above n 17, at [121].

(a) the expression of the intention of the donor to make a gift;

(b) the assent of the donee to the gift; and

(c) the actual or constructive delivery of the chattel to the donee.

[135] Here, the last two elements are clearly established. For all the reasons already given, I am further satisfied that Mr Reid intended to gift the money to Mr Castleton-Reid.

Conclusion on evidence

[136] Mr Reid has not satisfied me on the balance of probabilities that there was an agreement with Mr Castleton-Reid that he would purchase shares in Mr Castleton-Reid's name as nominee for Mr Reid. Further, there was no agreement that Mr Castleton-Reid would open a share trading account to hold shares and profits from Mr Reid's share trading as Mr Reid's nominee.

Decision on causes of action

[137] It is apparent from the pleadings, and it was confirmed by Ms Abdale, that each of the causes of action is founded on Mr Reid's position that Mr Reid was the beneficial owner of the shares and the money in the share trading account, and that Mr Castleton-Reid was merely his nominee.

[138] I have found against Mr Reid on that factual issue. That finding effectively disposes of each of the three causes of action.

First cause of action: breach of fiduciary duty

[139] There was no entrusting of assets and accordingly Mr Castleton-Reid was not in a fiduciary relationship with his father.

[140] The claim for accounting for the sale of shares and profits of share trading in the amount of approximately $1,507,000 fails; as does the claim that a constructive trust arises for the benefit of Mr Reid in the amount of the sum/s to be finally determined.

Second cause of action: breach of trust

[141] Mr Castleton-Reid was not holding the shares, share proceeds and profits on trust. The claim that a constructive trust arises for the benefit of Mr Reid in the amount to be finally determined also fails.

Third cause of action: restitution

[142] The claim simply pleads that as a consequence of Mr Castleton-Reid's retention of the proceeds of the sale of the shares and profits in the share trading account, Mr Reid has suffered loss in the amount of about $1,507,000. The claim seeks restitution in the amount of the finally determined sum. This claim similarly fails.

Affirmative defences

[143] All causes of action having failed, it is not necessary to consider the affirmative defences raised by Mr Castleton-Reid.

Result

[144] Mr Reid's claims fail and are therefore dismissed. Judgment is entered in favour of the defendant.

Costs

[145] My present view is that Mr Castleton-Reid is entitled to costs and that costs should be on a 2B basis. I encourage the parties to agree costs and file a joint memorandum. In the event that agreement cannot be reached, Mr Castleton-Reid is to file a memorandum within 20 working days of the date of this judgment. Mr Reid is to reply within a further 10 working days. Memoranda should not exceed five pages.

Gordon J