

**ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR
IDENTIFYING PARTICULARS OF PLAINTIFFS AND DEFENDANTS.**

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

**I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE**

**CIV-2018-441-000060
[2021] NZHC 2997**

BETWEEN

A
First Plaintiff

B
Second Plaintiff

C
Third Plaintiff

AND

D AND E LIMITED AS TRUSTEES OF
THE Z TRUST
Defendants

Hearing: 3 – 4 May 2021

Counsel: M Phillipps and N Dennison for the Plaintiffs
M Wenley and B Ronberg for the Defendants

Judgment: 5 November 2021

JUDGMENT OF GWYN J

Solicitors:
Vicki Ammundsen Trust Law, Auckland for Plaintiffs
Willis Legal, Napier for Defendants

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Introduction

[1] The plaintiffs, Ms A, Mr B, and Mr C, are the three living adult children of Mr Z. All three plaintiffs allege that they were repeatedly physically assaulted and mentally and emotionally abused by their father during the 1960s and 1970s. Ms A alleges that she was raped and repeatedly sexually abused by Mr Z during this period.

[2] The plaintiffs sue the surviving trustees, Mr D and E Limited (the trustees), of a trust settled by Mr Z (the Trust),¹ in relation to dispositions by Mr Z to the Trust prior to his death in 2016. The practical effect of those dispositions (and Mr Z's stated intention) was to alienate the majority of Mr Z's property so that it did not form part of his estate upon his death.

[3] The plaintiffs allege that Mr Z's alienation of the assets in question constituted a breach of fiduciary obligations owed to them. Four causes of action are pleaded against the trustees: breach of fiduciary duty; fraud on a power; knowing receipt; and unjust enrichment. The plaintiffs seek a declaration that the Deeds of Gift for the dispositions are void; and an order that the trustees hold the relevant property as constructive trustees for the Estate, and an order for account. The orders they seek would have the effect of unwinding the dispositions so that the assets would fall into Mr Z's estate (the plaintiffs have made a claim against Mr Z's estate, under the Family Protection Act 1955).

[4] The plaintiffs' claim was originally brought against the trustees as first defendants, and Mr Z's former solicitors as second defendants. The claim against the latter was of knowing assistance of Mr Z's alleged breach of his fiduciary obligations to the plaintiffs. The claims against all defendants were the subject of an application for summary judgment on the basis that the plaintiffs' claims could not succeed and should be struck out.

[5] Associate Judge Johnston gave summary judgment for the second defendants.² It was common ground between the parties that the plaintiffs would need to establish

¹ By minute dated 4 May 2021, I directed that counsel for the defendants was to represent all the beneficiaries of the Trust (both adult and infant beneficiaries).

² *A v D* [2019] NZHC 992.

that the second defendants, in assisting Mr Z to settle the trust and transfer the property to the trustees, acted dishonestly. That required the plaintiffs to establish that the second defendants knew of the circumstances that are said to have rendered Mr Z's actions a breach of the alleged fiduciary obligations to his children. Associate Judge Johnston found that on the material before him, the second defendants knew nothing of the allegations of abuse against Mr Z,³ and therefore the claim against them could not succeed.⁴ The Associate Judge entered summary judgment in favour of the second defendants.

[6] In relation to the plaintiffs' claim against the trustees, the Associate Judge concluded that, although the duty asserted had not been previously recognised, that did not mean that it was not possible that such a duty could be recognised. In the summary judgment context, the trustees could not satisfy the Court that the plaintiffs' claim could not succeed.

[7] The trustees sought leave of the Court of Appeal to appeal Associate Judge Johnston's decision, under s 56(5) of the Senior Courts Act 2016.⁵ Before the Court of Appeal the trustees contended that none of the plaintiffs' claims against them could succeed and, in particular, that there is no basis for the claim that Mr Z owed the plaintiffs fiduciary duties that effectively prevented him from disposing of his assets during his lifetime. The Court of Appeal said:⁶

[10] We agree with the Associate Judge that the respondents' proceedings will require a careful evaluation of whether the evidence demonstrates the respondents' claim that Z owed them a fiduciary duty at the time he transferred most of his assets to the Trust. While the claims by the respondents may be novel, they are very dependent upon whether or not they are able to establish the facts necessary to underpin their claim that Z owed them fiduciary duties.

[8] The Court of Appeal concluded that, because the proceedings are so dependent on what factual findings are reached by the trial court, the Associate Judge was right to decline leave to appeal under s 56(3) of the Senior Courts Act. The Court of Appeal saw no basis for granting leave to appeal and declined the application.

³ At [44].

⁴ At [46].

⁵ The Associate Judge had declined leave to appeal under s 56(3) of the Senior Courts Act 2016: *A v D* [2019] NZHC 1891.

⁶ *D v A* [2019] NZCA 585.

Background

[9] Mr Z and Ms J had four children before separating in the 1980s: Mr G was born in 1960, and died in 2015; the first plaintiff, Ms A, was born in 1961; the second plaintiff, Mr B, was born in 1963; and the third plaintiff, Mr C, was born in 1971. All three plaintiffs described Mr Z as exceptionally abusive, and I set out their picture of their general family life and the abuse the children witnessed by Mr Z against Ms J, before turning to their individual experiences.

[10] All three plaintiffs describe Mr Z as a violent man, an abusive husband and father. Ms A describes a pattern of verbal and physical abuse by Mr Z, of herself, her brothers, and her mother. Although Ms A describes Mr Z's behaviour as being worse when he had been drinking, she also describes many acts of violence and belittling happening when he had not consumed alcohol.

[11] The plaintiffs describe their parents' relationship as always abusive, and say they grew up observing Mr Z being regularly violent towards their mother. Ms A describes Mr Z's pattern as being to start shouting and punching Ms J, then the children out of bed to shout at them too, and then order them out of the house before beginning to really beat Ms J while yelling that he would kill her. Ms A recalls one occasion when she was made to stand in her parents' bedroom while Mr Z threw hot water, and then the kettle, at Ms J.

[12] Ms A's evidence is that even before Mr Z began sexually abusing her, her early childhood was a nightmare. When Mr Z wasn't being physically abusive to Ms J, he was verbally and emotionally abusive to all four of his children. Ms A describes all of them, including her mother, being terrified of Mr Z. Ms A says:

I recall [Mr G], [Mr B] and I would shelter together under the front doorsteps. [Mr Z] would punch and hit my brothers too, whenever he wanted to. I saw him on many occasions take off his belt and hit them with the buckle end.

[13] Mr Z left Ms J in 1981, when Mr G and Mr B had already left home, Ms A was 20 years old, and Mr C was 10 years old. Ms A, Mr C and their mother had to move out of the house they were then living in. By that time, Ms A was attending teachers' training college and was away from the household during term time.

[14] Mr Z moved out of the family home and was principally living in accommodation at his workplace. However, Mr Z moved back and forth between the family home and his employment accommodation. Ms A explains that he continued to control and abuse the family even after he stopped living with them full time in 1981. He reconciled briefly with Ms J in 1982, but by the end of that year he was again abusing her physically. Ms A gave evidence that she witnessed Mr Z hitting her mother and threatening to kill the family with guns. She describes that during this time, Mr Z tried to pull out Ms J's fingernails, and he gave her tablets which led to an overdose and then refused to take her to the hospital. Sometimes he stood outside the house and pointed his guns at the house, knowing that Ms J, Ms A, and Mr C were inside. He would make threatening phone calls during the night.

[15] By 1983, the marriage between Mr Z and Ms J was over. Ms J obtained a non-molestation order, although Mr Z would still drive up to the house at night and park in the drive with the lights on full beam shining into the living room. Ms A describes her mother pulling her to the floor to hide from him. She describes that once he brought his guns with him in the car and pointed them at the house from inside the car.

[16] Some time in the early 1980s, as his relationship with Ms J was ending, Mr Z started a relationship with Ms Y.

[17] All of the plaintiffs describe the ongoing effect of their father's abuse. They describe a life of poor achievement at school; leaving school prematurely; not being able to have a university education they might otherwise have achieved; being generally distrustful of other people, including friends and close family; and adverse impact on employment opportunities and, consequently, their financial position. They also describe never developing self-confidence or self-belief. All three plaintiffs say they were estranged from Mr Z as adults, as a result of his abusive behaviour.

Ms A's experience

[18] Ms A says she was continually sexually assaulted by Mr Z between 1968 and 1973, between the ages of seven and 13. Mr Z started coming into her room at night when she was seven years old, and Ms A describes him raping and sexually assaulting

her many, many times. Ms A recalls that she went to Holy Communion when she was in standard one of primary school (at approximately seven years old), and was aware at the time that she was not a virgin.

[19] She says “I still remember the terror seeing the bedroom door opening and the light shining through. That meant my father was coming in.” Ms A says she vividly remembers many of the individual incidents but finds it “too private, too painful, and too shameful” to discuss those details with anyone other than a professional counsellor. I confirm I have read the reports of Ms A’s subsequent counselling that were provided to the Court, however in the interests of Ms A’s privacy it is not necessary for me to repeat the details here, other than to say, as I will come to, that I accept Ms A’s evidence.

[20] Ms A describes herself as being helpless and powerless to stop the abuse. She never told anyone about it, because she was terrified of what would happen if she did. Shortly after the abuse began, Ms A says that she remembers Mr Z lying on top of her, holding a pillow tightly around her head and partly smothering her. Mr Z told her if she ever told anyone about what he was doing to her, he would kill her. He said he would kill her mother too. Ms A was eight years old at the time.

[21] By the time Ms A was nine years old, she was soiling herself frequently and was suffering from frequent urinary tract infections. She was taken to a general practitioner who would see her for a “sore bottom”. She had lost control of when she went to the toilet and suffered anxiety and embarrassment about that, especially in school.

[22] Ms A describes doing anything she could to escape her father. She remembers hiding in the basement under the house and running away and hiding up in the pine trees at a local school. She also describes following other children home from school who she didn’t know and staying at their houses as long as she could, even until it was dark, so she could avoid going home.

[23] By the time Ms A was 11 years old, she wanted to end her life, as she felt it was the only way she could be free of being terrified of her father and the harm he was inflicting on her.

[24] In 1973, the family moved to the Hawke's Bay. Ms A describes the sexual assaults and rapes continuing at the family's first Hawke's Bay address.

[25] Mr Z's sexual abuse of Ms A stopped in 1973 when she was 13, when they moved to a different house where her bedroom had a lock on it so she could lock the door and prevent Mr Z getting in at night.

[26] Ms A describes that although the sexual abuse by Mr Z stopped when she was able to lock her bedroom door, his psychological abuse continued. For example, he would peer through her window at night while he stood outside smoking cigarettes, and he would stand outside the bathroom door while she was using the bath.

[27] Ms A also describes Mr Z criticising and belittling her. At his direction, she worked at the shop he ran after school in the evenings and on weekends, and Mr Z told her if she wrote up her hours on the calendar she would be paid every month. When she asked for payment, Mr Z told her she was stupid to think he would pay her and laughed at her. Ms A worked in the shop for four years. Mr Z refused to take Ms A to extracurricular activities such as netball. She was isolated from school friends during weekends.

[28] As a result of Mr Z's abuse, Ms A lacked a lot of confidence and thought she was useless at many activities. She developed an eating problem and believed she was overweight. She stopped standing up for herself and became, as she describes it, a "timid, quiet, head-in-a-book teenager with no opinion and no self-worth". Ms A also describes continuing to frequently have suicidal thoughts.

[29] Ms A says that Mr Z never tried to have a relationship with her from the time she went to teacher's college in the late 1970s. She had not seen him or had any contact with him from 1983, other than a glimpse at a family funeral from which he was asked to leave, and what she describes as a strange phone call from him when she

was living in Australia in 1987. At that stage, Mr C was missing and Ms A was trying to find him. Mr Z called her, and was abusive and threatening and told her never to return to New Zealand.

[30] After graduating as a teacher, Ms A had a job at a school in 1982, but left after 16 months. She attributes that to the stress of the potential reconciliation between Mr Z and her mother during late 1982 and Mr Z's continued abuse of her mother, Mr C and herself. Ms A says that during her parents' reconciliation she continued to be bulimic and to suffer depression. She did not socialise as a young person and kept to her work and flat. She rejected opportunities for personal relationships with men because she was not able to share what had happened to her. She describes wanting to kill herself. She moved away in 1983.

[31] In 1985, when Ms A was 23 or 24, she returned to the Hawke's Bay to be with a friend who was dying of cancer. She describes being overwhelmed with panic when Mr Z was mentioned and being paralysed with fear that she might run into him at some point.

[32] Ms A describes that after qualifying as a teacher, she fell into a pattern of behaviour that meant she lived a transient lifestyle. She would begin a new role in a new place, but quickly feel overwhelmed. She would develop depression and suicidal thoughts, followed by a feeling of needing to get away. She did not take on normal teaching responsibilities necessary to move up the professional ladder and continued to experience extreme stress. She describes a pattern of feeling stressed, leaving her job, packing up her life and moving to a new place, to try to escape the pain she was feeling. In each new place, she was socially isolated. She describes the financial cost of leaving jobs suddenly and constantly moving. She has worked in many different roles, including as a teacher, in an office, as a cleaner, and in hospitality. Ms A describes times when she had no income until she could find another job, but always being careful with her spending and saving for those moments when the depression would come on again and she would panic and have to move on. Ms A also describes battling with the urge to take drugs or consume too much alcohol as a means of self-medication. Ms A also describes ongoing battles with her self-image, believing herself to be unlovable and ugly.

[33] Ms A started counselling for the first time in 1985-1986, when she was 24 or 25 years old. Ms A describes the disclosure process to the counsellor in 1985, and the emotions that went with it, as being overwhelming. She refers to disclosing what had happened to her as a child to a doctor in 1982, but her concerns were ignored. She had also previously disclosed what had happened to an older friend in 1982, as well as to a police officer in 1983. However, she explains that they were not professionals who could give her the help she needed.

[34] By 1990, Ms A was suicidal again and she sought help. She lodged a sensitive claim with the Accident Compensation Corporation (ACC), which allowed her to have counselling. She received a payment of approximately \$8,000 from ACC on account of her sensitive claim. Ms A allowed her counsellor to report to the hospital where Mr Z worked that Ms A had been abused by Mr Z, so that they could make enquiries to ensure that no children were being harmed.

[35] It was around this time that Ms A confided in her three brothers that Mr Z had sexually abused her. She describes her brothers as being very supportive of her and her decision not to pursue Mr Z through the courts for the sexual abuse. They agreed that they would continue to have no contact with him.

[36] In 1991, Ms A told her mother about the sexual abuse. Ms J contacted a lawyer and sought advice about what options might be available. Ms A describes it all being too much for her at the time. She was 30 years old with no self-confidence or support system, and the thought of sharing what happened to her with lawyers and police was too much for her to cope with.

[37] In early 1992, Ms J wrote to Mr Z, telling him that she knew about what he had done to Ms A and that it was unforgiveable. Ms J received a letter in reply from a lawyer in the Hawkes's Bay, saying that the allegations were untrue and defamatory and if they were repeated Mr Z would take "appropriate action".

[38] In August 1992, Ms A herself wrote to Mr Z, telling him that what she had gone through as a child was no longer a secret. She told him that he must not be allowed to do this to other children and that she was prepared to tell others to protect children in

his care. She told him about the effect his abuse had had on her life and the suffering it had caused. She received no response. Ms A describes the lack of acknowledgement by Mr Z of what he had done to her, and the absence of remorse or shame, as a burden on her.

[39] Ms A became pregnant with her son in early 1996. She became a single mother, describing her inability to have intimate relationships because of the abuse she suffered as a child. Her son has had no contact with his father. Ms A has brought up her son as a sole mother and has not been able to buy a house or build up any significant savings to provide for herself as she gets older.

[40] Ms A describes stopping her transient lifestyle after her son was born, and settling in a city in the North Island. Ms A lived on a domestic purposes benefit from 1996 to 2013, supplementing her income with childcare, teaching and cleaning. She describes not having the mental or physical strength to be a fulltime classroom teacher and continuing to suffer depression because of the abuse. She describes herself as overly protective of her son, not allowing him to be in childcare or to stay with others.

[41] Ms A says she never had any financial or emotional help from Mr Z. He never met or acknowledged her son. He never offered her support or financial assistance, even after he knew that his grandson had been born and that Ms A was a single parent.

[42] Ms A says that she is aware that family members had shared with Mr Z news of Ms A's struggles and of her need for support and maintenance. In her view, the fact that he had included her in his will at various points, was evidence of that. Ms A refers to a conversation with her brother Mr G, who died in 2015, where Mr G told her he had confronted Mr Z once about Mr Z abusing Ms A. Mr Z was mean and sarcastic and they came to blows. During this meeting, Mr Z stated that he would leave Ms A his house and that he would look after her. Ms A says she understands that he did this in his will dated 21 December 2001. Ms A says she had fully expected to receive Mr Z's house in his will.

[43] Ms A describes sending a message to Mr Z when she had heard through family members that he was close to dying. Her message was that Mr Z was in God's hands

and he was answerable only to God. She asked a priest, who had full knowledge of why Ms A and Mr Z's other children would not visit him on his deathbed, to visit him and she understands that the priest did so. Ms A attended Mr Z's funeral. She describes that it was only on seeing his casket at the funeral that she could believe that he was no longer capable of killing her or her family.

[44] Ms A describes hoping that when Mr Z died he would put into words his feelings towards his children, but that he left nothing for them to help understand what had happened to them – whether he was ashamed and disgusted at what he had done; whether he acknowledged the incest, abuse, and violence; and whether he was sorry. She says:

I expected [Mr Z] to acknowledge his children in his will. I expected my brothers to receive a financial acknowledgment of being [Mr Z]'s sons. I thought by the time he was dying [Mr Z] would know the value of having, and acknowledging, his own children through his will. We are all good people and I thought [Mr Z] would have the maturity to acknowledge us as well as recognise his appalling behaviour and make amends financially.

[45] Ms A describes the destructive and damaging effect of Mr Z's abuse on her life, both emotionally and financially.

[46] Ms A has been diagnosed with post-traumatic stress disorder and major depressive disorder. Many everyday things continue to trigger her memories of Mr Z's abuse, and she has regularly suffered from suicidal thoughts. Ms A also discusses her body issues and lack of self-confidence as a result of the abuse she suffered, explaining she developed bulimia and a warped body image and fear of showing her body.

[47] Ms A describes the continued experience of living in poverty, without safety and security.

[48] Ms A also describes the difficulties for her in having to disclose personal matters to people who were neither qualified nor responsible for responding with the support she needs, including wider members of her family, lawyers, and beyond that with the family of Ms Y. She speaks of her fear that there are people who may not respect her privacy, who may respond inappropriately, or show a lack of comprehension of and empathy for what has happened to her.

Mr B's experience

[49] Mr B describes his father as a violent drunk, and recalls being subjected to physical and emotional abuse from his father from about the age of six. He says he witnessed physical and emotional abuse by his father of his mother and his siblings. Mr B himself says his “childhood revolved around abuse by” Mr Z, and he was repeatedly beaten by Mr Z, sometimes using the buckle end of a belt. Mr B recalls one occasion that was particularly humiliating, where Mr Z forced him to strip naked before beating him. Mr B also recalls Mr Z humiliating him in front of others.

[50] At a young age Mr B developed a tremor where his body shook, and he also had hand tremors – he believes this was a psychological problem as a result of living in fear of his father. He recalls being referred (he thinks by his school) to see a “shrink” when he was 11 or 12. He was subsequently sent away to a health camp for the summer holidays, without explanation. He thought at the time that he had been sent to a home for naughty children permanently. His parents did not visit him while he was at the camp, and no one asked him about it when he returned.

[51] Mr B left home in 1980, when he was 16 years old, after a physical fight with his father. He recalls it as the first time he had defended himself against Mr Z – when Mr Z approached him with a leather belt, Mr B punched Mr Z in the face. Mr B was then told by Mr Z to “leave the house, to get out and never return”. Mr B had no further contact with Mr Z after leaving the family home at 16. Mr Z never made contact with him again, and Mr B says Mr Z never tried to help him in any way.

[52] Mr B explains that he failed School Certificate, which he largely attributes to living in such a “toxic atmosphere”. Despite a desire to attend university, Mr B was unable to complete School Certificate after leaving home. He started experimenting with drugs and alcohol. At the age of 17, Mr B was the victim of an attempted murder, when he was stabbed by a gang member. Mr B records that his mother may have visited him once after this happened, but his father did not visit him and neither parent attended at the trial where Mr B had to give evidence.

[53] Around the age of 18, Mr B moved to Australia with his partner. Soon after that they had a baby, but Mr B could not cope with the responsibility and eventually abandoned his partner and child. His lifestyle was transient for many years.

[54] Mr B is now married, and has two children with his current wife. He works full time. Although he considers himself “luckier” than his siblings in some ways, he details the “huge impact” Mr Z’s abuse had on him and “emotional scars that will never disappear”. He speaks of the difficulty he had as an adult coming to terms with Mr Z’s abuse, in particular the negative impact it had on his ability to be a father to his eldest child. He also explains that he missed out on education, and believes he would have better earning potential now if he had not had such an abusive father. He also explains that he is generally distrustful of people, including his family.

Mr C’s experience

[55] The youngest of the four siblings, Mr C, explains that he and his mother would often have to flee from the house and take shelter with family friends to escape Mr Z’s violence and drunken behaviour. Although Mr C did not elaborate on the details of the physical abuse he suffered, he does confirm he was physically and emotionally abused by Mr Z. Ms A and Mr B also confirm that Mr Z physically and emotionally abused Mr C.

[56] Due to the age gap between the plaintiffs, Mr C was left alone with his parents after his older siblings had left home. He describes Mr Z abandoning him and Ms J when their rental accommodation was sold, and informing Ms J that he was leaving her by leaving a hand-written note which Mr C found by their bed. At that point, Mr C and his mother moved into a rundown bach. Mr C was only approximately 10 or 11 years old and was living with his mother during the tumultuous period that Mr Z and Ms J were separating.⁷

[57] Mr C explains that he began using drugs and alcohol from the age of 13, to find comfort. He has suffered from depression since he was 14. Mr C says Mr Z sent him to live with an uncle in Australia when he was 15. Mr C ran away after four weeks

⁷ As described above at [14].

and he was missing for several months before Ms A went and brought him back to New Zealand.

[58] As an adult, Mr C's drug use developed into a severe and prolonged addiction, before he got support in 2011. He currently works full time, and purchased a modest house in 2015. He still suffers from depression. Like Mr B, Mr C believes Mr Z's abuse has negatively affected his current financial position.

Mr Z's estate planning

[59] As already noted, about the time Mr Z stopped living with Ms J, in 1980 or 1981, he met Ms Y and they began a relationship.

[60] At the time Mr Z met Ms Y she had three children. The eldest is married to Mr D (one of the trustees of the Trust).

[61] Mr Z instructed his lawyers in the preparation of seven wills that were executed by him between 2001 and 2015, including his final will:

- (a) 21 December 2001;
- (b) 12 September 2003;
- (c) 11 October 2004;
- (d) 23 June 2009;
- (e) 10 August 2010;
- (f) 21 June 2012;
- (g) 21 December 2015.

[62] In the 2003 will, Ms A's son was to receive Mr Z's residence subject to a life interest in favour of a third party (who it appears Mr Z was in a relationship with), and the executors were given discretion to pay any of Ms A's debts if they chose. The

balance of the estate was to be divided between two women (it is not clear what their relationship to Mr Z was).

[63] The plaintiffs were not included in the 2004 will, but their children were. The plaintiffs were included in the 2009, 2010 and 2012 wills, but not in the final will in 2015.

[64] On 28 May 2012, Mr Z acquired a residential property in the Hawke's Bay (the house). On 21 June 2012, Mr Z executed a will leaving the house to Ms Y's two daughters in equal parts, and his remaining property as to one part to his four children and the other part to Ms Y's three children.

[65] On 22 October 2014, Mr Z advised his lawyer that he wished to set up a trust. His lawyer recorded a file note: "Why Trust instead of will. – in case get 'crook' – also prevents any of his family chasing any of his."

[66] On 12 November 2014 Mr Z's lawyer met with him to take instructions in relation to the formation of the settlement of a trust. In an affidavit in the present proceeding, Mr Z's lawyer confirmed, with reference to a file note he took at the time, that Mr Z told him a claim against his estate by his children was an issue.

[67] The Trust was settled on 22 December 2014. The initial trustees were Mr Z and Mr D.⁸ E Limited was appointed as an additional trustee on 27 January 2016. The plaintiffs are not beneficiaries of the Trust. The primary beneficiaries are Ms Y's children and grandchildren and others, with one of Ms Y's grandchildren being the final beneficiary.

[68] A deed of gift by Mr Z to the Trust for the house was executed on 22 December 2014. A deed of gift by Mr Z to the Trust for shares held by Mr Z was executed on 27 January 2016. I refer to the house and the shares together as "the property".

⁸ F Limited was appointed as an additional trustee on 27 January 2016. E Limited was appointed in place of F Limited on 12 February 2020.

[69] In November 2015, Mr Z's lawyer recorded Mr Z's instructions to delete any reference in his will dated 21 June 2012 to his children, by deleting the clause providing for them.

[70] Mr Z died in 2016, leaving a will dated 21 December 2015. Probate was granted on 31 May 2016. No provision was made by Mr Z in the will for any of the plaintiffs.

[71] In December 2016, the plaintiffs brought a claim under the Family Protection Act 1955 against the executors of Mr Z's estate. As at 7 July 2016 there was \$46,839.90 in the Estate. The house has a book value of \$360,000 in the Trust books, and counsel for the plaintiffs submits it appears to have a current value of \$700,000. The shares were valued in the Trust books at 31 March 2017 at \$37,385.45.

[72] Mr Z's lawyer advises in his affidavit that the Trust distributed \$9,000 to the beneficiaries in April 2018, but it is not clear whether any other distributions have been made.

The plaintiffs' claim

[73] In summary, the plaintiffs' key contentions are that Mr Z owed fiduciary duties to them, and he breached those duties when he transferred the property to the trustees for the purpose of avoiding his obligations to them. As Mr Z was also a trustee of the Trust, the other trustees were visited with his knowledge of the breach. The express trust is therefore vitiated and the trustees hold the property for the executors of Mr Z's estate. Four causes of action are pleaded against the trustees:

- (a) breach of fiduciary duty;
- (b) fraud on a power;
- (c) knowing receipt; and
- (d) unjust enrichment.

[74] The alleged breach of the fiduciary duty arises by Mr Z transferring his assets to the Trust and acting adverse to the plaintiffs' interests, instead preferring the interests of himself and third parties. In doing so, he deliberately put himself in a position where he could no longer meet the plaintiffs' economic needs that had arisen because of the manner in which he had abused them. The abuse during the plaintiffs' childhood gave rise to the fiduciary obligation. The plaintiffs' vulnerability, created by that abuse, meant that Mr Z had a continuing obligation, and the plaintiffs reposed trust and confidence in him, to provide economically for them and not to act in a way that was adverse to their interests. In relation to the breach of fiduciary duty, the plaintiffs seek an order that the defendants hold the property and shares as constructive trustees for the estate of Mr Z, and an order for account.

[75] In the second, fraud on a power, claim, the plaintiffs claim the gifts of the property to the Trust were for an improper purpose (ensuring they would not go to the plaintiffs, in breach of the fiduciary obligations). The plaintiffs claim the defendants were aware, by imputation, that the gifts were for an improper purpose, and as a result they seek a declaration the deeds of gift are void. They again say the defendants hold the property and shares as constructive trustees for the estate of Mr Z.

[76] As to the knowing receipt cause of action, the plaintiffs say the defendants received the gifts knowing they were in breach of Mr Z's fiduciary obligations, and the defendants therefore hold them as constructive trustees for the estate of Mr Z.

[77] The final claim is based on the allegation that Z's conduct was unconscionable, and the Trust was unjustly enriched by Z's breach of his fiduciary obligations. The plaintiffs seek an order that the defendants restore and transfer the property, or the monetary equivalent, to the estate of Mr Z.

[78] The plaintiffs read their briefs of evidence before the Court and were cross-examined.

The defendants' case

[79] The defendants say Mr Z did not owe any fiduciary obligation to his adult children, and was free to dispose of his property however he wanted to while he was

alive. They emphasised that the plaintiffs chose to be estranged from Mr Z for most of their adult lives. They assert the claim is really a disguised claim for damages (whether compensatory or exemplary).

[80] Mr Wenley, counsel for the defendants, also urged the Court to take a cautious approach in considering the plaintiffs' claim, citing concerns about "floodgates" of claims by adult children against their parents' property.

[81] For the defendants, evidence was given by one of Mr Z's lawyers (who is also a director of the trustee defendant, E Limited) and by Ms Y.

[82] In the formal pleadings the allegations of abuse are denied solely on the grounds that the defendants have no knowledge of them. Ms Y's evidence was that she did not know of the plaintiffs' allegations against Mr Z until after Mr Z's death. No evidence was called to challenge the plaintiffs' evidence of Mr Z's abuse of them. The letter from Mr Z's solicitors to Ms J, dated 12 March 1992, asserts a general denial of the allegations of sexual abuse of Ms A and said Mr Z would "take appropriate action" if the allegations were continued. Mr Z did not respond to Ms A's letter to him in August 1992.

[83] Mr Wenley put it to Ms A in cross-examination that her allegations of sexual abuse by Mr Z may have been made up, or some kind of "recovered memory". No evidential basis was advanced for that proposition. Mr Wenley also suggested to Ms A and Mr C in cross-examination that the depression they experienced was a result of a "family predisposition", rather than a consequence of Mr Z's abuse. The plaintiffs strongly denied that suggestion, and the defendants did not call any expert evidence on the point. I also note that suggestion is inconsistent with the findings in Ms A's ACC reports, that the sexual abuse she suffered was (at least in part) causative of her diagnosis of post-traumatic stress disorder and major depressive disorder.

[84] No expert evidence was provided by either party.

The issues

[85] It will be necessary to determine the following questions:

- (a) Has each of the plaintiffs established, on the balance of probabilities, that the alleged abuse by Mr Z occurred?
- (b) Did Mr Z owe a fiduciary duty to the plaintiffs when they were children?
- (c) Was the sexual and physical abuse, if established, a breach of Mr Z's fiduciary duty to each of the plaintiffs?
- (d) Was there a fiduciary relationship between Mr Z and each of the plaintiffs at the time of the transfer of the property to the Trust?
- (e) Was the transfer of property by Mr Z to the Trust in breach of any of the fiduciary duties owed to the plaintiffs?
- (f) Did the defendants know the transfers were made in breach of Mr Z's fiduciary obligations to the plaintiffs?
- (g) Was the trustees' acceptance of the transfers a fraud on a power?
- (h) Does the doctrine of laches apply to make it inequitable to grant relief?

Has each of the plaintiffs established, on the balance of probabilities, that the alleged abuse by Mr Z occurred?

Burden and standard of proof

[86] As Chisholm J observed in *J v J*,⁹ a jury might more usually be called upon to resolve the factual issues in this kind of case. It is therefore useful to note the issues on which a jury would be directed.

[87] The plaintiffs must prove their allegations to the civil standard of balance of probabilities, flexibly applied to reflect the seriousness and consequences of the facts

⁹ *J v J* [2013] NZHC 1512 at [77].

that must be proved. In *Z v Dental Complaints Assessment Committee*, the Supreme Court said:¹⁰

[102] ... the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[88] Plainly, the allegations in this case are serious.

Discussion

[89] By his lawyer's letter in 1992, Mr Z denied the allegation of rape of Ms A made in Ms J's letter. He did not respond to Ms A's own letter to him in August 1992. As I have noted, no evidence was called by the defendants to rebut the allegations made by Ms A, Mr B and Mr C.

[90] Ms J did not give evidence in the proceeding, but it is plain from her letter to Mr Z in 1992 that she accepted what Ms A had told her.

[91] All three plaintiffs were sincere and credible witnesses. I am satisfied, having heard and assessed their evidence, that Ms A has proved that the sexual abuse of her by Mr Z did occur. Mr B and Mr C have proved that the physical and emotional abuse of them by Mr Z did occur.

[92] I am also satisfied that all three plaintiffs have suffered incalculable damage as a result of that abuse, Ms A in particular. That damage is in part emotional – as Ms A describes it herself, there is a real likelihood that she will remain unable to form a meaningful and lasting relationship with an intimate partner. The further consequences of that emotional damage are also profound, impacting directly on her ability to earn a living with the consequence that, at the age of 59, she finds herself in effect homeless and without the means to acquire a home.

Did Mr Z owe a fiduciary duty to the plaintiffs when they were children?

[93] The plaintiffs' statement of claim pleads:

¹⁰ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55; see also *Gate v Sun Alliance Insurance Ltd* HC Auckland CP1218/92, 19 January 1994 at 16-22.

32. From the time that he had care and responsibility for his children [Z] had a duty to:
- (a) care for, protect and rear his children;
 - (b) refrain from sexually or physically assaulting them;
 - (c) protect their economic interests;
 - (d) recognise them as members of his family and provide for them from his wealth.

[94] The Supreme Court in *Chirnside v Fay* confirmed there are two broad circumstances in which the courts will categorise a relationship as fiduciary:¹¹

- (a) Certain relationships are recognised by the law as inherently fiduciary because of the very nature of the relationship itself (for example, solicitor and client), and the law imposes fiduciary obligations unless the circumstances dictate otherwise. This is referred to as an “inherently fiduciary relationship”.
- (b) Outside those recognised categories, the law will impose fiduciary obligations on one party to a relationship where the particular circumstances justify doing so. This is referred to as a “particular fiduciary relationship”.

[95] In *Chirnside*,¹² Tipping J referred to *Estate Realties Ltd v Wignall* where the Judge observed:¹³

The word “fiduciary” derives from the Latin word “fiducia”, the primary meaning of which is trust. Important secondary meanings are confidence and reliance. The cases demonstrate that a fiduciary relationship will arise where one party is reasonably entitled to repose and does repose trust and confidence in the other, either generally or in the particular transaction ...

[96] Justice Tipping went on to say in *Chirnside*:¹⁴

It is clear from the authorities that relationships which are inherently fiduciary all possess the feature which justifies the imposition of fiduciary duties in a

¹¹ *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [73]-[75].

¹² At [77].

¹³ *Estate Realties Ltd v Wignall* [1991] 3 NZLR 482 at 492 per Tipping J.

¹⁴ *Chirnside v Fay*, above n 11, at [80].

case which falls outside the traditional categories; all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in *Arklow* as a legitimate expectation) of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.

[97] As the authors of *Equity and Trusts in New Zealand* have noted, the relationship between parent and child was once a recognised category of fiduciary relationship, although it is now “unusual to import the full gamut of restrictions on dealings between fiduciaries into familial relations where economic transactions occur all the time”.¹⁵ However, a significant recent development in this area of the law is the application of fiduciary duties against physical and sexual abuse, which has been facilitated by a move away from tying fiduciary protection only to economic interests and towards embracing non-economic interests.¹⁶

[98] The plaintiffs rely on the 1992 Canadian case of *M. (K.) v M. (H.)*, where the Supreme Court held:¹⁷

[72] It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.

[99] New Zealand courts have also, on a number of occasions, indicated that in certain circumstances (usually involving sexual abuse) there exists a fiduciary relationship between a parent or caregiver and a child.

[100] In *S v G* in 1995, in the context of considering a claim made by a victim of sexual abuse by a medical practitioner, the Court of Appeal commented that the “fiduciary position ... of the [victim's] mother must be unquestionable.”¹⁸

¹⁵ Andrew Butler “Fiduciary Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 471 at 553.

¹⁶ At 553.

¹⁷ *M (K) v M (H)* [1992] 3 SCR 6 at [61]-[62].

¹⁸ *S v G* [1995] 3 NZLR 681 at 691.

[101] The 1996 case of *H v R* involved allegations of breach of fiduciary duty arising from sexual abuse of a child by an unrelated adult. Although not required to make findings on the fiduciary cause of action, Hammond J referred to *M. (K.) v M. (H.)* and said:¹⁹

Nevertheless, it should not lightly be assumed that the law of fiduciaries will always avail a plaintiff in this area. For there must be, in law, a fiduciary relationship according to the usual criteria and tests adopted for such in a given jurisdiction before a claim could arise. It is notable that a number of the cases in which sexual abuse claims have been argued have been with respect to professional medical advisors. The professional relationship has been a fruitful source of the fiduciary duty. The position of parent and child would be another relatively obvious category.

[102] In *B v R* in 1996, where B sued her uncle R for sexually abusing her when she was left in his care as a child, it was not disputed that such a situation gave rise to a fiduciary duty owed by R to B, “namely to act in B's best interest at all times and certainly not to take advantage of her and exploit her for his own gratification.”²⁰ Justice Morris said “indeed, it could not be suggested, he was other than under an obligation to treat her properly and certainly not to abuse her.”²¹

[103] In 1998 in *Attorney-General v Prince*, the Attorney-General applied for strike-out of the plaintiff's claims, including a claim that child welfare officers of the Department of Education breached a fiduciary duty by failing to respond to complaints about the care provided by his adoptive parents.²² In refusing to strike out that element of the proceeding, the Court of Appeal held:²³

[The High Court] accepted there was a fiduciary relationship between the department and Mr Prince as a child and then as a young person, but he concluded in effect that there was no describable fiduciary duty to match the arguably present common law duty of care in receiving and responding to the complaint that Mr Prince as a young person was at risk.

The duty of the fiduciary, here the department, is to act in the child or young person's best interest and with the utmost good faith towards that child or young person. Essentially for the same reasons as apply in respect of the cause of action in negligence, we consider that the matter should be allowed to go to trial to allow the factual concerns and considerations to be investigated.

¹⁹ *H v R* [1996] 1 NZLR 299 at 307.

²⁰ *B v R* (1996) 10 PRNZ 73 at 75.

²¹ At 81.

²² *Attorney-General v Prince* [1998] 1 NZLR 262.

²³ At 285.

[104] In *Surrey v Speedy* in 2000, the plaintiff sued her biological mother for physical and mental and emotional distress (including allegations of the infliction of physical injury or harm) during the first 12 years of her life before she was put up for adoption.²⁴ Her claim included a claim for breach of fiduciary duty. In refusing to strike out the entire fiduciary cause of action, and after referring to *M. (K.) v M. (H.)*, Master Faire held “it seems to me ... that the essence of the parental obligation is to ‘refrain from inflicting personal injuries upon one’s child’.”²⁵ However, Master Faire did strike out the portion of the claim relating to a fiduciary obligation “to care for, protect and rear the plaintiff; to act in the plaintiff’s best interests” (contrary to the formulation of the fiduciary duty in *M. (K.) v M. (H.)*), and also expressed doubt as to whether the fiduciary obligation could extend to a duty “to protect the plaintiff from any acts of physical, mental and emotional harm.”²⁶

[105] In 2003 in *S v Attorney-General*, in the context of a claim by a victim of sexual abuse committed by foster parents with whom he was placed by the Superintendent of Child Welfare, the Court of Appeal proceeded on the basis the superintendent was a fiduciary for a child placed in foster care.²⁷

[106] In 2014 in *Jay v Jay*, the Court of Appeal considered a claim by a woman against her uncle, who had sexually abused her when she was a child.²⁸ The Court held that the familial relationship of uncle and niece was not an inherently fiduciary relationship;²⁹ however, the Court did caveat that by saying: “While we do not wish to categorically rule out its development as such in the future, we are comfortable with this conclusion as a reflection of current law.” Relevant for present purposes, the Court held:³⁰

[67] Turning to the facts, we do not consider that in the particular circumstances of this case the [uncle] owed any fiduciary obligation to the [victim]. The starting point is that the relationship here is not inherently fiduciary.³¹ It lies with the [victim] to prove a particular, context-specific duty.

²⁴ *Surrey v Speedy* [2000] NZFLR 899 (HC).

²⁵ At [35].

²⁶ At [36].

²⁷ *S v Attorney-General* [2003] NZCA 149, [2003] 3 NZLR 450 at [77].

²⁸ *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861.

²⁹ At [64] and [67].

³⁰ At [67] (emphasis added).

³¹ While we do not wish to categorically rule out its development as such in the future, we are comfortable with this conclusion as a reflection of current law.

In cases where such duties have been found to exist, the facts have typically been close to a relationship directly analogous to the *inherently fiduciary role of guardian or parent*. For example, in [*B v R*], the child was placed in the total care and control of an uncle while the mother and aunt worked.³² This is materially different from the intermittent contact the [uncle] had with the [victim] during the Easter and Christmas vacations. Even accepting the [uncle] invited the [victim] into his bedroom, the fleeting and limited nature of the incidents does not establish sufficient control or influence to bring this case on all fours with those noted above, or with the principles on the basis of which equity will impose a fiduciary relationship.

[107] Applying these authorities, I conclude that Mr Z's relationship with the plaintiffs, as their parent and caregiver while they were children, was inherently fiduciary. However, in terms of the plaintiffs' statement of claim, I do not consider the fiduciary duties arising from the relationship extended as far as they assert – for present purposes, I find the fiduciary duty owed to the plaintiffs as children was limited to the requirement at [32(b)] of the statement of claim, that Mr Z refrain from sexually or physically assaulting them.

Was the sexual and physical abuse a breach of Mr Z's fiduciary duty to each of the plaintiffs?

[108] It is plain that Mr Z's sexual abuse of Ms A was a breach of the fiduciary obligation he owed to her as a child.

[109] I also consider Mr Z's physical abuse of Mr B was a clear breach of the fiduciary obligation he owed to Mr B as a child.

[110] As I have noted above, Mr C's evidence of the physical abuse he suffered was less detailed than Ms A and Mr B's evidence, but it is difficult and undesirable to undertake any kind of gradation of abuse.

[111] Mr C's situation is different from, for example, the plaintiff in the British Columbia Supreme Court decision *R.L.L. v. R.L.*³³ There the plaintiff alleged her parents were regularly “violent, demeaning, and degrading toward her.”³⁴ The Court held that although there was “considerable evidence that [the plaintiff's family] was a

³² *B v R*, above n 20 – notwithstanding the fact that this specific issue was conceded in that case, and not fully argued at hearing, and is therefore of limited precedent value.

³³ *R.L.L. v. R.L.* [1999] B.C.J. No. 1764.

³⁴ At [17].

dysfunctional family”, the plaintiff had not met the onus of proof, on the balance of probabilities, that her parents’ behaviour constituted a breach of fiduciary duty.³⁵ The Court did find the plaintiff had established one allegation of assault and battery (as a result of the plaintiff’s father beating her). Given the Court did not accept all of the plaintiff’s allegations, the primary evidence of a dysfunctional family was the plaintiff witnessing her parents regularly drinking to excess and being violent towards each other, and the plaintiff’s parents being generally emotionally abusive of the plaintiff. However, unlike in the present case, there was limited corroborative evidence that the plaintiff’s parents had been regularly violent towards her, and her sibling and parents denied the bulk of the allegations.

[112] In the present case, there is no evidence that Mr C lived in a safe home. I am satisfied that Mr Z did physically abused Mr C, and Mr C lived in a constant state of fear that he or his mother would be seriously harmed by Mr Z. I consider that to have been a breach of the fiduciary obligation Mr Z owed to Mr C as a child.

[113] I find that Mr Z’s proven sexual abuse of Ms A and his proven physical abuse of Mr B and Mr C was a breach of the fiduciary duty he owed to each of them as children.

Was there a fiduciary relationship between Mr Z and each of the plaintiffs at the time of the transfer of the property to the Trust?

[114] I turn now to whether there was a fiduciary relationship between Mr Z and each of the plaintiffs at the time of the transfer of the property to the Trust.

[115] I again set out the relevant portion of the statement of claim, which pleads:

32. From the time that he had care and responsibility for his children [Mr Z] had a duty to:
 - (a) care for, protect and rear his children;
 - (b) refrain from sexually or physically assaulting them;
 - (c) protect their economic interests;

³⁵ At [131].

- (d) recognise them as members of his family and provide for them from his wealth.

[116] The claim pleads that, in breach of those duties, Mr Z:

- (a) carried out the assaults and other abuse referred to above;
- (b) failed to make any provision for any of them under his will;
- (c) settled the Trust, and gifted the property to the Trust to ensure that his assets would not go to the plaintiffs.

[117] I have already found that Mr Z was in a fiduciary relationship with the plaintiffs as children, and owed fiduciary duties to them in terms of the duty alleged at [32(b)] of the statement of claim, to refrain from sexually or physically assaulting them. I have also concluded that the allegations of abuse by Mr Z against each of the plaintiffs are established and that this amounted to a breach of Mr Z's fiduciary duties to the plaintiffs as children.

[118] The question is whether the relationship between Mr Z and the plaintiffs beyond their childhood was also fiduciary in nature.

[119] The plaintiffs say that the particular aspects of the relationship between them and Mr Z which justify the classification of the adult relationship as a fiduciary one are:

- (a) The plaintiffs were, as I have found, abused by Mr Z in their childhood, in breach of the fiduciary duty he owed them at that time (not to physically and sexually abuse them).
- (b) As a result of that abuse, they each remained vulnerable into their adulthood, and their trust and confidence in Mr Z to provide economically for them from his wealth continued.
- (c) Each of the plaintiffs expected, as adults, that Mr Z would not act in a way that was adverse to their interests.

[120] The plaintiffs say that they were operating under a disability as a result of their father's abuse. That continued disability meant that the fiduciary relationship between them and their father continued into their adulthood. As Mr Phillipps, counsel for the plaintiffs, put it: "It is not contended that the fiduciary obligation arises independently of the abuse. The abuse and its effect on the children is the underlying basis for the obligation."

[121] The plaintiffs say that by gifting the property to the Trust, Mr Z acted adverse to the plaintiffs' interests and instead preferred his own interests and the interests of third parties (the trustees and the beneficiaries of the Trust). He deliberately put himself in a position where he could no longer meet the plaintiffs' economic needs, which had arisen because of the manner in which they were abused by him. In doing so, he breached his fiduciary obligations to them.

[122] Mr Phillipps submits that the difference between this case and other New Zealand cases recognising a fiduciary obligation to a child is that in those cases it is the conduct during childhood – the abuse – which establishes the breach. In this case, it is the conduct during childhood that gave rise to the obligation, but the breach did not occur until the assets were transferred.

[123] The plaintiffs' submission is that Mr Z was in a position to unilaterally exercise a discretion or power in relation to his assets that would affect the lifelong interest of each of his children. Each of the children was peculiarly vulnerable to, and at the mercy of, their father as a fiduciary holding that discretionary power.

[124] The plaintiffs say the fiduciary relationship endured even though the relationship between Mr Z and each of the plaintiffs had broken down many years before the alleged breach and there was no ongoing communication between them; there is a difference between a physical relationship, which is signified by communications between the parties, and a fiduciary relationship. Although the plaintiffs decided to cease communications with Mr Z as a result of the abuse, they nevertheless retained trust and an expectation that he would "make amends" and do the right thing, particularly in relation to Ms A. Mr Phillipps relied by analogy on

cases arising in an employment context where the employment relationship may come to an end, but the fiduciary obligation continues.

[125] Mr Wenley, for the defendants, disputes that parents during their lifetime owe an enforceable duty in equity to make economic provision for their adult children. He accepts that Mr Z had a fiduciary duty to care for and not abuse his children while they were in his care. But as adults they were not in his care and they were not in contact with him. Mr Wenley emphasises that the plaintiffs were totally estranged from Mr Z, by their own choice, and accordingly there was no actual relationship giving rise to fiduciary obligations. In cross-examination, the proposition was put to all three plaintiffs that the estrangement between them and Mr Z was of their doing and they would have rebuffed any approach from him if he had made one. The defendants say the plaintiffs did not repose trust and confidence in Mr Z; they had nothing to do with him.

[126] The defendants say that the plaintiffs' claim against Mr Z, if there was one, was in tort. They say this claim is a disguised damages claim, fashioned to get around the limitation defences that would apply to a claim in tort and to the statutory bar created by the accident compensation regime. They also say that the plaintiffs' claim seeks to enhance their separate claim under the Family Protection Act by seeking a ruling that the property is held on a constructive trust for the executors of Mr Z's estate.

Preliminary issues

[127] Before I turn to the fiduciary duty claim, I address Mr Wenley's submission for the defendants that this is a disguised claim for damages (whether in tort, or by way of exemplary damages) that could have been brought against Mr Z during his lifetime, or against his estate. For completeness, I note the defendants highlight that a claim in tort against Mr Z's estate in law is now statute-barred by s 3(3) of the Law Reform Act 1936, and would face the statutory bar created by the accident compensation regime, but a claim for exemplary damages would be available, subject to overcoming a defence of laches.

[128] It is clear that fiduciary duties are conceptually different from obligations arising in contract and tort and may sit alongside other obligations. In *Simpson v*

Elliott,³⁶ the plaintiff sued her former psychiatric counsellor for breach of fiduciary duties in relation to his treatment of her. In declining an application for strike-out, Paterson J held that it was arguable that the fiduciary duties by a psychiatrist to his patient were quite different in scope from the duties he owed in tort and/or in contract.

[129] The relationship between a fiduciary duty claim and other causes of action was also discussed at some length by McLachlin J, in the Supreme Court of Canada decision *Norberg v Wynrib*:³⁷

[65] The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.

...

[67] The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is limited by the obligation he or she has undertaken – an obligation which “betokens loyalty, good faith and avoidance of a conflict of duty and self-interest” ... To cast a fiduciary relationship in terms of contract or tort (whether negligence or battery) is to diminish this obligation. If a fiduciary relationship is shown to exist, then the proper legal analysis is one based squarely on the full and fair consequences of a breach of that relationship.

[130] I conclude that, while the plaintiffs may have had potential claims against Mr Z in, for example, negligence, that is not in itself a bar to finding the existence of a fiduciary relationship.

[131] I also address Mr Wenley’s submission that Ms A did not pursue her allegations of sexual abuse in the criminal courts. I place no weight on this submission. Ms A made clear in her evidence that she has, understandably, struggled to discuss the details

³⁶ *Simpson v Elliott* HC Auckland CP 54/99, 14 March 2001.

³⁷ *Norberg v Wynrib* [1992] 2 SCR 226 at [65] (citations omitted).

of Mr Z's abuse. Ms A's choice to avoid the criminal process has no bearing on the claim I am considering.

[132] For completeness, I also record that, given the nature and extent of the abuse, Mr Wenley's submission that the plaintiffs were estranged from Mr Z by their own choice is of limited relevance.

Discussion

[133] Although I have recognised that Mr Z's relationship with the plaintiffs while they were children was inherently fiduciary, in my view, that cannot be so once they became adults. Generally, the relationship of an adult child to their parent is of a non-fiduciary kind. Nevertheless, there may be aspects of a relationship which do engage fiduciary obligations. The alleged fiduciary relationship here therefore falls to be considered within the second category in *Chirnside*,³⁸ as a particular fiduciary relationship, "subject to careful scrutiny of the context and the facts, on a case-by-case basis."³⁹

[134] As the Court of Appeal noted in *Jay v Jay*, Tipping J's observation that there is "no single formula or test" remains apposite – the "key feature in the imposition of a fiduciary duty is the entitlement of one party to place trust and confidence in the other."⁴⁰

[135] As the Court of Appeal said in the summary judgment decision, this case requires a "careful evaluation of whether the evidence demonstrates the respondents' claim that Mr Z owed them a fiduciary duty at the time he transferred most of his assets to the Trust."⁴¹

[136] Justice Wilson's famous dissenting judgment in the Canadian case of *Frame v Smith* is frequently relied on for her statement of the characteristics of a fiduciary

³⁸ *Chirnside v Fay*, above n 11.

³⁹ *Jay v Jay*, above n 28, at [64]

⁴⁰ At [65].

⁴¹ *D v A*, above n 6, at [10].

relationship.⁴² The issue in *Frame v Smith* was whether the relationship between a custodial parent and a non-custodial parent could be considered a category to which fiduciary obligations could attach. Although the majority in that case did not think it necessary to address the bases on which fiduciary obligations arise, in her dissenting judgment Wilson J set out three general characteristics of a fiduciary relationship:⁴³

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiaries' legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[137] Justice Wilson emphasised the third characteristic, vulnerability:⁴⁴

This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power.

[138] As I have noted above,⁴⁵ the Court of Appeal in *Jay v Jay* concluded that the relationship between uncle and niece is not inherently fiduciary, and nor was a particular, context-specific fiduciary duty established on the facts of that case.⁴⁶ However, the Court did discuss how to approach whether a relationship falls within the second *Chirnside* category, and observed that the approach to “ad hoc” fiduciary relationships in Canada broadly reflects the approach in *Chirnside*.⁴⁷ It noted that the Supreme Court of Canada has emphasised:⁴⁸

... while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship.

⁴² *Frame v Smith* [1987] 2 SCR 99. Justice Wilson's categorisation has been frequently cited with approval, for example in *Norberg v Wynrib*, above n 37, at [69]; *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574; and, in New Zealand, in *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA).

⁴³ At [60].

⁴⁴ At [63].

⁴⁵ See above at [106].

⁴⁶ *Jay v Jay*, above n 28.

⁴⁷ At [66].

⁴⁸ At [66]; citing *Galambos v Perez* [2009] SCC 48, [2009] 2 SCR 247 at [68].

[139] Exploitation is the sine qua non of the circumstantial fiduciary relationship; the circumstantial fiduciary relationship itself comes about through the exploitation of reliance and (consequential) vulnerability.⁴⁹ Benefit at the expense of the beneficiary is essential to the very existence of the relationship, as well as to its breach.⁵⁰ Canadian academic Margaret Hall poses the question as: “has one party been actively disempowered for the corresponding empowerment of the other?”⁵¹

[140] As McLachlin J said in *Norberg*,⁵² the requirement of vulnerability is the other side of the differential power equation which is fundamental to all fiduciary relationships:

It is only where there is a material discrepancy, in the circumstances of the relationship in question, between the power of one person and the vulnerability of the other that the fiduciary relationship is recognized by the law.

[141] Hall points to the structure and purpose of the social “family unit” in which childhood is extreme and prolonged in terms of dependence and vulnerability, stretching well into adolescence and far beyond physical dependence.⁵³

This socio-legal dependence exists alongside cultural and social norms isolating children from the wider community, intensifying dependence on the parent/s. The dynamic of power, dependency and isolation within the modern family structure exposes children as highly vulnerable ...

[142] Hall also points out that “the dependent party is dangerously exposed by the vulnerability inherent in the structure of that relationship.”⁵⁴ Hall notes the possibility of a particular fiduciary relationship arising where, for example, a parent relies on an adult child for advice, guidance and support. Conversely, it is conceivable that there are situations where a particular fiduciary relationship arises where the adult child relies on the parent.

⁴⁹ Margaret Isabel Hall “‘Intuitive Fiduciaries’: The Equitable Structure of Family Life” (2002) 19 Canadian Journal of Family Law 345 at 358.

⁵⁰ At 351.

⁵¹ At 350.

⁵² *Norberg v Wynrib*, above n 37, at [74].

⁵³ Hall, above n 49, at 354.

⁵⁴ At 356.

[143] The existence of a fiduciary relationship is sometimes also framed in terms of expectations. In *Lac Minerals Ltd v International Corona Resources Ltd* La Forest J framed it as a “reasonable expectation” test:⁵⁵

... the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other.

[144] Similarly, in *Chirnside*, referring to the feature which justifies the imposition of fiduciary duties in the second category, Tipping J said: “all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in *Arklow* as a legitimate expectation) of one party to place trust and confidence in the other.”⁵⁶

[145] In this case, the defendants say there was no relationship between Mr Z and the plaintiffs at the time of the transfer of the property. There was no contact between the plaintiffs and Mr Z, and no communications. As Mr Wenley put it, there was “no actual relationship involving expectation, trust, or confidence for all the adult lives of the Plaintiffs. Rather, the actual relationship involved no expectation, no trust, no confidence, and no contact.” That estrangement, the defendants say, was the plaintiffs’ choice. The “bare biological relationship” of parent and child did not give rise to a fiduciary relationship between Mr Z and the plaintiffs, there could have been no expectation by the plaintiffs of Mr Z, and there was no scope for the exercise of power by him.

[146] However, the existence of a fiduciary relationship does not require a mutual relationship in the usual sense, with reciprocal obligations. In their article *Fiduciary Law*, Tamar Frankel said:⁵⁷

In contrast to contract and status relations, in which both parties seek to satisfy their own needs and desires through the relation, fiduciary relations are designed not to satisfy both parties’ needs, but only those of the entrustor. Thus, a fiduciary may enter into a fiduciary relation without regard to his own needs. Moreover, an entrustor does not owe the fiduciary anything by virtue of the relation except in accordance with the agreed-upon terms or legally

⁵⁵ *Lac Minerals Ltd v International Corona Resources Ltd*, above n 42, at [171]; cited with approval in *Maclean v Arklow Investments Ltd* [1998] 3 NZLR 680 (CA) at 691.

⁵⁶ *Chirnside v Fay*, above n 11, at [80]. See also *DHL International (NZ) Ltd v Richmond Ltd*, above n 43, at 22.

⁵⁷ Tamar Frankel “Fiduciary Law” (1983) 71 Calif. L. Rev. 795 at 801.

fixed status duties. Therefore, in a fiduciary relation, the entrustor is free from domination by the fiduciary, although he may still be coerced in parallel status relation. Thus, fiduciary relations combine the bargaining freedom inherent in contract relations with a limited form of the power and dependence of status relations.

[147] Thus:

- (a) The beneficiary (the “entrustor”) does not owe the fiduciary anything.
- (b) Fiduciary relations do not give rise to reciprocal obligations.
- (c) There is no requirement for the fiduciary to have intended, or consented to, the fiduciary relationship.⁵⁸

[148] Nor is it necessary for a fiduciary to have been conscious of wrongdoing.⁵⁹ Although, in fact, Mr Z knew that Ms A and her mother were aware of his abuse of Ms A; and he was also aware of Ms A’s situation.

[149] Applying the *Frame v Smith* criteria to this case, Mr Z had scope for the exercise of power and discretion with respect to the plaintiffs. The words used by Wilson J in relation to her first characteristic were “some discretion or power”. Mr Wenley sought to confine the interpretation of “power” to a technical term, in the sense of authority to deal with or dispose of property which one does not own.⁶⁰ In his submission, in transferring the property to the Trust, Mr Z was exercising a property right, not a power. However, I interpret “power” in this context more broadly than the defendants’ submission. As Associate Judge Johnston said in his judgment on the application for summary judgment, it is possible to view the exercise of Mr Z’s right to alienate his house and shares as the exercise of a discretion or power: “his unilateral exercise of that discretion or power had the potential to and did affect the plaintiffs’ interests. Indeed, the evidence indicates that it was intended to do just that.”⁶¹

⁵⁸ See, for example *Chirnside v Fay* above n 11, at [82], [85]-[89].

⁵⁹ At [18].

⁶⁰ *Clay v Clay* [2001] HCA 9 at [41]-[42].

⁶¹ *A v D*, above n 2, at [35].

[150] Mr Z’s abuse of the plaintiffs as children, in breach of the fiduciary duties he owed to them at that time, rendered them (especially Ms A) vulnerable and at his mercy. The plaintiffs, especially Ms A, were without doubt peculiarly vulnerable as adults, as a result of Mr Z’s abuse of them as children. All the classic characteristics of a fiduciary relationship were present.

[151] Framed another way, the plaintiffs had an actual expectation that, when Mr Z came to consider the disposition of his property, he would make amends for the damage caused to them through his earlier breaches of fiduciary duty. Their expectation that he would act in a way that was not contrary to their interests was reasonable and legitimate.

[152] Although I have found the characteristics of a fiduciary relationship were present, there is an additional question to be addressed: should existing fiduciary principles be extended to the circumstances of this case? As Hammond J said in *H v R*, it should not be lightly assumed that the law of fiduciaries will apply.⁶² To like effect, in *Bowkett v Action Finance Limited*, Tipping J said “There will no doubt be many cases where a plea of breach of fiduciary duty is apt. It must however be recognised that the concept is not a universal panacea”.⁶³

[153] On the other hand, as many courts have observed, the categories of fiduciary relationship are never closed. Justice McLachlin in *Norberg* referred to and rejected a “closed, commercial view of fiduciary obligations”.⁶⁴ Justice McLachlin noted Sopinka J’s statement for the majority in *Lac Minerals Ltd* that fiduciary obligations “must be reserved for situations that are truly in need of the special protection that equity affords”.⁶⁵ As McLachlin J said:⁶⁶

The principles alluded to by Wilson J in *Frame v Smith* and applied by this Court in its earlier decision in *Guerin v The Queen* ... are principles of general application, translatable to different situations and the protection of different interests than those hitherto recognized. They are capable of protecting not only narrow legal and economic interests, but can also serve to defend

⁶² *H v R*, above n 19, at 307.

⁶³ *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 at 455.

⁶⁴ *Norberg v Wynrib*, above, n 37, at [82].

⁶⁵ At [93]; citing *Lac Minerals Ltd v International Corona Resources Ltd*, above n 42, at [29].

⁶⁶ At [93].

fundamental human and personal interests, as recognized by Wilson J in *Frame v Smith*.

[154] Alastair Hudson, the author of *Equity and Trusts*, is similarly critical of the approach of the English courts to use fiduciary liability “to protect claimants’ property rights and financial interests but not to look to the protection of the claimant’s long-term medical, psychiatric and welfare interests by means of identical remedies.”⁶⁷ And the authors of *Equity and Trusts in New Zealand* note that confining fiduciary law to property would mean that the law would have to ignore certain types of transactions and relationships altogether.⁶⁸

[155] There is no reason in principle why fiduciary principles should not be extended in this case to cover a relationship and circumstances that have not to date been recognised as fiduciary.

[156] It is a separate question whether policy reasons – such as a floodgates argument – point against finding that a fiduciary relationship existed between Mr Z and his adult children.

[157] Mr Wenley submits that such a finding would impinge on testamentary freedom. Indeed, part of the defendants’ submission was that to impose a fiduciary relationship in a case such as this would be an incursion into property rights. Mr Wenley pointed to Andrew Steele’s article, “Do parents owe fiduciary duties to their adult children?”, where the author considers some practical ramifications of imposing a fiduciary duty on parents to retain property in favour of their adult children and asks where the limits would be drawn; in particular, whether the duty would prevent a parent going on holiday or buying a car or a unit in a retirement village, or whether parents would be obliged to consult with their children before dealing with their property.⁶⁹

[158] But this is not in reality a case about testamentary freedom. As Associate Judge Johnston said in his judgment on the summary judgment application,⁷⁰ it is about

⁶⁷ Alastair Hudson *Equity and Trusts* (9th ed, Routledge, London, 2017) at 625.

⁶⁸ Butler, above n 15, at 486.

⁶⁹ Andrew Steele “Do parents owe fiduciary duties to their adult children?” (2019) NZLJ 315 at 315.

⁷⁰ *A v D*, above n 2, at [38(b)].

property rights and the ability to deal with property during one's lifetime, subject only to pre-existing legal constraints.

[159] There is another reason too why it may be appropriate to be cautious in concluding that a fiduciary relationship exists – that is the potential for what may be seen as illegitimate intrusions on parental authority and decision-making.⁷¹ As Hall observes, the limited approach to parental fiduciary duty demonstrated in a number of Canadian cases “may be grounded in resistance to arming adults with a fiduciary weapon which would allow for profit from parental failure”.⁷² However, Hall concludes that the fiduciary lens works to separate out parental conduct from other issues.⁷³

... where a parent has no choice regarding a material provision, for example, “fiduciary” child protection does not come into play (the trustee’s duty as fiduciary is not a duty to provide materially where one does not have the means or ability to do so). That issue involves a policy choice about social provision for other people’s children and is properly called child welfare. “Child welfare” is really entirely separate from “child protection,” and the fiduciary lens does allow us to see this distinction clearly.

[160] On a similar note, McLachlin CJ in *E.D.G v Hammer* rejected the notion of a duty to act “in a child’s best interests.”⁷⁴

The maxim that parents should act in their child’s best interests may help to justify particular parental fiduciary duties, but it does not constitute a basis for liability. The cases on the parental fiduciary duty focus not on achieving what is in the child’s best interest, but on specific conduct that causes harm to children in a manner involving disloyalty, self-interest, or abuse of power – failing to act selflessly in the interests of the child. This approach is well grounded in policy and common sense. Parents may have limited resources and face many demands, rendering it unrealistic to expect them to act in each child’s best interests. Moreover, since it is often unclear what a child’s “best” interests are, the idea does not provide a justiciable standard. Finally, the objective of promoting the best interests of the child, when stated in such general and absolute terms, overshoots the concerns that are central to fiduciary law.

⁷¹ Butler, above n 15, at 555.

⁷² Hall, above n 49, at 366.

⁷³ At 368.

⁷⁴ *E.D.G v Hammer* [2003] 2 SCR 459 at [23].

[161] On the other hand, as Hammond J said in *H v R*, “the supposed problems of a floodgate of litigation for already hard-pressed Courts” is an argument that is “always made”.⁷⁵ Justice Hammond was not deterred by that argument.

[162] As the authors of *Equity and Trusts in New Zealand* note, referring to the third characteristic in *Frame v Smith* that the beneficiary is “peculiarly vulnerable to or at the mercy of the fiduciary”, “peculiarly” suggests that it is not every vulnerability that will meet the test.⁷⁶ Rather, the test will be met “only if there was a grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the defendant’s discretion or power”.⁷⁷ As the authors note, “peculiarly” serves as a public policy backstop.

[163] In this case, the plaintiffs’ vulnerability was a direct consequence of Mr Z’s own actions. The abuse of the plaintiffs – particularly Ms A – was egregious. In my view, finding the existence of a fiduciary relationship between Mr Z and the plaintiffs as adults, on the particular facts of this case, does not give rise to the risk of a floodgate of litigation.

[164] In conclusion, I find that there was a fiduciary relationship between Mr Z and the plaintiffs at the time he gifted the property to the Trust.

Was the transfer of property by Mr Z to the Trust in breach of any of the fiduciary duties owed to the plaintiffs?

[165] The consequence of concluding that Mr Z was in a fiduciary relationship with the plaintiffs at the time he gifted the property is that he was obliged to act in the interests of the plaintiffs. It is then necessary to identify the specific duties he owed them.

[166] The plaintiffs say that the duties were twofold:

- (a) to protect their economic interests; and

⁷⁵ *H v R*, above, n 19, at 307.

⁷⁶ Butler, above n 15, at 566.

⁷⁷ At 566.

- (b) to recognise them as members of his family and provide for them from his wealth.

[167] The defendants say that there is no general legal or equitable obligation on a parent to support their adult children. Mr Wenley points to the statutory framework that allows the court, in some circumstances, to require that a person support and maintain others. The Steele article relied on by Mr Wenley refers, for example, to the Family Proceedings Act 1980, which allows the court to order spousal maintenance, and the Child Support Act 1991, which requires the payment of child support for dependent children.⁷⁸ These provisions are justified, the author says, by the fact that a person has continuing direct responsibility arising out of their relationship with another. While the Family Protection Act 1955 does recognise a responsibility by a parent to their adult children, that is only on the parent's death. There is no clawback mechanism, notwithstanding the proposals made by the New Zealand Law Commission.⁷⁹ Mr Wenley notes also that the Child Support Act 1991 provides that there is no statutory obligation to support a child beyond the age of 19. His submission is that equity should follow the law in this regard.

Discussion

[168] Essentially the defendants' argument is that there is no room for fiduciary breach where there is a statutory matrix of support for family relationships. Although *Frame v Smith* is not about the fiduciary relationship between parent and child, that case does stand for the proposition that where "comprehensive" family relations legislation applies, there is no room for a private cause of action on the basis of fiduciary breach.⁸⁰

[169] But as Mr Phillipps noted, in response to Mr Wenley's specific submission, the Child Support Act 1991 provides for payment from a parent to the carer of a child. It does not provide for payment from a parent to children, whether as adults or minors.

⁷⁸ Steele, above n 69, at 315.

⁷⁹ Te Aka Matua o te Ture/Law Commission *Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021).

⁸⁰ *Frame v Smith*, above n 43.

[170] More generally, this is not a case such as *Louie v Lastman*, which Mr Wenley cites in support of the proposition that there is no obligation to support children beyond the statutory regime.⁸¹ In *Louie v Lastman* the Court of Appeal for Ontario dismissed the plaintiffs' claims that their biological father, who had played no role in their lives, had a fiduciary obligation to pay retroactive child support. It found that the plaintiffs – now adults – were no longer in need and there was no gap in the legislative scheme. However, the Court did not foreclose the possibility of a fiduciary claim for child support outside the legislative scheme. Significantly, the respondent, although the biological father of the plaintiffs, had never assumed the *role* of father in their lives. Their mother had chosen to raise the children as part of her own family.

[171] The defendants say that because there was no ongoing relationship, in a day to day sense, between the plaintiffs and Mr Z, there was therefore no scope for the exercise of discretion or power by Mr Z, in a way that could affect the plaintiffs' legal or practical interests. However, as the evidence made clear, in fact Mr Z exerted a great deal of control over the plaintiffs' lives by his abuse of them as children, which led to the vulnerabilities and disadvantages I have already discussed.

[172] The particular duties are necessarily context-specific. As I have found, Mr Z's earlier breaches of the fiduciary duties he owed to the plaintiffs left them emotionally and psychologically vulnerable, and educationally and financially deprived. The consequence of his breach was enforced incompetence and non-autonomy. Those features were accentuated in Ms A's case.

[173] Although the plaintiffs had hoped for some acknowledgement from Mr Z of what he had done to them and their resulting situation, realistically, by the time Mr Z gifted the property to the Trust, the only way in which he could have addressed the vulnerability he had created was by providing for them financially, and in that way acknowledging them. I conclude that, at the time he gifted the property, Mr Z owed each of the plaintiffs a duty to recognise them as members of his family and to provide for them from his wealth, due to the vulnerability his earlier breach of fiduciary duties had caused them.

⁸¹ *Louie v Lastman* [2002] O.J. No. 3521.

[174] The evidence showed that at least one of Mr Z's reasons for transferring the property to the Trust was to prevent the plaintiffs receiving his assets. It was a deliberate step to ensure that his estate would not be available to meet the plaintiffs' needs. I find the transfer was in breach of the fiduciary duties I have found Mr Z owed to the plaintiffs.

Did the defendants know the transfers were made in breach of Mr Z's fiduciary obligations to the plaintiffs?

[175] The third cause of action is in knowing receipt: the plaintiffs allege the defendants received the gifts of the property from Mr Z, knowing such gifts were in breach of his fiduciary obligations to the plaintiffs. The plaintiffs say the trustees must be imputed with the knowledge that Mr Z was acting in breach of his fiduciary obligations to the plaintiffs – they say the defendants had objective (if not subjective) knowledge of the circumstances in which Mr Z made the gifts, and have “shut their eyes to the obvious”. Accordingly, they seek a declaration the property is held by the defendants on constructive trust for the estate of Mr Z.

Discussion

[176] A claim for knowing receipt in circumstances such as these is made out where there is:⁸²

- (a) disposal of assets the subject-matter of fiduciary obligations owed to the plaintiffs;
- (b) the beneficial receipt of assets subject to fiduciary obligations; and
- (c) knowledge on the part of the defendant that the assets received were subject to a breach of fiduciary duty.

[177] It is clear the Trust has received assets subject to fiduciary obligations, in breach of Mr Z's fiduciary obligations to the plaintiffs. The only element of knowing

⁸² *Torbay Holdings Ltd v Napier* [2015] NZHC 2477 at [184]; citing *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685 at 700; *Equiticorp Industries Group Ltd v R* [1998] 2 NZLR 481.

receipt really at issue is whether the defendants had knowledge that the property was transferred in breach of a fiduciary duty.

[178] Mr Z of course had knowledge of the abuse he had subjected the plaintiffs to. Although I acknowledge Mr Z may not have understood his parental obligations as fiduciary, I am satisfied his knowledge of his treatment of his children together with his desire to ensure they were not able to make any legal claim against his estate constitutes knowledge he was transferring the property in breach of his fiduciary obligations.

[179] The question then becomes whether the defendants, as the remaining trustees, had the requisite knowledge. As there is no evidence before me that the defendants knew of the abuse, or should have known of it, or were wilfully blind to it, I find they did not have actual knowledge Mr Z made the transfers in breach of his fiduciary obligations.

[180] However, it is still possible that they did have knowledge for the purposes of the cause of action in knowing receipt. In *Torbay Holdings Ltd v Napier* Woolford J found the first defendant, Mr Napier, had breached his fiduciary obligations as a director of the plaintiff company, Torbay, including by transferring money to his family trust:⁸³

[195] In *Ilion Technology Corp v Johannink*, Venning J found the defendants liable in knowing receipt, as trustees. The trust in that case had received profits made in breach of fiduciary duty, where one of the trustees had directly facilitated the breach. That trustee's knowledge was imputed to the trust, and the profits made were therefore able to be impressed with a trust in favour of the plaintiffs.

[196] In this case, Mr Napier's knowledge can be similarly imputed to the Napier Family Trust. The Trust therefore knowingly received money to which it was not entitled. The actions of Mr Napier in transferring money directly to the Napier Family Trust cannot shield that money from recovery by the Torbay companies. A finding of knowing receipt against the Trust means that, if the money can be traced into new property purchased by the Trust, a constructive trust would exist over that new property. Although some cases in other context have doubted the validity of imposing a constructive trust over an express trust, the contexts of those cases have primarily been relationship property disputes in which an ex-partner made a claim to an established piece of trust property, rather than misappropriated property transferred into a trust.

⁸³ *Torbay Holdings Ltd v Napier*, above n 82 (footnotes omitted).

The theoretical problems which arise in those cases are less applicable in relation to misappropriated property.

...

[202] Constructive trusts arise over property where the legal owner is required to account to another person in equity for that property. For example, where a fiduciary or knowing recipient obtains an improper profit or other property from his or her fiduciary position, it is well-established that a constructive trust arises over that profit or property in favour of the principal. The principal has an equitable proprietary interest in the property, which is not extinguished when the property is exchanged or transferred for new property.

[181] And in *Regal Castings Ltd v Lightbody* the Supreme Court said of one trustee, Mr Horrocks, who was unaware of the intention another trustee, Mr Lightbody, to defraud a creditor:⁸⁴

It is contended for the trustees that the trust acted in good faith in receiving the transfer of the property as the trustees collectively did not have, at that time, notice of Mr Lightbody's intention to defraud any creditor. That is no doubt true in respect of Mr Horrocks who was not aware of the Regal debt until some years later. But his unawareness of the intent of Mr Lightbody cannot immunise the trust when Mr Lightbody himself was also a trustee and, of course, was the very person who was alienating the property with that intent. Mr Lightbody's knowledge taints the receipt by the trustees of the property. They received it as a unity. They did not have separate interests in it.

[182] I find the Trust is imputed with Mr Z's knowledge, and received the gifts knowing they were in breach of Mr Z's fiduciary duties to the plaintiffs. The trustees therefore hold the property on constructive trust for the plaintiffs.

Was the trustees' acceptance of the transfers a fraud on a power?

[183] The second cause of action is founded in fraud on a power. The plaintiffs say that the gifts of the house and the shares to the Trust were for an improper purpose: to ensure that Mr Z's assets would not go to the plaintiffs, in breach of his fiduciary obligations to the plaintiffs.

[184] The plaintiffs say that the trustees, in accepting the gifts of property to the Trust, exercised their discretion. That exercise of discretion was improper because it was done by Mr Z as a trustee for his own benefit – to avoid his fiduciary obligations

⁸⁴ *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [70].

to the plaintiffs – rather than the benefit of the Trust. The other trustees were imputed with his knowledge. That exercise of the discretion amounts to a fraud on a power because it was for an improper purpose, and therefore voidable. The gifts must fail and the property revert to the estate of Mr Z.

[185] In response, the defendants say that the plaintiffs incorrectly characterise the gifting of the property as the exercise of a power; rather, Mr Z was exercising a right to transfer unencumbered property. They say also that the trustees had a duty to the beneficiaries of the Trust to accept the gifts.

Discussion

[186] Fraud on a power is an equitable doctrine which limits the power conferred on a person by an instrument of some kind. Where a discretionary power is given to a trustee, the trustee is authorised to use the power for a particular purpose. The trustee cannot use the power for an improper purpose, or with an improper intention.⁸⁵ Where a trustee exercises a power for an improper purpose, or with an improper intention, it is called a fraud on a power. The exercise of the power in those circumstances will be void.⁸⁶

[187] A “power” is an authority given to a person to dispose of or otherwise deal with property which is not theirs or to which they are not solely entitled.⁸⁷ In this context, fraud means the power is exercised for a purpose that is not the proper purpose of the power. It does not mean the power has been exercised with any dishonest or immoral intent.

[188] In *Wong v Burt*, the Court of Appeal summarised the law in relation to fraud on a power and made a number of significant points:⁸⁸

⁸⁵ Jeff Kenny “Trustees Powers” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 155 at 165; citing *Vatcher v Paull* [1915] AC 372 at 378 (PC).

⁸⁶ At 165-166.

⁸⁷ R E Megarry and H W R Wade *The Law of Real Property* (7th ed, Sweet & Maxwell, London, 2007) at 489.

⁸⁸ *Wong v Burt* [2005] 1 NZLR 91 (CA) at [27]-[33].

- (a) The principle is of general application. It does not just apply to dispositive powers.
- (b) The test for fraud on a power revolves around the powerholder's purpose or intention in exercising the power. It must align with the proper purpose of the power.
- (c) A fraudulent exercise of a power is totally invalid unless the improper part can be severed.

[189] Mr Wenley's first submission was that, in transferring the property to the Trust, Mr Z was not exercising a "power" in the sense required in order to establish a fraud on a power. However, it seems to me that this misapprehends the plaintiffs' pleading, which is that it was the exercise by the trustees of their discretion to accept the gifts, rather than Mr Z's transfer of the gifts, that is said to constitute the fraud on a power.

[190] It is clear on the evidence that Mr Z's intention in transferring the gifts to the Trust was, at least in part, to put the property beyond the reach of the plaintiffs, and thus breaching his fiduciary duties to them (in his instructions to his lawyers to settle the Trust, in October 2014, Mr Z said he wanted to prevent any of his family "chasing" his assets).⁸⁹ I infer that was also Mr Z's purpose and intention when, as a trustee, he exercised his discretion to accept the gifts, rather than intending to act solely in the best interests of the beneficiaries of the Trust.

[191] As I have already found,⁹⁰ there is no evidence on which I could conclude that the other trustees had actual knowledge of Mr Z's intention to avoid his fiduciary obligations in transferring and accepting the gifts. However, his knowledge and state of mind can be attributed to the other trustees.⁹¹

[192] Given I have already found the property is held by the trustees on constructive trust for the estate of Mr Z, it is not necessary for me to grant the remedies sought by the plaintiffs in relation to the fraud on a power cause of action. However, for

⁸⁹ See above at [65].

⁹⁰ See above at [179].

⁹¹ See above at [182].

completeness, I conclude that the trustees exercised their discretion to accept the gifts with the improper purpose or intention of putting the gifted property beyond the reach of the plaintiffs.

Does the doctrine of laches apply to make it inequitable to grant relief?

[193] By way of defence, the defendants point to the Limitation Act 2010, and also say that a claim in equity would need to overcome a plea of laches.

[194] The Limitation Act provides that certain types of claims must be brought within certain time periods from the date the cause of action accrued – most relevantly, six years for money claims or claims to personal property held on trust,⁹² and 12 years for claims to recover land.⁹³ The Limitation Act may also be applied by analogy to a claim in equity which no defence prescribed by the Act applies.⁹⁴ The defendants did not particularise their arguments in relation to the Limitation Act, and how they contend it applies to a breach of a fiduciary obligation. Given the plaintiffs filed their statement of claim within four years of Mr Z’s first breach of fiduciary duties (the transfer of the house in 2014), well within any applicable limitation period, I have proceeded on the basis that they simply rely on the policy reasons behind the Limitation Act to support their arguments in relation to laches.

[195] The equitable defence of laches applies where a plaintiff’s delay in bringing or pursuing a claim would make it unreasonable or inequitable to grant equitable relief.⁹⁵ The “classic exposition” of the doctrine of laches is found in *Lindsay Petroleum Company v Hurd*.⁹⁶

Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be

⁹² Limitation Act 2010, ss 11 and 31.

⁹³ Sections 21, 23 and 24.

⁹⁴ Section 9.

⁹⁵ As preserved by the Limitation Act, s 8.

⁹⁶ *Lindsay Petroleum Company v Hurd* (1874) LR 5 PC 221 at 239-240; cited in *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [34].

just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[196] The Supreme Court has explained:⁹⁷

Ultimately the defence of laches is an equitable defence which requires that the defendant has an equity which on balance outweighs the plaintiffs' rights. This takes into account the length of delay and the nature of the acts done during the interval of time. However, these are not the only factors and ultimately it is a balancing of equities "in relation to the broad span of human conduct".

[197] The defendants say that the plaintiffs – in particular, Ms A – have delayed in bringing their claim. They point to the date at which Ms A wrote to Mr Z in 1992 about the abuse she suffered as a child. The principal difficulty with this argument is that it treats the abuse the plaintiffs suffered as children as the relevant breach of fiduciary duty, when in fact Mr Z's transfers of the property in 2014 and 2016 are the relevant acts that constitute the breach of fiduciary duty on which the plaintiffs' claim is based. There has been no undue delay by the plaintiffs, and there is no evidence before me that establishes it would be inequitable to impose a constructive trust over the property in order for the plaintiffs to assert their claim to Mr Z's estate.

Result

[198] I find that Mr Z owed fiduciary obligations to the plaintiffs as adults.

[199] Mr Z acted in breach of the fiduciary obligations he owed to the plaintiffs when he transferred the property to the Trust.

[200] The trustees are liable for knowing receipt of the property, because Mr Z's knowledge is imputed to the Trust.

[201] The property is therefore held on constructive trust for the estate of Mr Z.

⁹⁷ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [696] (footnotes omitted).

[202] The defendants are to provide a copy of the Trust accounts to the executors of Mr Z's estate and the plaintiffs.

Costs

[203] If the parties are not able to agree on costs the plaintiffs are to file a memorandum within 10 working days of this decision, with the defendants having 10 working days to respond.

Gwyn J